

**BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF
HEALTH**

IN THE MATTER OF:

**FOXBRIDGE ASSISTED LIVING AND
MEMORY CARE
2180 MANGUM ROAD
MEMPHIS, TN 38134**

License No. #15

Docket No. 17.17-154528J

AGREED SETTLEMENT ORDER

Comes now the Division of Health Care Facilities (hereinafter "**Division**") of the Tennessee Department of Health (hereinafter the "**Department**"), by and through the Office of General Counsel, and **FOXBRIDGE ASSISTED LIVING AND MEMORY CARE** (hereinafter "**Foxbridge**"), by and through its legal counsel, and hereby stipulate and agree to the following, subject to approval by the Commissioner of the Department of Health:

I. Authority and Jurisdiction

1. The Board for Licensing Health Care Facilities (hereinafter "the Board") has the power to license and regulate assisted care living facilities pursuant to Tenn. Code Ann. § 68-11-202.
2. Tenn. Code Ann. § 68-11-210 provides that the Department shall conduct on-site inspections and investigations as may be necessary to safeguard and ensure at all times, the public's health, safety, and welfare.
3. The Commissioner of the Department of Health ("Commissioner") has authority to suspend the admission of new residents to any facility or licensee in those cases where the Commissioner has a factual basis upon which to believe that the conditions in any such

that, "Resident #1 was found outside on June 6, 2018 dehydrated and unresponsive. It is reported that Resident #1's assisted care living facility left him outside in the heat. It was 102 degrees outside."

24. The Department is prepared to present evidence that upon arrival at the local hospital, Resident #1 had a body temperature of over one hundred degrees (100) and was diagnosed with heat stroke and dehydration.
25. The Department is prepared to present evidence that Resident #1 was admitted to the hospital with a diagnoses of dehydration and heat stroke.
26. The Department is prepared to present evidence that the facility could not provide documentation as to how long Resident #1 had been outside in the sun.
27. The Department is prepared to present evidence that the facility had a "Code Orange" on June 6, 2018, which indicated a heat advisory was in effect for residents.
28. The Department is prepared to present evidence that the facility did not train all facility staff on "Code Orange" policies during a Heat-Advisory In-Service.
29. Based on interviews and medical record review from the August 20-22, 2018 survey, the surveyor substantiated the allegations made in the complaint and cited the facility for failure to provide a safe environment for Resident #1.
30. The Department contends that Commissioner's Suspension of Admissions was valid, as the statutory authority which allowed the Commissioner to suspend admissions in assisted care living facilities took effect on July 1, 2018. The survey in this matter did not take place until August 20-22, 2018. After completing its investigation, the Commissioner timely suspended admissions in this matter on September 6, 2018.

facility or licensee are, or are likely to be, detrimental to the health, safety, or welfare of a patient or resident. (Tenn. Code Ann. § 68-11-252(a).)

4. The Commissioner may suspend admissions pending a prompt hearing before the Board, or an administrative judge if the Board cannot be convened promptly. (Tenn. Code Ann. 68-11-252(b).)
5. Pursuant to Tenn. Code Ann. § 68-11-252(c), the Commissioner shall initiate a suspension of admissions by delivering to the facility or licensee a notice stating the Commissioner's decision to suspend the admissions of new patients. The Commissioner's notice to suspend admissions must:
 - (1) Detail what conditions are considered detrimental to the health, safety, or welfare of the patients;
 - (2) Provide an explanation of the specific time frame when and conditions under which the facility or licensee can reasonably expect the suspension to be lifted; and
 - (3) Be received by the facility or licensee within ten (10) business days of the conclusion of the Department's survey.
6. Pursuant to Tenn. Code Ann. § 68-11-252(d), within ten (10) business days of the conclusion of the Department's investigation, the Department shall also mail to the facility or licensee the Commissioner's order, which shall:
 - (1) Detail the alleged facts and pertinent law with particularity; and
 - (2) Inform the facility or licensee of its right to contest the action.
7. The Commissioner's suspension of admissions shall take effect on the next calendar day following the order provided to the facility or licensee, as provided for in subsection (d).
Tenn. Code Ann. 68-11-252(e).

