Shelby County Government

LEE HARRIS
MAYOR

June 9, 2020

Shelby County Delegation to the Tennessee General Assembly
Tennessee State Capitol
600 Dr. M. L. King Boulevard
Nashville, Tennessee 37243

VIA ELECTRONIC MAIL ONLY

Dear Shelby County Representatives and Senators:

As elected officials, we are all still grappling with the effects of the novel coronavirus on our communities, our families, and our public responsibilities. Thank you for your commitment to service, especially in the context of a "split" session that requires your presence in Nashville in June.

I am writing to you because my work as County Mayor has brought an important issue to my attention. One of the most dismaying aspects of the spread of COVID-19 has been the outbreaks among our most vulnerable populations. Our elderly and our disabled citizens who reside in nursing homes have experienced significant outbreaks in their facilities. We have too many outbreaks at nursing homes in our state and this problem begs for a state solution. I believe we all have an obligation to protect these residents.

Here in Shelby County, we have had outbreaks at 20 long term care facilities, many of which are nursing homes or include nursing home care. One of those nursing homes has had 19 coronavirus deaths. Three long term care facilities here in Shelby County have more than 70 residents with coronavirus. And that is nowhere near the Gallatin, Tennessee facility that has had more than 150 residents who tested positive. We need laws in place that give nursing home owners and investors incentives to keep residents safe. Furthermore, families need to rest assured that misplaced priorities and protections for nursing home investors do not prevent them from being made whole if a family member is injured.

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Many of you are aware of the legislative changes dating back to as early as 2008. In 2011, nursing homes became "health care providers" rendering all causes of action against them to be treated as healthcare liability actions (commonly known as medical malpractice). This change has made it substantially more difficult to hold badly behaving actors accountable. Then, in 2015, investors and owners of nursing homes were exempted from all liability. In addition, I am aware of proposed legislation now being drafted that would substantially expand legal immunity for those who own the facilities where our senior and disabled citizens reside.

While I understand the many competing interests that you must consider, my "ask" is that you keep our senior citizens and permanently disabled citizens who reside in nursing homes at the forefront of your minds during this second half of the "split" legislative session. Specifically:

1. ***Extend the statute of limitations for nursing home claims due to families' inability to discover injuries during the "no visitation" policies.***

   Unfortunately, many families are not told of injuries experienced by their loved ones in nursing homes. They are left to discover those injuries when they visit, or when their family members go to outside medical professionals. During this period of pandemic, families are not able to have their "eyes on" their loved ones. This means that some injuries will not be observed until much later than usual – and perhaps, only after a review of medical records. The statute of limitations for nursing homes claims should be extended by at least one year for living nursing home residents who survive their injuries, and by one year from the date of death of deceased nursing home residents, regardless of the date of the injury.

2. ***Require substantial insurance coverage for nursing homes.***

   Right now, every day drivers must maintain minimum levels of car insurance on any vehicles they own. Vehicle owners are not required to maintain "collision" insurance, but they must insure their vehicles for at least $15,000 in property damage per accident, at least $25,000 per person and $50,000 per accident for bodily injury liability, and at least $25,000 per person and $50,000 per accident for uninsured motorist bodily injury.

   Here in Tennessee, entire nursing home facilities are often insured for as little as $25,000 per incident. This means that no matter the injury, or the level of pain and suffering, the most that the person or the family can receive is $25,000 – including attorney fees. Effectively, Medicare subsidizes nursing homes that fail to provide an adequate level of care for its residents.

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Our seniors should not be punished with such a gross devaluing of their lives and of their care experience in a nursing home. While many nursing homes provide exceptional service, where they do not, and where injury results, the individuals and families should be able to recover amounts more closely aligned with the resulting medical bills and the pain and suffering of the resident.

