Challenges of Care

All sides agree that mistakes happened at The Pearl in 2006

BY LEE VAN DER VOO AND CHRISTIAN GASTON

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Elvera and James Stephan Sr. are shown in happier times during Christmas 2005. The next year, Elvera was living at The Pearl in Lake Oswego, where an incident prompted care staff to call the Lake Oswego Police Department.

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Second of two parts

When they saw the video of the scene, two of the jurors folded their arms. Two others covered their mouths. One began taking copious notes that would accumulate for six days, the length of the trial.

On the screen, 86-year-old Elvera Stephan lay facedown on the carpet, handcuffed. A nurse stands idly by as police take charge of the scene. One of Stephan's caregivers at The Pearl at Kruse Way, an Avamere facility, holds her ankles to the floor.

At the trial's end, the jury voted 11-1 to award Stephan's estate $904,200 for endangering her and compromising her dignity.

By then, two years had passed, and for her son James Stephan, the verdict brought some relief in troubled times. It came nine days after the death of his mother, four days after her funeral.

His days suddenly quiet, no longer sandwiched between caring for his parents and caring for his children, James Stephan began again to concentrate his time on running his small construction business and parenting his three children.

His youngest child is 19 months old. His oldest children, 9 and 11, are playing six sports. As the dust settles and death, illness, guilt and grief become a part of the past, James Stephan slowly recovers.

So too must the company he spent two years fighting in court.

Avamere Health Services was founded 13 years ago by Rick Miller and Rick Dillon, business partners intent on building a senior care company that could provide multiple care options to elderly without forcing them to wait or relocate.

With 38 facilities in Oregon and Washington, Avamere offers home health care, independent living, assisted living, dementia care, skilled nursing and hospice.

But as Avamere grew, Miller said quality control became inconsistent companywide. By 2006, the same year Elvera Stephan was handcuffed at The Pearl, Avamere facilities were in their second year of below-average performances on state surveys and Avamere officials were meeting quarterly with regulatory agents in the Oregon Department of Human Services to address quality.

Miller and Bob Schneider, newly appointed CEO, say many of the company's problems have stemmed from communication gaps and inconsistencies in training.

They say that not telling James Stephan what had happened to his mother at The Pearl two years ago was a mistake. Instead, James Stephan learned about the incident from the family of another patient. Both recognize the omission has caused problems.

There is still disagreement about where communication broke down that night in The Pearl, a dementia-care facility. When Elvera Stephan became confused and accused a caregiver of stealing her car keys April 13, 2006, the nurse who called 9-1-1 reported she was “extremely agitated” and “aggressive” and “threatening” and that employees at The Pearl needed help.

The nurse never examined Stephan. Caregivers later testified they expected paramedics to respond and take Stephan to a hospital. But when police came, the caregivers stood aside while Stephan was put in handcuffs and placed on the floor to wait for the ambulance.

In a subsequent state investigation, Oregon’s Department of Human Services found that Stephan’s caregivers at The Pearl failed to correctly intervene in her behalf. The agency fined the facility $300 for the incident, which they concluded caused severe bruising to Stephan’s forehead and wrists and a knee injury.

James Stephan describes the two years since then as hectic and tense, at times “a nightmare.”

His father, James Sr., died within weeks of the handcuffing incident. James Stephan moved his mother from The Pearl, and afterward, she suffered a broken hip and underwent surgery, remaining bedridden until her death May 3, 2008, during the trial.

In his Lake Oswego home, James Stephan points to a picture of his mother in her youth, smiling, her two children at her side.

He says he is going to frame it.

He wants to remember his mother as the person she was and not the person she became in the end. She was an avid seamstress, he says, a cook and a homemaker. She taught courses in home economics, loved to garden and loved the home she retired to in Bend. Topping the list of loves was her husband.

“They were together forever. Those were her passions: Taking care of him and taking care of the family,” said James Stephan.

Though he said he was angry at Avamere for the way his mother was handled at The Pearl, he never thought he would sue the company.

But when a mutual friend introduced him to 32-year-old Scott Kocher, who would later become his attorney, he was inspired.

