

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

THE ESTATE OF CHRISTOPHER CULLEN,) CASE NO.
JR., by and through Twana Cullen,)
c/o Eadie Hill Trial Lawyers)
3100 East 45th Street, Suite 400) JUDGE
Cleveland, Ohio 44127)
)
Plaintiff,) **COMPLAINT**
)
vs.) JURY DEMAND ATTACHED
)
S MERIDIAN LEASING CO., LLC DBA) AFFIDAVIT OF MERIT
AUSTINTOWN HEALTHCARE CENTER) ATTACHED
c/o Statutory Agent ACFB Inc.)
200 Public Sq., Ste 2300)
Cleveland, Ohio 44114)
)
Also Serve at:)
)
Austintown Healthcare Center)
650 S Meridian Rd.)
Youngstown, OH 44509)
)
and)
)
HEALTH CARE FACILITY MANAGEMENT)
LLC, DBA COMMUNICARE FAMILY OF)
COMPANIES)
c/o Statutory Agent ACFB Inc.)
200 Public Sq., Ste 2300)
Cleveland, Ohio 44114)
)
and)
)
COMMUNICARE HEALTH SERVICES,)
INC.)
c/o Statutory Agent ACFB Inc.)
200 Public Sq., Ste 2300)
Cleveland, Ohio 44114)
)
and)
)
COMMUNICARE, INC.)
c/o Statutory Agent ACFB Inc.)

200 Public Sq., Ste 2300)
Cleveland, Ohio 44114)

and)

SXCX MSTR LSCO, LLC)
c/o Statutory Agent ACFB Inc.)
200 Public Sq., Ste 2300)
Cleveland, Ohio 44114)

and)

MERIDIAN ARMS LAND, INC.)
c/o Statutory Agent CT Corporation System)
4400 Easton Commons Way, Suite 125)
Columbus, OH 43219)

and)

MOUNIR EL-HAYEK, MD)
2955 Canfield Rd.)
Youngstown, OH, 44511)

Also Serve at:)

MOUNIR EL-HAYEK, MD)
Austintown Healthcare Center)
650 S Meridian Rd.)
Youngstown, OH 44509)

Also Serve at:)

MOUNIR EL-HAYEK, MD)
3949 S Schenley Ave.)
Youngstown, OH 44511)

and)

MOUNIR EL HAYEK M.D., LLC)
c/o Registered Agent Mounir El Hayek, MD)
6177 Pebble Beach Ct.)
Canfield, OH 44406)

and)

SANDY VAN EVERY, PA)
Austintown Healthcare Center)
650 S Meridian Rd.)
Youngstown, OH 44509)
)
Defendants.)
)
_____)

Plaintiff, for its Complaint against the above-captioned Defendants, states and avers upon information and belief as follows:

INTRODUCTION

1. This is a negligence and recklessness action involving the Defendants’ failure to provide adequate care to their resident/patient Christopher Cullen, Jr. at Austintown Healthcare Center, a 70-bed rehabilitation and skilled nursing facility located at 650 S Meridian Rd, Youngstown, OH 44509 (the “Facility”) resulting in severe injuries, infection, and death to Christopher Cullen, Jr.

2. Defendants assumed care of Christopher Cullen, Jr. at their Austintown Healthcare nursing facility on July 17, 2019, when he was admitted to the Facility for short-term rehabilitation following a stroke.

3. The Facility, and Defendants Mounir El-Hayek, M.D., Mounir El-Hayek, M.D., LLC, and Sandy Van Every allowed Christopher to develop and suffer from clostridium difficile colitis (“C. Diff.”).

4. Defendants allowed Christopher Cullen, Jr. to contract C. difficile (aka C. diff), a highly contagious and potentially deadly without adequate treatment. C. difficile is treatable with appropriate monitoring and medication.

5. Defendants failed to properly monitor and treat Christopher Cullen, Jr.'s C. difficile following cessation of antibiotics, resulting in a recurrence of the infection that necessitated hospitalization of Christopher Cullen, Jr. on September 11, 2019.

