

# Nursing & Assisted Living Facility Professional

“NEWS AND VIEWS YOU CAN REALLY USE”

MAY 2015

ISSUE 5, VOLUME 5

SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

## THE HAT ADVANTAGE by Rebecca Adelman

# LEGISLATION AND LONG-TERM CARE LITIGATION HELP IS ON THE WAY



Liability costs for long-term care providers are expected to increase by five percent and claims frequency is expected to rise, according to an analysis released recently by the American Health Care Association (AHCA) and Aon Global Risk Consulting. The 2014 long-term care General

Liability and Professional Liability Actuarial Analysis provides estimates of loss rates or the cost of liability to the beds that care providers operate. The projected national 2015 loss rate, which is a combination of claim severity and frequency, is \$2,030 per occupied bed. This means that an operator with 100 beds can expect \$203,000 in liability expenses in 2015.

Kentucky's high cost of liability may be related to its lack of restrictions on tort actions. The state constitution prohibits limits on non-economic damages and there are no statutes concerning qualification of expert witnesses, certificates of merit, pre-trial alternative dispute resolution, or limits on attorney's fees. Kentucky has the highest average claim severity among the profiled states. West Virginia has the second highest loss rate. While West Virginia has a limit on non-economic damages of \$250,000 per claimant, it has not been clear whether this limit applied to long-term care providers. The state Legislature extended the protections of the cap to long-term care providers in 2013, and this appears to be reducing claims frequency. In contrast, Texas amended its state constitution to protect the tort reforms enacted in 2003. Texas has a \$250,000 limit on non-economic damages per claimant and rules concerning expert witnesses. Attorney's fees are not limited and there are requirements to provide special wording in arbitration agreements in order for the agreements to be valid. In 2011, Tennessee passed legislation that enhanced existing pre-suit notifications, broadened the definition of healthcare provider and services (intending to address case law from Tennessee's appellate courts holding that certain kinds of suits involving claims of ordinary negligence, such as positioning patients and helping them out of bed, do not require expert testimony on standard of care), and caps on noneconomic and punitive damages. Many other states are also addressing legislation to support the healthcare industry and the continued crisis of rising litigation related costs.

In addition to tort reform, states area also addressing more specific issues that arise in litigation and have been damaging to health care providers including use of surveys, claims extending to disclosed entities such as owners and landlords and limitations on communication with third party providers under HIPAA. This session, Tennessee passed important legislation that could lead the

charge for other states.

SB 892/HB 1003 by Kelsey and Lundberg - "The Givens Fix" - deems as a permissible disclosure relevant disclosure of protected health or other relevant information, including, but not limited to, opinions as to the standard of care of any defendant, compliance with or breach of the standard, causation of the alleged injury, or any other information relevant to the early analysis and evaluation of the plaintiff's claim. In two Tennessee case, *Givens* (2002) and *Alsip* (2006), the Tennessee Supreme Court noted that statutes enacted from 1997 to 2001 were "indicative of the General Assembly's desire to keep confidential patient's medical records and identifying information." *As a result, the Court held that ex parte interviews of treating healthcare providers by defense counsel violated the implied covenant of confidentiality that exists between physicians and patients.* In January 2015, the Tennessee Court of Appeals in *Hayslett* strictly interpreted the Given statute so as to defeat the legislative intent by holding that defense counsel could discuss in ex parte interviews only "protected health information," and could not discuss the standard of care, compliance with or breach of the standard, causation of the plaintiff's injury, or any other information relevant to the early analysis and evaluation of the plaintiff's claim. This opinion precluded any discussion of the defendant's standard of care, compliance with or breach of the standard, causation of the plaintiff's injury, or any other information relevant to the early analysis and evaluation of the plaintiff's claim. Defense counsel was essentially unable to learn significant information about Plaintiff's claims for early evaluation and assessment and developing defense strategies. This amendment permits the ex parte interviews necessary for the early analysis and evaluation of a plaintiff's claim, thereby increasing the potential for early resolution with the avoidance of further inconvenience and expense for all parties.

