
TERESA DUNNE, individually, § SUPERIOR COURT OF NEW JERSEY
and in her capacity as the § APPELLATE DIVISION
Administrator of the Estate of §
LOUIS DOTO, SR.; ANN MARIE §
TRASATTI; and LOUIS DOTO, JR. §
PLAINTIFFS/APPELLANTS §

v.

BP & SC SERVICES INC.; § APPEAL FROM FINAL JUDGMENT
ADVANCED SUBACUTE §
REHABILITATION CENTER § OF THE SUPERIOR COURT OF
AT SEWELL LLC; EMILCOTT § NEW JERSEY, GLOUCESTER
ASSOCIATES, INC.; § COUNTY
CONFIDENCE SERVICES, INC.; § DOCKET NO. GLO-L-0769-22
CONFIDENCE SERVICES, LLC; §
CONFIDENCE MANAGEMENT § APPELLATE
SYSTEMS, LLC; SC & BPS § DOCKET NO. A-002559-24
SERVICES, INC.; BP & SC, INC.; §
COMPREHENSIVE CLEANING §
CLEANING COMPANY, INC.; §
COMPREHENSIVE CLEARING §
COMPANY, INC.; 685 SALINA § SAT BELOW:
HEALTHCARE MANAGEMENT, § THE HON. BENJAMIN D. MORGAN
LLC; ADVANCED ASSOCIATES § J.S.C.
AT SEWELL, LLC; ADVANCED §
HEALTHCARE MANAGEMENT §
AT SEWELL, LLC; ADVANCED §
HEALTHCARE MANAGEMENT, § SUBMITTED: June 16, 2025
LLC; GLOUCESTER §
HEALTHCARE PROPERTIES, §
LLC; N. FRIED CORPORATION; §
NATHAN FRIEDMAN; EDWARD §
FRIEDMAN; FAMILY OF §
CARING LLC; CHESTNUT RIDGE §
HEALTHCARE, LLC d/b/a §
FAMILY OF CARING §

HEALTHCARE; §
CHESTNUT RIDGE §
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HEALTHCARE; CHESTNUT §
RIDGE CARE ASSOCIATES, LLC §
d/b/a FAMILY OF CARING §
HEALTHCARE; CHESTNUT §
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FAMILY OF CARING §
HEALTHCARE; §
JOHN DOE #1-10 (a fictitious §
name designating the owner, §
operator, maintainer, §
possessor, lessor, lessee, §
entity and/or individual §
legally responsible: for the §
care, control and/or safety §
of the premises); and ABC §
CORP. #1-10 (a fictitious §
corporation designating the §
owner, operator, maintainer, §
possessor, lessor, lessee, §
entity and/or corporation §
legally responsible for the §
care, control and/or safety §
of the premises) §
DEFENDANTS/RESPONDENTS §

**APPELLANT’S AMENDED BRIEF IN SUPPORT OF APPEAL FROM
FINAL JUDGMENT,
SUMMARY JUDGMENT ORDERS OF FEBRUARY 28, 2025,
THE HON. BENJAMIN D. MORGAN, J.S.C., PRESIDING**

ON THE BRIEF:

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I

PRELIMINARY STATEMENT

Plaintiff/Appellant decedent, Louis Doto, Sr. was employed by BP&SC Services, an outside vendor that provided housekeeping services at Advanced Subacute Rehabilitation Center (“ASRC”) a rehabilitation facility under the ownership and supervision of Defendants. Mr. Doto worked as a laundry aide in ASRC beginning in June of 2015. In December of 2020 Mr. Doto ultimately contracted COVID-19, testing positive on December 23, 2020 and succumbing to the disease and ultimately dying on January 18, 2021.

The instant Appeal concerns three issues: 1) whether reasonable jurors could conclude that Defendants’ were grossly negligent for failing to properly handle the potentially deadly COVID-19 pandemic; 2) whether it should be left to a jury to decide if Louis Doto was an employee of BP&SC and not Defendant ASRC, and thus, not subject to the exclusive remedy of the Workers’ Compensation Act; whether Plaintiffs’ expert opinions do explain a causal link between Defendants’ breaches of the standards of care and Louis Doto’s death.

II

PROCEDURAL HISTORY

The instant action was commenced by Complaint filed on or about July 28, 2022, which was subsequently Amended on several occasions, with Plaintiffs filing a Third Amended Complaint on July 25, 2024. Advanced Subacute filed an Answer to Plaintiff's Third Amended Complaint on August 13, 2024.

On October 11, 2024, Defendants/Respondents Advanced Subacute Rehabilitation Center at Sewell, LLC; Advanced Healthcare Management, LLC; N. Fried Corporation; Nathan Friedman; Edward Friedman; and Family of Caring, LLC filed a Motion for Summary Judgment. Pa1307. On October 29, 2024, Plaintiffs/Appellants filed an opposition to the Motion for Summary Judgment (Pa1312), as well as a Cross-Motion for Summary Judgment. Pa1310. On November 4, 2024, Defendants/Respondents Advanced Subacute Rehabilitation Center at Sewell, LLC; Advanced Healthcare Management, LLC; N. Fried Corporation; Nathan Friedman; Edward Friedman; and Family of Caring, LLC filed an opposition to Plaintiffs/Appellants' Cross-Motion for Summary Judgment. Pa1313.

Oral argument was held on November 13, 2024.² On February 28, 2025, the Hon. Benjamin D. Morgan, J.S.C. Granted Defendants/Respondents Motion for Summary Judgment (Pa1314) and Denied Plaintiffs/Appellants' Cross-Motion for Summary Judgment. Pa1317. On March 20, 2025, Plaintiff filed a Motion for Reconsideration. Oral argument was held on April 11, 2025.³

The instant Appeal follows.

² 1T: Transcript of Argument, Motion for Summary Judgment November 13, 2024

³ 2T Transcript of Argument, Motion for Reconsideration, April 11, 2025

III

STATEMENT OF FACTS

Plaintiffs'/Appellants' decedent, Louis Doto, Sr. was employed by BP&SC Services, an outside vendor that provided housekeeping services at Advanced Subacute Rehabilitation Center ("ASRC") a rehabilitation facility under the ownership and supervision of Defendants. Pa001. Mr. Doto worked as a laundry aide in ASRC beginning in June of 2015. In December of 2020 Mr. Doto ultimately contracted COVID-19, testing positive on December 23, 2020 and succumbing to the disease and ultimately dying on January 18, 2021.

The contract that governed the relationship between ASRC and BP&SC explicitly states that the laundry personnel remain employees of BP&SC, not ASRC. Further, the contract explicitly states that BP&SC are exclusively responsible for properly securing coverage for workers compensation for employees. Finally, the contract allows BP&SC and BP&SC's workers' compensation carrier to inspect ASRC premises for the purpose of promoting job safety. Pa137. The designee on behalf of BP&SC testified that the language explicitly identifying the true employer of the workers was purposefully included in the contract to prevent ASRC from "poaching" BP&SC's employees. Consistent with the relationship, BP&SC hired, trained and paid its employees, not ASRC. BP&SC employees recorded their time on a system controlled by

BP&SC, not Defendants. He further testified while he was employed by BP&SC, he was assigned to various rehabilitation centers owned by entities other than Defendants. Pa143. BP&SC employees had been working at the facility now known as ASRC, prior to its acquisition by its present owners. Pa165.

For all important purposes, BP&SC remained in control of its employees that worked at ASRC. In fact, BP&SC assigned a specific supervisor to work onsite at ASRC, who was ultimately responsible for the training and supervision of all of the BP&SC employees working at ASRC. The BP&SC employees worked at ASRC. However, it was BP&SC that controlled almost every aspect of the work done by the laundry personnel at ASRC. Pa143. In fact, the designee on behalf of BP&SC and Defendants' Designee both agreed: The laundry personnel were employees of BP&SC, not Defendants. Pa194.

Agency protocols, policies, and procedures with which ASRC was required to comply are contained within a CMS survey form titled "COVID-19 Focused Survey for Nursing Homes". This document states the following requirements for interaction with a resident with known or suspected COVID-19: "staff must wear gloves, isolation gown, eye protection and an N95 or higher-level respirator if available. A facemask is an acceptable alternative if a respirator is not available. When COVID-19 is identified in the facility, staff

wear all recommended PPE for the care of all residents on the unit, regardless of symptoms”. It is clear that individuals entering the room of a resident known or suspected to be COVID-19 positive were required to wear an N95 mask. Pa244. Sheila Smith, an employee of BP&SC who worked alongside Mr. Doto in the laundry department, testified that during the relevant time period, as part of her assigned duties, she would personally deliver laundry directly to each individual patient room. Pa165. Ms. Smith further testified as to the “breaking down” of laundry by Mr. Doto, which included the handling of laundry contained in red “COVID bags” and isolation bins, which contained laundry from the rooms of COVID-19 positive patients. The repeated handling of this laundry further exposed Mr. Doto to aerosol exposure to COVID-19. Pa165. Mr. Doto was required to wear an N95 mask while performing his duties at ASRC.

Further, per OSHA guidelines regarding the use of the N95, which included medical clearance, training, and fit testing. However, fit testing of laundry staff was first performed on December 23, 2020, after Mr. Doto had contracted COVID-19. Pa255. As a result of the death of Mr. Doto, an OSHA inspection was performed at ASRC, which resulted in the issuance of several citations related to the respiratory protection program. These violations were designated as “serious”. Pa287 and Pa572. A “serious” violation is defined as

there existing a substantial probability that death or serious physical harm could result and that the employer knew, or should have known, of the hazard. Pa572. These citations indicate that ASRC did not provide medical evaluation to determine the employee's ability to use a respirator, before the employee was fit tested or required to use a respirator in the workplace, and ASRC failed to fit test employee prior to the initial use of the respirator. Pa572. In effect, during the entirety of the COVID-19 pandemic until his ultimate death, ASRC failed to fit test the N95 worn by Mr. Doto, in violation OSHA regulations and industry standards, a violation which ASRC knew or should have known carried with it a substantial probability that death or serious physical harm could result.

The Director of Nursing at ASRC, Darrae Fornito, was part of the team that established all of the protocols concerning COVID-19 at ASRC – protocols that governed through the entirety of the COVID-19 pandemic. Accordingly, Ms. Fornito has first-hand knowledge regarding Defendants' COVID-19 protocols, at all material times. Pa597. In addition, through her testimony Ms. Fornito provided strong and compelling evidence that Defendants were reckless and willfully indifferent to the known and potentially deadly risk presented by COVID-19. For example, Ms. Fornito testified that Defendants allowed one of its own administrators, a woman named Monica Helwig, to walk freely throughout ASRC without wearing a mask of any kind in April 2020 – in clear

violation of federal regulations, state regulations, county regulations, as well as Defendants' own established COVID-19 protocols. Alarming, Ms. Helwig had just recently spent time inside facilities in northern New Jersey, which was nationally recognized at the time as a COVID "hot spot". More alarmingly, Ms. Helwig had recently tested positive for COVID-19. When finally confronted by Ms. Fornito, rather than express regret and put on a mask, Ms. Helwig responded with anger. Pa597.

During her deposition, Ms. Fornito further testified that the ASRC experienced a notable spike in COVID-19 infections, after Ms. Helwig left ASRC in April 2020. Pa597. Defendants have produced to Plaintiffs OSHA 300 Forms for 2020 and the beginning of 2021, which it claims were filed with the Gloucester County Department of Health. The OSHA 300 Forms are notable. In 2020, Defendants reported forty-eight (48) cases of work-related injury or illness. Of those forty-eight (48) instances, forty-seven (47) are identified as "respiratory conditions", in other words, COVID-19. Moreover, the veracity of the OSHA 300 Forms submitted by Defendants is at issue. It is glaring that Mr. Doto is not identified on any of those OSHA 300 Forms, despite him clearly testing positive in December 2020. Pa632.

