

Nursing Home Litigation

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Michael S. Reeves has been practicing law for 31 years. Recently Mr. Reeves was listed in the Second Annual *Guide To The Top Attorneys in Georgia* in Atlanta Magazine. Mr. Reeves, who was also named in 2004, was selected in a poll of more than 23,000 attorneys who were asked to vote for the best lawyers they had personally observed in action. Those nominated were then screened by a Blue Ribbon Panel and are said to be among "the top five percent of the attorneys in Georgia." Mr. Reeves was named as one of the 63 best lawyers in Georgia in his practice area. The survey, conducted by Law & Politics Magazine and Atlanta Magazine, is in the March 2005 issue of both magazines.

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It was once thought that nursing home claims were low risk and low exposure.¹ The life expectancy of the typical nursing home resident is not very long; therefore, it was thought that the pecuniary value of the case was lower. While that logic prevails in some cases, some juries are persuaded that the time remaining to the resident and her loved ones is important and the loss of those last few months or years may have substantial value. Couple this theory with evidence of

¹ Portions of this paper were presented to the Georgia Defense Lawyers Association in March 2001. Acknowledgment is gratefully given to Patrick Kelly, a student at the University of Georgia School of Law, for his assistance in updating and revising this paper.

abuse and neglect and the result can be explosive.² While most of the “big dollar” verdicts have occurred in other states, Georgia juries have joined the fray.³

There is legislation providing victims of nursing home abuse with a private cause of action. See Fla. Stat. Ann. § 381.026 (enacted in 1976); Texas Liability Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann., art. 4590i (enacted in 1977); See “The Georgia Bill of Rights for Residents of Long Term Care Facilities,” O.C.G.A. § 31-8-100, et seq. (enacted in 1981); See also Cal. Civ. Code § 3333.2(b) (enacted in 1997 to allow for enhanced remedies to nursing home residents where there is clear evidence of “physical abuse, reckless neglect or fiduciary abuse”).

A recent survey of payments made by a national insurer illustrates a growth in both the incidence of elder abuse and the probability of plaintiff recovery.⁴ Between 1992 and 1997, the number

² See e.g. Horizon/CMS Healthcare Corporation v. Auld, 34 S.W.3d 887 (Tex. 2000) (Tex.) (affirming remittitur of jury award of \$2.371 million in compensatory damages to \$1,541,203.13 and punitive damages from \$90 million to \$9,483,766.92 due to statutory caps in case involving negligent treatment and failure to treat pressure sores in nursing home); See also In Re Conservatorship of Gregory, 80 Cal.App.4th 514, 95 Cal.Rptr.2d 336 (Cal. App. 2000) (reducing a jury award of \$365,580.71 in compensatory and \$94.7 million in punitive damages to \$124,480.57 in compensatory and \$3 million in punitive damages).

³ See “Jury finds for burned woman,” The Times Herald, Coweta County, Georgia, Feb. 9, 2001, p. 1. In the case of Roden v. Starcrest of Newnan, the jury awarded \$550,000 in compensatory damages and \$2,750,000 in punitive damages.

⁴ See Markian Hawryluk, “Navigating Through a Legal Storm, Provider, Apr. 1999, 29 (examining the claims paid by St. Paul Fire and Marine Insurance Company); See also Karl Pillemer & David W. Moore,

of nursing home abuse claims doubled.⁵ Moreover, in 1992 only one claim alleging elder abuse resulted in payment of \$500,000, while by 1997 thirty-seven payments exceeded \$500,000 and seven exceeded the \$1 million mark.⁶

Also emerging is the potential viability of class action lawsuits within the elder abuse context. In a recent decision with Georgia ties, the Colorado Court of Appeals permitted a class action suit seeking the reimbursement of funds paid by plaintiffs and by Medicare on behalf of plaintiffs, to go forward against a care facility managed by an Atlanta based parent corporation, Mariner Post-Acute Network.⁷ While the pursuit of tort remedies in favor of a class of nursing home residents faces various obstacles⁸, actions brought with an eye toward

Abuse of Patients in Nursing Homes: Findings from a Survey of Staff, 29 *Gerontologist*, 314, 317 (1989) (survey noting that ten percent of all nursing home care providers admit to abusing their elderly wards); Elder-Abuse Prevention Seminar Set, *San Diego Union-Trib.*, Jan. 14, 2000, B3 (stating that every nineteen seconds an elder American suffers from some form of abuse).

⁵ See Markian Hawryluk, "Navigating Through a Legal Storm, Provider, Apr. 1999, 29 (examining the claims paid by St. Paul Fire and Marine Insurance Company).

⁶ See Jennifer Gimler Brady, Long Term Care Under Fire: A Case for Rational Enforcement, 18 *J. Contemp. Health L. & Pol'y* 1, 4 (Winter 2001).

⁷ See *Salas v. Grancare, Inc.*, 22 P.3d 568 (Col. App. 2001) (allowing a certified class of 600 plaintiffs to go forward without first exhausting administrative remedies).

⁸ See *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777 (1982) (noting the requirements of proof of individualized injury in a tort cause of action); *Kohn v. Am. Hous. Found.*, 178 F.R.D. 536 (D. Colo. 1998) (denying class certification because of plaintiffs' highly individualized injuries); *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013 (1984) (noting that where tort damages are alleged and Federal regulation is entailed, administrative remedies must be exhausted before jurisdiction may vest); Kimberly L. Intagliata, Improving the Quality of Nursing Home Care: Class Action Impact Litigation, 73 *U. Colo. L. rev.* 1013 (Summer 2002) (noting the difficulty presented to class action litigants by common "limitation of damages" legislation capping non-economic losses or injuries).

generalized failings (as opposed to individualized injury) have been proposed as a promising horizon for elder abuse litigation.⁹ It is argued that class action elder abuse cases are uniquely qualified as “impact litigation.”¹⁰ Because of the character of the injuries suffered, the typically vulnerable and powerless quality of the victims of elder abuse,¹¹ and the systemic quality of abuse suffered, class action suits are said to be an especially appropriate means of protecting rights and interests shared among a group of nursing home residents.¹² In fact, class action suits brought on behalf of victims of elder abuse were the primary impetus behind the enactment of the Federal Nursing Home Reform Act.¹³

⁹ See Kathy L. Cerminara, *The Class Action Suit as a Method of Patient Empowerment in the Managed Care Setting*, 24 *Am. J.L. & Med.* 7, 32-33 (1998) (suggesting that suits brought against plans or institutions rather than individual tortfeasors will allow class certification to “arise naturally”); David S. Douglas, et al., *Rx for the Elderly: Legal Rights (And Wrongs) Within the Health Care System*, 20 *Harv. C.R.-C.L. L. Rev.* 425, 468 (1985) (suggesting claims alleging failures in care provider procedures); Kimerly L. Intagliata, *Improving the Quality of Nursing Home Care: Class action Impact Litigation*, 73 *U. Colo. L. Rev.* 1013 (Summer 2002) (analogizing nursing home litigation to asbestos litigation of the late eighties); See also, e.g., *Guerin v. N.H. Catholic Charities, Inc.*, 418 A.2d 224, 227 (N.H. 1980) (holding that the defendant home violated an implied contract to “provide suitable board, room and nursing and medical care”).

¹⁰ See Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. Rev. L. & Soc. Change*, 535, 535 n.1 (1987-88) (defining impact litigation as “litigation oriented toward the change of institutional norms or practices, rather than the resolution of individual problems”).

¹¹ See *Arkansas Educ. Ass’n v. Board of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971) (noting the special fitness of the class action mechanism to allow “hesitant or fearful” litigants to vindicate their rights).

¹² See Kimberly L. Intagliata, *Improving the Quality of Nursing Home Care: Class Action Impact Litigation*, 73 *U. Colo. L. Rev.* 1013 (Summer 2002) (making a compelling case in favor of class action nursing home litigation).

¹³ See e.g., *Estate of Smith v. Heckler*, 747 F.2d 583 (10th Cir. 1984); Susan J. Hemp, *The Right to a Remedy: When Should an Abused Nursing Home Resident Sue?*, 2 *Elder L.J.* 195, 199 (1994) (noting reference in the Congressional Record to *Smith v. Heckler* and other accounts of elder abuse).

The changed atmosphere in the courtroom¹⁴ is accompanied by significantly more expansive governmental involvement and a heightened public awareness.

“Public and congressional concern about staffing has been heightened by the Health Care Financing Administration’s (HCFA’s) comprehensive 1998 nursing home Report to Congress that identified a range of serious problems including malnutrition, dehydration, pressure sores, abuse and neglect, as well as similar reports from the U.S. General Accounting Office, and the Office of the Inspector General. . . . In addition, there has been a heightened public concern with the issue due to the continuous flow of newspaper articles and television news reports highlighting inadequate care and abuse in nursing homes.”¹⁵

The graying of the “baby boomer” generation may explain part of the increased awareness. This segment of the population is demographically significant and tantalizing to marketers and those who would seek to profit by affording housing and care to the elderly.