6. Christopher died on September 18, 2019 due to septic shock from C. diff, as a direct and proximate result of the negligence of the Defendants.

7. Septic shock is the official cause of Christopher Cullen, Jr.'s death.

8. Christopher Cullen, Jr. was 86 years old when he died.

9. This Complaint includes a jury demand.

10. An Affidavit of Merit is attached.

11. Twana Cullen is the Administrator of the Estate of Christopher Cullen, Jr., the Plaintiff in this matter.

12. Plaintiff asserts claims for negligence, recklessness, wrongful death, and violations of Ohio Nursing Home Residents' Rights, on behalf of the Estate of Christopher Cullen, Jr., his children, and all other next of kin of Christopher Cullen, Jr.

13. 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.

DEFENDANTS

14. Defendant S MERIDIAN LEASING CO., LLC, DBA AUSTINTOWN HEALTHCARE CENTER (the "Facility" or "Austintown"), is a nursing home located at 650 S Meridian Rd, Youngstown, OH 44509 that is a part of the Communicare Family of Companies chain of nursing homes and assisted living facilities. It is an Ohio for-profit company that holds itself out to the public as a provider of medical and nursing care,

including but not limited to rehabilitation and skilled nursing care, through its agents, operatives and / or employees and does business as Austintown Healthcare Center.

15. Defendant COMMUNICARE, INC. (hereinafter “Communicare”) is an Ohio for-profit corporation that holds itself out to the public as a provider of medical care, including but not limited to, rehabilitation and skilled nursing care, through its agents, operative and/or employees and provides nursing services to more than 75 nursing home facilities throughout Ohio, Indiana, Pennsylvania, Virginia and Missouri, including Austintown Healthcare Center.

16. Defendant COMMUNICARE HEALTH SERVICES, INC. (“Communicare Healthcare”) is an Ohio for-profit corporation that holds itself out to the public as a provider of medical care, including but not limited to, rehabilitation and skilled nursing care, through its agents, operative and/or employees and provides nursing services to more than 75 nursing home facilities throughout Ohio, Indiana, Pennsylvania, Virginia and Missouri, including Austintown Healthcare Center.

17. Defendant HEALTH CARE FACILITY MANAGEMENT, LLC dba COMMUNICARE FAMILY OF COMPANIES (“HFM”) is an Ohio for-profit limited liability company that holds itself out to the public as a provider of medical care, including but not limited to, rehabilitation and skilled nursing care, through its agents, operatives and / or employees and provides nursing services to more than 75 nursing home facilities throughout Ohio, Indiana, Pennsylvania, Virginia, and Missouri, including Austintown Healthcare Center and does business under the fictitious name “Communicare Family of Companies.”

18. Defendant SXC CY MSTR LSCO, LLC (“SXC CY”) is an Ohio for-profit limited liability company that holds itself out to the public as a provider of medical care, including but not limited to, rehabilitation and skilled nursing care, through its agents, operatives and / or employees and provides nursing services to more than 75 nursing home facilities throughout Ohio, Indiana, Pennsylvania, Virginia, and Missouri, including Austintown Healthcare Center.

19. Defendant MERIDIAN ARMS LAND, INC. (“Meridian Arms”) is an Ohio for-profit corporation that holds itself out to the public as a provider of medical care, including but not limited to, rehabilitation and skilled nursing care, through its agents, operatives and / or employees and provides nursing services to more than 75 nursing home facilities throughout Ohio, Indiana, Pennsylvania, Virginia, and Missouri, including Austintown Healthcare Center

20. Defendants Austintown, Communicare, HFM, Communicare Healthcare, SXC CY, and Meridian Arms own, lease, manage, operate, and control their facilities, including Austintown Healthcare Center, under a single operational control structure doing business as “Communicare” and “Communicare Family of Companies,” or are shell companies formed by one or more of the other companies to hold licenses, employ care providers, or other services under the total control of, and without any separate mind, will, or existence separate from, those other companies. These Defendants employ, manage, and direct the care and service providers who were responsible for Christopher Cullen, Jr.’s care, treatment, and safety at Austintown Healthcare Center at all times he was a resident there and are to be referred to collectively as the “Communicare Defendants.”

