NURSING HOME TORTS

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1. MOST COMMON TYPE OF NURSING HOME CASES

A. PRESSURE ULCERS[2]

CASE 1: Plaintiff was a 58 years old male was admitted to defendant's facility after suffering a stroke. During the prior hospital admission he was intubated to protect the airway. On March 3, 2016, he was transferred to defendant's facility for continuation of care and vent support. He was alert and noted to be responsive to tactile stimuli but unable to make his needs known. At the time of his admission, the plaintiff did not have any pressure ulcers on his skin. However, during his 21 day residency at defendant's facility he developed multiple pressure ulcers on his body, including his feet, neck, ears, and back. His daughter will visit him at the nursing home approximately 5-7 times a week after work. She will usually remain for about an hour or two and she did not observe anyone turning and positioning her father during the visits. He was always laying down on his bed, except for one time that she observed him on a chair. His daughter would complain to the nurses about the sores she noticed on his foot. A couple of days prior to his transfer to a hospital spoke to a doctor who informed her of the pressure ulcers on the rest of his body. The medical chart rarely documented the wound.

After he was discharged from defendant's facility, he was transferred to a hospital for evaluation. The family decided to transfer him to other rehabilitation facilities searching for optimal care. He remained at his last facility until the time of his death on September 11, 2017. According to the Department of Health and Mental Hygiene medical report plaintiff's decedent's immediate cause of death was severe sepsis and still had multiple pressure ulcers at the time of his death.

B. FALLS

CASE 2: Plaintiff was a 83 year old woman who sustained a fall while she was a resident at defendant's facility, which resulted in an intertrochanteric left hip fracture that required intramedullary rodding. Plaintiff had been admitted for long-term care with a medical history that included Alzheimer, Dementia, unsteady gait, falls, need for total assistance with transfers and toileting, and was on antipsychotic medication, which placed her at a high risk for falls. During her one year residency, prior to the incident that caused

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[2] See Exhibit 1- NCHS Date Brief, Pressure Ulcers Amount Nursing Home Residents: United States 2004, Park-Lee, et al. (Feb. 2009).

her left hip fracture, Plaintiff had sustained falls on April 8, 2014, June 1, 2014, and December 3, 2014.

Pursuant to the medical records, on January 11, 2015, Plaintiff was complaining of severe left hip pain and the area was painful to touch. Her roommate advised the nursing staff that Plaintiff fell "this past Sunday" and that she witnessed the staff picking her up from the floor and putting her back to bed. Plaintiff was unable to communicate what had transpired due her mental condition and that a Spanish translator was not provided, as Spanish was her main language at the time. The nurse practitioner order stat x-rays to her left hip to rule out a fracture, which were reported as negative for fractures. According to the accident report her primary care physician, had ordered to transfer the resident to the ER for further evaluation. However, she was not transferred at that time. Plaintiff continued to complain of left hip pain, and the x-rays were repeated on January 13, 2015, which showed an acute intertrochanteric fracture on the left femur. The x-rays results were received about 4:30 pm; however, the facility did not request a transfer to the ER until approximately 9:49pm. Once she was transferred to the hospital, further x-rays were taken and she was diagnosed with a left intertrochanteric left hip fracture. The type of injury indicates that the source was traumatic and the location of the fracture indicates that the same was a result of a fall. As a result of her fracture and subsequent surgery with hardware, Plaintiff was confined to a wheelchair, continued to experience pain, and her functional level and ability to perform activities of daily living diminished. Prior to the fall that caused her left femur fracture, Plaintiff was able to walk up the stairs and transfer with assistance. Furthermore, since Plaintiff's fall went unreported for days, there was a delay in treatment for her injury causing her severe conscious pain and suffering.

2. DETERMINING THE MERITS OF THE CASE

A. INTERVIEW

- **Background**
- **Medical History**
- **Family Involvement/Visits**
- **Conversations with Medical Providers**

B. MEDICAL RECORDS

- **Accident/Incident Reports** (see example Exhibit 2)
- **Tracking Wound(s), Nutrition, Treatments, and Turning & Positioning**
- **Tracking conscious pain and suffering**
- **Nursing Progress Notes**
- **Fall/Pressure Ulcer Risk Assessment**
- **Preventive Measures**

C. PHOTOGRAPHS

"A picture is worth a thousand words"