The explosion of information and the ease of access to it through the Internet have added to the interest and complexity of nursing home cases. There is an abundance of information made available to consumers so they may make informed decisions regarding the

¹⁴ As noted by Robert Milligan, head of the health care practice at Gallagher & Kennedy in Phoenix “Ten years ago, nursing home tort case were, frankly, a training ground for the ‘real cases,’ . . . that has changed dramatically.” See Michael Higgins, *Getting Sued by Seniors: Verdicts growing in suits citing poor nursing home care*, 84 A.B.A.J. 28 (December 1998) (noting the greater likelihood of the growing population of “Ralph Nader” nursing home residents to bring suit and the heightened empathy felt toward victims of elder abuse by a graying jury pool).

¹⁵ See Marvin Feuerberg, *Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes: Phase I Report*. www.hcfa.gov/medicaid/reports/rp700hmp.htm Last visited: 10-19-00.

selection of a long-term care facility for themselves or a loved one. This same information is, however, available as a resource in litigation. For example, The Atlanta Journal recently compiled an on-line listing of Georgia nursing homes. The data base includes information about each elder care facility in the state. Information is provided about resident spending, staffing, the resident population, inspections, deficiencies and resident injuries.¹⁶

Georgia adopted a “Bill of Rights” for nursing home residents in 1981, 6 years before the federal “Resident’s Bill of Rights” adopted as a part of the Nursing Home Reform Act. A private cause of action was expressly created. The statute specifically excuses any obligation to “exhaust” administrative remedies.¹⁷ In Thurman v. Pruitt Corp., the Georgia Court of Appeals recognized this private right of action for violation of the Georgia Bill of Rights of Long Term Care Facilities.¹⁸ In Brogdon v. National Healthcare Corp., a federal judge held that claims under Georgia’s Bill of Rights for Residents of Long-Term Care Facilities survive the death of the resident as do breach of contract claims.¹⁹ Georgia has a similar statutory adoption of rights for

¹⁶ See <http://www.accessatlanta.com/ajc/metro/nursinghomes/database>. Additional resources include: The Alzheimer’s Association of Georgia, www.alzga.org; the Area Agency on Aging, www.agingatlanta.org and The National Citizens Coalition for Nursing Home Reform, www.nccnhr.org.

¹⁷ O.C.G.A. § 31-8-126(a).

¹⁸ Thurman v. Pruitt Corp., 212 Ga. App. 766, 769 , 442 S.E.2d 849, 851 (1994).

residents of "Personal Care Homes."²⁰ That statute also creates a private right of action.²¹

¹⁹ See 103 F. Supp. 2d 1322, 1333, 1335. For a description of the Georgia Resident's Rights see Michael S. Reeves, ELDER CARE AND NURSING HOME LITIGATION, ch. 3 (The Harrison Co., 2000).

²⁰ O.C.G.A. § 31-8-130, et seq.

²¹ O.C.G.A. § 31-8-136(a).

A. ELEMENTS OF NURSING HOME CLAIMS

When nursing home residents suffer injury, there is often a regulatory response and private litigation on behalf of current and deceased residents.²² Regulatory activity is beyond the scope of this paper. Private litigation falls into five broad areas:

1. Negligence;
2. Professional Negligence;
3. Premises Liability;
4. Breach of contract; and
5. Staffing.

Claims of inadequate care based on the Georgia Bill of Rights for Residents of Long Term Care Facilities survive the death of the resident.²³

1. Traditional Negligence Cases

Negligence claims are based on a breach of the standard of care. In nursing home negligence cases, the standard of care may be determined by reference to the "Bill of Rights for Residents of Long-Term Care Facilities."²⁴ For example, federal law, federal regulations, and state regulations require nursing homes to establish and follow a

²² See Julia Malone, Nursing homes bow to power of lawsuits, The Atlanta Journal-Constitution, Sept. 26, 2000, at A15.

²³ See Brogdon ex rel. Cline v. National Healthcare Corp., 103 F. Supp. 2d 1322 (N.D. Ga. 2000).

²⁴ See Associated Health Systems, Inc. v. Jones, 185 Ga. App. 798, 800, 366 S.E. 2d 147, 150 (1988).

“Plan of Care” which includes all doctors’ orders.²⁵ Failure to follow orders is not medical malpractice if the failure “does not involve the exercise of professional judgment.”²⁶

Thus, the failure to follow orders may establish simple negligence.²⁷

(a) Negligence Per Se

Negligence per se is an expedited method of proof. As artfully noted by Judge Powell:

“Salt is just salt, whether dug from the mine in its natural state and called salt at once or crystallized in some chemist's laboratory and called NaCl—the savor is the same in both cases. The plaintiff who has established the fact that a defendant has been guilty of doing what he ought not to have done, or of not doing what he ought to have done has something further to do in order to show a cause of action in his behalf. He must show, not only that he has directly and proximately suffered injury therefrom, but also that he is so related to the duty and the neglect thereof that he has the right to complain.”²⁸

The underlying principle animating the doctrine of negligence per se relies upon recognition of the law’s role in defining social obligations imbued with legal authority. Where a duty is essential or obligatory enough to invoke the legislature’s intervention, a breach of this duty

²⁵ See Davis v. First Healthcare Corp., 234 Ga. App. 744, 507 S.E.2d 563 (1998) (finding that authenticity of doctor’s orders was established by proof the orders were produced by the defendant nursing home, in conjunction with other circumstantial evidence).

²⁶ Smith v. N. Fulton Medical Center, 200 Ga. App. 464, 465-66(1), 408 S.E.2d. 468 (1991). See the next section on Professional Negligence.

²⁷ See Davis, 507 S.E.2d at 567.

²⁸ Platt v. Southern Photo Material Co., 4 Ga. App. 159, 163, 60 S.E. 1068, 1071 (1908).

may be said to be negligent as a matter of law. While negligence per se is not liability per se, the doctrine does recognize that legislation is capable of defining a minimum standard of care.²⁹

Within Georgia, negligence per se is statutorily defined. O.C.G.A. § 51-1-6 states, “When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.”³⁰ While negligence in fact requires that a proved fact be adjudged negligent by a jury, negligence per se requires only proof that a certain act or omission occurred.³¹ However, as O.C.G.A. § 51-1-6 notes, violation of a statute does not render a defendant automatically subject to a negligence per se jury charge. § 51-1-6. As a fundamental matter, the statute that is violated must have been enacted to protect the class of the person injured and to protect against the type of injury suffered.³²

²⁹See Parks-Nietzold v. J.C. Penney, 227 Ga. App. 724, 726, 490 S.E.2d 133 (1997); Shermer v. Crowe, 53 Ga. App. 418, 186 S.E. 224 (1936) (noting that “negligence... is in itself only one of the essential elements prerequisite to a cause of action in a given case”)

³⁰O.C.G.A. § 51-1-6.

³¹See Purcell v. Hill, 107 Ga. App. 85, 129 S.E.2d 341 (1962).

³²See Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), cert. denied 502 U.S. 855, 112 S.Ct. 167 (1991); National Upholstery Co. v. Padgett, 108 Ga. App. 857, 134 S.E.2d 856 (1964) (holding that traffic regulations intended to protect motorist were also enacted to protect pedestrians); See also O.C.G.A. § 51-1-7 (requiring a special injury to an individual in which “the public has not participated”).

The courts have interpreted the word “law” to encompass statutory enactments and administrative regulations that are mandatory in character,³³ however, where a regulation’s mandate is cumulative of ordinary care evidence already allowed, the regulation need not be submitted as evidence of negligence per se.³⁴

(1) Nursing Home Regulation

Nursing homes and related care facilities (i.e. long-term care home, personal care homes, assisted living facilities) are regulated in varying degrees by both Federal and State law.³⁵ Federal regulatory authority derives from the Social Security Act, while State regulation derives from local authority to mandate the minimum standard of care required of treatment providers.³⁶

³³See Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966) (noting that a failure to exercise a reasonable degree in the completion of certain professional duties constitutes the violation of a “duty imposed by law”); Dupree v. Keller Industries, Inc., 199 Ga. App. 138, 141(1), 404 S.E.2d 291 (1991) (finding that Occupational Safety and Health Administration regulations are admissible as evidence of a legal duty).

³⁴See Cardin v. Telfair Acres of Lowndes County, Inc., 195 Ga. App. 449, 393 S.E.2d 731 (1990) (noting that professional practice may impose a greater duty upon a defendant than corresponding regulations).

