

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

YVONNE SMITH,

Plaintiff,

vs

ROCK CREEK MANOR,

Defendant.

Civil Action No.

454-98

Monday, November 22, 1999
Washington, D.C.

The above-entitled action came on for jury trial before the Honorable GREGORY MIZE, Associate Judge, and a jury duly empaneled and sworn, in Courtroom 221, commencing at approximately 9:35 a.m.

THIS TRANSCRIPT REPRESENT THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiff:

JAMES TAGLIERI, Esquire
JEFF DOWNY, Esquire

On behalf of the Defendant:

KEITH ROSENBERG, Esquire
BEVERLY WALLACE, Esquire
Washington, D.C.

Linda C. Marshall
Official Court Reporter

Telephone 879-1030

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Nos. 63-a through f 50

Marked Rec'dOn behalf of the Defendant:INDEX OF MISCELLANYCertificate of Court Reporter Page 52

P R O C E E D I N G S

THE DEPUTY CLERK: Resuming the jury trial of Yvonne Smith versus Rock Creek Manor, et al., Civil Action 454-98.

THE COURT: I see all attorneys and parties are again present.

In walking past the jury room, I see about five or six of them are there, so we're waiting for three more. Let's take the time now to go over the anticipated attempted use by plaintiff of exhibits, Plaintiff's Exhibits 63-a through f and 24-b as in boy, during the testimony of Ms. Zeiman.

I understand plaintiff's position. I've had the pleasure of reading the 80 or so pages of exhibit early this morning. I've also, besides the cases cited by the parties, come to be guided by the case of the District of Columbia versus Jane Doe, recorded at 524 A.2d beginning at page 30, and pages 34 and 35 of that 1987 D.C. Court of Appeals decision are quite relevant.

Reading in part on page 34, the Court said evidence of prior incidence is generally admissible to show a defendant's notice or knowledge of a dangerous condition that causes an injury, citing several cases.

Such evidence is also admissible to show the

1 dangerous nature of the specific condition at issue,
2 citing more cases.

3 Basic considerations of relevancy require,
4 however, that other instances of injuries received
5 should have occurred under substantially similar
6 circumstances, citing Wigmore on evidence.

7 Thus, to qualify for admission, prior
8 incidents should have occurred under substantially
9 similar temporal as well as physical conditions,
10 citing more cases.

11 This requirement of similarity of
12 circumstances is at its strictest when evidence is
13 sought to be admitted to show the dangers of a
14 particular condition or situation, although it is much
15 relaxed when the evidence is merely proffered to show
16 notice.

17 This is a case involving an assault on a
18 child at a D.C. Public School and there was effort to
19 bring in similar assaultive conduct at other District
20 of Columbia elementary schools. So, I just want to
21 make clear to the parties my guiding principle.

22 So, let me hear from Mr. Rosenberg.

23 MR. ROSENBERG: All right. What I've tried
24 to do is to go through each one by page and make my
25 objections for the record.

1 I also object to the Court requesting that I
2 put my reasons on for objecting to the documents when
3 the case law clearly says that the burden is on the
4 plaintiff.

5 THE COURT: Right, and I heard from the
6 Plaintiff and there is papers submitted by the
7 Plaintiff. So, it's your turn. If you want to hear
8 again what's already been stated, go right ahead.

9 MR. ROSENBERG: I'm going to first say that
10 they have failed to sustain that burden. Merely
11 talking in generality; that it was incumbent upon them
12 to take each particular document, to proffer why it
13 was substantially similar rather than making a bold
14 and bald assertion that it is. So, I'll go and do
15 what I have to do.

16 THE COURT: I think that both I and you can
17 understand from the testimony of the plaintiff quite
18 readily, together with the pleadings and papers that
19 have been filed by the plaintiff the connection
20 between the document and the testimony up to this
21 point. So --

22 MR. ROSENBERG: Where would you like to
23 start, which exhibit?

24 THE COURT: Let's start with 24-b.

25 MR. ROSENBERG: Twenty-four-b, page 3189.

1 MR. TAGLIERI: The privacy issues tie into
2 dignity issues and there will be testimony by Nurse
3 Zeiman on the lack of dignity. It overflows with
4 other areas dealing with poor toileting, not giving
5 the activities.

6 So, I would submit that it is tied to the
7 case, but I will also represent to the Court that the
8 privacy issues are not the main focus of criticisms of
9 our nurse. She has a small section dealing with it
10 and, frankly, I was inclined not to spend a lot of
11 time on that issue.