Laundry personnel like Louis Doto were not at all kept separate and apart from other staff at ASRC – although they should have been. Instead, during the

COVID-19 pandemic Defendants forced laundry personnel to cluster into a room for training sessions with various other staff who worked throughout ASRC, none of whom were issued N95 masks. Pa640 and Pa643. It should also be noted that, according to the designee for BP&SC, OSHA issued a citation because housekeepers, who attended the training sessions with Louis Doto, were revealed to have been cleaning the rooms of patients with COVID-19. Pa143.

Lauren Pote, Administrator of ASRC during the relevant time period, testified as to the importance of having a qualified infection preventionist onsite at ASRC. Pa194. Additionally, ASRC's Outbreak Response Plan, dated April 15, 2020 lists the infection preventionist as first on the membership roster of the facility Infection Prevention Team. Pa686. Nevertheless, ASRC did not have a dedicated infection preventionist for most of the calendar year of 2020, despite the COVID-19 pandemic. Pa691. In fact, only in October of 2020 was Patricia Chmura-Saez hired as a regional infection preventionist. Pa701. More alarmingly, Ms. Chmura-Saez testified that she physically visited ASRC on only two occasions in the year of 2020, and that she was unfamiliar with the operations and specific job tasks performed at ASRC. Pa701. Defendants did not take any steps to adequately assess job specific hazards for non-healthcare staff, like Mr. Doto, at ASRC for the year 2020. Pa701.

Despite the promulgation by OSHA of COVID-19 Healthcare Worksite Checklist & Employee Job Hazard Analysis, ASRC failed to create and document a job hazard analyses for each and every job at ASRC. Such an analyses would have indicated the specific risks experienced by each worker while undertaking their assigned job tasks in order to put in place the controls to mitigate those risks. Pa888. Paramount to transmission prevention of COVID-19 is physical distancing and separation of individuals. Nevertheless, the testimony of Ms. Smith and BP&SC onsite supervisor Walter Rosas indicates that housekeepers, laundry workers, and porters were required to enter rooms occupied by COVID-19 positive patients in order to perform their job tasks, at a time when the N95 respirators in use had not been fit tested. Pa165, Pa255 and Pa890. Further, ASRC held regular in-service training sessions in which large groups of individuals—including at times combinations of healthcare and non-healthcare employees—would congregate, again at a time when laundry workers were using N95 respirators that had not been properly fit tested. Pa640 and Pa255. In addition to COVID-19 risk mitigation deficiencies, ASRC was also deficient in its resident COVID-19 surveillance efforts during the first several months of the pandemic. In fact, consultant and roaming nurse supervisor Monica Helwig testified that she observed an overreliance on x-rays as a COVID-19 diagnostic tools, expressing concern regarding the lack of

implantation of proper testing of residents during the summer of 2020, which contributed to an undetected outbreak of COVID-19 at ASRC. Pa1034.

Plaintiffs produced three expert reports in this case. First, the report of Hernando Perez, Ph.D., MPH, CIH, CSP. The expert report of Dr. Hernandez details the litany of ways by which Defendants showed a willful disregard for the safety of workers, most particularly the non-clinical staff; Defendants showed a willful disregard toward the detection, prevention, and response to COVID-19; Defendants failed to timely assign a qualified and competent Infection Preventionist, despite know of the potentially deadly consequences of an individual contracting COVID-19; Defendants failed to timely and adequately establish, implement and enforce industry standard risk mitigation protocols; Defendants failed to adequately train and supervise staff; Defendants failed to properly medically evaluate and fit test individuals for N95 respirators; Defendants willfully exposed non-clinical workers to COVID-19; Defendants continued to hold meetings and training sessions, increasing the likelihood of transmission; and, Defendants violated OSHA Respiratory Protection Standards, resulting in the issuance of two “serious” violations. Pa1166.

The second expert report from Julian Rich, FACHCA CNHA details the litany of ways by which Defendants exhibited a willful disregard for the detection and prevention of the spread of COVID-19 and resultant disregard for

the safety, health and welfare of all staff, including contract staff like Mr. Doto namely, failure to employ an infection preventionist specifically assigned to ASRC prior to and during the pandemic; failure to appropriately lab test to detect and track COVID-19; failure to appropriately fit-test workers; failure to prevent co-mingling as well as exposure to infect materials; failure to provide resources to protect residents and staff and maintain regulatory compliance. Pa1227.

The third expert report from Emil Lesho, DO, FACP, FIDSA, FSHEA details the litany of ways by which Defendants showed a willful disregard for the safety of workers through deviations of standard infection control practice and regulatory violations illustrate Defendants substandard conduct and disregard for the safety of people inside ASRC, especially laundry and housekeeping personnel; those deviations and violations elevated the risk of transmission of COVID-19 among residents and staff at ASRC. Pa1242. Most importantly, Dr. Lesho opines to within a reasonable degree of medical certainty that Louis Doto, Sr. acquired his infection at ASRC from close contact with asymptomatic and/or pre-symptomatic co-workers who had close contact with other infected staff and patients/residents. Pa1242.

IV

JURISDICTIONAL AUTHORITY

Appeals may be taken to the Appellate Division as of right, from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts. N.J. R. 2:2-3(a)(1).

The Court Order of February 28, 2025, entered summary judgment in favor of Respondents, thereby constituting final judgment in this matter.

As the February 28, 2025, Order for Summary Judgment constitutes final judgment, Appellants hereby appeal the ruling of February 28, 2025, pursuant to R. 2:2-3(a)(1).

The Scope of Review in this matter is governed by N.J. R. 2:10-2, the de novo standard. In reviewing summary judgment orders, the propriety of the trial court's order is a legal, not factual, question. See Fernandez v. Nationwide Mut. Ins., 402 N.J. Super. 166, 170 (App. Div. 2008), aff'd o.b., 199 N.J. 591 (2009); Ohio Cas. v. Island Pool & Spa, 418 N.J. Super. 162, 168 (App. Div.), certif. Den. 206 N.J. 329 (2011). Thus, the appellate court applies the same standard as the trial court in respect of the same motion record. See Templo Fuente v. Nat. Union Fire, 224 N.J. 189, 199 (2016). That is, the movant is entitled to judgment if, on the full motion record, the adverse party, who is required to have the facts

and inferences viewed most favorably to it, has not demonstrated a prima facie case. See, e.g. C.W. v. Cooper Health System, 388 N.J. Super. 42, 57 (App. Div. 2006). It is, in effect, a sufficiency of evidence test. See Winstock v. Galasso, 430 N.J. Super. 391, 395-396 (App. Div.), certif. Den. 215 N.J. 487 (2013) (reversing summary judgment order dismissing legal malpractice claims when the evidence presented sufficient disagreement to require submission to a jury). Consequently, an appellate court must consider the correctness of the decision below based on the case only as it has unfolded to the point of the motion, and the evidential material submitted on that motion. Lombardi v. Masso, 207 N.J. 517, 542 (2011).

V

LEGAL ARGUMENT

The Orders of February 28, 2025, granting Summary Judgment and dismissing Appellants' claims while denying Appellants' request for Summary Judgment must be overturned, as genuine issues of material fact remain, which must be resolved by a fact finder. The determination of whether there exists a genuine issue of material fact requires the court to consider whether the competent evidence presented, when viewed in the light most favorable to the non-moving party, is sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The standard for granting Summary Judgment mandates that the evidence must be viewed in the light most favorable to the non-moving party. In the instant matter, Summary Judgment granted as to Respondents must be reversed and remanded. Summary Judgment denied as to Appellant must also be reversed.

On April 1, 2020, Governor Murphy issued Executive Order No. 112, providing broad immunity to healthcare facilities and healthcare providers responding to the COVID-19 pandemic. The provisions contained in this Executive Order were subsequently enacted into New Jersey's COVID-19

Immunity Statute, retroactively effective as of March 9, 2020. The statute provides in relevant part:

[A] health care facility or a health care system . . . shall not be liable for civil damages for injury or death alleged to have been sustained by an act or omission by one or more of its agents, officers, employees, servants, representatives or volunteers . . . [in the course of providing medical services in support of the State’s response to the outbreak of coronavirus disease during the public health emergency and state of emergency declared by the Governor].
[. . .]

Immunity shall also include any act or omission undertaken in good faith by a healthcare professional or healthcare facility or a healthcare system to support efforts to treat COVID-19 patients and prevent the spread of COVID-19 during the public health emergency and state of emergency declared by the Governor[.]

2020 N.J. Sess. Law Serv. Ch. 18.

Point 1: Reasonable jurors could certainly conclude, based on all of the evidence, that Defendants were grossly negligent in the many ways they failed to properly handle the potentially deadly COVID-19 pandemic (1T⁴: 20:18 – 38:25)

Background

Advanced Subacute Rehabilitation Center (ASRC) is a 139-bed for-profit skilled nursing facility/nursing home located in Sewell, New Jersey. The skilled nursing facility, i.e., nursing home, is part of a group of New Jersey based facilities owned and operated by the Respondents. The facility was rated at two stars out of five, a below average score based on the five-star rating system

⁴ 1T: Transcript of Argument, Motion for Summary Judgment November 13, 2024

developed by the Centers for Medicare and Medicaid Services (CMS). Pa1227.

Skilled nursing facilities are required to comply with both Federal regulations and with state-specific regulations and standards, including the regulations for long-term care facilities and the Federal regulations which established minimum standards for facilities receiving Medicare and Medicaid funding. The governing body and facility administrators are responsible for overseeing the operations of facilities and ensuring compliance with applicable laws, as well as with policies and procedures. Pa1227.

Facilities like ASRC must operate and provide services in compliance with all applicable Federal, New Jersey and local laws, regulations and codes, and with accepted professional standards. Of special significance is that all skilled nursing facilities were provided with extensive, mandatory standards to protect residents and staff from the deadly Covid infections by numerous government agencies, including but not limited to the Center for Disease Control (CDC), the Center for Medicare and Medicaid Services (CMS), as well as other New Jersey agencies. These standards did not eliminate the requirement that ASRC comply with existing, pre-Covid regulations such as infection control. Pa1227.

The magnitude of the COVID-19 pandemic, including the number and rate of infections, as well as the number and rate of fatalities, resulted in the

Declaration of a Public Health Emergency by Governor Philip D. Murphy in the State of New Jersey on March 9, 2020. This was followed by Presidential Proclamation 9994 of March 13, 2020 titled Declaring of a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. These declarations granted emergency authority to various federal and state agencies to establish and enforce rules and guidelines to prevent the spread of COVID-19. In nursing home facilities, these rules and guidelines covered several topics such as hygiene and cleaning, general infection control practices, separation of residents, proper use of personal protective equipment, contact tracing, social distancing, facility inspection, and infection reporting, among others. Pa1166.

Defendants owed a duty to keep its patients, staff, and other business invitees such as Mr. Doto safe from COVID-19 infection during the ongoing pandemic. This duty required compliance with various federal and state agency rules, protocols, policies and procedures. This duty further required the establishment of internal facility policies and protocols consistent with industry standards and government guidance. Laundry personnel like Louis Doto were not at all kept separate and apart from other staff at ASRC – although they should have been. Instead, during the COVID-19 pandemic Defendants forced laundry personnel to cluster into a room for training sessions with various other staff who worked throughout the entire facility, none of whom were issued N95

masks. Forcing the laundry personnel, who were otherwise isolated, to cluster into a room with various staff who worked throughout the facility, was reckless and evidences a willful disregard for the safety of those particular workers. Forcing the laundry personnel, who were otherwise isolated, to cluster into a room with various staff who worked throughout the facility, was reckless and evidences a willful disregard for the safety of those particular workers.

**IT WAS GROSSLY NEGLIGENT FOR ADVANCED TO FAIL TO
TIMELY DESIGNATE A QUALIFIED, COMPETENT AND DILIGENT
INFECTION PREVENTIONIST**

Patricia Chmura-Saez was hired as a regional infection preventionist in October 2020, far too late in the pandemic given. The lack of having an infection preventionist at the facility for over a seven-month period during a global pandemic is just one of several facts that shows the ineptitude of Respondents. Even when Respondents finally hired an infection preventionist, she was not designated specifically for ASRC, but rather for all Respondents' locations. The testimony of Ms. Chmura-Saez indicates that she was clearly unqualified for the job of infection preventionist. She testified that she had no knowledge as to job specific duties of laundry workers like Mr. Doto. Without knowledge as to the duties and tasks being performed by the laundry workers, she was completely ill-equipped to develop and implement minimum industry standard infection control measures in order to protect these workers.

