

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CV

2018 08 1790

THE ESTATE OF LORRAINE McKENZIE
By Beverly Teaster, Executor
c/o Eadie Hill Trial Lawyers
3100 East 45 St., Suite 400
Cleveland, Ohio 44127

Plaintiff,

vs.

CLOSE TO HOME, INC.
c/o Sharon Hartwig, statutory agent
503 Vernon Avenue
Ironton, OH 45638

and

CLOSE TO HOME, II, LLC
c/o Charles E. Kunkel
1665 West Main St
Wilmington, OH 45177

and

SHARON HARTWIG
c/o Close to Home, II, LLC
3712 Roosevelt Blvd
Middletown, OH 54044

Defendants.

) CASE NO.

) JUDGE

) **COMPLAINT**

) **With Jury Demand**

) **Affidavit of Merit Attached**

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

AUG 1 0 2018

FILED in Common Pleas Court
BUTLER COUNTY, OHIO

Now comes Plaintiff, the Estate of Lorraine McKenzie, through Beverly Teaster, its duly appointed Executrix, and for Plaintiff's Complaint against Close to Home, Inc., Close to Home II, LLC and Sharon Hartwig (collectively "Defendants") states and avers upon information and belief as follows:

INTRODUCTION

1. Lorraine McKenzie, community leader and matriarch died Saturday December 30, 2017.

2. One Month earlier, on November 17, 2017, Lorraine was sexually assaulted while under the care of Defendants who were ethically, morally, and legally obligated to protect her.

3. Following the sexual assault, Lorraine returned to Defendants' facility where she became severely dehydrated, suffered pneumonia, and experienced multi-organ failure leading to her death.

4. This is a recklessness, medical negligence, and wrongful death action involving Lorraine McKenzie's care at Close to Home II assisted living facility located at 3712 Roosevelt Blvd., Middletown, OH 45044 ("Close to Home"), that led to her sexual assault on November 17, 2017 and death on December 30, 2017.

5. Plaintiff requests a trial by jury.

6. An Affidavit of Merit is attached as Exhibit 1.

7. A copy of the Resident Agreement is attached as Exhibit 2.

8. Plaintiff seeks punitive damages in an amount necessary to punish the above-named Defendants and deter Defendants from engaging in similar conduct in the future.

9. Plaintiff also requests attorneys' fees and the costs of this litigation.

10. Beverly Teaster is the duly appointed Executrix of the Estate of Lorraine McKenzie, Butler County Probate Court, Case No. PE18-07-0604

11. Plaintiff brings this action on behalf of the Estate of Lorraine McKenzie, the next of kin of Lorraine McKenzie, and anyone else entitled to compensation for the harms and losses sustained as the result of the negligence and recklessness described herein or discovered during the course of the litigation.

DEFENDANTS

12. Defendant Close to Home, Inc. is an Ohio for-profit corporation that holds itself out to the public as a residential care facility / assisted living facility and provider of medical, nursing, and homecare, including but not limited to, rehabilitation, skilled nursing, and home health care, through its agents, operatives, affiliates, and / or employees. Upon information and belief, Close to Home, Inc. is owned and operated by CO-Defendant Sharon Hartwig who exercises executive, administrative, operative, and corporate control over the facility.

13. Defendant Close to Home, II, LLC. is an Ohio for-profit corporation that holds itself out to the public as a residential care facility / assisted living facility and provider of medical, nursing, and homecare, including but not limited to, rehabilitation, skilled nursing, and home health care, through its agents, operatives, affiliates, and / or employees. Upon information and belief, Close to Home, II, LLC. is owned and operated by CO-Defendant Sharon Hartwig who exercises executive, administrative, operative, and corporate control over the facility.

14. Defendant Sharon Hartwig is the owner and executive director / administrator of multiple assisted living / residential care facilities in Ohio including:

- Close to Home, Inc, 503 Vernon St., Ironton, OH 45638
- Close to Home, II, LLC, 3712 Roosevelt Blvd., Middletown, OH 45044

- Close to Home, III ,LLC, 617 Center St., Ironton, OH 45638
- Close to Home, IV, Assisted Living, Inc., 12681 US 62, Sardinia, OH 45171
- Close to Home IV, Inc., 12681 US 62, Sardinia, OH 45171; and
- Close to Home, V, Inc., 5176 Washington Rd., Albany, OH 45710 and

15. Sharon Hartwig who was directly involved in the care, supervision, and residential care and services agreement for Lorraine McKenzie who exercised absolute control over all Co-Defendants.

