

UNDERSTAFFING IN FLORIDA NURSING HOMES: THE CASE FOR PUNITIVE DAMAGES

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Growing up in sunny southern California, I knew very little about Florida. What I did know, however, was that it was home to giant mosquitos, Mickey Mouse, and a disproportionate number of elderly people. For decades, retirees have been flocking to South Florida to spend their sunset years on the golf course and away from the snow blower. As the market for goods and services for Florida's eldest residents continues to grow, the one thing you don't see on the myriad of billboards plastering the highways and advertising for nursing homes filled with smiling grandmothers and grandfathers, is the number of residents who are unnecessarily hurt or killed because of the negligence of these facilities.

The numbers really are staggering. A recent study published by the Department of Health and Human Services found that fifty-nine percent of adverse incidents at skilled nursing facilities were preventable. Of that, fifty-six percent of the harm was the result of treatment which was provided in a substandard way. For a skilled nursing facility with 150 beds, that means that, in any given month, approximately twenty-nine residents are injured as a result of preventable negligence.

Every nursing home licensed in the state of Florida has a duty to provide its residents with "the highest practicable physical, mental, and psychosocial well-being." Fla. Administrative Code § 59A-4.108. Allowing each resident to live out some of the most difficult times in

their lives with the level of care and dignity they are due should not be a difficult task in a well-staffed facility. However, far too many facilities in Florida have chosen to put the interests of shareholders above all else, leading to the unnecessary suffering of some of our state's most vulnerable residents.

Nursing homes accept exorbitant amounts of money from the state and federal government, as well as desperate family members, to provide adequate and appropriate care to the sick and elderly. Yet, rather than honoring this contract, they look for ways to drive costs up (often by forming webs of subsidiaries who charge unreasonable fees for mostly nonexistent services) without actually providing adequate care. Even when these facilities appear to be meeting the statutory minimums for care, they are merely creating a façade of compliance by ignoring key aspects of care in their calculations.

At least once a week, I receive a call from a distressed child or spouse regarding the care a loved one is receiving in a nursing home. Most of these calls follow a similar outline: their loved one enters the facility for what is supposed to be a short period; care plans are either not put into place or not followed; injury or death ensue. The most infuriating aspect of many of these phone calls is that adequate staffing levels would have likely prevented these injuries. While I love my job and the help that I can give to clients, I would definitely prefer that they never need my services in the first place.

Far too many of my cases involve elderly residents who are forced to soil themselves because no one will assist them to the bathroom, or who suffer debilitating falls when they try

to get to the bathroom on their own. More often than not, those same residents are forced to lay in their own waste for hours, because a staff member who does not have time to assist residents with the most basic of tasks certainly does not have time to clean the resident once the inevitable happens. You can bet that if no one is coming to change the resident, they aren't turning and repositioning the resident every two hours either; and a resident who is forced to lay in a moist cesspool for hours will quickly lose skin integrity and develop bed sores. In these instances, it is also very common for residents to go without meals simply because a CNA does not have the time to feed them. This leads to malnutrition and a further deterioration of the resident's skin condition.

Nursing Homes know that their low staffing levels lead to avoidable resident injuries, yet they continue to understaff and create an environment where patient care is less important than investor return. Discovery early on to find out not only whether these facilities were meeting the minimum staffing requirements set forth by the state, but also to find out whether they really were taking into account the acuity of care required by the residents is key to showing an institutional failure. At a recent deposition, a nursing supervisor told me that, in the sixty bed acute care wing she manages, an average of eighty percent or more of the residents are incontinent and require perineal care. She told me that each resident requires perineal care three to four times each shift, and that such care takes at least twenty minutes to complete. Perineal care is done exclusively by the CNAs at this facility and the number of residents who need it is not taken into consideration when that particular facility calculates its staffing needs. There are

seven to nine CNAs on each shift. Assuming seventy-five percent of the residents require perineal care three times a shift, with nine CNAs working the shift, that comes out to five hours of perineal care per CNA each shift. That is five hours of care for each CNA that is simply not budgeted into their day. Is it little wonder, then, that residents are not toileted, cleaned, fed, or turned when they should be? The nursing home is purposefully understaffing its facility by choosing to ignore the most basic needs of its residents.

Prior to 1999, that standard for awarding punitive damages was willful, wanton, or gross misconduct of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects...or that reckless indifference to the rights of others which is equivalent to an intentional violation of them." *White Const. Co., Inc. v. DuPont*, 455 So. 2d 1026, 1028-29 (Fla. 1984). In 1999, when the Florida Legislature established caps on punitive damages with Fla. Stat. § 768.73, it also lowered the standard of proof required for awarding punitive damages to a showing of gross negligence or intentional misconduct.

The evolution of the gross negligence standard in Florida dates back to at least 1959, when the Florida Supreme Court in *Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959) explained the distinction between simple negligence and gross negligence: "simple negligence is that course of conduct which a reasonable and prudent man would know might possibly result in injury to persons or property whereas gross negligence is that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property." *Id.* at 182.

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In 1970, the Second District in *Glaab v. Caudill*, 236 So. 2d 180 (Fla. 2d DCA 1970) observed that “from the standpoint of degree, it is clear that gross negligence lies between simple negligence and the ‘willful and wanton’ conduct sufficient, if death results, to constitute ‘culpable negligence’ within the crime of manslaughter.” *Id.* The court in *Glaab* also laid out the required elements of a *prima facie* case for gross negligence: 1) a showing of circumstances which constitute a clear and present danger; 2) awareness of that danger; and, 3) “a conscious, voluntary act or omission in the face thereof which is likely to result in injury.” *Id.* at 185. These elements are consistent with the definition of gross negligence provided in Fla. Stat. § 768.72(2)(b), which states: “the defendant’s conduct was so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.” The statutory definition, like its common law counterpart, address conduct which a reasonably prudent

person should know will create a clear and present danger of injury to others.

In the nursing home context, a culture of disregard for the sanctity of human life is prevalent. It starts with chronic understaffing and low wages, and permeates into the attitudes of the individuals charged with caring for some of our state’s most vulnerable citizens. Even the most well-intentioned CNA will quickly learn that it is physically impossible to complete all of the tasks required to provide each resident with the “the highest practicable physical, mental, and psychosocial well-being.” It is a recipe for disaster, and many nursing homes would rather risk a potential lawsuit than increase staffing levels. This is because it is often cheaper to pay a few settlements than to pay for more staff. When the possibility of punitive damages are thrown into the mix, however, the cost of doing business the right way might suddenly seem like the cheaper option.



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