

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss

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COMES NOW the plaintiff, DIANA OBERNUEFEMANN, Executor of the Estate of KATHLEEN F. ADAMS, Deceased, by and through her undersigned counsel of record, and for her Memorandum in Opposition to Defendant's Motion to Dismiss, respectfully states: Plaintiff filed a single count complaint against defendant, Rosewood Care Center, Inc. of Edwardsville on March 13, 2007, seeking damages pursuant to the Illinois **Nursing Home** Care Act ([210 ILCS 45/3-601](#) & 602) for injury to and subsequent death of the decedent caused by defendant's negligence.

Plaintiff has alleged that defendant was negligent in one or more ways, that defendant's negligence violated certain rules and regulations of State and Federal laws applicable to skilled nursing facilities, and that defendant's negligence was the proximate cause of decedent's injury and death.

Defendant has filed a motion to dismiss plaintiff's complaint, asserting that plaintiff's negligence allegations of violations of Title 77, Ill. Admin. Code and Title 42 U.S. Code attempt to set forth "... an independent cause of action based upon its language ..." (defendant's words) and should be dismissed.

Defendant's assertions are completely without merit, and defendant's motion should therefore be denied *in toto*.

I. FACTS

The decedent, Kathleen Adams, was admitted to defendant's facility on June 1, 2006 from Anderson Hospital. Prior to decedent's discharge from the hospital, a nurse applied a narcotic transdermal pain patch ("Duragesic") to decedent's shoulder on May 31, 2006 per physician's orders, and clearly transmitted to defendant's personnel the order that this was to be replaced in 72 hours (or on June 3, 2007), again per physician's order.

Instead, defendant's employees applied a second Duragesic patch to decedent on June 2, 2006, without removing the first patch applied at the hospital, resulting in a narcotic overdose to decedent. As a direct result thereof, decedent was re-admitted to Anderson Hospital on June 3, 2006 with diagnosis of [narcosis](#) (narcotic overdose). She expired at Anderson Hospital on June 7, 2006.

The Illinois Department of Public Health, the State agency charged with licensing and regulating skilled nursing facilities in Illinois, conducted an investigation on June 7, 2006 and determined that defendant, through the negligence of its employees, violated at least two specific federal regulations ([42 CFR Ch. IV, §§483.13\(c\)](#) and [483.25](#)) and found that defendant's negligence in its care of decedent constituted both "neglect" and "improper nursing care" as those terms are defined in Title 77, Ill. Admin. Code. (See IDPH Complaint Determination attached hereto.)

II. ARGUMENT

A. Negligence Allegations

Defendant's argument that plaintiff's negligence allegations of violations of certain specific sections of 42 CFR & Title 77 Ill. Admin. Code constitute an attempt to establish an "independent cause of action based upon its language" (again, defendant's phrase) is *completely misguided*.

Violation of a statute, ordinance or administrative regulation has clearly and unquestionably long been considered by Illinois courts to be prima facie evidence of defendant's negligence. (See I.P.I. 60.01 and notes on use, attached hereto.)

In *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.*, 38 Ill.2d 31, 230 N.E.2d 173 (1967), the Illinois Supreme Court addressed this issue.

In *Boyer*, a railroad passenger sustained injury when thrown to the floor of a passenger car after a part of a train car coupler broke, throwing the train into emergency braking mode. The passenger sued the railroad, alleging that defendant was negligent in that its defective coupler violated the Federal Safety Appliance Act.

Defendant claimed (as defendant does here) that a violation of the F.S.A. Act did not in itself create a cause of action and hence plaintiff failed to allege any negligence on the part of the defendant.

The Illinois Supreme Court held that plaintiff's allegation that defendant violated the F.S.A. Act *did* state a cause of action.

The Court, in reaching this determination, after having set forth the protections to be afforded by the Act, reasoned that:

"... it is not unusual to allow a plaintiff to found a civil cause of action on a breach of a penal statute. *Dann v. Studebaker-Packer Corp.* (6th Cir.) 288 F.2d 201, referred, at page 208, to 'the long established general rule that a breach of statutory duty normally gives rise to a right of action on behalf of the injured persons for whose benefit the statute was enacted.' This Court in *Heimgaertner v. Benjamin Electric Mfg. Co.*, 6 Ill.2d 152, at page 155, declared: 'When a statute is enacted for the protection of a particular class of individuals, a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not mentioned specifically therein.' (*Boyer*, 38 Ill.2d 31, 36, attached.)

Indeed, this case is no different from a motor vehicle negligence claim where plaintiff's negligence allegations set forth statutory violations of the Illinois motor vehicle code, e.g., defendant's defective brakes, speeding, crossing over the center line of the highway, etc. It would be clearly erroneous for the Court to dismiss such negligence allegations *or* (if proven by the evidence) to fail to give IPI 60.01 instructions to the jury at trial to be considered by the jury in determining whether defendant's violations of motor vehicle statutes constituted negligence.