16. Lorraine McKenzie and her family looked to the Defendants for care based upon their representations.

17. The Defendants are vicariously liable for the negligent actions of their employees and agents (respondeat superior and agency liability) and / or independent contractors (Clark v. Southview agency by estoppel).

JURISDICTION AND VENUE

18. This Court has Jurisdiction over the Defendants because, among other things, all Defendants do, and all times relevant did, reside or have their domicile in the State of Ohio, purposefully avail themselves of the laws of the state of Ohio, and / or commit tortious acts within the state of Ohio.

19. Venue is proper in Butler County under Civil Rule 3(B) because, among other reasons: (a) Defendants reside, domicile, carry on their principal place of business, or practice medicine / nursing, in Mahoning County; and (b) part of the claim for relief arose in Butler County, in which county Lorraine McKenzie was sexually assaulted and died.

COMMON FACTS

20. Close to Home, Inc. and Close to Home, II, LLC (“Facility Defendants”) are for profit enterprises that provide residential care, skilled nursing, and myriad supplemental services on a short and long-term basis in exchange for payment.

21. The Facility Defendants’ for-profit model means their primary goal is to maximize profit, measured by revenues minus expenses.

22. For long-term care facilities, including nursing homes and assisted living facilities, generally, the largest individual revenue source is residents (filling beds), and the largest individual expense is the cost of employing nursing staff to provide care to those residents. This creates a financial incentive to take on more residents with greater care needs than the nursing staff can properly care for, a regulatory violation regarding staffing levels.

23. The Facility Defendants and Sharon Hartwig employ and control the nursing staff at Close to Home.

24. The Facility Defendants and Sharon Hartwig exercise actual control over Close to Home’s management and operations to maximize profits, including control over facility-level:

- a. Policies and procedures, including regarding resident care;
- b. Finances, including obtaining credit and loans, guaranteeing loans (both at the corporate and individual facility level), maintaining funds and banking, obtaining, owning, and leasing facility land and buildings, and capital expenditures.
- c. Budgeting, including controlling the amount of funds available for staffing facilities;
- d. Personnel management, including hiring and firing, or having authority to hire and fire, the supervisory and management personnel in each facility;

- e. Supervision of management, care providers, and staff in each facility, including compliance with federal and state regulations;
- f. Employment, such as setting pay scales, shifts, and time and vacation policies;
- g. Systems for training, monitoring, and supervising staff;
- h. Medical record systems and management;
- i. Financial control systems, including budgeting and payment processing;
- j. Marketing, including setting the image and expectations residents and their family should expect at Liberty, and even the name of the facility;
- k. Reporting procedures, including reporting to Medicare as to individual resident care and facility-wide issues.

25. As the result of this control, the Facility Defendants and Sharon Hartwig make decisions that affect the day-to-day care of Close to Home residents, such as the resources available for providing nursing staff and care to residents like Lorraine McKenzie, meaning it is responsible for the foreseeable harm that results from careless decisions while voluntarily exercising that control.

**Defendants' Obligations to Lorraine McKenzie
as Operator of a Residential Care Facility**

26. Close to Home is a Residential Care Facility (also known as an assisted living facility) pursuant to Chapter 3721 of the Ohio Revised Code and Section 3701-17-50 et seq. of the Ohio Administrative Code, and subject to those state laws and regulations.

27. During her stay, Lorraine McKenzie was a "resident" as defined by Ohio Revised Code section 3721.10, and the Facility was a "home," as defined by Ohio Revised Code section 3721.01, affording Lorraine McKenzie the Resident Rights in Revised Code section 3721.13, including the right to have Defendant provide:

- a. "a safe . . . living environment"; and

- b. “adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted”;

28. Close to Home is required under the Ohio Administrative Code to ensure an initial written health assessment and periodic assessments thereafter were completed for Lorraine McKenzie, to ensure that all components of the assessments were completed, and that Lorraine McKenzie did not require accommodations or services beyond those that the residential care facility provides.

29. Close to Home was required under the Ohio Administrative Code to enter into a Residential Care Agreement with Lorraine McKenzie meeting certain requirements, and fulfil those requirements.

