

Nos. G041184, G041120, G040841

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

MARY KATHLEEN ADAMS, et al.

Plaintiffs and Respondents,

vs.

SUNRISE SENIOR LIVING SERVICES, INC., et al.,

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY OF ORANGE,
SUPERIOR COURT NO. 05CC13119
THE HONORABLE KAZUHARU MAKINO, JUDGE

RESPONDENTS' BRIEF

Kimberly A. Valentine-Sibert (SBN 195891)
Wilkes & McHugh, P.A.
3780 Kilroy Airport Way, Suite 220
Long Beach, CA 90806
Tel: (562) 424-3003
Fax: (562) 424-3005

Martin N. Buchanan (SBN 124193)
Niddrie, Fish & Buchanan LLP
750 B Street, Suite 2640
San Diego, CA 92101
Tel: (619) 238-2426
Fax: (619) 238-6036

Attorneys for Respondents Mary Kathleen Adams, et al.

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF FACTS	3
A. Mrs. Adams’ Admission to Villa Valencia and Death From Bedsores	3
B. Breach of Standard of Care	5
C. The Sunrise Entities	8
D. The Marriott Acquisition	9
E. Vacancies in Top Leadership Positions at Villa Valencia	10
F. Regional Managers Responsible for Oversight and Management of Villa Valencia	11
G. Responsibility for Staffing Levels	12
H. DHS Surveys and Statements of Deficiency	13
I. Management’s Failure to Remedy Deficiencies in Staffing, Training, and Patient Care at Villa Valencia	15
STATEMENT OF THE CASE	20
ARGUMENT	22
I. THE SPECIAL VERDICT FORM DID NOT OMIT A NECESSARY FINDING	22
A. Appellants Waived Or Invited The Alleged Defect in the Form of the Special Verdict	23
B. The Jury’s Special Verdict Resolved the “Ultimate Facts” of the Case	27
C. The Trial Court Properly Interpreted the Verdict Form In Light of the Jury Instructions, Arguments, and Evidence	28

II. THE JURY’S FINDING OF NO “WILLFUL MISCONDUCT” WAS CONSISTENT WITH ITS AWARD OF PUNITIVE DAMAGES	30
III. THE JURY INSTRUCTIONS AND VERDICT FORM DID NOT OMIT THE NEGLIGENCE ELEMENT OF ELDER ABUSE OR DIRECT THE JURY TO FIND PER SE NEGLIGENCE	33
A. Appellants Waived or Invited Any Error	33
B. The Jury Instruction and Verdict Form Were Not Defective	34
C. Any Error Was Harmless	37
IV. THE ELDER ABUSE VERDICT AND AWARD OF PUNITIVE DAMAGES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE	38
A. Standard of Review	38
B. There Was Sufficient Evidence That Management Was the Managing Agent for Services	39
C. There Was Sufficient Evidence That A Managing Agent of Services Engaged in, Authorized, or Ratified Reckless, Malicious, Oppressive or Fraudulent Conduct or Had Advance Knowledge of the Unfitness of the Employees Placed in Charge of Villa Valencia	43
D. The Jury’s Verdict As to Management Has No Bearing on the Sufficiency of Evidence As to Services	48
V. MANAGEMENT AND LIVING ARE JOINTLY LIABLE FOR THE ELDER ABUSE AND PUNITIVE DAMAGES AWARDS AGAINST SERVICES	50
A. A Joint Venturer Is Vicariously Liable for Punitive Damages Based on the Wrongful Conduct of Another Joint Venturer Acting in the Course of the Joint Venture Business	50

B. Punitive Damages May Be Imposed Against a Corporation for the Wrongful Acts of Entities It Appoints to Manage Its Business	52
C. Civil Code Section 3294(b) Does Not Preclude Vicarious Liability for the Wrongful Conduct of Another Joint Venturer	53
VI. LIABILITY UNDER THE ELDER ABUSE ACT DOES NOT REQUIRE AN UNDERLYING CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE	55
A. Appellants Invited Any Error	55
B. Professional Negligence and Elder Abuse Are Mutually Exclusive	56
C. The Elder Abuse Act Creates an Independent Cause of Action	57
D. Any Error Was Harmless	59
VII. THE TRIAL COURT’S FINDING THAT COMPENSATORY DAMAGES WERE CAPPED AT \$250,000 DOES NOT REQUIRE A CORRESPONDING REDUCTION OF THE PUNITIVE DAMAGES	60
VIII. RESPONDENTS SHOULD BE AWARDED FEES ON APPEAL	63
CONCLUSION	64
CERTIFICATE OF COMPLIANCE	65

TABLE OF AUTHORITIES

CASES

<i>Babcock v. Omansky</i> (1973) 31 Cal.App.3d 625	25
<i>Bank of California v. Connolly</i> (1973) 36 Cal.App.3d 250	53
<i>Bardis v. Oates</i> (2004) 119 Cal.App.4th 1	63
<i>Barragan v. Superior Court</i> (2007) 148 Cal.App.4th 1478	27
<i>Barris v. County of Los Angeles</i> (1999) 20 Cal.4th 101	58
<i>Benun v. Superior Court</i> (2004) 123 Cal.App.4th 113	59
<i>Betts v. Allstate Ins. Co.</i> (1984) 154 Cal.App.3d 688	60
<i>Black v. Shearson, Hamill & Co.</i> (1968) 266 Cal.App.2d 362	51
<i>Blue v. Rose</i> (8th Cir. 1986) 786 F.2d 349	51
<i>BMW of North America, Inc. v. Gore</i> (1996) 517 U.S. 559	60
<i>Bremenkamp v. Beverly Enterprises-Kansas, Inc.</i> (D. Kan. 1991) 762 F. Supp. 884	48
<i>Central Pathology Service Medical Clinic, Inc. v. Superior Court</i> (1992) 3 Cal.4th 181	31
<i>Central Valley General Hosp. v. Smith</i> (2008) 162 Cal.App.4th 501	27
<i>Covenant Care, Inc. v. Superior Court</i> (2004) 32 Cal.4th 771	56, 58
<i>Crail v. Blakely</i> (1973) 8 Cal.3d 744	39
<i>Delaney v. Baker</i> (1999) 20 Cal.4th 23	37, 56, 57
<i>Duggins v. Guardianship of Washington Through Huntley</i> (Miss. 1993) 632 So.2d 420	51

<i>Egan v. Mutual of Omaha Ins. Co.</i> (1979) 24 Cal.3d 809	42
<i>Estate of Despain v. Avante Group, Inc.</i> (Fla. App. 2005) 900 So.2d 637, 645	48
<i>Fransen v. Washington</i> (1964) 229 Cal.App.2d 570	24
<i>Gebert v. Yank</i> (1985) 172 Cal.App.3d 544	32
<i>Gherman v. Colburn</i> (1977) 72 Cal.App.3d 544	34
<i>Gober v. Ralphs Grocery Co.</i> (2006) 137 Cal.App.4th 204	60, 62
<i>Howard v. Owens Corning</i> (1999) 72 Cal.App.4th 621	46
<i>In re Angelique C.</i> (2003) 113 Cal.App.4th 509	39
<i>In re Conservatorship of Gregory</i> (2000) 80 Cal.App.4th 514	36-37
<i>Intrieri v. Superior Court</i> (2004) 117 Cal.App.4th 72	58
<i>Jensen v. BMW of North America, Inc.</i> (1995) 35 Cal.App.4th 112	25
<i>Jentick v. Pacific Gas & Electric Co.</i> (1941) 18 Cal.2d 117	34
<i>Johnson v. Ford Motor Co.</i> (2006) 135 Cal.App.4th 137	62
<i>Kostecky v. Henry</i> (1980) 113 Cal.App.3d 362	36
<i>Lowe v. Yolo County Consolidated Water Co.</i> (1910) 157 Cal. 503	52
<i>Mack v. Soung</i> (2000) 80 Cal.App.4th 966	30
<i>Madsen v. Cawthorne</i> (1938) 30 Cal.App.3d 124	51
<i>Major v. Western Home Ins. Co.</i> (2009) 169 Cal.App.4th 1197	31, 32, 40, 41
<i>Marcos v. Board of Retirement</i> (1990) 51 Cal.3d 924	63

<i>Mardirossian & Associates, Inc. v. Ersoff</i> (2007) 153 Cal.App.4th 257	24-25
<i>Mary M. v. City of Los Angeles</i> (1991) 54 Cal.3d 202	26
<i>McGee v. Tucoemas Federal Credit Union</i> (2007) 153 Cal.App.4th 1351	60
<i>Meleski v. Pinero Int’l Restaurant</i> (Md. App. 1981) 424 A.2d 784	51
<i>Mesecher v. County of San Diego</i> (1992) 9 Cal.App.4th 1677	26, 56
<i>Metcalf v. County of San Joaquin</i> (2008) 42 Cal.4th 1121	35-36
<i>Mocek v. Alfa Leisure, Inc.</i> (2003) 114 Cal.App.4th 402	43
<i>Myers Building Industries, Ltd. v. Interface Technology, Inc.</i> (1993) 13 Cal.App.4th 949	27
<i>Neal v. Farmers Ins. Exchange</i> (1978) 21 Cal.3d 910	61, 62
<i>Nelson v. Abraham</i> (1947) 29 Cal.2d 745.	53
<i>Nestle v. City of Santa Monica</i> (1972) 6 Cal.3d 920	46
<i>Null v. City of Los Angeles</i> (1988) 206 Cal.App.3d 1528	49
<i>Orient Handel v. United States Fid. & Guar. Co.</i> (1987) 192 Cal.App.3d 684	25
<i>Pellegrini v. Weiss</i> (2008) 165 Cal.App.4th 515	50
<i>Perlin v. Fountain View Management, Inc.</i> (2008) 163 Cal.App.4th 657	57-59
<i>Red Mountain, LLC v. Fallbrook Public Utility Dist.</i> (2006) 143 Cal.App.4th 333	37
<i>Roberts v. Ford Aerospace & Communications Corp.</i> (1990) 224 Cal.App.3d 793	43-44

<i>Rogers v. Hickerson</i> (Mo. App. 1986) 716 S.W.2d 439	51
<i>Romo v. Ford Motor Co.</i> (2003) 113 Cal.App.4th 738	61-63
<i>Sababin v. Superior Court</i> (2006) 144 Cal.App.4th 81	57
<i>Serrano v. Unruh</i> (1982) 32 Cal.3d 621	63
<i>Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.</i> (2000) 78 Cal.App.4th 847	38
<i>Shetka v. Kueppers, Kueppers, VonFeldt & Salmen</i> (Minn. 1990) 454 N.W.2d 916	51
<i>Silver Creek, LLC v. Blackrock Realty Advisors, Inc.</i> (2009) 173 Cal.App.4th 1533	63-64
<i>Simon v. San Paolo U.S. Holding Co., Inc.</i> (2005) 35 Cal.4th 1159	60-62
<i>Soule v. General Motors Corp.</i> (1994) 8 Cal.4th 548	38
<i>Spencer v. Steinbrecher</i> (W. Va. 1968) 164 S.E.2d 710	51
<i>Sprague v. Equifax, Inc.</i> (1985) 166 Cal.App.3d 1012	36
<i>Stevens v. Owens-Corning Fiberglas Corp.</i> (1996) 49 Cal.App.4th 1645	34, 56
<i>Tavaglione v. Billings</i> (1993) 4 Cal.4th 1150	43
<i>Textron Financial Corporation v. v. National Union Fire Ins. Co. of Pittsburgh</i> (2004) 118 Cal.App.4th 1061	40, 41, 52
<i>Thompson Pacific Const., Inc. v. City of Sunnyvale</i> (2007) 155 Cal.App.4th 525	25, 26
<i>Thompson v. County of Los Angeles</i> (2006) 142 Cal.App.4th 154	36
<i>Unruh-Haxton v. Regents of University of California</i> (2008) 162 Cal.App.4th 343	53

<i>Valentine v. Baxter Healthcare Corp.</i> (1999) 68 Cal.App.4th 1467	37
<i>Weeks v. Baker & McKenzie</i> (1998) 63 Cal.App.4th 1128	54, 63
<i>West v. Duncan</i> (1962) 205 Cal.App.2d 140	28
<i>White v. Ultramar, Inc.</i> (1999) 21 Cal.4th 563	40-42, 54
<i>Wilson v. County of Orange</i> (2009) 169 Cal.App.4th 1185	38, 39
<i>Winant v. Bostic</i> (4th Cir. 1993) 5 F.3d 767	51
<i>Wolf v. Walt Disney Pictures and Television</i> (2008) 162 Cal.App.4th 1107	36, 37
<i>Wolk v. Green</i> (N.D. Cal. 2007) 516 F.Supp.2d 1121	59
<i>Woodcock v. Fontana Scaffolding & Equip. Co.</i> (1968) 69 Cal.2d 452	25, 28
<i>Wysinger v. Automobile Club of Southern California</i> (2007) 157 Cal.App.4th 413	32, 42
<i>Zeibak v. Nasser</i> (1938) 12 Cal.2d 1	50

STATUTES

Civil Code section 3294	27, 30-32, 39, 41, 48, 53, 54
Civil Code section 3333.2	22
Code of Civil Procedure section 377.34	61
Corporations Code section 16305	50
Corporations Code section 16306	51
Welfare and Institutions Code section 15610.27	27
Welfare and Institutions Code section 15610.57	26, 27, 35, 36, 55, 57
Welfare and Institutions Code section 15657	<i>passim</i>

JURY INSTRUCTIONS

CACI No. 3103	28
CACI No. 3105	2, 28, 29, 33-36, 55, 56
CACI No. 501	37
CACI No. 514	37

REGULATIONS

22 Cal. Code Regs. § 72329.1	18
22 Cal. Code Regs. § 72501(e)	18
22 Cal. Code Regs. § 72515(b)	18, 47
42 C.F.R. § 483.30(a)	18

OTHER AUTHORITIES

Assem. Com. on Judiciary, Republican Analysis of Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended Aug. 20, 1991	59
Bromberg & Ribstein on Partnership (1992-2 Supplement)	51
Witkin, California Procedure (5 th ed. 2008)	39

INTRODUCTION

In December 2004, 104-year old Mary Kathleen Adams was admitted to Villa Valencia Health Care Center for rehabilitation after breaking a leg. She was a vibrant woman who was still in good health for her age. Two months later, Mrs. Adams' family removed her from the facility after discovering she had developed advanced bedsores with necrotic black tissue. The bedsores had penetrated through several layers of skin to the muscle tissue or bone, and the flesh was literally rotting or decaying. Within weeks, Mrs. Adams died a painful and degrading death from an infection caused by the bedsores.

