ESTATE OF RENEE SAHAR, THROUGH JACK SAHAR, EXECUTOR, Plaintiff/Respondent, v. 301 UNION STREET, LLC d/b/a CARE ONE AT WELLINGTON; CARE ONE, LLC; Defendant/Respondent ABC COMPANIES (1-10); DEF PARTNERSHIPS (1-10); JOHN DOE PHYSICIANS (1-10); JOHN DOE NURSES (1-10); JOHN DOE TECHNICIANS, CERTIFIED NURSING AIDES, AND PARAMEDICAL EMPLOYEES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1103-24 On Appeal from an Order of Final Judgment and Order Denying Defendant's Motion for a New Trial Filed November 18, 2024 from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-0338-18 Sat Below: Hon. Anthony R. Suarez, J.S.C. Civil Action

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

In this nursing malpractice matter arising from Renee Sahar's admission to Care One at Wellington's sub-acute rehabilitation unit, Ms. Sahar got up from her wheelchair, placed at the nurses' station so that she could be monitored, fell and fractured her hip. The trial court improperly allowed the jury to consider a New Jersey's Nursing Home Responsibilities and Rights of Residents Act ("NHA"), N.J.S.A. 30:13-1 to -17, cause of action despite the fact that plaintiff was admitted for short-term rehabilitation following a stroke and despite the fact that no NHA claim was actually presented at trial.

At trial, the jury found ***no*** deviation from the nursing standard of care. There thus was ***no*** cause of action on the professional or medical negligence claim. Despite this, the jury found that Ms. Sahar's "right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident," pursuant to the NHA, specifically N.J.S.A. 30:13-5(j), had been violated, and awarded damages of $525,000.

The trial court by way of an order denying defendant's motion for summary judgment on the NHA claims and again at trial, held that because Care One was licensed as a long-term care facility Ms. Sahar was a "resident" of a "nursing home" in the meaning of and subject to the NHA and its fee-shifting provisions. The definition of a "nursing home" set forth in the NHA

does ***not***, however, include as an element the type of license issued to the facility. It is uncontroverted that Ms. Sahar was admitted to Care One for ***short-term subacute rehabilitation***—a higher level of care that does not implicate the NHA's special concerns and remedies—after an extended hospitalization due to a stroke. She thus was ***not*** admitted to a "nursing home" for "***extended*** care and treatment" on a "***continuing*** basis" in the meaning of the NHA, N.J.S.A. 30:13-2(c).

The ruling on the motion for summary judgment permitted plaintiff to pursue both negligence and NHA claims because the NHA claim arose from ***different*** conduct—allowing Ms. Sahar to urinate in her wheelchair and failing to promptly respond to the call bell. At trial, however, the NHA claim was ***not*** mentioned until plaintiff, in closing, asserted that the ***same*** conduct and damages—the April 6, 2016 fall and hip fracture—could be considered when evaluating ***both*** the nursing negligence and NHA rights claims. Indeed, there was no urinating in the wheelchair shown. The NHA claim then was submitted to the jury without any guidance as to what the elements of the NHA claim were, beyond that the same evidence could be considered in evaluating both the negligence and NHA claims. Under the circumstances, it can only be assumed that the jury—having already determined that plaintiff failed to establish that Care One's nursing staff deviated from the standard of care—

recast the ***same*** allegations of a fall and hip fracture as a violation of Ms. Sahar's right to a "***safe*** and decent living environment". As a consequence, plaintiff was awarded substantial damages solely because Ms. Sahar had a bad outcome. Plaintiff cannot be allowed to avoid the well-established requirements of establishing duty, breach and causation by way of competent expert testimony in professional nursing negligence case by referencing N.J.S.A. 30:13-5(j)'s "right to a safe and decent living environment."

The situation was further complicated by several evidentiary rulings at and prior to trial, permitting plaintiff to invoke a false narrative that Ms. Sahar was left unsupervised in the lobby and managed to get up from her wheelchair and walk unwitnessed, for an extended period of time, across the lobby past the nurses' station and into a hallway, ultimately falling and sustaining injuries, including a hip fracture. There was ***no*** evidence to support plaintiff's theory and defendant was barred from introducing directly contradictory evidence, including eyewitness and investigative accounts as well as portions of Ms. Sahar's medical records indicating that she "suddenly" got up from her wheelchair. The Court ruled that the defendant could not use that evidence-even for purposes of impeachment of plaintiff's nursing expert. Multiple errors prior to and at trial thus require the reversal of the final order of judgment and order denying defendant's motion for a new trial.

STATEMENT OF FACTS

Plaintiff in this action asserted claims arising from allegations that, on April 6, 2016, while decedent Renee Sahar was a patient at Care One at Wellington, she abruptly got up from her wheelchair, which had been placed at the nurses' station so that she could be monitored, fell and fractured her left hip. (See Da1-12; Da25-36; Da58-94.)

Ms. Sahar was eighty-three years old when she was admitted to Care One at Wellington on March 3, 2016 for subacute rehabilitation after an extended hospitalization and comprehensive rehabilitation for a stroke with complications including respiratory failure requiring tracheostomy and PEG tube placement and causing dysphagia and left-sided weakness. She had an extended and complex medical history with multiple prior hospitalizations. (See Da60-61; Da72-74.) Upon Ms. Sahar's admission to Care One, she continued to have functional and ambulatory deficits and cognitive issues contributing to decreased safety awareness and impulsive behavior, and repeatedly attempted to get out of her bed and wheelchair without assistance, falling several times with no or minor injuries. (See Da61-63; Da73-79.)

On the evening of April 6, 2016 at about 9:30 p.m., Ms. Sahar abruptly got up from her wheelchair, which had been placed at the nurses' station so that she could be monitored. The desk nurse heard the wheelchair sensor

alarm going off and noted Ms. Sahar already lying on the floor on her left side near her wheelchair. Upon examination, no injury or deformity was revealed and she denied any pain. She slept well throughout the night. The following afternoon, after previously trying to bend over to pick something up and participating in physical therapy, Ms. Sahar first reported left groin pain. (See Da63-64; Da79-81.)

Ms. Sahar was diagnosed with a left hip fracture. She underwent surgery on the evening of April 7, 2016 without complications, and returned to her prior status of minimal ambulation using a walker as of July 2016. (See Da64-65; Da79-81; Da92-94.) As of September 2016, she had returned to living at home with her son and a twenty-four hour aide. (See Da64-65; Da91-94.)

PROCEDURAL HISTORY

The complaint was filed on January 16, 2018. (Da1-12.) On March 29, 2018, plaintiff filed an amended complaint, reflecting that Ms. Sahar recently passed away. (Da25-36.)

On November 8, 2019, the Honorable John D. O'Dwyer, P.J.Cv., granted in part defendants' motion for a protective order, holding that the incident reports concerning Ms. Sahar's care were ***not*** privileged under New Jersey's Patient Safety Act ("PSA"), N.J.S.A. 26:2H-12.23 to -12.25, while the

remaining investigatory documents were privileged. (See Da963-969.) After pursuing an interlocutory appeal, defendants produced the non-privileged documents on June 5, 2020. (See Da48-49; Da1683-86; CDa94-100.)

On April 1, 2022, the Honorable Robert M. Vinci, J.S.C. granted in part defendants' motion for partial summary judgment, dismissing with prejudice the claims against Care One, LLC and for "corporate negligence". (See Da979-981; 2T36:13-19.) Defendants' motion to dismiss all claims alleging noncompliance with New Jersey and federal statutes and administrative regulations and pursuant to the NHA's "responsibilities" provision, N.J.S.A. 30:13-3, was denied as moot, given that plaintiffs indicated that there were no such claims. (See Da979-981; 2T38:4-9; 2T45:16-46:1.)

With respect to the NHA rights claim, Judge Vinci rejected defendants' position that because Ms. Sahar was admitted to Care One for short-term subacute rehabilitation, she was not a resident of a "nursing home" as defined in N.J.S.A. 30:13-2(c) because she did not receive "***extended*** care" on a "***continuing*** basis": Judge Vinci instead found, first, relying on New Jersey's Standards for Licensure of Long-Term Care Facilities ("SLLTCF"), specifically N.J.A.C. 8:39-1.1, (see 2T40:5-9), that "Here defendant is a licensed long-term care facility and was, without question, intended to be

included in the definition of nursing home," distinguishing the caselaw on point as involving hospital-based care, (2T41:22-24; see 2T38:24-42:10).

Second, plaintiff's claim for violation of Ms. Sahar's rights under N.J.S.A. 30:13-5(j) was ***not*** duplicative of the nursing negligence claim because "The malpractice claim is based, in a large part, on the failure to provide an appropriate wheelchair with restraints and/or appropriate nursing care," while the "rights violation claim is based on other conduct, including humiliating plaintiff by—by forcing her to urinate in her wheelchair [and] failing to answer her call bell." (2T44:14-45:15.)

Defendant's motion for summary judgment on the punitive damages claims initially was denied, but on May 26, 2023, Judge Vinci granted defendant's motion for reconsideration and dismissed the punitive damages claims with prejudice. (Da979-981; Da1436-1438.)

On August 2, 2024—the ***same day*** plaintiff filed a motion on short notice—Judge O'Dwyer granted plaintiff's motion to compel the de bene esse deposition of plaintiff's expert Carol White, RN, Ph.D to be conducted on August 15, 2024. (See Da644-645.) The court thus ordered the de bene esse deposition to proceed without allowing defendant an opportunity to respond, and the deposition did in fact take place just as defense counsel was completing a trial in another case. (See Da637-641; Da1439-1441.)

By letter dated August 12, 2024, defendant amended its answers to interrogatories to include additional investigatory documents and to name as witnesses who may testify at the time of trial several persons identified therein. (See Da646-649; CDa21-74.) The majority of these documents were previously withheld from plaintiff pursuant to the November 8, 2019 order. (See Da963.) On August 5, 2024, however, the New Jersey Supreme Court issued its opinion in Keyworth v. Careone at Madison Avenue, 258 N.J. 359 (2024), allowing discovery of incident investigations conducted in skilled nursing and assisted living facilities, as set forth in a certification of due diligence accompanying the discovery amendment. (See Da646-649.)

At a case management conference conducted at plaintiff's request on August 14, 2024, Judge O'Dwyer instructed that the "new documents" were barred, but did not further elaborate. Judge O'Dwyer did not respond to defense counsel's inquiry as to whether the documents could be used in the cross examination of plaintiff's experts in the event that plaintiff "opened the door" to their use for impeachment purposes. (See 4T13:13-14:10.)

At Nurse White's de bene esse deposition on August 15, 2024, plaintiff introduced a false narrative that Ms. Sahar was left unattended and unsupervised in her wheelchair at the nurses' station, got up and walked a distance away from her wheelchair into the hallway, where she fell and was

not discovered until sometime later. Defense counsel thus questioned Nurse White regarding three documents, each of which indicated that Ms. Sahar "suddenly" got up from her wheelchair, and that the desk nurse responded to the alarm: A physical therapy note dated April 8, 2016 contained in Ms. Sahar's medical records; an occupational therapy note dated April 7, 2016 also contained in the medical records; and a fall investigation review, which was among the documents produced on August 12, 2024. (See Da837:24-846:8; Da862:21-862:10; Da864:11-867:2; Da885:10-25; Da889:6-901:2; Da908:8-916:10; Da910:25-235:25; Da913:10-916:10; Da918:15-921:19; CDa76; CDa78; CDa69.)

Plaintiff filed nine motions in limine, focusing on the NHA claim, the use of statutes and regulations, and the documents produced on August 12, 2024 and used in Nurse White's cross examination. (See Da672-1315; Da1320-1427.) At trial, the Honorable Anthony R. Suarez, J.S.C. granted plaintiff's motion for rulings on the objections made during the de bene esse deposition of Nurse White and to bar the documents used in her cross examination. (See Da1425; 7T11:1-69:14; 8T271:1-272:15.) Judge Suarez also confirmed Judge O'Dwyer's ruling that the "new documents" produced on August 12, 2024 continued to be barred, and prohibited them from being used at all at trial, even for impeachment purposes. (See 8T270:10-25.)

In opening argument at trial on September 5, 2024 plaintiff's lawyer reiterated the false narrative introduced at Nurse White's de bene esse deposition as the core of plaintiff's theory of the case at trial. Plaintiff's lawyer stated that at 9:45 p.m. the chair alarm went off, Ms. Sahar began to walk, and, when a staff member finally returned to the desk, Ms. Sahar was lying on the ground. Ms. Sahar was found near her wheelchair, but there was "no mention of how far or how fast" she moved. (See 7T83:8-85:25.) This argument was advanced after the court barred the documentation that Ms. Sahar "suddenly" got up from her wheelchair.

Plaintiff's expert and treating orthopedic surgeon Jonathan Scherl, M.D. on direct examination stated that the cause of Ms. Sahar's broken hip was her fall on April 6, 2016. Dr. Scherl explained that he had recently obtained more information about how the fall occurred, and learned that Ms. Sahar was found "several feet away" from her wheelchair. (See 8T77:4-25.) On cross examination, however, Dr. Scherl explained that he got that information from plaintiff's lawyer and the transcript of Nurse White's de bene esse deposition. (See 8T78:8-80:3.)

In the cross examination of defense expert Marianna Resnick, RN plaintiff focused on 42 C.F.R. § 483.25(h) or "F-tag 323" a federal regulation requiring a safe environment in order to prevent accidents. Plaintiff's lawyer

implied that it was "unsafe" for Ms. Sahar to be allowed to walk unassisted, continually asking leading questions suggesting that Ms. Sahar walked from her wheelchair into the hallway and was found several feet away with no nurses present or nearby to supervise her. (See 9T153:15-161:18; 9T167:12-170:16.) For example, plaintiff' lawyer noted that, on the incident report which was not barred, the "exact location of the incident/accident" is checked off as "hallway" and insisted that it was not documented that Ms. Sahar fell at the nurses' station or near her wheelchair, but must have walked into the hallway. (See 9T153:15-175:4; 9T187:14-194:17.) It was, in fact, documented in multiple records that the specific location was in the hallway at the nurses' station, but those records were barred. (See, e.g., CDa68-74.) Plaintiff's counsel pursued a similar line of questioning of defense expert Sharon Brangman, M.D. again implying that it was "unsafe" under the federal regulations for Ms. Sahar to be allowed to get up and walk on her own, and that Ms. Sahar was found six or eight feet into the hallway and some distance from her wheelchair. (See 10T95:23-172:9.)

At the close of all evidence, defendant moved to dismiss the NHA claim based on Ms. Sahar's being a short-term subacute rehabilitation patient rather than a long-term care resident and because plaintiff had failed to prove an NHA claim at trial. (See 10T265:2-276:15; 10T276:21-278:1.) On the

following day, September 11, 2024, Judge Suarez denied defendant's motion to dismiss the NHA claims, holding that the long-term care license was determinative consistent with Judge Vinci's prior ruling. (See 11T122:13-23; see also 5T4:19-10:3; 10T276:16-20; 11T27:6-29:10.)

Plaintiff's lawyer in closing argument reiterated the false account of how the fall at issue occurred. First, according to plaintiff's lawyer, Care One nurse Rivelina Lorvil LPN said Ms. Sahar was supposed to be at the nurses' station but she was not. Second, plaintiff's lawyer claimed that there was no note from the desk nurse. Third, no one said Ms. Sahar was near her wheelchair. Fourth, plaintiff argued that the incident report said that the fall occurred in the hallway, not at the nurses' station. Fifth, if anyone had been nearby, that person would have looked and seen Ms. Sahar fall. Sixth, Ms. Sahar must not have received adequate supervision to prevent accidents given that she was allowed to get up and walk unassisted into the hallway with no one nearby. (11T235:25-259:22; 11T260:8-266:24.) Plaintiff's closing argument focused primarily on the fall and hip fracture, but also suggested that Care One's staff failed to timely respond to Ms. Sahar's need for assistance using the toilet and that an aide yelled at her. (See 11T255:23-255:4, 11T257:6-21.)

The court declined to charge the jury on the application of 42 C.F.R. § 483.25(h) or "F-tag 323" a federal regulation requiring a safe environment in order to prevent accidents. (See 11T155:7-8; 11T155:25-156:1.)

The court initially considered giving a Scafidi[1] or preexisting condition charge regarding Ms. Sahar's preexisting conditions of osteoporosis, dementia and stroke, but ultimately charged the jury only regarding Ms. Sahar's osteoporosis as it related to the negligence claim only. (See 11T120:22-121:5; 11T145:7-18; 11T152:3-5; 12T6:11-7:4; 12T40:12-43:14.)

The charge on the NHA claim provided no meaningful guidance. (See 12T43:15-45:8.) Damages were not to be duplicated on the negligence and NHA claims, (see 12T45:9-46:1), but the jury was instructed that "You may rely upon the same evidence in rendering a verdict as to whether or not the plaintiff's Nursing Home Resident's Rights were violated and whether or not the defendants were negligent," (12T45:22-46:1).

The jury returned a verdict finding no deviation from the nursing standard of care. On the NHA claim, however, the jury found that Ms. Sahar's rights pursuant to N.J.S.A. 30:13-5(j) had been violated and awarded damages of $525,000. (See 12T63:24-71:24.) On November 18, 2024, the court denied defendant's motion for a new trial and related relief and entered a final order

[1] Scafidi v. Seiler, 119 N.J. 93 (1990).

of judgment in the amount of $986,855.68 including the compensatory damages award, prejudgment interest, conditional payment of medical expenses made by Medicare, costs and attorneys' fees. (See Da1804-1850.)

LEGAL ARGUMENT

I. THE NHA CLAIM SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY (Da979-981; 2T35:7-48:17; 11T122:13-24).

Judge Suarez should not have submitted the NHA claim to the jury because, first, plaintiff did not establish that Ms. Sahar was admitted to a "nursing home" for "extended medical and nursing treatment. . . on a continuing basis." It is uncontroverted that Ms. Sahar was a short-term subacute rehabilitation patient of Care One, not a long-term care resident. Second, plaintiff presented no evidence to support an NHA rights violation, or any separate injury or damages to support such a violation, but merely recast the nursing malpractice allegations relating to the hip fracture as a violation of Ms. Sahar's right to "a safe and decent living environment" under N.J.S.A. 30:13-5(j) so as to receive the benefit of a more lenient standard of proof. Third and finally, N.J.S.A. 30:13-5(j) is void for vagueness, facially and as applied in this case.

A. The NHA Does Not Apply to the Subacute Rehabilitation Unit Where the Decedent Was Admitted for Short-Term Rehabilitation

The NHA defines a nursing home subject to the law as:

> any institution, whether operated for profit or not, which maintains and operates facilities for ***extended*** medical and nursing treatment or care for two or more nonrelated individuals with acute or chronic illness or injury, or a physical disability, or who are convalescing, or who are in need of assistance in bathing, dressing, or some other type of supervision, ***and*** are in need of such treatment or care on a ***continuing basis***.

N.J.S.A. 30:13-2(c) (emphasis added). The NHA's definition of a "nursing home" thus does ***not*** include as an element the type of ***license*** issued to the facility. The appropriate analysis considers how the unit at issue actually operates, focusing on the essential elements of whether the facility provides ***extended*** care and treatment on a ***continuing*** basis, as described in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24, 42-44 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016), and Bermudez v. Kessler Institute for Rehabilitation, 439 N.J. Super. 45, 56 (App. Div. 2015).