SB 819/HB 1285 by Kelsey and Lundberg - "Sue the Right Defendant" - adds to the healthcare liability provisions of present law that a healthcare liability action against a licensed healthcare provider ("licensee") may be brought only against the licensee, the licensee's management company, the licensee's managing employees, or an individual caregiver who provided direct healthcare services, whether an employee or independent contractor. A passive investor will not be liable. In the event a person, entity, or healthcare provider receives notice of a potential claim for healthcare liability, the person, entity or healthcare provider must, within 30 days of receiving the notice, based upon any reasonable knowledge and information available, provide written notice to the potential claimant of any other person, entity, or healthcare provider who may be a properly named defendant. Other than these parties, actions can only be brought after a

*Continued on page 3*



## Together, Elite Living™ and Therapy Co-Exist in Long Term Care

By Jill Fiala  
Director of Elite Living™

According to the Centers for Disease Control and Prevention, over the past decade, the death rate from falls has increased 63% for men and 83% for women. While rehabilitation and wellness services have always coincided with long-term care, Functional Pathways is focusing on such trends and becoming innovative by promoting programs that will keep people living independent longer and beat the statistics.

To start, Functional Pathways encourages communities to offer both services and facilitate a relationship that assists with referrals for each program. For example, Wellness Coordinators see residents daily and often notice weaknesses within residents before they become a major problem. This daily interaction helps build trusting relationships as Wellness Coordinators become confidants and advisors for daily living. When Wellness Coordinators are proactive with referrals to therapy, it helps target the source of the problem and prevent it from escalating into a major issue.

On the flipside, therapy is a beneficial referral source for wellness programs. Following therapy, wellness programs can offer on-going exercise and maintenance for residents which provide them the elite care they deserve. One-on-one personal training, group exercise, and education are all beneficial resources for seniors in long-term care. When Functional Pathways partners with facilities, our therapy programs coincide with our Elite Living™ wellness services; this model has been proven to help decrease falls, increase muscular strength/endurance, and ADLs to help residents maintain their independence.

### THE FINALE

In the next decade, the number of Americans 65 years and older is expected to double and the need for more innovative options to maintain their independence will increase. Functional Pathways provides new innovative therapy and wellness programs for the long term care communities we partner with.

### THE SIGNPOSTS

It is important that we all, as health care providers, be thinking together, expand on innovative ideas and understand why our loved ones need a variety of programs that focus on all dimensions of wellness.

### THE TAKEAWAY

Therapy and wellness are two vital components in the creation of a positive, successful, and overall healthier campus. They work hand-in-hand when providing individualized, elite care for our loved ones.

### ABOUT FUNCTIONAL PATHWAYS

Since 1995, Functional Pathways™ has consistently provided premier contract therapy services throughout the nation. Our mission has always been to provide **Excellence in Rehabilitation**.

To-date, our continued relationships have been predicated on three unique features that set us apart from all other therapy providers: **Our Values, Our Promise, and Our Innovation**. Organizations that partner with us will also receive these as additional benefits within their own communities. We understand that the synergies between these three core elements are philosophical to providing unique, yet customized therapy services

ELITE people who give ELITE care and produce ELITE results



OUR PARTNERSHIP PROMISE IS  
EXCELLENCE IN REHABILITATION



Functional  
Pathways™

Excellence in Rehabilitation

www.functionalpathways.com | 888.531.2204

There are several critical components to providing an elite wellness program. Educating seniors is a vital part, below are seven tips everyone can follow to live a happier, healthier, and longer life.

Seven tips to live a happier, healthier, and longer life.	
1 Drink more water	At least eight full glasses every day
2 Decrease the stress in you life	Learn to "Let it go!"
3 Know your numbers	Family History, Blood Pressure, Cholesterol, and Blood Sugar, etc.
4 Listen to music every day	Music is the one stimulus that uses all parts of your brain.
5 Move more	Incorporate physical exercise and activities in your daily routine
6 Nutrition	Know what you are eating and learn to read a food label
7 Get your Zzzzzzzzz	Allow your body to rest and maintain a schedule.

across the entire continuum of care to help residents age in place healthy and securely while creating a more stable census and by providing properly documented therapy.