The bedsores were caused by substandard care and a chronic shortage of nursing staff at the skilled nursing facility. The facility did not have sufficient nursing staff to turn and reposition residents every two hours, which was critical to prevent bedsores. The short-handed staff also failed to conduct regular assessments of Mrs. Adams' skin, as required by her care plan. As a result, the bedsores were not discovered until too late. Because of the shortage of nursing staff, the staff development director also did not have time to conduct training. The nursing staff was not adequately trained in basic nursing care, including turning and repositioning.

Defendants owned and operated Villa Valencia as a joint venture. They promulgated a staffing grid and approved the budget for Villa Valencia from their corporate headquarters in Virginia. For well over a year *before* Mrs. Adams was admitted, corporate managers were aware of the deficiencies in staffing and resident care. They were notified of these problems through statements of deficiencies issued by the Department of Health Services, as well as numerous complaints by the staff of Villa Valencia. Despite their awareness of the probable risk to residents, the

corporate managers failed to remedy the longstanding shortage of nursing staff or impose a moratorium on admissions until it was too late for Mrs. Adams.

After a two-month trial, a jury found defendants liable for neglect under the Elder Abuse Act. (Welf. & Inst. Code, § 15657.) The jury awarded \$1 million compensatory damages and \$1 million punitive damages. In post-judgment motions, the trial court ruled that noneconomic damages are capped at \$250,000 under the Elder Abuse Act and reduced the compensatory damages accordingly.

The judgment should be affirmed. There was ample evidence to support the jury's findings of elder abuse and its award of punitive damages. Many of appellants' claims are being raised for the first time on appeal and have not been preserved. In fact, their own proposed verdict form contained the same alleged "defect" they now raise as their lead issue on appeal. Likewise, the defense itself asked the trial court to give former CACI No. 3105, which contained both the "by failing to" language and the "reasonable person" standard of care appellants now attack as reversible error under the Elder Abuse Act.

Even if they were preserved, none of appellants' claims have merit. There was no defect in the elder abuse instruction or verdict form; there was no inconsistency in the jury's verdict; the trial court correctly entered judgment against all three defendants in accordance with the joint venture finding; and the reduction of compensatory damages did not require a corresponding reduction of punitive damages.¹

¹Plaintiffs originally filed notices of appeal from the judgment and amended judgment. (IV AA 948, 1026.) However, they are not pursuing their cross-appeals.

STATEMENT OF FACTS

A. Mrs. Adams' Admission to Villa Valencia and Death From Bedsores

In October 2004, Mary Kathleen Adams turned 104 years old. She still lived at home. She was charming, alert, cheerful, and well-nourished. (2 RT 263-264, 280; 13 RT 2259.) Mrs. Adams could walk, feed herself, read the newspaper, and do needlepoint. She had good relationships with family and friends. (2 RT 280-281, 351; 13 RT 2251-2252, 2378-2380.)

In November 2004, Mrs. Adams was placed on hospice after a hospital stay. Mrs. Adams made the decision to go on hospice because she did not like the way she had been treated at the hospital and did not want to return. (13 RT 2259-2266.) However, she was still in good health for her age. (2 RT 274, 350; 13 RT 2259-2263.) Her treating doctor, who certified her for hospice care, believed she was doing well and could live for several more years. (18 RT 3282, 3293.) Mrs. Adams quickly became the hospice nurse's favorite patient. (2 RT 264.)

On December 18, 2004, Mrs. Adams broke her leg and was admitted to Saddleback Hospital. On December 21, 2004, she was discharged to Villa Valencia Health Care Center ("Villa Valencia") in a leg cast for rehabilitation. (13 RT 2267-2269, 2394-2396; 14 RT 2430-2433.) Villa Valencia is a skilled nursing facility owned and operated by the defendants. (See Sections C & D, *post.*)

Mrs. Adams could have lived another two years even after breaking her leg. She was doing exceedingly well for her age and did not have any immediate risk factors for death. None of her health conditions, singly or in combination, would have caused her death within six months. (7 RT 1175, 1196-1200.)

Sometime after January 17, 2005, a new administrator of Villa Valencia ordered a facility-wide skin survey of all patients in the facility. (12 RT 2140-2141.) On January 25, 2005, the nursing staff conducting the survey discovered for the first time that Mrs. Adams had multiple skin tears and black blisters on both of her heels. (5 RT 797-800.) The blisters were advanced bedsores, also known as pressure wounds, pressure sores, pressure ulcers, or decubitus ulcers. The surrounding skin was necrotic, meaning that the cells were already dead and could not be regenerated. (2 RT 294-295; 6 RT 1036.) These types of wounds are painful. (6 RT 1082.)

Villa Valencia never notified Mrs. Adams' family that the wounds were anything more than ordinary blisters. The family had no idea that Mrs. Adams was suffering from advanced pressure ulcers. (13 RT 2334, 2352; 14 RT 2435-2436, 2502.)

Villa Valencia performed sharp debridement of the pressure wounds, which involves the use of a sharp instrument to cut away dead tissue. The procedure is painful. (7 RT 1254-1256, 1260.) Mrs. Adams also suffered pain during dressing changes and was placed on pain medications. (2 RT 288-290.)

In February 2005, about one month after the wounds were discovered by the nursing staff, Mrs. Adams' son, Wendell Adams, observed the Villa Valencia staff tending to her heel wounds. Mrs. Adams was crying out in pain and complaining that it hurt every time the staff touched her leg. The pressure wounds looked terrible. Wendell was surprised and upset. Wendell and his sister, Janice Borkovetz, made arrangements to have their mother discharged from the facility and placed back on hospice care. (13 RT 2281-2282, 2400-2404; 14 RT 2435-2439.)

When Mrs. Adams was released from Villa Valencia, she was suffering from stage four pressure wounds, the most advanced stage in which the damage extends through several layers of skin to the muscle tissue or bone. (2 RT 294; 6 RT 1038-1039; 12 RT 2142-2143.) After Mrs. Adams returned home, a hospice nurse inspected the pressure wounds on February 28, 2005. They were horrific decubitus ulcers with black necrotic tissue. They had a terrible odor of rotting or decaying flesh. The wounds were oozing and infected. When the hospice nurse attempted to prepare wound dressings, Mrs. Adams moaned and cried in pain and begged her to stop. The nurse had to give her pain medication. (2 RT 285-286, 294-296; 13 RT 2283; 14 RT 2439-2440.)

Because it was obvious that the wounds were not going to heal, the family made a decision to keep Mrs. Adams as comfortable and pain-free as possible in the last days of her life. (2 RT 301; 14 RT 2496-2500.) Mrs. Adams eventually passed away on March 7, 2005. The cause of death was decubitus ulcers. The mechanism of death was sepsis, a blood infection that occurs when bacteria enter the blood stream. The pressure sores were the likely portal of entry for the bacteria that caused the sepsis. (2 RT 359-364, 370; 3 RT 403; 6 RT 1085-1086; 7 RT 1232-1236, 1245-1247, 1261.)

B. Breach of Standard of Care

The care Mrs. Adams received at Villa Valencia fell below the standard of care for skilled nursing homes and nursing staff. Mrs. Adams received substandard care in multiple areas, including skin care and assessment, prevention of pressure sores, fall prevention, nutrition, care planning, pain management, charting, staffing, competency and training of staff, and compliance with treatment orders. As a result, Mrs. Adams developed pressure sores and experienced unnecessary pain, suffering, and

premature death. (6 RT 1032-1097; 7 RT 1101-1141; 9 RT 1548-1621.)

In its care of Mrs. Adams, Villa Valencia violated multiple state and federal regulations governing resident care, nutrition, care planning, prevention of pressure sores, written policies and procedures, charting of care, and accepting only those patients for whom the facility can provide adequate care. (6 RT 1088-1091; 7 RT 1114-1115, 1123-1124, 1136-1138, 1142-1144, 1148-1149; II AA 603-609 [jury instruction on regulations].)

Appellants “do not challenge the substantial evidence regarding the adequacy of Mrs. Adams’ care.” (AOB 9, fn. 4.) For purposes of this appeal, what is important is that the deficient care was directly attributable to a chronic shortage of nursing staff at Villa Valencia that existed for over a year prior to her admission and persisted throughout her residency. (See Sections H & I, *post*.) For example, the care plan for Mrs. Adams required that she be turned and repositioned every two hours to prevent pressure sores from developing. According to the nursing records, however, there were many shifts when she was not turned and repositioned at all. Mrs. Adams was only turned and repositioned during seven of 30 potential shifts from December 22 through December 31, 2004. (6 RT 1044-1048; 9 RT 1567.) The failure to turn and reposition patients regularly was attributable to the shortage of nursing staff. (See, e.g., 3 RT 429-431, 472-474.)

Mrs. Adams’ care plan also required that the nursing staff assess her skin on a daily basis and whenever they had contact with her through bathing or changing. Because of the shortage of nursing staff, Villa Valencia failed to comply with this part of the care plan. (6 RT 1043-1044.) If the care plan had been followed and regular skin assessments conducted, the nursing staff could have detected and treated the pressure sores at least a week earlier, when the wounds would have first manifested

themselves as red spots on the heels. (6 RT 1042-1044; 9 RT 1563-1565.)

Villa Valencia also breached the standard of care by failing to comply with physician orders for pressure-relieving devices. (6 RT 1061-1064; 7 RT 1121-1125.) This was part of a common pattern of neglect at the facility. Physician orders for pressure-relieving devices were frequently not followed. (4 RT 536-537.) About 50 percent of the residents who should have been wearing heel protectors did not have them on. (4 RT 586-587.) The facility was unable to provide adequate care to the residents because of the shortage of nursing staff. (4 RT 552-558.)

The competency of the nursing staff at Villa Valencia also fell below the standard of care. (9 RT 1615-1621.) The staff development director did not have sufficient time to provide training for the nursing staff because he had to fill in to perform nursing duties due to the short-staffing. (3 RT 427-428, 461-462.) As a result, the CNA's were not adequately trained in turning and repositioning, timely answering of call lights, and basic nursing care. (3 RT 446-447; 5 RT 852-853.) There were numerous deficiencies in basic nursing care given to Mrs. Adams that contributed to her pressure sores and skin tears. (See, e.g., 6 RT 1065-1066 [deficient brace care]; 6 RT 1067-1070 [deficient skin assessments]; 6 RT 1094-1097 [deficient care plans]; 7 RT 1140-1144 [deficient charting].)

The pressure sores and skin tears suffered by Mrs. Adams were avoidable injuries. (6 RT 1036; 7 RT 1114; 9 RT 1583-1584.) The pressure sores were caused by failure to use appropriate pressure-relieving devices and failure to turn and reposition Mrs. Adams every two hours. (6 RT 1057-1058.) With proper skin assessments by the nursing staff, the pressure sores likely could have been prevented from developing if they had been discovered when first visible as red spots. (9 RT 1564-1565.)

C. The Sunrise Entities

Sunrise Senior Living, Inc. (“Living”) is a provider of senior living services through its operating subsidiaries. It is a publicly traded company with headquarters in McLean, Virginia. (Stein Depo. [4/20/07 a.m.] 15, 45; RA 35.) Living’s wholly owned subsidiaries include Sunrise Senior Living Management, Inc. (“Management”) and Sunrise Senior Living Services, Inc. (“Services”). (Tomasso Depo. 9-10.)

Living and its subsidiaries (collectively “Sunrise”) have centralized accounting, finance, and other operational functions. (11 RT 1984; Stein Depo. [4/20/07 a.m.] 54-55; RA 45.) They report their finances on a consolidated financial statement as if it were a single company. (22 RT 4338-4339.) They do not maintain separate financial books and records. (22 RT 4351-4352.) The parent company (Living) has full control over all the money that comes into the subsidiaries. (6 RT 925-926; 11 RT 1990-1991; 22 RT 4358-4359.)

Living’s subsidiary Management provides the management services and operational policies for all of the senior living facilities operated by the Sunrise entities. Management establishes company-wide policies and procedures for matters including personnel, administration, and resident care. (Tomasso Depo. 215-216; Stein Depo. [11/29/07] 98; Stein Depo. [4/20/07 a.m.] 57-58.) Management oversees all aspects of the operation of the Sunrise living facilities, including finances, accounting, quality assurance, regulatory compliance, and resident satisfaction. (Tomasso Depo. 38, 93-95, 215-216; Stein Depo [4/20/07 a.m.] 62-63, 67-68, 70, 82.)

The senior managers of the Sunrise entities are all employed and paid by Management, but they perform services on behalf of Living and all

of its operating subsidiaries, including Services. They do not allocate or keep track of how much time they spend providing services to each Sunrise entity. (11 RT 2003-2007; 22 RT 4352-4353; Tomasso Depo. 25-27; Stein Depo. [11/29/07] 15-18.)

