

1 THE STATE OF OHIO, )  
 ) SS: WILLIAM J. COYNE, J.  
2 COUNTY OF CUYAHOGA.)

3 IN THE COURT OF COMMON PLEAS  
4 CIVIL BRANCH

5 ESTATE OF LEONA MAXIM BY )  
6 CHRISTINE GUEST, EXECUTOR, )  
 )  
7 Plaintiff, )  
 )  
8 -v- ) Case No. CV 15 845038  
 )  
9 KINDRED NURSING & REHAB - )  
10 STRATFORD, et al., )  
 )  
11 Defendants. )

12 - - - o0o - - -  
EXCERPT TRANSCRIPT OF PROCEEDINGS  
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14 whereupon the following proceedings  
15 were had in Courtroom No. 3-A, Lakeside  
16 Courthouse, Cleveland, Ohio, before the  
Honorable William J. Coyne, on Tuesday,  
October 18th, 2016, upon the pleadings filed  
heretofore.

17 APPEARANCES:

18 SPANGENBERG, SHIBLEY & LIBER, L.L.P., by;  
19 WILLIAM B. EADIE, ESQ.,  
MICHAEL A. HILL, ESQ.,

20 on behalf of the Plaintiff;

21 BONEZZI, SWITZER, POLITO & HUPP CO., L.P.A., by;  
22 PAUL W. MCCARTNEY, ESQ.,  
JENNIFER R. BECKER, ESQ.,

23 on behalf of the Defendants.

24 Angela R. Cudo, RPR/CRR  
25 Official Court Reporter  
Cuyahoga County, Ohio

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TUESDAY AFTERNOON SESSION

OCTOBER 18, 2016

PROCEEDINGS

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\* \* \* \* \*

The PLAINTIFF, to further maintain  
the issues on her part to be  
maintained, called as a witness,  
ERNEST TOSH, who, being first duly  
sworn, was examined and testified as  
follows:

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DIRECT EXAMINATION OF ERNEST TOSH

BY MR. EADIE:

Q. Good afternoon, Mr. Tosh. Welcome to  
Cleveland.

A. Thank you.

Q. Where are you from?

A. Dallas.

Q. And did I ask you to analyze publicly  
available data about the Kindred - Stratford nursing  
home to provide your conclusion as to whether Kindred  
was providing adequate staffing to meet the resident  
care needs?

A. Yes, you did.

1 Q. Before we jump into that, your conclusions, I  
2 want the jury to learn a little bit about you. Can  
3 you explain your background say from college forward,  
4 your education and training.

5 A. Sure. I went to Texas Tech Law School in  
6 Lubbock. Before I went to law school I also went to  
7 Tech and graduated with a degree in finance with  
8 significant hours in accounting and economics.

9 Once I got out of law school and started  
10 practicing law, in the semesters where I was not  
11 going to be in trial I would take additional  
12 coursework at Texas Christian University in Fort  
13 Worth mostly in math and computer science.

14 And then once I finished law school, like I  
15 said, I started practicing law in the Dallas/Fort  
16 Worth Area as a prosecutor, and then as a criminal  
17 defense attorney, and then more recently as a civil  
18 litigator.

19 Q. And have you been practicing consistently  
20 since you graduated from law school?

21 A. No, I have not. About five years ago I  
22 started practicing after taking about a ten-year  
23 hiatus to raise my children.

24 Q. And you said civil litigation. What you do in  
25 the last five years at least in terms of your legal

1 practice, does that include medical negligence cases  
2 like this one?

3 A. Yes, it does.

4 Q. Do you also have a company that does that type  
5 of analysis I've asked you to do for us today about  
6 staffing in nursing homes?

7 A. Yes. I have a company called Full Financials  
8 that provides analytical information, forensic  
9 accounting-type information, on skilled nursing  
10 facilities or as they're also known as nursing homes.

11 Q. How did that start? How did you end up  
12 starting that business and getting involved in that  
13 type of analysis?

14 A. About five years ago I had a friend that was  
15 practicing in civil litigation, my oldest son had  
16 just started college, and I was consulted about these  
17 spreadsheets he had. He couldn't really make heads  
18 or tails of them. So I consulted with him to help  
19 him understand what those spreadsheets were. They  
20 turned out to be the cost reports that nursing homes  
21 have to file with the federal government each year.  
22 And so through that initial contact I started  
23 consulting on nursing home cases as a consultant on  
24 the forensic accounting side and eventually I  
25 actually started practicing law again in this area.

1 Q. And when you were initially looking at these  
2 cost reports, was this electronic or on paper?

3 A. It was on paper. They are very voluminous  
4 spreadsheets, dozens and dozens and dozens of pages  
5 of spreadsheets.

6 Q. I know you don't have a stack of paper with  
7 you. You have your computer. Has that changed?

8 A. Yes. When we realized how difficult it was to  
9 work with the paper spreadsheets, I figured out how  
10 you could download CMS' database. CMS is the federal  
11 agency that oversees all of the nursing homes in the  
12 country, and so they collect this financial  
13 information each year from each facility, and they  
14 have a huge database. And so I figured out how to  
15 download that database into a mirror database that I  
16 have. By doing that, I don't have to deal with the  
17 paper anymore. It's all done electronically.

18 Q. When you say mirror database, I'm going to try  
19 to unpack. Sounds like you like numbers. I haven't  
20 met a lot of lawyers who do. I will try to unpack  
21 that a little bit. How did you create that database  
22 structure to receive that information?

23 A. Well, we got the database design from CMS, and  
24 then we, because I hired a database administrator to  
25 help me on it, we built the database basically to

1 absolutely mirror the structure that CMS had because  
2 they provide the information in a very raw form. And  
3 so we had to create the database to store all the  
4 information the same way that they do so we could  
5 then extract it into the reports and the analysis  
6 that I did.