D. RESEARCH

- **NYS Nursing Home Profiles -** https://profiles.health.ny.gov/nursing_home (see example Exhibit 3)
- **New York State Physician Profile -** https://www.nydoctorprofile.com
- **Office of the Professions -** http://www.op.nysed.gov/opsearches.htm

3. PLEADINGS

A. COMPLAINTS (see examples Exhibit 4)

i. Applicable Case law

- i.e. *Public Health Law § 2801(d)(1)* "Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided."
- *10 NYCRR §415.3* Residents' Rights - "(a) The facility shall ensure that all residents are afforded their right to a dignified existence, self-determination, respect, full recognition of their individuality, consideration and privacy in treatment and care for personal needs and communication with and access to persons and services inside and outside the facility." (see also 42 CFR §483.10)
- *10 NYCRR §415.5* – Quality of Life - "The facility care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life" (see also 42 CFR §483.24)
- *10 NYCRR §415.11* – Resident Assessment and Care Planning –"Upon admission and periodically thereafter the facility shall conduct a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity. Based on the results of these assessments, the facility shall develop and keep current an individualized comprehensive plan of care to meet each resident's needs." (see also 42 CFR §483.20)
- *10 NYCRR §415.12* – Quality of Care - "Each resident shall receive and the facility shall provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care subject to the resident's right of self-determination." (see also 42 CFR §483.25)
    - ***§415.12 (c)*** "Based on the comprehensive assessment of a resident, the facility shall ensure that: (1) a resident who enters the facility without pressure sores does not develop sores unless the individual's clinical condition demonstrates that they were unavoidable despite every reasonable effort to prevent them; and (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing"
    - ***§415.12(h)*** "The facility shall ensure that: (1) the resident environment remains as free of accidents hazards as is possible; and (2) each resident receives adequate supervision and assistive devices to prevent accidents"
- *10 NYCRR §415.13 – Nursing Services* – "The facility shall have sufficient nursing staff to provide nursing and related services to attain or maintain the

highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. The facility shall assure that each resident receives treatments, medications, diets and other health services in accordance with individual care plans." (see also 42 CFR §483.35)

ii. Causes of Action

- Negligence/Negligent Hiring
- Medical Malpractice
- Public Health Law § 2801(d)
- Wrongful Death

iii. Other Considerations

- Change of Venue Clauses
  - Pursuant to CPLR § 501 "subject to the provisions of subdivision two of section 510, written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." New York courts have upheld venue selection clauses within nursing home admission agreements. *See Medina v. Gold Crest Care Ctr., Inc.*, 117 A.D.3d 633 (1st Dep't. 2014); *Couvertier v. Councourse Rehab. & Nursing, Inc.*, 117 A.D.3d 772 (2d Dep't. 2014); *Puleo v. Shore View Ctr.*, 132 A.D.3d 651 (2d Dep't. 2015); *Casale v. Sheepshead Nursing Home & Rehab. Ctr., Inc.*, 131 A.D.3d 436, 13 N.Y.S.3d 904 (2d Dep't. 2015).
- Punitive Damages
  - Pursuant to Public Health Law § 2801-d(2) "where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed." However, punitive damages may be recovered in very rare instances and the wrongdoing "must be voluntary and intentional or must have created a substantial and unjustifiable risk of harm with a conscious disregard of, or indifference to, that risk" *Butler v. Shorefront Jewish Geriatric Ctr.*, 33 Misc. 3d 686 (Sup. Ct., Kings County 2011); *see Williams v. Ruby Weston Manor*, 2006 N.Y. Misc. Lexis 9396 (Sup. Ct., Kings County).
- PHL § 2801(d) as Separate Cause of Action
  - See article annexed as Exhibit 5

B. BILL OF PARTICULARS (see examples Exhibit 6)

"The purpose of a bill of particulars is to amplify the pleadings", however, "it need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure" *Harris v. Ariel Transp. Corp.*, 37 AD3d 308, 309 (1st Dept. 2007); *see also Dellaglio v. Paul*, 250 A.D.2d 806 (2nd Dept. 1998).

i. **Departures**

- CPRL 3043(a) provides that plaintiff must provide "*general statements* of the acts or omissions constituting the negligence claimed" (*emphasis added*). *See Fremont Inv. & Loan v Gentile*, 94 A.D.3d 1046 (2d Dept. 2012) (noting that "a bill of particulars may not be used to obtain evidentiary material" and defendant improperly included a request for detailed information of evidentiary nature); *see also Harris v. Ariel Transp. Corp.*, 37 A.D.3d 308, 309 (1st Dept. 2007)(noting that plaintiff's Bill of Particulars need only to "appraise[ ] defendants of the nature of the injury, which is sufficient for their defense of the claim"]).

