

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

Conservatorship of the Person and  
Estate of REBA GREGORY.

CHRISTINE SANDAHL, as Conservator,  
etc.,

Plaintiff and Appellant,

v.

BEVERLY ENTERPRISES, INC., et al.,

Defendants and Appellants.

C030074, C030733

(Super.Ct.No. 53756)

APPEALS from a judgment and an order of the Superior Court of the City of Yreka, County of Siskiyou, James E. Kleaver, Judge. Affirmed in case No. C030074, and reversed in part and remanded in case No. C030733.

Eisen & Johnston, Luce, Forward, Hamilton & Scripps, Jay-Allen Eisen, Christopher J. Healey, and Michael D. Thamer for Plaintiff and Appellant.

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, the introduction (first six paragraphs) and part I-B (Jury Instructions) of this opinion are certified for publication.

Gibson, Dunn & Crutcher, Kevin S. Rosen, Rory M. Hernandez, David Pendarvis, Theodore B. Olson, Theodore J. Boutrous, Jr., and Nancy E. Hudgins for Defendants and Appellants.

On January 31, 1995, 66-year-old plaintiff Reba Gregory broke her hip and shoulder in a fall at Beverly Manor, a nursing home in Yreka. Gregory, through her daughter and conservator, Christine Sandahl, sued defendants Beverly Enterprises, Inc. (BEI), Beverly Enterprises-California, Inc., Beverly Health and Rehabilitation Services, Inc. (BHRS), and Chuck Williams for elder abuse under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (Elder Abuse Act), negligence, and fraud. Her complaint sought compensatory damages, punitive damages, and attorney fees.<sup>1</sup>

The jury returned special verdicts in favor of Gregory on all three causes of action, and found defendants acted with malice, oppression, or fraud with respect to the claims of elder abuse and fraud. It awarded Gregory \$365,580.71 in compensatory damages, and \$94,720,450 in punitive damages.

On defendants' motion, the court conditionally granted a new trial unless Gregory accepted reduction of compensatory

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<sup>1</sup> We will refer to the corporate defendants collectively as "Beverly." The court granted the motion for nonsuit filed by defendant Beverly Enterprises-California, Inc., at the close of Gregory's case, and that entity is not a party to this appeal.

damages to \$124,480.57, and reduction of punitive damages to \$3 million. Gregory accepted the remittitur. The court then awarded Gregory attorney fees in the amount of \$517,927.50 under the Elder Abuse Act.

In these consolidated appeals, defendants appeal: (1) in case No. C030074 from the judgment on special verdict, and the court's rulings on their motions for partial judgment notwithstanding the verdict and for new trial; and (2) in case No. C030733 from the court's ruling on Gregory's application for attorney fees and costs. Gregory cross-appeals on the issue of attorney fees and costs.

On their part, defendants argue: (1) they are entitled to judgment as a matter of law, or a new trial, on the elder abuse claim; (2) they are entitled to judgment as a matter of law on the fraud claim; (3) there is no clear and convincing evidence of malice, oppression, or fraud to support punitive damages; (4) the punitive damage award is excessive under state and federal law; (5) jury misconduct, prejudicial media coverage, evidentiary and instructional errors, and cumulative error require a new trial; and (6) Gregory is not entitled to attorney fees under any theory. On cross-appeal, Gregory contends: (1) she is entitled to either statutory or contractual attorney fees; and (2) the court erred in denying compensation for the cost of paralegals and other litigation support.

With respect to defendants' appeal in case No. C030074, we affirm the judgment. In Gregory's cross-appeal in case

No. C030733, we reverse the order denying compensation for paralegal fees, and remand the matter for proceedings consistent with this opinion. In all other respects, the order is affirmed.

#### FACTUAL BACKGROUND<sup>2</sup>

Gregory entered Beverly Manor on June 18, 1993, after suffering a severe stroke which left her partially paralyzed and semi-comatose. She also required medical care for diabetes, coronary artery disease, and heart arrhythmia. Although Gregory's initial prognosis was not good, she showed marked improvement after several months of nursing and rehabilitative care. Gregory eventually participated in

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<sup>2</sup> Defendants' introductory statement of facts and later references to the record in support of their claim of insufficiency of the evidence were limited to facts supporting their contentions on appeal. "[Defendants] thus violated the California Rules of Court, rule 13, which provides in pertinent part that an appellant's opening brief 'shall contain a statement of the case, setting forth concisely, *but as fully as necessary for a proper consideration of the case* . . . [and] a summary of the material facts.'" (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 847, fn. 2, emphasis in original.) Experienced counsel is, no doubt, aware that violation of rule 13 may result in waiver of any claim of insufficiency of evidence. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 565; *Dietrich v. Dietrich* (1964) 226 Cal.App.2d 650, 652; *Schaefer v. Berinstein* (1960) 180 Cal.App.2d 107, 123, disapproved on other grounds in *Jefferson v. J. E. French Co.* (1960) 54 Cal.2d 717, 719-720.) We draw this factual background largely from the detailed statement of facts provided by Gregory.

social activities at Beverly Manor, including bingo and volleyball.

The admission agreement stated Beverly Manor agreed to abide by the Patient's Bill of Rights. The admission agreement booklet set forth nursing home patients' rights under federal and state law, and referenced other rights specified in Health and Safety Code section 1599.1.<sup>3</sup>

In August 1993, more than 20 members of Beverly Manor's nursing staff wrote a letter to Beverly's corporate management describing problems with understaffing, and insisting that more certified nurse's assistants (CNA's) were "desperately" needed. The letter continued: "We are overworked and overstressed. We can not [sic] provide the care we were trained to give. We are jeopardizing the safety of our residents as well as our own. Due to our workload there is not enough time to use gait belts, glove-up or wash hands between patients. It is a matter of time before a tragedy occurs that may have been preventable. . . . This is a crucial matter and should not be ignored."

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<sup>3</sup> Health and Safety Code section 1599.1 reads in part: "Written policies regarding the rights of patients shall be established and shall be made available to the patient, to any guardian, next of kin, sponsoring agency or representative payee, and to the public. Those policies and procedures shall ensure that each patient admitted to the facility has the following rights and is notified of the following facility obligations, in addition to those specified by regulation: [¶] (a) The facility shall employ an adequate number of qualified personnel to carry out all of the functions of the facility. . . ."

Beverly sent Julia Halladay, its human resources consultant in Sacramento, to investigate. Halladay found that Beverly Manor employees were working in short staffing conditions, turnover was inexplicably high, and employees were talking about a union. The administrator, Wayne Barney, told her "staffing is at a 'crisis point.'"

Barney hired Mary Keller as social services director at Beverly Manor in June 1993. Keller talked regularly with patients and the facility's ombudsman about patient care. A survey showed that more than 60 percent of the confirmed complaints were due to lack of adequate staffing. Patients cited results of understaffing which included the failure to respond to call lights in a timely manner or take patients to the bathroom as often as they needed. Patients were frequently left to lie in their own urine and feces.

Beverly terminated Barney in October 1993, and defendant Chuck Williams became administrator almost a year later. Keller continued to receive complaints about understaffing. She testified Beverly Manor was understaffed approximately 70 percent of her four-year tenure. CNA's also documented the chronic lack of staff through the fall of 1994 and after.

The California Department of Health and Human Services investigated Beverly Manor on several occasions between 1992 and the end of 1994. In a March 1993 survey, the department found that: (1) seven of fourteen patients examined were

suffering from decubitus ulcers;<sup>4</sup> (2) nine patients who were to be ambulated daily were not; and (3) one resident went thirteen days without a shower. An April 1994 survey also found inadequate patient care that resulted from understaffing. The Department of Health and Human Services issued notices of deficiency to Beverly Manor in May, June, and July 1994.

Gregory herself suffered from medical conditions related to inadequate staffing. She was free of bedsores when she moved to Beverly Manor in June 1993 following her stroke. However, bedsores developed within three months. In spite of doctor's orders that the bedsores be treated and Gregory repositioned every two hours "without fail," the bedsores persisted from July 1993 until April 1994, and from August 1994 to the date of her injury. Gregory was also suffering from a urinary tract infection (UTI) at the time she fell. Gregory's doctor testified that although Gregory was prone to UTI before she entered Beverly Manor, factors such as soiled linens, inadequate bathing, and the failure of a caregiver to change gloves after treating an incontinent patient contributed to the condition.

On November 9, 1994, Chuck Williams discussed patient care and staffing at a charge nurse meeting. A summary of the

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<sup>4</sup> Decubitus ulcers, commonly known as "bedsores," develop from pressure on the skin. They can be avoided in nursing homes by repositioning the patient every couple of hours.

meeting included the following admonitions: "We are still getting complaints that we are sending residents to the [doctor] and hospital and church . . . when they still need grooming and personal hygiene. THIS MUST STOP. Our reputation, and your future job security[,] is leaving with those residents. I don't want to see appointment[s] cancelled, but I would rather that happen than have the community observe that we are neglecting our residents. . . . It is a matter of dignity for our residents. . . . [¶] . . . [¶] . . . Several residents are complaining that there wasn't enough staff. This has to come from over hearing [sic] staff talk about it. NEVER NEVER let anyone other than Beverly Associates hear about our staffing situation. First, we have never been below the required 3.2 WAH [weighted average hours]. We can provide their care, and if there is a staffing need that is for us to problem solve. Residents should NEVER have to worry about those things. . . ."

Gregory fell around 11 a.m. on January 31, 1995, while CNA Freida Pease was getting her up for the day. Williams had issued instructions that all patients were to be out of bed by 11 o'clock in the morning, and Pease felt pressured to comply.

Pease found Gregory wet, and had to move her from the bed to the bathroom to be cleaned up. Pease could not move Gregory easily without help. Gregory weighed approximately 160 pounds, and could not walk. The stroke had left her paralyzed on the left side, and she had poor balance. Gregory

had recently resumed taking Prozac which had side effects of dizziness and imbalance. However, Pease did not have time to review Gregory's history or current condition, and did not know about the Prozac.

The CNA's were instructed that at least two people were required to move Gregory, and Pease knew she needed help. Her teammate CNA Deborah Cook was busy in the shower room with another patient. Although Pease realized it was unsafe to move Gregory alone, she had done it before using a device called a "gait belt." She also knew it was safest to put the belt on while the patient was lying down, but faster if the patient was sitting on the edge of the bed.

On the morning of January 31, Pease sat Gregory on the edge of the bed. Before Pease was able to attach the belt, Gregory fell to the floor, lacerating her forehead, and breaking her right shoulder and hip.