7 Q. Okay. Is it fair to say by taking that giant  
8 data dump from CMS or the agency that oversees  
9 nursing homes and putting it in your system you're  
10 now able to run an analysis on the different data  
11 electronically?

12 A. Yes, that's correct.

13 Q. As opposed to on paper and try to connect  
14 dots?

15 A. Yes.

16 Q. How many data points are in this annual cost  
17 report from each nursing home?

18 A. Each nursing home files a cost report each  
19 year, and within that one cost report will be about  
20 5,000 data points.

21 Q. What are the types of analyses you can perform  
22 now that you set up this system?

23 A. Mostly what I do is an analysis on their  
24 income, on their expenses, basically what they're  
25 spending money on and how much, and then also on

1 their staffing information. And then we do a trend  
2 analysis over a period of years to see how those  
3 expenditures or how their revenues or how their  
4 staffing are trending over time.

5 Q. What does CMS stand for?

6 A. Centers For Medicare and Medicaid Services.

7 Q. That's the federal agency we're talking about?

8 A. That's right. They oversee the nursing homes.

9 Q. Where do they get all that data?

10 A. All the information contained in the annual  
11 cost reports is submitted to them by each nursing  
12 home within the Medicare/Medicaid system.

13 Q. And then how long did it take you to develop  
14 that database system to allow you to do this type of  
15 work?

16 A. Well, it's ongoing. I've been working on it  
17 for about five years. It took us about a year to be  
18 able to do the first meaningful analysis. Took us  
19 about four months just to build the database, then it  
20 took us about eight months to do the testing to make  
21 sure that we had accurate mapping of all the data,  
22 and so at the end of that year we were able to do our  
23 first bit of analysis. For the last four years we've  
24 continued to add new data to it and enhance the  
25 amount of information we can glean from it.

1 Q. On opening statement the jury heard that this  
2 is a system you put together to make it easier to sue  
3 nursing homes. Is that why you put this together?

4 A. No, that is not why I put it together.

5 Q. Why did you put it together?

6 A. To try to understand the numbers because as a  
7 consultant it was very difficult to work with the  
8 paper product and so I developed the electronic  
9 system so we can better understand, like I said,  
10 their income streams, their expenses, their staffing.

11 As far as making it easier to sue anybody, no,  
12 that's not actually true.

13 Q. Are you asked by attorneys like me who are  
14 involved in a lawsuit against a nursing home to help  
15 analyze things like based on the data whether the  
16 staffing is adequate to the care needs?

17 A. Yes.

18 Q. Are you ever asked to provide this information  
19 to other types of people?

20 A. Yes.

21 Q. Like what?

22 A. I've been approached by elder law attorneys,  
23 those are individuals that work with older clients in  
24 setting up their estates and their wills, and they've  
25 approached me about doing this type of analysis in



1 helping them advise their clients on where to put a  
2 family member. So they will consult me to see what  
3 the staffing levels and the expenses and everything  
4 else are at facilities and then recommend a facility  
5 for a family.

6 Q. The Centers For Medicare and Medicaid Services  
7 that oversees these nursing homes, do they make some  
8 of the information in their database publicly  
9 accessible so people can compare nursing homes?

10 A. They don't let you access the raw data, but  
11 they do have a website called CMS Compare where they  
12 have a five star rating system, and they rate the  
13 nursing homes on four or five different items and  
14 then give it a one- to five-star rating. So that's  
15 out there. But other than that, that's about it.

16 Q. The information analysis you can provide to  
17 those elder law attorneys, how is that different than  
18 what they could just have a client go online and do  
19 themselves?

20 A. Well, mine is infinitely more detailed. We  
21 can get down to telling them exactly every dime the  
22 facility made and how they made it, how their  
23 expenses are done, if they're moving money to related  
24 parties, how their staffing is done. And sometimes  
25 the staffing numbers that appear on the CMS Compare

1 website are not consistent with the staffing numbers  
2 that we find in the annual cost reports, so it gives  
3 them at least another data point to look at to help  
4 make their decision.

5 Q. As I understand it -- well, let me just ask  
6 you you're not a nurse, fair?

7 A. No.

8 Q. You're not a nursing aide?

9 A. No.

10 Q. You're not an administrator of a nursing home?

11 A. No, sir.

12 Q. You don't own or run nursing homes?

13 A. No.

14 Q. Are you going to purport to tell the jury from  
15 a clinical perspective how many staff members should  
16 be serving any particular resident?

17 A. No, I'm not.

18 Q. So let me understand a little bit about your  
19 methodology of what you can tell people. How do you  
20 go about comparing the financial data you have with  
21 the care needs at a particular facility like Kindred  
22 - Stratford?

23 A. There's two different main sources of data  
24 that we use for this. One is the annual cost reports  
25 that come from CMS. That's the big database we

1 started with. There's also CMS' five star system  
2 that we also have access to that allows us to look at  
3 what CMS expects the staffing level to be. So by  
4 looking at what CMS expects the staffing to be and  
5 compare that to the staffing that has been reported  
6 in their annual cost reports, then we can then see if  
7 there's a discrepancy between what is expected and  
8 what was actually paid for.

9 Q. Okay. So how is it that you can determine --  
10 or how does Centers For Medicare and Medicaid  
11 services determine how many staff -- how much of a  
12 particular nursing staff should be available at a  
13 particular facility?

