



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

New Case Electronically Filed: COMPLAINT
April 6, 2022 16:32

By: MARK A. TASSONE 0099017

Confirmation Nbr. 2518283

ESTATE OF EDWARD J. KOTHERA, SR.

CV 22 961692

vs.

VILLA ST. JOSEPH, ET AL.

Judge: HOLLIE L. GALLAGHER

Pages Filed: 13

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ESTATE OF EDWARD J. KOTHERA, SR.,)
Care of Eadie Hill Trial Lawyers)
3100 E 45 St., Suite 400)
Cleveland, OH 44127)

PLAINTIFF,)

vs.)

VILLA ST. JOSEPH)
5200 Marymount Village Drive)
Garfield Heights, Ohio 44125)

VILLAGE OF MARYMOUNT D.B.A. VILLA)
ST. JOSEPH)
5200 Marymount Village Drive)
Garfield Heights, Ohio 44125)

VILLAGE AT MARYMOUNT)
c/o Registered Agent Jeffrey A. Myers)
5200 Marymount Village Drive)
Garfield Heights, Ohio 44125)

MARYMOUNT HEALTH CARE SYSTEMS)
c/o Registered Agent Jeffrey A. Myers)
5200 Marymount Village Drive)
Garfield Heights, Ohio 44125)

DEFENDANTS.

CASE NO.

REFILED FROM: CV-20-941313

JUDGE: HOLLIE L. GALLAGHER

COMPLAINT

WITH JURY DEMAND AND
AFFIDAVIT OF MERIT
ATTACHED

Plaintiff The Estate of Edward J. Kothera, Sr., for its Complaint against the above-captioned Defendants, states and avers upon information and belief as follows:

INTRODUCTION

1. This is a wrongful death and negligence action involving the nursing home Villa St. Joseph's substandard care causing their resident, Edward Kothera, physical injuries, pain and suffering, and wrongful death after he fell several times, suffering multiple injuries including a broken hip and brain bleed.

2. Mr. Kothera's most recent falls were on December 11, 2019, and December 13, 2019, at Villa St. Joseph.

3. Mr. Kothera died on December 24, 2019.

4. The Cuyahoga County Medical Examiner's Office accepted jurisdiction over Mr. Kothera's death and determined that Edward Kothera's death was caused by "blunt impacts to head with subdural hematoma" resulting from falls on December 11, 2019, and December 13, 2019, at Villa St. Joseph.

5. The Medical Examiner's determination is the legally accepted cause of death and creates a rebuttable presumption at trial. R.C. 313.19.

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

7. 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.

8. Plaintiff requests a trial by jury.

9. An Affidavit of Merit is attached.

JURISDICTION AND VENUE

10. This Court has Jurisdiction over 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.

11. Venue is proper in this 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 this county; and (b) part of the claim for relief arose in this county, in which county Plaintiff's Decedent was injured and died.

12. Pursuant to Ohio Civil Rule 10(D)(2), attached is an Affidavit of Merit.

DEFENDANTS

13. Defendants are Ohio corporations responsible for providing care and services to residents of Villa St. Joseph (the "Facility"), including Edward Kothera.

14. Defendants, Villa St. Joseph; Village of Marymount d.b.a. Villa St. Joseph; Village at Marymount; and Marymount Health Care Systems, hold themselves out to the public as providers of nursing care, including but not limited to, rehabilitation, skilled nursing, and long-term care, through their agents, operatives and/or employees, including through the operation of the Facility.

15. Defendants employ the care providers who were responsible for ensuring Edward Kothera's care and safety.

16. Defendants manage, control, and/or employ the nursing staff at the Facility.

17. Edward Kothera and his family looked to Defendants for care based upon their representations.

18. 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), including visiting physicians and nurse practitioners contracted with any of Defendants and/or provided to residents as default or house care providers.

19. Defendants Villa St. Joseph, Village of Marymount d.b.a. Villa St. Joseph, Village at Marymount, and Marymount Health Care Systems directly control operations at the Facility and are therefore directly liable for mismanagement of the facility without regard to piercing the corporate veil.

