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Nature of Action: Death of nursing home rehab resident from sepsis infection

Injuries: Death

County: Waukesha County

Case name: Estates of Nissenbaum v. Woodland Health Care Center, et al.

Judge: James Kieffer

Verdict or settlement: Verdict in favor of plaintiff

Original demand: \$350,000 reduced to \$200,000 during trial

Original offer: Denial of liability and pretrial offer was \$60,000

Amount: \$715,000

Award Summary: \$500,000 for loss of society and companionship - reduced to \$350,000 per wrongful death cap, \$200,000 for conscious pain and suffering, and \$15,000 in hospital, funeral and burial expenses.

Plaintiff's attorney: Jay Urban & Jennifer Wilson, Urban & Taylor s.c., Milwaukee

Defendant's attorney: Charles Bohl & Steven Stanaszak, Whyte Hirschboeck & Dudek, for defendants, Milwaukee

Plaintiff's expert: Moira Fordyce, M.D., California (plaintiff's geriatric physician) and Helen Jacobs, R.N., Milwaukee (plaintiff's nurse administrator)

Defendant's expert witnesses: Kim Pedersen, M.D., Madison, Wisconsin (defendants' geriatric physician) and Kim Heim, R.N., Mequon, Wisconsin (defendants' nurse administrator)

Noteworthy issues: Liability dispute; cause of death question; value of pain and suffering and loss of society and companionship to elderly couple.

Plaintiff counsel's summary of the facts: Helen Nissenbaum was 77 years old when she entered Woodland Health Care Center (Woodland) on Oct. 24, 2001. Woodland was to be an interim facility between her hospitalization for a non-surgical aortic dissection at a local hospital, and her hoped return home to independent living with her husband of 55 years. It was the intention of her physician that she be monitored while regaining her endurance. Instead, she became confused, infected and died 5 days later.

Mrs. Nissenbaum was the caretaker of a husband who had significant physical disabilities, and the loving mother to her next-door-neighbor daughter, Martha Gilerovich, and her husband. Helen Nissenbaum was admitted to Woodland Health Care Center on Oct. 24, 2001 from Froedtert Memorial Lutheran Hospital, where a diagnosis of dissecting aneurysm of the aorta had been made. On admission to Woodland on Oct. 24, 2001 she was found to be alert, with some confusion and could verbalize her needs without difficulty. She needed help with all activities of daily living, set up help only for eating. Her vital signs were stable on admission, and no respiratory distress was observed.

On Oct. 26, 2001, Mrs. Nissenbaum was “found sitting on the floor next to the bed unable to recall what caused [the] event.” On the same day she seemed to be more confused, and stated, “I hope I will die.” On Oct. 27, 2001 she was noted as confused and yelling out. At 8:30 p.m. her axillary temperature was reported as 100.4 degrees F. She was given Tylenol for this. A behavioral health evaluation was carried out during the morning and/or early afternoon of Oct. 28, 2001. Mrs. Nissenbaum ate poorly that afternoon and complained of general pain everywhere. Her potassium was found to be 2.6, and the potassium chloride that had been stopped on Oct. 25, 2001 was restarted. A portable chest x-ray reported a small amount of left basilar regular opacity suggesting infiltrate and possibly early pneumonitis. On Oct. 28, 2001 at 5:15 p.m. the staff at Woodland were unable to waken Mrs. Nissenbaum. She was moved from her wheelchair to bed, and moaned with the transfer. Her axillary temperature was 100.9 degrees F, with lung sounds slight congestion. A late entry in the chart states that when the staff found her unresponsive in her wheelchair there was applesauce in her mouth, which they cleaned out with a washcloth. At approximately Oct. 28, 2001 Mrs. Nissenbaum was transferred to Elmbrook Memorial Hospital where she was found to have staph aureus septicemia; L lower lobe pneumonia; urinary tract infection and anemia. Her rectal temperature was 102.0 degrees F, with elevated WBC, BUN and creatinine. On Oct. 29, 2001, Ms. Nissenbaum died of massive sepsis at Elmbrook Hospital.

Plaintiffs believed that Ms. Nissenbaum’s sepsis and death was caused by an undiagnosed and untreated urinary tract infection. There were numerous signs and symptoms of this infection in the days before she died, including a fall, confusion and high fever. There was no dip to detect the UTI, and a physician was not called until it was too late. Ms. Nissenbaum was incontinent, and this UTI was probably picked up by her lack of care including times when the family found her lying in her own feces. Plaintiffs presented expert evidence that Helen Nissenbaum would still be alive for 2 or 3 more years had Woodland met its duty of care for her. Much of the plaintiff’s part of the trial was the adverse testimony of current and former Woodland nurse and administration staff through cross examination by plaintiff counsel. The plaintiffs’ theory was that if the fall were noted as a change of condition as was the elevation in temperature that a doctor should have been called to prescribe an antibiotic that hopefully would have helped her fight off the infection and survive.

Plaintiffs were substantially limited in their trial evidence. Only one photo of the couple was allowed to be shown to the jury. Plaintiff’s counsel could not suggest “neglect” or

“abuse” by staff. The Woodland infection control and other procedures could not be used. The Medicare and other regulations could not be referenced. No prior complaints, surveys or other evidence of poor performance of the home or employees could be utilized.

Defendants presented evidence that nothing would have saved Mrs. Nissenbaum from death, and that she was infected with probably pneumonia upon admission that more likely caused her death than any urosepsis. They also defended that the standards of care for monitoring a fall and a fever were met according to policies and procedures and the same level of care as the hospital. Defense expert opined that she was suffering from dementia, and thus her confusion was confusing to the staff as an indication of her mental status and not any sign of infection.

The case went to the jury on a straight negligence instruction.

Damages focused on the death of Helen Nissenbaum. While capped by statute, the loss to her husband, who had since died, of many years was catastrophic. Their children, Sam Nissenbaum and Martha Gilerovich, knew their parents well, and believe that Helen’s passing actually hastened Gabriel’s demise. She was his world. They met in a concentration camp in Nazi Germany, fell in love and were together ever since emigrating to America to start a new life and family. In fact, the Nissenbaums lived right next door to the Gileroviches so every day care of Gabriel then fell onto Martha. This was a couple deprived of their very best — the twilight of their golden years — together. The adult children and son-in-law and grandson were the only damages witnesses. Mediation with retired Judge Snyder did not produce a settlement.