In Estate of Eagin v. CareOne at Evesham, Docket No. A-0426-23 (App. Div. Feb. 12, 2024) (Da1337-1358), the Court summarized Bermudez as follows:

> In Bermudez, we granted the defendant health care facility leave to appeal from an order denying its motion for partial summary judgment regarding a patient's claims that asserted violations of the NHA. 439 N.J. Super. at 49. We considered whether the facility, which was licensed as "a comprehensive rehabilitation hospital," satisfied the definition of nursing home under the act. Id. at 50.
>
> Citing the NHA's legislative history, we observed "although the Legislature wrote a broad definition of 'nursing home,' it

> nevertheless intended to limit the statute's reach to nursing homes and similar facilities." Id. at 55. We noted the absence of anything in the legislative history "that the Legislature sought to include an entity such as a comprehensive rehabilitation hospital" in the NHA. Id. at 56. We were persuaded that "[h]ad the Legislature intended to apply the requirements of the [NHA] to institutions such as comprehensive rehabilitation hospitals, it would undoubtedly have used a more inclusive term than 'nursing home,' such as 'health care entity,' in the title and text of the legislature." Ibid. We therefore reversed the denial of summary judgment on the plaintiff's NHA claims. Ibid.

Eagin, Docket No. A-0426-23, slip op. at 11 (Da1348). Ptaszynski was discussed as follows:

> A few months after we issued our decision in Bermudez, we decided Ptaszynski v. Atlantic Health Systems, Inc., where we reversed a jury verdict, awarding the plaintiff damages and counsel fees against the defendant health care facility. 40 N.J. Super. 24, 29. (App. Div. 2015). We considered the defendant's contentions—raised in the context of its charitable immunity argument under N.J.S.A. 2A:53A-8—that its facility was not a nursing home within the meaning of the NHA. Id. at 43. The defendant argued its facility was "hospital-based. . . where persons are admitted for fewer than thirty days for sub[ ]acute rehabilitation." Ibid. The plaintiff countered the facility was "a hospital-based, long-term care facility," thereby satisfying the NHA's definition of a nursing home. Ibid.
>
> Referencing the record, we noted the defendant was licensed to operate both "a comprehensive rehabilitative hospital consisting of thirty-eight beds" and "a hospital-based, long-term care facility with forty beds." Ibid. However, neither license stated the facility "[wa]s licensed to operate as a nursing home." ibid. Nor was there any evidence in the record that the Department of Health (DOH) had "issued a separate certificate of need" to the facility "authorizing the establishment of a nursing home." Ibid. (citing N.J.S.A. 26:2H-2(a).

> We further observed there was no evidentiary support that the facility "would be permitted to provide care on a 'continuing basis,' which is an essential element of a 'nursing home' in the NHA." Id. We noted patients [we]re treated temporarily at [the facility], with the expectation that they w[ould] be moved to another facility for long-term care or 'continuing' care if needed." Ibid. Choosing not to decide the issue on the record presented on appeal, we remanded for the court to consider the arguments, guided by our decision in Bermudez. Id. at 44.

Eagin, Docket No. A-0426-23, slip op. at 11-12 (Da1348-1349).

The Eagin court found it unnecessary to discuss the NHA's legislative history in detail, but noted that "the driving force of the enactment was the Legislature's intent to address concerns about 'the condition of the nursing homes and the personal care facilities for the aged in this state,'" id., slip op. at 9 (quoting Bermudez, 439 N.J. Super. at 53) (Da1346), and that "the NHA was enacted to protect our state's most vulnerable elderly individuals, most of whose care is ***not managed with the same intensity as a subacute rehabilitation unit***," id., slip op. at 18 (emphasis added) (Da1355). The Eagin court ***rejected*** the plaintiffs' contention that all licensed long-term care facilities are "nursing homes" under the NHA:

> Turning to the NHA's definition of a nursing home, we note the term "any institution" is untethered to a facility's licensure. Because a specifically designated "nursing home" license is not required under the [Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 to -26] and its related regulations, the omission is not surprising. Nonetheless, we are not persuaded by plaintiffs' argument that the reference in N.J.A.C. 8:39-1.1, i.e., "long-term care facilities, commonly known as nursing homes," is dispositive

> of the issue. Enacted in 1976 and amended thereafter, the NHA does not reference the statutory and regulatory scheme encompassing long-term care facilities.

Eagin, Docket No. A-0426-23, slip op. at 15 (Da1352).

In Eagin, in the appellate court's view, it was disputed whether the term "any institution" as used in the NHA applied to the "institution as a whole" or only the unit to which the decedent was admitted, whether the institution as a whole or its subacute rehabilitation units fell under the remainder of the definition, and whether the unit to which the decedent was admitted was separate and apart from the facility as a whole. See id., slip op. at 18-19 (Da1355-1356). The Appellate Division thus vacated the portion of the trial court's order granting defendant's motion for summary judgment on the NHA claims, and remanded for additional discovery. See id., slip op. at 4, 20-21 (Da1341; Da1357-1358).

Ms. Sahar was admitted to Care One on March 3, 2016 for subacute rehabilitation after an extended hospitalization and comprehensive rehabilitation for a stroke with complications including respiratory failure requiring tracheostomy and PEG tube placement and causing dysphagia and left-sided weakness. (See Da60-61; Da705:1-706:4; see generally Da58-94; Da581-595; Da1325-1336.) An evaluation upon admission indicates Ms. Sahar was admitted for "Short-term/Post Acute Care" with "Anticipated

discharge to" "Home" or "Other". (CDa2.) Ms. Sahar spent slightly more than ***one month*** at Care One. (See generally Da58-94; Da581-595; Da1325-1336.)

Plaintiff's nursing expert Nurse White at her discovery deposition agreed that Ms. Sahar was admitted to Care One for short term rehabilitation after her hospitalization, with the expectation that she would return home. (See Da105 at 28:3-12.) Nurse White confirmed this testimony at her de bene esse deposition. (See Da684:4-13, Da786:1-14.) Ms. Sahar's son Jack Sahar and daughter Ilene Handal agreed that their mother was admitted to Care One for subacute rehabilitation and therapy after her stroke so that she could return to living at home. (See 7T111:8-17; 7T122:11"-123:3, 7T128:6-19; 8T153:12-154:8; 8T167:19-170:16; 8T172:4-174:1; 8T180:20-181:3; 8T253:13-257:18; 9T23:18-24:14; 9T31:12-19; 9T57:13-58:25; 9T62:18-22.) Plaintiff's lawyer also confirmed that Ms. Sahar went to Care One for "rehabilitation" after her stroke. (See 7T82:7-9; 7T82:19; 7T83:11.)

The NHA's definition of the term "nursing home", which is a facility for ***extended*** care on a ***continuing*** basis, does ***not*** apply to the subacute unit at Care One to which Ms. Sahar was admitted or to the circumstances of her admission, that is, for short term rehabilitation. Plaintiff did ***not*** offer any evidence or argument to the contrary as to how Care One was operated or the

circumstances of Ms. Sahar's admission as they relate to the definition of a "nursing home" contained in the NHA. See N.J.S.A. 30:13-2(c). Plaintiff merely relied upon the long-term care license, which was not even introduced into evidence and is not an element of the definition of a "nursing home" contained in the NHA, N.J.S.A. 30:13-2(c). There is ***no*** separate license, however, for subacute rehabilitation in New Jersey; subacute rehabilitation units that are not hospital based are licensed as long-term care facilities. See N.J.A.C. 8:39. Nor did the circumstances of Ms. Sahar's admission implicate the characteristics of a nursing home so as to invoke the special concerns embodied in the NHA. See, e.g., In re Conroy, 98 N.J. 321 (1985).

Notably, the Appellate Division in Eagin observed:

> To the extent plaintiffs rely on the recently revised MJC 5.77, their argument is misplaced. Plaintiffs cite the "Note To Judge" portion of the charge, which states—without citation to any authority other than the NHA's definition of a nursing home—that the NHA "applies to any facility licensed as a long-term care facility, whether the resident is in for long-term care or sub[]acute rehabilitation." As the motion judge correctly decided, "Model Jury charges are neither sanctioned nor approved by the Supreme Court before their publication". Nor has the Court addressed the definition.

Eagin, Docket No. A-0426-23, slip op. at 15 n.3 (Da1352). Finally, the mere fact that Judge Vinci declined to dismiss the NHA claim prior to trial does ***not*** establish that plaintiff was entitled to submit that claim to the jury or recover on it. Defendant's motion for summary judgment was denied, but plaintiff did

not move for summary judgment on the NHA claim. Plaintiff thus continued to bear the burden of proving each element the NHA claim at trial, including that defendant was a "nursing home" subject to the statute. Furthermore, a "trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Lombardi v. Masso, 207 N.J. 517, 534 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)). Judge Vinci's pretrial ruling thus did not prevent Judge Suarez from dismissing the NHA claim at trial, based on plaintiff failure to prove a prima facie case.

B. Plaintiff Did Not Allege or Present Evidence to Support an NHA "Rights" Claim

Plaintiff in this case did not allege or present any evidence over the course of discovery or at trial to show that the defendant infringed any actionable "***right***" of a nursing home resident listed in N.J.S.A. 30:13-5 with respect to Ms. Sahar's care. Plaintiff did not reference any of the specific rights listed in N.J.S.A. 30:13-5, such as "the right to manage his own financial affairs" or "right to wear his own clothing" but relied upon only N.J.S.A. 30:13-5(j)'s more generalized

> right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right to expect and receive appropriate

> assessment, management and treatment of pain as an integral component of that person's care and consistent with sound nursing and medical practices.

The evidence and argument presented did not establish any violation of this right but related solely to allegations of nursing negligence allegedly resulting in a fall and hip fracture. Plaintiff's expert Nurse White gave the opinion that the nursing staff at Care One deviated from the standard of care in failing to prevent the fall due to inadequate supervision, and violated applicable statues and regulations regarding resident safety and assessments. (See Da679-957.) Nurse White also testified the fall likely caused the hip fracture. (See Da705:19-706:4.) Nurse White agreed, however, that Care One's nursing staff responded appropriately to Ms. Sahar's high risk of falls by implementing precautions such as chair and bed alarms, bed side-rails, non-slip pads, a floor mat, a toileting schedule, more frequent monitoring, and moving Ms. Sahar to the nursing station for closer observation. On cross examination, Nurse White agreed that "one on one" supervision was not necessary, and that the nurses did not have to have "eyes on" the patient "24/7", and did not have to be within arms' reach. (See Da820:1-17, Da823:1-10.) Essentially, Nurse White's opinion was that because the Care One nurses were unable to prevent Ms. Sahar from falling, they were negligent although they brought her to the nurses' station so she could be more closely watched. (See Da823:11-825:25.)

Plaintiff's expert Dr. Scherl performed the partial hip replacement surgery and gave an opinion that Ms. Sahar's fall from her wheelchair on April 6, 2016 caused the hip fracture. (See 8T36:18-77:25.) On cross-examination, however, Dr. Scherl agreed that Ms. Sahar had osteoporosis, which was why her hip broke. (See 8T57:10-58:1; 66:19-69:22; 8T81:4-82:3.) Dr. Scherl denied that the hip fracture could have occurred when Ms. Sahar bent over the next day, but agreed that, had she had a displaced fracture the day before, she would have had much more apparent pain. (See 8T103:3-24; 8T116:15-117:21; CDa81.) The surgery was successful; the goals of repairing the hip, eliminating pain and walking were achieved. (See 8T78:10-77:3; 8T86:11-87:25; 8T92:8-103:2.)

Defense expert Marianna Resnick, RN gave the opinion that the nursing staff at Care One complied with the standard of care by assessing Ms. Sahar to be at high risk of falls and adopting appropriate precautions each time she fell or there was a suspected fall, including placing her at the nurses' station so staff could keep a closer watch on her than if she was in a room. (See 9T86:14-87:4; 9T87:25-94:5; 9T107:7-121:2; 9T121:23-130:7; 9T146:6-148:15.) The fall at issue was unavoidable, and the failure to prevent the hip fracture was not a deviation from the standard of care. (See 9T135:22-236:14.)

Defense experts geriatrician Sharon Brangman, M.D. and orthopedic trauma surgeon Richard Schenk, M.D. also addressed the hip fracture. Dr. Brangman confirmed that the nursing staff complied with the standard of care and took no actions that caused injury to Ms. Sahar. (See 10T24:3-32:15; 10T150:16-155:23; 10T163:15-165:10.) Restraints are not appropriate and the standard of care was satisfied by keeping Ms. Sahar at the nursing station for close observation. (See 10T27:1-11; 10T163:12-166:13.) Dr. Schenk testified that Ms. Sahar had severe osteoporosis. Based upon Ms. Sahar's complaints, she could not have suffered a displaced femur fracture from the fall from her wheelchair on the evening of April 6, 2016. Rather, she reported groin pain for the first time the next day, after bending over to pick something up off the floor and participating in physical therapy. (See 10T194:9-197:4.)

In his closing statement, plaintiff's lawyer directed that the jury could consider the same conduct and the same harm for purposes of evaluating the nursing negligence claim and the NHA claim—the April 6, 2016 fall and hip fracture. (See 11T257:22-258:18.) As such, it is clear that any purported NHA "rights" claim, like the negligence claim, was based solely on allegations that Ms. Sahar fell and fractured her hip as a consequence of substandard nursing care at Care One. The allegations in this case thus do ***not*** include a separate claim for infringement of any actionable "right" of a nursing home

resident listed in N.J.S.A. 30:13-5. Instead, there was merely an allegation of substandard care or nursing negligence. Plaintiff did ***not*** allege any separate harm or damages arising from the NHA rights claim beyond those premised upon the alleged negligence. A jury can only be instructed to allocate damages between negligence and NHA rights claims ***if*** separate damages flowing from the different claims can be identified at the outset. That did not occur in this case and is prohibited by the Ptaszynski opinion.[2]

Generally, a patient has three avenues of tort relief against a doctor: "(1) deviation from the standard of care (medical malpractice); (2) lack of informed consent; and (3) battery." Howard v. Univ. of Med. & Dentistry of N.J., 172 N.J. 537, 545 (2002). Normally, therefore, when a claim arises from a doctor or other medical professional's failure to provide appropriate care, the appropriate cause of action is for malpractice or deviation from the standard of care, not, for example, breach of contract or fraud—or in this case, an NHA rights claim. See Perna v. Pirozzi, 92 N.J. 446, 465 (1983).

[2] To the extent that plaintiff did present evidence other than that relating to the hip fracture to support a claim that Ms. Sahar's rights under N.J.S.A. 30:13-5(j) were violated, that evidence—relating to failure to respond to the call bell in a timely manner and Ms. Sahar's being purportedly being yelled at on one occasion—was not linked to any harm and was grossly insufficient to support the damages award of $525,000, as discussed in greater detail in later in this brief. See infra § III.

The Appellate Division's recent decision in Labega v. Joshi, 470 N.J. Super. 472 (App. Div. 2022), confirms and clarifies that plaintiff's experts' ability to reference statutes and regulations as an element of the standard of care is closely circumscribed in the nursing or medical malpractice context. The Appellate Division in Labega prohibited the plaintiff in a medical negligence case from pursuing claims for breach of contract premised upon a third party beneficiary theory and for negligence per se arising from defendants' alleged violations of hospital policies and procedures and statutory obligations. The Labega court emphasized that negligence per se claims premised upon allegations of statutory or regulatory noncompliance are not typically recognized and "virtually non-existent" in medical malpractice actions under New Jersey law:

> Negligence per se is not often invoked in New Jersey generally because its application is so narrow. Braitman v. Overlook Terrace Corp., 68 N.J. 368, 385 (1975) (noting "[i]n this State the violation of a statutory duty of care is not conclusive on the issue of negligence in a civil action"). As the Court explained in Eaton v. Eaton, "[o]rdinarily, the determination that a party has violated 'a statutory duty of care is not conclusive on the issue of negligence, it is a circumstance which the jury should consider in assessing liability." 119 N.J. 628, 642 (1990) (quoting Waterson v. Gen. Motors Corp., 111 N.J. 238, 263 (1998)). The reason for our rule is that "statutes rarely define a standard of conduct in the language of common-law negligence. Hence, proof of a bare violation of a statutory duty ordinarily is not the same as proof of negligence." Ibid.

> Thus, the only occasion for application of negligence per se in New Jersey is in "the exceptional situation," Horbal v. McNeil, 66 N.J. 99, 105 n. 1 (1974), ***where a statute specifically incorporates a common law standard of care***, as, for example, N.J.S.A. 39:4-97, the careless driving statute, which by its "plain language. . . prohibits negligent driving. Eaton, 119 N.J. at 643. "Proof of the violation of the statue" in that circumstance, "is proof of negligence itself." Ibid.; Torres v. Pabon, 225 N.J. 167, 187 (2016) (noting a driver's conduct contravening a common law standard incorporated into the motor vehicle code "***is*** negligence and a jury should be so instructed") (quoting Dolson v. Anastasia, 55 N.J. 2, 10 (1969)). As the Court reasoned in Eaton, "[i]t would be inconsistent to find" a defendant had violated the careless driving statute, "but that she had not been negligent." 19 N.J. at 643.
>
> That is not to say a factfinder must ignore a party's violation of a statute. As we noted over sixty years ago, the general rule in this State is that "the violation of a statute," ***while not negligence Per se***, is evidence which may be considered by a jury together with all of the evidence in determining issues of negligence or contributory negligence." Mattero, 71 N.J. Super. at 9 (emphasis added). We added the necessary caveat, however, that "this rule is subsumed by the overriding principle that the statutory violation, to be evidential, must be causally related to the happening of the accident, since a permissible inference of causality is indispensable to its relevancy." Ibid.

Labega, 470 N.J. Super. at 489-91 (emphasis added). See also, e.g., Badalamenti v. Simpkiss, 422 N.J. Super. 86, 102-03 (App. Div.) (To be evidential as to negligence, a statutory or regulatory violation must also be causally related to the accident or occurrence at issue), certif. denied, 208 N.J. 600 (2011) The trial court in Labega quoted Mattero but omitted the portion emphasized above, explaining that negligence per se is applied only when the

Legislature has incorporated a common law standard of care into a statute. As a consequence, the trial court erroneously concluded that negligence per se could be invoked whenever there was an alleged causal relationship between the negligence and the violation of a statute or regulation. See Labega, 470 N.J. Super. at 491-93.

Plaintiff in this case thus cannot assert a negligence per se claim for recovery premised on allegation that the defendant failed to comply with the NHA. Nurse White did not reference N.J.S.A. 30:13-5(j) in giving her opinions regarding the nursing standard of care, nor does the statute itself set forth a common law standard of care. Nor was there any other testimonial or other evidence to establish that a violation of N.J.S.A. 30:13-5(j) caused the hip fracture or any other harm to Ms. Sahar

If plaintiff wishes to pursue negligence claims on behalf of Ms. Sahar, plaintiff must support those claims by way of the appropriate proofs, including a competent expert opinion, not by attempting to recast the same allegations as a claim for violation of her "dignity" or "safety" under the NHA. In Ptaszynski, the Appellate Division confirmed that plaintiff must support a medical or professional negligence claim by way of appropriate proofs, including a competent expert opinion, not by attempting to recast a medical negligence claim as an NHA claim to recover for the same damages:

> Plaintiff argues that the evidence allowed the jury to infer that Mrs. Ptaszynski suffered ***different injuries and harm from defendant's negligence and its violations of the NHA.*** Plaintiff notes that the judge had instructed the jury that plaintiff was only entitled to fair and reasonable compensation. Plaintiff contends that the instructions presented the possibility of a double recovery for the same injuries or harm.
>
> We do not agree. If properly instructed, the jury could have allocated the damages to the separate claims, ***based on the different theories of liability being asserted,*** but the jury was not provided with those instructions. We cannot assume that the jury allocated its damage awards based on the different theories of recovery being advanced in this case.
>
> Accordingly, the verdicts and damage awards on the negligence and wrongful death claims are reversed and the matter remanded for a new trial on these claims.

