ESTATE OF JEAN M. EARLY by Executor DOREEN MCCULLOUGH and DOREEN MCCULLOUGH individually, Plaintiffs/Appellants v. ENGLEWOOD HOSPITAL AND MEDICAL CENTER, CAREONE AT TEANECK, JOHN DOE (1-10), JANE ROE, RN (1-20), and ABC CORP, said names John Doe, Jane Roe and ABC Corp being fictitious, jointly, individually and in the alternative, Defendants/Respondents	SUPERIOR COURT OF NJ APPELLATE DIVISION DOCKET NO. A-3244-23 ON APPEAL FROM JURY VERDICT AND FINAL JUDGMENT OF SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, LAW DIVISION, CIVIL PART SAT BELOW: HONORABLE PETER GEIGER, J.S.C.

BRIEF IN SUPPORT OF APPEAL OF APPELLANT EARLY

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The transcript dated June 11, 2024, vol. 2, is referred to as 9T.
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PROCEDURAL HISTORY

On May 22, 2019, the plaintiffs, Estate of Jean Early by Executrix Doreen McCollough and Doreen McCollough individually, filed a complaint against defendant Englewood Medical Center, a hospital, and defendant CareOne, a nursing home, for nursing malpractice. (Pa1). The complaint asserted the defendants were negligent in providing nursing care to the plaintiff resulting in a severe pressure wound and infection, pain, suffering, loss of life quality and death. (Pa1). The plaintiff pled deviations from the standard of nursing care and violations of State and Federal statutes, including provisions of the NJ Nursing Home Act (NHA) found at N.J.S.A. 30:13-1 et seq., against the nursing home defendant CareOne. (Pa3).The plaintiff claimed compensatory damages along with attorney's fees and costs permitted against CareOne by the NHA under N.J.S.A. 30:13-8. (Pa3).

Defendant Englewood filed an answer on June 26, 2019 and defendant CareOne filed its answer on July 26, 2019. (Pa7; Pa16). During discovery, the plaintiff answered Interrogatories attaching the Death Certificate and a photo of the plaintiff's pressure wound. (Pa25; Pa35; Pa36). The plaintiff also served a nursing expert report of Nurse Charlotte Sheppard which included deviations from the standard of nursing care and cited to violations of certain statutes and regulations including the NHA. (Pa75). In addition, the plaintiff served the

expert report of a medical doctor and surgeon, Dr. Lloyd Krieger, regarding causation of the pressure wound and the plaintiff's death. (Pa101).

Discovery ended on November 30, 2022 and the matter was set for trial. The defendants brought summary judgment motions at the close of discovery moving to dismiss the plaintiff's case alleging failure to supply sufficient evidence regarding deviations and causation of the wound and death, as well as for dismissal of the violations of State and Federal laws claimed by the plaintiff including the NHA. On February 17, 2023, the motions for summary judgment were denied with regard to all issues except the violations of State and Federal laws. (Pa155). The Court granted partial summary judgment with respect to those claims including dismissal of the NHA claims against CareOne. (Pa158).

Prior to trial, the parties served Pretrial Exchanges and filed motions in limine. (Pa37; Pa49; Pa55). On May 22, 2024, defendant CareOne filed a motion to preclude the plaintiff's nursing expert from testifying regarding violations of Federal and State laws cited to in her report including the NHA. (Pa70). The plaintiff opposed this motion on May 27, 2024, and defendant replied. (Pa167; Pa198). The Court granted this motion on June 6, 2024 by ruling on the record. (4T52-4 to 23; 4T53-4).

The matter was called in for trial on May 28, 2024. Trial was held before the Honorable Peter Geiger, J.S.C. Jury selection began on May 28, 2024, and

openings and testimony started on June 3, 2024. The trial concluded on June 14, 2024 by jury verdict in favor of the defendants. (1T-12T).

During expert testimony at trial, the plaintiff's experts were precluded by objection from testifying to the contents of the Death Certificate upon which they relied to form their opinions, while a defense expert was permitted to do so. (4T106-7 to 11; 4T269-24 to 25; 4T270-1 to 3; 6T172-21 to 25). Also, as the result of objections at trial, the photo of plaintiff's pressure wound was struck after initially being admitted on June 11, 2024. (9T277-10 to 20).

