

Holding nursing home corporate employers accountable for fraud

A case study

By Jennifer Fiore & Susan Kang Gordon

Clear and convincing evidence of fraud requires asking the right questions of the right people. That's what happened, which led to a jury in Alameda County unanimously finding fraud for each of the 10 nursing home residents and awarding nearly $8.9M in punitive damages.

And that's what led to the Court ordering injunctive relief post-verdict to stop chronic understaffing. The evidence was overwhelming that intervention was needed to protect the health, safety and rights of all nursing home residents at Parkview Healthcare Center in Hayward.

The case

In 2021, we had the privilege of trying the case of 10 nursing home residents in a four-month trial of three phases by Zoom. (*Ledesma, et al. v. Mariner Health Central, Inc., et al.* ("*Ledesma*").) We tried the case with Jody Moore before the Honorable Evelio Grillo.

The main claims were for neglect under the Elder Abuse and Dependent Care Act against Parkview Operating Company, LP ("Parkview") and Mariner Health Central, Inc. ("Mariner"), and violation of residents' rights under Health & Safety Code section 1430, subdivision (b) against Parkview.[1] We joined all residents together in one complaint, with the common theme of understaffing and overlapping common injuries, harms and rights violations.

Parkview is the facility licensee, while Mariner is the related corporation that administers, manages and operates the facility pursuant to a contract Mariner created. We presented evidence showing Mariner created Parkview, gave itself express authority to do whatever was necessary to fulfill Parkview's day-to-day operations, and gave itself control by requiring two senior Mariner employees sit on the Governing Body. The facility Administrator testified the Governing Body answered to Mariner.

Nursing homes that receive payments from Medicare and Medicaid are required to have a Governing Body. (42 CFR § 483.70.) The Governing Body is "legally responsible for establishing and implementing policies regarding the management and operation of the facility." (483.70(d).) The Governing Body appoints the administrator, who in turn reports to and is accountable to the Governing Body.

Mariner put the following two persons on the Governing Body: (1) its Chief Compliance Officer/Senior Vice President, who also served as President of Parkview; and (2) its Regional Vice President of Operations. Parkview's Administrator and Director of Nursing ("DON") were the other two members.



Another individual, Mariner's Chief Operating Officer and Executive Vice President, was responsible for ensuring the needs of the residents were met. He was responsible for staffing, created the staffing ladder (which predetermined the number of nurses on staff any given day), and set the budget for nurse staffing.

The jury heard that these same individuals were officers, directors and/or managing agents by virtue of their positions, roles on the Governing Body, ability to affect and/or change corporate policy and/or overall responsibilities. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567; *Marron v. Superior Ct.* (2003) 108 Cal.App.4th 1049, 1067-1068.)

Sufficient staffing requirements

Sufficient staffing is critical to meeting the residents' needs, and is governed by federal and state laws.[2] What we refer to as the subjective standard is guided by 42 U.S.C. section 483.35 – sufficient staff to all residents in accordance with resident care plans, and 22 C.C.R. section 72501(e) – adequate number of qualified personnel to carry out all the functions of the facility.

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In *Ledesma*, the parties stipulated that each resident had staffing-related rights. Under California Health & Safety Code section 1276.5, each resident had a right to a certain number of nursing hours per patient day ("NHPPD")[3], which we refer to as the objective standard. The State minimum is a floor, not a ceiling, since facilities are required to meet the residents' needs under the subjective standard.

In order to obtain enhanced remedies for elder abuse under Welfare & Institutions Code section 15657, we put on evidence of insufficient care issues and understaffing with recklessness, malice, oppression and fraud. The jury had to complete 10 separate special-verdict forms. For every neglect finding, the jury found recklessness and fraud. For every violation of residents' rights, the jury found fraud.[4]

Establishing fraud under section 3294

For purposes of Civil Code section 3294: "'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3, subd.(c).)[5] Under section 3294, there are several paths to establishing punitive damages for fraud against a corporate entity: (1) act(s) of fraud by one or more officers, directors or managing agents (i.e., "personally guilty"); (2) act(s) of fraud by one or more employees that was authorized or ratified by one of more officers, directors or managing agents; or (3) advance knowledge of the unfitness of an employee committing act(s) of fraud, and employing him or her with a conscious disregard of the rights or safety of others. Based on the substantial evidence of intentional misrepresentation, deceit and concealment, the jury in *Ledesma* found the first two paths.

We got there through evidence of direct acts and ratification by officers, directors and managing agents: those in charge engaging in the fraud and knowing the detrimental impact of understaffing, and investigating, but not disciplining or firing anyone, or changing policies. (See, e.g., *College Hospital Inc. v. Superior Ct.* (1994) 8 Cal.4th 704, 726). Consistent with *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908, 915, "maintaining a wrongdoer employee in the service of the employer" indicates the employer's "approval of the employee's course and with other acts will make the employer liable in punitive damages." (Citing *Edmunds v. Atchison, etc. Ry. Co* (1917) 174 Cal. 246, 249.)

Evidence of chronic understaffing

Without enough qualified staff, it was predicable that care plans would not get written or would be ignored and care needs would be neglected, such as wound care, turning and repositioning, showers and hygiene, assistance with feeding and hydration, monitoring for safety and to prevent falls, and giving psychotropic medications without proper informed consent.