Ptaszynski, 440 N.J. Super. at 39-40 (emphasis added). The appellate court in Ptaszynski therefore determined that the redundant allegations were problematic not only because of the potential for double recovery, but also because there was ***no*** actionable claim under the NHA at the outset. See ibid. Plaintiff in an NHA case must identify and present evidence to establish a violation of one of the specific rights listed in N.J.S.A. 30:13-5, such as "the right to manage his own financial affairs" or "the right to wear his own clothing" or of the more generalized "right to privacy" or "right to a safe and decent living environment"". The plaintiff in a suit against a nursing home must not, however, be permitted to recast a nursing or other medical

negligence claims as an NHA "rights" claim, particularly as a claim pursuant to N.J.S.A. 30:13-5(j).

Plaintiff in this case thus improperly sought to recover under both a negligence theory and under the NHA for the ***same*** alleged harm to Ms. Sahar, and recovered on the NHA claim although the negligence claim failed. Health care professionals must provide care that is medically indicated in accordance with the standard of care. See Model Civil Jury Charge 5:50A. N.J.S.A. 30:13-5(j) does not allow plaintiff to pursue an NHA claim regarding Ms. Sahar's care that essentially is duplicative of the negligence claim but allows a more lenient standard of proof. Plaintiff's NHA "rights" claim should have been dismissed at trial, if not at an earlier time.

C. N.J.S.A. 30:13-5(j) Is Void for Vagueness

Statutes that do not set forth a clear proscription of conduct are void for vagueness. See State v. Rogers, 308 N.J. Super. 59, 64 (App. Div.), certif. denied, 156 N.J. 385 (1998). New Jersey's Constitution "requires the law to be sufficiently clear and precise so that the ordinary person has notice and an adequate warning of the prohibited conduct." State v. Lee, 96 N.J. 156, 165-66 (1984); Binkowski v. State, 322 N.J. Super. 359, 381 (App. Div. 1999). If a law is so vague "that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application,' it is considered void and

unenforceable." Rogers, 308 N.J. Super. at 64-65 (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983)). Vague laws are unenforceable under the United States and New Jersey Constitutions. See State v. Cameron, 100 N.J. 586, 591 (1985).

A statute can be "facially" vague or vague "as applied". A statute may be challenged on its face if it is "impermissibly vague in all its application." Cameron, 100 N.J. at 593. A statute can be challenged "as applied" if the "law does not with sufficient clarity prohibit the conduct against which it sought to be enforced." Ibid. It "need not be proven vague in all conceivable contexts, but must be shown to be unclear in the context of the particular case." Ibid.

Plaintiff in this action generally alleged with respect to Ms. Sahar's admission to Care One, violations of her "right to respectful care that recognizes the dignity and individuality of the resident." (Da33 ¶44.) Plaintiff did not identify any infringement of any of the specific rights listed in N.J.S.A. 30:13-5, but relied only upon N.J.S.A. 30:13-5(j), which recognizes

> the right to a ***safe and decent*** living environment and ***considerate and respectful*** care that recognizes the ***dignity and individuality*** of the resident, including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that person's care consistent with sound nursing and medical practices.

(emphasis added). N.J.S.A. 30:13-5(j) is vague, both facially and as applied, because the highlighted terms are subjective and open to myriad interpretations, while the terms are not defined in the statute.

First, the statute is facially vague, because it is "impermissibly vague in all its application." Cameron, 100 N.J. at 593. No nurse or other healthcare provider can mold his or her conduct in order to refrain from engaging in activity that the statute proscribes. By way of example, a patient may think it is "undignified" to use a bed pan. However, the patient's medical status may require it and would then comply with the standard of care. The terms, "safe", "decent", "dignity", "individuality", and the like cannot be the standard applicable to healthcare professionals providing care to a patient, because the interpretation and application of the terms will vary significantly from person to person and because it is an outcome-based analysis, which is not permitted. The statute, by its own terms, is imprecise in all its applications and must be found to be void as facially vague.

Second, the statute is vague "as applied" because it is unclear in the context of this case. See Cameron, 100 N.J. at 594. Plaintiff' complaint and the evidence and argument presented at trial in no way ties any factual allegation to an allegation of noncompliance with N.J.S.A's 30:13-5(j). (See generally Da25-36.) As a practical matter and in the context of a medical or

nursing malpractice case, a health care professional, such as a registered nurse or a certified nursing assistant, cannot be held to the standard of "providing dignity" or "safe". Health care professionals must provide care that is medically indicated in accordance with the standard of care, based on what an average healthcare provider practicing in his or her profession would do under the circumstances, regardless of the outcome. See Model Civil Jury Charge 5.50A. N.J.S.A. 30:13-5(j) is unconstitutionally vague as applied, is void for vagueness and cannot provide the basis for an NHA "rights" claim in this case. The Legislature never intended and did not provide for a malpractice action to be brought as a "rights" claim under the NHA.

II. AS A CONSEQUENCE OF RULINGS MADE PRIOR TO AND AT TRIAL, DEFENDANT WAS PROHIBITED FROM IMPEACHING PLAINTIFF'S FALSE NARRATIVE (Da644; 3T; 4T13:13-14:10; 8T270:10-25; 8T271:1-272:15; Da1425; 7T11:1-69:14; 8T270:10-272:15).

At Nurse White's de bene esse deposition, plaintiff introduced a false narrative that Ms. Sahar was left unattended and unsupervised in her wheelchair at the nurses' station, got up and walked a distance away from her wheelchair into the hallway, where she fell and was not discovered until sometime later. Defense counsel thus questioned Nurse White regarding three documents. First, Mario Surio, Jr.'s physical therapy note, dated April 8, 2016 and contained in Ms. Sahar's Care One medical records states:

> As per [nursing management], on 4/6/16, desk nurse called the nurse practitioner and reported that pt. had a fall incident. Pt was sitting on her wheelchair in front of the nurses' station, suddenly stood up and attempted to walk, then fell on the floor.

(CDa76.) Second, Hazel Doland's occupational therapy note, also contained in Ms. Sahar's Care One medical records indicates:

> 4-7-16 as per nursing report, on 4/6/16 the desk nurse called the nursing supervisor to report that while patient was sitting in her wheelchair in front of nursing station, she just suddenly stood up and attempted to walk

(CDa78.) Third, nursing supervisor Maxine Burns' fall investigation review states:

> Received a call from the desk nurse that while pt. was sitting in her wheelchair in front of nursing station, she just suddenly stood up and attempted to walk then fell to the floor.

(CDa69.) The fall investigation review was among the documents produced on August 12, 2024. (See Da646-649; Da963-969; CDa21-74.)[3] At trial, Judge Suarez granted plaintiff's motion in limine for rulings on the objections and to bar the documents used in Nurse White's cross examination, and also confirmed Judge O'Dwyer's ruling that the "new documents" produced on August 12, 2024 could not used at all at trial. (See Da1425; 8T270:10-25.)

Subject to the limitations of N.J.R.E. 808, however, medical records are ***not*** inadmissible hearsay, but instead are routinely admissible pursuant to

[3] Defendant listed Nurse Burns as a trial witness, but not Mr. Surio or Ms. Doland. (See Da658-659.)

N.J.R.E. 803(c)(6)'s exception for records of regularly conducted activity or business records. See, e.g., Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 584-88 (App. Div. 2014), aff'd as mod., 223 N.J. 245 (2015); DeBartolomeis v. Board of Review, 341 N.J. Super. 80, 86 (App. Div. 2001); Gunter v. Fischer Scientific American, 193 N.J. Super. 688 (App. Div. 1984). The unavailability of the person who recorded a business record was a requirement for its admission at common law, but there is no such requirement under N.J.R.E. 803(c)(6). See Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 219 (App. Div. 1996).

There are three requirements for application of the business records exception to the hearsay rule: (1) the writing was made in the regular course of business, (2) it was prepared within a short time of the act, condition or event described, and (3) the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence. See, e.g., Konop, 425 N.J. Super. at 402. There was been no showing that the three documents were anything other than medical records made in the ordinary course of business, shortly after the matters described occurred and under circumstances indicating their reliability.

Expert opinions must be grounded in "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data

relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts." Townsend v. Pierre, 221 N.J. 36, 53 (2015). The caselaw applying N.J.R.E. 703 and N.J.R.E. 808 has consistently enforced the prohibition of the admission of complex expert opinions contained in hearsay documents, including medical records and expert reports, where the person offering the opinion is not available to give testimony concerning them. In the leading case, James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015), the Appellate Division explained

> [T]he combined impact of Rules 703 and 808 is to limit the ability of a testifying expert to convey to a jury either (1) objective "facts or data" or (2) subjective "opinions" based upon such facts, which have been set forth in a hearsay report issued by a non-testifying expert. In either instance, the testifying expert may not serve as an improper conduit for substantive declarations (whether they be objective or subjective in nature by a non-testifying expert source.

Id. at 66; see also, e.g., Hayes v. Delamotte, 231 N.J. 373 (2018) (testimony of defense expert impermissibly sought to establish the substance of the reports of non-testifying physicians); Agha v. Feiner, 198 N.J. 50 (2009) (reversing a jury verdict in favor of the plaintiff where the plaintiff's testifying experts—a chiropractor and an anesthesiologist—premised their opinions upon a radiologist's report contained in the plaintiff's medical records); Brun v. Cardoso, 390 N.J. Super. 409, 421 (App. Div. 2006) (hearsay interpretation of MRI of the spine was inadmissible); Nowacki v. Community Med. Ctr., 279

N.J. Super. 276, 281-83 (App. Div. 1995) (a radiologist's hearsay opinion within a hospital record addressing whether patient's fractures were "pathologic" or "non-traumatic" was inadmissible).

These opinions prohibit the parties' experts from "bootstrapping" complex medical opinions and diagnoses contained in a non-testifying physician's report through the expert's own testimony. N.J.R.E. 808 does not, however exclude "a straightforward observation of a treating physician," Agha, 198 N.J. at 66, or a doctor's "factual observations," New Jersey Div. of Child Prot. & Permanency v. N.B., 452 N.J. Super. 513, 526 (App. Div. 2017). Accordingly, the Appellate Division in Konop v. Rosen, 425 N.J. Super. 391 (App. Div. 2012), found that the specific notation in a consulting physician's report contained in the medical records that "Pt. has tics and was moving too much at time of procedure" was a ***factual statement***, ***not*** an ***opinion*** and thus could not properly be excluded under N.J.R.E. 808. See Konop, 425 N.J. Super. at 405.[4]

In this case, the documents used in Nurse White's cross examination were medical records made within a short period of time and under circumstances establishing their reliability. They also may be considered as

[4] The statement nonetheless was excluded because the declarant was not present during the colonoscopy at issue, and therefore had no direct knowledge to support the notation. See Konop, 425 N.J. Super. at 406.

statements made for the purpose of making a medical diagnosis or obtaining medical treatment pursuant to N.J.R.E. 803(c)(4). They also are of a kind normally relied upon by experts pursuant to N.J.R.E. 703. They do not contain complex opinions subject to exclusion pursuant to N.J.R.E. 808.

Defendant did ***not*** introduce the physical and occupational therapy notes and Nurse Burns' statement at Nurse White's de bene esse deposition in order to demonstrate their truth, but only in order to impeach Nurse White's opinions that Ms. Sahar was incapable of "suddenly" getting up out of her wheelchair had she been monitored appropriately. (See, e.g., Da823:11-824:25; Da869:19-872:4.) On cross examination, defense counsel thus introduced the physical and occupational therapy notes and Nurse Burns' review in order to impeach that testimony, by confirming that Ms. Sahar "suddenly" got up from her wheelchair, and that the desk nurse responded to the alarm. (See id. at 161:24-170:8; 186:21-188:10; 189:11-191:2; 209:10-25; 223:6-225:2; 232:8-240:10; 234:25-235:25; 236:10-240:6; 242:15-245:19.) Only after plaintiff's expert introduced the false narrative that Ms. Sahar could not have "suddenly" gotten up from here wheelchair and thus must have been left unattended and unsupervised when the fall occurred—thus opening the door to the impeachment of her opinions pursuant to N.J.R.E. 607—did defense counsel introduce the documents contained in the contemporaneous

medical and other business records in order to rebut that testimony. Defendant did not attempt to use the documents in its case-in-chief.

The Supreme Court recently applied the "opening the door" doctrine in Hrymoc v. Ethicon, Inc., 254 N.J. 446 (2023), a products liability matter involving "pelvic mesh" devices. See id. at 452. The trial court, ruling on the parties' motions in limine, barred all evidence of "Section 510(k) clearance" allowing the devices to be marketed without premarket clinical trials, because the 510(k) process determines substantial equivalency only, not safety and efficacy. See id. at 452-453. The Appellate Division reversed and remanded for a new trial, and the Supreme Court affirmed that ruling, holding that the exclusion of any 510(k) evidence deprived the defendant of a fair trial on the issue of negligence, particularly on the issue of the reasonableness of the manufacture's conduct in not performing clinical trials or studies. See id. at 453. The Supreme Court confirmed that evidence relating to the 510(k) process normally is not admissible because that procedure determines substantial equivalence, not the safety and efficacy of the product. See id. at 473-74. The 510(k) materials were, however, highly relevant to the issue of reasonableness of the manufacturer's conduct in not performing clinical theories or studies. See ibid. Plaintiffs "opened the door" by making the defendant's failure to conduct clinical trials or studies a central theme of

plaintiff's case, although studies are not required in the 510(k) clearance process. See id. at 462, 473-74. The defendant therefore had to be allowed to use the 510(k) information to rebut the plaintiff's case.

In State v. James, 144 N.J. 538 (1996), the Supreme Court explained

> The "opening the door" doctrine is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) ***admissible evidence*** that generates an issue, or (2) ***inadmissible evidence*** admitted by the court over objection. The doctrine of opening the door allows a party to elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence. United States v. Lum, 466 F. Supp. 328 (D. Del.), aff'd, 605 F.2d 1198 (3rd Cir. 1979). That doctrine operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context. Lum, supra, 466 F. Supp. at 334-35.

James, 144 N.J. at 554. The doctrine of opening the door has been applied in conjunction with the doctrine of "completeness", which provides that when a witness testifies on cross-examination as to part of a conversation, statement, transaction or occurrence, the party calling the witness may elicit on redirect "the whole thereof, to the extent it relates to the same subject matter and concerns the specific matter opened up." Ibid. The also related "curative admissibility" doctrine "provides that when one party introduces ***inadmissible***

evidence, thereafter the opposing party may introduce otherwise inadmissible evidence to rebut or explain the prior evidence." Id. at 556.

The federal and New Jersey courts have consistently allowed evidence obtained in violation of a criminal defendant's Constitutional rights to be used to impeach the defendant should he or she testify untruthfully. See, e.g., United States v. Havens, 446 U.S. 620, 626-28 (1980) (evidence obtained in an illegal police search could be admitted against the defendant if he opened the door to its admission by testifying untruthfully although the government cannot use the evidence in its case in chief); State v. Harris, 181 N.J. 391, 440 (2004) ("Statements taken in violation of Miranda may be used for impeachment when they were given freely and voluntarily."); State v. Burris, 145 N.J. 509, 525 (1996) (same); State v. Battle, 256 N.J. Super. 268, 275 (App. Div.) ("[I]llegally seized evidence may be used. . . to impeach a defendant")), certif. denied, 130 N.J. 393 (1992).

The circumstances also are comparable to those in C.A. v. Bentolila, 428 N.J. Super. 115 (App. Div. 2012), rev'd, 219 N.J. 449 (2014), in which the Appellate Division noted that the trial judge determined that while PSA-shielded documents could not be used by counsel for any purpose including the cross examination of witnesses, he further recommended that "the judge who ultimately presides over the trial should be given a copy of [the privileged

document] to decide, in his or her discretion, whether to refer to it during trial in making determinations about the testimony of witnesses." Id. at 140-41 (footnote omitted). After the Supreme Court by way of Keyworth v. Careone at Madison Avenue, 258 N.J. 359 (2024), allowed the discovery of incident investigations conducted in skilled nursing and assisted living facilities, the documents produced on August 12, 2024 were no longer privileged and should have been used in the manner as the trial court in C.A. recommended.

The excluded documents and defendant's line of questioning were fully compatible with the medical records as well as the other documents produced on August 12, 2024 that also were excluded, and contradicted plaintiff's nursing expert's description of Ms. Sahar's April 6, 2016 fall event, including the following:

> **Nursing note by Rivelina J. Lorvil, LPN at 10:55 p.m.:** "9:30PM PT sitting near nursing station. Desk nurse heard sensor alarm went off, noted PT lying on the floor on (L) side near W/C." (CDa102.)
>
> **Incident report by Rivelina J. Lorvil, LPN, regarding the April 6, 2016 fall, produced pursuant to the November 8, 2019 order:** "Desk nurse heard sensor alarm went off noted pt. lying on the floor on L side." (CDa99; see Da963-969.)
>
> **WE CARE care conference note regarding the April 6, 2016 fall, dated April 8, 2016:**
>
> Patient was trying to get OOB after family had put her in bed and left for the night. She was sitting in front of the nurses station and nurse was standing near 301. Nurse heard the chair sensor alarm

> and looked over to see the patient laying on her left side on the floor. Initially patient stated she had no pain and exam did not show any injury. 4/7/16- IDC meeting discussed and it was decided to get a perimeter mattress for night safety. Back releasing seatback was also authorized by the family and would be applied when patient returned.

(CDa83.)

Fall Investigation dated April 6, 2016, produced on August 12, 2024: "'Location' has 'Hallway' checked off and then next to it is written 'nurses station'". (CDa68.)

Individual Statement Form by Loella Gutierrez, dated April 6, 2016, produced on August 12, 2024:

> 1. Where and when (date and time) did the incident occur? Hallway in front of nurse's station.
>
> 2. Resident name and rm. # Renee Sahar 316W. I was standing in front of Rm. 1 talking to nurse supervisor when I heard the alarm going off and a loud noise, saw pt on the floor beside wheelchair on her left side. Supervisor, nurses and CNA's came, pt. assessed and transferred back to wc. Pt was last seen sitting on the wheelchair before the fall.

(CDa70.)

Individual Statement Form by Kadiatu Koroma, CNA, dated April 6, 2016, produced on August 12, 2024: "Notify by nurse that the resident on the floor. Resident was sitting in front of nurse's station." (CDa71.)

Investigation Report for Date of Incident 4/6/16, Date of Investigation 4/8/16 by Dana M. Lee, RN, produced on August 12, 2024:

1. Summary of Alleged Incident: On April 6th, 2016 L.G. [Loella Gutierrez] was standing near the nurses station when she heard R.S. alarm sounding. She immediately went to see the resident. She was found in a lying position in front of her wheelchair on her left side.

(CDa72; see CDa72-74.)

> On April 6th, 2016 resident's alarm was sounding and she was discovered by staff on the floor in a side lying position on her left side. No apparent injury was noted, resident denied pain. MD was notified and declined to send resident for ER evaluation as she did not hit her head and she denied pain. Resident was placed on close 1:1 monitoring until family arrived.

(CDa73; see CDa72-74.)

A trial court has broad discretion with respect to the admission of evidence. See, e.g., Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999). Its rulings may, however, be overturned on appeal if there has been a palpable abuse of that discretion, i.e., a finding so wide of the mark as to amount to a manifest denial of justice. See ibid.; see also, e.g., State v. Kuropchak, 221 N.J. 368, 385 (2015); State v. J.D., 211 N.J. 344, 354 (2012). The standard for granting a new trial has been articulated as requiring a determination that the jury's verdict was "contrary to the weight of the evidence or clearly the product of mistake, passion, prejudice or partiality." Lanzet v. Greenberg, 126 N.J. 168, 175 (1991). Cumulative errors, including as to the admission of evidence, considered in the aggregate may render the proceedings unfairly prejudicial so as to require a new trial. See, e.g., Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 51-57 (2009); Crawn v. Campo, 136 N.J. 494, 511-12 (1994). In this case, to the extent that the jury found that Ms. Sahar's environment was not "safe" because Ms. Sahar was allowed to get up and walk

away from her wheelchair while unattended and unsupervised, that view of the evidence was colored by plaintiff's distortion of the evidence and the court's prohibition on the use of the medical records and investigatory documents contradicting that narrative. A new trial is required.

