

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GARY SPEIGINER, as Personal
Representative, etc., et al.,

Plaintiffs and Appellants,

v.

BEN BENNETT, INC.,

Defendant and Respondent.

E052730

(Super.Ct.No. RIC444667)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,
Judge. Affirmed.

Kevin P. Kane & Associates, Kevin P. Kane; Balisok & Associates and Russell S.
Balisok for Plaintiffs and Appellants.

Arne Werchick and Anthony Chicotel for California Advocates for Nursing Home
Reform as Amicus Curiae on behalf of Plaintiffs and Appellants.

Law Office of Barry M. Wolf and Barry M. Wolf for Defendant and Respondent.

This is an appeal from a judgment in favor of Gary Speiginer and Rennae Speiginer, plaintiffs and appellants (plaintiffs), following a jury trial on their complaint for damages against defendant and respondent, Ben Bennett, Inc. (defendant), alleging among other things elder abuse and the wrongful death of their 91-year-old father, Julius Speiginer. The jury found defendant, the operator of the nursing home where Julius Speiginer had been a resident a month before his death, was negligent but that defendant's negligence was not a cause of Mr. Speiginer's death. The jury found that Julius Speiginer and defendant were equally liable for Mr. Speiginer's injuries, which included stage IV decubitus ulcers and metastatic prostate cancer. The jury determined \$25,000 to be adequate compensation for Mr. Speiginer's noneconomic damages.

Plaintiffs raise various claims of purported error that occurred at trial, including the erroneous exclusion of evidence and failure to properly instruct the jury. We recount the details of plaintiffs' claims, below, in our discussion of the pertinent issues. We conclude either the trial court did not err in the ways about which plaintiffs complain, or if error occurred, that plaintiffs have failed to demonstrate it was prejudicial. Therefore, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' father, Julius Speiginer, died at Riverside Community Hospital on May 8, 2005, at the age of 91. From March 2, 2005, to March 31, 2005, Mr. Speiginer was a patient at Community Care and Rehabilitation Center (hereafter Community Care, also referred to by the parties as CCRC), a skilled nursing facility operated by defendant.

After their father's death, plaintiffs sued defendant, along with Riverside Community Hospital and Riverside Medical Clinic (both of which settled with plaintiffs and are not parties to this appeal), on various purported theories of recovery including elder abuse, negligence, wrongful death, breach of fiduciary duty, and unfair business practices. In their complaint plaintiffs alleged, in pertinent part, that Riverside Community Hospital had transferred their father to Community Care without plaintiffs' permission, and while at Community Care their father developed sepsis, pneumonia, and a stage IV sacral decubitus ulcer that became infected with an antibiotic resistant bacteria known as MRSA.¹ Julius Speiginer was also diagnosed with metastatic prostate cancer shortly after his arrival at Community Care. Due to his illness and injuries, plaintiffs' father was transferred back to Riverside Community Hospital at the end of March and he died there a month later.²

Plaintiffs alleged that their father's injuries were the result of defendant's staff willfully violating regulations and statutes pertinent to the care of patients in nursing homes, including state regulations that require staff to: reposition immobile patients every two hours to avoid bedsores; protect patients from infection; provide adequate toilet assistance to patients in order to prevent incontinence; and provide patients with adequate

¹ MRSA is an acronym for Methicillin-resistant Staphylococcus aureus.

² According to an autopsy performed at the request of the Speiginer family, Mr. Speiginer died as the result of complications from metastatic prostate cancer, as well as sepsis, pneumonia, congestive heart failure, and arteriosclerotic and hypertensive cardiovascular disease.

hydration. Plaintiffs also alleged that Riverside Medical Clinic and Riverside Community Hospital knew at the time they transferred their father to defendant's nursing facility that the agency dispensing public funds for the care of elderly patients had suspended payments to Community Care for its repeated failure to prevent its patients from developing decubitus ulcers and to heal the lesions once patients developed them.

Plaintiffs also alleged without complaint that according to public records maintained by the California Department of Health Services (DHS) during the four years before their father's death, state and federal regulatory agencies had repeatedly cited Community Care "for regulatory violations arising from reckless neglect, abandonment, and abuse substantially similar to that perpetrated by Defendant Community Care upon [their father], and, in each of these prior instances, defendant Community Care's managing agents made a specific written commitment to correct these violations to ensure that they would not occur again."