30. Close to Home has not produced the entire resident agreement or medical records despite multiple requests.

31. Close to Home was obligated to act reasonably in setting staffing levels and ensuring “sufficient staffing” to meet the residents’ needs, including providing sufficient funding to have adequate staff to meet resident care and assistance needs.

Systemic Understaffing and Lorraine McKenzie’ Care

32. Defendants failed to ensure, through their operational, budgetary, consultation and managerial decisions and actions, that Close to Home was sufficiently staffed to meet the individual needs of Lorraine McKenzie.

33. Defendants engaged in a systemic practice to understaff the Close to Home facility to maximize profits at the expense of its residents’ care.

34. This lack of sufficient staff directly resulted in Lorraine McKenzie not receiving basic and necessary services to prevent, among other things, neglect leading to injury and death.

**The Defendants Fail to Meet their
Legal and Contractual Duties to Lorraine McKenzie**

35. Defendants agreed to care for Lorraine McKenzie in June 2007 in exchange for monetary payment.

36. Close to Home improperly assessed Lorraine McKenzie's needs and its ability to meet those needs, and retained her as a resident when they could not meet those needs.

37. The Facility Defendants represented themselves as a memory care facility catering to residents with memory disorders caused by dementia, Alzheimer's disease, traumatic brain injury, and other conditions who can no longer care for themselves in an effort to solicit consumers to place their loved ones in their care.

38. When Lorraine McKenzie initially became a resident of the facility in June 2017, she needed little care and assistance. As time passed, however, Lorraine's needs increased significantly beyond what Close to Home provides, including assistance with most activities of daily living, including transfers, mobility, and toileting.

39. Among other conditions, Lorraine McKenzie had a memory care disorder, physical limitations, and was unable to advocate for her own safety. Like many memory care patients, Lorraine McKenzie relied on Close to Home for safety and protection.

40. Close to Home failed to provide periodic assessments of Lorraine McKenzie as required by law and its resident agreement resulting in Lorraine McKenzie remaining a resident far beyond what was safe for her.

41. Lorraine McKenzie suffered numerous infections caused by dehydration. These were the direct result of Close to Home's failure to assess and reassess Lorraine McKenzie and appropriately staff the facility with competent staff.

42. Lorraine McKenzie was frequently left in soiled undergarments. This was the direct result of Close to Home's failure to assess and reassess Lorraine McKenzie and appropriately staff the facility with competent staff.

43. Lorraine McKenzie frequently had scraped knees and bruises that could not be explained by Defendants. This was the direct result of Close to Home's failure to assess and reassess Lorraine McKenzie and appropriately staff the facility with competent staff.

44. Defendants failed to ensure a safe environment for its residents as required by law.

45. Defendants accepted Gary Earls as a resident. At the time of his admission, Earls had a lengthy criminal history and concerning issues regarding his mental stability. This criminal history included criminal charges related to trafficking in food stamps, possession of drugs / disorderly conduct, driving while intoxicated, improper handling of firearms, intoxication, sexual battery / kidnapping, sale or consumption of alcoholic beverages on city property, and disorderly intoxication / public disturbance.

46. Defendants ignored this criminal history, and permitted Earls to become a resident to the detriment of its vulnerable, elderly resident population.

47. Defendants never warned any family members of residents that Earls had been accepted as a resident.

48. At approximately 5:00am on November 17, 2017, a Close to Home aid heard screams coming from Lorraine's room.

49. Close to Home's employees have admitted to seeing Earls' assault Lorraine.

50. Earls was straddling Lorraine and holding her down while he assaulted her.

51. Following the assault on November 17, 2017, Lorraine McKenzie was hospitalized and then returned to Close to Home where she was generally lethargic and depressed before being hospitalized and dying.

52. As a direct and proximate result of the action and inaction of Defendants, Lorraine McKenzie suffered conscious pain and suffering, incurred medical and medical related expenses, and death.

53. Prior to Lorraine's injuries on November 17, 2017, there were prior instances of male residents exposing themselves to female residents and making unwanted sexual advances, including in resident's rooms. Defendants did not remedy these concerning problems.