III. AS A CONSEQUENCE OF THE EVIDENTIARY ERRORS AND FAILURE TO DISMISS THE NHA CLAIM, THE JURY CHARGES AND INTERROGATORIES WERE INADEQUATE, THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE, AND THE DAMAGES AWARD AND OTHER AMOUNTS INCLUDED IN THE FINAL JUDGMENT WERE EXCESSIVE (11T155:7-156:1; 11T122:13-23; 12T6:11-7:4; 12T40:12-46:1; Da1804-1850).

As set forth above, ***no*** evidence was presented at trial as to the NHA rights claim. The expert and fact witness testimony focused solely on the professional negligence claim relating to the hip fracture. (See supra § II.B.) As a consequence, the jury was left to speculate as to what the NHA claim was and what evidence could be considered in connection with that claim. The court provided absolutely no meaningful instruction to the jury on this point, but only repeated plaintiff's lawyer's improper remarks, in his closing statement, that the jury could consider the ***same*** conduct relating to the fall and the hip fracture for purposes of both the nursing negligence and NHA claims. (See 11T257:22-258:18; 12T45:22-46:1.)

Given that the jury found the plaintiff failed to prove that Care One's nursing staff deviated from the standard of care, the extent of the resulting

injury was irrelevant because plaintiff could not recover for that injury. No evidence was presented other than as to the fall and hip injury, and no guidance was given by the court as to what evidence could or could not be considered in connection with the NHA claim. It therefore can only be assumed that the jury recast the ***same*** allegations of professional negligence as a violation of Ms. Sahar's right to a "safe and decent living environment" by finding that because Ms. Sahar broke her hip, her environment was not "safe".[5] Plaintiff thus was allowed to circumvent the requirements of establishing the duty of care, breach of that standard and causation by way of competent expert testimony and was improperly allowed to recover on the basis of outcome alone. See Morlino v. Medical Ctr. of Ocean County, 152 N.J. 563, 584 (1998)

[5] The Court failed to instruct the jury that the federal regulation referenced by Nurse White in giving her opinion that defendants failed to satisfy the standard of care by allowing Ms. Sahar to fall, 42 C.F.R. § 483.25(h) or "F-tag 323", could not be considered in evaluating the NHA rights claim. (See Da771:4-773:13.) The Appellate Division, in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016), determined that there is no private cause of action to enforce the "responsibilities" provision of the NHA, N.J.S.A. 30:13-3, including the responsibility to "ensure compliance with all applicable state and federal statutes, rules and regulations," N.J.S.A. 30:13-3(h). Plaintiff in this case thus cannot rely upon the federal regulation cited by Nurse White in order to support the NHA rights claim on behalf of Ms. Sahar.

This result is equivalent to application of a negligence per se, res ipsa loquitur or strict liability standard holding defendant Care One responsible for any harm to Ms. Sahar that might occurred while she was a patient at the facility, based on outcome alone. Absent an instruction that the jury could not recast the professional negligence claim as an NHA "rights" claim, the verdict is plainly against the weight of the evidence because ***no*** evidence was presented as to the NHA rights violation or its having caused any injury to Ms. Sahar.

The court further complicated the situation by failing to give a preexisting condition charge on the NHA rights claim and in restricting the charge on the negligence claim to Ms. Sahar's osteoporosis. All of Ms. Sahar's preexisting conditions, including her prior stroke resulting in hemiparesis and weakness and dementia contributed to her risk of falls. Moreover, according to Dr. Scherl's records and testimony, Ms. Sahar returned to her status prior to her hip fracture two months after surgery. When a preexisting condition poses a risk of harm, the defendant provider of medical services is liable only if the malpractice, as distinguished from the preexisting condition, was a "substantial factor" in producing the ultimate harm or injury, and the plaintiff's recovery must be limited to the extent (expressed in a percentage determined by the jury) to which the malpractice increased the risk

of harm posed by the preexisting condition. See, e.g., Model Civil Jury Charge 5.50E; Scafidi v. Seiler, 119 N.J. 93, 109 (1990). Thus, if the award of $525,000 in damages on the NHA claim related to the hip fracture, it is plainly excessive and must be reduced.

If, in the alternative, the $525,000 damages award is ***not*** based upon the hip fracture, it still is obviously excessive. The only evidence other than that relating to the fall and hip fracture that was presented to potentially support a violation of Ms. Sahar's rights under N.J.S.A. 30:13-5(j) was Jack Sahar and Ilene Handal's brief hearsay testimony that their mother told them that a person named "Willow" yelled at her and that it often took fifteen to twenty minutes for anyone to respond to the call bell at Care One. (See 8T247:18-248:7; 8T260:8-23.).) No details or context were offered to substantiate the allegations, and there was no evidence any such incident caused any harm to Ms. Sahar, including with respect to the fall or hip fracture.[6] If the verdict on the rights claim is related to these two incidents, a new trial is required

[6] Plaintiff in opposing the motion for partial summary judgment suggested that Ms. Sahar urinated in her wheelchair at Care One, and Judge Vinci mentioned that allegation in denying defendant's motion. (See 2T44:14-45:15.) In fact, Ilene Handal at her deposition testified that she did not recall ever finding her mother to have had such an "accident" at Care One or being told that she had had any such issue. (See Da1376 at 64:12-15, 65:1-19.) No evidence of any such event was presented at trial. Plaintiff's and defendant's experts agreed that toileting had nothing to do with Ms. Sahar's April 6, 2026 fall near the nurses' station.

because the result is premised on inadmissible hearsay and there is no evidence of associated harm. The damages award also is plainly excessive.[7] The trial court's failure to give a proper jury charge thus resulted in a verdict that was against the weight of the evidence, requiring reversal and remand for a new trial. See, e.g., Reynolds v. Gonzalez, 172 N.J. 266, 289 (2002); Velazquez v. Portadin, 163 N.J. 677, 688 (2000).

The trial court's award of the medical lien of ***$69,228.39***, attorney's fees of ***$208,770.00*** and costs of ***$54,777.44***, plus interest on a litigation funding loan of ***$12,267.35,*** for a total of ***$67,044.79***, was in error. A grant of attorney's fees under the circumstances presented in this case does not serve the remedial purposes of the NHA because plaintiff did not effectively assert an NHA "rights" claim, where monetary recovery is typically limited, and, instead, recast a professional negligence claim. The public policy of this State is not to encourage trial lawyers who are unable to prove their professional negligence claims—despite having incurred significant costs associated with

[7] Medical costs relating to the hip fracture cannot be added to the verdict because that care has nothing to do with the rights claim. Attorneys' fees and costs also cannot be added to verdict because any such expenditures during discovery and at trial relate to the professional negligence claim, which plaintiff lost, as defendant argued in opposing plaintiff's motion for a final order of judgment. If the medical costs for the hip fracture are permitted to be recovered in connection with the NHA claim, a proper Scafidi charge was required to allow apportionment to pre-existing conditions.

obtaining expert opinions and testimony—to instead invoke the NHA in order to recover the ***same*** substantial damages ***without*** having to prove the elements of medical negligence. Even if the Court finds that the NHA claim was properly submitted to the jury, it was error for the trial court to award all of the attorney's fees and costs incurred in the case when the majority, if not all of those costs, were associated with the malpractice claim and not the NHA claim.

CONCLUSION

The final order of judgment and order denying defendant's motion for a new trial must be vacated with directions that a new trial be conducted.

Respectfully submitted,
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301 Union Street, LLC d/b/a
Care One at Wellington

Dated: April 2, 2025

By: _____
Anthony Cocca, Esq.

ESTATE OF RENEE SAHAR, THROUGH JACK SAHAR, EXECUTOR, Plaintiffs/Respondents, vs. 301 UNION STREET, LLC d/b/a CARE ONE AT WELLINGTON; CARE ONE, LLC; ABC COMPANIES (1-10); DEF PARTNERSHIPS (1-10); JOHN DOE PHYSICIANS (1-10); JOHN DOE NURSES (1-10); JOHN DOE TECHNICIANS, CERTIFIED NURSING AIDES, AND PARAMEDICAL EMPLOYEES (1-10) Defendants/Appellants.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** DOCKET NO.: A-1103-24 On Appeal from: On Appeal From Order of Final Judgement and Order Denying Defendant's Motion For A New Trial Filed November 18, 2024 from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-338-18

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PRELIMINARY STATEMENT

This is a Nursing Home Resident Rights matter, wherein Renee Sahar, 83, an elderly and infirm individual with a history of dementia, was admitted to CareOne at Wellington ("CareOne") on March 3, 2016 following an extended hospitalization for a stroke. The trial court correctly held that CareOne was a nursing home because it met the statutory definition, was licensed as a long-term care facility, was staffed and operated in accordance with nursing home regulations, and treated and described itself as a nursing home in internal documents and federal filings.

The evidence at trial was a troubling account of how Ms. Sahar was subjected to an unsafe environment and indecent care at CareOne. After hearing the evidence presented at trial, the jury found that Ms. Sahar's resident right "to a safe and decent living environment and considerate and respectful care" was violated. Next, the jury found proximate causation between this violation and her harms. The jury awarded $525,000 in compensatory damages.

As explained in Point I, Appellant attempts to subrogate the Legislature's will, as expressly set forth in the Nursing Home Responsibilities and Rights of Resident's Act ("NHRRA") to the common law. The NHRRA is remedial legislation intended to address the inferior "care" and "treatment" elderly and infirm individuals, all too frequently receive, in a nursing home. The Legislature granted an express cause of action for a violation of their "Resident Rights." The plain language, as well as

legislative history, unequivocally support the fact that the care and treatment Ms. Sahar received at CareOne was the ***exact type*** intended to be addressed by the NHRRA. Without any legal basis, Appellant argues that Ms. Sahar's subpar care can only be used to prove a negligence claim and cannot be used to prove a residents' rights violation. As addressed in Point I, this argument contradicts case law, common sense, but more importantly, principles of legislative supremacy.

In Point II, Respondent addresses Appellant's "void for vagueness" argument.

In Point III, Respondent demonstrates that CareOne was a "Nursing Home," and Renee Sahar was a "Resident" as defined in the NHRRA. Appellant incorrectly argues that CareOne is not a "nursing home" by inserting new qualifiers into the legislative definition of a nursing home, such as "short-term rehabilitation" or "sub-acute." New Jersey has a comprehensive healthcare regulatory framework that, through licensure, defines how a healthcare facility can use its licensed bed capacity and the types of care that can be provided. Applicable New Jersey Department of Health regulations expressly restrict the use of "long-term care beds" in long-term care facilities, like CareOne, to "***general nursing home care***." Appellant's attempt at self-characterizing itself as being able to provide anything other than what its license allowed is simply unfounded and has far-reaching implications for undermining our State's regulatory framework. Moreover, even Appellant's own staff members and experts admitted CareOne was a nursing home.

In Point IV, Respondent addresses Appellant's claims of evidentiary errors at trial. Days before trial, Appellant attempted to surprise Respondent with 54 pages of new documents it had the court bar 5 years prior under a claim of privilege. In moving for the privilege Appellant represented to the trial court, there was nothing in the documents that was not in the medical chart. Now, Appellant claims prejudice from its own representation. Regardless, the one document Appellant sought to use from this privileged set was a multi-level hearsay document authored by someone who lacked personal knowledge of Ms. Sahar's unwitnessed fall on April 6.

Additionally, there were two other multi-level hearsay documents, which were part of the medical chart but also made by people without personal knowledge of the unwitnessed fall. Appellant never sought to produce any of these witnesses at trial. In classic doublespeak, Appellant claims it was not introducing the statements for the truth of the matter asserted, but rather just to "confirm" what was asserted therein. The court correctly ruled on these evidentiary issues at trial.

In Point V, Respondent explains a simple fall case where 'but for' causation applies is not the type of case for which Scafidi is intended. The trial court applied Scafidi based on Ms. Sahar's age-appropriate osteoporosis as the "preexisting condition." However, this is not the type of condition to which Scafidi applies given neither expert testified the osteoporosis on its own caused the April 6th hip fracture. Finally, Appellant did not allocate damages for the jury.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On December 12, 2015, Ms. Sahar was admitted to St. Joseph Regional Medical Center due to an acute stroke. (8T 152:4-13). Her hospital course was complicated by acute respiratory failure. Id. Ms. Sahar was thereafter admitted to Select Specialty Hospital and then Kessler Rehabilitation for rehabilitation and tracheostomy weaning. Id. Ms. Sahar was admitted to CareOne on March 3, 2016. Id.

Ms. Sahar, 83, required skilled nursing, therapy and maximum assistance with all activities of daily living. (7T 137:8-24). She had dementia and residual stroke deficits. Her son, Jack, did not know how long his mom would need to remain at CareOne. (8T 153:12-16). He hoped for her to return home eventually. Id. Her recovery timeline was unclear. No discharge date was set. Id.

While at CareOne, Ms. Sahar was subjected to an unsupervised and unsafe environment and inadequate care. At trial, the jury heard testimony from Ms. Sahar's children describing neglect in basic care needs. (8T 161:21-162:25). Ms. Sahar was supposed to be toileted every 2 hours, but this was not done. Id. The staff repeatedly failed to respond to call bells, even after escalating complaints to management. Id. At nighttime, when Ms. Sahar's family was not present, a CareOne aide repeatedly yelled at her, causing distress and fear. (8T 261:3-20.)

The jury heard Ms. Sahar had unexplained bruising. (8T 262:5-13; 9T 25:16-

[1] For purposes of clarity and convenience of the Court, Respondent has combined the Procedural History and Facts.

27:13). Ms. Sahar complained she had fallen multiple times. Id. Her family brought this to the attention of CareOne's staff, however, they would undermine Ms. Sahar by saying that she was "confused" and outright deny anything happened. Id. Unbeknownst to the family, multiple falls and incidents ***had*** occurred. Id. The only fall reported to the family was the one on April 6, 2016. (8T 163:10-164:9).

On April 6, 2016, Jack Sahar tended to his mother that evening as he always did. (8T 164:12-24). He brought her to her room for bed around 9:00 p.m. Id. Between 9:00 and 9:30, a nurse went into Ms. Sahar's room and observed that Ms. Sahar was experiencing increased confusion. (9T 153:19-22). She was concerned that in this state Ms. Sahar would unknowingly try get out of her wheelchair and walk unassisted. (9T 153:19-154:4). Ms. Sahar was brought into the lobby near the front desk, specifically so she could be closely supervised and prevented from getting up and walking unassisted. Id.

Respondent's expert, Carol White, NP, testified that "putting someone at the nurses' station requires supervision to the point that someone can get to the people if they need intervention." (8T 133:12-24). CareOne's staff admitted that "that when someone is at the nurses' station there must be someone close enough to intervene." Id. Appellant's expert, Dr. Brangman, likewise, testified someone needs to be as close as "humanly possible" to get to her when she starts to rise out of the wheelchair. (10T 104:21-107:9). This could have been an aide, an activities person or even a

nurse, but it was someone's duty. Everyone, including CareOne's experts and employees agreed it was "*unsafe*" for Ms. Sahar to be allowed to get up from her wheelchair and walk unassisted. (9T 154:2-12); (10T 104:21-107:8).

Appellant's nursing expert recounted the following facts at trial. Despite needing to be closely supervised, no one was watching Ms. Sahar between 9:30 and 9:45. (9T 154:13-15). She was last observed in the lobby by any CareOne staff at 9:30. (9T 193:23-194:6). The fall occurred at 9:45 p.m. Id. The fall was unwitnessed. (9T 158:10-159:20). The only indication of the fall was hearing the wheelchair alarm, highlighting the lack of adequate supervision. Id. No one knew how much time had passed, from the alarm ringing to Ms. Sahar being found on the floor. Id.

The following morning, a nurse told Ms. Sahar's daughter, Ilene, that her mom got up and walked across the lobby and fell in the hallway behind the nurses' station. (9T 14:3-T15:7). The physical evidence supports this. Ms. Sahar had rug burns from the fall, but only the hallway was carpeted, not the lobby. (9T 14:3-T15:7). Additionally, the distance from the elevator in the lobby, where Ms. Sahar was placed, to the nurses' station was between 10 to 12 feet. (8T 156:19-157:4); (8T 159:8-18); (9T 14:3-15:7).

There was no mention of the abrasions to Ms. Sahar's body in CareOne's records. Testimony during trial also noted that the facility's records regarding the incident contained substantial inconsistencies. For example, Ilene found her mother the

morning of April 7 in significant and visible pain. (9T 6:20-13:15). CareOne's staff and, even their records, denied any pain and said she slept peacefully. Cda102. Despite her significant pain and distress and repeated requests from the family (almost as soon as Ilene arrive that morning) CareOne failed to transfer her to the hospital until later that afternoon. (8T 167:12-18). Overall, the evidence before the jury portrayed a care environment that was not only unsafe but also emotionally and psychologically distressing for Ms. Sahar.

Ultimately, Ms. Sahar was at CareOne for only 35 days because she was transferred to the hospital on April 7. She suffered a displaced left femoral neck fracture. Da93. At the hospital the attending surgeon, Dr. Jonathan Scherl reviewed the x-rays, found good bone health, and performed a left hip uncemented bipolar hemiarthroplasty. Da94. This required hammering her bone and prosthesis with a mallet, a clear sign her osteoporosis was not significant. (8T 68:5-15). Ms. Sahar had to restart therapy at other nursing homes but eventually returned home. As a result of the fall Ms. Sahar lost half of her ability to walk. Da587; (10T 206:22-23).

On January 16, 2018, Plaintiff Renee Sahar filed a complaint. Da1-12. The complaint alleged negligence, as well as a violation of Ms. Sahar's resident rights, particularly N.J.S.A. 30:13-5(j). Da8-10. CareOne answered on May 4, 2018 asserting "it operated as a Licensed Long-Term Care Facility." Da13. On January 29, 2019, CareOne answered Form C interrogatories. Da1055. CareOne failed to

identify any witnesses or people with knowledge related to any falls. Da1055.

CareOne filed a motion for a protective order asserting that 54 pages of documents about Ms. Sahar's falls were privileged. Da964. The factual and legal basis of that claim was seriously disputed. Pa22-39. However, CareOne's counsel represented to the court:

> Nobody's trying -- you know, this nefarious, underhanded, oh my goodness, ***there's information in here that's not elsewhere and somebody's trying to hide something – not the case. Everything's out here***, these are not very interesting reports. [Pa30(emphasis added)].

On November 8, 2019, the Court, ordered CareOne to turn over the first page of 6 incident reports for the fall incidents. Those pages are CDa021 (3/21/16), CDa31 (3/29/16), Cda36 (3/29/16), CDa52 (4/2/16), Cda58 (4/4/16), CDa66 (4/6/16). The remaining 49 pages were barred from all use in the litigation. Da963-964. Thereafter, CareOne unilaterally filed a motion for leave to file an interlocutory appeal claiming that plaintiff was not entitled to even the first page of the incident reports. The Appellate Division denied the motion. CareOne then sought review by the NJ Supreme Court, who also denied the petition. Litigation continued and CareOne elected to proceed without producing the remaining 49 pages of documents—among them, the statement of Maxine Burns.

Discovery ended in this matter on June 30, 2021. On February 4, 2022, CareOne filed a summary judgement motion arguing that it was not a nursing home. Da50-51. Plaintiff opposed with ample evidence that CareOne was a nursing home,

including testimony of its employees, certified federal forms, rules, regulations, the license, and even the testimony of its own experts which directly indicated CareOne was a nursing home. Da295-301; Da311; Da350; CDa4-18; CDa20; Da319-321, Da323; Da325-326; Da329-330; Da698.

