

October 2, 2018

Hon. Chief Justice Tani Cantil-Sakauye
& Hon. Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

**Re: *Cochrum v. Costa Victoria Healthcare, LLC, et al.*, Case No. S251140
Support of Petition for Review and Request for Depublication**

To the Chief Justice Cantil-Sakauye and the Associate Justices:

I write on behalf of AARP and AARP Foundation pursuant to California Rules of Court 8.500(g) and 8.1125(a), respectively, to support the pending petition for review and to request depublication of the ruling by the Court of Appeal in the above-referenced matter.

STATEMENT OF INTEREST

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. As of 2016, approximately 1.3 million people live in nursing facilities nationally, 101,623 of whom reside in facilities in California.¹ AARP and AARP Foundation have an interest in ensuring that quality care is provided to nursing facility residents and a long history of supporting resident rights. AARP and AARP Foundation support the establishment and enforcement of laws and policies designed to protect the rights of nursing facility residents to secure legal redress when they have been victims of neglect or abuse.

AARP Foundation has a nationwide litigation practice, and frequently serves as counsel of record or provides briefing as a friend of the court in cases relating to abuse and neglect in skilled nursing facilities. In California, AARP Foundation attorneys have been counsel of record in *Gloria Single et al. v. Cathedral Pioneer Church Homes II, et al.*, No. 34-2017-00220058 (Superior Court, Sacramento County); *Levine v. Ventura Convalescent Hospital et al.*, No. 56-2011-00406713-CU-AT-VTA (Superior Court, Ventura County); and have filed amicus briefs in *California Advocates for Nursing Home Reform, et al. v. Smith*, No. A147987 (Sept. 29, 2017); and *Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th 609 (Aug. 15, 2012).

¹ Ari Houser, et al., *Across the States: Profiles of Long-Term Services and Supports* A-45, AARP PUB. POLICY INST. (2018) available at <https://www.aarp.org/content/dam/aarp/ppi/2018/08/across-the-states-profiles-of-long-term-services-and-supports-full-report.pdf> [hereinafter Houser, *Across the States 2018*].

BACKGROUND

Nursing facility residents are vulnerable and isolated, and thus at high risk of abuse or neglect. Nursing facility residents – like the resident at issue in the *Cochrum* case – need significant assistance with activities of daily living, such as eating, dressing, bathing, and walking. Accordingly, nursing facilities must provide hands-on care around the clock. There is no substitute for having adequate numbers of nurses and certified nurse aides, and inadequacy in staffing inexorably puts residents’ health and safety at risk. Research consistently shows that staffing levels in nursing facilities are intrinsically linked to the provision of safe, appropriate, and quality care.²

Understaffing in skilled nursing facilities is a widespread problem in the United States. Since 2014, health inspectors have cited 1 in 8 nursing homes across the country for having too few nursing staff.³ In 2014, the Department of Health and Human Services Office of Inspector General (OIG) found that 33 percent of Medicare beneficiaries experience adverse events or temporary harm events during their stays in skilled nursing facilities.⁴ Physicians who reviewed these events for OIG found that 59 percent were clearly or likely preventable, and were attributable to “substandard treatment, inadequate resident monitoring, and failure or delay of necessary care.”⁵ Indeed, increased staffing has been shown to have a host of benefits for residents, including lower mortality rates, improve physical functioning, less antibiotic use, fewer pressure ulcers, catheterized residents, and urinary tract infections, lower hospitalization rates, and less weight loss and dehydration.⁶ Conversely, chronic understaffing contributes to an increase in these adverse health and safety outcomes.

Unsurprisingly, understaffing in nursing facilities is also a significant issue in California. A 2014 study of a single nursing facility chain in California examined citations the chain received for staffing deficiencies that impacted residents in serious ways including failure of the nursing staff to care for residents’ wounds, to prevent falls, and to provide basic incontinence care.⁷ More recently, several class action lawsuits have been filed against California nursing

² See, e.g., Houser, *Across the States 2018* at 14; Centers for Medicare & Medicaid Services, Electronic Staffing Data Submission Payroll-Based Journal, Long-Term Care Facility Policy Manual, Version 2.4 (Sept. 2017) (noting that the Centers for Medicare and Medicaid Services has “long identified staffing as one of the vital components of a nursing home’s ability to provide quality care.”) available at <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Downloads/PBJ-Policy-Manual-Final-V24.pdf>; Bostick, et al., *Systemic Review of Studies of Staffing and Quality in Nursing Homes*, 7 J. AM. MED. DIRECTORS ASS’N 366, 366-377 (2006) (reviewers found a proven association between higher staffing levels and improved quality of care).

³ Jordan Rau, *‘Like a Ghost Town’: Erratic Nursing Home Staffing Revealed Through New Records*, KAISER HEALTH NEWS (July 13, 2018), <https://khn.org/news/like-a-ghost-town-erratic-nursing-home-staffing-revealed-through-new-records/>.