³⁵ See, e.g., 42 U.S.C. § 1396r; Patient Bill of Rights, 42 U.S.C. § 1395i-3(c); Nursing Home Reform Act, Pub.L. No. 100-203, 101 Stat. 1330 (codified as amended in scattered sections of 42 U.S.C.); Requirements for State and Long-Term Care Facilities, 42 C.F.R. § 483 et. seq.; The Bill of Rights for Residents of Long-Term Care Facilities, O.C.G.A. §§ 31-8-100- 31-8-127; Remedies for Residents of Personal Care Homes Act, O.C.G.A. §§ 31-8-130- 31-8-139; Ga. Comp. R. & Regs. r. 290-5-35-.01 et. seq.; Ga. Comp. R. & Regs. r. 290-5-9-.01 et. seq.; Ga. Comp. R. & Regs. r. 290-5-8-.01 et. seq.

³⁶ See U.S. v. Northern Health Facilities, Inc., 25 F.Supp.2d 690, 691 (D.Md. 1998) (noting Federal authority to regulate and control the manner in which services are provided to Medicare and Medicaid recipients); Blue v. Koren, 72 F.3d 1075, 1081 (2d. Cir. 1995) (noting the “substantial government interest” in maintaining a uniform regulatory scheme); Thurman v. Pruitt Corp., 212 Ga. App. 766, 769 , 442 S.E.2d 849, 851 (1994) (noting a state imposed statutory obligation to exercise ‘reasonable care and skill.’).

Federal control of medical care is narrowly limited to insuring that medical aid is made available to the aged, disabled, and indigent.³⁷ In light of Federalist concerns and Constitutional constraints, direct regulation of medical services and care providers is reserved to state control.³⁸ Therefore, Federal control may be effectuated only through Federal funding requirements. Conversely, state regulation of health care facilities is confined only by the United States Constitution's civil liberty guarantees.³⁹

(2) Federal Regulations as Evidence of Negligence

Per Se

Violations of the Federal Nursing Home Reform Act (hereafter FNHRA) and related Federal legislation can not support a private cause of action. While private enforcement of Federal statutes regulating state actors is presumed, a legislative intent to provide an implied civil

³⁷ See Whitman v. Weinberger, 382 F.Supp. 256 (E.D.Va. 1974) (noting the "...Congressional purpose of insuring that adequate medical care is available to the aged"). Federal intervention is statutory confined to these narrow parameters. See 42 U.S.C. § 1395 (forbidding Federal "supervision or control over the administration or operation of any [covered] institution").

³⁸ Szekely v. Florida Medical Ass'n, 517 F.2d 345 (5th Cir.), cert. denied 425 U.S. 960, 96 S.Ct. 1742 (1975).

³⁹ See, e.g., Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) (noting that state maintenance of a facility for the mentally impaired is constrained only by Constitutional guarantees); Metpath Inc. v. Imperato, 450 F.Supp. 115 (S.D.N.Y. 1978) (noting that medical control may not impinge upon First Amendment rights of free expression).

cause of action against private actors must be proven.⁴⁰ The standard for determining whether an implied private cause of action is provided for by Federal legislation was articulated in the Supreme Court decision of Cort v. Ash.⁴¹ In order to discern the legislature's unexpressed intentions, the Ash Court asked: "(1) whether the statute was created for the plaintiffs' special benefit, (2) whether there is evidence of legislative intent to create a private remedy, (3) whether a private remedy would be consistent with legislative purposes, and (4) whether the area is one traditionally relegated to the states."⁴²

Judge Murphy of the United States District Court in North Georgia wrote a thorough explanation of Federal (and state) nursing home legislation in Brogdon ex rel. Cline v. National Healthcare Corp.⁴³ Applying the Cort standard, the Brogdon court concluded that while the FNHRA was enacted to protect elder residents of long term care homes, this end is to be achieved exclusively through Congress' taxing

⁴⁰ Compare Ottis v. Shalala, 862 F.Supp. 182, 187 (W.D. Mich. 1994) (allowing private litigants to compel enforcement of Federal laws regulating nursing home operation); Suter v. Artist M., 503 U.S. 347, 363, 112 S.Ct. 1360, 1370 (1992) (noting that unless a private cause of action is expressly provided for it is presumed that the enforcement of Federal laws or regulations is reserved to the appropriate state or Federal agencies).

⁴¹ Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975).

⁴² Cort, 422 U.S. 66, 78, 95 S.Ct. 2080, 2086; See also Touche Ross & Co. v. Redington, 442 U.S. 560, 579, 99 S.Ct. 2479, 2491 (noting that where the plaintiff is not within the class specially protected and there is no evidence in the legislative history of an intent to create a private cause of action additional inquires need not be made).

⁴³ Brogdon ex rel. Cline v. National Healthcare Corp., 103 F.Supp.2d 1322, 1331 (2000).

and spending power.⁴⁴ Though a private cause of action under common law principles is not precluded by the Act, the Brogdon court noted that private citizens may not sue to compel compliance.⁴⁵ In light of the limitations upon the Federal regulation of health facilities, the FNHRA is similarly precluded from compelling compliance. The FNHRA was not enacted to protect against personal injury. Instead it is intended to insure control and administration over the disbursement of public funds. As noted within the legislative record, “the central purpose of the [FNHRA] is to improve the quality of care for Medicaid-eligible nursing home residents, and either to bring substandard facilities into compliance with Medicaid quality of care *requirements or to exclude them from the program.*”⁴⁶

As previously noted, in order for a statute to be viewed as evidence of a legal standard of care, the statute has to have been enacted for the special benefit of the injured party. It should be noted that in Georgia the absence of a private cause of action does not summarily conclude any inquiry into whether non-compliance is evidence of negligence per se. A private cause of action is not

⁴⁴ See Brogdon, 103 F.Supp.2d 1322, 1331.

⁴⁵ Id. at 1332.

⁴⁶ H.R.Rep. No. 100-391, at 452 (1987), reprinted in 1987 U.S.C.C.A.N. 2313-1, 2313-272. (emphasis added).

essential to the recovery of damages where a legal duty has been breached.⁴⁷ However, absent an express allowance, the obligation imposed flows exclusively between the funding recipient and the federal government.⁴⁸

While Federal Regulations speak of duties owed to residents, this language can not change the limited purpose of the FNHRA or related legislation. Rules though specific and mandatory are inapplicable since “[a] rule or regulation promulgated under the authority of a federal statute cannot alone provide the source of an implied right of action if the specific language of the statute does not authorize such a result.”⁴⁹

(3) Georgia Legislation as Evidence of Negligence

Per Se

While a private cause action is provided for by the relevant Georgia legislation, non-compliance with the relevant statutory mandates is not necessarily admissible as evidence of negligence per

⁴⁷ See Hubbard v. Department of Transp., 2002 WL 1433913 at 7 (Ga. App.) (noting that, “...when the law requires a person to perform an act... or to refrain from doing an... although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby”); Compare with, Tinder v. Lewis County Nursing Home Dist., 2001 WL 1876681, *6 (E.D.Mo.) (requiring a private cause of action to support a claim of negligence per se). Georgia courts have noted that “the Medicare and Medicaid Acts were enacted to benefit recipients.” Silver v. Baggiano, 804 F.2d 1211, 1217 (11th Cir.1986).

⁴⁸ Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 2, 101 S.Ct. 1531, 1532 (1981).

⁴⁹ Rousseau v. City of Philadelphia, 589 F.Supp. 961, 971 (E.D.Pa.1984); See also Chalfin v. Beverly Enterprises, Inc., 741 F.Supp. 1162, 1168 (E.D. Pa. 1990) (holding that non-compliance with Federal regulations enacted pursuant to the administrative authority granted through Title XIX of the Social Security Act are evidence of negligence per se).

se. The Middle District of North Carolina has considered whether violations of a state law similar to the Georgia Bill of Rights for Residents of Long-Term Care Facilities could be offered as proof of negligence per se.⁵⁰ In Makas v. Hillhaven, Inc. the court noted that a private cause of action is not a pre-requisite to the application of the negligence per se doctrine.⁵¹ In spite of this, the court noted the difficulty of discerning a quantifiable standard from the North Carolina Patient's Bill of Rights' generalized language.⁵²

The Makas court defined regulatory mandates as aspirational and noted that while private enforcement through injunctive relief may be available, money damages were not. The court relied upon a statutorily defined standard of health care in noting that the applicable standard for malpractice actions is defined by "the standards of practice among members of the same health care profession" rather than through an ancillary legislative decree.⁵³ In a similar ruling an ordinance that required "adequate protection" was viewed as too imprecise to justify a negligence per se instruction.⁵⁴ Where statutory

⁵⁰ Makas v. Hillhaven, Inc., 589 F.Supp. 736 (1984).