8. Any facility or licensee subject to a suspension of admissions by the Commissioner has the right to contest the factual or legal basis for a suspension of admission imposed against it through a prompt contested case hearing before the Board, or an administrative judge if the Board cannot be convened promptly. Tenn. Code Ann. § 68-11-252(f).
9. All contested cases pursuant to Tenn. Code Ann. § 68-11-252(f) shall be conducted according to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, part 3, and shall be heard within thirty (30) days of the facility's or licensee's request for a contested case, unless otherwise agreed to by both parties. Tenn. Code Ann. § 68-11-252(g).
10. An order in all cases contesting a suspension of admissions shall be issued within ten (10) business days after the hearing contesting the suspension of admissions, regardless of whether the hearing is conducted before the Board or an administrative judge. The order must determine whether the suspension of admissions was initially valid and whether conditions at the facility or licensee continue to be detrimental to the health, safety, or welfare of a patient or resident to justify the continuation of the suspension of admissions if not previously lifted. Tenn. Code Ann. § 68-11-252(h).
11. The Commissioner is authorized, at any time prior to a hearing, based on information presented to the Commissioner showing that such conditions have been and will continue to remain corrected, to revoke the suspension of admissions. Tenn. Code Ann. § 68-11-252(i).
12. Within ten (10) days of receiving the Commissioner's order to suspend admissions, any facility or licensee for which admissions have been suspended pursuant to this section shall submit a corrective action plan to the Board delineating the measures to be taken to address violations and associated time frames. If it is deemed by the Board to be necessary to ensure the health, safety, and welfare of patients or residents, the Commissioner may require any

facility or licensee for which admissions have been suspended to take all necessary actions to correct violations immediately. The Board may also set a lesser time frame than ten (10) days for the facility or licensee to submit a corrective action plan when it deems necessary to ensure the health, safety, and welfare of residents. Tenn. Code Ann. § 68-11-252(j).

- 13. If the facility or licensee asserts that it has corrected the underlying conditions upon which the suspension of admissions is based, or if the facility or licensee complies with the conditions for the suspension to be lifted as set forth in the Commissioner's order, the Department shall verify such corrections, after receiving notice and evidence of such corrections from the facility or licensee, within fourteen (14) business days unless waived by the facility or licensee. Tenn. Code Ann. § 68-11-252(k).
- 14. Proceedings for disciplinary action against a facility are conducted in accordance with the Tennessee Administrative Procedures Act, Title 4, Chapter 5, of Tenn. Code Ann. Tenn. Code Ann. § 68-11-252(g) and Tenn. Comp. R. & Regs. 1200-08-25-.05(7).
- 15. Foxbridge, as any facility, in a disciplinary action is entitled to be represented by legal counsel, to personally appear before the Board, to present witnesses, to have subpoenas issued and to receive thirty (30) days' notice of the charges before being required to appear for a hearing.

II. Stipulations of Fact

The Parties agree and hereby stipulate to the following facts:

- 16. **FOXBRIDGE ASSISTED LIVING AND MEMORY CARE** at all times pertinent hereto, has been licensed as an assisted care living facility, having been issued license number 000000015 on November 18, 1998. The facility's license has a current expiration date of June

- 14, 2021.
- 17. Resident #1 entered into an agreement to reside at Foxbridge in November 2017 with diagnoses of atrial fibrillation, dementia, falls, hypertension, and peripheral vascular disease.
- 18. On or about June 6, 2018, Resident #1 was found sitting in a chair on the dock by the facility's small pond.
- 19. Resident #1 was unresponsive to all stimuli, but breathing. Resident #1 was brought into the facility and placed in front of a fan and bags of ice were placed on him. Emergency medical services were called.
- 20. A complaint survey was conducted by the Department on August 20-22, 2018.
- 21. On or about September 6, 2018, the Commissioner of the Department of Health suspended new admissions to Foxbridge and assessed a three thousand dollar civil monetary penalty (\$3,000.00) for failure to provide safety to Resident #1 while in the facility. A practice monitor was assigned to Foxbridge during the duration of the Suspension of Admissions.
- 22. On or about October 4, 2018, the Commissioner of the Department of Health lifted the Suspension of Admissions, as the deficiency had been corrected by Foxbridge, and the facility had returned to substantial compliance

III. Position of the Parties

The Parties agree that if a hearing were held in this matter, each side is prepared to present the following evidence:

A. THE DEPARTMENT'S POSITION

- 23. The incident involving Resident #1 took place on or about June 6, 2018. The Department did not receive a complaint regarding the facility until June 18, 2018 when Tennessee's Department of Human Services, Adult Protective Services ("APS") filed a complaint alleging