We encourage you to partner with us to **Make a Difference in the Lives We Touch**.

614 Mabry Hood Rd., Suite 301 | Knoxville, TN 37932  
888.531.2204 | www.functionalpathways.com

# In the Spirit of Excellence: Thoughts of an Olympian

By Meg Stone – 2 Time Olympic Games Competitor



*Editor's Note from Chip Kessler: We are most pleased to welcome Meg Stone to our roster of Nursing & Assisted Living Professional contributors. This two-time Olympian brings with her a key skill set in helping others become his or her very best! I'm thrilled to be able to have her share her commitment to excellence as a means of giving you the opportunity to discover new and innovative ways to achieve greatness in your job and for the residents and families you serve.*

I was born and raised in Scotland by parents who instilled me a belief, that with an education and a stellar work ethic, anything could be achieved. I competed in two Olympic Games, placing 12th in Moscow in 1980, and 5th in Los Angeles in 1984 both extraordinary experiences which obvious stay with me for a lifetime. I still have that same belief today, having moved through the professions of teaching to coaching, and on to become the first female National track and field coach in Europe, and then the first female Head Strength and Conditioning coach to work with Football at the NCAA Division one level, Dad was right, with the right approach, hard work and education anything is possible.

My latest venture is to direct the Center for Excellence in Sport Science and Coach Education, along with the Olympic Training Site at East Tennessee State University. In order to do the best possible job in this position, as a Scot living in the U.S., I felt it was necessary to become a U.S. citizen, after all, I am interacting with U.S. coaches and athletes, they needed a commitment from me as Director of the U.S. Olympic Training Site, and I owe the same commitment to a country that has given me so much opportunity!

What does this have to do with Assisted Living and the Nursing Facility environment that you are associated with? I have recently had the chance to visit a variety of caregiving facilities in order to find the best possible accommodations for my aging mother-in-law who is 88 years young. And I mean young! Through our visits and because she is still very much self-sufficient we determined that an assisted living facility would be the right choice for her at this present time.

That decision made, what was I looking for in an assisted living facility? The same commitment from the assisted living staff I have given to my career in coaching and teaching! A passion for the well-being of people and the job at hand. Making the transition from home to assisted living is not easy one, particularly when all your worldly possessions are rearranged and/or diminished to an institutions organizational structure. An understanding and caring attitude was important. My beautiful mother-in-law is elderly with all her faculties; she is not a four year old and does not need to be treated or spoken to in a childlike fashion. She is active in the church and needs to stay active, having her independence is extremely important. She carefully watches her diet, likes to dress very nicely, in fact, I would say, she is a bit of a fashionista.

Like my experiences in the world of athletics I want my mother-in-law to continue to have what she needs to be her best, and a quality of life which is worth living. As with my life in athletics, we have found an assisted living facility which supports her efforts to stay young, provides the right kind of activities to allow her to be her best, she has reached her Olympic Final as I did mine, Thank you Governors Bend!

It may be that someday my dear mother-in-law will need to be moved to a nursing facility, when and if she requires that level of care. If this time comes, I'll again look for the same level of dedication from the staff. Fact is, working in an assisted living or nursing facility is much the same as competing in the Olympics- there's a job to be done and you must strive to do it to the best of your abilities. In others words- Strive for Excellence!

---

*The HAT Advantage continued from page 1*

hearing on a motion for leave to amend, the court or arbitrator determines that there is sufficient evidence in the record or proffered by the claimant to establish a reasonable showing that: (1) The individual or entity owed a duty of reasonable care to the claimant and that the individual or entity breached that duty; and (2) The breach of that duty is a legal cause of loss, injury, death, or damage to the claimant.