DEFENDANTS' MANAGEMENT OF NURSING FACILITIES LIKE VILLA ST. JOSEPH SEEKS TO MAXIMIZE PROFIT AT THE EXPENSE OF PATIENT SAFETY

20. Defendants' for-profit model means their primary goal is to maximize profit, measured by revenues (from residents and patients) minus expenses (the largest of which is staffing costs).

21. 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.

22. Defendants exercise actual control over the Facilities' 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 associated facilities, and even the name of the facility;
- k. Reporting procedures, including reporting to Medicare as to individual resident care and facility-wide issues.

23. Through this control, those Defendants make decisions that affect the day-to-day care of Villa St. Joseph residents, such as the resources available for providing nursing staff and care to residents like Edward Kothera, meaning they are responsible for the foreseeable harm that results from careless decisions while voluntarily exercising that control.

DEFENDANTS' MANDATORY REPORTING OF FACILITY RESIDENT CARE NEEDS ("RUG SCORES"), FINANCES, AND STAFFING LEVELS

24. Every nursing home receiving Medicare or Medicaid funding—including those at issue in this case—is 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.”

25. The data Defendants submit to Medicare regarding their facilities 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.

26. This information is contained in “Minimum Data Set” evaluations of residents’ care needs and treatment, and “cost reports” containing information on the

facilities' staffing levels, pay scales, hours worked, payments to companies treated as commonly owned (called "related-party transactions"), and more.

27. Medicare uses some of this data submitted by Defendants to produce its nursing home 5-star rating system, also known as "Nursing Home Compare," which Defendants use to market their facilities, and upon which the public may rely in selecting or evaluating nursing homes.

28. This data is certified correct by Defendants and/or submitted under penalty of perjury and/or civil or criminal penalties.

29. Nursing homes provide detailed information regarding the health status, care and treatment, and services provided to each resident in the facility using a standardized electronic questionnaire called the **Minimum Data Set**, or **MDS**.

30. This evaluation is done for all nursing home residents regardless of whether their care is being paid for by Medicare.

31. Nursing homes 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.

32. 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**.

33. 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.

34. 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.”

35. 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.

36. Despite this information, Defendants intentionally understaff the facilities to make more money, with the predictable outcome being increased preventable resident injuries and deaths from things like falls, dehydration, malnutrition, bedsores (pressure ulcers), and infections like urinary tract infections and sepsis.

37. This systemic understaffing leads to poor outcomes because the nursing staff is overworked and unable to provide needed care to all residents, such as turning and positioning (leading to bedsores), changing incontinent residents (leading to bedsores and infections), toileting residents (leading to increased falls and other issues), and assisting residents with eating and drinking (leading to dehydration, malnutrition, choking, and other complications).

38. Defendants failed to ensure, through their operational, budgetary, consultation and managerial decisions and actions, that Villa St. Joseph was sufficiently staffed, well managed, and staff well trained, to meet the individual needs of Edward Kothera.

39. Defendants engaged in a systemic practice to understaff its nursing home facility to maximize its profits at the expense of their residents’ care.

40. This lack of sufficient staff, poor management, and poor training, directly resulted in Edward Kothera not receiving basic and necessary services to prevent, among other things, neglect leading to injuries and death.

DEFENDANTS' NEGLIGENCE AND RECKLESSNESS
WITH EDWARD KOTHERA'S CARE

41. Defendants received Edward Kothera as a nursing home resident at the Villa St. Joseph and agreed to provide care to him in exchange for monetary payment.

42. Villa St. Joseph failed to meet Edward Kothera's care needs.

43. Defendants' systemic understaffing, inadequate training, and poor management of its Villa St. Joseph facility led to poor care of its resident, Edward Kothera, causing him to suffer, among other things:

- a. Repeated falls
- b. Right hip fracture
- c. Overmedication, resulting in reduced quality of life
- d. Subdural hematoma
- e. Death

44. While a resident of Villa St. Joseph, Edward Kothera was often found by family to be covered in unexplained bruises.

45. Defendants' staff provided excessive medications to Edward Kothera, to the point that he was at times unresponsive when visited by his spouse.

