

JOSEPH J. EMMONS, III,  
ADMINISTRATOR OF THE  
ESTATE OF JOSEPH J. EMMONS,  
JR.,

Plaintiff,

v.

ELMWOOD HILLS  
HEALTHCARE CENTER, LLC;  
JOHN/JANE DOE DIRECTOR OF  
NURSING 1-100; JOHN/JANE  
DOE ADMINISTRATOR 1-100;  
JOHN/JANE DOE DIRECTOR OF  
NURSING 1-100; JOHN/JANE  
DOE MANAGEMENT COMPANY  
1-100; JOHN/JANE DOE  
MEDICAL DIRECTOR 1-100;  
JOHN/JANE DOES 1-100;  
JOHN/JANE DOE CORPORATION  
1-100; individually, jointly,  
severally, and/or in the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-000089-24T4

CIVIL ACTION

ON APPEAL FROM AN ORDER OF  
FINAL JUDGMENT FROM THE LAW  
DIVISION: CAMDEN COUNTY  
DOCKET NO. CAM-L-002996-21

Sat Below:

The Hon. Judith S. Charny, J.S.C.

---

**BRIEF OF PLAINTIFF IN SUPPORT OF THE APPEAL**

---

On the brief and of counsel:

RICHARD J. TALBOT, ESQUIRE (#040771993)  
**LAW OFFICE OF ANDREW A. BALLERINI, ESQ.**  
535 Route 38, Suite 328  
Cherry Hill, New Jersey 08002  
Telephone: (856) 665-7140  
Email: [rtalbot8@comcast.net](mailto:rtalbot8@comcast.net)

## TABLE OF CONTENTS – BRIEF

	<u>Page</u>
TABLE OF CONTENTS - BRIEF	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS	ii
TABLE OF TRANSCRIPT DESIGNATIONS	ii
TABLE OF CONTENTS - APPENDIX	iii
TABLE OF AUTHORITIES	v
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	4
LEGAL ARGUMENT	7
<b>POINT I: THE COURT ERRED IN DENYING PLAINTIFF’S     APPLICATION FOR ATTORNEY’S FEES AND COSTS.     (PA1; 2T38:6)</b>	7
A. Standard of Review.	7
B. Discussion.	8
C. Statutory Construction.	11
CONCLUSION	17

## **TABLE OF JUDGMENTS, ORDERS AND RULINGS**

	<b><u>Page</u></b>
Order of Final Judgment, filed August 2, 2024	Pa1
Reasons on the Record	2T38:6

## **TABLE OF TRANSCRIPT DESIGNATIONS**

- 1T – Transcript of Trial (Jury Charge) dated June 25, 2024
- 2T – Transcript of Motion Hearing dated August 2, 2024

## TABLE OF CONTENTS – APPENDIX

### (Volume 1 of 1 – Pa1 to Pa157)

	<u>Page</u>
Order of Final Judgment, filed August 2, 2024	Pa1
Complaint, filed October 1, 2021	Pa3
Answer, filed November 9, 2021	Pa37
Jury Verdict Sheet (C-2), filed June 27, 2024	Pa57
Jury Verdict Sheet (C-3), filed June 27, 2024	Pa59
Notice of Motion for Order of Final Judgment, filed July 11, 2024	Pa60
Certification of Richard J. Talbot, Esq., filed July 11, 2024	Pa62
Affidavit of Services, filed July 11, 2024	Pa65
Exhibit A to Affidavit of Services, Billing Records, filed July 11, 2024	Pa69
Exhibit B to Affidavit of Services, Order of Final Judgment in <u>Moody v. The Voorhees Care &amp; Rehab. Ctr.</u> , as filed with highlighting, filed July 11, 2024	Pa73
Exhibit C to Affidavit of Services, Order awarding fees in <u>Capano v. Care One</u> , as filed with highlighting, filed July 11, 2024	Pa76
Exhibit D to Affidavit of Services, Summary of Costs, filed July 11, 2024	Pa78
Exhibit E to Affidavit of Services, Excerpt of Trial Testimony, as filed with highlighting, filed July 11, 2024	Pa80
Certification of Jonathan L. Berkowitz, Esq., filed July 25, 2024	Pa81
Exhibit A to Berkowitz Certif., Excerpt of Trial Testimony dated June 18, 2024, filed July 25, 2024	Pa84

	<u>Page</u>
Exhibit B to Berkowitz Certif., Model Jury Charge (Civil) 8.11E, filed July 25, 2024	Pa116
Exhibit C to Berkowitz Certif., Inflation Calculations, filed July 25, 2024	Pa121
Exhibit D to Berkowitz Certif., web site excerpts, filed July 25, 2024	Pa129
Exhibit E to Berkowitz Certif., Order and Memorandum of Reasons in <u>Burckhardt v. Advanced Subacute Rehab. at Sewell LLC</u> , filed July 25, 2024	Pa143
Notice of Appeal, filed September 11, 2024	Pa149
Civil Appeal Case Information Statement, filed September 11, 2024	Pa153
Certification of Transcript Delivery, filed February 25, 2025	Pa157

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Bermudez v. Kessler Inst. for Rehab.</u> , 439 N.J. Super. 45 (App. Div. 2015)	12,14
<u>Carey v. Piphus</u> , 435 U.S. 247 (1978)	9
<u>Cox v. Sears Roebuck &amp; Co.</u> , 138 N.J. 2 (1994)	2,15,16
<u>DiProspero v. Penn</u> , 183 N.J. 477 (2005)	11,12
<u>Farrar v. Hobby</u> , 506 U.S. 103 (1992)	9,10
<u>In re Conroy</u> , 98 N.J. 321 (1985)	13
<u>Manalapan Realty v. Twp. Committee</u> , 140 N.J. 366 (1995)	7
<u>O'Connell v. State</u> , 171 N.J. 484 (2002)	12
<u>Performance Leasing Corp. v. Irwin Lincoln-Mercury</u> , 262 N.J. Super. 23 (App. Div.), <u>certif. denied</u> , 133 N.J. 443 (1993)	15,16
<u>Ptaszynski v. Atlantic Health Sys.</u> , 440 N.J. Super. 24 (App. Div. 2015)	12
<u>Spiegel v. Evergreen Cemetery Co.</u> , 117 N.J.L. 90 (Sup. Ct. 1936)	11
<u>State v. Crawley</u> , 187 N.J. 440 (2006)	11
<u>State v. Duva</u> , 192 N.J. Super. 418 (Law Div. 1983)	12
<u>State v. Froland</u> , 193 N.J. 186 (2007)	12
<u>State v. Zeidell</u> , 154 N.J. 417 (1998)	12
<u>Szczepanski v. Newcomb Med. Ctr.</u> , 141 N.J. 346 (1995)	9
<u>Tarr v. Ciasulli</u> , 181 N.J. 70 (2004)	9

<u>Constitutions</u>	<u>Pages</u>
----------------------	--------------

<u>Statutes</u>	<u>Pages</u>
-----------------	--------------

42 U.S.C. § 1988	10
<u>N.J.S.A.</u> 10:5-1 to -49	8,9
<u>N.J.S.A.</u> 10:5-27.1	9
<u>N.J.S.A.</u> 10:6-1 to -7.2	8
<u>N.J.S.A.</u> 30:13-1 to -17	1,8
<u>N.J.S.A.</u> 30:13-1	12
<u>N.J.S.A.</u> 30:13-4.2	13
<u>N.J.S.A.</u> 30:13-5	13
<u>N.J.S.A.</u> 30:13-5(b)	14
<u>N.J.S.A.</u> 30:13-5(c)	14
<u>N.J.S.A.</u> 30:13-5(d)	14
<u>N.J.S.A.</u> 30:13-5(f)	14
<u>N.J.S.A.</u> 30:13-5(j)	14
<u>N.J.S.A.</u> 30:13-5(l)	14
<u>N.J.S.A.</u> 30:13-8	13
<u>N.J.S.A.</u> 30:13-8(a)	2,7
<u>N.J.S.A.</u> 56:8-19	15,16

**Rules of Court**

**Pages**

R. 4:42-9

8

**Other Authorities**

**Pages**

Senate Institutions, Health and Welfare Committee,  
Statement to S. 944 (1976)

14



## PRELIMINARY STATEMENT

This appeal presents the novel issue of whether attorney's fees and costs should be awarded under the Nursing Home Responsibilities and Resident's Rights Act, N.J.S.A. 30:13-1 to -17 ("NHA"), where the jury finds a violation of rights but awards no actual damages for that violation. At bar, the jury found a violation of the rights of decedent, Joseph J. Emmons, Jr., under the NHA by defendant, Elmwood Hills Healthcare Center, LLC ("Elmwood Hills"). The jury did not award damages for that claim, instead awarding \$100,000.00 in damages under the negligence claim. The same set of underlying facts formed the basis for the negligence claim and the violation of rights claim. The damages also were the same under both causes of action. Accordingly, plaintiff's counsel asked that there be one line for damages under both claims. Defense counsel wanted two separate lines for damages. The Verdict Sheet reflected the defense's position.

Multiple times, the jury was instructed not to duplicate damages. Although the Verdict Sheet contained two separate lines for damages under each cause of action, the jury was instructed that there was "only one set of damages." Under those circumstances, plaintiff, Joseph J. Emmons III, as administrator of the Estate of Joseph J. Emmons, Jr., should be considered to have "prevailed," entitling Mr. Emmons' estate to attorney's fees and costs per statute. Plaintiff was awarded affirmative relief by way of an enforceable judgment against defendant, Elmwood

Hills. Even if plaintiff had received no damage award, he is entitled to attorney's fees and costs because he established a violation of decedent's rights.

Pursuant to N.J.S.A. 30:13-8(a), "Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation . . . . Any plaintiff who prevails in any such action **shall** be entitled to recover reasonable attorney's fees and costs of the action." N.J.S.A. 30:13-8(a). Distinguishing the NHA from most other fee-shifting statutes, attorney's fees and costs are **mandatory** when a plaintiff prevails. Also distinguishing the NHA from most other fee-shifting statutes, the Legislature chose not to use the term "prevailing party." Only a plaintiff can prevail in NHA actions.

Like the NHA, under the Consumer Fraud Act ("CFA"), an award of fees and costs is mandatory. According to CFA jurisprudence, where a jury finds that a defendant has violated the CFA but has not given actual damages for that violation, a plaintiff is entitled to attorney's fees and costs incurred in proving that violation. Our Supreme Court in Cox v. Sears Roebuck & Co., 138 N.J. 2, 24-25 (1994), held that "the fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial hardship." Plaintiffs pursuing NHA violations should be afforded similar treatment.

Our Legislature, in making fee awards in NHA cases mandatory, underscored the importance of attracting qualified attorneys to take on cases where

there may be no actual damages arising from the violation of a nursing home resident's rights. Based on the vulnerable nature and circumstances of the majority of nursing home residents, it stands to reason that the Legislature intended the violation itself to be actionable and redressable without a finding of actual damages. Without the incentive of being able to recover attorney's fees and costs, no attorney would commit the considerable resources required for this type of case, and those violations would go unaddressed and unremedied. That is why establishment of the violation itself entitles a NHA plaintiff to the mandatory award of fees and costs.

Under the circumstances at bar, where a plaintiff succeeds on both the statutory claim and the common-law claim but receives damages for the common-law claim only, a plaintiff should be awarded fees and costs because plaintiff has achieved affirmative relief by way of a judgment against defendant. To do otherwise, as the trial court acknowledged, "would undermine the statute." The trial court's decision to deny attorney's fees and costs in this case was error and should be reversed.

### **PROCEDURAL HISTORY**

On October 1, 2021, plaintiff, Joseph J. Emmons III, as administrator of the Estate of Joseph J. Emmons, Jr., filed a Complaint against the nursing home defendant, Elmwood Hills Healthcare Center, LLC. Pa3. On November 9, 2021,

defendant filed an Answer. Pa37. The matter proceeded through discovery and was scheduled for trial by a jury in June 2024.

