

ROBERT F. BURCKHARDT, JR.,
AND SHERRY BURCKHARDT-
DEMARCO, ADMINISTRATORS
OF THE ESTATE OF ROBERT F.
BURCKHARDT, SR.,

Plaintiffs,

v.

ADVANCED SUBACUTE
REHABILITATION CENTER AT
SEWELL, LLC; ADVANCED
SUBACUTE REHABILITATION
CTR AT SEWELL, LLC;
JOHN/JANE DOE DIRECTOR OF
NURSING 1-100; JOHN/JANE
DOE NURSE 1-100; JOHN/JANE
DOE CNA 1-100; JOHN/JANE
DOE MANAGEMENT COMPANY
1-100; JOHN/JANE DOE
MEDICAL DIRECTOR 1-100;
JOHN/JANE DOES 1-100;
JOHN/JANE DOE CORPORATION
1-100; individually, jointly,
severally, and/or in the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001917-23T4

CIVIL ACTION

ON APPEAL FROM AN ORDER OF
FINAL JUDGMENT FROM THE LAW
DIVISION: GLOUCESTER COUNTY
DOCKET NO. GLO-L-0381-20

Sat Below:

The Hon. Benjamin D. Morgan, J.S.C.

BRIEF OF PLAINTIFFS IN SUPPORT OF THE APPEAL

On the brief and of counsel:

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

TABLE OF CONTENTS – BRIEF

	<u>Page</u>
TABLE OF CONTENTS - BRIEF	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS	ii
TABLE OF TRANSCRIPT DESIGNATIONS	ii
TABLE OF CONTENTS - APPENDIX	iii
TABLE OF CONTENTS – CONFIDENTIAL APPENDIX	iv
TABLE OF AUTHORITIES	v
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	5
LEGAL ARGUMENT	8
POINT I: THE COURT ERRED IN FINDING PLAINTIFFS FAILED TO SHOW PROXIMATE CAUSE. (PA1; PA4; 6T67:11-19)	8
A. Standard of Review.	8
B. Proximate Cause.	9
C. Discussion.	13
POINT II: UNDER THE NHA, ONCE A VIOLATION OF RIGHTS IS ESTABLISHED, PLAINTIFF IS ENTITLED TO DAMAGES FOR THE VIOLATION OF RIGHTS WITHOUT PROVING PROXIMATE CAUSE. (PA1, PA6)	19
POINT III: PLAINTIFFS’ CLAIM FOR PUNITIVE DAMAGES IS SUBSUMED IN ITS NURSING HOME VIOLATION OF RIGHTS CLAIM AND SHOULD NOT HAVE BEEN DISMISSED. (Pa1, PA7)	23

	<u>Page</u>
POINT IV: THE COURT ERRED BY NOT ALLOWING PLAINTIFFS TO USE THE DEPOSITION OF DEFENDANT’S CORPORATE DESIGNEE. (1T24:17-27)	24
CONCLUSION	27

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	<u>Page</u>
Order for dismissal with prejudice, filed October 12, 2023	Pa1
Order denying reconsideration with Memorandum of Reasons, filed February 21, 2024	Pa2
Reasons on the record for denial of use of corporate designee deposition, dated September 27, 2023	1T24:17
Reasons on the record for dismissal with prejudice, dated October 11, 2023	6T58:25

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Motions dated September 27, 2023
2T – Transcript of Trial dated October 3, 2023
3T – Transcript of Trial dated October 4, 2023
4T – Transcript of Trial dated October 5, 2023
5T – Transcript of Trial dated October 10, 2023
6T – Transcript of Trial dated October 11, 2023
7T – Transcript of Hearing dated November 17, 2023

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 1 – Pa1 to Pa103)

	<u>Page</u>
Order for dismissal with prejudice, filed October 12, 2023	Pa1
Order denying reconsideration with Memorandum of Reasons, filed February 21, 2024	Pa2
Complaint, filed March 17, 2020	Pa8
Affidavit of Merit, filed March 17, 2020	Pa43
Curriculum Vitae of Bonnie Tadrack, RN-BC, LNC, CWCA, filed March 17, 2020	Pa45
Answer, filed July 29, 2020	Pa50
Order denying summary judgment, filed June 24, 2022	Pa73
Order denying partial summary judgment, filed September 11, 2023	Pa77
Order to bar testimony of Dr. Ian Hood, filed September 26, 2023	Pa87
Notice of Appeal, filed February 28, 2024	Pa89
Civil Appeal Case Information Statement, filed February 28, 2024	Pa95
Certification of Transcript Delivery, filed March 19, 2024	Pa100
Certification of Transcript Delivery, filed April 15, 2024	Pa101
Certification of Transcript Delivery, filed April 30, 2024	Pa102
Certification of Transcript Delivery, filed September 6, 2024	Pa103

TABLE OF CONTENTS – CONFIDENTIAL APPENDIX

(Volume 1 of 1 – Ca1 to Ca5)

Page

Trial Exhibit P-26, Nurse’s Note, admitted in evidence October 4, 2023 Ca1

Trial Exhibit P-29, excerpt of Interdisciplinary Plan of Care,
admitted in evidence October 4, 2023 Ca3

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Baliko v. Int'l Union of Operating Eng'rs</u> , 322 N.J. Super. 261 (App. Div.), <u>certif. denied</u> , 162 N.J. 199 (1999)	8
<u>Bigelow v. RKO Radio Pictures, Inc.</u> , 327 U.S. 251 (1946)	16
<u>Brown v. U.S. Stove Co.</u> , 98 N.J. 155 (1984)	10,12
<u>Caputzel v. The Lindsay Co.</u> , 48 N.J. 69 (1966)	9
<u>Catalane v. Gilian Instrument</u> , 271 N.J. Super. 476 (App. Div. 1994)	23,24
<u>Conklin v. Hannoeh Weisman</u> , 145 N.J. 395 (1996)	10,12
<u>Davidson v. Slater</u> , 189 N.J. 166 (2007)	12
<u>Evers v. Dollinger</u> , 95 N.J. 399 (1984)	16,17
<u>Fleuhr v. City of Cape May</u> , 159 N.J. 532 (1999)	9
<u>Francis v. United Jersey Bank</u> , 87 N.J. 15 (1981)	15
<u>Frugis v. Bracigliano</u> , 177 N.J. 250 (2003)	8
<u>Gardner v. Pawliw</u> , 150 N.J. 359 (1997)	15,16,17
<u>Ginsberg v. St. Michael's Hosp.</u> , 292 N.J. Super. 21 (App. Div. 1996)	14
<u>J.S. v. R.T.H.</u> , 155 N.J. 330 (1998)	9
<u>Komlodi v. Picciano</u> , 217 N.J. 387 (2014)	11,12
<u>Kulas v. Pub. Serv. Elec. & Gas Co.</u> , 41 N.J. 311 (1964)	12,13
<u>Lanzet v. Greenberg</u> , 126 N.J. 168 (1991)	17
<u>Luczak v. Twp. of Evesham</u> , 311 N.J. Super. 103 (App. Div.), <u>certif. denied</u> , 156 N.J. 407 (1998)	8

<u>Cases</u>	<u>Pages</u>
<u>Panasonic Indus. Co. v. Emerson Quiet Kool Corp.</u> , 269 N.J. Super. 502 (Law Div. 1993)	26
<u>People Express Airlines v. Consol. Rail Corp.</u> , 100 N.J. 246 (1985)	10
<u>Ptaszynski v. Atlantic Health</u> , 440 N.J. Super. 24 (App. Div. 2015), <u>certif. denied</u> , 227 N.J. 357 (2016)	20
<u>Scafidi v. Seiler</u> , 119 N.J. 93 (1990)	9,14,15
<u>Thorn v. Travel Care, Inc.</u> , 296 N.J. Super. 341 (App. Div. 1997)	12
<u>Townsend v. Pierre</u> , 221 N.J. 36 (2015)	12
<u>Vega by Muniz v. Piedilato</u> , 154 N.J. 496 (1998)	9
<u>Verdicchio v. Ricca</u> , 179 N.J. 1 (2004)	8,14,15,17
<u>Weiss v. Parker Hannifan Corp.</u> , 747 F. Supp. 1118 (D.N.J. 1990)	23,24
<u>Williamson v. Waldman</u> , 150 N.J. 232 (1997)	10
 <u>Constitutions</u>	 <u>Pages</u>
 <u>Statutes</u>	 <u>Pages</u>
<u>N.J.S.A. 30:13-5</u>	3,23
<u>N.J.S.A. 30:13-5(j)</u>	5
<u>N.J.S.A. 30:13-8(a)</u>	19,23
 <u>Rules of Court</u>	 <u>Pages</u>
<u>N.J.R.E. 803(b)</u>	26

Rules of Court

Pages

N.J.R.E. 803(b)(1)

26

N.J.R.E. 803(b)(3)

26

R. 4:14-2(c)

25,26

R. 4:16-1(b)

3,24,25,26,27

R. 4:37-2(b)

8

R. 4:40-1

8

Other Authorities

Pages

Malone, Ruminations on Cause-In-Fact,
9 Stan. L. Rev. 60, 88-90 (1956)

14

Model Jury Charge (Civil) 5.77 “Violations of Nursing Home
Statutes or Regulations” (Nov. 2023)

20,22

Prosser & Keeton on Torts, § 41 at 266-268

14

W. Prosser, Law of Torts § 41 at 242 (4th ed. 1971)

15

PRELIMINARY STATEMENT

In this appeal, the trial court incorrectly entered a directed verdict against plaintiffs, Robert F. Burckhardt, Jr. and Sherry Burckhardt-DeMarco, the Administrators of the Estate of Robert Burckhardt, Sr., their father, on the issue of proximate cause. The trial testimony showed that the deceased, Mr. Burckhardt, Sr., while a resident at defendant, Advance Subacute Rehabilitation Center at Sewell, LLC's nursing home, was at an increased risk for choking on his food and required supervision and monitoring while eating to prevent him from choking on his food, as noted in the care plan. The testimony unequivocally showed that no one was monitoring or supervising Mr. Burckhardt while he ate his scrambled eggs, that he choked on those eggs, went into cardiac arrest and died.

The trial court improperly required plaintiffs to show that had someone been in the room with Mr. Burckhardt, he would not have choked. That would be impossible for plaintiffs to prove because defendant deprived them of the opportunity to find out what would have happened had someone been in the room. The United States Supreme Court has stated the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." The Supreme Court of New Jersey similarly has held that the burden created by the lack of definitive evidence is borne by the party whose wrongful conduct caused that lack of definitive evidence.

The inability to prove what would have happened hypothetically if defendant had **not** neglected Mr. Burckhardt is defendant's cross to bear; not plaintiffs'.

The evidence adduced at trial showed that the lack of supervision and monitoring was a substantial factor in Mr. Burckhardt's death. That he was a choking risk was known to defendant. That he required supervision and monitoring and verbal cues to control his eating was known to defendant. That it was foreseeable that Mr. Burckhardt would choke on his food when left on his own was known to defendant. That defendant had a duty to keep Mr. Burckhardt safe is undeniable. Plaintiffs' nursing expert made clear that someone needed to be in the room with him "to prevent him from choking or aspiration." She testified that he was at a "very great risk for aspiration or choking" if left alone while eating. She also testified that having someone in the room "immensely decreases his risk of aspiration and choking" because they would "intercept" the choking process immediately. Applying the proper standard for a directed verdict, the facts and all reasonable inferences would lead a reasonable jury to conclude that the defendant's failure to have staff in the room with Mr. Burkhardt while he ate was a proximate cause of his death by choking on his food.

Moreover, the trial court found that there was sufficient evidence for a jury to conclude Mr. Burckhardt's right to a safe and decent living environment was violated pursuant to the Nursing Home Responsibilities and Rights of Residents

Act, N.J.S.A. 30:13-5 (“NHA”), but refused to let the jury decide the damages to which plaintiffs were entitled. That also is error. Proving that the violation of Mr. Burckhardt’s rights under the NHA caused Mr. Burckhardt’s death is not necessary to prevail on the NHA cause of action. The violation is itself actionable pursuant to the plain language of the statute. In fact, the pertinent Model Jury Charge 5.77 provides that there is **no** proximate cause element to the cause of action under the NHA. Even *arguendo* if a showing of proximate cause was required, it was supplied.

The issue of punitive damages arising out of the violation of Mr. Burckhardt’s rights should have gone to the jury. The trial court, having found sufficient evidence of a violation, should have given the case to the jury to decide the appropriate damages. Moreover, the trial court erred in preventing plaintiffs from offering the deposition testimony of the corporate representative under Rule 4:16-1(b). The orders dismissing the action with prejudice and denying reconsideration should be reversed, and this cause remanded for trial.

PROCEDURAL HISTORY

On March 17, 2020, plaintiffs, Robert F. Burckhardt, Jr. and Sherry Burckhardt-DeMarco, the Administrators of the Estate of Robert Burckhardt, Sr., their father, filed a Complaint against defendant, Advanced Subacute Rehabilitation Center at Sewell, LLC. Pa8. On July 29, 2020, the nursing home defendant filed an Answer. Pa50.

On April 22, 2022, defendant moved for summary judgment making the same arguments that form the basis of its directed verdict application. 6T5:6-17. On May 10, 2022, plaintiffs opposed the motion. By Order dated June 24, 2022, the Honorable Timothy W. Chell, P.J. Cv., denied summary judgment to defendant holding, *inter alia*, that just because Mr. Burckhardt may have choked even if someone was in the room did not “absolve” defendant from potential liability. Pa75.

This case was tried before a jury from September 26 through October 11, 2023. On October 11, 2023, after plaintiffs rested, defendant moved for a directed verdict for the same reasons laid out in its Motion for Summary Judgment. 6T5:6-17. After argument before the Honorable Benjamin D. Morgan, J.S.C., the court granted the relief sought by defendant and by Order dated October 12, 2023, dismissed with prejudice all plaintiffs’ claims. Pa1.

On October 31, 2023, plaintiffs moved to reconsider. On November 9, 2023, defendant opposed the motion. On November 13, 2023, plaintiffs filed their Reply Brief. On November 17, 2023, the trial court held oral argument and reserved decision. 7T25:4-7. By Order dated February 21, 2024, the trial court denied reconsideration. Pa2. This appeal followed.

STATEMENT OF FACTS

On January 26, 2019, Mr. Burckhardt, Sr., while alone in his room at defendant nursing home, choked on his breakfast of scrambled eggs causing him to go into cardiac arrest and die. 5T49:7-14; 5T55:4-8; 5T56:6-7. Scrambled eggs were found at the level of the vocal cords. That Mr. Burckhardt choked on his eggs is irrefutable. That Mr. Burckhardt was left alone in his room is undisputed. 3T17:9-18. As a result of being intubated during a prior hospitalization, Mr. Burckhardt suffered from oropharyngeal dysphagia. 4T40:13-19. As such, he had “difficulty swallowing and a much higher risk of aspiration and choking.” 4T41:6-13.

Pursuant to N.J.S.A. 30:13-5(j) of the NHA, nursing homes are required to ensure residents have safe and decent living conditions and care that meets their needs. 4T43:4-8. Nursing homes are to provide care tailored to the resident’s needs and care that preserves the resident’s dignity and individuality under the NHA. N.J.S.A. 30:13-5(j). Pursuant to 42 C.F.R. 483.35, the facility was required to provide Mr. Burckhardt with the safety interventions that he required to be able to consume food and fluids safely while at the facility. 4T44:4-8; 4T47:3-6. Mr. Burckhardt’s care plan was the “blueprint” for his care and all disciplines are required to know what is in their resident’s care plan. 4T56:24-57:24. Documented in his medical records was Mr. Burckhardt’s inability to “self-

control” and that he needed someone in the room with him while eating to “encourage [him] to take small sips and bites.” 4T60:4-25; Ca1; Ca3.

Defendant knew that Mr. Burckhardt had “poor safety awareness” and was “impulsive,” meaning that he had poor self-monitoring skills to avoid large amounts of food in his mouth at one time. 4T61:7-14. Making sure he alternated his liquids and solids and took smaller bites of food were “interventions” that were important for his care so he could “swallow more safely.” 4T61:15-22. **A member of the nursing staff was required to be in the room when Mr. Burckhardt was eating to encourage him and to monitor him to ensure those interventions were followed “to keep him safe.”** 4T62:3-24; Ca3-5. A staff member was required to be in Mr. Burckhardt’s room while he was eating to “monitor for signs and symptoms of aspiration.” That was “very important” for Mr. Burckhardt’s individualized care because he had dysphagia and had prior episodes of low oxygen saturation and prior incidents of coughing while eating. 4T63:1-12; 4T64:22-65:2. **Left alone, Mr. Burckhardt was at a “very great risk for aspiration or choking.”** 4T69:7-8.