14 A. CMS has done time studies about how long it  
15 takes a caregiver to do certain things with a  
16 resident; how long does it take to feed them, how  
17 long does it take to bathe them, how long does it  
18 take them to get dressed or transferred from bed to a  
19 wheelchair. They've done these big time studies.  
20 They then have a RUG system, Resource Utilization  
21 Group, RUG. If you think of rungs of a ladder,  
22 people who need very little nursing care they're  
23 slotted in at the very bottom rungs of the ladder.  
24 Towards the top of the ladder are the individuals  
25 that require the most nursing care.

1 CMS has looked at all these different rungs  
2 and they know how much time it takes to take care of  
3 somebody at each one of those rungs. And so since  
4 they know that, they can then calculate how much time  
5 a nursing home should be dedicating per patient per  
6 day.

7 Q. Now, the jury heard some testimony by video  
8 yesterday from Mr. Lipsey, an administrator, that  
9 included a discussion of RUG scores. I won't go  
10 through that exhaustively. But just as it relates to  
11 your analysis, how -- Let me understand the RUG  
12 itself. What is the resource in the Resource  
13 Utilization Group?

14 A. That is nursing care. It's how much time you  
15 need from your care providers, your RNs, your LPNs,  
16 and your aides.

17 Q. And then the U, the utilization, is that for a  
18 particular level of how much of that nursing resource  
19 is going to be expected to be used on that resident?

20 A. Correct. Each rung on that ladder, each RUG,  
21 has a different amount of nursing time associated  
22 with it.

23 Q. Then I assume, if I'm right, the G, the group  
24 would be those actual rungs?

25 A. That's correct.

1 Q. Those RUG levels, if I'm understanding you  
2 correctly, it's not that any particular resident on a  
3 particular RUG level is identical to another  
4 resident. It's just that their unique needs, their  
5 unique care needs based on their conditions, put them  
6 in the same group in terms of the number of minutes  
7 of care time Medicare expects them to need?

8 A. Correct. You could have two people with  
9 completely different medical diagnoses, but, because  
10 of their diagnoses, they may need the same amount of  
11 medical care. They may both need a two-person  
12 transport to get from bed to wheelchair. They may  
13 both need help getting dressed. So their underlying  
14 diagnosis is not as important as where they slot in  
15 on the RUG ladder when you're talking about how much  
16 nursing care is needed.

17 MR. MCCARTNEY: Move to strike.

18 THE COURT: Overruled.

19 MR. EADIE:

20 Q. Where does the Centers For Medicare and  
21 Medicaid Services get the information about how much  
22 care a particular resident needs or what RUG level  
23 they're on?

24 A. Each individual in a facility at least every  
25 90 days has to have what's called a Minimum Data Set

1 completed, it's called an MDS. And the MDS in Part  
2 Z, which is right towards the end of the assessment,  
3 in Part Z it calculates what that person's RUG score  
4 is based on all the data that was put in in the early  
5 part of that report.

6 And so every person has a RUG score, and that  
7 RUG score is sent to CMS at least every 90 days.

8 Q. Who is doing that evaluation?

9 A. Individuals at the nursing home. They  
10 actually have individuals employed there called MDS  
11 coordinators, that's pretty much all they do.

12 Q. So is the information on resident care needs  
13 actually the nursing home's analysis being given to  
14 the government?

15 A. That's correct.

16 Q. And then the data you get to do your analysis,  
17 at least the publicly available data, does that  
18 include the care need or RUG information for  
19 residents at the facility over a period of time?

20 A. What we get from the five star system is just  
21 a calculation of how much time CMS believes this  
22 facility needs on a per patient per day basis. We do  
23 not have access to the underlying RUG data for  
24 everybody in the facility.

25 Q. Why not?

1 A. That is not disclosed to us through CMS. That  
2 is controlled by the nursing home.

3 Q. I forwarded to you, I think as soon as I got  
4 it a week ago, I forwarded to you what purported to  
5 be from Kindred purported to be that Section Z data  
6 for their residents so you could incorporate that  
7 into your analysis. Is what you received the actual  
8 section Z information on individual RUG levels?

9 A. Some of it was. It was very incomplete data.

10 Q. What do you mean by that?

11 A. There were a lot of individuals -- Basically,  
12 it broke down how many people of each RUG level there  
13 were, but there was a very large number that were  
14 listed as unknown RUG levels. And so without knowing  
15 those individuals' RUG levels, I could not then go  
16 back and calculate how much time was needed on a  
17 daily basis. Because if I had been given that  
18 information I could have told you on, you know,  
19 March 1st this is how much time CMS would have  
20 expected them to have that day.

21 Q. Are you able to still give us that analysis on  
22 a monthly basis?

23 A. No. I can do it on a quarterly basis.

24 Q. How far back does your information go from  
25 CMS?

1 A. On the cost report, it goes back to 1996. On  
2 the five star data, it goes back to second quarter  
3 2009.

4 Q. So were you able to provide your analysis on  
5 at least a few years of Kindred - Stratford where  
6 Leona Maxim was at the facility?

7 A. Yes.

8 Q. Have you obtained in other situations that  
9 you've been asked to do this type of analysis that  
10 actual Section Z data?

11 A. For everybody in the facility?

12 Q. Yes.

13 A. Yes, we did.

14 Q. Do you have any conclusions as to whether the  
15 type of data, the MDS they're expected to complete  
16 with the RUG levels, that a facility like Kindred -  
17 Stratford would ever have 60 some people without a  
18 RUG level?

19 MR. MCCARTNEY: Objection.

20 THE COURT: I'll sustain

21 that.

22 MR. EADIE: May I lay a

23 little more foundation, Your Honor?

24 THE COURT: Let him testify.

25 MR. EADIE: I will



1           absolutely let him testify.

2   MR. EADIE:

3   Q.       Mr. Tosh, in your work over the last five  
4   years with this type of analysis are you familiar  
5   with those MDS assessments and the requirements for  
6   those MDS assessments for nursing homes like Kindred  
7   - Stratford?