21. Defendant MOUNIR EL-HAYEK, M.D. is a physician licensed to practice medicine in Ohio and served as the physician for Christopher Cullen, Jr., and/or the facility doctor for Austintown Healthcare Center and was acting within the scope of his employment when he provided care and treatment to Christopher Cullen, Jr. at Austintown Healthcare Center.

22. Defendant MOUNIR EL-HAYEK, M.D., LLC is a corporation and/or limited liability company and/or other business entity, with its principle place of business in Mahoning County, Ohio, and which employs physicians, physicians assistants, nurses, and other medical personnel to evaluate, care for, and treat patients, and which held itself out to the public as a provider of medical care and treatment to individuals in the State of Ohio.

23. Defendant SANDY VAN EVERY, PA is a physician's assistant licensed in the State of Ohio and was acting within the scope of his/her employment with the Communicare Defendants and/or Mounir El-Hayek, M.D. and/or Mounir El-Hayek, M.D., LLC when he/she provided care and treatment to Christopher Cullen, Jr. at Austintown Healthcare Center.

24. Defendants employ and/or manage the care providers who were responsible for the care of Christopher Cullen, Jr.

25. The care providers who were responsible for ensuring the care and safety of Christopher Cullen, Jr. were acting within the course and scope of their employment and/or agency with Defendants.

26. Christopher Cullen, Jr. and his family looked to the Defendants for care based upon the Defendants' representations as providers of skilled, competent, and dedicated caregivers.

27. 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

28. This Court has Jurisdiction over the Defendants because, among other things, all Defendants do, and all times relevant did, purposefully avail themselves of the laws of the State of Ohio, and/or committed tortious acts within the State of Ohio.

29. Venue is proper in Mahoning County, Ohio under Civil Rule 3(B) because, among other reasons: (a) one or more Defendants resides, domiciles, or carries on their principal place of business in that county; and (b) part of the claim for relief arose in Mahoning County.

COMMON FACTS

Communicare Defendants' Control of Austintown Healthcare Center Leads to Understaffing

30. The Communicare Defendants hold themselves out to the public as providers of long-term nursing home, skilled nursing, and memory care services.

31. The Communicare Defendants' for-profit model means their primary goal is to maximize profit, measured by revenues minus expenses.

32. For nursing homes 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 violation of federal nursing home regulations regarding staffing levels.

33. The CommuniCare Defendants manage, control, and / or employ the nursing staff at the Facility.

34. The CommuniCare Defendants exercise actual control over the Facility'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 the facility;
- d. Personnel management, including hiring and firing, or having authority to hire and fire, the supervisory and management personnel in the facility;
- e. Supervision of management, care providers, and staff in the 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 that each resident and their family should expect, and even the name of the facility;
- k. Reporting procedures, including reporting to Medicare as to individual resident care and facility-wide issues.

35. As the result of this control, The Communicare Defendants make decisions that affect the day-to-day care of residents, such as the resources available for providing nursing staff and care to residents like Christopher Cullen, Jr., meaning they are responsible for the foreseeable harm that results from careless decisions while voluntarily exercising that control.

36. Defendants failed to ensure, through their operational, budgetary, consultation and managerial decisions and actions, that the facility was sufficiently staffed to meet the individual needs of Christopher Cullen, Jr.

37. Christopher Cullen, Jr. complained to his family members on a regular basis that the staff was taking too long to change his soiled undergarments and respond to call lights.

38. Christopher Cullen, Jr.'s family members witnessed that Christopher would often require changing from incontinence and that staff was slow to respond due to understaffing issues.

39. Christopher Cullen, Jr.'s daughter grew concerned regarding delays in changing Christopher following diarrhea episodes and noticed that the diarrhea had a remarkably foul and even putrid smell.

40. Despite bringing her concerns regarding the foul smell to the attention of staff members, the Facility's understaffing resulted in delays getting Christopher Cullen, Jr. testing orders for *C. difficile*, and even after a test was ordered, there was a delay in obtaining the necessary fecal samples.