There were various explanations for the accident. Immediately after Gregory fell, Pease told social services director Keller that she had tried to find someone to help her move Gregory, "and she couldn't find anybody, so decided to do it on her own because she had done it before, and it just didn't work out right this time." Notes made by the Department of Health and Human Services investigator indicate Gregory fell while Pease was trying to move her without help. Beverly Manor notified Sandahl that her mother had fallen off the bed while they were in the process of putting her in a shower chair, and that is what Beverly Manor reported to the

Department of Health and Human Services. Pease later denied trying to move Gregory alone, and gave different versions of what occurred. First, Pease stated that after she placed Gregory in a sitting position on the bed, she went to find help, and Gregory fell while she was out of the room. Second, Pease said that after she sat Gregory on the edge of the bed, she glanced toward the door to see if her teammate Cook might be passing by, and Gregory "just fell" when Pease looked away.

We will describe additional facts as they relate to the specific issues raised in these appeals.

## DISCUSSION

### I

#### Elder Abuse

Contrary to defendants' characterization of this case as "an unfortunate but simple slip and fall," elder abuse was a central theme in the pleadings and at trial, and understaffing the key factual issue to be determined by the jury. The jury found that: (1) defendants abused Gregory on January 31, 1995; (2) the abuse was a cause of her injury; (3) by clear and convincing evidence, defendants were guilty of oppression, malice, or fraud in the conduct on which it based its finding of elder abuse; and (4) by clear and convincing evidence, defendants were guilty of reckless neglect in the conduct upon which it based its finding of elder abuse.

On appeal, defendants contend they are entitled to judgment as a matter of law because the Elder Abuse Act does not apply to claims based on professional negligence, and

there was no substantial evidence to support the jury's special findings. Alternatively, they argue they are entitled to a new trial because the court's instructions on elder abuse were improper.

The California Supreme Court rejected defendants' principal legal argument in *Delaney v. Baker* (1999) 20 Cal.4th 23, 32, 34, 41 (hereafter *Delaney*), holding that "the acts proscribed by [Welfare and Institutions Code] section 15657 do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence." (*Id.* at p. 32.) We, in turn, reject defendants' challenge to the jury instructions and sufficiency of the evidence of elder abuse. Given this resolution of the elder abuse claim, we also conclude there was no error in awarding Gregory attorney fees pursuant to Welfare and Institutions Code section 15657.

A. The Elder Abuse Act:

Defendants properly describe the 1982 Elder Abuse Act as "essentially a reporting statute." (Welf. & Inst. Code, §§ 15600, subd. (i), 15601.) However, the Legislature's 1991 amendments to the Elder Abuse Act included incentives which shifted its focus to private, civil enforcement of laws against elder abuse and neglect. (*Delaney, supra*, 20 Cal.4th at p. 33.) At the time of the alleged abuse of Gregory on January 31, 1995, Welfare and Institutions Code section 15657 provided:

"Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in subdivision (c) of Section 15610, neglect as defined in subdivision (d) of Section 15610, or fiduciary abuse defined in subdivision (f) of Section 15610, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:

"(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term 'costs' includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

"(b) The limitations imposed by subdivision (c) of Section 573 of the Probate Code on the damages recoverable shall not apply.<sup>[5]</sup> However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.<sup>[6]</sup>

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<sup>5</sup> Former Probate Code section 573, subdivision (c) provided that damages for pain, suffering, or disfigurement do not survive the death of the person having a cause of action. The provision now appears without substantive change as Code of Civil Procedure section 377.34.

<sup>6</sup> As part of the Medical Injury Compensation Reform Act (MICRA), Civil Code section 3333.2, subdivision (b) limits damages for noneconomic losses to \$250,000 in actions for injury against health care providers. (Stats. 1975, Second Extra. Sess., ch. 1, § 1, p. 3949, ch. 2, § 1.191, p. 3991.)

"(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.[7]"

The Legislature amended and renumbered definitions under the Elder Abuse Act in 1994. (Stats. 1994, ch. 594, § 3.) Under Welfare and Institutions Code section 15610.07, it defined "Abuse of an elder or a dependent adult" as "physical abuse, neglect, fiduciary abuse, abandonment, isolation, or other treatment with resulting physical harm or pain or mental suffering, or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering."

Amended Welfare and Institutions Code section 15610.63 defined "physical abuse" as violation of various sections of the Penal Code, "[u]nreasonable physical constraint, or

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<sup>7</sup> Civil Code section 3294, subdivision (b) states: "An employer shall not be liable for [punitive] damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

prolonged or continual deprivation of food or water," or the improper use of physical or chemical restraints or psychotropic medications.

As amended, Welfare and Institutions Code section 15610.57 defined "neglect" as "the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care which a reasonable person in a like position would exercise. Neglect includes, but is not limited to, all of the following:

"(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

"(2) Failure to provide medical care for physical and mental health needs. . . .

"(3) Failure to protect from health and safety hazards.

"(4) Failure to prevent malnutrition."

"Fiduciary abuse" was defined in Welfare and Institutions Code section 15610.30 as "a situation in which any person who has the care or custody of, or who stands in a position of trust to, an elder or a dependent adult, takes, secretes, or appropriates their money or property, to any use or purpose not in the due and lawful execution of his or her trust."

*Delaney* explained that to obtain the remedies provided in Welfare and Institutions Code section 15657, "a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or

'conscious' wrongdoing of a 'despicable' or 'injurious' nature." (*Delaney, supra*, 20 Cal.4th at p. 31.)

B. Jury Instructions:

Following a discussion regarding jury instructions at the end of the trial, defendants placed on the record their general objection to "any instruction that was not proposed by the defendants." Earlier in the discussion, they specifically objected to the use of state and federal regulations to define the standard of nursing home care. Citing *Klein v. Bia Hotel Corp.* (1996) 41 Cal.App.4th 1133, a case alleging negligence per se based on violation of regulations found in title 22 of the California Code of Regulations, the court denied defendants' request to strike those instructions.

The court proceeded to instruct the jury in the language of Welfare and Institutions Code section 15610.07 that "[a]buse of an elder or dependent adult means physical abuse, neglect, or other treatment with resulting physical harm or pain or mental suffering, or the deprivation by a custodian of goods and services which are necessary to avoid physical harm or mental suffering." It then described how "[p]atients of skilled nursing facilities shall be treated and cared for" by reading portions of state statutes, and state and federal regulations governing patients' rights and patient care in skilled nursing facilities. (Health & Saf. Code, §§ 100275, subd. (a) (formerly § 208, subd. (a)), 1275, 1599.1; Cal. Code Regs., tit. 22, §§ 72315, 72528; 42 C.F.R. §§ 483.10, 483.15,

483.25 [applicable to skilled nursing facilities participating in Medicaid].)

The court also instructed the jury that "[i]n considering the term . . . reckless neglect . . . the term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences. [¶] Recklessness requires conduct more culpable than mere negligence."

1. Definitions of "Physical Abuse" and "Neglect":

"Generally speaking if it appears that error in giving an improper instruction was likely to mislead the jury and thus to become a factor in its verdict, it is prejudicial and ground for reversal." (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670.) Defendants argue the instruction on elder abuse based on Welfare and Institutions Code section 15610.07 was incorrect as a matter of law because it omitted the statutory definitions of "physical abuse" and "neglect" contained in Welfare and Institutions Code sections 15610.57 and 15610.63.<sup>8</sup> They assert this erroneous instruction,

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<sup>8</sup> There being no claim Gregory was physically assaulted within the meaning of Welfare and Institutions Code section 15610.63, we focus on defendants' argument the court erred in failing to give the statutory definition of "neglect." In 1995, Welfare and Institutions Code section 15610.57 read:

"'Neglect' means the negligent failure of any person having the care or custody of an elder or a dependent adult to

combined with vague instructions based on administrative regulations, allowed the jury to transform a simple negligence case involving Reba Gregory into a referendum on anything that happened to residents of Beverly Manor at any point in time. Defendants also say the instructions left the jury with the impression elder abuse equaled negligence.

"Instructions in the language of an applicable *statute* are properly given." (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 280, p. 326.) Where, as here, "the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed.*" (7 Witkin, Cal. Procedure, *supra*, § 272, pp. 318-319, emphasis in original and added; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534-1535.) Defendants' failure to specifically request that the jury be instructed in accordance with Welfare and Institutions Code sections 15610.57 and 15610.63 waives the issue on appeal. (*Agarwal v.*

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exercise that degree of care which a reasonable person in like position would exercise. Neglect includes, *but is not limited to*, all of the following:

"(a) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

"(b) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

"(c) Failure to protect from health and safety hazards.

"(d) Failure to prevent malnutrition." (Stats. 1994, ch. 594, § 3, p. 8, emphasis added.)

*Johnson* (1979) 25 Cal.3d 932, 948, disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) However, even assuming defendants properly raised the issue of instructional error, we conclude the instructions were correct and did not mislead the jury.

We begin with the observation that the statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect. Defendants would gain no particular advantage from an instruction which conveyed the layperson's understanding of the term. In this case, the administrative regulations incorporated into the instructions on elder abuse included numerous, specific examples of what constituted neglect in the treatment and care of nursing home patients. Each of the examples of neglect listed in Welfare and Institutions Code section 15610.57 is included in the instructions read to the jury. Contrary to defendants' characterization of the regulations as vague, the instructions formulated by the court provided concrete examples which amplified the instruction on elder abuse based on Welfare and Institutions Code section 15610.07. Accordingly, we reject defendants' claim the elder abuse instructions misled the jury and prejudiced their case.

As we explained, the court also instructed the jury on the concept of "recklessness" as it applied to "reckless neglect." Contrary to defendants' claim the jury was misled into believing elder abuse was equivalent to negligence, these

instructions emphasized that "[i]n considering the term . . . reckless neglect . . . the term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences. [¶] Recklessness requires conduct more culpable than mere negligence."

Defendants suggest the language of Welfare and Institutions Code section 15610.07 is similar to statutory provisions enacted at the same time to govern reporting of suspected elder abuse, not liability. We conclude there is no basis for the claim the statutory definition of "abuse of an elder or dependent adult" is inapplicable to the case before us. Welfare and Institutions Code section 15610, added in 1994, expressly states that "[t]he definitions contained in this article shall govern the construction of this chapter, unless the context requires otherwise." (Stats. 1994, ch. 594, § 3.) The "chapter," that is, chapter 11 of the Elder Abuse Act, includes articles 4 and 8.5 which address both reporting requirements and civil liability.<sup>9</sup> Our conclusion is consistent with the general rule that "[t]he definition of

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<sup>9</sup> Defendants are incorrect that Welfare and Institutions Code section 15657 was enacted in 1997. As we explained, the Legislature added it to the Elder Abuse Act in 1991. (Stats. 1991, ch. 774, § 3.) The 1997 amendment simply updated the numbering of code sections referenced in the earlier version. (Stats. 1997, ch. 724, § 38.)

a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute." (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 20.08, p. 90.)

