

## COMPENSATION FOR RESIDENT-TO-RESIDENT ATTACKS IN SENIOR LIVING FACILITIES

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*Residents of assisted living facilities, nursing homes, and other types of senior living facilities are vulnerable to being violently attacked by fellow residents. These attacks are occurring with unexpected regularity. This Article examines the problem by first reviewing the literature with an examination of the more commonly adopted preventive measures. It then discusses the monetary compensation that might be recovered from irresponsible facility operators when injury or death results from an act of avoidable violence committed in a senior living facility.*

### I. Introduction

Contrary to the common perception that nursing homes, assisted living facilities, and other senior care and senior living facilities are scenes of tranquility, elderly residents are frequently attacked by other residents in these places.<sup>1</sup> Although the staff members of these facilities

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1. Catherine Hawes & Anne-Marie Kimbell, *Detecting, Addressing and Preventing Elder Abuse In Residential Care Facilities*, TEX. A&M HEALTH SCI. CTR. (Jan. 2010),

are, at times, responsible for abusing elderly residents, the more significant threat to their safety is the risk of attack from fellow residents who suffer from various brain disorders, including dementia.<sup>2</sup> Because of this possibility, owners and operators of these facilities must take reasonable precautions to prevent internecine elderly violence from occurring or face potential civil liability for injury to, or death of, these senior citizens.<sup>3</sup>

The Census Bureau projects that the number of individuals sixty-five and over in the U.S. population will more than double between now and 2050, particularly when the “baby boom” generation enters their elderly years.<sup>4</sup> Many of these elderly citizens will find it necessary to relocate from their homes to senior facilities, which provide more care, but also provide increased opportunities for abuse and neglect to occur.<sup>5</sup>

In recent years, news outlets have reported on the violent attacks being committed by, and upon, elderly residents in senior living facilities. Safety concerns of this nature are brought to the public’s attention and highlighted when, for instance, video recordings surface showing an eighty-six-year-old resident being punched fifty times by another

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<https://www.ncirs.gov/odfiles1/nii/grants/229299.pdf>; Chris Serres, *When Roommates are the Abusers*, STARTRIBUNE (Nov. 14, 2017), <http://www.startribune.com/surging-resident-on-resident-violence-rarely-investigated/450625693/>.

2. Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 N. ENG. J. MED. 1947, 1947–56 (Nov. 2015).

3. Kirk Mitchell, *Aurora nursing home sued again after resident beats wheelchair-bound 92-year-old woman, Jury awarded other plaintiff beaten by same resident \$3.6 million*, DENVER POST (June 19, 2019, 12:45 PM), <https://www.denverpost.com/2019/06/19/renew-aurora-nursing-home-sued-dementia-patients/>; Bea Lewis, *Lawsuit calls health system guilty of medical negligence in elderly woman’s death*, N. H. UNION LEADER (July 10, 2018, 8:14 PM), <https://www.herhealthonly.com/lawsuit-calls-health-system-guilty-of-medical-negligence-in-elderly-womans-death-the-union-leader/>; Lois Bowers, *Admission error, understaffing led to resident’s loss of eye, lawsuit maintains*, MCKNIGHT’S SENIOR LIVING (Feb. 21, 2018), <https://www.mcknightsseniorliving.com/news/admission-error-understaffing-led-to-residents-loss-of-eye-lawsuit-maintains/article/745475/> [hereinafter Bowers].

4. U.S. CENSUS BUREAU, POPULATION DIVISION, *Sixty-Five Plus in the United States* (May 1995), <https://www.census.gov/population/socdemo/statbriefs/agebrief.html> (last updated Oct. 31, 2011, 10:07 PM).

5. See Bowers, *supra* note 3.

resident.<sup>6</sup> Much of this violence can be attributed to dementia<sup>7</sup> and hallucinations,<sup>8</sup> as well as sexual depravity.<sup>9</sup> The horrific details of these acts are being exposed not only by the media but by what is learned in lawsuits as well. One lawsuit revealed that, for apparent amusement, facility workers watched as a vulnerable elderly resident was beaten with a belt and dragged across the floor by a fellow resident.<sup>10</sup> In another case, employees of a nursing home failed to stop a ninety-year-old resident from being sexually assaulted when the facility knew that the perpetrator tried raping a different patient earlier that same day.<sup>11</sup>

Professionals from an array of disciplines are studying this problem, including gerontologists, mental health professionals, security professionals, criminologists, caregivers, insurance adjusters, attorneys, and operators of senior facilities.<sup>12</sup> Family members of the victims, as well as family members of the perpetrators themselves, seek to understand the violence which has occurred and to have these questions addressed: Why are these violent attacks occurring? How often do the attacks occur? How do we identify potential offenders and their victims? What can be done and should be done to reduce this violence? What is the potential for imposing civil liability in such situations?

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6. Elizabeth Cohen & Michael Nedelman, *Retirement home shut down months after attack on 86-year-old*, CNN, <https://www.cnn.com/2017/12/28/health/retirement-home-neglect-florida/index.html> (last updated Dec. 28, 2017).

7. Dan Scalan, *Jacksonville man, 61, dies after attack in nursing home; fellow resident with dementia suspected in attack*, FLA. TIMES-UNION JACKSONVILLE (Jan. 28, 2016, 5:12 PM), <http://www.jacksonville.com/news/crime/2016-01-28/story/jacksonville-police-investigate-nursing-home-death-involving-dementia>.

8. Elizabeth Simpson, *Senior care facilities mix the frail and the disturbed*, VIRGINIAN-PILOT (Feb. 22, 2015, 12:00 AM), [https://pilotonline.com/news/local/health/article\\_25627136-e02a-555d-9a96-4f564f7b1c3d.html](https://pilotonline.com/news/local/health/article_25627136-e02a-555d-9a96-4f564f7b1c3d.html).

9. Roger Waters, *Sex Offender Accused of Sexually Assaulting Elderly Living Center Patient*, PITTSBURGH NEWS (Sept. 16, 2010, 2:35 PM), <http://www.wpxi.com/news/news/sex-offender-accused-of-sexually-assaulting-elder/nGW5g/>.

10. Michael J. Davidson, *Governmental Response to Elder Abuse and Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*, 12 ELDER L.J. 327, 331 (2004) [hereinafter Davidson].

11. Bruce Vielmetti, *Rape Victim's Family Sues Nursing Home*, J. SENTINEL: MILWAUKEE NEWS (Nov. 26, 2010), <http://www.jsonline.com/news/milwaukee/110893629.html>.

12. U.S. DEP'T OF JUST. OFF. OF VIOLENCE AGAINST WOMEN, *A National Protocol for Sexual Assault Medical Forensic Examinations*, 1, 13 (Apr. 2013), available at <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

Until now, much of the literature published on the problem of elder abuse focused primarily on abuse committed by caregivers in senior facilities.<sup>13</sup> Recent research, on the other hand, has begun to examine the problem of violent attacks on elderly residents perpetrated by their contemporaries.<sup>14</sup> It may be that internecine elderly violence presents a greater danger and threat to resident safety than elder abuse committed by the employees who staff these facilities.<sup>15</sup> Of course, not all violence is preventable, but owners and operators of senior care and living facilities are uniquely positioned to implement reasonable measures in order to prevent such violence from occurring.<sup>16</sup>

This Article further examines the growing problem of resident-to-resident violence and discusses the civil caselaw generated by these unfortunate events, in the four remaining sections. Part II addresses the types of senior living facilities in the U.S. and the prevalence of violence in them, including an analysis of the victims and perpetrators, the triggers to violence, and the various violence prevention strategies. Part III extensively discusses current legal remedies such as civil lawsuits and negligence, as well as special relationships, legal duty, causation, and various tests of foreseeability in this context. Additionally, this Article will examine the viable theories of liability, including premises liability

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13. U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-312, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE, 1, 1-4 (Mar. 2002) available at <https://www.gao.gov/new.items/d02312.pdf>; Kevin B. Dreher, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go From Here?*, 10 ELDER L.J. 119, 109, 111-13, 114-43 (2002).

14. Ryan Hall et al., *Nursing Home Violence: Occurrence, Risks, and Interventions*, *Annals of Long-Term Care*, 17 ANNALS OF LONG-TERM CARE 25, 25-31 (Jan. 2009) available at <https://www.managedhealthcareconnect.com/content/nursing-home-violence-occurrence-risks-and-interventions> [hereinafter Hall et al.]; Tony Rosen et al., *Resident-to-Resident Aggression in Long-Term Care Facilities: An Understudied Problem*, 13 AGGRESSION & VIOLENT BEHAV. 77, 77-87 (2008) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2741635/> [hereinafter *Resident-to-Resident Aggression*]; Tony Rosen et al., *Sexual Aggression Between Residents in Nursing Homes: Literature Synthesis of an Underrecognized Problem*, 58 J. AM. GERIATRICS SOC'Y 1970, 1970-79 (2010) [hereinafter *Sexual Aggression Between Residents*].