At the conclusion of a jury trial before the Honorable Judith S. Charny, J.S.C., on June 27, 2024, the jury rendered its verdict for plaintiff. Pa57 (Ex. C-2, Verdict Sheet). According to the Verdict Sheet, the jury found defendant to be negligent and awarded \$100,000.00 in damages. Pa57-58. The jury also found that defendant had violated Mr. Emmons' rights under the NHA but did not award monetary damages for that violation. Pa57. On July 11, 2024, plaintiff moved to enter a final judgment including interest and attorney's fees and costs pursuant to the NHA. Pa60. On July 25, 2024, defendant opposed the motion. Pa81. On August 2, 2024, oral argument was heard before Judge Charny. 2T. On that same date, the court entered an Order for Final Judgment in the amount of \$102,934.05 and denied plaintiff's application for attorney's fees and costs for the reasons cited on the record. Pa1. Plaintiff timely appealed from that Order. Pa149.

### **STATEMENT OF FACTS**

In his Complaint, plaintiff alleged claims against defendant sounding in negligence, gross negligence and violation of rights under the NHA. Plaintiff alleged the same set of operative facts as the basis for all his claims. Pa9-11.

The Complaint states in pertinent part as follows:

13. The negligence, as well as gross negligence, and violations of rights committed by all of the defendants included, but was not limited to the

following, to wit: (A) permitting abuse of the Plaintiff/Resident; (B) condoning the failure of employees to immediately report to supervisory personnel acts of abuse of the Plaintiff/Resident; (C) permitting inadequate and false charting of the Plaintiff/Resident's medical records; (D) failure to notify the physician and the Plaintiff/Resident and Plaintiff/Resident's family in a timely manner of action which affected the Plaintiff/Resident's safety and well-being; (E) failure to hire a sufficient number of trained and competent staff, as evidenced by continuous understaffing; (F) condoning questionable recording/charting in the Plaintiff/Resident's medical records; (G) violating New Jersey Statutes, New Jersey Administrative Regulations, as well as Federal OBRA regulations; (H) failure to adhere to the plan of care; (I) failure to discharge employees when the facility knew or should have known of the employee's propensity for negligent care of the Plaintiff/Resident; (J) condoning, and thus allowing, untrained/unlicensed individuals to provide care to the Plaintiff/Resident; (K) failure to properly train employees to deal with geriatric residents who are unable to care for themselves as well as residents in need of rehabilitation; (L) failure to properly investigate the background of prospective employees; (M) failure to notify supervisors of the on-call physician's failure to properly care for the resident, as required by regulations in effect at the time of this incident; (N) failure to train the employees to recognize medical conditions/symptoms which required the Plaintiff/Resident's transfer to the hospital; (O) failure to properly train employees to deal with geriatric/disabled residents who are disabled and likely to be subject to injuries if not properly assisted; (P) failure to provide proper assistance; (Q) failure to provide adequate nutrition; (R) failure to provide adequate hydration; (S) failure to properly manage and administer the subject nursing home; (T) failure to properly monitor and assess; (U) failure to provide the appropriate number of staff to assist the resident; (V) failure to adequately care plan for the individualized needs of the resident; (W) failure to provide appropriate care and assistance while toileting; (X) failure to transfer the resident to the appropriate facility; (Y) failure to properly administer medication(s); (Z) failure to prevent the development of and/or worsening of pressure injuries; and (AA) failure to properly move, roll, position and/or assist the resident in bed or otherwise, given the individualized needs and condition of the resident.

[Pa9-11.]

At the charge conference, all parties and the court acknowledged that the same

set of facts formed the basis for damages under both the negligence and violation of rights claim. Specifically, to avoid what came to pass, the jury having to choose under which cause of action to place damages, plaintiff's counsel wanted one line for damages on the Verdict Sheet. He stated that this was necessary because "you have two causes of action for the same set of damages." Pa87 at 13:16-18. The court asked defense counsel: "Defense, do you want one line since it's the same set of facts or do you want two lines." Pa88 at 14:13-15. The defense wanted two lines and the court allowed it, notwithstanding the court's own acknowledgement that that would be problematic. The trial judge presciently stated ". . .and the problem is I don't know how they could possibly segregate it without speculating because [plaintiff] put the evidence in all as one." Pa88 at 14:21-24.

The jury was instructed several times not to duplicate damages, which is correct. 1T15:20-25; 1T16:23-25; 1T26:9-13; 1T26:19-25; 1T27:1-2. However, the jury was also told that there was only one set of damages. "There are two theories of recovery . . . but you have to decide them separately because the damages, if you get to damages, are not to be duplicated. You can't have damages that intersect. **There's only one set of damages.**" 1T15:20-25. "You are not to duplicate damages, which means you may not compensate the plaintiff twice for the same injuries in the event you find in favor of both negligence and nursing home resident's rights." 1T26:9-13. "However, if you find that the plaintiff did not sustain separate injuries or damages,

then **you may compensate plaintiff once and only once.**" 1T26:19-25. **"But the damages are to be compensated once and only once."** 1T27:1-2.

At the hearing on the application for attorney's fees and costs, the court stated: "I don't want to give nothing because that would undermine the statute." 2T22:23-24. Notwithstanding that accurate assessment of the legislative intent of the NHA, the court awarded plaintiff no attorney's fees and no costs. Pa1-2; 2T38:6.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE COURT ERRED IN DENYING PLAINTIFF'S APPLICATION FOR ATTORNEY'S FEES AND COSTS. (PA1; 2T38:6)**

##### **A. Standard of Review.**

Attorney's fees and costs are mandatory, not discretionary, under the NHA. "Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation . . . . Any plaintiff who prevails in any such action **shall** be entitled to recover reasonable attorney's fees and costs of the action." N.J.S.A. 30:13-8(a). Whether plaintiff "prevailed" in this action is a question of law that is reviewed de novo. See Manalapan Realty v. Twp. Committee, 140 N.J. 366, 378 (1995) (questions of law addressed to the trial court are not entitled to deference, and an appellate panel's review of legal issues is de novo).

B. Discussion.

Although the State of New Jersey generally abides by the “American Rule” that litigants pay their own attorneys’ fees in lawsuits, the Legislature and the courts have recognized several exceptions to that rule. The exceptions set forth in the Court Rules include certain costs in a family action, out of a fund in court, in a probate action, in an action for the foreclosure of a mortgage, in an action to foreclose tax certificates, in an action on a liability or indemnity policy of insurance, or as expressly provided by the New Jersey Court Rules with respect to certain specified actions. R. 4:42-9.

In addition to the allowances for recovery of fees set forth in the Court Rules, fee-shifting is allowed where expressly authorized by statute. Statutes that provide for fee shifting include the Consumer Fraud Act, the Law Against Discrimination, the Civil Rights Act, the Environmental Rights Act, the Construction Lien Law, Prevailing Wage Act, Uniform Commercial Code, certain federal laws such as civil rights actions and, of course, the Nursing Home Responsibilities and Resident’s Rights Act, N.J.S.A. 30:13-1 to -17, or simply, the Nursing Home Act (“NHA”).

The New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -7.2, provides that counsel fees may be awarded if there is a violation of a statutory or substantive right. The New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-1 to



-49, has a fee-shifting provision that also provides for a discretionary award of counsel fees and costs. N.J.S.A. 10:5-27.1. Our Supreme Court has held that under the LAD provision authorizing attorney fee awards to “prevailing parties,” a prevailing party is one who succeeds “on any significant issue in the litigation that achieves some of the benefit the parties sought in bringing suit.” Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995). The Court clarified in Tarr v. Ciasulli, 181 N.J. 70 (2004), that a “prevailing party” under the LAD means a plaintiff who is awarded “some affirmative relief by way of an enforceable judgment against defendant or other comparable relief through a settlement or consent decree.” Id. at 86-87. The Court further ruled that “some affirmative relief” includes an award of nominal damages. Id. at 87. The Tarr Court based its decision on the United States Supreme Court decision in Farrar v. Hobby, 506 U.S. 103 (1992).

The issue in Farrar was whether a plaintiff who establishes a civil rights violation but does not receive actual damages and instead receives nominal damages under the federal civil rights act is a “prevailing party” for purposes of the fee-shifting provision of that statute. Petitioners in Farrar were entitled to nominal damages under Carey v. Piphus, 435 U.S. 247, 266 (1978), because they were able to establish defendant’s liability for the denial of procedural due process. However, they did not show actual injury from that violation of their rights

necessary for a compensatory damages award. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. § 1988, provided in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . . , or title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Farrar Court decided that a plaintiff that receives nominal damages is a prevailing party and may be entitled to attorney's fees per the above provision.

"We therefore hold that a plaintiff who wins nominal damages is a prevailing party under § 1988. When a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant's legal immunity to suit." 506 U.S. at 111. The point is a plaintiff has prevailed where a defendant did not secure a judgment in his favor or establish legal immunity to suit.

The case *sub judice* is distinguishable from the circumstances in both Tarr and Farrar because the jury here found plaintiff was entitled to actual damages and plaintiff recovered an enforceable judgment against defendant. The problem here was the choice the jury had to make regarding where to place the damages award. Had there been one line for damages as plaintiff requested, there would be no dispute that plaintiff was entitled to recover fees and costs.

Even *arguendo* if we apply the Tarr/Farrar holdings and reasoning to the case at bar and NHA claims in general, plaintiff is entitled to fees and costs. Plaintiff should be considered to have prevailed, where, as here, his two causes of action are inextricably intertwined, the jury was instructed that there was only one set of damages, he has received a judgment on the merits against defendant, and he has established the violation of the nursing home resident's rights.

Moreover, a plaintiff that cannot show actual damages under the NHA should still be entitled to attorney's fees, whether by virtue of an award of nominal damages or establishment of the violation itself. That is so because the injury is inherent in the violation itself. The common law of New Jersey has long recognized that where a legal right has been violated, the law will infer nominal damages even in the absence of actual loss. Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 96-97 (Sup. Ct. 1936).

C. Statutory Construction.

When interpreting a statute, the paramount goal is to determine the Legislature's intent. State v. Crawley, 187 N.J. 440, 452 (2006). To do so, one must first examine the plain language of the statute and ascribe to the words their ordinary meaning. DiProspero v. Penn, 183 N.J. 477, 492 (2005). "It is not the function of th[e] Court to `rewrite a plainly-written enactment of the Legislature [] or presume that the Legislature intended something other than that expressed by

way of the plain language.'" Ibid. (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)). In other words, if the statute is clear on its face, the inquiry ordinarily ends. State v. Froland, 193 N.J. 186, 194 (2007).

Legislative enactments should be construed wherever possible so that no language is unnecessary or impotent. State v. Zeidell, 154 N.J. 417 (1998). "[T]he legislature is deemed to have intended what it wrote and the Court may not construe a contrary concept." State v. Duva, 192 N.J. Super. 418, 421 (Law Div. 1983).

Where the plain meaning does not point the court to a clear and unambiguous result, it then considers extrinsic evidence from which it hopes to glean the Legislature's intent. Included within the extrinsic evidence rubric are legislative history and statutory context, which may shed light on the drafters' motives. Likewise, interpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation.

[Bermudez v. Kessler Inst. for Rehab., 439 N.J. Super. 45, 50 (App. Div. 2015).]

The NHA "was enacted in 1976 to declare 'a bill of rights' for nursing home residents and define the 'responsibilities' of nursing homes." Ptaszynski v. Atlantic Health Sys., 440 N.J. Super. 24, 32 (App. Div. 2015). "The Legislature hereby finds and declares that the well-being of nursing home residents in the State of New Jersey requires a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents." N.J.S.A. 30:13-1 (legislative findings and declarations). The NHA established the many rights of nursing home

residents, N.J.S.A. 30:13-5, and expressly declares that residents "shall have a cause of action against any person" violating their rights that would include the right to "recover actual and punitive damages" and "reasonable attorney's fees and costs" incurred by a plaintiff who prevails in such an action. N.J.S.A. 30:13-8; see N.J.S.A. 30:13-4.2.

