IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 1167 EDA 2014

Thomas Williams, Administrator of the Estate of
Gardenia Williams, deceased
Plaintiff-Appellant,

v.

Penn Center for Rehabilitation and Care and Hospital of the
University of Pennsylvania and Trustees of the University of
Pennsylvania and Manor Care of Yeadon, LLC and Manor Care Inc.
d/b/a Manor Care Health Services,
Defendants-Appellees.

Appeal from the Order of the Philadelphia County Court of Common Pleas,
First Judicial District, Civil Division, May Term, 2011, No. 003790
Denying Appellant's Motion for Reconsideration of the Appellant's Motion for
Post-Trial Relief Dated April 9, 2014 by the Honorable Albert J. Snite, Jr.

BRIEF OF *AMICUS CURIAE* AARP IN SUPPORT OF APPELLANT

IRIS Y. GONZÁLEZ
Counsel for AARP
igonzalez@aarp.org

AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-6289
Fax (202) 434-6424

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

MISCELLANEOUS

MISCELLANEOUS, CTND.

MISCELLANEOUS, CTND.

STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan organization, with a membership, that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. Through education, advocacy, and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. AARP advocates for access to affordable healthcare and for controlling costs without compromising quality. AARP supports the establishment and enforcement of laws and policies designed to protect the rights of nursing facility residents to obtain redress when they have been victims of neglect or abuse.

AARP has filed amicus briefs in numerous federal and state cases around the country regarding the enforceability of sanctions against nursing facilities for violations of resident rights and quality of care standards, including sanctions levied through the civil justice system. These briefs have addressed the importance of maintaining meaningful access to the civil justice system so that the most vulnerable of consumers can avail themselves of the full range of enforcement remedial mechanisms to redress abuse, neglect, and violations of their civil rights while residing at nursing facilities.

SUMMARY OF ARGUMENT[1]

The abject neglect and abuse of nursing facility residents is an all-too-common occurrence that has not been adequately addressed by regulatory enforcement. Nursing facilities frequently fail to comply with regulatory and statutory obligations setting minimum standards of quality for resident care. The process of inspecting nursing facilities misses many violations due to the regulatory authorities' lack of resources to inspect facilities with the necessary frequency. Even when noncompliance is detected, regulatory authorities fail to vigorously enforce penalties and, thus, fail to adequately protect nursing facility residents. In this context, ensuring meaningful access to additional remedial measures that are available through the civil justice system is essential to addressing and deterring abuse and neglect in nursing facilities.

One of the available remedial measures for nursing facility residents and their families is the civil lawsuit. Many states, through either statutory or common law, permit residents and their successors in interest to recover damages for

[1] Though Amicus supports the legal arguments made by the Appellant, Amicus submits this brief to provide the court additional information on the issue of whether the trial court erred, abused its discretion, and committed reversible error in prohibiting Appellant from presenting at trial the substance of laws, regulations, and guidelines that govern quality of care in nursing facilities. As relevant to the arguments presented in this brief, Amicus adopts and incorporates by reference the following parts of Appellant's Brief: Statement of Jurisdiction, Order or Other Determination in Question, Statement of Scope of Review and Standard of Review, Statement of the Questions Involved, Order Below, Opinion Below, and Statement of the Matters Complained of on Appeal.

negligent care in nursing facilities and to use violations of federal and state statutory and regulatory minimum quality of care requirements as evidence of neglect. Pennsylvania is one such state. Pennsylvania case law is clear that violations of statutory and regulatory requirements can be presented as evidence of negligence and that the standards embodied in such laws and regulations can inform the relevant standard of care.

The Court of Common Pleas committed reversible legal error and abused its discretion in denying the jury the opportunity to hear the substance of state and federal laws, regulations, and agency interpretive guidelines setting minimum quality of care standards for nursing facilities that participate in the Medicaid and Medicare programs. The court also committed error in instructing the jury that these laws and regulations were not the standard of care and could not be considered as part of the standard of care in a negligence action. Instead, the court characterized these laws and regulations as merely "guidance" or simply for "reimbursement" purposes. These rulings were contrary to Pennsylvania law and negated the very purpose of nursing facility regulations—to protect nursing facility residents by ensuring minimum standards of care. As a result, the jury was unable to determine the true standard of care and unable to objectively decide whether such standard was breached by the nursing facility defendants. These legal errors effectively denied Appellant (hereinafter "Mr. Williams") meaningful access to the

civil justice system to remedy the neglect of his wife, a frail and powerless nursing facility resident, that resulted in her death. For these reasons, as detailed below, Amicus AARP urges this Court to reverse the trial court's decision and remand for a new trial during which the jury may consider all admissible evidence relevant to Mr. Williams' claim of neglect.

