

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,  
ex rel. DEBORA PARADIES, et al.,

**Plaintiff,**

v.

GGNSC ADMINISTRATIVE  
SERVICES, LLC, et al.,

**Defendants.**

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CV 2:12-cv-00245-KOB

**COURT’S INSTRUCTIONS TO THE JURY**

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished and the lawyers have made their closing arguments, you will go to the jury room and begin your discussions – what we call your deliberations.

A jury trial has, in effect, two judges. I am one of the judges; the other judge is the jury. My duty is to preside over the trial and to decide what evidence is proper for your consideration. My duty at this time is to explain to you the rules of law that you must follow and apply in arriving at your decision.

First, I will give some general instructions that apply in every case; for example, instructions about the burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

Duty

Your duty in this phase of the trial will be to decide whether the United States has proved by a preponderance of the evidence the specific facts necessary to find that AseraCare made a false claim for reimbursement of hospice care for one or more of the 121 patients during all or a portion of their hospice admission at issue in this phase. I will give you more instructions about the specific law on this point in a minute.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial. You, as jurors, are the judges of the facts. You must not be influenced in any way by either sympathy or prejudice, for or against either party, but in determining what actually happened – that is, in reaching your decision as to the facts – your sworn duty is to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one

instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. Your duty is to apply the law as I explain it to you, regardless of whether you like the law or its consequences.

Your duty also is to base your decision solely upon the evidence, without prejudice or sympathy for or against anyone. You made that promise and took that oath before being accepted by the parties as jurors, and they have the right to expect nothing less.

Remember that anything the lawyers say is not evidence in the case. Your own recollection and interpretation of the evidence controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Nor should you give any special attention to any questions I have asked. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

#### Government and Corporate Party

The United States brings this lawsuit against a group of companies known as AseraCare. The fact that the United States government and corporations are involved as parties must not affect your decision in any way. A governmental

entity, a corporation, and all other persons stand as equal before the law and must be dealt with as equals in a court of justice. When a governmental entity or corporation is involved, of course, it may act only through people as its employees; and, in general, a governmental entity or a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the governmental entity or company.

### Evidence

In your deliberations you should consider only the evidence—that is, the testimony of the witnesses and the exhibits I have admitted in the record. As you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions that reason and common sense lead you to make. In other words, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of your common experience.

I have disallowed certain evidence and ordered you to disregard or ignore it— this is also called “striking” the evidence. That means that you must not consider that evidence when you are deciding this case because it is not properly before you. You should also not speculate as to why I struck the evidence, or allow it to influence your decisions.

I also allowed some evidence for a limited purpose—specifically the testimony from Ms. McNicholas about the Excelas summaries. I instructed you that I allowed her testimony and an exhibit for a limited purpose; you must consider it for only that purpose and no other.

You should not be concerned about whether the evidence is direct or circumstantial. “Direct evidence” is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. “Circumstantial evidence” is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence, or to the reasonable inferences you draw from direct or circumstantial evidence.

### Credibility

Now, in saying that you must *consider* all of the evidence, I do not mean that you must *accept* all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest

that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of this case or a related case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things about which he or she testified? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether evidence was offered tending to prove that a witness testified falsely concerning some important fact; or, whether evidence was offered that at some other time a witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory, an innocent mistake, or an intentional falsehood; and the significance of that consideration may depend

on whether the misstatement relates to an important fact or with only an unimportant detail.

When a witness is questioned about an earlier statement he or she may have made, or earlier testimony he or she may have given, such questioning is permitted to aid you in evaluating the truth or accuracy of the witness' testimony here *at this trial*.

Earlier statements made by a witness or earlier testimony given by a witness are not ordinarily offered or received as evidence of the truth or accuracy of *those* statements, but are referred to for the purpose of giving you a comparison and aiding you in making your decision as to whether you believe or disbelieve the witness' testimony that you hear *at trial*. However, if the prior inconsistent statement of the witness was made under oath, such as in a deposition, you may also consider it as evidence, if you so choose.

Whether such prior statements of a witness are, in fact, consistent or inconsistent with his or her trial testimony is entirely for you to determine. You can also decide whether to believe the earlier testimony given under oath, or the testimony given in this trial, or you can disregard both. You are the sole judge of the credibility of witnesses.

### Deposition Testimony

In this case, we have heard the testimony of some witnesses by video deposition. When a person is unavailable to testify at trial, the deposition of that person may be used. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify. You should treat deposition testimony the same as any other testimony presented in court.

### Expert Witness

You have heard testimony in this case from expert witnesses about their opinions. When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has been designated as an expert and expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, you decide whether to rely upon that testimony.