Our Supreme Court in In re Conroy, 98 N.J. 321 (1985), described nursing home residents as “a particularly vulnerable population . . . . Most suffer from chronic or crippling disabilities and mental impairments, and need assistance in activities of daily living. The vast majority of patients who enter a nursing home will eventually die there, and their illnesses and deaths will be viewed as consistent with their advanced age and general infirmity.” Id. at 374. In its statement to the bill that eventually became the Nursing Home Act, the Health and Welfare Committee of the Senate described the statute's purpose as follows:

Residents of nursing homes are all too often given inferior treatment because they are old, feeble or poor. They are in need of a bill of [rights] similar to the bill recently passed by the Legislature and signed into law, enumerating certain rights of the mentally ill. This bill not only declares that nursing home residents have certain rights; it also lists a number of responsibilities that nursing homes have with regard to the care of residents. The Federal government has established clear standards of care for residents of skilled and intermediate care nursing facilities who are Medicaid or Medicare recipients. However, this bill makes similar standards of care applicable to *all* nursing homes and nursing home residents in the State and, moreover, makes such standards an expression of legislative policy and intent.

[Bermudez, 439 N.J. Super. at 55 (quoting Senate Institutions, Health and Welfare Committee, Statement to S. 944 (1976)).]

The point of the NHA, then, is to deter inferior treatment by nursing homes that may take advantage of their elderly, feeble and infirm residents by establishing rights by which those residents can seek legal redress in our courts. The problem recognized by the Legislature in fee-shifting statutes, in general, and in the NHA, in particular, is that some of those rights, although actionable, may not be easily quantifiable. For example, under the Act, a resident has the right to:

“wear his own clothing” N.J.S.A. 30:13-5(b);

“retain and use his personal property” N.J.S.A. 30:13-5(c);

“receive and send unopened correspondence” N.J.S.A. 30:13-5(d);

“unaccompanied access to a telephone” N.J.S.A. 30:13-5(e);

“privacy” N.J.S.A. 30:13-5(f);

“a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident” N.J.S.A. 30:13-5(j);

“reasonable opportunity for interaction with the opposite sex” N.J.S.A. 30:13-5(l).

Those rights, although recognized by the Legislature as worthy of protection may, nevertheless, be unquantifiable or difficult to quantify when it comes to damages. For example, a nursing home resident suffering from dementia left for hours unattended who has soiled himself has had his right to a safe and decent

living environment and care recognizing his dignity violated but may not be cognizant enough to incur actual damages. Without the incentive of being able to recover attorney's fees and costs, no competent attorney would commit the considerable resources required for that type of case and the violation would go unaddressed and unremedied. That could not logically be what the Legislature intended because it would, in fact, render those rights illusory.

The mandatory fee award to a plaintiff who prevails further underscores the Legislature's intent that private citizens litigate these cases and vindicate those rights for themselves in order to promote better treatment generally. Similarly, under the Consumer Fraud Act, an award of fees and costs is mandatory. The CFA states, in relevant part, that "[i]n all actions under this section . . . the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."

N.J.S.A. 56:8-19.

Our Supreme Court has held that a plaintiff in a consumer-fraud action "can recover reasonable attorneys' fees, filing fees, and costs, if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages." Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994); see also Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J. Super. 23, 34 (App. Div.) (holding that where a jury found that a defendant violated the CFA, but the plaintiff had not been

damaged by that violation, strong precedent supported an award to the plaintiff of attorney's fees), certif. denied, 133 N.J. 443 (1993). "The fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial hardship." Cox, 138 N.J. at 25. The same reasoning applies equally to the concept of fees and costs for violations of a nursing home resident's rights under the NHA.

Pertinently, the Cox Court found that even without an ascertainable loss, a plaintiff that establishes a violation of the Act is entitled to fees and costs, notwithstanding the fact that the CFA applies to "any person who suffers any **ascertainable loss.**" N.J.S.A. 56:8-19. The NHA has no "ascertainable loss" requirement. Logically, then, if a violation of the law alone entitles a CFA plaintiff to fee-shifting, where the statute actually references an "ascertainable loss," a nursing home resident should be entitled to the same relief under the NHA, where there is no requirement of an "ascertainable loss."

The CFA and the NHA are considered remedial legislation. As our Supreme Court noted in Cox regarding the CFA and is also true of the NHA, "[a]lthough one purpose of the legislation is clearly remedial in that it seeks to compensate a victim's loss, the Act also punishes the wrongdoer by awarding a victim treble damages, attorneys' fees, filing fees, and costs. In that sense, the Act serves as a deterrent." Id. at 21. There would be no deterrent to nursing homes mistreating



their residents if attorney's fees and costs are not awarded where a violation of rights has been found by a jury in the absence of monetary loss. Given the vulnerability of nursing home residents, the focus on human dignity of the enumerated rights and the intent to deter inferior treatment by nursing homes, failure to provide for fee-shifting in such cases would substantially undermine the legislative purpose of the NHA. The trial court's decision to deny attorney's fees and costs in this case, therefore, was error and should be reversed.

### CONCLUSION

For the foregoing reasons, the order denying plaintiff's application for counsel fees and costs should be reversed and remanded to the trial court to award reasonable fees and costs incurred in establishing the violations of Mr. Emmons' rights.

Respectfully submitted,

**LAW OFFICE OF  
ANDREW A. BALLERINI, ESQ.**  
Counsel for Plaintiff-Appellant

By: Richard J. Talbot  
Richard J. Talbot, Esq.

DATED: March 28, 2025

JOSEPH J. EMMONS, III,  
Administrator of the Estate of JOSEPH  
J. EMMONS, JR.,

Plaintiff,

-against-

ELMWOOD HILLS HEALTHCARE  
CENTER, LLC; JOHN/JANE DOE  
DIRECTOR OF NURSING 1-100;  
JOHN/JANE DOE  
ADMINISTRATOR 1-100;  
JOHN/JANE DOE DIRECTOR OF  
NURSING 1-100; JOHN/JANE DOE  
MANAGEMENT COMPANY 1-100;  
JOHN/JANE DOE MEDICAL  
DIRECTOR 1-100; JOHN/JANE  
DOES 1-100; JOHN/JANE DOE  
CORPORATION 1-100; individually,  
jointly, severally, and/or in the  
alternative,

Defendants.

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-000089-24

Civil Action

ON APPEAL FROM ORDER OF  
THE SUPERIOR COURT OF NEW  
JERSEY, LAW DIVISION,  
CAMDEN COUNTY

DOCKET NO.: CAM-L-2996-21

SAT BELOW:

JURY TRIAL BEFORE HON.  
JUDITH S. CHARNY, J.S.C.

---

**BRIEF OF DEFENDANT-  
RESPONDENT ELMWOOD HILLS HEALTHCARE CENTER,  
LLC**

---

**GOLDBERG SEGALLA LLP**

301 Carnegie Center, Suite 200

Princeton, New Jersey 08540-6530

Tel: (609) 986-1300 / Fax: (609) 986-1301

Thaddeus J. Hubert, IV, Of counsel and on the brief (Bar No.:020402010)

[thubert@goldbergsegalla.com](mailto:thubert@goldbergsegalla.com)

## **TABLE OF CONTENTS**

PRELIMINARY STATEMENT .....	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS.....	3
A. Prior to trial, plaintiff entered into a consent order that distinguished the factual inquiry on plaintiff’s claims for common-law negligence versus violation of the NHA.....	3
B. Testimony at trial factually distinguished between plaintiff’s claims for common-law negligence versus violation of the NHA.....	4
C. Plaintiff made admissions effecting his ability to establish his father’s rights were violated at Elmwood Hills due to the development of a pressure wound.....	6
D. Plaintiff acknowledged proximate cause is a fundamental element of an NHA claim at the charge conference.....	7
E. The court instructed the jury to consider different evidence on plaintiff’s claims for negligence versus violation of NHA and not to duplicate damages on those distinct theories of liability.....	7
F. After days of deliberation, the jury awarded damages on the common-law negligence claim, but found no proximate cause on the NHA claim.....	9
G. During post-trial motion practice, the court rejected plaintiff’s position that the facts and damages on plaintiff’s claims for negligence and violation of the NHA were the same.....	10
STANDARD OF REVIEW.....	11
LEGAL ARGUMENT.....	12

I. Plaintiff did not prevail on his NHA claim because he did not achieve any benefit in bringing this claim or materially alter the relationship between the parties (2T29:12 – 33:24; 2T38:6 – 41:14).....	12
II. Plaintiff agreed that proximate cause is a required element of proof to prevail on an NHA claim. Plaintiff’s position on appeal contradicts his position during the trial and violates the invited error doctrine (2T29:12 – 33:24; 2T38:6 – 41:14; 8T14:1-3; 8T14:11-13; 8T15:2-12; 8T34:18-21; Pa57).....	14
III. Plaintiff’s position that a rights violation alone establishes he is a prevailing party is inconsistent with the express language of the NHA because the NHA requires plaintiff to establish actual or punitive damages to be considered a prevailing party (2T16:22-24;2T25:25 – 26:17; 2T29:12 – 33:24; 2T38:6 – 41:14).....	16
IV. The trial court also correctly found that plaintiff’s damages awarded on the common-law, non-fee-shifting negligence claim supports no award of attorneys’ fees and costs under the NHA (2T29:12 – 33:24; 2T36:1 – 37:5; 2T38:6 – 41:14).....	18
V. Plaintiff’s reliance on the consumer fraud act is mistaken because it is not a prevailing party statute (2T12:9-16:24; 2T29:12 – 33:24; 2T38:6 – 39:16).....	20
CONCLUSION.....	22

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Bergen Comm'l Bank v. Sisler</u>	
157 N.J. 188 (1999) .....	16
<u>Cox v. Sears Roebuck &amp; Co.</u>	
128 N.J. 2 (1994) .....	21
<u>Farrar v. Hobby</u>	
506 U.S. 103, 111-112 (1992).....	13, 14
<u>Gnall v. Gnall,</u>	
222 N.J. 414 (2015) .....	12
<u>Kozma v. Starbucks Coffee Co.</u>	
412 N.J. Super. 319 (App. Div. 2010) .....	9
<u>Lesniak v. Budzash</u>	
133 N.J. 1 (1993) .....	17
<u>Lippman v. Ethicon, Inc.</u>	
222 N.J. 362 (2015) .....	16
<u>New Jersey Builders, Owners and Managers Ass'n v. Blair</u>	
60 N.J. 330 (1972) .....	17
<u>New Jersey Div. of Youth and Family Services v. M.C. III</u>	
201 N.J. 328 (2010) .....	15
<u>Ptaszynski v. Atlantic Health Sys.</u>	
440 N.J. Super. 24 (App. Div. 2015) .....	15
<u>State v. Nantambu</u>	
221 N.J. 390 (2015) .....	12
<u>State v. Pierre</u>	
223 N.J. 560 (2015) .....	11

Tarr v. Ciasulli

181 N.J. 70 (2004) ..... 11, 13, 21, 22

Wingate v. Estate of Ryan

149 N.J. 227 (1997) .....17

**Statutes**

N.J.S.A. 10:5-27:1 .....13

N.J.S.A. 30:13-1 et seq. ....1

N.J.S.A. 30:13-8 ..... 1, 13, 17

N.J.S.A. 30:13-8a .....17

N.J.S.A. 56:8-19 .....20

**Other**

Rule 2:10-2 .....9

Rule 4:58-3 .....10

### **PRELIMINARY STATEMENT**

The Court should deny Plaintiff's appeal because the Honorable Judith S. Charny, J.S.C. correctly applied governing New Jersey and United States Supreme Court law regarding prevailing parties to Plaintiff's unsuccessful pursuit of damages on his claim under the New Jersey Nursing Home Responsibilities and Rights of Residents Act, *N.J.S.A. 30:13-1 et seq.* ("NHA").