12 THE COURT: I'm going to ask both of you to
13 be very economical. We could have the rest of the day
14 on this and we're going to finish this case by
15 Wednesday of next week.

16 I'm going to sustain the objection to the
17 privacy entries on page 3186 given the state of the
18 record up until now, so that'll have to be redacted
19 from that page.

20 Go ahead. Next?

21 MR. ROSENBERG: Yes, on page 3187, the
22 general issue on this is that it was harm caused by
23 application of a restraint. There's no allegation in
24 this case that Ms. Euell was harmed by the application
25 of a restraint.

1 THE COURT: But we have heard evidence, have
2 we not, Mr. Rosenberg, if the jury chooses to believe
3 it, of bruises and breaks unexplained perhaps due to
4 Ms. Euell falling out of bed or falling out of a
5 chair. And so, the lack of restraint or the type of
6 restraints is at issue in plaintiff's claims.

7 MR. ROSENBERG: But this is completely
8 different if you read it carefully.

9 THE COURT: I read it carefully.

10 MR. ROSENBERG: I understand what they're
11 talking about is the potential for a resident to be
12 harmed by application of a restraint, not the resident
13 getting out of the restraint, which I think is an
14 issue that is complained of by the plaintiff and
15 further the complaint that she fell which would be the
16 application of restraints to prevent falling. So,
17 this is not substantially similar. It's globally
18 similar, but it becomes very prejudicial if you put it
19 in.

20 THE COURT: Anything in response?

21 MR. TAGLIERI: Just that there will be
22 evidence of harm relating to the restraints that will
23 come in through our nurse and it deals with the
24 application of restraints.

25 THE COURT: Given the record up to now, I

1 think that this is, is relevant and the objection to
2 the restraints entries at the bottom of the chart on
3 page 3186 and 3187 can come in.

4 Next?

5 MR. ROSENBERG: 3188, these are housekeeping
6 issues. One relates to dirt; one relates to urine;
7 food on the wheelchair and adequate bed covering was
8 not available. The only one that I would not object
9 to is number four. The other three, I don't think
10 they're issues in this case or substantially similar.

11 THE COURT: Anything in response?

12 MR. DOWNY: Yes, Judge, our nurse will be
13 addressing, as she puts it, lack of clean environment
14 and she will be testifying about problems relating to
15 urine being pervasive smell, lack of infection
16 control. There'll be evidence of roaches crawling in
17 the food and just general poor hygiene in the
18 facility. And there'll also be evidence that that
19 caused harm to her. Specifically, she conducted or
20 obtained a staph infection.

21 So, there are numerous instances where we'll
22 show through direct of Nurse Zeiman that this facility
23 was simply unclean and an infection hazard, and these
24 issues go directly to notice of those problems; dirt,
25 urine odor and I think they are relevant for that

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION

FORM APPROVED
OASIS No. 0039-0051

(R3) DATE SURVEY COMPLETED
9/12/91

(R1) PROVIDER NUMBER
09-E014

(R2) MULTIPLE CONSTRUCTION
A. BUILDING
B. WING

NAME OF PROVIDER OR SUPPLIER
Rock Creek Hallor

ID PREFIX TAG

STREET ADDRESS, CITY, STATE, ZIP CODE
2131 "O" Street, N.W., Washington, D.C. 20037

SUMMARY STATEMENT OF DEFICIENCIES
(EACH DEFICIENCY SHOULD BE PRECEDED
BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)

PROVIDER'S PLAN OF CORRECTION
(EACH CORRECTIVE ACTION SHOULD BE CROSS-
REFERENCED TO THE APPROPRIATE DEFICIENCY)

(R3)

COMPLETION
DATE

3186

Level 0 requirement

405.15(a) Restraints

22 LSCJ 3210.1 Restraints and Limitations

Restraints rights were denied by LSC

F203

Refer to Page 2 of 8, next page

PROVIDER REPRESENTATIVE'S SIGNATURE

TITLE

Administrator

(R4) DATE

10/28/91

Any deficiency statement ending with an asterisk (*) denotes a deficiency which the institution may be excused from correcting providing it is determined that other safeguards provide sufficient protection to the patients. (See reverse for further instructions.) The findings above are disclosable 90 days following the date of survey whether or not a plan of correction is provided. If deficiencies are cited, an approved plan of correction is required.