On the day Mr. Burckhardt died, no one was in the room with him while he was eating, a violation of defendant’s own care plan. 4T68:1-10. **If a staff member had been in the room with Mr. Burckhardt while he was eating, they would have been monitoring him, cueing him and reminding him to take**

small bites and sips and to alternate fluids and solids, which would
“immensely decrease his risk of aspiration or choking.” By not having a staff
member in the room with him while eating, with his history of poor safety
awareness and his inability to self- regulate, he was left at a “very great risk
for aspiration and choking.” 4T68:23-69:8. If a nursing staff member had been
in the room with Mr. Burckhardt, they could “very quickly intercept if there’s any
sign of coughing or that he is having difficulty swallowing and help can be
summoned immediately if needed.” 4T69:15-19. By intercepting, you “reduce the
risk of aspiration or choking.” 4T71:2-7.

In the opinion of plaintiffs’ nurse expert, Bonnie Tadrick, Mr. Burckhardt’s
right to a safe and decent living environment was violated because he required
supervision and monitoring while he was eating his meals and that would create a
safe environment for him, for someone to be there in the event something would
happen and **“to prevent him from choking or having aspiration.”** 4T77:6-11.
His right to care that recognized his individual needs was violated as well as his
right to care that recognized his dignity. 4T77:12-20; 4T78:6-21. Nurse Tadrick
testified unequivocally and unchallenged that there were **“deviations from the**
standard of care that caused harm to Mr. Burckhardt.” 4T33:20-34:2.

LEGAL ARGUMENT

POINT I

THE COURT ERRED IN FINDING PLAINTIFFS FAILED TO SHOW PROXIMATE CAUSE. (PA1; PA4; 6T67:11-19)

A. Standard of Review.

Appellate courts apply the same standard of review as the trial court in considering a motion for involuntary dismissal at trial under Rule 4:37-2(b). Frugis v. Bracigliano, 177 N.J. 250, 269 (2003) (discussing R. 4:40-1); Luczak v. Twp. of Evesham, 311 N.J. Super. 103, 108 (App. Div.) (discussing R. 4:37-2(b)), certif. denied, 156 N.J. 407 (1998). The motion under Rule 4:37-2(b) shall be granted only if, after presenting its proofs, plaintiff "has shown no right to relief." It shall be denied "if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." Ibid.; see also Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (stating that if reasonable minds could differ after according plaintiff all reasonable and legitimate inferences, the motion should be denied); Baliko v. Int'l Union of Operating Eng'rs, 322 N.J. Super. 261, 273 (App. Div.) (stating that the appellate "court must accept as true all evidence supporting plaintiffs' claims"), certif. denied, 162 N.J. 199 (1999). As a matter of law, defendant was not entitled to a verdict in its favor.

B. Proximate Cause.

"To recover damages for the negligence of another, a plaintiff must prove that the negligence was a proximate cause of the injury sustained." Scafidi v. Seiler, 119 N.J. 93, 101 (1990). "Proximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court." Ibid. Proximate cause has been described as a standard for limiting liability for the consequences of an act based "upon mixed considerations of logic, common sense, justice, policy and precedent." Caputza v. The Lindsay Co., 48 N.J. 69, 77-78 (1966). Proximate cause as an issue, however, "may be removed from the factfinder in the **highly extraordinary case in which reasonable minds could not differ on whether that issue has been established.**" Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (emphasis supplied) (citing Vega by Muniz v. Piedilato, 154 N.J. 496, 509 (1998)); J.S. v. R.T.H., 155 N.J. 330, 352 (1998) ("[O]ur courts have, as a matter of law, rejected the imposition of liability for highly extraordinary consequences."). For example, in Fleuhr, the Court reinstated the grant of summary judgment in favor of a municipality because dangerous ocean conditions and a surfer's conduct, not the alleged negligence of a lifeguard, caused a surfing accident. 159 N.J. at 543–45; see Vega, 154 N.J. at 507–09 (holding summary judgment properly granted where no reasonable jury could find condition of property, with an open air shaft, and not plaintiff's "undisputed" attempt to leap air shaft, was proximate cause of injury.).

There are no “highly extraordinary circumstances” at bar. Rather, plaintiffs’ nursing expert made crystal clear that not having nursing staff in the room while Mr. Burckhardt was eating caused him harm. Having a nursing staff member in the room would **prevent** Mr. Burckhardt from choking or at the very least, **decrease** the likelihood of him choking on his food. Stated differently, not having nursing staff in the room **increased his risk of harm**, which is exactly what happened. **The very harm that the care plan was meant to address came to pass because defendant failed to follow that plan.**

"Proximate cause consists of any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." Conklin v. Hannoch Weisman, 145 N.J. 395, 418 (1996). Proximate cause "is that combination of 'logic, common sense, justice, policy and precedent' that fixes a point in a chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery." Williamson v. Waldman, 150 N.J. 232, 246 (1997) (quoting People Express Airlines v. Consol. Rail Corp., 100 N.J. 246, 264 (1985)); see also Conklin, 145 N.J. at 417 n.5 ("We have been candid in New Jersey to view this doctrine not so much as an expression of the mechanics of causation, but as an expression of line-drawing by courts and juries, an instrument of 'overall fairness and sound public policy.'") (quoting Brown v. U.S. Stove Co., 98 N.J. 155, 173 (1984))). There was nothing fair

in taking the case from the jury on this record.

"Foreseeability is a constituent part of proximate cause." Komlodi v. Picciano, 217 N.J. 387, 417 (2014). Accordingly, "[i]f an injury is not a foreseeable consequence of a person's act, then a negligence suit cannot prevail." Ibid. Foreseeability is determined by an objective standard, namely, whether "a reasonably prudent, similarly situated person would anticipate a risk that [his or] her conduct would cause injury or harm to another person." Id. at 417-18. Thus, if "the injury or harm suffered was within the realm of reasonable contemplation, the injury or harm is foreseeable." Id. at 418.

There is no question that the injury suffered by Mr. Burckhardt was foreseeable and was, in fact, foreseen. That is why his own care plan, created by defendant, required supervision and monitoring while eating. That Mr. Burckhardt may have choked if supervised and monitored is pure speculation by defendant. It is along the lines of "anything is possible." Defendant is not absolved of liability because Mr. Burckhardt may have choked anyway when it is their negligence that led to his demise.

"[W]hen there are concurrent causes potentially capable of producing the harm or injury," this Court applies the "substantial factor" test to evaluate proximate cause. Id. at 422. Under that test, "a tortfeasor will be held answerable if its 'negligent conduct was a substantial factor in bringing about the injuries,' even where there are

'other intervening causes which were foreseeable or were normal incidents of the risk created.'" Id. at 423 (quoting Brown, 98 N.J. at 171). Put differently, "[t]he substantial factor test accounts for the fact that there can be any number of intervening causes between the initial wrongful act and the final injurious consequence and **does not require an unsevered connecting link between the negligent conduct and the ultimate harm.**" Conklin, 145 N.J. at 420 (emphasis added).

Our Supreme Court has explained that to prove the element of causation, plaintiffs bear the burden to "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Townsend v. Pierre, 221 N.J. 36, 60-61 (2015) (quoting Davidson v. Slater, 189 N.J. 166, 185 (2007)). "[A]lthough plaintiffs bear the burden of proving causation, **'they are not obliged to establish it by direct, indisputable evidence.'** **Instead, '[t]he matter may rest upon legitimate inference,** so long as the proof will justify a reasonable and logical inference as distinguished from mere speculation.'" Thorn v. Travel Care, Inc., 296 N.J. Super. 341, 347 (App. Div. 1997) (emphasis supplied) (quoting Kulas v. Pub. Serv. Elec. & Gas Co., 41 N.J. 311, 319

(1964)).

Plaintiffs produced evidence that it was more likely than not that had a member of the nursing staff been in the room with Mr. Burckhardt, monitoring and supervising him, this tragedy would not have occurred. The trial judge, however, insisted that plaintiffs had to show unequivocally that if someone had been with Mr. Burckhardt, he would not have choked. That is not the standard nor should it be.

There was sufficient evidence for a reasonable jury to conclude that defendant's failures were a proximate cause of plaintiff's damages. That is all the law requires.

C. Discussion.

In deciding the motion for directed verdict, the trial court stated “[p]laintiff has to show that defendant’s conduct constituted a cause and [sic] fact of his injuries.” The court went on to say that “[a]n act or omission is not regarded as a cause and [sic] fact of an event if the event would have occurred without such act or omission. It’s the but for piece of this.” 6T60:25-61:7. First, there is no way to show that “the event would have occurred without such act or omission.” It is an entirely hypothetical inquiry and dispositive of nothing because it never happened. Defendant did not supervise Mr. Burckhardt. Defendant did not monitor Mr. Burckhardt. Due to defendant’s deviations from its care plan and neglect of Mr. Burckhardt’s rights, whether the event would have happened anyway will never be known. The court’s

requirement is an impossibility. What we do know is that defendant deviated from the standard of care, failed to intervene as required and the very harm that was foreseen and gave rise to the care plan befell Mr. Burckhardt, causing his death.

Second, this is not a “but for” causation case. Plaintiffs tried the case on an “increased risk of harm/substantial factor” causation basis. Although not a medical negligence case but rather a nursing home negligence case, the analysis of causation according to Scafidi, 119 N.J. 93, and its progeny is appropriate. The “substantial factor” test of causation is utilized in cases involving pre-existing conditions because of the inapplicability of “but for” causation where the harm is produced by concurrent causes. See Prosser & Keeton on Torts, § 41 at 266-268; Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 88-90 (1956). “The ‘substantial factor’ standard requires the jury to determine whether the deviation, in the context of the preexistent condition, is sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause.” Ginsberg v. St. Michael's Hosp., 292 N.J. Super. 21, 30 (App. Div. 1996).

The trial court held incorrectly that plaintiffs had to show as a certainty that if someone was in the room, Mr. Burckhardt would not have choked. 6T64:10-17 (“There’s not an opinion that had a staff member been with Mr. Burckhardt while eating he would not have choked.”). That is exactly what Verdicchio, 179 N.J. 1, holds, in analogous circumstances, that plaintiffs do **not** have to do. In Verdicchio,

our Supreme Court held that, in increased risk of harm cases, plaintiff is required to show only that defendant's failure to perform an examination that would have led to the discovery of the condition complained of increased the risk that plaintiff would lose the opportunity for treatment at an earlier stage. Id. at 24. Plaintiff is not required to prove the results of examinations, tests and care that defendant neglected to administer. In much the same way, plaintiffs cannot prove someone in the room would have absolutely prevented Mr. Burckhardt's choking and untimely demise because defendant neglected to provide that someone. Under the controlling precedent, plaintiffs are not required to do so. **Where a case involves nonfeasance, no one can say "with absolute certainty what would have occurred if the defendant had acted otherwise."** Francis v. United Jersey Bank, 87 N.J. 15, 45 (1981) (citing W. Prosser, Law of Torts § 41 at 242 (4th ed. 1971)) (emphasis added).

In Gardner v. Pawliw, 150 N.J. 359 (1997), where the plaintiffs alleged that the failure to perform diagnostic tests that would have revealed an umbilical cord defect increased the risk that their fetus would not survive, our Supreme Court clarified the standard set forth in Scafidi:

When the prevailing standard of care indicates that a diagnostic test should be performed and that it is a deviation not to perform it, but it is unknown whether performing the test would have helped to diagnose or treat a preexistent condition, the first prong of Scafidi does not require that the plaintiff demonstrate a reasonable medical probability that the test would have resulted in avoiding the harm. Rather, the plaintiff must demonstrate to a reasonable degree of medical probability that the failure to give the test increased the risk of harm from the preexistent condition.

A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases. We reach that conclusion to avoid the unacceptable result that would accrue if trial courts in such circumstances invariably denied plaintiffs the right to reach the jury, thereby permitting defendants to benefit from the negligent failure to test and the evidentiary uncertainties that the failure to test created.

Gardner, 150 N.J. at 387-89 (citations omitted). “When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he had put beyond the possibility of realization. **If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.**” Evers v. Dollinger, 95 N.J. 399, 417 (1984) (citation omitted) (emphasis supplied).

Here, plaintiffs were denied the right to reach the jury on the presumptively factual issue of proximate cause, thereby permitting defendant to benefit from its negligent failure to abide by the standard of care and the evidentiary uncertainties that failure created. “The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). Plaintiffs could not unequivocally say what would have happened if defendant had not been negligent because defendant was negligent. That does not absolve defendant, as the

motion judge correctly held when denying defendant's summary judgment motion.

Pa75. The burden created by the lack of definitive evidence is borne by the party

whose wrongful conduct caused that lack of definitive evidence. Lanzet v.

Greenberg, 126 N.J. 168, 188 (1991). Accordingly, that was defendant's burden and should not have been thrust on plaintiffs.

The entire basis for the trial court's opinion that plaintiffs did not establish proximate cause is the lack of evidence created by defendant's failure to follow its own care plan and its breach of the appropriate standard of care. The court opined: "There's no testimony in the record saying that Mr. Burckhardt, Sr. was taking too big of a bite at the time, or that he wasn't taking sips, or that he was doing anything different than he would have been doing had someone been in there cuing him to do that. There's just no opinion in the record saying any of that, and a jury would have to be left to their own speculation on that point, which is a crucial point in the prima facie case for a plaintiff." 6T67:11-19. The lower court failed to appreciate or even to consider that the lack of that highly specific evidence was caused by defendant. The law is clear; it does not reward a defendant for a lack of evidence created by its own negligence. Verdicchio, 179 N.J. 1; Gardner, 150 N.J. 359; Lanzet, 126 N.J. 168; Evers, 95 N.J. 399. The trial court's analysis was incorrect.

The evidence adduced at trial showed that Mr. Burckhardt had trouble swallowing and was a known choking risk. Because of that known risk, his care plan

and applicable standards of care required nursing staff to be in the room while Mr. Burckhardt was eating to monitor the way in which he was eating and to intervene if he had trouble swallowing and/or started to choke. The evidence unequivocally showed that no one was in the room while Mr. Burckhardt was eating, and Mr. Burkhardt choked on his food and died. Looking at that evidence, a reasonable jury could infer that the failure to do what was required to be done increased the risk of harm and was a substantial factor in the injuries that followed.

The failure to perform as required by the standard of care, coupled with the occurrence of **the very harm** that the **standard of care and care plan were intended to prevent**, gives rise to a reasonable inference that the breach of duty was a **proximate cause of the harm**. Moreover, plaintiffs' expert unequivocally stated that it was "deviations from the standard of care that **caused harm to Mr. Burckhardt**." 4T33:20-34:2 (emphasis supplied). Defendant then had the burden to show that the harm that occurred would have occurred regardless of the breach; not could have but **actually** would have. It was error to take the case from the jury. The Orders below should be reversed, and the case remanded for trial.

POINT II

UNDER THE NHA, ONCE A VIOLATION OF RIGHTS IS ESTABLISHED, PLAINTIFF IS ENTITLED TO DAMAGES FOR THE VIOLATION OF RIGHTS WITHOUT PROVING PROXIMATE CAUSE. (PA1, PA6)

Section 8(a) of N.J.S.A. 30:13 states in part as follows: “Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation * * * . Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney’s fees and costs of the action.” There is no requirement in the statute that plaintiff also show proximate cause.

Proving that the violation of Mr. Burckhardt’s rights under the NHA caused Mr. Burckhardt’s choking and death is not necessary to prevail on the NHA cause of action. The violation is itself actionable pursuant to the plain language of the statute. To hold otherwise would negate the public policy and purpose of the remedial statute – and the availability of remedies of punitive damages and attorney’s fees and costs – to deter violations.

In fact, the pertinent Model Jury Charge 5.77 provides for **no proximate cause element** to the cause of action under the NHA. In pertinent part, the jury charge sets forth the residents’ rights at issue in a particular case. It goes on to state: “If you find that the Defendants violated any of these rights, you have found a violation of the

New Jersey Nursing Home Responsibilities and Rights of Residents Act, and a violation of the Plaintiff's nursing home residents' rights. **Thus, if you conclude that Defendants violated Plaintiff's nursing home residents' rights, you must find for Plaintiff on this issue.**" Model Jury Charge (Civil) 5.77 "Violations of Nursing Home Statutes or Regulations" (Nov. 2023).

As for damages, there is no proximate cause requirement. Rather, the charge warns per Ptaszynski v. Atlantic Health, 440 N.J. Super. 24 (App. Div. 2015), certif. denied, 227 N.J. 357 (2016), that there can be no duplication of damages if a jury finds both negligence and a violation of rights. "The Plaintiff has brought claims for damages under both violations of nursing home residents' rights and negligence. You are not to duplicate damages, which means that you may not compensate Plaintiff twice for the same injuries in the event you find in Plaintiff's favor on both negligence and nursing home residents' rights." Again, there is no mention of a plaintiff having to show proximate cause, only a violation of residents' rights.

The Jury Interrogatories to Model Civil Jury Charge 5.77 were changed with the November 2023 Jury Charge revision. They now underscore that proximate cause is **not** an element of the cause of action and provide as follows:

JURY INTERROGATORIES

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

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

VOTE: YES _____
NO _____

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

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

\$ _____

VOTE: YES _____
NO _____

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

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

VOTE: YES _____
NO _____

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

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

VOTE: YES _____
NO _____

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

5) What amount of money would fairly compensate for Plaintiff's

damages resulting from Defendant's negligence? You are not to duplicate damages awarded under other theories of recovery.