After answering the complaint, defendant twice unsuccessfully moved for summary adjudication on plaintiffs' claims for elder abuse, emotional distress, and unfair business practices, as well as on plaintiffs' punitive damage allegations. At a pretrial hearing in October 2009, the trial court ruled that documents entitled "statements of deficiency" that the DPH issued to defendant from 2001 to 2007 were inadmissible hearsay. Plaintiffs' expert witness, K.J. Page, testified at an Evidence Code section 402 hearing that she had reviewed the DPH statements of deficiency, and based on that review, formed the opinion that defendant's facility was not meeting the needs of the

patients in its care. The trial court ruled that Page's opinion was inadmissible at trial because it was based entirely on the statements of deficiency, which are inadmissible hearsay.

After bifurcating trial on plaintiffs' sixth and seventh causes of action, which alleged unfair business practices (Bus. & Prof. Code, § 17200) and violations of the patients' bill of rights (Health & Saf. Code, § 1430, subd. (b)), respectively, from trial on the remaining theories of recovery, a jury trial commenced on those remaining theories. During trial, the court ruled inadmissible any testimony by defendant's managing agent, Bruce Bennett, regarding his knowledge of any regulatory violations that occurred before plaintiffs' father was admitted to defendant's nursing home.

At the conclusion of plaintiffs' case, the trial court granted defendant's motion for nonsuit on the punitive damage aspect of the elder abuse theory of recovery, and also on the breach of fiduciary duty, and negligent infliction of emotional distress (or bystander negligence, as defendant calls it) theories alleged in the first, third, and fourth causes of action, respectively. The jury considered plaintiffs' claims for wrongful death and elder abuse. In their special verdict, the jurors found defendant was negligent in its care of Mr. Speiginer but that defendant's negligence was not a cause of Julius Speiginer's death. The jury also found that Mr. Speiginer failed to comply with medical advice while at defendant's nursing home and that his acts were a cause of the harm he suffered. The jury attributed 50 percent of the harm Mr. Speiginer suffered to him and the remaining 50

percent to defendant. The jury determined the proper amount of noneconomic damages suffered by Julius Speiginer to be \$25,000.

In a court trial on plaintiffs' unfair business practices and patients' bill of rights regulatory violations, the trial court found defendant had violated the patients' bill of rights and awarded plaintiffs \$5,000 in statutory penalties. The trial court also awarded plaintiffs \$50,000 in attorneys' fees, but denied their motion for new trial.

Plaintiffs appeal from the subsequently entered judgment.

DISCUSSION

The dispositive issue in this appeal is whether the trial court properly sustained defendant's hearsay objection to DPH reports setting out deficiencies at defendant's nursing home. Plaintiffs raise various arguments to support their claim that the ruling was in error and as a result of that error they were prevented from showing that defendant was willfully negligent in its care of their father, thereby causing his death and entitling them to enhanced damages for elder abuse.

Before addressing the issue of whether the records are inadmissible hearsay, we first address plaintiffs' claim that the trial judge was precluded from considering the issue of admissibility of those records because the judge who ruled on and denied defendant's motions for summary judgment had addressed and resolved that issue. In denying defendant's first summary judgment motion, the judge overruled defendant's hearsay objection to the DPH statements of deficiency, which plaintiffs had submitted as part of the evidence in opposition to defendant's motion. Plaintiffs contend here, as they did in

the trial court, that the first judge's ruling could not later be reconsidered and effectively overruled by the trial judge. We will not resolve the issue, although we disagree with plaintiffs, because this court is not precluded from reviewing either of the evidentiary rulings in question and thereby resolving the issue of whether the records are inadmissible hearsay. When faced with the same contention in *Payne v. City of Perris* (1993) 12 Cal.App.4th 1738 (Fourth Dist., Div. Two), albeit involving rulings other than on the admissibility of evidence, we concluded it would be pointless to apply the general principle that one trial court judge may not reconsider and overrule a ruling of another judge in the same court. Reversal of the judgment on that basis would result in a retrial and an inevitable second appeal in which the issue would again be raised, this time by the other side. That procedure would elevate form over substance. (*Id.* at pp. 1742-1743.)

1.

ADMISSIBILITY OF DPH RECORDS

The DPH records in question are from 2001 to 2007 and consist of documents entitled "Statement of Deficiencies and Plan of Correction" (hereafter deficiency statements or statements of deficiency). Defendant moved to exclude the deficiency statements from evidence at trial on various grounds, including hearsay and that the records constituted evidence of bad character and if offered to prove conduct in conformity with that bad character, were inadmissible under Evidence Code section 1101, subdivision (a). The trial judge sustained the hearsay objection and ruled the DPH statements of deficiency were inadmissible. As previously noted, the trial judge also

excluded the testimony of K.J. Page, plaintiffs' expert witness, who testified at an Evidence Code section 402 hearing that she reviewed 257 statements of deficiency issued by DPH to defendant over the course of nine years and based on her review of those reports, formed the opinion that "managers at CCRC did not manage the facility in a way that was providing the care and services necessary for the people that lived there, to the residents."