D. The Marriott Acquisition

In March 2003, Sunrise acquired Marriott Senior Living Services. Prior to the Marriott acquisition, Sunrise had limited experience in skilled nursing and it operated primarily assisted and independent living facilities. (6 RT 888.) As a result of the acquisition, Services became the operator of skilled nursing facilities formerly owned by Marriott with nearly 4,000 residents, including Villa Valencia Health Care Center (“Villa Valencia”). (22 RT 4350; Stein Depo. [11/29/07] 104-105; RA 36-37.) Skilled nursing requires a significantly higher level of care and more nursing staff for the patients. (5 RT 658; RA 59.)

Services employs the staff of the facilities Sunrise acquired from Marriott, including Villa Valencia. (Tomasso Depo. 25, 93-94.) Services has no employees in senior management of the Sunrise entities. (*Id.* at 10.) The highest-ranking employees of Services are the executive directors of the individual communities, who oversee the day-to-day operations of the facilities. The executive directors report directly to the regional managers of Management. (*Id.* at 149-151; 4 RT 593, 595.)

The duties of Services are carried out through Management. (Tomasso Depo. 38.) The Management entity is responsible for oversight and management of all the Services facilities, including Villa Valencia. (*Id.* at pp. 38, 93-95, 215-216.) Tiffany Tomasso, the chief operating officer of Living and president of Management, also served as president of Services

for a period of time. (6 RT 884; Tomasso Depo. 25, 27-28.) As president of Management, Tomasso has final authority for carrying out and executing the duties and responsibilities of Services. (Tomasso Depo. 34, 38.) Tomasso also has final reviewing and approving authority for Villa Valencia's budget. (6 RT 909.)

E. Vacancies in Top Leadership Positions at Villa Valencia

State regulations require that every skilled nursing facility must have a director of nursing and an administrator. (5 RT 708; Tomasso Depo. 102-103; II AA 601-602.) Sunrise also requires that there be an executive director for communities such as Villa Valencia. (Tomasso Depo. 103-104, 106-107.)

When Mrs. Adams was admitted to Villa Valencia on December 21, 2004, there were vacancies in all three of the top leadership positions at the facility. (10 RT 1742-1752.) The executive director position had been vacant since Terry Records left in September 2004 and remained vacant until filled by John Niemira on January 17, 2005. (4 RT 631; 10 RT 1752; 13 RT 2364.) The healthcare administrator position had been vacant since Hahn Ta left on October 9, 2004 and remained vacant until filled by Shane Dahl on January 17, 2005. (12 RT 2146; 13 RT 2363-2364.) The director of nursing position had been vacant since Lisa Moore left on September 14, 2004 and remained vacant until filled by Sheila Raja on January 10, 2005. (13 RT 2364.)

Matthew Neeley served as a part-time "floating" executive director of Villa Valencia from October 2004 through December 10, 2004. He was present at the facility about three days a week. During this time period, Neeley was still the executive director of another facility. After Neeley left,

Villa Valencia had no permanent or acting executive director between December 10, 2004 and January 17, 2005. (8 RT 1427-1436; 10 RT 1779, 1797-1798.)

During this same period of time, Villa Valencia also had no MDS (“minimum data set”) coordinator. The role of the MDS coordinator includes monitoring the level of care required by residents. (8 RT 1448-1449.)

F. Regional Managers Responsible for Oversight and Management of Villa Valencia

Ann Wood was employed as the executive director of Villa Valencia when it was first acquired by Sunrise. (6 RT 876-878.) After the acquisition, she became area manager of operations for Management from March 2003 through July 2004, when she was replaced by Maria Connelly. (6 RT 878, 899-900; 8 RT 1409, 1475.) The area manager is responsible for oversight and support of eight Sunrise communities, including Villa Valencia. (6 RT 879; 8 RT 1412-1413; RA 25-27 [job description].) Wood and Connelly reported to Management’s vice president of operations, Cindy Musikantow, and later to Musikantow’s successor, Lisa Brush. Musikantow and Brush worked at the Sunrise corporate headquarters in Virginia. They reported to Tomasso. (6 RT 883; 8 RT 1415; Tomasso Depo. 150-151.)

During the period of Mrs. Adams’ residency from December 2004 through February 2005, Connelly was personally present at Villa Valencia working on patient care issues three or four times a week. (10 RT 1871.) Connelly had no prior experience working in or managing skilled nursing facilities. (8 RT 1408, 1413-1414.) She was not familiar with the regulations applicable to skilled nursing facilities, and she never received

any training specific to skilled nursing. (8 RT 1414-1416, 1420-1421.) However, she was ultimately responsible for ensuring that Villa Valencia complied with the skilled nursing regulations. (10 RT 1781.)

Joni Bonacci was the area director of resident care for Management. She oversaw the resident care at eight facilities, including Villa Valencia. Bonacci also had no experience in skilled nursing. (6 RT 895, 899; 8 RT 1437-1441, 1477.) The area director was a “clinical leader” whose responsibilities included quality improvement, regulatory compliance, training and education, and development and implementation of policies for resident care. (RA 28-30 [job description].)

Connelly designated Bonacci to serve as interim director of nursing for Villa Valencia when the position was vacant from the fall of 2004 through January 17, 2005. While serving as interim director of nursing at Villa Valencia, Bonacci remained responsible for overseeing seven other facilities. (4 RT 516; 6 RT 896-899; 8 RT 1437-1441, 1477, 1485.)

In discovery, Sunrise identified Connelly and Brush as members of Villa Valencia’s governing body from December 21, 2004 through February 25, 2005. (13 RT 2368.) Tomasso was also listed on filings with the State as being one of the members of Villa Valencia’s governing body in 2004 and 2005. (11 RT 1975-1977.) Under federal regulations, the governing body is legally responsible for establishing and implementing policies regarding the management and operation of the facility. (II AA 601.)

G. Responsibility for Staffing Levels

As area manager, Wood and then Connelly were responsible for staffing levels at Villa Valencia. (6 RT 954-957; 8 RT 1424-1425, 1443-1445, 1481-1483.) They received daily reports on staffing levels at the

facility. (5 RT 667-668; 8 RT 1455, 1489.)

Prior to January 17, 2005, when the new executive director took over, Connelly relied on Bonacci's judgment in making staffing decisions for Villa Valencia. (8 RT 1444-1445, 1454-1455; 10 RT 1845.) Connelly personally consulted with Bonacci about staffing and attended director of nursing meetings on the subject. (4 RT 542, 555; 8 RT 1424-1426.)

Connelly met frequently with Bonacci to discuss staffing. (8 RT 1452.)

Wood and Connelly had authority to impose a moratorium on new admissions if the facility was unable to provide adequate care for potential residents. (6 RT 943-944; 8 RT 1458-1459, 1516; 10 RT 1885.) They understood the importance of adequate staffing in a skilled care facility, and they knew that inadequate staffing levels could result in harm to patients. (6 RT 912-913; 8 RT 1456-1459.)

H. DHS Surveys and Statements of Deficiency

In February 2004, ten months before Mrs. Adams was admitted to Villa Valencia, the California Department of Health Services ("DHS") conducted a survey of the facility and issued a statement of deficiencies. DHS found numerous deficiencies, including failure to investigate all injuries of unknown source, failure to ensure that residents were provided with necessary services, failure to provide assistance in a timely manner when residents rang call lights, and failure to provide adequate supervision and assistance devices to prevent accidents. (RA 69-76; 5 RT 718-723.)

DHS notified Villa Valencia that it was taking staff up to 30 minutes to answer call lights, and that residents were complaining that staff did not have time to take care of them. Villa Valencia did not contest any of these findings. (5 RT 724-726, 729; RA 73.)

One month later, in March 2004, DHS investigated two complaints about Villa Valencia and issued a citation and two more statements of deficiency. (9 RT 1694-1703, 1713-1714.) DHS found deficiencies in the areas of skin care, wound treatment and assessments, documentation, implementation of physician orders, and care planning. (RA 1-18.)

In its investigation of these complaints, DHS asked Villa Valencia to produce its policies and procedures for pressure sore identification, care planning, assessment, treatment, and documentation of skin tears, falls and post-fall assessments, alarm monitoring, and neurological assessments. Villa Valencia was unable to provide any of these policies. (9 RT 1710-1711, 1715-1717; RA 6, 16-17.)

In December 2004, the month Mrs. Adams was admitted, DHS conducted another survey of Villa Valencia. DHS reported the results in an exit interview with staff on December 23, 2004. (8 RT 1496-1511; RA 127-131.) DHS again found multiple deficiencies including: residents still had to wait 30-45 minutes for their call lights to be answered; residents did not have regular assessments or complete pain assessments; the facility failed to investigate all incidents of unknown origin; the facility failed to assess, care plan, or investigate after residents fell; the facility did not have a licensed nursing home administrator; there were no in-services training of staff during September, October, and November 2004; and the facility failed to maintain clinical records in a professional manner. (RA 77-131.)

During the December 2004 survey, DHS asked Villa Valencia to provide its abuse policy. Villa Valencia was unable to provide the policy. (8 RT 1496-1497.)

Wood and Connelly were responsible for reviewing the DHS statements of deficiency and approving the plans of correction for Villa Valencia, which included implementation of policies to address the deficiencies. They forwarded the statements of deficiency and plans of correction up the chain of command to Musikantow and/or Brush at the corporate office in McLean, Virginia. (6 RT 881-883; 8 RT 1490-1513.)

I. Management's Failure to Remedy Deficiencies in Staffing, Training, and Patient Care at Villa Valencia

For over a year prior to Mrs. Adams' admission to Villa Valencia, Management was aware of serious deficiencies in staffing and patient care, but failed to remedy the problems. Management was on notice of these issues as a result of the DHS statements of deficiency, as well as numerous complaints made by the executive director and staff of Villa Valencia.

Terry Records was the executive director of Villa Valencia from August 2003 through September 2004. (4 RT 593, 631.) The executive director was responsible for oversight and day-to-day operations of the entire community. (4 RT 595.) Records' immediate supervisor was Anne Wood, the area manager of operations for Management. (4 RT 593.)

Throughout his tenure as executive director, Records expressed concern to Wood that (i) Sunrise lacked experience in skilled nursing and did not have the skill, institutional knowledge, or experience to run a skilled nursing facility (5 RT 655-657; 6 RT 887-888, 894); and (ii) there was a shortage of staff in skilled nursing at Villa Valencia. (5 RT 671.) Chondola Yanguba, the healthcare administrator for Villa Valencia, also expressed concern to Wood about the lack of clinical support. (6 RT 894.)

Virginia Wren worked at Villa Valencia as a charge nurse on the night shift from August 2004 through March 2005. (5 RT 787.) She

complained repeatedly about the shortage of nursing staff. (5 RT 828-831, 839-840, 849-851.) There were supposed to be two nurses and three certified nursing assistants (“CNA’s”) on the night shift. At least half the time, Wren was the only nurse working the night shift. At least a third of the time, there were fewer than three CNA’s on duty. Wren was unable to meet the needs of the residents when she was the only nurse on duty. As a result of the short staffing, call lights went unanswered and patient care suffered. (5 RT 824-828, 834-836, 841-842.) At trial, Wren identified assignment sheets for multiple shifts in January and February 2005 when she was the only nurse on duty. (5 RT 860-865.)

Wren complained repeatedly to Bonacci and others about the low staffing levels. Bonacci did nothing and the problem persisted. (5 RT 828-829, 834, 839-840.) In mid-January 2005, when Shane Dahl became the healthcare administrator and Sheila Raja became the director of nursing, Wren continued to complain about the short staffing. (5 RT 847-851.)

Alberto Reynaldo was a licensed vocational nurse and the director of staff development at Villa Valencia for two years beginning in November 2004. (3 RT 421-427.) During the entire period of Mrs. Adams’ stay at Villa Valencia, there were chronic problems with short staffing. (3 RT 429, 460-461, 471-472.) There was a constant shortage of CNA’s, who were primarily responsible for turning and repositioning patients. (3 RT 429-431.) The CNA’s took long breaks and hid from their supervisor outside. As a result, residents were not getting turned and repositioned every two hours and were developing bedsores. (3 RT 445-452, 473-474.)

Reynaldo complained to his supervisor and to Bonacci about the shortage of CNA’s and the failure to turn and reposition patients every two hours. Nothing changed. (3 RT 430-432, 453-455, 458-459, 474.)

Reynaldo was supposed to devote 3-4 days per week to his duties as staff development director. He was unable to do so because he was continually pulled onto the floor to perform nursing duties due to the shortage of nursing staff. Reynaldo did not have sufficient time to train and educate the rest of the nursing staff. (3 RT 427-428, 461-462.) As of December 2004, Reynaldo was still unable to complete his training duties because of the shortage of staff. (3 RT 464.)

Sharon Lutz was the director of nursing at Brighton Gardens, another skilled nursing facility operated by Services. In the fall of 2004, Bonacci asked her to work at Villa Valencia part-time to update data from the weekly wound rounds in the computer. (4 RT 514-517.) Lutz was there once or twice a week from September 3, 2004 through mid-January 2005. (4 RT 527, 539; 10 RT 1784.)

Lutz frequently observed discrepancies between the dates recorded on the wound dressings and the dates recorded on the treatment sheets. The dates on the dressings were earlier than those recorded on the treatment sheets for approximately 40-50 percent of patients. These false entries involved more than one nurse. Lutz informed Bonacci and asked if she wanted a written report. Bonacci said no. (4 RT 526-531.)

Lutz also observed that measures to prevent patient wounds were not being implemented at Villa Valencia. Treatment orders for pressure-relief devices such as foam booties or heel protectors were not being followed. (4 RT 536-537, 586-587.) Lutz observed that call lights would remain on for long periods of time without being answered. (4 RT 546, 542.) The rooms, carpets, and beds were not clean, and patients did not look well-kept. (4 RT 540-541, 543.) During the entire period of time Lutz was at Villa Valencia through mid-January 2005, there were “big pieces” of patient care that

needed to be corrected. (4 RT 541.)