8   A.       Yes, I'm aware.

9   Q.       Are there any nursing homes in America, is  
10   there a small sliver somewhere of nursing homes that  
11   for whatever reason don't have to engage in that  
12   process?

13   A.       There are a few nursing homes. If you're a  
14   nursing home that does not accept Medicare or  
15   Medicaid patients, if you're a private pay or  
16   insurance only facility, then you would not fall  
17   under Medicare/Medicaid's umbrella. But the vast,  
18   vast, vast majority of nursing homes accept Medicare  
19   and Medicaid money; and therefore, they are  
20   controlled by CMS.

21   Q.       And so do you know from your research whether  
22   Kindred - Stratford is one of the facilities that has  
23   to engage in those MDS evaluations?

24   A.       Yes. They accept Medicare and Medicaid money.

25   Q.       And, in your understanding, would any

1 organization that's completing those types of  
2 assessments have that section Z data for all of their  
3 residents?

4 A. Yes. CMS requires that an MDS be filed at  
5 least every 90 days on every person in the facility  
6 no matter whether that person is being paid for by  
7 Medicare, Medicaid, private pay or private insurance.  
8 It doesn't matter who's paying their bills, MDS has  
9 to be filed at least every 90 days.

10 Q. Can you explain the methodology you go through  
11 when you are asked to do this type of analysis?

12 A. Yes. First thing I do is find out what years  
13 the individual's interested in looking at, then we  
14 have a program that will pull the data for those  
15 years and put it in an Excel spreadsheet and it has  
16 literally hundreds, if not thousands, of calculations  
17 that are done behind the scenes.

18 Within that, after that spreadsheet is  
19 generated, it has a lot of checkpoints in there that  
20 it's automatically calculating to see if the  
21 calculations from the spreadsheet are matching the  
22 calculations on the original data. And so I go  
23 through and make sure that all our data checkpoints  
24 are correct.

25 From there I then hand examine the data from

1 CMS' five star system to make sure that that data is  
2 also correctly displayed in the worksheets, and from  
3 there we can finish the calculations on staffing and  
4 the report is ready to be delivered.

5 Q. When you say calculations, are these formulas  
6 within the spreadsheet that are set no matter what  
7 nursing home data you plug in it's always the same  
8 calculations?

9 A. Yes. It uses the same numbers in the  
10 calculation, but it will come up with a different  
11 number depending on what's put in there.

12 Q. If you put in different nursing home data it  
13 gets different answers, but it's the same process in  
14 the middle?

15 A. Exactly.

16 Q. Do you have any discretion in that middle  
17 process, or are these set algorithms that you  
18 created? Other than finding them?

19 A. I created all these algorithms that run it, so  
20 I do have the ability to control that portion. As  
21 far as from one report to another, the reason I  
22 created those algorithms is so that I didn't have to  
23 redo them by hand every time.

24 Q. Is it fair to say using this system when you  
25 start with a nursing home's data it doesn't matter

1 how you feel about the particular nursing home or  
2 not, the system's going to come out with the analysis  
3 on the back end based on the numbers that you gave?

4 A. Yes. When I start looking at a facility, I  
5 don't have any expectations about what I'm going to  
6 see until I get the report at the very end. You  
7 don't know if it's going to be understaffed or  
8 properly staffed or making money or losing money  
9 because that's what the calculations will determine.

10 Q. Okay. Are you ever asked to perform this type  
11 of analysis and then you do and the conclusion is  
12 that the facility is meeting or exceeding the Centers  
13 for Medicaid and Medicare Services' expected staffing  
14 levels?

15 A. Yes, that does occur.

16 Q. Did that occur in this case?

17 A. No, it did not.

18 Q. Did you apply the same -- I won't take you  
19 through it again. Did you apply the same methodology  
20 as indicated, getting the publicly available data,  
21 putting it through the system and looking at the back  
22 end of what happened?

23 A. Yes, I did that.

24 Q. And did you reach a conclusion about whether  
25 over the period of the time you were looking at

1 Kindred - Stratford was appropriately staffing the  
2 nursing staff for the care needs that Kindred was  
3 reporting in those RUG scores?

4 MR. MCCARTNEY: Objection, Your  
5 Honor. May we approach, Your Honor?

6 THE COURT: That will be  
7 sustained as to that. Approach sidebar.

8 - - - o0o - - -

9 (Thereupon, a discussion was had  
10 between Court and counsel at  
11 sidebar.)

12 - - - o0o - - -

13 THE COURT: Counsel, proceed  
14 with another question. Proceed, please.

15 MR. EADIE: Thank you, Your  
16 Honor.

17 MR. EADIE:

18 Q. Did you reach your conclusions in this case to  
19 a reasonable degree of professional certainty?

20 A. Yes, I did.

21 Q. Were they based on reasonable information and  
22 methods of analysis in this type of case?

23 A. Yes.

24 Q. And did you reach a conclusion as to whether  
25 Kindred - Stratford was providing enough staff, the

1 level of staff, that would be expected by Centers for  
2 Medicare or Medicaid Services based on the care needs  
3 or the RUG scores the nursing home was reporting?

4 A. Yes. My opinion was based upon the publicly  
5 available information, and that they were not  
6 staffing to the level that CMS expected them to be  
7 staffed at.

8 Q. Okay. Let's talk about that opinion a little  
9 bit. You prepared a chart I believe about -- that's  
10 comparing the resident care needs. I think you  
11 called that acuity?

12 A. That's correct.

13 Q. So when we say acuity, it's just how much care  
14 based on the RUG scores?

15 A. That's correct.

16 Q. Did you analyze and compare that with the  
17 actual staffing the nursing home reported that they  
18 had over that period?

