



QUINTAIROS, McCUMBER, PRIETO & WOOD, P.A.
ADVOCATES FOR THE NURSING HOME & LONG-TERM CARE INDUSTRY

QMPW Names Creasman Partner

Quintairos, McCumber, Prieto & Wood, P.A. is pleased to announce that **Jeffrey R. Creasman** has



been admitted as a partner. "Jeff first joined the firm in 1999, and because of

his experience in nursing home defense, we knew it wouldn't be long before he became a partner," said **Hugh L. Wood, Jr.**, managing partner of the firm, which now has more than 30 attorneys representing its clients throughout Florida.

A University of Florida graduate, where he earned a BA degree in English in 1979, Creasman received a Juris Doctor with Honors from St. Thomas University School of Law in 1988.

He first practiced law at Haddad, Josephs & Jack in Miami, and was with Wolpe & Leibowitz from 1989-1999. ♦

QMPW Attorneys Earn Directed Verdict

On Dec. 12, 2001, Manatee County Judge Jannette Dunnigan granted Defense's Motion for a Directed Verdict at the close of the Plaintiff's case in *William Foster, as Personal Representative of the Estate of Donald Foster v. Vantage Healthcare Corporation*, d/b/a Manatee Health Care & Rehabilitation Center. The case was tried by QMPW's **George F. Quintairos** and **Eric Boyer** and **Mike Howard** of Gallagher & Howard, P.A., for the Defense, and **Kurt Berman** and **Ray Papparella** of Spiegel & Utera, P.A. for the Plaintiff.

The initial complaint had three counts: Chapter 400 claim, negligent survival claim, and

Spoilation of Evidence claim. The judge previously granted Summary Judgment on the Spoliation of Evidence count and the Chapter 400 count based on the *Knowles* decision, leaving only the negligence claim. Judge Dunnigan had also denied Plaintiff's Motion to Add a Claim for Punitive Damages.

At the conclusion of the Plaintiff's case-in-chief, Defense counsel moved for a directed verdict on the basis that the Plaintiff failed to present sufficient evidence that the alleged negligence caused any injuries or damage to the decedent. In essence, the Plaintiff failed to show a causal link between any negligence and

injuries allegedly suffered by Mr. Foster. A significant development prior to the directed verdict was disqualification of Plaintiff's administrative and staffing expert, **Marc Lichtman**. At a *Frye* hearing prior to Mr. Lichtman's testimony, **Mike Howard** and **Eric Boyer** successfully argued that Lichtman's opinions were not based on any scientifically accepted principals. Due to the disqualification, and Plaintiff's failure to call another expert to testify that the injuries were the result of any violations of the standard of care, Judge Dunnigan followed the law and granted the defense motion. ♦

Defense Verdict for Sarasota Facility

Quintairos McCumber Prieto & Wood has successfully defended Sarasota Health Care Center in a multi-million dollar lawsuit alleging wrongful death and negligence. The case, won on October 30th following a two-and-a-one-half week trial, was tried by

QMPW attorneys **George Quintairos**, **Edward Prieto** and **Eric Boyer**, for the defense, and **Mike Houtz** and **Alex Fiol** of Morgan of Colling & Gilbert for the Plaintiff.

The Plaintiff's decedent, an 80-year-old man, was admitted to Sarasota Health

Care Center on May 13, 1998 with a history of severe osteoporosis, compression fractures, congestive heart failure, dementia, cardiomyopathy, mitral valve regurgitation, weight loss issues and a suspicion of multiple myeloma.

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QMPW Expands, Tampa and Jacksonville Offices Relocate

The firm's Tampa office has outgrown its space, and has relocated to Suite 100 at 5102 West Laurel Street.

"This is the second time in less than three years that we have outgrown our space,"

noted **Andrew R. McCumber**, managing partner of QMPW's Tampa office. "Our caseload has increased dramatically, and we needed the extra room to accommodate the many new attorneys and paralegals

we have added to our staff."

Please make a note of our new telephone: 813/287-1100.