⁵¹ Id. at 742; See also Irvine v. Cargill Investor Services, Inc., 799 F.2d 1461, 1462 (11th Cir. 1986) (noting that a private cause of action is not an essential to an instruction that the violation of a regulation constitutes negligence per se).

⁵² See Makas, 589 F.Supp. 736 at 742.

⁵³ See Id., quoting N.C.G.S.A. § 90-21.12.

language is imprecise, application of the negligence per se doctrine is inappropriate.

Under Georgia law, a statutorily mandated duty need not supplant or exceed the common law duty of care; however, a statutory duty must be clearly stated and easily ascertained.⁵⁵ Where a duty is defined in abstract general terms, a breach is not properly denominated negligence per se, rather a specific act must be forbidden.⁵⁶

Moreover, Georgia courts have resisted taking the question of the degree of care owed away from the jury.⁵⁷ In Carlo v. Americana Healthcare Corp. the court refused to allow compliance with the appropriate regulatory standards to absolve a nursing home from potential tort liability.⁵⁸ The Carlo court viewed regulatory compliance as an aid that may be submitted to the jury to assist them in determining whether the complying facility was negligent.⁵⁹ Under this

⁵⁴ Laurie v Patton Home for the Friendless, 267 Or 221, 516 P2d 76 (1973).

⁵⁵ See Holbrook v. Executive Conference Center, Inc., 219 Ga. App. 104, 107, 464 S.E.2d 398, 401 (1996) (noting that a generally applicable duty may be submitted as evidence of negligence per se where the duty owed is easily ascertained).

⁵⁶ See Motes v. 6 "S" Co., 186 Ga. App. 67, 68, 366 S.E.2d 358, 360 (1988); See also Spooner ex rel. Butler v. City of Camilla, 2002 WL 1380313, *4 (Ga. App.) (noting the necessity of a clear standard of care in order to support a negligence per se instruction).

⁵⁷ See Central of Georgia Ry. Co. v. Bernstein, 38 S.E. 394, 395 (1901) (noting that due care under particularized facts is properly reserved for jury consideration).

⁵⁸ Carlo v. Americana Healthcare Corp. 179 Ga. App. 678, 680, 347 S.E.2d 282, 284 (1986).

⁵⁹ Id.

reasoning, compliance or non-compliance with a general duty of care may be offered as evidence to be considered and weighed by the finder of fact in reaching an independent adjudication of liability.

The Brogdon court endorsed the Carlo rule when faced with an imprecise statutory standard of care, "Participation requirements... are relevant... only to the extent that they relate to the degree of care and skill required of nurses in malpractice cases in Georgia."⁶⁰ While Georgia law provides for a private cause of action where patient rights are violated, what these rights consist of is not precisely defined.⁶¹ Within Georgia, nursing is a profession subject to its own standards of care and qualifications.⁶² Nursing negligence is defined by a breach of the minimum standards of care established and adhered to by members of the profession.⁶³

The Brogdon court noted that "the legislature and courts of the State of Georgia are empowered to determine the applicable professional standard of care."⁶⁴ However, the Thurman court had previously defined the applicable statutory standard of care, "as an...

⁶⁰ Brogdon, 103 F.Supp.2d 1322, 1333.

⁶¹ See O.C.G.A. 31-8-126(a).

⁶² See Candler Gen. Hosp. v. Joiner, 180 Ga. App. 455, 456-57, 349 S.E.2d 756 (1986).

⁶³ Thurman, 212 Ga. App. 766 at 769.

⁶⁴ Id. at 1343.

obligation ...to exercise 'reasonable care and skill.'⁶⁵ This duty of care endures in a nursing home setting under a reasonable persons standard where professional competencies are not entailed.⁶⁶ Therefore, where the controlling statute is precise, prevailing practice need not be considered.⁶⁷ However, where the duty owed is imprecise, difficulty in proving non compliance may render a negligence per se instruction inappropriate.

(4) Georgia Regulations as Evidence of Negligence Per Se

While the Georgia Bill of Rights for Residents of Long Term Care Facilities articulates the “general and nebulous” standard of care, that troubled the Makas Court, specificity is often provided by parallel regulations in the Georgia Administrative Code.⁶⁸ As previously noted, regulatory provisions may be relied upon as evidence of negligence per se.⁶⁹ In order for a regulation to have the force of law, it must be

⁶⁵ Thurman, 212 Ga. App. 766 at 769.

⁶⁶ See Associated Health Systems, Inc. v. Jones, Ga. App. 798, 800, 366 S.E.2d 147, 150 (1988) (noting the duty to exercise reasonable care in protecting patients from the aggressive acts of others).

⁶⁷ Compare Brogdon, 103 F.Supp.2d 1322 at 1333 (discussing the standard of care applicable under Georgia’s medical malpractice law); Id. at 1342 (discussing the direct application of state regulations to a private cause of action sounding in tort).

⁶⁸ See Reddix v. Chatham County Hospital Authority, 134 Ga. App. 860, 862, 216 S.E.2d 680, 682 (1975) (noting the detailed and mandatory nature of the Administrative Code sections regulating health care).

⁶⁹ See Dupree, 199 Ga. App. 138, 141(1), 404 S.E.2d 291.

mandatory in character.⁷⁰ Indications of a regulation's mandatory effect are derived from the regulation's plain language.⁷¹ The relevant sections of the Georgia Administrative Code are clearly mandatory in nature.⁷²

However, even where regulatory violations exist, legal liability may not necessarily follow. Enforcement power of the relevant regulatory standards is vested in the Department of Human Resources.⁷³ Where the applicability of the appropriate regulatory standards to a specific factual scenario is in dispute, testimony from a Department of Human Resources investigator may be required.⁷⁴ Therefore, the question of whether or not a violation occurred may ultimately be left to the finder of fact.

An instruction of negligence *pre se* may be appropriate where certain Georgia statutory or administrative regulations have been violated. The hallmarks of a legal duty amenable to a negligence per

⁷⁰ See Hubbard, 2002 WL 1433913 at *7.

⁷¹ See Department of Transp. v. Cushway, 240 Ga. App. 464, 465, 523 S.E.2d 340 (1999).

⁷² See Ga. Comp. R. & Regs. r. 290-5-8, et. seq.; Ga. Comp. R. & Regs. r. 290-5-9, et. seq.; Ga. Comp. R. & Regs. r. 290-5-39, et. seq.; Ga. Comp. R. & Regs. r. 290-5-54, et. seq. (note the continued use of "shall" and similar compulsory language).

⁷³ See Ga. Comp. R. & Regs. r. 290-1-6-.03.

⁷⁴ Ga. Comp. R. & Regs. r. 290-1-6-.06; Rockefeller v. Kaiser Foundation Health Plan of Georgia, 251 Ga. App. 699, 704, 554 S.E.2d 623, 628 (2001) (requiring testimony of a Board examiner to establish a violation of an applicable standard regulating the legal authority of a physician's assistant to render medical aid).

se instruction are: 1) the purpose of the legislation, 2) the precision of the legislation, 3) and the legislation's mandatory character. State laws that express a precise standard that exceeds the common law duty owed may be submitted as evidence of negligence per se.

(b) Record Keeping Regulations

Regulations require facilities to keep records that may be used by plaintiffs. The Centers for Medicare & Medicaid Services (CMS) web-page provides access to the Nursing Home Compare page. There are summaries of the violations found by state inspectors for the past three years.⁷⁵ Key documents include the incident investigation reports kept by nursing homes pursuant to Ga. Comp. R. & Regs r. 290-5-35-.10(1). These documents may show the facility had notice of unsafe conditions prior to the alleged injury.⁷⁶

O.C.G.A. § 9-11-34 permits plaintiffs to request incident reports covering the time period that the plaintiff was a resident at the

⁷⁵ See www.medicare.gov/NHCompare/home.asp

⁷⁶ See *Apple Investment Properties, Inc. v. Watts*, 220 Ga. App. 226, 226, 469 S.E.2d 356, 357 (1996) (finding that the confidentiality of other residents' records mandated by Ga. Comp. R. & Regs r. 290-5-35-.08(h) could be protected by viewing the records in camera and limiting the distribution of these reports). This case was also premised on Ga. Comp. R. & Regs r. 290-5-35-.03(2) which requires personal care homes to provide 24-hour responsibility for the well-being of residents.

facility.⁷⁷ These reports may constitute similar act evidence that may be relevant both to showing liability (notice to the facility that its employees were not properly supervising) and to proving “conscious indifference.”