Based on her observations at Villa Valencia, Lutz felt there was insufficient staff to meet the needs of the residents. (4 RT 582.) During this period of time, the Sunrise facilities were using a staffing grid provided by Tomasso's corporate office in Virginia. The goal was to keep the staffing ratio at 3.2 hours per day per nursing home resident, the absolute minimum required by state law.² (4 RT 550-551; 6 RT 923-924.) Lutz repeatedly complained that it was impossible to give adequate care with a 3.2 staffing ratio, because it did not take into account the needs of individual patients. (4 RT 551-554.) She expressed this concern from the fall of 2004 through January 2005. (4 RT 558.) This was a system-wide problem that affected all of the facilities using the grid. (4 RT 562-563.)

Lutz complained to Bonacci about the inadequate staffing and the staffing grid. She had meetings about the issue with Bonacci and Connelly. Lutz also complained about inadequate staffing to the human resources

²State and federal regulations require an absolute minimum of 3.2 hours per day per nursing home resident, but also require that skilled nursing facilities "must have sufficient nursing staff to provide nursing and related services to attain the highest practicable physical, mental or psychosocial well-being of each resident, as determined by resident assessments and individual plans of care." (II AA 605 [jury instruction quoting 42 C.F.R. § 483.30(a) and 22 Cal. Code Regs. § 72329.1].) If necessary based on the acuity of the residents, a skilled nursing facility must therefore provide a higher level of staffing than just the 3.2 minimum. (5 RT 690-692; 6 RT 914-916; 8 RT 1443.) State regulations further provide that the licensee of a skilled nursing facility "shall employ an adequate number of qualified personnel to carry out all the functions of the facility" including "a continuing in-service training program and competent supervision" (II AA 605 [jury instruction quoting 22 Cal. Code Regs. § 72501(e)]) and "shall accept and retain only those patients for whom it can provide adequate care." (II AA 608 [jury instruction quoting 22 Cal. Code Regs. § 72515(b)].)

department at Villa Valencia, the company ombudsman, and by email to the CEO of Living, Paul Klaassen. Nothing changed after her complaints, and she received no response to her email to Mr. Klaassen. (4 RT 542, 552, 555-563.)

Lutz also made a complaint about inadequate staffing to the company hotline. (4 RT 555.) Virginia Wren similarly reported incidents to the hotline regarding a pattern of poor nursing care at Villa Valencia. (6 RT 976-977.) Complaints to the company hotline would have been routed to Connelly as area manager. (6 RT 884-885; 8 RT 1473-1474; 18 RT 3405-3406.)

Lutz was experienced in skilled nursing and Connelly claimed to value her expertise. (4 RT 514-515; 10 RT 1782-1784, 1851.) However, Connelly and Bonacci did nothing in response to Lutz's repeated complaints. (4 RT 555-556.) At trial, Connelly admitted that she had consulted with Lutz about staffing, but claimed she could not recall Lutz complaining that the staffing levels were too low in the fall of 2004. (10 RT 1842-1843.) Lutz finally quit because nothing was done in response to her complaints. (4 RT 555-556.)

Dr. Richard Ferreras was the medical director of Villa Valencia from 1998 through 2006. He came to the facility once a week to do wound care rounds. (8 RT 1316-1317.) During his wound care rounds, he only saw patients who already had wounds. Beginning in 1998 and for years thereafter, Dr. Ferreras requested that patients at high risk for developing wounds be included in the wound care rounds. This policy was never implemented. (8 RT 1319-1321, 1334-1335.)

Dr. Ferreras repeatedly asked the Villa Valencia nursing staff to

assess patients for skin breakdown on at least a daily basis, and to assess patients for skin breakdown every time they came into contact with them through bathing, massaging, or moisturizing. This policy was never put into effect. (8 RT 1322-1325.)

Dr. Ferreras also told the nursing staff that pressure-relieving measures and devices should be given to any patient with immobility due to orthopedic surgery, such as a broken leg. The measures he recommended included regular turning and repositioning, and pressure-relieving boots. From 2003 through 2005, however, Dr. Ferreras observed that 30-50 percent of patients with lower extremity immobility did *not* have pressure-relieving devices in place. (8 RT 1325-1331, 1339-1340.)

In discovery, Sunrise claimed that numerous documents pertaining to the time period of Mrs. Adams' admission to Villa Valencia were "lost, misplaced, or destroyed." These included the calculations of nursing hours per patient day and reports on staffing sent to the regional managers of Management. (13 RT 2364-2368.)

STATEMENT OF THE CASE

Mrs. Adams' two surviving children, Janice Borkovetz and Wendell Adams, sued Living, Management, and Services.³ (I AA 1.) The case ultimately went to jury trial on claims for wrongful death brought by Mrs. Adams' children, elder abuse brought solely on behalf of Mrs. Adams, and willful misconduct brought on behalf of Mrs. Adams and her children. (1 AA 51-63, 74-76; 3 AA 690-700.)

³Wendell Adams died shortly after trial.

After a two-month trial, the jury found that Living, Management, and Services were all engaged in and acting as joint venturers during Mrs. Adams' residency at Villa Valencia. (III AA 690.)

On the Elder Abuse Act claim, the jury found that Mrs. Adams was in the care and custody of Management and Services at Villa Valencia; that Management and Services failed to exercise reasonable care by committing one or more of eleven specified acts of neglect; that Services' neglect was a substantial factor in causing harm to Mrs. Adams; that Services acted with recklessness, oppression, fraud or malice; and that an officer, director, or managing agent of Services personally engaged in, authorized, or ratified the wrongful conduct or had advance knowledge of the unfitness of an employee. (III AA 692-694.) The jury concluded that Mrs. Adams' compensatory damages were \$1 million. (III AA 695.)

The jury also made a separate finding that Services "acted with oppression, fraud or malice justifying an award of punitive damages." (III AA 695.)

On the claim for wrongful death brought by Mrs. Adams' children, the jury found that Management and Services were negligent in their care and treatment of Mrs. Adams, and that Services' negligence was a substantial factor in her death. However, the jury concluded that Mrs. Adams' children suffered no damages from their mother's death. (III AA 697.)

On the claim for willful misconduct, the jury found that none of the defendants had engaged in willful misconduct. (III AA 699.)

In a bifurcated phase of trial, the jury awarded another \$1 million in punitive damages against Services. (III AA 704.) In accordance with the

joint venture finding, the trial court entered judgment against Living, Management, and Services for the full amount of the jury verdict. (III AA 705-714.)

In post-judgment motions, the trial court ruled that noneconomic damages for elder abuse are capped at \$250,000 pursuant to Welfare and Institutions Code section 15657(b) and Civil Code section 3333.2(b). Accordingly, the court granted partial judgment notwithstanding the verdict by reducing the \$1 million compensatory damages to \$250,000. (IV AA 944-945.) The court also awarded fees and costs of approximately \$1.4 million pursuant to the Elder Abuse Act. (IV AA 1009-1012.) The court entered an amended judgment for a total of approximately \$2.6 million including fees and costs. (IV AA 1013-1022.)

ARGUMENT

I.

THE SPECIAL VERDICT FORM DID NOT OMIT A NECESSARY FINDING

For the first time on appeal, appellants assert that the special verdict form was defective because it did not require that the same act of neglect caused harm and was reckless.⁴ Appellants contend that are entitled not only to a reversal, but also a judgment in their favor because of this newly

⁴Appellants repeatedly refer to a recklessness requirement in their opening brief. However, the Elder Abuse Act does not necessarily require a finding of recklessness. As the trial court instructed (II AA 584-587), it requires “recklessness, oppression, fraud, *or* malice” in the commission of the abuse. (Welf. & Inst. Code, § 15657, emphasis added.) Any finding of recklessness would have been superfluous in this case, because the jury made a separate finding that Services “acted with oppression, fraud or malice justifying an award of punitive damages.” (III AA 695.)

discovered defect in the verdict form. However, appellants waived this claim of error by failing to assert it in the trial court. They also invited any error by proposing a verdict form that contained the same alleged defect. In any event, the claim has no merit.

A. Appellants Waived Or Invited The Alleged Defect in the Form of the Special Verdict

Near the end of trial, both sides submitted proposed verdict forms. The trial judge reviewed them and indicated they were both too long and detailed. (20 RT 3855-3856.) Defense counsel immediately agreed to modify his proposed verdict form, but apparently never did. (20 RT 3855:20-25.)

Later the same day, plaintiffs submitted a new proposed verdict form, which the court found to be “much simpler, straight forward.” (20 RT 3895:20-22.) The court allowed defense counsel to make objections to the new form. (20 RT 3896.) The court and counsel then discussed the verdict form extensively. Plaintiffs’ counsel agreed to make additional modifications to simplify the verdict form. Defense counsel made comments and objections on the record. (20 RT 3896-3914.) The trial court directed plaintiffs’ counsel to submit a revised verdict form to reflect its rulings. (20 RT 3914.)

The next day, defense counsel made additional objections to the newly revised verdict form. After further discussion and modifications, plaintiffs’ counsel submitted another revised verdict form to conform to the final rulings. (21 RT 3916-3930.)

During these extensive discussions, defense counsel never objected that Questions 8-10 were defective because they failed to require that the same act of neglect both caused harm and was reckless. When the jury

returned its verdict, the defense did not object that it was ambiguous, uncertain, or incomplete. (22 RT 4169-4188.) Nor did defendants raise this issue in post-judgment motions. (III AA 743-819.)

Contrary to the claim now made by defendants (AOB 21), their own proposed verdict form contained the same alleged defect they are attacking on appeal. Question 19 of the defense form asked if defendants failed to exercise reasonable care in caring for Adams. (I AA 110.) Question 20 asked if defendants acted recklessly “while engaging in the conduct to which you answered ‘yes’ in response to question 19.” (I AA 111.) Question 21 asked: “*For each defendant for whom you answered ‘yes’ in response to question 19, have plaintiffs proven by clear and convincing evidence that the defendant’s employee’s or employees’ conduct caused Mary Kathleen Adams injury?*” (I AA 112, emphasis added.)

Notably, Question 21 of the defense form did *not* ask if the reckless conduct identified in Question 20 caused harm to Mrs. Adams. It only asked if the injury was caused by any of the defendants identified in Question 19 who failed to exercise reasonable care. Thus, the defendants’ own verdict form did not explicitly require the jury to link the injury-causing conduct identified in Question 21 to the reckless conduct identified in Question 20.

In these circumstances, the defense waived the claimed defect in the verdict form by failing to object on this ground in the trial court, and it invited any error by requesting a verdict form with the same “defect.” “If the form of a verdict is defective the complaining party must object in the lower court, since the failure to so object results in a waiver of any defect of form.” (*Fransen v. Washington* (1964) 229 Cal.App.2d 570, 574; accord *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th

257, 277; *Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 700.)

This waiver rule applies to the type of defect claimed here. For example, in *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, defendant BMW challenged a special verdict form “on the ground it failed to submit for jury resolution the primary issue of BMW’s liability” under the Song-Beverly Warranty Act. (*Id.* at p. 131.) The Court of Appeal found that “BMW waived any objection to the special verdict form by failing to object before the court discharged the jury.” (*Ibid.*, citing *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2 [“Frequently, failure to object to the form of a verdict before a jury is discharged has been held to be a waiver of any defect”].)

In *Thompson Pacific Const., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, the defendant argued for the first time on appeal that a special verdict form was insufficient because it did not require a finding on the materiality element of liability under the California False Claims Act. The court held: “There is no indication that Thompson objected to the form for its failure to require a finding on the materiality element. As a result, the issue was waived.” (*Id.* at p. 550; see also *Babcock v. Omansky* (1973) 31 Cal.App.3d 625, 630 [defendant waived claim that special verdict omitted findings on all elements of fraud by failing to raise it in trial court].)

These cases are controlling. If anything, the claimed defect is *less* significant than those in *Jensen* and *Thompson Pacific*. The verdict form here *did* require jury findings on all the necessary elements of the Elder Abuse Act, including neglect, causation, and recklessness, oppression,

malice, or fraud.⁵ (3 AA 692-694.) Defendants’ only complaint is that the verdict form was not explicit enough in requiring the jury to find that the same act of neglect caused harm and was reckless. As in *Jensen* and *Thompson Pacific*, defendants waived this claim by failing to object on this ground in the trial court. A contrary rule would only encourage parties to waste judicial resources and create reversible error by remaining silent about a defect in the verdict form at trial.

Defendants also invited any error by proposing a verdict form that contained the same alleged defect. The doctrine of invited error applies “when a party by its own conduct induces the commission of error.” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) Where the defendant proposes an erroneous verdict form, the resulting error is invited. (See *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1687 [defendant waived claim of inconsistent verdicts by drafting verdict form that invited the inconsistency].) By proposing a verdict form that contained the same “defect” they are now complaining about on appeal, the defense put the trial court in the position of committing the alleged error no matter which side’s verdict form it used. Thus, the defense affirmatively invited the commission of the alleged error.

///

///

///

⁵The Elder Abuse Act creates a cause of action for “physical abuse” or “neglect” where “the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse.” (Welf. & Inst. Code, § 15657.) “Neglect” is defined to include: “The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” (Welf. & Inst. Code, § 15610.57(a)(1).)

B. The Jury’s Special Verdict Resolved the “Ultimate Facts” of the Case

Even if the issue were preserved, there was no defect in the verdict form. As appellants concede, a special verdict need only resolve the “ultimate facts” in the case. (AOB 21, quoting *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960.) “[T]he term ‘ultimate fact’ generally refers to a core fact, such as an essential element of a claim.” (*Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 513.)