2. Instructions Based on Administrative Regulations:

The more interesting question is whether the court erred in reading the jury instructions based on state and federal regulations. Defendants argue that although the regulations have nothing to do with the Elder Abuse Act, and involve only the regulation of federal Medicaid payments, Gregory effectively used them to create a private cause of action. They also complain the instructions were too vague to provide meaningful guidance to the jury. Defendants maintain that "by convincing the trial court to instruct the jury not from the Elder Abuse Act itself, but instead from language contained in vague and aspirational regulations, [Gregory] succeeded in having the jury find elder abuse based on standards resembling negligence or less." We conclude the instructions were proper.

Defendants are correct that ". . . an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature." (*California Service Station etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175-1176.) Unlike the regulations involved in the cited case, the regulations at issue here were authorized by federal and state legislation. (42 U.S.C. §§ 1395i-3, subds. (d)(4) & (f)(1),

1396r, subds. (d)(4) & (f)(1); Health & Saf. Code, § 1275.) Moreover, the question before us is not whether violation of these regulations gives rise to a private right of action, but whether the duly authorized regulations can be used to describe the care required under an *existing* statutory right of action for elder abuse.

"In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; . . ." (Code Civ. Proc., § 608.) "Although a party is entitled to instructions on his theory of the case, if reasonably supported by the pleadings and the evidence, instructions must be properly selected and framed. The trial court is not required to give instructions which are not correct statements of the law or are incomplete or misleading." (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 782.)

Sources of law for jury instructions include statutes, court opinions, treatises, hornbooks, legal encyclopedias, digests, and form books. (2 Cal. Trial Practice: Civil Procedure During Trial (Cont.Ed.Bar 1997) § 20.25, p. 1225; 7 Witkin, Cal. Procedure, *supra*, Trial, §§ 280-282, 294, pp. 326-328, 341-342.) We find no authority to suggest a party may not base instructions on relevant state or federal regulations in the proper case. Like statutes, applicable regulations are a "factor to be considered by the jury in determining the reasonableness of the conduct in question." (*Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747 [Veh. Code,

§ 27315, requiring the use of seatbelts, was properly considered by the jury deciding whether the driver exercised due care, although the statute could not be used to establish presumptive negligence under Evid. Code, § 669]; see also *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 529-530 (*Casa Blanca*), disapproved on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184 (*Cel-Tech*) [violation of Cal. Code Regs., tit. 22, supported civil action against a nursing home for unfair practices under Bus. & Prof. Code, § 17200].)<sup>10</sup>

Welfare and Institutions Code section 15657 established a civil remedy for elder abuse apart from the regulations at issue. Gregory alleged wrongful infliction of personal injury resulting from defendants' reckless failure to exercise due care. Defendants concede the regulations were relevant to government enforcement actions. We agree with the court that they were designed to protect nursing home residents by defining the care that was due. Given the variety of sources

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<sup>10</sup> In their reply brief, counsel for defendants mischaracterize *Cel-Tech*, *supra*, 20 Cal.4th at pages 184-185, as criticizing "these regulations" as impermissibly vague. They suggest that "[t]he *Cel-Tech* decision and its criticism of *Casa Blanca* completely undercuts plaintiff's arguments in this case and makes clear that liability cannot be imposed based upon the broad and vaguely-worded regulations which comprised the instructions on elder abuse." *Cel-Tech* criticized only *Casa Blanca's* definition of "unfair business practice." (*Casa Blanca*, *supra*, 159 Ca.App.3d at p. 530.)

from which parties may draw instructions -- so long as the instructions are correct statements of law -- we conclude the court did not err in using the regulations to assist the jury in determining whether defendants' conduct involved physical abuse or neglect, or recklessness, oppression, fraud, or malice within the meaning of the Elder Abuse Act. Defendants offered no alternative guidance in this regard.

We also reject defendants' claim the instructions based on state and federal regulations were too vague to provide meaningful guidance to the jury. A statute or regulation is not void for uncertainty in an enforcement action if its meaning can be objectively ascertained by any reasonable and practical construction. (*Lackner v. St. Joseph Convalescent Hospital, Inc.* (1980) 106 Cal.App.3d 542, 551; see *Casa Blanca, supra*, 159 Cal.App.3d at pp. 528-529 [the term "clean and sanitary" not too vague to be understood by a jury where the facility was so filthy and pest ridden that maggots were observed in patients' body cavities].) Moreover, a statute or regulation may be made specific "by reference to a standard of practice in the particular profession [citation] or 'by the common knowledge of members of the particular vocation . . . .'" (*Beach v. Western Medical Enterprises, Inc.* (1981) 116 Cal.App.3d 153, 162; *Perea v. Fales* (1974) 39 Cal.App.3d 939, 942.) Here the jury heard testimony describing how nursing home professionals construed and applied the federal and state regulatory standards regarding sufficient staff.

Defendants cite as representative two regulations out of seven pages of instructions on how “[p]atients of skilled nursing facilities shall be treated and cared for.” Omitted from defendants’ brief were the following specific regulations relevant to key issues in this case:

“[T]he facility shall employ an adequate number of qualified personnel to carry out all of the functions of the facility.”

“[T]he facility shall be clean, sanitary, and in good repair at all times.”

“[E]ach patient shall be given care to prevent formation and progression of decubiti, contractures, and deformities. Such care shall include changing position of bedfast and chairfast patients with preventive skin care in accordance with the needs of the patient, . . . .”

“[I]t is not the fair test in considering whether the jury has been properly instructed in a given case, to take into consideration excerpts from a particular instruction, or a single instruction.” (*Peters v. Southern Pacific Co.* (1911) 160 Cal. 48, 69.) Considering the instructions as a whole, as we must (7 Witkin, *Cal. Procedure, supra*, Trial, § 328, pp. 372-373), we conclude the instructions drawn from state and federal regulations were not impermissibly vague.<sup>11</sup>

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<sup>11</sup> We deny Gregory’s request for judicial notice of the 1998 general accounting office report on California nursing homes.

C. Sufficiency of the Evidence of Elder Abuse:

To prevail at trial, Gregory was required to establish her claim of elder abuse by "clear and convincing evidence." (Welf. & Inst. Code, § 15657.) "But the [higher standard of proof] applies only in the trial court. . . . On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 365, p. 415.) In other words, where there is conflicting evidence, we "will not disturb the verdict of the jury . . . . The presumption being in favor of the judgment . . . , [we] must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment." (*Id.* at § 359, p. 408, emphasis in original.) Where no special findings are made, and "the evidence supports implied findings on any set of issues which will sustain the verdict, it will be assumed that the jury so found.'" (*Everett v. Everett* (1984) 150 Cal.App.3d 1053, 1063-1064.)

Without acknowledging or citing in their opening brief the conflicting evidence on Gregory's claim of elder abuse, and without citation to case authority, defendants maintain Pease's conduct cannot be imputed to the other defendants to establish reckless neglect under the Elder Abuse Act. They complain the jury made no findings that the standards of Civil Code section 3294 were satisfied with respect to the corporate

defendants, and argue there was no substantial evidence to support such a finding.<sup>12</sup>

As we already explained, an appellant's failure to set forth all material evidence on essential issues, not merely his or her own evidence, waives appellant's challenge to the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 1 Cal.3d at p. 881.) However, even if we were to address the merits of defendants' challenge, we would conclude there is sufficient evidence to support the verdict.

Defendants prepared the special verdict forms, and did not request an express finding on Civil Code section 3294.<sup>13</sup> Nonetheless, the record supports the inference Williams and the corporate defendants had advance knowledge or authorized or ratified the wrongful conduct for which damages were awarded. (Civ. Code, § 3294, subd. (b).)

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<sup>12</sup> See footnote 7 *ante*, at page 12.

<sup>13</sup> Nor do defendants cite a jury instruction on the requirements of Civil Code section 3294, subdivision (b), or the definition of "managing agent." In civil trials, the court has no duty to instruct on a particular issue in the absence of a specific request by a party. (*Willden v. Washington Nat. Ins. Co.* (1976) 18 Cal.3d 631, 636.) A duty to instruct *sua sponte* arises only where the parties fail to provide instructions on "controlling legal principles" raised by the pleadings. (*Agarwal v. Johnson, supra*, 25 Cal.3d at p. 951; *Paverud v. Niagara Machine & Tool Works* (1987) 189 Cal.App.3d 858, 863, disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574-575.) Defendants cite no instruction error here.

The administrators of Beverly Manor, as well as the corporate defendants, were aware for nearly a year and a half before Gregory's injury that the facility was understaffed. The complaints regarding insufficient staff were conveyed through the nursing staff's letter to Beverly's corporate headquarters, almost daily complaints from various levels of staff, repeated notices of deficiency from the State of California, and consistent and repeated complaints from the residents and their families. There was conflicting evidence on the effectiveness of defendants' response to the staffing shortage. However, Williams acknowledged that on the day shift for half of January 1995, and on the night shift for the entire month of January before Gregory was injured, staffing levels fell below what he himself described as "money hungry and intentionally understaffed . . . ." In the face of defendants' knowledge of understaffing, defendants continued to abide by budgetary policies and a staffing directive from Beverly's regional vice president that fixed staffing levels at Beverly Manor. Williams could not produce copies of the staffing directive or the 1994 and 1995 budgets at trial. When CNA Pease complained to a woman from Beverly's regional management that there was not enough help, she was told "they [were] allowed so many girls on the floor."

Because the evidence supports the implied finding the requirements of Civil Code section 3294, subdivision (b) were satisfied, we assume the jury so found. (*Everett v. Everett*, *supra*, 150 Cal.App.3d at pp. 1063-1064.)

## II

### Fraud

The elements of fraud include: "(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778.) The court instructed the jury on intentional misrepresentation and concealment. It also instructed on the duty to disclose known facts with or without a fiduciary or confidential relationship.

The jury found by special verdict that: (1) all three defendants made false representations as to past and existing material facts; (2) defendants made the representations knowingly, recklessly, and with the intent to defraud Gregory; (3) Gregory was unaware of the falsity of the representations; (4) Gregory justifiably relied upon the representations; and (5) defendants' false representations caused Gregory damage on January 31, 1995.