ARGUMENT

I. Because Regulatory Enforcement Processes Fail to Adequately Protect Nursing Facility Residents, It Is Vital That Victims of Abuse and Neglect Have Meaningful Access to Remedial Measures Available Through the Civil Justice System.

As a consequence of their vulnerabilities and isolation, residents often fall prey to abuse and neglect while in the care of nursing facilities. Given the prevalence of such abuse and neglect and the failure of regulatory enforcement to effectively detect and remedy this problem, it is imperative that nursing facility residents be allowed to utilize all avenues to deter bad conduct—particularly when that bad conduct results in a vulnerable person's suffering and death.

A. Elderly, Vulnerable Nursing Facility Residents Are Frequent Victims of Abuse and Neglect.

In 2012, more than 1.4 million Americans lived in 15,652 nursing homes certified to participate in the Medicaid and/or Medicare health insurance programs. Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs., *Nursing Home Data Compendium 2013 Edition*, at 5, 11 (2013) [hereinafter *2013*

Compendium], *available at* http://goo.gl/zHKGGs. Of these nursing facility residents, 85% were 65 years of age or older, 62% had functional impairments in four or more activities of daily living, and 63% had moderate or severe cognitive impairments. *Id.* at 168, 170. Nursing facility residents are vulnerable to abuse and neglect due to their: isolation from social networks; institutional living setting; dependence on others to perform activities of daily living such as eating, bathing, dressing, and toileting; and cognitive impairments. *See* Nat'l Ctr. on Elder Abuse, *Nursing Home Abuse Risk Prevention Profile and Checklist*, 15-19 (2005), *available at* http://goo.gl/LyblDk.

The available empirical data suggests that nursing facility residents are frequent victims of abuse and neglect. According to the Long-Term Care Ombudsman Office, as many as one third of all nursing facilities have reported complaints of abuse. *See* Nicholas Castle, Jamie C. Ferguson-Rome, & Jeanne A. Teresi, *Elder Abuse in Residential Long-Term Care: An Update to the Research Council Report*, 34(4) J. Appl. Gerontol. 407, 429 (2015) [hereinafter *Elder Abuse in Residential Long-Term Care*]. Nursing facility staff also report abuse. In one study, over 50% of nursing facility staff admitted to subjecting older patients to physical violence, mental abuse, or neglect within the prior year. *See* Merav Ben Natan, Pat Matthews & Ariela Lowenstein, *Study of Factors That Affect Abuse of Older People in Nursing Homes*, Nursing Home Mgmt., Dec. 8, 2010, at 20-24.

National databases also provide an indication of the severity of abuse and neglect in nursing facilities. In 2012, state surveys—inspections mandated by federal regulations and used to determine whether facilities are in compliance with federal and state law—revealed that 12% of the facilities surveyed had been cited for causing actual harm to residents or putting them in immediate jeopardy, 3.1% for substandard care, 5.6% for use of restraints, and 13.9% for failure to prevent or treat bedsores. *2013 Compendium*, *supra*, at 51, 114, 126, 138. The complex challenges of collecting accurate data on the prevalence of abuse and neglect in nursing facilities means that these numbers, though unacceptably high, are only a small sample of a largely under-detected and under-reported problem. *See Elder Abuse in Residential Long-Term Care*, *supra*, at 429.

B. Federal and State Enforcement Efforts Have Failed to Effectively Remedy and Deter Abuse and Neglect in Nursing Facilities.

Nursing facilities are regulated on both state and federal levels with the goal of ensuring quality care. In particular, nursing facilities that receive federal funding must comply with the 1987 Omnibus Budget Reconciliation Act (OBRA) and its implementing regulations, which set forth minimum standards of care for long-term care facilities. *See* 42 U.S.C. §§ 1395i-3, 1396r (2012); 42 C.F.R. §§ 483.1 to 483.75 (2014). States are responsible for inspecting nursing homes to ensure compliance with these minimum standards of care. *See, e.g.*, Pa. Dep't of Health, *Long Term Care Survey Process*, http://goo.gl/1wqDgO (last visited May

19, 2015). Despite the mandatory nature of these requirements, the majority of facilities fail to comply with them. In 2010, for example, more than 93% of nursing facilities in the country were cited for violations of federal health and safety standards. *See* Charlene Harrington et al., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2005 Through 2010*, at 79 (Dep't of Soc. & Behavioral Scis., Univ. of Cal. San Francisco, 2011).

