

NO. 20-CI-001763

JEFFERSON CIRCUIT COURT
DIVISION 3
HON. MITCH PERRYDIANNE HOLBROOK, AS EXECUTRIX AND
PERSONAL REPRESENTATIVE OF THE ESTATE
OF RALPH D. HOLBROOK AND DIANNE
HOLBROOK, INDIVIDUALLY

PLAINTIFFS

v.

DEFENDANTS' TRIAL MEMORANDUMLAKE FOREST POST ACUTE, LLC d/b/a
VALHALLA POST ACUTE; PROVIDENCE
GROUP, INC.; ERIC HENRY; KEVIN
SCHOENFELD; EVANGELINE BURCH; JEFF
BAXTER; AND DONNA CANTWELL,
ADMINISTRATOR

DEFENDANTS

* * * * *

Defendants, Lake Forest Post Acute, LLC d/b/a Valhalla Post Acute; Providence Group, Inc. ("PGI"); Eric Henry; Kevin Schoenfeld; Evangeline Burch; Jeff Baxter; and Donna Cantwell, Administrator, by counsel, in compliance with the Civil Jury Trial Order entered March 7, 2022, tenders the following Trial Memorandum:

STATEMENT OF THE FACTS

Ralph Holbrook, 82, was admitted to Valhalla Post Acute skilled nursing facility on March 6, 2019 where he was to receive two weeks of daily physical and occupational therapy following a right total knee replacement surgery at Norton Audubon Hospital one week earlier. He was properly assessed by both the nursing and therapy departments as a falls risk, as any total knee replacement patient would be. During each physical therapy session, he received gait training as he ambulated from his room to the therapy gym and performed therapeutic exercises and therapeutic activities. Over the course of his first 10 days of therapy, Mr. Holbrook achieved significant progress in terms of his strength, endurance, range of motion, gait, balance, and

mobility – increased walking distance with a rolling walker, able to handle some stairs, and improved gait and balance per objective standardized testing. His assist level was initially “contact guard assist”, which is defined as “contact with patient due to unsteadiness”, and he progressed to “stand by assist”, which is defined as “close enough to reach patient if assist needed for safety”. For some activities of daily living, his assist level on certain days was “supervision”, which means he was in eyesight of nursing staff.

On the eleventh day of therapy on Sunday, March 17, 2019, Mr. Holbrook had a scheduled PT session with Defendant Eric Henry, PTA. Eric was familiar with Mr. Holbrook’s abilities, having worked with him several times and participating in his interdisciplinary team (“IDT”) Care Plan Meeting on March 13, 2019. Eric began the session with 6 minutes of gait training followed by 20 minutes riding a stationary bike including a short rest break. Eric then performed a ball bounce therapeutic activity with Mr. Holbrook which is a dynamic standing balance activity. Mr. Holbrook successfully completed the ball bounce activity with no loss of balance. Eric next proceeded with a balloon toss exercise, which involved tapping a large inflated balloon back and forth with Mr. Holbrook taking a small step if necessary. Mr. Holbrook was SBA assist with Eric being within arms-length reach. During the activity, Mr. Holbrook dropped the balloon and he bent over to pick it up. Mr. Henry stepped toward him to assist, but when Mr. Holbrook picked up the balloon and started standing back up, Mr. Henry began moving backward to restart the toss. However, at that moment, Mr. Holbrook again dropped the balloon and fell when he bent over to retrieve it and Eric’s rearward momentum prevented him from catching Mr. Holbrook. Eric strenuously denies he instructed Mr. Holbrook to not let the balloon touch the ground.

The parties dispute whether the balloon toss activity was appropriate and the extent of safeguards that should have been implemented. Defendants contend the ball bounce activity is

more challenging for the patient than the balloon toss due to the heavier weight of the ball as well as intentionally taking a step forward when bouncing the ball back to the therapist. At that point in his therapy with the improvements Mr. Holbrook had made with his gait, strength, endurance, and balance, there was no indication a second therapist or parallel bars were needed for safety while performing a less challenging task than the one he had just successfully performed with no balance issues. This was not the first dynamic standing balance activity Mr. Holbrook had performed, as he performed such an activity one week before, which could have been ball bounce or balloon toss. He exhibited a loss of balance on that day, which was even more reason to work on balance on the date of the incident. Further, occupational therapy notes confirm he demonstrated good balance on several days in between March 10 and 17.

Nor did Mr. Holbrook exhibit any sign of being tired or exhausted during his therapy session on March 17. While Plaintiff contends the session was significantly longer than any prior session, several of the minutes Eric recorded was post-fall when Eric was tending to Mr. Holbrook until EMS arrived, and the actual pre-fall therapy time was very consistent with prior sessions. Further, although Mr. Holbrook was on pain medication and Neurontin (which can be for pain or neuropathy), he did not complain of any side effects such as dizziness or weakness and told the emergency room he did not experience those symptoms before the fall and he simply lost his balance.