Defendants argue on appeal that they are entitled to judgment as a matter of law on the fraud cause of action. They contend Gregory cannot base her fraud claim on general statements regarding "good care" in the absence of evidence Gregory relied on the statements, or that the statements caused her injury. They suggest "[t]he negligence claim in this case was dressed up as fraud for a simple strategic purpose: under the guise of proving that Beverly knew that

the representations of good care were false, plaintiff was improperly allowed to introduce volumes of prejudicial evidence concerning people and events that had nothing whatsoever to do with the only injury for which Ms. Gregory sought damages -- her January 31, 1995 fall." Defendants also complain Gregory improperly changed her theory of recovery posttrial to encompass statements in the Beverly Manor admission documents. Lastly, defendants argue there is insufficient evidence of reliance and causation regardless of what constituted the alleged false representation. We find no merit in defendants' arguments.

A. The Fraudulent Representations:

Defendants are correct that California courts have rejected attempts to transform medical negligence actions against a particular party into breach of warranty or fraud claims against the same party based on generalized representations regarding services or injury. (See, e.g., *Pulvers v. Kaiser Foundation Health Plan, Inc.* (1979) 99 Cal.App.3d 560, 564-565 [breach of warranty claim based on promises defendant would provide high standards of medical service rejected as "generalized puffing"]; *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212, 227 [false representations or fraudulent concealment of the nature and extent of an injury treated as action for malpractice and barred by the statute of limitations].) Gregory's pleadings and proof do not fall into this category of cases.

Defendants suggest Gregory's fraud case "rested entirely" on the testimony of Sandahl "who merely testified she was told that while Beverly Manor did not have 'fancy equipment, they did have a nursing staff and they would supply physical therapy,' and 'they were a hospital, not . . . an old folks home.'" However, the pleadings offered a broader theory of recovery based on specific allegations that "[p]rior to January 30, 1995, Defendants expressly and/or impliedly represented to the public in general, and Plaintiff in particular, that the subject convalescent hospital would be operated and managed in a reasonable manner *and that patients/residents would receive reasonable and adequate care, services and attention, and that Defendants would provide adequate staffing to insure such adequate care, services and attention.*"<sup>14</sup> (Emphasis added.)

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<sup>14</sup> The second amended complaint continued: "At the time Defendants made said representations [they] were false and known by Defendants to be false. As described above, Defendants operated, managed and ran the subject convalescent hospital in an understaffed and unreasonable manner and, as a result, the care often provided by Defendants to patients/residents, including Plaintiff, was inadequate, unreasonable, and subjected said patients/residents to unreasonable risk or injury. [¶] . . . At the time said fraudulent representations were made to Plaintiffs, and Plaintiff's various family members, Plaintiffs were ignorant of the false and fraudulent nature of said representations, and relied upon same, to Plaintiffs' detriment. [¶] . . . As a result of the fraud of Defendants, and each of them, Plaintiff suffered serious injuries and damages, . . ."

Consistent with theories of intentional representation and fraudulent concealment, the evidence showed defendants made specific promises when Gregory was admitted to Beverly Manor in a coma in June 1993 that they would meet objective standards of care and service. At the same time, defendants attempted to conceal the fact Beverly Manor was not adequately staffed. Barney assured Sandahl that Gregory would receive adequate care. In addition to the testimony cited by defendants, Sandahl testified Barney told her Beverly Manor was "the same as an acute care hospital, except they did not have the x-ray machines, . . . but they had the nursing staff . . . ." However, no one told her then or when she signed the admission agreement as Gregory's conservator in December 1993, that the facility operated in a chronically understaffed condition, that employees were taking shortcuts with regard to patient care, and that members of the nursing staff felt an otherwise preventable tragedy was likely to occur at Beverly Manor unless there were significant changes in staffing practices. Other than an occasional nurse's comment that she was shorthanded, no one told Sandahl prior to January 31, 1995, that Beverly Manor was unable to comply with orders provided by Gregory's doctor due to inadequate staffing levels. We already explained there is sufficient evidence to support Gregory's claims defendants were aware Beverly Manor lacked adequate staff during the period up to the date Gregory fell. In addition, Williams admitted staff was instructed in

November 1994: "Never, never let anyone other than Beverly Associates hear about our staffing situation."

In the light of the foregoing, we conclude there is no merit in defendants' assertion Gregory articulated a new fraud theory when she cited the admission documents in her opposition to defendants' posttrial motion for judgment notwithstanding the verdict. The documents simply provided additional evidence to support the theories of intentional misrepresentation and fraudulent concealment.

Gregory introduced exhibits 12, 13, and 31 without objection to show BEI operated Beverly Manor. Exhibit 12 was the admission agreement booklet given residents and their families at the time of admission. Exhibits 13 and 31 were the admission agreements signed by James Gregory and Christine Sandahl. The admission agreements contained an addendum which stated Beverly Manor agreed to abide by the Patient's Bill of Rights. The admission agreement booklet listed patient rights under federal and state law, and incorporated the Patient's Bill of Rights set forth in Health and Safety Code section 1599.1.<sup>15</sup> It expressly stated that Beverly Manor would "protect and promote the rights of each Resident . . ." and "[t]he Resident has a right to be fully informed in advance about care and treatment and any changes in that care or treatment . . . ." By signing the addendum to the admission

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<sup>15</sup> See footnote 3 *ante*, at page 5.

agreement, Gregory's family acknowledged it had been informed about the Patient's Bill of Rights.

The court did not limit the purpose for which it admitted exhibits 12, 13, and 31, and those exhibits were sent to the jury room during deliberations. Accordingly, the jury could use the admission documents for any purpose, including evidence of intentional misrepresentation and fraudulent concealment. Even incompetent or otherwise inadmissible evidence admitted without objection will sustain a judgment. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 363, pp. 413-414, citing *Holzer v. Read* (1932) 216 Cal. 119, 122 [nonresponsive answer]; *Powers v. Board of Public Works* (1932) 216 Cal. 546, 552 [hearsay].)

B. Reliance:

"Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.] 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

Defendants maintain there is no credible, direct evidence that Gregory justifiably relied on any alleged

misrepresentation made on June 18, 1993, about the care she would receive at Beverly Manor. Citing *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 215, disapproved on other grounds in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, they stress Gregory remained at Beverly Manor after her fall, knowing everything she later proved at trial. Defendants also argue there was no evidence of actual reliance on exhibits 12, 13, or 31, or that Sandahl even read the admission documents.

We begin by noting the jury was permitted to consider both direct and circumstantial evidence in deciding whether plaintiff relied on the alleged misrepresentations. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 426.) We as an appellate court have no power to judge the credibility of the witnesses. (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 642.)

The parties describe the conflicting evidence of reliance, and whether that reliance was justified. The jury resolved the conflict against defendants. We conclude there is substantial evidence to support the verdict.

Apart from any fiduciary or confidential relationship between defendants and Gregory, the admission agreement itself obligated defendants to fully inform Gregory "in advance about care and treatment and any changes in that care or treatment." The agreement also obligated defendants to notify Gregory and her family that Beverly Manor was required to employ an adequate number of qualified staff. (Health & Saf. Code, §

1599.1, subd. (a).) By signing the addendum to the admission agreement, Gregory's family acknowledged it had been informed about these and other provisions of the Patient's Bill of Rights.

After listening to Barney's representations, and signing the admission agreement, Gregory's family admitted her to Beverly Manor in a paralyzed and semi-comatose state. Although Gregory and her daughter knew Gregory was having problems at Beverly Manor, the jury could conclude they had no reason to know the problems were the result of chronic understaffing rather than occasional negligence or inattention -- particularly in light of Williams's efforts to conceal the truth from patients and their families. Sandahl described in detail her reasons for keeping her mother at the facility, even after initiating legal action against defendants. Gregory's doctor strongly advised Sandahl against trying to care for her mother at home. Based on this evidence, the jury could find that Gregory remained at Beverly Manor, even after realizing she had been defrauded, because there was no other reasonable alternative available to her. Thus, this case is readily distinguishable from *Rochlis v. Walt Disney Co.*, *supra*, 19 Cal.App.4th at page 213, where the plaintiff *voluntarily* remained employed after discovering the fraudulent inducements to take the job.

C. Causation:

"The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who

justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss.'" (*Helm v. K.O.G. Alarm Co.* (1992) 4 Cal.App.4th 194, 202, quoting Rest.2d Torts, § 546.) Thus, Gregory was "'not required to establish the fact of causation with absolute certainty. It is sufficient if there is evidence from which reasonable men could conclude that it is more probable that the defendant's conduct was the cause, than that it was not.'" (*Valdez v. J. D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 509.) In determining causation, the jury is "'permitted to draw upon ordinary human experience as to the probabilities of the case.'" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253.)

Relying on *Helm, supra*, 4 Cal.App.4th 194, defendants argue Gregory "failed to point to any evidence that would even remotely suggest that had there been additional staff at that large facility on the day of plaintiff's accident, that additional staff would have been at Ms. Pease's side to assist at the precise moment that plaintiff was being moved." In *Helm*, the appellate court upheld a judgment of nonsuit where the purchaser of an alarm system "failed utterly" to prove that defendant's misrepresentations were the cause in fact of their subsequent loss by theft and arson. (*Id.* at pp. 199-200, 203.) By contrast, there is ample evidence in this case to support the jury finding of cause in fact.

Although there is conflicting testimony, Pease had between 11 and 13 patients the morning Gregory fell. According to Beverly's standards, each CNA should have cared for no more than eight or nine patients on a shift. Pease testified that during the day shift, which she worked, staffing was inadequate as much as 70 percent of the time. As a result, CNA's and other care workers had to cut corners.

It is uncontradicted that Pease was attempting to move Gregory, and had been instructed that two people were required to accomplish the task. Williams had instructed the CNA's that all patients were to be out of bed by 11 a.m., and people came around to check to make sure staff complied. Those orders upset Pease.

Among the numerous accounts of how the fall actually occurred was testimony by Pease that she attempted to move Gregory using a gait belt without waiting for her teammate to assist her. Although Pease realized it was unsafe to move Gregory alone, she had done it before in this manner. In another version, Pease said she left Gregory sitting on the bed while she went to find help.

Based on this evidence, a jury could reasonably infer that the chronic understaffing created a climate in which CNA's like Pease routinely ignored standard protocol for the safe transfer of patients. In this instance, the jury could have concluded Pease felt the additional pressure of Williams's 11 o'clock deadline for having her 11 or more patients up and dressed. Moreover, it was abundantly clear

there was not enough staff to clean, move, feed, and dress patients during the busy morning shift. We conclude this record supports the jury finding defendants' false representations and fraudulent concealment of the true staffing situation were substantial factors in causing Gregory's injury.

