

Partnering with Legal Advocates: Reform Through Class Action Litigation

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HOW CAN CLASS ACTION LITIGATION BE USED TO REFORM FAILING INSTITUTIONS?

- ▶ Class actions are a powerful tool to make systemic change. Court orders can require unsafe nursing homes to make significant changes to improve the lives of patients.
 - ▶ *Farruggio v. 918 James Receiver et al.*, 00383/2017 (N.Y. Sup. Ct.): Court ordered the defendant to spend millions of dollars hiring additional staff so that the home is now much better staffed and ordered the home to meet quality performance benchmarks.
- ▶ Court orders can also hold homes financially accountable for mistreating residents, which incentivizes safer homes.
 - ▶ *Bates v. Skilled Healthcare Grp., Inc.*, No. DR060624 (Cal. Sup. Ct.): Court entered a judgment of over \$50 million against a home that failed to properly care for its residents.

WHEN IS LEGAL ADVOCACY APPROPRIATE?

- ▶ Class action litigation is appropriate when a nursing home is systematically failing to provide adequate and safe care to its residents.
- ▶ Indicators that a class action may be appropriate include:
 - ▶ CMS Data showing problems
 - ▶ Obviously understaffing and/or disgusting physical conditions
 - ▶ Numerous complaints from residents and their families, and/or from employees
- ▶ Individual litigation may be appropriate when an individual has been harmed by a (relatively) unusual occurrence of significant magnitude, such as when the nursing home or its employees were negligent and caused a patient severe harm or death.

HOW CAN YOU BE PART OF LEGAL ADVOCACY?

- ▶ Bringing a case to an attorney
 - ▶ Knowing when a case may be appropriate
 - ▶ What information needs to be shared
 - ▶ Be sure to only share information you can legally share.
- ▶ Be a fact witness
 - ▶ You can describe unlawful situations you have witnessed.
- ▶ Be an expert witness
 - ▶ My experience as an expert witness with Jeremiah

HOW CAN YOU BE PART OF LEGAL ADVOCACY?

Review Medical Records

- ▶ Read medical records, not as a medical professional, but as an expert in regulations - did the records indicate that the facility complied with regulations?
 - ▶ Does it appear that the home has violated the Federal and State staffing requirements for nursing homes?
 - ▶ If it has violated these rules, has this affected the care of all the residents in the home?

HOW CAN YOU BE PART OF LEGAL ADVOCACY? - Reviewing Medical Records

From My Expert Report

- ▶ Based upon my review of the available information, it is my opinion thatRehabilitation & Nursing Care Center has violated Federal and State standards for nursing homes, including staffing requirements. In addition, it is my opinion that these violations must have affected all the residents of ..., given their high percentages of residents with negative outcomes.

HOW CAN YOU BE PART OF LEGAL ADVOCACY? - Reviewing Medical Records

- ▶ First, there is an indisputable correlation between the number of nursing home staff who provide direct care to residents on a daily basis and high quality of care and quality of life for residents.
- ▶ Second, ...“Quality Indicators/Measures” - i.e., negative outcomes - as reported by the Federal and State governments, demonstrate a number of “red flags.”
- ▶ Third, ... staffing levels - as reported by the Federal government - indicate understaffing.
- ▶ Fourth,negative resident outcomes, including the negative ...unlawfully low level of staffing, -- indeed, the Federal Government has given the home the lowest possible staffing rating for each of the last seven years.

HOW CAN YOU BE PART OF LEGAL ADVOCACY? - Reviewing Medical Records

- ▶ When she was admitted in May 2012 the resident did not have contractures or a wound on her head. She did have an ulcer on her buttocks. She was gerri-chair bound and needed total care.
- ▶ Within a month she needed ointment on her head and by October, 2012 she had a stage 4 decubitus.
 - ▶ (Decubitus ulcers, commonly referred to as bedsores or pressure ulcers, develop in individuals that are chair bound or bed bound for an extended period. Many ulcers can begin forming in as little as a week when lying or sitting in the same place. Pressure ulcers are preventable in most every case - gave reference.)

HOW CAN YOU BE PART OF LEGAL ADVOCACY? - Reviewing Medical Records

- ▶ She also developed contractures by October of 2012.
 - ▶ (Contractures represent a common but preventable source of excess disability among nursing home residents . People who are physically inactive for long periods of time are at risk for developing contractures. As a direct result of physical inactivity and the failure to regularly move a limb or joint through its full range of motion, muscle fibers begin to break down and joints begin to stiffen, which can lead to the affected limb slowly pulling toward the body and becoming rigid - gave reference.)

HOW CAN YOU BE PART OF LEGAL ADVOCACY? - Reviewing Medical Records

- ▶ This nursing home has had a very low level of staff for many years. In my opinion, the resident's development of both decubitus ulcers and contractures may be due to such low staffing.
- ▶ ***The medical records indicate that care for the ulcers and contractures were ordered and given.*** However, with such low levels of staff, it is hard to see how they had the staff or time to give such care. Staff is needed to turn physically inactive residents and bed bound and chair bound residents every two hours (which was ordered), give frequent skin care and frequent range of motion activities. The resident's body would have needed to be checked every day from head to toe to check for redness that might lead to ulcers. Facility staff need to take the time to properly exercise and stretch the limbs and joints of immobile residents to prevent contractures.