Ms. Chmura-Saez's deposition testimony indicates that she physically visited Advanced on only two occasions in calendar year 2020 and that she was unfamiliar with the operations and specific job tasks performed at Advanced. This lack of on-site presence in combination with her lack of familiarity with the specific job tasks performed by workers at Advanced resulted in her being unable to adequately assess the risk of occupational COVID-19 transmission at the facility. An adequate assessment of task-based risk was necessary for the development and implementation of risk control measures specific to the job tasks at the facility. For example, she would have been unable to determine what measures were required to prevent infection of Ms. Smith when she entered COVID-positive rooms to deliver personal laundry, or to prevent infection to Mr. Doto when breaking down laundry from the rooms of COVID-positive residents, if she did not know that Ms. Smith and Mr. Doto were performing these tasks. The deposition testimony of Ms. Chmura-Saez clearly indicates that Advanced neglected to take minimum industry standard infection control measures to adequately protect facility employees and residents.

**IT WAS GROSSLY NEGLIGENT FOR ADVANCED TO FAIL TO
TIMELY ESTABLISH AND IMPLEMENT ADEQUATE PROTOCOLS
TO DETECT COVID**

Monica Helwig was a roving nurse for Family of Caring. At some point in the summer of 2020, she took over temporarily as the Director of Nursing at

ASRC. Upon arrival, she was surprised that ASRC was not doing labs to see who at the facility had COVID-19. The other locations where she worked had already been doing labs. Knowing that labs are the only way to confirm the diagnosis, she brought this to the attention of corporate. Corporate authorized her to start getting labs, and as a result, ASRC starting finding COVID-19 in the facility. As described by Ms. Helwig, they discovered an outbreak at the facility. Implementing labs that late on the pandemic was in violation of an Executive Directive from the New jersey Department of Health. ASRC should have been doing labs months prior to when it did not only to uphold its duty under the law but to uphold its duty to its patients, including Mr. Doto.

**IT WAS GROSSLY NEGLIGENT FOR ADVANCED TO
CONTINUE TO ALLOW NON-CLINICAL WORKERS INTO COVID
ROOMS WHEN THEY HAD NOT BEEN FIT-TESTED TO WEAR
AN N-95 MASK**

Fit testing is vital to the wearing of any tight fitting respirator as the complete seal of the respirator to the wearer's face ensures that no airborne contaminant, including airborne SARS-CoV-2, bypasses the filtration media resulting in exposure and potential infection. The only way to confirm that a respirator will effectively protect the wearer from airborne contaminants is to fit test. Because it is not possible to know if a respirator is protective unless properly fitted, fit testing is an essential step in the use of tight-fitting respirators. The defendants did not perform any fit testing for personnel at

Advanced until August 2020. The testing at this time was only performed on clinical staff. The defendants did not fit test non-clinical workers, including laundry workers, housekeepers and porters until December 2020, after it became known that Louis Doto had become COVID-19 positive. The defendants had these non-clinical workers, including Ms. Sheila Smith, enter COVID-19 positive and suspected rooms without providing fit testing from the onset of the pandemic, through December 2020.

Any and all employees at Advanced entering the rooms of COVID-19 positive or COVID-19 suspected residents should have been required to wear an N95 filtering facepiece respirator in addition to gloves, a gown and eye protection. OSHA and CMS allowed for flexibility in this requirement for facilities experiencing respirator shortages. This type of shortage was not an issue for Advanced as the facility administration did not have difficulty in obtaining N95 respirators as is documented from the deposition of Lauren Pote.

IT WAS GROSSLY NEGLIGENT FOR ADVANCED TO CONTINUE TO GATHER WORKERS IN LARGE GROUPS DESPITE THE COVID PANDEMIC

Physical separation of individuals was a primary transmission prevention measure during the COVID-19 pandemic. OSHA stated the following in its COVID-19 Healthcare Worksite Checklist & Employee Job Hazard analysis

tool: “Employers must implement physical distancing along with the other provisions of the ETS as part of a multi-layered strategy to minimize employee to COVID-19.” While ASRC facility administrators, including Ms. Pote and Ms. Chmura-Saez, suggest in their deposition testimonies that these types of worker separation policies were in place at advanced in the year 2020 during the pandemic, the testimony of workers contradicts this. For example, Ms. Pote stated that while housekeepers entered COVID rooms, laundry workers did not. This contradicts the testimony of Ms. Smith. Mr. Chmura-Saez stated that no housekeepers, porters or laundry workers were permitted in COVID rooms. This is contradicted by the previously referenced OSHA citations as well as by the testimony of Ms. Smith and of Mr. Walter Rosas. Mr. Rosas was the on-site supervisor of laundry workers, housekeepers and porters at ASRC from approximately August 2020 until 2023. During his testimony he stated that housekeepers, laundry worker Ms. Smith, and porters would be required to enter COVID rooms to perform their job tasks.

The requirement of these workers to enter COVID rooms represented a significant risk of occupational SARS-CoV-2 infection. It is clear that ASRC understood this risk and issued N95 respirators to these workers as a result. However, the requirement of these individuals to enter COVID rooms with respirators for which they were not medically cleared or fit tested put them at

unacceptable risk of SARS-CoV-2 infection. This level of risk is documented in OSHAs categorization of these violations as “Serious” due to the substantial probability that death or serious physical harm could result and that the employer knew, or should have known, of the hazard.

In addition to the above-described risk associated with entering COVID rooms without adequate respiratory protection, ASRC held regular in-service training sessions in which large groups of individuals, including at times combinations of healthcare and non-healthcare employees, would congregate. These group sessions represented high-risk of transmission to non-healthcare personnel due to their close proximity to several other individuals and to their use N95 respirators in these meetings for which they were not medically cleared or fit tested. Additionally, laundry workers would routinely leave the laundry areas and enter other physical areas of the facility during the course of their shifts. These other areas included bathrooms and breakrooms. ASRC should have taken steps to ensure more effective cohorting and separation of different groups of employees to reduce this risk of infection transmission. These steps should have included separate time windows for cohorts of employees to enter break rooms and training by occupational cohorts only. The failures to ensure physical separation of individuals at ASRC exhibit Respondents’ willful

disregard and indifference toward the safety of people at ASRC, including Louis Doto.

**IT WAS GROSSLY NEGLIGENT FOR ADVANCED TO ALLOW
HOUSEKEEPERS AND LAUNDRY PERSONNEL TO HANDLE A
"COVID BAG"**

The 2007 guideline for isolation precautions from the Health Care Infection Control Practices Advisory Committee to the CDC states that as Standard Precautions for the care of all patients in healthcare settings, textiles and laundry should be handled in a manner that prevents transfer of microorganisms to others and to the environment. The guidelines acknowledge that while bedding, towels and resident clothing may be contaminated with pathogenic microorganisms, the risk of transmission is negligible if the items are handled in a safe manner. This safe manner includes avoidance of handling in any way that may aerosolize infectious agents. During deposition, Ms. Smith described the “breaking down” of laundry by Mr. Doto. This included the handling of laundry contained in red “COVID bags” and isolation bins. These COVID bags contained laundry from the rooms of COVID positive residents. This breaking down and additional handling generated airborne SARS-CoV-2 in Mr. Doto’s breathing zone. This routine and repeated occupational exposure would have resulted in the requirement for Mr. Doto to be enrolled in an advanced respiratory protection program compliant with OSHA’s Respiratory

Protection Standard 1910.134. ASRC was required to comply with 1910.134 whenever any employee was required to wear an N95 or any other tight-fitting respirator. The requirements of this mandatory OSHA standard include medical clearance, training and respirator fit testing. None of these requirements were met for Mr. Doto at any time during his employment at Advanced.

**IT WAS GROSSLY NEGLIGENT FOR ADVANCED TO ALLOW
ITS STAFF TO WALK THROUGH THE FACILITY
WITHOUT WEAR A MASK**

Corporate management involvement was at least monthly visits by Monica Hellwig who was the regional nurse consultant assigned to the facility. She visited other facilities operated by ownership which were known to have extensive Covid outbreaks. The Director of Nurses, Ms. Fornito, in deposition, indicated that Ms. Hellwig refused to wear a mask when asked and potentially spread COVID infections throughout the facility because of her defiance, a poor example for staff and residents as well as an indication that the governing body, i.e., ownership, was not fulfilling their ultimate responsibility to oversee a facility expected to maintain compliance.

**PURSUANT TO ITS INVESTIGATION AFTER THE DEATH OF LOUIS
DOTO OSHA DETERMINED THAT ADVANCED SHOWED A
DISREGARD FOR THE SAFETY OF PEOPLE AT ITS FACILITY
DESPITE KNOWING IT COULD RESULT
IN SERIOUS INJURY OR DEATH**

The OSHA investigation was conducted on behalf of the death of Mr. Doto and concluded that the facility failed to protect employees against Covid. Of significance was that housekeeping and laundry personnel congregated together (contrary to infection control principles during the pandemic), that housekeeping personnel were required to go into resident rooms without proper protective equipment, appropriate fit testing, or medical evaluation. This was confirmed in the depositions by Mr. Doto's coworkers, including Sheila Smith, Walter Rosas and Dwight Collins. Importantly, fit testing of protective N95 masks (i.e., respirators) did not begin until August 2020 and only direct care staff was tested. Nonclinical staff was not fit tested until December 2020, the month that Mr. Doto contracted Covid, and housekeeping, porter and laundry staff continued to enter rooms occupied by Covid-positive and Covid-exposed residents.

On two occasions in March and June 2021, the facility was inspected by the US Department of Labor to investigate the death of Mr. Doto. The facility received two "serious" citations reflecting that staff was unnecessarily exposed to Covid because they were required to go into resident rooms before medical evaluation and fit-testing: ASRC did not provide a medical evaluation to determine an employee's ability to use a respirator (i.e., N95 mask) before the employee was tested or required to use the respirator in the workplace; and

employees using tightfitting facepiece respirators were not fit tested prior to initial use of the respirator (i.e., N95 mask). The effectiveness of the mask could not be determined without proper fit testing. The facility was fined close to \$25,000 for these citations which were described as contributing to the unsafe conditions as described herein that led to the death of Mr. Doto.

In sum, Defendants showed a willful disregard for the safety of workers, most particularly the non-clinical staff; Defendants showed a willful disregard toward the detection, prevention, and response to COVID-19; Defendants failed to timely assign a qualified and competent Infection Preventionist, despite knowing of the potentially deadly consequences of an individual contracting COVID-19; Defendants failed to timely and adequately establish, implement and enforce industry standard risk mitigation protocols; Defendants failed to adequately train and supervise staff; Defendants failed to properly medically evaluate and fit test individuals for N95 respirators; Defendants willfully exposed non-clinical workers to COVID-19; Defendants continued to hold meetings and training sessions, increasingly the likelihood of transmission; and, Defendants violated OSHA Respiratory Protection Standards, resulting in the issuance of two “serious” violations.

Point 2: It should be left to a jury to decide whether Louis Doto was an employee of BP&SC and not Defendant ASRC, and thus, not subject to the exclusive remedy of the Workers’ Compensation Act (1T: 13:12 - 20:16)

Under well-established law in the state of New Jersey a worker remains an employee of their direct employer if the direct employer retains control over the worker for important purposes, to include hiring, training, supervision and payment. Volb v. GE Capital Corp., 651 A.2d 1002 (1995). Kelly v. Geriatric & Medical Services, Inc., is the controlling law on whether a temp employee is barred from recovery from the employer where he works every day. 287 N.J. Super. 567, 571-72, 671 A.2d 631 (App. Div. 1996). Kelly established a 5-pronged test to determine whether a leased or borrowed employee is a “special employee” of the employer he is leased to, the “special employer.” If he is a special employee, the exclusive remedy bar of the NJ WCA applies to the special employer. The five-pronged test to establish a special employer-special employee relationship considers: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done by the employee is essentially that of the special employer; (3) the special employer has the right to control the details of the work; (4) the special employer pays the employee’s wages; and (5) the special employer has the power to hire, discharge or recall the employee.

