2 Civil No. B212933

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

Teresa D. Green,

Plaintiff and Appellant

vs.

LAIBCO, LLC dba Las Flores Convalescent Hospital

Defendant and Appellant

On Appeal From The Superior Court of Los Angeles County
Honorable Richard Fruin, Jr., Judge,
Los Angeles Superior Court Case No. BC374097

APPELLANT'S OPENING BRIEF

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INTRODUCTION

"With jurisdictional deadlines, the rule, like the song, is what a difference a day makes." (*Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 524.) Defendant LAIBCO, LLC ("LAIBCO") served notice of intent to move for new trial on September 19, 2008. This action triggered the 60 day period for deciding the new trial motion because notice of entry of judgment had not been served. The order granting the new trial motion was filed November 19, 2008, *61* days later. Therefore, the motion is deemed denied by operation of law and the order is void for want of jurisdiction. For that reason, this Court need not decide the merits of the new trial grant.

Even if the Court needed to reach the merits, however, reversal still would be required. Plaintiff Teresa Green sued defendant after she was fired from her position as activities director in defendant's nursing home, Las Flores Convalescent Hospital ("Las Flores.") Plaintiff had held this position for 22 years and loved it because she was able to enrich the lives of elderly, often frail patients. During the first 20 years of plaintiff's tenure, Las Flores was operated by Diana Fortune. During that time, Las Flores had an excellent reputation, was not filled to capacity and did not admit patients with schizophrenia or other mental disturbances.

In early 2006, defendant began operating Las Flores. LAIBCO's CEO, Laib Greenspoon, became the administrator. Plaintiff and another witness testified conditions at Las Flores deteriorated: it became filled to capacity with patients, many of whom had serious psychiatric issues. Greenspoon, several current employees and one former employee who still sees patients at Las

Flores testified patient care did not deteriorate and supplies increased.

Plaintiff testified she complained to Greenspoon and others about conditions she perceived to be detrimental to patient care and safety, including "dignity issues" such as the fact that residents who wanted assistance to the bathroom would be told to use their diaper! Greenspoon and several current employees denied plaintiff made such complaints, except for one regarding the absence of a garden hose on the residents' smoking patio. Plaintiff also testified she and another employee notified Greenspoon that employee had been sexually harassed. Greenspoon and the other employee denied that the three discussed this matter.

On the morning of March 30, 2007, Los Flores resident Joseph Schlank caught fire while smoking on the residents' smoking patio. Staff were required to monitor only smokers designated as unsafe. Plaintiff testified Schlank was designated a safe smoker at the time of his accident. Schlank kept smoking materials, which only safe smokers could do. Although a form dated January 10, 2007 identified Schlank as an unsafe smoker, plaintiff testified this document did not exist when Schlank was injured, it was created afterward, and the director of nursing (Renita Morgan) pressured plaintiff to sign the backdated document. Morgan denied that the document was backdated. The document was a form used before Schlank's accident that had only one signature line, which plaintiff customarily signed. However, there were three signatures on this document.

All employees at Las Flores were responsible for patient safety. The activities department personnel were present during the day shift. Testimony conflicted regarding whether the activities department had exclusive

responsibility for monitoring unsafe smokers during that time. Plaintiff was not on the premises when Schlank was injured because she was running job-related errands, some of which had to be done that day. Plaintiff testified that, as Las Flores required, she told several people she was leaving the premises. Defendant's witnesses testified they did not hear plaintiff telling them or others that she was leaving the premises. Plaintiff and several witnesses testified she never left Las Flores during working hours without telling another employee she was doing so.

On April 2, 2007, Greenspoon telephoned plaintiff at her home on her day off. Plaintiff testified Greenspoon asked her several times to state that she was on the residents' smoking patio when Schlank was injured and that she refused each time. Plaintiff's witness Jerome Edgar, who was present during the conversation, testified plaintiff said three times that she did not see the incident. Greenspoon testified he asked plaintiff if she was on the patio when Schlank was burned and she said that she was not. Greenspoon denied he asked plaintiff to lie to investigators.

On April 17, 2007, Greenspoon met with plaintiff to fire her. Greenspoon testified he had investigated the matter, concluded plaintiff was negligent and held her solely responsible although he acknowledged he also bore some responsibility. Plaintiff's replacement's testimony regarding the events resulting in her hiring demonstrated that Greenspoon decided to fire plaintiff within a short time after the April 2nd phone call.

The effect on plaintiff was immediate. She was devastated and felt she lost everything she for worked all her life. When she returned home, Edgar saw her crying and shaking, walking around the house and looking at the floor.

Plaintiff began to have trouble sleeping, lost weight, suffered headaches, stomach pains and shingles, and became so depressed she formulated a suicide plan. Although plaintiff was finally able to obtain employment at a lesser wage with no benefits after a 10 month search, Edgar testified she still cries frequently and is always sad.

Plaintiff sued defendant, alleging that she was fired in violation of public policy because she complained about patient care and safety, she reported the sexual harassment of another employee and she refused to lie to the Department of Health Services ("DHS.") Plaintiff also sued under the Fair Employment and Housing Act ("FEHA") for retaliatory discharge based on reporting the harassment.

The trial boiled down to whom the jury believed: plaintiff or Greenspoon. Although other witnesses testified on certain points, the jury could have discounted nearly all such testimony because of the witnesses' emotional or economic ties. The jury's choice was most starkly presented on plaintiff's theory that she was discharged for refusing to lie to the DHS, which required the jury to believe either plaintiff's and Edgar's account of the April 2nd conversation or Greenspoon's.

Obviously, the jury did not believe Greenspoon on this and many other matters. That disbelief was amply justified by Greenspoon's own inconsistent, evasive and sometimes preposterous testimony, which included flatly asserting that he does not get mad! The jury unanimously entered special verdicts finding that plaintiff had been discharged for all of the reasons she alleged, and awarded plaintiff compensatory and punitive damages.

Defendant moved for a new trial on numerous grounds, arguing the

evidence was insufficient to support the liability-related verdicts for plaintiff and the compensatory and punitive damages were excessive.

The trial court granted defendant's motion, *but not for the reasons defendant advanced*. Instead, the court concluded that its *own* special jury instruction was erroneous because it did not require the jury to find that the patient care and safety deficiencies of which plaintiff complained violated or threatened to violate the law. The court also found that plaintiff's patient care and safety complaints did not vindicate a statutory or constitutional policy and therefore could not support plaintiff's public policy discharge claim. Finally, the court ruled that evidence plaintiff adduced pertaining to patient care and safety prejudiced the jury's deliberations on *all* of plaintiff's claims and resulted in an excessive compensatory damages award.

None of these grounds could withstand scrutiny if this Court had to rule on the order's merits. The jury instruction in question was proper because the jury fulfilled its role in determining whether plaintiff was discharged due to her complaints regarding patient care and safety; it was the *court's* role to decide whether a discharge for this reason violated public policy–if it had been called on to do so.[1] Moreover, even if the jury instruction had been improper, it would have affected only one of the grounds on which plaintiff prevailed.

The court also erred in finding that plaintiff's patient care and safety complaints did not vindicate a statutory or constitutional policy. The court's

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[1/] The court was not required to make this determination because defendant never raised the issue at trial, contending instead that plaintiff never made the complaints and even if she had made them, they did not result in her discharge.

basis for this finding was that plaintiff failed to show the conditions about which she complained violated any statute or regulation. However, such a showing was unnecessary. Plaintiff was only required to show that she complained about violations of public policies tethered to statutes and regulations, and she produced ample evidence of such violations. Moreover, as with the allegedly improper jury instruction, any failure of plaintiff to meet her burden on this theory did not affect the other special verdicts entered by the jury.

Finally, for three independently adequate reasons, the court erred in concluding that plaintiff's patient care and safety evidence prejudiced the jury's deliberations on *all* of plaintiff's claims and led to excessive compensatory damages. First, defendant's failure to object to this evidence precluded a new trial being granted on this basis. Second, the evidence was not prejudicial. Third, even if the evidence might have had some prejudicial effect, that effect was so dwarfed by other evidence and Greenspoon's lack of credibility that a new trial was unwarranted.

As stated above, this Court need not reach the new trial order's merits because the order was void for want of jurisdiction. However, if the Court had to reach the merits, reversal would still be required.

STATEMENT OF THE CASE

A. Procedural Fact Summary.

Plaintiff went to trial against LAIBCO on causes of action for wrongful discharge in violation of public policy and retaliation violating the FEHA. (Appellant's Appendix ["AA"] 1-9, 53-55.) Plaintiff asserted that she was tortiously discharged because: (1) she refused to give false information to the DHS; (2) she complained about sexual harassment of another employee; and (3) she complained about patient care and safety. (AA 1-7, 53.) Plaintiff asserted that her dismissal for reporting sexual harassment of another employee also violated the FEHA. (AA 7-9, 54-55.)

On August 18, 2008, the jury, by means of special verdicts, unanimously found that plaintiff was discharged for all the reasons she asserted, and awarded plaintiff $1,237,086.00 in compensatory damages and another $1,237,086.00 in punitive damages. (AA 53-57, 193.)

On September 19, 2008, defendant filed a notice of intention to move for a new trial. (AA 58.) Judgment was entered on October 14, 2008 and plaintiff served notice of entry of judgment on October 20, 2008. (AA 191-194.) On November 19, 2008, the court ruled on the defendant's new trial motion, a minute order was entered and the clerk mailed notice of entry of the minute order, which incorporated the ruling. (AA 195-207.)