B. Structure and Legislative Scheme of the Illinois Nursing Home Care Act

The Illinois **Nursing Home** Care Act, enacted in 1979, gives a private right of action to **nursing home** residents or their legal representatives for damages, costs and attorney fees for violation of the Act by a **nursing home**. (210 ILCS 45/3-602; see also, IICLE, "Issues in Long Term Care", "**Nursing Home** Litigation - Defense Perspective", relevant

portions attached hereto; and see also, Buser, Stephen C, IICLE “**Nursing Home Neglect**”, relevant portions attached hereto.)

The Act authorizes the Illinois Department of Public Health to license and regulate all long-term care facilities that fall under its auspices, and also mandate that IDPH promulgate rules and regulations which **nursing homes** *must* follow in the operations of such facilities. (See 77 Ill. Admin. Code §300, *et seq.*)

These rules and regulations mandate, *inter alia* that facilities “... establish written policies and procedures to implement the responsibilities and rights provided in Article II of the [Nursing Home Care] Act.” (See 77 Ill. Admin. Code §300.3330, attached.)

The regulations also require **nursing homes** to “... have written policies and procedures ...” which “... shall be in compliance with the Act and all rules promulgated thereunder.” (See 77 Ill. Admin. Code, §300.610 attached.)

This very defendant has admitted, in prior litigation, through its corporate Director of Operations, Lori Konicek, that Title 77 of the Illinois Administrative Code constitutes the minimum standard of care applicable to long-term or skilled nursing home care facilities such as Rosewood Care Center, Inc. of Edwardsville. (See depo of Lori Konicek, p. 18, in Graves v. Rosewood Care Center, Inc. of Edwardsville. No. 03-L-1166, attached.)

C. OBRA Regulations

The “**Nursing Home Reform Act**” portion of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87, Pub. L. No. 100-203, 101 Stat 1330, 42 U.S.C. §§1395i, 1396r) sets forth no less than 13 distinct types or areas of care which shall be provided to residents, including, but not limited to, prevention of medication errors. (42 C.F.R. §483.25)

Plaintiff submits that these OBRA regulations constitute minimum standards of care owed by **nursing homes** to its residents.

Illinois courts have long held that regulations such as OBRA can be used to establish standards of care (see, e.g. *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 332 (1965) attached; see also Buser, *ibid.*)

D. Cases Cited by Defendant

To be clear, plaintiff does not contest that the applicable standard of care for **nursing home** is “ordinary care”, as stated in *Harris v. Manor Care Corp.*, Ill. 2d 350, 367, 489 N.E.2d 1374, 1381 (1986). However, what plaintiff does contend is that the rules and regulations, as promulgated by the IDPH do constitute “ordinary care” within the **nursinghome** industry. This fact was, as mentioned above, conceded by the defendant's corporate representative before this very Court.

The case cited by defendant, *Stogsdill v. Manor Convalescent Home Inc.*, 35 Ill.App.3d 634, 343 N.E.2d 589 (2d Dist., 1976) was decided *three years* prior to the enactment of the Illinois **Nursing Home** Care Act of 1979, and the promulgation of specific rules and regulations of Title 77 Ill. Admin. Code. That case was filed as a *malpractice* claim against the **nursing home**, which is clearly no longer the law. (See e.g. *Eads v. Heritage Enterprises*, 204 Ill.2d 92, 787 N.E.2d 771, 272 Ill. Dec. 585 (2003) wherein the Illinois

Supreme Court held that cases filed under the Illinois **Nursing Home** Care Act do not come under the requirements of the Illinois Healing Arts Malpractice Act.)

In fact, the regulations introduced by plaintiff at trial were those of the Illinois Department of Public Health under its prior, very general “Minimum Standards, Rules and Regulations for Classification & Licensure of Long-Term Care Facilities by Levels of Service”. [Now replaced by the very specific regulations set forth in Title 77, Ill. Admin. Code.]

Defendant even concedes in its motion that the court in *Stogsdill* held that the aforementioned general regulations then in existence *absent expert testimony* (emphasis added) could not be utilized to establish the standard of care in, what was at the time of the *Stogsdill* decision, a medical malpractice context.

This holding pre-dated the very specific provisions contained in 77 Ill. Admin. Code prior to the enactment of the Illinois **Nursing Home** Care Act.

Moreover, one can be assured that the plaintiff will have expert testimony, from IDPH employees as well as others in this case, who will testify that the regulations violated by the defendant in this case (see IDPH survey, *supra*.) constitute a deviation from the duty of ordinary care owed to plaintiff's decedent by the defendant.

III. CONCLUSION

In summary, plaintiff's complaint, as well as its allegations of negligence, absolutely are in accordance with generally accepted principles of pleading in Illinois Courts and defendant's motion to dismiss plaintiff's complaint should be denied *in toto*.

Respectfully Submitted,

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