Under *N.J.S.A. 30:13-8(a)*, a plaintiff may bring a private right of action to enforce a nursing home resident's rights "and to recover actual and punitive damages for their violation." Under the NHA, proximate cause is a fundamental element and Plaintiff's counsel repeatedly and explicitly requested that proximate cause be charged to the jury. At trial, after multiple days of deliberation, the jury found that Elmwood Hills Healthcare Center, LLC's ("Elmwood Hills") conduct violated Joseph J. Emmons, Jr.'s ("decedent") nursing home resident rights, but that the violation proximately caused no damages under the NHA. Based on the verdict, Judge Charny correctly refused to award Plaintiff attorneys' fees and costs under the NHA because the statute requires a plaintiff to prove damages caused by the violation of rights, not a violation alone, to prevail. Plaintiff's argument on appeal – that a violation alone confers upon him prevailing party status – contradicts the NHA, case law interpreting the NHA, Plaintiff's position during the trial, and violates the invited error doctrine.

Judge Charny correctly applied the law, which holds that a plaintiff only prevails on the merits when actual relief awarded materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. Here, since the jury found no violation proximately caused an injury, Judge Charny correctly found that Plaintiff did not prevail under the statute. The jury was free to determine that not every negligent act is a rights violation and not every indignity is compensable.

Judge Charny also correctly refuted Plaintiff's baseless attempts to pursue attorney's fees and costs under the NHA through the jury's award of damages on Plaintiff's non-fee-shifting common-law negligence claim. First, she correctly disputed Plaintiff's claim that the evidence presented on these two claims was synonymous. To the contrary, Plaintiff's common-law negligence claim pertained to nursing home care provided after the March 2020 COVID-19 lockdown that led to the development of pressure injuries, whereas Plaintiff's NHA claim addressed care provided throughout the decedent's nursing home residence, dating back to October 2019. Second, Judge Charny correctly acknowledged that even though damages for negligence and violation of the NHA should not be duplicated, separate damages can be awarded under a claim for common-law negligence versus a claim for violation of the NHA. Based on this recognition, Judge Charny correctly found that a plaintiff does not prevail on a statutory NHA claim through damages awarded



on a distinct common-law negligence claim. Third, Judge Charny refuted Plaintiff's meritless attempt to apply New Jersey's Consumer Fraud Act ("CFA") to justify an award of damages under NHA. There is simply no precedent supporting Plaintiff's baseless argument regarding the application of the CFA to the NHA.

Based on the foregoing, Judge Charny correctly applied the law to the jury's extensive, thorough, and in-depth deliberations and verdict. This Honorable Court should not disturb the jury's findings of fact nor the Court's conclusions of law, and Plaintiff's appeal should be denied in all respects.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>**

#### **a. Prior to Trial, Plaintiff Entered into a Consent Order that Distinguished the Factual Inquiry on Plaintiff's Claims for Common-Law Negligence Versus Violation of the NHA.**

Plaintiff incorrectly asserts that the same set of underlying facts formed the basis for his claims for common-law negligence versus violation of the NHA, and as a result, the damages were the same under both causes of action. To the contrary, prior to trial, the parties entered into a Consent Order, dated February 21, 2024, under which Plaintiff agreed to dismiss his negligence claims under all Counts of the Complaint based on alleged breaches of the standard of care or alleged regulatory violations that occurred prior to the COVID-19 lockdown (on or about March 16,

---

<sup>1</sup> The statement of facts and procedural history are represented together for the Court's convenience and to avoid repetition.

2020) . . . .” Da2-3. However, under the Consent Order, Plaintiff’s claims for violation of the NHA survived without any time restrictions regarding the COVID-19 lockdown.<sup>2</sup>

Plaintiff’s counsel even admitted at the charge conference that the jury is “still going to be determining violations of rights for the whole time” decedent resided at Elmwood Hills, while acknowledging that the negligence claim would be limited to the post-COVID-19 lockdown timeframe. See 8T81:2 - 83:9.<sup>3</sup>

**b. Testimony at Trial Factually Distinguished Between Plaintiff’s Claims for Common-Law Negligence versus Violation of the NHA.**

Consistent with the Consent Order, Plaintiff’s evidence at trial distinguished between Plaintiff’s post-COVID-19 pressure-injury based negligence claim versus his more expansive pre-COVID-19 NHA claim. By way of examples, Mrs. Kerrie Emmons, Plaintiff’s wife, testified that before the COVID-19 lockdown, staff at Elmwood Hills tried to put another resident’s dentures in the decedent’s mouth, even

---

<sup>2</sup> Plaintiff’s experts conceded that the decedent experienced no pressure injuries prior to the COVID-19 lockdown, so they offered no opinion that a breach of the standard of care or governing regulations caused damages sounding in negligence before the COVID-19 lockdown. However, since expert testimony was not required to support an NHA claim, Plaintiff reserved the right to offer fact testimony regarding care provided throughout the decedent’s nursing home residence to support the resident’s rights claim.

<sup>3</sup> The transcripts in this brief are designated as follows: 1T - 6/25/24 trial transcript (to be consistent with Plaintiff’s designation); 2T - 8/2/24 motion transcript (to be consistent with Plaintiff’s designation); 3T – 6/5/24 trial transcript; 4T – 6/6/24 trial transcript; 5T – 6/10/24 trial transcript; 6T - 6/14/24; 7T - 6/17/24 trial transcript; 8T – 6/18/24 trial transcript; 9T - 6/24/24 trial transcript.

though the decedent did not wear dentures; that staff tried to put another resident's shoes on the decedent's feet that were a size and a half too small; that she repeatedly needed to ask the staff to provide the decedent with incontinence care; that when she laundered the decedent's clothing, it was wet with urine and feces; and that the staff failed to timely feed the decedent his dinner when his room was switched from subacute to long-term care on New Year's Eve 2019. See 4T130:8-11; 4T131:2-10; 4T131:11-132:5; 4T129:15-22; 4T133:4-8; and 4T134:19-136:8. All of Mrs. Emmons' observations of this care occurred before the inception of the COVID-19 lockdown because she could not visit the decedent once the lockdown began. Id. at 4T127:19-25; 4T136:9-13.

Elmwood Hills contested Ms. Emmon's testimony. She admitted on cross-examination that decedent never made any statement to her regarding the cleanliness of his room or bathroom. Id. at 4T140:16 – 143:1. Additionally, Elmwood Hills contested her allegations during the cross-examination of Plaintiff. Plaintiff admitted that he (1) never moved decedent from Elmwood Hills despite the complaints testified to by his wife and himself; (2) Plaintiff understood he could discharge decedent to another facility; (3) his admission agreement advised he could file a complaint or grievance if he was unsatisfied but he never produced any such document during his testimony; (4) his interrogatory answers did not identify any pre COVID-19 complaints; (5) and his interrogatory answers did not identify any

statements from his wife concerning any pre COVID-19 complaints. See 5T27:18 – 43:7.

**c. Plaintiff Made Admissions Effecting His Ability to Establish His Father's Rights Were Violated at Elmwood Hills Due to the Development of a Pressure Wound.**

Plaintiff admitted that that he was not shocked or surprised that decedent developed pressure wounds prior to being admitted at Elmwood Hills while he resided at other facilities “because to be honest with you, you got to be somewhere and most of the time you’re sitting on your butt. I mean, I can understand that.” Id. at 5T44:14-22. Plaintiff admitted that these other facilities never advised him that decedent had a pressure wound, instead he learned about the injury for the first time at his deposition. Id. at 5T44:1 – 45:22. Plaintiff was not angered or upset about his father developing a pressure wound while hospitalized.<sup>4</sup> Id. at 5T46:3-15. Plaintiff admitted the development of the pressure wound at the hospital did not violate his father’s dignity. Id. at 5T46:16-21.

Plaintiff testified his father’s pressure wound while at Atrium did not violate his dignity or safety and did not make his environment indecent. Id. at 5T47:3-14. Plaintiff originally provided much of this testimony at his deposition. Id. at 5T46:16 – 47:14.

---

<sup>4</sup> Prior to being admitted at Elmwood Hills, decedent spent time at two facilities: Inspira and Atrium.

**d. Plaintiff Acknowledged Proximate Cause is a Fundamental Element of an NHA Claim at the Charge Conference.**

Plaintiff's counsel explicitly and emphatically requested a proximate cause charge regarding the NHA claim at the charge conference. He advised the Court, "the current version of [the] model civil jury charge inexplicably to me, takes out proximate cause for violations of rights." See 8T14:1-3. Plaintiff's counsel explained the "suggested verdict sheet in the jury charge does not have proximate cause for violations of rights. I don't agree with that." Id. at 8T14:11-13. (Emphasis added). Plaintiff's counsel explained "I think [charging proximate cause] that's the safer way to protect any verdict I want, I'm asking for proximate cause on violations. Id. at 8T15:2-12. Thus, Plaintiff submitted a verdict sheet with proximate cause language on the NHA claim. Id. at 8T34:18-21.

**e. The Court Instructed the Jury to Consider Different Evidence on Plaintiff's Claims for Negligence versus Violation of NHA and Not to Duplicate Damages on those Distinct Theories of Liability.**

Based on the evidence, the jury was instructed to consider different time periods for the claims for negligence versus violation of the NHA. The jury was instructed it could only consider damages arising from Elmwood Hills' negligence since March 16, 2020. See 1T33:21 – 34:6. However, the jury was also instructed it could consider damages incurred by decedent for a rights violation starting on October 26, 2019, when decedent was admitted to Elmwood Hills. Id. at 1T34:7-10. The pertinent portion of the damages charge reads as follows:

The law also permits a person to recover for the loss of enjoyment of life, which means the inability to pursue one's normal pleasure and enjoyment. When we say normal enjoyment, we're only talking about Mr. Emmons as the person he was at certain times. When considering negligence, we are only talking about Mr. Emmons as the person as he was on March 16, 2020, when the State of New Jersey declared the COVID-19 lockdown. When considering violation of Mr. Emmons' nursing home residents' rights, we are talking about Mr. Emmons as the person he was when he was admitted to Elmwood Hills on October 26, 2019.

[Id. at 1T33:21 – 34:10].

The Court also instructed the jury that the damages for the negligence claim could not intersect or commingle with the damages for the NHA claim:

[t]here are two theories of recovery, which I'm going to go over the law for each of them, but you have to decide them separately, because the damages, if you get to damages, are not to be duplicated. You can't have damages . . . that intersect. There's only one set of damages. So, they have to be separate. (Emphasis added)

[Id. at 1T15:20 – 16:1.]

The paragraph, when read in its entirety, conveys the damages under each theory must be different. Plaintiff's brief fails to include the "[s]o, they have to be separate" language because it conveys to the jury that damages may be awarded under both theories, but the damages must be distinct. See Pb6. Additionally, Judge Charny subsequently instructed the jury that "it's very clear you are not duplicate

damages awarded under another theory. So there's two theories and two separate damage awards, if necessary." Id. at 1T16:23 – 17:1.<sup>5</sup>

**f. After Days of Deliberation, the Jury Awarded Damages on the Common-Law Negligence Claim, but Found no Proximate Cause on the NHA Claim**

Based on the distinct evidence and the Court's instructions, the jury found that Elmwood Hills' negligence was a proximate cause of Plaintiff's damages and awarded \$100,000. However, while the jury found a violation of the decedent's rights under the NHA, the jury also concluded that that the violation did not proximately cause damages under the NHA.