After presentation of plaintiff's evidence, the defendants moved for a directed verdict dismissing plaintiff's wrongful death claim. Defendant Englewood filed its motion on June 4, 2024. (Pa205). Defendant CareOne filed its motion on June 5, 2024, attaching the trial testimony of plaintiff's expert, Dr. Lloyd Krieger, which was conducted by de benne esse. (Pa213). The plaintiff opposed the motion on June 5, 2024. (Pa282). On June 7, 2024, the Court dismissed the plaintiff's wrongful death claim by ruling on the record. (5T185-5 to 25; 5T186-1 to 9).

On June 13, 2024, at the close of its case, defendant CareOne moved to admit a voluminous amount of pages into evidence for deliberation by the jury over plaintiff's objection. (11T87; 11T93-150). The Court granted the defendant's motion by ruling on the record on the same date. (11T200-201).

The Jury Charge Conference was held beginning June 13, 2024 and continued through the last day of trial on June 14, 2024. (11T151-203; 12T4-16; 12T104-164). The plaintiff objected to the Jury Charge for increased risk/loss of chance, otherwise known as the Scafidi Charge, along with the unduly complex jury verdict sheet. (11T160-18 to 25; 11T161-1 to 2; 11T160-8 to 17). The Court granted the Scafidi Charge and verdict sheet over plaintiff's objection. (Pa288; Pa315; 12T6-8 to 16).

After the three-week trial, the jury received the Charge on Friday, June 14, 2024 at 3:30pm, about an hour prior to the end of the Court day. (12T16-5 to 25). The jury was instructed from the start that this would be the last day of trial and they would not be returning on Monday. On the same day, the jury found in favor of the defendants regarding deviation, but also demonstrated their misunderstanding of the verdict sheet by proceeding to answer the Scafidi questions despite being instructed to return their sheets. (Pa315-6; 12T198-200).

The Trial Court then entered an Order for Judgment in favor of the defendants on June 18, 2024. (Pa318). On June 21, 2024, the plaintiff filed a Notice of Appeal appealing from the final judgment and jury verdict. (Pa320).

STATEMENT OF FACTS

The plaintiff Jean Early was 67 years old when she was admitted to defendant Englewood Hospital from her home on December 11, 2017 for flu-

like symptoms. Upon admission, her skin was intact but she was at risk for pressure wounds due to her need for assistance from nursing staff for daily activities. (Pa72). Due to her risk, nursing staff there should have turned and repositioned her every 2 hours to relieve pressure as per the standard of care. The staff systematically failed to abide by this standard. As a result, by December 28, 2017, Ms. Early developed a sacral pressure wound measuring 15 x 6 cm. (Pa72).

Ms. Early's condition stabilized and she was discharged to defendant CareOne for continued nursing care on January 17, 2018 with an unstageable wound. Id. The nursing staff at CareOne were also responsible to turn and reposition Ms. Early every 2 hours, pursuant to the nursing standard of care, to prevent a Stage 3 or Stage 4 wound from developing. Instead, nursing staff failed on multiple occasions to do so, sometimes allowing days to pass without the necessary pressure relief, and also not supplying Ms. Early with the proper specialty mattress for wound healing. Id. A consult on January 22, 2018 revealed Ms. Early's pressure injury measured 16 x 8 cm and required debridement. In February of 2018, Ms. Early underwent surgical debridement of her wound. The physician's note at the time described the pressure injury as Stage 4 measuring 16 x 10 cm with depth to the bone. Id.

On March 14, 2018, Ms. Early was transferred to Prospect Heights Care Center due to concern for the care she was receiving at CareOne. Id. Admission assessment there revealed that she had a Stage 4 sacral pressure wound with 5 cm of tunneling and undermining. There was drainage with muscle and bone exposed. Id. On March 16, 2018, Ms. Early was readmitted to Englewood Hospital due to infected pressure injury. A wound culture had been returned positive for infection and she was diagnosed with sepsis by the hospital. Ms. Early passed away at Englewood on April 9, 2018 with Death Certificate noting her cause of death as sepsis three weeks duration. (Pa35).