The order granted a new trial on three grounds: insufficiency of the evidence to justify the verdict, excessive compensatory damages and an error in law. (AA 197, 199.) The court began by stating there was insufficient evidence to support the special verdict for wrongful discharge based on

plaintiff's patient care and safety complaints. (AA 197.) The court's rationale was that "[n]one of these conditions that [plaintiff] testified she observed and complained to management about were shown to violate any statute or regulation." (AA 207.) The court found that this evidence "prejudiced the jury in its deliberations on plaintiff's other claims" and cited four "prejudicial effects" purportedly caused by this evidence. (AA 198.)

The court also concluded that the jury instruction pertaining to tortious discharge was erroneous because it "did not make clear that evidence of complaints of patient care and safety do not establish a public policy concern unless the conduct attributed to defendant violated or threatened the violation of a law." (AA 199.) In the remainder of the ruling, the court elaborated on these points. (AA 199-207.)

B. Appealability.

On December 24, 2008, plaintiff filed a notice of appeal from the November 19, 2008 order granting defendant's new trial motion. (AA 208.) Although void, this order was appealable. (Code Civ. Proc. § 904.1, subd. (a)(4); *Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 379 and fn.5 [appeal from void order granting new trial was proper]; see generally *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370 ["We hold that a special order after final judgment is appealable regardless of whether it is void and regardless of whether it is provided for by any of the prescribed methods of procedure."].) Plaintiff's notice of appeal was timely because it was filed within 60 days of the date the clerk mailed notice of entry of the order granting the new trial. (California Rule of Court 8.104 (a)(1), (f).)

C. Standards of Review.

Whether the new trial order is void for want of jurisdiction is a question of law reviewed de novo. (*People ex rel. Dep't. of Transp. v. Cherry Highland Properties* (1999) 76 Cal. App. 4th 257, 260, disapproved on other grounds in *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278, fn. 5 ["The issue as to what triggers the commencement of time within which to rule on a motion for new trial involves a pure question of statutory interpretation, which we review de novo."].)

Whether the new trial order is void on the merits involves several different issues. "[A]s a general matter, orders granting a new trial are examined for abuse of discretion. [Citations.] [¶] But it is also true that any determination underlying any order is scrutinized under the test appropriate to such determination." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.) The standard of review pertaining to each merits issue will be discussed in connection with that issue.

D. Substantive Fact Summary.

The *substantive* facts are largely or wholly irrelevant to most of the issues plaintiff raises in this brief, including the dispositive threshold issue that the new trial order was void for want of jurisdiction. However, the facts are relevant to two of plaintiff's bases for contending the trial court erred in ruling that plaintiff's complaints about patient care and safety were prejudicial. Because the trial court was required to "weigh[] the evidence" in granting a new trial on insufficiency of the evidence and excessive damages (Code Civ. Proc., § 657), plaintiff will discuss evidence favorable and unfavorable to her.

1. Plaintiff's long career (primarily spent at Las Flores) providing high quality care to seniors and disabled adults was tremendously satisfying and important to her.

Plaintiff Teresa Green went straight to work after graduating from high school, and spent ten years working at as a certified nursing assistant ("CNA"). (4 Reporter's Transcript ["RT"] 378-379. Plaintiff worked in approximately seven skilled nursing facilities or convalescent homes during that time, never received a pay cut from an unhappy employer, steadily advanced in pay and was never fired. (4 RT 378-379.)

Plaintiff became a certified activities consultant who studied gerontology in college courses taken at night while she worked full time. (4 RT 380.) She started working as Las Flores' activities director in 1986. (4 RT 377-378.) Las Flores is a 99 bed skilled nursing facility and nursing home. (3 RT 35-36, 52; 6 CT 1030; Health & Saf. Code, § 1250, subds. (c), (k).) When residents were admitted, plaintiff or her staff would assess their needs, abilities and interests so meaningful activities could be provided. (4 RT 381.) These activities would continually be adapted "based on the abilities and changes in condition of residents." (4 CT 382.) Plaintiff was "part of the interdisciplinary team to discuss the care and plans of action for quality care." (4 CT 382.)

Diana Fortune, the former administrator of Las Flores (4 RT 347), testified that when plaintiff began working at Las Flores, "there wasn't much in the way of formal activity services in skilled nursing, but Teresa brought that to us." (4 RT 353.) Plaintiff "developed and formed activities that were

specific to certain kinds of residents so that every resident in the facility had some sort of diversion and activity planned." (4 RT 354.) Plaintiff "coordinated outside activities," including Disneyland visits and shopping at the mall. (4 RT 354.) She brought in adult education teachers and volunteers from community organizations. (4 RT 381.) She managed the beauty shop, handled the residents' petty cash and walked with them to local stores or arranged for someone else to go with them. (4 RT 355-356.)

Plaintiff knew the residents by name and visited them at least once a day. (RT 356, 382.) She wrote the monthly newsletter Las Flores sent to the health department, the Gardena mayor and the residents' families. (4 RT 356.) She arranged for events picture taking for mothers' day, fathers' day breakfast and Christmas, when the staff "would dress the residents and have special portraits taken of them so their families would have them." (4 RT 356.)

Fortune testified that plaintiff cared about the residents' welfare "absolutely every day" and rated plaintiff's performance "absolutely exceptional." (4 RT 356, 359.) Fortune placed performance evaluations reflecting these sentiments in plaintiff's personnel file along with "notices from the community, newspaper clippings and awards" and "letters from residents and their families who thanked Las Flores for what [plaintiff] did." (4 RT 358-359.) Greenspoon never assessed plaintiff's job performance, though she heard him telling families "what a good job we were doing in the activities program . . . ." (4 RT 386.) Up to the day Greenspoon fired plaintiff, he never said anything negative about her performance. (4 RT 386.)

Plaintiff is unmarried without children. (4 RT 377-378.) Her career was "[t]remendously important" to her. (4 RT 378.) She loved her job at Las

Flores and it "meant a lot" to her. (4 RT 377.) She "love[d] the residents . . . . loved seeing the smiles on their faces, hugging them. It was very meaningful." (4 RT 377.) Although plaintiff had a budget (4 RT 355), she would use her own money to purchase "comfort" items such as hair ribbons, socks, T-shirts and candy for residents. (4 RT 452.) She also brought them flowers. (5 RT 727.) Plaintiff looked forward to work every morning. (4 RT 378.) She got the greatest satisfaction from "the hugs and smiles and the responses that [she] got from the residents for the programs that we provided and the joy that we tried to bring them." (4 RT 378.) Jerome Edgar, who lives with plaintiff (4 RT 424), testified the residents "were very much like her family. She would stay there instead of going to holidays and stuff with everybody else . . . ." (4 RT 425.) Plaintiff went to all the Las Flores residents' funerals and even spoke at many of them. (4 RT 356; 4 RT 403.)

When plaintiff was fired from Las Flores, she was earning $19.00 per hour and had "good benefits," including medical and dental insurance, vacation time and sick time. (4 RT 379-380.)

2. Conditions at Las Flores before and after Laib Greenspoon began administering the facility.

a. Plaintiff's evidence.

In 1977, Fortune became the administrator at Los Flores and remained in that capacity for 28 years. (4 RT 347.) During that time, Las Flores' mission "was to provide a home-like atmosphere with quality health care services . . . ." (4 RT 348.) Las Flores did its best every day to carry out that mission. (4 RT 348.) Las Flores' reputation in the community was

"exemplary," as evidenced by all the awards the facility received. (4 RT 438.) Las Flores enjoyed the best reputation possible with attending physicians at the local hospitals. (4 RT 349.)

Plaintiff described the atmosphere during that time as "loving" and "home-like," stating that "[t]he residents always came first. Every effort was made to provide for their needs." (4 RT 382.) Most residents were "frail and elderly . . . ." (4 RT 384.) Plaintiff never felt the residents were unsafe or not nurtured and she would not have hesitated to place her parents in Las Flores during Fortune's tenure. (4 RT 382-383.) During that time, Las Flores would never admit residents with primary diagnoses of schizophrenia or other mental disturbances. (4 RT 349.) The staff was not trained to deal with such patients and Las Flores was not a locked psychiatric facility. (4 RT 349-350.)

In approximately January 2006, LAIBCO took over the operation of Las Flores. (3 RT 34.) Laib Greenspoon, the CEO of LAIBCO then and at trial, became Las Flores' administrator. (3 RT 34-35; 6 RT 1013-1014.) When Fortune's tenure ended, Las Flores had approximately 40-50 residents. (5 RT 730.) After LAIBCO began operating Las Flores, Greenspoon "rapidly" increased the "census" (number of patients). (3 RT 36.) The census has been "at capacity" since Greenspoon arrived. (5 RT 704.)

Plaintiff testified that conditions at Las Flores changed "dramatically" after LAIBCO took over. (4 RT 387.) Many new arrivals had "very, very serious issues, a lot of psychiatric issues." (4 RT 388.) They were "very different" from the "frail elderly" residents of Fortune's tenure. (4 RT 388.) Many residents were admitted with psychiatric diagnoses, such as schizophrenia, and some were exhibiting violent behaviors and would be out

of control at times. (4 RT 390-391.) Sometimes there was no medication available, or it was not provided. (4 RT 391.)