Prior to trial, Elmwood Hills filed an offer of judgment as to all claims in the amount of \$150,000. Da5. Plaintiffs' counsel rejected the offer of judgment and

---

<sup>5</sup> Plaintiff did not object to the jury charge instructing the jury that the time frame for each claim was different (due to the consent order), and he did not object to the portion of the charge stating there is "only one set of damages." Thus, Plaintiff would need to establish plain error. See Rule 2:10-2. But his brief does not address the law for reversing based upon an erroneous jury charge nor does he explicitly claim the charge was an error. He indirectly claims Judge Charny's "only one set of damages" language was improper because the "verdict sheet contained two separate lines for damages under each cause of action." See Pb 1. But the verdict sheet contained two separate lines for damages precisely because the jury was instructed they could award damages under each cause of action if the damages were distinct. When read as a whole, the charge is proper. Furthermore, Plaintiff's concern is unfounded, and no perceived error could be "clearly capable of producing an unjust result" because the jury never addressed damages on the rights violation claim since proximate cause is separate from damages. See Kozma v. Starbucks Coffee Co., 412 N.J. Super. 319, 325 (App. Div. 2010) (holding that a jury may properly refuse to award damages despite finding proximate cause if the proofs established the "injury was inconsequential in affecting plaintiff's lifestyle and quotient of pain and suffering.").

received less than the offer of judgment at trial. Elmwood Hills moved for fees and costs, but Judge Charny ruled that the offer of judgment was inapplicable because it included the NHA claim, and the offer of judgment rule did not apply to the NHA claim pursuant to Rule 4:58-3(c) (“No allowances shall be granted if . . . a fee allowance would conflict with the policies underlying a fee-shifting statute.”).

**g. During Post-Trial Motion Practice, the Court Rejected Plaintiff’s Position that the Facts and Damages on Plaintiff’s Claims for Negligence and Violation of the NHA were the Same.**

During post-trial motion practice, Plaintiff argued that the facts and damages underlying his two claims were the same. In response, Elmwood Hills reinforced that the evidence for Plaintiff’s two theories of recovery was different. 2T29:12 – 30:14. Elmwood Hills stated:

the jury could have reasonably found there was a violation of rights with regard to the dentures or something along those lines, but that did not proximately cause any injuries. But under the common law claim, they could have found with regard to the pressure injuries that there was breach, proximate cause, and damages. It’s not the same.

[Id. at 2T30:7-15.]

Judge Charny agreed that the jury appropriately considered the distinct evidence on both claims to render a proper verdict:

[i]t was very clear that there was different conduct. The jury was – the jury spent a lot of time. They didn’t just say, well, it’s negligence and it’s a violation of rights, they spent hours. This jury was out for hours. They sifted through dozens of exhibits, we were very, very diligent



and careful about the charge, about the verdict sheet, and they – they took their job very, very seriously.

[Id. at 2T38:11-18].

Based on jury’s diligent verdict, Judge Charny found that “the reality is the jury found there was no damages. And the prevailing party, it says as a quote . . . from Tarr and from the U.S. Supreme Court, [a] plaintiff prevails when actual relief on the merits of his or her claim materially alters the legal relationship between the parties by modifying the defendant’s behavior [and] directly benefits the plaintiff. This did not happen here.” Id. at 2T38:23 – 39:6. Because no damages were related to the NHA claim, the trial judge admitted, “I cannot initiate the fee-shifting on that judgment.” Id. at 2T39:15-16.

### **STANDARD OF REVIEW**

Judge Charny made a factual finding that the evidence for both claims was different and concluded based upon that finding that Plaintiff was not a prevailing party on his claim under the NHA. As a result, Plaintiff’s appeal presents mixed questions of law and fact since the trial judge’s legal ruling was premised on her conclusion that “it was very clear that there was different conduct” for each liability theory. Id. at 2T38:9-12.

Under such circumstances, the reviewing court gives deference to the supported factual findings of the trial court but reviews de novo the trial court’s application of legal rules to the factual findings. See State v. Pierre, 223 N.J. 560,

576 (2015); State v. Nantambu, 221 N.J. 390, 404 (2015). Factual findings “are binding on appeal when supported by adequate, substantial, credible evidence.” Gnall v. Gnall, 222 N.J. 414, 428 (2015); Pierre, *supra*, at 576.

Judge Charny’s conclusion that there was different evidence for each liability theory is supported by the pre-trial Consent Order, which allowed Plaintiff to present pre-COVID-19 evidence to support his NHA claim, and Mrs. Emmons’ testimony that Elmwood Hills provided improper care in violation of the decedent’s rights before inception of the COVID-19 lockdown. Based upon this testimony, the jury was charged that different timeframes could be considered for each liability theory. The jury’s verdict supports the Judge’s conclusion that different facts supported the rights violation from the negligence determination. Thus, adequate, substantial, and credible evidence exists to support the trial judge’s finding and that finding is binding on appeal.

### **LEGAL ARGUMENT**

#### **I. PLAINTIFF DID NOT PREVAIL ON HIS NHA CLAIM BECAUSE HE DID NOT ACHIEVE ANY BENEFIT IN BRINGING THIS CLAIM OR MATERIALLY ALTER THE RELATIONSHIP BETWEEN THE PARTIES. (2T29:12 – 33:24; 2T38:6 – 41:14)**

Based on multiple days of deliberation, the jury did not find that Elmwood Hills’ conduct violating the decedent’s rights proximately caused actual or punitive damages under the NHA. As such, Judge Charny correctly found that Plaintiff cannot be a prevailing party under the NHA because New Jersey law defines a

“prevailing party” as “one who succeeds on ‘any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit.’” Tarr v. Ciasulli, 181 N.J. 70, 85 (2004) (quoting Sczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995)). Under this definition, “a plaintiff ‘prevails’ when actual relief on the merits of his [or her] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Id.* at 85 (quoting Farrar v. Hobby, 506 U.S. 103, 111-112 (1992)). (Emphasis added).

The NHA is a prevailing party statute like the New Jersey Law Against Discrimination; the statute Tarr addressed in setting forth the standard for determining whether a litigant prevails and is entitled to attorneys’ fees. See N.J.S.A. 10:5-27:1; N.J.S.A. 30:13-8(a). The NHA allows a plaintiff to recover his or her attorneys’ fees when he or she prevails. The NHA states, in relevant part,

Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation. The Department of Health and Senior Services may maintain an action in the name of the State to enforce the provisions of this act and any rules or regulations promulgated pursuant to this act. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for their violation. Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney’s fees and costs of the action. (Emphasis added).

[N.J.S.A. 30:13-8(a)]

Here, Plaintiff did not prevail on the NHA claim because the jury awarded no relief on its merits. The jury only awarded relief on the separate and distinct non-fee-shifting negligence claim, which does not support an award of attorney's fees and costs under the NHA. See Farrar, supra, at 113. ("No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant."). Plaintiff needed to establish both proximate cause and damages to prevail on his violation of rights claim. Ibid. ("A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.").<sup>6</sup> Without a finding that Elmwood Hills' conduct proximately caused an injury to decedent resulting in an award of damages under the NHA, Plaintiff is not a prevailing party.

**II. PLAINTIFF AGREED THAT PROXIMATE CAUSE IS A REQUIRED ELEMENT OF PROOF TO PREVAIL ON AN NHA CLAIM. PLAINTIFF'S POSITION ON APPEAL CONTRADICTS HIS POSITION DURING THE TRIAL AND VIOLATES THE INVITED ERROR DOCTRINE. (2T29:12 – 33:24; 2T38:6 – 41:14; 8T14:1-3; 8T14:11-13; 8T15:2-12; 8T34:18-21; Pa57)**

---

<sup>6</sup> Farrar supports Elmwood Hills' arguments. In Farrar, plaintiff was entitled to nominal damages on his civil rights violation claim despite failing to establish proximate cause, based upon prior legal precedent. Because Plaintiff was entitled to damages, he was a prevailing party. Here, there is no legal precedent that would allow Plaintiff to receive nominal damages for a rights violation without establishing proximate cause, and Farrar holds attorneys' fees are typically inappropriate when a plaintiff is awarded nominal damages. Id. at 115. (When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all.").

Judge Charny correctly found that Plaintiff is not a prevailing party under the NHA because the jury found that Plaintiff did not meet his burden of proof on the element of proximate cause.

Proximate cause is a required element of proof under a claim alleging a violation of the NHA. See Ptaszynski v. Atlantic Health Sys., 440 N.J. Super. 24, 32, 40 (App. Div. 2015) (holding the jury determined the issue of proximate cause regarding plaintiff's violation of rights claim, and the Appellate Division did not instruct that this was improper despite remanding the case back to the trial court to determine if the jury duplicated damages since they awarded the same amount of damages for the negligence claim and the rights violation).

At trial, Plaintiff agreed that proximate cause is a required element of an NHA claim and therefore requested that proximate cause be charged to the jury for the NHA claim. Plaintiff told the trial judge that the model jury charge's failure to include proximate cause on a violation of rights claim was "inexplicable" and proposed the inclusion of proximate cause as "the safer way to protect any verdict."

Adopting Plaintiff's counsel's requested charge, Plaintiff now inexplicably argues that proximate cause is not a required element of an NHA claim. Plaintiff's argument is precluded under the invited error doctrine. See New Jersey Div. of Youth and Family Services v. M.C. III, 201 N.J. 328, 340 (2010) ("[t]he doctrine of invited error operates to bar a disappointed litigant from arguing

on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error.”).

Plaintiff’s brief argues he is a prevailing party because he established a violation. See Pb11 (“a plaintiff that cannot show actual damages under the NHA should still be entitled to attorney’s fees, whether by virtue of an award of nominal damages or establishment of the violation itself. That it is because the injury is inherent in the violation itself.”). If Plaintiff simply needed to establish that a violation occurred, it was error for Plaintiff to request a proximate cause charge. That alleged error was the product of Plaintiff’s advocacy and Plaintiff cannot now make a contrary argument on appeal.

**III. PLAINTIFF’S POSITION THAT A RIGHTS VIOLATION ALONE ESTABLISHES HE IS A PREVAILING PARTY IS INCONSISTENT WITH THE EXPRESS LANGUAGE OF THE NHA BECAUSE THE NHA REQUIRES PLAINTIFF TO ESTABLISH ACTUAL OR PUNITIVE DAMAGES TO BE CONSIDERED A PREVAILING PARTY. (2T16:22-24;2T25:25 – 26:17; 2T29:12 – 33:24; 2T38:6 – 41:14)**

The trial Court also correctly found that Plaintiff is not a prevailing party merely because the jury found a rights violation because the express language of the NHA does not support that finding.

The first step of statutory construction requires an examination of the statutory language. The meaning derived from that language controls if it is clear and unambiguous. Bergen Comm'l Bank v. Sisler, 157 N.J. 188, 202 (1999). Courts should not rewrite plainly worded statutes. Lippman v. Ethicon, Inc., 222 N.J. 362,

388 (2015). If the text, however, is susceptible to different interpretations, the court considers extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the legislature's intent. Wingate v. Estate of Ryan, 149 N.J. 227, 236 (1997); Lesniak v. Budzash, 133 N.J. 1, 8 (1993). Above all, the Court must seek to effectuate the "fundamental purpose for which the legislation was enacted." New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972).

Here, the plain language of the NHA demonstrates that a violation of resident's rights is insufficient to prevail; rather, a finding of actual or punitive damages caused by a rights violation is necessary to be deemed a prevailing party under the statute. N.J.S.A. 30:13-8a states,

The action may be brought in any court of competent jurisdiction . . . to recover actual and punitive damages for their violation. Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action. (Emphasis added).