Here, several prongs are not met. First, Louis Doto, Sr. did not make a contract of hire, express or implied, with ASRC. The contract that governed the relationship between ASRC and BP&SC explicitly states that the laundry

personnel remain employees of BP&SC, not ASRC. Further, the contract explicitly states that BP&SC are exclusively responsible for properly securing coverage for workers compensation for employees. Finally, the contract allows BP&SC and BP&SC's workers' compensation carrier to inspect ASRC premises for the purpose of promoting job safety. (Cross MSJ -See Exhibit 14; See also Exhibit 15, 28-36.). The designee on behalf of BP&SC testified that the language explicitly identifying the true employer of the workers was purposefully included in the contract to prevent ASRC from "poaching" BP&SC's employees. Thus, the first prong of the Kelly test is not met.

Second, prongs three and four are not met because ASRC did not control the details of the work performed by Louis Doto, Sr. and did not pay him. BP&SC hired, trained and paid its employees, not ASRC. BP&SC employees recorded their time on a system controlled by BP&SC, not Defendants. The designee on behalf of BP&SC testified that while he was employed by BP&SC, he was assigned to various rehabilitation centers owned by entities other than Defendants. BP&SC remained in control of its employees that worked at ASRC. In fact, BP&SC assigned a specific supervisor to work onsite at ASRC who was ultimately responsible for the training and supervision of all of the BP&SC employees working at ASRC. Although the BP&SC employees worked at ASRC, it was BP&SC that controlled almost every aspect of the work done by

the laundry personnel at ASRC. The designee on behalf of BP&SC and Defendants' Designee both agreed: The laundry personnel were employees of BP&SC, not Defendants.

Lastly, prong five is not met because ASRC did not have the power to hire, discharge or recall the Mr. Doto. The power to hire, discharge or recall Mr. Doto was completely in the power of BP&SC. Therefore, Mr. Doto was an employee of BP&SC and not Defendant ASRC, and thus, not subject to the exclusive remedy of the Workers' Compensation Act. At the very least, whether Mr. Doto was an employee of ASRC or not should be left for the jury to decide.

Point 3: Plaintiffs' expert opinions do explain a causal link between Defendants' breaches of the standards of care and Louis Doto's death (1T: 33 -37:22)

The presentation of scientific evidence and the use of expert witness testimony are crucial to the litigation of matters involving future loss of earning capacity. Expert witnesses serve as interpreters and translate specialized knowledge into knowledge of common understanding to enable ordinary laypersons to comprehend and decide complex issues, which jurors ordinarily would not understand.

While the qualifications of an expert as a basis for excluding expert witness testimony have received less attention lately, the New Jersey case law may be viewed as a microcosm of the national experience in this area. A court's initial inquiry ordinarily involves the qualification of the expert witness under the appropriate rules

of evidence. The rules, however, do not establish any express standards by which a trial court can determine whether the proffered witness has the requisite experience, training or education to qualify as an expert. The expert witness qualification standards are found in New Jersey Rule 702 which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Although the rules fail to provide standards for determining the adequacy of a witness' proffered qualifications, the commentator's language is certainly geared to a liberal approach. See Mitchell, *The Proposed Federal Rules of Evidence: How They Affect Product Liability Practice*, 12 Duq.L.Rev. 551, 563-64 (1974) (Rule 702 expands the scope of political expert witnesses to "any area of 'specialized' knowledge and expands the scope of when the testimony may be used to whenever it is 'helpful' to the trier of fact); Biunno, *Current N.J.Rules of Evidence*, Comment 3 to Evid.R. 19 (1991) (trial court has broad discretionary power to allow or exclude expert testimony).

Thus, whether a witness has the appropriate qualifications to testify as an expert on a particular subject in New Jersey continues to depend on the expert's knowledge, skill and experience in that area. In the case In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 855-56 (3d Cir.1990), the court concluded that the

trial court had abused its discretion by excluding portions of testimony from several experts, specifically a toxicologist and an epidemiologist. The circuit court reviewed the witnesses' respective qualifications and concluded that "[i]n light of the liberal Rule 702 expert qualification standard" the experts should not have been precluded from testifying "simply because the experts did not have the degree or training which the district court apparently thought would be most appropriate." In re Paoli, 916 F.2d at 856; see also DeLuca v. Merrell Dow Pharmaceutical, Inc., 911 F.2d 941 (3d Cir.1990), revised, 131 F.R.D. 71 (D.N.J.1989) (the circuit court concluded that a witness should not be precluded from testifying as an expert simply because of the absence of a particular degree, without also considering the witness' experience, knowledge and specific training.)

This brief overview of New Jersey and Third Circuit case law indicates that both formal education and practical experience can suffice to qualify an individual as an expert, even absent particularized experience. In short, there are no mechanical rules or objective standards upon which to evaluate an expert's qualifications. The judicial trend, however, certainly appears to be in favor of admissibility as long as the expert's qualifications comply with the broad language of the applicable evidence rule. There does not appear to be an argument that Plaintiffs' experts lack the qualifications, knowledge, skill, training and/or education in the field of vocational economics, that would warrant the barring of his expert testimony in the

relevant field. Therefore, the Court’s analysis must only focus upon the substantive opinions offered by Plaintiffs’ experts, to which Defendants herein object.

The “net opinion rule” has been thoroughly discussed both in this jurisdiction and others. The New Jersey case law has held that a qualified expert opinion is admissible to assist the jury (N.J.R.E. 702), but there must be a factual and scientific basis for an expert’s opinion. Rubanick, 125 N.J. 421, 593 A.2d 733 (1991). An opinion lacking in foundation is worthless. Stanley Co. of America v. Hercules Powder Co., 16 N.J. 295, 305, 108 A.2d 616 (1954). When an expert’s opinion is merely a bare conclusion unsupported by factual evidence, i.e., a “net opinion,” it is inadmissible. Buckelew v. Grossbard, 87 N.J. 512, 524, 435 A.2d 1150 (1981); In re Yaccarino, 117 N.J. 175, 564 A.2d 1184 (1989). In essence, the net opinion rule requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion. As the Supreme Court stated, this rule “frequently focuses ... on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting there from.” Id. at 87 N.J. at 524, 435 A.2d 1150. Where ... an expert offers an opinion without providing specific underlying reasons for the alleged malfunction, he ceases to assist the trier of fact and becomes nothing more than an additional juror. Jimenez v. GNOC, Corp., 286 N.J.Super. 533, 540, 670 A.2d 24 (App.Div.) (parallel citations omitted), certif.

denied, 145 N.J. 374, 678 A.2d 714 (1996). See also Rubanick, 242 N.J.Super. at 48-51, 576 A.2d 4 (discussing net opinion).

Notably, the case law does not say that other potential causes or contradictory findings make an expert's finding a net opinion. In fact, recent case law suggests that "[f]ailure of an expert to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if the expert otherwise offers sufficient reasons which logically support [their] opinion; rather, such an omission merely becomes a proper subject of exploration and cross-examination at a trial." N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 703." Rosenberg v. Tavorath, 352 N.J.Super. 385 (App.Div. 2002), 800 A.2d 216.

A. Expert Report of Hernando Perez, Ph.D., MPH, CIH, CSP

Hernando Perez, Ph.D., MPH, CIH, CSP is well qualified in the field of industrial hygiene. Dr. Perez has been certified as an industrial hygienist by the American Board of Industrial Hygiene since 2006. He further has been certified as a safety professional by the Court of Certified Safety Professionals since 2008. Dr. Perez is a member of the American Conference of Governmental Industrial Hygienists and the American Industrial Hygiene Association. He has published and presented dozens of peer reviewed papers on a host of topics related to industrial hygiene and related topics.

In preparing his expert report in the instant matter. Dr. Perez reviewed

numerous journal articles, standard textbooks, other authorities as well as material published by the Occupational Safety and Health Administration, National Institute for Occupational Safety and Health, Environmental Protection Agency, Centers for Disease Control and Prevention, National Institute of Allergy and Infectious Disease, National Institute of Environmental Health Sciences, and New Jersey Department of Health. Dr. Perez also reviewed volumes of materials directly related to the instant matter including discovery responses, deposition transcripts, and other materials contained within the evidentiary record, all of which is explicitly referenced in Dr. Perez's expert report.

In brief, Dr. Perez is well qualified to offer his opinions and testimony as to the response and mitigation efforts of Defendants to the COVID-19 pandemic. Dr. Perez's report details, at length, the standards of care violated by Defendants. Dr. Perez's report cites to a litany of examples of how the response and mitigation efforts of Defendants showed a shocking disregard for the safety and well-being of its staff and patients, especially the non-clinical staff. Dr. Perez offers nowhere near what could be qualified as a net opinion, but rather painstakingly details each individual failure of Defendants to adhere to appropriate standards and practice in the context of a pandemic of COVID-19's proportions. Accordingly, the report and testimony of Dr. Perez will assist the trier of fact in making the fact-based determination as to whether Defendants violated the duty owed to Mr. Doto—and

others—to keep the subject premises reasonably safe from COVID-19 infection during the then-ongoing pandemic.

B. Expert Report of Julian Rich, FACHCA CNHA

Julian Rich, FACHCA CNHA is well qualified in the field of nursing homes, assisted living facilities, and other senior care/post-acute/rehab facilities. Mr. Rich has served in an administrative capacity at various hospitals, rehabilitation centers and nursing centers for over forty-five years. Mr. Rich has published and presented extensively on topics largely related to compliance within the field of rehabilitation and nursing centers. Mr. Rich has previously served as an expert witness in topics related to compliance, marketing, labor relations, quality assurance, and fundraising to organizations in the long-term care fields. Mr. Rich has been a member of the American College of Health Care Administrators for over forty years, and maintains and Fellowship and Nursing Home Administrator Certification status with that organization, have served on both the national board of directors, as well as president of the Massachusetts chapter.

In preparing his expert report in the instant matter, Mr. Rich reviewed the relevant state and federal regulatory standards relating to administration of long-term care facilities, infection control within long term care facilities, and infection preventionist within long term care facilities, as well as relying on his own extensive experience within the industry. Mr. Rich also reviewed volumes of materials

directly related to the instant matter including discovery responses, deposition transcripts, and other materials contained within the evidentiary record, all of which is explicitly referenced in Exhibit I attached to Mr. Rich's expert report.

In brief, Mr. Rich is well qualified to offer his opinions and testimony as to the response and mitigation efforts of Defendants to the COVID-19 pandemic. Mr. Rich's report details, at length, regulatory and policy failures committed by Defendants. Mr. Rich's report cites to a litany of examples of how regulatory and policy failures of Defendants showed a shocking disregard for the safety and well-being of its staff and patients, especially the non-clinical staff. Mr. Rich offers nowhere near what could be qualified as a net opinion, but rather painstakingly details each individual failure of Defendants to adhere to appropriate standards and practice in the context of a pandemic of COVID-19's proportions. Accordingly, the report and testimony of Mr. Rich will assist the trier of fact in making the fact-based determination as to whether Defendants violated the duty owed to Mr. Doto—and others—to keep the subject premises reasonably safe from COVID-19 infection during the then-ongoing pandemic.

C. Expert Report of Emil Lesho, DO, FACP, FIDSA, FSHEA

Emil Lesho, DO, FACP, FIDSA, FSHEA is well qualified in the field infectious diseases. Dr. Lesho is a licensed physician, and the Program Director for Healthcare Epidemiology at Rochester Regional Health. Dr. Lesho is also board

certified in internal medicine. He serves as a fellow of the Infectious Diseases Society of America, and a fellow of the American College of Physicians. Dr. Lesho has co-authored nearly two hundred papers in-reviewed scientific literature and has lectured extensively on various internal medicine and infectious disease topics. Dr. Lesho served as a member of the COVID-19 Incident Command Team for Rochester Regional Health from 2020 until it was disbanded in 2023. He presently serves as a Clinical Professor of Medicine at the University of Rochester School of Medicine and Dentistry.