\$ _____

VOTE: YES _____

NO _____

Model Jury Charge (Civil) 5.77 "Violations of Nursing Home Statutes or Regulations" (Nov. 2023).

The key in the charge and interrogatories is the lack of the reference to proximate cause for the violations of rights claims under the NHA. The jury interrogatories under the Model Charge were revised to make clear that proximate cause is not an element of the statutory cause of action, the NHA claim. The analysis, therefore, focuses on whether there is a violation and what is fair compensation for that violation, with the caveat not to duplicate damages. Nothing more is required. Notably, the law has not changed; **the new jury interrogatory simply clarifies what has always been the case.** A plaintiff is entitled to compensation flowing from the violation itself without resort to proximate causation. Even *arguendo* if evidence of causation is required, as discussed in the Statement of Facts and Point I, that evidence was proffered by plaintiffs. Plaintiffs' NHA cause of action should have gone to the jury.

POINT III

PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES IS SUBSUMED IN ITS NURSING HOME VIOLATION OF RIGHTS CLAIM AND SHOULD NOT HAVE BEEN DISMISSED. (Pa1, PA7)

N.J.S.A. 30:13-8(a) expressly provides for the award of punitive damages on a finding of a violation of one of the enumerated resident's rights contained in N.J.S.A. 30:13-5. Because plaintiffs' NHA violation claim should have been submitted to the jury, the dismissal of plaintiffs' claim for punitive damages was premature and erroneous. Assuming for the sake of argument here that the level of proof required to recover punitive damages under the NHA is the same as under the Punitive Damages Act, the issue for the jury would be whether the harm suffered because of the proven and admitted omissions of defendant in light of the known risks to Mr. Burckhardt were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. As with the other claims, the resolution of that issue was for the jury on the record presented.

In similar circumstances involving the New Jersey Law Against Discrimination Act ("NJLAD"), another remedial statute, this Court has stated that the issue of punitive damages is for a jury to decide. **"Under New Jersey law, the exceptional nature of a given case and the wanton or malicious nature of the defendant's conduct are questions for the finder of fact."** Catalane v. Gilian Instrument, 271 N.J. Super. 476, 501 (App. Div. 1994) (citing Weiss v. Parker

Hannifan Corp., 747 F. Supp. 1118, 1135 (D.N.J. 1990) (emphasis supplied). “If discrimination is found, the issue of entitlement to, and the extent of, punitive damages must be retried under the standards we have enunciated.” Catalane, 276 N.J. Super. at 501. The statutory violation of the remedial Act mandates that a jury must determine punitive damages, even though the standard and burden of proof before the jury falls under the Punitive Damages Act. Once a statutory violation of the NHA is found – and the judge below acknowledged that there was sufficient evidence for a reasonable jury to find a violation – whether punitive damages are appropriate must be determined by a jury. Accordingly, whether plaintiffs were entitled to punitive damages was for a jury to decide.

POINT IV

THE COURT ERRED BY NOT ALLOWING PLAINTIFFS TO USE THE DEPOSITION OF DEFENDANT’S CORPORATE DESIGNEE. (1T24:17-27)

Pursuant to Rule 4:16-1(b), plaintiffs sought to play portions of the video-taped deposition of defendant’s corporate designee, Lynn Homicillada, as part of their case-in-chief. Defendant argued that because Ms. Homicillada was available to testify live at trial, plaintiffs could not use her video-taped deposition in lieu of live testimony. The trial court erroneously held that the Rule applied to using the deposition testimony of a corporate designee for impeachment purposes only. “It says in that rule that it can be used for any purpose against the deponent. Well if it

has to be used against the deponent, which means the deponent has to be there to say something. It's not being used – if you're using it as the deponent, you're not using it against the deponent. It's something you bring up and show them to assess credibility, or to impugn their veracity of statements. That's how I read that particular rule.” 1T26:23-27:7. The court did not think “just using her deposition testimony from her discovery deposition to be appropriate.” 1T27:20-22. The trial court misconstrued the Rule. The trial court failed to consider the portion of the Rule that allows use of the deposition not only against the deponent but **against the party that deponent represents** as well.

Rule 4:16-1(b) applies when the deposition is that of a **party** and the proponent is an **adverse party**. The Rule provides:

“The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or **a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose against the deponent or the corporation, partnership, association or agency.**”

R. 4:16-1(b) (emphasis added). Ms. Homicillada was produced in response to plaintiffs' notice in lieu of subpoena that required defendant to produce for deposition a corporate designee. Rule 4:14-2(c) provides:

Organizations. A party may in the notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. **The organization so named shall designate**

one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each person designated the matters on which testimony will be given. The persons so designated shall testify as to matters known or reasonably available to the organization.

R. 4:14-2 (c) (emphasis added).

Thus, when produced for deposition, Ms. Homicillada became the corporate representative of defendant for purposes of this litigation. As such, it is irrelevant what Ms. Homicillada's official position was or whether she was of a particular rank within defendant's organizational structure. Though not an "officer, director, or managing agent," Ms. Homicillada was some "other person" "designated" by defendant "to testify on (its) behalf." Ibid. Defendant made the designation and made no showing why or under what authority it was entitled to withdraw it at trial.

Rule 4:16-1(b) is based on the hearsay exceptions for vicarious admissions contained in N.J.R.E. 803(b). Panasonic Indus. Co. v. Emerson Quiet Kool Corp., 269 N.J. Super. 502, 506 (Law Div. 1993). In particular, pursuant to N.J.R.E. 803(b)(3), "When a person is authorized by a party to make a statement concerning the subject," the statement is deemed an admission by the party itself. There is no unavailability requirement per the applicable rule because admissions by a party opponent are admissible without regard to the declarant's availability. See also N.J.R.E. 803(b)(1) (statement is not excluded by the hearsay rule when the "statement is offered against a party-opponent and is: (1) the party-opponent's own

statement, made either in an individual or in a representative capacity”).

The trial court’s overly narrow reading of the rule to apply to use of the deposition testimony only against the deponent completely disregards the language of the rule. The rule applies to the deponent or the corporate party. The testimony “may be used by an adverse party for any purpose against the deponent **or the corporation.**” Rule 4:16-1(b) (emphasis supplied). The trial judge improperly denied plaintiffs’ request to play portions of the corporate designee’s video-taped deposition testimony under oath for the jury.

CONCLUSION

For the foregoing reasons, plaintiffs are entitled to a reversal of the order dismissing their claims and remand of the cause for a new trial.

Respectfully submitted,

**LAW OFFICE OF
ANDREW A. BALLERINI, ESQ.**
Counsel for Plaintiffs-Appellants

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

DATED: October 4, 2024

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001917-23T4**

Date Filed: January 24, 2025

Amended Filed: February 2, 2025

Second Amended Filed: February 11, 2025

ROBERT F. BURCKHARDT, JR.,
AND SHERRY BURCKHARDT-
DEMARCO, ADMINISTRATORS
OF THE ESTATE OF ROBERT F.
BURCKHARDT, SR.,
Plaintiffs/Appellants,

v.

ADVANCED SUBACUTE
REHABILITATION CENTER AT
SEWELL, LLC; ADVANCED
SUBACUTE REHABILITATION
CTR AT SEWELL, LLC;
(cont. on next page)

On Appeal From:
Superior Court of New Jersey,
Law Division, Gloucester County
Docket No.: GLO-L-000381-20

Sat Below:
Hon. Benjamin D. Morgan, J.S.C.

**BRIEF OF ADVANCED SUBACUTE REHABILITATION CENTER AT
SEWELL, LLC**

MARSHALL DENNEHEY, PC

Lynne N. Nahmani, Esq.

NJ Id: 016711989

lnnahmani@mdwcg.com

Walter F. Kawalec, III, Esq.

NJ Id: 002002002

wfkawalec@mdwcg.com

15000 Midlantic Drive, Suite 200,

P.O. Box 5429,

Mount Laurel, NJ 08054

(856) 414-6000

On The Brief:

Walter F. Kawalec, III

(con't from previous page)

JOHN/JANE DOE DIRECTOR OF
NURSING 1-100; JOHN/JANE DOE
NURSE 1-100; JOHN/JANE DOE
CNA 1-100; JOHN/JANE DOE
MANAGEMENT COMPANY 1-100;
JOHN/JANE DOE MEDICAL
DIRECTOR 1-100; JOHN/JANE
DOES 1-100; JOHN/JANE DOE
CORPORATION 1-100;
individually, jointly, severally,
and/or in the alternative
Defendant-Respondents.

Table of Contents

Table of Contents	i
Appendix	i
Table of Authorities.....	ii
Preliminary Statement.....	1
Statement of Procedural History	2
Statement of Facts	4
Legal Argument.....	8
Issue I: Judge Morgan Properly Granted A Directed Verdict In Defendants’ Favor.	9
Issue II: The Dismissal Of The NHA Claim Was Not Erroneous, Because Plaintiffs Did Not Establish Causation.	27
Issue III There Was No Error In The Dismissal Of The Plaintiff’s Punitive Damages Claim.	34
Issue IV: There Was No Error In Not Permitting The Use of Designee’s Deposition Transcript.....	40
Conclusion	43

Appendix

Answer of Advanced Subacute Rehabilitation Center At Sewell, LLC	1a
<u>Estate of Davis ex rel. Davis v. Vineland Operations, LLC</u> , A-2950-11T4, 2013 WL 331495 (App. Div. Jan. 30, 2013)	24a

Table of Authorities

Cases

<u>27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd.</u> , 469 N.J. Super. 200 (App. Div. 2021)	9
<u>Avis Rent-A-Car, Inc. v. Cooper</u> , 273 N.J. Super. 198 (App. Div. 1994).....	42
<u>B.G. v. L.H.</u> , 450 N.J. Super. 438 (Ch. Div. 2017)	42
<u>Berg v. Reaction Motors Div.</u> , 37 N.J. 396 (1962).....	35, 36
<u>Bigelow v. RKO Radio Pictures, Inc.</u> , 327 U.S. 251 (1946)	19, 20, 22
<u>Catalane v. Gilian Instrument Corporation</u> , 271 N.J. Super. 476 (App. Div. 1994).....	34, 39, 40
<u>Cowley v. Virtua Health Sys.</u> , 242 N.J. 1 (2020).....	26
<u>Dawson v. Bunker Hill Plaza Associates</u> , 289 N.J. Super. 309 (App. Div. 1996)...	10
<u>Entwistle v. Draves</u> , 102 N.J. 559 (1986)	35
<u>Estate of Davis ex rel. Davis v. Vineland Operations, LLC</u> , A-2950-11T4, 2013 WL 331495 (App. Div. Jan. 30, 2013).....	32, 33
<u>Evers v. Dollinger</u> , 95 N.J. 399 (1984)	19, 20, 21, 26
<u>Ex parte Kershner</u> , 9 N.J. 471 (1952)	41
<u>Fischer v. Johns-Manville Corp.</u> , 103 N.J. 643 (1986)	35
<u>Frugis v. Bracigliano</u> , 177 N.J. 250 (2003).....	9
<u>Gardner v. Pawliw</u> , 150 N.J. 359 (1997).....	9, 10, 11, 26
<u>Germann v. Matriss</u> , 55 N.J. 193 (1970).....	19
<u>Klesh v. Coddington</u> , 295 N.J. Super. 51 (Law Div. 1996)	34
<u>Komlodi v. Picciano</u> , 217 N.J. 387 (2014).....	9
<u>Lanzet v. Greenberg</u> , 126 N.J. 168 (1991).....	19, 20, 21, 26

<u>Lehman v. Toys ‘R’ Us, Inc.</u> , 132 N.J. 587 (1993)	34
<u>Leimgruber v. Claridge Assocs., Ltd</u> , 73 N.J. 450 (1977)	35
<u>LoRocco v. N.J. Mfrs. Ins. Co.</u> , 82 N.J. Super. 323 (App. Div. 1964)	35
<u>Nappe v. Anschelewitz, Barr, Ansell & Bonello</u> , 97 N.J. 37 (1984)	34, 35
<u>Nicholas v. Mynster</u> , 213 N.J. 463 (2013)	11
<u>Panasonic Indus. Co. v. Emerson Quiet Kool Corp.</u> , 269 N.J. Super. 502 (Law. Div. 1993)	42
<u>Paroline v. United States</u> , 572 U.S. 434, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014)	33
<u>Pavlova v. Mint Mgmt. Corp.</u> , 375 N.J. Super. 397 (App. Div. 2005)	36
<u>Prioleau v. Kentucky Fried Chicken, Inc.</u> , 434 N.J. Super. 558 (App. Div. 2014)	9
<u>Rendine v. Pantzer</u> , 141 N.J. 292 (1995)	34
<u>Rivera v. Valley Hospital Inc.</u> , 252 N.J. 1 (2022)	36
<u>Rowe v. Bell & Gossett Co.</u> , 239 N.J. 531 (2019)	41
<u>Ryan v. Renny</u> , 203 N.J. 37 (2010)	12
<u>Scafidi v. Seiler</u> , 119 N.J. 93 (1990)	10, 26
<u>State v. Derry</u> , 250 N.J. 611 (2022)	11
<u>State v. K.P.S.</u> , 221 N.J. 266 (2015)	32
<u>State v. O'Donnell</u> , 255 N.J. 60 (2023)	29
<u>State v. One Marlin Rifle, 30/30, 30 AS, Serial No. 12027068</u> , 319 N.J. Super. 359 (App. Div. 1999)	12
<u>Thorn v. Travel Care, Inc.</u> , 296 N.J. Super. 341 (App. Div. 1997)	10
<u>Vizzoni v. B.M.D.</u> , 459 N.J. Super. 554 (App. Div. 2019)	10
<u>Walker v. Briarwood Condo Ass’n</u> , 274 N.J. Super. 422 (App. Div. 1994)	41

<u>Weiss v. Parker Hannifan Corp.</u> , 747 F. Supp. 1118 (D.N.J. 1990).....	40
--	----

Statutes

<u>N.J.S.A. 2A:15-5.12</u>	35
----------------------------------	----

<u>N.J.S.A. 2A:53A-29</u>	26
---------------------------------	----

<u>N.J.S.A. 30:13-1 to -17</u> , the Nursing Home Act (“NHA”).....	passim
--	--------

<u>N.J.S.A. 30:13-5</u>	32, 37
-------------------------------	--------

<u>N.J.S.A. 30:13-8</u>	passim
-------------------------------	--------

Court Rules

<u>N.J.R.E. 702</u>	11
---------------------------	----

Other Authorities

22 Am.Jur.2d, <u>Damages</u> (1988).....	40
--	----

<u>Black’s Law Dictionary</u> (6th Ed.1990)	28
---	----

<u>Model Jury Charges (Civil) 5.77</u> , Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents’ Rights Claims (Approved 11/2022)	29
---	----

<u>Model Jury Charges (Civil) 5.77</u> , Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents’ Rights Claims (Approved 11/2022; Revised 11/2023)	33
--	----

Preliminary Statement

This is a nursing home malpractice action in which the Plaintiffs' decedent suffered from dysphagia, or a difficulty swallowing. The decedent's care plan included mechanically soft food, such as scrambled eggs, along with moderate supervision, which, according to Plaintiff's expert, meant that a nurse was to be in his room when he ate. The decedent was served his breakfast in his room with set up by staff. At some point while eating unattended he began coughing and allegedly choked. He subsequently went unconscious and later died.

In the subsequent trial, Plaintiffs presented the testimony of two experts. The first expert was a nurse who gave an opinion as to the standard of care and who alleged that Defendant breached of the standard of care by not having a nurse present when the decedent began eating his food. The second was a pathologist who testified to the mechanism of decedent's death and who opined that he died as a result of choking on his food.

Neither of these experts gave any testimony on proximate cause; that is, they failed to opine that the deviation from the applicable standard of care identified by the nursing expert proximately caused the alleged injury or that it increased the risk of harm which was a substantial factor in the harm alleged.

Because of that omission, at the close of Plaintiff's case, the trial judge

properly granted a directed verdict, as causation is a necessary element of Plaintiffs' causes of action. There was no error in that determination and Defendant ask this Court to affirm the directed verdict.

Plaintiff also raised several other issues. They argue that they did not need to show causation to succeed in their claim under the Nursing Home Act, notwithstanding the clear causation language in the statute. Furthermore, they argue that the trial judge erred by dismissing their claim for punitive damages, as they failed to present any evidence demonstrating the kind of evil-minded act needed to sustain such damages under New Jersey law. Finally, Plaintiffs took issue with the decision not to permit the presentation of a video deposition of Defendant's corporate designee due to the trial judge's preference for live testimony.

There was no reversible error in these additional arguments and this Court is asked to affirm the lower court's decisions.

Statement of Procedural History

This case began with the filing of the complaint on March 17, 2020. (Pa8-42) On July 29, 2020, Advanced Subacute Rehabilitation Center at Sewell, LLC filed its answer and cross-claims. (See, Da1-23)

The case proceeded through discovery. Prior to the trial, the Honorable Benjamin D. Morgan, J.S.C., considered whether to permit Plaintiff to play the

videotaped deposition of corporate designee Lynn Homicillada, notwithstanding the fact that she was to appear live at trial. (1T13:5-31:25) ¹ He denied Plaintiff's request based on the law's preference for live testimony. (Id.)