In Jacksonville, a similar situation caused QMPW to seek larger quarters. "However, this time the move was in

the same building," said **Clemente Inelan**, managing attorney of the Jacksonville office, which is now located in Suite 1650. The telephone number remains the same: 904/354-5500. ♦

Miami Office

9200 So. Dadeland Blvd.
Miami, FL 33156
Tel: 305/670-1101

Tampa Office

5102 West Laurel Street
Tampa, FL 33607
Tel: 813/287-1100

Jacksonville Office

One Independent Drive
Jacksonville, FL 32202
Tel: 904/354-5500

Orlando Office

8427 South Park Circle
Orlando, FL 32819
Tel: 407/903-9205

QMPW Earns Defense Verdict for Sarasota Nursing Facility

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The decedent passed away at the 120-bed nursing home on March 15, 1999 as a result of acute renal failure, secondary to end-stage dementia.

The Plaintiff filed a three-count complaint as a result of the death, alleging violations of Florida Statutes, Chapter 400, Wrongful Death and Negligence. The Plaintiff also alleged that the decedent had suffered significant weight loss due to malnutrition, sustained a hip fracture and developed decubitus ulcers as a result of the center's shortage of staffing and supplies, dirty facilities, poor surveys and fraudulent charting.

The Plaintiff called two agency nurses aides who testified about an alleged pattern of consistent staffing shortages and undesirable conditions at the nursing home. Several of these agency witnesses stated that they did not like working at the center and often requested other assignments. They also stated, however, that the center's residents

received good, continuous care.

An Agency for Health Care Administration (AHCA) survey, which pertained to the decedent's decubitus ulcers, weight loss and the center's staffing shortage, was admitted into evidence. On cross-examination, the AHCA surveyor admitted that he failed to recognize in his investigations that the decedent was terminal and was a no-code or DNR patient. He also testified that he failed to notice that the decedent was significantly below his ideal body weight and that he may have suffered from multiple myeloma, an illness which may have caused the weight loss and ulcers.

The Plaintiff then retained four experts, one of whom testified that the facility failed to provide adequate nutrition and hydration, but on cross-examination admitted that a significant portion of the decedent's weight loss was attributable to recurrent upper respiratory infections that was not the fault of the center. She further testified



George Quintairos



Edward Prieto



Eric Boyer

that the staff inappropriately measured the decedent's height, which is generally used to calculate caloric and protein intake.

Through cross-examination, however, it was established that the hospital staff and the decedent's attending physicians also miscalculated the decedent's height due primarily to his kyphosis. Additionally, it was proven that despite the alleged miscalculation of the decedent's height, he gained weight during the initial months of the residency period.

Pat Collins, RN, a former Director of Nursing at another nursing facility, testified that the facility failed to appropriately care plan for falls and failed to provide appropriate nutrition and hydration, adequate skin care and appropriate pain management. On cross-examination, Ms. Collins was unable to prove that the fall was preventable or whether the decedent suffered a spontaneous hip fracture prior to falling. It was proven that despite the fact that there was no specific care plan for falls during the first seven months of the residency period, the decedent did not suffer any falls during that time frame.

During cross-examination, Ms. Collins acknowledged that the decedent initially gained weight at the facility, but then lost weight due to upper respiratory infections and persistent refusals to eat or drink. She also testified that the decubitus ulcers, which had developed at mid-spine, were related to the decedent's kyphosis.

Leonard Williams, MD, testified that the fractured hip caused the decedent's death; however, on cross-examination he admitted that the hip fracture was not a terminal condition and that the death was primarily the result of the decedent's underlying medical conditions that were present upon admission to the nursing home. Dr. Williams' testimony was the only evidence submitted as to death, which he backed away from on cross-examination.

Defense expert Arnold Blaustein, MD testified that based on his review of the decedent's medical history, the decedent had suffered from multiple myeloma, which is a rare form of bone cancer. Furthermore, Dr. Blaustein indicated that multiple myeloma causes pathological fractures (similar to those the decedent sustained on the spine), progressive weight loss, and renal failure. Dr. Blaustein also opined that the fractured hip could have been a spontaneous fracture caused by the weakening of the bone due to multiple myeloma. He noted that the initial fracture was non-displaced, but became displaced later at the hospital, giving credence to the spontaneous theory.



Of the 11 cases taken to trial, Quintairos, McCumber, Prieto & Wood, P.A. has obtained nine nursing home defense verdicts and one directed verdict, while the 10th case settled during trial for \$75,000 when the pre-trial demand was \$1,000,000.