D. The Liability of BEI and Williams:

The jury allocated responsibility for Beverly's injuries as follows: BEI - 50 percent; BHRS - 49 percent; and Williams - 1 percent. Defendants contend the evidence did not support the findings that either Williams or BEI had anything to do with Gregory's purported fraud claim. There is no basis for this contention.

Defendants' protestation that Williams was not employed by Beverly Manor at the time of the alleged misrepresentations is consistent with their continued insistence that Gregory's claim was based solely on Barney's statements to Sandahl when Gregory was admitted in June 1993. We already explained the pleading and proof supported claims of intentional misrepresentation and fraudulent concealment up to the date of Gregory's fall. There is evidence to support a finding Williams ratified the actions of the corporate defendants during this period by helping establish the annual budgeted hours for nurses and CNA's, by maintaining the status quo, and by concealing the staffing crisis from residents and their families.

Defendants also assert there is "no evidence linking BEI, the parent corporation of BHRS, to any representation." Again, taking the narrow view of Gregory's claims and ignoring the record, defendants insist "[t]he issue is whether BEI represented anything to plaintiff at her admission (it did not), . . . ." Although Williams testified that Beverly Manor was owned and operated by BHRS, the full record before the jury showed the City of Yreka issued Beverly Manor's business license in the name of BEI, the admission agreement and the admission agreement booklet state that "Beverly Enterprises," not BHRS, is the operator of the facility, Williams was employed by BEI, forms and checks relating to Beverly Manor's trust account had BEI's name on them, and the personnel handbook for Beverly Manor employees was printed by BEI. Regional manager Carole Tomey testified that "[t]he only entity that staffed Yreka was Beverly Enterprises, . . . ." Finally, it was BEI that sued Gregory in a separate action for amounts allegedly due on her account at Beverly Manor. In that lawsuit, Williams swore under penalty of perjury that BEI contracted with Gregory to provide her with nursing home care.

### III

#### Punitive Damages

Defendants raise three claims of error with regard to the award of punitive damages. First, they argue the court erred in instructing the jury on the grounds for awarding punitive damages. Second, defendants say there was no clear and convincing evidence of malice, fraud or oppression to support

a claim for punitive damages for fraud or violation of the Elder Abuse Act. Third, defendants assert the reduced punitive damage award is excessive. We consider and reject each argument in turn.

A. Jury Instructions:

Defendants raised a general objection to "any instruction that was not proposed by the defendants." They argue on appeal that the court erred when it read a modified version of BAJI No. 14.72.1 which omitted the separate definition of "despicable conduct."<sup>16</sup> The instruction does, however, refer to "despicable conduct" as components of "malice" and "oppression," and tracks the language of Civil Code section 3294. As we already explained, "Instructions in the language

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<sup>16</sup> The court read the following instruction to the jury: "If you find that plaintiff suffered actual injury, harm, or damage caused by intentional misrepresentation, you must decide in addition whether, by clear and convincing evidence, you find that there was oppression, malice, or fraud in the conduct on which you based your finding of liability. [¶] The term 'oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] The term 'malice' means conduct which is intended by a defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights or safety of others. [¶] A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid those consequences. [¶] The term 'fraud' means an intentional misrepresentation, deceit or concealment of a material fact known to the defendant with the intention on the part of a defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

of an applicable *statute* are properly given." (7 Witkin, Cal. Procedure, *supra*, Trial, § 280, p. 326, emphasis in original.)

Defendants also cite dictum in *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487, footnote 8 (*Weaver*), in support of their assertion the definition of "clear and convincing evidence" found in BAJI No. 2.62 was insufficient.<sup>17</sup> Other courts have declined to endorse *Weaver's* suggestion the form instruction is incomplete. (See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1165 [affirming punitive damages based on BAJI No. 2.62]; and *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847-850 ["Without an additional mandate from the Supreme Court or the Legislature, BAJI No. 2.62 remains a correct instruction"].) We conclude BAJI No. 2.62 is a correct statement of the law.

B. Evidence To Support Punitive Damages:

The jury found by clear and convincing evidence that defendants were guilty of oppression, malice, or fraud in the conduct upon which it based its findings of liability for intentional misrepresentation and elder abuse. On appeal,

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<sup>17</sup> The court instructed the jury in the language of BAJI No. 2.62 that: "The term 'clear and convincing' means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. [¶] Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it."

defendants argue "there was no substantial, much less clear and convincing, evidence to support the fraud claim." They also argue the jury findings with respect to elder abuse do not authorize an award of punitive damages under the Elder Abuse Act. Because we conclude there is substantial evidence to support the punitive damage award on the fraud cause of action, we need not address defendants' second argument.

Defendants maintain the "undisputed evidence showed that: (1) the staffing levels on the day of the incident *exceeded* California's required daily average of 3.0 nursing hours per resident day . . . ; (2) the state-required staffing levels were *exceeded* at Beverly Manor on nearly every day for at least six months before the accident; (3) the facility was not understaffed because of a failure to meet required staffing levels; and (4) Beverly made great efforts to remedy the infrequent staffing problems which arose solely from 'call-offs.'" (Emphasis in original, fn. omitted.) They maintain the evidence the court relied on to reduce the amount of punitive damages awarded by the jury "precludes a finding that defendants were guilty, by clear and convincing evidence, of oppression or malice." Indeed, defendants insist "[t]he undisputed evidence -- that defendants intended to and did comply with the law -- *precludes as a matter of law* a finding that defendants were guilty, by clear and convincing evidence, of malice, oppression, or fraud." (Emphasis in original.)

The first difficulty with defendants' argument is that testimony regarding staffing levels on January 31, 1995, was

not undisputed. As we explained, defendants' failure to set forth all the material evidence waives their challenge to the sufficiency of the evidence.<sup>18</sup> However, addressing the merits of their claim, we conclude the record supports the special verdict.

The state requirement is that skilled nursing facilities not drop below a weighted average of 3.2 nursing hours per patient per day. However, there was testimony that compliance with state requirements did not necessarily guarantee adequate patient care. Both Tomey and Williams testified the critical factor was patient acuity, a measure of the extent to which patients were unable to perform basic tasks for themselves.

Defendants' expert, May Turner, testified Beverly Manor met the state standards on January 31, 1995. She had no information on patient acuity the day Gregory fell, but acknowledged patient acuity was a factor in determining adequate patient care. Turner based her testimony on payroll records and exhibit 197, a copy of the employee sign-in sheet for that day. However, defendants produced three different versions of the sign-in sheet for January 31, 1995. The version they gave Turner, exhibit 197, was different from the copy they gave Gregory's counsel during discovery, exhibit 186, and both those exhibits were different from the version defendants produced at trial. For example, one person listed

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<sup>18</sup> See discussion at page 25 *ante*, and footnote 2 *ante*, at page 4.

on exhibit 197 as an LVN did not work at Beverly Manor the day Gregory was injured; he was off with a broken leg.

Another defense expert, Crystal Webster, also used the sign-in sheet to calculate the title 22 minimum weighted average hours the day Gregory fell. Webster admitted on cross-examination that she had decided Beverly Manor was adequately staffed before she reviewed a single record showing how many people were working that day. She had no information about the acuity levels of the residents.

A key item of evidence was unavailable at trial. Beverly Manor used the daily group assignment sheet to track which nurse or CNA provided care to a particular patient. Williams acknowledged it was the only single document which showed the number of patients each CNA cared for on any given day. He also testified the daily assignment sheets for the entire period of Gregory's stay, including the day of her injury, had been destroyed. However, the record destruction log did not list those documents as having been destroyed. Kathie Justice, a CNA whose job included the scheduling of CNA's at Beverly Manor, testified the daily assignment sheets were routinely kept for about three years.

As we explained, pleading and proof of fraud encompassed conduct from the date of Gregory's admission to Beverly Manor through the date of her injury. The evidence showed patients endured numerous indignities, such as having to lie in bed for hours in urine and feces, being served meals that had grown cold, not being fed at all if they needed assistance to eat,

not being bathed or washed for extended periods, waiting for long periods to be put to bed or helped to the bathroom, waiting long periods for a response to calls for assistance, and persistent bed sores and urinary tract infections. Defendants were informed of the existence and dangers of understaffing through the letter from the nursing staff in August 1993, and the repeated citations from the state between 1992 and 1994.

Although the record demonstrated defendants' efforts to remedy the problem of understaffing, which defendants outline in detail in their opening brief, the jury found defendants guilty of malice, fraud, or oppression. As we stated earlier, "[t]he sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the [trier of fact] to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." (Hoch v. Allied-Signal, Inc. (1994) 24 Cal.App.4th 48, 59.)

Defendants also suggest the court acknowledged the validity of their mitigating evidence by reducing the punitive damage award from \$94,720,450 to \$3 million. We simply note that in reducing the award, the trial judge found there was a "wealth of evidence" to support punitive damages, and determined defendants deserved punishment in spite of their claimed efforts to improve the staffing situation at Beverly Manor.

C. Punitive Damages Not Excessive Under State or Federal Law:

Under California law, we may reverse a trial court's punitive damage award only when it appears excessive as a matter of law, or where it is so grossly disproportionate that it raises the presumption the award was the result of passion or prejudice. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928 (*Neal*)). In making that determination, we consider: (1) the reprehensibility of the defendant's conduct; (2) the amount of compensatory damages; and (3) the defendant's wealth. (*Id.* at p. 928.) Federal courts apply similar standards to decide whether punitive damages violate the Fourteenth Amendment's prohibition against arbitrary or excessive punishment on tortfeasors. (*BMW of North America v. Gore* (1996) 517 U.S. 559, 562, 574 [134 L.Ed.2d 809, 825-826] (*BMW*)). In *BMW*, the United States Supreme Court also compared the punitive damage award with the civil penalties authorized or imposed in similar cases. (*Id.* at p. 575 [134 L.Ed.2d at p. 826].)

We accord substantial deference to the trial court in setting the amount of punitive damages on a motion for new trial. As we explained in *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078, where defendants challenged the compensatory damage award, "The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. [Citations.] All presumptions favor the trial

court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule."