Additionally, prior to trial, Defendant filed motions for summary judgment on liability and on punitive damages, which were denied without prejudice pending the evidence presented at trial. (Pa73-86)

The trial was held before Judge Morgan and a jury from October 3 – 11, 2023. (2T-6T) At trial, Plaintiff presented two expert witnesses, Nurse Bonnie Tadrick, who testified to standard of care and breach of the standard of care (4T6:5-190:25), and Dr. Ian Hood, who testified that the decedent died as a consequence of choking on his food and discussed the mechanism for choking (5T6:4-149:7).

At the conclusion of Plaintiff's case, Defendant moved for a directed verdict, on Plaintiff's negligence claim, on the claim under the Nursing Home Act, and on the punitive damage count. (6T5:2-58:7) Judge Morgan granted

¹ 1T = Motion Transcript Sept. 27, 2023
2T = Trial Transcript Oct. 3, 2023
3T = Trial Transcript Oct. 4, 2023
4T = Trial Transcript Oct. 5, 2023
5T = Trial Transcript Oct. 10, 2023
6T = Trial Transcript Oct. 11, 2023
7T = Motion Transcript Nov. 17, 2023

the directed verdict on all counts. (6T58:24-686:20; Pa1) He determined that Plaintiffs failed to present any evidence demonstrating a causal link between the alleged breach of the standard of care and the decedent's death. (Id.) The lack of causation also justified the dismissal of the Nursing Home Act claim. The claim for punitive damages was dismissed due to the absence of evidence justifying it. (Id.)

Judge Morgan entered his order on October 12, 2023, dismissing the complaint with prejudice. (Pa1) Plaintiffs then filed a motion for reconsideration and, after Defendant filed an opposition, Judge Morgan denied the motion and issued a memorandum opinion explaining his reasoning. (Pa2-7)

Statement of Facts

This case stems from the nursing-home care given to Plaintiffs' decedent, Robert Burckhardt, Sr. (Pa8-42) The decedent, who was seventy-one at the time of his death, had many pre-existing medical conditions, including: hypertension, lymphedema, prostate cancer, and morbid obesity. (4T40:2-19)

One of the decedent's conditions was dysphagia, or difficulty swallowing. (3T164:24-165:1) The decedent had a history of incidents of aspirating on food while eating, leading to incidents of coughing and choking. (3T169:22-170:5) Consequently, the decedent was subject to a food and eating

plan which restricted the kind of food he could eat and directed how he should eat, to ensure complete chewing of the food and use of liquids to wash it down. (4T187:9-187:25) The plan also envisioned him receiving a moderate level of supervision, which Plaintiff's expert opined required a nurse's in-room presence when he ate.² (4T152:14-153: 15)

On January 26, 2019, at approximately 8:00 am, the decedent was provided his breakfast in his room. (4T98:21-99:2) The egg breakfast was fully in accord with his prescribed dietary restrictions. (4T98:21-99:13) At approximately 8:05 am, the decedent's son, Plaintiff Robert Burckhardt, Jr., arrived at his father's room. (2T58:24-25) According to Mr. Burckhardt, Jr., the door open four to six inches and no nurse or other personnel was in the room. (2T61:1-6)

Mr. Burckhardt, Jr. found his father in bed, but with the upper half of his body leaning over the edge of the bed. (2T61:4-11) The decedent was coughing and when Mr. Burckhardt, Jr. asked him what was wrong, the decedent replied, "I'm choking." (2T617-13) Mr. Burckhardt, Jr. hit his father on the back asked if he was okay, and the decedent "yeah." (Id.) Mr.

² Defendant would have presented expert testimony that the standard only required the nursing staff to make periodic checks of the decedent.

Burckhardt, Jr. then left the room and sought the assistance of a nurse.

(2T61:14-18)

Mr. Burckhardt, Jr., testified that he returned to the room, pushed his father back on the bed, at which point “he was coughing and coughing and coughing and coughing” and he returned to slapping his father on the back, at which point the nursing staff responded. (2T61:19-62:3) They first sought to suction the decedent’s throat and larynx to clear his airway and performed CPR in an attempt to resuscitate the decedent. (2T63:19-64:23) Emergency medical personnel were called and after some resuscitation, they found egg and emesis in the decedent’s larynx. (3T21:25-22:25)

The decedent was resuscitated, but remained unconscious, and was transported to Inspira Medical Center. (Id.) Unfortunately, the decedent never regained consciousness his condition worsened, and, on January 28, 2019, he suffered cardiac arrest and died. (2T68:16-24)

Plaintiffs filed suit, asserting medical negligence claims against Defendant, Advanced Subacute Rehabilitation Center at Sewell, LLC. (Pa8-42) On the same facts, Plaintiffs asserted a claim for violation of N.J.S.A. 30:13-1

to -17, the Nursing Home Act (“NHA”)³. (Id.) The case proceeded to trial before Judge Morgan and a jury. (2T-6T)

In support of their claims, Plaintiff presented the testimony of two experts, a nursing standard-of-care expert, Nurse Bonnie Tadrick, and a cause-of-death expert, Dr. Ian Hood. (4T5:21-190:21; 5T6:4-149:6)

Nurse Tadrick’s testimony consisted of her opinion as to what the nursing standard of care required considering the decedent’s medical condition and the specifics of his care plan, and an opinion that, by not having a nurse present when the decedent began to eat his breakfast, that there was a breach in the standard of care because of a lack of a moderate level of supervision. (See, 4T5:21-190:21) Nurse Tadrick was legally incapable of offering a medical causation opinion.

As for Dr. Hood, his testimony discussed the mechanism of choking, including his belief that the decedent suffered from the “ball valve effect,” meaning that the eggs in the decedent’s throat permitted him to exhale, but any attempt to inhale was blocked by the food, which explained why he could speak to his son but could not breathe. (See, 5T6:4-149:6)

³ Also known variously as the Nursing Home Responsibilities and Rights of Residents Act, or the Nursing Home Bill of Rights

Neither Nurse Tadrick nor Dr. Hood expressed lodged any complaint about the quality or timeliness of how the emergency response was carried out. More importantly, neither Nurse Tadrick nor Dr. Hood expressed any opinion on medical causation or proximate cause. That is, there was no expert testimony which provided an opinion on medical causation which linked Nurse Tadrick's assertion that the Defendant violated the standard of care and Dr. Hood's testimony on the manner of decedent's death.

In the absence of an opinion on proximate cause or that the alleged breach increased the risk of harm and was a substantial factor in the decedent's death, Defendants moved for directed verdict at the conclusion of Plaintiffs' case in chief. (6T4:23-58:21) Judge Morgan granted that directed verdict and judgment in Defendants' favor was entered. (6T58:25-68:20)

This appeal follows. (Pa89-94)

Legal Argument.

At the conclusion of Plaintiffs' case in chief, Judge Morgan granted a directed verdict, as Plaintiffs failed to demonstrate causation. In their brief to this Court, Plaintiffs allege that Judge Morgan committed four separate errors in this case and that, as a result, they are entitled to a new trial. However, because none of alleged errors constitute reversible error, Defendant asks this Court to affirm the trial judge's decision.

ISSUE I: JUDGE MORGAN PROPERLY GRANTED A DIRECTED VERDICT IN DEFENDANTS' FAVOR.

Plaintiffs first claim that Judge Morgan erred by granting a directed verdict at the close of Plaintiffs' case, considering their failure to present any expert testimony on proximate cause.

In deciding a motion for directed verdict at the close of the evidence, the trial judge must "accept as true all evidence presented ... and the legitimate inferences drawn therefrom, to determine whether the proofs are sufficient to sustain a judgment[.]" Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 569 (App. Div. 2014), aff'd, 223 N.J. 245 (2015). If the evidence is such that one party must prevail as a matter of law, then a directed verdict is appropriate. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003).

To establish a medical malpractice action, a plaintiff has the burden of proving the relevant standard of care, a deviation from that standard, an injury proximately caused by the deviation, and damages suffered as a result.

Komlodi v. Picciano, 217 N.J. 387, 409 (2014). Moreover, in all but the rare case involving common knowledge, expert opinion is necessary to establish these elements. Gardner v. Pawliw, 150 N.J. 359, 375 (1997). See, also, 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd., 469 N.J. Super. 200, 221 (App. Div. 2021), cert. denied, 250 N.J. 164 (2022) (noting that "Plaintiff's burden included proof of proximately caused damages," and

explaining that plaintiff has the burden of showing “the damages were the natural and probable consequences of the defendant's negligence.”)

The plaintiff “must show that a defendant's conduct constituted a cause-in-fact of his injuries.” Vizzoni v. B.M.D., 459 N.J. Super. 554, 574 (App. Div. 2019), citing Dawson v. Bunker Hill Plaza Associates, 289 N.J. Super. 309, 322 (App. Div. 1996). Furthermore, “an act or omission is not regarded as a cause-in-fact of an event if the event would have occurred without such act or omission.” Id. at 574-75, citing Thorn v. Travel Care, Inc., 296 N.J. Super. 341, 346 (App. Div. 1997).

Moreover, the requirement that a plaintiff must demonstrate proximate cause is true even in medical malpractice claims premised on the argument that the alleged breach of care increased the risk of harm. See, Scafidi v. Seiler, 119 N.J. 93, 108 (1990) (“Evidence demonstrating within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a preexistent condition raises a jury question whether the increased risk was a substantial factor in producing the ultimate result.”); Gardner, 150 N.J. at 375-76 (“The majority of jurisdictions has similarly modified the traditional “but for” causation standard of proof in cases where the injury allegedly resulted in part from a defendant's negligence and in part from a preexistent condition to permit such plaintiffs to submit for jury consideration

the questions of whether the defendant's deviation from standard medical practice increased a patient's risk of harm or diminished a patient's chance of survival and whether such increased risk was a substantial factor in producing the ultimate harm.”)

A matter requires expert testimony when “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” State v. Derry, 250 N.J. 611, 632 (2022) (quoting N.J.R.E. 702) The expert in a medical negligence action must demonstrate, inter alia, that the deviation from the applicable standard of care proximately caused the alleged injury. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). The jurors in this case could not be expected to know whether the alleged breach of the standard of care was a cause of Plaintiff’s alleged damages, based on their own common knowledge, so therefore expert testimony was necessary to establish proximate cause.

Thus, to avoid a directed verdict, Plaintiffs had to have provided admissible evidence from the testimony of one of their experts demonstrating the causation element recognized in Gardner. Neither expert’s testimony provided the needed causation testimony.

Nurse Tadrack identified the applicable nursing standard of care and opined as to what she believed to be the breach of that standard. However, as a

nurse, she is incapable—as a matter of law—of offering an opinion on medical causation. State v. One Marlin Rifle, 30/30, 30 AS, Serial No. 12027068, 319 N.J. Super. 359, 368 (App. Div. 1999) (holding that a nurse is not legally qualified to offer an opinion on medical causation.) See, also, Ryan v. Renny, 203 N.J. 37, 50 (2010) (cited favorably to One Marlin Rifle.)

Furthermore, during the hearing on the directed verdict, Plaintiff's counsel repeatedly conceded that Tadrick could not offer a causation opinion. (6T10:16-17 ("What she does not cross over into, then, is the medical causation."))

THE COURT: Well, but hold on a second, Mr. Talbot.

She's -- she testified pretty clearly she wasn't offering any opinion on causation.

MR. TALBOT: Yes, the causation of further damages.

THE COURT: She was simply there --

MR. TALBOT: She can't --

THE COURT: -- for a deviation --

MR. TALBOT: -- *because she can't*.

THE COURT: -- of standard --

MR. TALBOT: *Because she can't*.

THE COURT: Right.

(6T13:21-14:8, emphasis supplied.)

See, also, 6T15:18-22; (“[S]he can’t give a medical causation opinion...”); 6T17:18-19, (“[S]he's not allowed to call it causation because then we're starting to get into medical.”); 6T23:11-12 (“she can't go into medical causation.”)

Indeed, at trial, Nurse Tadrick conceded that the law does not permit her to offer a causation opinion and that she was not offering any such causation opinion:

Q: Can we agree, ma’am, that you told me at the time of your deposition that you were not intending -- or not going to be offering any opinions on causation?

A: Yes.

Q: Okay. In fact, I said, “Q Am I correct to understand that you are not intending to offer any opinions on causation?” And you said correct, right?

A: Yes.

Q: And that's what you hold to to this day, that you're not offering any opinions on causation, right?

A: Correct. Yes.

(4T146:11-23)

Nurse Tadrick simply could not, and did not, fulfill Plaintiff’s burden on medical causation.

The only other expert presented by Plaintiff was Dr. Ian Hood. Dr. Hood's testimony was that of a forensic pathologist and he limited his opinions to the mechanics of choking and the fact that the decedent's death resulted from choking on his eggs. First, Dr. Hood specifically denied that he was opining as to liability issues:

Q: Dr. Hood, so that the jury understands, are -- is it fair to say you are not providing any opinions with regard to the liability issues -- who is to blame in this case?

A: That's correct. I don't run nursing homes. I've never even worked in one.

(5T48:14-19)

Further, he testified that his opinion was simply that the decedent's cause of death was choking on his food:

Q: Okay. With regard to -- let's start with kind of the end and you can then give your basis. Did you formulate an opinion as to the cause of death in this case?

A: I did.

Q: And what did you formulate that opinion to be?

A: I would have attributed his death to simply choking on food, or sometimes we say choking on bolus of food.

He was getting a soft diet so in his case, I would have just said choking on food and the manner I would classify as an accident.

(5T49:5-17)

Q: So, Doctor, you tried to convey your opinions here.

Is it fair to say your opinion is that the cause of death is the choking on the eggs?

A: Correct.

Q: And is it fair to say that the mechanical process of that choking, which involved a ball valve process, was a little more prolonged because of the ball valve process?

A: That's correct.

(5T83:9-18)

However, on the question of proximate causation—that is, whether the breach identified by Nurse Tadrick was the cause of or a substantial factor in the decedent choking—Dr. Hood offered no opinion.

Dr. Hood's testimony did not touch at all on proximate causation, as Plaintiffs' counsel conceded at trial.

Judge Morgan: What I think Ms. Nahmani is arguing is that there's nobody that has given expert testimony before this jury that takes it to the next step, that says had someone been there, pursuant to what the standard of care required, Mr. Burckhardt would have been fine. He wouldn't have gone through the choking, he wouldn't have incurred the injury he did.

And I think the person you have to look to for that is Dr. Hood, and I think, as you said, he's the one who has the medical background for it.

Did Dr. Hood at any point in time say to this jury that had someone been there that this event wouldn't have occurred?

MR. TALBOT: *Well he wasn't permitted to give any testimony on liability, so I couldn't ask him that question.*

(6T16:15-17:10, emphasis supplied.)

Thus, in the absence of expert testimony on this question, Plaintiffs failed to satisfy their burden to demonstrate proximate causation with expert medical evidence.

In granting a directed verdict, Judge Morgan thoroughly and correctly demonstrated that Plaintiffs' experts produced failed to supply the needed, relevant evidence and that the jury was therefore left with nothing but speculation:

[T]he first motion I had was about proximate causation. Here Nurse Tadrick said quite plainly at trial, and I think also in her deposition testimony, she's not providing any opinion about causation. She's just providing the standard of care and what she believed to be the breach.

So the Court and the jury would then have to look to the other expert, Dr. Ian Hood. And Dr. Ian Hood, who was qualified as a forensic pathologist, who opined on the mechanics of choking and the cause of Mr. Burckhardt, Sr.'s injury, which he said was Mr. Burckhardt was choking on eggs and that's what caused his injury because he was choking on the eggs.

In looking at these motions, the Court takes them very seriously and you have to scour the record in trying to find if the jury could find something that they could look at, and giving all favorable interest to the plaintiff, saying here's where I can resolve that -- all of the elements of the prima facie case and the Court has taken some time to do that.

And given that review, I'm forced to come to the conclusion that what's absent from this case is some evidence showing that there's a proximate connection between the failure to supervise and Mr. Burckhardt's injury.

There's not an opinion that had a staff member been with Mr. Burckhardt while eating he would not have choked.

The Court and the jury can't look to Ms. Tadrick for that opinion because she made it clear she was not giving any opinions on causation. She was simply giving the standard of care and the breach.

* * *

Any kind of causation needs to come from Dr. Ian Hood.

Dr. Hood testified about the mechanics of choking and that Mr. Burckhardt choked on eggs, but what he doesn't provide any opinion about is what defendant should have done or that had defendant been in the room supervising, the choking would not have occurred.

The record is devoid on that particular issue and the jury would be left to speculate about that particular issue.

* * *

I didn't hear anything from Dr. Hood about the size of the egg that was in the throat. I don't think he provided any testimony about that.

There's no testimony in the record saying that Mr. Burckhardt, Sr. was taking too big of a bite at the time, or that he wasn't taking sips, or that he was doing anything different than he would have been doing had someone been in there cuing him to do that.

There's just no opinion in the record saying any of that, and a jury would have to be left to their own speculation on that point, which is a crucial point in the prima facie case for a plaintiff.