Plaintiffs contend the statements of deficiency are not hearsay and in any event were not offered for the truth of their content, but rather for the nonhearsay purpose of showing that defendant had notice of various deficiencies in the performance of its staff, and that it ratified those deficiencies by failing to intercede and correct them. We disagree.

A. Standard of Review

We review a trial court's ruling on the admissibility of evidence under the abuse of discretion standard. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1111.) In order to prevail on their claim, plaintiffs must not only show the trial court abused its discretion but also that the error was prejudicial in that it resulted in a miscarriage of justice. (*Id.* at p. 1114.) In this context, a miscarriage of justice occurs only if we are able to say, based on the entire record, that it is reasonably probable the jury would have reached a result more favorable to plaintiffs absent the error. (*Ibid.*)

B. Analysis

We begin our analysis with Evidence Code section 1200, which sets out the hearsay rule. (Evid. Code, § 1200, subd. (c).) “‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible except as provided by law. (Evid. Code, § 1200, subd. (b).)

The statements of deficiency at issue in this appeal set out the result of an investigation of a complaint about defendant’s nursing home and/or an inspection of that facility conducted by a representative of the DPH. The statements cite deficiencies the DPH inspector/investigator found as a result of the inspection/investigation. (See, e.g., Statement of Deficiencies and Plan of Correction regarding survey completed on January 22, 2001, by Carla Hill, H.F.E.N., representing the Department of Health Services.) The types of deficiencies cited in the various deficiency statements at issue here run the gamut, from failing to comply with the statutory requirement to provide a minimum of 3.2 hours of nursing care per patient per day, to failure to chart physical changes in patients, such as weight loss, incontinence, and elevated temperature, and to notify a physician of those changes, to failure to give a patient medication as directed by a physician.

In addition, the deficiency statements include defendant’s plan of correction. For example, in response to the statement of deficiency regarding failure to provide 3.2 hours of nursing care per day per patient, defendant included a plan of correction that, among

other things, explained “[i]llness among the staff resulted in less than desired attendance with an inability of overtime staff and on-call staff to fill in to achieve the necessary hours. This is being addressed in the following ways: [¶] Additional staff is being recruited (particularly CNAs) through advertising, signage, and calls to nursing programs, offering bonuses to existing staff for recruitment.”

We agree with the trial court that the statements of deficiency are hearsay if offered to prove the cited deficiency, i.e., they are out-of-court statements offered to prove that the deficiency cited in the statement actually occurred. Moreover, Health and Safety Code section 1280, subdivision (f) specifically states that “the act of providing a plan of correction, the content of the plan of correction, or the execution of a plan of correction, [is inadmissible] in any legal action or administrative proceeding as an admission within the meaning of Sections 1220 to 1227, inclusive, of the Evidence Code against the health facility, its licensee, or its personnel.”

Plaintiffs contend the statements of deficiency were admissible for their nonhearsay purpose—to show defendant’s notice and knowledge that the DPH had repeatedly cited defendant for violations of various statutory and regulatory requirements concerning the care of patients. In plaintiffs’ view, use of the statements of deficiency to show notice and knowledge of prior regulatory and statutory violations is a nonhearsay purpose. While we agree that notice and knowledge is a nonhearsay purpose, in order to be relevant for that purpose, the statements of deficiency must involve the same types of violations that plaintiffs claim were committed in caring for their father. (See, e.g.,

Hickman v. Arons (1960) 187 Cal.App.2d 167, 171 [inspector's notice regarding dangerous condition of building following fire was admissible to prove notice and knowledge of that danger in action for damages by family of man killed when wall of building collapsed two weeks later]; see also *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 778-779.)

Unless the statements of deficiency pertain to specific acts of negligence of the type plaintiffs claim were committed by defendant in caring for their father, the statements constitute evidence of defendant's bad character. As such, the deficiency statements are inadmissible under Evidence Code section 1101, subdivision (a) which makes evidence of defendant's character trait, such as a propensity to act negligently, inadmissible if offered to prove conduct on a specific occasion, i.e., that defendant acted negligently in caring for plaintiffs' father. "It is a fundamental rule of evidence that you cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances. Such evidence is simply not relevant. . . ." [Citation.]” (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 851 [Fourth Dist., Div. Two].)