Defendants argue the record does not justify punitive damages under either the state or federal test. First, they insist "Beverly's conduct -- providing one nurse's assistant, rather than two, to assist Ms. Gregory in moving from her bed -- was not reprehensible enough to justify a multi-million dollar fine." They also point out the ratio of the \$3 million punitive damage judgment to the \$124,480.57 compensatory damage judgment was over 24 to 1. Third, they emphasize the punitive damage award was 300 times greater than the maximum fine under former Health and Safety Code section 1424, subdivision (c).<sup>19</sup> Finally, citing *BMW, supra*, 517 U.S. at

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<sup>19</sup> Former Health and Safety Code section 1424, subdivision (c), renumbered as subdivision (d), states: "Class 'A' violations are violations which the state department determines present either (1) imminent danger that death or serious harm to the patients or residents of the long-term health care facility would result therefrom, or (2) substantial probability that death or serious physical harm to patients or residents of the long-term health care facility would result therefrom. A physical condition or one or more practices, means, methods, or operations in use in a long-term health care facility may constitute a class 'A' violation. The condition or practice constituting a class 'A' violation shall be abated or eliminated immediately, unless a fixed period of time, as determined by the state department, is required for correction. A class 'A' citation is subject to a civil penalty in an amount not less than one thousand dollars

page 572 [134 L.Ed.2d at pp. 824-825], defendants contend the punitive damage award was "unconstitutionally excessive in light of plaintiff's closing argument, which sought to incite the jury's regional biases and to penalize Beverly for its lawful activities outside of California." We reject these arguments, and conclude the punitive damage award was not excessive.

With regard to the reprehensibility of defendants' conduct, defendants again attempt to minimize the seriousness of their actions. The jury was entitled to find from the evidence we have set forth that defendants' wrongdoing involved more than a mere failure to provide two CNA's when Gregory needed to be moved. Moreover, in determining the reprehensibility of defendants' conduct, jurors were entitled to consider not only the injurious consequences to Gregory, but the effect on others. (*Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 637, 644 (*Moore*); see also *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602.) Nor is federal due process violated by a large punitive damage award that reflects in part "the likely potential harm to others arising from the complained of conduct; . . ." (*Weeks v. Baker & McKenzie, supra*, 63 Cal.App.4th at p. 1167.)

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(\$1,000) and not exceeding ten thousand dollars (\$10,000) for each and every citation."

On the question whether the relationship between punitive and compensatory damages shows the award is excessive, the California Supreme Court explained that "there is no fixed ratio by which to determine the proper proportion between the two classes of damages." (*Finney v. Lockhart* (1950) 35 Cal.2d 161, 164-165.) Thus, the fact the punitive damage award at issue here was 24 times compensatory damages does not mean it is excessive; California courts have approved higher ratios of punitive to compensatory damages. In *Moore, supra*, 150 Cal.App.3d at pages 616, 637, we affirmed a punitive damage award 83 times compensatory damages. (See also *Neal, supra*, 21 Cal.3d at pp. 928-929 (78 to 1 ratio); *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1099 (32 to 1 ratio); and *Chodos v. Insurance Co. of North America* (1981) 126 Cal.App.3d 86, 104 (40 to 1 ratio).) "The proper consideration is whether the punitive damage award bears a reasonable relationship to its principal purpose of punishment and deterrence." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 712; see also *Moore, supra*, 150 Cal.App.3d at pp. 636-637.)

A factor defendants say weighs against the award in this case is the 300 to 1 ratio between punitive damages and the potential statutory fine of \$10,000. In *BMW*, the case they cite in support of their argument, a jury found the BMW distributor civilly liable for violating Alabama's consumer disclosure laws by failing to inform buyers that some cars it sold as new had been repainted. (517 U.S. at pp. 563-564 [134

L.Ed.2d at pp. 819-820].) The Supreme Court of Alabama affirmed a judgment awarding \$4,000 in compensatory damages, but reduced the punitive damage award to \$2 million. (*Id.* at pp. 565, 567 [134 L.Ed.2d at pp. 820-821].) The United States Supreme Court ruled that the punitive damages award was excessive based on *all* the factors the court was entitled to consider, and BMW did not receive fair notice that its conduct would subject it to so severe a penalty. (*Id.* at pp. 574, 576, 582, 583-584 [134 L.Ed.2d at pp. 825-827, 830-832].) It stated that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." (*Id.* at p. 575 [134 L.Ed.2d at p. 826].) The court simply noted that "the \$2 million economic sanction [was] substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." (*Id.* at p. 584 [134 L.Ed.2d at p. 831].) Here, by contrast, there was strong evidence of defendants' reprehensible conduct which endangered the lives of Gregory and others at Beverly Manor.<sup>20</sup>

Moreover, defendants do not discuss the relationship between punitive damages and defendants' wealth, a factor which supports a conclusion the reduced award was the reasonable. They stipulated that BEI and BHRS had a combined

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<sup>20</sup> In this case, the court did not instruct the jury on the additional factor considered by the United States Supreme Court in *BMW*.

net worth of over \$861 million, with net income exceeding \$50 million in 1996. Thus, punitive damages represented less than .35 percent of Beverly's net worth, or about three weeks' worth of net income.

Defendants also argue it was improper for Gregory's counsel to seek punitive damages to deter defendants' conduct in states outside California. We are unconvinced counsel's argument raised issues of sovereignty and comity, or otherwise encouraged the jury to impose sanctions to deter conduct that is lawful in other jurisdictions.<sup>21</sup> (See *BMW*, *supra*, 517 U.S. at pp. 568-574 [134 L.Ed.2d at pp. 822-826].) However, even if counsel's remarks constituted misconduct, defendants' failure to object and request an admonition waives

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<sup>21</sup> The remarks now challenged by defendants, read in context as follows:

"The first point I'd like to make to you is why -- why should you feel comfortable in, as you sit here in this town, in this county, in this corner of our state, determining a punishment of the largest operator of convalescent facilities in the United States. . . ."

"How do you put on the evidence that will give the jurors a picture as to how the company runs, . . . [¶] And the way -- the way that we attempted to do that was to ask people like Mr. Williams, . . . is this the way that company is operated? Is there anything unusual about the manner in which this facility was operated as compared to the other facilities? [¶] And that's where the task was made easier by the testimony that Mr. Mathies' directive went to all the administrators in the region in four states."

"Now, even though we're in Yreka, an award of this case will -- the concept is that you're levying a civil penalty which will have a deterrent effect on this corporation back in Arkansas and that will set an example to *others* who operate skilled nursing facilities." (Emphasis added.)

consideration of their claim on appeal. (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318; see also *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 406.)

IV

Defendants' Motion for New Trial

Defendants filed a timely motion for new trial, citing a variety of grounds. The court ordered a new trial on the issues of compensatory and punitive damages only, subject to the condition the motion would be denied if Gregory consented to a reduction of those awards. Gregory accepted the remittitur. Defendants contend they were entitled to a new trial on the other grounds raised in their motion.

"We are mindful of the fact that a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) However, when considering an order *denying* a motion for new trial, we must review the entire record, including the evidence, to make an independent determination whether the error, if any, was prejudicial. (*Id.* at p. 872.) For reasons we explain, we conclude the court did not err in denying defendants' new trial motion.

A. Admission of Irrelevant Evidence:

Defendants moved in limine to exclude evidence regarding other patients at Beverly Manor, and other matters unrelated to Gregory's fall on grounds it was irrelevant and inadmissible under Evidence Code section 352. The court ruled

the evidence admissible so long as it related to staffing. On appeal, defendants contend the court "erred when it permitted Ms. Gregory's counsel to introduce volumes of irrelevant, confusing, and prejudicial evidence concerning people, dates, and events having nothing whatsoever to do with the January 31, 1995 accident." We conclude the evidence was properly admitted.

We begin by rejecting yet another attempt by defendants to characterize this as a simple negligence case, and to narrow the scope of Gregory's other theories of recovery. As alleged in the second amended complaint, the causes of action for elder abuse and fraud encompassed more than the events of June 18, 1993, and January 31, 1995. Evidence of how understaffing affected Gregory and other residents of Beverly Manor was relevant to the question whether defendants were liable for physical abuse or neglect as defined by the Elder Abuse Act. It was probative of Gregory's fraud claim that "[p]rior to January 30, 1995, Defendants expressly and/or impliedly represented to the public in general, and Plaintiff in particular, that the subject convalescent hospital would be operated and managed in a reasonable manner and that patients/residents would receive reasonable and adequate care, services and attention, and that Defendants would provide adequate staffing to insure such adequate care, services and attention." Evidence of conditions at Beverly Manor was also relevant to the claim defendants acted with malice,

oppression, and fraud which gave rise to enhanced remedies for fraud and elder abuse.

Defendants argue that regardless of relevance, the court should have excluded the evidence regarding other persons, dates and events pursuant to Evidence Code section 352 because "any probative value it may have had was necessarily outweighed by the time-consuming, prejudicial, confusing, and misleading nature of the evidence." "Appellate courts give great deference to trial court evaluations . . . of probative value versus prejudice. . . . Reviewing courts will reverse a judgment based on [Evidence Code section 352] error only if they find a 'miscarriage of justice.'" (Jefferson Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1999) Court's Discretion To Exclude Relevant Evidence, § 22.11, p. 344.)

The claim that Gregory's evidence would involve an undue consumption of time at trial is now moot. Prejudice alone does not warrant exclusion of otherwise relevant evidence. Moreover, as the Supreme Court explained in the criminal context, "'The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, emphasis in original.) "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally

flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is ‘prejudicial.’” (Ibid.) In this case, we are unconvinced the challenged evidence was unduly prejudicial, or that the court’s decision to allow its introduction involved a miscarriage of justice.

Defendants did not object before or during trial to the former employees’ testimony on understaffing on the ground it was “incompetent opinion testimony” by lay witnesses. Accordingly, this issue is not properly before us on appeal. (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, §§ 2012, 2016, 2019, pp. 1971, 1976, 1980.) Moreover, even if it were error to admit the opinions of lay witnesses, there is no prejudice where expert witnesses testify to the same effect without objection. (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1391.)

B. Attorney Misconduct:

Defendants argue they are entitled to a new trial because Gregory’s counsel improperly injected Medicare fraud into the trial. The controversy focuses on exhibits 177, 178, and 179, which included, in their original form, pages from Gregory’s medical chart and corresponding Medicare billing reports.<sup>22</sup> Defendants argue the exhibits were inadmissible for any

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<sup>22</sup> Gregory’s counsel agreed to remove the medical chart from the exhibits before the court read the jury instructions.

purpose, and the limiting instruction read to the jury "did not cure the prejudice caused by the initial admission of these inflammatory matters, . . ."

During opening argument, defendants cited "the compassion and the caring" of the Beverly Manor staff, and claimed that "for 13 months prior to Mrs. Gregory's fall, she . . . lived at Beverly Manor for free." Gregory's counsel later questioned Williams about exhibits 177, 178, and 179, asking him to explain differences between the handwritten treatment summaries and the computerized billing statements. Defendants concede he never used the term "Medicare fraud" while examining Williams.