19 A. Yes. Actually, I compared it to a couple  
20 different staffing numbers; the staffing that is  
21 contained within the five star data system, and then  
22 I also compared it to the staffing that they reported  
23 on their annual cost report.

24 Q. Okay. Before I show it to the jury I think  
25 out of fairness, can you bring up the first chart.

1           Mr. Tosh, is the chart we're looking at one  
2 you created based on the hard numbers from your  
3 analysis?

4 A.       Yes, it is.

5 Q.       Is it a fair and accurate summary of the  
6 hundreds of thousands of cells in your database?

7 A.       Yes, it is.

8 Q.       Okay. Can you explain to us if I'm -- Let me  
9 make sure I'm reading it right. It looks like we  
10 have July of 2011 to June -- the end of June 2012,  
11 this first third here?

12 A.       Correct. Instead of being on a calendar  
13 system, this particular facility was on a fiscal year  
14 that started July 1st and ended June 30th of each  
15 year. So each one of those blocks is a set one-year  
16 time period.

17 Q.       Okay. So we have the '11-'12, '12-'13, and  
18 then '13-'14?

19 A.       That is correct.

20 Q.       It looks like for each one you have three  
21 categories, RN, LVN and CNA. What do those  
22 categories represent?

23 A.       RN is for registered nurses. LVN, in Texas we  
24 have LVNs, I believe here in Ohio you have LPNs,  
25 licensed practical nurses.

1 Q. That's the same thing?

2 A. Exactly. Then CNA is a certified nursing  
3 assistant. They also go by the term aide.

4 Q. Okay. In here I think they've heard aide,  
5 assistant and STNA. Are all those the same thing?

6 A. Yes. That's my understanding.

7 Q. And so if I'm understanding this chart, in  
8 this first year's period we see a green and a red,  
9 green and red. What's the difference between the  
10 green and the red?

11 A. The green numbers are the expected staffing  
12 numbers that CMS expected this facility to have based  
13 upon the care needs of the residents at Kindred, and  
14 then the red is the staffing as reported by Kindred.

15 So, as we can see, in the first year in RNs  
16 what that means is Kindred reported .25 hours, that's  
17 15 minutes, quarter of an hour, of RN time per  
18 patient per day. CMS expected them to have staffed  
19 1.28 hours per patient per day.

20 Q. That expectation, is that CMS basing that on  
21 how much time in those studies would be required  
22 based on the RUG scores reported by a nursing home?

23 A. That's exactly right.

24 Q. So is it the same thing here for the LPN or  
25 LVN on your chart?



1 A. Correct. LPN, you can see that they staffed  
2 -- their staffing was slightly above what CMS  
3 expected for LVNs. Then you can see that they were  
4 again below CMS' expectations for their aides.

5 Q. The jury's heard testimony that in this case  
6 the type of care at issue was done by an aide and  
7 would be traditionally done by an aide. Did the data  
8 from the sources, the government sources, show that  
9 Kindred was consistently providing fewer hours of  
10 aide or assistant time per resident than would be  
11 expected for the level of care that Kindred was  
12 reporting from that facility?

13 A. Yes. Across all three of the years we looked  
14 at you can see that in the CNA column each year they  
15 are staffing below CMS' expected number.

16 Q. Were you able to use the data to analyze the  
17 difference in cost to the nursing home between the  
18 care needs under those government studies, if those  
19 were met, what would it have cost versus the amount  
20 that Kindred actually spent on those particular  
21 positions?

22 A. Yes. In the annual cost reports the nursing  
23 home, besides identifying how many hours of nursing  
24 care they paid for in each of these categories, they  
25 also have to list what their average pay is, hourly

1 pay rate is, for each of those categories. So having  
2 that information available, I was able to calculate  
3 the difference between what they paid for their  
4 staffing and what it would have cost if they had  
5 staffed to CMS' expectations.

6 Q. Did you produce a chart to summarize the data  
7 in your spreadsheets about that difference between  
8 how much Kindred was spending on these types of staff  
9 members versus if Kindred hired at their current  
10 rates how much they would have spent to meet those  
11 timeframes that the government set out?

12 A. Yes, I did a graph that displayed that.

13 MR. MCCARTNEY: I'm going to  
14 object. I object to posting this.

15 THE COURT: The graph?

16 MR. MCCARTNEY: The graph. Also  
17 testifying as to that number.

18 MR. EADIE: I can show it to  
19 him first before the jury.

20 MR. MCCARTNEY: That's not the  
21 issue. I'm not worried about foundation.

22 THE COURT: Approach  
23 sidebar. Bring the graph.

24 ~ ~ ~ ~ ~

25 (Thereupon, the following discussion

1                   was had between court and counsel at  
2                   sidebar.)

3                                 ~ ~ ~ ~ ~

4                   THE COURT:                   We're at sidebar  
5                   out of the presence of the jury, and  
6                   Mr. McCartney has an objection to the use of  
7                   the graph.

8                   MR. MCCARTNEY:                 Yes. It's on  
9                   Page 11 of his report. Amount saved by  
10                  under/overstaffing per year for facility. I  
11                  object to putting this into a dollar amount.  
12                  The dollar amount doesn't in and of itself  
13                  tell you whether or not the facility was  
14                  understaffed. There is no CMS expected number  
15                  for dollar amounts that you must spend. It's  
16                  a CMS expected staffing level that you must  
17                  have.

18                  We're in the compensatory damage  
19                  phase. In this phase the only issue relative  
20                  to staffing is whether there was sufficient  
21                  staffing or not.