At the summary judgement motion, Plaintiff's theory of the case was fully disclosed. Appellant misrepresents to this Court that Plaintiff's theory was created after Judge Suarez barred the Maxine Burns statement in 2024. See Db10. This is patently false. In 2022, at the summary judgment motion, plaintiff advised:

> Mrs. Sahar did not get up abruptly. She physically was incapable of doing so. She got up slowly and began to walk. Her chair alarm was going off. No one was around despite being placed in an area where she was supposed to be directly supervised by the desk nurse. She walked to the hallway and collapsed and broke her hip. [Da1026.]

CareOne, thereafter, did not turn over the statement of Maxine Burns. On April, 2022, The Honorable Robert M. Vinci, J.S.C., denied CareOne's motion to dismiss the NHRRA claim, stating that Plaintiff's evidence goes to an unsafe living environment. Da981; 2T 45:19-23. The trial court did not just rely on the licensure but applied the plain language definition of a nursing home, as well as considered the factual evidence submitted by Plaintiff. (2T 41:10-44:23).

The initial trial date of May 10, 2022 was followed by ten (10) additional trial dates. Da609-610. As confirmed by email correspondence, Appellant and Respondent agreed upon a date for Carol White's *de bene esse* in accordance with

R. 4:36-3(c). Da623-636. Appellant had months of notice, was not on trial at the time of Carol White's *de bene esse*, and even told the trial court on August 12th it was not asking for an adjournment of the *de bene esse* or trial. Pa40-41; (4T 5:12-13).

Also on August 12, 2024, Appellant had unilaterally declared it was going to use the 49 pages of privileged documents and the people named therein as potential witnesses at trial. See Da646-649. Trial was scheduled for September 3, 2024 and the *de bene esse* deposition of Carol White was on August 15, 2024. Appellant did not move to reopen discovery or for reconsideration of the 2019 protective order.

Plaintiff requested a conference to discuss the unfair surprise on the eve of trial. The trial court said the documents were still subject to the protective order. (4T 5:12-13). Instead of making a motion, Appellant indicated it will go to trial and "*if the case goes south* that will be Point 2 of the appeal." (4T 6:19-22). In other words, it would assert on appeal it was prejudiced by the 2019 protective order and by not being allowed to unilaterally ignore it. (4T 6:19-22).

Despite the conference, at Carol White's *de bene esse* on August 15, 2024, over objection, Appellant still used the multi-level hearsay statement of Maxine Burns to cross-examine Carol White, even though she had never seen the document. Da907-908. Appellant's experts also did not have the Maxine Burns statement or any of the 49 pages of documents.

On August 27, 2024, plaintiff filed a motion-in-limine for a declaration that

CareOne was a nursing home. Da975. In addition to the evidence submitted in opposition to the 2022 summary judgment motion, Plaintiff submitted the NJ DOH guidance issued on April 18, 2024 on the "rules governing long-term care facilities, commonly known as nursing homes." Da983. That guidance provides that the definition of "resident" is not "based on the type or duration of care an individual receives in a long-term care facility." Da983.

The trial proceeded on September 3rd and concluded on September 12, 2024. On September 6, 2024, The Honorable Anthony Suarez, J.S.C., granted Plaintiff's motion-in-limine to bar and redact portions of the *de bene esse* deposition of Plaintiff's expert, Carol White, that referenced the hearsay statements of Maxine Burns, Mario Surio, and Hazel Doland. Da1425. When charged, the jury was instructed not to duplicate damages, which was also reiterated explicitly on the verdict sheet. (12T 45:9-22); (12T 56:18-24). Based on the evidence outlined above, the jury came back with a unanimous verdict of 7-0 in favor of Plaintiff finding 1) a violation of Ms. Sahar's resident right, 2) causation, and 3) damages. The compensatory damages were $525,000. (12T 69:1-10). Since the jury did not find on the first cause of action, there were no concerns that the jury duplicated damages.

On October 10, 2024, Plaintiff filed a motion for final judgement, attorneys' fees, cost, pre-judgement interest and reimbursement of a stipulated Medicare lien. Da1442. In Plaintiff's certification to the it court, it was explained that N.J.S.A

30:13-8(a) of the NHRRA states: "***Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action."*** (emphasis added). The motion papers, certification of counsel, and exhibits, provided the court with itemized costs, fees, and interest and information regarding similarly situated attorneys for purposes of a lodestar calculation. Da1446-1447; Da1365. In addition to the compensatory award, the judgement consisted of 1) $116,812.50 in prejudgment interest 2) $69,228.39 for the stipulated lien, 3) $67,044.79 for costs pursuant to R. 4:42-8 and N.J.S. 30:13-8, and 4) $208,770.00 for attorney's fees pursuant to R. 4:42-9(a)(8) and N.J.S. 30:13-8. Da1444. Respondent also requested $41,754.00 as a 20% contingency enhancement as set forth in Rendine v. Pantzer, 141 N.J. 292 (1995). This was not granted. After reviewing the papers and arguments, the Court entered final judgment for $986,855.68.

LEGAL ARGUMENT

POINT I THE REMEDIAL NHRRA WAS CREATED TO ADDRESS INFERIOR CARE AND LIVING CONDITIONS ELDERLY AND INFIRM INDIVIDUALS, SUCH AS RENEE SAHAR, RECEIVE IN NURSING HOMES

Appellant's argument that Respondent "recast" a common law negligence claim under the NHRRA, N.J.S.A. 30:13-1, et seq. improperly subordinates a Legislative enactment to common law. When the Legislature enacts a statute establishing a new right and remedy, it is not required to track the common law, and indeed may depart

from it or supplant it. "Legislation has primacy over areas formerly within the domain of the common law." Farmers Mut. Fire Ins. Co. of Salem v. N.J. Property-Liability Ins. Guar. Ass'n, 215 N.J. 522, 543 (2013). As the Court emphasized:

> Legislative enactments are never subservient to the common law when the two are in conflict with each other. The saying "equity follows the law" is a recognition that the common law must bow to statutory law." [Id.] at 543.

see also Juliano & Sons Enters. v. Chevron, Inc., 250 N.J. Super. 148, 157 (App. Div. 1991) ("Our Legislature [is] the authoritative source of public policy."). This principle is well illustrated across multiple statutory schemes. For instance, the Dog Bite Statute imposes strict liability and abrogates prior common law requirements. See Goldhagen v. Pasmowitz, 247 N.J. 580, 594 (2021). The Uniform Commercial Code also overrides the common law where the two conflict. See Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat'l Bank, 390 N.J. Super. 199, 204 (App. Div. 2007). Most notably, the Workers' Compensation Act abolished the common law negligence remedy for workplace injuries, supplanting it with a statutory no-fault system. See Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 185 (1985). The NHRRA, enacted to protect nursing home residents and impose affirmative obligations on facilities, was enacted precisely because existing remedies, such as negligence or malpractice, were insufficient.

N.J.S.A. 30:13-5 of the NHRRA delineates the Bill of Rights of a nursing home resident. There are 19 separate resident rights listed in subsections (a) through (n)

that concern a wide variety of resident issues. Subsection (j) provides a critical right as it relates to individualized care and the right to live in a safe environment. Id. Subsection (j) provides that every resident has the right to a:

> [S]afe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that persons care consistent with sound nursing and medical practices.[2] [N.J.S.A. 30:13-5(j)]

As to the statutory cause of action for a violation of these rights, N.J.S.A. 30:13-8 of the NHRRA provides:

> Any person or resident whose *rights* as defined herein are violated *shall have a cause of action* against any person committing such violation. . . 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." [N.J.S.A. 30:13-8 (emphasis added).]

To now suggest that the Legislature cannot enact rights-based protections for nursing home residents, when that is exactly what it did, is to ask this Court to ignore both legislative authority and intent.

A. Addressing Poor Care and Unsafe Living Environments Through The NHRRA Was of Paramount Importance To The Legislature

The NHRRA, enacted in 1976, was the culmination of a two-year legislative initiative. In 1974, Nursing Home Study Commission ("Commission") was created

[2] The portion of N.J.S.A. 30:13-5(j) stating "including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that persons care consistent with sound nursing and medical practices" was added in 2000. See L. 2000, c. 65, § 2, eff. July 13, 2000.

to investigate the conditions of nursing homes in New Jersey. Da1517-1519. The Commission held four (4) hearings on April 16, 1975 (Da1520), May 2, 1975 (Da1600), June 24, 1975 (Da1625), and October 17,1975 to receive first-hand testimony from health professionals, advocacy groups, industry insiders, and family members about care being provided to individuals in nursing homes.

The Commission heard about the litany of abuses in the U.S. Senate Subcommittee on Long Term Care report including instances of individuals not being assisted to the bathroom causing injury, a patient's skin deteriorating due to lack of hygiene, and patients being physically struck for requesting water. Da1577-1578. The National Council of Senior Citizens highlighted the disproportionate neglect occurring during the evening and night shifts due to reduced staff and lack of supervision. Da1571-1577; Da1624. Residents were frequently left unassisted, sometimes forced to wait until morning for basic necessary care. Da1577-1578. It was explained to the Commission that hands-on care was mainly provided by aides rather than nurses. Nurse Suzanne Long testified and told the Commission about patients suffering from bed sores, lack of staff training, and personal accounts of uncovering falsified care reports. Da1523-1524.

Charlotte I. Roy, spoke about the treatment of her mother, who tripped over a wastebasket negligently placed in the doorway of her room. Da1628-1652. As a result, her mother fell, broke her hip, and later died from complications. Da1630-

1631. Ms. Roy described this living condition, among a host of other poor care her mother received, including not having a functioning call bell, and not being assisted to the bathroom during the night. Da1634-1635. Ms. Roy testified that her "mother's death needlessly resulted from carelessness and lack of care…"

i. The Commission Recognized The Need To Create Actionable Resident Rights To Protect The Elderly

William J. Jones, the former Director of the Division of Medical Assistance and then current Superintendent of the Meadowview Hospital recommended that the Legislature, "Enact a patient abuse law … Incorporate a right to sue by the patient, patient's family or the State on behalf of patients without family or unable to act on their own for acts of malpractice." Da1534. Assemblyman Garubbo (a Commission member) raised his concern that nursing homes must provide "reasonable care and a habitable environment." Pa14. Again, Mr. Jones recommended legislation that would provide a "a right to sue" if they did not provide that. Pa13-14.

Stanley Van Ness, head of NJ Department of the Public Advocate, (Da1605), discussed litigation and a bill of rights as logical next steps to curtail neglect and abuse in nursing homes. Da1620. Assemblyman John P. Doyle recognized that individuals in nursing homes deserve human dignity and are often not in control of their environment or the care and advocated for an "enforceable" "bill of rights" and a "legislative law" creating an "***extra duty of care upon the nursing home***." Da1654-1655 (emphasis added).

A March 3, 1976 interim report by the Commission titled the "Plight of the Elderly," detailed the rise and "Growth of the Nursing Home Industry" due largely to increased federal funding. The report highlighted the inadequacy of the quality of the care delivered to residents of nursing homes and recommended a patient bill of rights, as well as the enactment of Senate Bill No. 944 of 1976. Da262-273.

Bill No. 944 sets forth those resident rights, including the right to a "a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident." Da268. It also set forth the new statutory cause of action for violation of the rights at N.J.S.A. 30:13-8. Da269. On October 7, 1976, the NHRRA was enacted.

Given the testimony and reports received by the Commission, it was rightfully concerned that individuals in nursing homes are "a particularly vulnerable population," who are subject to "abuse and physical danger.... cruelty, negligence…virulent infections, [and] lack of human dignity," and whose care "[i]s perhaps 'the most troubled and troublesome, component of our entire health care system.'" In re Conroy, 98 N.J. 321, 375-76 (1985) (internal citation omitted).

For nursing home residents, the ability to receive assistance with basic needs, such as supervision, ambulation, hygiene, and toileting, is not a luxury. It is essential to their safety and well-being and fundamental to human dignity. "Care" goes to the very heart of the protections guaranteed under N.J.S.A. 30:13-5(j).

Appellant's position, that the very evidence proving poor care and treatment and an unsafe living environment is only admissible under a negligence theory, would nullify the NHRRA by rendering its standards and remedies meaningless. If violations of statutory rights cannot be established through the evidence that proves those violations, the statute becomes illusory. There can be no doubt that our Legislature sought to provide a private cause of action for unsafe and indecent living environments, or inconsiderate, disrespectful care impacting the dignity and individuality of the resident. The Legislature is well within its powers when doing so. See Estate of Burns v. Care One at Stanwick, LLC, 468 N.J. Super. 306, 318 (App. Div. 2021) ("The Legislature has repeatedly demonstrated its ability to create private causes of action … expressly declare what types of facilities that house the elderly and infirm may be the subject of a private cause of action...")

This is why Appellant's citation to Labega v. Joshi, 470 N.J. Super. 472 is wholly misplaced. The case has no bearing on this matter, as it neither involves a nursing home, nor the NHRRA, nor any statutory private cause of action. Accordingly, Labega offers no guidance in interpreting the NHRRA and should be disregarded.

Further, Appellant's argument that negligence *per se* requires incorporation of a common law duty is equally unavailing. See Waterson v. General Motors Corp., 111 N.J. 238, 262-63 (1988) (holding that whether a statutory violation constitutes negligence *per se* depends on legislative intent not whether the statute mirrors a

common law duty). Under the NHRRA, the Legislature's intent could not be clearer. N.J.S.A. 30:13-8 provides any person who violates a resident's "***rights***" shall have a ***cause of action*** against any person committing such violation." (emphasis added).

In this same vein, Appellant also incorrectly suggests that a NHRRA rights violation cannot exist because the only claim against a nursing home should be for malpractice of a nurse. Under the Affidavit of Merit Statute (AOM) statute, only Registered Professional Nurses ("RN") are "licensed professionals." This excludes, other responsible actors in a nursing home, such as licensed professional nurses (LPNs), Certified Nurses Aides (CNA), owners, operators, management, administrators, nursing assistants, activities personnel, and even housekeeping staff. See Gilligan v. Junod, 474 N.J. Super. 39, 48 (App. Div. 2022) ("[T]he AOM statute does not cover a negligence claim against a licensed practical nurse."). Such a narrow and novel rule would allow nursing home owners and operators who do not supply enough staff to provide adequate supervision of individuals, like Ms. Sahar, escape liability. Non-licensed professional staff who commit abuse and neglect - by yelling at patients or failing to toilet – would not be accountable.

In this case, the jury was presented with ample evidence that multiple individuals, including non-nursing staff, bore responsibility for supervising Ms. Sahar. Appellant's own nursing expert, Marianne Resnick, RN, testified that in her facility, she utilizes CNAs, aides, activities personnel, and even housekeepers to help

supervise residents, particularly in high-traffic areas like the lobby and nurses' station. (9T 148:8–151:19). Likewise, Appellant's medical expert, Dr. Sharon Brangman, testified that aides are often responsible for implementing fall prevention interventions and assisting residents with mobility and supervision. (10T 26:2–11). Respondent's expert, Carol White, also identified aides and CNAs as having responsibilities related to supervision and response to call bells. (7T 257:16–25). All experts acknowledged that supervision could be provided by staff other than RNs and that CareOne must provide appropriate personnel to meet the residents' needs. There was no testimony suggesting that only an RN could have, or should have, supervised Ms. Sahar. The jury was well within its authority to conclude, based on the totality of the evidence, CareOne violated Ms. Sahar's statutory rights when she went unsupervised.

ii. Appellant Misrepresents Ptaszynski v. Atl. Health Sys.

Appellant misstates that the court in Ptaszynski v. Atl. Health Sys., 440 N.J. Super. 24 (App. Div. 2015) prohibited a plaintiff from using the same evidence for negligence and a NHRRA claim and misrepresents that the court held there was "no actionable NHRRA claim at the outset." See Db28-29. Neither statement is true.

In Ptaszynski v. Atl. Health Sys. the plaintiff asserted both a negligence claim and a violation of the NHRRA ("to a safe and decent living environment and considerate and respectful care") based on the same conduct. Id. at 30. The Appellate

Division affirmed that the jury may consider both theories of liability, provided it is instructed not to award damages twice for the same injury. Id. at 40. The exact discussion from the court follows.

> In this case, plaintiff sought damages for Mrs. Ptaszynski's personal injuries, mental anguish, loss of dignity and death. Plaintiff's evidence did **not**, however, distinguish between the injuries and harm caused by defendant's alleged violations of the NHA and its alleged negligence.
>
> '[I]t is fundamental that *no matter under what **theories** liability may be established*, there cannot be any duplication of damages.' . . . The common law prohibits a double recovery for the same injury. . . Furthermore, it would be inconsistent with well-established principles to require a tortfeasor to pay twice for the same damages caused by a single wrong. []
>
> *Here, the jury was **not** instructed that it could not award plaintiff damages for defendant's violations of the NHA and its negligence based upon the same injuries or harm to Mrs. Ptaszynski*. As noted, the jury awarded plaintiff $250,000 for the NHA violations, and $250,000 on the negligence claim. Based on the judge's instructions, those awards could have been based on the same injuries or harm…
>
> We do not agree. *If properly instructed, the jury could have allocated the damages to the separate claims, based on the different theories of liability being asserted, but the jury was not provided with those instructions*. We cannot assume that the jury allocated its damage awards based on the different theories of recovery being advanced in this case.
> [Ptaszynski, 440 N.J. Super. at 40 (emphasis added)]

In Ptaszynski, the Appellate Division did not take exception to the jury being charged on alternative theories of liability. In fact, it upheld the portion allowing the jury to be charged on ***both*** theories of liability. The Appellate Division also did not take exception to the fact that the "evidence [did] not, distinguish between the injuries and harm caused by defendant's alleged violations of the NHRRA and its

alleged negligence." The court did not say Ms. Ptaszynski needed to have urinated on herself to have a NHRRA claim. The court allowed the liability evidence to support either theory of liability. The court created ***no limitation*** on the evidence allowed to support the NHRRA resident right's damages. The only instruction was that the jury cannot award damages twice when, regardless of the number of liability theories, there was in essence one set of harms.

Causes of action/theories of liability and damages are two distinct issues. Appellant seeks to conflate and confuse these issues. It is well established that while multiple theories may be submitted to the jury, the damages are tied to the harm - not the number of theories of liability. Juries decide liability separate from damages. Asserting multiple theories of liability is common in cases where a plaintiff has a statutory and common law causes of action. Appellant's argument that the jury could not award damages for a hip fracture under the NHRRA because the injury resulted from nursing negligence is unsupported and legally incorrect. No authority prohibits statutory liability where the harm arises from inadequate care. Moreover, the Court need not speculate as to whether the NHRRA violation caused Ms. Sahar's injury. The jury specifically answered that question when they answered the proximate cause question on the verdict sheet in the affirmative.

B. The Evidence Before The Jury Unequivocally Demonstrated That Ms. Sahar Was Subjected To An Unsupervised and Unsafe Environment And Indecent And Inadequate Care

Appellant's nursing expert, Marianne Resnick, testified that at some point prior to 9:30 p.m. on April 6, 2016, it became known to CareOne's staff that Ms. Sahar was experiencing increased confusion. The staff knew it was likely that Ms. Sahar would try get out of her wheelchair and walk unassisted. (9T 153:19-154:4). Defense Expert Resnick also told that jury that Ms. Sahar was put in the lobby for close supervision specifically to prevent her from walking unassisted. She said it was "*unsafe*" for Ms. Sahar to be allowed to get up from her wheelchair and walk unassisted. (9T 154:2-12). She confirmed this several times. Id.