Plaintiff also alleges Defendants scheduled an overly aggressive number of therapy minutes to meet the “ultra-high” RUG Medicare reimbursement level and gain additional revenue. To be in the ultra-high category, therapy must involve 2-3 therapy disciplines with a minimum of 5 days/wk. coverage and 720 therapy minutes in that 5-7 day period. While Plaintiff assign a profit motive for Mr. Holbrook’s therapy schedule, an ultra-high level for a total knee replacement

patient is standard and his physician agreed it was appropriate to receive that level of therapy minutes by signing the therapy order. Further, the Valhalla therapy team delivered 758 minutes but got paid for only 720 minutes, so they gave away 38 minutes for free, which negates Plaintiff's profit motive argument. Valhalla did not just bill the minimum, but the number of minutes from which they thought Mr. Holbrook would benefit. Additionally, per Medicare rules, Valhalla Post Acute cannot bill for the date of a patient's discharge, and therefore did not bill for the therapy provided on the date of the fall, so the 72 minutes logged on the date of the fall, even assuming it was all pre-fall time, is irrelevant.

Plaintiff filed suit in March 2020 against Valhalla Post Acute, Eric, two supervising physical therapists (Kevin Schoenfeld, PT and Evangeline Burch, PT), the Rehab Director (Jeff Baxter, PTA), and the Administrator (Donna Cantwell, RN) at the time of Mr. Holbrook's residency. Plaintiff asserts negligence claims against all Defendants, a gross negligence claim against Eric and Valhalla Post Acute, and claims against Valhalla Post Acute and/or PGI for breach of contract and violation of KRS 216.515, the Resident's Rights statute, including Mr. Holbrook's right to be free from mental and physical abuse and to be treated with consideration, respect, and full recognition of his dignity and individuality. Mrs. Holbrook also asserts a loss of consortium claim. Mr. Holbrook died in May 2021 and Mrs. Holbrook revived the action and added a wrongful death claim. Currently pending are PGI's motion for summary judgment on the grounds that it is merely a holding company that owes no duties to Plaintiff and Defendants' motion for partial summary judgment to dismiss the punitive damages claim and to dismiss .

In addition to liability, the other main issue in this case is causation of Mr. Holbrook's condition, declining health, and ultimate death. Mr. Holbrook has a long and complicated medical history. He previously underwent three open heart surgeries with chronic a-fib and experienced

lifelong eating (anorexia as a child), swallowing (esophageal strictures and dysmotility) and malnutrition issues (never hungry, did not like to eat), and bouts of aspiration pneumonia (precipitated by his esophageal issues, hiatal hernia, and GERD). During his Valhalla Post Acute residency, the staff expressed concern with Mr. Holbrook's swallowing problems and losing weight, and recommended a gastroenterology consult and psychotherapy services, which Mr. Holbrook refused. While undergoing therapy post-hip surgery at Nazareth Health, his eating issues continued with the staff making the same GI consult recommendation that the Valhalla staff had recommended. Mr. Holbrook was admitted to the hospital for an abdominal aortic aneurysm (AAA) and aspiration pneumonia and was diagnosed with adult failure to thrive. He was put on a feeding tube for nutritional strengthening to survive the life-saving AAA surgery that he underwent four months later. Other conditions he subsequently suffered from include dysphagia, reduced epiglottic inversion, Zenkers diverticulum, worsening peripheral neuropathy, Myasthenia Gravis, debility, ongoing tachycardia, aspiration pneumonia and more, which required numerous hospitalizations, surgeries, and medical specialists. None of this was related to his fall and hip fracture.

Despite all of Mr. Holbrook's medical issues, he gained weight primarily due to the feeding tube, and achieved a successful orthopedic recovery from his hip surgery as evidenced by an ability to walk up to 1,700 feet and more daily, ceasing taking pain medication, and visits with his hip surgeon reduced to annual follow-up visits. However, his overall health from the plethora of other issues declined and he died on May 12, 2021 with the cause of death listed in his death certificate as acute hypoxemic respiratory failure, community acquired pneumonia, enterococcal pneumonia, and severe tricuspid regurgitation with right ventricular failure.

ISSUES OF FACT

The issues of fact include:

1. Whether Defendants breached any duty of care owed to Plaintiff;
2. Whether Mr. Holbrook breached his duty to exercise ordinary care for his own safety;
3. Whether and, if so, the extent to which the hip fracture caused any of Mr. Holbrook's medical and health issues following the hip surgery;
4. Whether the hip fracture caused Mr. Holbrook's death more than two years later;
5. If any Defendant is found to have breached a duty which was a substantial factor in causing Plaintiff's alleged injuries, the percentage of comparative fault to be allocated to Defendants and Mr. Holbrook;
6. The amount of medical expenses Plaintiff incurred as a result of the hip fracture; and
7. The amount of Plaintiffs' damages, if any, the jury finds any of Plaintiffs alleged injuries were caused by the fall and hip fracture.

ISSUES OF LAW

The issues of law include:

1. Whether any Defendant is entitled to a directed verdict as to any of Plaintiff's claims and damages;
2. Whether PGI is entitled to summary judgment as owing no duty to Plaintiff;
3. Whether Defendants are entitled to summary judgment on Plaintiff's punitive damages claim; and
4. Whether Valhalla Post Acute and PGI are entitled to summary judgment on Plaintiff's claim for violation of his Resident's Rights claims other than violation of KRS 216.515(6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record; a courtesy copy is also being electronically mailed to the following counsel of record:

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