

## RESIDENTS OF COUNTY OPERATED NURSING HOMES ARE UNPROTECTED FROM NEGLIGENT ACTS\*

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Baby Boomers Beware! The United States Census Bureau projects Americans over the age of sixty five will grow from thirty-five million to seventy-two million by 2030. This escalation will result in a dramatic need for quality nursing homes.

With almost one out of every three nursing homes being cited for a neglect or abuse violation, the Ohio General Assembly statutorily enacted the Nursing Home Bill of Rights to help protect residents. The Nursing Home Bill of Rights sets out thirty two distinct rights for all residents including the right to be free from abuse and the right to adequate and appropriate medical care. The statute provides that if any of the rights are violated the resident has a cause of action against the home or any persons committing the violation.

Under Ohio law, every potential resident of a nursing home is given a copy of the Nursing Home Bill of Rights and a set of provisions explaining them. However, unbeknownst to many, almost ten percent of residents are living under a false sense of security because the Ohio Political Subdivision Tort Liability Act dismisses the responsibilities of county homes and their employees for negligent acts. Stated differently, residents of county owned homes do not have a cause of action when their rights are violated.

Ninety percent of homes are privately owned. The government owns the other ten percent. The majority of government owned homes are run by individual counties. A county is considered a political subdivision and therefore protected by the tenets of sovereign immunity.

Sovereign immunity denies recovery to injured persons without regard to the county's culpability or the persons need for damages. In Ohio, political subdivisions are protected from liability under the Political Subdivision Tort Liability Act. This flip-flop statute confers general immunity onto the Political subdivision. Subsequently, the political subdivision's immunity can be removed for specific situations. However, the political subdivision has one last opportunity to regain immunity by asserting a proper defense.

Ohio courts agree that the Nursing Home Bill of Rights expressly imposes liability on nursing homes. However, the county home can regain immunity by showing the injury occurred in connection with the exercise of discretion in deciding how to use equipment, supplies, materials, and other resources. Current Ohio courts have interpreted this to mean that a nurse's decision how to move patients and care for them is a discretionary decision. In other words, a county owned nursing home employees' decision on how to provide medical care in a nursing home is a discretionary function.

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Moreover, employees of political subdivisions are immune unless it can be proven that their acts or omissions were made with malicious purpose, in bad faith, or in a wanton or reckless manner. Accordingly, employees of political subdivisions are not held accountable for their negligent acts or omissions.

The Supreme Court of Ohio now must decide if the Nursing Home Bill of Rights expressly imposes liability on nursing homes employees. Without an affirmative decision to this question, residents of county homes will remain unprotected.

The Ohio General Assembly enacted the Ohio Nursing Home Bill of Rights to protect all of the residents of nursing homes—not just those fortunate enough to afford private homes. Ohio's elderly population deserves to be treated fairly and not misled.

With the elderly becoming the fastest growing segment of our population, immediate attention and change is required to help protect the aging. First, all county homes need to disclose information regarding a residents' rights at a county home facility. Currently, half of the county homes do not disclose and they are county operated in their names. Moreover, residents are handed a copy of the Nursing Home Bill of Rights when they enter. County homes need to disclose how the Ohio Political Subdivision Tort Liability Acts will hinder any negligent cause of action. Second, the Ohio legislature could step in and waive political subdivision immunity from all county owned homes just like they did for county hospitals. This action would remove the county home from the protections of the Political Subdivision Immunity Act. Stated differently, all nursing home residents would have a cause of action against any home and employee of the home if their rights were violated.