41. When the test results finally came back, Christopher Cullen, Jr. tested positive for *C. difficile*.

42. The delay in identifying and responding to Christopher Cullen, Jr.'s C. difficile resulted in him suffering from the infection without treatment for an extended period.

43. Christopher Cullen, Jr.'s family members witnessed incidents of staff members giving Christopher an incorrect dose of tube-feed and under-administering fiber mix to him due to being rushed because of understaffing.

44. Services such as tube-feed and fiber mix were important to Christopher Cullen, Jr.'s health and well-being.

45. On numerous occasions, Christopher Cullen, Jr.'s family told the Facility Administrator that the Facility did not have enough staff and that as a consequence Christopher's needs were not being met.

46. The Communicare Defendants engaged in a systemic practice to understaff the facility to maximize profits at the expense of its residents' care.

47. Austintown Health Center received a Two-Star rating for staffing ("below average) on Medicare's "Nursing Home Compare" website, which utilizes data provided by the facility itself to formulate rankings.

a. Licensed Nurse Staffing

- i. The national and state average for licensed nursing (RN/LPN) time available in a particular day for each resident is 1 hour and 34 minutes (national) and 1 hour and 36 minutes (Ohio).
- ii. But at Austintown there is only on average 1 hour and 7 minutes of licensed nursing time available per day for each resident, nearly a half-hour off of the state/national averages.

iii. The amount of licensed nursing time available at Austintown is actually less than 1 hour and 7 minutes per resident each day because these figures take into account all time nurses are being paid—including breaks, vacations, holidays, and personal time off—and is not limited to the time they are actually at Austintown providing nursing care.

b. Nursing Assistant and Aide Staffing

i. Austintown also falls far short in the amount of nursing assistant or aide time available for its residents. The national and state average for nursing assistant or nursing aide time per resident is 2 hours and 18 minutes (national) and 2 hours and 4 minutes (Ohio) per day.

ii. But at Austintown there is only 1 hour and 53 minutes of available nursing assistant / aide time available per resident per day.

48. The Facility's lack of sufficient staff directly resulted in Christopher Cullen, Jr. not receiving basic and necessary services to prevent, among other things, neglect leading to illness, injury, and death.

49. Christopher Cullen, Jr. and his family were not informed of the staffing ratings by the Communicare Defendants.

Reporting Data

50. Nursing homes like the Facility are required to report significant amounts of data to the federal agency that oversees operations of nursing homes receiving federal or state funding, the Centers for Medicare and Medicaid Services, or "Medicare."

51. The data the Communicare Defendants submit to Medicare regarding its Facility includes data on its residents (numbers, care needs, and bed days), its finances, and its nurse and nursing aide staffing levels as compared to resident care needs.

52. This data is certified correct by the Communicare Defendants or their agents and / or submitted under penalty of perjury and / or civil or criminal penalties.

53. Medicare uses some of this data submitted by the Communicare Defendants to produce its nursing home 5-star rating system, also known as “Nursing Home Compare.”

Nursing Home Resident Care Needs and Staffing Levels (MDS and RUG Scores)

54. Every nursing home receiving Medicare or Medicaid funding—the clear majority of nursing homes, including Austintown Healthcare Center and others operated and / or controlled by the Communicare Defendants—is required to provide detailed information regarding the health status, care and treatment, and services provided to each resident in the facility using a questionnaire called the **Minimum Data Set**, or **MDS**. This evaluation is done for all nursing home residents regardless of whether their care is being paid for by Medicare.

55. Nursing homes like Austintown Healthcare Center are required to evaluate every resident using the Minimum Data Set questionnaire shortly after the time of admission, every 90 days thereafter, when a resident has a significant improvement or decline in health (physical, mental, or psychosocial), and upon discharge.

56. Based on this Minimum Data Set, each resident’s individual care needs (called “acuity level”) are assigned into a group signifying how much nursing or staff care the resident requires, called a **Resource Utilization Group** score, or **RUG score**.