Based upon the NHA's text, a party prevails by recovering actual or punitive damages for violation of a right; in other words, damages caused by violation of a right. The text establishes the statute's purpose is to allow an individual to recover damages for a rights violation. If a plaintiff succeeds with recovering damages, he

or she prevails. There is no text establishing a party prevails even if they do not receive damages.<sup>7</sup>

**IV. THE TRIAL COURT ALSO CORRECTLY FOUND THAT PLAINTIFF'S DAMAGES AWARDED ON THE COMMON-LAW, NON-FEE-SHIFTING NEGLIGENCE CLAIM SUPPORTS NO AWARD OF ATTORNEYS' FEES AND COSTS UNDER THE NHA. (2T29:12 – 33:24; 2T36:1 – 37:5; 2T38:6 – 41:14)**

The trial Court also correctly found that Plaintiff's damages on the claim sounding in negligence warrants no finding that he is prevailing party under the NHA. There is no authority before this Court that supports deeming a plaintiff a prevailing party under a statute by virtue of an award of damages on a common-law claim.

This is particularly true where the evidence on the two claims is distinct, like here. Judge Charny correctly found that the jury considered different conduct on Plaintiff's claims for negligence versus violation of the NHA, which precludes a finding that Plaintiff's negligence award supports a prevailing party finding under the NHA. The fundamental, underlying premise of Plaintiff's appeal is that the jury's verdict is simply mistaken. According to Plaintiff, because the same set of facts formed the basis for both claims, the jury must have failed to award damages on the

---

<sup>7</sup> The NHA allows plaintiffs to sue to enforce a right, but Plaintiff did not seek to enforce any rights, and we do not need to determine whether damages are required when a plaintiff seeks to enforce a right. Plaintiff sought damages based upon alleged violations of rights.



violation of rights claim due to the instruction not to duplicate damages. However, Plaintiff's argument intentionally fails to recognize the factual differences between the two claims, as discussed throughout the factual and procedural history section of this brief. Judge Charny correctly recognized that these factual differences between the two claims precluded Plaintiff from being deemed a prevailing party under the NHA claim by virtue of his award of damages on the negligence claim.

Judge Charny's instructions to the jury regarding duplication of damages were also consistent with Model Jury Charge 5.77, which provides two lines for damages on claims for violation of the NHA versus a claim for negligence. Here, the jury did not simply omit damages from the violation of rights claim because of the instruction not to duplicate damages. Rather, the jury never addressed the damages question for the NHA claim because the jury did not find the rights violation proximately caused an injury. The jury did not find the violation of rights claim was a proximate cause of decedent's injuries because this conduct was distinct from the care pertaining to the decedent post-COVID-19 pressure injuries. Mrs. Emmons described nuisances occurring prior to the COVID-19 lockdown and the jury was fair to conclude, based upon the evidence, that this conduct was not the proximate cause of any injuries. If the jury believed Elmwood Hills' clinical care of decedent's pressure injuries violated the decedent's rights, they would have found proximate cause on the NHA claim. The jury would then determine what amount of damages, if any, to award

Plaintiff. Once it is recognized that the claims did not rest on the same set of facts and that the proximate cause question is distinct from the damages question on the verdict sheet, it becomes clear that Plaintiff did not prevail under the NHA.

**V. PLAINTIFF'S RELIANCE ON THE CONSUMER FRAUD ACT IS MISTAKEN BECAUSE IT IS NOT A PREVAILING PARTY STATUTE. (2T12:9-16:24; 2T29:12 – 33:24; 2T38:6 – 39:16)**

Finally, Judge Charny correctly did not deem Plaintiff a prevailing party under the NHA by virtue of Plaintiff's misguided efforts to apply the CFA to the NHA. No authority supports Plaintiff's reliance on the CFA to support his appeal.

Further, unlike the NHA, the CFA is not a prevailing party statute. It states, in pertinent part,

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

[See N.J.S.A. 56:8-19.]

Notably absent from the CFA is any requirement that a plaintiff be a prevailing party.

The Supreme Court's decision in Cox v. Sears Roebuck & Co., 128 N.J. 2, 24 (1994) (allowing plaintiff to recover attorney's fees despite the failure to establish an ascertainable loss) does not stand for the proposition that all remedial fee shifting statutes allow for attorney's fees without the need to prove causation or damages. If that were true, the Supreme Court would not have conducted a prevailing party analysis ten years later in Tarr v. Ciasulli, 181 N.J. 70, 74 (2004) (holding that to be considered a prevailing party under the New Jersey Law Against Discrimination, a party must receive some affirmative relief in the form of damages, injunctive relief, or declaratory relief, for purposes of entitlement to counsel fees).

Instead, the Supreme Court's holding in Cox pertains to the CFA only.

For the sake of completeness we add that a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages. Performance Leasing, supra, 262 N.J. Super. at 31, 34 (holding that where jury found that defendant had committed unconscionable commercial practice and thus had violated Act, but that plaintiff had not been damaged by that violation, strong precedent supported award to plaintiff of attorneys' fees). The fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial hardship.

[Id. at 24-25 (emphasis added)]

The NHA is similar to LAD claims as they are both prevailing party and remedial statutes. Without a judgment to enforce the claim, attorneys' fees are not allowed despite their remedial nature. Plaintiff's brief improperly mixes and matches different statutes to make inconsistent arguments. For example, Plaintiff argues the statutory construction of the NHA requires that it be interpreted similar to the CFA, see Pb11-17, but also argues he is a prevailing party by citing Tarr. See Pb9-11. Plaintiff's arguments are meritless.

### **CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiff's appeal in all respects and he should be awarded no attorneys' fees or costs on his claim under the NHA.

**GOLDBERG SEGALLA, LLP**

*Attorneys for Defendant*

*Elmwood Hills Healthcare Center, LLC*

Dated: May 28, 2025

By: /s/ Thaddeus J. Hubert IV

Thaddeus J. Hubert IV, Esquire

JOSEPH J. EMMONS, III,  
ADMINISTRATOR OF THE  
ESTATE OF JOSEPH J. EMMONS,  
JR.,

Plaintiff,

v.

ELMWOOD HILLS  
HEALTHCARE CENTER, LLC;  
JOHN/JANE DOE DIRECTOR OF  
NURSING 1-100; JOHN/JANE  
DOE ADMINISTRATOR 1-100;  
JOHN/JANE DOE DIRECTOR OF  
NURSING 1-100; JOHN/JANE  
DOE MANAGEMENT COMPANY  
1-100; JOHN/JANE DOE  
MEDICAL DIRECTOR 1-100;  
JOHN/JANE DOES 1-100;  
JOHN/JANE DOE CORPORATION  
1-100; individually, jointly,  
severally, and/or in the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-000089-24T4

CIVIL ACTION

ON APPEAL FROM AN ORDER OF  
FINAL JUDGMENT FROM THE LAW  
DIVISION: CAMDEN COUNTY  
DOCKET NO. CAM-L-002996-21

Sat Below:

The Hon. Judith S. Charny, J.S.C.

---

## REPLY BRIEF OF PLAINTIFF IN SUPPORT OF THE APPEAL

---

On the brief and of counsel:

RICHARD J. TALBOT, ESQUIRE (#040771993)  
**LAW OFFICE OF ANDREW A. BALLERINI, ESQ.**  
535 Route 38, Suite 328  
Cherry Hill, New Jersey 08002  
Telephone: (856) 665-7140  
Email: [rtalbot8@comcast.net](mailto:rtalbot8@comcast.net)

## TABLE OF CONTENTS – BRIEF

	<u>Page</u>
TABLE OF CONTENTS - BRIEF	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS	ii
TABLE OF TRANSCRIPT DESIGNATIONS	ii
TABLE OF CONTENTS - APPENDIX	iii
TABLE OF AUTHORITIES	v
LEGAL ARGUMENT	1
<b>POINT I: THE PROOFS AT TRIAL FOR THE NEGLIGENCE     AND NHA CLAIMS WERE THE SAME.</b>	1
<b>POINT II: THE REASONING WHY CFA PLAINTIFFS ARE     ENTITLED TO ATTORNEY’S FEES WITHOUT PROVING     ACTUAL DAMAGES APPLIES TO NHA PLAINTIFFS.</b>	6
<b>POINT III: UNDER THE CIRCUMSTANCES OF THIS CASE,     PLAINTIFF IS ENTITLED TO ATTORNEY’S FEES FOR     THE VIOLATION OF HIS FATHER’S NURSING HOME     RESIDENT’S RIGHTS.</b>	11
CONCLUSION	17

## **TABLE OF JUDGMENTS, ORDERS AND RULINGS**

	<b><u>Page</u></b>
Order of Final Judgment, filed August 2, 2024	Pa1
Reasons on the Record	2T38:6

## **TABLE OF TRANSCRIPT DESIGNATIONS**

1T – Transcript of Trial (Jury Charge) dated June 25, 2024
2T – Transcript of Motion Hearing dated August 2, 2024
3T – Transcript of Trial dated June 5, 2024
4T – Transcript of Trial dated June 6, 2024
5T – Transcript of Trial dated June 10, 2024
6T – Transcript of Trial dated June 14, 2024
7T – Transcript of Trial dated June 17, 2024
8T – Transcript of Trial dated June 18, 2024
9T – Transcript of Trial dated June 24, 2024

**TABLE OF CONTENTS – APPENDIX**

**(Volume 1 of 1 – Pa1 to Pa157)**

	<b><u>Page</u></b>
Order of Final Judgment, filed August 2, 2024	Pa1
Complaint, filed October 1, 2021	Pa3
Answer, filed November 9, 2021	Pa37
Jury Verdict Sheet (C-2), filed June 27, 2024	Pa57
Jury Verdict Sheet (C-3), filed June 27, 2024	Pa59
Notice of Motion for Order of Final Judgment, filed July 11, 2024	Pa60
Certification of Richard J. Talbot, Esq., filed July 11, 2024	Pa62
Affidavit of Services, filed July 11, 2024	Pa65
Exhibit A to Affidavit of Services, Billing Records, filed July 11, 2024	Pa69
Exhibit B to Affidavit of Services, Order of Final Judgment in <u>Moody v. The Voorhees Care &amp; Rehab. Ctr.</u> , as filed with highlighting, filed July 11, 2024	Pa73
Exhibit C to Affidavit of Services, Order awarding fees in <u>Capano v. Care One</u> , as filed with highlighting, filed July 11, 2024	Pa76
Exhibit D to Affidavit of Services, Summary of Costs, filed July 11, 2024	Pa78
Exhibit E to Affidavit of Services, Excerpt of Trial Testimony, as filed with highlighting, filed July 11, 2024	Pa80
Certification of Jonathan L. Berkowitz, Esq., filed July 25, 2024	Pa81
Exhibit A to Berkowitz Certif., Excerpt of Trial Testimony dated June 18, 2024, filed July 25, 2024	Pa84



	<b><u>Page</u></b>
Exhibit B to Berkowitz Certif., Model Jury Charge (Civil) 8.11E, filed July 25, 2024	Pa116
Exhibit C to Berkowitz Certif., Inflation Calculations, filed July 25, 2024	Pa121
Exhibit D to Berkowitz Certif., web site excerpts, filed July 25, 2024	Pa129
Exhibit E to Berkowitz Certif., Order and Memorandum of Reasons in <u>Burckhardt v. Advanced Subacute Rehab. at Sewell LLC</u> , filed July 25, 2024	Pa143
Notice of Appeal, filed September 11, 2024	Pa149
Civil Appeal Case Information Statement, filed September 11, 2024	Pa153
Certification of Transcript Delivery, filed February 25, 2025	Pa157