Laverne Mitchell, a friend of plaintiff's and a former convalescent hospital activities director who taught adult education classes at Las Flores (4 RT 400, 402), testified she had "never seen patients who had psychiatric type of diagnosis mixed in with frail elderly." (4 RT 405.) This "disturbed [her] quite a bit" and she "even considered calling the health department because [she] didn't think it was safe." (4 RT 405.) Mitchell's classes "couldn't go smoothly anymore" because of residents' behavioral issues. (4 RT 405-406.) Moreover, the activities department staffing had become inadequate. (4 CT 407.) Mitchell testified "It was just chaotic, you know, to put it bluntly." (4 RT 406.)

One resident threatened to cut up all her roommate's clothing. (4 RT 391.) That resident would leave when her Medicare ran out, then return. (4 RT 391.) Another resident assaulted plaintiff when she attempted to calm him down. (4 RT 392.) He grabbed her wrist, pulled and twisted it, held a telephone over her head and "said that he'd killed his own mother and he didn't care who–who he killed, if he killed anyone again." (4 RT 392.) He did not leave Las Flores until evening. (4 RT 392.) Before that, he wandered around and plaintiff followed him to prevent further assaults. (4 RT 392-393.) Plaintiff knew of no other assaults on patients or staff. (5 RT 647.)

Many new patients were homeless, and very unkempt and dirty. (4 RT 389.) Some had infectious diseases including HIV, others had skin diseases such as scabies. (4 RT 389-390.) One had open wounds that he would scratch, producing much blood, after which he would "go and handle common

objects." (4 RT 390.) People were admitted without contacts on their charts, many did not even have a doctor listed and some had no diagnosis. (4 RT 393.) This "was happening quite a bit." (4 RT 393.) As a result, the staff was "kind of working blind, trying to provide for them without any past information. It was very difficult." (4 RT 393.) Some were admitted "without medication or having problems getting medication." (4 RT 445.)

Theft issues increased with the new population. (4 RT 445.) One resident complained about her cell phones and cash being stolen. (4 RT 445.) Another was very upset about her clothing being taken and worn by other residents. (4 RT 445-446.) A third resident also brought up theft issues. (4 RT 445.)

Not only did the population change under Greenspoon's administration; there were staffing problems as well. Laverne Mitchell testified she saw a difference in nursing quality after Greenspoon became administrator, with patients being "more neglected, lying in the bed more." (4 RT 420.) Mitchell smelled urine, which she did not recall occurring previously. (4 RT 420.) Mitchell characterized the staff's attitude as "lackadaisical. I don't care. No one takes the patient to the activity." (4 RT 406-407.) When a resident urinated on the floor of the classroom, it "took so long for people to come," that Mitchell sometimes "cleaned it up herself." (4 RT 406.) Mitchell, who had always been able to "count on" plaintiff and her staff, no longer works at Las Flores because "there's no joy there" and "no support." (4 RT 407, 411.)

b. Defendant's evidence.

Greenspoon testified that before he took over, Las Flores had a "decent

reputation," but also had "serious financial problems" and was "constantly short on supplies." (6 RT 1021.) He testified this shortage did not affect the employees' "work ethic," but did impact what they were able to do. (6 RT 1021.) Greenspoon increased supplies and purchased new equipment. (6 RT 1022-1023.) He hired additional nurses as the number of residents rose, so Las Flores could meet the requirement of 3.2 nursing hours per patient per day. (6 RT 1030.) Greenspoon testified there was no staffing shortage. (3 RT 74.)

Kevin Jones, a licensed vocational nurse ("LVN") at Las Flores, testified he did not notice any decline in the level of care after Greenspoon became the administrator. (5 RT 694, 697.) Esmerelda Flores, a Las Flores CNA, testified there were fewer supplies at the end of Fortune's tenure, that Greenspoon had improved this situation and that the level of patient care had "gone up." (5 RT 707-709.) Eddie Vaughn, an LVN at Las Flores, testified patients were receiving the same level of care under Greenspoon as under Fortune. (5 RT 712-714.) Sherri Parker, the Las Flores Director of Staff Development, testified there were financial difficulties toward the end of Fortune's tenure that made it harder to obtain supplies, that Greenspoon eliminated the supply problems and that the level of patient care increased. (5 RT 728-731, 734.) Plaintiff testified that "a few items . . . were short" towards the end of Fortune's tenure. (5 CT 620.)

Yulionis Gayauskas, the former medical director at Las Flores who still sees patients there, testified that the residents receive good care. (6 RT 997-998, 1000.) Las Flores director of nursing Renita Morgan testified that the staffing increase under Greenspoon improved patient care. (6 RT 943, 973.) Morgan also testified she recently told Diana Fortune "things are crazy"

at Las Flores. (6 RT 972.)

3. Plaintiff's complaints about patient care and safety.

a. Plaintiff's evidence.

Plaintiff testified she complained to "management"–including Laib Greenspoon, Renita Morgan and Sherry Parker–about patient care and safety deficiencies at Las Flores. (4 CT 389-390.) These complaints centered around the above-described problems (including theft, bizarre behavior and violence) caused by the influx of the homeless and psychiatrically disturbed into a nursing home that cared for the frail elderly. (4 RT 389-394, 444-445.)

In addition to informing management of these problems, plaintiff complained to management about "dignity issues." (4 RT 444.) Plaintiff told management that "[o]n occasion, residents would ask for assistance to the rest room and be told 'Just use your diaper,' that type of thing, which is not acceptable in the area of dignity." (4 RT 444.) Plaintiff testified that she brought her hairdresser to the facility, but her services were rejected "due to financial consideration . . . ." (4 RT 444.)

Plaintiff also brought up staffing issues, including the following:

- "[T]he staff weren't adequately trained, I don't believe, to work with the population that was coming in with the psychiatric diagnoses, and that was creating a lot of problems in the facility." (4 RT 444-445.)

- "I told [Greenspoon] that with this type of resident, we needed more staffing. A lot of them needed one-to-one calming and individual attention. I told him my department needed staffing. The demands on us were growing, and we wanted to provide quality service and care." (4 RT 395.)

- Sometimes on Saturdays there was no registered nurse available and residents were not being evaluated right away to make sure their needs were met. (4 RT 445.)

Plaintiff's complaints were either ignored or she was told that management would "look into it." (4 RT 390-391, 393, 447.) Greenspoon's reply regarding activities department staffing was "Well, if you can manage with one person some days, why would you need three on other days?" (4 RT 395.)

b. Defendant's evidence.

Greenspoon testified plaintiff never "brought anything substantial to my attention that required an investigation." (3 CT 47.) When asked about specific complaints, Greenspoon denied plaintiff made those complaints except for a "suggestion" that a garden hose be placed on the smokers patio. (3 CT 67-69.) Greenspoon also testified plaintiff never brought up patient safety issues in meetings. (6 RT 1026-1028.) Parker and Morgan testified plaintiff had never raised concerns about patient care or safety in meetings or on a one-to-one basis. (5 RT 732-734; 6 RT 949-952.)

4. Plaintiff's complaint about sexual harassment of another employee.

a. Plaintiff's Evidence.

Plaintiff's assistant, Roxana Marroquin, told plaintiff that maintenance worker Javier Castellanos was harassing her, "asking her out and following her around. (4 RT 323, 448-449.) This made Marroquin "very uncomfortable"

and “incredibly upset,” and she threatened to quit “if something wasn’t done.” (4 RT 449.)

Plaintiff witnessed Castellanos “stare at [Marroquin] inappropriately and make comments and things.” (4 RT 450.) Other staffers, including housekeepers and plaintiff’s assistant Cynthia Wicker, told plaintiff “they were seeing [Castellanos] making gestures and various things.” (4 RT 450.)

Las Flores policy required plaintiff to report sexual harassment. (4 RT 449.) Plaintiff and Marroquin met with Greenspoon, who did not appear particularly interested, but “said he’d look into it.” (4 RT 450-451.) He did not take notes or say an investigation would occur. (4 RT 451.)

After this, “all hell kind of broke loose.” (4 RT 451.) Castellanos was in a relationship with Desiree Buchanan, the dietary supervisor at Las Flores. (4 RT 323, 332.) Buchanan is friendly with Nursing Director Renita Morgan. (6 RT 972.) After plaintiff and Marroquin reported the sexual harassment, the activities department had “difficulty getting assistance in many areas– dietary, nursing.” (4 RT 451.) A disturbed resident would be placed in an activities department program, he would create a disruption, be wheeled out and then returned to the activities room. (4 RT 452.) Getting refreshments from the kitchen became so difficult plaintiff would go out and purchase them. (4 RT 452.)

Plaintiff told management that she felt she was being retaliated against for reporting sexual harassment. (4 RT 453.) Morgan replied “‘Well, why did you–why did you report that? You hurt Desiree. You made her cry. Doesn’t Roxana know how to handle herself?’” (4 RT 453.) The retaliation did not stop. (4 RT 453.) After plaintiff reported the harassment, she requested a

raise for Marroquin and later requested a raise for herself. (4 RT 453-454.) Plaintiff had been at the same wage for a "couple of years." (4 RT 454.) Greenspoon said he would look into it. (4 RT 454.)

b. Defendant's Evidence.

Roxanna Marroquin testified that she had a problem with Castellanos, who started following Marroquin and asking her out, but "it was solved." (4 RT 323.) Up to that point, Marroquin and Buchanan had been friends and Buchanan had "been very nice" to the activities department. (4 RT 323-324.) Marroquin testified she reported the problem to plaintiff, who did nothing about it. (4 RT 324.) Marroquin and Wicker went to see Buchanan to get her to tell Castellanos to stop. (4 RT 324-325.)