Out of the presence of the jury, defendants' counsel objected to "the introduction of evidence which suggested Medicare fraud" on grounds of relevancy and Evidence Code section 352. Gregory's counsel stated he offered the documents to show billings and payments on Gregory's account during that period, and that Gregory's family had reasonable grounds to dispute the charges. The court ruled the exhibits admissible, but indicated that Gregory's counsel would have to tie exhibits 177, 178, and 179 to the billing dispute.

Defendants' counsel raised the issue again at the close of trial, complaining Gregory failed to tie the exhibits to any issue in the case. Counsel for Gregory assured the court he had "no intention of suggesting that the billings were improper and that Medicare was overcharged for what was provided to Mrs. Gregory." However, the court observed that

"14 heads snapped up when that testimony came along." It ordered counsel to fashion a mutually acceptable instruction which it read to the jury: "Certain evidence was elicited concerning physical therapy and speech therapy billings to Medicare and to Boilermakers insurance. That evidence should not and cannot be considered by you to be evidence of improper billings to Medicare or Boilermakers."

We agree with the trial court's assessment that Medicare fraud was a "non-issue." Counsel for Gregory never used the term in the presence of the jury; the term was mentioned for the first time by defendants' counsel.

We conclude - in the words of the trial court - that the exhibits were relevant to "the staying-for-free business." They showed billings and insurance payments on Gregory's behalf. At the close of the final discussion on the issue, the court asked Gregory's counsel to explain the relevance of the *questions* to Williams concerning the specific number of units billed. Thereafter, the court denied the motion to strike the exhibits. Counsel for defendants acknowledged the removal of the chart page from the exhibit solved her "primary concern."

The court was also correct in providing the jury with the parties' jointly prepared instruction as "a precaution." (Evid. Code, § 355.) Ordinarily, such a limiting instruction is adequate to avoid prejudice. It assures that when the court admits evidence for a limited purpose, the jury does not misuse that evidence for a different, improper purpose. (1

Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, §§ 313, 418, pp. 285 & 392; 3 Witkin, Cal. Evidence, *supra*, Introduction of Evidence at Trial, § 2023, p. 1985; 7 Witkin, Cal Procedure, *supra*, Trial, § 307, pp. 353-354.) The trial court found no credible evidence the jury was influenced by the challenged documents or related testimony. Defendants cite none here.

C. Instructions on Abuse of Discovery:

In March 1997, Gregory began her unsuccessful attempt to obtain the daily group assignment sheets through discovery. Three months before trial, the judge hearing plaintiff's motion for discovery sanctions determined that "defendants and their counsel misused the discovery process . . . ." The motion judge found the daily assignment sheets were "extremely probative and relevant," and defendants' initial objections to the subpoena, and their subsequent express agreement to produce the documents, "constitutes an implicit, and false, factual assertion that counsel had viewed the documents, and therefore, that they existed." He ordered that "the court reserve[] jurisdiction until the trial to impose sanctions for the misuse of discovery, which sanctions may include, among other things, a modified BAJI 2.03 instruction."<sup>23</sup>

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<sup>23</sup> BAJI No. 2.03 (8th ed. 1994) reads: "If you find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider that fact in determining what inferences to draw from the evidence."

The court read the following instruction to the jury at trial: "The C.N.A. daily assignment sheets for the period January 1, 1992, through February 1, 1995, were requested by plaintiff to be produced by defendants on March 13, 1997. [¶] Defense counsel objected to the production of those documents and later agreed to produce the requested documents for January 31, 1995. [¶] . . . [¶] On May 14, 1997, the Superior Court ordered production of all of the requested documents. [¶] On August 8, 1997, defense counsel advised plaintiffs' counsel for the first time that the documents were destroyed. In a later proceeding, it was determined by the Superior Court that the original objection of defense counsel to production of the documents constituted an implicit and false factual assertion that counsel had viewed the documents and therefore that they existed. [¶] The court found this to be a misuse of the discovery process. [¶] These proceedings were not conducted by me, but by another judge."

Defendants assert the instruction was "not warranted by fact or law, and prejudicially affected the jury's deliberations." Citing juror affidavits, they say "[t]he jury interpreted the instruction as telling them that Beverly's attorneys had intentionally destroyed documents. The jury used the instruction as a basis for its finding that defendants acted with 'fraud,' thus justifying punitive damages. The error was so damaging that the entire judgment must be reversed." Defendants' argument focuses on error in

imposing this particular discovery sanction, not instructional error apart from the discovery issue.

Code of Civil Procedure section 2023, subdivision (a) sets forth a nonexclusive list of actions which constitute abuse of the discovery process.<sup>24</sup> It also authorizes the court to impose a monetary sanction, an issue sanction, an evidence sanction, a terminating sanction, or a contempt sanction if it finds, after notice and hearing, that a party "engag[ed] in conduct that is a misuse of the discovery process." (Code Civ. Proc., § 2023, subd. (b).) Gregory's motion sought issue and evidence sanctions.

"The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action.'" (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 9.) Where the facts constituting abuse of discovery are found by the trial court to be true, such findings are also entitled to deference on appeal. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 114.) However, whether the court was legally authorized to impose a particular sanction is a question of law subject to our de novo review.

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<sup>24</sup> Code of Civil Procedure section 2023, subdivision (a) reads in part: "Misuses of the discovery process include, but are not limited to, the following: [¶] . . . [¶] (5) Making, without substantial justification, an unmeritorious objection to discovery. [¶] (6) Making an evasive response to discovery. [¶] (7) Disobeying a court order to provide discovery. [¶] (8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery." (Fn. omitted.)

(*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1584.) We conclude the court did not exceed its power, or otherwise abuse its discretion, by instructing the jury on defendants' abuse of discovery.

Defendants first challenge the motion judge's finding that their discovery responses "expressly or implicitly represented to the court or to Ms. Gregory's counsel that they had seen the documents at issue." They argue the nature of their discovery objections -- rejecting as irrelevant documents for dates other than the date Gregory fell -- did not require counsel to have viewed the documents. Defendants emphasize Gregory's counsel expressly observed at the May 14, 1997 hearing to review discovery stipulations that "*the defendants at this point in time have not had the opportunity to go through all the documents requested.*"<sup>25</sup> (Emphasis added by defendants.)

In finding the conduct of defendants and their counsel established misuse of the discovery process, the motion judge relied on *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976 (*Bihun*) (disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664).

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<sup>25</sup> Defendants misquote the record. Counsel for Gregory observed only that defendants had not had the opportunity to "go through" all the documents requested. We agree with Gregory's view this was "no more than counsel's recognition that defendants might not have had the opportunity to conduct a full review of the *contents* of the records." (Emphasis in original.)

In that action for sexual harassment by a senior company official, plaintiff served a request for production of the official's personnel file pursuant to Code of Civil Procedure section 1987, subdivision (c). Defense counsel objected on grounds of privacy and relevancy, although he had never seen the documents. In fact, he had been informed by defendant several months earlier that the personnel file could not be found. Counsel for defendant never informed the court or plaintiff the file was missing until, during trial, plaintiff renewed her request for production. (*Bihun, supra*, at p. 991.) The court instructed the jury: "'If you find that defendant . . . wilfully suppressed the personnel file . . . , you may draw an inference that there was something damaging to defendant's case contained in that personnel file. Such an inference may be regarded by you as reflecting defendant's recognition of the strength of plaintiff's case generally and/or the weakness of its own case. The weight to be given such circumstance is a matter for your determination.'" (*Id.* at p. 992.) The appellate court found there was sufficient circumstantial evidence of willful suppression for the issue to go to the jury. (*Id.* at p. 994.)

Here, after initially objecting to production of the daily assignment sheets on grounds they were irrelevant, immaterial, and not calculated to lead to discovery of admissible evidence, defendants agreed to produce the January 31, 1995 daily assignment sheets, and then to produce all the daily assignment sheets from January 1, 1993, through February

1, 1995. Unlike *Bihun*, where the file was allegedly lost (13 Cal.App.4th at p. 991), defendants in this case admitted the daily assignment sheets had been destroyed. The motion judge stated it was "unknown exactly when and in what manner defense counsel first discovered that the documents couldn't be produced." We conclude the record, and reasonable inferences to be drawn from that record, support the motion judge's determination that the actions and words of counsel for defendants constituted an abuse of discovery.

Alternatively, defendants contend that even if the conduct warranted discovery sanctions, the jury instruction was not an authorized or appropriate sanction under Code of Civil Procedure section 2023. Discovery sanctions, such as the issue and evidence sanctions authorized by Code of Civil Procedure section 2023, are not the maximum or ultimate sanctions permitted under California law. (See *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 569 [plaintiff bound by earlier claim of attorney-client privilege when it attempted to introduce the privileged records at trial]; *In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1475-1476 [husband barred from seeking any affirmative relief until he complied with discovery orders].) A trial court has inherent power to protect its integrity and the due administration of justice by punishing such wrongful acts as willful destruction of evidence. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 687-688; see also *Cedars-Sinai Medical Center v. Superior Court* (1998)

18 Cal.4th 1, 11-13 [describing non-tort remedies for spoliation of evidence, including but not limited to Code of Civil Procedure section 2023].)

Defendants also assert the jury instruction improperly *punished* defendants for the discovery transgression. It is generally accepted that "the court's discretion must be exercised in a manner consistent with the basic purposes of [discovery] sanctions: to compel disclosure of discoverable information. Discovery sanctions cannot be imposed to punish the offending party or to bestow an unwarranted 'windfall' on the adversary." (*In re Marriage of Economou, supra*, 224 Cal.App.3d at p. 1475.) Of course, where the documents at issue are lost or destroyed, it is impossible for the court to compel their production. We do not believe courts are powerless to act in these circumstances so long as the sanctions are not excessive. (See *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36.) Moreover, the fact that the court could have imposed a lesser sanction does not establish that the more severe sanction is excessive and an abuse of discretion. The burden is on the aggrieved party to show the sanction was unreasonable. (*Waicis v. Superior Court* (1990) 226 Cal.App.3d 283, 287.) This defendants have failed to do.

Having concluded the court did not abuse its discretion by instructing the jury on defendants' abuse of discovery, we need not dwell on their claims of prejudice. Suffice it to say, the sanction could have been worse. The jury instruction

at issue did not impose an issue sanction or an evidence sanction. Nor did it expressly invite the inference defendants "willfully suppressed evidence in order to prevent its being presented" at trial. (BAJI No. 2.03; see *Bihun*, *supra*, 13 Cal.App.4th at p. 992.) The instruction simply informed the jury of facts surrounding the earlier finding of discovery abuse involving what Williams testified were the only records that showed directly how many patients each nurse and CNA cared for each day.