Likewise, Defendant's other expert, Dr. Brangman, testified that on the night of April 6, 2016, Ms. Sahar was confused and needed "close supervision" to prevent her from walking and that is the exact reason she was at in the lobby near the nurse's station. (10T 105:1-23). Like Respondent's expert Carol White, Dr. Brangman explained that Ms. Sahar's supervision required "someone [] to be close enough to get to her when she starts to rise out of the wheelchair" and that Ms. Sahar actually be supervised to be effective. (8T 133:12-24; 10T 107:4-8; 10T 103:3-14). The jury heard that even CareOne's staff agreed "when someone is at the nurses' station there must be someone close enough to intervene." (8T 133:12-24).

Defense expert Resnick explained to the jury the fall was unwitnessed and the only indication to anyone that Ms. Sahar fell was upon hearing an alarm. (9T 158:10-159:20). She had no idea how long Ms. Sahar had been on the floor before she was

found. (10T 133:4-14). Dr. Brangman agreed that there was no evidence that Ms. Sahar just slid out of her wheelchair on her left side or that Ms. Sahar bent down to pick something off the floor on April 6th. (10T 107:21-108:7).

CareOne's staff would not toilet Ms. Sahar as required. (8T 161:21-162:25). The staff consistently failed to respond to call bells, even after escalating complaints to management. Id. At nighttime, when Ms. Sahar's family was not present, a CareOne aide repeatedly yelled at her. (8T 261:3-20.). The jury heard Dr. Brangman explain that supervision encompasses more than just fall prevention, it includes providing redirection and reassurance to confused residents. (10T 94:13-96:4). Effective supervision also enables staff to address a resident's "basic human needs," such as addressing hunger, fatigue, going to bed, or the need to use the bathroom, along with a range of other physical and emotional needs.

The jury heard Ms. Sahar had unexplained bruising. (8T 262:5-13; 9T 25:16-27:13). Ms. Sahar complained she had fallen multiple falls. Id. Her family brought this to the attention of CareOne's staff, however, they would undermine Ms. Sahar by saying that she was "confused" and outright deny anything happened. Id. Unbeknownst to the family, the staff was aware multiple falls and incidents ***had*** occurred. Id. The only fall reported to the family was the one on April 6, 2016, but by then it was too late for Ms. Sahar to get the help she needed. (8T 163:10-164:9).

Based on the above, the jury well within its province to find Ms. Sahar's rights

had been violated. In our civil justice system, the jury is charged with the responsibility of deciding the merits of a civil claim and the quantum of damages to be awarded a plaintiff." Cuevas v. Wentworth Grp., 226 N.J. 480, 499 (2016). Appellant fails to demonstrate any "manifest injustice."

II. APPELLANT'S VOID FOR VAGUENESS ARGUMENT FAILS AS A MATTER OF FACT AND LAW

Appellant's void-for-vagueness challenge is another attempt to invalidate the NHRRA. Procedurally, Appellant failed to comply with R. 4:28-4 (requiring notification of the Attorney General when challenging the "validity" of a statute). Its challenge should be disregarded on this basis alone.

Legally, the NHRRA imposes civil obligations on nursing homes. It does not implicate constitutionally protected rights, like free speech, religion, or privacy. Rather, it seeks to protect and vindicate the rights of vulnerable nursing home residents. The law also does not result in a criminal or any quasi-criminal penalty. Therefore, Appellant's challenge is subject to deferential scrutiny and must meet a high bar to succeed. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982).

A statute is "facially vague" only when the Appellant can demonstrate "it is vague in all its applications." Jenkins v. N.J. Dep't of Corr., 412 N.J. Super. 243, 250 (App. Div. 2010). This means "there is *no* conduct that it proscribes with sufficient certainty." State v. Cameron, 100 N.J. 586, 593 (1985)(emphasis added). N.J.S.A.

30:13-5(j) does not meet this standard as it plainly sets forth an example of the type of care that would constitute prohibited conduct: failure to provide appropriate pain management. A statute that expressly identifies conduct constituting a violation cannot be deemed vague in all applications.

Appellant next suggests that the statute is vague "as applied" because it applies differently to different residents. Their argument is unpersuasive. Many well-established civil standards adjust based on individual circumstances. For example, "negligence" is defined by reference to the conduct of a reasonably prudent person "under similar circumstances." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 364 (2016). The tort of "private nuisance" is the "unreasonable interference with the use and enjoyment" of a person's property. Ross v. Lowitz, 222 N.J. 494, 505 (2015). What constitutes "reasonably prudent," "unreasonable interference" or "use and enjoyment" adjusts on the unique factual circumstances of each case. All these standards vary from person to person, jury to jury, and situation to situation. Courts and juries routinely apply these flexible standards, without finding them impermissibly vague. Appellant is unable to articulate any explanation why these causes of action are permissible and not vague.

Accordingly, Appellant's "bed pan" hypothetical lacks factual nuance to be of any use. For example, if a bed pan is used solely for the convenience of the nursing home staff when the resident is capable of using the toilet with assistance that is a

well-known example of undignified care, a violation of resident rights, and possibly a form of restraint. See 42 CFR 483.24 ("Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being"); 42 CFR 483.12(a) (The resident has the right to be free from any "physical or chemical restraints imposed for purposes of discipline or ***convenience***, and not required to treat the resident's medical symptoms."). Simply put, absent medical necessity, our elders are not required to surrender their dignity and individuality merely because they might need additional assistance in using the toilet.

A party claiming that a law is vague "as applied" may only challenge the law as to their own conduct. State v. Walker, 385 N.J. Super. 388, 403 (App. Div. 2006). Sufficient notice is provided when "a person of ordinary intelligence may reasonably determine what conduct is prohibited so that he or she may act in conformity with the law." State v. Saunders, 302 N.J. Super. 509, 520-522 (App. Div. 1997); See In Re Demarco, 83 N.J. 25, 29 (1980) (upholding the revocation of a physician's license based on a violation of a statute which allowed revocation when the physician was found "guilty of gross malpractice and gross neglect in the practice of medicine which had endangered the health and lives of patients.); see also Merin v. Maglaki, 126 N.J. 430, 437 (1992)(reviewing holding of In Re DeMarco).

In the present matter, Appellant's own expert witnesses confirmed the applicable

standards and recognized the importance of supervision as a vital safety measure in Renee Sahar's living environment. For instance, both defense experts, Nurse Resnick and Dr. Brangman, testified they understood "It was ***unsafe*** for [Ms. Sahar] to walk unassisted," and CareOne's staff knew it was unsafe as well. (9T 154:2–12; 9T 170:10-13; 10T 104:21-25; 10T 104:21-107:9). They identified that Ms. Sahar was placed by the nurses' station "for close supervision" "so she would not walk unassisted" to prevent her from doing what was unsafe. Id.

Both defense experts also testified that there are specific guidelines and regulations, including F-Tag 323, which assist in understanding a facility's duty regarding safety and adequate supervision to prevent falls. (9T 135:7-11; 10T 101:21-102:14). Those guidelines, for example, specify that a "wheelchair alarm is not a substitute for adequate supervision." (9T 167:22-24). The experts were aware "that you can't rely on just hearing the noise of a wheelchair alarm" to provide supervision. (9T 168:1-6). In short, given both defense experts understanding of the standards and their familiarity with guidelines and regulations that are customarily relied upon in the field it can be fairly said there was fair warning of what constituted a "safe environment" for Ms. Sahar and that leaving her unattended when she was confused and going to get up and walk and injury herself was unsafe.

III. CAREONE WAS A "NURSING HOME" SUBJECT TO THE NHRRA

Appellant CareOne was as a "nursing home" and Renee Sahar was a "resident"

as defined by the plain language of the NHRRA, N.J.S.A. 30:13-2. Despite Appellant's attempts to distance itself from this designation and its unsubstantiated claims that it provided a higher level of care than a nursing home is allowed, CareOne's licensure, operations, regulatory obligations, internal records, and the testimony of its own experts confirm that it was a "nursing home."

In an effort to avoid liability under the NHRRA, Appellant advances a series of legally flawed and factually unsupported arguments. It contends that the definition of a "Nursing Home" permits segmentation of the facility by unit and by type of care a particular plaintiff was receiving. Db15. The plain language definition of "Nursing Home" provides no such qualification. Appellant also emphasizes that a "resident" must receive care on a "continuing basis," yet that phrase does not appear in the statutory definition of a "resident." See Db2, 6, 14, 15.

The NHRRA defines a "nursing home" as a facility that:

> operates for extended medical and nursing treatment or care for two or more nonrelated individuals with acute or chronic illness or injury, or a physical disability, or who are convalescing, or who are in need of assistance in bathing, dressing, or some other type of supervision, and are in need of such treatment or care on a continuing basis."[3]
> [N.J.S.A. 30:13-2(c)]

There is no allowance for delineation by unit or reference to the specific type of care

[3] The pre-2017 definition of a nursing home used the word "crippled" instead of "disabled." It also used "infirm" instead of "who are in need of assistance in bathing, dressing, or some other type of supervision." See L. 2017, c. 131, effective July 21, 2017. The pre-2017 version explained "Infirm is construed to mean that an individual is in need of assistance in bathing, dressing or some type of supervision." See Pa21.

an individual who pursues a lawsuit against the facility is receiving. "Resident" is simply defined as "any individual receiving extended medical or nursing treatment or care at a nursing home." N.J.S.A. 30:13-2(e). Any arguments CareOne advances must be scrutinized as they attempt redefine the statutory definitions and inject non-statutory qualifications like "sub-acute" or "short-term" that do not exist.

Appellant further claims that its licensure status is irrelevant. But licensure is a cornerstone of our State's comprehensive health care regulatory framework, defining both the type of care a facility can provide and the oversight to which it is subject. Appellant attempts to evade its legal obligations by arguing it is effectively operating an unlicensed healthcare unit, and was providing care that its license does not allow. Appellant held a license to operate a "long-term care facility" (LTC), which, as the Court will see is a nursing home, and allowed to provide skilled nursing and therapy care. Da13. Providing this type of care does not alter the nature of the facility.

Further, Appellant's own fact and expert witnesses undermine its position. At trial, defense expert, Marianne Resnick, RN testified CareOne was as a "skilled nursing facility," (9T 135:6-11), and affirmed a "skilled nursing facility," "long-term care facility," ***and*** "nursing home" all mean the "***same thing***" and are wholly "interchangeable." (9T 77:6-9). She also acknowledged that CareOne was subject to the rules and regulations applicable only to nursing homes. (9T 135:6-11).

A. Licensure Defines The Types Of Care That Can Be Provided By A Healthcare Facility

New Jersey law provides a clear framework for determining the type of facility through licensure. The Legislature vested exclusive authority and obligation to the executive branch and the Department of Health (DOH) to license all health care facilities in the State of New Jersey, including nursing homes, through the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1, et seq. Da427. That Act declares:

> In order to provide for the protection and promotion of the health of the inhabitants of the State, **the Department of Health shall have the central responsibility for the development and administration of the State's policy with respect to health planning** [N.J.S.A. 26:2H-1.]

While Appellant brushes our laws aside, this comprehensive regulatory framework ensures that healthcare facilities, and their obligations, are defined not by self-characterization but by license. That principle extends to the NHRRA, which granted the Commissioner of Health the authority to promulgate regulations to effectuate the purposes of the Act. See N.J.S.A. 30:13-9; Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 117 (2014)("The statute authorizes the Commissioner of Health to promulgate regulations pursuant to the statute."). Those regulations, codified at N.J.A.C. 8:39-1, et seq., expressly refer to "nursing homes" as licensed "long-term care facilities." See N.J.A.C. 8:39-1.1 ("long-term care facilities, [are] commonly known as nursing homes, throughout New Jersey.").

Using the words "nursing home," "skilled nursing facility," or "long-term care facility" interchangeably is not new or novel. The legislative history of the NHRRA uses these terms interchangeably and frequently. In 1975, the Commission received

the testimony and written statement of then acting Commissioner of Health, Joanne E. Finley, M.D. See Da1698 (Testimony), Da422 (Statement). In her statement Commissioner Finley consistently referred to nursing homes, licensed long-term care facilities (LTC), and skilled nursing facilities (SNFs) interchangeably. Da422-438. She explained that in New Jersey "nursing homes (also known as SNFs, i.e., skilled nursing facilities), intermediate care facilities (ICFs), homes for the aged (also classified as skilled nursing facilities)" where all included within the term "nursing home" when was used in a generic sense.[4] See Bermudez v. Kessler Inst. for Rehab., 439 N.J. Super. 45, 54-55 (App. Div. 2015); Da425-426. Commissioner Finley further explained the emerging State and Federal trend was to do away with "identifiable units within facilities" and with segregation of patients "requiring disparate levels of care" as they all fit within the parameter of what levels of care a nursing home could provide. Da426; Da1703.

This legislative history was central to the Appellate Division's decision in Bermudez v. Kessler Inst. for Rehab., supra, where it held the Legislature used the generic term "nursing home" in the NHRRA "because the Legislature intended to encompass the types of similar facilities outlined by Commissioner Finley in her testimony. Bermudez, 439 N.J. at 54-56.

[4] Commissioner Finley also explained that "government medical institutions, special hospitals, general hospitals, and facilities for the mentally disabled," even though they could provide similar services, were traditionally not considered a "nursing home." Da425-426

Applicable NJ DOH regulations expressly restrict the use of "long-term care beds" in long-term care facilities, like CareOne, for anything other than "***general nursing home care***." See N.J.A.C. 8:33H-1.1(g). The regulations further provide: "Applicants approved for long-term care beds ***shall not*** admit residents who require a different licensing category of care, such as comprehensive rehabilitation." N.J.A.C. 8:33H-1.1(g). This issue was addressed in the case Estate of Burns v. Care One at Stanwick, LLC, 468 N.J. Super. 306, 322 (App. Div. 2021), where the Appellate Division reaffirmed the centrality of a facility's licensure. The Appellate Division held that facility type is governed by the license issued by the DOH, not by self-characterizations or litigation strategies. Although Burns was a case about an assisted living facility, the court did a review of all related facilities including, nursing homes and broadly held "Whether, during decedent's stay there, Care One was operating something other than that should be determined **only** by the Department of Health which possesses special expertise in these matters, not by either the trial judge or a jury. Estate of Burns, 468 N.J. Super. at 322.

That same logic applies here. Appellant holds a license to operate a long-term care facility, commonly known as a "nursing home." See Da13. No evidence supports a claim it operated under any other license type, nor that it was authorized to admit residents to its beds who do not require "general nursing home care." The

Court should not endorse Appellants attempt to undermine our State's comprehensive healthcare framework drawing authority away from the DOH.

i. Providing Therapy Services Does Not Remove a Facility from the NHRRA's Scope

To be clear, CareOne's license permits it to provide therapy or rehabilitative services, and providing these services does not mean it is not a nursing home. First, the statutory definition of a "nursing home" expressly includes facilities that provide care for individuals who are "convalescing." See N.J.S.A. 30:13-2(c). "Convalescing" means recovering strength after illness or surgery—precisely the type of rehabilitative care allowed in a nursing home. The term "convalescing" makes no reference to length of stay and anticipates a shorter residency than someone who needs care for the remainder of their life. The Legislature clearly anticipated that nursing homes would provide post-acute services.

Second, our law provides:

> Some patients in nursing homes may, on occasion, require rehabilitative care. The rehabilitative services offered to patients in most nursing homes are distinguished from comprehensive rehabilitation, which may ***only*** be offered by a licensed rehabilitation hospital. [N.J.A.C. 8:33H-1.1(e)]

CareOne's assertion that it provides a "higher level of care" is unsubstantiated. The facility was offering rehabilitative services within the scope permitted to nursing homes—not the specialized care reserved for licensed rehabilitation hospitals. Appellant never explains why a resident who requires a higher level of

care is less vulnerable and "doesn't implicate the NHA's special concerns." Db2. The opposite is true. Likewise, on April 18, 2024, the NJ DOH issued guidance explaining the "rules governing long-term care facilities, commonly known as nursing homes," provides that the definition of a "resident" is not "based on the type or duration of care an individual receives in a long-term care facility." Da983. It further explains "every individual who resides in the long-term care facility, including, but not limited to, individuals in the facility receiving subacute care and long-term care" are "residents." Id.

Third, the cooperative state and federal Medicare and Medicaid funding mechanisms, which undergird most nursing home reimbursement, require that nursing homes provide rehabilitative care and track such services through the federally mandated "Minimum Data Set (MDS)." Da428; See also Health & Hosp. Corp. v. Talevski, 599 U.S. 166, 180-182 (2023) (explaining state and federal governments work cooperatively to improve nursing home care by tying payment to certain quality measure and ensuring "safe and dignified care for the elderly.")

Before a nursing home is reimbursed for care provided to residents, they are required to certify that they are, in fact, a "nursing home." See CDa3-18 (MDS forms applicable to Renee Sahar). These forms allow reimbursement to the nursing home for "skilled nursing and rehabilitation care" depending on the individual patient's expected therapeutic needs. See United States ex rel. Dolan v. Long Grove Manor,

Inc., 315 F. Supp. 3d 1107, 1110 (N.D. Ill. 2018). All MDS form are certified as to the "accuracy and truthfulness" of the information being submitted. See CDa7, 11, 14, 17. It would defy logic for a facility that certifies it is a "nursing home" and receives compensation for providing skilled nursing and therapy services to then turn around and claim in civil litigation it is not a nursing home because it provided skilled nursing and therapy. Nursing homes were always able and intended to be places for people to go after an illness or operation for skilled nursing care to recover through therapy and rehabilitation. Appellant fails to cite any source, which says a nursing home that provides therapy is not a nursing home.

ii. Only Hospitals May Legally Operate "Sub-Acute Units"

Appellant also attempts to evade the law by self-proclaiming itself as having "sub-acute unit." See Db17, 18, 20. This argument fails because New Jersey law specifically limits which healthcare entities may operate "Sub-Acute Units." The Health Care Facilities Planning Act was amended in 1996 to allow hospitals, not nursing homes, to convert their "existing hospital bed capacity to a less intensive and more appropriate level of care for post-acute care patients in order to create subacute care units..." Da440; See N.J.S.A. 26:2H-7.6. A "Sub-acute care unit" is defined as "a unit located within a hospital which utilizes licensed long-term care beds to provide subacute care for patients." Da441. Initially, draft legislation extended the ability to create a "sub-acute unit" to skilled nursing facilities, but the

final enactment limited eligibility to hospitals—reflecting a clear intent to limit they types of facilities that operate such unit. See Da449-466 (legislative history).

Notably, the sub-acute law, N.J.S.A. 26:2H-7.6 limits the maximum length of stay in a sub-acute unit to **eight (8) days**. Da442. In the present matter, CareOne claims Ms. Sahar remained in its "sub-acute unit" for approximately 30 days—confirming it was, in fact, not operating a sub-acute unit. It also reinforces that Ms. Sahar received "extended medical or nursing treatment" and is thereby a "resident." N.J.S.A. 30:13-2(e).

B. CareOne Operated A Nursing Home; Renee Sahar Was A Resident

CareOne's *only* license was to operate a LTC comprised of 128 long-term care beds. Da295-301; Da13. These beds could only be occupied by individuals who required "nursing home care." See N.J.S.A. 26:2H-7. In connection with Ms. Sahar's care, CareOne submitted, on five separate occasions, certified federal MDS forms affirming it was, indeed, a "nursing home." CDa4-18.

CareOne employed a Nursing Home Administrator (NHA) as required by long-term care facility regulations. Da302-305. See N.J.A.C. 8:39-9.2. In CareOne's yearly licensure application, the NHA certified that CareOne "has been and will be" operated in accordance the licensure requirements for long-term care facilities, commonly known as nursing homes. Da297; see N.J.A.C. 8:39-1.1. The NHA likewise testified that CareOne had to ensure compliance with the "applicable state

and federal nursing home rules and regulations." Da311. Similarly, Joan Sampedro, RN, the unit manager of Renee Sahar's unit testified that CareOne was required to comply with "State and Federal nursing home laws and regulations." Da350.