Marroquin testified that Buchanan said she would speak to Castellanos about his conduct, and that the conduct did stop. (4 RT 325.) However, Buchanan for a time treated Marroquin differently and stopped talking to her. (4 RT 325.) They are once more "friends." (4 RT 325.) Marroquin denies both that her speaking about Castellanos caused "big problems" for the activities department and that she and plaintiff talked to Greenspoon about this matter. (4 RT 325-326.) In a previous job, Marroquin's supervisor told her to represent herself as an occupational therapy aide for medicare purposes although she did not have a license, and Marroquin did so. (4 RT 328.)

Buchanan testified that she had been quite friendly with plaintiff, Marroquin and Wicker, but the relationship changed when Marroquin, accompanied by Wicker, told Buchanan that Castellanos had asked Marroquin to go out with him. (4 RT 333-334.) Buchanan replied "'[w]ell, is there

anything else you needed to tell me? Because this right here, I mean, it's nothing." (4 RT 334.) Buchanan did not believe Marroquin and Wicker, and was "mad" at them for making these complaints. (4 RT 334-335.) Buchanan testified she never said she would speak to Castellanos about the matter "and it will stop." (4 RT 335.)

After the activities department published a newsletter containing a joke bothering Buchanan, she told Morgan about Marroquin's complaint, and Morgan did nothing. (4 RT 335-336.) Buchanan testified that she was not angry with the activities department personnel and she was professional with them. (4 RT 336-337.) To Buchanan's knowledge, Castellanos was never investigated. (4 RT 337.)

Morgan testified she recalled Buchanan being upset about the newsletter and that plaintiff never came to her to lodge a complaint on Marroquin's behalf. (6 RT 948.)

Greenspoon denied plaintiff approached him with a sexual harassment complaint on Marroquin's behalf or told him she (plaintiff) had been retaliated against for having come forward. (3 RT 44-45.) Parker testified that Greenspoon had investigated a prior sexual harassment complaint. (5 RT 751.)

5. Joseph Schlank's accident.

In the morning of March 30, 2007, Los Flores resident Joseph Schlank caught fire while smoking on the residents' smoking patio. (5 RT 697-698.) Desiree Buchanan, who was on the residents' patio on break several feet away, was talking on her cell phone facing away from Schlank, so she did not see him catch fire. (4 RT 339.) Buchanan testified she was distracted because she

learned of her father's death that morning, but she did not put this information into a statement she wrote after the incident, though she testified she told the DHS investigator. (4 RT 341-343.)

Greenspoon testified he saw Schlank catch fire, but did not leave his office because "there must have two dozen licensed nurses there . . . I would be getting in their way." (3 RT 72.) Greenspoon then said there were 24 "certified nurses," and, when questioned further, said "there were a lot of people." (3 RT 73.) LVN Kevin Jones put the fire out, after which paramedics transported Schlank to the hospital. (5 RT 700-702.) Schlank suffered second and third degree burns. (4 RT 311.)

The activities department personnel were only on premises during the 8:30 a.m. to 3:30 p.m day shift. (3 RT 55; 5 RT 658.) Plaintiff testified that the activities department staff provided most of the supervision for smokers, although sometimes a nursing assistant would monitor them during the day. (5 RT 629, 658.) Greenspoon testified that only the activities department was supposed to monitor smokers during this time, unless they notified a charge nurse they would be unable to do so. (3 RT 64.)

The evidence regarding responsibility for Schlank's accident seriously conflicted on two key points:

- **Whether Schlank had been designated an "unsafe smoker" by the Interdisciplinary Team ("IDT") at the time of his accident.**

The IDT designated smokers as "safe" or "unsafe;" only the latter had to be monitored. (3 RT 62.) Plaintiff testified that Schlank had been designated a safe smoker and there was only one unsafe smoker at the time, Marla Levine (Levitt.) (4 RT 456, 459; 5 RT 655.) Marroquin testified that

before Schlank's accident, safe smokers were allowed to keep smoking materials. (4 RT 430.) Marroquin then testified she did not know if Schlank kept smoking materials, but was contradicted by her deposition testimony stating that Schlank did keep those materials. (4 RT 320-321.)[2]

An assessment dated January 10, 2007 identified Schlank, who had recently returned to Las Flores after hospitalization for stroke, as an unsafe smoker. (4 RT 463-464; 6 RT 954.) Although a smoking assessment was due shortly after Schlank returned from the hospital (5 RT 627), plaintiff testified this assessment was created on the day of the accident and backdated, and that Renita Morgan pressured her into signing it. (4 RT 463-464.) Morgan denied the form was backdated. (6 RT 956.)

The assessment dated January 10, 2007 (Exhibit 8) was on the same type of form as previous assessments. (AA 49-50.) This form had one signature line. (AA 50.) Morgan testified that "one person"–Green–was responsible for completing this form. (6 RT 946.) Green testified she filled out and signed the form for each resident. (5 RT 622.) Schlank's prior assessment (Exhibit 6), which had designated him as a safe smoker, had only Green's signature on it, and when she asked Morgan whether other IDT members should sign, Morgan "blew [her] off." (AA 49; 4 RT 459.)

Despite the fact that the January 10, 2007 assessment form had only one signature line, there were three signatures on it and an "s" was handwritten over the colon following the words "IDT Member Signature." (AA 50.) After

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2/ The court instructed the jury, without objection, that "[y]ou must consider the deposition testimony that may be read to you in the same way as you would consider testimony given in court." (3 RT 10.)

Schlank's accident, a new safe smoking form (Exhibit 12) was devised that had multiple signature lines. (4 RT 471; AA 51.)

- **Whether plaintiff notified anyone before she left to run errands.**

Plaintiff was running work-related errands, one of which involved materials to be sent out by April 1st, when Schlank's accident occurred. (4 RT 455.) Plaintiff left in the early morning because Las Flores' only unsafe smoker, Marla Levine, generally slept in. (4 RT 456.) Plaintiff testified she checked on Levine, then notified Marroquin, the receptionist, the director of nursing and several individuals at nursing station two that she was going out for a brief errand. (4 RT 457.)

Greenspoon testified he talked to the charge nurses and none were notified by Green she was going off premises. (4 RT 308.) Greenspoon "[d]id not care to hear [plaintiff's] side of the story" because he had "multiple witnesses." (3 RT 82.) Kevin Jones was at or near nursing station two at various times that morning and does not specifically recollect having seen plaintiff. (5 RT 697, 705.) LVN Alexis Lavigne testified she was assigned to nursing station two that day and plaintiff did not tell her she was leaving. (5 RT 724-725.) Lavigne also testified she does not recall if she saw plaintiff the day of the accident. (5 RT 726.) Morgan, the director of nursing, testified plaintiff did not tell her she was going off-site that morning. (6 RT 952.)

Plaintiff testified she had never left work during the day without telling people where she was going. (4 RT 457.) Fortune also testified this was plaintiff's practice, as did Patricia Garcia, the Social Services person at Las Flores. (4 RT 356; 6 RT 1006.)

6. Greenspoon's April 2, 2009 call to plaintiff.

On Monday, April 2, 2007, Greenspoon telephoned plaintiff at her home on her day off. (4 RT 466; 6 RT 1033, 1048-1049.) Plaintiff testified he told her "'it would look better for the hospital, to the Department of Health, if I were to say I was present on the patio at the time of the incident'" and she replied "'I was not present. I didn't see it. I wasn't there.'" (4 RT 467.) Plaintiff testified that Greenspoon repeated his statement "three times or so" and also said "'[Y]ou could say that you were out there working on some charting or something like that.'" (4 RT 467.) Edgar, who was present during the phone call, testified plaintiff three times said "something to the effect of, 'No, Laib. I wasn't there. I didn't see it.'" (4 RT 435.)

Greenspoon testified he asked plaintiff if she was on the patio when Schlank was injured and she replied "she was not." (6 RT 1033-1034.) Greenspoon testified this was the "context" of the conversation and he did not recall "the words I used, the questions, the answers . . . ." (6 RT 1034.) He estimated the call took "one to two minutes." (3 RT 77.) Greenspoon also testified he never asked plaintiff to lie to the DHS investigator. (6 RT 1034.)

7. Greenspoon fires plaintiff and hires a new activities director.

On April 17, 2007, Greenspoon met with plaintiff to fire her. (4 RT 307.) Prior to firing her, he never said "I want to hear your side of the story . . . ." (3 RT 308.) Greenspoon testified he did a "thorough"investigation, but did not document it. (3 RT 81.) He did not talk with Marroquin. (4 RT 319.) Greenspoon testified he fired plaintiff because his "investigation concluded it

was her negligence" and the consequences were "severe." (6 RT 1038, 1040.) Greenspoon acknowledged "some sense of responsibility" for Schlank's accident, but wasn't "going to fire" himself and held plaintiff "solely responsible." (4 CT 307-308.)

Marvina Ward is the Las Flores activities director. (5 RT 755.) Over a week elapsed between her interview with Greenspoon and her hiring. (5 RT 761.) She gave two weeks notice at her previous job and began work on *April 24, 2007.* (5 RT 759, 761.) Greenspoon testified he thought Ward gave less than two weeks notice. (6 RT 1049.) This sequence demonstrates that Ward's interview must have taken place almost immediately after Greenspoon's April 2nd phone conversation with plaintiff–and long before April 17th.