“Somebody needs to step up and hold them accountable. I think he has a passion for it. Scott has a passion for cases like this, not for frivolous lawsuits. He wants to (make) change and do the right thing,” said Stephan. “I had a lot of people around me saying somebody needs to do something and you’re the guy, you’re in the right spot.”

‘Shell game’

Kocher, along with law partner Richard Vangelisti, evaluates hundreds of potential lawsuits each year, many involving nursing homes.

The two both left a large law firm in downtown Portland in the last three years, forging a partnership as Vangelisti Kocher LLP, and have quickly built a reputation for taking a tough stance on corporate care providers.

“They take care of some of the most frail and fragile people in our society,” said Kocher. “There’s a huge need to represent those people because of accountability in our society. A $300 fine is not going to make anybody change their ways.”

James Stephan said the jury’s verdict helped him feel the decision to sue was the right one. But he called his trial experience “shocking.”

Attorneys for The Pearl, in its defense, accused James Stephan and his sister of failing to appropriately describe his mother’s condition. They said surveillance video of the night of the handcuffing did not tell the whole story: That Elvera Stephan really was threatening, out of control and easily could have hurt the people around her.

The path to the verdict also took nearly two years and required Kocher to find his way through Avamere’s elaborate corporate structure – 84 of the 105 corporations registered to Avamere are active.

When he filed the Stephans’ suit, Kocher ultimately filed suit against eight corporations tied to The Pearl, a process that left James Stephan amazed.

“I don’t even pretend to understand the corporate shell game and how it works. But I understand what Avamere was trying to do, which is to separate themselves and protect themselves from as many lawsuits as they can,” James Stephan said.

But Avamere's Miller said the company is simply following a federal model. Many of Avamere's facilities were built with loans guaranteed by the U.S. Department of Housing and Urban Development, which requires each piece of real estate to be a separate corporate entity.

The government wants to protect its investment from liability, Miller said, and Avamere adopted the model throughout the company.

"It's really very standard in the industry," Miller said. "We're following the model the government told us to follow."

The result is a web of interrelated corporations with unclear ties and responsibilities. Testifying during the Multnomah County trial, Avamere's own in-house attorney, Larry Lopardo of Lake Oswego, struggled to explain the company's corporate structure to a jury, unable to answer many questions about how the entities relate and how money moves from one to another.

The effect in the courtroom was dizzying. Though Elvera Stephan was injured at The Pearl, that entity simply holds the licenses to operate facilities and hires and fires the staff.

The land under The Pearl is owned by a group of real estate investors to which The Pearl pays rent, trial testimony showed.

The fees paid by the patients that live at The Pearl are transferred to the other companies but those companies hold no licenses, do not provide care, hire or fire employees or enter into contracts with the clients who receive services from The Pearl.

In a legal sense, they are immune from negligence.

That defensive posture is typical, said Tim Marble, a Forest Grove attorney specializing in elder law.

"You have to show that operators are operating their facilities negligently and that's a tough thing to do. That's why they set up all those LLCs," said Marble.

When a senior is injured, "They play a shell game. The director all of a sudden moves to a new facility … The new people don't know anything. The name of the facility changes and it's not even associated with the business you're trying to sue. You don't know who to sue."

By the time the case reaches a courtroom, "The jury is going to have to figure out which is which. And the jury is not going to be able to figure it out."

Injuries, violations

Nationally, the model has been sharply criticized.

A recent analysis by the New York Times showed investor-owned care providers routinely out-maneuver juries at trial, insulating investors from damages with "Byzantine" corporate structures.

It also showed investor-owned nursing homes perform worse on national surveys than their nonprofit counterparts, echoing a 2001 study by researchers for the University of California and Harvard Medical School.

An analysis of state records on senior care facilities in Oregon by the Pamplin Media Group found similar results, showing for-profit care ventures are cited for injuries and violations with more frequency than their nonprofit counterparts.

The analysis examined two years of records for 59 facilities owned by three senior care groups operating in the tri-county area – Avamere, Alterra and Marquis Care – and compared the results with those of seven independently operated nonprofit and publicly owned facilities.

The results showed all three for-profit ventures earned citations at higher per-patient rates than the nonprofit and public facilities.