Plaintiffs did not limit statements of deficiency to those, if any, involving conduct of the type they contend defendant committed in caring for their father. They sought the wholesale admission of the statements of deficiency to prove that because defendant was negligent in the past, it must have been negligent in caring for their father. The statements of deficiency are inadmissible for that purpose.

The question remains whether the statements of deficiency are admissible under any exception to the hearsay rule. The two that immediately come to mind are the business records exception and the official records exception.

The hearsay exception for business records is set out in Evidence Code section 1271 which states, “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event, if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

Plaintiffs argued in the trial court as they do in this appeal, that the deficiency statements are not hearsay because they are authenticated by the DPH and therefore are subject to judicial notice under Evidence Code section 452, subdivisions (b) and (c). Authentication means simply to establish that the document is what the proponent claims it to be, in this case a photocopy of the DHS deficiency statements issued to defendant. (See Evid. Code, § 1400.) In response to a subpoena duces tecum, the DPH provided plaintiffs with copies of statements of deficiency the DPH had issued to defendant. Those photocopies were accompanied by the affidavit required by Evidence Code section 1561. Plaintiffs submitted the photocopies of the statements of deficiency as part of their opposition to defendant’s summary judgment motion.

In *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697 (Fourth Dist., Div. Two), we explained that the custodian’s declaration required under Evidence Code section 1561 does not establish that a writing is a business record under Evidence Code section 1271 because the custodian’s declaration “is not required to state the ‘identity’ or ‘mode of preparation’ of the records. As a result, it will usually fail to show that ‘[t]he ‘sources of information and method and time of preparation’ of the records indicate their trustworthiness. ‘Therefore, in the face of a hearsay objection, the affidavit of the custodian, made pursuant to [section] 1561, does not satisfy the requirements of the business-records exception to the hearsay rule set forth in [section] 1271(c)-(d), and the copy of the business record, produced pursuant to [sections] 1560-1561, is inadmissible hearsay.’ [Citation.]” (*Taggart*, at p. 1706.) Here, as in the quoted case, the affidavit of the custodian of records does not satisfy the requirements of Evidence Code section 1271, and therefore the DPH statements of deficiency are inadmissible hearsay.

Unlike the business records exception, which requires testimony regarding the identity of the record and its mode of preparation, the public records exception to the hearsay rule does not have that requirement. The public records exception is set out in Evidence Code section 1280 and states, “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or

event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

Plaintiffs did not rely on the public records exception in the trial court and therefore did not establish the foundational requirements for the admissibility of the statements of deficiency under that exception. Consequently, we will not address that exception in this appeal. Instead, we conclude the trial court did not abuse its discretion by excluding the DPH deficiency statements from evidence at trial based on its finding that the records were hearsay and not within any exception to the hearsay rule.

Our conclusion that the DPH records are hearsay not within any exception to the hearsay rule, compels the further conclusion that the trial court did not abuse its discretion by excluding the opinion testimony of plaintiffs’ expert witness because that testimony was based entirely on inadmissible hearsay set out in the DPH statements of deficiency. Moreover, plaintiffs’ expert did not express an opinion related to a subject “sufficiently beyond common experience,” and therefore requiring the testimony of an expert. (See Evid. Code, § 801.) According to her testimony at the Evidence Code section 402 hearing, plaintiffs’ expert witness intended to express the opinion, based on her review of the DPH deficiency statements, that defendant’s managers “did not manage the facility in a way that was providing the care and services necessary for the people that lived there, to the residents.” As plaintiffs’ expert acknowledged, a layperson who had read the 257 statements of deficiency in question would have come to the same conclusion. In short, plaintiffs’ expert witness did not express an opinion related to a

subject “sufficiently beyond common experience.” Instead, she simply synthesized the content of the statements of deficiency to form a conclusion that anyone who had read the material would also have formed.

2.

TESTIMONY OF DEFENDANT’S MANAGING AGENT

Plaintiffs also contend the trial court abused its discretion by excluding the deposition testimony of defendant’s managing agent, Bruce Bennett, regarding his knowledge of the DPH deficiency statements. Again we disagree, although we confess to not fully appreciating plaintiffs’ complaint because Mr. Bennett, defendant’s managing agent, testified at trial and plaintiffs do not explain the relevance of his deposition testimony.