8. Plaintiff's firing devastated her emotionally and economically.

The firing immediately affected plaintiff. While driving home, she was "devastated" and felt she had "lost everything [she] worked all [her] life for." (4 RT 474) When she returned home, Edgar saw her "crying and shaking, sweating, walking around the house, looking at the floor." (4 RT 436.) When Mitchell called plaintiff after she was fired, plaintiff was "distraught and very, very upset." (4 RT 410.) Fortune also spoke with plaintiff after her firing and said she sounded "devastated." (4 RT 361.)

Although plaintiff started looking for work "immediately," she was unable to find a job for ten months. (4 RT 475-476.) Plaintiff testified that during that time, she had began to have trouble sleeping, lost weight, suffered headaches and stomach pains, and became so depressed she formulated a

suicide plan. (4 RT 479, 483.) Plaintiff has received counseling, taken anti-depressants, and feels "a little better" about herself since starting her new job. (4 RT 479, 482, 485.)

Laverne Mitchell testified that since plaintiff's firing, she became depressed, lost weight, smokes too much and developed physical illnesses that she did not have previously. (4 RT 410.) One such illness is shingles. (4 RT 483.)

Plaintiff's sister, Kathy Dawson, also described how plaintiff had changed since her firing. In July 2007, plaintiff failed to attend a nephew's wedding ceremony, though she had never missed a "happy family occasion." (5 RT 682.) Dawson saw plaintiff the next day and "she wasn't herself. She didn't look like herself. She didn't act like herself. She was very subdued. She was very down." (5 RT 682.) Dawson told plaintiff she appeared to have "lost a lot of weight" and plaintiff replied "she hadn't been eating very much." (5 RT 682.)

Dawson subsequently convinced plaintiff to drive with her to Utah, where their mother was converting an old church into an art gallery. (5 RT 683-684.) Plaintiff was "not very communicative" during the first two days, but burst into tears the second evening. (5 RT 684-685.) The next day, plaintiff told Dawson what happened at Las Flores. (5 RT 685-686.) Plaintiff "was totally devastated." (5 RT 686.) Normally, plaintiff and Dawson would visit relatives, go out to eat, go "four-wheeling" and do yard work. (5 RT 688.) Instead of these activities, plaintiff watched a little TV, looked for work and "spent a lot of time just sitting and staring into space." (5 RT 688-689.) Dawson recommended plaintiff get counseling. (5 RT 687.)

After the trip, Dawson called plaintiff at least once a week "for a while" to make sure she was receiving counseling. (5 RT 689.) Dawson "still keep[s] tabs" on plaintiff, calling her once or twice a month. (5 CT 689-690.) Dawson has seen plaintiff since then and testified "[s]he's still not the same person she was before she got fired. She's still sad." (5 RT 690.)

Edgar testified that plaintiff had been "very happy" before her firing and had numerous hobbies, including fishing, hiking and camping. (4 RT 425.) Plaintiff had two dogs "she's crazy about" and a spectacular garden. (4 RT 426.) Plaintiff was a very good cook who loved to invite people over and cook for them. (4 RT 426.) After plaintiff's firing, she was "not the same spunky, cheerful, wanna get out and do something." (4 RT 436.) She stopped interacting with friends and family, does not take care of the dogs like she used to, and neglects the garden and house, which was very nice. (4 RT 436-437.) Plaintiff "still cries a lot" and is "sad all the time." (4 RT 436.)

Plaintiff's current job pays her $16,000 less annually than she earned at Las Flores and has no benefits. (4 RT 481.) As of trial, plaintiff had lost $54,911 in salary. (4 RT 481.) Plaintiff was fifty when she testified and expects to work until sixty-six, when she would receive full social security benefits. (4 RT 481.) Plaintiff has also had out of pocket medical expenses and job search costs. (4 RT 484-486.) Plaintiff owes her counselor $2,250, and cannot afford to see a dentist–despite dental pain–or to see the doctor treating her shingles as often as she would like, or to purchase the "very expensive" medication he prescribed to treat plaintiff's shingles. (4 RT 483-485, 487.) Plaintiff is frightened by not having health insurance and worries about losing her house . (4 RT 480, 487.)

ARGUMENT

I.

THE NEW TRIAL ORDER IS VOID BECAUSE IT WAS GRANTED AFTER EXPIRATION OF THE 60 DAY PERIOD FOR RULING ON NEW TRIAL MOTIONS.

The trial court's power to rule on a motion for new trial expires

> 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, *or if such notice has not theretofore been given*, then 60 days after filing of the first notice of intention to move for a new trial.

(Code Civ. Proc., §660, emphasis added.)

Defendant filed and served a notice of intention to move for a new trial on September 19, 2008. (AA 58-60.) Notice of entry of judgment was not served until October 20, 2008. (AA 191.) Therefore, the 60 days in which the trial court had the power to rule on the new trial motion began running when the notice of intention to move for a new trial was filed on September 19, 2008, *not when the notice of entry of judgment was served on October 20, 2008*. (*Bunton v. Arizona Pacific Tanklines* (1983) 141 Cal.App.3d 210, 216 [when notice of intent to move for new trial is filed before notice of entry of judgment is served, the 60 day period for deciding a new trial motion does not start running anew when the notice of entry of judgment is served by a party or mailed by the clerk].)

In *Bunton*, the trial court issued and entered its order granting the new trial on February 28, 1980, 63 days from the filing of the notice of intention to move for new trial, and 56 days from the mailing of notice of entry of judgment by the court clerk. (*Id*. at p. 213.) The Court of Appeal held the new trial order void because it had not been decided within the 60 day time period for deciding a new trial motion. (*Id*. at p. 217.)

The Court of Appeal cited *Bunton* in holding that a trial judge properly ruled a new trial motion could not be granted for want of jurisdiction when the notice of intention to move for a new trial was filed on December 19, 1985, the notice of entry of judgment was mailed by the clerk on January 7, 1986, and the new trial motion was not heard until March 7, 1986. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 148-150; *Rubens v. Whittemore* (1934) 2 Cal.App.2d 575, 576-577 [when notice of intent to move for a new trial was filed on August 24, 1931, notice of entry of judgment was served on October 23, 1931 and a new trial was granted on December 18, 1931, the trial court lacked jurisdiction to grant the motion].)

In the present case, defendant's filing a notice of intent to move for a new trial on September 19, 2008 triggered the 60 day period for deciding the new trial motion. The last day on which the motion could have been granted was November 18, 2008. (Code Civ. Proc., § 12 ["The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."].) November 18, 2008 was not a court holiday. (www.alameda.courts.ca.gov/courts/general/holidays.shtmlf, accessed September 14, 2009.) However, the court failed to rule on defendant's new

trial motion until November 19, 2008. (AA 195-197.)

Because the court's power to rule on the motion expired November 18, 2008, the motion was denied by operation of law and the order was void for want of jurisdiction. (Code Civ. Proc., § 660 [new trial motion deemed denied after 60 day period expires]; *Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101 ["The time limits of section 660 are mandatory and jurisdictional, and an order made after the 60-day period purporting to rule on a motion for new trial is in excess of the court's jurisdiction and void."].)

II.
EVEN IF THE NEW TRIAL COURT ORDER HAD NOT BEEN VOID, IT WOULD HAVE HAD TO BE REVERSED ON THE MERITS.

The jury unanimously found that defendant tortiously discharged plaintiff in violation of public policy for three reasons: (1) refusing to give false information to the Department of Health Services; (2) complaining about the sexual harassment of Roxanna Marroquin; and (3) complaining about patient care and safety. (AA 53-54, 193.) The jury unanimously found defendant liable under the FEHA for discharging plaintiff in retaliation for her complaint about Marroquin's sexual harassment. (AA 54-55, 193.) The jury unanimously awarded plaintiff compensatory damages and awarded punitive as well. (AA 193.)

The court's new trial order set aside the jury's unanimous findings. The court ruled there was "insufficient evidence" to support plaintiff's tortious discharge claim, insofar as it was based on her complaints about patient care

and safety, because those complaints "did not vindicate a statutory or constitutional policy." (AA 197.) The court then concluded that plaintiff's patient care and safety complaints and certain other evidence "prejudiced the jury in its deliberations on plaintiff's other claims" and resulted in excessive damages. (AA 198.) Finally, the court also deemed a new trial necessary because of a purportedly erroneous jury instruction that "did not make clear that evidence of complaints of patient care and safety do not establish a public policy concern unless the conduct attributed to defendant violated or threatened the violation of a law." (AA 199.)

None of these grounds withstand scrutiny; they show only that the court failed to understand the law applying to claims for tortious discharge in violation of public policy. This failure ultimately rendered all the grounds for the new trial order incorrect, so the new trial grant would have to be reversed even if the order was not void. Plaintiff begins by discussing the court's last ground–the purportedly erroneous jury instruction–because showing why the jury instruction was proper lays the foundation for demonstrating that all the court's grounds for granting the new trial motion were erroneous.

. The Court Erred in Ruling That the Jury Instruction Regarding Tortious Discharge in Violation of Public Policy Was Incorrect; Moreover, an Error in this Instruction Would Not in and of Itself Justify a New Trial.

"The legal adequacy of jury instructions is a legal issue subject to the de novo standard of appellate review." (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.) "[W]here . . . a new trial has been granted

because of a correct instruction which the court should have given, and was given, there is no basis for the exercise of discretion. Under such circumstances, as a matter of law, there is no legal ground upon which a new trial may be ordered." (*Parker v. Womack* (1951) 37 Cal.2d 116, 123, overruled in part on other grounds by *Butigan v. Yellow Cab Co.* (1958) 49 Cal.2d 652, 660.)