Federal and state regulatory enforcement efforts are inadequate to remedy the problem, as demonstrated by the fact that many nursing facilities, even after being cited by regulators, continue the practices that harm and sometimes kill residents. *See* U.S. Gov't Accountability Office, GAO-07-241, *Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents*, 5 (2007) [hereinafter *GAO Nursing Home Federal Enforcement Report*], *available at* http://www.gao.gov/products/GAO-07-241 (finding that almost half of the nursing facilities reviewed cycled in and out of regulatory compliance over a five-year period). In 2007, the GAO found that about 17% of nursing homes were cited for deficiencies that caused "actual harm or immediate jeopardy" to patients. *Id.* at 65. In another study four years later, the GAO found that the number of nursing facilities cited for the most serious deficiencies, referred to as "immediate jeopardy," had increased over the previous several years, particularly in for-profit and multi-facility chains. U.S. Gov't

Accountability Office, GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, at Highlights (2011), *available at* http://www.gao.gov/assets/330/321067.pdf. Yet, these reports reveal only a fraction of the care deficiencies because state surveys of compliance with federal quality standards repeatedly understate serious care problems. U.S. Gov't Accountability Office, GAO-08-517, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, 11 (2008), *available at* http://www.gao.gov/new.items/d08517.pdf. "From fiscal year 2002 through 2007, about 15 percent of federal comparative surveys nationwide identified state surveys that failed to cite at least one deficiency at the most serious levels of noncompliance—the actual harm and immediate jeopardy levels." *Id.*

Federal enforcement efforts have induced only temporary compliance and have "not deterred some homes from repeatedly harming residents." *See* U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 3, 9-16 (2007), *available at* http://www.gao.gov/new.items/d07794t.pdf. Almost half of the nursing facilities with past citations for serious quality problems "continued to cycle in and out of compliance, continuing to harm residents." *GAO Nursing Home Federal Enforcement Report*, *supra*, at 26. These facilities that

cycled in and out of compliance were cited for deficiencies such as inadequate treatment or failure to prevent pressure ulcers. *See id.* at 68.

Federal law mandates the most severe consequences for facilities that fail to timely remedy serious, longstanding, or repeated violations of federal quality of care standards. These consequences are exclusion from participation in Medicare or temporary suspension of reimbursement. *See* 42 C.F.R. §§ 488.412, 488.417 (2011). However, a 2006 report by the U.S. Department of Health and Human Services found that, for violations requiring a nursing facility's permanent exclusion from participation in Medicare, CMS failed to impose that mandatory sanction 55% of the time. *See* Office of the Inspector Gen., Dep't of Health & Human Servs., OEI-06-03-00410, *Nursing Home Enforcement: Application of Mandatory Remedies*, at i (2006), *available at* http://goo.gl/vsQJqn. For violations requiring temporary suspension of Medicare reimbursement, CMS failed to impose that mandatory sanction 28% of the time. *Id.* at ii. Even though these facilities often remedied the violations after the time for Medicare exclusion or payment suspension had expired, all those reviewed in a subsequent survey were found to have new instances of noncompliance that again required referral to CMS for enforcement action. *Id*.

Pennsylvania nursing facilities have also failed to comply with regulatory minimum standards of care. In the span of only three-and-a-half years (from July

8, 2011 to December 2014)[2] inspection reports showed that Pennsylvania's nursing facilities were cited for 11,006 deficiencies. *See* ProPublica, *Nursing Home Inspect: Pennsylvania*, http://goo.gl/AJ0lzb (last visited May 19, 2015) (raw data available at https://data.medicare.gov/data/nursing-home-compare). The vast majority of these deficiencies (10,156) involved the potential for more than minimal harm to the residents. *Id.*[3] A significant number of these deficiencies—253—were categorized in the higher severity levels, those that cause actual harm to residents. *Id*. In 2012 alone, Pennsylvania nursing facilities were cited 2,902 times and 43 of these citations were at the higher severity levels for actual harm to residents. *Id*. Yet, in the same year, the Pennsylvania Department of Health in conjunction with CMS issued only two penalties (provisional licenses). *See* Pa. Dep't of Health, *Long Term Care Survey Process*, *supra*, 6. Consistent with the national trend, in Pennsylvania there were many more citations for deficiencies than there were penalties. Nursing facilities know that they will most likely not face penalties for the most serious and persistent violations of the quality care

[2] These are the earliest and most recent dates for which inspection reports have been made available to the public by CMS.