57. Each resident's Resource Utilization Group score is contained in Section Z of their Minimum Data Set evaluations, meaning the total care needs of the residents in any facility at a specific time is available by totaling the residents' Resource Utilization Group scores from their Minimum Data Set evaluations.

58. Medicare has commissioned and made available to every nursing home studies and data showing the number of minutes of nursing and nursing aide care a person at a specific RUG level should be expected to require, which Medicare calls "expected staffing."

59. When these Resource Utilization Group scores are combined for all residents in a nursing home facility, the nursing home knows exactly how many minutes of nursing and nursing aide care should be provided, on average, to meet the expected care needs of their residents.

Misleading Advertising

60. In an effort to persuade the families of patients with memory care disorders to become customers, the Communicare Defendants make promises to the families of such potential residents that they will provide a level of care that they know they are incapable of providing, including touting their expertise in patient safety issues concerning residents requiring skilled nursing care.

61. For example, the Communicare Defendants state on the Facility's website the following information:

"Patients and their families rely on CommuniCare for a broad range of special care. From short-term rehabilitation to assisted living and palliative care, our trusted system of medical experts and compassionate caregivers deliver high-quality services to meet your needs."

<https://www.communicarehealth.com/services/>

and

Each and every one of our employees' primary importance stems from our philosophy: Serving with Pride. We recognize that we are called to reach out with our hearts and touch the lives of others. This recognition instills a great sense of purpose in the work we do each day. As a result, we take immense pride in our opportunity to deliver the highest quality of care. We remind ourselves daily that we have to serve with pride and this energizes us in our mission to, to give the gift of life to each and every guest and resident of the CommuniCare Family of Companies.

<https://www.communicarehealth.com/about-us/who-we-are/>

62. The intent and outcome of this misleading practice is to cause residents, their families, and external care providers to believe the nursing facility is much better staffed than it is.

Christopher Cullen, Jr.'s Care

63. Christopher Cullen, Jr. had been a resident of Austintown Healthcare since July 17, 2019, when he was admitted to the Facility for short-term rehabilitation with a goal to return to the community.

64. The Defendants were responsible for the care and treatment of Christopher Cullen, Jr.

65. Christopher Cullen, Jr. had medical conditions that made him dependent on the Defendants for maintaining and advocating for his safety and well-being.

66. The Defendants knew that Christopher Cullen, Jr. had numerous risk factors for infection.

67. The Facility was required to assess and reassess Christopher Cullen, Jr. for his risk of developing infections.

68. Christopher Cullen, Jr. was dependent on Facility staff for most activities of daily living, including total dependence on the staff for tube feeding and hydration.

69. Christopher Cullen Jr. was susceptible to infections and was dependent on the Defendants to monitor him for signs and symptoms of potential infection.

70. The staff at the Facility, who worked under the supervision and control of the Communicare Defendants, and Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every should have been properly trained on recognizing signs and symptoms of infection in patients.

71. At the time of his admission, Christopher Cullen, Jr. was charted by facility staff to be free of any infections.

72. Within two weeks of entering the Facility, Christopher Cullen, Jr. was diagnosed with a *Clostridium difficile* infection, more commonly known by its abbreviation of “C.diff.”

73. *Clostridium difficile* bacteria are found throughout the environment — in soil, air, water, human and animal feces, and food products, such as processed meats.

74. Spores from *C. difficile* bacteria are passed in feces and spread to food, surfaces, and objects when people who are infected do not wash their hands thoroughly. These spores can persist in a room for weeks or months. If you touch a surface contaminated with *C. difficile* spores, you may then unknowingly swallow the bacteria.

75. Once established, *C. difficile* can produce toxins that attack the lining of the intestine. The toxins destroy cells, produce patches (plaques) of inflammatory cells and decaying cellular debris inside the colon, and cause watery diarrhea.

76. The majority of *C. difficile* infections occur in people who are or who have recently been in a health care setting — including hospitals, nursing homes and long-term care facilities — where germs spread easily, antibiotic use is common, and people are

especially vulnerable to infection. In hospitals and nursing homes, *C. difficile* spreads mainly on hands from person to person, but also on cart handles, bedrails, bedside tables, toilets, sinks, stethoscopes, thermometers — and even telephones and remote controls.