15. Sheri Hall, *Aggression Between Nursing-Home Residents More Common Than Widely Believed, Studies Find*, CORNELL CHRON. (May 29, 2008), <https://news.cornell.edu/stories/2008/05/aggression-between-residents-prevalent-nursing-homes>.

16. BARBARA ACELLO, THE LONG-TERM CARE LEGAL DESK REFERENCE: UNDERSTANDING AND MINIMIZING RISK FOR NURSING HOME MANAGERS 253 (2d ed. 2013) (claiming the ABC plan is a very effective method for managing behavior problems and explaining it may be used for both alert and cognitively impaired residents.); Nora L. Tooher, *Rising Nursing Home Violence Spurs Increase in Lawsuits*, LAW. WKLY. USA (May 9, 2005).

cases involving inadequate security. Part IV provides pre-lawsuit recommendations for litigators who handle these cases, including evidence preservation and expert consultations. Part V involves litigation strategies for both the plaintiff and defense, including a discussion of pleading claims and defenses, the importance of site visits conducted by security experts, depositions, motion practice techniques, offers of proof, and impermissible damage arguments.

## II. Facts About Aging Demographics, Senior Facilities, and Elderly Resident Violence

An appreciation of how prevalent the problem is, who the victims and perpetrators are, how the violence is triggered, and the ways violence might be prevented are topics that need to be understood before examining whether an incident of elderly resident violence might result in the imposition of civil liability against a senior living facility. These important facts and more will be addressed in the subsections below, but only after briefly providing a sufficient backdrop of our aging population and defining the different types of senior living facilities.

### A. Aging U.S. Population

It is estimated that nearly 43 million people in the United States are over the age of sixty-five.<sup>17</sup> By 2025, 83 million people will be over the age of sixty-five,<sup>18</sup> and many individuals within this group will enter senior living facilities at some point during their lifetime.<sup>19</sup> It is projected that 6.6 million seniors will be living in some type of housing facility by 2025.<sup>20</sup> Experts predict that nearly 40% of Americans over the age of sixty-five will spend time in a nursing home and that 50% of

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17. See Jennifer M. Ortman et al., *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU (May 2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

18. *Id.*

19. See, e.g., Robert A. Hawks, *Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and its Prevention*, 8 MARQ. ELDER'S ADVISOR 159, 159 (2006) [hereinafter Hawks].

20. *Overview of Elder Abuse*, NAT'L INST. OF JUSTICE (Nov. 5, 2007) <https://nij.ojp.gov/topics/articles/overview-elder-abuse>.

those individuals will never leave.<sup>21</sup> In the early 2000s, 1.6 million people were residing in nursing homes.<sup>22</sup> In 2007, one million senior citizens were living in assisted living facilities.<sup>23</sup>

## B. Categories of Senior Living Facilities

Senior living facilities are classified into three general categories: (1) *independent living*; (2) *assisted living*; and (3) *nursing homes*.<sup>24</sup> Of course, there are variations of each, but experts place independent living facilities at one end of the supervision/care spectrum and nursing homes at the other end, with assisted living facilities falling somewhere in the middle.<sup>25</sup> Independent living is characterized by age-restricted housing (senior apartments, for example), where little or no supervision or care is provided to residents.<sup>26</sup> Assisted living, by comparison, provides seniors with supervision, general health care, personalized support, and housing.<sup>27</sup> When medical care or close supervision is required because of physical or cognitive impairment, nursing home care is needed.<sup>28</sup> The specific type of facility involved, as well as the extent of care provided by the facility, generally determines the legal duty

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21. STELLA M. HENRY, R.N. & ANN CONVERY, *THE ELDERCARE HANDBOOK: DIFFICULT CHOICES, COMPASSIONATE SOLUTIONS* 112 (1st ed. 2006) [hereinafter HENRY].

22. Evan M. Myers, *Physical Restraints in Nursing Homes: An Analysis of Quality of Care and Legal Liability*, 10 ELDER L.J. 217, 219 (2002) [hereinafter Myers].

23. Eric M. Carlson, *Protecting Rights or Waiving Them? Why "Negotiated Risk" Should be Removed from Assisted Living Law*, 10 J. HEALTH CARE L. & POL'Y 287, 287 (2007), available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1141&context=jhclp>.

24. See Kimberly L. Intagliata, *Improving the Quality of Care in Nursing Homes: Class Action Litigation Implications*, 73 U. COLO. L. REV. 1013, 1013–14 (2002) (stating there are roughly 17,000 nursing homes alone in the U.S. today, not counting independent living and assisted living facilities).

25. HENRY, *supra* note 21, at 110.

26. See *Senior Housing Options & Retirement Guide*, SENIORLIVING.ORG, <https://www.seniorliving.org/housing/> (last visited Nov. 24, 2019).

27. Robert Mollica et al., *Residential Care and Assisted Living Compendium 2007*, 1, 1–7 (Nov. 30, 2007), available at <https://aspe.hhs.gov/system/files/pdf/75316/07alcom.pdf> (explaining assisted living is also referred to as residential care, resident care for the elderly, and congregate-care retirement).

28. U.S. CTR. FOR MEDICARE & MEDICAID SERV., *Nursing Home Data Compendium 2013 Edition*, 1, 6–7 (2013), [https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/downloads/nursinghomedata-compendium\\_508.pdf](https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/downloads/nursinghomedata-compendium_508.pdf).

owed to prevent violent encounters between elderly residents as will be discussed in Section III.<sup>29</sup>

### C. Prevalence of Elderly Resident Violence in Senior Facilities

Recent studies indicate that rates of violence among the elderly are rising despite this segment of the population being statistically less likely to engage in violent behavior than younger people.<sup>30</sup> In terms of nursing homes alone, it is estimated that 88,000 elderly residents engage in physically aggressive behavior on a weekly basis.<sup>31</sup> Resident-on-resident acts of aggression reportedly occurred thirty times in a single eight-hour period in one nursing home.<sup>32</sup> Another study found that 380 convicted sex offenders were living in nursing homes spanning thirty-two different states.<sup>33</sup> This is all very troubling due to significantly higher personnel turnover rates known to be associated with senior living facilities and, given the increasing demand for elderly housing as the population ages, operators of these facilities are having difficulty maintaining qualified staff to care for their elderly residents.<sup>34</sup>

The total extent of the problem is not fully known because some senior facilities conceal, or fail to report, acts of resident violence. For example, in one case, workers told the family of an eighty-three-year-old woman that she suffered injuries in a fall, but it was later discovered that the woman's injuries were sustained in an attack perpetrated by a

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29. See *Conlev v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713, 729 (Tenn. Ct. App. 2007); see also *Goode v. St. Stephens United Methodist Church*, 494 S.E.2d 827, 833 (S.C. Ct. App. 1997).

30. Raqota Berger, *Criminal Behavior among the Elderly: A Look into What People Think about This Emerging Topic*, 7 *ADVANCES IN AGING RES.* 1, 1–16 (Jan. 2018), available at [https://www.researchgate.net/publication/322792966\\_Criminal\\_Behavior\\_among\\_the\\_Elderly\\_A\\_Look\\_into\\_What\\_People\\_Think\\_about\\_This\\_Emerging\\_Topic](https://www.researchgate.net/publication/322792966_Criminal_Behavior_among_the_Elderly_A_Look_into_What_People_Think_about_This_Emerging_Topic); PETER C. KRATCOSKI, *THE VICTIM-OFFENDER RELATIONSHIP IN THE CRIMINAL VICTIMIZATION OF THE ELDERLY, PERSPECTIVES ON ELDERLY CRIME AND VICTIMIZATION*, in *PERSPECTIVES ON ELDERLY CRIME AND VICTIMIZATION* 101, 101–23 (Peter C. Kratcoski & Maximilian Edelbacher eds., 2018).

31. See generally Ralph Leonard, M.D. et al., *Potentially Modifiable Resident Characteristics That are Associated With Physical or Verbal Aggression Among Nursing Home Residents with Dementia*, 166 *ARCHIVES INTERNAL MED.* 1295 (June 26, 2006), <https://www.ncbi.nlm.nih.gov/pubmed/16801512> [hereinafter Leonard, M.D. et al.].

32. *Resident-to-Resident Aggression*, *supra* note 14, at 79.

33. Matthew T. Clarke, *Sex Offenders Living in Nursing Homes*, *PRISON LEGAL NEWS* 1, 25 (July 2005).

34. See Hall et al., *supra* note 14.

sixty-six-year-old resident who had a violent history.<sup>35</sup> Although the responsible supervisory employees in that instance were not aware of the attacker's pre-admission history of violence, it was later learned as the result of a lawsuit filed by the family of the victim that the attacker had been physically aggressive at the facility before the assault.<sup>36</sup> The nursing home's concealment of the attack combined with evidence that it had prior notice of the perpetrator's violent tendencies motivated the nursing home to settle the lawsuit with the victim's family members.<sup>37</sup> Underreporting issues are also problematic in this context; elderly victims are sometimes reluctant to report being attacked due to fear of retribution.<sup>38</sup> Despite these barriers, general profile characteristics shared by perpetrators and victims have been identified in the following published literature.