LEGAL ARGUMENT

1. THE TRIAL COURT ERRED IN PRECLUDING TESTIMONY AND APPLICATION OF THE NJ NURSING HOME ACT AND NURSING HOME FEDERAL STATUTES AS WELL AS THE NURSING HOME JURY CHARGE IN THIS NURSING HOME CASE AGAINST CAREONE (4T6-54; 12T128-145)

On May 22, 2024, defendant CareOne filed an in limine motion to preclude the plaintiff's nursing expert from testifying to violations of State and Federal statutes and regulations including NJ Nursing Home Act claims. (Pa70). The defendant based this in part on the Court's Order dated February 17, 2023 granting partial summary judgment dismissing those violations, but allowing the plaintiff's experts to testify to regulations as evidence of negligence for any remaining claims. (Pa155). The plaintiff opposed this motion on May 27, 2024

by asserting that the defendant was a nursing home subject to claims under the NJ NHA and Federal Nursing Home Statute, citing to a recent Appellate Division decision vacating a finding by the Trial Court that the NHA did not apply. (Pa167; Pa173) The same evidence was presented by CareOne in this matter as in the new and recent decision. The plaintiff also supplied a Memo promulgated by the Department of Health with respect to this issue dated April 18, 2024. (Pa195). The defendant filed a reply on May 28, 2024. (Pa198). The Court wrongfully granted this motion on June 6, 2024. (4T52-4 to 23; 4T53-4).

The Court suggested that as a result of the new information, plaintiff's opposition should be treated as a motion for reconsideration of the Court's February 17, 2023 interlocutory Order. (4T51-52). A motion to reconsider interlocutory Orders may be made any time until entry of final judgment in the Court's discretion and in the interests of justice. Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 261-64 (App. Div. 1987). The Appellate Division has found that a "motion for reconsideration does not require a showing that the challenged Order was palpably incorrect, irrational, or based on a misapprehension or overlooking of significant material presented on the earlier application." Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). The Lawson Court urged "judges not to view reconsideration motions as hostile gestures." The Court found that there are "those that argue in good faith a prior mistake, a change in

circumstances, or the court's misappreciation of what was previously argued." The Court noted that reconsideration presents an opportunity to fix an issue for the sake of fair and efficient administration of justice. Id.

Defendant CareOne is a licensed Long-Term Care facility, otherwise known as a nursing home. N.J.A.C. 8:39-1.1. (Pa197). While CareOne did not dispute its licensure, it argued that Ms. Early was admitted to a "subacute rehabilitation unit" of its facility for short-term care which was not a nursing home under the NJ NHA.

This same argument was made by CareOne in the recent decision brought to the Court's attention. Eagin v. CareOne, 2024 N.J. Super. Unpub. LEXIS 209 (App. Div. Feb. 12, 2024) (Pa173). In the Eagin case, CareOne filed a motion for summary judgment arguing that Mr. Eagin was admitted to its "subacute rehabilitation unit" and that the NHA did not apply. The Trial Court granted CareOne's motion and Mr. Eagin filed an interlocutory appeal. The Appellate Division granted the appeal and vacated the Trial Court's Order. Id. at 20-1.

Shortly after the Eagin decision was rendered in February of 2024, the New Jersey Department of Health published a Memo dated April 18, 2024. (Pa195). The Memo clarified that residents of licensed Long-Term Care facilities, otherwise known as nursing homes, included all individuals residing in the nursing home and was not based on the unit, length of stay, nor receipt of

subacute care. In Bermudez v. Kessler Institute for Rehabilitation, 439 N.J. Super. 45, 50 (App. Div. 2015), a seminal nursing home case, the Appellate Division instructed that "interpretations of the statutes and cognate enactments by agencies empowered to enforce them" are to be "given substantial deference in the context of statutory interpretation." Consequently, it was plaintiff's position that this Memo should be strongly considered when determining whether the NHA should have applied to CareOne while Ms. Early was a resident.

The NJ Nursing Home Act is found at N.J.S.A. 30:13-1 et seq. In 1976, the Legislature enacted the NHA as a remedial measure. The Act aimed to ameliorate the harsh conditions of the elderly in nursing homes. In re Conroy, 98 N.J. 321, 377-8 (1985). The NJ Supreme Court recognized that nursing home residents were a particularly vulnerable population subject to abuse, physical injury, danger, cruelty, negligence, virulent infections and lack of human dignity. The Court found that the NHA conferred the right upon residents to have considerate and respectful care that recognized their dignity. The Court acknowledged that when those rights were sufficiently transgressed, we as a society should all be ready to say enough. Id. at 486.

