

## Top #2 Ten

# Neglect and Fraud in Nursing Home Lead to \$83 Million Verdict

By Amy Johnson

**D**avid Marks has specialized for seven years in cases against nursing homes. Until this year, none had netted much more than \$1 million.

But the case of Ruth Waites, 84, was an extraordinary example of poor care and corporate greed, says Marks, who practices in Houston with one associate.

The jury agreed — awarding \$83 million against a national nursing home chain in order to send a warning about neglect of the elderly.

Waites died from a bedsore that had required surgery to remove eight ounces of dead skin. Just a few weeks earlier, she'd been admitted to a hospital suffering from the bedsore and severe dehydration; after treatment, she was released back to the nursing home with specific instructions for treating the bedsore and for keeping her hydrated.

Those instructions were never followed, Marks says.

The Borger Nursing Home in Borger, Tex., was understaffed in violation of state regulations, and had poorly trained and uncertified nurse aides, Marks told the jury. Yet the home offered finan-

cial rewards to staff for bringing in more patients.

"It's the equivalent of loading more passengers onto the Titanic after it rammed the iceberg," Marks says.

In the seven months preceding Waites' death, the home received 72 warnings regarding sanitation and other problems from the state and private consultants hired by its parent company, Beverly Enterprises. And a number of residents were admitted to the local hospital suffering from extreme dehydration.

Yet nothing changed, Marks says. Conditions were so bad that former staff members were among his best witnesses.

"One recent nursing-school graduate said he left the home because everything he'd been taught in school was being violated," Marks recalls.

Marks emphasized to the jury that not only were residents neglected but their families were defrauded by the home's claims that the elderly were well cared for.

The defense denied these claims. And while the plaintiff's lawyer gave the jury no guidelines on an appropriate punitive award — other than to point out that Beverly Enterprises had a net worth of \$880 million — the

David Marks, who practices in Houston with one associate, specializes in cases against nursing homes. The story of Ruth Waites, 84, who died of a bedsore after weeks of neglect, was so horrible that the defendant nursing home chain should be taught a lesson, he convinced the jury.



Richard Carson

defense did provide a suggested damages amount: \$1.

"All it will take to get this company's attention is one dollar," Marks recalls the defense saying in closing. "It was just another example of the [defendant's] arrogant attitude," which backfired horribly, he believes.

The verdict, reduced to \$54.6 million by the trial judge, was a gratifying one for Marks, who has settled other cases against Beverly Enterprises.

"I felt like the jury was able to do what the health department and hospital and complaining employees weren't able to do, which was to get the attention of this company," Marks says.

The executors of the estate, the plaintiff's niece and her son, didn't file suit to cash in on their aunt's death, Marks says.

"When she died, they gave all her possessions to the church — that's the kind of people they

are," he says. "They wanted to prevent this from happening again. They are donating a large portion of the award to a national coalition that works for the prevention of nursing home abuse."

However, the defense claims the donation is actually "payment" for the testimony of the coalition's founding director, who they believe helped to inflate damages by making the case "seem more important" to the jury, according to the defense opening statement.

"That's a blatant lie," Marks responds.

Defense lawyer Nathan Rymer of Houston's Carlson & Smith, who tried the case with partner Deanna Dean Smith, says the coalition's involvement and other issues make the case ripe for appeal.

"The plaintiff tried and got away with some gutsy calls, but

we'll see how they stand up on appeal," Rymer says. Specifically, he adds, the plaintiff's allegation that the home defrauded Medicare shouldn't have been allowed into evidence because the case didn't involve Medicare. The only party with standing to bring such a claim is the state of Texas, he says.

## Bedsore and Dehydration

Suffering the effects of age and adult-onset diabetes, Ruth Waites, 83 at the time, entered the Borger Nursing Center in Borger, approximately 45 miles north of Amarillo, on June 18, 1993.

At first, Waites needed very little assistance from the staff, other than meals and medication, Marks says. She was in a wheelchair most of the time but enjoyed playing the piano everyday. Waites was a very spiritual person, Marks told the jury in his opening statement, and most of the songs were spirituals and hymns.

Waites continued at this level of care for about five months but then suffered a stroke. After treatment at a local hospital, she was released back to the nursing home. She recovered from the effects of the stroke within three weeks, and was quickly back to her old self, according to the nursing home's activity director.

Over the next nine months, though, Waites became more passive. Her need for assistance also increased because she was using a catheter, which required frequent attention. As she spent more time in bed, she needed to be cleaned if she became incontinent, and needed to be turned at two-hour intervals so she wouldn't develop bedsores.