Thus, the standard of review for the new trial grant based on a supposedly erroneous jury instruction is effectively de novo, because the trial court per se abuses its discretion by granting a new trial due to a purportedly erroneous jury instruction that was actually proper. The relevant jury instruction in the present case accurately stated the law, so the trial court erred in granting a new trial on the ground of instructional error.

The jury instruction in question was Special Instruction No. 1, which the court drafted and both parties agreed was satisfactory. (7 RT 1201-1202.) The relevant portions of that instruction read as follows:

> The law holds that it is unlawful for an employer to terminate an 'at will' employee for certain reasons that are against public policy. If that were to occur, the employee may sue the employer for 'wrongful discharge in violation of public policy.'
>
> Plaintiff Teresa Green has filed suit against defendant Las Flores Convalescent Hospital for 'wrongful discharge in violation of public policy.'
>
> . . . .
>
> It would be unlawful for defendant Las Flores Convalescent Hospital to discharge Teresa Green if its decision was motivated because Teresa Green had made complaints to management about the care or safety of patients who were in the Convalescent Hospital.

(AA 52.)

The court deemed this instruction "an error in law," stating:

> The relevant jury instruction did not accurately state the law as to a tortious discharge in violation of public policy. The jury instruction did not make clear that evidence of complaints of patient care and safety do not establish a public policy concern unless the conduct attributed to defendant violated or threatened the violation of a law.

(AA 199.)

The court was right the first time, when it drafted the instruction. The court incorrectly criticized its own instruction because the jury determines whether an employee was fired for engaging in certain conduct, but the *court* determines whether firing an employee for that conduct would violate public policy.[3] (*Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 925, 929, fn. 8 [*jury* determined that plaintiff had been discharged because he told the athletic director at his previous employer that a coach recommended a student use a nutritional supplement and the *trial court* determined that the discharge was against public policy.].) The court did not need to make this determination here because defendant waived the issue by failing to contend at trial that plaintiff's discharge would not have violated public policy if it occurred for the reasons plaintiff alleged. (3 RT 23-32; 7 RT 1242-1260.).

Our Supreme Court has seen fit to impose limits on the power of *courts*

3/ As discussed in Argument II(B)(2) below, the court also misinterpreted the law in criticizing the special instruction for failing to state that defendant's conduct must violate a law or threaten to do so. Actually, defendant's conduct must violate the fundamental public policy "tethered" to a constitutional provision, statute or regulation.

to hold that firing an employee for particular conduct violates public policy. In *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 ("*Gantt*"), the Court stated that "courts in *wrongful discharge actions* may not declare public policy without a basis in either constitutional or statutory provisions." (*Id.* at p. 1095.) *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66 ("*Green*"), echoed *Gantt's* caution against "'judicial policymaking,'" although *Green* overruled *Gantt* to the extent that the latter decision could be read to preclude public policy claims based on administrative regulations. (*Id.* at p. 80, fn. 6.) Clearly, the Court expects judges, not juries, to decide whether the reason for firing an employee violates public policy if defendant contends that it does not.

The relevant CACI instruction "requires [plaintiff] to prove (1) he was employed by [defendant], (2) [defendant] discharged him, (3) the alleged violation of public policy was a motivating reason for the discharge, and (4) the discharge caused him harm." (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641, citing Jud. Council of Cal. Civ. Jury Instns. (2004) CACI No. 2430.) The instruction's directions state that "[t]he judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy." (www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf, accessed September 14, 2009.) As discussed above, defendant's waiving this issue obviated any need for the court to make this determination.

Because the instruction was correct, the court had no discretion to order a new trial for instructional error and the order must be reversed insofar as it is based on such error. (*Parker v. Womack*, *supra*, 37 Cal.2d at p. 123; *Conner v. Southern Pac. Co.* (1952) 38 Cal.2d 633, 637 ["The inquiry as to whether

instructions are erroneous presents purely a question of law [citations] and if it appears on appeal that a trial court in granting a new trial based its order exclusively upon an erroneous concept of legal principles applicable to the cause, its order will be reversed [citation].”].)

Finally, even if the instruction had been incorrect, the court would not had been justified in granting a new trial on that basis because the instructional error pertained only to one of the three theories on which the jury found for plaintiff on her tortious discharge claim and did not pertain at all to plaintiff’s FEHA claim. (*California Wine Ass’n v. Commercial Union Fire Ins. Co. of New York* (1910) 159 Cal. 49, 51 [“When more than one special issue which would sustain a judgment is submitted to a jury, and the jury’s general verdict is supported by one of these special verdicts and is not supported by the others, if there be no self-destroying inconsistency between these special verdicts, that one which is correctly found will sustain the judgment, and the incorrect special verdicts become harmless error.”].) Although *California Wine Ass’n* involved special interrogatories and a general verdict, the same principle is even more applicable to special verdicts on different theories of liability, which are entirely separate.

. The Court Erred in Ruling That Plaintiff’s Complaints about Patient Health and Safety Did Not Vindicate a Statutory or Constitutional Policy; Moreover, a New Trial Would Not Be Justified Even If The Court Was Correct.

1. This issue is reviewed de novo.

The court found that “[p]laintiff’s patient care and safety complaints do

not trigger public policy protection as the complaints did not vindicate a statutory or constitutional policy." (AA 197.) As discussed in section A above, this determination is one of law for the court to make, if necessary. Because the trial court failed to understand this principle, it used the rubric of "insufficient evidence," stating that this "factual ground for the verdict is not supported by sufficient evidence as a matter of law . . . ." (AA 197.)

However, the new trial ruling nowhere stated that the court found plaintiff's evidence insufficient to show *that she had been fired* because of her patient care and safety complaints. Tellingly, the court did not find that plaintiff's testimony was less than credible or that other testimony or evidentiary materials were more convincing. Instead, the court concluded that "[n]one of these conditions that Green testified that she observed and complained to management about *were shown to violate any statute or regulation*." (AA 207, emphasis added.)

Thus, the court was not acting as a "thirteenth juror" whose independent judgment is subject to the abuse of discretion standard. Instead, the court was acting as a judge by applying an (incorrect) legal standard. (*Musgrove v. Ambrose Properties* (1978) 87 Cal.App.3d 44, 54-55 [order purporting to grant a new trial on insufficient evidence was actually based on a purported error of law because "the trial court, after treating the plaintiff's case as entirely credible, concluded that as a matter of law no duty was established."].) This determination is reviewed de novo. (*Carter v. Escondido Union High School Dist.*, *supra*, 148 Cal.App.4th at p. 929.)

A de novo standard also applies because the court effectively granted judgment notwithstanding the verdict on plaintiff's tortious discharge cause of

action insofar as it was based on her patient care and safety complaints. "[A]n appellate court has the power to look at the substance of a new trial ruling rather than just its title. [Citation.] If the effect of the ruling is actually closer in nature to a directed verdict or a judgment notwithstanding the verdict, then in such a case, the ruling may be deemed to have been based upon a conclusion of law, and de novo review is appropriate." (*In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 614.) ("*Latex Glove*.")

In *Latex Glove* the court granted defendant's motions for judgment notwithstanding the verdict and (in the alternative) for a new trial on the ground that plaintiff failed to adduce sufficient evidence to satisfy the strict liability manufacturing defect test. (*Id*. at p. 604.) The Court of Appeal held de novo review of the new trial motion proper because "the effect of the new trial ruling was to allow [defendant] to prevail as a matter of law, since the relevant evidence had already been presented . . . ." (*Id.* at p. 614.)

The situation is the same here because the trial court ruled that plaintiff's evidence regarding her contention that she was tortiously discharged for making such complaints did not vindicate a statutory or constitutional policy. If the new trial order stands, plaintiff would be unable to present this evidence and would lose forever one of her three tortious discharge theories. Therefore, the de novo standard of review applies.

2. Plaintiff's patient care and safety complaints vindicated multiple fundamental policies tethered to statutes and regulations.

"[W]hen an employer's discharge of an employee violates fundamental

principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170.) These "fundamental policies" must be "delineated in constitutional or statutory provisions . . . ." (*Gantt v. Sentry Insurance*, *supra*, 1 Cal.4th at p. 1095.) Public policy claims can also be based on statutorily authorized administrative regulations. (*Green v. Ralee Engineering Co.*, *supra*, 19 Cal.4th at p. 80, fn. 6 [overruling *Gantt* to the extent that *Gantt* could be read "to conclude that important administrative regulations implementing fundamental public policies as reflected in their enabling statutes are not 'tethered to' legislative enactments . . ."].)

Contrary to the trial court's belief, a defendant's conduct does not have to violate a law or threaten to do so in order to violate public policy. It is true that public policies serving as the basis for a tortious discharge action "must be tethered to a constitutional or statutory provision [citation] or a regulation carrying out statutory policy [citation]." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185.) However, defendants can be liable for violating the public policy "tethered" to a constitutional provision, statute or regulation even if the defendant does not violate that constitutional provision, statute or regulation. (*Green v. Ralee Engineering Co.*, *supra*, 19 Cal.4th at p. 87 ["though it may be unclear whether defendant, as a subcontractor or supplier, legally violated the FAA regulations, its alleged conduct in shipping nonconforming parts to an aircraft manufacturer violated the public policies embodied in the regulations."].)