[3] "Health inspections are based on federal regulations, which surveyors implement using national interpretive guidance and a federally-specified survey process. Federal staff train state surveyors and oversee state performance." Ctrs. for Medicare & Medicaid Servs., *Design for* Nursing Home Compare *Five-Star Quality Rating System: Technical Users' Guide* 5 (2015), *available at* http://goo.gl/3cf8P (describing the designations for severity and scope of deficiencies used by state surveyors).

standards, eliminating the coercive incentive to provide care that meets minimum standards and reasonably mitigates the risk of harm to vulnerable residents.

C. Private Negligence Actions Supplement Lax Federal and State Regulatory Enforcement.

Civil lawsuits against nursing facilities for negligence have complemented the regulatory enforcement system as a means to penalize violations of minimum care standards that harm residents and even cause their deaths. Indeed, the effectiveness of these lawsuits in punishing negligent nursing facilities led the nursing facility industry to successfully lobby state legislatures for caps on punitive damages in nursing facility neglect cases. *See* Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 Elder L.J. 331, 334 (2006) [hereinafter *Neglecting the Neglected*]. Despite the negative effect that limits on punitive damages and other "tort reforms" have on elderly and vulnerable victims of abuse and neglect, *see id.* 368-82, personal injury lawsuits continue to be filed against nursing facilities. The sheer prevalence and severity of neglect in nursing facilities and the historic and continued failure of state and federal governments to hold nursing facilities accountable creates an urgent need for nursing facility residents to use every tool of deterrence available to them.

II. Defendant Facilities Failed to Abide by Both Minimum Care Requirements and Pressure Ulcer Treatment Requirements, and Mr. Williams Was Entitled to Present These Requirements as Evidence of Negligence.

The Penn Center for Rehabilitation and Care and Manor Care of Yeadon were responsible for overseeing every aspect of Gardenia Williams' care while she resided at these facilities. In exchange for the right to participate in and be paid by publicly funded Medicare and Medicaid programs, these facilities committed to give each resident the best possible care and to meet the specific obligations under the nursing facility regulations. The gravamen of Mr. Williams' negligence claim is that the defendant facilities did not provide Mrs. Williams the services and treatment necessary to prevent the progression of and/or heal pressure ulcers. Mr. Williams sought to inform the jury of the regulations and interpretive guidelines that describe the necessary services and treatment, including:

> Based on the comprehensive assessment of a resident, the facility must ensure that -- (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing. 42 C.F.R. 483.25(c).
>
> Based on a resident's comprehensive assessment, the facility must ensure that a resident -- (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and (2) Receives a therapeutic diet when there is a nutritional problem. 42 C.F.R. 483.25(i).

See R.R. 2714a.

Mr. Williams also sought to introduce the content of federal interpretive guidance on the prevention and treatment of pressure ulcers. *See* R.R. 3211a (listing interpretive guidance for 42 C.F.R. 483.25(c) number F314). Various aspects of these interpretive guidelines are directly relevant to determining what nursing facilities are expected to do to treat pressure ulcers. For example, these guidelines state that:

- "Effective prevention and treatment are based upon consistently providing routine and individualized interventions."
- "[F]acility staff and practitioners should document clinically valid reasons why such interventions were not appropriate or feasible."
- "Repositioning is critical for a resident who is immobile or dependent upon staff for repositioning."
- "The care plan for a resident who is reclining and is dependent on staff for repositioning should address position changes to maintain the resident's skin integrity. This may include repositioning at least every 2 hours or more frequently depending upon the resident's condition and tolerance of the tissue load (pressure)."
- "The 1994 AHCPR Guidelines and current literature indicate that a clean pressure ulcer with adequate blood supply and innervation should show evidence of stabilization or some healing within 2-4 weeks. Evidence accumulating since 1962 indicates that management of wound exudate coupled with a clean, moist wound environment allows a chronic wound (e.g., pressure ulcer) to lay down healthy granulating tissue more efficiently."