But she got no such care, Marks says.

Waites developed a bedsore on her tailbone from lying in one position without being turned. The staff also didn't monitor her fluid intake and she became dehydrated. She developed urinary tract infections because her catheter and catheter bag were improperly placed, and she often lay in her own feces and urine, according to Marks.

Waites then contracted a type of staph infection that is resistant to treatment by methicillin, an antibiotic. Staph, the most common infection contracted in hospitals and nursing homes, is highly contagious and passed through poor sanitation — specifically, failing to wash hands.

These conditions were discovered by nursing home staff on September 20, 1994, Marks says. Five days later, Waites was sent to the local hospital where doctors diagnosed her with an advanced stage of dehydration that is often deadly for elderly patients.

Over the next four weeks, the nursing home sent four other residents to the hospital with the same condition; one died eight hours after he was admitted, according to Marks.

While treating Waites, the hospital discovered the bedsore on her tailbone, which was diagnosed at Stage II, meaning that a superficial layer of the skin has been injured. Such a bedsore looks like a blister and will heal rapidly if kept dry, covered and clean, and if the surrounding tissue is kept hydrated.

But when Waites returned to the nursing home on Oct. 1, the staff didn't take these precautions, Marks says. Nor did they turn Waites or have a plan for helping the wound heal. What's more, the staff didn't record in her medical chart how much fluid she was drinking. The wound became worse and the dehydration again set in, Marks says.

Meanwhile, in light of the cluster of Borger Nursing Home residents that had been admitted to the hospital with extreme dehydration, the hospital reported the home to the state health department.

A week later, the Texas Department of Human Services investigated the nursing home. Among other things, they found that Waites was dehydrated again. Marks says the investigators marked the level of water in Waites' pitcher and marked her position on her sheets. When they returned hours later, the

**In the seven months before the plaintiff's death, the nursing home received 72 warnings from the state health department and private consultants regarding poor sanitation and other problems, Marks claims.**



water level was the same, as was Waites' position in her bed.

Waites was sent back to the hospital on Oct. 19 and died 10 days later. While there, she was treated for dehydration and the bedsore, which had progressed to Stage IV. It was surgically debrided the day before she died, and doctors extracted an eight-ounce piece of dead tissue, Marks says.

The attending physician listed Waites' cause of death as a bedsore, Marks says.

## Home Had 72 Warnings

Marks says the standard of care at nursing homes requires residents to be turned every two hours to prevent bedsores. It is also important that residents drink at least 1,500 cc of liquid everyday; because of her condition, Waites' doctor had ordered that she be administered 3,000 cc each day.

These standards were not followed by the nursing home, Marks says. Neither were standards that called for residents to be cleaned between incontinent episodes, and that called for hand-washing by staff and other infection-preventing measures.

In the months immediately preceding Waites' death, the home had received 72 warnings from the state health department and from consultants sent to the home by its owner, Beverly Enterprises. These warnings, which Marks found during discovery, specifically referred to poor sanitation and other problems. Marks also found 52 documented incidents of skin tears after elderly residents with fragile skin were handled too roughly, he says.

Defense attorney Nathan Rymer says these allegations stem from situations that were blown out of proportion.

"Our position is that [the plaintiff's] bedsore did not form in the home," he says. He points to hospital admission records

that showed no skin problems at the time she was admitted to the hospital. But when the plaintiff returned from the hospital, she had a Stage II bedsore; thus, it could only have developed in the hospital, he claims.

And when the plaintiff was sent back to the hospital about three weeks later, her sore was not debrided until the ninth day of her stay. Had the sore been as serious as alleged, Rymer says, it would have been debrided upon her arrival.

Rymer says the allegations of dehydration rely only on medical records, which didn't document how much fluid residents were given during meals and as snacks. And families often provide residents drinks during visits, which nurses never recorded, he adds. He also says many residents were dehydrated as a side effect of medication.

With respect to the plaintiff, Rymer says her diabetes was so severe that her blood-sugar levels were uncontrollable, which contributed greatly to her dehydration.

Controlling infection in hospitals and nursing homes is a formidable task, Rymer adds. Staph is virulent "anytime a group of people is together," he notes. Staph lives everywhere, and "It's one of those things that sounds worse than it is," he says.

"The plaintiff presented it like it's this horrible, dreadful disease, but there are four other antibiotics it can be treated with" besides the drug to which the plaintiff's strain was immune.

## Understaffing a Problem

One of the home's gravest problems was understaffing, Marks says. At any given time, the number of nurse aides on duty at the home didn't meet the requirements of state law. And

the aides weren't properly certified to care for residents in nursing homes, Marks says.