Payment to expert witnesses for their time and expenses is a regular and accepted practice. However, when a witness is being paid for reviewing and testifying concerning the evidence, you may consider the possibility of bias by that witness in favor of the party making the payments.

### Burden of Proof

The Plaintiff United States bears the burden of proof. In Phase One of this case, that means the United States has the responsibility to prove false claims for the 121 patients at issue by a “preponderance of the evidence.” This requirement is sometimes called the “burden of proof” or the “burden of persuasion.”

A “preponderance of the evidence” simply means an amount of evidence that is enough to persuade you that a contention is more likely true than not true.

In deciding whether the United States has proved any contention by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the United States fails to establish by a preponderance of the evidence that AseraCare made false claims for any of the 121 patients at issue, you should find against the United States as to that patient. Conversely, if the United States establishes by a preponderance of the evidence that AseraCare made false claims

for any of the 121 patients at issue, you should find in favor of the United States as to that patient.

SPECIFIC LEGAL CHARGES: False Claims Act

In this case, the parties' presentation of the evidence and your decision making is broken into two phases. In Phase One, you are asked only to decide whether the United States proved by a preponderance of the evidence that AseraCare made false claims to Medicare for hospice services for any of the 121 patients at issue now, and if so, the time period of those false claims.

The False Claims Act is a federal law that authorizes the United States to recover monies when false claims are submitted to the United States with knowledge of the falsity and paid by the United States.

A "claim" is a request or demand for payment of money from the United States. The parties do not dispute that AseraCare made claims to Medicare for payment for hospice services for the 121 patients at issue.

To find in favor of the United States for Phase One, you must find that the United States proved, by a preponderance of the evidence, that AseraCare made false claims to Medicare for hospice services for one or more of the 121 patients for all or a portion of their hospice admission.

To establish that AseraCare violated the False Claims Act, the United States

must prove that a claim was false. A claim is “false” if it is an assertion that is untrue when made or when used. Claims to Medicare may be false if the provider seeks payment, or reimbursement, for health care that is not reimbursable. For a hospice provider’s claims to Medicare to be reimbursable, the patient must be eligible for the Medicare hospice benefit.

### Hospice Requirements

You have heard testimony that, before being admitted to hospice care, three requirements must be met:

- (1) the patient elected or chose hospice care; and
- (2) the patient is entitled to Medicare Part A.

The parties do not dispute these two requirements as to the 121 patients at issue. They do dispute the third requirement:

- (3) that the patients were properly certified as terminally ill.

For hospice, a patient is considered to be “terminally ill” when the patient has a medical prognosis that the patient’s life expectancy is 6 months or less if the illness runs its normal course.

For a hospice provider to meet the disputed certification requirement, for the initial benefit period, the patient’s attending physician, if the patient has one, and the hospice program’s medical director each must certify that the patient is

considered to be terminally ill based on the doctor's clinical judgment regarding the normal course of the patient's illness.

After the initial 90 day period, for recertification for the Medicare hospice benefit, the hospice program's medical director must certify that the patient is considered to be terminally ill based on the doctor's clinical judgment regarding the normal course of the patient's illness.

Clinical information and other documentation that support the medical prognosis must accompany each certification and must be filed in the medical record.

The parties do not dispute that AseraCare obtained certifications for each patient – only whether the certifications were proper.

In reviewing the clinical information to certify that a patient's life expectancy is 6 months or less if the illness runs its normal course, the medical director must consider the following: 1) the primary terminal condition; 2) related diagnosis(es), if any; 3) current subjective and objective medical findings; 4) current medication and treatment orders; and 5) information about the medical management of any of the patient's conditions unrelated to the terminal illness.

#### Your Considerations

In considering whether any claim was false when made, you must consider

each patient and the evidence relating to that patient separately. You may consider all the admitted evidence and testimony, including the medical record and any information the doctor had when certifying the patient. You may also consider whether any information the doctor had when certifying the patient was false, and whether Aseracare provided false information to or withheld relevant information from the certifying doctor.

You may also consider the relevant Local Coverage Determinations (“LCDs”) issued by Palmetto. Palmetto refers to Medicare patients as “beneficiaries.” In considering the relevant LCDs, you should keep in mind that the LCDs, which contain criteria or factors, are provided as eligibility guidelines.

As Palmetto advised:

The beneficiary may not meet the criteria, yet still be appropriate for hospice care because of other comorbidities or structural/functional impairment. Coverage for these beneficiaries may be approved on an individually considered basis. . . .

. . . . Please do not consider these to be the exact criteria used for determining terminality. These are suggested guidelines to help the clinical staff understand the type of information that should be assessed and documented to paint a clear picture of the beneficiary’s medical condition. There are many other factors, which may need to be considered when determining the beneficiary’s terminal condition. Of course, the whole picture of the beneficiary’s condition should be considered when determining the beneficiary’s hospice appropriateness.