In discovery, Appellant's expert Dr. Brangman repeatedly referred to CareOne as a nursing home and testified to the nursing home standard of care as being the relevant standards. Da319-321; Da323; Da325-326; Da329-330. She did the same at trial. (10T 96:5-8, 97:7-11, 101:21-24). Likewise, Appellant's nursing expert preferred to refer to CareOne at as a skilled nursing facility (SNF) and admitted "*skilled nursing facility*, long term care facility, *nursing home*," are all the same. (9T 77:6-9) (emphasis added). This usage aligns with current and historical use of these terms, including the testimony of Dr. Joanne Finley in 1974. Da425-426

Turning to the statutory text, Appellant never identifies how CareOne fails to meet the definition of a "nursing home" under N.J.S.A. 30:13-2(c). None of its arguments actually relate to excluding itself from the plain language definition of a nursing home. As noted by Judge Vinci, "There's no legitimate dispute" that CareOne met the definition of a nursing home and "Defendant does not even attempt to make the argument…because it can't." (2T 41:10-42:9). In sum, CareOne meets the statutory definition of a nursing home under any reasonable interpretation.

Renee Sahar meets the definition of a resident because she was receiving extended nursing care. Ms. Sahar was a post-stroke patient with an unclear recovery

timeline. (8T 153:12-16, 172:6-173:25). Ms. Sahar was admitted on March 3, 2016. In total, she was at CareOne for 35 days. This was well beyond the eight-day maximum allowed for "sub-acute" units. In fact, CareOne's staff explicitly asked Ms. Sahar whether she understood she was in a "nursing home." CDa20. Her son, Jack Sahar, did not know how long she was going to reside there. (8T 153:12-16). At CareOne, she required skilled nursing, therapy and maximum assistance with all activities of daily living. (7T 137:8-24). She was only discharged on April 7th, 2016, due to her fractured hip requiring hospital admission. (7T 122:1-10).

IV. THE THREE (3) DOCUMENTS THAT APPELLANT SOUGHT TO USE AT TRIAL WERE PROPERLY EXCLUDED

There are only three (3) documents at issue with respect to the evidentiary issues raised by Appellant. They are: (1) an April 8, 2016 note from physical therapist Mario Surio (CDa76), (2) an April 7, 2016 note from occupational therapy assistant Hazel Doland (Cda78), and (3) a written statement of Maxine Burns (Cda69). Of these, only the statement of Maxine Burns was barred by a November 8, 2019 Protective Order. Da963. The notes by Surio and Doland were part of the medical chart and were not subject to that Order.

While numerous documents were subject to the Protective Order sought by Appellant (Cda22-30, Cda32-35, Cda37-51, Cda53-57, Cda59-65, Cda67-74), Appellant did not seek to use any of those protected documents at trial but for the Maxine Burns statement (Cda69). Since these other documents were not used by

Appellant, and no witnesses, including expert witnesses on both sides had them or relied on them, no ruling was made as to their individual admissibility. As such, there is no appealable issue before the Court and Appellant suffered no prejudice.

A. Mario Surio, Hazel Doland, And Maxine Burns Lacked Personal Knowledge And Their Statements Constituted Multi-level Hearsay

At Carol White's *de bene esse* deposition, Appellant used the statement of Mario Surio, PT. Ms. Sahar fell on April 6, 2016. Two days later, Surio wrote in an April 8, 2016 therapy note:

> As per [nursing management], on 4/6/16, desk nurse called the nurse practitioner and reported that [Ms. Sahar] had a fall incident. [Ms. Sahar] was sitting on her wheelchair in front of the nurses' station, suddenly stood up and attempted to walk, then fell on the floor. [CDa76.]

Respondent objected on the basis of multi-level hearsay and lacking personal knowledge. Da829-835.

Similarly, Appellant used the hearsay statement of Hazel Doland, OT, who wrote the day after the fall:

> 4-7-16 as per nursing report, on 4/6/16 the desk nurse called the nursing supervisor to report that while [Ms. Sahar] was sitting in her wheelchair in front of nursing station, she just suddenly stood up and attempted to walk, then fell on floor. [CDa78.]

Respondent objected on the grounds of multi-level hearsay and lacking personal knowledge. Da843.

Finally, Appellant sought to introduce a handwritten statement from Maxine Burns, contained in a document titled "Fall Investigation Review" which was

excluded from discovery pursuant to the November 8, 2019 Protective Order. The document stated,

> Received a call from the desk nurse that while [Ms. Sahar] was sitting in her wheelchair in front of nursing station, she just suddenly stood up and attempted to walk then fell to the floor. [CDa69].

Respondent objected on the grounds of multi-level hearsay, lacking personal knowledge, exclusion by the November 8, 2019 Protective Order, and because it had not been previously reviewed by Carol White. Da894-989.

At trial, Appellant laid no foundation to admit Maxine Burn's statement as a business record. See Manata v. Pereira, 436 N.J. Super. 330, 346–47 (App. Div. 2014) ("Without an officer's testimony, it is unclear whether the report was prepared in accordance with regular practice including governing guidelines."). Even if it qualified as a business record, its admission would violate the principle that statements bearing on a critical issue should not be admitted when the opposing party has no opportunity for cross-examination. Nowacki v. Cmty. Med. Ctr., 279 N.J. Super. 276, 282 (App. Div. 1995).

Appellant represents it had no intention of calling these witnesses at trial or seek to introduce the statements as substantive evidence. However, none of the individuals—Surio, Doland, or Burns—witnessed Ms. Sahar's unwitnessed fall on April 6, 2016. The statements were properly excluded for multiple reasons: (1) the authors lacked personal knowledge of the incident, a prerequisite for admissibility

under N.J.R.E. 602 and 701; (2) Appellant failed to lay the necessary foundation to qualify the documents, particularly the statement of Maxine Burns, as a business record; and (3) even if it had, the statements therein still contained multiple levels of inadmissible hearsay in violation of N.J.R.E. 801, 802, and 805.

i. Cross-Examination Is Not An Exception To Hearsay

Appellant appears to claim that it could "back-door" the statements in through cross examination by calling it "impeachment." See State v. Burris, 298 N.J. Super. 505, 512 (App. Div. 1997) ("a defendant might abuse the rule by using an expert witness as a means to defeat the normal prohibition against the admission of hearsay. Clearly, an expert witness should not be permitted to serve as a conduit for alerting the jury to evidence it would not otherwise be allowed to hear."). In Manata v. Pereira, 436 N.J. Super. 330, 349 (App. Div. 2014), the Court explained:

> Put another way, "[i]t is improper 'under the guise of 'artful cross examination,' to tell the jury the substance of inadmissible evidence.'" . . . "The reason for this rule is that the question of the crossexaminer is not evidence and yet suggests the existence of evidence...which is not properly before the jury."

Further, Carol White did not have the statement of Maxine Burns available to her in preparing her expert report as it was excluded by the Protective Order. There was nothing to impeach. This is nothing more than an attempt to create a new narrative of events using multi-level hearsay. "[H]earsay evidence not relied upon by an expert may not be employed on cross-examination." State v. Spencer,

319 N.J. Super. 284, 299 (App. Div. 1999); e.g. See James v. Ruiz, 440 N.J. Super. 45, 76 (App. Div. 2015)("'[i]t is improper to cross-examine a witness about inadmissible hearsay documents upon which the expert has not relied in forming his opinion.'")

Appellants "open the door" argument fails for this same reasons. Carol White couldn't have opened the door to be cross-examined documents and statements she never had. For this reason, Hrymoc v. Ethicon, Inc., 254 N.J. 446 (2023), a case involving 510(k) clearance for drugs, is inapplicable. In Hyrmoc, both experts had the regulatory agency findings. In this case, neither Appellant's nor Respondent's experts had the documents or commented on them. Moreover, Hrymoc is not a case about hearsay statements made by people who did not witness the event at issue.

B. CareOne Refused To File A Motion For Reconsideration of The November 8, 2019 Protective Order Instead Opting To Proceed To Trial Without The Statement Of Maxine Burns

Discovery closed on June 30, 2021. Three years later, on August 12, 2024, Appellant violated the November 8, 2019 Protective Order by disclosing a statement by Ms. Burns that doesn't otherwise exist in the medical chart. This was three days before trial testimony was taken. Pursuant R. 4:42-2, Appellant was required to seek reconsideration of the 2019 order and reopen discovery. Appellant did not do that.

Nevertheless, after unilaterally deciding the protective order did not apply, at an August 14, 2024 conference Appellant attempted to argue, without any motion, that all previously withheld documents could be used by him in the case. The court

properly declined to entertain this maneuvering. Instead of filing a motion, Appellant made the strategic decision to proceed to trial without the documents. This is evidenced by the following colloquy with the Court: "*if the case goes south* that will be Point 2 of the appeal." (4T 6:19-22). Failure to move for reconsideration waives any claim of prejudice.

i. Appellant Excluded These Documents On Its Own Volition

In 2019, when Appellant was asking for a protective order, Appellant assured the Court at the November 8, 2019 protective order hearing that the documents contained no information not already present in the medical chart.

> Nobody's trying -- you know, this nefarious, underhanded, oh my goodness, there's information in here that's not elsewhere and somebody's trying to hide something – not the case. Everything's out here, these are not very interesting reports. [Pa30].

At Appellant's insistence, litigation proceeded in compliance with the 2019 protective order. Respondent prepared its case for trial, accordingly. There is ***no*** statement in the entire medical chart by Maxine Burns or any other nurse that Ms. Sahar got up "suddenly." (see CDa102). In fact, there is *no* statement by *any person* who was present on the evening of the fall that Ms. Sahar got up "suddenly." Appellant never identified Maxine Burns as a person with knowledge during discovery. As a result of waiting until trial (6 years) before suddenly disclosing these statements, Respondent was prevented from investigating their reliability and the circumstances under which they were created.

Appellant claims Keyworth v. CareOne at Madison Ave. "relieved" it of some imagined duty to withhold factual information under the pretext of privilege. However, no party is legally obligated to assert a privilege, and privileges, are waivable prior to entry of a protective order.

Additionally, Appellant's argument misstates the law. The Patient Safety Act ("PSA"), N.J.S.A. 26:2H-12.23 to -12.25, does not require any party to assert privilege and privileges must be affirmatively claimed. Appellant made a strategic choice to assert privilege over all post-incident materials. Counsel admitted as much during the November 8, 2019 hearing stating the Court "I don't take a selective approach" to applying for protective orders. Pa30. Appellant's tactic of broadly suppressing disclosure of factual information should not then be used to surprise plaintiff at trial and cannot be the basis of CareOne claiming it was prejudiced.

Keyworth does not retroactively validate Appellant's strategy. On the contrary, the factual information Appellant withheld was required to be produced. In Keyworth, the Court explained the PSA was not created to impact a plaintiff's ability "to discover factual information regarding alleged adverse events through other non-privileged means." Keyworth v. CareOne at Madison Ave., 258 N.J. 359, 364 (2024). Our Courts have ***always*** held factual data related to an incident and the identities of involved individuals must always be disclosed in interrogatories. See Brugaletta v. Garcia, 234 N.J. 225, 251- 52 (2018)(explaining that factual data underlying

protected documents must be produced). Appellant had a duty to provide the names of any persons with knowledge and any alleged factual information they may have so it can be verified. They never did that, and once a protective order is entered, as was the case here in November 2019, a different legal framework applies. A party seeking to modify that order must seek judicial reconsideration. Appellant failed to do so. Keyworth provides no basis for ignoring this requirement, nor does it excuse Appellant's attempt to unilaterally circumvent the trial court's orders.

V. THE TRIAL COURT CORRECTLY DECLINED TO APPLY SCAFIDI TO THE NHRRA CLAIM AND TO MS. SAHAR'S STROKE AND DEMENTIA BUT ERRED IN APPLYING SCAFIDI TO HER AGE-APPROPRIATE OSTEOPOROSIS WHICH, HOWEVER, WAS HARMLESS ERROR

In cases of physician malpractice involving complex progressive diseases, Scafidi v. Seiler, 119 N.J. 93 (1990) and its precursor, Evers v. Dollinger, 95 N.J. 399 (1984) established a framework, which lowered the burden of proof for plaintiffs recognizing it would be impossible to prove damages when a physician mistreated or failed to diagnose a pre-existing condition which, by itself and without malpractice was already causing the ultimate harm the plaintiff experienced. See Gardner v. Pawliw, 150 N.J. 359, 377 (1997) ("the Evers Court recognized that proximate cause can be difficult to prove in the context of harm that results from a combination of a plaintiff's preexistent condition and a defendant's negligent discharge of a duty related to that condition, because the preexistent condition itself

serves as a "but for" cause of the ultimate injury.); see also Holdsworth v. Galler, 345 N.J. Super 294 (App. Div. 2001) (explaining a pre-existing condition is one that is being treated to "alter or delay the outcome attributable to the condition."). This charge does not apply to a straight-forward fall case, where simple "but for" analysis would suffice. See Komlodi v. Picciano, 217 N.J. 387, 394-396 (2014) (noting case involving misuse of prescription of Duragesic patch by suicidal patient "did not involve the ineluctable progression of a disease on its own . . . was not the traditional lost-chance-of-recovery case.")

In the case at hand, the ultimate harm was the hip fracture. The trial court charged the jury with the Scafidi charge as to Ms. Sahar's osteoporosis, over Respondent's objection. Appellant unsuccessfully argued that the Scafidi charge should have been given as to Ms. Sahar's stroke and dementia. The trial court was appropriately unimpressed by this illogical und unprecedented extension of Scafidi. Dementia, by itself, does not cause a hip fracture. A stroke does not cause a hip fracture.

At trial, Ms. Sahar's treating surgeon, Dr. Scherl, did not attribute her hip fracture to osteoporosis. Rather, he explained that Ms. Sahar had bone health very typical of her age. (8T 57:10-58:1; 8T 66:19-69:22). There was no severe osteoporosis, which might cause a fracture on its own. Id. In this regard, Appellant confused Ms. Sahar's propensity to develop an injury once negligence occurs, with having a condition that own its own, without negligence, caused the hip fracture on April 6th. See Golinski

v. Hackensack Med. Ctr., 298 N.J. Super. 650 (App. Div. 1997)(declining to give Scafidi charge when defendant only proved "plaintiff suffered from a propensity to develop adhesions."). Without the failure to supervise, Ms. Sahar's osteoporosis would not have caused a hip fracture on April 6. This was not a Scafidi case.

Appellant's orthopedic expert, Dr. Schenk testified he would defer to Dr. Scherl on Ms. Sahar's bone health. (10T 218:16-219:7.) Dr. Schenk conceded at trial, in contradiction of his expert report and his deposition, that Ms. Sahar's hip fracture did not happen when "she tried to bend over or, … during physical therapy." (10T 211:2-6.) He also denied the fracture occurred on April 6th.

> I'd first like to say what didn't cause it. And it wasn't whatever incident occurred on the 6th when she was found on the floor at 9:30 at night. Likely, there was some type of I want to call it event or incident between lunch and 1:40 when she complained of pain. [10T 194:14-19.]

By advancing an entirely separate theory of when the harm occurred, Appellant created two wholly separate versions of events for the jury to consider. Scafidi ***only*** applies when concurrent causative factors are simultaneously at play. Dr. Schenk's theory disqualified this case from Scafidi. Regardless, as it relates to the first aspect of Scafidi – decreasing the burden of proof, Appellant suffered no prejudice. Plaintiff proved "but for" causation, a higher burden of proof than required under Scafidi.

The second aspect of the Scafidi framework is the goal to have physicians only responsible for the portion of the injury they caused. That is, where a plaintiff had a pre-existing injury and the physician exacerbated that condition, the physician

should only be responsible for the worsening. Under Scafidi, the defendant bears the burden of segregating the damages, lest they be responsible for the full amount. In this matter, the hip fracture was new; it was not pre-existing so there is no basis for Appellant to claim a damages offset. Plaintiff is not claiming an exacerbation of her osteoporosis. Additionally, Appellant never apportioned the damage as it would be required to do under Scafidi, so no offset would be required.

Finally, the Court correctly did not apply Ms. Sahar's 'risk of falling' as a basis for application of Scafidi, especially in the context of a NHRRA claim, where it has never been applied. The NHRRA is remedial social legislation designed to protect vulnerable elderly residents in nursing homes as affirmed in Manahawkin Convalescent Center v. O'Neill, 217 N.J. 99, 117 (2014) ("The Legislature incorporated enforcement and remedial provisions in the NHA").

Remedial statutes must be construed to fulfill their fundamental purpose. Nini v. Mercer County Community College, 202 N.J. 98, 109 (2010). This means remedial statutes must be "read with an eye toward the evil or mischief it was designed to address," and courts should not permit regulated entities to "preclude[e]" the intended beneficiaries of the statute "from resorting to [its] salutary protections." Id.

Applying Scafidi to a NHRRA violation of rights claim, improperly shifts attention from the rights of the resident's to their to the vulnerabilities - precisely the inverse of the statute's intent. It would invite jurors to speculate about whether Ms.

Sahar's "dementia" or her "stroke" "increased her risk" of a rights violation, an inquiry wholly unrelated to whether CareOne provide a safe, dignified living environment as required by statute.

Application of Scafidi would also impermissibly attempt to introduce comparative negligence into a case where the duty of care includes protecting vulnerable individuals from foreseeable harm. In Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 338 (1994), the Court declared.

> We hold that when a health-care professional's duty includes exercise of reasonable care to prevent such a patient from engaging in self-damaging conduct, the healthcare professional may not assert contributory negligence as a defense to a claim arising from the patient's self-inflicted injuries. Were we to rule otherwise, the law of comparative negligence would significantly undermine and dilute the duty of care that the profession itself recognizes.

e.g., Cowan v. Doering, 111 N.J. 451 (1988). On this principal, the Supreme Court in Komlodi v. Picciano, 217 N.J. 387, 415 (2014) cautioned courts from allowing Scafidi to be used to "allocate fault" and thereby serve as "a substitute for the comparative-fault charge." Such charges in negligence actions, impair the jury's ability to answer the initial question regarding deviation in the standard of care. Tobia, 136 N.J. at 343. In the present instance, this constituted harmless error for the Respondent as the jury found on the violation of Ms. Sahar's resident rights.

CONCLUSION

Respondent respectfully requests the Court deny the Appellant's appeal.

ESTATE OF RENEE SAHAR, THROUGH JACK SAHAR, EXECUTOR, Plaintiff/Respondent, v. 301 UNION STREET, LLC d/b/a CARE ONE AT WELLINGTON; CARE ONE, LLC; Defendant/Respondent ABC COMPANIES (1-10); DEF PARTNERSHIPS (1-10); JOHN DOE PHYSICIANS (1-10); JOHN DOE NURSES (1-10); JOHN DOE TECHNICIANS, CERTIFIED NURSING AIDES, AND PARAMEDICAL EMPLOYEES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1103-24 On Appeal from an Order of Final Judgment and Order Denying Defendant's Motion for a New Trial Filed November 18, 2024 from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-0338-18 Sat Below: Hon. Anthony R. Suarez, J.S.C. Civil Action

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PRELIMINARY STATEMENT

Plaintiff in this case asserted claims arising from allegations that during an admission to Care One at Wellington for short-term subacute rehabilitation after a stroke, Renee Sahar got up from her wheelchair, which had been placed at the nurses' station so that she could be monitored, fell and fractured her hip. Plaintiff's respondent's brief and the trial judge's correspondence augmenting his opinion in response to defendant's initial brief fail to address the core issues presented on appeal.

