

REPRESENTATIVE DIANE GRENDELL (HB 606)
SENATOR MATT HUFFMAN (SB 308)

SENATE JUDICIARY COMMITTEE

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COMMENT AND OPPOSITION IN PART
TO SUB. H.B. NO. 606

INTRODUCTION

I am a Certified elder law attorney. I have been a specialist in this area since 2006 and an attorney in private practice since 1998. I am a graduate of Cleveland Marshall College of Law and the University of Cincinnati. I am a past president of the Ohio chapter of the National Academy of Elder Law Attorneys and the Life Care Planning Law Firms Association. I am active with the National Elder Law Foundation. I have also taught Elder Law to students at Cleveland Marshall College of Law and Case Law School as a guest lecturer.

I do not take tort cases of any type. I have represented thousands of elderly clients, most of whom have spent some time in nursing homes and long term care facilities. My experience has caused me to view the immunity legislation as it pertains to long term care facilities and intermediate care facilities with serious concern.

As such, I am testifying against inclusion of these facilities in the legislation herein SB 308 and its companion HB 606.

ARGUMENT

Nursing homes are responsible for the most vulnerable among us. Good nursing homes provide quality care that adds to the dignity of our family members and my clients. Bad nursing homes are a nightmare that allow our vulnerable elderly to die and suffer misery. This is true with COVID-19. Most nursing homes seem to have avoided COVID-19 running through their

facilities. However, many facilities are negligent and this has led to a high number of cases and deaths.

The negligence can be as simple as not isolating COVID patients, not donning PPE, not monitoring their staff or other visitors, or allowing staff to work at multiple facilities and thereby carry the virus from facilities that are affected to facilities that are not.

House Bill 606 in its findings in section 5 states as follows:

“Business and premises owners have not historically been required to keep members of the public from being exposed to airborne viruses.”

This is true for nearly all the business owners covered by this bill, but it is not true for long term care facilities. Long term care facilities have dealt with flu outbreaks, C-Diff (a highly contagious GI bug) and MRSA. They should not be granted immunity like the neighborhood coffee place. They should not be granted immunity at all and if they are, they should not be entitled to immunity if they are negligent.

I was in a nursing home to have a client sign a power of attorney. I had taken all the precautions including gloves, temperature check, and a mask. I called ahead to schedule a time and make sure we had gone over procedures. I was to see through a window but then had to come in to go through the screening. Since I knew my client had C-Diff, and no COVID was present in the facility, I was mainly worried about the C-Diff. Despite our precautions, this gentleman was wheeled through the entire facility with C-Diff risking staff and other residents, least of all myself. Facilities play fast and loose all the time with infectious disease and should not be entitled to immunity.

The concern that nursing homes will hide behind this immunity is serious. If the immunity was only tied to the COVID diagnosis that could be understandable. However, there is a serious fear that nursing homes will hide behind COVID for cases where they allowed pressure ulcers or falls to occur and the facility will say that because of COVID, they are understaffed and that caused their negligence.

I have another client that actually had COVID in February and recovered from it. She subsequently developed a bone deep bedsore. The bedsore was exacerbated from the facility failing to turn her when she had COVID. Now that she has recovered, the facility is simply saying that she is on hospice so there is nothing they can do about this huge painful sore. This is exactly the type of case that this law would protect the nursing home from if the son wanted to take action. This is completely unacceptable as first, they should have turned her during the COVID treatment and secondly they could have treated this bedsore since the COVID cleared.

Even if they do not see derivative liability for non-COVID related deaths, not all nursing homes are notifying family members about COVID positive residents. The Ohio Department of Health website only requires notification on Wednesdays and when it went to that structure, there were cases that were lost. For example, before that date, there was an assisted living in Cleveland called Stone Gardens that had 26 cases and multiple fatalities including a good friend of mines' mother. When I asked what happened, they said it was COVID and had never heard of anyone

having a case in the facility. That is when I checked and saw the 26 cases listed on the ODH website. I called my friend back and she had never been told. Fast forward to the next week and there were 0 cases. Zero for Stone Gardens, zero for Menorah Park. Was it gross negligence to fail to notify the family? Probably not, but without some cause of action, this family will never know what happened because they can't see redress which would include discovery in a case.

If the cases are not reported accurately to ODH or to CMS there is a major problem with transparency. Seeing how nursing homes manipulate the ODH numbers by potentially sending their COVID positive residents to hospitals so they are not counted in their weekly numbers. This lack of transparency means that we cannot grant immunity to these facilities and if you do, you must look at what the data says before granting such broad immunity to long term care facilities. That analysis takes time. Pushing this through for the long term care industry will let them off the hook for COVID that runs rampant through their facilities because of ordinary negligence.

This questionable care concern is combined with the fact that families are literally shut out of the process of caring for their loved one. Of course, families understand that they do not want to cause their elderly loved one to be exposed to COVID. They do not want to bring in COVID and risk death. Nursing homes rely on family members to make sure elders are fed, bathed, have no skin ulcers, have companionship and love. For our loved ones with dementia, families provide comfort and reorient their loved one when their symptoms flare up. Families are being asked to blindly trust a nursing home's level of care when many times, it falls short. Maybe the staffing was down or maybe the elder was combative. When a family member cannot be there, the fear of negligent care is real and scary. Then, with this law, you are providing facilities with a "Get of a lawsuit free" card at the time when they need the nursing homes to be scared enough to provide good care.

CONCLUSION

In summary, I request this committee remove long term and intermediate facilities from this immunity statute. In the alternative, take more time and do more research on family concerns, transparency in number reporting and how to address expansion of immunity that nursing homes will necessarily out of their own self preservation seek to abuse in this legislation. Also in the alternative, would be to allow for an exemption for ordinary negligence to the blanket immunity. The elderly are not expendable in this debate. They must be protected!

Thank you for your time.