B. FOXBRIDGE'S POSITON:

Facts leading to the Suspension of Admissions at Foxbridge:

31. As an ACLF, Foxbridge does not provide medical services to its residents and is not legally authorized to do so (Tenn. Code Ann. § 68-11-201(4)). ACLF's provide contractually based living services for senior adults. A Plan of Care is established for each resident collaboratively with input and participation from the resident or the resident's legal representative, treating physician, or other licensed health care professionals. See Tenn. Comp. R. & Regs. 1200-08-25-.12(5)(a).
32. As an ACLF, Foxbridge cannot restrict its residents to limited areas of its facilities, thus Resident 1 was free to go outside whenever he chose to do so (Tenn. Code Ann. §68-11-201(4)).
33. On the afternoon of June 6, 2018 Resident 1 chose to go outside to sit in a chair on the dock by a small pond. Foxbridge records reflect Resident 1 was outside for approximately thirteen (13) minutes that afternoon. During that time, he was offered water on several occasions and encouraged to come inside. Foxbridge records reflect when Resident 1 was encouraged to go inside he "yelled at staff and told them to back off." Shortly after this exchange, Resident 1 became unresponsive and immediately was taken inside, cooled with ice and fans. An ambulance was called immediately, and he was taken to the local emergency room for further treatment.
34. As a result of this June 6, 2018 incident, the Tennessee APS sent an investigation letter to Foxbridge on June 13, 2018. Foxbridge responded immediately and provided all documents related to the incident and the records of Resident 1. The June 14, 2018 response letter to APS documents that Resident 1 was outside thirteen (13) minutes on the afternoon of June

6, 2018. APS took no further action following this response from Foxbridge.

The August 2018 Survey

35. The Department's stated reason for suspending admissions to Foxbridge was "failure to provide safety when in the ACLF". That decision was based upon the information gathered by the Department's surveyor in the August investigation of the June incident.
36. The surveyor conducted telephone interviews with two Foxbridge residential care assistants. One stated that she saw Resident 1 on the dock on the date of the incident and gave him some water. Another referred to a "code orange" and claimed none was posted the day of the June incident and she had never received training regarding it. Foxbridge would show that "code orange" was never a term used in its facility policies. Code orange is a term used by the National Oceanic and Atmospheric Administration (NOAA) and is a reference to air quality, not heat. For that reason, no assistant is trained regarding a code orange. Foxbridge would also show that it did have a heat advisory policy in place and its staff was trained on what to do in the event of a heat advisory. The heat advisory policy was followed on June 6.
37. During the investigation, the Department's surveyor was offered written records from June 6 to show the length of time Resident 1 was outside that afternoon. The surveyor declined to review such records stating they could have been altered. These same records had been submitted to APS seventy-five (75) days previously so the records could have been cross checked for accuracy.
38. Instead, the surveyor relied on hospital admission records which lacked eyewitness testimony because the incident occurred at the shift change and the assistant who was present when the EMS arrived did not possess all relevant facts. Specifically the statement

“apparently, he [Resident 1] was exposed to a lot of heat and was left for several hours, is what was being told to me” was provided by a care assistant who had just arrived at work and had not had time to learn all the facts due to the emergency situation.

39. It is also Foxbridge’s position that the investigation of the complaint should have taken place at or near the time of the incident and/or complaint, at which time the Department did not have the legal authority to suspend admissions. Thus, it is the position of Foxbridge that the survey was not properly conducted. If the complaint survey had been conducted timely and had it included all of the relevant records, and first-hand knowledge obtained at or near the time of the incident, the Commissioner would not have suspended admissions.
40. Notwithstanding the gap in facts and the delay, as a result of its August survey, the Commissioner suspended admissions at Foxbridge, pursuant to Tenn. Code Ann. § 68-11-252 *et. seq.* The Commissioner’s Order, along with a press release was issued to the public, stating that the facility had been cited for violations of Tenn. Comp. R. & Regs. 1200-08-25-.07(7)(a)(2), failure to provide safety to a resident while in the ACLF.

IV. Stipulated Grounds for Discipline

41. Foxbridge agrees to accept discipline based as a best interest agreement to resolve this matter. Specifically, Foxbridge agrees Resident #1 was hospitalized due to an injury sustained on Foxbridge property, but denies it violated statutes and/or rules, for which disciplinary action by the Board is authorized.
42. However, in order to avoid further litigation costs and to avoid further administrative action with respect to this cause, Foxbridge agrees to accept discipline based on a violation of Tenn. Comp. R. & Regs. Rule 1200-08-25-.07(7)(a)(2) the relevant portion of which reads as follows:

- (7) An ACLF shall provide personal services as follows:
 - (a) Each ACLF shall provide each resident with at least the following personal services;
 - (2) Safety when in the ACLF.