HOW CAN YOU BE PART OF LEGAL ADVOCACY? - Documenting Information

- ▶ Wrote an expert report for the court on the importance of using the MDS to accurately determine the acuity level of residents which can translate into needed staff. The case focused on the need for more staff and the facility did not want to release the MDS scores of the residents; it wanted to provide only the CMIs.
 - ▶ What is the MDS?
 - ▶ How is it used?
 - ▶ How burdensome is it to be communicated?
 - ▶ Is the MDS for the residents in a nursing home a better and more useful measure of their acuity than the CMI for that home?

HOW CAN YOU BE PART OF LEGAL ADVOCACY?

Suit Against James Square In Syracuse New York*

- ▶ The nursing home did not have enough staff to regularly care for incontinent residents, at least one of whom frequently goes entire nights without being changed.
- ▶ James Square was unsafe, understaffed and negligent in its care of residents.
- ▶ Understaffing led to the death of Theresa A. Farruggio, who died in 2016 at age 79.

*Farruggio v. 918 James Receiver

https://www.syracuse.com/health/2017/10/syracuse_nursing_home_left_residents_lying_in_urine_feces_lawsuit_says.html

SUIT AGAINST JAMES SQUARE IN SYRACUSE NEW YORK

- ▶ Farruggio fell on Dec. 28, 2015 after being left unattended, according to the complaint. Instead of taking Farruggio's vital signs or sending her to a hospital, staff " ... simply returned her to her bed, put her on oxygen, gave her a Xanax (sedative), and left her to fend for herself."

SUIT AGAINST JAMES SQUARE IN SYRACUSE NEW YORK

- When her son arrived after the fall, he called 911 and she was taken to a hospital where she was diagnosed with respiratory failure, pneumonia, acute renal failure and a urinary tract infection. She was put on comfort care and died in the hospital.
- Farruggio's urinary tract infection was "... likely due to having been left in her own urine and feces for extended periods of time by staff at the facility."
- ▶ Another resident has been left in her own waste on many occasions and frequently goes entire nights without being changed.

HOW CAN YOU BE PART OF LEGAL ADVOCACY? WORKING WITH ATTORNEYS ON SETTLEMENT

- ▶ Worked on settlement that included requirements to increase staffing and improve quality indicators and increase star rating.
 - ▶ Analyzed the facility's staffing and quality indicators in comparison to other facilities
 - ▶ Conference calls with lawyers, owner and professional staff, negotiating benchmarks to be met

HOW CAN YOU BE PART OF LEGAL ADVOCACY?

- ▶ Settlements are a negotiation. Although we did not get everything we wanted, we did get:
 - ▶ Substantial increase in staffing
 - ▶ Facility had to meet the NYS average for 2 out of the 3 staffing averages: LPN/LVN, CNAs, RNs.
 - ▶ Substantial increase in a number of quality indicators
 - ▶ Facility had to attain the NYS averages for 8 of the 10 chosen indicators
 - ▶ All results had to be above the bottom quartile of the NYS averages

HOW CAN YOU BE PART OF LEGAL ADVOCACY? RESULTS OF PARTNERSHIP

STAFFING

Staffing Ratings	Facility	NY Average	National Average
Total # of licensed nurse staff hours per resident per day	1 hour and 36 minutes	1 hour and 31 minutes	1 hour and 33 minutes
RN hours	27 minutes	42 minutes	40 minutes
LPN/LVN hours	1 hour and 9 min	49 minutes	53 minutes
CNA hours	2 hours and 41 minutes	2 hours and 14 minutes	2 hours and 19 minutes

Improvement in Quality Indicators

INDICATOR	% IN 1ST QUARTOR 2018	% IN AUG 2019
LONG TERM RESIDENTS		
High risk with pressure ulcers	4.03	2.7
Lose too much weight	9.69	11
UTI	2.72	1.1
Restraint Use	0.3	0
Need for help with daily activities has increased	14.23	12.7
Falls causing major injury	3.3	2.8
Antipsychotic med	14.42	10.8
Move independently worsens	20.88	19.5
SHORT TERM RESIDENTS		
New or worsened pressure ulcers	0	0
Antipsychotic med	2.3	1.1

HOW TO FIND LAWYERS WHO DO CLASS ACTION SUITS

- ▶ Ask any lawyer you know for recommendations
- ▶ Call friends
- ▶ Contact your state bar association
- ▶ Look at Martindale Hubble
 - ▶ Look up areas of practice: class action
 - ▶ Look up geographical areas
- ▶ Check <https://www.classaction.org/>
- ▶ Check the background of the lawyer
 - ▶ Google the lawyer and her/his firm
 - ▶ Go on firm's website: where studied; what cases they have done; check bios; check references.