When determining the statute of limitations in a healthcare liability action, the date of the original pleading will control regardless of whether there are amended pleadings or substituted or added parties. In most all healthcare liability lawsuits, the Plaintiff names as defendants the licensee/operator, management companies, owners, landlords, ancillary service providers and individual nurses, doctors and administrators. This amendment creates an increased burden on a Plaintiff to name a defendant beyond the licensed operator.

SB0889/ HB0714 by Wilburn and Kelsey – "Survey Admissibility" - adds, in regard to healthcare liability actions, that the results of a survey, an inspection, or an investigation of a healthcare provider that is conducted by any state or federal department or agency, including any statement of deficiencies and all findings and deficiencies cited in the statement of deficiencies on the basis of the survey, inspection or investigation, all proposed or implemented plans of correction submitted by the healthcare provider, and statements of or records of interviews with employees or independent contractors of the healthcare provider will not be admissible in evidence in any health care liability action in any court or arbitration proceeding on the basis that it satisfies an exception to the Tennessee rules of evidence governing hearsay or used in an advertisement unless specific strict criteria are met. An Ohio federal

judge last week sent a lawsuit filed by a Portsmouth-based nursing home facility against Mississippi law firm McHugh Fuller Law Group back to a state court.

Many Plaintiff law firms across the country (see news reports on McHugh Fuller in West Virginia and Ohio many article written by Plaintiff's attorneys instructing on the use of surveys and federal regulations as evidence at all stages of litigation) are encouraging tort litigation against long-term care facilities by distributing advertisements that make misleading references to surveys and regulatory violations. Defense attorneys are requesting restraining orders and injunction against these firms successfully. These proactive efforts by defense counsel and supporting legislation enhance the litigation strategies available to respond to the predatory Plaintiff's practices. Take some time to learn about the cases and legislation in your states by contacting the state health care association and me, as well. It is critical that the industry continues to respond to the rising costs in healthcare litigation and create the strong cooperative coalitions that continue to provide the necessary legal and legislative strategies.

Next month, The HAT Advantage will share highlights from the third annual Litigation Risk and Defense Strategies for Long-Term Care & Assisted Living Providers, Insurers, and Brokers Conference.

*Rebecca Adelman, Esq. – Ms. Adelman, PLLC is a shareholder of Hagwood Adelman Tipton and practices in the Memphis, Tennessee office. For over 20 years, Rebecca has concentrated her practice in healthcare law, long-term care assisted living and medical malpractice defense litigation. Her expertise and her scope of practice involve all insurance defense litigation areas including premises and product liability as well as employment law. Please feel free to contact her at [radelman@hatlawfirm.com](mailto:radelman@hatlawfirm.com).*



Extended Care

**Products**  
Inc.

**Presents the 60-Minute Webinar/  
Teleconference:**

**“Quality Measures 2015**

**Are You Ready”** with presenter  
Joel VanEaton, RN, BSN, RAC-CT.  
through Extended Care Products, Inc.

**Webinar date: Tuesday, May 12th**

10 a.m. (eastern), 9 a.m. (central),  
8 a.m. (mountain) 7 a.m. (pacific)

**OR**

2 p.m. (eastern), 1 p.m. (central),  
12 noon (mountain), 11 a.m. (pacific)

**To Register Please Visit  
[www.WebinarLTC.com](http://www.WebinarLTC.com)  
or call 1-800-807-4553**

**Your Investment Comes  
with Two Free Bonus Gifts!**

NAL PROFESSIONAL  
P.O. Box 4852  
Johnson City, TN 37604

PRSR STD  
US POSTAGE  
PAID  
MWI

# DART Chart's HMO MAP & TRACK<sup>SM</sup>



## Easy Implementation

Digitized mapped contracts

Interface existing data

Ready for use

## Actively Manage Costs

Cost of care is tracked

Overages are displayed

Co-pays during stay

HIPPS Code reports

## Maximize Revenue

Less time managing contracts

Cost containment

Mitigate claim denials

Higher revenue

## Proactive MCO Management

*Effective MCO Contract Management doesn't have to be complex*



**888-210-3200**

**[www.DARTChart.com](http://www.DARTChart.com)**