77. The most common signs of *C. difficile* include weight loss, stomach pain or cramping, and diarrhea—especially foul-smelling diarrhea.

78. Christopher Cullen, Jr.'s daughter complained of a foul smell to Christopher Cullen, Jr.'s diarrhea, yet the Defendants failed to respond to these signs of *C. diff* and delayed testing orders until Christopher Cullen, Jr.'s daughter demanded the testing.

79. Austintown staff, under the control and supervision of the Communicare Defendants, and/or Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every, should have been trained to identify these common signs and symptoms for *C. difficile*.

80. *C. difficile* is treated with an antibiotic called vancomycin. Antibiotics are typically taken by mouth for 14 days. Most people notice an improvement in symptoms within 3-4 days.

81. Christopher Cullen, Jr. was treated with vancomycin for 14 days.

82. On August 26, 2019, the facility, per the instructions of Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every discontinued the administration of Vancomycin for Christopher's *C. difficile*. Austintown staff and Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every did not retest Christopher to ensure his *C. difficile* was gone, even though his symptoms remained.

83. *C. difficile* returns in about 20 percent of people treated with antibiotics because the initial infection never went away, or the person was re-infected with a different strain of the bacterium. Symptoms such as diarrhea typically appear three days to three weeks after treatment is discontinued.

84. Christopher's family was concerned that his diarrhea did not subside during or after the Vancomycin treatment. Within days of treatment ending, Christopher's foul-smelling diarrhea returned, and his family continued to complain to staff about it. For weeks, Austintown staff and Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every failed to monitor and/or treat Christopher Cullen, Jr. in response to his family's ongoing complaints.

85. The Communicare Defendants and Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every failed to effectively treat Christopher Cullen, Jr.'s recurrence of symptoms of *C. diff* by restarting his Vancomycin and/or taking other medical measures to respond to his symptoms, allowing the infection to grow unchecked for at least two weeks.

86. About 2 weeks from the date Vancomycin was discontinued, on September 9, 2019, Austintown staff charted that Christopher Cullen, Jr. had a fever and his diarrhea had a foul smell. Austintown staff suspected that Christopher had *C. difficile* again and a stool sample to test for *C. diff* was ordered.

87. Although taken, the stool sample was never sent to be analyzed for the presence of *C. difficile*.

88. On or about September 10, 2019 Austintown staff collected and sent Christopher Cullen, Jr.'s blood to be examined due to his fever. The Facility received the

bloodwork results that same day. Christopher Cullen, Jr. had an elevated white blood count that is an indication of a likely infection—called leukocytosis. Having a high white blood count usually indicates that the body’s immune system is working to fight off an infection.

89. The same test results also showed that Christopher Cullen, Jr.’s glucose level was much higher than his baseline.

90. Infection causes a stress response in the body by increasing the level of hormones that work against insulin production and, as a result, the body’s production of glucose increases, which results in high blood sugar levels. This is another indicator of infection.

91. On September 10, 2019, Austintown also charted that Christopher was found shaking when staff entered his room.

92. Despite the obvious signs and symptoms of a serious infection, which was confirmed through his test results, Austintown staff, under the control of the Communicare Defendants, and Defendants Mounir El-Hayek, M.D. and/or Mounir El Hayek M.D., LLC and/or Sandy Van Every continued to administer only Tylenol for Christopher Cullen, Jr.’s fever and infection symptoms.

93. On September 11, 2019, by the time Defendant Dr. El-Hayek came in to see Christopher Cullen, Jr. during Dr. El-Hayek’s regular rounds at the facility, Christopher was lethargic with fever, low blood pressure, and blood in his urine.

94. On September 11, 2019, Christopher Cullen, Jr. was finally sent by Defendants to Mercy Health St. Elizabeth Hospital, where he was diagnosed by the hospital’s emergency department with septic shock, dehydration, acute respiratory failure

with hypoxia, acute kidney injury, lack of movement in the intestines (called ileus), pressure wounds (aka bedsores) and hyperkalemia.