And for all those reasons, this Court finds that based on the testimony that was provided by the plaintiff in this trial so far, and giving them all favorable inferences -- and assuming that the jury completely finds Nurse Tadrick credible and believes every word that she has said, and assuming that the jury finds Dr. Hood credible and believes every word he said, I can't find that either one of those experts fills in that last remaining gap about the proximate cause, which is an essential element for a plaintiff's prima facie case in this matter.

And for those reasons, the Court is going to grant the motion for a directed verdict in favor of the defendant on the basis of the lack of proximate cause.

For those reasons, the Court doesn't need to get to the remaining motions.

[6T63:14-68:10]

In this case, Judge Morgan considered all the evidence, fully appreciated it, and correctly concluded that Plaintiffs failed to present the competent medical evidence which provided the needed causal link between Nurse

Tadrick's testimony that the standard of care was breached and Dr. Hood's testimony that the decedent died by choking on eggs. Absent that evidence, all that was left was speculation, which is insufficient to submit the matter to a jury, as it would invite speculation. Germann v. Matriss, 55 N.J. 193, 208-09 (1970) (explaining that it is error to allow a jury to decide whether the negligence of the defendant was the proximate cause of plaintiff's injury based on mere conjecture or speculation).

In Plaintiffs' brief, they assert, for the first time on appeal, the argument that somehow it was Defendant's burden on proximate cause, and not Plaintiffs', citing to Lanzet v. Greenberg, 126 N.J. 168 (1991), Evers v. Dollinger, 95 N.J. 399 (1984), and Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). At trial, and in Plaintiff's motion for reconsideration, however, Plaintiffs recognized that they had the burden of demonstrating proximate cause, but attempted to demonstrate that Nurse Tadrick's testimony or Dr. Hood's testimony met that burden:

With regard to causation, however, we relied upon a forensic pathologist who, although he doesn't normally treat living people, he does an enormous amount of autopsies, and unfortunately in this case we're talking about a deceased individual, Robert Burckhardt, Sr.

So who better to talk about causation for death and the choking than a forensic pathologist such as Dr. Hood?

...

That certainly covers proximate cause.

(6T10:23-11:11)

“At this point we're really splitting hairs. So you can call it what you want, but [Nurse Tadrick's] giving the why and wherefore of why they deviated from the standards of care and violated his rights. So, technically, you could call that a causation opinion I guess...”

(6T15:23-16:2)

However, as detailed previously, the record is devoid of any support for the contention that the burden was met by the testimony of these experts.

Furthermore, Lanzet, Evers and Bigelow do not demonstrate that there is any shifting of the burden, as Plaintiffs argue. None of these cases asserted that the plaintiff's burden of demonstrating proximate cause ever shifted to the defendant.

First, Lanzet dealt with the question of what evidence is sufficient to establish an increased-risk-of-harm theory of recovery. In that case, the decedent's heart rate and pulse declined during an eye operation to the point where her brain was oxygen deprived, eventually causing her death. The case was therefore litigated around the question of whether the physicians' delayed response to the patient's worsening condition was a breach of the standard of care that increased the risk of harm. The evidence included testimony from the plaintiff's expert that the failure to timely respond was the proximate cause of

the decedent's injury, opining that an "earlier intervention would have saved [decedent's] brain." Lanzet, 126 N.J. at 177. On cross-examination, the defendants' expert—who believed the injury occurred as a consequence of an unrelated embolism—conceded that if the evidence favorable to the plaintiff's case, he would be of the opinion that the damages occurred during the surgery and were caused by the inaction of the defendants. Id.

From that evidence, the Court in Lanzet concluded that there was sufficient evidence for the jury to have proceeded on an increased-risk-of-harm theory. Id., at 187-188.

Evers addressed the increased-risk-of-harm theory of medical malpractice and held, in relevant part, that a plaintiff may sustain his or her cause of action by demonstrating, through admissible expert testimony, that the alleged violation of the standard of care increased the risk of harm and that that increase was a substantial factor in the plaintiff's damages:

Applying the principles extracted from these cases, we hold that on remand plaintiff should be permitted to demonstrate, within a reasonable degree of medical probability, that the seven months delay resulting from defendant's failure to have made an accurate diagnosis and to have rendered proper treatment increased the risk of recurrence or of distant spread of plaintiff's cancer, and that such increased risk was a substantial factor in producing the condition from which plaintiff currently suffers.

Evers, 95 N.J. at 417.

In the present case, however, medical expert testimony on causation is exactly what was missing. There was no medical expert testimony asserting to a reasonable degree of medical probability that the failure to provide the moderate supervision caused the decedent's death or increased the risk of decedent choking and that that increase was a substantial factor in his demise.

Finally, the Bigelow Court did not address the burden for demonstrating medical causation, but, rather, whether a jury's reasonable estimate for damages caused by a violation of the federal anti-trust statute was permissible when the anti-trust violation precluded a more accurate measure of damages.

In their brief Plaintiffs further argue that “[t]he failure to perform as required by the standard of care, coupled with the occurrence of **the very harm** that the **standard of care and care plan were intended to prevent**, gives rise to a reasonable inference that the breach of duty was a **proximate cause of the harm.**” (Pb18, emphasis in original.)

This statement is not accurate. Plaintiffs had demonstrate more than that the decedent died by choking, and that there was no nurse present. Rather, they had to show through medical evidence that the failure to provide that moderate supervision caused decedent's death or increased the risk of harm and that increase was a substantial factor in decedent's death.

This is an important requirement because there was no evidence on the record from which the jury could otherwise find that those causation showings. This is not a case in which the absence of a nurse caused the dysphagia or caused the choking incident. There was no evidence presented that the decedent did anything different in terms of the amount of food he ate or whether he sipped water. There was no criticism by either expert on the speed of the response in calling a code and attempting resuscitation efforts once notified that the decedent was choking, or to the quality of the attempts which were performed to save the decedent.

Even under supervision, a patient with dysphagia may still choke and even with immediate efforts, might still result in death. Plaintiffs simply wanted the jury to assume that staff not being present increased the risk the decedent faced, but there is no medical expert opinion substantiating that position.

Given the facts in this case, that lack is crucial, as the decedent was conscious when his son found him and sought the assistance of a nearby nurse. For the Defendant to have been liable, there had to be a medical difference in the decedent's possibility of survival between the response that actually occurred and the response which would have occurred had a nurse been in the room and not the hallway when then choking incident started.

Without evidence on causation, the jury would be forced to speculate about whether the lack of moderate supervision was the cause of, or a substantial factor in, the decedent's death.

Such speculation would be improper regardless of whether the jury speculated that the few minutes' difference in responding to the choking episode would have made no difference at all in the decedent's survival chances, or, conversely, if they speculated that it was a causal factor in the death. It would be improper because the average lay jury cannot know without expert testimony what the survival possibilities were once the choking episode from dysphagia occurred, whether medical intervention even with supervision would have likely resulted in the patient's survival or, on the other hand, whether medical intervention at that point would be a near hopeless endeavor, constituting a desperate prayer for a miracle with no appreciable increase in the risk of harm nor constituting a factor in the decedent's demise.

It is to eliminate such speculation that the law requires plaintiffs to bear the burden of adequately supporting the causation element. In the absence of that testimony, Plaintiffs have not asserted a viable cause of action and the directed verdict was proper.

Next, Plaintiffs asserted that, “plaintiffs’ expert unequivocally stated that it was ‘deviations from the standard of care that **caused harm to Mr. Burckhardt.**’ 4T33:20-34:2 (emphasis supplied).” (Pb18).

This statement is false. The testimony in question is cited by Nurse Tadrick. In the section being quoted, Nurse Tadrick was not giving a medical opinion, but simply describing the Affidavit of Merit she authored:

Q: What -- yeah, what did you do when you found merit? What was the next step?

A: The next step was to, of course, speak to you about it -- about my opinions and my findings, and then from then on as -- I produced an affidavit of merit.

Q: What's that?

A: An affidavit of merit is a declaration stating that within a degree of -- a reasonable degree of nursing probability, I, as the nurse expert, find merit to this case and that there were deviations from standard of care.

Q: And where --

A: And -- which -- that caused harm to Mr. Burckhardt.

(4T33:14-34:2)

Moreover, in her Affidavit of Merit, while Nurse Tadrick indicated that she found a reasonable probability that the care fell outside the standard of care, nowhere in the affidavit did she discuss causation, or use the word

“cause” or any variant of it, at all. Furthermore, an Affidavit of Merit is not a replacement for adequate expert opinion at trial, as its role is to state a cause of action, not establish one. See, Cowley v. Virtua Health Sys., 242 N.J. 1, 23 (2020) (citing N.J.S.A. 2A:53A-29 and noting that failure to supply an Affidavit of Merit constitutes a failure to state a cause of action.)

Most importantly, as previously indicated, however, she, as a nurse, is legally incapable of giving an opinion on medical causation. As such, Plaintiffs did not have expert testimony that the breach of the standard of care caused harm.

Finally Plaintiffs asserted that “Defendant then had the burden to show that the harm that occurred would have occurred regardless of the breach; not could have but **actually** would have.” (Pb18, emphasis in original.) There is simply no support for this assertion whatsoever in New Jersey law.

The very case law cited by Plaintiffs—Lanzet, Evers, as well as in Scafidi and Gardner, supra—hold that a plaintiff asserting a cause of action for increased risk of harm must provide the medical expert testimony on causation that the violation of the standard of care increased the risk of harm and that that increase was a substantial factor in the plaintiff’s damages. Gardner, 150 N.J. at 375-376; Lanzet, 126 N.J. at 187-188; Scafidi, 119 N.J. at 98-99; and Evers, 95 N.J. at 406.

Because Plaintiffs made no such showing in this case, Defendant had no burden and was entitled to judgment in its favor as Judge Morgan properly determined. There was no error in that determination and Defendant asks this Court to affirm that decision.

***ISSUE II: THE DISMISSAL OF THE NHA CLAIM WAS NOT
ERRONEOUS, BECAUSE PLAINTIFFS DID NOT
ESTABLISH CAUSATION.***

Next, Plaintiffs argue that Judge Morgan should not have dismissed the claim under the NHA because, they assert, causation is not an element under the NHA. (Pb13, arguing that “causation of actual damages is not required...”)

This is false. N.J.S.A. 30:13-8 permits recovery, but only of “actual” and punitive damages. It reads, in relevant part, “[t]he action may be brought in any court of competent jurisdiction to enforce such rights and to recover ***actual and punitive damages*** for their violation.” N.J.S.A. 30:13-8, (emphasis added.)

The term “actual damages” is not defined by the statute, but Black's Law Dictionary defines “actual damages” as “the amount awarded to a complainant in compensation for his actual and real loss ... synonymous with compensatory damages ...” Compensatory damages are defined in part as “... such as will simply make good or replace the loss ***caused by the wrong or injury....*** The rationale behind compensatory damages is to restore the injured party to the

position he or she was in prior to the injury.” Black’s Law Dictionary, pp. 390 (6th Ed.1990)(emphasis added).

Thus, to be entitled to “actual damages,” a plaintiff must demonstrate that the alleged violation resulted in a loss which were actually incurred and caused by the alleged wrongdoing. In other words, causation is an element to the statutory claim.⁴

Therefore, there is no basis to reconsider the directed verdict on the statutory claim because Judge Morgan properly dismissed it for lack of evidence of proximate cause, for the same reason he dismissed the negligence claim, as detailed in the previous section of this brief.

Plaintiffs base their argument that there is no causation element in the NHA on recent change to Model Jury Instruction 5.77. (Pb20-21) More specifically, Plaintiffs rely on a November 2023 revision to the model jury interrogatories which eliminated a separate jury interrogatory for proximate causation. However, this argument is specious.

First, the revision at issue was issued in November 22, 2023, which post-dated the grant of a directed verdict in more than a month. There is simply no

⁴ It is telling that when Plaintiffs quoted the language of N.J.S.A. 30:13-8 in their brief, they omitted the language which stated that the cause of action under that statute could be brought to recover “actual damages.”

basis to believe that the Model Jury interrogatory was meant to have any retrospective application whatsoever. It is undisputed that, at the time the directed verdict was granted, Model Jury Charge 5.77 included an explicit proximate causation charge. (See, Model Jury Charges (Civil) 5.77, Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents’ Rights Claims (Approved 11/2022))

Further, it is well-established law that model jury charges “are not binding statements of law. In general, because of practical limitations, this Court does not evaluate model jury charges other than when they are reviewed as part of an appeal.” State v. O'Donnell, 255 N.J. 60, 79 (2023). Thus, the fact that there was a change in the model jury charge is not binding and does not establish that the NHA does not contain a causation element.

It also must be recognized that while there was an amendment to the non-binding model jury interrogatory, there was no amendment to the statute itself. Indeed, the operative language of N.J.S.A. 30:13-8 has remained unchanged since its enactment in 1976.

As initially enacted in 1976, N.J.S.A. 30:13-8 originally read:

8. Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation. The Department of Health and Senior Services may maintain an action in the name of the State to enforce the provisions of this act and any rules or regulations

promulgated pursuant to this act. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for their violation. Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action.

The Legislature only amended N.J.S.A. 30:13-8 once, in 1997. It designated the entire then-existing text of the statute as subsection a., and added a new section b, reading:

b. In addition to the provisions of subsection a. of this section, treble damages may be awarded to a resident or alleged third party guarantor of payment who prevails in any action to enforce the provisions of section 3 of P.L.1997, c.241 (C.30:13–3.1).

[See, L.1997, c. 241, § 2, eff. Sept. 5, 1997.]

No other amendment has ever been made to this statute. That fact is key, because as Model Jury Charge 5.77 interrogatories, prior to the 2023 changes, contained a provision explicitly addressing proximate cause, recognizing that the statute, itself, contains a proximate cause requirement. As such, the change in the model jury interrogatories was not motivated by a change in the law, nor that the causation element which was explicitly recognized was somehow eliminated.

The Supreme Court Committee on Model Civil Jury Charges did not detail why the changes were made, other than to state that, “[t]he Committee has significantly revised this charge following a review requested by members

of the bar. References to federal statutes and regulations are removed and the jury interrogatories are amended to provide clarity with regard to the apportionment of damages.”⁵

Plaintiff presents nothing but speculation to suggest that the removal of the specific mention of the proximate cause question necessarily means that this somehow should indicate that the NHA should now be interpreted as not including a causation element, notwithstanding the complete absence of any binding authority interpreting the statute in that manner.

What is more likely is that the authors of the model charges simply believed that the but-for causal link—between “violation of the NHA” and “damages caused by the violation of the NHA”—is so direct that a separate proximate-causation question had a greater potential to generate confusion than it had to clarify the issues. Most cases would not need the additional, proximate cause jury interrogatory, and the trial courts are more than capable of supplementing the jury verdict slip with such a question in the small number of cases wherein the trial judge deems a specific causation interrogatory to be necessary.

5

<https://www.njcourts.gov/attorneys/notices?start=&end=&search=model+civil+jury+charges&page=0>

Furthermore, without an amendment to the statute itself, the NHA's plain language predicated recovery on the presence of "actual damages," i.e., damages caused by the alleged violation of the NHA, belies Plaintiffs' argument. Because there was no showing of causation, there was no basis to award any actual damages, including attorney fees, under the NHA.

In Estate of Davis ex rel. Davis v. Vineland Operations, LLC, A-2950-11T4, 2013 WL 331495 (App. Div. Jan. 30, 2013)⁶, a plaintiff asserted a negligence claim and a violation of N.J.S.A. 30:13-5(j), just as Plaintiff did in this case. Because the Plaintiff in Estate of Davis failed to provide evidence that the alleged mistreatment caused the alleged pain and suffering or that the patient actually experienced the alleged pain and suffering, this Court affirmed that trial court's holding that "no violation of the Nursing Home Bill of Rights occurred." Estate of Davis, 2013 WL 331495, at *4-5. On that basis, this Court held the plaintiff was not entitled to attorney fees.

In this case, the same is true. Because this was a negligence-based claim of an NHA violation, the fact that Plaintiff failed to establish all the elements

⁶ The Supreme Court has held that non-published cases like Estate of Davis may be considered for their "persuasive value." State v. K.P.S., 221 N.J. 266, 279 n.7 (2015).

of the underlying negligence claim, “no violation of the Nursing Home Bill of Rights occurred” here, any more than it did in Estate of Davis.

Finally, even considering the non-binding, revised proposed jury interrogatories in the model charge interrogatories, Plaintiff’s argument that there is no causation element is simply false. Question 2 of the model interrogatory reads, “[w]hat amount of money would fairly compensate for Plaintiffs’ damages *resulting from* the violation(s) of Plaintiff’s nursing home residents’ rights?” (Model Jury Charges (Civil) 5.77, Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents’ Rights Claims (Approved 11/2022; Revised 11/2023), emphasis added.) The inclusion of the term “resulting from” clearly indicates a causation element which must be met. See, e.g., Paroline v. United States, 572 U.S. 434, 445, 134 S. Ct. 1710, 1720, 188 L. Ed. 2d 714 (2014) (“The words ‘as a result of’ plainly suggest causation.”) Thus, the NHA has always had and continues to have a causation element that must be met.