QMPW at FHCA Conference



QMPW attorneys at the annual FHCA Convention were (from left): E. Patrick Buntz, managing attorney, Orlando office; Deborah Moskowitz (Orlando); Travis A. Reinhold (Jacksonville); Clemente J. Inclan, managing attorney, Jacksonville office; Ann Zonderman (Jacksonville); Christopher J. Karpinski (Jacksonville); and Hugh L. Wood, Jr. of Miami, managing partner of the firm, which has grown to more than 30 lawyers in four offices in Florida.

Recent ALJ Decisions Reverse State Surveyors, Sanctions

By Jane Thornton Mastrucci, Esq.
and Cynthia Harrison Ruiz, Esq.

Hope has recently emerged for nursing homes faced with disastrous surveys resulting in huge fines or termination of Medicare and/or Medicaid participation.

While many nursing homes pursue an Informal Dispute Resolution (IDR) process to appeal survey findings, the Agency for Health Care Administration reports that in 2001, only 15% of IDRs resulted in a reversal of survey citations or tags, down from a reversal rate of 36% in 1999, and a rate of 18% in 2000.

If you aren't in that fortunate percentage, you may appeal the survey directly to a Federal judge through the Administrative Appeal Process. The Petition for Hearing must be filed within 60 days from the date of the letter imposing sanctions.

Surveys that result in the imposition of Civil Money Penalties or denial of Medicare and/or Medicaid payment for new admissions may be appealed to: Department of Health and Human Services, Departmental Appeals Board, Civil Remedies Division, in Washington, D.C.

Florida cases are routed to the Office of General Counsel in Atlanta, Georgia and assigned to an Administrative Law Judge (ALJ). An ALJ may well be a more impartial arbiter of the facts and law than an IDR panel, which consists of State supervisors who judge findings of the State's own survey team.

The issue ALJs decide is whether the greater weight of the evidence establishes that a facility was NOT in substantial compliance with the Medicare participation requirements for ANY of the tags assessed. If the ALJ determines that only ONE of the tags was valid, the penalty will be upheld.

In recent federal decisions, ALJs have refused to consider survey findings based upon



Jane Thornton Mastrucci

statements of unidentified nursing home residents (as hearsay), which are commonly accepted as fact by IDR panels. ALJs may also refuse to consider an isolated incident as proof that a facility was not in substantial compliance with Medicare or Medicaid notice requirements.

ALJs may also take the totality of a resident's clinical condi-



Cynthia Harrison Ruiz

tion into account before making a determination. For example, an ALJ may rule that a facility should not be held responsible for a 16 lb. weight loss, where the resident was still well above her ideal body weight.

An ALJ recently ruled that: "42 CFR Sec. 483.25 (i)(l) does not require a facility to prevent each of its residents from losing

weight. All that the regulation requires is that a facility provide each of its residents with adequate nutrition. If a facility provides adequate nutrition to a resident, it is complying with the requirements of the regulation even if the resident loses weight despite the nutrition that is being supplied to that resident." *Carehouse Convalescent Center v. HCFA*, No. C-00-006 (H.H.S., DAB, Civil Remedies Div., Jan 16, 2001.)

In a case we recently tried, *Palm Beach County Home v. CMS*, the ALJ reversed all three tags and held that CMS had no basis to deny payments for new admissions to the facility. (See sidebar article below.)

In a recent California case, an ALJ determined that a

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Judge Reverses 'Bad' Nursing Home Survey

Jane Thornton Mastrucci and Cynthia Harrison Ruiz of Quintairos, McCumber, Prieto & Wood, P.A., have received a very favorable decision in an administrative appeal of a "bad" nursing home survey by the Center for Medicare & Medicaid Services (CMS).

In *Palm Beach County Home v. CMS* (Case No. C-99-102, H.H.S., DAB, Civil Remedies Div., Oct. 29, 2001), Administrative Law Judge Steven Kessel reversed all three tags, and held that CMS had no basis to deny payments for new admissions. The case was tried by Jane Mastrucci and her father and former partner, **John W. Thornton**, while Cindie Ruiz co-authored the pre- and post-trial briefs.

During the trial, the ALJ refused to hear testimony about the facility's written policy on discharge and discharge planning, certain medications, and an alleged leg fracture requiring nursing care since there were no allegations regarding these topics in the survey. He also refused to admit into evidence or hear testimony on prior surveys, other residents not at issue in the case, or the facility's reputation.