FORM HCFA-2567 (10-84)

00000000

198

DEFICIENCIES AND PLAN OF CORRECTION

FORM APPROVED
OMB No. 0535-0081

OR SUPPLIER

(VII) PROVIDER NUMBER

09-2014

(X2) MULTIPLE CONSTRUCTION

A. BUILDING
B. WING

(X3) DATE SURVEY COMPLETED

9/12/91

STREET ADDRESS, CITY, STATE, ZIP CODE

(X4) ID
PREFIX
TAG

SUMMARY STATEMENT OF DEFICIENCIES
(EACH DEFICIENCY SHOULD BE PRECEDED
BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION)

Application of restraints that were not
monitored as ordered by the physician.

The resident had an order for a posey vest
to prevent falling during agitation.
release every two (2) hours for ten (10)
minutes and reapply. Check resident every
thirty (30) minutes. This resident was
observed on two (2) occasions asleep in bed
with the restraint applied.

Another resident had an order for a posey
belt for safety. The order specified to
release every two (2) hours for ten (10)
minutes, exercise then reapply. This is a
resident who was admitted to Georgetown
University Hospital from July 24, 1990 to
August 9, 1990 for aspiration pneumonia. It
was documented by the physician at
Georgetown University Hospital "that the
resident was apparently in her chair in a
posey restraint. The posey in some manner
wrapped around her neck and began choking,
and aspiration contents into her lung."

These residents were observed throughout the
survey process. Nursing staff did not
release the restraints or apply range of
motion.

PROVIDER'S PLAN OF CORRECTION
(EACH CORRECTIVE ACTION SHOULD BE CROSS-
REFERENCED TO THE APPROPRIATE DEFICIENCY)

To enhance restrain monitoring procedures
presently in place, a revised Restraint
Sheet Form has been developed and implement-
ed (Please refer to attached Sheet, entitled
Restraint Check (Appendix A, PSI). Also,
a thorough inservice with all Nursing Staff
will be conducted to ensure Staff fully under-
stand protective device procedures and usage.
Ongoing monitoring by Charge Nurses during daily
Rounds, coordinated with PCC's Rounds will
enforce and maintain compliance.

ID
PREFIX
TAG

P203

COMPLETION
DATE

11/15/91

PROVIDER REPRESENTATIVE'S SIGNATURE

TITLE
Administrator

(X10) DATE

10/28/91

* Any deficiency statement ending with an asterisk (*) denotes a deficiency which the institution may be excused from correcting providing it is determined that other safeguards provide sufficient protection to the patients. (See
reverses for further instructions.) The findings above are disclosable 90 days following the date of survey whether or not a plan of correction is provided. If deficiencies are cited, an approved plan of correction is required to
continued program participation.

FORM HCFA-3027 (10-91)

PROVIDER

If continuation sheet P203 of

1 I'm going to Plaintiff's Exhibit Number 24 -- I have
2 it as O, is that right?

3 THE COURT: We know of 24-a and b as
4 exhibits.

5 MR. ROSENBERG: Mine begins with -- oh, here
6 it is. I'm sorry. Begins with page 2812. This is
7 1997.

8 MR. DOWNY: We're not offering 24-a or the
9 regular 24 at this time. We really requested 24-b,
10 because we knew it focused on the sub-standard issues
11 involved.

12 THE COURT: So that takes us to Exhibit 63-a
13 through f. Any objections?

14 MR. ROSENBERG: Having withdrawn at this
15 time?

16 THE COURT: I didn't hear they were, 63-a
17 through f?

18 MR. ROSENBERG: Oh, I'm sorry. I don't have
19 a. I have d, e and f.

20 MR. DOWNY: It's in the beginning of the
21 exhibit starting with 63.

22 THE COURT: In my review of them early this
23 morning, they did appear to relate to the issues
24 spoken of by Ms. Smith in her testimony and I was
25 inclined to allow them all in.

1 MR. ROSENBERG: Sixty-three-a

2 THE COURT: Sixty-three-a through f relate
3 to cleanliness, infestation of pest, theft of
4 residents' property, diapering, quality of food,
5 amount of food, timing of feedings and staffing levels
6 on the floors.