ii. **Injuries**

- Main Injuries, related injuries, and ensuing complications and/or treatment.

iii. **Statutes**

- i.e. Public Health Law §2801(d) and §2803-c; 42 CFR §§483.10; 483.13 (Resident Behavior); 483.15 (Admission, Transfer, Discharge Rights); 483.20; §483.24; 483.25; 483.30 (Physician Services); §483.35; 483.65 (Rehabilitative Services); and 10 NYCRR §§415.3; 415.4 (Resident Behavior); 415.5; 415.11; 415.12; 415.13; 415.14 (Dietary Services); 415.15 (Medical Services); 415.16 (Rehabilitative Services); 415.19 (Infection Control); and 415.20 (Laboratory Services).

iv. **Supplemental Bill of Particulars**

- *See Brynes v. New York Hospital*, 91 A.D.2d 907 (1st Dept. 1983) (noting that it is frequent in medical malpractice cases for plaintiffs to lack the requisite material information for a bill of particulars prior to discovery and therefore it is proper to supplement bill of particulars "upon completion of discovery"); *Miccarelli v. Fleiss*, 219 A.D.2d 469 (1st Dept. 1995) (establishing that when a plaintiff is not able to respond to separate alleged acts and omissions it is proper to serve supplemental bill of particulars upon acquiring information after disclosure).

4. DISCOVERY

A. DEMANDS FOR DISCOVERY AND INSPECTION (see examples Exhibit 7)

i. Identification/Employment Status of Witnesses
ii. Photographs from Facilities (Defendant and Subsequent)
iii. Turning and Positioning Charts
iv. CNA Accountability Records
v. Accident/Incident Reports

- Pursuant to CPLR § 3101(g), "there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices" unless otherwise provided by law. Only accident and/or incident reports specifically "created or generated for quality assurance purposes" are protected from disclosure. *In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 N.Y.2d 434 (2003).

vi. Policies and Procedures

- Institutional Policies, Procedures, and/or Protocols are relevant, necessary and material items of discovery. *See Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 18 A.D.3d 713 (2nd Dept. 2005); *Harber v. Cross County Hosp.*, 37 N.Y.2d 888 (1975); *Dixon-Gales v. Brooklyn Hosp. Ctr.*, 35 Misc. 3d 676 (Kings Cty. 2012) (noting that it is well known that violation of protocols constitutes evidence of negligence). Plaintiff is entitled to know about the applicable protocols in place and defendant has the duty to disclose such rules and regulations, which are under the exclusive control of the defendants. *See Gourdine v. Phelps Memorial Hospital*, 40 A.D.2d 694 (2d Dept. 1972).

B. DEPOSITIONS

"To Take, or Not to Take, that us the question"

C. EXPERT DISCLOSURES (see examples Exhibit 8)

- Pursuant to CPLR 3101(d), "each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."
    - Wound Specialist
    - Internal Medicine
    - Geriatric Medicine
    - Palliative Medicine
    - Infectious Disease
    - Physical Medicine and Rehabilitation
    - Registered Nurse

5. COMMON MOTIONS

A. SPECIAL PREFERENCE (see example Exhibit 9)

- CPLR 3403(a)(4) expressly provides that the Court should grant a trial preference in "in any action upon the application of a party who has reached the age of seventy years" (*see Tytel v. Battery Beer Distribs.*, 194 A.D.2d 330 [1st Dept. 1993]).

B. AMENDING PLEADINGS (see example Exhibit 10)

- CPLR 1015[a] provides that "if a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." "[A] motion for substitution may be made by the successors or representatives of a party or by any party". CPLR §1021.

6. PRE-TRIAL RESOLUTION/NEGOTIATION

A. MEDIATION (see example Mediation Memo Exhibit 11)

B. SAMPLE VERDICTS/SETTLEMENTS

- Pressure Ulcers (Exhibit 12)
- Falls (Exhibit 13)

C. LIENS

- Medicaid cannot assert a lien, nor can the funds, whether gifted or retained by the plaintiff, be utilized in any determination of eligibility for ongoing Medicaid. *See* PHL 2801-d(5).