The verdict form *did* cover all of the essential elements of liability under the Elder Abuse Act. As to Services, the jury found that: (i) Mrs. Adams was in its custody and care; (ii) Mrs. Adams was over the age of 65; (iii) Services committed neglect; (iv) its neglect was a substantial factor in causing harm to Mrs. Adams; (v) Services acted with recklessness, oppression, fraud, or malice; and (vi) an officer, director, or managing agent of Services personally engaged in, authorized, or ratified the wrongful conduct or had advance knowledge of the unfitness of an employee. (III AA 692-695.) These *are* all of the essential elements of liability under the Elder Abuse Act. (Welf. & Inst. Code, §§ 15610.27, 15610.57, 15657; Civ. Code, § 3294.)

None of the cases cited by appellants support their claim that a more explicit linkage of causation and recklessness as to the same neglect is an “ultimate fact” within the meaning of this rule. If the defense wanted a more explicit jury finding on the linkage between these elements, it should have requested it at trial, rather than waiting to play this as a trump card on appeal. “The law is not a game of ‘gotcha’” (*Barragan v. Superior Court* (2007) 148 Cal.App.4th 1478, 1485.)

C. The Trial Court Properly Interpreted the Verdict Form In Light of the Jury Instructions, Arguments, and Evidence

Even if there were any ambiguity in the verdict form, the trial judge properly interpreted the jury's verdict as a finding that the same acts of neglect caused harm to Mrs. Adams and were also committed with recklessness, malice, oppression, or fraud. Where no objection is made to an allegedly ambiguous verdict before the jury is discharged, "it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.'" (*Woodcock, supra*, 69 Cal.2d at pp. 456-457.) "[I]n construing an ambiguous verdict the court may use anything in the proceeding that serves to show with some certainty what the jury intended" including "the pleadings, the admissions of the parties, the instructions, and the forms of verdict submitted." (*West v. Duncan* (1962) 205 Cal.App.2d 140, 143.)

The trial court instructed the jury with former CACI No. 3105 on the elements of elder abuse.⁶ In relevant part, this instruction required the jury to find: (i) "That one or more of the [defendant's] employees ... failed to use the degree of care that a reasonable person in the same situation would have used" by committing one of eleven specified acts of neglect; (ii) "That such employee or employees acted with recklessness, malice, oppression, or fraudulently"; (iii) "That MARY KATHLEEN ADAMS was harmed"; and (iv) "That such employee or employees' conduct was a substantial factor in causing MARY KATHLEEN ADAMS' harm." (II AA 585.)

⁶In October 2008, after the trial of this case, the Judicial Council eliminated former CACI No. 3105. Its substance is now contained in CACI No. 3103.

The sequence of elements as set forth in this instruction made clear that the employee who committed the act of neglect had to have acted with recklessness, malice, oppression, or fraud, and that this conduct also had to be a substantial factor in causing the harm to Mrs. Adams. The reference to “such employee or employees’ conduct” in the causation element referred back to the conduct specified in the preceding elements – neglect committed with recklessness, malice, oppression, or fraud. Notably, the defense itself requested former CACI No. 3105 (1 AA 159), and it makes no claim on appeal that the *instruction* was deficient in failing to link the reckless and harm-causing conduct.

Other jury instructions also support this interpretation of the jury’s verdict. For example, the punitive damages instruction stated: “If you find that [defendants] caused MARY KATHLEEN ADAMS harm, you must decide whether *that conduct* justifies an award of punitive damages.... [Y]ou must decide whether ... [defendants] engaged in *that conduct* with malice, oppression, or fraud.” (II AA 600, emphasis added.) Under this instruction, the jury simply could not have awarded punitive damages without finding that the harm-causing conduct was committed with malice, oppression, or fraud.

In addition, the terms recklessness, malice, oppression, and fraud were themselves defined in terms of the probability, intention, or result of causing harm. (II AA 586-587.) For example, the court instructed: “‘Oppression’ means that the conduct of the defendant was despicable *and subjected MARY KATHLEEN ADAMS to cruel and unjust hardship* in knowing disregard of her rights.” (II AA 587, emphasis added.) Plaintiffs’ counsel relied on this definition in closing argument, telling the jury that the neglectful conduct was oppressive precisely because it “caused Mary

Kathleen Adams to suffer cruel and unjust hardship” (21 RT 4003:24-25; 21 RT 4004:8-10.) These instructions and argument necessarily linked the harm-causing and oppressive conduct. For all these reasons, the trial court properly interpreted the jury’s verdict in light of the jury instructions and the record as a whole.

II.

THE JURY’S FINDING OF NO “WILLFUL MISCONDUCT” WAS CONSISTENT WITH ITS AWARD OF PUNITIVE DAMAGES

Appellants assert that the jury’s finding of no “willful misconduct” is fatally inconsistent with its award of punitive damages. They contend that “willfulness is a threshold requirement for punitive damages.” (AOB 25-26.) This argument is contrary to controlling authorities.

Willful misconduct is not required to establish liability under the Elder Abuse Act. (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 973, fn. 4.) Neglecting an elderly patient “with conscious disregard for the high probability of injury or suffering, *whether ‘willful misconduct’ or not*, is precisely the sort or egregious behavior which the Legislature sought to remedy in passing the act.” (*Ibid.*, emphasis added.)

Nor is a finding of “willful misconduct” necessary to impose punitive damages. Punitive damages may be imposed where the defendant has been guilty of “oppression, fraud, or malice.” (Civ. Code, § 3294.) Although the statutory definition of “malice” requires “willful and conscious disregard” (Civ. Code, § 3294(c)(1)), the definitions of oppression and fraud do not require “willful” conduct. (Civ. Code, § 3294(c)(2) & (3).)

In *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, the court relied on this very distinction in rejecting a claim of inconsistent verdicts. The defendant Western Home Insurance Company (“Western”) argued that a special verdict was inconsistent because the jury had found Western “did not act with malice, but did act with oppression.” (*Id.* at p. 1225.) Based on the statutory definitions of “malice” and “oppression,” the court ruled: “[T]he jury need not find Western acted with malice to find it acted oppressively. Malice requires a finding that Western acted with **both a ‘conscious’ and ‘willful’** disregard for the rights of others. The statutory definition of oppression instead **only requires a ‘conscious’ disregard** for the rights of others.” (*Id.* at p. 1226, emphasis added & quoting Civ. Code, § 3294(c).)

As explained in *Major*, the statutory definition of “oppression” does *not* require “willful misconduct.” (*Major*, 169 Cal.App.4th at p. 1226.) In 1987, the Legislature amended the definition of “malice” in Civil Code section 3294(c) to add a “willful” requirement, but did not include any such requirement in the statutory definitions of “oppression” and “fraud.” (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 188.) The trial court defined these terms for the jury consistently with the statute. (II AA 586-587.) Thus, the jury’s finding of no “willful misconduct” is compatible with a finding of oppression or fraud and an award of punitive damages.

Further, the trial court’s definition of “willful misconduct” was not equivalent to its definitions of “oppression” or “fraud.” The trial court defined “willful misconduct” to require that the defendant “knew or should have known that injury is a probable ... result of the danger” and engaged in a “conscious and deliberate failure to act to avoid the peril” (II AA

609-610.) By contrast, the court defined “oppression” as “despicable” conduct that subjected Mrs. Adams “to cruel and unjust hardship in knowing disregard of her rights.” (II AA 587.) Because these definitions were substantively different, the jury could properly have concluded that they are not equivalent concepts. “Oppression” requires knowing disregard of another person’s *rights*, but it does not necessarily require knowledge that *injury* is a *probable* result, nor does it require a *deliberate* failure to avoid a known probability of injury.

The statutory definition of “fraud” also does not require “willful misconduct.” (Civ. Code, § 3294(c).) The trial court defined “fraud” as “an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving [Mrs. Adams] of property or of a legal right or otherwise to cause [Mrs. Adams] injury.” (II AA 587.) Thus, fraud could have been established by an intention to deprive Mrs. Adams of a legal right, which does not necessarily require a deliberate failure to avoid a known probability of “injury.” (II AA 610.)

“Where special verdicts appear inconsistent, if any conclusions could be drawn which would explain the apparent conflict, the jury will be deemed to have drawn them.” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.) The judgment must stand if “the apparent defect or inconsistency may be reasonably reconciled with the ultimate result reached below.” (*Gebert v. Yank* (1985) 172 Cal.App.3d 544, 550.) Because the trial court’s definitions of “oppression” and “fraud” did not require a finding of “willful misconduct,” the jury’s finding of no “willful misconduct” was consistent with its award of punitive damages. (*Major, supra*, 169 Cal.App.4th at pp. 1225-1226.)

III.

THE JURY INSTRUCTIONS AND VERDICT FORM DID NOT OMIT THE NEGLIGENCE ELEMENT OF ELDER ABUSE OR DIRECT THE JURY TO FIND PER SE NEGLIGENCE

A. Appellants Waived or Invited Any Error

Raising yet another issue for the first time on appeal, appellants claim that the special verdict form and corresponding jury instruction omitted the negligence element of the Elder Abuse Act and improperly directed the jury to find per se neglect by instructing that a defendant could be held liable if it “failed to exercise that degree of care that a reasonable person in the same situation would have exercised *by failing to do* one or more of the following [eleven acts].” (AOB 32.)

Appellants fail to mention that *they requested* the CACI instruction from which this language was taken. The defense asked the trial court to give former CACI No. 3105. (I AA 159.) Former CACI No. 3105 stated the “neglect” element of the Elder Abuse Act as follows:

That one or more of [*name of defendant*]’s employees failed to use the degree of care that a reasonable person in the same situation would have used by [*insert one or more of the following:*]

[failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

[failing to provide medical care for physical and mental health needs;]

[failing to protect [*name of plaintiff/decedent*] from health and safety hazards;]

[failing to prevent malnutrition or dehydration;]

[*insert other grounds for neglect*]

The defense-requested version of former CACI No. 3105 used this exact wording, except that it included only the second and third forms of

neglect listed in the CACI instruction. (I AA 159; II AA 585.) Critically, the specific language of the instruction and verdict form appellants are now complaining about (“failed to use the degree of care that a reasonable person in the same situation would have used *by failing to ...*”) was given at their own request. (I AA 159.)

“The doctrine of invited error bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant’s request.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653, citing cases.) The requested instruction need not be identical to the one given; the doctrine of invited error applies “if the two are substantially the same in meaning.” (*Jentick v. Pacific Gas & Electric Co.* (1941) 18 Cal.2d 117, 122.) It also applies to jury instructions requested by both sides. (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 567.)

By specifically asking the trial court to give former CACI No. 3105 (I AA 159), the defense invited any error in the court’s use of the “by failing to” language taken directly from former CACI No. 3105. Further, the trial court advised the parties that if they had objections to the wording of any instruction, they had to submit their own alternative wording. (20 RT 3765-3769.) Defendants never submitted any alternative to the wording of former CACI No. 3105. Accordingly, the defense has waived its objection to the wording of this instruction and the corresponding language of the verdict form.

B. The Jury Instruction and Verdict Form Were Not Defective

Even if the issue were preserved, there was no defect in the jury instruction or the corresponding verdict form. Appellants fail to mention

that the “by failing to” language of former CACI No. 3105 came directly from the statutory definition of neglect contained in the Elder Abuse Act. After defining “neglect” as a breach of the “reasonable person” standard (Welf. & Inst. Code, § 15610.57(a)), the Elder Abuse Act goes on to state: “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 or dehydration....” (Welf. & Inst. Code, § 15610.57(b), emphasis added.)

The first three forms of neglect listed in the jury instruction and verdict form were simply the statutory categories (2), (3), and (4) above. (II AA 585; III AA 693.) Others were just more specific forms of these same categories, such as “failing to provide appropriate pressure relief,” “failing to provide cast and brace care,” “failing to prevent falls,” and “failing to prevent pressure ulcers.” (II AA 585; III AA 693.) Many of the listed forms of neglect were also violations of the regulations governing skilled nursing facilities, such as “failing to provide sufficient numbers of adequate and appropriately trained staff for the skilled nursing facility” and “failing to provide policies and procedures relat[ing] to patient care for use in the skilled nursing facility.” (II AA 585; III AA 693.) The trial court correctly instructed the jury on the substance of these regulations at trial. (II AA 602-609.)

Because the “by failing to” language of the jury instruction and corresponding verdict form was derived directly from the language of the Elder Abuse Act, it was not error to use this language. “Instructions in the language of an applicable *statute* are properly given.” (*Metcalf v. County*

of *San Joaquin* (2008) 42 Cal.4th 1121, 1131.)

Contrary to the opening brief, a reasonable juror would not have understood former CACI No. 3105 to omit the requirement that the defendant failed “to use that degree of care that a reasonable person in a like position would exercise.” (Welf. & Inst. Code, § 15610.57(a)(1).) Both the jury instruction and verdict form told the jury that the defendant must have “failed to use the degree of care that a reasonable person in the same situation would have used” by committing one of the specified acts of neglect. (2 AA 585; 3 AA 693.) In other words, they required both a violation of the “reasonable person” standard *and* that the violation occurred by means of one of the specified failures. “An instruction should be interpreted in a manner that will support rather than defeat a judgment if it is reasonably susceptible to such an interpretation.” (*Kostecky v. Henry* (1980) 113 Cal.App.3d 362, 375; accord *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 163.)

Nor was the jury instruction or verdict form argumentative. The mere repetition of the innocuous phrase “by failing to” did not favor one side over the other. (See *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1118 [holding that although questions on special verdict form were “no doubt repetitive, they were not ... tantamount to placing the trial court’s imprimatur on Disney’s theory of the case”].) The trial court told the jury that any repetition in the instructions “does not mean that these ideas or rules are more important than the others are.” (II AA 574.) “[R]epetition of a correct instruction rarely constitutes reversible error.” (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1047.) Further, it was proper for a trial court to instruct on specific examples of neglect under the Elder Abuse Act. (*In re Conservatorship of Gregory*

(2000) 80 Cal.App.4th 514, 521.)