Ctrs. for Medicare & Medicaid Services, Dep't of Health & Human Servs., Pub. 100-07 State Operations Provider Certification: Transmittal 5, *Revisions to Appendix P (Survey Protocols for Long Term Care Facilities) and Appendix PP (Guidance to Surveyors for Long Term Care Facilities)*, at 142-46, 150 (2004) (citations omitted), *available at* https://goo.gl/LF6Bwh (providing additional, detailed information about repositioning and pressure distribution as methods of preventing and treating of pressure ulcers).

Finally, Mr. Williams also sought to inform the jury that Pennsylvania law expressly incorporates these federal nursing facility regulations. *See* R.R. 3211a-3213a (providing judicial notice of various chapters of title 28 of the Pennsylvania Code, which incorporate, by reference, the federal requirements for long-term care facilities). These regulations help to form the standard of care in this negligence claim.

III. The Trial Court Committed Reversible Legal Error by Excluding the Substance of the Relevant Laws and Regulations That Set Minimum Care Requirements for Nursing Facilities and by Misleading the Jury Regarding Their Legal Significance in a Negligence Action.

A. State and Federal Laws and Regulations Setting Minimum Care Requirements for Nursing Facilities Are Admissible as Evidence of the Standard of Care and Breach of Duty.

Contrary to longstanding Pennsylvania common law permitting the use of laws and regulations as evidence of the standard of care and of negligence, the trial court did not permit the jury to hear the actual content of the federal and state laws

and regulations that Mr. Williams argued were part of the standard of care for treating pressure sores and were violated by defendant facilities. *See* R.R. 2705a-2707a. Pennsylvania courts have "uniformly held admissible … safety codes and regulations intended to enhance safety" as evidence of the standards of care and of breaches of such standards. *Brogley v. Chambersburg Eng'g Co*., 452 A.2d 743, 745-46 (Pa. Super. Ct. 1982) (admitting OSHA regulations as evidence of standard of care and violation of these regulations as evidence of breach of this standard); *accord Wood v. Smith*, 495 A.2d 601, 603-04 (Pa. Super. Ct. 1985). Pennsylvania courts have also applied this legal principle in cases alleging nursing facility negligence and involving the evidentiary use of federal nursing facility laws and regulations. Several state trial courts have permitted plaintiffs to use "the principles enunciated in the federal regulations … to prove that [a] defendant failed to conform to the standard of conduct … expected of a nursing home for the protection of its residents …under general principles of negligence." *See Frantz v. HCR Manor Care, Inc.*, 64 Pa. D. & C.4th 457, 469 (Pa. Ct. Com. Pl. 2003) (citing *Brogley*); *accord Laff v. Jewish Home of Greater Harrisburg*, No. 2009-cv-10920, 2012 Pa. Dist. & Cnty. Dec. LEXIS 131, *26-27 (Pa. Ct. Com. Pl. Aug. 14, 2012); *Gula v. Golden Hill Nursing Home, Inc.*, 24 Pa. D. & C.5th 300, 310 (Pa. Ct. Com. Pl. 2011).[4]

[4] Federal district courts have held similarly. *See, e.g.*, *George v. N. Health*

B. Without Access to All of the Relevant Evidence of What Constitutes the Nursing Facilities' Duty of Care to Their Residents, the Jury Was Unable to Fairly Evaluate Whether Defendants Breached Their Duty.

The trial court's instructions to the jury regarding federal and state regulatory requirements for nursing facilities and their legal effect in negligence actions were incomplete and misleading. "Where a charge is generally accurate, but misleads the jurors on a critical issue, a new trial should be granted." *Wood v. Smith*, 495 A.2d at 604 (citing *Hamil v. Bashline*, 392 A.2d 1280, 1289 (Pa. 1978)). In *Wood*, the plaintiff argued that the trial court erred in its instructions to the jury about negligence because it did not "explain the legal significance of government and industry standards which had been testified to during the trial." *Id.* at 603. Attempting to prove that a construction scaffolding accident was caused by the negligence of a contractor, the plaintiff introduced evidence that the scaffolding was not built according to the standards set by the Occupational Health

