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HEALTH LAW**Nursing Home—Wrongful Death—Elder Law—State Statutes****Unaddressed fecal impaction resulted in fatal heart attack****VERDICT** **\$20,000,000**

CASE Wanda R. Delaplane, as administratrix of the Estate Of Loren Richards, deceased v. Beverly Health And Rehabilitation Services, Inc. d/b/a Beverly Health and Rehabilitation of Frankfort, Constance (Connie) O'Brien, R.N. and Deborah Cunigan, R.N., No. 02-CI-01119

COURT Franklin County Circuit Court, KY

JUDGE William Graham

DATE 05/04/2006

PLAINTIFF

ATTORNEY(S) **Kenneth L. Connor**, Wilkes & McHugh, P.A., Leesburg, VA
Stephen M. O'Brien III, Garmer & O'Brien, LLP, Lexington, KY

DEFENSE

ATTORNEY(S) **A. Courtney Guild Jr.**, Hall, Render, Killian, Heath & Lyman, P.S.C., Louisville, KY
Kirsten K. Ullman, Ullman, Bursa, Hoffman & Ragano, LLC, Tampa, FL
Norris C. Cunningham, Hall, Render, Killian, Heath & Lyman, P.S.C., Indianapolis, IN

FACTS & ALLEGATIONS On March 2, 2002, plaintiff's decedent, Loren Richards, 84, a resident of Beverly Health and Rehabilitation of Frankfort [Ky.], suffered a heart attack and died. Administrators at the facility told his three children that Richards, who had been living there for five years, died suddenly. However, the children later heard reports that their father had been crying out in pain for some time before

the heart attack. In May, they arranged to have his body exhumed and an autopsy performed. The final anatomic diagnosis indicated, among other things, a probable bowel obstruction. The cause of death was listed as "arteriosclerotic cardiovascular disease contributed to by abdominal pain subsequent to probable bowel obstruction."

On behalf of Richards' estate, his daughter sued the facility and its Fort Smith, Ark.-based parent, Beverly Health And Rehabilitation Services Inc., and two registered nurses who were charged with his care, Constance O'Brien and Deborah Cunigan, claiming wrongful death. Plaintiff counsel argued that they the defendants were negligent in his care and treatment, violated his resident's rights as defined by state law, and subjected him to abuse and neglect in violation of state law.

Plaintiff's pathology experts, Kent Harshbarger and George Nichols, testified that the autopsy revealed an impacted colon. Richards' medical records indicated that he had a history of fecal impactions and vascular disease.

Meanwhile, plaintiff's counsel also introduced evidence that for at least 10 hours before he passed away at about 1230 p.m. on March 2, 2002, Richards was complaining of abdominal pain.

Plaintiff counsel called Cunigan, who was the nurse on duty between 11 p.m. and 7 a.m. She testified that she assessed Richards at 440 a.m. Her examination showed that his abdomen was hard and distended, and he had hypoactive bowel sounds in all four quadrants. She said that she performed a digital rectal exam that indicated that he had hard formed stool in the upper vault of the rectum that could not be digitally removed, but didn't chart it or take any other action.

Plaintiff counsel also called O'Brien who came on duty at 7 a.m. Referring to Richards' medical chart, O'Brien testified that he vomited several times that morning and complained about abdominal pain. However, whether she observed this first-hand was called into question by her

admission that she didn't put notes in Richards' file at that time, but wrote them in later. Her credibility was further impeached by the testimony of the wife of a resident who lived across the hall from the decedent, who said that she heard Richards cry out for help several times that morning and, when no one responded to his cries, had to go find someone to check on him.

The facility's medical records showed that it wasn't until 12:20 p.m., or 10 minutes before he died, that a physician was called to check on Richards.

Plaintiff's internal medicine expert, Andrew Weinberg, testified that the impaction and the failure to treat it led to the fatal heart attack.

The plaintiff also submitted evidence of investigations by three agencies—the Kentucky Inspector General, the U.S. Dept. of Health and Human Services and Kentucky Adult Protective Services—all of which found that the facility was negligent in the care it afforded Richards before he died.

The defense contended that Richards impaction didn't cause his death. Defense pathology expert Greg Balko testified that the autopsy slides weren't conclusive that Richards was impacted. Defense internal medicine expert Ralph Caldrony testified that, even if he was impacted, it had nothing to do with causing his death.

INJURIES/DAMAGES Plaintiff's counsel asked the jury to award \$5 million for his pain and suffering and \$150 million for punitive damages.

VERDICT INFORMATION The jury found that the defendants were negligent and awarded the estate \$20 million, including \$18.8 million in punitives, of which \$500 each was assessed against O'Brien and Cunigan, and the remainder was against Beverly.

**ESTATE OF
LOREN**

RICHARDS \$200,000 Personal Injury compensatory award for violation of plaintiff's resident's rights
\$1,000,000 Personal Injury pain & suffering, mental anguish and loss of enjoyment of life
\$18,800,000 Personal Injury punitive damages

**PLAINTIFF
EXPERT(S)**

Judith Kidd MSHP, RNC, LNHA, General Nursing Practices, Azle, TX
Andrew Weinberg M.D., Internal Medicine, Columbia, SC
Kent Harshbarger M.D., Forensic Pathology, Dayton, OH
George Nichols M.D., Forensic Pathology, Louisville, KY
Byron Arbeit, Nursing Home Administration, Tampa, FL

**DEFENSE
EXPERT(S)**

Jean Shook R.N., Nursing, Alexander, AK
Barbara Bargo R.N., Nursing, Barbourville, KY
Greg Balko M.D., Forensic Pathology, Fort Wright, KY
Ralph Caldrony M.D., Internal Medicine, Lexington, KY

POST-TRIAL The parties entered into a post-trial settlement for a confidential amount.