#### D. Profiles of the "Elderly Perpetrator" and "Elderly Victim"

The totality of a given set of circumstances must be carefully examined in assessing incidents of elderly resident aggression because offender profiling is of limited reliability.<sup>39</sup> Yet, most experts agree that there is a connection between violent elderly residents and delirium, dementia, and/or physical illness.<sup>40</sup> This association must be further examined; but, generally speaking, violent elderly perpetrators tend to be undereducated men with significant psychiatric problems.<sup>41</sup> An even better predictor of violence is the individual's prior psychiatric history,<sup>42</sup> with paranoia being the variable most associated with geriatric

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35. See Ind. State Bd. of Health Facility Adm'rs v. Werner, 841 N.E.2d 1196 (Ind. Ct. App. 2006).

36. *Id.*

37. *Id.*

38. See David Jackson & Gary Marx, *Nursing home sexual violence: 86 Chicago cases since July 2007—but only 1 arrest*, CHI. TRIB. (Jan. 26, 2010), <https://www.chicagotribune.com/lifestyles/ct-xpm-2010-01-26-ct-met-nursing-home-rape-20100126-story.html>.

39. Ann W. Burgess, *Elderly Victims of Sexual Abuse and Their Offenders*, NAT'L INST. OF JUST. 1, 54–55 (June 20, 2006), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/216550.pdf> [hereinafter Burgess].

40. See Hall et al., *supra* note 14.

41. Catherine F. Lewis, M.D. et al., *A study of geriatric forensic evaluatees: who are the violent elderly?*, 34 J. AM. ACAD. PSYCHIATRY & L. 324, 329 (2006), available at [https://pdfs.semanticscholar.org/ba16/bc49e75dcaf977f2d8494f11fd269b33e6b2.pdf?\\_ga=2.262549068.1960669993.1567378660-1231493184.1567378660](https://pdfs.semanticscholar.org/ba16/bc49e75dcaf977f2d8494f11fd269b33e6b2.pdf?_ga=2.262549068.1960669993.1567378660-1231493184.1567378660) [hereinafter Lewis, M.D. et al.].

42. *Id.* at 330.

violence.<sup>43</sup> Additional risk factors for elderly violence involve antisocial personality disorder, a history of violence and social isolation, and unhealthy use of alcohol and drugs.<sup>44</sup>

Similarly, from a victim's perspective, dementia and dependency are known to be two of the most common vulnerability risk factors for the elderly.<sup>45</sup> Elderly male victims in senior living settings tend to be men who have behavioral problems, cognitive impairments, and a propensity to wander.<sup>46</sup> Sexual assault victims tend to be women in poor health with diminished cognitive abilities.<sup>47</sup> Inasmuch as offender and victim profiles are sometimes helpful in understanding violent behavior,<sup>48</sup> as is always the situation when profiling, the entirety of the situation must be examined in order for any violent geriatric offender's motivations to be understood.

#### E. Symptomatic Associations, Environmental Triggers, and Employee Provocation

Elderly resident offenders are not ordinarily malicious, and their aggression is often the product of dementia and confusion.<sup>49</sup> Depression, delusion, hallucination, and constipation are also associated with elderly aggression.<sup>50</sup> Violence in senior living facilities is often triggered by unwanted touching, unwelcomed visits made by wandering residents, and by competition over possessions such as furniture or televisions.<sup>51</sup> Employee provocation has also been known to precipitate violence between elderly residents in certain circumstances.<sup>52</sup>

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43. *Id.* at 325; see also Linda Ganzini et al., *Characteristics of Violent Elderly in the Emergency Department*, 10 INT'L J. GERIATRIC PSYCHIATRY 945, 947-48 (1995) (discussing the findings of a study revealing an association between mental illness and violence committed by the elderly in emergency rooms).

44. Raqota Berger, *Criminal Behavior among the Elderly: A Look into What People Think about This Emerging Topic*, 7 ADVANCES IN AGING RES. 1, 4 (2018), available at [https://www.scirp.org/pdf/AAR\\_2018013014004382.pdf](https://www.scirp.org/pdf/AAR_2018013014004382.pdf).

45. Bryan K. Payne, *Physical and Emotional Abuse of the Elderly*, CTR. FOR PROBLEM-ORIENTED POLICING 1, 10 (Mar. 2013), [https://popcenter.asu.edu/problems/elderly\\_abuse/](https://popcenter.asu.edu/problems/elderly_abuse/).

46. *Resident-to-Resident Aggression*, *supra* note 14, at 78.

47. Burgess, *supra* note 39, at 44.

48. *Id.* at 55.

49. *Sexual Aggression Between Residents*, *supra* note 14, at 1070.

50. Leonard, M.D. et al., *supra* note 31, at 1300.

51. Mark Lachs et al., *Resident-to-Resident Elder Mistreatment and Police Contact in Nursing Homes: Findings From a Population-Based Cohort*, 55 J. AM. GERIATRICS SOC'Y 840, 841-45 (2007).

52. Davidson, *supra* note 10, at 330.

## F. Violence Prevention

Research indicates that violence increases appreciably when senior facilities operate without violence prevention policies and when the staff-to-resident ratios are insufficient.<sup>53</sup> Security experts recommend thorough background checks for incoming residents as part of a comprehensive intake policy to guard against such violence.<sup>54</sup> Senior living facilities should also collect and review the medical records of incoming residents and carefully observe resident behavior after admission so that residents with violent tendencies are appropriately segregated and/or monitored.<sup>55</sup> Educating and training staff about the appropriate methods of managing and handling agitated elderly residents has been shown to effectively reduce the level of violence.<sup>56</sup> Although pharmacologic intervention is sometimes necessary to calm aggressive elderly residents, experts suggest using behavioral management techniques first.<sup>57</sup> Academicians and forensic experts often disagree about the effectiveness of any given security measure.<sup>58</sup> Despite consensus among security experts that no single preventive measure will ever guarantee resident safety,<sup>59</sup> there is no doubt that developing violence prevention policies will reduce internecine violence and lessen potential civil liability of caregivers and senior living facility operators.

## III. Legal Remedies for Victims of Resident-to-Resident Attacks

The criminal justice system does not meaningfully compensate victims of violence despite the availability of some restitution. This often means that the only meaningful method of obtaining redress is for victims of elderly resident violence to pursue civil litigation. Attorneys who handle these cases must be familiar with this developing area of

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53. Hawks, *supra* note 19, at 194.

54. Elliot A. Boxerbaum & Patrick F. Donaldson, *Respecting and Protecting Elders*, 21 J. HEALTHCARE PROTECTION MGMT. 67, 72 (Feb. 2005).

55. See Hall et al., *supra* note 14, at 25–31 (explaining that elderly residents with a tendency for violent or aggressive behavior must be assessed for specific predictive factors allowing for the implementation of a multi-disciplinary treatment plan with environmental changes, behavioral changes, and medication changes in order to protect other residents).

56. *Id.*; Linda Williams, *When Residents Attack Residents*, 53 NURSING HOMES 64, 66 (Aug. 2004).

57. *Id.*

58. See Lewis, M.D. et al., *supra* note 41.

59. *Id.*

law and understand the applicable state law claims, which involves principles of negligence including foreseeability, legal duty, causation, and special relationships. Practitioners must also be familiar with recognized theories of liability in this context, lawsuits based on federal law, and the similarities these cases have with inadequate security cases. Before we examine these topics, we will briefly highlight the significant monetary stakes involved in these cases.

#### A. High Stakes Litigation

Facility operators who do nothing to minimize the risk of elderly resident violence obviously increase their exposure to civil liability, and the exposure to large damage awards in these types of cases is remarkable. A jury in Texas, for example, awarded \$160 million to the family of an eighty-one-year-old nursing home resident.<sup>60</sup> The perpetrator in that case, a man named Geronimo Vela, was admitted into the nursing home's secure unit because he was a delusional schizophrenic and had a history of being involuntarily committed to a psychiatric hospital before his arrival.<sup>61</sup> While in the secure unit of the nursing home, Mr. Vela attacked twenty-nine elderly residents.<sup>62</sup> Despite this aggressive conduct and his prior mental health history, the nursing home moved Vela into the general population and specifically assigned him to Tranquilino Mendoza's room.<sup>63</sup> On the day the room change was made, Mr. Vela viciously beat Mr. Mendoza with a hard plastic water pitcher in and about the face.<sup>64</sup> Unlike cases involving violent attackers who are actually cognizant of their depravity, there is often jury sympathy for the elderly attackers whose actions may be a reflection of some mental infirmity. However, this can be outweighed by jury sympathy felt for the elderly victim.<sup>65</sup> Sympathy for the victim could explain the unusually large verdict awarded to Mr. Mendoza's family.<sup>66</sup> Regardless of the reason, attorneys litigating these cases need to be aware of the significant stakes involved. The remainder of this Article will address legal

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60. *Casas v. Paradez*, 267 S.W.3d 170, 190 (Tex. Ct. App. 2008).