---

Facilities, Inc., No. 11-2234, 2011 U.S. Dist. LEXIS 78863, at *15-16 (E.D. Pa. July 20, 2011) (admitting failure to conform to federal nursing facility regulatory standards as evidence of negligence); *McNamee v. Cnty. of Allegheny*, No. 05-1536, 2007 U.S. Dist. LEXIS 59139, at *13-14 (W.D. Pa. Aug. 13, 2007) (same); *Guernsey v. Country Living Pers. Care Home(s), Inc.*, No. 3:cv-04-0423, 2006 U.S. Dist. LEXIS 31450, *39-40 (M.D. Pa. May 19, 2006) (same); *Ratmansky v. Plymouth House Nursing Home, Inc.*, No. 05-0610, 2005 U.S. Dist. LEXIS 5713, at *14-15 (E.D. Pa. Apr. 6, 2005) (same); *McCain v. Beverly Health & Rehab. Servs.*, No. 02-657, 2002 U.S. Dist. LEXIS 12984, at *2, *5 (E.D. Pa. July 15, 2002) (in a negligence claim involving a resident's death from complications from pressure ulcers, the court cited to federal and state nursing facility regulations as evidence of "a nursing home's tortious duty in these circumstances").

and Safety Act (OSHA) and the American National Standards Institute (ANSI). *Id.* In its charge to the jury, however, the court made no mention of the role that such regulations could play in setting the standard of care. *Id.* Specifically, the court did not instruct the jury that "evidence of OSHA regulations is admissible as a standard of care, the violation of which is evidence of negligence." *Id.* The Superior Court held that the jury charge was erroneous because it was "an insufficient explanation of the degree of care required by the defendants." *Id.* The Superior Court emphasized that, without considering these applicable regulations, "the jury may very reasonably have assumed that since the defendants were not required by law to adhere to the OSHA or ANSI standard[s], their failure to do so was irrelevant … [and might incorrectly assess the defendant's conduct] against that generally used in the trade and not against the more stringent OSHA and ANSI standards." *Id*. at 604.

The trial court's charge to the jury in this case suffered from the same defect as the erroneous charge in *Wood*—it did not provide an accurate explanation of the legal significance of federal nursing facility regulations in forming part of the relevant standard of care and, thus, in determining whether the nursing facilities were negligent. Consequently, the court misled and confused the jury on a crucial issue. *See Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1069 (Pa. 2006) ("Error in a charge is sufficient ground for a new trial if the charge as a

whole is inadequate or not clear or has a tendency to mislead of confuse rather than clarify a material issue."). The trial court charged the jury as follows:

> Any hospital or long-term care rehabilitation center by providing its services for compensation to the public is under the duty to provide a certain level of care to its patients. This level of care is the care that would normally be provided by a reasonably careful and prudent medical facility, that is the standard of care in Pennsylvania. If a health care facility fails to provide this appropriate standard of care, it is negligent…
> ….
> Now, the standard of care is not strictly defined by any particular law or guideline or regulation that any Governmental unit or particular entity publishes. Some of these have a variety of purposes. Some are to further the discussion on what is going on and suggest improvements. Some set goals and protocols. Some are there to give guidance to the practitioners, give guidance and suggestions. And with regard to some of the laws, and the laws are to warn certain institutions such as a long term nursing home as to what their responsibilities are to continue to receive Federal Medicare funds. It is important to note that OBRA Federal regulations that have been referred to were specifically designed to affect long term care.
>
> Now, although such sources of information do not set the standard of care however they, of course, can be considered by practitioners as to what might be appropriate, and they may be relied upon by experts in discussing what they believe an appropriate standard of care should be. The critical issues are … for a nursing home that provides long-term care, what should a reasonable and prudent and careful nursing home be offering to their patients in their nursing homes to competently care for them?

R.R. 2579a, at 141:6–143:22.

Like the jury in the *Wood* case, the jury in the instant case, after hearing this charge, may have reasonably believed that the nursing home

defendants were not required by law to adhere to federal regulatory standards and that any failure to do so was completely irrelevant. *See Wood*, 495 A.2d at 604. The charge characterized the federal laws and regulations as tools to "further the discussion," "suggest improvements," "set goals and protocols," "give guidance and suggestions," and "warn [nursing facilities] as to what their responsibilities are to continue to receive Federal Medicare funds." *See* R.R. 2579a, at 142:10-23. Though the trial court informed the jury that such regulations "can be considered by practitioners as to what might be appropriate, and they may be relied upon by experts in discussing what they believe an appropriate standard of care should be," in the very same sentence it told the jury that "such sources of information do not set the standard of care." R.R. 2579a, at 143:4-10 (emphasis added).