54. These factual allegations are supported by expert conclusions from qualified experts in the field of long-term care. See, for example, Affidavit of Merit of Theodore Homa, MD., attached as Exhibit 1, providing that Defendants actions did not meet the standard of care for, among other reasons:

"Elderly patients are especially vulnerable to abuse, neglect and accidental injury. It is clear that Close to Home did not appreciate these risks and did not provide appropriate assessments, reassessments, interventions, supervision, and monitoring to ensure the safety of its residents.

Close to Home's care and conduct was deficient for numerous reasons, including but not limited to the following:

- a. *Close to Home failed to appropriately assess and reassess Lorraine McKenzie to ensure that she was an appropriate candidate for assisted living;*
- b. *Close to Home failed to provide appropriate care to Lorraine McKenzie before and after the assault on November 17, 2017;*

- c. *Close to Home failed to appropriately assess and reassess Gary Earls to ensure that he was an appropriate candidate for assisted living;*
- d. *Close to Home accepted Gary Earls as a resident to live amongst a vulnerable population;*
- e. *Close to Home failed to implement appropriate interventions to monitor and the supervise residents to protect their safety;*
- f. *Close to Home failed to ensure the rights and safety of its residents, including Lorraine McKenzie, as required by Ohio and federal regulations;*
- g. *Close to Home failed to appropriately train its staff on how to assess and reassess residents, implement appropriate safety interventions, and sufficiently staff the facility to ensure the rights and safety of its residents.*

Each of the above the violations of the standard of care by Close to Home was a direct cause of Ms. McKenzie's sexual assault on November 17, 2017 and her death on December 30, 2017.

Close to Home's violations of the standard of care demonstrate a conscious disregard for the rights and safety of its residents, including Lorraine McKenzie, under circumstances that were substantially likely to cause injury."

Exhibit 1 at ¶ 14-17.

**FIRST CAUSE OF ACTION
(MEDICAL NEGLIGENCE / RECKLESSNESS)**

55. Plaintiff incorporates all other paragraphs of this Complaint as if fully rewritten herein.

56. Lorraine McKenzie and Defendants had a special relationship where she depended on the Defendants, and their respective nursing, medical, and non-medical staff, for medical, nursing, and non-nursing care, treatment, evaluation, assistance, and for her general safety.

57. The Defendants, including their medical, nursing, and non-medical staff, failed to provide proper care and treatment to Lorraine McKenzie, which they knew or should have known she required, resulting in her injury and death.

58. The Defendants' failure to provide proper care and treatment included, but is not limited to:

- a. Choosing not to appropriately assess and reassess Lorraine McKenzie to ensure that she was an appropriate candidate for assisted living;
- b. Choosing not to provide appropriate care to Lorraine McKenzie before and after the assault on November 17, 2017;
- c. Choosing not to appropriately assess and reassess Gary Earls to ensure that he was an appropriate candidate for assisted living;
- d. Inappropriately accepting Gary Earls as a resident to live amongst a vulnerable population;
- e. Failing to implement appropriate interventions to monitor and the supervise residents to protect their safety;
- f. Failing to ensure the rights and safety of its residents, including Lorraine McKenzie, as required by Ohio and federal regulations;
- g. Failing to appropriately train its staff on how to assess and reassess residents, implement appropriate safety interventions, and sufficiently staff the facility to ensure the rights and safety of its residents.
- h. Choosing to provide too few, and / or underqualified nursing and non-nursing staff members for the resident needs at the facility to protect and provide adequate care to residents like Lorraine McKenzie;
- i. Choosing to not provide accurate, adequate, or timely information to Lorraine McKenzie's family;
- j. Choosing to violate state and federal regulations governing care and staffing levels in facilities by which residents like Lorraine McKenzie are a member of the class of persons intended to be protected from injuries like she suffered; and
- k. Such other acts or omissions described in this Complaint or discovered during litigation.

59. The Defendants and their nursing and non-nursing staff provided care to Lorraine McKenzie that fell below the standard of care expected of long-term care

organizations, including residential care facilities, under the same or similar circumstances.

60. As a direct and proximate result of the negligence described above, Lorraine McKenzie sustained permanent injury and loss including, but not limited to, conscious pain, suffering, and disability and these physical injuries and her untimely and wrongful death on December 30, 2017.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly, in an amount more than Twenty-Five Thousand Dollars (\$25,000.00), for Lorraine McKenzie' conscious pain and suffering, medical expenses, loss of enjoyment, together with costs of suit, attorney's fees and expenses, punitive and exemplary damages, and any other relief to which the decedent may be entitled to and / or that the court finds is appropriate and / or equitable.