22                  How much money might have been spent  
23                  to staff Kindred - Stratford, or anyone else,  
24                  is completely irrelevant. It doesn't make  
25                  material facts more likely than not. It only

1 can be served to try to inflame the passions  
2 of the jury, and under Rule 403 should also be  
3 excluded. Even if it's deemed to be somehow  
4 relevant, this can be put aside until the  
5 punitive damage stage.

6 THE COURT: On behalf of the  
7 plaintiff?

8 MR. EADIE: Obviously, we  
9 disagree. We think it is probative. I think  
10 letting us know -- A flown out expert is in  
11 town. This kind of objection launched in this  
12 phase of the trial is prejudice to us. We  
13 could have planned to have this testimony  
14 presented outside of the jury. It is  
15 relevant. This chart helps the jury  
16 understand that there is understaffing that  
17 would be to an extent that might affect  
18 clinical care.

19 The only thing that has been  
20 presented so far has been an abstract per  
21 patient per day minutes, which is not going to  
22 be understood or easily understood by a lay  
23 person. These are Kindred's own dollar  
24 figures on the amounts. This is what  
25 Kindred's paying, so it does directly go to

1 make it more likely based on the amount that  
2 they are understaffed.

3 And I would further point out  
4 Mr. Lipsey testified about financial  
5 pressures, about revenue --

6 THE COURT: Let's keep that  
7 in mind. I totally disagree with what you  
8 summarized at sidebar. His testimony's part  
9 of the record. You don't have to remind me of  
10 that. I heard him testify. My recollection  
11 of the sidebar before you came over, mine is  
12 different from plaintiff's counsel. The  
13 record will reflect that accurately.

14 The Court, by way of observation,  
15 believes this, first of all, should have been  
16 raised in a Daubert motion prior to trial;  
17 that the trial judge -- we're here at  
18 4 o'clock with a witness from Dallas, Texas  
19 that everybody agrees wants to go back to  
20 Texas tonight. And part of the plaintiff's  
21 case in this matter is that; one, the nursing  
22 home was understaffed; and two, as I  
23 understand has been stated by plaintiff many  
24 times, that they were understaffed because  
25 they wanted to save money. And that goes

1           together -- The understaffing I believe goes  
2           to the compensatory damages, and, more  
3           importantly, the theory of negligence. They  
4           were understaffed. why? Because they wanted  
5           to save money.

6                        So I believe it's a close call, but  
7           I'm going to permit the testimony. And rather  
8           than continue your objection, I'm going to  
9           grant you a continuing objection unless  
10          there's something else you're going to object  
11          about.

12                       MR. MCCARTNEY:           Thank you, Your  
13          Honor.

14                       MR. HILL:                        Thank you.

15                                       ~ ~ ~ ~ ~

16                       (Thereupon, the following proceedings  
17                       were had in open court and on the  
18                       record.)

19                                       ~ ~ ~ ~ ~

20          MR. EADIE:

21          Q.           I think we were just starting about you had  
22          created a chart using Kindred's numbers in terms of  
23          how much they pay staff, RNs, LPNs, and assistants,  
24          to determine the difference between the amount of  
25          staffing Kindred actually had versus what was

1 expected by Centers For Medicare and Medicaid  
2 services based on the care needs of the residents?

3 A. Correct.

4 Q. Is this a copy of that chart summarizing that  
5 information?

6 A. Yeah. This summarizes how much the facility  
7 saved by understaffing, and this is per year based on  
8 the figures that they gave us as far as how much  
9 they're paying per hour for each category.

10 Q. During the fiscal year July 2011 to 2012, how  
11 much did Kindred save in dollars by not having the  
12 expected level of staffing?

13 A. Just over \$2.3 million, \$2,339,051.

14 Q. Same question for the '12-'13 fiscal year, how  
15 much money did Kindred save by not having the  
16 staffing as expected by Centers for Medicare and  
17 Medicaid Services?

18 A. They saved \$1,180,640.

19 Q. And for 2013 to 2014?

20 A. They saved \$1,189,339.

21 Q. So a little over \$2.5 million over this  
22 three-year period?

23 A. Four and a half. You're one of those  
24 attorneys that is not good in math.

25 THE COURT: Just answer the

1 question.

2 MR. EADIE:

3 Q. Just a little over \$4.5 million over those  
4 three years?

5 A. Correct.

6 Q. I want to ask you about the data you relied  
7 on. Did the data you relied on account for all of  
8 the residents in the facility whether or not they  
9 were Medicare Part E, Part A, or Part B, whatever  
10 their payer source was?

11 A. That's correct. That's based on all the  
12 residents in the facility.

13 Q. Have you had an opportunity to read the  
14 deposition of a nursing home administrator from  
15 Florida, Mr. Levine, that Kindred hired in this case  
16 about staffing levels?

17 A. Yes, I've read his deposition.

18 Q. Did he take issue in that deposition with any  
19 of your analysis?

20 A. Yes, he did.

21 Q. Did he particularly take issue with that issue  
22 of how many residents were included in your analysis?

23 A. Yeah. I think his bigger issue was with which  
24 portion of the five star data that I used, which  
25 columns that I used to do my analysis. I think that



1 was primarily most of his issue with my analysis.

2 Q. Assuming none of us run nursing homes or dig  
3 into that type of data on a regular basis, what are  
4 you talking about?

5 A. In the five star system they have multiple  
6 columns of data that's available. The first portion  
7 of it is what the facility is reporting as their  
8 staffing, so they've got reported hours for RNs,  
9 reported hours for LPNs, reported hours for aides,  
10 then like the total time for all of those if you add  
11 them together.

12 The next set of columns next to it is what CMS  
13 expects their staffing to be for RNs, LPNs, aides in  
14 a total. Then next to that is another set of  
15 columns, which is called the adjusted columns. And  
16 what that is that's a scoring mechanism that they do  
17 a little calculation to create this score, and that's  
18 what dictates how many stars they get. It's off that  
19 score.