At trial, the jury found ***no*** deviation from the nursing standard of care. There thus was ***no*** cause of action on the professional or medical negligence claim. The jury nonetheless further found that Ms. Sahar's "right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident," pursuant to New Jersey's Nursing Home Responsibilities and Rights of Residents Act ("NHA"), N.J.S.A. 30:13-1 to -17, specifically N.J.S.A. 30:13-5(j), had been violated, and awarded damages of $525,000.

This plainly incongruent result demonstrates that the trial court improperly submitted the NHA cause of action to the jury although there were no facts to support the NHA claim. It can only be assumed that the jury—having already determined that plaintiff failed to establish that the nursing staff deviated from the standard of care—recast the ***same*** allegations of a fall and hip fracture

as a violation of Ms. Sahar's right to a "safe and decent living environment". As a consequence, plaintiff was awarded substantial damages ***only*** because Ms. Sahar had a bad outcome. Plaintiff thus was allowed to avoid proving the well-established elements of duty, breach and causation by way of competent expert testimony by referencing N.J.S.A. 30:13-5(j)'s "right to a safe and decent living environment." This result is equivalent to application of a negligence per se, res ipsa loquitur or strict liability standard holding the defendant responsible for ***any*** harm to Ms. Sahar that might occur while she was a patient at the facility.

Plaintiff presented virtually ***no*** evidence to support an NHA rights violation—for instance, that Ms. Sahar was allowed to urinate in her wheelchair or staff neglected her basic needs, as alleged pre-trial but not proven at trial. The trial court nonetheless declined to dismiss the NHA claim and directed that the ***same*** conduct—the April 6, 2016 fall and hip fracture—could be considered in evaluating ***both*** the negligence and NHA claims. Plaintiff thus was permitted to recover substantial damages for the fall and hip fracture without establishing the elements of a professional negligence claim. In the alternative, plaintiff was permitted to recover grossly excessive damages (including the jury's award of $525,000 plus the medical lien and all attorney's fees and costs for a total of $986,855.68) for the only other grievances mentioned at trial—that response to the call bell was slow and that Ms. Sahar said someone yelled at her, without any evidence of resulting injury or damages.

Additionally, there still has ***not*** been a showing that Ms. Sahar was admitted to a "nursing home" for "***extended*** care and treatment" on a "***continuing*** basis" in the meaning of the NHA, N.J.S.A. 30:13-2(c) (emphasis added). Instead, Ms. Sahar received short-term subacute rehabilitation after her stroke with discharge planned, which is not a "nursing home" under the NHA.

There was no reason to prohibit defendant from referencing documents—including excerpts from the medical records—indicating that Ms. Sahar "suddenly" got up from her wheelchair and fell in front of her wheelchair at the nurse's station to impeach plaintiff's false narrative that Ms. Sahar was left unsupervised in the lobby, managed to get up from her wheelchair and walk unwitnessed across the lobby and past the nurses' station into a hallway where she ultimately fell and sustained injuries. Multiple errors prior to and at trial thus require the reversal of the final order of judgment and order denying defendant's motion for a new trial.

LEGAL ARGUMENT

I. THE NHA CLAIM SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

In responding to defendant's brief, plaintiff ***first*** argues that because Ms. Sahar was within the class of "elderly and infirm" persons the NHA seeks to protect (Pb1; Pb12 Pb16; Pb18), and was exposed to an "unsafe" (Pb1; Pb4; Pb6; Pb9; Pb14; Pb17; Pb22) and "unsupervised" (Pb4; Pb20) environment at

Care One, she undoubtedly had a cause of action for violation of her rights under the NHA[1], N.J.S.A. 30:13-5(j), recognizing a nursing home resident's

> right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that person's care and consistent with sound nursing and medical practices.

Plaintiff suggests that, if defendant's position that only a negligence claim is available in this case is accepted, the NHA's bill of rights listed and private cause of action for its enforcement would be rendered unenforceable. (See generally Pb12-20.) This is not correct. As noted in defendant's initial brief (See Db22-24), plaintiff in this case did ***not*** allege or present any evidence over the course of discovery or at trial to show that the defendant infringed any actionable "***right***" of a nursing home resident listed in N.J.S.A. 30:13-5 with respect to Ms. Sahar's care. (See Db21-20.) Plaintiff did not reference any of the specific rights listed in N.J.S.A. 30:13-5, such as "the right to manage his own financial affairs" or "right to wear his own clothing", but relied upon only N.J.S.A. 30:13-5(j)'s

[1] As set forth below, plaintiff's interpretation ignores the plain language of the definition of "nursing home" subject to the NHA, which requires ***not only*** that the individual have "acute or chronic illness or injury, or a physical disability, or who are convalescing, or who are in need of assistance in bathing, dressing, or some other type of supervision", ***but also*** requires, in the conjunctive, "***and*** are in need of such treatment or care ***on a continuing basis***". N.J.S.A. 30:13-2(c) (emphasis added). To ignore the last element would be contrary to statutory interpretation and would render every hospital, rehabilitation hospital, subacute rehabilitation and other healthcare facility in the State subject to the NHA.

more generalized "right to a safe and decent living environment" by recasting the professional negligence conduct under this outcome-based standard. The evidence and argument presented at trial, however, did not establish any violation of this right but related solely to allegations of nursing negligence allegedly resulting in a fall and hip fracture. (See Db22-24 (summarizing testimony of plaintiff's and defense experts relating to fall and hip fracture).)

In his closing statement, plaintiff's lawyer directed that the jury could consider the ***same*** conduct and the ***same*** harm for purposes of evaluating the nursing negligence claim and the NHA claim—the April 6, 2016 fall and hip fracture. (See 11T257:22-258:18.) As such, it is clear that any purported NHA "rights" claim, like the negligence claim, was based solely on allegations that Ms. Sahar fell and fractured her hip as a consequence of substandard nursing care at Care One. The allegations in this case thus do ***not*** include a separate claim for infringement of any actionable "right" of a nursing home resident listed in N.J.S.A. 30:13-5.

The Appellate Division in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24, 39-40 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016), recognized that the redundant allegations were problematic not only because of the potential for double recovery, but also because there was ***no*** actionable claim under the NHA at the outset. A jury can only be instructed to allocate damages between negligence and NHA rights claims ***if*** separate

damages flowing from the different claims can be identified. (See Db28-30.) Defendant did not "misrepresent" the Ptaszynski Court's reasoning as plaintiff claims. In fact, both parties quoted the ***same*** passage, but defendant makes fewer omissions. (See Pb20-21; Db28-29.)

It is well-established under New Jersey law that a plaintiff may assert a medical negligence action by demonstrating that a defendant's deviation from the applicable standard of care proximately caused harm to the plaintiff. See, e.g., Bender v. Adelson, 187 N.J. 411, 435 (2006); Sanzari v. Rosenfeld, 34 N.J. 128, 134-34 (1961). A medical negligence plaintiff cannot, however, circumvent the requirements of proof of causation and damages by pursuing a novel alternative cause of action. See Howard v. University of Med. & Dentistry of N.J., 172 N.J. 537, 544 (2002); Labega v. Joshi, 470 N.J. Super. 472, 485 (App. Div. 2022). The trial court's rulings in this case, in combination with plaintiff's argument and presentation of the evidence, improperly permitted plaintiff to pursue claims under both a negligence theory and under the NHA for the ***same*** alleged conduct and harm to Ms. Sahar—the fall and hip fracture—and allowed plaintiff to recover on the NHA claim although the negligence claim failed.

N.J.S.A. 30:13-5(j) does not allow plaintiff to pursue an NHA claim regarding Ms. Sahar's care that essentially is duplicative of the negligence claim but allows a more lenient standard of proof. Prohibiting such medical negligence claims—for which there is already a common law cause of action—from

proceeding will ***not*** prevent plaintiffs from bringing meaningful NHA claims for violations of the statute's bill of rights provision. It will only prevent plaintiffs from instead presenting professional negligence claims as NHA "rights" claims so as to take advantage of a more lenient standard of proof and other benefits afforded by the statute. As plaintiff observes, "The [NHA] was enacted precisely because existing remedies, such as negligence or malpractice, ***were insufficient***." (Pb13 (emphasis added); see Pb14; Pb16-18.) Neither the terms of the statute nor its legislative history, however, indicates that it is intended to provide an alternative or simpler means of prosecuting a negligence claim.

The evidence presented at trial focused almost exclusively on the April fall and hip fracture. (See, e.g., Db22-24.) Plaintiff's brief and Judge Suarez's supplemental opinion confirm that the ***only*** evidence other than that relating to the hip fracture to support a claim that Ms. Sahar's rights under N.J.S.A. 30:13-5(j) were violated was Ms. Sahar's son Jack Sahar's testimony, first, that his mother told him, and he himself observed, that it took about fifteen to twenty minutes for anyone to respond to the call bell (see Supp. Op. at 3 (citing 8T161:21-162:25); Pb4 (citing 8T161:21-162:25); Pb24 (citing 8T161:21-162:25) and, second, the hearsay statement that his mother told him that a person named "Willow" yelled at her (see Pb4 (citing 8T261:3-20)). This testimony was not linked to any harm to Ms. Sahar and was grossly insufficient to support the damages award of $525,000. There was also no instruction to the jury

limiting the NHA claim to this conduct, as opposed to the professional negligence.

The jury must have awarded damages for the alleged fall and hip fracture pursuant to the NHA, although plaintiff's negligence claim was unsuccessful. (See Db45-50.) Plaintiff thus was allowed to circumvent the requirements of establishing the duty of care, breach of that standard and causation by way of competent expert testimony and was improperly allowed to recover substantial damages on the basis of outcome alone. See Morlino v. Medical Ctr. of Ocean County, 152 N.J. 563, 584 (1998). This is not a correct result under a negligence theory or under the NHA. Plaintiff's NHA "rights" claim should have been dismissed at or prior to trial.

Second, plaintiff reiterates that Care One's "licensure" as a long-term care facility establishes that Care One a "nursing home" to which the NHA applies. (See Pb28-39.) Plaintiff claims that "There is no allowance for delineation by unit or reference to the specific type of care an individual who pursues a lawsuit against the facility is receiving," (Pb29) and that defendant is attempting to add qualifications to the statutory language in order to avoid liability (see Pb29-30.) Plaintiff's assertions again are incorrect. The NHA defines a nursing home subject to the law as:

> any institution, whether operated for profit or not, which maintains and operates facilities for ***extended*** medical and nursing treatment or care for two or more nonrelated individuals with acute or chronic

> illness or injury, or a physical disability, or who are convalescing, or who are in need of assistance in bathing, dressing, or some other type of supervision, ***and*** are in need of such treatment or care on a ***continuing basis***.

N.J.S.A. 30:13-2(c) (emphasis added). The NHA's definition of a "nursing home" does ***not*** include as an element the type of ***license*** issued to the facility. The appropriate analysis considers how the unit at issue actually operates, focusing on the essential elements of whether the facility provides ***extended*** care and treatment on a ***continuing*** basis, as described in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24, 42-44 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016), and Bermudez v. Kessler Institute for Rehabilitation, 439 N.J. Super. 45, 56 (App. Div. 2015), and most recently—and specifically considering a patient admitted to a licensed long-term care facility for subacute rehabilitation after hospitalization, Estate of Eagin v. CareOne at Evesham, Docket No. A-0426-23 (App. Div. Feb. 12, 2024) (Da1337-1358). (See Db15-18.)

The Eagin court noted, among other things, that "the NHA was enacted to protect our state's most vulnerable elderly individuals, most of whose care is ***not managed with the same intensity as a subacute rehabilitation unit***," id., slip op. at 18 (emphasis added) (Da1355). See also In re Conroy, 98 N.J. 321 (1985) (discussing differences between hospitals and nursing homes). The Eagin court ***rejected*** the plaintiffs' contention that all licensed long-term care facilities are "nursing homes" under the NHA:

> Turning to the NHA's definition of a nursing home, we note the term "any institution" is untethered to a facility's licensure. Because a specifically designated "nursing home" license is not required under the [Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 to -26] and its related regulations, the omission is not surprising. Nonetheless, we are not persuaded by plaintiffs' argument that the reference in N.J.A.C. 8:39-1.1, i.e., "long-term care facilities, commonly known as nursing homes," is dispositive of the issue. Enacted in 1976 and amended thereafter, the NHA does not reference the statutory and regulatory scheme encompassing long-term care facilities.

Eagin, Docket No. A-0426-23, slip op. at 15 (Da1352). This Court, like the Eagin Court, should reject plaintiff's arguments. (See Pb31.)

Finally, plaintiff's reliance upon Estate of Burns v. Care One at Stanwick, LLC, 468 N.J. Super. 306 (App. Div. 2021), as demonstrating that type of license is controlling, also is misplaced. (See Pb33). Burns involved the application of the ***assisted living*** bill of rights statute, N.J.S.A. 26:2H-128, to a licensed ***assisted living*** residence. The assisted living statute specifically applies to "Each assisted living facility and comprehensive personal care home provider ***licensed*** pursuant to P.L.1971, c.136 (C.26:2H-1 et seq.)." N.J.S.A. 26:2H-128 (emphasis added); see Burns, 468 N.J. Super. at 322. The NHA, however, does ***not*** include the type of ***license*** as an element of the definition of a "nursing home" subject to that Act. See N.J.S.A. 30:13-2(c).

Plaintiff's comments that Care One could not "legally" operate a "sub-acute unit" similarly are inappropriate. (Pb20-21.) There is no separate license for subacute rehabilitation as opposed to long-term care in New Jersey.

Subacute rehabilitation units that are not hospital based are licensed as long-term care facilities. As the Burns Court directed, "Whether, during decedent's stay there, Care One was operating something other than" what its license allowed "should be determined only by the Department of Health, which possesses special expertise in these matters, not by either the trial judge or a jury." Burns, 468 N.J. Super. at 322.

It is uncontroverted that Ms. Sahar was admitted to Care One on March 3, 2016 for subacute rehabilitation after an extended hospitalization and comprehensive rehabilitation for a stroke, with the expectation that she would return to living at home with her son. She spent slightly more than ***one month*** at Care One. (See Db18-19.) The NHA's definition of the term "nursing home", a facility for ***extended*** care on a ***continuing*** basis, does ***not*** apply to the subacute unit at Care One to which Ms. Sahar was admitted or to the circumstances of her admission.

Third, plaintiff contends that N.J.S.A. 30:13-5(j) is not void for vagueness because the experts in this case agreed that it as "unsafe" for Ms. Sahar to walk unattended and that she required "close supervision". (See Pb28.) Again, however, plaintiff disregards the core and basic issue presented in this appeal, that is, that plaintiff was unable establish a deviation from the standard of care so that there was ***no*** negligence cause of action, but was able to recover substantial damages for the same injuries pursuant to N.J.S.A. 30:13-5(j)

because the environment was "unsafe" and Ms. Sahar was "unsupervised". The statute thus is not sufficiently clear and precise so to give an ordinary person—including the defendants and the jury in this case—notice and an adequate warning of the prohibited conduct, facially or as applied in this specific case. See, e.g., State v. Cameron, 100 N.J. 586, 591-93 (1985); State v. Rogers, 308 N.J. Super. 59, 64-65 (App. Div.), certif. denied, 156 N.J. 385 (1998).[2]

II. DEFENDANT WAS PROHIBITED FROM IMPEACHING PLAINTIFF'S FALSE NARRATIVE.

The trial court prohibited defendant from using multiple documents—an April 8, 2016 physical therapy note (CDa76), an April 7, 2016 occupational therapy note (CDa78) and portions of the fall investigation documents (CDa68-74), each indicating that Ms. Sahar "suddenly" stood up from her wheelchair and fell at the nurse's station, in order to counter plaintiff's false narrative that Ms. Sahar was left unattended in her wheelchair at the nurses' station, got up and walked a distance into the hallway, where she fell and was not discovered until sometime later. (See Db33-45.) The first two documents were among Ms. Sahar's medical records. The fall investigation documents were among the investigatory documents that had previously been withheld pursuant to New

2 The error in submitting the NHA to the jury was compounded post-verdict when the trial judge awarded the medical lien relating to the hip fracture and all attorney's fees and costs, plus interest on a litigation funding loan. The majority, if not all, of those costs were associated with the malpractice claim, which plaintiff did not prove and for which there are no permissible fees and costs.

Jersey's Patient Safety Act ("PSA"), N.J.S.A. 26:2H-12.23 to -12.25, and a November 8, 2019 order, but were produced on August 12, 2024, pursuant to the recent opinion in Keyworth v. Careone at Madison Avenue, 258 N.J. 359 (2024), allowing discovery of incident investigations conducted in skilled nursing and assisted living facilities. (See Da646-649; Da963-969; CDa21-74.)[3]

Plaintiff insists that the documents were appropriately excluded as "multiple hearsay" and because defendant did not file a motion for reconsideration of the November 8, 2019 order before releasing the investigatory documents. (See Pb39-46.) Plaintiff thus disregards, ***first***, that medical records are ***not*** inadmissible hearsay, but instead are routinely admissible pursuant to N.J.R.E. 803(c)(6)'s exception for records of regularly conducted activity or business records. See, e.g., Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 584-88 (App. Div. 2014), aff'd as mod., 223 N.J. 245 (2015). (See Db34-37.)

Second, while defendant agrees cross-examination should not be used as a means of introducing otherwise inadmissible evidence (see Pb42), defendant surely should have been permitted to reference medical and associated

[3] The appropriate remedy to avoid prejudice to either party would have been to reopen discovery briefly regarding the investigation records based on the recent Keyworth opinion, including witness depositions, not to bar the records and then permit plaintiff to make arguments directly contradicted by the barred records.

investigatory records made in the ordinary course of business, typically relied upon by experts in giving their opinions, made shortly after the matters described occurred and under circumstances indicating their reliability, consistent with the hearsay exceptions, the "opening the door" and other doctrines described in defendant's initial brief, for purposes of impeachment on cross-examination of plaintiff's expert after she gave a description of the core event at issue that was incompatible with the record. (See Db27-42.) At a minimum, this was an inadmissible net opinion, not only unsupported by the evidence, but contradicted by the barred evidence. ***Third***, the excluded documents were fully consistent with a number of other notations in the medical records and investigatory documents. (See Db42-44.) ***Fourth***, Ms. Sahar's son and daughter were allowed to give their own hearsay accounts of how their mother's fall occurred at trial. (See, e.g., 8T164:25-167:9; 8T196:15-202:25.) If the jury found that Ms. Sahar's environment was "unsafe" because she was allowed to get up and walk away from her wheelchair while left alone, that view of the evidence was a consequence of plaintiff's distortion of the evidence and the court's evidentiary rulings. A new trial is required.

III. THE PREEXISTING CONDITION CHARGE WAS IMPROPERLY RESTRICTED.

Plaintiff's argument demonstrates that the trial judge should have given a preexisting condition charge on both the negligence and NHA claims and should

have instructed the jury to consider not only osteoporosis, but all of Ms. Sahar's relevant preexisting conditions. Plaintiff states that a stroke or "Dementia, by itself does not cause a hip fracture." (Pb47.) Similarly, plaintiff suggests that Ms. Sahar's osteoporosis was not sufficiently severe on "its own, without negligence, [to have] caused the hip fracture." (Pb47.) Defense expert Richard Schenk, M.D. on the other hand, gave an opinion that Ms. Sahar had severe osteoporosis, and gave the opinion that the femur fracture was not a consequence of the fall from her wheelchair on the evening of April 6, 2016, but instead occurred the next day. (See 10T194:9-197:4.) Plaintiff's argument thus demonstrates that there is no meaningful difference between the three preexisting conditions. Anyone of them could have caused the fall and injury on its own, in combination with other facts, or not at all. The jury should have been directed to consider all of them.

CONCLUSION

The final order of judgment and order denying defendant's motion for a new trial must be vacated with directions that a new trial be conducted.

Respectfully submitted,
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Dated: July 14, 2025

By: _____
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