In preparing his expert report in the instant matter, Dr. Lesho reviewed the relevant New Jersey Executive Directive and subsequent legislative codification as well as relying on his own extensive experience within the field of infectious disease. Dr. Lesho also conducted an epidemiologic-based interview of Mr. Doto's daughters. Dr. Lesho also reviewed volumes of materials directly related to the instant matter including discovery responses, deposition transcripts, and other materials contained within the evidentiary record, all of which is explicitly referenced in Dr. Lesho's expert report.

In brief, Dr. Lesho is well qualified to offer his opinions and testimony as to the response and mitigation efforts of Defendants to the COVID-19 pandemic. Dr. Lesho's report details, at length, regulatory and policy failures committed by Defendants. Dr. Lesho's report cites to a litany of examples of how clinical failures

of Defendants showed a shocking disregard for the safety and well-being of its staff and patients, especially the non-clinical staff. Dr. Lesho offers nowhere near what could be qualified as a net opinion, but rather painstakingly details each individual failure of Defendants to adhere to appropriate standards and practice in the context of a pandemic of COVID-19's proportions. Accordingly, the report and testimony of Dr. Lesho will assist the trier of fact in making the fact-based determination as to whether Defendants violated the duty owed to Mr. Doto—and others—to keep the subject premises reasonably safe from COVID-19 infection during the then-ongoing pandemic.

VI

CONCLUSION

Based upon the foregoing, Appellants respectfully requests that this Honorable Court reverse Summary Judgment granted to Respondents on February 28, 2025, and Granting Appellants' Cross-Motion for Summary Judgment against the Defendants. Plaintiff respectfully requests that this matter be remanded for trial upon the meritorious issues.

Respectfully submitted,

**SPEAR, GREENFIELD
RICHMAN, WEITZ & TAGGART, P.C.**

/s/ Marc F. Greenfield

MARC F. GREENFIELD, ESQUIRE

**TERESA DUNNE, individually,
Administrator of the Estate of §
LOUIS DOTO, SR.; ANN MARIE
§
TRASATTI; and LOUIS DOTO,
JR. §
PLAINTIFFS/APPELLANTS,**

Plaintiff/Appellant,

vs.

**BP & SC SERVICES INC.;
ADVANCED SUBACUTE
REHABILITATION CENTER AT
SEWELL LLC; EMILCOTT
ASSOCIATES, INC.;
CONFIDENCE SERVICES, INC.;
CONFIDENCE SERVICES, LLC;
CONFIDENCE MANAGEMENT
SYSTEMS, LLC.; SC & BPS
SERVICES, INC.; BP & SC, INC.;
COMPREHENSIVE CLEANING
COMPANY, INC.;
COMPREHENSIVE CLEARING
COMPANY, INC.; 685 SALINA
HEALTHCARE MANAGEMENT,
LLC; ADVANCED ASSOCIATES
AT SEWELL, LLC; ADVANCED
HEALTHCARE MANAGEMENT
AT SEWELL, LLC; ADVANCED
HEALTHCARE MANAGEMENT,
LLC; GLOUCESTER
HEALTHCARE PROPERTIES,
LLC; N. FRIED CORPORATION;
NATHAN FRIEDMAN; EDWARD
FRIEDMAN; FAMILY OF
CARING, LLC; CHESTNUT
RIDGE HEALTHCARE, LLC**

**SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION**

**APP. DIV. DOCKET NO.: A-002559-
24**

Civil Action

ON APPEAL FROM Superior Court of
New Jersey Law Division – Gloucester
County

Docket No. GLO-L-0769-22

SAT BELOW:

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

d/b/a FAMILY OF CARING HEALTHCARE; CHESTNUT RIDGE HEALTHCARE II, LLC d/b/a FAMILY OF CARING HEALTHCARE; CHESTNUT RIDGE CARE ASSOCIATES LLC, d/b/a FAMILY OF CARING HEALTHCARE; CHESTNUT RIDGE CARING, LLC d/b/a FAMILY OF CARING HEALTHCARE; JOHN DOE #1-10 (a fictitious name designating the owner, operator, maintainer, possessor, lessor, lessee, entity and/or individual legally responsible: for the care, control and/or safety of the premises); ABC CORP. #1-10 (a fictitious corporation designating the owner, operator, maintainer, possessor, lessor, lessee, entity and/or corporation legally responsible for the care, control and/or safety of the premises),

Defendants/Respondents.

BRIEF ON BEHALF OF ADVANCED SUBACUTE REHABILITATION CENTER AT SEWELL, LLC; ADVANCED HEALTHCARE MANAGEMENT, LLC; N. FRIED CORPORATION; NATHAN FRIEDMAN; EDWARD FRIEDMAN; AND FAMILY OF CARING, LLC

BURNS WHITE LLC

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I. COUNTER STATEMENT OF PROCEDURAL HISTORY

Plaintiff filed their initial Complaint in this matter on or around July 28, 2022. Plaintiff thereafter filed multiple amended complaints, the last being the Third Amended Complaint filed on July 25, 2024. Pa1. Following the close of fact discovery and after Plaintiff's expert reports were served, on October 11, 2024, Respondents filed a Motion for Summary Judgment. Pa1307. Appellants then filed an opposition to the motion, as well as a Cross-Motion for Summary Judgment on or around October 29, 2024. Pa1310; Pa1312. Oral argument for said motion was held on November 13, 2024, and the Honorable Benjamin D. Morgan, J.S.C. granted Respondent's Motion for Summary Judgment and Denied Appellants' Cross-Motion. Pa1314; Pa1317. Plaintiff then filed a Motion for Reconsideration on the same issue on or around March 20, 2025, which was also denied by the Court following Oral Argument. Ra1.

Respondents' Motion for Summary Judgment, Appellant's Cross Motion, and Appellant's subsequent Motion for Reconsideration, presented three issues to the Court. First, to determine whether Respondent's were subject to civil immunity pursuant to N.J.S.A. 26:13-1, et. seq., as the cause of action involved a claim of negligence in a health care facility during the height of the COVID pandemic. Second, if Appellant was able to overcome the Workers Compensation Bar due to being a leased employee of Respondents. And third,

whether Appellants three experts offered net opinions. The Court issued a 28-page opinion granting summary judgment to Respondent's. Ra21. The Court found that none of the actions taken by Advanced Subacute could be found by a reasonable fact finder to rise to the level of gross negligence or willful misconduct, and that civil immunity applied. Ra38. Next, the Court found that as a leased employee of BP & SC, Mr. Doto was considered an "employee" of Respondent for purposes of the Workers' Compensation Act, and thus would have to show that Respondent committed an "intentional wrong" causing his injury, and a reasonable fact finder could not conclude the same. Ra44. Lastly, the Court found that all of Appellant's expert opinions failed to detail a causal link between breaches of standard of care and Mr. Doto contracting COVID-19. Ra51-Ra52. The Court then subsequently issued another 21-page opinion denying Appellant's Motion for Reconsideration, finding that there was no controlling decision or factual circumstances that were overlooked in the original order. Ra1. As such, Plaintiff/Appellant filed the current appeal.

While the underlying motion for summary judgment dealt with the dismissal of all named Defendants in the Third Amended Complaint, the instant appeal only seeks the reinstatement of Advanced Subacute Rehabilitation Center (hereinafter "Advanced Subacute"). As such, the dismissal of all other previously named Defendants must be upheld.

II. COUNTER STATEMENT OF FACTS

The underlying claim involves Mr. Louis Doto, who was a leased employee from BP & SC Services, Inc. to Advanced Subacute. Mr. Doto tested positive for COVID on December 23, 2020, and passed away from the disease on January 18, 2021. Pa1. Although Mr. Doto had a contract with BP & SC Services, Inc., his work was essentially that of Advanced Subacute. Pa137. He worked only in the laundry department of Advanced Subacute, and Advanced Subacute controlled the details of his work, paid his wages, and had the power to hire/discharge Mr. Doto. This made him a borrowed employee, whose sole remedy was a Workers Compensation claim. Mr. Doto also knew this, as a workers compensation claim was filed against Advanced Subacute by Mr. Doto's legal representative. Ra53.

Mr. Doto lived in the general outside community in 2020, where COVID was still very prevalent and the COVID positive numbers remained high. At no time did Appellant ever show that the only mechanism for Mr. Doto to have contracted COVID was from his work in the basement of Advanced Subacute-- where 1) there were no patient rooms, 2) he had a separate entrance and exit directly into the basement, 3) he worked the overnight shift from 11pm – 7 am, 4) he—any all other people in the building were required and wear a mask, 5) he had no direct patient contact and never went into patient rooms, 6) all visitors

and workers in the building had to answer questions daily about COVID symptoms and exposures, 7) all employees and contractors in the building were routinely tested in December 2020; 8) all employees had all COVID prevention in services occur in a staggered manner, in a large room where they could be six (6) feet apart, and 9) where no other employees—and in particular no other direct care providers—were required to come. Pa157, Page 54-1 to Page 54-21; Pa214, Page 81-1 to Page 81-24; Pa180, Page 58-13 to Page 58-16; Pa215, Page 84-22 to Page 85-5; Pa180, Page 58-4 to Page 58-9; Pa186, Page 82-6 to Page 82-21; Pa224, Page 120-24 to Page 121-9; Pa213, Page 76-2 to Page 76-10; Pa186, Page 85-11 to Page 85-23.

Lauren Pote, the former Administrator of Advanced Subacute, and Brian Powers, the Vice President of BP & SC Services, Inc., both testified at their depositions that Mr. Doto, like all other laundry personnel, entered and exited the facility through the basement entrance, which prevented any contact with residents or clinical staff members of the facility. Pa194; Pa143. This was part of an ongoing effort to reduce exposure to and inhibit the spread of COVID-19. Ms. Sheila Smith, who also worked in the laundry department at the time Mr. Doto worked there, testified that she entered into COVID-19 rooms at times. Pa165, Page 30-7 to Page 30-17. However, she explicitly confirmed that only SHE entered these rooms, and never saw or heard about Mr. Doto ever entering

these rooms. Pa185, Page 80-20 to Page 80-22. By contrast, all clinical staff entered and exited the building via the side entrance on the first floor and all visitors entered and exited the building via the reception entrance. Pa214, Page 81-6 to Page 82-4.

The Respiratory Protection Program, developed for and implemented at Advanced Subacute in June of 2020 and throughout Mr. Doto's entire employment, outlined that only high-risk employees were required to wear N-95 masks. Ra55. High Risk employees were defined in the program as "staff with direct resident contact" and included Medical Staff (physicians, nurses, nursing aides)" and "Occupational and Physical Therapists." Ra 57. As such, Mr. Doto was not a high risk employee and was not required to wear an N-95 face mask, and thus was not required to be fit tested for the same. Although it was not required, N-95 masks were made readily available to all employees and contractors at Advanced Subacute should they want to wear one instead of the required surgical masks. There is no indication that Mr. Doto elected to do so. He was also required to wear at minimum a surgical mask at all times where he was in the building. Notably, when fit testing was later done for every housekeeping employee, no one needed their fit adjusted. Pa255.

All employees and independent contractors who routinely worked at Advanced Subacute were all also routinely tested for COVID in December 2020.

This was ultimately in fact how Mr. Doto found out he had COVID on December 23, 2020. The last member of the housekeeping staff, who were the only ones that Mr. Doto might have remotely encountered, who tested positive for COVID, was positive 22 days prior to Mr. Doto. Ra67-Ra71.

An OSHA investigation was performed remotely from March of 2021 to June of 2021 at Advanced Subacute, which resulted in two citations. Pa572. Those citations, however, involved two housekeeping staff members who had close contact with COVID positive patients during their cleaning duties in patient rooms. *Id.* Neither of these citations apply to Mr. Doto, or anyone similarly situated to Mr. Doto, who worked in the basement of the facility in the laundry department and had no duties involving housekeeping, and no interaction outside of the laundry area. Housekeeping staff, unlike Mr. Doto, were required to wear N-95 masks.