V. Stipulated Disposition

43. For the purpose of avoiding further litigation costs and administrative action with respect to this cause, Foxbridge agrees to the following:

The assessment of one (1) Type A civil monetary penalty in the amount of one thousand five hundred dollars (\$1,500.00). Payment shall be submitted to the following address within thirty (30) days of the effective date of this Order:

**Tennessee Department of Health
Division of Health Care Facilities
Attn: Eddie J. Stewart
665 Mainstream Drive, Second Floor
Nashville, Tennessee 37243**

Respondent agrees to pay outstanding practice monitoring fees in the amount of Two Thousand Six Hundred Sixty-nine Dollars and Eighty Cents (\$2,669.80) in full, pursuant to Tenn. Code Ann. § 68-11-221.

44. In addition to the foregoing, each party to this action hereto shall bear its own respective costs, expenses, and attorneys' fees with respect to the Appeal of the Suspension of Admissions and this Agreed Order.

45. Upon ratification by the Board, the parties agree to list this Agreed Settlement Order, including deficiencies and civil penalties pursuant to Tenn.Code Ann. § 68-1-114.

46. Each condition of discipline herein is a separate and distinct condition. If any condition of this Order, or any application thereof, is declared unenforceable in whole, in part, or to any

extent, the remainder of this Order, and all other applications thereof, shall not be affected. Each condition of this Order shall separately be valid and enforceable to the fullest extent permitted by law.

Upon the agreement of the parties, this **AGREED ORDER** is approved as a **FINAL ORDER** by the Commissioner of the Tennessee Department of Health, Dr. Lisa Piercey, and signed this 19th day of November, 2020.

ACCORDINGLY, IT IS ORDERED that the agreement of the parties does hereby become the Final Order of the Commissioner of the Department of Health.

APPROVED FOR ENTRY:

Lisa Piercey MD ^{VAN} 11.19.20
Lisa M. Piercey, M.D., M.B.A., FAAP
Commissioner, Tennessee Dept. of Health

Rob Wilson 11/20/20
Rob Wilson,
Administrative Judge

Rebecca Himes
Rebecca Himes, Administrator
Foxbridge Assisted Living & Memory Care
Respondent

11-17-2020
DATE

Martha M. Gentry
Martha M. Gentry
Attorney for Foxbridge
611 Commerce Street, Suite 2702
Nashville, TN 37203

11/17/2020
DATE

Barbara J. Perutelli
Barbara J. Perutelli *by permission*
Attorney for Foxbridge *LLC*
Schulman, LeRoy & Bennett, P.C.
3310 West End Avenue, Suite 460
Nashville, TN 37203

11/17/2020
DATE

Caroline R. Tippens
Caroline R. Tippens (BPR #080375)
Senior Associate General Counsel
Tennessee Department of Health
Office of General Counsel
665 Mainstream Drive, Second Floor
Nashville, Tennessee 37243
(615) 741-1611

11/17/2020
DATE

CERTIFICATE OF FILING

This Order was received for filing in the Office of the Secretary of State, Administrative Procedures Division, and became effective on the 19 day of November, 2020.

Stephanie Shackelford
Stephanie Shackelford, Director
Administrative Procedures Division

TN SOS-APD Thu, Nov 19, 2020 03:45 PM : 12 of 13 pages received

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon the Respondent, **Foxbridge Assisted Care Living Facility**, by and through its counsel, Martha M. Gentry, 611 Commerce Street, Suite 2702, Nashville, TN 37203, and Barbara J. Perutelli, Schulman LeRoy & Bennett P.C., 3310 West End Avenue, Suite 460, Nashville, TN 37203-7601 by delivering same in United States regular mail and United States certified mail, numbers 7018 3090 0002 0150 7942 and 7018 3090 0002 0150 7935, return receipt requested, with sufficient postage thereon to reach its destination.

This 20th day of November, 2020.

Caroline Tippens (with permission)
Caroline R. Tippens
Senior Associate General Counsel

TN SOS-APD Thu, Nov 19, 2020 03:45 PM : 13 of 13 pages received