⁴ Dept. of Health and Human Servs. Office of Inspector General, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, 17, 20 (Feb. 2014) <https://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf>.

⁵ *Id.* at 24.

⁶ Charlene Harrington, et al., Issue Brief, *Key Issues in Long-Term Services and Supports Quality*, Kaiser Family Foundation, 3 (Oct. 27, 2017), <https://www.kff.org/medicaid/issue-brief/key-issues-in-long-term-services-and-supports-quality/>.

⁷ Charlene Harrington et al., *The Effects of Regulation and Litigation on a Large For-Profit Nursing Home Chain*, JOURNAL OF HEALTH POLITICS, POLICY, AND LAW, Vol. 39, No. 4, 793 (Aug. 2014).

facility chains, alleging purposeful understaffing.⁸ In addition to private lawsuits against nursing facilities brought by residents under the California Nursing Home Care Act, California Courts have validated that knowing, chronic understaffing constitutes reckless neglect under Welfare & Inst. Code § 15657.⁹

ARGUMENT

I. THE OPINION SHOULD BE REVIEWED AND DEPUBLISHED BECAUSE THE COURT OF APPEAL OVERLOOKED EVIDENCE OF A PATTERN AND PRACTICE OF KNOWING UNDERSTAFFING THAT THE JURY COULD HAVE REASONABLY RELIED UPON IN FINDING RECKLESS NEGLECT.

Under Welfare & Institutions Code § 15657, if a plaintiff can prove, by clear and convincing evidence, “that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse,” then the plaintiff is entitled to attorney’s fees and costs and increased damages. “Neglect” is defined to include, among other things, “[f]ailure to assist in personal hygiene, or in the provision of food, clothing, or shelter” and “[f]ailure to protect from health and safety hazards.”¹⁰ With respect to recklessness, the trial court instructed the jury that “[a]n employee acted with recklessness if he or she knew it was highly probable that his or her conduct would cause harm and he or she knowingly disregarded this risk. Recklessness is more than just failure to use reasonable care.”¹¹ The relevant California case law that addresses staffing issues in the context of the elder abuse statute make clear that understaffing and inadequate training can be sufficient to establish reckless neglect.¹²

In this case, it was within the jury’s purview to find that there was clear and convincing evidence presented at trial establishing Costa Victoria acted recklessly, with knowledge of the high probability that this conduct would cause harm. Specifically, that evidence included:

- Testimony of the administrator of the Costa Victoria facility at issue that he only spent four to five hours per week on the premises, and that 90% of his time was spent at the other facility where he also served as administrator.¹³ This is inconsistent with the requirements set out in 22 Cal.Code Regs. § 72513(a) and (b).

⁸ Hannah Holzer, *Lawsuit alleges Roseville nursing home and others understaffed on purpose – to increase profits* SACRAMENTO BEE, (Aug. 3, 2018), <https://www.sacbee.com/news/local/health-and-medicine/article215947390.html> (referring to fifteen understaffing suits filed by a single elder abuse law firm).

⁹ See, e.g. *Fenimore v. Regents of the Univ. of California* (2016) 245 Cal. App. 4th 1339, 1349 (finding that a “pattern and knowing practice of improperly understaffing to cut costs” can constitute recklessness under the Elder Abuse Act); *Delaney v. Baker* (1999) 20 Cal. App. 4th 23, 27 (upholding jury verdict of recklessness where neglect was a result of understaffing, rapid staff turnover, and inadequate staff training).

¹⁰ Cal. Welf & Inst. Code § 15610.57(b) (providing none-exhaustive list of failures that constitute neglect).

¹¹ Trial Tr., No. 30-2013-00679696-CU-PO-CJC, Vol. 14 at 1966 (March 18, 2015).

¹² See n.9, *supra*.

¹³ Pet. for Review, *Cochrum v. Costa Victoria Healthcare, LLC, et al.*, Case No. S251140, 14 (Sept. 10, 2018) [hereinafter “Petition”].

- One of Plaintiff's experts testified that the facility was setting staffing levels *as close as possible* to the minimum staffing ratio, as opposed to basing staffing on the acuity of the resident population, as required by Health & Safety Code § 1276.75(d); Health & Safety Code § 1599.1(a); and 22 Cal. Code Regs. § 72329.1(a).¹⁴ In support of this conclusion, the expert identified facts in the record indicating that on the day Mr. Cohoon choked on his food, the facility sent a CAN home to correspond to a decreased number of residents in the facility.¹⁵
- The resident council minutes from September to December 2012 presented at trial showed that understaffing, and in particular its impact on residents' eating, was a problem for the facility for months before Mr. Cohoon's death.¹⁶ These minutes were signed by the director of nursing, who acknowledged in her testimony that she knew about this issue, but did not look into whether the staffing was sufficient to respond to resident needs.¹⁷
- Three weeks before Mr. Cohoon died, the facility's operations manager learned about resident concerns regarding understaffing. He signed the response portion of resident council minutes on this topic, indicating in a notation that he would look into the issue.¹⁸ Both he and the director of nursing testified that they could not remember following up.¹⁹