A trial court has “broad discretion” in deciding on the form of a special verdict. (*Wolf, supra*, 162 Cal.App.4th at p. 1119, citing *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 364.) The “selection of a more detailed special verdict form was well within the trial court’s discretion.” (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1488.)

C. Any Error Was Harmless

Even if the trial court had omitted the negligence element of the Elder Abuse Act from the jury instruction and the verdict form, the error would be harmless for two reasons. First, the jury found that Services “acted with recklessness, oppression, fraud or malice” in committing the neglect (III AA 694) and it found that Services “acted with oppression, fraud or malice justifying an award of punitive damages.” (III AA 695.) This required a finding of “culpability greater than mere negligence.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 32.) There is no reasonable probability that the jury would have found recklessness, oppression, fraud, or malice, but *not* mere negligence.

Second, the jury also found a breach of the professional standard of care. In connection with the wrongful death claim, the trial court gave CACI Nos. 501 and 514 on the standard of care applicable to health care professionals and skilled nursing facilities. (II AA 583-584.) Applying this standard, the jury found that both Management and Services “were negligent in their care and treatment of Mary Kathleen Adams” and that the negligence of Services was a substantial factor in her death. (III AA 697.) Thus, the jury found a breach of the professional standard of care that

resulted in Mrs. Adams' death, though it awarded nothing on the wrongful death claim because it found the Adams children had suffered no damages. (III AA 697.) Again, there is no reasonable probability the jury would have found a breach of the professional standard of care for the wrongful death claim, but no negligence for the elder abuse claim.

Instructional error “does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) There is no reasonable probability of a result more favorable to the defense.

IV.

THE ELDER ABUSE VERDICT AND AWARD OF PUNITIVE DAMAGES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard of Review

Appellants contend that the elder abuse verdict and punitive damages award must be reversed because there is insufficient evidence to support the jury's finding that a managing agent of Services engaged in or ratified reckless conduct. (AOB 40-49.)

“[A] party raising a claim of insufficiency of the evidence assumes a daunting burden.” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) The “power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.” (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 889.) The reviewing court “must ‘view the evidence

in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor”
(*Wilson, supra*, 169 Cal.App.4th at p. 1188.)

Although elder abuse liability and punitive damages must be established by clear and convincing evidence (Civ. Code, § 3294(a); Welf. & Inst. Code, § 15657), this is not a standard of appellate review. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) “[O]n appeal from a judgment required to be based upon clear and convincing evidence, ‘the clear and convincing test disappears ... [and] 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.’” (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 519; accord 9 Witkin, California Procedure (5th ed. 2008) Appeal § 371, p. 428.)

B. There Was Sufficient Evidence That Management Was the Managing Agent for Services

Appellants contend that plaintiffs failed to identify any individual officer, director, or managing agent of Services who engaged in or ratified reckless misconduct. (AOB 41-44.) They assert that the Services employees who work at Villa Valencia are not managing agents because they cannot set corporate policy, and the regional managers are not managing agents of Services because they are employees of Management. (AOB 41-43.)

By this logic, Services would have *no* managing agents. The highest-ranking employees on the Services payroll are the executive directors of the facilities, who report directly to the regional managers of Management. (Tomasso Depo. 149-151; 4 RT 593, 595.) The fact that the regional managers are not employees of Services cannot immunize Services

against an award of punitive damages. Otherwise, a corporation could easily insulate itself from punitive damages just by placing the management function in a separate entity.

As appellants concede, a managing agent is “someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy.” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.) Contrary to the opening brief, the term “managing agent” is not limited to individual employees on the defendant’s own payroll. Under this court’s decision in *Textron Financial Corporation v. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1080-1081 (*Textron*), a managing agent may also be another entity authorized to manage the corporation’s affairs, or an employee of the managing entity. (*Major, supra*, 169 Cal.App.4th at pp. 1219-1221.) Here, the evidence supports a finding that Management and/or its managers are the managing agents of Services, as Management’s name was surely meant to convey.

In *Textron, supra*, this court affirmed an award of punitive damages against an insurer based on the fraudulent conduct of TRM International (“TRM”), a separate entity appointed by the insurer to administer policies for its commercial bus program. (*Textron, supra*, 118 Cal.App.4th at pp. 1067, 1079-1081.) The insurer claimed there was insufficient evidence to support the punitive damages, arguing that “its own conduct was not oppressive, fraudulent, or malicious, TRM’s activity cannot be attributed to it, and it did not ratify TRM’s actions.” (*Id.* at p. 1079.)

In rejecting this claim, this court found that the agency agreement between the insurer and TRM gave TRM “broad discretion over defendant’s bus insurance program.” (*Textron, supra*, 118 Cal.App.4th at p. 1080.) Under this agency relationship, “TRM ‘exercise[d] substantial

discretionary authority over decisions ... ultimately determin[ing] corporate policy' for defendant's bus insurance program." (*Textron, supra*, 118 Cal.App.4th at p. 1082, quoting *White v. Ultramar, Inc., supra*, 21 Cal.4th at p. 573.) Accordingly, the court concluded: "This evidence supports the jury's conclusion TRM was defendant's managing agent, thereby subjecting [defendant] to punitive damages under Civil Code section 3294." (*Id.* at pp. 1080-1081.)

As in *Textron*, the evidence supports a finding that Management is the managing agent for Services. Management provides the management services and operational policies for all the Sunrise facilities, including policies and procedures for matters including personnel, administration, and resident care. (Stein Depo. [11/29/07] 98; Stein Depo. [4/20/07 a.m.] 57-58.) Management oversees all aspects of operation of the facilities, including finances, accounting, quality assurance, regulatory compliance, and resident satisfaction. (Tomasso Depo. 38, 93-95, 215-216; Stein Depo [4/20/07 a.m.] 62-63, 67-68, 70, 82.) Plainly, Management "exercises substantial discretionary authority over decisions that ultimately determine corporate policy" for Services. (*White v. Ultramar, supra*, 21 Cal.4th at p. 573.)

Alternatively, the evidence supports a finding that the Management employees with responsibility for Villa Valencia were managing agents of Services. (*Major, supra*, 169 Cal.App.4th at pp. 1219-1221 [claims adjuster for third-party entity retained by defendant to handle insurance claims was managing agent of defendant].) As president of Management, Tomasso had final authority for carrying out and executing the duties of Services. (Tomasso Depo. 34, 38.) Her corporate office was responsible for creating the staffing grid used by Villa Valencia (4 RT 550-551; 6 RT

923-924) and for final approval of the facility's budget. (6 RT 909.)

Wood and Connelly served as area manager for eight Sunrise facilities, including Villa Valencia. They had broad management authority that included making staffing decisions (6 RT 954-957; 8 RT 1444-1445), imposing a moratorium on admissions if necessary (6 RT 943-944; 8 RT 1458-1459, 1516; 10 RT 1885), and approving plans of correction to respond to the DHS statements of deficiency. (8 RT 1506-1508.)

Bonacci served as area director of resident care overseeing the clinical care at Villa Valencia and seven other facilities, and she also served as interim director of nursing at Villa Valencia from the fall of 2004 through January 2005. As interim director of nursing, Bonacci filled a role normally occupied by a Services employee. (Tomasso Depo. 93-94 [staff of Villa Valencia is employed by Services].) Bonacci was responsible for staffing the facility. (8 RT 1444-1445, 1454-1455; 10 RT 1845.) As area director of resident care, Bonacci was also a "clinical leader" responsible for assisting in development and implementation of corporate health care policies. (RA 28.)

These individuals all had "substantial discretionary authority over decisions that ultimately determine[d] corporate policy." (*White v. Ultramar, supra*, 21 Cal.4th at p. 573.) Thus, they were managing agents of Services. (See *id.* at p. 577 [regional director of eight of the defendant's retail stores with 65 employees had sufficient control over corporate policy and daily operations at those stores to be a "managing agent"]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823 [insurance claims representatives with authority to dispose of insured's claims had sufficient discretion to be managerial employees]; *Wysinger, supra*, 157 Cal.App.4th at pp. 428-429 [Automobile Club vice president with jurisdiction over

district office operations in western states was managing agent].)

C. There Was Sufficient Evidence That A Managing Agent of Services Engaged in, Authorized, or Ratified Reckless, Malicious, Oppressive or Fraudulent Conduct or Had Advance Knowledge of the Unfitness of the Employees Placed in Charge of Villa Valencia

Appellants claim there is insufficient evidence that any Services managing agent engaged in or ratified “reckless” conduct. (AOB 40-41, 44-49.) However, the Elder Abuse Act does not necessarily require a finding of *reckless* conduct. As the trial court instructed (II AA 584-587), the Elder Abuse Act requires “recklessness, oppression, fraud, *or* malice” in the commission of the abuse. (Welf. & Inst. Code, § 15657, emphasis added.) The jury specifically found that Services “acted with oppression, fraud or malice” in answering the special verdict question on punitive damages. (III AA 695.)

Appellants have not made any claim that there is insufficient evidence of oppression, fraud, or malice. (AOB 40-41, 44-49.) Because the jury found “oppression, fraud or malice” (III AA 695), it is immaterial whether there was sufficient evidence of recklessness. The finding of “oppression, fraud or malice” is sufficient to sustain both the elder abuse verdict and the punitive damages. In light of appellant’s failure to challenge this finding, the judgment should be affirmed without addressing their claim of insufficient evidence of recklessness. (*Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 409 [issues not raised in opening brief are waived]; *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1157 [where alternate theories are presented to the jury, the “general verdict rule” presumes that jury relied on the theory supported by substantial evidence]; *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224

Cal.App.3d 793, 799 [same rule applies to special verdicts].)

In any event, as described below, there is ample evidence in the record to support a finding that Management engaged in, authorized, or ratified reckless, oppressive, malicious, or fraudulent conduct in its capacity as Services' managing agent. To summarize, the evidence established that Management was aware of serious deficiencies in patient care and woefully inadequate staffing at Villa Valencia long before Mrs. Adams was admitted. Though they were responsible for staffing, the regional managers of Management (Ann Wood, Maria Connelly, and Joni Bonacci) failed to remedy the chronic under-staffing for over a year before Mrs. Adams was admitted, despite their knowledge that inadequate staffing was likely to result in deficient care and harm to residents. As a result, Mrs. Adams received substandard care and suffered a horrible and undignified death from painful bedsores.

The evidence clearly established that Management and its managing employees were aware of the inadequate staffing and substandard care at Villa Valencia long before Mrs. Adams was admitted on December 21, 2004. Throughout his tenure as executive director of Villa Valencia from August 2003 through September 2004, Terry Records complained to Wood about the lack of adequate staffing. (5 RT 671.) Chondola Yanguba, the healthcare administrator for Villa Valencia from October 2003 through July 2004 (5 RT 687), also complained to Wood about the lack of clinical support. (6 RT 894.)

From the fall of 2004 through January 2005, Sharon Lutz repeatedly complained to Bonacci and Connelly about inadequate staffing and substandard care and discussed the issue with them in director of nursing meetings. (4 RT 529, 542-543, 552, 551, 555.) Others also complained to

Bonacci about the shortage of nursing staff and substandard patient care during this time period. (3 RT 453-454, 458, 474 [Alberto Reynaldo]; 5 RT 828-829, 832-833, 839-840 [Virginia Wren].) Lutz and Wren both made complaints to the company hotline, which would have been routed to the area manager. (4 RT 555; 6 RT 884-885, 976-977; 8 RT 1473-1474; 18 RT 3405-3406.)

In February 2004, DHS issued a statement of deficiency for Villa Valencia. Among other deficiencies, DHS notified Villa Valencia that it was taking staff up to 30 minutes to answer call lights, and residents were complaining that staff did not appear to have time to take care of them. (5 RT 724-726, 729; RA 73.) Ten months later, DHS conducted another survey and found that residents *still* had to wait 30-45 minutes for their call lights to be answered. (RA 88-91, 128.) The regional managers of Management received these statements of deficiencies and were responsible for approving plans of correction. (6 RT 881-883; 8 RT 1490-1513.)

The managers of Management admitted they were aware of the importance of adequate staffing to prevent harm to the residents of their skilled nursing facilities. (6 RT 913-916, 957; 8 RT 1442-1443, 1455-1459; Tomasso Depo. 142-144.) They had authority to impose a moratorium on new admissions if the facility was unable to provide adequate care for potential residents. (6 RT 943-944; 8 RT 1458-1459, 1516; 10 RT 1885.) However, Management failed to remedy the staffing problems or impose a moratorium before Mrs. Adams was admitted to Villa Valencia in December 2004, and the staffing problems persisted at least into January and February 2005. (3 RT 458-459, 464, 471-472; 4 RT 555-558; 5 RT 834, 839-840, 849-850, 860-865.) Staffing levels were only temporarily increased shortly before the impending DHS survey of December 2004,

then decreased again immediately afterwards. (3 RT 463-464.)

The evidence also established that Management and its regional managers had a financial incentive for the short-staffing. The budget for staffing was based on a staffing grid created by Tomasso's corporate office in Virginia. (4 RT 550-551; 6 RT 923-924.) The area managers had to ensure that staffing schedules were within budgeted hours and report any variances in excess of the staffing budget. (8 RT 1423; RA 26.) The facilities were required to meet revenue targets, and their biggest expense was the nursing staff. (5 RT 699, 702; Tomasso Depo. 204-205.) The area managers and executive directors were eligible for bonuses based in part on exceeding the revenue targets. (4 RT 606; Tomasso Depo. 203-204.) A moratorium on admissions at Villa Valencia would have made them ineligible for a bonus. (6 RT 942-944.) In the absence of any other explanation, the jury could reasonably infer that Management's persistent failure to remedy the under-staffing of Villa Valencia was solely due to profit motives.