(c) Punitive Damages

If there is evidence of conscious indifference to the safety of the residents, the jury may be authorized to award punitive damages.⁷⁸ While punitive damages are usually not awarded in negligence cases, even where there is gross negligence, the cases referred to in footnotes 2 and 3 resulted in large verdicts including punitive damages.

In Georgia, punitive damages may be awarded where the evidence shows “that entire want of care which would raise the presumption of conscious indifference to consequences.”⁷⁹ There is a \$250,000 cap on punitive damages but it does not apply if the jury finds that the Defendant acted or failed to act with the specific intent to cause harm (or, hopefully in other settings, while under the

⁷⁷ See also Peacock v. HCP III Eastman, Inc., 230 Ga. App. 726, 497 S.E.2d 253 (1998) (extending the holding in Apple from eleven months to cover a plaintiff who had been a resident for twenty-six months and ordering the facility to release the incident reports for that time period).

⁷⁸ See Apple Investments, 469 S.E.2d at 358.

⁷⁹ O.C.G.A. § 51-12-5.1(b); see also Donson Nursing Facilities v. Dixon, 176 Ga. App. 700, 702, 337 S.E. 2d 351, 353 (1985) (finding that punitive damages are not justified where there is no “evidence of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences”).

influence of drugs or alcohol).⁸⁰ Voluminous records of other similar incidents, of governmental records adverse to the facility and of inadequate staffing with resultant dehydration, bed sores, etc. may be sufficient to show "conscious indifference."

2. Professional Negligence

"The general standard of care required of a nursing home is that degree of care, skill, and diligence usually exhibited by such homes generally in the community."⁸¹ In nursing home cases, however, there may be two distinct claims. First, there is a claim for traditional professional negligence. Second, there may be a claim for damages for failure to provide rights guaranteed by the "Residents Bill of Rights."⁸²

With respect to the professional negligence claim, the nursing home may be vicariously liable for "acts and omissions requiring the exercise of professional skill and judgment by professional members of [its] staff."⁸³ To prevail on a claim of professional negligence, the plaintiff must show "the particulars in which the treatment was

⁸⁰ See *id.* at §§ (f), (g).

⁸¹ Associated Health Systems, Inc. v. Jones, 185 Ga. App. 798, 801, 366 S.E.2d 147 (1988).

⁸² See Thurman v. Pruitt Corp., 212 Ga. App. 766, 442 S.E.2d 849 (1994); Brogdon v. National Healthcare Corp., 103 F. Supp. 2d 1322 (N.D. Ga. 2000).

⁸³ Thurman, 442 S.E.2d at 850.

negligent, including an articulation of the minimum standard of acceptable professional conduct, and how and in what way defendant deviated therefrom.”⁸⁴ Where the allegations call the professional judgment of caregivers into question, the complaint must be supported by an expert affidavit and the proof at trial must contain expert testimony stating that conduct fell below the standard of care.⁸⁵

To the extent, however, the plaintiff alleges simple negligence, plaintiff may prevail even without expert testimony.⁸⁶ The difference is whether the alleged negligent act or omission requires the exercise of expert professional judgment.⁸⁷ Administrative or clerical acts are contrasted with those requiring medical knowledge, skill or judgment.⁸⁸

⁸⁴ Hillhaven Rehabilitation & Convalescent Center v. Patterson, 195 Ga. App. 70, 392 S.E.2d 557, 558 (1990).

⁸⁵ See Chafin v. Wesley Homes, Inc., 186 Ga. App. 403, 403-04, 367 S.E.2d 236, 237 (1988); see also O.C.G.A. § 9-3-70 for an explanation of which types of caregivers and decisions implicate the expert affidavit requirement. New O.C.G.A. § 9-11-9.1(f) lists the types of caregivers to which the expert affidavit requirement applies. The list includes: medical doctors, dietitians, clinical social workers, nurses, occupational therapists, physical therapists, physician’s assistants, pharmacists and others.

⁸⁶ Id. at 559.

⁸⁷ Robinson v. Medical Center of Central Georgia, 217 Ga. App. 8, 9, 456 S.E.2d 254, 256 (1995) (finding that hospital employee’s decision to not raise bed rails was a “professional decision” and therefore, professional negligence was the proper cause of action). Compare, Blackwell, n.46 *infra*, the underlying claim was based on an injection administered by a nurse, which required professional skill and was, therefore, “professional negligence.”

⁸⁸ Smith v. N. Fulton Medical Center, 200 Ga. App. 464, 465-66(1), 408 S.E.2d. 468 (1991), it was ordinary negligence for the hospital staff to fail to raise the side rails in accordance with “the written nursing assessment” which was in the chart and provided the side rails should be raised. The failure to carry out orders does not involve professional judgment.

Whether the claim involves “medical malpractice” affects the statute of limitations for bringing a claim.⁸⁹ Claims for medical malpractice must be brought “within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.”⁹⁰ There is a further statute of “ultimate repose and abrogation”: “... in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.”⁹¹ Further, this statutory scheme addresses tolling of the statute of limitations and the statute of repose. While O.C.G.A. § 9-3-90 generally provides for tolling of the claims of minors and persons who are legally incompetent due to mental retardation or mental illness, claims for medical malpractice on behalf of those persons receive special treatment. O.C.G.A. § 9-3-73(b) applies the two year statute of limitations and the five year statute of repose to “all persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age

⁸⁹ See O.C.G.A. § 9-3-70. Subsections (1) and (2) list actions which constitute “medical malpractice.” The actions listed in (1) are routine medical care issues. Subsection (2), however, is more broad and includes as “medical malpractice” “[c]are or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility or institution, . . .”

⁹⁰ See O.C.G.A. § 9-3-71(a).

⁹¹ See O.C.G.A. § 9-3-71(b).

of five years.”⁹² No action for medical malpractice may be brought on behalf of a legally incompetent person more than five years after the event occurred.⁹³

However, not all injury in an institution is “medical malpractice.” Claims arising from “premises liability” theories or from actions which do not require the exercise of professional judgment are not subject to the special medical malpractice statutes of limitation and repose. For example, moving a mentally incompetent patient from a wheelchair to her bed was not something required to be performed by a person with medical training or which required the exercise of medical judgment or required medical expertise. Hence, when an action was filed on her behalf more than two years after the incident, it was error to grant summary judgment to the facility.⁹⁴

3. Premises Liability

Facilities may be held liable for defects on their premises and criminal acts of third parties that occur in the facility or on the grounds.⁹⁵

⁹² A minor under five at the time the cause of action arose may bring the action within two years from his fifth birthday. See O.C.G.A. § 9-3-73(b).

⁹³ O.C.G.A. § 9-3-73(c)(1). Subsections (c)(2)(A) and (B) provide the statutes of repose for medical malpractice actions brought on behalf of minors.

⁹⁴ See Moore v. Smith Mem. Hosp., Inc., 216 Ga. App. 299, 454 S.E.2d 190 (1995).

⁹⁵ See Michael Gorby, PREMISES LIABILITY IN GEORGIA (The Harrison Co., 1998).

(a) Third Party Criminal Acts

In the case of Savannah College of Art and Design, Inc. v. Roe (“SCAD”), the Georgia Supreme Court specified when a property owner is liable for the criminal acts of third parties.⁹⁶ Where the property owner had knowledge of prior crimes that were “substantially similar incidents,” then that property owner has a duty to exercise reasonable care to protect invitees from the dangerous condition.

Nursing homes have a contractual and statutory duty to protect residents from other residents that the facility knows or should know has a propensity towards violence.⁹⁷ This duty is heightened by Georgia laws imposing liability on caregivers that do not report cases of abuse of the elderly.⁹⁸ This duty is also heightened by the fact that the facility is required to investigate and keep records of all incidents that occur on the premises. Thus, the plaintiff may be able to easily meet her burden by requesting production of the records required by the regulations.

⁹⁶ 261 Ga. 764, 409 S.E.2d 848 (1991); see also McCoy v. Gay, 165 Ga. App. 590, 302 S.E.2d 130 (1983); but see Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339, 341 (1997) (“In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question.” The crime does not need to be identical to put the property owner on notice that a danger exists.

⁹⁷ See Associated Health Systems, Inc. v. Jones, 185 Ga. App. 798, 366 S.E.2d 147 (1988) (finding that while O.C.G.A. § 31-8-108 limits the use of physical restraints, nursing homes still have a duty to keep violent residents in areas of the facility where they can be properly supervised).

⁹⁸ O.C.G.A. § 30-5-4; SB 407, “Georgia Protection of Elder Persons Act of 2000.”