Appellant also continually attempts to point to claimed events that occurred months before the relevant time frame of December 23, 2025. Between June 2020 to October 2020, there were zero COVID positive cases at Advanced Subacute. Pa632. As such, any allegations that there were a spike in COVID-19 infections after April of 2020 categorically have nothing to do with Mr. Doto's COVID diagnosis in December of 2020. Additionally, contrary to Appellant's assertion that "Defendants forced laundry personnel to cluster into

a room for training sessions,” all training sessions were held in the dining room, which had ample ventilation and were closed to residents. Pa186, Page 82-6 to Page 82-21. Not only was it a large space, but Advanced Subacute also ensured that the sessions were staggered by department to ensure adequate space for social distancing. *Id.* All employees wore masks throughout these trainings. The last meeting Mr. Doto attended was also in November 2020, and thus would have had no impact on his December 23, 2020 COVID positive result. Pa642.

In October of 2020, Advanced Subacute hired Patricia Chmura-Saez as a regional infection preventions. Pa730, Page 30-21 to Page 30-22. At her deposition, she testified that she is well aware of specific “zones” in the facility assigned to housekeepers, demonstrating her familiarity with the operational procedures in place regarding where staff are allowed to enter/exit the building. Pa778, Page 78-18 to Page 79-11. Additionally, she testified that if she ever needed additional information about specific job positions or duties, she was able to consult with the administrator or those directly overseeing the housekeepers. Pa778, Page 78-5 to Page 78-9. Although Ms. Chmura-Saez was officially hired in October, Advanced Subacute was being closely monitored by both the New Jersey Department of Health and the County Department of Health during the entire COVID-19 pandemic. They were never cited by either of these agencies.

Appellant provided three expert reports in this matter, from Dr. Hernandez Perez, Julian Rich, and Emil Lesho. Pa1166; Pa1227; Pa1242. None of the provided expert reports definitively opined on how alleged violations in the standard of care actually caused harm to Mr. Doto. Instead, all of Appellant's experts speculate potential contributing causes of the spread of COVID-19 at the facility in general. None of the experts opine on how Mr. Doto actually contracted COVID.

III. LEGAL ARGUMENT

On April 1, 2020, Governor Murphy issued Executive Order No. 112 in response to COVID-19, providing civil immunity to healthcare facilities and healthcare providers responding to the COVID-19 pandemic. Ra72. The provisions contained in this Executive Order were subsequently enacted into New Jersey's COVID-19 Immunity Statute, retroactively effective as of March 9, 2020. *See* 2020 N.J. Sess. Law Serv. Ch. 18.

In the Executive Order, Governor Murphy stated:

The immunity granted in N.J.S.A. § 26:13-19 extends to private entities, including healthcare providers, for injuries caused by acts or omissions in connection with a public health emergency, or preparatory activities, that are exercised in good faith and pursuant to any order, rule or regulation adopted in response to a public health emergency.

See Ra72 (emphasis added). Moreover, the statute provides in relevant part:

[A] health care facility or a health care system . . . shall not be liable for civil damages for injury or death alleged to have been sustained by an act or omission by one or more of its agents, officers, employees, servants, representatives or volunteers . . . [in the course of providing medical services in support of the State’s response to the outbreak of coronavirus disease during the public health emergency and state of emergency declared by the Governor].

[...]

Immunity shall also include any act or omission undertaken in good faith by a healthcare professional or healthcare facility or a healthcare system to support efforts to treat COVID-19 patients and prevent the spread of COVID-19 during the public health emergency and state of emergency declared by the Governor[.]

See 2020 N.J. Sess. Law Serv. Ch. 18. (emphasis added).

Moreover, courts have now confirmed that the New Jersey COVID-19 Immunity Statute indeed immunizes long-term care and skilled nursing facilities from claims of negligence and professional liability such as those pled in this case. In *The Estate of Pantoliano v. Care One at Wellington*, BER-L-1226-22 (August 2, 2022), Ra84, and *The Estate of Whitehurst v. Hallmark Health Care, LLC, et al.*, MRS-L-678-22 (August 18, 2022), Ra105, two separate New Jersey courts found that the New Jersey COVID-19 Immunity Statute specifically applied to plaintiffs’ negligence-based claims and dismissed with prejudice those complaints at the pleadings stage. In *Whitehurst*, the Court further stated that it could not “glean the fundament[al] cause of action beyond negligence,”

which is immunized under the state statute. Ra117. Similarly, and like the courts in *Pantoliano* and *Whitehurst*, the court in *The Estate of Maglioli v. Alliance HC Holdings, LLC, et al.*, SSX-266-22 (October 3, 2022), Ra119, found that a plaintiff's conclusory allegations will not stave off dismissal in this pandemic context. The allegations made in *Pantoliano*, *Whitehurst*, and *Maglioli* are similar to those at issue before this Court in that the plaintiffs there likewise blame COVID diagnoses on defendants' response to the pandemic. While the court generally does not place authority on unpublished opinions, due to the novelty of this issue, the Court should grant weight to these rulings.

The Executive Order and statute do provide an exception from this immunity for acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct. See 2020 N.J. Sess. Law Serv. Ch. 18; Ra72. Here, Appellant's claims do not rise to the extremely high level of a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct needed to maintain this action.

**A. APPELLANT'S CLAIMS AGAINST DEFENDANTS ARE
BARRED UNDER THE NEW JERSEY COVID IMMUNITY
STATUTE AND GOVERNOR MURPHY'S EXECUTIVE ORDER**

"Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence. *Steinberg v. Sahara Sam's Oasis*,

LLC, 226 N.J. 344, 366 (2016) (quoting New Jersey Civil Model Jury Charge). The tort of gross negligence has a heightened standard and requires “more than inattention or mistake.” *Id.* “As is evident by its descriptive name, gross negligence is a higher degree of negligence, see Monaghan v. Holy Trinity Church, 275 N.J. Super. 594, 599 (App. Div. 1994), and undoubtedly denotes ‘the upper reaches of negligent conduct,’ Parks v. Pep Boys, 282 N.J. Super. 1, 17, n.6 (App. Div. 1995).” Steinberg, 226 N.J. at 364 (2016). Gross negligence includes “fail[ure] to exercise even scant care,” “is commonly associated with egregious conduct,” is “an extreme departure from ordinary care or the want of even scant care,” and is “the failure to exercise slight care or diligence.” *Id.* at 364-366 (internal quotation marks and citations omitted). Gross negligence refers to behavior which constitutes indifference to consequences. Banks v. Korman Assocs., 218 N.J. Super. 370, 373 (App. Div. 1987). It requires wanton or reckless disregard for the safety of others. In re Kerlin, 151 N.J. Super. 179, 185 (App. Div. 1987). See also Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269 (App. Div. 2015) (“conclusory allegations” and normative adverbs in plaintiff’s pleading were not sufficient to sustain a claim or “justify a freewheeling discovery mission delving” into those matters). Likewise, the Court in Pantoliano stressed that New Jersey requires facts beyond conclusory language and must set forth elements of the cause of action of gross negligence

or recklessness as required by law. Thus, the court dismissed the claims in that case.

1. ADVANCED SUBACUTE HIRED AN INFECTION PREVENTIONIST

It is uncontested that Mr. Doto tested positive for COVID-19 on December 23, 2020. In October 2020, Advanced Subacute hired Ms. Patricia Chmura-Saez as an infection preventionist in response to the COVID-19 pandemic. Pa730, Page 30-21 to Page 30-22. Appellant is critical of Respondents having not hired Ms. Chmura-Saez until 7 months into the pandemic, however, an Infection Control staff member was not mandated in April 2020. Nevertheless, an infection preventionist was in place for over two months before time of the date at issue. *Id.* It is also undisputed that there were no reported COVID-19 cases from June 2020 to October 2020. Moreover, the last known positive case of COVID-19 was 22 days before Mr. Doto tested positive. Pa634.

Respondent also had an Infection Preventionist entirely in keeping with the rapidly evolving COVID directives and were never to be found to be non-complaint by the multitude of entities that were actively monitoring all long-term care facilities in New Jersey in December 2020. Ms. Chmura-Saez visited the facility twice in the last 2 months of the year. Pa760, Page 60-16 to Page 60-20. Further, Appellant mischaracterizes Ms. Chmura-Saez's testimony, as she testified that she was aware of specific "zones" assigned to housekeepers, thus

demonstrating her familiarity with the operational procedures in place regarding where certain personnel were permitted to enter. Pa778, Page 78-16 to Page 779-2. Additionally, if she required further information about job tasks or risk assessments, she had the opportunity to consult with administrators or those directly responsible for overseeing the housekeepers. Pa778, Page 78-5 to Page778-9.

Advanced Subacute also took many affirmative steps in compliance with all Department of Health recommendations during the COVID pandemic in the relevant time. Mr. Doto was required to enter and leave through the basement to minimize exposure to “high-risk” employees and avoid any contact with any of the residents. Pa215, Page 83-17 to Page 83-21. All entrants to the building also had a temperature check upon entrance every shift. Pa213, Page 76-2 to Page 76-10. He was also required to wear a surgical mask for the duration of his shift. Pa215, Page 83-24 to Page 84-4. As such, none of the provided evidence reaches to the extent of gross negligence needed to be exempt from immunity.

2. LAB TESTING FAILS TO SUPPORT APPELLANT’S CLAIMS

An alleged delay in implementing lab testing provides no causal connection to Mr. Doto’s death, despite Appellant’s expert claims that inadequate lab testing “impacted the life of Mr. Louis Doto,” after testing revealed a COVID outbreak. Pa1240. There is no evidence that the outbreak, or

any alleged inadequate testing, caused Mr. Doto to contract COVID-19. The last known positive case of COVID-19 was 22 days before he tested positive. Ra67; Ra69. The facility was also highly monitored and regulated by the State Department of Health and County Department of Health—neither of which ever had any violations and would surely have intervened if they found Advanced Subacute’s testing protocols insufficient. Pa238, Page 177-17 to Page 178-3.

Further, health care facilities such as Advanced Subacute were navigating through a pandemic that was changing at a rapid pace. These facilities were having to constantly adapt their approach in order to maintain the proper levels of protection and health for both their residents and staff. Advanced Subacute took multiple COVID-precautions prior to October, including requiring all employees to wear surgical masks, separate entrances to the building for laundry personnel, temperature checks before shifts, and symptom reporting. Pa213, Page 76-2 to Page 76-10; Pa215, Page 83-17 to Page 84-4. Respondents acted within their capabilities in response to a public health emergency and such efforts could not be construed as gross negligence.

3. THE OSHA CITATIONS DID NOT APPLY TO APPELLANT’S ROLE

Appellant also relies heavily on the OSHA citations related to an investigation that was performed remotely from March 2021 to June 2021. Pa572. However, in doing so, Appellant is relying on hearsay only. In *Millison*

v. E. I. du Pont de Nemours & Co., the court addressed “the real and troublesome issue in the case: the improper admission of the OSHA citations as substantive evidence.” 226 N.J. Super. 572, 590 (App. Div. 1988). They found that “while OSHA regulations may be admissible to establish a standard of care, OSHA citations are the opinions of investigators and ordinarily do not ‘carry with [them] the indicia of reliability that is inherent in government adopted safety standards.’” *Id.* at 594 (citations omitted). They concluded that OSHA citations are hearsay, unless they fall within one of the hearsay exceptions, which is not the case here.

The citations resulting from the OSHA investigation related to two completely separate housekeeping staff members, who allegedly had close contact with COVID-positive patients whilst cleaning their rooms. Pa572. The citations are also wholly unrelated to his completely separate role as a laundry room worker in the basement during the overnight shift, with zero patient interactions.