Yet, in the midst of this staffing crisis, Beverly Enterprises issued a memo offering a \$100 to \$200 reward to staff members who brought new residents to the home, to help end what management called the "census crisis," Marks says.

Rymer offers the following explanations:

First, this particular nursing home did have problems keeping its staff. However, it was continuously advertising for and training new aides, he says.

Second, the parties disagreed on how extensive the state-mandated training for nurse aides is. Rymer says the aides at Borger were trained in accordance with what the defense believes the state requires and in the same manner as nurse aides in 95 percent of the nursing homes in the state.

Third, the memo issued by Beverly announcing the census crisis was issued to all its homes in three southern states. Rymer says the Borger center was not expected to raise its census because it was filled to 90- to 95-percent capacity. The memo was intended to give an incentive to nursing homes that had lower resident populations.

## Open-Minded Jurors

Voir dire began on October 31, 1997.

Marks says his only goal in jury selection was to find people who didn't have an opinion — or who at least had an open mind — about tort reform.

"We in Texas, like most states, have had a big push toward tort reform. Everyone's heard about the McDonald's case ... Our concern was that people didn't bring into the jury box feelings about tort reform that would affect the way they looked at this case," Marks says.

Rymer says the defense had a more specific juror profile in mind.

"We were looking for middle-aged jurors," he says. "We, as a public, lack objectivity about nursing homes. Our position is that younger people don't yet understand that the world can't

***Waites v. Beverly Enterprises, et al.***  
**Verdict: \$83 million**  
**State: Texas**  
**Date of verdict: Nov. 18, compensatory; Nov. 19, punitives**  
**Status: Reduced by judge to \$54.6 million on Dec. 8. On appeal.**  
**Plaintiff's attorneys: David Marks, The Marks Firm, Houston; sole partner with one associate**  
**Timothy F. Lee, Ware, Snow Fogel, Jackson & Greene, Houston; 13 lawyers**  
**David Hill, Wellborn, Houston, Adkinson, Mann, Sadler & Hill, Henderson (local counsel); 7 lawyers**  
**Defense attorneys: Deanna Dean Smith and Nathan Rymer, Carlson & Smith, Houston; 5 lawyers**  
**Gordon R. Akin, Akin, Bush, Neeley & Mason, Longview, Tex.; 5 lawyers**

be perfect. The most understanding juror is one who's lived a long time, been in business and has made mistakes and knows that making mistakes doesn't mean anything bad."

At trial, the former head of the nursing staff and the head of the physical therapy department both testified about the unsanitary conditions and the fact that residents were becoming dehydrated and developing bedsores due to poor care. They said they alerted the administrator of the home on numerous occasions that residents were being neglected because there wasn't enough staff, and that the staff was poorly trained.

Marks supported this testimony with personnel records showing that some nurse aides weren't certified. He also used staffing schedules to show the facility didn't have enough nurses on duty for the number of residents.

Former employees also testified that the home billed Medicare for services it hadn't provided, testimony the judge allowed despite defense objections.

The jury heard from nurses and doctors at the local hospital who testified about the condition in which they received residents from the home; they often arrived dehydrated, with bedsores and crusted excrement on their bodies because they hadn't been properly cleaned.

Marks also called an official at the state health department, who told jurors about the results of its investigation and why it didn't shut down the home.

"There was no immediate threat," Marks recalls her saying.

"If someone is being dehydrated to death, is that not an immediate threat?" he asked.

"No," she replied.

"Well, what would be an immediate threat, someone on fire, maybe?" he asked.

"Yes, that would be an immediate threat," she answered.

This testimony helped the case, Marks believes, because it showed the state "didn't have the teeth" to correct the wrongs at the home. While the investigation was helpful in uncovering abuses, the state "didn't have the power to shut down the nursing home," he says.

Marks also presented notes from state investigators as well as notes from consultants the defendant had hired. The defense objected, saying state law allows only final reports, not preliminary notes, into evidence. The judge overruled.

Throughout the trial, Marks used an elaborate timeline to help jurors stay interested and to keep evidence clear. On the top half of the timeline, he placed the events in the plaintiff's stay, including her condition when she entered the facility, the stroke and her subsequent condition, and her gradual deterioration. He attached pictures and placards to the timeline with Velcro.

On the bottom half, he attached the events that took place in the facility, including the infection outbreaks, warnings from the health department and outside consultants, and the memo the

defendant issued about the census crisis.