The trial court ruled that evidence of Mr. Bennett’s knowledge of statements of deficiency issued by the DPH to Community Care was inadmissible at trial because in his deposition, Mr. Bennett testified he could not recall whether he knew about most of the purported regulatory violations. In addition, the trial court found that Mr. Bennett’s knowledge of regulatory violations was obtained from information contained in the statements of deficiency and therefore was based on hearsay, and that his action in correcting any of the purported deficiencies was protected under Evidence Code section 1157, which protects records of, and testimony about, matters discussed during a meeting of the institution’s quality care committee.

Plaintiffs contend that, as the trial court acknowledged, Mr. Bennett confirmed during his deposition that on four occasions he recalled regulatory violations. Although we are not persuaded that the trial court acknowledged four occasions, the point is irrelevant because plaintiffs have not demonstrated that Mr. Bennett's testimony would have been admissible at trial.

Moreover, even if we were to assume the trial court abused its discretion by excluding that evidence, plaintiffs have not demonstrated the error was prejudicial, i.e., there is a reasonable probability that the jury would have reached a result more favorable to plaintiffs if the jury had heard the excluded evidence. (Evid. Code, § 354; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Plaintiffs' showing of prejudice consists of a single sentence: "Little wonder that, ignorant of the testimony of Mr. Bennett concerning his knowledge of these regulatory violations, the jury found no recklessness and never reached the issue of ratification." That bald assertion does not satisfy plaintiffs' obligation to demonstrate prejudicial error.³

³ Plaintiffs also contend that the trial court erred by excluding all evidence of or in reference to regulations applicable to defendant's nursing home. Plaintiffs do not identify any evidence they intended to introduce, but instead cite to the trial court's ruling precluding mention of the regulations during trial, including in their opening statement. The crux of plaintiffs' complaint is that the trial court erred in finding the regulations did not state the pertinent standard of care, and therefore refusing to instruct the jury in that regard. Plaintiffs separately raise that claim in this appeal, and we address that issue later in our discussion.

3.

NONSUIT

Plaintiffs contend the trial court erred in granting defendant's nonsuit motion on their claims for willful misconduct, breach of fiduciary duty, and punitive damages. Plaintiffs concede, absent the statements of deficiency which the trial court excluded as hearsay, the testimony of their expert witness which the trial court excluded because it was based on those hearsay documents, and absent the testimony of Mr. Bennett regarding his knowledge of the violations which the trial court also excluded, there was no evidence to support the noted claims. We have concluded the trial court correctly excluded the evidence in question. Therefore, we must further conclude the trial court did not err in granting defendant's motion for nonsuit. In other words, plaintiffs' nonsuit argument is merely a different articulation of their claim that the trial court abused its discretion by excluding the statements of deficiency from evidence at trial.

4.

INSTRUCTIONAL ERROR

Plaintiffs contend the trial court committed various errors in instructing or failing to instruct the jury. With three exceptions, plaintiffs' claims are all based on their previously addressed assertion that the trial court erroneously excluded the DHS deficiency statements from evidence. The three exceptions are (1) the trial court's refusal to instruct the jury on the duty of care purportedly established by the Title 22 Regulations pertinent to nursing homes; (2) the trial court's modification of the CACI jury instruction

regarding ratification; and (3) the trial court's refusal to give CACI No. 431 requested by plaintiffs which instructs on how to consider multiple causes of an injury.

A. Title 22 Regulations

Plaintiffs contend pertinent Title 22 regulations establish the relevant standard of care and that violation of the regulations entitled them to an instruction on negligence per se. Therefore, plaintiffs argue the trial court should have instructed the jury in the language of the pertinent regulations.

The trial court was of the view that all the regulations “boil down to thou shalt take reasonable care to prevent avoidable injury.” The trial court purportedly included the quoted principle in its proposed instructions. But it refused to instruct the jury in the language of the pertinent Title 22 regulations.

Although we are of the view that the trial court erred in refusing to give instructions based on the specific duties of care set out in the Title 22 regulations (see, e.g., *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 522-524), we will not resolve the issue because the jury in this case found defendant was negligent, but that defendant's negligence was not a cause of Julius Speiginer's death. Plaintiffs do not, and more importantly cannot, claim that a finding of negligence based on the duties of care set out in the Title 22 regulations is somehow more significant than a finding of negligence based on failure to use reasonable care to prevent malnutrition or dehydration, and/or skin ulcers from starting, and/or skin ulcers from worsening. Consequently, we must conclude any error in this case was harmless.