## TABLE OF AUTHORITIES

<b><u>Cases</u></b>	<b><u>Pages</u></b>
<u>Chattin v. Cape May Greene, Inc.</u> , 243 N.J. Super. 590 (App. Div. 1990), <u>aff'd o.b.</u> , 124 N.J. 520 (1991)	8
<u>Coleman v. Fiore Bros., Inc.</u> , 113 N.J. 594 (1989)	8
<u>Cox v. Sears Roebuck &amp; Co.</u> , 138 N.J. 2 (1994)	9
<u>Huffmaster v. Robinson</u> , 221 N.J. Super. 315 (Law Div. 1986)	8
<u>Performance Leasing Corp. v. Irwin Lincoln-Mercury</u> , 262 N.J. Super. 23 (App. Div.), <u>certif. denied</u> , 133 N.J. 443 (1993)	7,8,9
<u>Ptaszynski v. Atlantic Health Sys.</u> , 440 N.J. Super. 24 (App. Div. 2015)	13
<u>State v. A.R.</u> , 213 N.J. 542 (2013)	12
<u>Tarr v. Ciasulli</u> , 181 N.J. 70 (2004)	6
<u>Wisser v. Kaufman Carpet Co.</u> , 188 N.J. Super. 574 (App. Div. 1983)	9

<b><u>Constitutions</u></b>	<b><u>Pages</u></b>
-----------------------------	---------------------

<b><u>Statutes</u></b>	<b><u>Pages</u></b>
<u>N.J.S.A. 10:5-1 to -49</u>	6
<u>N.J.S.A. 30:13-1 to -17</u>	1
<u>N.J.S.A. 30:13-5(j)</u>	3
<u>N.J.S.A. 30:13-8(a)</u>	12
<u>N.J.S.A. 56:8-1 to -20</u>	7
<u>N.J.S.A. 56:8-19</u>	8

**Regulations**

**Pages**

42 C.F.R. § 483.10 (2024)

2

42 C.F.R. § 483.20 (2024)

2

42 C.F.R. § 483.21 (2024)

2

42 C.F.R. § 483.24 (2024)

2

42 C.F.R. § 483.25 (2024)

2

42 C.F.R. § 483.70 (2024)

2

**Rules of Court**

**Pages**

**Other Authorities**

**Pages**

Model Jury Charges (Civil), 5.77, “Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents’ Rights Claims” (rev. Nov. 2023)

11,13-16

## LEGAL ARGUMENT

### POINT I

#### **THE PROOFS AT TRIAL FOR THE NEGLIGENCE AND NHA CLAIMS WERE THE SAME.**

Defendant, Elmwood Hills Healthcare Center, LLC (“Elmwood Hills”), relies on an immaterial chronological difference in evidence, per a pretrial Consent Order, and cherry-picked testimony of decedent’s daughter-in-law to try to convince this Court that the proofs for plaintiff’s negligence claim and statutory claim under the Nursing Home Responsibilities and Resident’s Rights Act, N.J.S.A. 30:13-1 to -17 (“Nursing Home Act” or “NHA”), were not the same. The contemporaneous record of the trial, however, tells a different story. That record reaffirms, unequivocally, that the proofs for those two claims were the same, that the injuries were the same, and that the damages were the same. “This matter involves allegations of violations of nursing home rights under the New Jersey Nursing Home Act as well as nursing home neglect which caused Joseph Emmons, a resident in the nursing home, to sustain pressure injuries or bedsores. The plaintiff alleges the defendant violated Joseph Emmons’ rights as a nursing home resident in the State of New Jersey and that defendant was negligent, leading to suffering and death.” 3T5:8-16; 1T9:14-24. That is verbatim how the trial court explained this case to the jury at jury selection and when the jury was charged. The reliance by defendant on the Consent Order to distinguish the

claims is a red herring.

Although the violation of rights case covered a broader period of time than the negligence case, the pertinent period of time, when Mr. Emmons developed pressure injuries, is common to both. Temporally and factually, the negligence claim and the violation of rights claim are the same. Indeed, that Consent Order makes crystal clear that the bases for the negligence claim and the statutory claim were the same and were preserved for trial. “Plaintiffs negligence and resident's rights claims and allegations under the Second and Sixth Counts of the Complaint predicated upon alleged violations of 42 C.F.R. § 483.24 (Quality of life); 42 C.F.R. § 483.20 (Resident assessment); 42 C.F.R. § 483.21 (Comprehensive person-centered care planning); 42 C.F.R. § 483.10 (Resident rights); 42 C.F.R. § 483.25 (Quality of care) and subsection (b)(Skin integrity); 42 C.F.R. § 483.70 (Administration)” were not dismissed under the Consent Order. Da003.

This case is about the lack of individualized care given Mr. Emmons that led to the development of severe pressure injuries, culminating in his suffering and death. “This case, if I had one word to describe this case, is individuality. And the care plan does not recognize the individuality which goes to the statutory claims, the negligence claims and the punitive claims . . . So they did not relieve the pressure sufficiently by having the appropriate turning and repositioning in place for Mr. Emmons in recognition of his individuality. That’s really the crux of the

case.” 7T100:1-12. Every nursing home resident has the right to “a safe and decent living environment and considerate and respectful care that recognizes the dignity and **individuality** of the resident.” N.J.S.A. 30:13-5(j).

Mr. Emmons was non-ambulatory, which meant that he needed to be positioned and repositioned frequently to avoid the development of bedsores. His care plan, however, failed to provide an “individualized interval” for Mr. Emmons. The nursing home staff, specifically defendant’s own licensed Nursing Home Administrator and Director of Nursing, admitted that if the nursing home provided inadequate care to a resident that resulted in harm to that resident, it would be a violation of his rights under the NHA and, specifically, his rights under N.J.S.A. 30:13-5(j). See, e.g., 3T210:4-11 (video testimony of Avrohom Rotberg, Administrator of defendant nursing home); 3T227:15-22 (video testimony of Kelly Kathleen Shirley, Director of Nursing of defendant nursing home).

In other words, negligence in providing care to Mr. Emmons is also a violation of his rights. Nowhere is that more apparent than in the testimony of plaintiff’s expert in internal medicine, geriatric medicine and nursing home care, Dr. John Kirby. Dr. Kirby’s testimony underscores that the failure of the nursing home to provide adequate, individualized and appropriate care for Mr. Emmons resulting in severe pressure injuries, suffering and death, not only established negligence but also established a violation of Mr. Emmons’ statutory rights. 6T29-

87. “Mr. Emmons had risk factors for pressure injuries. Those risk factors did not make it certain that he would develop pressure injuries. If he had received appropriate treatment at Elmwood Hills, it would not have developed. The fact that Elmwood Hills staff did not turn and reposition him appropriately was the single salient cause for development of pressure injury . . . failure to turn and reposition was neglect. It was a failure to treat him in a dignified fashion and his rights were violated and that caused pressure injuries.” 6T78:22-79:2; 6T87:11-17. That is what this case is about, period.

Although Mrs. Emmons testified at trial about other instances of neglect, like putting someone else’s dentures in her father-in-law’s mouth and putting someone else’s shoes on his feet, there is no doubt, on review of the complete record, that the crux of the case was the lack of care leading to those pressure injuries. Those instances were additional evidence of violations of Mr. Emmons’ rights **and** negligent care.

Moreover, defendant deliberately misleads this Court by stating that plaintiff “admitted” that pressure injuries at other facilities that cared for his father did not violate his “father’s dignity” or “safety and did not make his environment indecent.” Db6. Those injuries were distinguishable from the injuries caused by defendant’s “care” because, as plaintiff testified, they “**healed in two to three weeks.**” Mr. Emmons had no pressure injuries when he went into defendant’s

care, and defendant, by contrast to the other facilities, “did nothing about it.”

5T46:3-23. Plaintiff unequivocally testified that he “observed they didn’t do their job correctly. **There were holes in his [father’s] body . . . As an individual, he wasn’t treated correctly.**” 5T62:25-63:4. Further, it was not for plaintiff to decide whether there was a violation of his father’s rights. That determination was for the jury, and the jurors decided those rights were, indeed, violated. What is relevant is what is contained in the contemporaneous record and not what is said by defendant after the fact about the contents of that record. At trial, plaintiff’s counsel was quite clear that the case was “about why did Mr. Emmons develop pressure injuries” and that “the way this case has been presented, the damages are very much the same.” 9T66:22-23; 9T121:10-11.

As addressed in our Opening Brief, based on the instructions given to the jury that there were two claims but only “**one set of damages,**” and that plaintiff could be “**compensated once and only once,**” that the evidence was the same on both claims and the damages were also the same, plaintiff should be considered as prevailing because the jury found a violation of rights and negligence but gave only one damage award, consistent with the jury instructions. In deciding the motion for attorney’s fees, the trial court acknowledged that although there were two separate claims, they were “intertwined” and that is why plaintiff’s attorney had argued that “the verdict sheet should not have been the way it was because **it**



**was the same evidence for both.”** 2T29:12-16. The trial judge made the same acknowledgement at the Charge conference. “[T]he problem is I don’t know how they could possibly segregate it without speculating because [plaintiff] **put the evidence in all as one.”** Pa88 at 14:21-24. Moreover, the trial court’s contemporaneous explanation to the jury at the beginning of trial and at the end of the trial shows unequivocally that the two causes of action were based on the same set of facts and were not based on dentures, shoes or anything other than the development of pressure injuries. **“This matter involves allegations of violations of nursing home rights under the New Jersey Nursing Home Act as well as nursing home neglect which caused Joseph Emmons, a resident in the nursing home, to sustain pressure injuries or bedsores.”** 3T5:8-16; 1T9:14-24.

## **POINT II**

### **THE REASONING WHY CFA PLAINTIFFS ARE ENTITLED TO ATTORNEY’S FEES WITHOUT PROVING ACTUAL DAMAGES APPLIES TO NHA PLAINTIFFS.**

Unfortunately, although the trial court recognized that giving “nothing” “would undermine the statute,” 2T22:23-24, the court gave nothing because it found that Tarr v. Ciasulli, 181 N.J. 70 (2004), a New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (“LAD”), case, applied and that under Tarr, plaintiff had not prevailed on the rights claim because the jury did not award damages specifically for

that claim. 2T38:19-39:5. The trial court erred in applying the Tarr standard because, among other things, attorney's fees under the LAD are discretionary, whereas attorney's fees under the NHA are mandatory.

Contrary to defendant's position, the standard to be applied at bar is not an abuse of discretion. There was no fact-finding undertaken by the judge. Although at one point the judge stated the conduct was "different," the contemporaneous record and the judge's statements to the jury at the time of trial demonstrate that the conduct was very much the same. The issue at bar is one of law subject to de novo review.

Plaintiff's position is that the **mandatory** nature of a fee award under the Nursing Home Act distinguishes it from a discretionary award under the LAD and makes it more akin to the mandatory award of fees under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 ("CFA"). See Pb14-17. Plaintiff urges this Court to follow the reasoning this Court applied in Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J. Super. 23, 34 (App. Div.), certif. denied, 133 N.J. 443 (1993), and find that plaintiff is entitled to attorney's fees. In Performance Leasing, the plaintiff brought claims for breach of contract and violations of the CFA. The jury awarded damages for the breach of contract claim. The jury also found that the defendant had violated the CFA but awarded no monetary damages. The trial court, nevertheless, awarded attorney's fees for the violation of the CFA.

The defendant argued, as the defense argues here, that no damages award

means no attorney's fee award. This Court disagreed. In upholding the fee award, this Court reviewed the statutory basis for the award of fees and cases finding that the fee award is **mandatory** under the CFA. This Court also noted that the fee-shifting provision in N.J.S.A. 56:8-19 "advanced the Act's policy of ensuring that plaintiffs with bona fide claims are able to find lawyers to represent them and encouraging counsel to take on private cases involving an infringement of statutory rights." Id. at 33 (citing Coleman v. Fiore Bros., Inc., 113 N.J. 594 (1989)). The Coleman Court stated: "Although we have never held that the counsel fees and treble damages are mandatory under the Act, we have no doubt that there is a strong legislative policy in favor of fees both to make whole the victims of consumer fraud and to deter unconscionable practices." Coleman, 113 N.J. at 599, n. 1; see also Huffmaster v. Robinson, 221 N.J. Super. 315, 319 (Law Div. 1986) ("assessment of treble damages and attorney's fees is mandatory when a violation of the Consumer Fraud Act has been proved") (cited with approval in Performance Leasing).

