Busting The Health Care Caps With Punitive Damages

By Erica T. Grossman, Esq.

The caps on recovery in cases under the Health Care Availability Act ("HCAA") allow for only limited recoveries in what is generally expensive litigation. Under the HCAA, the cap for wrongful death is $300,000.[1] The caps for negligence outside the HCAA, such as against an Assisted Living facility is better, but still only around $468,000.[2] After liens, costs and attorneys fees are paid, this does not leave a great deal for the patient and family who have suffered an enormous loss.

Given the reality that economic and special damages such as lost earnings are extremely rare, if not nonexistent, when dealing with patients in long term care facilities, seeking punitive damages is one way to increase the value of a case and obtain a fairer recovery for your client to compensate them for the wrong done. Additionally, increasing the defendants' exposure by adding a punitive damages remedy to the complaint widens the zone of negotiation, and puts pressure on defendants to reach a fair settlement before trial.

Note - Substantial Discovery Required

Unlike general cases involving punitive damages, claims for exemplary damages in the health care context under Colorado law may not be included in any initial claim for relief in the complaint.[3] Rather, when the claims for exemplary damages are against "health care professionals," this remedy may only be sought following "the substantial completion of discovery."[4]

What does this mean? Unsurprisingly, there is no precise definition for 'substantial discovery.' But there is a general pattern. Courts have consistently interpreted it to mean that discovery relevant to the punitive damages remedy has been conducted, not that all discovery has been completed. Practically speaking, this generally means obtaining the relevant medical records and likely the depositions of the key players so that plaintiff's counsel can present a prima facie case regarding the state of mind of the involved actors.

Defendants may try to oppose a complaint amendment for punitive damages on the grounds that substantial discovery has not been completed because there is still discovery to be taken. They may argue that they have not disclosed their experts or that they have not taken all of their depositions, including plaintiffs'. In such a case, consider whether the relevant discovery has been completed, including the disclosure of any medical records and the depositions or questioning into the state of mind of the involved actors.

Contrary to what they often argue, defendants do not need to have completed the discovery **they** think is necessary in order for a plaintiff to make out a prima facie case for punitive damages. It is simply not necessary for experts to have been disclosed or for defendants to present their side of the story. The trial court is not making a finding that plaintiff has proven beyond a reasonable doubt that punitive damages are warranted in granting a motion to amend. They can present their side at trial and inferences at this stage are to be drawn in favor of plaintiffs. Thus, judges have held that the proper standard for determining whether discovery has been substantially completed before assertion of a claim for exemplary damages is whether discovery relevant to the exemplary damages issue has been substantially completed.

Although arguably unnecessary, it may also be smart to include in the case management order that the deadline to amend the complaint does not apply to punitive damage amendments. We have never lost on this procedural issue, but we have briefed it multiple times and suggest that putting it directly into an order can avoid an unnecessary fight later.

Pleading Punitive Damages

Although substantial discovery before amendment of the complaint is required in the health care context, the grounds for allowing amendment seeking punitive damages is essentially the same standard as any other initial pleading - that is - you need to make a prima facie showing that circumstances of fraud, malice, or willful and wanton misconduct attend the injury.[5] The Colorado Supreme Court has described this as a "lenient" standard, and one which you can meet through an 'offer of proof' or by an evidentiary showing.[6]

While defendants will undoubtedly argue (or at least imply) that this lenient burden is essentially insurmountable in a health care context, plaintiffs need only make prima facie case justifying punitive damages in order to amend the complaint. The trial court is not sitting in judgment, but merely gatekeeping on whether there is a threshold showing.

In order to skirt this lenient standard, Defendants frequently argue a less damaging interpretation of the offered evidence, such as 'this was merely negligence', 'the nurse had no intent to harm,' the 'chart wasn't fraudulent, it was an accident' and so forth. Remember that these are litigation arguments that they can make at trial, but are not appropriate on a motion that simply adds a punitive damages remedy. Whether in a health care context or another area, *prima facie* proof is not a high bar, but simply requires "'a showing of a reasonable likelihood that the issue will ultimately be submitted to the jury for resolution.'"[7] There is no special health care standard despite attempts to characterize it that way.