With respect to survey tag F201, the Judge ruled that the nursing home justifiably transferred a resident to an unregulated facility (a residential Salvation Army) since his continued presence at the home endangered not only the safety of other residents, but its staff. The resident in question was a 35-year-old,

homeless, male resident who had made a significant recovery (from a head injury and numerous fractures) while at the nursing home over a nine-month period. As the man recovered, he became increasingly violent and aggressive, and was ultimately discharged after an unprovoked attack on another resident and a Certified Nursing Assistant.

The ALJ further held that F224, Abuse, dealt with facility abuse of residents, not "resident-to-resident abuse," and contained no requirement that the facility report "resident-to-resident abuse" to police or local abuse hotlines. He also ruled there was NO evidence of facility abuse.

Finally, the ALJ held that while F329 requires "adequate" monitoring of the side effects of psychotropic drugs, daily monitoring is not required unless there is a medical basis for daily monitoring. Moreover, he ruled that there is no requirement that a specific form be used to document the monitoring (such as a Psychoactive Drug Flow Record). The ALJ also held that the absence of side effects need not be recorded, and that monitoring is not required to be documented. Rather, the focus of the regulation is that the resident be adequately monitored, and that the physician be kept adequately informed of the condition of the resident. ♦



Disastrous State Surveys May Be Reversed

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facility was in substantial compliance with Medicare and Medicaid requirements, and **reversed** the imposition of Civil Money Penalties and a termination from Medicare participation, both of which totaled approximately \$6 million. This is apparently the **first reported case** where a termination had been reversed.

The Departmental Appeals Board rules submitted to attorneys well prior to trial preclude “surprise” testimony and witnesses. Based upon these rules and ALJ decisions, surveyors will not be allowed to change allegations during the trial or add new allegations or tags. Testimony will be confined to the allegations contained in the survey, and the tags cited in the survey, unless the survey was formally amended by CMS. Tags which are not supported by the allegations in the survey are also subject to dismissal for failure to state a prima facie case.

After assignment of the case, the ALJ will typically issue an order requiring that the parties enter into a stay to negotiate, or that the Center for Medicare and Medicaid Services (CMS),

formerly known as HCFA, file a motion to dismiss, or that the parties prepare a report of readiness for an evidentiary hearing.

Each of the 7–8 ALJs has about 200 cases pending at any given time. In the past, hearings typically were scheduled for anywhere from three days to two weeks, but recently ALJs have shortened the hearing time. Cases previously scheduled for three days have been shortened to one day (even if 7–8 witnesses are involved) with specified time limits for testimony, such as four hours per side. Cases may be scheduled for hearing as early as 6–8 months after docketing, if the parties are ready.

The location of the hearing may be set by mutual agreement in the county in which the nursing home is located. Exhibits are marked pursuant to a precise protocol and exchanged months before the hearing. No provision for deposition exists, although

discovery motions and subpoenas are permitted.

At the hearing, which is conducted just like a civil trial, each side is allowed a brief opening statement, followed by the identification of exhibits, objections and rulings on exhibits. Expert witness testimony is permitted.

At the trial, CMS presents its case first, represented by senior attorneys who have participated in many evidentiary hearings. Oral motions to dismiss for CMS’ failure to present a prima facie case may follow. The nursing home then proceeds with its case and limited rebuttal is allowed.

Original exhibits are provided to the Judge. No closing arguments are allowed.

Following the receipt of the trial transcript, the Judge will set a briefing schedule wherein both parties simultaneously exchange initial post-trial briefs within 30–45 days, followed by reply briefs 15 days later. Page limits are enforced.

Judges will normally decide

within 30 days or so, and the opinion, including findings of fact and conclusions of law, may be filed within 2–3 months. One appeal is allowed from the ALJ’s decision — to the Departmental Appeals Board, whose decision is final.

Attorneys fees and costs to a prevailing nursing home may be awarded on a limited basis under the Equal Access to Justice Act. Nursing homes with less than 500 employees and whose net worth is less than \$7,000,000, or which qualify as a non-profit corporation under Sec. 501(c)(3) of the Internal Revenue Code are eligible for the award.

ALJ decisions are not found in the usual places that trial lawyers look for opinions, such as Southern Second Reporter or Federal Reporters, and are difficult to access. There is no Florida Jur or other digest organizing the decisions, but the opinions can be found on Westlaw.

The basic principles of due process, fairness and common sense evidenced in many of these recent opinions are not only refreshing, but are a source of hope for many of us who labor in the long-term care field. ♦

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