Plaintiffs’ argument that they did not need to demonstrate causation to succeed on the NHA claim was without merit and properly rejected by the trial court. Defendants ask this Court to affirm that decision.

***ISSUE III THERE WAS NO ERROR IN THE DISMISSAL OF THE
PLAINTIFF'S PUNITIVE DAMAGES CLAIM.***

Next, Plaintiffs argue that it was error to dismiss their punitive damages claim. A claim for punitive damages is not a viable stand-alone cause of action, but, rather, is a species of damages. “[P]unitive damages cannot stand alone, separate and apart from any other cause of action.” Klesh v. Coddington, 295 N.J. Super. 51, 65 (Law Div. 1996), aff’d and remanded, 295 N.J. Super. 1 (App. Div. 1996). See, also, Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 45 (1984) (noting that “punitive damages may lie provided there is a valid underlying cause of action.”) Consequently, this Court needs only address the claim for punitive damages if it finds that the grant of directed verdict for lack of proximate causation was somehow reversible error.

Under the facts of this case, Judge Morgan properly dismissed the claim for punitive damages. New Jersey courts have determined that “punitive damages are only to be awarded in exceptional cases.” Catalane v. Gilian Instrument Corporation, 271 N.J. Super. 476, 500-01 (App. Div.), certif. denied, 136 N.J. 298 (1994); see also, Lehman v. Toys ‘R’ Us, Inc., 132 N.J. 587, 624-25 (1993) (“punitive damages are to be awarded when the wrongdoer's conduct is especially egregious”); Rendine v. Pantzer, 141 N.J. 292 (1995) (offending conduct must be “especially egregious”).

It is well-settled law that plaintiffs may not recover punitive damages by “recasting merely negligent conduct as willful and wanton.” Entwistle v. Draves, 102 N.J. 559, 562 (1986). To warrant punitive damages, the defendants' conduct must consist of “an *intentional wrongdoing* in the sense of an ‘evil-minded act or an act accompanied by a wanton and willful disregard of the rights of another.’” Nappe, 97 N.J. at 49 (emphasis added). There must have been a “positive element of *conscious wrongdoing*.” Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962) (emphasis added).

Neither mere negligence nor gross negligence can support an award of punitive damages. LoRocco v. N.J. Mfrs. Ins. Co., 82 N.J. Super. 323, 327 (App. Div. 1964), certif. den., 42 N.J. 144 (1964). The underlying theory is to punish the offender for aggravating misconduct to deter the conduct in the future. Fischer v. Johns-Manville Corp., 103 N.J. 643, 662 (1986); Leimgruber v. Claridge Assocs., Ltd., 73 N.J. 450, 454 (1977).

Under New Jersey’s Punitive Damages Act, N.J.S.A. 2A:15-5.9. et seq., punitive damages are only available in cases where the plaintiff proves by “clear and convincing evidence” that the acts complained of were “actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions.” N.J.S.A. 2A:15-5.12. This is an affirmative burden on the plaintiff to prove malice or willful

and wanton conduct. Berg, 37 N.J. at 414 (1962). See, also, Rivera v. Valley Hospital Inc., 252 N.J. 1 (2022) (holding that punitive damages in a medical malpractice context requires a plaintiff to show, by clear and convincing evidence, that the medical provider acted with actual malice or with a wanton and willful disregard of the defendant’s safety.”)

The Punitive Damages Act also defines “clear and convincing evidence” as the “standard of evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is a standard which requires more than a preponderance of evidence, but less than beyond a reasonable doubt, to draw a conclusion.” N.J.S.A. 2A:15-5.10.

In Pavlova v. Mint Mgmt. Corp., 375 N.J. Super. 397 (App. Div. 2005), this Court noted that the Punitive Damages Act was enacted to “establish *more restrictive standards* with regard to the awarding of punitive damages” than had previously existed. Pavlova, 375 at 403 (emphasis added). The Pavlova Court also noted that, in other ways, the Act codified the common law, “which limited punitive damages to only ‘exceptional cases’... as punishment of the defendant and as a deterrent to others from following his example.” Id.

In this case, Judge Morgan properly granted a directed verdict on Plaintiff’s punitive damage claim. There is simply nothing in the record to demonstrating that Advanced Subacute Rehab Center at Sewell, or anyone at

the center, acted with any actual malice or committed an intentional wrongdoing in the sense of an evil-minded act.

In Plaintiffs' brief, they argue that N.J.S.A. 30:13-8(a) "expressly provides for the award of punitive damages on a finding of a violation... of N.J.S.A. 30:13-5." (Pb23) This claim is inaccurate. N.J.S.A. 30:13-8(a) provides that a party may *file suit and seek* punitive damages in connection with a claimed violation of the statute, not that a court or jury may award punitive damages merely upon the violation of the statute. N.J.S.A. 30:13-8(a) ("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.")

Further, Plaintiffs argue that whether the evidence established the "evil-minded" act need to recover fees was a jury question. (Pb23-24) Plaintiffs cited to nothing on the record which went beyond negligence or recklessness that a jury might have credited to find the kind of willful and wanton conduct needed to recover punitive damages.

In fact, Plaintiff's expert, Nurse Tadrack, specifically denied any suggestion that anyone at the facility either physically or mentally abused the decedent; consciously or purposefully disregarded the decedent; acted willfully or intentionally to hurt the decedent; or were disrespectful or verbally abusive in any way:

Q: Am I correct, ma'am, that you have not opined in this case that the facility physically abused Mr. Burckhardt?

A: Correct.

Q: And you have not opined in this case that the facility mentally abused Mr. Burckhardt?

A: Correct.

Q: And you have not opined in this case that the facility, or any of its staff, consciously disregarded Mr. Burckhardt?

A: Yes. Correct.

Q: And you've not offered an opinion in this case that any one member of the staff purposely disregarded Mr. Burckhardt?

A: Correct. Yes.

Q: And you have not opined in this case that anyone acted willfully or intentionally to hurt Mr. Burckhardt at the facility, right?

A: Correct.

Q: And you've not offered any opinions in this case that their actions -- strike that. You've not offered an opinion in this case that they said anything that was disrespectful to him as an individual?

A: Correct.

Q: And you've not offered any opinions that they verbally abused him in any way, right?

A: Correct.

Q: In fact, didn't you read testimony from the Burckhardt family that they actually had a really nice relationship with the staff, that is Mr. Burckhardt -- the Burckhardt family, including the wife and Mr. Burckhardt?

A: Yes, there was discussion of that in the deposition testimony regarding some of the staff members.

(4T141:4-142:14)

As such, the evidence seen in the light most favorable to Plaintiffs only demonstrates that decedent was served his breakfast and was able to start eating in the absence of the moderate supervision required by his care plan. That was not enough, as a matter of law, meet the standard required for the award of punitive damages, because they were not evil-minded acts, nor made with reckless indifference or with a high probability of harm to the decedent.

As such, the dismissal of the punitive damages claim was proper.

Furthermore, Plaintiffs cite to Catalane, supra, in support of their argument. In Catalane, the Court addressed whether the mere violation of the New Jersey Law Against Discrimination (“NJLAD”) was sufficient for the jury to have awarded punitive damages. Catalane, 271 N.J. Super. at 500-01. The Court held that even though the NJLAD permitted the recovery of punitive damages, a plaintiff seeking punitive damages must demonstrate wanton or malicious conduct, as required under the PDA. Id.

In that regard, the Catalane Court held that “[i]t is within the discretion of the trier of fact to make an award of punitive damages, *if there is a legal foundation in the record for an award.*” Catalane, 271 N.J. Super. at 501 (emphasis added; quoting Weiss v. Parker Hannifan Corp., 747 F. Supp. 1118, 1136 (D.N.J. 1990) and 22 Am.Jur.2d, Damages, § 739 (1988)).

In this case, Judge Morgan granted a directed verdict because there simply was no evidence from which the jury could have credited as “a legal foundation... for an award” of punitive damages.

Because there is absolutely no evidence that Defendants had any evil motive or intended to cause decedent harm in any way, Judge Morgan properly dismissed the punitive damages claim. Defendants ask this Court to affirm that decision.

***ISSUE IV: THERE WAS NO ERROR IN NOT PERMITTING THE
USE OF DESIGNEE’S DEPOSITION TRANSCRIPT.***

Finally, Plaintiff argued that Judge Morgan erred by barring the use of the videotaped testimony of Lynn Homicillada, in preference for her live testimony.

However, this Court need not address this argument if it finds that Judge Morgan properly granted a directed verdict. Nothing in the testimony of Lynn Homicillada had the capacity to provide the missing evidence concerning proximate causation, and Plaintiffs did not even attempt to argue that it would

have made any difference. As such, even if it were error to preclude the videotape deposition of Ms. Homicillada, that would be no more than harmless error. Walker v. Briarwood Condo Ass’n, 274 N.J. Super. 422, 426 (App. Div. 1994) (“[A]ppeals are taken from judgments and not from a judge’s reasons. Thus, a judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it.”) See, also, Ex parte Kershner, 9 N.J. 471, 473-74 (1952) (“An appeal is taken from a ‘judgment, order or determination,’ ... not from an opinion or ‘letter decision.’”)

The standard applicable to this argument is deferential and is only error upon a showing that the denial of the admission of the evidence was an abuse of discretion. “When a trial court admits or excludes evidence, its determination is entitled to deference absent a showing of an abuse of discretion, i.e., that there has been a clear error of judgment.” Rowe v. Bell & Gossett Co., 239 N.J. 531, 551-52 (2019) (internal quotes and bracketing omitted.) Accordingly, this court will “reverse an evidentiary ruling only if it was so wide of the mark that a manifest denial of justice resulted.” Id.

In this case, Judge Morgan did not abuse his discretion by denying Plaintiff’s request. First, Judge Morgan was correct in noting that Ms. Homicillada was present at trial and would be appearing live and, therefore, her live testimony was preferable to deposition testimony. It is well established

that live testimony is preferred, and that deposition is merely secondary evidence. Avis Rent-A-Car, Inc. v. Cooper, 273 N.J. Super. 198, 202 (App. Div. 1994) (“After all, live testimony at trial is still preferred.”); B.G. v. L.H., 450 N.J. Super. 438, 458 (Ch. Div. 2017) (stating that “live testimony is preferred.”); Panasonic Indus. Co. v. Emerson Quiet Kool Corp., 269 N.J. Super. 502, 507 (Law. Div. 1993)(“a deposition is secondary evidence and live testimony is preferable.”)

Finally, Plaintiff failed to identify any prejudice to the requirement of live testimony. Any evidence or information which Plaintiffs might have wanted the jury to hear could have been presented through Ms. Homicillada’s live testimony, so any error in barring the deposition would have been harmless.

In this case, Plaintiffs failed to demonstrate any error in Judge Morgan’s decision. This Court is asked to affirm that decision.

Conclusion

For the foregoing reasons, this Court is asked to affirm the grant of a directed verdict in favor of Advanced Subacute Rehabilitation Center at Sewell, LLC.

Respectfully Submitted,
MARSHALL DENNEHEY PC

/s/ Lynne N. Nahmani
Lynne N. Nahmani, Esq.
NJ Id: 016711989

/s/ Walter F. Kawalec, III
Walter F. Kawalec, III, Esq.
NJ Id: 002002002

*Attorneys for Advanced Subacute Rehabilitation
Center at Sewell, LLC*

ROBERT F. BURCKHARDT, JR.,
AND SHERRY BURCKHARDT-
DEMARCO, ADMINISTRATORS
OF THE ESTATE OF ROBERT F.
BURCKHARDT, SR.,

Plaintiffs,

v.

ADVANCED SUBACUTE
REHABILITATION CENTER AT
SEWELL, LLC; ADVANCED
SUBACUTE REHABILITATION
CTR AT SEWELL, LLC;
JOHN/JANE DOE DIRECTOR OF
NURSING 1-100; JOHN/JANE
DOE NURSE 1-100; JOHN/JANE
DOE CNA 1-100; JOHN/JANE
DOE MANAGEMENT COMPANY
1-100; JOHN/JANE DOE
MEDICAL DIRECTOR 1-100;
JOHN/JANE DOES 1-100;
JOHN/JANE DOE CORPORATION
1-100; individually, jointly,
severally, and/or in the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001917-23T4

CIVIL ACTION

ON APPEAL FROM AN ORDER OF
FINAL JUDGMENT FROM THE LAW
DIVISION: GLOUCESTER COUNTY
DOCKET NO. GLO-L-0381-20

Sat Below:

The Hon. Benjamin D. Morgan, J.S.C.

REPLY BRIEF OF PLAINTIFFS IN SUPPORT OF THE APPEAL

On the brief and of counsel:

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

TABLE OF CONTENTS – REPLY BRIEF

	<u>Page</u>
TABLE OF CONTENTS – REPLY BRIEF	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS	ii
TABLE OF TRANSCRIPT DESIGNATIONS	ii
TABLE OF CONTENTS - APPENDIX	iii
TABLE OF CONTENTS – CONFIDENTIAL APPENDIX	iv
TABLE OF AUTHORITIES	v
LEGAL ARGUMENT	1
POINT I: RESPONDENT’S ARGUMENTS DO NOT REFUTE THE ERROR MADE BY THE TRIAL COURT IN FINDING PLAINTIFFS HAD NOT ESTABLISHED PROXIMATE CAUSE.	1
A. Plaintiffs Established Proximate Cause.	2
1. Substantial Factor Causation.	4
2. Proximate Cause Is the Foreseeable Outcome of Negligence.	8
3. Defense Arguments on Medical Causation Are a Red Herring.	8
4. Proximate Cause Is a Matter of Logic and Common Sense.	11
5. Plaintiffs Do Not Have to Show What Would Happen if Defendant Was Not Negligent.	12
POINT II: PLAINTIFFS ESTABLISHED PROXIMATE CAUSE UNDER THE NHA; DEFENDANT’S ARGUMENTS LACK MERIT.	16
POINT III: PLAINTIFFS’ CLAIM FOR PUNITIVE DAMAGES SHOULD HAVE BEEN SUBMITTED TO THE JURY.	21

POINT IV: A TRIAL JUDGE’S PERSONAL PREFERENCE FOR LIVE TESTIMONY CANNOT TRUMP OUR RULES OF COURT.	<u>Page</u> 22
CONCLUSION	24

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	<u>Page</u>
Order for dismissal with prejudice, filed October 12, 2023	Pa1
Order denying reconsideration with Memorandum of Reasons, filed February 21, 2024	Pa2
Reasons on the record for denial of use of corporate designee deposition, dated September 27, 2023	1T24:17
Reasons on the record for dismissal with prejudice, dated October 11, 2023	6T58:25

TABLE OF TRANSCRIPT DESIGNATIONS

1T – Transcript of Motions dated September 27, 2023
2T – Transcript of Trial dated October 3, 2023
3T – Transcript of Trial dated October 4, 2023
4T – Transcript of Trial dated October 5, 2023
5T – Transcript of Trial dated October 10, 2023
6T – Transcript of Trial dated October 11, 2023
7T – Transcript of Hearing dated November 17, 2023

TABLE OF CONTENTS – APPENDIX

(Volume 1 of 1 – Pa1 to Pa103)

	<u>Page</u>
Order for dismissal with prejudice, filed October 12, 2023	Pa1
Order denying reconsideration with Memorandum of Reasons, filed February 21, 2024	Pa2
Complaint, filed March 17, 2020	Pa8
Affidavit of Merit, filed March 17, 2020	Pa43
Curriculum Vitae of Bonnie Tadrick, RN-BC, LNC, CWCA, filed March 17, 2020	Pa45
Answer, filed July 29, 2020	Pa50
Order denying summary judgment, filed June 24, 2022	Pa73
Order denying partial summary judgment, filed September 11, 2023	Pa77
Order to bar testimony of Dr. Ian Hood, filed September 26, 2023	Pa87
Notice of Appeal, filed February 28, 2024	Pa89
Civil Appeal Case Information Statement, filed February 28, 2024	Pa95
Certification of Transcript Delivery, filed March 19, 2024	Pa100
Certification of Transcript Delivery, filed April 15, 2024	Pa101
Certification of Transcript Delivery, filed April 30, 2024	Pa102
Certification of Transcript Delivery, filed September 6, 2024	Pa103

TABLE OF CONTENTS – CONFIDENTIAL APPENDIX

(Volume 1 of 1 – Ca1 to Ca5)

Page

Trial Exhibit P-26, Nurse’s Note, admitted in evidence October 4, 2023 Ca1

Trial Exhibit P-29, excerpt of Interdisciplinary Plan of Care,
admitted in evidence October 4, 2023 Ca3