Practices that may be improper, standing alone, are insufficient to show falsity without proof that specific claims were in fact false when submitted to Medicare.

Your only responsibility for Phase One is to answer a single question for the 121 patients about whom you have heard testimony and received other evidence: whether the United States has proven by a preponderance of the evidence that one or more of the claims for one or more of the 121 patients are false claims, and if so, the time period of the false claims. You will not and should not consider *any* other question during Phase One.

You must consider each patient and the evidence relating to that patient separately.

If you are reasonably satisfied of the United States' proof that AseraCare made false claims to Medicare for hospice services as to any patient during all or a portion of the hospice admission, your answer as to that patient should be "yes." As to each patient you answer "yes," you then need to state the time period for which you find AseraCare made a false claim.

If you are not reasonably satisfied of the United States' proof that AseraCare made false claims to Medicare for hospice services as to a patient, your answer as to that patient should be "no."

We will now hear summations, or closing arguments, from the attorneys.

Remember: what the lawyers say is not evidence. I encourage you to test what the lawyers say against your own memory of the evidence. You are the judges of the facts – not the lawyers.

Final Instruction

Ladies and Gentlemen of the Jury:

I remind you once again that the arguments of counsel are not evidence in this case. The court allows counsel to make closing arguments or summations to help you recall the evidence and to help you tie the evidence together. You should not substitute what the lawyers say about the evidence for your own recollection. Neither should you decide this case based on the eloquence of the lawyers and their arguments. You must decide the case solely based on your view of the facts as you find them to be from the evidence, and applying the law to those facts as I have instructed you.

Notes

In this case you have been permitted to take notes during the course of the trial, and most of you – perhaps all of you – have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Your duty as jurors is to discuss the case with one another and consult with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full and impartial consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind, if you become convinced that your initial opinion was wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because the others think differently, or merely to reach a decision.

Remember, in a very real way you are judges – judges of the facts and judges of the credibility of the witnesses. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will guide your deliberations and will speak for you here in court.

#### Special Interrogatories

As I've already told you, in Phase one you have one question to answer: whether the United States proved by a preponderance of the evidence that

AseraCare made false claims to Medicare for hospice services for any of the 121 patients at issue now, for all or a portion of their hospice admission. That question, however, has 121 subjects. You will need to answer that question as to each of the 121 patients at issue.

When you go to the jury room in a few minutes, you will take with you a document entitled “Special Interrogatories to the Jury.” It lists each of the 121 patients whose hospice service is at issue. For each patient, you as a jury must unanimously decide whether the United States proved by a preponderance of the evidence that AseraCare made a false claim for all or a portion of that patient’s hospice service.

If you answer “yes” for any patient, then you also must agree as to the time period of any false claims. The form provides a space for you to fill in that time period.

If you answer “no” for a patient, then you just go to the next patient on the list.

Every answer you reach in the jury room must be unanimous, that is, you must all agree on the answer. Your deliberations will be secret; you will never have to explain your answers to anyone.

You will take the Special Interrogatories form to the jury room. When you

have reached unanimous agreement as to all 121 patients, you will have your foreperson fill in the Interrogatories form, date and sign it, and then return to the courtroom. When you have reached your decision, knock on the jury room door and tell the marshal that you have answered the Special Interrogatories.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, regarding any message or question you might send, that you should not tell me your numerical division at the time.

From this point, you will decide when you want to take your breaks, and when you want to stop for the day. You will also decide whether you want to come to court on Friday to deliberate. Just let Ms. Calahan know. But you can only discuss the case when all of you are together in the sanctity of the jury room.

I remind you again: do not discuss this case, or anything about it, with anyone outside the jury room. Do not post anything about this case or your jury service on any blog or social networking page. Do not send email or text messages about the case or your deliberation to anyone. Do not call, text or email each other. Do not conduct any research about any aspect of this case – that

means do not consult a dictionary; do not use Google or Wikipedia; do not ask questions of anyone other than each other or me. Remember, as I told you earlier, the only information you should use to decide this case is the evidence presented and the law explained in this courtroom.

At this time, please move to the jury room. You may select your foreperson, but wait until Ms. Calahan brings the exhibits to you. Then you may begin your deliberations.

So Ordered this 30<sup>th</sup> day of September, 2015.

A handwritten signature in cursive script that reads "Karon O. Bowdre". The signature is written in black ink and is positioned above a horizontal line.

KARON OWEN BOWDRE  
CHIEF UNITED STATES DISTRICT JUDGE