D. Prejudicial Media Coverage:

It is misconduct for a juror "to receive any information on the subject of the litigation except in open court and in the manner provided by law." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952-953.) Thus, "it is misconduct for a juror to read newspaper accounts of a case on which he is sitting, . . . [Citations.] . . . [A]nd if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors . . . the act would constitute ground for a motion for a new trial. . . ." (*People v. Holloway* (1990) 50 Cal.3d 1098, 1108, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

In their motion for new trial, defendants described the extensive media coverage of the trial. Citing juror declarations, they argued the jury was influenced by the media to their prejudice. The court acknowledged the media attention was "at a level seldom seen in [the] area." At the

same time, it found "[t]he jury was instructed not to read, watch or listen to news media accounts of the case until after the jury had reached its verdict and was discharged. Declarations of jurors show that they observed this admonition. The efforts of defendants to establish prejudicial influence upon the jury do not rise beyond the level of speculation." We agree with the trial court's findings.

Defendants' argument turns on two declarations, neither of which states that any juror saw or heard information relevant to the case in the media. Alternate Juror Paul Weddle stated that sometime early in the trial jurors learned that Beverly was worth about \$3 million. In a second declaration submitted by plaintiff in opposition to the motion for new trial, Weddle denied he told defense counsel that all the jurors heard the information. He explained he believed he heard information about Beverly's finances from testimony or exhibits, but thought it probable he actually read it after trial in old newspaper articles. "Not once during trial did [he] hear one of [his] fellow jurors mention Beverly's worth."

Defendants also relied on the declaration of dismissed Juror Jack Stevens who believed he heard Juror Ray Apodaca say something to two other jurors about Beverly being worth "big money." However, Apodaca declared that the only information he received about Beverly's financial condition was the evidence presented in the second phase of trial. He

flatly denied he provided information on Beverly's finances to other jurors.

Weddle, Apodaca, and six other jurors submitted declarations stating they followed the court's instructions regarding media contact, and did not receive or consider information about the trial from any outside source, including the news media.

Based on the foregoing, we conclude there is nothing in the record to support defendants' claim of juror misconduct.

F. Other Jury Misconduct:

The court's instructions on damages included the admonition that the jury should "consider only those damages sustained as a result of the January 31, 1995, accident." The parties stipulated that the medical and nursing care expenses resulting from Gregory's fall were \$24,480.57. In support of their motion for new trial, defendants offered juror declarations which showed the jury calculated and added to this amount Gregory's monthly cost of care at Beverly Manor. The jury also added \$100,000 for pain and suffering.<sup>26</sup>

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<sup>26</sup> "[P]osttrial solicitation and use of jurors' statements concerning their conduct and deliberation and which seek to explain the effect of evidence upon their mental processes is improper. On the other hand, use of a juror's affidavit or declaration is proper to disclose objectively ascertainable overt acts by the jury." (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 9, citing *Krouse v. Graham* (1977) 19 Cal.3d 59, 80-81.) The latter type of declaration may be used to describe the overt act of awarding a particular sum for a particular element of damage. (*Drust v. Drust, supra*, at p. 9.)

The court found in its ruling on the motion for new trial that "the jury improperly included in the compensatory damage award an amount based on care costs of plaintiff from the date of her admission . . . until the date of injury, and that the jury properly included economic damages of \$24,480.57 as medical and nursing expense, and noneconomic damages of \$100,000.00 for pain and suffering." It issued the conditional order granting new trial, and reducing compensatory damages to a total of \$124,480.57. The court stated in its written order: "The ground upon which this motion is granted is termed in California law 'misconduct of the jury.' This unfortunate term requires explanation. The use of the term is not to be construed as a criticism of the jury by this court. This court is satisfied that the jury conducted itself in a conscientious and good faith effort to comply with the jury instructions. The fact that the damage instructions were misinterpreted cannot detract from the public service the jury performed in this complex and difficult case." Defendants argue that the only permissible remedy for jury misconduct is an unconditional new trial, not a conditional remittitur.

Defendants do not explain how they were prejudiced by a remittitur which reduced their liability for compensatory damages by more than \$240,000. However, even assuming for purpose of argument that defendants were prejudiced, we find no merit in the argument the jury's actions required a new trial.

Code of Civil Procedure section 662.5 authorizes the use of a remittitur only when it is proper to grant a new trial on the issue of damages. Where the ground for granting a new trial is excessive damages, the court in its discretion may "make its order granting the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable." (Code Civ. Proc., § 622.5, subd. (b).)

In *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 166, the trial court determined the jury improperly increased the damage award to account for the 33 percent fee it assumed plaintiff would have to pay her attorney, and for income taxes it erroneously believed applied to the award. (*Id.* at pp. 166, 171.) As here, the court granted a new trial conditioned on plaintiff's acceptance of reduced damages. (*Id.* at p. 161.) Although jury misconduct is a ground for new trial, the appellate court approved the trial court's determination that jury misconduct helped account for the excessive damages in that case. (*Id.* at p. 171.) It found "no legal or logical impediment to the trial judge's decision that juror misconduct was an objective fact which improperly influenced the verdict herein." (*Ibid.*; see also 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 36, p. 542.)

"It is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.'" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735.) With this rule in mind, we easily distinguish the cases cited by defendants. *Drust v. Drust*, *supra*, 113 Cal.App.3d 1, does not mention jury misconduct; the court ordered a new trial on grounds the jury award included inconsistent damage elements. (*Id.* at p. 11.) The rule regarding jury misconduct stated in *Krouse v. Graham*, *supra*, 19 Cal.3d at page 81, is dictum. The pivotal issue was admissibility of the juror declarations, and the Supreme Court remanded the case to the trial court to determine whether those declarations revealed jury misconduct. The court in *People v. Perez* (1992) 4 Cal.App.4th 893, 908, found the court abused its discretion in denying new trial on findings the jury explicitly or implicitly agreed to disregard an instruction - "a factual scenario presumptively establishing prejudicial jury misconduct." (*Id.* at p. 909.) None of the cases cited by defendants holds the trial court is powerless to strike the improper element and grant a remittitur where, as here, the jury innocently misinterprets the jury instructions.

Defendants also ignore the factual circumstances of two additional cases on which they rely. *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, involved apportionment of liability, not apportionment of compensatory damages. In

that case, the Supreme Court simply held that the procedure set forth in Code of Civil Procedure section 622.5 "may not be used to condition a new trial order if a damage award is excessive only because it reflects an improper apportionment of liability." (*Schelbauer, supra*, at p. 454.) Thus, *Schelbauer* is not inconsistent with our conclusion remittitur was proper in the case before us. Nor does *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 729-730, hold that a trial court may not correct a verdict that *clearly* includes an improper element of damages.

G. Cumulative Error:

Having found no error to warrant a new trial, we need not consider defendants' argument cumulative error requires reversal.

V

*Gregory's Cross-appeal on Attorney Fees*

Gregory raises two issues in her cross-appeal, arguing the court erred in denying her attorney fees under Civil Code section 1717, and compensation for paralegal and investigative services under Welfare and Institutions Code section 15657, subdivision (a). Having affirmed the judgment on Gregory's cause of action for elder abuse, and thus her entitlement to reasonable attorney fees and costs, we need not decide whether there was a contractual basis for claiming attorney fees. We therefore turn to the remaining issue.

Welfare and Institutions Code section 15657, subdivision (a) states that "[t]he court shall award to the plaintiff

reasonable attorney's fees and costs. . . ." Code of Civil Procedure section 1033.5, subdivision (a) lists expenses allowable as costs. Section 1033.5, subdivision (b) identifies nonrecoverable expenses, including "[i]nvestigation expenses in preparing the case for trial" and "[c]osts in investigation of jurors or in preparation for voir dire." (Code Civ. Proc., § 1033.5, subds. (b)(2) and (b)(4).)

In ruling on Gregory's application for attorney fees, the court found "the expenses for litigation support (40,281.00), investigator (\$71,578.50) and paralegals/case assistants (\$1,366.50) involve costs not allowed under CCP 1033.5 and must be disregarded." We agree with the court's ruling with respect to investigative expenses which are expressly excluded as a recoverable item under Code of Civil Procedure section 1033.5, subdivisions (b)(2) and (b)(4). Gregory withdrew this claim of error at oral argument. Paralegal expenses are another matter.

"[N]ecessary support services for attorneys, e.g., secretarial and paralegal services, are includable within an award of attorney fees." (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 951.) Indeed, "awards of attorneys' fees for paralegal time have become commonplace, largely without protest." (*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 274; see also *Citizens Against Rent Control v. Citizens of Berkeley* (1986) 181 Cal.App.3d 213, 227-228 [affirming fee award that included compensation for paralegals and law clerks]; and *Guinn v.*

*Dotson* (1994) 23 Cal.App.4th 262, 268-269 [reviewing state and federal authorities to conclude court abused discretion in refusing to compensate paralegal time in attorney fee award].)

*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095 (*Science Applications*), confirms our analysis of this issue. In that contract case, the appellate court initially affirmed the judgment in favor of the State of California, reversed the \$1.2 million awarded in attorney fees, but remanded the items designated "litigation expenses" for the court to reconsider whether they were disallowed under the contract or allowable under Code of Civil Procedure section 1033.5. On remand, the trial court then awarded the bulk of the original items as litigation expenses, and the corporation petitioned for writ of mandate to vacate the award. (*Science Applications, supra*, at p. 1099.) Issuing the writ with respect to a number of items, the appellate court analogized "the cost of hiring assistants to help counsel organize documents and access them in discovery and at trial" as "the cost of a 'high tech' paralegal." (*Id.* at p. 1104.) Because it had concluded on appeal that attorney fees were not compensable, it could not "condone payment of paralegal fees." (*Ibid.*) Here, having concluded Gregory is entitled to attorney fees, we also conclude those fees properly include the cost of paralegals.

On the record before us, however, we are unable to address the question of whether the amount of paralegal time was reasonably expended in the course of this litigation.

We leave this issue to be addressed by the trial court on remand.

DISPOSITION

With respect to defendants' appeal in case No. C030074, the judgment is affirmed. With respect to Gregory's appeal in case No. C030733, the order denying compensation for paralegal fees is reversed, and the matter remanded for proceedings consistent with this opinion. In all other respects, the order is affirmed. Plaintiff shall receive costs on appeal in case Nos. C030074 and C030733. (CERTIFIED FOR PARTIAL PUBLICATION.)

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CALLAHAN, J.

We concur:

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SCOTLAND, P.J.

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BLEASE, J.