Willful and wanton conduct in a health care context

What conduct can be described as willful and wanton when relating to the delivery of health care in a nursing home or long term care facility?

Unfortunately, way too often in these cases, nurses and CNAs and other health care providers are aware of a serious condition and either do not provide the ordered treatment, or do not call a doctor or send the patient to the hospital. They also, in an attempt to hide or detract from what is happening, frequently do not call the involved family. Shockingly, we often see that the response to a known serious change of condition or medical problem of patients in a nursing home is literally to do nothing.

Over and over in nursing homes, you will find conduct that goes above simple negligence so as to justify amendment to seek punitive damages. You will see evidence or witness accounts that caregivers not only should have known or diagnosed a condition, but actually knew of a condition and failed to treat it, that the defendant or its staff was conscious of his conduct and the existing conditions and proceeded with the conduct recklessly as to the known likelihood that injury would result by his actions or inactions.

A classic example of this can be seen when dealing with a bedsore/pressure ulcer. Bedsores are common among neglected nursing home patients because people who are high risk for sores or who already have sores require diligent and timely care – care that is frequently either not provided at all or not provided at the level required by the standard of care. Staff must turn and reposition people with bedsores frequently in order for the bed sore to heal – such sores will quickly worsen and can lead to death when not treated sufficiently.

For various reasons, sometimes due to grossly inadequate staffing, reckless lack of training, or reckless failures to translate care plans into actions, this will not be done, leading to a massive infection and often death. Defendants will often point to a lack of intent to harm to get out of punitive damages but so long as staff acted in "utter disregard of consequences," they do not need "intentional malice in its odious or malevolent sense."[8] Willful and wanton conduct is defined as "conduct purposefully committed which the actor must have realized as dangerous, done needlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.[9]

Thus, showing that staff were consciously aware of a bedsore but failed to properly treat it or transfer the patient to a place of higher acuity or notify his caregivers and family may serve as a basis for punitive damages, in that, defendants' conduct created a "substantial risk of harm to another" and was "purposefully performed with an awareness of the risk in disregard of the consequences."[10]

Another common example of willful and wanton conduct is notice of a dangerous condition and failure to remedy. If staff had knowledge that, say, a lift used to safely transfer people was defective, but failed to do anything about it, that could similarly support an amendment seeking a punitive damages remedy. Or, if staff knew a person was a fall risk, and failed to create a care plan for proper precautions, that also may constitute reckless conduct.

Circumstances of fraud in health care context

Demonstrating fraudulent and deceptive conduct on the part of nursing home staff also serves as a basis for pleading punitive damages. Pay close attention to deceptive/false charting here. For example, not charting a condition they knew was there in order to hide it, false charting, inaccurate charting, incomplete charting, or blatant cover-up charting.

We have seen all of these situations and more. Often, someone will fall and there will no report of it except for the aftermath and injury – such as a hematoma or broken bones. A person totally dependent on caregivers for transfer will suddenly be described as having a bruise or broken bone from an "unwitnessed fall." In many of these situations, it will be easily established that someone had to pick the fallen resident up. Someone knows where the resident fell, what was around the resident, what time of day it was, etc. Not filling out a nursing note and incident report of a clear incident triggers fraudulent conduct. Or, one nursing note will report that someone is absolutely fine with normal test results when that would be impossible given their hospital results the following day. Frequently family members will have voicemails saved where a facility representative informs the family of a fall or other incident that the record omits entirely. All of these can support a motion to amend to seek punitive damages.

We have even seen nurses make chart entries for days after a person has gone to the hospital and passed away.

Yet another example of fraud is outright express representations by high up staff, such as administrators and marketing people that they can care for someone that they know at the time requires higher care than they can actually provide. For instance, saying that they can provide round the clock care for a wandering patient with Alzheimer's when they know that they are not staffed to do so is fraudulent and justifies punitive damages.