Based on this evidence, the jury could have reasonably concluded that the failure to provide Mr. Cohoon with the proper meal, failure to check his meal before he received it, and subsequent failure to monitor Mr. Cohoon while he ate, was due to understaffing. Simply put, it was reasonable for the jury to conclude that the facility knew it did not have requisite staff to properly assist and monitor residents during meal time, knew that the failure to do so would likely result in harm to residents, and despite this knowledge did not increase its staff levels. Mr. Cohoon, who was only supposed to be in the facility temporarily, suffered fatally as a result.

II. THE DECISION SHOULD BE REVIEWED AND DEPUBLISHED BECAUSE THE COURT OF APPEAL DID NOT CONSIDER THE RELEVANT CALIFORNIA STAFFING REQUIREMENTS BASED ON THE RESIDENTS' NEEDS.

The Court of Appeal decision referred to Health & Safety Code § 1276.5(a) in its decision, which says "the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours[.]"²⁰ but failed to address the various other laws designed to ensure facilities can actually meet the needs of all residents, taking into consideration the acuity of each person admitted to a particular facility. Specifically, California law provides:

¹⁴ Petition at 12.

¹⁵ *Id.*

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 14.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal. App. 5th 1034, 1048.

- “Skilled nursing facilities shall employ and schedule additional staff as needed to ensure quality resident care based on the needs of individual residents and to ensure compliance with all relevant state and federal staffing requirements.” Health & Safety Code § 1276.75(d).
- Each facility has several obligations to its residents, including that “[t]he facility shall employ an adequate number of qualified personnel to carry out all of the functions of the facility.” Health & Safety Code § 1599.1(a).
- “Nursing service personnel shall be employed and on duty in at least the number and with the qualifications determined by the Department to provide the necessary nursing services for patients admitted for care.” 22 Cal. Code Regs. § 72329.1(a).
- With respect to facility administration, unless certain conditions are met an administrator should only be responsible for one facility, and that administrator “shall have sufficient freedom from other responsibilities and shall be on the premises of the skilled nursing facility a sufficient number of hours to permit adequate attention to the management and administration of the facility.” 22 Cal. Code Regs. § 72513(a) and (b).

All of these provisions speak to the significant difference between the minimum staffing ratio of 3.2 nursing hours per patient, and the level of staffing required to provide for the health and safety of residents. The minimum ratio is a floor, not a minimum standard of care, and both California lawmakers and researchers agree it is necessary to increase staffing when resident acuity levels require it.²¹ This is underscored by the fact that since 1987, when the federal nursing facility staffing standards were first passed, complex health needs of residents in nursing facilities across the country has increased dramatically.²²

The Court of Appeal’s conclusion that Costa Victoria “met the legal minimum staffing levels for the number of patients they had[,]” was contrary to law in light of the California requirements that nursing facilities must ensure that, at a minimum, they have adequate numbers of trained staff to meet the complex needs of its residents.

²¹ Cal. Health & Safety Code § 1276.65(d) (“The direct care service hour requirements to be developed pursuant to this section shall be minimum standards only.”); *see also* Charlene Harrington et al., Health Service Insights, *The Need for Higher Minimum Staffing Standards in U.S. Nursing Homes*, 2016:9 13-19 (2016) (noting that “minimum expected staffing based on acuity should be higher than the [CMS] recommended minimums.”).

²² Charlene Harrington et al., *The Need for Higher Minimum Staffing Standards in U.S. Nursing Homes*, HEALTH SERVICE INSIGHTS, 2016:9, 13-19 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4833431/> (explaining, for example, that between 2002 and 2013 the percent of Medicare resident days classified as needing intensive rehabilitation and nursing care increased from 29 to 79.).

CONCLUSION

For the foregoing reasons, AARP and AARP Foundation respectfully request that the Court grant the pending petition for review and depublish the Court of Appeal's decision.

Respectfully Submitted,



William Alvarado Rivera

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DECLARATION OF SERVICE BY MAIL (CCP §1013A(3))

I, William Alvarado Rivera, am employed in the County of Washington, District of Columbia. I am over the age of 18 years and not a party to the within action. My business address is 601 E St., NW, Washington, DC, 20049. On October 2, 2018, I served the attached Letter of AARP and AARP Foundation by mailing a copy by first class mail addressed as follows:

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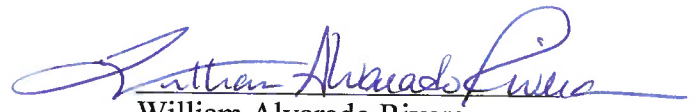
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 2, 2018


William Alvarado Rivera