

After a six-week jury trial, Pamela Andrews of Andrews Skinner PS, Seattle, WA, obtained a defense verdict in favor of her client, a skilled nursing facility located in Spokane Washington, against the Texas law firm of Marks, Balette & Geissel.

The Marks Firm expended significant resources in both preparing and trying the case, including six trial counsel attending nearly every day of the trial. This was the first time the Marks Firm's staffing model, which finds "dangerous understaffing" in any high acuity SNF that does not maintain a 3.2 nursing aide PPD, was tested in a courtroom setting. Their model is premised upon the historic research of Dr. John Schnelle and is applied to a particular case through their use of an accountant who "re-calculates" the defendant facility's nurse aide PPD and a simulation expert who puts the calculations into a computerized simulation model. The model reliably concludes that it is mathematically impossible to meet the core care needs a resident population if the facility does not provide 3.2 nurse aide PPD standard. The Marks Firm is using this staffing model nationwide to argue percentages of "omitted care" which they assert results in neglectful and negligent care.

The facts of the case involved the plaintiff, an 83-year-old woman who had undergone total knee replacement surgery and was admitted to the SNF in 2007 for short-term rehabilitation. During her nine day stay a pressure wound surfaced on her coccyx. The defendant maintained the SNF provided proper care and that the wound was a deep tissue injury which originated during the Plaintiff's knee surgery hospitalization preceding her admission to the SNF. The plaintiff asserted that the staff at the SNF neglected her and provided negligent care which resulted in the development of the sacral wound. The wound subsequently became colonized with MRSA, took 15 months to heal and, according to plaintiff, led to an above-the-knee amputation of her right leg due to hyper-coagulation caused by immobility.

The parties attempted mediation but plaintiff would accept nothing short of the remaining policy limits (the full value of the policy limits was \$6M) dropping only 25 cents off that value at mediation. A policy limits demand was again made, and rejected, the week prior to trial. The plaintiff presented evidence of special damages in the amount of \$299,638.64 and asked the jury to award a total value of \$33 million.

The thrust of the plaintiff's claim was that the facility engaged in a pattern of conduct of understaffing that created a situation of it being "dangerously understaffed." Plaintiff claimed that because the SNF was understaffed, it was mathematically impossible to provide adequate care to the plaintiff. To bolster this theory they relied heavily upon the work of Dr. Schnelle and their staffing "model."

The staffing model concept was created by the Marks Firm several years prior to this suit. It was based upon the research of Dr. Schnelle, a well-respected academic eldercare advocate who studied nursing home care over the expanse of his 30+ year career and who authored a research paper presented to Congress arguing for a nationwide ratio of 3.2 nurse aide PPD in high acuity facilities. Dr. Schnelle testified that plaintiff's counsel approached him several years

ago and worked with him to make his research more “user friendly” and ultimately available to them to use as a litigation tool in elder care lawsuits. Armed with Dr. Schnelle’s research, plaintiff’s counsel then commissioned a simulation expert, Mr. Dale Schroyer, and an accountant, Mr. Bryne Liner, to work with them to create a template/model that they could then use to overlay on any nursing home that does not maintain a 3.2 nurse aide PPD. In this case, applying the staffing model resulted in a conclusion that 40-50% of the core care needs were omitted for the resident population during the plaintiff’s nine-day stay.

Given the self-depleting nature of the insurance policy at issue, and escalating defense costs, the defendant offered \$1.5 Million to settle plaintiff’s claims a month prior to trial and increased that offer to \$2 Million during trial. Both offers were rejected out of hand by plaintiff.

At trial, the defense emphasized the shortcomings of the staffing model and also explained that despite the elaborate presentation through the simulation, plaintiff’s theory was nothing but a formula that boiled down to basic math: the facility’s recalculated PPD by Mr. Liner, divided by 3.2 resulting in a % of care that would allegedly be omitted. The defense explained that by applying Dr. Schnelle’s 3.2 nurse aide PPD figure to any nursing home, the Marks Firm would be assured of finding “omitted care” unless the facility staffed nurse aides at 3.2 PPD. Since approximately 94% of nursing homes in the United States did not staff nurse aides at 3.2 PPD in 2007 the defense argued that the use of such a template could not be used as an accurate measure of provided/omitted care and should be disregarded by the jury.

The verdict came back in one day. The jury found no neglect (a claim that by statute allows recovery of attorney fees and costs for a plaintiff) but did find negligence in the charting practices of the SNF; however they also found that those charting errors did not proximately cause injury to the plaintiff so no damages were awarded. In discussing the case with jurors afterward they explained that they were not persuaded by the staffing analysis which they felt would hold a SNF to an impossibly high standard.

Hannah Jones v. Regency Pacific Inc., King County Superior Court Cause No. 10-2-21303-1 KNT