61. *Id.* at 176–77.

62. *Id.*

63. *Id.* at 177.

64. *See id.* (determining that there had been a breach of the standard of care by the nursing home facility, supported by the testimony of its regional vice president who admitted at trial that he should have known that Vela was a danger and also holding that the \$160 million jury verdict was excessive).

65. *Myers*, *supra* note 22, at 237.

66. *Casas*, 267 S.W.3d at 190.

issues important to both plaintiff and defense lawyers in the context of litigating claims involving elderly internecine violence occurring in senior living facilities.

### **B. State Claims, Negligence, Premises Liability, and Medical Malpractice**

Not all of the violence may be anticipated or prevented, but senior living facilities may, in certain circumstances, be exposed to civil liability for failing to take appropriate preventive measures to reduce the potential risk of harm. Most of the litigation in this area involves state law. State laws often determine which legal duties are owed by senior facilities, while the nature of the services provided to their elderly residents ordinarily determines the scope of their duties.<sup>67</sup> A majority of the claims pursued by seniors attacked by their contemporaries in senior facilities are for negligence and, as is true in all negligence cases, the following four elements must be demonstrated by the plaintiff in order to establish a prima facie case: (1) that he/she was owed a legal duty; (2) that there was a breach of that legal duty; (3) that the breach of that legal duty was the proximate cause of the injury or death,<sup>68</sup> and (4) damages.<sup>69</sup> In addition to and/or in lieu of claims of negligence, premises liability and medical malpractice claims are often asserted against senior living facilities and the responsible medical staff.<sup>70</sup>

### **C. Legal Duty, Special Relationships, and Standards of Foreseeability**

Regardless of the claim type, a senior living facility generally does not have a legal duty to protect against criminal attacks committed by third parties because it is universally accepted by all states that there is no legal duty to protect persons from criminal attacks committed by

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67. See *Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713, 729 (Tenn. Ct. App. 2007) (providing a thorough legal analysis distinguishing between claims of ordinary negligence and medical malpractice in the nursing home context).

68. A wrongful death action brought by the family of the deceased is necessary when a death occurs as a result of an attack. See *Walker v. Aderhold Properties*, 694 S.E.2d 119, 121 (Ga. Ct. App. 2010).

69. *Id.*

70. Breach of contract claims may also be asserted when senior living facilities fail to provide security for elderly residents if they have agreed to do so in writing. See *Goode v. St. Stephens United Methodist Church*, 494 S.E.2d 827, 833 (S.C. Ct. App. 1997) (acknowledging that a contractual covenant to protect may give rise to an actionable breach of contract claim).

third parties absent a “special relationship.”<sup>71</sup> A special relationship arises when a person relinquishes control over his or her safety to another.<sup>72</sup> For example, a senior citizen in this case relinquishes control over their safety to a senior living facility. When this happens, a legal duty to protect is imposed on the other party to whom control over safety has been relinquished.<sup>73</sup> Examples of generally recognized special relationships include proprietor-patron, invitor-invitee, landlord-tenant, psychiatrist-patient, and innkeeper-guest.<sup>74</sup> Establishing a “special relationship” is often required of the plaintiff in these cases to demonstrate that a duty of care was owed to the elderly victim.<sup>75</sup>

Legal duty and causation are determined by foreseeability, and four different tests of foreseeability are utilized by state courts in determining when liability may be imposed against a business owner for failing to protect individuals who have relinquished control over their personal safety to them.<sup>76</sup> The most demanding for a plaintiff to satisfy is the *imminent harm test*. States following the imminent harm test impose a legal duty on a business operator to protect individuals on their land only when they are in imminent danger of being attacked, so long as the landowner is aware of such imminent harm.<sup>77</sup> A second test, known as the *prior similar acts test*, ties foreseeability to prior similar attacks and other crimes committed on the subject property.<sup>78</sup> States using this test require a victim to show a similarity between his/her attack and prior incidents of violence on the property before liability will be imposed on the possessor of land.<sup>79</sup> Third, the *totality of the circumstances test* focuses not only on prior violent crimes committed on the property, but additionally examines all of the surrounding circumstances connected with the attack to determine foreseeability. This test rejects the

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71. *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 383 (Mich. 1988).

72. *See id.*

73. *Id.*

74. *Murdock v. Higgins*, 559 N.W.2d 639, 643 n.11 (Mich. 1997).

75. *Id.* at 643.

76. *Id.* at 642.

77. *MacDonald v. PKT, Inc.*, 628 N.W.2d 33, 43 (Mich. 2001); *but see Samson v. Saginaw Prof'l Bldg., Inc.*, 224 N.W.2d 843, 855 (Mich. 1975); *Stanley v. Town Square Coop.*, 512 N.W.2d 51, 54–55 (Mich. Ct. App. 1993) (holding that landlords have a heightened duty to protect those in common areas from foreseeable criminal acts of third parties). *See also Wagner v. Regency Inn Corp.*, 463 N.W.2d 450, 453 (Mich. Ct. App. 1990) (holding that businesses may be held liable for attracting dangerous criminal activities to the land under a nuisance theory).

78. *Miletic v. Wal-Mart Stores, Inc.*, 529 S.E.2d 68, 70 (S.C. Ct. App. 2000).

79. *Id.*

*prior similar acts test*, rationalizing that one free pass should not be given to a business operator for failing to protect simply because a similar attack did not previously occur.<sup>80</sup> A final foreseeability test is known as the *sliding-scale balancing approach*.<sup>81</sup> This approach weighs the potential for harm resulting from a criminal attack against the burden of the business operator having to implement measures to guard against the potential risks of harm.<sup>82</sup> Depending on the particular state involved, one of these tests of foreseeability will often need to be addressed by the plaintiff-victim in order to establish both duty and causation.

#### D. Additional Legal Duties and Viable Theories of Liability

In some states, an additional duty separate from the special relationship duty is imposed on a senior living facility to exercise appropriate control over violent elderly residents for the protection of both the violent elderly residents and the non-violent elderly residents.<sup>83</sup> Indeed, some courts have recognized that residents of senior care facilities are generally entitled to a reasonable degree of safety.<sup>84</sup> Numerous theories of liability may be asserted by victims and the family members of deceased seniors against facility operators including *negligent admission* (failing to discover available information about an incoming resident's past violent behavior or admitting a violent resident after being aware of their violent propensities), *negligent placement* (failing to segregate residents according to their vulnerabilities and based on their potential for engaging in aggressiveness), *negligent supervision* (failing to adequately train and monitor staff, failing to maintain appropriate levels of staff, and failing to appropriately monitor residents), *negligent retention* (failing to discharge violent residents), *failure to warn* (failing to inform incoming residents and existing residents of the presence of

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80. *Clohesy v. Food Circus Supermarkets*, 694 A.2d 1017, 1028 (N.J. 1997); see also *Johnson v. Spectrum of Support Services*, No. 82267, 2003 WL 21982915, at \*2 (Ohio Ct. App. 2003) (applying the totality of the circumstances test in a resident violence case).

81. *Castaneda v. Olsher*, 162 P.3d 610, 615 (Cal. 2007).

82. *Id.* at 616 (holding that less foreseeability is needed to impose a legal duty in these jurisdictions where the harm can easily be prevented and where there is a strong public policy reason for preventing the harm).

83. *Holles v. Sunrise Terrace, Inc.*, 509 S.E.2d 494, 497 (Va. 1999); RESTATEMENT (SECOND) OF TORTS § 315 (1965).

84. Provocation has also been recognized as a foreseeable cause of death. See *Hall v. Cadillac Nursing Home*, No. 209010, 2000 WL 33538536, at \*6 (Mich. Ct. App. 2000).

violent individuals in a facility), and the negligent failure to protect generally, as was previously discussed above.<sup>85</sup>

A nursing home's duty to protect and duty to segregate elderly patients was addressed in *Intrieri v. Superior Court*.<sup>86</sup> Mrs. Intrieri, an eighty-eight-year-old patient residing in the Alzheimer's unit, was injured during an unprovoked attack by another resident who was able to bypass a segregated unit's security features.<sup>87</sup> The attacker was able to enter the secure unit because the passcode was posted above the keypad, and the altercation transpired long enough for other elderly residents who heard the incident to leave their beds and enter the hallway before staff intervened to stop it.<sup>88</sup> In the weeks leading up to the attack, medical records revealed that the attacker had been exhibiting hostile and disoriented behavior.<sup>89</sup> Based on these facts, it was determined by an appellate court that there was a triable issue of fact to be resolved at trial.<sup>90</sup>

In the matter of *Glanda v. Twenty Pack Management Corp.*, for instance, a court addressed a general failure to protect theory.<sup>91</sup> In *Glanda*, this theory was successfully asserted by an elderly resident of an assisted living facility who was sexually assaulted in her room by another resident who was suffering from dementia.<sup>92</sup> The elderly victim suffered from aphasia and right-sided paralysis, yet the door to her room was left open by staff during evening hours.<sup>93</sup> When deciding a motion to dismiss, the court ruled that these facts presented a genuine issue of material fact for a jury to resolve regarding whether the sexual assault was reasonably foreseeable given that the facility failed to prohibit access to a vulnerable person's room.<sup>94</sup>

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85. See *Glanda v. Twenty Pack Mgmt. Corp.*, No. 07-13262, 2008 WL 4445257 (E.D. Mich. 2008); *Intrieri v. Superior Court*, 117 Cal. App. 4th 72 (2004); *Associated Health Sys. v. Jones*, 366 S.E.2d 147 (Ga. Ct. App. 1988); *Riley v. Maison Orleans II, Inc.*, 829 So. 2d 479 (La. Ct. App. 2002); *Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713 (Tenn. Ct. App. 2007).