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Bergquist v. Penterman</u> , 46 N.J. Super. 74 (App. Div. 1957)	9
<u>Bigelow v. RKO Radio Pictures, Inc.</u> , 327 U.S. 251 (1946)	14,15
<u>Butler v. Acme Mkts., Inc.</u> , 89 N.J. 270 (1982)	2
<u>Caputza v. The Lindsay Co.</u> , 48 N.J. 69 (1966)	12
<u>Catalane v. Gilian Instrument</u> , 271 N.J. Super. 476 (App. Div.), <u>certif. denied</u> , 136 N.J. 298 (1994)	21,22
<u>Chin v. St. Barnabus Med. Ctr.</u> , 160 N.J. 454 (1999)	11,12
<u>Cox v. Sears Roebuck & Co.</u> , 138 N.J. 2 (1994)	18
<u>Est. of Davis v. Vineland Operations, LLC</u> , A-2950-11 (App. Div. Jan. 30, 2013) (unpublished) (Da24)	19,20,21
<u>Est. of Kotsovska ex rel. Kotsovska v. Liebman</u> , 221 N.J. 568 (2015)	19
<u>Est. of Narleski v. Gomes</u> , 244 N.J. 199 (2020)	5
<u>Ettin v. Ava Truck Leasing, Inc.</u> , 53 N.J. 463 (1969)	2,3
<u>Evers v. Dollinger</u> , 95 N.J. 399 (1984)	14
<u>Francis v. United Jersey Bank</u> , 87 N.J. 15 (1981)	13
<u>Grassis v. Johns-Manville Corp.</u> , 248 N.J. Super. 446 (App. Div. 1991)	4
<u>Kelly v. Gwinnell</u> , 96 N.J. 538 (1984)	2,3,4,5
<u>Koenig v. Gen. Foods Corp.</u> , 168 N.J. Super. 368 (App. Div. 1979)	4
<u>Komlodi v. Picciano</u> , 217 N.J. 387 (2014)	8
<u>Kulas v. Pub. Serv. Elec. & Gas Co.</u> , 41 N.J. 311 (1964)	7

<u>Cases</u>	<u>Pages</u>
<u>Lanzet v. Greenberg</u> , 126 N.J. 168 (1991)	5,15
<u>Panasonic Indus. Co. v. Emerson Quiet Kool Corp.</u> , 269 N.J. Super. 502 (Law Div. 1993)	23
<u>Powers v. Standard Oil Co.</u> , 98 N.J.L. 730 (Sup. Ct.), <u>aff'd o.b.</u> , 98 N.J.L. 893 (E. & A. 1923)	12
<u>Rappaport v. Nichols</u> , 31 N.J. 188 (1959)	2
<u>Scafidi v. Seiler</u> , 119 N.J. 93 (1990)	4,8
<u>State v. R.B.</u> , 183 N.J. 308 (2005)	19
<u>Stephenson v. R.A. Jones & Co., Inc.</u> , 103 N.J. 194 (1986)	4
<u>Thorn v. Travel Care, Inc.</u> , 296 N.J. Super. 341 (App. Div. 1997)	5,6,7,9
<u>Trinity Cemetery Ass'n v. Twp. of Wall</u> , 170 N.J. 39 (2001)	19
 <u>Constitutions</u>	 <u>Pages</u>
<u>N.J. Const. art. I, ¶9</u>	8
<u>N.J. Const. of 1844 art. I, ¶7</u>	8
 <u>Statutes</u>	 <u>Pages</u>
<u>N.J.S.A. 30:13-1 to -17</u>	1
<u>N.J.S.A. 30:13-1.1</u>	19
<u>N.J.S.A. 30:13-5</u>	20
<u>N.J.S.A. 30:13-5(b)</u>	17
<u>N.J.S.A. 30:13-5(c)</u>	17

<u>Statutes</u>	<u>Pages</u>
<u>N.J.S.A.</u> 30:13-5(d)	17
<u>N.J.S.A.</u> 30:13-5(e)	17
<u>N.J.S.A.</u> 30:13-5(j)	10,16,20
<u>N.J.S.A.</u> 30:13-8(a)	17,20,21

<u>Rules of Court</u>	<u>Pages</u>
<u>N.J.R.E.</u> 803(b)	23
<u>N.J.R.E.</u> 803(b)(1)	23
<u>N.J.R.E.</u> 803(b)(3)	23
<u>R.</u> 1:36-3	19
<u>R.</u> 4:14-2(c)	23
<u>R.</u> 4:15-1	23
<u>R.</u> 4:16-1(b)	22,23,24

<u>Other Authorities</u>	<u>Pages</u>
Model Jury Charge (Civil) 5.77 “Violations of Nursing Home Statutes or Regulations” (Nov. 2023)	19
Model Jury Charge (Civil) 6.11 "Proximate Cause — Routine Tort Case Where No Issues of Concurrent or Intervening Causes, or Foreseeability of Injury or Harm" (Apr. 2016)	4
W. Prosser, <u>Law of Torts</u> § 41 at 242 (4th ed. 1971)	13

LEGAL ARGUMENT

POINT I

RESPONDENT’S ARGUMENTS DO NOT REFUTE THE ERROR MADE BY THE TRIAL COURT IN FINDING PLAINTIFFS HAD NOT ESTABLISHED PROXIMATE CAUSE.

Defendant, Advanced Subacute Rehabilitation Center at Sewell, LLC, mistakenly and repeatedly relies on medical malpractice cases and standards in those cases to argue plaintiffs, Robert F. Burckhardt, Jr., and Sherry Burckhardt-DeMarco, did not establish “medical causation” at bar. This is not, and never was, a medical malpractice case. Any citations to the medical causation standard in medical malpractice cases should be ignored. Those cases and that standard simply do not apply.

This is a case primarily of violations of Mr. Burckhardt’s statutory rights under the Nursing Home Rights and Responsibilities Act, N.J.S.A. 30:13-1 to -17 (“NHA”), and nursing home negligence. Defendant nursing home knew that its resident, Mr. Robert F. Burckhardt, Sr., was at risk for choking on his food because of his inability to swallow and to self-regulate his eating. Recognizing that decedent was a choking risk, defendant, per Mr. Burckhardt’s care plan that defendant drafted, required that a nurse be in the room with him while he was eating to prevent him from choking. There was no nurse in the room while Mr. Burckhardt ate his breakfast. Mr. Burckhardt choked on his food and died. The

only “medical causation” at issue in this case concerned how Mr. Burckhardt died. Plaintiffs’ expert doctor’s un rebutted testimony was that Mr. Burckhardt choked on his breakfast of scrambled eggs, causing him to go into cardiac arrest and die. 5T49:7-14; 5T55:4-8; 5T56:6-7. That is the medical cause and actual cause of Mr. Burckhardt’s death. That is different from proximate cause.

A. Plaintiffs Established Proximate Cause.

Proximate cause or legal cause is the foreseeable consequences of someone’s negligence. “Negligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others.” Rappaport v. Nichols, 31 N.J. 188, 201 (1959); see Butler v. Acme Mkts., Inc., 89 N.J. 270 (1982) (supermarket operator’s negligent failure to provide shoppers with parking lot security proximately caused the injury from an attack). “When negligent conduct creates such a risk, **setting off foreseeable consequences that lead to plaintiff's injury, the conduct is deemed the proximate cause of the injury.**” Kelly v. Gwinnell, 96 N.J. 538, 543 (1984) (emphasis added).

“[A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries.” Rappaport, 31 N.J. at 203; see Ettin v. Ava Truck Leasing Inc., 53 N.J. 463, 483

(1969) (parking tractor-trailer across street is substantial factor in cause of accident when truck with failed brakes collides into trailer). There is no dispute, for purposes of this appeal, that defendant was negligent. The only dispute is whether there was sufficient evidence at trial for a reasonable jury to conclude that that negligence proximately caused Mr. Burckhardt's injuries and death. "The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable." Kelly, 96 N.J. at 544.

Here, it was foreseeable that if a nurse was not in the room to monitor Mr. Burckhardt's intake, to give him cues, to stop him from taking too large bites of food, to alternate liquids with his food, he would choke on his food and, potentially, die. Plaintiffs showed that defendant's own care plan dictated that Mr. Burckhardt have a member of the nursing staff in the room with him to "prevent" him from choking. 4T77:6-11. Without such nursing staff in the room, he was at a "very great risk for aspiration or choking." 4T69:7-8. Having a nurse in the room "immensely decreases his risk of aspiration and choking" because the nurse would "intercept" the choking process immediately. 4T68:23-69:8; 4T69:15-19. Although not having a nurse in the room may not have been the only cause of Mr. Burckhardt's choking, proximate cause was established by showing it was a

substantial factor in his choking and subsequent death.

1. Substantial Factor Causation.

Plaintiffs do not have to prove a single cause, only that defendant's conduct was a substantial factor in causing the injury. Grassis v. Johns-Manville Corp., 248 N.J. Super. 446, 457 (App. Div. 1991). In determining whether a cause is a substantial factor "we do not tell a jury that a significant factor must be" a particular percentage to be deemed substantial **but leave that determination to the fact finder.** See Grassis, 248 N.J. Super. at 446, 457 n.8 (noting that the jury in Stephenson v. R.A. Jones & Co., Inc., 103 N.J. 194, 199 (1986), had "found that a 5% causative factor on the part of a manufacturer was [sufficiently] significant" to constitute a substantial factor in causing the plaintiff's harm). Proximate causation need be only a cause, which sets off a foreseeable sequence of consequences, unbroken by any superseding cause, and which is a substantial factor in producing the injury. Scafidi v. Seiler, 119 N.J. 93, 101 (1990); Model Jury Charge (Civil) 6.11 "Proximate Cause — Routine Tort Case Where No Issues of Concurrent or Intervening Causes, or Foreseeability of Injury or Harm" (Apr. 2016); see Kelly, 96 N.J. at 543. The tortfeasor need not foresee the precise injury; it is enough that the type of injury be within an objective "realm of foreseeability." Koenig v. Gen. Foods Corp., 168 N.J. Super. 368, 373 (App. Div. 1979). The question is "whether [a] reasonably prudent person at the time

and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others' by [their] conduct." Est. of Narleski v. Gomes, 244 N.J. 199, 226 (2020) (quoting Kelly, 96 N.J. at 543). Undoubtedly, defendant foresaw the exact harm that came to pass because it put in place a plan to prevent it from happening. Tragically for Mr. Burckhardt, defendant failed to follow its own care plan.

Moreover, **plaintiffs did not have to show what would have happened if a nurse was in the room.** Defendant argues that in order for plaintiffs to establish defendant's negligence caused Mr. Burckhardt, Sr.'s choking death, they had to establish what would have happened if defendant had not been negligent. That is absurd and contrary to the law on proximate cause and negligence. Moreover, the burden created by the lack of definitive evidence is borne by the party whose wrongful conduct caused that lack of definitive evidence. Lanzet v. Greenberg, 126 N.J. 168, 188 (1991).

The possibility that Mr. Burckhardt may have started to choke anyway does not absolve a negligent defendant from liability. That is simply not the law. In Thorn v. Travel Care, Inc., 296 N.J. Super. 341 (App. Div. 1997), a similar defense argument was rejected. In that case, the plaintiffs argued, among other things, that the defendants' negligent maintenance of a seat belt proximately caused the injuries of Maria Thorn. Id. at 343. Neither of the plaintiffs' experts testified that had the

plaintiff been wearing her seatbelt, she would not have been injured. Defendants contended that the plaintiffs' experts' testimony was insufficient to establish proximate cause because "she had the burden to demonstrate by expert testimony that an operable seat belt would have prevented those injuries." Ibid. In much the same way, the trial court here required plaintiffs to show that had a nurse been in the room with Mr. Burckhardt, he would not have choked. "There's not an opinion that had a staff member been with Mr. Burckhardt while eating he would not have choked." 6T64:10-17.

The defendants in Thorn moved for a directed verdict at the close of the plaintiffs' case arguing that plaintiffs failed to sustain their burden of proof with respect to proximate cause on the negligent maintenance of the seat belt claim. The trial judge denied defendants' motion, wisely ruling that "[t]he plaintiff is not required to prove that if [she] had used a good safety belt . . . she would not have sustained . . . injury." Id. at 345. On appeal, the defendants maintained that the trial court erred because "it was plaintiffs' burden to demonstrate through expert testimony that plaintiffs' injuries would not have occurred had she been wearing a seat belt." Id. at 345-346. The Appellate Division affirmed the trial court's decisions, finding that the plaintiffs did not have to prove that the negligent maintenance of the seatbelt was **the** cause of plaintiffs' injuries; they had to prove only that it was a substantial factor in those injuries occurring. Id. at 348.

Further, the Thorn court held that to meet a plaintiff's burden of proving proximate causation, a plaintiff is not obligated to provide "direct, indisputable evidence," as the trial court here required. Id. at 347. Rather, "the matter may rest on legitimate inference." Ibid. "[A]lthough plaintiffs bear the burden of proving causation, 'they are not obliged to establish it by direct, indisputable evidence.' Instead, '[t]he matter may rest upon legitimate inference, so long as the proof will justify a reasonable and logical inference as distinguished from mere speculation.'" Id. at 347 (quoting Kulas v. Pub. Serv. Elec. & Gas Co., 41 N.J. 311, 319 (1964)). "Construing all inferences in favor of plaintiffs, we conclude that a jury could draw 'a reasonable and logical inference' that defendants' negligent failure to furnish an operable seat belt was a substantial factor in causing plaintiffs injuries, a conclusion clearly predicated upon more than 'mere speculation.' See Kulas, supra, 41 N.J. at 319." Thorn, 296 N.J. Super. at 348.

The same is true at bar. Construing all inferences in favor of plaintiffs, a jury could draw a reasonable and logical inference that defendant's negligent failure to have a nurse supervising Mr. Burckhardt while he ate was a substantial factor in causing Mr. Burckhardt's death from choking, a conclusion clearly predicated on more than mere speculation. After a three-week trial, the evidence on proximate cause adduced at trial was sufficient to submit to the jury on that issue. Plaintiffs established that not having a nurse in the room with Mr.

Burckhardt while he ate was negligent and that negligence was a substantial factor in his choking death.

2. Proximate Cause Is the Foreseeable Outcome of Negligence.

"Foreseeability is a constituent part of proximate cause." Komlodi v. Picciano, 217 N.J. 387, 417 (2014). Foreseeability is determined by an objective standard, namely, whether "a reasonably prudent, similarly situated person would anticipate a risk that [his or] her conduct would cause injury or harm to another person." Id. at 417-18. Thus, if "the injury or harm suffered was within the realm of reasonable contemplation, the injury or harm is foreseeable." Id. at 418. Once a prima facie showing is established, "[p]roximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court." Scafidi, 119 N.J. at 101. For the court below to take this case from the jury was a glaring error and a violation of plaintiffs' inviolate right to trial by jury. N.J. Const. art. I, ¶9 ("The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons."); N.J. Const. of 1844 art. I, ¶7 (the "right of trial by jury shall remain inviolate").

3. Defense Arguments on Medical Causation Are a Red Herring.

Defendant nursing home incorrectly conflates medical causation with proximate causation; repeatedly stating that Nurse Tadrack could not opine on "medical causation." She did not have to do so! This is not a medical malpractice

case; medical causation is not at issue in this appeal. The use of those defense arguments serves merely to distract this Court from the pertinent issue at bar.

Contrary to the position of the trial court and defendant, plaintiffs did not need to provide an expert to say the magic words “proximate cause” for a jury to find proximate cause in this case. Plaintiffs are not required to establish proximate cause by “direct, indisputable evidence.” Thorn, 296 N.J. Super. at 347. Rather, “[t]he matter may rest upon legitimate inference.” Ibid. Nurse Tadrick was perfectly qualified to offer opinions from which a jury could infer proximate cause. She is a registered nurse who has vast experience working in nursing homes. She neither had to be an expert on medical causation nor use the words proximate cause for a jury to understand that the nursing home’s negligence put Mr. Burckhardt at an increased risk of choking. She did not have to testify to the ultimate issue in this case. Rather, her testimony and that of plaintiffs’ other witnesses, provided the circumstantial evidence by which a jury could find proximate cause. “Plaintiff’s burden of proving proximate cause can be established by circumstantial evidence.” Bergquist v. Penterman, 46 N.J. Super. 74, 89 (App. Div. 1957).

Moreover, inherent in Nurse Tadrick’s testimony were the elements of proximate cause. She established the foreseeability of the harm that could befall Mr. Burckhardt if he was not supervised while eating. The very harm that the care plan

was meant to prevent came to pass because defendant failed to follow that plan. Documented in his medical records was Mr. Burckhardt's difficulty in swallowing, which left Mr. Burckhardt at "a much higher risk of aspiration and choking." 4T:41:6-13. Also documented in those records was Mr. Burckhardt's inability to "self-control" and that he needed someone in the room with him while eating to "encourage [him] to take small sips and bites." 4T60:4-25; Pa89; Pa91.

Defendant knew that Mr. Burckhardt had "poor safety awareness" and was "impulsive," meaning that he had poor self-monitoring skills to avoid large amounts of food in his mouth at one time. 4T61:7-14. Ensuring he alternated his liquids and solids and took smaller bites of food were "interventions" that were important for his care so he could "swallow more safely." 4T61:15-22. A nurse was required to be in the room when Mr. Burckhardt was eating to encourage him, to monitor him and to ensure those interventions were followed "to keep him safe." 4T62:3-24; Pa91-93. Notably, one of the rights that were violated under the statutory cause of action was the right to a **safe** and decent living environment. N.J.S.A. 30:13-5(j).

