



POSTSCRIPT: 1 YEAR AFTER HUMBOLDT

by: Kippy L. Wroten, Esq.

On July 6th we celebrated the dubious 1 year anniversary of the catastrophic \$677 million Humboldt verdict that served up the long term care industry on the proverbial platter and started a plaintiff attorney feeding frenzy. To be certain, this was an anniversary I would have rather avoided, particularly given the gluttony of litigation that has unfolded in the aftermath of this perverse legal hell hole. Well, we are supposed to learn from our mistakes so let's review the legal landscape birthed from the loins of Humboldt County one year ago. Take a big breath, this is going to stink.

First, let's review the status of 6 of the 11 similarly branded understaffing class action claims that followed the Lavender fiasco and have had initial hearings where courts have ruled on three of the fundamental legal questions that drove the Lavender verdict. (1) 3.2 nursing PPD is an individual patient right; (2) a claim brought by a representative plaintiff against one facility can tie together all related facilities into a single case; and (3) the Superior Court is an appropriate jurisdiction for such a claimed violation of staffing to be heard despite the legislative mandate for oversight by the Department of Public Health. As we look at these first strikes, remember that fairness and constitutional due process dictate that every citizen will have notice of just what it takes to comply with the law, particularly where the penalty is financial castration.

1. Shuts v. Covenant Holdco (Alameda County). God bless this state court judge who decided simply that the Superior Court is not equipped to navigate the regulatory waters which were expressly legislated to be the domain of the Department of Public Health. Case dismissed.
2. Wehlage v. Evergreen (North District). Court refuses to defer to the rule of the Department of Public Health but will not allow plaintiffs to bootstrap affiliated facilities together. 8 of 9 facility defendants dismissed.
3. Valentine v. Thekke (Alameda County). Seems like an opportunity for the court to make the same ruling as in Shuts. Not so. The court defers a decision on the right to 3.2 staffing and whether facilities can be bootstrapped for review later in the class certification process. These defendants all remain hostage.
4. Walsh v. Kindred Healthcare (North District). Another opportunity for courts in the same jurisdiction to come together. Not. Here the court rules that the 3.2 ratio is not a patient right but may be used to support argument there were inadequate numbers of qualified personnel employed.
5. Chandler v. LBCC (Los Angeles County). Tentative rulings initially favor full dismissal. Then comes the Lavender verdict. About face. Class certified. Plaintiffs in heaven.

6. Pakdaman v. Country Villa (Los Angeles County). Finally, consistency. But then again, it's the same judge as ruled in Chandler.

Next let's look at the action taken by those actually charged with oversight. On only their third effort, the Department of Public Health finalized interpretive guidelines for their 3.2 PPD staffing audits. I personally want to extend a hand of gratitude that the DPH finally came out with these guidelines. And only a decade after the legislature directed them to adopt regulations defining the application of the 3.2 PPD ratio (and barely months after one unfortunate long term care provider was held accountable under the unique "interpretive guidelines" developed in one Humboldt County court). Well, almost. Unfortunately interpretive guidelines aren't regulations (and that is what our legislature mandated DPH accomplish). Regardless that there is a lot in the All Facilities Letter to like, it really would have been most helpful if DPH would have actually adopted an operative regulation requiring the 3.2 standard. Instead Title 22 Section 72329, with its very own 3.0 PPD standard, remains the operative California regulation while Section 72329.1, which finally adopts the 3.2 PPD ratio, remains in abeyance awaiting financing. Financing in California? Pigs will fly. (That's for you Kelly.)

About the Author:

Founder and Shareholder of Wroten & Associates, Kippy Wroten's experience covers a broad spectrum of complex litigation encompassing all areas of healthcare liability including high exposure and class action claims of elder abuse, fraud, and corporate unfair business practices. Ms. Wroten's experience includes the successful defense of individual healthcare providers, independent long term care facilities, ancillary service providers, as well as related corporate enterprises and their executives.

Ms. Wroten started her legal career as a Deputy District Attorney for Orange County where she prosecuted gang, child and spousal abuse cases. Thereafter, she spent 15 years as a litigator for a prestigious healthcare defense firm where she was a shareholder and lead her long term care practice area. Ms. Wroten founded Wroten & Associates in 2006 to better meet the growing challenges of the long term care industry. Wroten & Associates is designed to provide personal service at rational rates.

Ms. Wroten is a sought after speaker who is dedicated to the education of the healthcare industry and legal community. She has been an invited lecturer for the Defense Research Institute, Irvine Medical Center, Chapman University College of Law, and the Association of Southern California Defense Counsel.

More information about Wroten & Associates may be found at www.wrotenlaw.com or by contacting Kippy Wroten directly at kwroten@wrotenlaw.com