3. ***Nursing home owners who control nursing home operations or who have controlling financial interests must be accountable when a resident is injured.***

   Business owners have a lot of protection from liability, even when their decisions about an action or an inaction causes harm. They can form corporations, limited partnerships, limited liability companies and other formations that can protect them from liability. Nursing home residents should not have less protection than nursing home business owners. Instead of protecting our elderly and disabled nursing home residents, we have protected out of state investors whose business decisions harm vulnerable Tennessee residents. We should no longer provide immunity from claims for owner decision-makers and controlling investors for Tennessee nursing home residents.

4. ***Do not expand legal immunity for nursing homes.***

   The novel coronavirus has resulted in adjustments for all of us. And nursing homes must have the flexibility to adjust to continue to provide adequate levels of care for their residents. However, expanded legal immunity for claims that are simply made during the coronavirus pandemic relieves nursing homes from having to provide the same level of care as they did prior to the emergency declarations. Nursing homes should be doing more for their residents rather than less.

   An early version of the proposed bill created heightened standards for claims from even routine care just because it occurred during the pandemic. Recovery should not be limited to malicious, reckless or willful misconduct. The bill also excluded pain and suffering altogether. The pain and suffering of our seniors should not be discounted by the legislature.

   We must continue to provide these residents recourse for their injuries from nursing home failures to nourish and hydrate our seniors, as well as provide adequate medical care. And where there are coronavirus-related claims, for failure to test, or failure to isolate, nursing homes will have the same defenses to raise as they did prior to the pandemic. They will be able to point to the medical guidance from the CDC and from the Tennessee and local health departments, and the judge or jury can

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decide whether their efforts to comply were adequate. Silencing that debate will permit nursing homes to provide inadequate care, and to avoid accountability.

5. ***Retroactive laws are unconstitutional.***

   Do not make expanded legal immunities retroactive. This simply creates busy work for the attorneys and the court. It is well-settled that Tennessee courts do not recognize laws that are made to be retroactive. We are all subject to the laws as they exist at the time of the incident.

6. ***Protect essential front-line workers.***

   Require facilities to provide adequate PPE, and to replace it upon request. Require paid sick leave so that employees do not feel pressured to work when they are sick, and so that they can remain isolated while awaiting test results.

7. ***Require Tennessee Department of Commerce to report the amount paid out in claims against nursing homes by County.***

   The Tennessee Department of Commerce collects claims data from both attorneys who file claims and from facilities and providers against whom claims are made. This includes both court judgments and settlements. The resulting annual report includes the amounts of all claims against all nursing homes statewide. Consumers and residents should be able to examine claims at the County level, in order to understand where there may be hotspots of care issues.

8. ***Require timely disclosure to facility residents and their family caregivers when an outbreak occurs.***

   Where there is a documented outbreak of two or more positive tests, the facility should notify all residents, employees, and families within 24 hours of any notification of the second positive result. Public disclosure should be made within 48 hours in the interest of public health.

9. ***Remove non-medical nursing home business decisions from healthcare liability causes of action.***

   Many claims that arise from individuals in nursing homes are not medical in nature. These are claims that relate to hygiene, hydration, personal positioning, staffing levels, among others. These kinds of claims are not about medical care, and should not require a medical doctor as an expert witness. The strict healthcare liability standards for these more basic tort claims let nursing homes off the hook for failure

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to have enough staff to make sure that our seniors are regularly bathed, and that our seniors who are confined to their beds do not develop bed sores. Nursing homes should not be classified as healthcare providers – only the doctors, nurses, and medical aides at nursing homes should be classified as healthcare providers.

We will all continue to learn of unanticipated effects of this public health emergency. Where we can anticipate ill effects on our most vulnerable populations, we must work to protect them. Our seniors have bestowed the fruits of their productive lives upon all of us, and we must give them the best care that we can in their advancing years. Where we fail to do so, there must be appropriate remedies. Please let me know how I can support your work in this regard.

All the best,

Lee Harris
Mayor

LH/jli

Cc: Chief Administrative Officer Dwan Gilliom
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