86. See *Intrieri*, 117 Cal. App. 4th at 72.

87. *Id.* at 76.

88. *Id.* at 84.

89. *Id.*

90. *Id.* at 82.

91. See *Glanda v. Twenty Pack Mgmt. Corp.*, No. 07-13262, 2008 WL 4445257, at \*1 (E.D. Mich. 2008).

92. *Id.*

93. *Id.*

94. Comparative fault rules often apply in order to allocate fault to the criminal tortfeasor. See *Riley v. Maison Orleans II, Inc.*, 829 So. 2d 479, 487 (La. Ct. App. 2002).

A senior living facility's legal duties to protect and to exercise appropriate supervisory control over aggressive elderly residents were addressed in *Associated Health Systems v. Jones*.<sup>95</sup> *Jones* involved an elderly resident who was beaten by another resident with a history of engaging in physical altercations.<sup>96</sup> The nursing home argued that there was nothing it could have done to stop the violence because it was prohibited from physically restraining the dangerous patient.<sup>97</sup> According to the reviewing court, however, the legal duty to supervise included other methods beyond physical restraint such as counseling, therapy, and denying access to certain areas of the facility, all as means of exercising behavioral control.<sup>98</sup> Upholding a jury verdict in favor of the victim's family, the appellate court determined that there was sufficient evidence to support a finding of neglect on the part of the nursing home because it both failed to properly supervise a resident known to be physically aggressive and failed to exercise reasonable care to protect its residents from harm.<sup>99</sup>

The duty to supervise was also addressed in the case of *Riley v. Maison Orleans II, Inc.*<sup>100</sup> In *Riley*, an elderly resident viciously attacked another resident while wielding a steel pipe obtained from a maintenance room.<sup>101</sup> On appeal, the court held that the senior living facility was responsible for the elderly victim's injuries because two facility workers were sleeping in the recreational room when the violence ensued.<sup>102</sup> Yet, with regard to the elderly victim's separate claim that the attacker was negligently admitted, the reviewing court concluded that the nursing home was not negligent because a psychiatric examination conducted as part of the admission process did not reveal any violent propensities.<sup>103</sup>

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95. *Associated Health Sys. v. Jones*, 366 S.E.2d 147, 151 (Ga. Ct. App. 1988).

96. *Id.* at 149.

97. *Id.*

98. *Id.* at 150.

99. *Id.* at 152.

100. *Riley v. Maison Orleans II, Inc.*, 829 So. 2d 479, 487 (La. Ct. App. 2002).

101. *Id.* at 482.

102. *Id.* at 485.

103. *Id.* at 500; *see also* *Rodriguez v. Terence Cardinal Cooke Health Care Ctr.*, 771 N.Y.S.2d 516, 517 (N.Y. App. Div. 2004) (holding that the plaintiffs' claim of negligent supervision was properly dismissed for lack of evidence that defendant had notice of the decedent's assailant's violent tendencies).

A negligent retention theory of liability was asserted in the case of *Conley v. Life Care Centers of America, Inc.*<sup>104</sup> In *Conley*, the estate of a deceased nursing home resident, who was the victim of elderly resident violence, sued the facility for failing to discharge the attacker before the physical assault upon the deceased took place.<sup>105</sup> On appeal, the reviewing court was presented with the question of whether a negligent retention theory pursued in this context was fundamentally a claim of negligence or medical malpractice.<sup>106</sup> According to the court, the claim was one of medical malpractice because the negligent retention theory of liability depended on an assessment of the attacker's psychiatric condition.<sup>107</sup>

The outcome of these cases may depend on how a court classifies this particular theory of liability and how a particular claim is presented in the pleadings by a plaintiff, but importantly, courts have recognized a legal duty on the part of a senior living facility to implement reasonable measures to prevent violent encounters between elderly residents.<sup>108</sup>

#### E. Landlord-Tenant Context

Some senior living facilities provide age-restricted housing. The scope of the duty to protect tenants in these situations is determined by the landlord-tenant relationship. A few states treat the landlord-tenant relationship as a "special relationship" and impose a duty on landlords to protect tenants from the criminal acts of third parties.<sup>109</sup> These juris-

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104. *Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713, 730–31 (Tenn. Ct. App. 2007); *see also Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005) (recognizing that nursing homes have a legal duty to protect their patients from being assaulted by other residents because the state's health care liability law required it).

105. *Conley*, 236 S.W.3d at 719.

106. *Id.* at 725.

107. *Id.* at 731; *see also Dorris v. Detroit Osteopathic Hosp. Corp.*, 594 N.W.2d 455, 465 (Mich. 1994) (holding that an inadequate patient supervision theory sounds in medical malpractice); *Bryant v. Oakpointe Villa Nursing Ctr.*, 684 N.W.2d 864, 872 (Mich. 2004) (quoting *Dorris* and explaining that medical malpractice procedural requirements must be satisfied when claims sound in medical malpractice).

108. *Jamaica Plain Non-Profit Hous. v. Reynolds*, 2007 Mass. App. Unpub. Lexis 485 (Mass. App. Ct. 2007).

109. *Molosz v. Hohertz*, 957 P.2d 1049, 1051 (Colo. App. 1998); *Ryan Transp., Inc. v. M and G Assoc.*, 832 A.2d 1180, 1185 (Conn. 2003); *Lay v. Dworman*, 732 P.2d 455, 457 (Okla. 1986); *McPherson v. State of Oregon*, 152 P.3d 918, 923 (Or. Ct. App. 2007); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364–65 (Tenn. 2009).

dictions have determined that landlords are in the best position to protect against violence when tenants give up control over their own protection and do not have the right to make alterations to the property.<sup>110</sup> Consequently, courts have at times recognized a landlord's duty to protect tenants in places where the landlord has exclusive control over the common areas.<sup>111</sup> Other courts hold landlords responsible for attacks upon elderly tenants when the likelihood of violence on the property has been increased as a result of landlord-created defects on the property located within the common areas which contribute to the violence in a meaningful way.<sup>112</sup> In these jurisdictions, landlords have a duty to protect against reasonably foreseeable criminal acts in common areas.<sup>113</sup> At least one jurisdiction has acknowledged that landlords may be held liable for not investigating the criminal backgrounds of incoming tenants and for not evicting violent tenants.<sup>114</sup>

Most states do not consider the landlord-tenant relationship to be a "special relationship" which gives rise to a duty to protect.<sup>115</sup> Those jurisdictions are reluctant to alter the longstanding common law rule that landlords do not have a duty to protect.<sup>116</sup> Nevertheless, landlords may be held responsible for their tenants being attacked in these jurisdictions based on general principles of negligence rather than the liability arising from a landlord's duty to protect.<sup>117</sup> Landlords have a duty to refrain from exposing tenants to an increased risk of being physically

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110. See, e.g., *Ryan Transp., Inc.*, 832 A.2d at 1184.

111. *Id.* at 1185.

112. *Lay*, 732 P.2d at 458–59.

113. *McPherson*, 152 P.3d at 923.

114. *Giggers*, 277 S.W.3d at 363, 371.

115. See *Pippin v. Chi. Hous. Auth.*, 399 N.E.2d 596 (Ill. 1979); *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship*, 826 A.2d 443, 540 (Md. 2003); *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001); *Ward v. Inishmaan Assocs. Ltd. P'ship*, 931 A.2d 1235, 1237 (N.H. 2007); *Smith v. Lagow Constr. & Developing Co.*, 642 N.W.2d 187, 190–91 (S.D. 2002); *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 140 (Va. 2001); *Miller v. Whitworth*, 455 S.E.2d 821, 826 (W.Va. 1995); RESTATEMENT (SECOND) OF TORTS, § 341A (1965).

116. See *Bartley v. Sweetser*, 890 S.W.2d 250, 251–52 (Ark. 1994) (holding that landlords are not obligated to protect tenants from violence unless they are required by statute or an agreement); *Irma W. Merrill, Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 433 (1985) (describing that tenants maintained the leasehold at common law, and landlords had no duty to protect because they lacked control over the premises).