The Respiratory Protection Program developed for and implemented at Advanced Subacute in June of 2020, and continuing throughout Mr. Doto’s employment, outlined that only the high risk employees were required to wear N-95 face masks. Ra55. Mr. Doto was not considered a “High Risk” employee per the Respiratory Protection Program, as he had absolutely no interactions

with any of the residents or clinical staff. *Id.* As such, he was not required to wear an N-95 mask, nor was he required to be fit tested for one. He was, however, required to wear a surgical mask and also always had an N-95 mask readily available from the facility should he wish to wear it. Pa215, Page 83-24 to Page 84-4.; Pa795, Page 95-16 to Page 95-23. As mentioned, he had to take daily temperature checks and report any new symptoms or interactions with people who were COVID positive. Pa213, Page 76-2 to Page 76-10. He also entered through a separate entrance directly into the basement—where there were no patient rooms and where none of the actual caregivers for the residents ever went. Pa215, Page 83-17 to Page 83-21. It is readily apparent that the moving Defendants went above and beyond—something that was noted by the actual governing bodies, the State and County Departments of Health. Pa238, Page 177-17 to Page 178-3. At no time did either have any criticisms or citations as to the COVID precautions that were in place. *Id.*

**4. ALL MASKS WERE FOUND TO FIT PROPERLY WHEN
ADVANCED SUBACUTE FIT-TESTED ALL
EMPLOYEES**

Appellant’s claim of a lack of fit testing falls flat as—when fit testing occurred for everyone—all employees’ masks fit appropriately from the standard masks with no need for alteration or extra fittings. Pa255. N95 masks

are designed to lay flush on the face, and do not have as much space between the face and the mask as a regular surgical mask.

Advanced Subacute did later perform mask fit testing on all employees, including non-clinical staff such as laundry workers, housekeepers, and porters. Pa255. When fit testing was performed, it was determined that all non-clinical employees were found to be in compliance. *Id.* This demonstrates that, despite the timing of the fit testing, Advance Subacute took the necessary action to ensure that all employees had appropriate personal protective equipment in place. It is not as though Respondents completely ignored the face covering requirement. It required face masks, conducted shift-mandated temperature checks, and attempted to seclude its workers whenever possible. Pa213, Page 76-2 to Page 76-10; Pa215, Page 83-17 to Page 84-4.; Pa232, Page 153-21 to Page 158-11. Further, as previously mentioned, N95 masks were made available to employees at all times regardless of employee risk level. Pa795, Page 95-16 to Page 95-23. Such effort cannot rise to the level of “scant care” and utter disregard for safety. Simply not being fit tested for an N95 mask is not nearly enough to rise to the level of gross negligence needed to be removed from immunity.

**5. MR. DOTO WAS NOT A HIGH-RISK EMPLOYEE AND
ADVANCED SUBACUTE MAINTAINED EFFORTS TO
SECLUDE FROM THOSE WHO WERE**

Mr. Doto did not directly interact with any resident of the nursing home. Pa157, Page 54-14 to 54-21. Staff members who were not required to wear N95 respirators were still required to wear surgical masks and N95 respirators were readily available at multiple locations on the premises for any staff member. Pa795, Page 95-16 to Page 95-23. Additionally, all employees and independent contractors were required to have temperature checks and report any developing symptoms. Pa213, Page 76-2 to Page 76-10. Mr. Doto entered and exited the building through a separate entrance and exit, as previously mentioned, and never needed to go to the main floor where all patient rooms were for his job duties. Pa215, Page 83-17 to Page 83-21.

Any in service trainings were held in a large dining room with ventilation, and the room was closed to residents. Pa186, Page 83-17 to Pa188, Page 91-25. Advanced Subacute ensured that the sessions were staggered by department to ensure space for social distancing of at least six feet apart. *Id.* Additionally, all employees wore masks throughout these trainings. This was not only appropriate but vital to combatting the ever changing fight against COVID-19. Furthermore, the last training session Mr. Doto attended was in November 2020—well before his COVID diagnosis. Pa642. As such, Respondents' efforts to minimize contact and transmission of COVID-19 during necessary meetings dedicated to ensuring proper infection control techniques can, in no way, be interpreted as the willful

disregard towards the safety of the people at Advanced Subacute needed to strip immunity under the COVID-19 Immunity Statute.

6. THE HANDLING OF “COVID BAGS” CAN NOT CONSTITUTE GROSS NEGLIGENCE AND IS IRRELEVANT TO MR. DOTO’S CONTRACTION OF COVID-19

Handling bags containing the laundry of patients who contracted COVID-19, otherwise known as “COVID bags,” was well within Mr. Doto’s job description, and Advanced Subacute’s efforts to mitigate exposure to COVID-19 cannot constitute gross negligence. Pa190, Page 101-10 to Pa101, Page 102-9. Ms. Sheila Smith, another individual working as laundry personnel, testified that laundry workers such as Mr. Doto were responsible for the handling of COVID bags and washing the contents inside. *Id.* The COVID bags referenced were clearly marked in a red bag to alert to alert Mr. Doto to use extra caution and placed in an isolation bin to be washed separately. *Id.* To complete his duties, Mr. Doto remained in the basement secluded from high-risk employees, and linens were sent to him through a dumb-waiter system. Pa157, Page 55-13 to Page 55-17. Although these responsibilities may carry risk of contracting COVID-19, they were an essential part of Mr. Doto’s work. Nevertheless, Mr. Doto was still required to follow all necessary precautions for non-high risk employees as he never had direct contact with residents. Ra55; Pa157, Page 54-14 to 54-21. He did not enter residents’ rooms to collect linens. He was required

to wear a mask throughout his shift. Pa795, Page 95-16 to Page 95-23. If he wished, he could exchange his surgical mask for a facility-provided N95 mask at any point. *Id.* These protocols were formed to prevent contamination and spread of COVID-19 as much as possible and such efforts cannot be deemed as “scant care.”

7. MONICA HELWIG’S ACTIONS BEAR NO RELEVANCE TO THE CLAIMS SET FORTH

As provided, Mr. Doto tested positive for COVID-19 in December of 2020. Monica Helwig’s alleged actions, including walking through the facility without a mask, occurred in April of 2020, 8 months prior to Mr. Doto’s contraction of COVID-19. Pa621, Page 96-2 to Page 96-11. In Ms. Fornito’s deposition, she testified that Advanced Subacute experienced a notable spike in COVID-19 infections following Ms. Helwig’s visit. Pa626, Page 117-14 to Page 117-24. However, it is once again uncontested that there were no reported COVID-19 cases at Advanced Subacute from June 2020 to October 2020. Pa635. Additionally, Advanced Subacute was being closely monitored by both the both the New Jersey Department of Health and the County Department of Health and, at no time, was Advanced Subacute ever cited by either of these agencies. Pa238, Page 177-14. The absence of any citation further establishes that the facility was staying updated regarding specific risks experienced by workers in all departments. Pa238, Page 177-14 to Pa 139, Page 178-3. Therefore, Appellants

have ultimately provided no evidence as to how Ms. Helwig's purported actions could have caused Mr. Doto's death or demonstrated an inability to maintain compliance.

It is clear that Respondents could not have acted in any grossly negligent manner regarding the claims brought forth by Appellant, and such claims are wholly irrelevant without evidence establishing a causal connection. Respondents took action to provide and maintain protection for the safety of workers, including non-clinical staff, in response to COVID-19. Respondents acted within their capabilities to detect, prevent, and respond to a global pandemic. Respondents acquired a qualified Infection Preventionist to better assist in these efforts, while also employing knowledgeable individuals for said Infection Preventionist to consult about facility operations and worker responsibilities if needed. Respondents were highly monitored by actual governing bodies, the State Department of Health and County Department of Health, regarding the implementation and enforcement of industry risk standards and were found in compliance at all times. Respondents fit tested all employees and all N95 respirators fit without additional alterations or fittings needed. Respondents took critical precautions to train and supervise staff in order to continue operations of an essential facility and made efforts to seclude workers when such trainings were mandatory.

In sum, the acts or omissions of the Defendants caused Mr. Louis Doto to contract COVID-19 fall squarely within the immunity provided by this statute. First and foremost, it is undisputed between the parties that Advanced Subacute, a licensed long-term care facility, qualifies as a “health care facility” under N.J.S.A. 26:13-2 as required by the statute. Second, Appellant explicitly brings claims for injury – i.e., Mr. Doto’s COVID-19 diagnosis – related to Advanced Subacute’s implementation of countermeasures to prevent the spread of COVID-19 during his employment in December of 2020, during which the Governor’s public health emergency and state of emergency were in effect within New Jersey. The statute is unequivocal that Advanced Subacute is immune from Appellant’s claims regarding the alleged COVID-19 diagnosis of Mr. Doto. Third, Appellant cannot establish that Advanced Subacute’s actions rise to the level of gross negligence necessary to trigger the exemption of immunity under the COVID-19 Immunity Statute. Therefore, denying Appellant’s request is appropriate at this time.

B. APPELLANT’S CLAIMS ARE BARRED PURSUANT TO THE EXCLUSIVE REMEDY PROVISION OF NEW JERSEY’S WORKERS’ COMPENSATION ACT

When an employee—or here a leased employee—is suing for damages incurred in the course of their employment, their only means of remedy are through a Workers’ Compensation claim. New Jersey's Workers' Compensation

Act (the Act), N.J.S.A. 34:15–1 to –128.5, provides a swift and efficient remedy for an employee's claim against an employer for a workplace injury. The Legislature made the statutory workers' compensation remedy its favored mechanism for providing compensation to injured workers. Employees who suffer work-related injuries are barred by the exclusive remedy provision of the Act from pursuing negligence actions in court against their employers. The exclusive remedy provision provides, in pertinent part, as follows:

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article.... If an injury or death is compensable under this article, **a person shall not be liable to anyone at common law** or otherwise on account of such injury or death for any act of omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

[N.J.S.A. 34:15–8 (emphasis added)]

Our courts routinely dismiss employees' negligence claims against employers pursuant to the exclusive remedy provision of the Act. See New Amsterdam Casualty Co. v. Popovich, 18 N.J. 218, 226 (1955) (noting that the declared public policy of the Workers' Compensation Act precludes any other recovery or measure of compensation); see also Gore v. Hepworth, 316 N.J. Super. 234, 242 (App. Div. 1998), certif. denied 158 N.J. 70 (1999) (finding that plaintiff, as “special employee” of trucking company was precluded under

exclusive remedy of Workers' Compensation Act from suing employer in tort for injuries sustained on the job); Doe v. Saint Michael's Med. Ctr., 184 N.J. Super. 1, 9 (App. Div. 1982) (finding that workers' compensation was the exclusive remedy of medical technologist for injuries sustained when she was sexually assaulted and robbed in her room in the hospital dormitory at medical complex at which she worked); Smith v. Exxon Mobil Corp., 374 F. Supp. 2d 406, 424 (D.N.J.2005) (Workers' Compensation Act barred claim for negligent infliction of emotional distress due to hostile work environment); Fregara v. Jet Aviation Bus. Jets, 764 F. Supp. 940, 954–955 n.8 (D.N.J.1991) (finding a plaintiff's action against former employer for “negligent evaluation” was barred by the Workers' Compensation Act); Cremen v. Harrah's Marina Hotel Casino, 680 F. Supp. 150, 154 (D.N.J.1988) (noting a cause of action for negligent hiring by female employee who sustained both emotional and physical injuries as a result of sexual harassment by supervisor was limited to recovery under the Workers' Compensation Act).

As a Special Employee, New Jersey “allows an employee, for the purposes of workers’ compensation to have two employers, both of whom may be liable in [workers’] compensation.” Kelly v. Geriatric & Med. Servs., Inc., 287 N.J. Super. 567, 671 A.2d 631 (App. Div.) (citing Antheunisse v Tiffany & Co., Inc., *supra*, 229 N.J. Super. at 402, 551 A.2d 1006). In such circumstances, the right

to recover workers' compensation benefits serves to bar the employee from maintaining a tort action against either employer. See *Ibid.*; *Murin v. Frapaul Const. Co.*, 240 N.J. Super. 600, 606-07, 573 A.2d. 989 (App.Div.1990).