Citing to Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 616 (App. Div. 1990), aff'd o.b., 124 N.J. 520 (1991), the Performance Leasing court "noted that N.J.S.A. 56:8-19 provides that successful plaintiffs shall be awarded reasonable attorneys' fees and reasonable costs of suit, and that 'there is no requirement that an award of attorneys' fees be proportionate to damages.'"

Performance Leasing, 262 N.J. Super. at 33; see also Wisser v. Kaufman Carpet Co., 188 N.J. Super. 574 (App. Div. 1983) ("appropriate attorney's fees under the [Consumer Fraud] Act may be allowed **without** regard to the amount involved in the underlying dispute") (cited with approval in Performance Leasing). In Performance Leasing, this Court concluded that “[w]here, as here, a jury finds that a defendant has committed an unconscionable commercial practice as defined in the Consumer Fraud Act, no damages attributable to that practice need be found in order to invoke the attorneys' fees provision of the Act.” 262 N.J. Super. at 33-34. That holding was confirmed in Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994), where the Court reiterated the holding in Performance Leasing and further held that the “fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial hardship.” Id. at 24-25.

That reasoning and holding applies equally to the circumstances of this case. Both the CFA and the NHA allow enforcement of the provisions of those Acts by the State of New Jersey and also allow a private cause of action. Both Acts state attorney’s fees “**shall**” be awarded, indicating the award of fees is **mandatory**. Both Acts are remedial in nature and are intended to serve a dual purpose, to allow for their victims to be made whole **and** to deter unconscionable conduct. Moreover, like the CFA, there is no language in the NHA conditioning the award

of fees on a finding of damages. The similarities between the two statutes dictate that attorney's fees under the NHA should be decided in the same way attorney's fees under the CFA have been decided, i.e., being mandatory on a showing that the statute was violated.

Contrary to defendant's argument, although actual damages and punitive damages are recoverable under the Act, there is nothing in the statute making that a prerequisite to an award of attorney's fees. A plaintiff prevails in an NHA action **once a violation of their rights is established**. Although the CFA does not use "prevailing plaintiff" language, it is clear that a violation must be shown to recover attorney's fees, which means the plaintiff has prevailed. As stated in plaintiff's Opening Brief, the inherent nature of a nursing home resident makes a finding of actual damages, in many cases, unlikely. To interpret the statute as requiring a showing of actual damages to recover attorney's fees would make the statute illusory and undermine the legislative intent. Pb12-15.

There are substantial reasons why an award of attorney's fees is vital to accomplish the goals of the NHA. By awarding attorney's fees, courts send a powerful message to nursing homes that abuse, neglect, and substandard care will result in full legal and financial accountability. That deterrent effect is particularly important in the nursing home industry, where facilities must adhere to strict care standards. Nursing home abuse and neglect cases can be costly, especially when

they involve expert testimony, medical records, and detailed investigation. The award of attorney's fees helps to ensure that vulnerable residents, elderly and disabled residents and their families, can pursue justice without fear of financial ruin due to the impact of legal expenses. When courts award attorney's fees, attorneys are incentivized to take cases for deserving clients who may not be able to afford legal representation otherwise. That provision promotes access to quality legal representation, ensuring that nursing home residents have advocates who can effectively hold facilities accountable.

### **POINT III**

#### **UNDER THE CIRCUMSTANCES OF THIS CASE, PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES FOR THE VIOLATION OF HIS FATHER'S NURSING HOME RESIDENT'S RIGHTS.**

Contrary to defendant's assertion, the invited error doctrine is inapplicable here. No party is challenging the charge given to the jury. At trial, defendant was not requesting that proximate cause be included as an element of the violation of rights charge. 8T14:1-6. The model charge was expressly amended in 2023 to exclude proximate cause as an element of the claim. Model Jury Charges (Civil), 5.77, "Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents' Rights Claims" (rev. Nov. 2023).

Plaintiff's attorney, in an overabundance of caution, asked that proximate

cause be added to the model charge. “I’m asking for proximate cause on violations because I think that’s the safer way to protect any verdict.” 8T15:5-13.

Diametrically opposed to inviting error, plaintiff was trying to avoid error. The invited error doctrine states, in essence, that trial errors that are “induced, encouraged or acquiesced in or consented to by defense counsel **ordinarily** are not a basis for reversal on appeal.” State v. A.R., 213 N.J. 542 (2013). “That principle is grounded in considerations of fairness and is meant to prevent defendants from manipulating the system . . . Even if a party has invited an error, though, courts will not bar defendants from raising an issue on appeal if the particular error . . . cut mortally into the substantive rights of the defendant. If the doctrine would cause a fundamental miscarriage of justice, it will not be applied automatically.” Id. at 561 (quotations omitted).

That proximate cause has been eliminated as a requirement supports plaintiff’s position that the violation itself is actionable, without a showing of actual damages, and that a plaintiff who establishes a violation of rights should be considered a “prevailing” plaintiff entitled to attorney’s fees. The statute provides that an action may be brought to enforce a resident’s rights “and to recover actual damages and punitive damages for their violation.” N.J.S.A. 30:13-8(a). That one can bring an action to recover actual and punitive damages under the statute does **not** equate with defendant’s argument that you must recover actual damages to be

entitled to attorney's fees. Taken to its logical conclusion, defendant's interpretation would mean that a plaintiff would have to recover **both** actual and punitive damages to be able to recover attorney's fees. That is simply not the case, thus demonstrating the flaw in the defense argument.

The revised model charge recognizes the general reality of NHA claims, as addressed in plaintiff's Opening Brief, that some violations may not cause monetary damages; nonetheless, to promote the legislative intent of the NHA, proof of the violation itself should be sufficient. Pb12-15. Specifically, under the circumstances at bar, an award of attorney's fees and costs is warranted.

Contrary to defendant's claim, Ptaszynski v. Atlantic Health Systems, 440 N.J. Super. 24, 32 (App. Div. 2015), did **not** state that "proximate cause is a required element of proof under a claim alleging a violation of the NHA." Db15. Rather, Ptaszynski requires courts to charge juries that they are not to duplicate damages because of the recognition that a negligence claim and a violation of rights claim may be based on the same evidence and, therefore, may have the same damages. The applicable charge, Model Jury Charges (Civil), 5.77, is entitled "VIOLATIONS OF NURSING HOME STATUTES OR REGULATIONS — NEGLIGENCE AND VIOLATIONS OF NURSING HOME RESIDENTS' RIGHTS CLAIMS." It was revised in 2023 and expressly **removed** proximate cause as an element of a violation of rights claim. The charge acknowledges that



evidence of negligence and violations of rights may be intertwined.

The Plaintiff alleges Defendants violated a statute and regulations, including the *New Jersey Nursing Home Responsibilities and Rights of Residents Act*, and state regulations, which set up standards of conduct for nursing homes in our state. If you find that the Defendants violated any such standards of conduct, any such violation or violations is evidence to be considered by you in determining whether negligence, as I have defined that term to you, has been established. You may find that such violation or violations constituted negligence on the part of the Defendants, or you may find that they did not constitute such negligence. Your finding on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon that issue, you may consider such violation or violations together with all such evidence in arriving at your ultimate decision as to the Defendants' negligence.

[Model Jury Charges (Civil), 5.77, at 1-2.]

Establishment of a violation of rights entitles a plaintiff to redress, without a finding of proximate cause. Under the statute itself, there is **no** requirement for a plaintiff to prove proximate cause to be entitled to damages or attorney's fees.

There is nothing in the body of the model charge to support such a requirement and the jury interrogatories confirm that proximate cause is not an element of the cause of action. See id. at 9-10.

## JURY INTERROGATORIES

Please answer the following questions in deliberations, noting the vote on the "Yes" or "No" line, as applicable. Please follow the instructions after answering the questions.

1) Did the Defendant Nursing Home violate Plaintiff's rights as a nursing home resident?

VOTE: YES \_\_\_\_\_  
NO \_\_\_\_\_

If you answer “Yes,” proceed to answer question #2. If you answer “No” and Plaintiff is also alleging negligence, proceed to question #3. If Plaintiff is not alleging negligence, your deliberations are complete.

2) What amount of money would fairly compensate for Plaintiff’s damages resulting from the violation(s) of Plaintiff’s nursing home residents’ rights? You are not to duplicate damages awarded under other theories of recovery.

\$ \_\_\_\_\_

VOTE: YES \_\_\_\_\_  
NO \_\_\_\_\_

If Plaintiff is also alleging negligence, proceed to question #3. If Plaintiff is not alleging negligence, your deliberations are complete.

3) Was the Defendant Nursing Home, or its staff, negligent?

VOTE: YES \_\_\_\_\_  
NO \_\_\_\_\_

If you answered “Yes,” proceed to question #4. If you answered “No,” your deliberations are complete.

4) Was the negligence of the above Defendant a proximate cause of Plaintiff’s damages?

VOTE: YES \_\_\_\_\_  
NO \_\_\_\_\_

If you answered “Yes,” proceed to question 5. If you answered “No,” your deliberations are complete.

5) What amount of money would fairly compensate for Plaintiff’s damages resulting from Defendant’s negligence? You are not to duplicate damages awarded under other theories of recovery.

\$ \_\_\_\_\_

VOTE:     YES \_\_\_\_\_  
             NO     \_\_\_\_\_

[Id. at 9-10.]

The difference between the charge for negligence and the charge for a NHA violation is the absence of the second question on proximate cause from the NHA claim. The contrasting language underscores that proximate cause is not an element of the NHA cause of action.

Regarding damages, the Model Jury Charge states as follows:

The Plaintiff has brought claims for damages under both violations of nursing home residents' rights and negligence. You are not to duplicate damages, which means that you may not compensate Plaintiff twice for the same injuries in the event you find in Plaintiff's favor on both negligence and nursing home residents' rights. If you find that Plaintiff has sustained separate and independent injuries, losses, and/or harms for the negligence and nursing home residents' rights, you may award separate damage awards. However, if you find that Plaintiff did not sustain separate injuries or damages, then you may compensate Plaintiff once and only once. **You may rely upon the same evidence in rendering a verdict as to whether or not the Plaintiff's nursing home residents' rights were violated and whether or not the Defendants were negligent.**

[Id. at 7-8 (emphasis added).]

That section establishes that the same evidence may be considered on both claims, that separate damages may be given under each claim **if** there are separate damages and that, if the damages are the same, plaintiff may be compensated

“once and only once.” The problem arises where, **as here**, there are lines for separate damages but **the damages are the same** and plaintiff may be compensated “once and only once.” For that reason, **plaintiff’s counsel requested one line for damages. That was appropriate because of the way in which the evidence was presented to the jury.** That way the jury could come up with one number for both, without duplicating damages. The jury here, however, had two separate lines for damages but could award damages only once and placed them under the negligence claim. The jury also found that plaintiff established a violation of Mr. Emmons’ rights. That the jury did not find proximate cause on the NHA claim is irrelevant because proof of proximate cause is not required to prevail on a NHA claim. Like the CFA, actual damages also are not required under the NHA in order to recover mandatory attorneys’ fees and costs, as the violation of those remedial Acts mandates an award of attorneys’ fees and costs. The establishment of the violation of Mr. Emmons’ rights under the circumstances at bar entitles plaintiff to attorney’s fees and costs.

### **CONCLUSION**

For the foregoing reasons and those contained in plaintiff’s Opening Brief, the order denying plaintiff’s application for counsel fees and costs should be reversed and remanded to the trial court to award reasonable fees and costs incurred in establishing the violations of Mr. Emmons’ rights.

Respectfully submitted,

**LAW OFFICE OF  
ANDREW A. BALLERINI, ESQ.**  
Counsel for Plaintiff-Appellant

By: Richard J. Talbot  
Richard J. Talbot, Esq.

DATED: July 7, 2025