7 Anything you want to say in this regard?

8 MR. ROSENBERG: I object to -- the only one
9 we'd actually -- I mean, you -- I'm going to make a
10 general objection to them all because, number one,
11 they're just complaints. They're complaints which are
12 unverifiable in most instances. They are complaints
13 from residents. Eighty-five percent of the resident
14 population is demented.

15 THE COURT: I think you made that point
16 earlier and they're not being admitted for the truth
17 of anything stated therein, but for the inference that
18 may be drawn about the defendant being on notice of --
19 of problems that are part of the plaintiff's
20 complaint.

21 MR. ROSENBERG: They haven't furnished us
22 with the resolution of the complaints, the
23 investigation of the complaint. What does that mean?
24 That makes the events substantially similar and
25 otherwise unreliable. I suggest it doesn't --

1 THE COURT: Anything in response?

2 MR. DOWNY: Just that, Your Honor, I spent a
3 great deal of time going through volumes of complaints
4 with respect to ones that dealt specifically with the
5 problems of Mrs. Euell and for the reasons you
6 expressed, we think all of the complaints are
7 relevant.

8 And as far as them just being a complaint,
9 we have the facility's response. So, Mr. Rosenberg on
10 a particular complaint can point out that, you know,
11 the problem has been corrected.

12 Obviously, if the person is demented and
13 they don't believe it's valid, they wouldn't take the
14 time to correct the problem. So, for all these
15 reasons we would take the position that 63-a through f
16 is admissible.

17 THE COURT: I overrule objection and they
18 will be allowed with limitations that the jury will be
19 instructed about.

20 (Thereupon, Plaintiff's Exhibits 63-a
21 through f were received in evidence.)

22 THE COURT: All right. I'm going to bring
23 the jury in. I've got another case to deal with
24 that's scheduled for twelve noon and we're going to
25 resume the trial at ten minutes after one.

Office of the D.C. Long Term Care Ombudsman
Legal Counsel for the Elderly

COMPLAINT RECORD

Name of person completing this record: Vera Mayer
Iona House Ombudsman Program
4200 Butterworth Place N.W.
Washington D.C. 20016
(202) 966-1055

Date this record was written: August 16, 1991

Resident's Name: _____

Resident's Room Number: 212 B

Resident Anonymous (circle if applicable)

Location where Complaint Happened: 212 B

Date Complaint Happened: Sometime between admission + Now.

Time Complaint Happened: unknown

Complaint: Mrs. _____ states that the follow-
ing items are missing from her closet:

1 Beige trench coat, 1 brown sweater,

1 brown pleated skirt (These items are included on inventory sheet)

Complaint was corrected and/or no response is needed: _____

A response to the complaint is requested: yes

Response: The above mentioned items have been located and are
presently in Ms. Prout's closet and in good condition.

Chris Blaise, Linen Director

(use other side of page if necessary)



RC 04790

Office of the D.C. Long Term Care Ombudsman
Legal Counsel for the Elderly

COMPLAINT RECORD

Name of person completing this record: ~~Vera Mayer~~ Gloria Jean White
Iona House Ombudsman Program
4200 Butterworth Place N.W.
Washington D.C. 20016
(202) 966-1055

Date this record was written: September 20, 1991

Resident's Name: Mr.

Resident's Room Number: 409A

Resident Anonymous (circle if applicable)

Location where Complaint Happened: 409A

Date Complaint Happened: between Sept. 18th 19th 1991

Time Complaint Happened: unknown

Complaint: Resident stated that two hundred fifty dollars (\$250.⁰⁰) was taken from his coat pocket. It was verified that the resident had a "large amount of money" per a third party.

Complaint was corrected and/or no response is needed: _____

A response to the complaint is requested: YES.

Response: Residents are fully advised that the facility can not be responsible for their personal money once their money is withdrawn. In fact we advise patients should they need large amount of monies the facility would keep the money in the safe for safe keeping.

(use other side of page if necessary)

Office of the D.C. Long Term Care Ombudsman
Legal Counsel for the Elderly

COMPLAINT RECORD

Name of person completing this record: ~~Vera Nayer~~ Gloria J. Walker
Iona House Ombudsman Program
4200 Butterworth Place N.W.
Washington D.C. 20016
(202) 966-1055

Date this record was written: September 20, 1991

Resident's Name: _____

Resident's Room Number: 409A

Resident Anonymous (circle if applicable)

Location where Complaint Happened: 409A

Date Complaint Happened: September 05, 1991

Time Complaint Happened: unknown

Complaint: Resident states his sister bought him new clothing for his birthday (Sept. 03). Missing from bedside table: 1 pr. black slacks; 1 pr. blue slacks; 1 green + black plaid shirt; 3 prs. underwear. Resident's sister confirms description of clothing. (over-Complaint was corrected and/or no response is needed: _____

A response to the complaint is requested: yes

Response: As far as we know the items are now in the system. We are searching his regular laundry for them, but have not as yet located those specific items. Will advise when they are found.