At its 30 facilities in Oregon, Avamere averaged one citation for every nine clients over two years between 2006 and 2008. That citation rate was higher than citation rates for Alterra and Marquis Care, which earned an average of one citation for every 15 and 23 of their clients, respectively, during the same period.

Nonprofit and publicly owned senior care facilities, by contrast, were cited once for every 32 clients, based on an average of citations issued to a random sample group.

Avamere's citations were earned for everything from failing to provide essential care and treat clients with respect and dignity to failing to shield clients from rough treatment, financial exploitation, corporal punishment, mental and emotional abuse and unwanted sexual contact.

In 65 of the incidents, state regulators determined that seniors in Avamere's care were harmed. The state levied fines totaling $26,850 in 63 cases.

Miller attributes the company's higher number of citations to its pattern of alerting state officials to their own problems in facilities.

That's been the aim, said Miller, since the company began falling behind state averages and seeing fluctuations in survey performance at its facilities.

"We tried internally to make some adjustments to enhance quality and it seemed like we were making some progress but it also seemed like every time we took a step forward, we took two steps backward," said Miller, adding he knew the company needed help.

By the start of 2007 he and Avamere colleagues had carried out an aggressive restructuring aimed at improving. With the changes, Avamere hired a new CEO in Schneider, a company strategist and a quality control specialist.

The company also assembled a volunteer board of current and retired executives from managed health care, the pharmacy industry, electronics and wholesale bottled water. Prominent long-term care quality expert, Mary Ousley, is also on the board.

"More good people around Avamere help us with different perspectives in terms of how to manage the business, how to avoid mistakes and, when I was the CEO, to hold me accountable. I believe in running an organization in a good, sound, progressive way," said Miller.

Formerly acting as Avamere's CEO, Miller passed the reins to Schneider, a retired health care executive in May 2007, and began focusing his own time on lobbying for change in the national approach to senior care.

Miller recognizes the company still has room to grow and talks candidly about problems.

"We've got to be a company where if there's a problem we've got to be transparent about that," he said.

He feels confident that citation rates are trending down at Avamere facilities.

Since the company made changes, Avamere's track record has improved, Miller said. In 2007, the company's state surveys topped Oregon averages, according to Avamere's own calculations on these numbers.

But Mary Gear, the state's licensing and quality care administrator, said the Department of Human Services would not still be issuing citations at Avamere if allegations against the company, self-reported or otherwise, did not turn up problems in investigations.

In July 2007, the same year Avamere officials hit high marks on state surveys, regulators had enough concern about the company to invoke a rarely used authority to initiate their own investigations.

In a probe of Avamere's personnel files, they cited nine of the company's 30 facilities for failing to conduct criminal background checks on workers.

At Beaverton Rehab & Specialty Care, an Avamere facility where the state found that managers had failed to complete criminal background checks on seven employees, managers failed to terminate those workers even after the state ordered them fired.

Only one of those employees had a potentially disqualifying arrest on their record, but "(the) facility's repeated failure to properly conduct the criminal history process for seven employees placed all residents at risk of harm," state regulators wrote.

In Salem, regulators are pushing for increases in the fees charged to license a care facility in Oregon and the penalties they pay when problems are found.

Similar legislation failed to pass last session but appears headed back to the Oregon Legislature in 2009.

Gear is hopeful the session will improve the agency's ability to regulate homes, particularly as growing profits in the senior care industry render the state's small penalties for violations inconsequential.

Resources are also squeezed, Gear said.

"We have not only more elders but we have more projected, more facilities than in the past and DHS suffered budget cuts in the 03-05 biennium… which we really never recovered from," she said.

Marble, the Forest Grove attorney, meanwhile has pushed for citation histories for care facilities to be posted online, at least in Washington County, where he serves on the Board of Directors for the Washington County Department of Aging and

Veterans Services.

That data is now available online through a state Web site, making it easier for Oregon families to weed out unsafe care facilities as they search for homes for loved ones.

That kind of information would not have helped James Stephan, who was among the first to place his parents at The Pearl when it opened.

But as courtrooms remain a place of justice for some, Stephan is hopeful the one-of-a-kind verdict involving his mother broadens a conversation about senior care in Oregon and puts companies on notice to improve.