"I wanted to show the jury how this case was integrated in the big picture of what was going on. I think it was an extremely effective way of tying the case together," Marks says.

He presented some depositions by videotape and encouraged his expert witnesses to use slide shows to talk about medical conditions.

"I think that was effective because doctors are used to giving slide shows. I think they give doctors a class in med school about how to do a slide show," Marks jokes.

## Low Point

The defense countered with experts who challenged the allegations of neglect. A registered nurse testified as an expert on nursing-home practices and told the jury that she had decided — within five hours of reviewing the records — that she could defend the nursing home's decisions and documentation.

"This was the low point in the case," Marks says. "I had to decide whether to attack only a few points, or push forward and address as much as we could" in as short a time as possible.

As it turned out, Marks believes the nurse's direct exam went too long at three-and-a-half hours. "I think the jury was saturated," he says.

On cross, Marks decided to challenge how the nurse could have arrived at her opinion in such a short time. She admitted that although she'd read the residents' medical records, she hadn't read any of the 37 depositions in the case. She also admitted that she simply assumed the staff finally did give residents water when it was documented they hadn't received any.

The defense also called current employees, who said sanitary conditions weren't bad. And defense lawyer Smith pointed out that the plaintiff's niece visited her twice each day, and that in the plaintiff's 17 month stay at the home, found her dirty only twice.

"That's not indicative of bad hygiene," Rymer adds. "When you have residents who can't go



to the bathroom themselves, there's going to be a period of time before they are cleaned. It's just like with babies, there's a period of time before their diaper is changed."

The employees also testified about the infrequent documentation. "When faced with caring for a patient and documenting something, documentation comes last," Rymer explains. "Just because it isn't documented, it doesn't mean it wasn't done."

### Defense Suggests \$1 in Punitives

After three weeks of testimony, the jury took just six hours to return a verdict for the plaintiff on claims of gross negligence and fraud, and awarded actual damages of \$13 million.

"I think one component of that was [the defendant's] deliberate refusal to address the warnings, and the efforts on the part of the home to get more patients," Marks says. He also believes evidence of understaffing fueled the fire.

Next came the punitive damages portion of the case. Marks didn't ask for a specific dollar

amount. Instead, he called an economic expert, who testified that Beverly Enterprises had a net worth of \$880 million.

Marks told the jury that the defendant was driven by money and made decisions based on what profit it would generate, rather than what was best for the residents. He reminded them of the testimony of ex-employees who said the home billed Medicare for services it hadn't provided.

"We basically told them to let their conscience be their guide," Marks says. He told them it should be a number that would get the company's attention.

The defense reminded the jury that the case was about the plaintiff only and not the treatment of other residents, nor was it about Medicare fraud. Although it had made a settlement offer of \$4.7 million during trial, the defense told the jury the case was worth just one dollar in punitives.

Two hours later, the jury returned with a \$70 million punitive damages verdict — 8 percent of Beverly's net worth.

### Grounds for Appeal

The defense is appealing the

verdict on several grounds, including that the judge allowed into evidence allegations of Medicare fraud, and that he allowed the testimony of Elma Holder, the founding director of the National Citizens' Coalition for Nursing Home Reform.

After the verdict, the plaintiff's niece and nephew decided to give a large portion of the award to the coalition, to help prevent this sort of death in the future, Marks says.

The defense claims this was no act of generosity. Rather, it was "payment" for the testimony of Holder, who was substituted as the executrix of the plaintiff's estate 30 days before trial.

"She is here in this lawsuit to make it more attractive to you, to make it seem more important," defense lawyer Smith told the jury in her opening statement. Smith also told the jury that Holder offered to testify at the last minute in a similar case in return for 50 percent of the plaintiff's award, and that the majority of funding for the organization comes from lawyers.

Marks says he is flabbergasted that the defense continues to make this allegation. "They tried to sell

that to the jury and you can see what their response was," he says.

The only reason Holder was substituted as executrix was because the plaintiff's niece and nephew, ages 85 and 65, were worried that they didn't have the strength to endure a trial, Marks says. He adds that he and Holder met 10 years ago when the coalition became involved in another nursing home case he tried as a special prosecutor for the state attorney general's office.

"This organization has been around for two decades. I can't think of any organization that stands better for the proposition that elderly people should be treated with respect and have the right to dignified and adequate care," Marks says.

The defense is also appealing the admission of notes on the condition of residents at the facility made by investigators from the state health department, on the grounds that only final reports should be admitted.

"There were some mistakes made on the admissibility of evidence," Rymer says, adding that the judge is new to the bench. "It is my understanding that this is his first big trial."