(b) Slip and Fall

“Foreign substance cases” occur where liquid or other slippery substances are spilled on the floor. “Static defects” are structural conditions of the property that create a dangerous condition. In a static defect case, superior knowledge may sometimes be inferred when the defective condition is a result of a building code violation.⁹⁹

Wheelchair ramp incidents are frequently litigated. The American National Standards Institute (ANSI) and the building code provide guidelines on how ramps are to be graded, marked and finished. When a property owner fails to follow these guidelines, superior knowledge of the danger may be inferred and negligence per se imposed.¹⁰⁰ The defense to this type of case is a showing that the plaintiff had equal knowledge of the dangerous condition due to prior use and that no other similar incidents have occurred despite violations of the regulations.¹⁰¹

⁹⁹ See Murray v. West Building Materials of Ga., 2000 W. L. 550799 (finding that a building code violation could create an inference of dangerous condition of stairs).

¹⁰⁰ Val D'Aosta Co. v. Cross, 241 Ga. App. 583, 526 S.E.2d 580 (1999)(finding that defendant's superior knowledge could be inferred when ramp was not properly beveled and a gap existed between the ramp and the sidewalk in violation of the American National Standards Institute ("ANSI") standards and negligence per se was also available under OCGA § 30-3-8).

¹⁰¹ See Wood v. Winn Dixie, 244 Ga. App. 187, 534 S.E.2d 556 (2000) (ramp was not painted with slip-resistant paint as required by the ANSI standards as well as a section of the Gwinnett County Life Safety Code); Mechanical Equipment Co. v. Hoose, 523 S.E. 2d 575, 241 Ga. App. 412 (Oct. 7, 1999). See also, Shepard v. Winn Dixie Stores, Inc., 527 S.E.2d 36, 241 Ga. App. 746 (Dec. 7, 1999) (finding that under the “distraction theory” a plaintiff who could have seen the condition if he had been watching where he was walking, could survive summary judgment if his or her attention was being diverted by the defendant at the time of the fall); Hall v. J.H. Harvey Co., 529 S.E.2d 444, 242 Ga. App. 315 (Feb. 10, 2000).

4. Breach of Contract

Inadequate care may constitute a breach of the contract found in the admissions agreement required by federal regulations. Nursing home residents can also sue as intended third party beneficiaries of the contract between the facility and the Georgia Department of Community Health when care falls below regulatory standards.¹⁰²

(a) Breach of the Admissions Agreement

The admissions agreement signed by the facility and the resident can be used against the facility in a breach of contract claim.¹⁰³

Admissions agreements may obligate the facility to prevent encroachments on the rights guaranteed to residents of long-term care facilities in the “Bill of Rights for Residents of Long-Term Care Facilities.”

Plaintiffs may also pursue more traditional breach of contract claims where such admissions agreements promise to provide care in accordance with applicable state and federal rules and regulations.¹⁰⁴

In Brogdon, the court held that ERISA does not preempt such contract

¹⁰² Brogdon ex rel. Cline v. National Healthcare Corp., 103 F. Supp. 2d 1322 (N.D. Ga. 2000) (finding that while the Medicare and Medicaid acts do not provide plaintiffs with a private cause of action, they do not preempt private lawsuits based on breach of contract).

¹⁰³ See Michael S. Reeves, *ELDER CARE AND NURSING HOME LITIGATION*, ch. 3 (The Harrison Co., 2000).

¹⁰⁴ See Brogdon v. National Healthcare Corporation, 103 F. Supp. 2d 1322, 1335 (N.D. Ga. 2000).

claims and the absence of a private cause of action under the Medicaid and Medicare Acts does not mean that residents cannot sue for breach of contract when a contract promises compliance with these Acts. Plaintiffs in Brogdon were permitted to proceed with their breach of contract claim even though they had not complied with a dispute resolution procedure that was included in the contract. The admissions agreement in question contained a provision stating the facility would provide services “in accordance with licensure laws, certification requirements and standards of the industry.” Based on this language the Plaintiffs alleged that the facility breached the admissions contract by failing to meet the standards of care.

(b) Intended Third-Party Beneficiary Claims

Plaintiffs may also sue as intended third-party beneficiaries under contracts entered into by the nursing home. In Brogdon v. National Healthcare Corp., 103 F. Supp. 2d 1322 (N.D. Ga. 2000), residents sued as the intended third-party beneficiaries of the agreement between the nursing home and the Georgia Department of Community Health. Plaintiffs alleged that there was an agreement between the Department of Community Health and the facility that included a promise by the facility to obey Georgia and federal laws and

regulations relating to nursing facilities.¹⁰⁵ This count was also significant in that the court held that while the Medicare and Medicaid Acts do not provide a private cause of action, the Acts do not preempt the breach of contract claims either. See Brogdon, 103 F. Supp. at 1342.

5. Staffing

(a) Inadequate Staffing

In July of 1998 the Healthcare Financing Administration issued a massive report to Congress identifying nurse staffing as the “root cause” of the inadequate care and abuse being discovered in nursing homes. “Many large nursing home chains have experienced financial difficulties in the past few years, and there is concern that facilities associated with these chains may reduce staffing levels as part of efforts to control costs.”¹⁰⁶

Based on the 1998 HCFA report, President Clinton presented a report to Congress recommending further research into the establishment of minimum nursing staff to resident ratios.¹⁰⁷ The Phase I report found that there is a point below which injuries are more likely to occur that was roughly equal to the 2.0 hour per day per

¹⁰⁵ See id. at 1333.

¹⁰⁶ See 42 U.S.C. § 1396r(b)(4)(A)(2).

¹⁰⁷ Id.

resident nursing ratio which is currently required by Georgia regulations.¹⁰⁸

Current federal regulations require “sufficient nursing staff to attain or maintain the highest practicable . . . well-being of each resident. . . .”¹⁰⁹ The only more specific regulation requires a registered nurse to be in the facility for a minimum of eight hours a day and requires a licensed nurse to be in the facility twenty-four hours a day.¹¹⁰ This minimum requirement does not vary according to the number of residents in the facility or the level of care required for each facility. While Georgia has more demanding regulations, fourteen states do not and of the thirty states that have more specific regulations, the rules are extremely varied.¹¹¹

Georgia regulations require 2.0 hours of nursing care per patient per day.¹¹² Compliance is determined by using HCFA Forms 671 and 672 to determine what the Nursing Hours Per Patient Day should be in

¹⁰⁸ See Ga. Comp. R. & Reg r. 290-5-8-.04.

¹⁰⁹ See Marvin Feuerberg, Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes: Phase I Report, www.hcfa.gov/medicaid/reports/rp700hmp.htm. Last visited: 10-28-00, at § 3.5.

¹¹⁰ See 42 U.S.C. § 1396r(b)(4)(C); 42 C.F.R. § 483.30 (providing requirements but permitting waivers of these requirements under certain conditions).

¹¹¹ *Id.* at § 2.6.1.

¹¹² See Ga. Comp. R. & Reg r. 290-5-8-.04, 290-5-8-.05, 290-5-8-.06, 290-5-8-.06, 290-5-8-.09, 290-5-8-.15.

order to reach the minimum standard of care. If a facility has residents who need a higher level of care due to Alzheimer's or residents who are confined to their beds and unable to perform any of the Activities of Daily Living (ADL's)¹¹³, then the number of nursing hours required to meet the minimum standard may be much higher than the 2.0 stated in the regulations.

The Georgia Legislature also created the Joint Long-term Care Industry Study Committee to evaluate the adequacy of the Georgia regulations regarding nursing staff.¹¹⁴ The fruits of these studies may become the standard of care used in future negligence actions against nursing homes.

(b) Negligent Hiring, Retention, and Supervision

Administrators of long-term care facilities have a duty to use reasonable care in the hiring, retention and supervision of employees. Georgia statutes have required criminal record checks for some time; however, the initial versions of the statutes did not prohibit hiring persons with criminal records. In 2001, the Legislature amended the law relating to nursing homes¹¹⁵ and in 2002, amended the law

¹¹³ See the Resident Assessment (done on admission, quarterly, annually and upon any "significant change" in the resident's condition), the minimum data set ("MDS"), the Resident Assessment Protocol ("RAP"), and the treatment plan or care plan.

¹¹⁴ See HR 850.

¹¹⁵ See O.C.G.A. § 31-7-351(a). (requiring a GCIC criminal record check and stating: "A nursing home shall not employ a person with an unsatisfactory determination.")

relating to personal care homes.¹¹⁶ While these cases are typically prosecuted as simple negligence cases, attention should be paid to the underlying acts to see if they involve medical judgment or the rendering of medical treatment. If they do, one Georgia court has held that the claim constitutes medical malpractice in which case an affidavit from a physician was required as in other professional negligence cases.¹¹⁷

(1) Distinguished from respondeat superior liability O.C.G.A. § 51-2-2¹¹⁸ imputes liability to the employer for the torts of employees occurring within the scope of employment under the theory of respondeat superior. However, an employer may also be liable for the acts of its employees outside the scope of employment, such as intentional torts or crimes, if the employer knew or should have known of an employee's violent or negligent propensities. If the employer had or should have had knowledge at the time of hiring, the claim is negligent hiring. If the employer acquired the knowledge

¹¹⁶ See O.C.G.A. § 31-7-259

¹¹⁷ See Blackwell v. Goodwin, 236 Ga. App. 861, 513 S.E. 2d 542 (1999) (finding that the underlying claim was based on a nurse administering an injection and therefore constituted a claim for medical malpractice).