This particular part of the instruction is inaccurate, confusing, and misleading. The instruction is inaccurate because Pennsylvania law is clear that safety laws and regulations are admissible as evidence of standard of care and negligence. *See supra* Part III.A. The instruction is confusing because it is contradictory. It states that practitioners may use these regulations and guidelines to determine what care to give—in other words, that they may, in fact, inform the standard of care. The instruction is misleading because it discredits the testimony of Mr. Williams' expert

witness. The trial court essentially told the jury that if Mr. Williams' experts relied on these regulations and guidelines to determine the standard of care and to opine that the nursing facilities failed to meet the standard, they were wrong because "such sources of information do not set the standard of care." R.R. 2579a, at 143:4-5; *see also* R.R. 2577a, at 133:22-135:5 (charge on how to determine the value of expert witness testimony and how to choose among opposing expert opinions). Lastly, the instruction is confusing because it begs the question: If experts can rely on these regulations to opine on the standard of care owed by the facilities, how was the jury to know if the standard of care was met, given that they were not permitted to hear the substance of these regulations and interpretive guidelines?

The record is replete with such instances of error. For example, during pre-trial evidentiary hearings, the trial court excluded all expert deposition testimony which reflected questions and answers regarding knowledge of and the substantive contents of specific federal regulations and guidelines regarding prevention and treatment of pressure sores. *See, e.g.*, R.R. 738a-741a, at 22:15–25:8. During trial, the court sustained defense objections, excluded Mr. Williams' expert's testimony that would have detailed the applicable regulations and guidelines, and instructed the jury that, although the expert was entitled to rely on the regulations to form his

opinion, they did not constitute the standard of care. *See* R.R. 741a-746a, at 26:9-30:16; *see also* R.R. 2547a, at 13-14:14. The trial court also denied Mr. Williams' request to read the content of the applicable regulations and guidelines to the jury. *See* R.R. 2460a-2464a, at 212:16-216:3. Mr. Williams' request to discuss the content of the regulations and interpretive guidelines in closing argument was also denied. *See* R.R. 2509a-2513s, at 261:10-265:14; R.R. 2709a. During closing argument, the trial court sustained defense objections to the mere mention of laws and regulations, and specifically instructed the jury that federal and state laws and regulations do not play the same role in the "medical care field" as they do in other fields and that such laws and regulations "are not [the] mandatory standard of care for medical care facilities, unlike some other industries in the country." R.R. 2546a-2547a, at 12:8-15:24. The effect of all these evidentiary rulings and of the jury charge was that the jury was unable to consider regulatory nursing facility care standards even as a part of the standard of care in this negligence action. As a result, the jury could not properly assess the claims against the defendants. "The jury cannot determine whether a party is guilty of negligence or contributory negligence without knowing the degree of care required of that party." *Wood*, 495 A.2d at 603 (citing *Crotty v. Reading Indus.*, 345 A.2d 259 (Pa. Super. Ct. 1975)).

C. The Trial Court's Unduly Restrictive View of What Sources May Inform the Standard of Care in Nursing Facility Negligence Cases Fails to Account for Important Aspects of Nursing Facility Care That Render These Cases Legally Distinct from Traditional Medical Malpractice Cases.

The record reflects that the trial court saw this case as a pure medical malpractice case and failed to appreciate important realities in nursing facility care that render nursing facility negligence cases legally distinct from traditional medical malpractice cases. The trial court created a false dichotomy between government mandated standards of care and medical community standards of care. When deciding which charges to give the jury, the trial court stated:

> "Now, you know, it's a great thing that the Federal Government can, wants to clean up nursing home abuses, and wants to say to people, unless you follow this protocol we're going to bounce you out of the program, and you're not going to get any money. But that does not set the standard of care in the medical community.… [W]hen it comes to a medical malpractice suit, we do not establish the standard of care by reading Medicare regulations."

R.R. 2462a-2463a, at 214:22–215.