Appellants' only real response to this evidence is to summarize the conflicting defense evidence and claim they made reasonable efforts to remedy the problems. (AOB 45-48.) However, in deciding sufficiency of evidence, a reviewing court “*looks only at the evidence supporting the successful party, and disregards the contrary showing.*” (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926, emphasis in original.) “Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact” (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) Viewed in the light most favorable to the judgment, the

evidence and inferences discussed above fully support the jury's findings.

Appellants also claim that the short-staffing problem was ultimately remedied by Shane Dahl sometime after he became the new administrator on January 17, 2005. (AOB 48.) According to appellants, their persistent failure to remedy the staffing problems any earlier is insufficient to sustain the verdict because "ineffectual, incompetent, and slow to react are not *reckless*." (AOB 48.) This is absurd. If immediate action is necessary to prevent a known risk of probable injury, then incompetent delay in taking action to prevent the harm is obviously reckless. The operators of a skilled nursing facility cannot incompetently expose elderly residents to a known risk of harm for two years, then claim they are immune from elder abuse liability and punitive damages for the resulting death of a resident simply because they eventually got around to remedying the problem for *future* residents.

The law requires that a skilled nursing facility "shall accept and retain only those patients for whom it can provide adequate care." (II AA 608, quoting 22 Cal. Code Regs. § 72515(b).) If Villa Valencia did not have enough nursing staff to provide adequate care, then Management had a legal duty to impose an immediate moratorium on new admissions until it remedied the problem. In light of Management's knowledge of the longstanding deficiencies in staffing and patient care, the vacancies in the top leadership positions, and the lack of staff with experience in skilled nursing, the jury could reasonably find that Management acted recklessly by failing to impose a moratorium before Mrs. Adams was admitted.

Taken in its totality, there was ample evidence to support a finding that Management's failure to remedy the deficiencies in staffing or impose a moratorium *before* Mrs. Adams was admitted to Villa Valencia was

reckless, malicious, oppressive, or fraudulent. (See *Bremenkamp v. Beverly Enterprises-Kansas, Inc.* (D. Kan. 1991) 762 F. Supp. 884, 893-895 [finding sufficient evidence to support punitive damages based on short-staffing of nursing facility]; *Estate of Despain v. Avante Group, Inc.* (Fla. App. 2005) 900 So.2d 637, 645 [finding sufficient evidence to support punitive damages against corporate operators of nursing home where “the facility was not adequately staffed, which contributed to the inability to provide the decedent with proper care”].)

Alternatively, there was sufficient evidence that Management had “advance knowledge of the unfitness of the employee[s]” it placed in charge of Villa Valencia and employed them “with a conscious disregard of the rights and safety of others.” (Civ. Code, § 3294(b), incorporated as part of Elder Abuse Act in Welf. & Inst. Code, § 15657(c).) Appellants have waived any sufficiency of evidence challenge to this theory by failing to raise it in their opening brief. When Management hired Connelly and Bonacci for their respective positions as area manager and area director of resident care, and when it designated Bonacci to serve as interim director of nursing for Villa Valencia, it knew they lacked any prior experience in skilled nursing (6 RT 895-902; 8 RT 1413-1416), and it knew the facility was already lacking in staff with experience in skilled nursing. (5 RT 655-657; 6 RT 887-888, 894.) By putting Connelly and Bonacci in charge of Villa Valencia and giving them responsibility for staffing and compliance with regulations governing skilled nursing facilities, Management employed unfit employees with conscious disregard of the rights and safety of others.

D. The Jury’s Verdict As to Management Has No Bearing on the Sufficiency of Evidence As to Services

Appellants assert that the verdict may not be affirmed on the basis of Management’s conduct because it was “exonerated” by the jury. (AOB 42.)

This is not so. The jury found that Management was engaged in a joint venture with Services during Mrs. Adams' residency at Villa Valencia. (III AA 690.) It also found that Mrs. Adams was in the care or custody of Management (III AA 692); that Management failed to exercise reasonable care with respect to her care or custody (III AA 693); and that Management was negligent in its care and treatment of Mrs. Adams. (III AA 697.)

Although the jury ultimately concluded that Management's neglect did not cause harm to Mrs. Adams, this did not constitute "exoneration" of Management's conduct as managing agent for Services. The jury could have found that even though Management's own neglect did not cause harm, Management authorized or ratified the harmful neglect *committed by Services*, or it hired employees to run Villa Valencia with knowledge of their unfitness and conscious disregard of the risk. For example, the jury could have found that Services staff caused the harm by failing to turn and reposition Mrs. Adams every two hours or assess her skin regularly, and Management authorized or ratified Services' neglect by knowingly understaffing the facility and failing to impose a moratorium on admissions.

In any event, even if the jury had exonerated Management, it would not make any difference. The issue is whether there is substantial evidence to support the findings *against Services*. The sufficiency of evidence as to Services has nothing to do with the findings as to Management. In fact, the trial court instructed the jury to "decide the case against each defendant separately as if it were a separate lawsuit." (II AA 576.) Sufficiency of evidence "must be measured against the instructions given the jury." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.) Appellants have cited no authority that a finding in favor of one defendant has any relevance in assessing the sufficiency of evidence to sustain a separate

finding against another defendant. Sufficiency of evidence is determined solely by examining the evidence in the light most favorable to the judgment, not by reference to other findings made as to a different defendant.

V.

MANAGEMENT AND LIVING ARE JOINTLY LIABLE FOR THE ELDER ABUSE AND PUNITIVE DAMAGES AWARDS AGAINST SERVICES

Appellants contend that the jury's joint venture finding does not make Management and Living vicariously liable for elder abuse or punitive damages. They maintain that "California law does not permit vicarious liability for punitive damages" (AOB 50) and that the Elder Abuse Act "expressly incorporates the punitive damages standards for imposing vicarious liability." (AOB 51.) Appellants are wrong on the law.

A. A Joint Venturer Is Vicariously Liable for Punitive Damages Based on the Wrongful Conduct of Another Joint Venturer Acting in the Course of the Joint Venture Business

"The rule is that the rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership." (*Zeibak v. Nasser* (1938) 12 Cal.2d 1, 12; *accord Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 525.) Under the uniform partnership law, "[a] partnership is liable for loss or injury caused to a person, *or for a penalty incurred*, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership." (Corp. Code, § 16305(a), *emphasis added*.) Further "all partners are liable jointly and severally for *all obligations of the partnership* unless otherwise agreed by

the claimant or provided by law.” (Corp. Code, § 16306(a), emphasis added.)

The statutory rules of partnership liability contain no exception for punitive damages. Thus, a partnership and its partners are liable for punitive damages based on the malicious, oppressive, or fraudulent acts of other partners committed in the course of the partnership business. (*Black v. Shearson, Hamill & Co.* (1968) 266 Cal.App.2d 362, 369 [punitive damages properly assessed against partnership for malicious conduct by individual partner]; see also *Madsen v. Cawthorne* (1938) 30 Cal.App.3d 124, 125-126 [partnership liable for willful and malicious acts of partner while engaged in partnership business].)

Other states applying the uniform partnership laws have also recognized that partners may be held vicariously liable for punitive damages based on acts of their copartners committed in the course of the partnership business. (See, e.g., *Winant v. Bostic* (4th Cir. 1993) 5 F.3d 767, 775 (applying North Carolina law); *Blue v. Rose* (8th Cir. 1986) 786 F.2d 349, 352-353 (applying Missouri law); *Duggins v. Guardianship of Washington Through Huntley* (Miss. 1993) 632 So.2d 420, 430; *Shetka v. Kueppers, Kueppers, VonFeldt & Salmen* (Minn. 1990) 454 N.W.2d 916, 918-919; *Rogers v. Hickerson* (Mo. App. 1986) 716 S.W.2d 439, 447; *Meleski v. Pinero Int’l Restaurant* (Md. App. 1981) 424 A.2d 784, 790-792; *Spencer v. Steinbrecher* (W. Va. 1968) 164 S.E.2d 710, 716; see also 1 Bromberg & Ribstein on Partnership (1992-2 Supplement) § 4.07(e) at 4:122 [partnership is liable for “any penalty” incurred by a partner acting in the ordinary course of business, including “fines and punitive damages”].)

Under these authorities, Management and Living are vicariously liable for the award of punitive damages against Services. The jury found

they were all engaged in a joint venture. (III AA 690.) Under the rules of partnership liability applicable to joint ventures, a joint venturer is liable for punitive damages based on the wrongful conduct of another joint venturer acting in the course of the joint venture business.

B. Punitive Damages May Be Imposed Against a Corporation for the Wrongful Acts of Entities It Appoints to Manage Its Business

Even apart from partnership law, punitive damages may be imposed against a corporation for the malicious acts of another entity it appoints as an agent to carry out its business. (*Textron, supra*, 118 Cal.App.4th at pp. 1079-1081.) *Textron* rejected the defendant’s claim that it was improper to impose vicarious liability for punitive damages based on the conduct of another entity acting as its agent: “Simply describing [defendant’s] liability as vicarious does not militate against imposing a proportionally appropriate punitive damage award against defendant based on [the other entity’s] wrongdoing.” (*Textron, supra*, 118 Cal.App.4th at p. 1083.) “[A] corporation may be held guilty of malice or oppression by reason of acts of those whom it has placed in charge of its affairs and who ‘constitute, to all purposes of dealing with others, the corporation.’” (*Lowe v. Yolo County Consolidated Water Co.* (1910) 157 Cal. 503, 510-511.)

Living and Management are liable for the wrongdoing of Services because they authorized Services to carry out the daily affairs of the Sunrise business, subject to the management and oversight of Management. Living provides senior living services to the residents of the Sunrise facilities *through* its wholly owned subsidiaries, including Services. (Stein Depo. [4/20/07 a.m.] 75.) Living itself merely provides overall strategic direction, having delegated the task of day-to-day operations to its subsidiaries. (*Id.* at pp. 44-45; Stein Depo. [11/29/07] 115.) Living is the

owner of Services and authorized Services to carry out the daily operations of its nursing homes, including Villa Valencia. (Stein Depo. [11/29/07] 104-105; 4 RT 595.) Living allows Services to display the Living logo, and Services' acts effectively constitute those of the Living corporation for purposes of dealing with others. (5 RT 697; 11 RT 1991-1997.)

The jury found that Living, Management, and Services were all involved in a joint venture. (III AA 690.) By definition, joint venturers are authorized to manage and control the affairs of the business on behalf of one another. “A joint venture ... is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.” (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370, quoting *Nelson v. Abraham* (1947) 29 Cal.2d 745, 749.) “An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business.” (*Bank of California v. Connolly* (1973) 36 Cal.App.3d 250, 364.) The jury here was so instructed. (III AA 596 [“A joint venture exists when two or more persons combine their property, skill, or knowledge to carry out a single business undertaking and agree to share the control, profits, and losses”].) By finding that Management and Living were engaged in a joint venture with Services, the jury necessarily concluded that they were agents of each other in carrying out the joint venture's business. For this reason, Management and Living are liable for the punitive damages assessed against Services.

C. Civil Code Section 3294(b) Does Not Preclude Vicarious Liability for the Wrongful Conduct of Another Joint Venturer

In arguing that Living and Management may not be held vicariously liable for the punitive damages award imposed against Services, appellants rely on cases discussing Civil Code section 3294(b). By its terms,

however, section 3294(b) only addresses imposition of punitive damages against an employer “based upon acts of an employee.” This statute does not assist appellants because Services is not an “employee” of Living or Management.

Section 3294(b) precludes imposition of punitive damages against an employer based solely on the doctrine of respondeat superior. (See *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at pp. 569-577; *College Hospital, Inc. v. Superior Court*, *supra*, 8 Cal.4th at p. 724, fn. 11; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1154-1155.) However, the trial court did not impose vicarious liability against Living and Management based on the doctrine of respondeat superior. It imposed vicarious liability against Living and Management based on principles of partnership law applicable to joint venturers. Section 3294(b) does not address principles of vicarious liability *other than* respondeat superior.

The same is true of the provision of the Elder Abuse Act cited by appellants. This provision states: “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.*” (Welf. & Inst. Code, § 15657(c), emphasis added.) Once again, this statute does not purport to address the vicarious liability of a joint venturer for the wrongful conduct of another joint venturer acting in the course of the joint venture business. Nothing in the Elder Abuse Act negates the ordinary operation of partnership law in determining the vicarious liability of joint venturers.

VI.

LIABILITY UNDER THE ELDER ABUSE ACT DOES NOT REQUIRE AN UNDERLYING CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE

A. Appellants Invited Any Error

Appellants contend that the remedies of the Elder Abuse Act are not available to plaintiffs in the absence of an underlying claim for professional malpractice. Thus, they assert that the trial court erred by instructing on a “reasonable person” standard of care, rather than the professional standard of care. However, appellants invited this alleged error by proposing jury instructions directly contrary to the theory they are now espousing.

As noted, the defense asked the trial court to give former CACI No. 3105 on the Elder Abuse Act claim. (I AA 159.) The instruction proffered by the defense stated the applicable standard of care as follows: “That one or more of each defendant’s employees failed to use the *degree of care that a reasonable person in the same situation would have used* by: (a) failing to provide medical care for physical and mental health; and (b) failing to protect Mary Adams from health and safety hazards.” (1 AA 159, emphasis added.)

The trial court agreed to give a version of CACI No. 3105 similar to the one requested by the defense, including the “reasonable person” standard of care. (II AA 584-585.) As conceded by appellants (AOB 32), this is the standard of care mandated by the Elder Abuse Act. (Welf. & Inst. Code, § 15610.57(a)(1) [defining “neglect” in terms of the “degree of care that a reasonable person in a like position would exercise”].)

During the conference on jury instructions, defense counsel never asked the court to instruct that the Elder Abuse Act requires a finding of

professional malpractice, nor did he withdraw his request for former CACI No. 3105 or ask for an instruction on the professional standard of care. (See 20 RT 3787-3790 [discussion of CACI No. 3105].)