¹¹⁸ "Every person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily."

during the term of employment, then the employer is liable for negligently retaining the employee.¹¹⁹

(2) Negligent Hiring in the Nursing Home Setting

Negligent hiring claims can arise where a facility hires someone without conducting a background check, without verifying references or with actual or constructive knowledge of an employee's propensities to abuse or neglect others. Federal regulations prohibit nursing homes from hiring or retaining employees who have been "[f]ound guilty of abusing, neglecting, or mistreating residents by a court of law; or . . . [h]ave had a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property."¹²⁰

Georgia law requires nursing homes to request criminal background checks on all applicants and, effective July 1, 2001 prohibits the facility from hiring a person with a criminal record.¹²¹ On the other hand, Administrators, facilities and employees are immune from liability for wrongful discharge, unemployment security benefits

¹¹⁹ See Bunn-Penn v. Southern Regional Medical Corp., 227 Ga. App. 291, 488 S.E.2d 747 (1997).

¹²⁰ See 42 C.F.R. § 483.13(c)(1)(ii).

¹²¹ See O.C.G.A. §§ 31-7-350 to 31-7-353 (applying to nursing homes).

or other tort actions related to good faith efforts to screen out violent applicants.¹²²

(3) Negligent Hiring in the Personal Care Home Setting

There are several Georgia statutes dealing with record checks and employee hiring in the personal care home setting.¹²³ Effective July 1, 2002, there were substantial amendments to the statutes dealing with the hiring of directors and other employees of personal care homes.¹²⁴ The new statute requires more extensive criminal background checks and prohibits employment if the preliminary records check is unsatisfactory. The statute requires fingerprinting and subsequent checks for directors and employees. If the fingerprint records check is unsatisfactory, the facility “shall take such steps as are necessary so that such person is no longer” the director or an employee of the facility.¹²⁵ After July 1, 2002, all personal care homes must maintain a file on each employee containing that employee’s employment history “and a satisfactory determination that the person does not have a criminal record.” Not only must such files be

¹²² O.C.G.A. § 31-7-352(b).

¹²³ See O.C.G.A. §§ 31-7-250 to 31-7-269 (applying to personal care homes).

¹²⁴ See O.C.G.A. § 31-7-259.

¹²⁵ See O.C.G.A. § 31-7-259(a) (relating to directors) and (h) (relating to directors and employees).

maintained, a personal care home is prohibited from retaining in employment any person for whom it does not have the necessary file.¹²⁶ The statute also provides criminal and civil penalties for those facility directors who do not comply with statutory requirements.

(4) Negligent Retention in Nursing Homes and Personal Care Homes

Negligent retention claims can arise where a facility does not terminate an employee after an incident occurs. Employees of nursing facilities participating in Medicare or Medicaid are required to report and investigate all incidents of suspected abuse.¹²⁷ Once the report is filed, a facility cannot claim that it did not have knowledge of the incident and from that point on, the facility is vulnerable to claims for negligent retention.

Due to the open records laws, plaintiffs have access to this proof of knowledge through the “open records” at the Office of Regulatory Services.¹²⁸ This state agency provides potential plaintiffs with copies of incident reports and inspection results showing the facility’s

¹²⁶ See O.C.G.A. § 31-7-259(i).

¹²⁷ See 42 C.F.R. §§ 483.13 (c)(2)-(4).

¹²⁸ Keeping this information current can have a larger impact than one might inspect even where the case does not involve nursing related claims. In N.L.R.B. v. Clark, the court held that a former Administrator and owner could still be personally served by service to the facility because public records he filed still showed him as owner. See 468 F. 2d 459, 462-463 (finding that apparent agency was still in affect so long as public record contained Ownership and Control Statement with the Defendant listed as Owner).

knowledge of incidents involving its employees. The advent of the Internet has provided potential plaintiffs with many new and productive ways to investigate this type of negligence claim. For example, state nurse registries are available to check the background of nurses and certified nurse aids that nursing homes are prohibited from hiring if they receive federal reimbursement from Medicaid or Medicare as do over 80% of Georgia nursing homes.¹²⁹

The new statutory provisions (discussed immediately above) which require personal care homes to “take such steps as are necessary” to make a person with a criminal record “no longer” an employee and which prohibit the continued employment of persons without sufficient files may give rise to claims of negligent retention, if there is an incident involving such an employee.

B. THE IMPACT OF THE INTERNET ON DISCOVERY

Nursing homes are specifically exempted from open records and open meetings laws,¹³⁰ however, advances in technology provide instant access to information. Filing, record-keeping and reporting requirements are forcing nursing facilities to create even more documentation that is then being used by resourceful plaintiffs. As mentioned above, this information is used to prove that the facility had

¹²⁹ See www2.state.ga.us/Departments/DHR/ORS/nar-home.htm.

¹³⁰ See O.C.G.A. § 50-14-1(a)(1)(E) (exempting nursing homes specifically).

knowledge of “substantially similar incidents” in premises liability cases and as knowledge of the tendencies of an employee to act negligently or violently in negligent hiring and retention cases. The facility is put in a catch-22. If they obey regulations, they are giving up information to prospective plaintiffs. If they disobey regulations, they open themselves up to civil monetary penalties and other sanctions, which will also be used by prospective plaintiffs as evidence of wrongdoing. While it is unclear how the facilities can best negotiate these landmines, being aware of the information that is being inadvertently or unavoidably made available to potential plaintiffs is necessary to properly assess a facility’s vulnerability to litigation.

Nursing home risk management assessments should always evaluate the information available to plaintiffs via the Internet. Potential plaintiffs alleging negligence can access data bases such as that maintained by the Atlanta Journal,¹³¹ the Secretary of States’ web-page to obtain the names and addresses of proper defendants¹³² or, the Composite State Board of Medical Examiners also has a web-

¹³¹ See <http://www.accessatlanta.com/ajc/metro/nursinghomes/database>.

¹³² See www.sos.state.ga.us/corporations/

page under the Secretary of State that provides the license numbers and addresses of doctors and other medical professionals.¹³³

1. Record-Keeping And Reporting Requirements

(a) Incident Reports:

Federal regulations force nursing facilities to assist the Plaintiff's search for evidence of their knowledge of "substantially similar" incidents for premises liability by requiring them to:

(iii) Report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the State nurse aide registry or licensing authorities.

(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).

(3) The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.

(4) The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with State law (including to the State survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.
42 C.F.R. § 483.13(c)(1)(ii).

¹³³ See www.sos.state.ga.us/ebd%2Dmedical/default.htm. See www.sos.state.ga.us/ebd-lpn/search.htm for

In Georgia, these incident reports are discoverable for the period of time that the Plaintiff was a resident of the nursing home.¹³⁴ Potential plaintiffs can also use open records laws to determine if incidents occurred that were not reported in the incident reports by requesting police reports relating to the facility. Since the police department is a public agency and a report of a crime is a public matter, police reports are subject to the Open Records Act as a “legitimate public inquiry.” See Doe v. Board of Regents of University System of Georgia, 215 Ga. App. 684, 687, 452 S.E. 2d 776, 779 (1994). There are specific exemptions for motor vehicle accident reports and reports containing personal information but citizens are entitled to copies of all other police reports.

(b) Policies and Procedures:

licensed practical nurses and www.sos.state.ga.us/ebd-rn/search.htm for registered nurses.

¹³⁴ See Apple Investment Properties, Inc. v. Watts, 220 Ga. App. 226, 469 S.E. 2d 356 (1996) (evidence of similar acts were admissible against personal care home to show a pattern of misconduct); Peacock v. HCP III Eastman, Inc., 230 Ga. App. 726, 497 S.E. 2d 253 (1998) (nursing home had to produce incident reports for 26 month period).