95. Christopher Cullen, Jr. died at Mercy Health St. Elizabeth Hospital on September 18, 2019. Christopher Cullen, Jr.'s official cause of death according the state of Ohio was "septic shock."

96. As a direct and proximate cause of Defendants' violations of the standard of care, Christopher Cullen, Jr. suffered severe physical and emotional injuries, infection, loss of enjoyment of life, and death.

FIRST CAUSE OF ACTION
(MEDICAL NEGLIGENCE / RECKLESSNESS)

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

98. Christopher Cullen, Jr. and Defendants had a special relationship wherein he 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 his general safety.

99. The Defendants, including their medical, nursing, and non-medical staff, failed to provide proper care and treatment to Christopher Cullen, Jr., which they knew or should have known he required, ultimately resulting in his injuries and death.

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

- a. Choosing not to appropriately assess and reassess Christopher Cullen, Jr. to ensure that the Defendants' facility and its staff could provide the level of care that he required;

- b. Choosing not to provide appropriate care to Christopher Cullen, Jr. while he was a resident of the Defendants' facility;
- c. Failing to implement appropriate interventions to monitor and supervise residents, including Christopher Cullen, Jr., to protect their safety;
- d. Failing to properly train staff on care and management of Christopher Cullen, Jr.'s health conditions;
- e. Failing to ensure the rights and safety of its residents, including Christopher Cullen, Jr., as required by Ohio and federal regulations;
- f. 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, which included Christopher Cullen, Jr.;
- g. 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 Christopher Cullen, Jr.;
- h. Choosing to not provide accurate, adequate, or timely information to Christopher Cullen, Jr.'s family;
- i. Choosing not to adequately, timely and consistently prevent, assess, and treat Christopher Cullen, Jr.'s risk for infection and other medical conditions from which Christopher Cullen, Jr. suffered;
- j. Choosing not to adequately, timely and consistently prevent, assess and treat Christopher Cullen, Jr.'s risk for wounds;
- k. Choosing not to adequately, timely and consistently prevent, assess and treat Christopher Cullen, Jr.'s risk for dehydration;
- l. Choosing not to adequately, timely and consistently prevent, assess and treat Christopher Cullen, Jr.'s risk for malnutrition;
- m. Choosing to violate state and federal regulations governing care and staffing levels in facilities by which residents like Christopher Cullen, Jr. are a member of the class of persons intended to be protected from injuries like he suffered;
- n. Failing to sufficiently staff the facility with competent caregivers who could assess, treat, care plan, and manage the patient;
- o. Failing to provide appropriate restorative nursing and therapy to Christopher Cullen, Jr.,

- p. Failing to implement appropriate infection control practices resulting in infections;
- q. Such other acts or omissions described in this Complaint or discovered during this litigation.

101. These actions constituted a conscious disregard for Christopher Cullen, Jr.'s rights and safety with a great probability of causing substantial harm from this misconduct, by which—through heedless indifference to the consequences—the Defendants or their staff disregarded a substantial and unjustifiable risk that the health care provider's conduct was likely to cause, at the time those services or that treatment or care were rendered, constituting an unreasonable risk of injury, death, or loss to person or property, or intentional misconduct or willful or wanton misconduct. The Defendants were aware of the great probability of the harm that could result from their willful, wanton, and/or reckless misconduct.

102. The Communicare Defendants and Defendants Mounir El-Hayek, M.D. and Sandy Van Every provided care to Christopher Cullen, Jr. that fell below the standard of care expected of medical doctors and/or long-term care organizations, under the same or similar circumstances.

103. The Defendants' lack of care demonstrated conscious disregard for Christopher Cullen, Jr.'s rights and safety with a great probability of causing significant harm.

104. The Communicare Defendants' intentional decision to inadequately staff Austintown Healthcare Center demonstrated conscious disregard for Christopher Cullen, Jr.'s rights and safety with a great probability of causing significant harm.

105. The Defendants were aware of the great probability of the harm that could result from their willful, wanton, and/or reckless misconduct.