46. Edward Kothera was allowed to fall on multiple occasions while a resident at Villa St. Joseph and had to be hospitalized to treat injuries resulting from these.

47. Edward Kothera broke his right hip and sustained a subdural hematoma. Each of these wounds was the result of falls while under the supervisions of Defendants' staff.

48. As the result of this inadequate care, Edward Kothera died on December 24, 2019, from injuries sustained in falls at Villa St. Joseph.

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

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

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

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

FIRST CAUSE OF ACTION
(SURVIVORSHIP / NEGLIGENCE / RECKLESSNESS)

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

54. Edward Kothera depended on Defendants, and their respective nursing and medical staff, for medical and nursing care, treatment, evaluation, and assistance.

55. Defendants, including their medical and nursing staff, failed to provide proper care and treatment to Edward Kothera, which they knew or should have known he required, resulting in his injury and death.

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

- a. Choosing to put inadequate prevention and response interventions in place to prevent falls, infections, dehydration, and malnutrition;

- b. Choosing to provide too few, and / or underqualified nursing staff members for the resident needs at the facility to protect and provide adequate care to residents like Edward Kothera;
- c. Choosing to not provide accurate, adequate, or timely information to Edward Kothera's family;
- d. Choosing to violate state and federal regulations governing care and staffing levels in nursing home facilities by which residents like Edward Kothera are a member of the class of persons intended to be protected from injuries like those he suffered;
- e. Failing to ensure the rights and safety of its residents, including Edward Kothera, as required by Ohio and federal regulations;
- f. Choosing not to provide appropriate care to Edward Kothera while he was a resident of Defendants' Facility; and
- g. Such other acts or omissions described in this Complaint or discovered in litigation.

57. Defendants and their medical and nursing staff provided care to Edward Kothera that fell below the standard of care expected of medical care and nursing home organizations, under the same or similar circumstances.

58. As a direct and proximate result of the negligence described above, Edward Kothera sustained permanent injury and loss including, but not limited to, conscious pain and suffering, disability, and significant medical expenses and these physical injuries caused his untimely and wrongful death.

59. WHEREFORE, Plaintiff demands judgment against Defendants, jointly, in an amount more than Twenty-Five Thousand Dollars (\$25,000.00), for 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)

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

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

62. As a direct and proximate result of the negligence/recklessness described above, Edward Kothera sustained physical injuries that caused his untimely and wrongful death.

63. Edward Kothera's heirs and 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 decedent's support, services, society and companionship.

64. WHEREFORE, Plaintiff demands judgment against 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 Edward Kothera's rights as a resident of 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, Edward Kothera endured conscious pain and suffering and disability, incurred medical expenses, suffered his untimely death, and was otherwise harmed.

69. WHEREFORE, Plaintiff demands judgment against Defendants, jointly, 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.

/s/ Mark A. Tassone

MARK A. TASSONE (0099017)

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Counsel for Plaintiff

STATE OF
CUYAHOGA

) AFFIDAVIT OF MERIT
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Affiant MARK SHOAG, MD, having been first duly sworn, states:

1. I am an adult, have 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 Edward Kothera while a resident of Villa St. Joseph.

4. I have reviewed all medical records reasonably available to Carol Kothera concerning the allegations contained in the complaint.

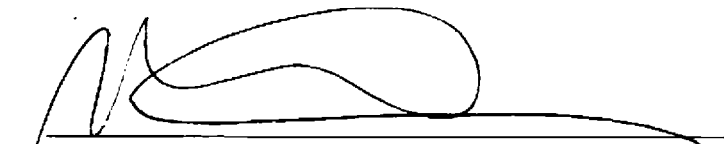
5. To a reasonable degree of medical probability, the Defendants Villa St. Joseph, Village of Marymount d.b.a. Villa St. Joseph, Village at Marymount, Marymount Health Care Systems, breached the standard of care and the breach caused Edward Kothera's injuries and death.

FURTHER AFFIANT SAYETH NAUGHT.



MARK SHOAG, MD

SWORN TO BEFORE ME and subscribed in my presence this 6th day of April, 2022.


NOTARY PUBLIC
Beth Dvorak

*My commission has no
expiration date pursuant
to R.C. §147.03*