As a leased employee, New Jersey similarly “expressly extends statutory immunity [under N.J.S.A. 34:8-72(b)] from suit to companies that hire or lease workers from employee leasing companies.” *Hocutt v. Minda Supply Company*, 464 N.J. Super. 361, Footnote 1. This statute, N.J.S.A. 34:8-72(b) , provides an independent basis for the conclusion that [a leased employee] is subject to the exclusive remedy of workers' compensation. *Id.* (See also, *State v Heisler*, 422 N.J. Super. 399, 416, 29 A.3d 320 (App. Div. 2011)).

The exclusion to the Exclusive Remedy Provision of the Workers' Compensation Act is if the employer has committed an “intentional wrong.” In all Sixteen (16) counts of Appellant's Third Amended Complaint, he alleges that “Defendants failed to exercise reasonable care...” and damages were “[a]s a direct and proximate result of the negligence, carelessness, recklessness and/or gross negligence” which are negligence principles and not intentional torts. Pa1. Appellant's allegations as to the Defendants' conduct would still have to be egregious enough to overtake New Jersey's Workers Compensation Bar.

Here, Appellant's only argument is that Mr. Doto was not an employee of Advanced Subacute because he remained under the “control” of BP & SC. See

Kelly v. Geriatric & Med. Servs., Inc., 287 N.J. Super. 567, 671 A.2d 631 (App. Div.), aff'd sub nom. Kelly v. Geriatric & Med. Centers, Inc., 147 N.J. 42 (1996) (“Employee of temporary nursing services provider, who was injured while assigned to work at convalescent center, was “special employee” of center, and thus was barred by Workers' Compensation Act from maintaining tort suit against center; employee's voluntary acceptance of work at center gave rise to implied contract of employment; employee was under day-to-day control of center even though she was licensed practical nurse (LPN); money used to pay employee's wages came indirectly out of fees paid by center for employee's services; and center had functional equivalent of power to discharge employee in that it controlled whether she would continue to work at center) (citing N.J.S.A. 34:15–8).

Kelly specifically provides a five-prong test to establish a special employer-special employee relationship using the following fact-sensitive factors: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done by the employee is essentially that of the special employer; (3) the special employer has the right to control the details; (4) the special employer pays the employee’s wages; and (5) the special employer has the power to hire, discharge or recall the employees. Id.

Before applying the five-prong test, it is clear that Mr. Doto was a leased

employee to Advanced Subacute, as exhibited by the contract between BP & SC and Respondent. Pa137. In fact, the beginning of the contract explicitly states, “[t]his is an Employee Lease Agreement...between Advanced Subacute...and BP & SC Services.” *Id.* Mr. Doto’s Estate—who is also the Appellant in the instant litigation—clearly believed that the Respondents were his employer as they filed a workers’ compensation claim against Advanced Subacute. Ra53. The provision found in the contract between Advanced Subacute and BP & SC stating that “employees shall remain employees of BP & SC Services” does not contradict Advanced Subacute’s ability to lease employees. Pa137.

Appellant further accepts this assertion in their appeal as, under their interpretation of the special employee factors, the test is used “to determine whether a leased or borrowed employee is a ‘special employee’ of the employer he is leased to, the ‘special employer.’” Appellants have ultimately misconstrued *Kelly*’s rule and provided that being a leased employee is a prerequisite to the special employee analysis, despite the exclusive remedy provision applying to both employee statuses independently. Therefore, by applying these factors under their understanding of the case law, Appellant acknowledges that Mr. Doto is to be considered a leased employee to Advanced Subacute and should thus be barred under the Act.

In any event, the Act should also bar Appellant’s claims as Mr. Doto must

also be considered a “special employee” of Advanced Subacute. There mere fact that Louis Doto was not a direct employee of the Defendants is not the salient factor in determining whether. Instead, the Courts look at a totality of circumstances using Kelly’s five-prong test. Regarding the first prong, Louis Doto is not identified in the complaint as an employee of any of the defendants. However, he had a contract of hire, express or implied with BP & SC Services, Inc. and was a leased employee from BP & SC Services, Inc. to Advanced Subacute. It is undisputed that the work he did was essentially that of Advanced Subacute, thus satisfying the second prong. In light of the third prong, by Appellant’s own contention in this case, Advanced Subacute controlled the details of his work. For the fourth prong, Mr. Doto’s wages were paid by Advanced Subacute as the salary from BP & SC was paid through the Employee Lease Agreement. Finally, Advanced Subacute had the power to hire and/or discharge him from its facility. *See Kelly*, 287 N.J. Super. 567.

When applying the exclusion to the Workers Compensation bar, as referenced in length here, the facts of this case show that there were numerous interventions in place at Advanced Subacute to prevent the spread of COVID-19. Obviously, the COVID-19 pandemic affected the entire world, and Respondents do not deny its occurrence. Instead, their best efforts to control the spread of the disease were made, which could never qualify as an “intentional

wrong.” Further, Appellants have failed to show a genuine dispute of material fact as to whether Advanced Subacute acted with “substantial certainty” that harm would occur to Mr. Doto, as detailed above.

In sum, Mr. Doto is clearly a leased employee of Advanced Subacute. Mr. Doto could also be considered a “special employee” of “special employer,” Advanced Subacute. Under either interpretation, Mr. Doto is subject to the exclusive remedy clause of the Act and is thus barred from maintaining a tort action against Advanced Subacute. Lastly, Appellant is unable to establish that Advanced Subacute committed an intentional wrong and therefore fails to trigger the exclusion to the Exclusive Remedy Provision.

As such, it is imperative that the Court denies this appeal as Appellant’s claims against Respondents are barred pursuant to the Exclusive Remedy Provision of the New Jersey Workers’ Compensation Act. Given the clarity this case provides, there is no need to leave this decision for a jury to decide.

C. PLAINTIFF’S EXPERT OPINIONS DO NOT EXPLAIN A CAUSAL LINK BETWEEN ADVANCED SUBACUTE’S ALLEGED ACTIONS OR INACTIONS AND MR. DOTO’S DEATH.

As mentioned in Respondent’s Renewed Motion for Summary Judgment, for a claim of negligence in a medical/professional malpractice action, a plaintiff must present expert testimony establishing: (1) the applicable standard of care;

(2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury.” Gardner v. Pawliw, 150 N.J. 359, 375 (1997).

Expert testimony is intended to aid the trier of fact, here the laypeople of the jury, to understand the facts of the case before them in particularly complex factual situations. N.J.R.E. 702. The net opinion rule is a corollary of the rule of evidence pertaining to the foundation for expert testimony, and forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data; the rule requires that an expert give the “why and wherefore” that supports the opinion, “rather than a mere conclusion.” Rosenberg v. Tavorath. 352 N.J. Super. 385, 401 (App. Div.2002) (quotation omitted). The net opinion rule further mandates that experts “be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.” Landrigan v. Celotex Com., 127 N.J. 404, 417 (1992). An expert's conclusion “is excluded if it is based merely on unfounded speculation and unquantified possibilities.” Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 300 (App. Div. 1990).

Appellant yet again argues that their three expert reports were not offering net opinions. However, here Appellant relies only on the supposed qualifications of their experts rather than the actual substance of the expert

reports. The plain language of the reports clearly establish that no expert ever establishes a causal link between Advanced Subacute's actions and Mr. Doto's actual injury – the contraction of COVID-19 – which ultimately led to his death.

First, Appellant claims that Dr. Hernando Perez's report details the standard of care that was allegedly violated by Advanced Subacute and goes through each alleged individual failure of Respondent's to adhere to proper standards during the pandemic. However, Dr. Perez's report ignores the fact that both the State Department of Health and County Department of Health were carefully monitoring the facility, and neither of them issued citations or violations to Advanced Subacute. Pa1166. Additionally, he asserts that ASRC subsequently fit tested non-clinical workers in December 2020, following the revelation that Mr. Doto had tested positive for COVID-19 in December 2020. Pa1190. However, the subsequent fit testing, confirmed that all staff members passed medical evaluations and properly fit into their N95 respirators. Pa255. Given the effectiveness of these measures it is reasonable to conclude that any lack of fit testing for Mr. Doto did not contribute to Mr. Doto's COVID-19 infection. Mr. Perez's report also mischaracterizes Patricia Chmura-Saez's testimony. He claimed that her lack of familiarity with specific job tasks of workers resulted in her being unable to adequately assess the risk of

occupational COVID-19 transmission. Pa1215. However, Ms. Chmura-Saez testified that she was aware of specific “zones” assigned to housekeepers, and that if she ever required further information about job tasks or risk assessments, she had the opportunity to consult with administrators or those directly responsible for overseeing the housekeepers. Pa778, Page 78-18 to Page 79-11; Pa778, Page 78-5 to Page 78-9. Hernando Perez’s report makes no opinion that any alleged acts or omissions of Advanced Subacute with regard to COVID-19 constitutes a crime, actual fraud, actual malice, or wanton or reckless disregard. Most importantly, Appellant still does not make any argument or show any evidence that Dr. Perez’s report actually substantiates a causal link between the alleged failures of Advanced Subacute and Mr. Doto’s contraction of COVID-19, making it indeed, a net opinion.

Next, Mr. Julian Rich opines that Advanced Subacute was non-compliant with Federal and New Jersey Regulations and COVID related directives. Pa1227. Specifically, asserting there was a lack of adequate distancing and respiratory protection policy at ASRC. Pa1239. But, the actual governing body for making this determination—the New Jersey Department of Health and the County Department of Health was not only well aware of the COVID precautions in place but had the COVID protocols from ASRC submitted to them. At no time did either actual governing health agency find any violation

or issue with the protocols in place. Appellant claims that “Mr. Rich offers nowhere near what could be qualified as a net opinion, but rather painstakingly details each individual failure of Defendants to adhere to appropriate standards and practice in the context of a pandemic of COVID-19 proportions,” however, simply going through each alleged action or inaction still does not provide any sort of causal link to Mr. Doto’s injury. As noted above, the net opinion rule requires that experts provide factual basis for their conclusions, and here, simply pointing out actions or inactions do not at all support the conclusion that Mr. Doto contracted COVID-19 while working at Advanced Subacute.

Lastly, Dr. Lesho’s assertions lack supporting evidence. His report opines that Advanced Subacute failed to assign a qualified Infection Preventionist (even though it was not required), failed to timely and adequately medically evaluate and fit-test workers (even though basically no masks required an adjustment, and gathered workers together for meetings (even though any meetings were appropriately socially distanced). Pa1242. Dr. Lesho also incorrectly asserts that Sheila Smith had frequent exposures to COVID-19 patients and had overlapping shifts with Mr. Doto and that Ms. Smith would also attend training sessions with other staff who “had or were about to test positive for COVID-19.” Pa1284. However, the truth of the matter is that the actual documentation contains no indication that Ms. Smith tested positive for COVID-

19. This absence of Ms. Smith testing positive for COVID-19 undermines the claim that Ms. Smith's presence posed a risk to Mr. Doto or other employees. Additionally, like the other expert reports, Dr. Lesho uses Ms. Smith's testimony that she entered COVID-19 rooms in her capacity as a laundry worker as evidence that Mr. Doto did as well. *Id.* However, there is no testimony or evidence to back up this claim. In addition, all trainings were held in the dining room, which had ample ventilation and was closed to residents. The sessions were staggered by department to ensure adequate space for social distancing. Employees adhered to safety protocols by wearing masks throughout the trainings. Pa186, Page 82-6 to Page82-21.

Consistent with Judge Morgan's opinion in the order denying Appellant's Motion for Reconsideration, Appellant once again fails to establish how alleged negligence, actions, or inactions, opined by each of their experts, actually proves a causal link between Advanced Subacute's actions and Mr. Doto's contraction of COVID-19 and ultimate death. Ra1. Appellant's reports are not adequate for purposes of proving negligence in this matter. Just as before, Appellant does not point to any opinions in their expert reports that opine as to how Mr. Doto actually contracted the infection. Thus, all three of Appellant's expert reports are net opinions.

IV. CONCLUSION

For the above stated reasons, it is respectfully requested that Appellant's Appeal is denied and the Trial Court's Dismissal of Appellant's Complaint with prejudice as to all counts is affirmed.

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