117. See *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 675 (Tex. 2004). Unlike the legal duties owed by landowners in the context of premises liability claims which are based on the victim's status in relation to the property, general principles of negligence view the legal duty owed from a prototypical foreseeability model.

attacked, and some courts require landlords to take reasonable measures to eliminate physical defects in the common areas.<sup>118</sup> Failure to address known defects in common areas, at least according to one particular court, will result in civil liability being imposed on a landlord only if such defects precipitate a violent criminal attack inside of the tenant's leased space.<sup>119</sup> One state applies the imminent harm foreseeability test in the landlord-tenant context and requires landlords to take reasonable measures to protect tenants.<sup>120</sup> Whenever landlords undertake the responsibility of providing security for their tenants' protection, gratuitously or by contract, landlords have a legal duty to carry out those security measures with reasonable care.<sup>121</sup> Since nearly all states recognize some legal duty on the part of landlords to protect their tenants, prudent senior housing providers should exercise reasonable care to prevent violence from occurring on their property.

#### F. Federal Law Remedy: 42 U.S.C. § 1983

Although state law claims in this context predominate, federal law claims are also pursued against senior living facilities by victims of elderly violence. Local governments operating senior living facilities are potential litigation targets for victims of resident violence.<sup>122</sup> This is because liability under 42 U.S.C. § 1983 may be imposed on local or county governments whenever an individual has been deprived of a constitutional right or a right provided to them under federal law.<sup>123</sup>

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118. *Kopoian v. George W. Miller & Co.*, 901 S.W.2d 63, 74 (Mo. Ct. App. 1995) (referring to the increased risk theory as "special circumstances" warranting the imposition of a duty on the landlord); RESTATEMENT (SECOND) OF TORTS, §§ 302b cmt. e, 315 (1965).

119. *Hemmings*, 826 A.2d 443 at 543; *but see* *Cramer v. Balcor Prop. Mgmt., Inc.*, 312 S.C. 440, 443 (S.C.1994) (refusing to impose a legal duty on landlords to provide security in and around the leased premises to protect tenants from the criminal acts of third parties).

120. *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 139 (Va. 2001).

121. *Hemmings*, 826 A.2d 443 at 457; RESTATEMENT (SECOND) OF TORTS § 323 (1965). *But see* *Hall v. Rental Mgmt.*, 913 S.W.2d 293, 297 (Ark. 1997) (providing tenants with lighting and evening security patrols did not constitute an assumption of a duty to protect against criminal attacks).

122. *Tinder v. Lewis Cty. Nursing Home Dist.*, 207 F. Supp. 2d 951, 952 (E.D. Mo. 2001) (beating of a nursing home resident to death by another resident resulted in a suit being brought by the estate of the nursing home resident pursuant to § 1983).

123. *See* *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that a state government is immune from § 1983 liability); *see also* *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978) (imposing § 1983 liability on local and municipal governmental bodies and on governmental decision-makers and policymakers). *Cf.* *United*

When death results from elderly violence in a government-operated senior living facility, it is usually argued that the deceased was denied his or her constitutional right not to be deprived of life without due process.<sup>124</sup> Federal courts generally recognize that municipal governments have a duty to protect citizens who are in their custody.<sup>125</sup> This essentially means that when local government-run senior facilities fail to protect elderly residents from harm, victims may be afforded relief under § 1983.

Deprivation of a federal right granted by a federal statute will also support a § 1983 claim.<sup>126</sup> In the nursing home context, victim litigants have attempted to use Medicare and Medicaid laws, as well as the Nursing Home Reform Act, to establish deprivations of their federal rights.<sup>127</sup> Although most courts have held that these federal statutes do not provide independent sources of nursing home liability,<sup>128</sup> some courts have determined that violations of these statutes constitute federal rights deprivations under § 1983.<sup>129</sup>

In *Tinder v. Lewis County Nursing Home District*, for example, the estate of a deceased nursing home resident brought a § 1983 claim

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States v. Classic, 313 U.S. 299 (1941) (imposing, however, some “state action” must be established before such liability).

124. U.S. Const. amend. V, § 14.

125. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–201 (1989); *Kalstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998).

126. 42 U.S.C. § 1983.

127. See *Grammar v. John J. Kane Reg’l. Ctrs.-Glen Hazel*, 570 F.3d 520, 525 (3rd Cir. 2009) (holding that a § 1983 claim may be based on a violation of the Nursing Home Act); *Arkansas Med. Soc’y., Inc., v. Reynolds*, 6 F.3d 519 (8th Cir. 1993) (holding that violations of the Social Security Act provide a basis for proceeding under 42 U.S.C. § 1983); *Nebraska Health Care Ass’n v. Dunning*, 778 F.2d 1291, 1295 (8th Cir. 1985) (holding that violations of the Social Security Act provide a basis for proceeding under 42 U.S.C. § 1983); *Conner v. Branstad*, 839 F.Supp. 1346, 1355 (S.D. Iowa 1993) (holding that violations of the Social Security Act provide a basis for proceeding under 42 U.S.C. § 1983); see Karen Levy et al., *Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws*, 26 ELDER L. J. 323, 323–63 (2019) (providing a wide range of rights to nursing home residents, including the freedom from neglect).

128. *Stewart v. Bernstein*, 769 F.2d 1088, 1092–93 (5th Cir. 1985); *Brogdon v. Nat’l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1330–31 (N.D. Ga. 2000); *Est. of Ayres v. Beaver*, 48 F. Supp. 2d 1335, 1340 (M.D. Fla. 1999).

129. 42 U.S.C. § 1396(r)(b)(1)(A) (requiring nursing homes to care for its residents in such a manner and in such an environment as will promote the maintenance or enhancement of the quality of life of each resident).

against a county-operated nursing home facility.<sup>130</sup> The claim was pursued because the elderly nursing home resident's roommate beat him to death with a cane.<sup>131</sup> Refusing to dismiss the lawsuit at the request of the county nursing home, the court determined that an actionable § 1983 claim had been alleged.<sup>132</sup> The court reasoned that the deceased resident was presumptively deprived of both his constitutional right to life and his federal rights under Medicare/Medicaid and the Nursing Home Acts.<sup>133</sup>

Privately owned nursing homes are not considered "state actors" and cannot be held liable under § 1983 simply because they are regulated by the government or because they receive government funding.<sup>134</sup> Indeed, liability under § 1983 does not usually attach to private actors, however, § 1983 liability may attach when private businesses provide governmental services.<sup>135</sup> This ordinarily occurs when a private business is acting under the color of state law.

### G. Inadequate/Negligent Security Cases Compared

There are notable differences between a standard inadequate security lawsuit and one involving elderly residents attacking their contemporaries in senior living facilities.<sup>136</sup> In a typical case of negligent/inadequate security, the perpetrator's harmful actions are ordinarily intentional whereas the elderly perpetrator in a senior living facility setting is usually behaving violently because of some mental infirmity, so there may be sympathy for the agitated elderly combatants who might not be fully aware of their actions.<sup>137</sup> Another significant difference between a negligent security case and a case involving elderly-perpetrated violence in a senior facility is the degree of control that the facility

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130. *Tinder v. Lewis Cty. Nursing Home Dist.*, 207 F. Supp. 2d 951, 953 (E.D. Mo. 2001).

131. *Id.*

132. *Id.* at 956.

133. *Id.* 954–56.

134. *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348–49 (5th Cir. 1985); *Dibrill v. Normandy Nursing Ctr.*, No. 4:09CV764-DJS, 2010 U.S. Dist. LEXIS 6124, at \*2 (E.D. Mo. 2010).

135. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

136. See Rebecca Adelman, *Assisted Living Lawsuits: An Ounce of Prevention Is Worth A Pound of Cure*, REBECCA ADELMAN (July 24, 2018), <http://www.rebeccaadelman.com/thoughts/2018/7/24/assisted-living-lawsuits-an-ounce-of-prevention-is-worth-a-pound-of-cure>.

137. *Myers*, *supra* note 22, at 237.

has over both the perpetrator and the victim with regard to admission, interaction, and the movements of residents.

#### **IV. Pre-Lawsuit Recommendations**

The following pre-lawsuit recommendations are intended to assist attorneys who practice in this area whether representing the interests of the elderly victim or the senior living facility. Some of these suggestions apply to both the plaintiff and defendant, but most of them benefit only one litigant. The plaintiff attorney's first step in these cases is to determine ownership of the facility where the attack occurred and then identify the responsible staff who may have contributed to the attack so that the proper parties can be named as defendants in the lawsuit.

##### **A. Determine Appropriate Parties, Notify Insurer, and Ascertain Funding Sources**

Performing online searches of state-operated commercial databases often provides a plaintiff's attorney with a wealth of information about ownership of senior living facilities. Licensure information of all responsible medical providers associated with a particular facility will often be available through these state databases. Some of these medical providers operate under a separate medical practice so it is critical to carefully perform searches of the state websites in order to determine all of the business entities that should be named as defendants.<sup>138</sup> Family members of the residents usually know which caregivers were assisting the victims, so interviewing them is often a good starting point.