20 And what Mr. Levine was saying was that my  
21 relying on the actual reported and the expected was  
22 incorrect, that I should have been using the data  
23 from the adjusted columns to do my analysis. And  
24 that is incorrect.

25 Q. why?

1 A. He made a mistake in which columns he thinks  
2 needs to be used for the analysis.

3 Q. Is that understanding, the five star system  
4 understanding, how Centers For Medicare and Medicaid  
5 services does those calculations, is that part of the  
6 experience and expertise you've developed over the  
7 last five years?

8 A. Absolutely.

9 Q. Anything else you wanted to respond to from  
10 Mr. Levine, or was that the crux?

11 THE COURT: That will be  
12 sustained. If you have a specific question,  
13 you can ask it. Not anything else you would  
14 like to say.

15 MR. EADIE: Okay. One  
16 second.

17 MR. EADIE:

18 Q. Did you prepare a summary of your findings in  
19 this case including those figures on the chart and  
20 the other analysis you did regarding Kindred -  
21 Stratford's staffing policies over that three-year  
22 period?

23 A. Yes.

24 Q. Is that the summary you produced in this case  
25 as to those findings (indicating)?

1 A. Yes, it is.

2 Q. Is it a fair and accurate summary of however  
3 much data it is that addressed specifically the  
4 questions I asked you to address?

5 A. Yes, it does.

6 Q. Okay. Can you explain --

7 MR. MCCARTNEY: Objection, Your  
8 Honor. Object to producing said information  
9 about which he has not testified.

10 THE COURT: I'll hold ruling  
11 on that until after the testimony. You can't  
12 show it until it's in evidence. I'm holding  
13 ruling on that until after the testimony.

14 MR. EADIE:

15 Q. Did you look at the legal entity name for  
16 Kindred - Stratford?

17 A. Yes.

18 Q. Is that part of the summary you produced to  
19 make sure that you were looking at the right  
20 facility?

21 A. Correct. Yeah, we checked the name because  
22 oftentimes the name that is reported using CMS'  
23 system is not the same name that they expose to the  
24 public. So we checked the name against the address  
25 to make sure it's the correct facility.

1 Q. Same question about the owner, type of  
2 facility, number of beds, did you consult the  
3 government data about that to verify the facility  
4 features?

5 A. Correct. That information is contained both  
6 in the annual cost reports and on Medicare's -- CMS'  
7 website, so I checked it both places to make sure  
8 again we're talking about the same facility.

9 Q. Is that Kindred's own data being sent to the  
10 government?

11 A. Correct.

12 Q. Did you consider the related parties -- Let me  
13 ask, what does related parties mean?

14 A. A related party is where you have a parent  
15 corporation that has what we call children  
16 corporations. So, in this case, Kindred's nursing  
17 home is held in a corporation that is owned by the  
18 Kindred parent. At the same time, Kindred and other  
19 nursing homes have what are called related parties,  
20 which are therapy companies, drug companies, maybe a  
21 housekeeping company, that are also owned by the same  
22 parent. And CMS, Centers For Medicare and Medicaid  
23 Services, requires them to identify what related  
24 parties they are paying money to and how much they're  
25 paying to those related parties within, you know, the

1 same corporate family.

2 Q. In looking at that and analyzing the related  
3 entities, are you saying there's anything wrong with  
4 that practice?

5 A. No, no. It's just that CMS wants there to be  
6 transparency. If they're dealing with corporations  
7 that are owned by the same entities, they have to  
8 reveal that information.

9 Q. And the jury's heard some testimony about  
10 Kindred Healthcare Operating, Inc. being the  
11 corporate parent. And here you have an ultimate  
12 corporate parent that's different. Does  
13 Medicare/Medicaid Services, for lack of a better  
14 word, cut to the chase and just put the top entity  
15 on?

16 A. It's actually whoever the facility identifies  
17 as their ownership.

18 Q. Okay. And so it's not -- Never mind.

19 Did you look at cash and temporary investments  
20 available at the facility?

21 A. Yes. That's also information contained within  
22 the cost reports that are filed each year.

23 Q. Is all of this based on data that's reported  
24 by Kindred to the federal government?

25 A. Yes.

1 MR. EADIE: It's turnaround  
2 time.

3 MR. MCCARTNEY: I still object.

4 THE COURT: I already ruled  
5 what I was going to do.

6 MR. EADIE: I thought I  
7 needed to lay more foundation. Okay.

8 MR. EADIE:

9 Q. When you discussed the related parties,  
10 another way to think about that is it's all like  
11 different arms of the same company/owner paying each  
12 other for different services, is that fair?

13 A. Correct.

14 Q. And so when you look at a related party say  
15 for therapy services, that would be Kindred nursing  
16 home paying Kindred therapy department, so basically  
17 Kindred paying Kindred?

18 A. Exactly.

19 Q. Did you analyze whether Kindred was over or  
20 underpaying itself in those transactions?

21 A. Yes, I did that analysis.

22 Q. What did you base that analysis on?

23 A. In the annual cost reports the nursing home  
24 has to reveal how much the underlying service cost to  
25 the related party to provide. So in this case if you

1 were providing therapy services, Kindred's therapy  
2 company would have to reveal how much it cost them to  
3 provide that service. Then Kindred also has to  
4 reveal how much they paid for that service. And when  
5 you have those two numbers, you can just calculate  
6 did they pay more than the cost or less than the  
7 cost.

8 Q. Specifically as it relates to nursing aides,  
9 in all the data you reviewed did Kindred consistently  
10 provide less nursing aide or assistant time to  
11 residents than Centers For Medicare and Medicaid  
12 services would expect based on the care needs of the  
13 residents as reported by Kindred?