Plaintiffs' nursing home administrator expert, Christopher Cherney, did a thorough review of Defendants' various staffing documents. He found that the nursing home did not meet the objective standard, the State minimum NHPPD, for 328 days over a three-year period.

Parkview and Mariner also failed to provide adequate nurse staffing to their residents under the subjective standard. Geriatric medical expert, Dr. Kathryn Locatell, testified that Parkview's overall population had very high needs given their health conditions (acuity level), which were time-consuming – and needs were being unmet. She opined the failure to provide adequate staffing to the 10 residents was the root cause of the harm to each and violation of their rights.[6]

The staffing fraud

Mariner and Parkview worked together to submit fraudulent timecards and payroll records to make it appear they met staffing requirements when they did not. The extensive evidence on understaffing included:

- Mariner was responsible for reviewing Time Clock Correction Forms submitted by Parkview on a daily basis.
- Parkview employees were required to clock in and out of work and in and out from lunch, a total of four punches. Employees were required to complete the Time Clock Correction Form each time a punch was missed so that Mariner could manually enter the time into the time-keeping system.
- Parkview and its employees were required to put the reason for each missed punch, and have the form signed by the employee, supervisor and facility administrator to "verify" the employee actually worked and provided direct patient care.
- From 2017 to 2020, at least 9,305 Time Clock Correction Forms submitted by Parkview to Mariner contained deficiencies – missing signatures and reasons for missed punches.[7]
- Mariner reviewed these defective forms, then manually entered the data "verifying" the employees had worked. Mariner then submitted required Payroll Based Journal ("PBJ") data to the federal government attesting that these employees actually worked.
- Cross-referencing other staffing documents, such as the daily State nursing sign-in sheets (530 Forms) and daily nursing room assignments, names of those same employees could not be found.
- Mr. Cherney testified that after reviewing several complete data sets of staffing-related documents, he found a pattern where Mariner reported to the government Parkview employees worked when the documents were overwhelmingly convincing they did not work.[8]
- During deliberations, the only read-back the jurors requested was on these staffing documents. It was clear from read-back that Defendants failed to present any evidence that these individuals

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did in fact work on the days they said they did; and failed to explain why thousands of defective forms were submitted by Parkview, approved and used by Mariner in reporting staffing hours to the government.

Asking the right questions of the right people

The evidence showed Parkview and Mariner's officers, directors and/or managing agents used fraudulent Time Clock Correction Forms to inflate their NHPPD figures, and knew harm could result if the facility was understaffed. The prime example of questioning is that of one witness who was able to bind both entities, Mariner's Chief Compliance Officer, Senior V.P, who also served as President of Parkview.

Here are some of the key questions on understaffing and ratification:

Q. You do know, true, Parkview has to have a sufficient number of staff to meet the residents' needs in order to avoid physical harm and mental suffering of residents?
A. I know we certainly need to have the required requisite staff, yes. If that's what you're asking, yes.
Q. You know you need sufficient staff to protect residents from health and safety hazards?
A. We certainly strive to have sufficient staff, absolutely. Unfortunately, things happen, but yes, that is important.
Q. To protect the residents is why it's important; right?
A. It's for a variety of reasons, that being one.
Q. And do you agree that without sufficient staff, needs of the residents may go unmet?
A. From my professional judgment, it would be speculation in that we would certainly like to think it didn't cause harm, but of course the potential is there, which was your question.
Q. You've testified that you looked into or investigated the ten claims of the Plaintiffs, true?
A Yes, I did review them.
Q. Are you aware of anyone at Mariner being fired or disciplined after you concluded your investigation?
A. Not to my knowledge. Not to my recall.
Q. And are you aware of anyone at Parkview being fired or disciplined after you conducted your investigation?
A. Not to my recollection, no.

Conclusion

How did we get to the fraud findings? We got to the end result because of planning on the front end. Throughout pretrial depositions, we asked a series of questions to uncover evidence of understaffing from all staff members – from the nursing assistants to the DON – and punitive conduct and ratification from those in charge. The jury heard many of those same questions at trial and held the Defendants accountable for fraud.

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Endnotes

[1] The statute by its own wording applies only to the facility licensee.

[2] While we presented multiple bases of fraud including Minimum Data Set/5-Star Medicare and State of California Survey Fraud, this article focuses on staffing.

[3] California required 3.2 NHPPD through June 30, 2018, and 3.5 NHPPD from July 1, 2018 to present.

[4] In order to avoid any potential $250,000 cap on wrongful death damages, we requested a question on the verdict form whether the Defendants engaged in recklessness, malice, oppression and fraud and malice and oppression in the neglect, which was a substantial factor in causing the deaths of two of the ten residents. The jury found all four.

[5] Establishing a fraud as a cause of action (Civ. Code, § 1710) is different than establishing fraud for purposes of punitive damages. Detrimental reliance is not required under section 3294. (See, e.g., *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 369.)

[6] The jury returned unanimous findings of rights violations for all 10 and neglect for eight.

[7] This does not even count the entire period since Defendants did not produce forms for nine months in 2019…we've always wondered what those really show.

[8] For instance, Mr. Cherney compared the payroll data in the Key Factor Reports to the data in the Payroll Based Journal submitted to the federal government for 2017-2019, a total of 1,072 days. On 593 out of 1072 days (55%), there were different hours reported, even though they should match.

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