As noted, the doctrine of invited error bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request. (*Stevens, supra*, 49 Cal.App.4th at p. 1653, citing cases.) It was appellants' duty to propose complete jury instructions in accordance with their theory of the case. (*Mesecher, supra*, 9 Cal.App.4th at p. 1686.) They never requested jury instructions on the theory they are now asserting. On the contrary, they requested an instruction (former CACI No. 3105) that treated the Elder Abuse Act as an independent cause of action subject to a "reasonable person" standard of care. (I AA 159.) Accordingly, any error was invited.

B. Professional Negligence and Elder Abuse Are Mutually Exclusive

Even if the claimed error were preserved, appellants are wrong in asserting that the Elder Abuse Act requires a breach of the professional standard of care. The Supreme Court has squarely held that the Elder Abuse Act "covers an area of misconduct distinct from 'professional negligence.'" (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783, citing *Delaney v. Baker* (1999) 20 Cal.4th 23, 34-35.) In *Delaney, supra*, the Supreme Court concluded that the term "professional negligence" is "mutually exclusive of the abuse and neglect specified in section 15657." (*Delaney, supra*, 20 Cal.4th at p. 30; accord *Covenant Care, supra*, 32 Cal.4th at p. 785.) "[T]he acts proscribed by 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.” (*Delaney, supra*, 20 Cal.4th at p. 32.)

Under these holdings, the Elder Abuse Act “excludes liability for acts of professional negligence.” (*Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 88.) For this reason, appellants cannot be correct in asserting that breach of the professional standard of care is a necessary element of liability under the Elder Abuse Act. The statute provides that neglect is measured by the “degree of care that a reasonable person in a like position would exercise.” (Welf. & Inst. Code, § 15610.57(a)(1).) That is exactly what the trial court instructed – at the request of both sides. (1 AA 159; II AA 444-455, 584-585.)

C. The Elder Abuse Act Creates an Independent Cause of Action

Appellants are also wrong in asserting that the Elder Abuse Act does not create an independent cause of action. They reluctantly acknowledge the holding of *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, which decided that the Elder Abuse Act “creates an independent cause of action.” (*Id.* at p. 666.) However, appellants attempt to characterize the holding of *Perlin* as dictum and they assert that it was wrongly decided. (AOB 54.)

This holding was not dictum. The issue in *Perlin* was whether attorney fees were available to plaintiffs under the Elder Abuse Act. The jury had found causation only under a preponderance of the evidence standard, and it was unable to reach a causation verdict under the clear and convincing evidence standard of the Elder Abuse Act. In arguing that they were still entitled to fees under the Elder Abuse Act, the plaintiffs asserted “that causation is not an aspect of a defendant being ‘liable’ under section 15657 because causation must be proved in connection with the underlying

cause of action.” (*Perlin, supra*, 163 Cal.App.4th at p. 665.)

In a discussion spanning three pages of the official reporter, the Court of Appeal responded to this argument by addressing whether the Elder Abuse Act created a cause of action or merely provided enhanced remedies. The court ultimately ruled: “We reject plaintiffs’ argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs’ failure to obtain a verdict establishing causation—one element of liability-by clear and convincing evidence, precludes an award of attorney fees.” (*Id.* at p. 667.) Plainly, this conclusion was necessary to the court’s decision, *not* obiter dictum. Although appellants suggest that this issue is ripe for Supreme Court review, they fail to mention that the Supreme Court unanimously denied review in *Perlin* itself. (No. S164591.)

Nor was *Perlin* wrongly decided. Appellants simply ignore the actual reasoning of the *Perlin* decision. As the court noted, the Supreme Court has repeatedly described the Elder Abuse Act as a distinct “cause of action.” (*Perlin, supra*, 163 Cal.App.4th at pp. 665-666, quoting *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 116 [referring to “a cause of action for ‘reckless neglect’” under the Elder Abuse Act]; *Covenant Care, supra*, 32 Cal.4th at p. 786 [referring to “statutory causes of action for elder abuse committed with recklessness, oppression, fraud or malice”]; *id.* at p. 788 [referring to “Elder Abuse Act causes of action”]; *id.* at p. 789 [referring to “an Elder Abuse Act action”]; *id.* at p. 790 [referring to “Elder Abuse Act claims”]; *id.* at p. 790 [referring to “an action under the Elder Abuse Act”].) Other courts have also referred to the statutory “cause of action” arising under the Elder Abuse Act. (*Perlin, supra*, 163 Cal.App.4th at p. 666, citing *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82;

Benun v. Superior Court (2004) 123 Cal.App.4th 113, 119; *Wolk v. Green* (N.D. Cal. 2007) 516 F.Supp.2d 1121, 1133.)

Perlin also found it “noteworthy that when the Legislature added Article 8.5 of the Act, of which section 15657 is a part, it labeled the article, ‘Civil Actions for Abuse of Elderly or Dependent Adults.’” (*Perlin, supra*, 163 Cal.App.4th at p. 666, quoting Stats. 1991, c. 774 (SB 679), § 1.) Though not cited in *Perlin*, the legislative history further supports its conclusion. The Republican Analysis of the Assembly Committee on the Judiciary specifically stated that the bill was intended to “[d]efine the ‘actionable’ abuse to be physical abuse as defined in existing law in the Welfare & Institutions Code.” (RA 140 [Assem. Com. on Judiciary, Republican Analysis of Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended Aug. 20, 1991].) As this analysis confirms, the actionable abuse is defined by the Welfare and Institutions Code, not by the elements of some other common law cause of action such as professional malpractice.

D. Any Error Was Harmless

Even if the trial court had committed error in failing to instruct on the professional standard of care under the Elder Abuse Act, the error would be harmless because (i) the jury found that Services acted with “oppression, fraud or malice” (III AA 694-695), which clearly constitutes a breach of *any* standard of care; and (ii) the jury found a breach of the professional standard of care in connection with the wrongful death claim when it concluded that Management and Services “were negligent in their care and treatment of Mary Kathleen Adams.” (III AA 697; see Argument IIC, *ante*.) There is no reasonable probability that the jury would have reached a different verdict if it had been instructed on the professional standard of care in connection with the Elder Abuse Act claim.

VII.

THE TRIAL COURT'S FINDING THAT COMPENSATORY DAMAGES WERE CAPPED AT \$250,000 DOES NOT REQUIRE A CORRESPONDING REDUCTION OF THE PUNITIVE DAMAGES

The jury awarded \$1 million in compensatory damages and \$1 million in punitive damages. However, the trial court ruled that there was a \$250,000 statutory cap on allowable non-economic damages under the Elder Abuse Act and reduced the compensatory award accordingly. (IV AA 944-945.) Appellants now claim that the trial court's reduction of the compensatory damages also requires a corresponding reduction of the punitive damages to maintain a 1:1 ratio. They assert that "the new 4:1 ratio is excessive as a matter of law" and argue that the punitive damages must either be reduced to \$250,000 or retried. (AOB 58-60.)

Once again, this argument ignores controlling authorities. "[A] reduction in compensatory damages does not mandate a corresponding reduction in punitive damages. There is no requirement that the original ratio between compensatory and punitive damages as measured by the jury remain." (*McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal.App.4th 1351, 1362, citing *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 712.)

This is especially true when the trial court's reduction of compensatory damages is based solely on a statutory cap. The relevant ratio is the ratio of the punitive damages award "to the actual harm inflicted on the plaintiff." (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 222, quoting *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 580.) The harm inflicted *includes* any uncompensated harm. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1174

& fn. 3, citing cases; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 (*Neal*); *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 760-761.)

In *Neal, supra*, 21 Cal.3d 910, the plaintiff died before judgment, precluding her estate's recovery of emotional distress damages in an insurance bad faith case. (Code Civ. Proc., § 377.34 (formerly Prob. Code, § 573).) Considering it "likely that absent this limitation plaintiff would have recovered a substantial additional amount in compensation for emotional distress," the Supreme Court held that the disparity between the relatively small compensatory damages award and the significant award of punitive damages did not require nullification of the award. (*Neal, supra*, 21 Cal.3d at p. 929.)

In *Romo, supra*, 113 Cal.App.4th 738, the court held that the ratio of punitive damages to actual harm in a wrongful death case must take into account the decedent's non-compensable harm from loss of life. The court reasoned: "[N]o one would deny that a *decedent* has lost something valuable when he or she loses life.... Given the unique nature of the compensatory damages arising under section 377.34, the proportionality inquiry must focus ... on the relationship of punitive damages to the harm to the deceased victim, not merely to compensatory damages awarded." (*Id.* at pp. 760-761.)

In this case, the jury found that Mrs. Adams sustained actual harm of \$1 million *not including* her premature loss of life.⁷ In reducing the

⁷The elder abuse instructions allowed the jury to award damages for Mrs. Adams' "loss of enjoyment of life" while she was still alive, but they did not authorize an award of damages for her premature death. (II AA 597-598.) Plaintiffs' counsel only asked the jury to award damages for

compensatory damages, the trial court did not disturb the jury's finding that Mrs. Adams suffered actual harm of \$1 million. Instead, it simply ruled that the Elder Abuse Act caps recoverable non-economic damages at \$250,000 as a matter of law. (IV AA 944-945.) The uncompensated harm of \$750,000 must still be considered in determining the ratio of punitive damages to actual harm. (*Simon, supra*, 35 Cal.4th at p. 1174 & fn. 3; *Neal, supra*, 21 Cal.3d at p. 929; *Romo, supra*, 113 Cal.App.4th at pp. 760-761.) Thus, the artificial statutory cap on compensatory damages does not require a corresponding reduction of the punitive damages. Even excluding the decedent's premature loss of life, the ratio of punitive damages to actual harm inflicted was only 1:1.

In any event, a 4:1 ratio would not be excessive on this record. The defendants' conduct was highly reprehensible. They knowingly put profits above the health and safety of their residents by consciously disregarding the risk of under-staffing Villa Valencia for well over a year before Mrs. Adams was admitted to the facility, resulting in a horrible and painful death caused by avoidable bedsores. In doing so, defendants violated the trust placed in them to safeguard the well-being of a particularly vulnerable population.

Numerous cases have approved ratios higher than 4:1 based on conduct less reprehensible than this. (See, e.g., *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 223 [6:1 ratio for sexual harassment]; *Johnson v. Ford Motor Co.* (2006) 135 Cal.App.4th 137, 151 [10:1 ratio

Mrs. Adams' premature death in connection with the wrongful death claim brought by her children, not the Elder Abuse Act claim brought by her successor in interest. (21 RT 4017-4019.) Although the jury found that Mrs. Adams' children did not suffer any damages from her death, Mrs. Adams clearly did.

for concealing automobile's history of transmission repairs]; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26-27 [9:1 ratio for business dispute involving purely economic injury].) Because the conduct was egregious, and Mrs. Adams received no compensation for her own loss of life, the facts would even support a double-digit ratio. (See *Romo, supra*, 113 Cal.App.4th at p. 761.) Thus, a 4:1 ratio would not be excessive.

Finally, the \$1 million award was not excessive in relation to the wealth of the defendants. According to the defense evidence, the net worth of the Sunrise companies as of December 31, 2006 was over \$647 million. (22 RT 4345-4346.) The jury's award was about 64 times *less* than the 10 percent threshold generally recognized as excessive under California law. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 ["punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth"].)

VIII.

RESPONDENTS SHOULD BE AWARDED FEES ON APPEAL

"[I]t is established that fees, if recoverable at all--pursuant either to statute or parties' agreement--are available for services at trial and on appeal." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) "[S]tatutory attorney fee provisions are interpreted to apply to attorney fees on appeal *unless the statute specifically provides otherwise.*" (*Marcos v. Board of Retirement* (1990) 51 Cal.3d 924, 929, italics added.) The fees provision of the Elder Abuse Act does *not* provide otherwise. (Welf. & Inst. Code, § 15657(a).) Accordingly, if the judgment is affirmed, respondents request that this court adjudicate their entitlement to fees on appeal and remand to the trial court for a determination of the amount. (See, e.g., *Silver Creek*,

LLC v. Blackrock Realty Advisors, Inc. (2009) 173 Cal.App.4th 1533,
1541.)

CONCLUSION

For all the foregoing reasons, the judgment should be affirmed. In addition, the court should adjudicate respondents' entitlement to fees on appeal pursuant to Welfare and Institutions Code section 15657(a) and remand the matter to the trial court for determination of the proper amount.

Dated: September __, 2009

NIDDRIE, FISH & BUCHANAN LLP

By: _____

Martin N. Buchanan
Attorney for Respondents
Mary Kathleen Adams, et al.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing Respondents' Brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 17,861 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: September __, 2009

NIDDRIE, FISH & BUCHANAN, LLP

By: _____

Martin N. Buchanan
Attorney for Respondents
Mary Kathleen Adams, et al.

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 750 B Street, Suite 2640, San Diego, California 92101. On Sept. ____, 2009, I served the **RESPONDENTS' BRIEF** by mailing a copy by first class mail in separate envelopes or packages addressed as follows:

Robert A. Olson Cynthia E. Tobisman Greines, Martin, et al. 5900 Wilshire Blvd., 12 th Floor Los Angeles, CA 90036 (Attorneys for Appellants)	James A. Napoli Glenda M. Zarbock Hanson Bridgett LLP 425 Market Street, 26 th Floor San Francisco, CA 94105 (Attorneys for Appellants)
Clerk of Court California Supreme Court 350 McAllister Street San Francisco, CA 94012 (4 copies)	Hon. Kazuharu Makino Orange County Superior Court Central Justice Center, Dept. C-3 700 Civic Center Drive West Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Sept. ____, 2009, at San Diego, California.

Martin N. Buchanan