B. Ratification

Plaintiffs also contend that the trial court's instruction on ratification did not correctly state the law. We disagree.

“The standard of review for a claim of instructional error of this kind is de novo: the question is one of law, involving as it does the determination of the applicable legal principles [citation].” (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800.)

Liability under Welfare and Institutions Code section 15610.57 for elder abuse can be based on the negligence of “any person having the care or custody of an elder or a dependent adult.” To recover so-called enhanced damages for elder abuse under Welfare and Institutions Code section 15657, plaintiffs must meet the standards of Civil Code section 3294, subdivision (b), which states in pertinent part, “An employer shall not be liable for damages pursuant to subdivision (a) [punitive damages], based upon acts of an employee of the employer, unless the employer . . . authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.”

The trial court instructed the jury in this case that defendant is responsible for enhanced damages if plaintiffs prove among other things that Dianna Klarenbach (defendant's chief of nursing) was an officer or a managing agent of defendant acting on

behalf of defendant; that she “had advance knowledge of the unfitness of the employees that treated Julius Speiginer with reckless disregard, and employed him or her with a knowing disregard of the rights or safety of others”; or that she “knew of the wrongful conduct against Julius Speiginer and approved of the conduct after it occurred.”

Plaintiffs are of the view that the trial court’s instruction is wrong because this “narrow test for ratification” is “precisely” the one rejected by the judge who ruled on defendant’s summary judgment motions. Although the point is irrelevant, plaintiffs have not demonstrated that in ruling on defendant’s summary judgment motion, the judge rejected the above quoted legal definition of ratification. Plaintiffs’ only support for their assertion is a citation to the points and authorities they filed in opposition to defendant’s motion for summary adjudication in which they argue that the test is incorrect. They have not shown that the judge, in ruling on defendant’s summary judgment motion, actually adopted plaintiffs’ view.

Even if the judge ruling on the summary judgment motion had expressly rejected the language the trial judge later used in his jury instruction, that would not establish that the trial judge was wrong. It would only show that the two judges disagreed on the proper test. In short, and simply put, plaintiffs have failed to demonstrate that the trial court incorrectly articulated the pertinent legal principle.⁴

⁴ Plaintiffs insist here, as they did in the trial court, that the correct test for establishing ratification is set out in *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704: An employer ratifies the conduct of an employee when the employer or its managing agent fails to intercede in a known pattern of workplace abuse. Plaintiffs are incorrect. “For purposes of determining an employer’s liability for punitive damages,
[footnote continued on next page]

C. Multiple Causation

Plaintiffs' final claim regarding jury instructions is that the trial court erred when it refused to instruct the jury according to CACI No. 431 entitled Causation: Multiple Causes, that "A person's negligence may combine with another factor to cause harm. If you find that the negligence of Defendant was a substantial factor in causing Plaintiffs' harm, then Defendant is responsible for the harm. Defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the harm."

Plaintiffs contend that the trial court's failure to give the quoted instruction, and instead instructing the jury on defendant's theory that Julius Speiginer's injuries and death were the result of his failure to follow medical advice, "misled the jury into believing it could not allocate fault for Mr. Speiginer's death between these multiple causes." As a result of being misled, plaintiffs contend the jury found defendant's negligence was not a cause of Mr. Speiginer's death.

With respect to causation, the trial court instructed the jury, "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to

[footnote continued from previous page]

ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*Id.* at p. 726.) The language plaintiffs rely on is taken from the example the Supreme Court cited of when the issue of ratification commonly comes up: "The issue commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known." (*Ibid.*)

the harm. It must be more than a remote or trivial factor. *It does not have to be the only cause of the harm.* [Emphasis added.]” The emphasized language conveyed to the jury the fact that plaintiffs’ harm, in this case the death of their father, could be the result of more than one factor and that defendant was liable as long as the harm it caused was a substantial factor. In short, although the trial court did not instruct the jury according to CACI No. 431, it did convey the critical principle to the jury by giving the quoted jury instruction.

5.

SPECIAL VERDICT FORM

Plaintiffs contend the trial court’s special verdict form was incorrect because it incorporated all of the previously discussed errors. Because we conclude the trial court did not err in any of the ways about which plaintiffs complain, we must reject this final claim of error.⁵

⁵ Plaintiffs have withdrawn their claim that it was error for the trial court to deny them a jury trial on their sixth and seventh causes of action.

DISPOSITION

The judgment is affirmed. Defendant to recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.