A nurse was required to be in Mr. Burckhardt's room while he was eating to "monitor for signs and symptoms of aspiration." That was "very important" for Mr. Burckhardt's individualized care because he had dysphagia and had prior episodes of low oxygen saturation and prior incidents of choking while eating.

4T63:1-12; 4T64:22-65:2. Left alone, Mr. Burckhardt was at a “very great risk for aspiration or choking.” 4T69:7-8. If a nurse had been in the room with Mr. Burckhardt, they could “very quickly intercept if there’s any sign of coughing or that he is having difficulty swallowing and help can be summoned immediately if needed.” 4T69:15-19. By intercepting, you “reduce the risk of aspiration or choking.” 4T71:2-7. Mr. Burckhardt required supervision and monitoring while he was eating his meals and needed a nurse to be there in the event something would happen and **“to prevent him from choking or having aspiration.”** 4T77:6-11. A reasonable jury could certainly conclude from those facts that defendant’s negligence was a cause of Mr. Burckhardt’s choking death.

4. Proximate Cause Is a Matter of Logic and Common Sense.

Defendant argues that “[t]he jurors in this case could not be expected to know whether the alleged breach of the standard of care was a cause of Plaintiff’s alleged damages, based on their own common knowledge, so therefore expert testimony was necessary to establish proximate cause.” Db11. That argument, based on the common knowledge doctrine, is raised in medical malpractice cases as an exception to the general rule that a deviation from the standard of care requires expert testimony. “The doctrine of common knowledge is appropriately invoked where the ‘carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience.” Chin v. St. Barnabus Med. Ctr.,

160 N.J. 454, 469 (1999) (citations omitted).

Again, this is **not** a medical malpractice case with complex medical issues. Defendant's citation to medical malpractice cases and standards have no application at bar.

Nor is there any dispute on appeal that plaintiffs established defendant's breach of its duty to keep Mr. Burckhardt safe. Most importantly, in this simple negligence case, on the evidence at trial, a reasonable jury could certainly infer that had a nurse been in the room with Mr. Burckhardt, as required, that nurse could have prevented him from choking. As such, the failure to have a nurse in the room while he was eating was a substantial factor in his choking death. That is not rocket science. That is pure common sense and within the purview of any juror's common knowledge. The doctrine of proximate cause is based on "logic, common sense, justice, policy and precedent." Caputzal v. The Lindsay Co., 48 N.J. 69, 78 (1966) (quoting Powers v. Standard Oil Co., 98 N.J.L. 730, 734 (Sup. Ct.), aff'd o.b., 98 N.J.L. 893 (E. & A. 1923)).

5. Plaintiffs Do Not Have to Show What Would Happen if Defendant Was Not Negligent.

Defendant claims, without any citation to the record, that "for the first time on appeal, "plaintiffs are arguing that 'it was Defendant's burden on proximate cause, and not Plaintiffs.'" Db19. That mischaracterization of plaintiffs' position is manufactured (1) because defendant has no legitimate rebuttal to the point

plaintiffs actually make and (2) because defendant seeks to distract this Court from the real issue. The entire basis for defendant's argument below and the lower court's opinion was plaintiffs' inability to present definitive evidence of what would have happened had a nurse been present when Mr. Burckhardt was eating. "There's not an opinion that had a staff member been with Mr. Burckhardt while eating he would not have choked." 6T64:10-17. "There's no testimony in the record saying that Mr. Burckhardt, Sr. was taking too big of a bite at the time, or that he wasn't taking sips, or that he was doing anything different than he would have been doing had someone been in there cuing him to do that." 6T67:11-19. Had a nurse or anyone been in the room with Mr. Burckhardt while he was eating, we would know exactly why he choked on his food. That person could tell us how big a bite he was taking etc. The injustice of the trial court's ruling is obvious. The level of evidence required by the trial court was foreclosed by defendant, because of its negligence.

Accordingly, the law provides that plaintiffs are not required to produce the very evidence that defendant's malfeasance prevented from being produced. Where a case involves nonfeasance, no one can say "with absolute certainty what would have occurred if the defendant had acted otherwise." Francis v. United Jersey Bank, 87 N.J. 15, 45 (1981) (citing W. Prosser, Law of Torts § 41 at 242 (4th ed. 1971)). That absence of a smoking gun, created by defendant's negligence

and omission, does not immunize defendant from being held to answer for its negligent conduct.

Plaintiffs never argued that it was defendant's burden and not plaintiffs to show proximate cause as an element of its negligence claim. Plaintiffs did argue – correctly, as a matter of law – that they are not required to show what would have happened had defendant not been negligent, as the trial court erroneously required. In addition to the arguments made supra at 4-7, that is so because defendant's wrongdoing has prevented plaintiffs from providing that definitive evidence.

Even *arguendo* if plaintiffs required an expert to discuss what would have happened had defendant nursing home not violated Mr. Burckhardt, Sr.'s nursing home resident rights and not been negligent, unless that expert had a crystal ball, they could not possibly say how big a bite Mr. Burckhardt took or how many sips of liquid he took while eating on his own. That is not, as defendant spuriously argues, an attempt to burden-shift by plaintiffs but rather, a well-settled principle of law that embraces logic and common sense. It has been fully briefed already. See Pb16-17. “Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.” Evers v. Dollinger, 95 N.J. 399, 417 (1984) (citation omitted)).

Here, plaintiffs were denied the right to reach the jury on the presumptively factual issue of proximate cause, thereby permitting defendant to benefit from its

negligent failure to abide by its own care plan and the evidentiary uncertainties that failure created. “The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). Plaintiffs could not unequivocally say what would have happened if defendant had not been negligent **because defendant was negligent**. That does not absolve defendant, as the motion judge correctly held when denying defendant’s summary judgment motion. Pa75. The burden created by the lack of definitive evidence is borne by the party whose wrongful conduct caused that lack of definitive evidence. Lanzet v. Greenberg, 126 N.J. 168, 188 (1991). The point is the burden of establishing what would happen if there was no negligence is on defendant, not plaintiffs. Put another way, it was defendant’s burden to show he would have choked and died even if a nurse was in the room. That is not part of plaintiffs’ burden in establishing proximate cause. Plaintiffs established that the violation of Mr. Burckhardt, Sr.’s rights and defendant’s negligence in not having a nurse present, in direct violation of the care plan defendant created, was a substantial, foreseeable factor leading to Mr. Burckhardt, Sr.’s tragic death by choking. Because plaintiffs established proximate cause, plaintiffs are entitled to reversal and remand.

POINT II

PLAINTIFFS ESTABLISHED PROXIMATE CAUSE UNDER THE NHA; DEFENDANT'S ARGUMENTS LACK MERIT.

As a preliminary matter, the issue of whether plaintiffs were entitled to redress for the conceded violation of Mr. Burckhardt's rights without establishing proximate cause is moot because plaintiffs did establish proximate cause. Moreover, contrary to defendant's argument and opinion, nowhere in the NHA does it state that a plaintiff must prove that the violation of his rights caused actual damages.

Although a plaintiff may recover actual and punitive damages under the Act, actual damages is not a prerequisite for a plaintiff to be entitled to relief under the Act. That is so because of the nature of the residents whose rights are affected and the nature of the rights being protected. Many residents lack the capacity to incur actual damages. For example, a resident suffering from dementia left for hours in his soiled clothing, parked in a hallway, has certainly had his right to "a safe and decent living environment and considerate and respectful care that recognizes [his] dignity and individuality" violated under N.J.S.A. 30:13-5(j) even if his lack of awareness of his state makes the violation hard to quantify or unquantifiable. The NHA exists to protect residents and to deter unacceptable care for those who constitute an at-risk class under the public policy of this State. Lack of cognition

that would cause actual damages does not make the conduct any less of a violation of the Act.

Similarly, the violations of some of the protected rights do not cause actual damage other than the injury that is inherent in the violation itself. For example, a plaintiff is entitled to the following rights: “to wear his own clothing,” N.J.S.A. 30:13-5(b); “to retain and use his personal property,” N.J.S.A. 30:13-5(c); “to receive and send unopened correspondence,” N.J.S.A. 30:13-5(d); and “unaccompanied access to a telephone,” N.J.S.A. 30:13-5(e). Those rights are entitled to redress but, again, may not be quantifiable or may cause no actual damage. Even under those circumstances, a plaintiff who vindicates his or her rights by establishing a violation would be considered a “plaintiff who prevails” under the statute and entitled to attorney’s fees and costs.

Pursuant to N.J.S.A. 30:13-8(a), “Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation Any plaintiff who prevails in any such action **shall** be entitled to recover reasonable attorney's fees and costs of the action.” N.J.S.A. 30:13-8(a). That relief is mandatory per the statute. Just as a plaintiff in a Consumer Fraud Act (“CFA”) case does not have to prove an ascertainable loss to be entitled to attorney’s fees and costs, a plaintiff in an NHA case does not have to prove actual damages to be entitled to attorney’s fees and costs. “A plaintiff in a

consumer-fraud action can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages.” Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994).

The CFA and the NHA are considered remedial legislation. As our Supreme Court noted in Cox regarding the CFA and is also true of the NHA, “[a]lthough one purpose of the legislation is clearly remedial in that it seeks to compensate a victim's loss, the Act also punishes the wrongdoer by awarding a victim treble damages, attorneys' fees, filing fees, and costs. In that sense, the Act serves as a deterrent.” Id. at 21. There would be no deterrent to nursing homes mistreating their most at-risk residents if attorney’s fees and costs are not awarded where a violation of rights has been found in the absence of legally recognized damages. Given the vulnerability of nursing home residents, the focus on human dignity of the enumerated rights and the intent to deter inferior treatment by nursing homes, failure to provide for fee-shifting in such cases would substantially undermine the legislative purpose of the NHA.

The violation itself is compensable. That is the reason the Model Jury Charge does not require proximate cause. As indicated by the Model Jury Charge and Sample Verdict Sheet, a jury is not required to answer questions of proximate cause for the statutory violations of rights under the NHA but may still award

damages for such violations. The current Verdict Sheet that appears with Model Civil Jury Charge 5.77 omits any question of proximate cause for the statutory claims and asks only whether there was a violation and what amount is to be awarded for such violation(s). That is not based on a change in the law. Rather, it is based on an understanding that proximate cause is not a requirement to prove the statutory cause of action for violation of a nursing home resident's rights. That **statutory** cause of action has existed since November of 1976. N.J.S.A. 30:13-1.1.

Although defendant disparages the importance of the Model Jury Charges, our Supreme Court has held otherwise. The Model Jury Charges "should be followed and read in their entirety to the jury." State v. R.B., 183 N.J. 308, 325 (2005). If a model charge is "applied to a dispute" that was "contemplated" by its drafters and read to the jury in a context that reflects "the specific purpose for which the charge was adopted," the trial court's "reliance" on it carries a "presumption of propriety." Est. of Kotsovska ex rel. Kotsovska v. Liebman, 221 N.J. 568, 596 (2015).

Defendant's argument based on the unpublished case of Estate of Davis v. Vineland Operations, LLC, Da24, similarly misses the mark. Preliminarily, it is of no precedential value. An unreported decision "serve[s] no precedential value, and cannot reliably be considered part of our common law." Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); see R. 1:36-3. Further, it is not the least bit

persuasive as it is completely dissimilar to the facts at bar. Defendant mistakenly claims that the plaintiff in that matter, “asserted a negligence claim and a violation of N.J.S.A. 30:13-5(j), just as Plaintiff did in this case.” Db32. **Although it is true plaintiffs did make both claims in this case, it is false that the plaintiff did so in the Davis case.** In Davis, the reason that the trial court did not award attorney’s fees and the appellate court affirmed that decision was specifically because the plaintiff in Davis **did not** make a statutory claim under the NHA. The court stated: “N.J.S.A. 30:13-8(a) authorizes payment of reasonable attorney's fees to nursing home residents where their rights as enumerated in N.J.S.A. 30:13-5 are violated. As the trial judge observed, however, the **plaintiff did not assert ‘a violation of the statutory rights afforded by the [A]ct.’** Although plaintiff in Davis alleged some causes of action created by the Nursing Home Bill of Rights, the actual jury instructions, verdict sheet and recovery were all based on theories of ordinary negligence and not on a violation of any patient rights.” Slip op. at 11 (emphasis supplied). In **this** case, plaintiffs’ primary cause of action is the statutory violations of rights under the NHA, along with claims of nursing home negligence, both of which are covered under Model Civil Jury Charge 5.77. Unlike the Davis plaintiff, plaintiffs here have zealously pursued the statutory claims of violations of rights under the NHA, with the jury to be instructed regarding those statutory violations and negligence claims under the jury charge.

Moreover, the opinion in Davis had **nothing to do** with proximate cause. In Davis, the plaintiff offered no evidence of pain and suffering. “It was plaintiff's obligation to establish decedent's pain and suffering; the trial record is devoid of such proofs.” Slip op. at 7. Plaintiffs are at a loss to understand why defendant cited this unpublished, unhelpful case. Nonetheless, plaintiffs have established proximate cause and this case should be remanded for trial.

POINT III

PLAINTIFFS’ CLAIM FOR PUNITIVE DAMAGES SHOULD HAVE BEEN SUBMITTED TO THE JURY.

N.J.S.A. 30:13-8(a) expressly states that punitive damages are recoverable for a violation of rights under the statute. “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.**” Ibid. The violation itself then gives rise to the ability of a plaintiff to recover punitive damages. There is no dispute that the court below found plaintiffs had presented enough evidence for a jury to determine that the defendant nursing home had violated Mr. Burckhardt’s statutory rights. Accordingly, it was for a jury to decide whether he was entitled to punitive damages for that violation.

In Catalane v. Gilian Instrument, 271 N.J. Super. 476 (App. Div.), certif. denied, 136 N.J. 298 (1994), this Court stated that “[t]he jury should have been

instructed that to warrant an award of punitive damages, the defendant's conduct must have been exceptional in nature, **rising to the level of wanton or reckless conduct.**” Id. at 501. Contrary to defendant’s assertion that plaintiffs needed to show “wrongdoing in the sense of an evil-minded act,” Db37, the above-quoted language in Catalane makes clear that wanton or **reckless conduct** is sufficient to support a finding of punitive damages under the Law Against Discrimination, a remedial statute like the NHA. Because plaintiffs’ NHA violation claim should have been submitted to the jury, the dismissal of plaintiffs’ claim for punitive damages was premature and erroneous. As with the other claims, the resolution of that issue was for the jury on the record presented.

POINT IV

A TRIAL JUDGE’S PERSONAL PREFERENCE FOR LIVE TESTIMONY CANNOT TRUMP OUR RULES OF COURT.

Because this issue may come up again at the retrial of this matter, if permitted by this Court, plaintiffs have sought a ruling that the trial court’s decision barring plaintiffs’ use of the videotaped deposition of defendant’s corporate designee under Rule 4:16-1(b) was an abuse of discretion. That Rule clearly and unequivocally allows an adverse party to use the deposition of a corporate designee against the deponent or the corporate defendant **for any purpose**. The Rule provides:

“The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose against the deponent or the corporation, partnership, association or agency.”

[R. 4:16-1(b) (emphasis added).]

Defendant does not dispute the legitimacy of plaintiffs’ claim, rather the nursing home argues that it was not an abuse of the trial judge’s discretion because live testimony is favored and, if anything, it is harmless error. Db40-41. Although plaintiffs concede that the resolution of this issue does not impact the main issue at bar, the ruling is still patently erroneous and should be clarified for remand and future trials. The trial court completely missed the point of the Rule.

Rule 4:16-1(b) is based on the hearsay exceptions for vicarious admissions contained in N.J.R.E. 803(b). Panasonic Indus. Co. v. Emerson Quiet Kool Corp., 269 N.J. Super. 502, 506 (Law Div. 1993). In particular, pursuant to N.J.R.E. 803(b)(3), "When a person is authorized by a party to make a statement concerning the subject," the statement is deemed an admission by the party itself. There is no unavailability requirement per the applicable Rule because admissions by a party opponent are admissible without regard to the declarant's availability. See also N.J.R.E. 803(b)(1) (statement is not excluded by the hearsay rule when the “statement is offered against a party-opponent and is: (1) the party-opponent’s own

statement, made either in an individual or in a representative capacity.”).

The trial court’s overly narrow reading of Rule 4:16-1(b) to apply to use of deposition testimony only against the deponent is contrary to the clear and unambiguous language of the Rule. The Rule applies to the deponent or the corporate party. The testimony “may be used by an adverse party for any purpose against the deponent **or the corporation.**” R. 4:16-1(b) (emphasis supplied). The trial judge improperly denied plaintiffs’ request to play portions of the corporate designee’s video-taped deposition testimony under oath for the jury. The trial court’s misinterpretation of the law was error.

CONCLUSION

For the foregoing reasons and those detailed in plaintiffs’ Opening Brief, plaintiffs are entitled to a reversal of the order dismissing their claims and remand of the cause for a new trial.

Respectfully submitted,

**LAW OFFICE OF
ANDREW A. BALLERINI, ESQ.**
Counsel for Plaintiffs-Appellants

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

Dated: February 20, 2025