"[T]he cases in which violations of public policy are found generally

fall into four categories: (1) refusing to violate a statute [citations]; (2) performing a statutory obligation [citations]; (3) exercising a statutory right or privilege [citations]; and (4) reporting an alleged violation of a statute of public importance [citations]." (*Gantt v. Sentry Insurance*, *supra*, 1 Cal.4th at pp. 1090-1091.) Plaintiff's patient care and safety complaints fall within the fourth *Gantt* category because they involved allegations that Las Flores violated policies tethered to statutes and regulations effectuating California's fundamental interest in protecting the aged and infirm. Plaintiff produced ample evidence that she complained of violations of public policies tethered to statutes and regulations.

Las Flores is a skilled nursing facility and a nursing home. (3 RT 35, 52; 6 CT 1030.) Skilled nursing facilities and nursing homes are included in the category of long-term health care facilities. (Health & Saf. Code, § 1418, subd. (a) (1), (7); *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 288, 290; *People v. Firstenberg* (1979) 92 Cal.App.3d 570, 580 [discussing the needs of "patients of skilled nursing homes and other long-term health care facilities . . . "].)

Long-term health care facilities are subject to the Long-Term Care, Health, Safety, and Security Act of 1973 ("the Act") and regulations promulgated thereunder. (*California Assn. of Health Facilities v. Department of Health Services*, *supra*, 16 Cal.4th at p. 288 [citing Health & Saf. Code, § 1417 et seq.; Cal. Code Regs., tit. 22, § 72001 et seq.].) "The Act's provisions are designed to implement the Legislature's declared public policy objective of 'assur[ing] that long-term health care facilities provide the highest level of care possible.' (§ 1422, subd. (a).)" (*Kizer v. County of San Mateo* (1991) 53

Cal.3d 139, 143.) This public policy objective is indisputably fundamental.

All of plaintiff's patient care and safety complaints pertained to Las Flores' failure to provide the highest level of care possible, which violated the fundamental policy delineated in Health and Safety Code section 1422, subdivision (a).[4] Moreover, as shown below, plaintiff's complaints explicitly dealt with matters covered by more specific provisions of the Act or the regulations adopted thereunder.

Plaintiff's complaints regarding the influx of homeless and psychiatrically disturbed residents, and the failure to adequately staff Las Flores for these residents, alleged a violation of the policies embodied in a statute providing that "[n]o long-term health care facility shall accept or retain any patient for whom it cannot provide adequate care." (Health & Saf. Code, § 1418.6.)

Plaintiff's complaint about staff telling residents to go to the bathroom in their diapers alleged a violation of the policies delineated in two regulations. The first mandates that patients "be treated with *consideration, respect and full recognition of dignity and individuality*, including privacy in treatment and in care of personal needs." (Cal. Code Regs., tit. 22, § 72527, subd. (a)(11), emphasis added.) The second required care to include the "[c]hanging of linens and other items in contact with the patient, as necessary, to maintain a clean, dry skin *free from feces and urine*." (Cal. Code Regs., tit. 22, § 72315, subd. (f)(6), emphasis added.)

Plaintiff's complaint that defendant would not employ her hairdresser

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[4] All further statutory references will be to the Health and Safety Code unless otherwise stated.

to provide services alleged a violation of the policies embodied in a regulation providing that "[e]ach patient shall be provided care which shows evidence of good personal hygiene, including care of the skin, *shampooing and grooming of hair*, oral hygiene, shaving or beard trimming, cleaning and cutting of fingernails and toenails. The patient shall be free of offensive odors." (Cal. Code Regs., tit. 22, § 72315, subd. (d), emphasis added.)

Plaintiff's complaints regarding inmates who were dirty, had infectious diseases and, in at least one case, walked around with open bloody wounds touching common objects, alleged a violation of the policies embodied in a regulation providing that patients with infectious diseases shall not be admitted to or cared for in the facility unless they are accommodated in a room, vented to the outside, and provided with a separate toilet, hand-washing facility, soap dispenser and individual towels. (Cal. Code Regs., tit. 22, § 72321, subd. (a)(1).) This regulation expresses the policy that residents whose medical conditions could adversely affect other residents be kept separated from those residents. Plaintiff's complaint alleged a violation of the policy embodied in the regulation.

Finally, plaintiff's theft-related complaints alleged a violation of the policies embodied in two statutes. The first provides that "[l]ong-term health care facilities, as defined in Section 1418, shall develop and implement policies and procedures designed to reduce theft and loss." (Health & Saf. Code, §1418.7, subd. (a).) The second requires facilities to take a number of anti-theft measures, including "[d]ocumentation of theft and loss of property with a value of twenty-five dollars ($25) or more" and "[r]egular review of the effectiveness of the policies and procedures." (Health & Saf. Code, §1418.7,

subd. (b)(3), (6).)

For all these reasons, plaintiff's complaints were more than adequate to "vindicate" the public policies tethered to the above-discussed statutes and regulations, so the court erred in ruling that her complaints did not support her claim for wrongful discharge in violation of public policy. And of course, because the jury found for plaintiff on her other theories, the judgment still stands even if the jury's verdict on the patient care and safety issue must be reversed. (*California Wine Ass'n v. Commercial Union Fire Ins. Co. of New York*, *supra*, 159 Cal. at p. 51.)

. The Court Erred in Ruling That Plaintiff's Complaints about Patient Care and Safety, as Well as Other Evidence, Was Prejudicial.

As noted above, the trial court's finding that plaintiff's complaints about patient care and safety were insufficient to support a jury verdict would not in and of itself have been grounds for a new trial, since the jury by special verdict also found defendant discharged plaintiff for refusing to lie to the DHS and for reporting sexual harassment of another employee. However, the court concluded that the patient care and safety evidence prejudiced the jury's special verdicts on her other theories and resulted in excessive compensatory damages. (AA 198, 207.)

The court erred for three reasons. First, defendant's failure to object to any of the allegedly prejudicial evidence precluded a new trial grant ultimately predicated on its admission. This issue is purely a matter of law reviewed de novo. Second, the court abused its discretion in ruling that the evidence in

question was prejudicial. Third, even if the evidence might have had some prejudicial effect, that effect was so dwarfed by other evidence and Greenspoon's lack of credibility that the court abused its discretion in ordering a new trial.

1. Defendant's failure to object to the evidence in question precludes a new trial grant based on its purported irrelevance and prejudicial nature.

The new trial grant fails because defendant failed to object to the evidence in question.[5] *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851 ("*Mosesian*"), disapproved on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15, is squarely on point. In *Mosesian*, the trial court granted a new trial on the ground that hearsay evidence was improperly admitted. (*Mosesian*, supra, 191 Cal.App.3d at p. 855.) Plaintiff failed to "properly and timely object" to most of this evidence. (*Id.* at p. 865.) The Court of Appeal reversed the new trial grant, stating "[b]ecause of the plaintiff's waiver, there was no error at all. Absent some error, the motion for new trial cannot be granted . . . ." (*Ibid*.)

Similar results were reached in *Bayley v. Souza* (1940) 42 Cal.App.2d

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5/ Defendant filed two motions in limine that arguably had some relevance to this evidence. (AA 26-44.) However, the court refused to decide either motion, choosing instead to wait for testimony. (AA 45, 48.) Therefore, defendant failed to preserve its objection (if any) to this evidence. (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved of on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 [motion in limine will only preserve objections if "the motion is directed to a particular, identifiable body of evidence; and . . . the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context."].)

166 ("*Bayley*"), disapproved on other grounds in *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 578-579, and *Baron v. Sanger Motor Sales* (1967) 249 Cal.App.2d 846 ("*Baron*").

The *Bayley* appellant contended that a new trial had been granted solely because the court had concluded that certain evidence had been improperly admitted. (*Bayley*, *supra*, 42 Cal.App.2d at pp. 167-168.) The Court of Appeal held that whether evidence had been erroneously admitted was not at issue because the evidence had been admitted without objection. (*Id.* at p. 168.) (The court went on to find the new trial grant proper on other grounds.) (*Id.* at pp. 170-171.)

The *Baron* respondent had objected to testimony whose purported inadmissibility later resulted in the grant of a new trial, but failed to adequately specify the grounds for her objection. (*Baron*, *supra*, 249 Cal.App.2d at pp. 848, 855-856.) The court concluded that the new trial order could not be affirmed on this ground because "even if it is assumed that the admissibility of . . . [the] disputed testimony was debatable, respondent waived her right to raise this issue by her failure to properly object." (*Id.* at p. 857.)

As in *Mosesian*, *Bayley* and *Baron*, defendant failed to object to the evidence whose admission was purportedly erroneous. As in those cases, therefore, the court was not permitted to base its new trial order on the effect of such evidence. In consequence, the new trial order must be reversed because even if the special verdict on plaintiff's patient care and safety complaints fails because the jury instruction on that theory was improper or the evidence insufficient, the special verdicts on plaintiff's other theories stand.

2. The evidence in question was not prejudicial.

The trial court ruled that "plaintiff's evidence of her complaints of about patient care and safety, although not sufficient itself to support a jury verdict, prejudiced the jury in its deliberations on plaintiff's other claims." (AA 198.) The court elaborated, stating that "[p]laintiff, under the guise of proving wrongful discharge based on her complaints of patient care, introduced testimony that portrayed defendant Convalescent Hospital as an uncaring, dangerous facility, motivated only to make money off its patients." (AA 198.)

Unlike the court, defendant did not think this evidence prejudiced the jury. Defense counsel's closing argument stated that "[o]pposing counsel has persistently and falsely portrayed Mr. Greenspoon as someone who operates a nursing home simply to make money. *I sincerely believe* the evidence has demolished counsel's invidious theory." (7 RT 1256-1257, emphasis added.) Even more significantly, defendant's new trial memoranda did not contend the evidence the court cites was prejudicial. (AA 61-79, 166-179.)