SECOND CAUSE OF ACTION
(WRONGFUL DEATH)

61. Plaintiff incorporates all other paragraphs of this Complaint as if fully rewritten herein.

62. Plaintiff brings this Cause of Action pursuant to Ohio's Wrongful Death Statute for the benefit of Lorraine McKenzie' heirs and next of kin who have suffered loss and damage due to Lorraine McKenzie's wrongful and untimely death

63. As a direct and proximate result of the unreasonable conduct described above, Lorraine McKenzie sustained physical injuries that caused her untimely and wrongful death.

64. Lorraine McKenzie's next-of-kin, including her children and grandchildren suffered damages as set forth in the Ohio Wrongful Death statute, including mental

anguish and grief, medical and funeral expenses, and loss of decedent's support, services, society and companionship.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly, in an amount more than Twenty-Five Thousand Dollars (\$25,000.00) to compensate the decedent's next of kin and heirs at law, together with costs of suit, attorney's fees and expenses, exemplary damages, and any other relief the court finds is appropriate and / or equitable.

THIRD CAUSE OF ACTION
(NURSING HOME RESIDENT RIGHTS VIOLATION R.C. 3721.13)

65. Plaintiff incorporates all other paragraphs of this Complaint as if fully rewritten herein.

66. Defendants, directly or through their employees or agents, violated Lorraine McKenzie's rights as a resident of the Defendants' facilities, as enumerated in R.C. 3721.13, including, but not limited to, the right to adequate and appropriate medical treatment and nursing care.

67. These violations constitute negligence per se and give rise to a statutory cause of action.

68. As a direct and proximate result of Defendants' violations of R.C. 3721.13, Lorraine McKenzie endured conscious pain and suffering and disability, incurred medical expenses, suffered her untimely death, and was otherwise harmed.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly, in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00), together with costs of suit, attorney's fees and expenses, punitive and exemplary damages, and any other relief to which the court finds is appropriate and / or equitable.

FOURTH CAUSE OF ACTION
(FRAUD)

91. Plaintiff incorporates all other paragraphs of this Complaint as if fully rewritten herein.

92. Defendants concealed facts concerning their staffing levels, pay, and the amount of care they were actually capable of providing at Close to Home.

93. Not only did Defendants conceal this information, they publicly and privately represented that they provide exceptional memory care services in an effort to induce the family of Lorraine McKenzie and other potential customers to place their loved ones in their care and custody.

94. These inducements were made falsely, with knowledge of their falsity, or with such utter disregard and recklessness as to whether they were true or false that knowledge may be inferred with the intent of misleading Lorraine McKenzie's family and other potential customer's into placing their loved ones in the care and custody of Close to Home.

95. Lorraine McKenzie and family members of other potential customers reasonably relied on Defendants' representations and concealments regarding the degree of care they provide.

96. The result of these inducements and concealments was that Lorraine McKenzie's family, and the family of numerous other residents, allowed their loved one to be placed in Defendants' facility.

97. As a direct and proximate result of Defendants' actions, representations, and concealments, Lorraine McKenzie suffered conscious pain and suffering, assault, and death.

98. As a direct and proximate result of Defendants' action, representations, and concealments, Lorraine McKenzie's next-of-kin have experienced harms and losses as a result of his death, including those damages set forth in Ohio's wrongful death statute—R.C. 2125.02.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly, in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00), together with costs of suit, attorney's fees and expenses, punitive and exemplary damages, and any other relief to which the court finds is appropriate and/or equitable.

SIXTH CAUSE OF ACTION
(BREACH OF CONTRACT)

69. Plaintiff incorporates all other paragraphs of this Complaint as if fully rewritten herein.

70. Defendants, directly or through their employees or agents, violated their contractual obligations in the Residential Agreement, a copy of which is attached.

71. As a direct and proximate result of those violations, Plaintiff suffered harm.

WHEREFORE, Plaintiff demands judgment against Defendants in an amount more than Twenty-Five Thousand Dollars (\$25,000.00), together with costs of suit, attorney's fees and expenses, punitive and exemplary damages, and any other relief to which the court finds is appropriate and/or equitable.

A TRIAL BY JURY IS HEREBY DEMANDED.

Dated: August 8, 2018



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