106. The Defendants' disregard for the rights and safety of residents like Christopher Cullen, Jr. created circumstances under which it became substantially certain that serious injuries would result, entitling Plaintiff to awards for compensatory and punitive damages.

107. The Defendants are directly liable for their own willful, wanton, and/or reckless misconduct.

108. The Defendants are also vicariously liable for their employees' and agents' willful, wanton, and/or reckless misconduct.

109. As a direct and proximate result of the negligence and/or recklessness described above, Christopher Cullen, Jr. sustained permanent injury and loss including, but not limited to, conscious pain, suffering, disability, and his untimely and wrongful death.

110. **WHEREFORE**, Plaintiff demands judgment against the Defendants, jointly, in an amount more than Twenty-Five Thousand Dollars (\$25,000.00), for Christopher Cullen, Jr.'s conscious pain and suffering, 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)

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

112. Plaintiff brings this Cause of Action pursuant to Ohio's Wrongful Death Statute, Ohio Revised Code section 2125 et seq., for the benefit of Christopher Cullen, Jr.'s heirs and next of kin who have suffered loss and damage due to Christopher Cullen, Jr.'s wrongful and untimely death.

113. As a direct and proximate result of the unreasonable conduct described above, Christopher Cullen, Jr. sustained physical injuries that caused his untimely and wrongful death.

114. Christopher Cullen, Jr.'s next-of-kin suffered damages as set forth in the Ohio Wrongful Death statute, including mental anguish and grief, medical and funeral expenses, and loss of Christopher Cullen, Jr.'s support, services, society, and companionship.

115. **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)

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

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

118. These violations constitute negligence and give rise to a statutory cause of action.

119. As a direct and proximate result of Defendants' violations of R.C. 3721.13, Christopher Cullen, Jr. endured conscious pain and suffering and disability, incurred medical expenses, and was otherwise harmed.

120. **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 the court finds is appropriate and / or equitable.

A TRIAL BY JURY IS HEREBY DEMANDED.

/s/ Michael A. Hill

MICHAEL A. HILL (0088130)

WILLIAM B. EADIE (0085627)

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Counsel for Plaintiff

STATE OF OHIO

CUYAHOGA COUNTY

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AFFIDAVIT OF MERIT

Affiant MARK SHOAG, M.D., having been first duly sworn, states:

1. I am an adult, with no known disability preventing my truthful testimony, and have personal knowledge of the matters contained within this affidavit.

2. I am a full-time practicing physician in the fields of Geriatric and Internal Medicine, licensed in the state of Ohio, board certified in Internal Medicine, and a medical director of a long-term acute care hospital, spending more than 50% of my professional time providing direct patient care.

3. Through my specialized knowledge, skill, training, experience, and education, I am familiar with the standard of care applicable to the medical and nursing care and treatment that was provided to Christopher Cullen Jr. in 2019, while a resident at Austintown Healthcare Center and while under the care of Mounir El-Hayek, MD and Sandy Van Every, PA.

4. I have reviewed all medical records reasonably available to the Estate of Christopher Cullen Jr. concerning the allegations of negligence causing his death.

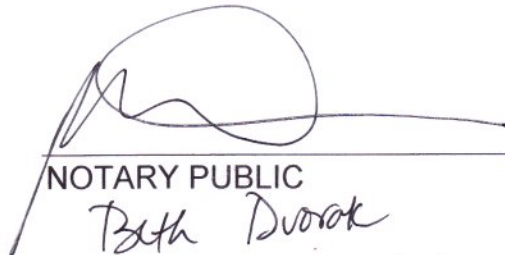
5. To a reasonable degree of medical probability, it is my opinion that the medical and nursing care and treatment provided to Christopher Cullen Jr. deviated from the established standard of care and the breach caused Mr. Cullen's infection and death.

FURTHER AFFIANT SAYETH NAUGHT.



MARK SHOAG, M.D.,

SWORN TO BEFORE ME and subscribed in my presence this 24th day of August 2020.



NOTARY PUBLIC

Beth Dvorak

No expiration date pursuant to
RC §147.03