14 A. Yes.

15 MR. EADIE: Thank you.

16 THE COURT: Cross  
17 examination, Mr. McCartney?

18 MR. MCCARTNEY: Yes. Thank you,  
19 Your Honor.

20 - - - o0o - - -

21 **CROSS-EXAMINATION OF ERNEST TOSH**

22 **BY MR. MCCARTNEY:**

23 Q. Mr. Tosh, would you agree with the statement  
24 nursing staffing levels are just one part of  
25 staffing, the actual skill and turnover of the staff

1 are also important?

2 A. Yes.

3 Q. And would you agree with this statement; in  
4 reviewing staffing for sufficiency, there are five  
5 general areas of review: Composition, quality,  
6 quantity, pattern and management method?

7 A. Yes.

8 Q. The only number that you've analyzed deals  
9 with quantity; is that right?

10 A. Quantity, and also a second prong of that is  
11 the -- I can't remember exactly what term was used  
12 there.

13 Q. Composition?

14 A. Composition: RN, LPN, CNA.

15 Q. Your analysis does not include anything about  
16 quality, pattern, or management method, does it?

17 A. No, it does not.

18 Q. The word that the Centers For Medicare and  
19 Medicaid Services uses in terms of looking at the  
20 acuity through the RUG score is "expected"?

21 A. Yes.

22 Q. And "expected" is a vastly different word than  
23 the word "required"; isn't that right?

24 A. Yes, sir.

25 Q. And Centers For Medicare and Medicaid Services



1 has the ability if they believe a facility is not  
2 providing adequate levels of staffing to revoke that  
3 facility's license -- or excuse me, their prior  
4 agreement with Medicare and Medicaid; is that right?

5 A. Yes, that is correct.

6 Q. As far as you know, the Centers For Medicare  
7 and Medicaid Services has never revoked Stratford's  
8 license, have they?

9 A. Not to my knowledge, no.

10 Q. And there is no study that's been done that  
11 you know of, any kind of scientific study that's been  
12 done, to look at the expected level of staffing per  
13 CMS and whether that actually leads to any  
14 improvement in the quality of care; isn't that fair?

15 A. There are studies about the time required to  
16 provide these services, and there are studies that  
17 would show that a lesser amount of time leads to more  
18 injuries. But are you asking me has there been a  
19 study specifically on expected versus the actual  
20 staffing?

21 Q. I'm talking about looking just at the expected  
22 level of staffing per CMS, has there been a study  
23 that looked at that number and that number alone?

24 A. No, not that I'm aware of.

25 Q. And Mr. Eadie touched on this, but you've

1 never worked in a nursing home, have you?

2 A. No.

3 Q. You've never been part of how nursing homes go  
4 about actually deciding on how much staff they need,  
5 have you?

6 A. No, I have not.

7 Q. And you don't know whether in the nursing home  
8 industry they use -- actually look at the RUG score  
9 and expected level of staffing for staffing levels,  
10 do you?

11 A. As an industry I do not know how they set  
12 their staffing.

13 Q. And you talked a little bit about related  
14 entities, and how much related entities were being  
15 paid. Do you remember that?

16 A. Yes.

17 Q. And when you say the related entities and how  
18 much they were being paid, that was the related  
19 entities was reporting the actual cost to them of  
20 providing those services?

21 A. That's correct.

22 Q. And if a third party vendor was to come in  
23 instead of a related company, the third party vendor  
24 would not report their actual cost, would they?

25 A. No, they would not be listed on that report

1 since they were an unrelated party.

2 Q. You would expect the third part vendor not  
3 only to charge their actual cost but a number above  
4 that in order to get a profit; isn't that right?

5 A. I would expect that, yes.

6 Q. It would be reasonable for a related entity  
7 also to charge not just the actual cost but a number  
8 above that in order to make a profit?

9 A. No, I would not agree with that statement.

10 Q. You would not agree with that?

11 A. No.

12 Q. Now, do you know whether the amount that was  
13 actually billed by in this case I think it was Rehab  
14 Care, what was actually billed by Rehab Care for the  
15 services they provided, whether it was commercially  
16 reasonable or not?

17 A. By definition, they have to report a cost that  
18 is commercially reasonable.

19 Q. I'm talking about what they actually billed,  
20 do you know if it was commercially reasonable or not?  
21 Did you go out and explore whether that was a  
22 reasonable number?

23 A. No.

24 Q. As far as you know, that was a commercially  
25 reasonable number charged by Rehab Care for their

1 services provided?

2 A. Yes.

3 Q. Your experience is never having worked in a  
4 nursing home but having come up with this algorithm;  
5 is that correct?

6 A. Correct.

7 Q. Also suing nursing homes; isn't that correct?

8 A. Yes, I have sued nursing homes.

9 Q. You have sued Kindred facilities, too, haven't  
10 you?

11 A. I have.

12 MR. MCCARTNEY: Thank you.

13 That's all the questions I have.

14 THE COURT: Any Redirect on  
15 those issues?

16 MR. EADIE: No, Your Honor.

17 THE COURT: You may step  
18 down.

19 - - - o0o - - -

20 (Thereupon, the witness was excused.)

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C E R T I F I C A T E

I, Angela R. Cudo, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that I have transcribed my said stenotype notes into typewritten form, as appears in the foregoing Excerpt Transcript of Proceedings; that said transcript is an excerpt record of the proceedings had in the trial of said cause and constitutes a true and correct Excerpt Transcript of Proceedings had therein.

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Angela R. Cudo, RPR/CRR  
Official Court Reporter  
Cuyahoga County, Ohio