Chen Blum
Room Director

(use other side of page if necessary)

Office of the D.C. Long Term Care Ombudsman
Legal Counsel for the Elderly

COMPLAINT RECORD

Name of person completing this record: ~~Vera Hayer~~ Gloria J. Walker
Iona House Ombudsman Program
4200 Butterworth Place N.W.
Washington D.C. 20016
(202) 966-1055

Date this record was written: September 20, 1991

Resident's Name: _____

Resident's Room Number: 316B

Resident Anonymous (circle if applicable)

Location where Complaint Happened: 316B

Date Complaint Happened: Sept. 19, 1991 / Sept. 20, 1991

Time Complaint Happened: Unknown

Complaint: Resident states that during the night a large box of "Lorna Doone" Cookies and thirty (30) twenty-nine cents (\$.29) stamps were taken from her bed side table

Complaint was corrected and/or no response is needed: _____

A response to the complaint is requested: Yes.

Response: a ^{thorough} search was conducted unfortunately the items were not found. However a directive will be sent out by Administration advising employees that anyone caught stealing will be immediately terminated if proven.

(use other side of page if necessary)

Office of the D.C. Long Term Care Ombudsman
Legal Counsel for the Elderly

COMPLAINT RECORD

Name of person completing this record: ~~Vera Mayer~~ Gloria Jean Walker
Iona House Ombudsman Program
4200 Butterworth Place N.W.
Washington D.C. 20016
(202) 966-1055

Date this record was written: March 02, 1993

Resident's Name: _____

Resident's Room Number: 515A

Resident Anonymous (circle if applicable)

Location where Complaint Happened: 515A

Date Complaint Happened: between Feb. 27 - 28, 1993

Time Complaint Happened: Unknown

Complaint: Resident states that a "one (01) lb. box of chocolate nut candy was taken from her room closet." Resident states she "wants Administrators to know." "our place")

Complaint was corrected and/or no response is needed: No

A response to the complaint is requested: no

Response: _____

(use other side of page if necessary)

Ms. Fantaylin, Admin.
Ms. Vera Mayer, Ombudsman
Records
Social Services

RC 04875

RECORD OF COMPLAINT
ROCK CREEK MANOR

RESIDENT/ VISITOR/ EMPLOYEE (circle one)

Place completed form in Administrator's mailbox or in person.

Date of this report: Monday September 3, 1990

Name of Resident: _____

Room 1: 521 A

Complaint made by: Mrs. J. [unclear] [unclear]

Phone: 341-1793

Complaint made in writing: ✓ in person: ✓ by telephone: _____

Date of incident: 9/14/90 / 9/3/90 Time: 10:30 AM

Location: 5th Floor

Who received complaint: _____

Nature of complaint: (please provide specific details) Use reverse or additional paper if needed.

I have signs in my mother room to not take the laundry
on second visit I have found her clothes missing and talk to the
nurse at station. Next no one seem to know what happen to
her things. I come every day to take care of her clothes.
Last Tuesday I brought clean clothes and come back Wednesday
they were not here. Her black long and multi color dress is missing
some of her light, and a black dress she live on Sunday. I was
here Monday morning and that is gone too. Please don't take

clothes. Also there are some of her gown (white) gone
that have been missing Thank you for your help.

Suggestions for follow up: _____

For administrative use only below

Who investigated complaint (name & title): Robert Probert RN ADDN

Steps taken to resolve and/or correct complaint:

Clothes are being searched for. A sign is posted
on her closet reminding staff to keep clothes in her closet.

Family was requested to bring a clothes hamper this has not
been done yet. Also all her clothes need to have her name in
Person submitting complaint advised of investigation: yes no Date: _____

Outcome:

complaint resolved: _____

complaint not resolved ✓

complaint will be resolved by: _____

reason: still looking for clothes

reason: _____

Signature: Robert Probert

Title: RN ADDN

Date: 10/10/90