TRIAL NEWS
WASHINGTON STATE ASSOCIATION for JUSTICE
February 2014 Volume 49, Number 6

Finding seven-figure coverage in the "no-coverage" case

Publication Date: February 2014
Volume: 49-6
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Category: Elder Law

Eighty eight-year-old Ho Im Bae died in the Lakeside Adult Family Home in Lynnwood on March 30, 2009. The cause of death was morphine overdose. Ms. Bae had not been prescribed morphine. Instead, she had been given it without her knowledge numerous times over a one week period by a Certified Nursing Assistant (CNA) who disappeared after the death. It was never determined whether the CNA made a mistake, had been trying to help Ms. Bae with pain, or simply didn't like Ms. Bae. What was clear was that Lakeside Adult Family Home had not followed the law regarding disposal of unused medications:

WAC 388-76-10485 – "Medication storage," requires the home to ensure that all medications are stored in a locked storage and in the original container with legible and original labels.

WAC 388-76-10490 – "Medication Disposal," requires the home to dispose of unused and expired medications of current and former residents in a safe manner and to have a written policy regarding the same.

Instead, the police investigation showed that Lakeside kept a plastic bag of over 1,000 old, expired, and unused medications in a locked cupboard that all employees had key access to, as well as other random pills, unlabeled and unlocked, on counters and cabinets in the home. There was no question that this case had merit.

Insurance was another matter. Before 2010, adult family homes in Washington were not required to carry liability insurance coverage. In 2010, the WAC's were amended to codify a $500,000 per occurrence/$1M aggregate requirement. We were told by Lakeside's owner and her private counsel that Lakeside did not have any coverage and that we should essentially "go away."

We didn't. We put the case into suit and served interrogatories and requests for production to Lakeside requesting insurance coverage information. Under oath, the owner of the home responded that at one point she had insurance, but that it had lapsed for non-payment. She also referenced her local insurance agent, English Insurance Group. She did not provide the insurance policy that was once in effect. Defense counsel continued to ignore us, not return calls, and repeatedly claimed that there was no insurance and that we were wasting his time and his client's money.

We subpoenaed English Insurance Group's file. They provided 731 pages of records and internal emails regarding our loss. These records showed that a $500,000 professional liability insurance policy through PCH did exist, but that this was a "claims-made" policy. Their internal investigation determined that no claim had been made during the requisite time period, and they therefore refused to even defend under a reservation of rights. This was insurance policy number one.

As it was clear to us that neither the home's owner nor her private counsel was interested in helping us find coverage for her, we continued subpoenaing records, this time from Lakeside's accountant. We requested everything relating to insurance premium payments for a period of two years prior to and one year after the date of death. Sure enough, we discovered a payment had been made to a second insurance company, CNA/American Casualty, in August 2008, seven months before our claim arose. A subpoena was sent to CNA. The documents they produced showed that there was a $1,000,000 professional liability policy in effect. However, they claimed that no coverage existed because the tort had been committed by a person other than the named insured (the owner of the home). They, however, agreed to defend under a reservation of rights. This was insurance policy number two.

Additional discovery, including depositions, eventually showed that PCH had been notified of the death within the claims-made period. Even though they did not define it as a "claim," it met the legal requirement of a claim.

CNA essentially fooled around for most of a year, pretending that the claim was not covered and was not worth their policy limits for various reasons. We were eventually able to prove that the loss was covered by the policy and that the claim was worth more than the limits.

The case settled for the combined limits of $1.5M in the summer of 2013. I suspect that some of the people on the defense/ insurance company side really believed that there was no coverage; others just wanted it to be that way. All it took, however, was a refusal to believe their initial assertions, and a few good records subpoenas to find what we were looking for.

As a side note, we also sued the visiting nurse services agency whose employee/ nurse witnessed the events leading up to the death but did not "immediately" report them to DSHS or law enforcement. We asserted that under RCW 74.34.035 the nurse was a mandatory reporter and had duties to report suspected abuse, neglect, and physical assault. That case was dismissed on summary judgment but an appeal is pending.

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