The court divided the purportedly prejudicial evidence into two categories. One was plaintiff's testimony "that she complained to management about patient care and safety." (AA 204.) The other category was evidence purportedly "not relevant to any claim . . . ." (AA 201.) The court cited excerpts from plaintiff's testimony (AA 204-207), as well as evidence it deemed irrelevant. (AA 201-204.) In reality, none of this evidence was either irrelevant or prejudicial.

a. Plaintiff's testimony regarding her complaints to management about patient care and safety.

The excerpts the court cited from plaintiff's testimony describing her complaints to management about patient care and safety dealt with the physical and psychiatric problems of the new admissions, the lack of data regarding these patients, plaintiff's complaints to management that staffing and staff training was inadequate, dignity issues and theft issues. (AA 204-207.)

After citing these excerpts, the court reiterated its previous conclusion that the conditions about which plaintiff testified did not violate any statute or regulation and therefore did not "establish a claim for wrongful termination in violation of public policy." (AA 207.) The court concluded with a paragraph referring to the purported prejudicial effect of "complaints about patient care." (AA 207.) As noted above, the court stated that these complaints included both plaintiff's testimony *and* evidence the court concluded "was not relevant to any claim." (AA 201.)

The court utterly fails to explain how and why *plaintiff's testimony regarding the complaints she made to management about patient care and safety* had any prejudicial effect. This failure is not surprising, because the evidence had no such effect! The court was careful not to label plaintiff's testimony irrelevant, though it did (incorrectly) conclude that the testimony was inadequate to establish a claim for violating public policy. (See Argument II(B)(2) above.) Even if the court had been right on this point, however, that did not make the evidence prejudicial. Plaintiff's language was temperate and she did not accuse LAIBCO or Greenspoon of attempting to enrich themselves at their patients' expense.

If plaintiff's testimony was prejudicial, then no tortious discharge claim involving nursing home resident care and safety can ever be tried to a jury without inducing prejudice. Of course, such claims can be and are tried to juries without such prejudice. The reason is simple: although no decent human being wants the aged and infirm to be poorly treated, jurors will not necessarily believe a plaintiff's testimony that such treatment occurred, that the plaintiff made such complaints or that the complaints caused her discharge. That the jurors did so here simply showed that they believed plaintiff's relevant testimony regarding her patient care and safety complaints.

Because the court's utterly conclusory finding that plaintiff's testimony was prejudicial had no basis whatsoever, it was clearly an abuse of discretion. (*Concord Communities, L.P. v. City of Concord* (2001) 91 Cal.App.4th 1407, 1417 ["The discretion intended, however, is not a capricious or arbitrary discretion . . ."].) The court's finding of prejudice therefore stands or falls on the remaining evidence the court deemed prejudicial.

b. Purportedly irrelevant evidence.

The court deemed certain evidence "not relevant to any claim, but . . . prejudicial to defendant." (AA 201.) The court cited only three examples: LAIBCO's distributing free cigarettes to residents, LAIBCO's policy of discharging patients when their medicare or medical coverage expired and Laverne Mitchell's testimony regarding deteriorating conditions under LAIBCO. (AA 201-204.)

However, all of this evidence was relevant to a critical issue in this case: did plaintiff actually complain about patient care and safety? The reason

is simple: the more evidence plaintiff offered about deteriorating patient care and safety conditions at Las Flores, the easier it would be for a jury find that there were conditions to complain about, an obvious prerequisite for finding that plaintiff made such complaints. A counterfactual illustrates this argument: assuming that plaintiff had not adduced testimony that patient care and safety were deteriorating at Las Flores, who would have believed her testimony that she had complained about such conditions?

Because the court's finding of prejudice from this evidence was based on its purported irrelevance, that finding cannot stand and the court must be held to have abused its discretion in finding the evidence prejudicial.

Since none of the evidence cited in the new trial order was prejudicial, the court abused its discretion in ordering a new trial.

3. Any potential prejudice from this evidence was rendered insignificant by other evidence and Greenspoon's lack of credibility.

The court stated that because plaintiff's evidence on other theories was (purportedly) uncorroborated, "the absence of any corroboration heightens the issue of whether patient care evidence that is irrelevant, inflammatory and impugns defendant's character misled the jury." (AA 198.) The court therefore concluded that a new trial "on properly received evidence" was necessary. (AA 198-199.)

Even assuming the evidence in question was potentially prejudicial, other evidence and Greenspoon's lack of credibility so dwarfed the effect of this evidence that the court abused its discretion in ordering a new trial.

As a threshold matter, the court misconstrued the record in finding no corroboration for plaintiff's testimony on her theory that she was discharged for refusing to lie to the DHS investigator. Edgar testified regarding what he heard plaintiff say to Greenspoon when he called her on April 2nd. (4 RT 435.) Moreover, activities director Ward's testimony regarding the time that elapsed between her interview, her giving notice and her first day of work at Las Flores demonstrates that Greenspoon decided to fire plaintiff almost immediately after his April 2nd phone conversation with plaintiff. Because other evidence corroborated plaintiff's testimony that she was fired for refusing to lie, the court's ground for finding prejudice unquestionably fails as to this theory.

Additionally, the jury could easily have discounted Greenspoon's purported reason for firing plaintiff because there was strong evidence that Schlank was a safe smoker who did not need to be monitored. Marroquin, whose testimony was generally unfavorable to plaintiff, testified in her deposition that before Schlank's accident, safe smokers were allowed to keep their own smoking materials and that Schlank kept his. (4 RT 321.) Moreover, the three signatures on the January 10, 2007 assessment form (which had only one signature line and was the type of form that plaintiff always completed) lend credence to plaintiff's testimony that the form was backdated. Also lending credence to plaintiff's testimony was Las Flores' production of two different "smoking logs" monitoring patio smoking for the same time period (Exhibit 3). (AA 48a-48b; 4 RT 312-313; 6 RT 909-910.)

Most importantly, this trial was essentially a credibility contest between plaintiff and Greenspoon, and the court failed to consider the likely effect on

the jury of Greenspoon's evasions, inconsistencies and unbelievable statements, which began almost as soon as he took the stand. Space considerations preclude copious citations, but even a small sampling shows why a jury would not find Greenspoon credible.

The third question to Greenspoon was: "Is LAIBCO, LLC associated with your name, sir," Greenspoon replied "Not technically, no." (3 RT 34.) When Greenspoon testified why he did not leave his office when he saw Schlank catch fire, he first stated there were "two dozen licensed nurses," then backed off that statement and said there were "two dozen certified nurses," and ended up saying "there were a lot of people." (3 RT 72-73.)

Greenspoon testified that he conducted a thorough investigation of the Schlank incident, but did not document it. (3 RT 81.) He did not look at plaintiff's personnel file before firing her. (3 RT 44.) He never told plaintiff he wanted to hear her side of the story. (4 RT 308.) When asked if it was true that plaintiff was not on the premises when Schlank was injured, Greenspoon replied "That's what she says. I have no idea." (3 RT 73.) Greenspoon acknowledged "some sense of responsibility" for Schlank's accident, but wasn't "going to fire [him]self," and held plaintiff "solely responsible." (4 CT 307-308.)

When asked if Green cared about the residents, Greenspoon said "I would hope so." (3 RT 57.) Greenspoon testified that who gave Schlank the cigarette that burned him was important, not who purchased the cigarette, then testified he did not know who gave Schlank the cigarette. (3 RT 59-60.) Greenspoon denied there were *ever* any employee complaints regarding conditions at Las Flores before plaintiff's firing. (3 RT 66.) When asked if

he got angry at plaintiff for refusing to lie to the DHS, Greenspoon said "I don't get mad." (3 RT 78.)

Greenspoon's most memorable testimony was his statement about the day Schlank was injured:

> I remember specifically that it was Friday because that night was the first night of Passover and I just remember, you know, essentially the worst Passover I ever had. [¶] I know Mr. Schlank . . . . He's a patient I really care about. [¶] And, you know, I left the building that evening to go home to celebrate Passover, knowing that we didn't know if he was going to be alive.

(6 RT 1032-1033.)

This testimony was astounding because Greenspoon was subsequently forced to admit that the first night of Passover in 2007 was April 3rd. (6 RT 1048.) Despite his claims of ethics and piety (6 RT 1016-1017), he had been caught in a lie trying to earn sympathy for himself. It backfired. His credibility was damaged beyond repair.

The court also found the allegedly prejudicial evidence "inflamed" the jury and caused excessive compensatory damages, stating "[p]laintiff did not provide sufficient evidence to support her $1,237,086 compensatory damage award." (AA 198.) Plaintiff suffered over $200,000 in past and future economic damages, her life was effectively destroyed for 10 months, she suffers from the excruciating disease of shingles, she is frightened by her lack of health insurance and worried she will lose her home, and a jury could find that she will never be the same person she once was.

Given what plaintiff has endured, the court's conclusory statement that she failed to provide enough evidence to support her compensatory damage

award shows it was the court, not the jury, whose sensibilities were inflamed. As a result, the court abused its discretion by finding the award excessive, as well as by finding plaintiff's patient care evidence irrelevant and/or prejudicial.

CONCLUSION

For the reasons stated above, plaintiff respectfully requests this Court to reverse the order granting a new trial and reinstate the judgment based on the jury's unanimous verdict.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached Appellant's Opening Brief contains 13,997 words excluding the tables of contents and authorities, and this certificate.

DATED: September 16, 2009

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