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138. Medical malpractice statutes sometimes have pre-suit notice requirements and a plaintiff's failure to provide notice of the intent to file a claim to potential defendants prevents a lawsuit from being filed. *See* CAL. CODE CIV. P. 364(b) (2019); D.C. CODE § 16-2802 (2019); FLA. STAT. § 766.106(2) (2019); GA. CODE § 9-2-6 (2019); MASS. GEN. LAWS ch. 231, § 60L (2019); MICH. COMP. LAWS § 600.2912b(2) (2019); MISS. CODE ANN. § 15-1-36(15) (2019); TENN. CODE ANN. § 29-26-121 (2019); TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(a) (2019); S.C. CODE ANN. § 15-79-125 (2019). Business entity searches on state websites are extremely helpful in learning this information. Nearly every state has such resources available to examine free of charge. Whatever information is not available online can be obtained through federal and state Freedom of Information Act ("FOIA") requests. *See* Adam Blank & Zachary Phillipps, *Make the Most of FOIA*, TRIAL MAGAZINE (Mar. 2019), available at [http://www.wrkk.com/wp-content/uploads/Trial\\_2019\\_March\\_Blank\\_Phillipps.pdf](http://www.wrkk.com/wp-content/uploads/Trial_2019_March_Blank_Phillipps.pdf) (discussing extensive discussion of FOIA request used as a means of informal discovery).

Counsel for both the victim and the facility should routinely provide formal written notice of the event to the appropriate insurance company so that insurance coverage is available to cover the cost of defense and potential judgments.<sup>139</sup> Plaintiffs' attorneys should also examine sources of governmental funding for the senior facility in order to evaluate the merits of a potential federal claim.<sup>140</sup> Simultaneously with determining the parties, attorneys should be carefully inspecting resident admission contracts, residential leases, facility operations manuals, and advertisements. This documentation is ordinarily enlightening.

**B. Review Advertisements, Facility Manuals, Resident Contracts, and Leases**

Attorneys for both the victim and the facility should read all advertisements, manuals, resident admission contracts, and leases to determine what promises were made with regard to security, staffing, placement, protection, and general care. Although determination of a duty is generally a question of law, an argument can be made that a senior facility contractually assumed a duty to protect elderly residents.<sup>141</sup> Some of the resident admission contracts contain mandatory arbitration provisions and others have contractually shortened periods within which legal action must be taken, so it behooves attorneys to look for them at the outset. Arbitration provisions may or may not be enforceable depending on who actually signed the resident admission agreements and the circumstances surrounding the execution of such

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139. At times, insurance companies will deny coverage to the senior living facility arguing that coverage is not available because the offender committed an intentional act, so declaratory judgment actions are sometimes necessary in these situations. *See Cincinnati Ins. Co. v. Magnolia Ests., Inc.*, 648 S.E.2d 498 (Ga. Ct. App. 2007) (discussing insurance coverage issues discussed in a declaratory judgment matter).

140. Facilities receiving federal funding must remain in substantial compliance with the rules promulgated pursuant to the Social Security Act. Nursing homes are bound by their provider agreements with the Secretary of the Department of Health and Human Services and annual "resident centered inspections," are performed to ensure compliance. *See Lakeridge Villa Health Care Ctr. v. Leavitt*, No. 05-4194, 2006 U.S. App. LEXIS 27338 (6th Cir. 2006). A search of Medicare.gov and Data.Medicare.gov will identify the owners of such facilities.

141. A landlord was determined to have a contractual duty to protect an 82-year-old tenant based on a fee charged each month for security in a suit involving the octogenarian's murder. *See Brookview Holdings, LLC v. Suarez*, 645 S.E.2d 559 (Ga. Ct. App. 2007).

agreements.<sup>142</sup> Preadmission screenings, medical records, investigative reports, and other similar documentation must also be reviewed to determine the specifics about the attack as well as the victim and perpetrator.

### C. Preserve Evidence

Immediately after retention, counsel for the plaintiff should send a letter to the senior facility requesting that all evidence be preserved and providing notice of the incident. Regardless of whether a written demand to preserve evidence is received by the senior facility, the operator's attorney should independently request that all evidence be preserved in any event. This ensures against a plaintiff's attorney making a spoliation claim or argument at a later date.<sup>143</sup> On the other hand, plaintiff's counsel should raise these concerns if evidence has been destroyed. Counsel for the senior living facility should conduct witness interviews and statements before memories fade.

### D. Make FOIA Requests for Law Enforcement Records

If law enforcement was either called or investigated, the plaintiff's attorney should send Freedom of Information Act ("FOIA")<sup>144</sup> requests to obtain dispatch records, narrative reports, and the logs of all calls for service to that particular senior facility. State survey records should also be requested from nursing homes. Complaints made against senior living facilities and against health professionals are also maintained by the

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142. Courts have enforced arbitration clauses even when the resident admission agreements were signed by the family members of elderly residents so long as the elderly resident was mentally competent and aware of the circumstances surrounding its execution. See *Kindred Nursing Ctrs. East, LLC v. Jones*, 201 So.3d 1146 (Ala. 2016). Other courts have refused to enforce them when family members sign such agreements. See *Barrow v. Dartmouth House Nursing Home, Inc.*, 14 N.E.3d 318 (Mass. App. Ct 2014) (permitting the adult son of a ninety-year-old woman to pursue a lawsuit against a nursing facility for the death of his mother despite him having signed the nursing home resident agreement on behalf of his mother).

143. Jackie Jewell, *Electronically Stored Evidence + Spoliation Of Evidence=Retailers Have a Duty To Preserve*, REMINGER (Apr. 18, 2019), <https://www.reminger.com/insights-799.html>.

144. Nathan Hughey, *Written Discovery in Nursing Home and Long Term Care Cases*, HUGHEY L. FIRM (Apr. 9, 2013), <https://nursinghomeattorneys.com/blog/written-discovery-in-nursing-home-and-long-term-care-cases/>.

state,<sup>145</sup> so it is important for the lawyers on both sides to obtain these records. Once all of the preliminary information is obtained, experts should be consulted.

### E. Consult Experts

Experts should be consulted at the earliest possible stages. Knowledgeable experts have significant expertise to assist in assessing the merits of a claim. A lawyer who consults with an expert early has a distinct advantage over an adversary who does not employ an expert until the civil proceeding is well underway. Not only will a criminologist and/or physical security expert often be needed in such cases, as are commonly used in typical inadequate security cases, but attorneys on both sides would also benefit from retaining geriatric and psychiatric experts to assist with standards of care, foreseeability, causation, and damages.<sup>146</sup> Security experts and medical experts are often permitted to testify about issues of foreseeability, standards of care, and causation.<sup>147</sup> Yet, experts who employ unreliable methodologies and/or provide unsupported conclusions must be challenged under Federal Rule of Evidence 702 or a similar state rule of evidence.<sup>148</sup> Engaging the experts early is extremely helpful to a plaintiff's attorney because the complaint must clearly articulate the breaches of the standards of care that resulted in the violent attack.

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145. See *Consumer Information for Complaints about Health Care Professionals, Facilities, and Programs*, DISABILITY RIGHTS CAL. (June 2018), available at [https://www.disabilityrightsca.org/system/files/file-attachments/528701\\_0.pdf](https://www.disabilityrightsca.org/system/files/file-attachments/528701_0.pdf).

146. Almost universally, medical malpractice claims require expert testimony. See Michael Hill, *Proving Your Assisted Living Facility Abuse and Neglect Case: It's a Numbers Game*, EADIE HILL TRIAL LAWS (Jan. 15, 2018), <https://www.eadiehill.com/nursing-home/assisted-living-abuse-neglect-lawyers/proving-assisted-living-facility-abuse-neglect-case-numbers-game/>.

147. An expert was permitted to address standards of care and causation in a lawsuit involving an assault by a nursing home resident against another in *Harrington v. Schroeder*. See *Harrington v. Schroeder*, No. 04-15-00136-CV, 2015 Tex. App. LEXIS 12683 (Tex. App. Dec. 16, 2015).

148. Expert testimony is not permitted in all cases. The issue is often discretionary on the part of a trial judge who must determine if the expert opinion being offered to the jury is one of general common knowledge. See *Raines v. Maughan*, 718 S.E.2d 135 (Ga. App. 2011).

## F. Research Applicable Statutes and Caselaw

Significant research must be performed by either the defense attorney or plaintiff's lawyer. This is because different legal duties are owed to elderly residents depending on the type of senior living facility involved, state rules regarding foreseeability, and the specific circumstances of the attack.<sup>149</sup> Some jurisdictions consider senior living facilities to be health care providers if care is provided to residents. Therefore, only medical malpractice claims may be brought against the facilities in these states.<sup>150</sup> Understanding the medical malpractice landscape and all of the procedural rules is crucial for attorneys litigating these cases. If a senior facility is operated either by state or local government, governmental immunity needs to be researched.<sup>151</sup> Issues of jurisdiction and venue are also important considerations.<sup>152</sup> The final section of this Article addresses litigation strategies, beginning with the initial pleading phase.