Federal laws and regulations require facilities to maintain written policies and procedures on various subjects that can then be used by Plaintiffs against the facility during discovery.¹³⁵

Georgia law requires facilities to have written policies and procedures to enforce all Resident's Rights provisions and to train their staff to recognize such rights.¹³⁶ State laws and regulations require facilities to make all written policies and procedures available for inspection and copying during business hours.¹³⁷

(c) Miscellaneous Records

State law in Georgia provides potential plaintiffs with even more information by requiring facilities to provide residents with a copy of their rights and grievance procedures upon admission.¹³⁸ Georgia law also requires facilities to give residents a copy of the annual financial disclosure that is filed with the Department of Community Health upon

¹³⁵ See 42 U.S.C. § 1396r(g)(1)(C); 42 C.F.R. § 483.13(c), (policies to prevent abuse and neglect); 42 U.S.C. § 1396r(c)(1)(B)(iv), 42 C.F.R. § 483.10(b)(5) (requiring written list of fees and services to be available to residents); 42 U.S.C.A. § 1396r(c)(1)(A)(iv), 42 C.F.R. § 483.10(b)(2)(i) (requiring nursing facilities to permit access to resident's medical records).

¹³⁶ See O.C.G.A. § 31-8-122.

¹³⁷ See O.C.G.A. 31-8-106(a)(4), GA. ADC § 290-5-39-.03(d).

¹³⁸ See O.C.G.A. § 31-8-104.

request.¹³⁹ Georgia law further requires facilities to investigate thefts of resident's property and to disclose the results to the resident.¹⁴⁰

(d) Georgia "Public Records"

While nursing homes are specifically excluded from open records laws, they are nonetheless, affected by them. Potential plaintiffs can use these laws to get access to records maintained by public agencies relating to nursing homes such as police reports and inspection results that can be used against the facility. The law in Georgia specifically provides:

- (a) As used in this article, the term "public record" shall mean all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency. "Public record" shall also mean such items received or maintained by a private person or entity on behalf of a public office or agency which are not otherwise subject to protection from disclosure; provided, however, this Code section shall be construed to disallow an agency's placing or causing such items to be placed in the hands of a private person or entity for the purpose of avoiding disclosure. . . .
- (b) All public records of an agency as defined in subsection (a) of this Code section, except those which by order of a court of this state or by law are prohibited or specifically exempted from being open to inspection by the general public, shall be open for a personal inspection by any citizen of this state at a reasonable time and place; and those in charge of such records

¹³⁹ See O.C.G.A. § 31-8-106(a)(3).

¹⁴⁰ See O.C.G.A. § 31-8-113(c).

shall not refuse this privilege to any citizen.

These records are subject to public access unless a specific exception exists. There are limited exceptions for medical and personal information.¹⁴¹ Georgia DHR also has confidentiality exceptions in their regulations.¹⁴²

Plaintiffs may not use the Georgia Public Records laws to ask agencies or private companies with public information to create new records. O.C.G.A. § 50-18-70(d) provides that “[n]o public officer or agency shall be required to prepare reports, summaries, or compilations not in existence at the time of the request.” Therefore, plaintiffs must be requesting documents or compilations that are already in existence.¹⁴³

(e) Information Released Pursuant To Subpoena

In Georgia, there is a “physician shield” statute that protects facilities and doctors from liability for releasing medical information if the patient puts their medical treatment or care at issue in any civil or criminal proceeding.¹⁴⁴ This statute also provides protection from

¹⁴¹ See O.C.G.A. § 50-18-72.

¹⁴² See Ga. ADC § 290-5-35.17(2).

¹⁴³ See Schulten, Ward & Turner, LLP v. Fulton-DeKalb Hosp. Authority, 272 Ga. 725, 726, 535 S.E. 2d 243, 245 (2000) (denying request to order Authority to create hospital records from computer data to determine overpayments by Medicare).

¹⁴⁴ See O.C.G.A. § 24-9-40.

liability for facilities or doctors that release information pursuant to subpoena. While disclosure of medical records pursuant to the statute and/or subpoena waives the privilege of the patient, the waiver only applies to the purpose of the disclosure. The medical records remain confidential for other purposes.¹⁴⁵

The confidential records provision may not be used to object to discovery requests for incident reports or other records that do not contain solely “personal information.” Personal information may be redacted in some cases.¹⁴⁶ Furthermore, Georgia statutes authorizing release of medical records pursuant to subpoena can overcome confidentiality provisions to permit Plaintiffs to discover information about other patients in the facility.¹⁴⁷

(f) Federal Open Records Provisions

The first stop of a potential plaintiff in a case against a nursing home will likely be the Georgia Office of Regulatory Services office. Federal law requires the agency of each state that performs inspections on nursing facilities to make the file on each nursing home accessible to the public. There is a wealth of information in these files. In addition to the expected inspection results, there are also correction

¹⁴⁵ See O.C.G.A. § 24-9-42.

¹⁴⁶ See Apple Investment Properties, Inc. v. Watts, 220 Ga. App. 226, 228, 469 S.E. 2d 356, 359 (1996).

¹⁴⁷ See O.C.G.A. §§ 24-9-41, 24-9-42, 37-3-166(a)(8), 37-4-125(a)(8).

plans, sanctions, in-service restrictions, ownership and control statements, correspondence between the agency and the facility administrator, staffing reports (HCFA Form 671), Resident Census and Condition reports (HCFA Form 672) and Minimum Data Set and Resident Assessment Protocol are all available to potential plaintiffs.

C. FALSE CLAIMS ACT

The False Claims Act was intended to be used to recoup reimbursements under the Medicaid and Medicare Acts that were obtained fraudulently.¹⁴⁸ The False Claims Act was also intended to deter and punish providers that knowingly submitted claims that the government paid for but did not result in care being given to the intended beneficiary. While some claims can be detected by the government in an audit such as where a psychiatrist claims to have been seeing patients in excess of twenty-four hours in the same day, the government does not have the means to detect subtler or less obvious false claims. To give The False Claims Act a better chance at success, Congress provided for cases to be brought by “relators” that have actual knowledge of the falsity of the claim, called qui tam litigation. These claims may then be pursued by the government or

¹⁴⁸ See Michael S. Reeves, ELDER CARE AND NURSING HOME LITIGATION, § 5-2 (The Harrison Co., 2000); 31 U.S.C. § 3729.

may remain in the name of the relator who gets a percentage of the money recovered.

Relators are oftentimes employees that are fired and have a grudge against the facility or provider. Thus, facilities and providers should evaluate what information a terminated employee had access to or what practices the employee had knowledge of prior to termination. Relators may still be employees but an analysis of what information the government has may reveal the identity of the government's confidential source. While retaliation against a relator is prohibited, there may be ways to limit the amount of information the relator has future access to without interfering with the terms or conditions of employment in violation of the statute.¹⁴⁹ Just because the facility does not believe that it has engaged in outright fraud does not necessarily mean that it safe from this type of litigation as the following cases illustrate.

Furthermore, government prosecutors may also allege that inadequate staffing constitutes a violation of the False Claims Act. In United States v. NHC Healthcare Corp., the Western District of Missouri court found that a case could proceed on this theory.¹⁵⁰ The

¹⁴⁹ See 31 U.S.C. § 3730(h) (also providing protection for employers who investigate, initiate or testify in the prosecution of False Claims Act violations).

¹⁵⁰ See 115 F. Supp. 2d 1149, 1153-1154 (2000).

government argued that the nursing facility was so understaffed that it could not be administering all of the care that it had filed reimbursement claims for. The court found that the Medicare and Medicaid Acts paid per diem payments for skilled nursing care in exchange for agreements from the facility to “care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life” of the residents.¹⁵¹ The court further held that the difficulty in proving such an “amorphous” standard should not be a bar to the government in bringing the claim and attempting to prove it.

The first attempt at holding a facility liable for filing a false claim due to failing to meet professionally recognized standards of care was in the Western District of Oklahoma in the case of U.S. ex rel. Aranda v. Community Psychiatric Centers of Oklahoma.¹⁵² This was followed by the case of U.S. ex rel. Mikes v. Straus, which also used a violation of section 1320c-5 to allege that the facility claimed it was meeting federal regulations when it filed for reimbursement under the Medicare or Medicaid Acts.¹⁵³ However, the court in Mikes found that liability

¹⁵¹ See 42 U.S.C.A. § 1396r(b).

¹⁵² 945 F. Supp. 1485 (1996).

¹⁵³ 84 F. Supp. 2d 427, 435 (S.D. N.Y. 1999).

under the False Claims Act was precluded where payment was not expressly conditioned upon statutory compliance.

A more successful attempt by the government was then made in the District of Massachusetts in the case of Kneepkins v. Gambro Healthcare, Inc.¹⁵⁴ There, the court held that liability under the False Claims Act was not precluded where services were not performed economically as required by section 1320c-5. While all of these claims would have been a simple negligence or medical malpractice claim in the past, the False Claims Act greatly increased the cost to the facility for the same underlying acts of failures to act.

¹⁵⁴ 115 F. Supp. 2d 35, 42 (2000).