However, most cases against nursing facilities that are brought under medical malpractice statutes or common law doctrines involve neglect by nursing facility staff rather than by physicians. *See Neglecting the Neglected*, *supra*, at 383. This neglect often involves: failure of nursing facility staff to execute plans of care or perform activities consistent with the medically accepted standard for addressing a particular health issue or preventing deterioration; failure to supervise

and monitor residents; failure to assist in moving, transferring, or toileting; or failure to provide adequate food, clothing, medicine or medical care. *Id.* at 383 tbl. 10, 384-90. In other words, nursing facility negligence does not stem from medical error or mistake; instead, it is about failing to perform tasks that skilled nursing facilities are paid to perform and are required to perform by federal law. In this context, compliance with relevant nursing facility federal laws and regulations must be considered part of the standard of care against which nursing facilities are judged.

The trial court's opinion denying Mr. Williams' request for post-trial relief similarly embraces this false dichotomy. The trial court held, without any supporting citation, that federal and state laws and regulations governing nursing facilities "had nothing to do with the actual issue of the duty of care" and "were for government reimbursement purposes and not for standards of care." *Williams v. Penn Ctr. for Rehab. & Care*, No. 3790, 2015 Phila. Ct. Com. Pl. LEXIS 54, *18-20 (Pa. Ct. Com. Pl. Feb. 5, 2015). Based on this unsupported statement, the trial court denied Mr. Williams' request for relief.

CONCLUSION AND RELIEF SOUGHT

Abuse and neglect of vulnerable nursing facility residents is an all-too-common occurrence not effectively remedied or deterred by regulatory enforcement efforts. If left unaddressed, the epidemic of neglect and suffering in our nation's nursing facilities will worsen as America's rapidly aging population seeks long-term care services. In light of the aging population, continued high rates of nursing facility neglect, and failure of regulatory enforcement to deter and remedy such neglect, it is imperative that nursing facility residents and their families have meaningful access to all available avenues to redress violations of their rights and the resulting harm.

The trial court committed reversible legal error by excluding admissible evidence about minimum regulatory standards of care for nursing facilities that form part of the standard of care for the treatment of pressure ulcers, by failing to allow the jury to hear the content of these regulations, and failing to accurately explain to the jury their legal significance in the context of a nursing facility negligence claim. These errors denied Mr. Williams meaningful access to the civil justice system to redress neglect by those entrusted with his wife's complete care and which resulted in her death. For these reasons, this Court should reverse the trial court's decision and remand for a new trial during which the jury may consider all admissible evidence relevant to Mr. Williams' claims.

Date: May 22, 2015.

Respectfully submitted,

/s/*Iris Y. González*
Iris Y. Gonzalez
Counsel for AARP
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-6289
igonzalez@aarp.org
Texas Bar No.: 24042545
D.C. Bar No.: 987156

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Amicus Curiae Brief of AARP in Support of Plaintiff-Appellant were served on this 22nd day of May, 2015, by certified mail, return receipt requested, upon each of the following, which service satisfies the requirements of Pa.R.A.P. 121:

Rhonda Hill Wilson
Law Office of Rhonda Hill Wilson, PC
1500 John F. Kennedy Blvd., #820
Philadelphia, PA 19102-1737
Tel. (215) 972-0400
Plaintiff-Appellant, Thomas Williams, Admin. of Estate of Gardenia Williams, Deceased

Joseph Raymond Viola
Joseph R. Viola, P.C.
150 S. Independence Mall W.
Philadelphia, PA 19106-3410
Tel. (215) 825-5080
Plaintiff-Appellant, Thomas Williams Admin. of Estate of Gardenia Williams, Deceased

Kathleen M. Kramer
Marshall, Dennehey, Warner, Coleman & Goggin, PC
2000 Market Street, #2300
Philadelphia, PA 19103-3231
Tel. (215) 575-2618
Defendants-Appellees Hospital of the University of Pennsylvania and Trustees of the University of Pennsylvania

Thomas Mark Savon
Christine Renee Guiliano
Naulty, Scaricamazza & McDevitt, L.L.C.
1617 John F. Kennedy Blvd., #750
Philadelphia, PA 19103-1818
Tel. (215) 568-5116
Defendant-Appellee, Penn Center for Rehabilitation and Care

Maria R. Granaudo Gesty
Burns White, LLC
1001 Conshohocken State Road, #515
West Conshohocken, PA 19428-2908
Tel. (484) 567-5718
Defendants-Appellees Manor Care of Yeadon, LLC, and Manor Care Inc. d/b/a Manor Care Health Services

/s/ *Iris Y. González*
Iris Y. González
AARP Foundation Litigation