## V. Litigation Strategies

A critically important phase of litigation, especially in this context, is the pleading stage because of the unique treatment accorded to these cases by the courts. We will discuss this first and then discuss site visits by experts, medical records subpoenas, deposition practice, in limine motions, preserving the record at trial, and damage arguments.

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149. See, e.g., *Glanda v. Twenty Pack Mgmt. Corp.*, No. 07-13262, 2008 WL 4445257 (E.D. Mich. 2008); *Intrieri v. Superior Court*, 117 Cal. App. 4th 72 (2004); *Associated Health Sys. v. Jones*, 366 S.E.2d 147 (Ga. Ct. App. 1988); *Riley v. Maison Orleans II, Inc.*, 829 So. 2d 479 (La. Ct. App. 2002); *Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713 (Tenn. Ct. App. 2007); see generally *Assisted Living Laws by State: Know Your Rights*, ASSISTEDLIVING.COM, <https://www.assistedliving.com/laws-by-state/> (last visited Oct. 7, 2019) (providing links to each state's regulations regarding assisted living communities).

150. See *Assisted Living Laws by State: Know Your Rights*, ASSISTEDLIVING.COM, <https://www.assistedliving.com/laws-by-state/> (last visited Oct. 7, 2019).

151. Governmental Tort Liability Acts have been adopted in some states and one example is a statute adopted in Michigan. MICH. COMP. LAWS § 691.1407 et seq. (2019). See also CAL. GOV. CODE § 810-998.3 (2019); GA. CODE ANN. § 50-21-24 (2019); OKLA. STAT. TIT. 51, § 151 (2019); TENN. CODE ANN. § 29-20-101 et seq. (2019); ILL. COMP. STAT. §§ 745-10/1-101-02 et seq. (1965). Notice of intent to file a lawsuit against the government is required in some states. See GA. CODE ANN. § 5-21-26(a)(2) (2019); MICH. COMP. LAWS § 600.6431 (2019).

152. *Schwartzberg v. Knobloch*, 98 So.3d 173 (Fla. 2012) (discussing jurisdiction concerning an out-of-state nursing home).

### A. Pleading Claims and Defenses

Unlike garden variety negligence cases, cases of resident-to-resident aggression are filled with procedural minefields. Counsel for the plaintiff should assert medical malpractice claims and assert alternative claims of ordinary negligence in the complaint. Viable theories have been highlighted in this Article. Articulating those theories with specificity in the complaint is good practice.<sup>153</sup> As a general rule, a plaintiff is required to plead in avoidance of governmental immunity so this issue must also be addressed in the complaint.<sup>154</sup> Knowing the applicable standard of foreseeability is likewise important because this is the first opportunity that the plaintiff has to demonstrate that the senior facility breached its legal duties owed to prevent the attack. Naming the perpetrator as a defendant is a relevant consideration because some states have adopted comparative negligence, and the jury is required to apportion fault among all tortfeasors.<sup>155</sup>

As a strategy, defense attorneys should raise causation as an affirmative defense and provide notice to the plaintiff that the senior facility intends to apportion fault to the perpetrator. Additionally, defense attorneys should file a motion to dismiss if the plaintiff's complaint does not comply with medical malpractice procedural rules or if avoidance of governmental immunity was not addressed in the

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153. See *Winn v. Pioneer Med. Group, Inc.*, 370 P.3d 1011 (Cal. 2016) (explaining generally that practitioners should consider relying on elder abuse/neglect statutes to demonstrate breach of a legal duty and using the statutes as a private right of action).

154. *Mack v. City of Detroit*, 649 N.W.2d 47, 57 (Mich. 2002).

155. See *Vining v. City of Detroit*, 413 N.W.2d 486 (Mich. 1987) (explaining that Michigan has adopted a true comparative fault statute and requires fault of all parties and non-parties to be apportioned in accordance with MCLA 600.2959); see also *Martel v. Montana Power Co.*, 752 P.2d 140 (Mont. 1988); *Blazovic v. Andrich*, 590 A.2d 222 (N.J. 1991); *Bielski v. Schulze*, 114 N.W.2d 105 (Wis. 1962). Other jurisdictions do not allow intentional conduct to be apportioned with negligence despite adoption of comparative negligence so that a negligent tortfeasor cannot reduce its liability for failing to prevent a risk of harm stemming from a criminal attack committed by a third party. The rationale is that a negligent business owner should not be permitted to avoid liability when the intentional tort is foreseeable because the intervening intentional tort is exactly the risk that the security measures are supposed to protect against. See *Merill Crossings Assocs. v. McDonald*, 705 So. 2d 560 (Fla. 1997); *Burke v. 12 Rothschild's Liquor Mart*, 593 N.E.2d 522 (Ill. 1992); *Davies v. Butler*, 602 P.2d 605 (Nev. 1979); *Krivijanski v. Union R.R. Co.*, 515 A.2d 933 (Pa. Sup. Ct. 1986); *Adkisson v. City of Seattle*, 258 P.2d 461 (Wa. 1953); *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).

complaint.<sup>156</sup> A third-party complaint against the attacker should be considered if a defendant is not permitted to make an empty-chair argument that fault should be apportioned to the perpetrator.<sup>157</sup> Provocation on the part of the plaintiff-victim is also a matter that should be raised as an affirmative defense because some of these violent encounters between the elderly begin with the alleged victim wandering into the elderly attacker's personal space.<sup>158</sup>

### **B. Miscellaneous Practice Tips**

Visiting the facility where the attack occurred is important for the expert to provide an honest and reliable assessment of the security and operations. Expert site visits are therefore recommended for both plaintiffs and defendants in these cases.

Medical records of the victim and the perpetrator should be subpoenaed by the attorneys in order to evaluate the totality of the circumstances. The senior living facility should consider asserting the physician-patient privilege to shield damaging medical/investigative records from being obtained by the plaintiff.<sup>159</sup> Records documenting the resident-to-staff ratios should also be sought during the discovery phase by the plaintiff's attorney. Depositions of the perpetrator, victim, lay witnesses, supervisory staff, medical director, law enforcement, and experts should be taken in order to develop a complete factual record and to understand the positions of the opposing party.

Motions to dismiss, in addition to motions requesting the exclusion of evidence or argument, must be evaluated by the defense attorney and anticipated by the plaintiff's attorney.<sup>160</sup> Depending on the state and the test of foreseeability, a senior living facility might seek to

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156. See *Elzer v. LaSalle Cty. Nursing Home*, No. 3-12-0130, 2013 Ill. App. Unpub. LEXIS 2112 (Ill. App. Ct. Sept. 23, 2013) (discussing governmental immunity issues applied in a nursing home setting).

157. *Id.* This strategy might result in the perpetrator suing the senior living facility so the defense lawyer should carefully evaluate the facts.

158. *Laing v. Goldberg*, No. 10-520-AA, 2011 U.S. Dist. LEXIS 55987, at \*3 (D. Or. 2011) (order granting judgment as a matter of law).

159. See *Crawford v. Care Concepts*, 625 N.W.2d 876 (Wis. 2001) (determining health care records were not privileged).

160. See *Benisatto v. Sprain Brook Manor Nursing Home, LLC*, 50475/13, 2016 N.Y. Misc. LEXIS 3889, at \*9 (N.Y. Sup. Ct. 2016) (denying the nursing home's motion holding that a senior living facility may be held liable for one resident attacking another when the facility has notice of the perpetrator's prior violent conduct).

exclude evidence of prior dissimilar criminal attacks on the premises.<sup>161</sup> Some trial courts have prohibited crime statistic testimony from experts because it has a tendency to confuse the jury.<sup>162</sup> During trial, it is critical for offers of proof to be made when a judge excludes evidence in order for an issue to be preserved for appeal.<sup>163</sup> Likewise, the golden rule argument, if raised by the attorney for the plaintiff, must be objected to during closing argument or the appellate argument will be waived in many jurisdictions.<sup>164</sup> Where appropriate, these litigation strategies should be utilized by attorneys who litigate these cases.

## VI. Conclusion

Senior care and living facilities are generally charged with the legal duty of guarding against foreseeable and preventable acts of violence committed by and between elderly residents. When this legal duty is ignored, civil liability will be imposed on the senior facility and monetary compensation is available to the victim as we have seen through a survey of the cases. Operators of these facilities must, therefore, stay abreast of the current literature and implement reasonable security for the safety of our senior citizens.

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161. See *Bellevue v. Frenchy's S. Beach Café*, 136 So.3d 640, 642 (Fla. Dist. Ct. App. 2013) (holding that prior incidents are generally relevant).

162. *Hynson v. Dover Downs, Inc.*, No. K14C-03-023 RBY, 2015 Del. Super. Lexis 444, at \*10 (Del. Super. Ct. 2015).

163. *Duke v. Jack in the Box E. Div., L.P.*, No. 14-15-00798-CV, 2017 Tex. App. Lexis 5341, at \*17 (Tex. App. June 13, 2017) (explaining generally how a stipulation might be used to preserve the record).

164. *Paragon Family Rest. v. Bartolini, Jr.*, 769 N.E.2d 609, 620 (Ind. App. 2002).