Proving Punitive Damages – thinking outside the chart

In most cases, the defendants own charting will be their downfall. We had a case where nurses actually charted that the patient's toes were turning black and growing more and more infected and did nothing in response. They charted day after day that the infection was spreading and the toes were turning black leading to sepsis yet no doctor was timely called and he was never sent to the hospital.

Charting of such egregious lack of care is rare, however. More often, it will be crucial to look closely at the chart for what is not there. Look outside the chart: what isn't documented or in there that should be? Did a witness report a fall and there are clearly injuries yet no incident report was filled out?

Or, can your client or other family member tell you anything about what happened and what the staff knew that they did not chart? Family members may have told the staff something or be witness to an event that was not charted but that will justify punitive damages. Such information evidences circumstances of fraud.

Did the facility fail to make a timely occurrence report to the department of health as required under C.R.S. 25-1-124 and CDPHE's regulation? Was such a failure an attempt to cover up or divert from liability? Did the director of nurses tell a surveyor something about a resident that was not in the chart that eventually made its way to you, was it removed? Are there relevant days missing from the nurses notes?

Importantly here, do not assume that the staff are all sympathetic to the facility. In our cases, the testimony of the involved caregivers can be the most damaging to the defendant. Many caregivers are under-paid and over-worked and there because they genuinely care about the residents. They are often treated poorly by management and strongly discouraged from choosing the care option that costs the most money. Or, they may have seen people being fired for speaking out against the poor care.

Because of this, defendants' staff will on occasion freely admit that more should have been done or that a course of care was grossly negligent and reckless. Depositions of nurses and nurse's aides are thus critical components of getting punitive damages. This is particularly true of course if the nurse no longer works there or has been fired, which is often the case given the poor working conditions and high staff turnover rates in these facilities.

Ratification

Facilities themselves through cost savings measures, ignoring facility plans of correction approved by the department of health, understaffing, or ignoring information from caregivers are also reckless in their own right. If an actor high enough up in the company, such as a director of nurses or an administrator or other employee acting in a managerial capacity and in the scope of employment is reckless to a known serious risk of harm, punitive damages can be sought against the company. Absent such a high-level worker, the facility can also be liable for punitive damages through ratification.[11]

Plaintiff's counsel in nursing home cases who wish to seek punitive damages should resist the defense attempts to increase the burden beyond that required for pleading such damages. Punitive damages are appropriate to redress this kind of conscious disregard of known serious life threatening dangers for frail, vulnerable, elderly dependent persons. ▲▲▲

Erica Grossman worked as a litigation associate at Latham & Watkins, LLP in San Francisco, California, in areas of white-collar crimes, antitrust litigation, securities litigation, and employment law. She came to Colorado in 2007 and is a partner of Holland, Holland Edwards & Grossman, PC, a practice that is deeply

committed to representing the families of people injured in nursing homes and to bringing cases to vindicate serious deprivations of civil rights.

Endnotes:

[1] C.R.S. § 13-64-302.

[2] See C.R.S. § 13-21-102 (3)(a) and (b). The Colorado Secretary of State certified limitations on damages adjusted for inflation are available at www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.

[3] C.R.S. §§ 13-64-302.5 and 13-21-102.

[4] C.R.S. § 13-64-302.5(3).

[5] C.R.S. § 13-21-102 (1)(a) provides that: In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

[6] *Stamp v. Vail Corp,* 172 P.3d 437, 450 (Colo. 2007).

[7] *Id*. at 449.

[8] *Carlson v. McNeill*, 162 P.2d 226, 230-31 (Colo. 1945).

[9] C.R.S. § 13-21-102 (1)(b).

[10] *W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 578 (Colo. App. 2006).

[11] *Jacobs v. Commonwealth Highland Theatres, Inc.*, 738 P.2d 6, 12-13 (Colo. App. 1986). Colorado has expressly adopted the Restatement (Second) of Agency § 217C on punitive damages, which states that an employer is liable for punitive damages for the acts of an agent, even when that agent is not a manager, if the employer "ratified or approved" the act. *See Fitzgerald v. Edelen*, 623 P.2d 418, 423 (Colo. App. 1980) (stating, "we hereby adopt this section in its entirety.").