Where the Legislature's intent is remedial, a Court should construe a statute liberally. Bermudez v. Kessler Institute for Rehabilitation, 439 N.J. Super. 45, 55-56 (App. Div. 2015); Young v. Schering Corp., 141 N.J. 16, 25

(1995). Our Supreme Court has long held that remedial social legislation should be given liberal construction in order to accomplish the benefits awarded to its targeted class. Torres v. Trenton Times Newspaper, 64 N.J. 458, 461 (1974).

The NHA defines a Nursing Home as follows:

> Nursing home means any institution, whether operated for profit or not, which maintains and operates facilities for extended medical and nursing treatment or care **for two or more nonrelated individuals with acute or chronic illness or injury, or a physical disability, or who are convalescing, or who are in need of assistance in bathing, dressing, or some other type of supervision, and are in need of such treatment or care on a continuing basis**. N.J.S.A. 30:13-2(c).

N.J.S.A. 30:13-3.2 titled "Applicability of Act" states that the NHA applies to any resident of the facility. The definition provides for "any institution" meaning in plain language the entire institution. The statute does not limit its protections to any class of patients, lengths of stay, divisions, departments, or "units" within the nursing home. If the Legislature had intended to restrict protection under the NHA in such a way, that language would have been added to the definition. If it had intended to except from the NHA those patients admitted to nursing homes for sub-acute rehab or short-term stays then it would have expressly done so.

The Act's definition covers facilities that provide continuous and extended nursing care, not a certain length of care, to 2 or more unrelated individuals who have chronic illnesses or injuries, disabilities, or who are in of

convalesce. Convalesce means any patient who requires treatment and time to recover, suggesting patients are contemplated by the Act to require extended nursing care to heal and return home. Even if the Court were to focus solely on the plaintiff, Ms. Early was 67 years old when she was deemed stable to be discharged from Englewood and transferred to CareOne for round-the-clock nursing care. At that time, she required nursing assistance with daily activities including every 2 hour repositioning to prevent a pressure wound. She was a resident along with the others there who needed continuous nursing care.

In Bermudez, the Appellate Division performed a careful statutory analysis of the NHA definition. The Court was considering whether the NHA should apply to defendant Kessler which was **not a Long-Term Care licensed facility.** The analysis started with a review of the license issued to Kessler by the NJ Department of Health which was a license for a comprehensive rehabilitative hospital. 439 N.J. Super. 45, 50. The Court then determined it was unclear whether the broad definition of the Act encompassed such a facility. Therefore, it delved deeply into the legislative history of the NHA and its definitional provision. The testimony of then DOH Commissioner, Dr. Finley, before the Nursing Home Study Commission was heavily considered and relied upon. The Commission had been investigating the condition of nursing homes in 1974 directly before the enactment of the NHA in 1976. Id. at 54.

The Court ruled that based on the legislative history surrounding the NHA, the NHA was meant to apply to nursing homes, intermediate care facilities, and homes for the aged as described by Dr. Finley. The homes she described were distinguished from acute care facilities such as hospitals and were facilities meant for extended and continuous nursing care. Id. at 55-6. While the Court ultimately determined a comprehensive rehab hospital did not fit within the statutory definition of the NHA, the facilities described by the Commissioner that were encompassed by the NHA definition in Bermudez unquestionably fit CareOne. Coupled with its license, it is clear that CareOne is a nursing home covered by the Act.

Further, the Appellate Division in Burns v. CareOne, 468 N.J. Super. 306, 310 (App. Div. 2021), expressly held that the type of healthcare facility that an institution operates is governed solely by its license from the Department of Health. While in this case CareOne asked the Court to find that its nursing home license was something other than that issued to it by the DOH, like a sub-acute license that the DOH purposefully does not recognize, the Burns Court explained that the Department of Health has special expertise in that area that should not be disturbed.

> The judge's oral decision also suggests that if plaintiff can prove CareOne was operating something other than an assisted living residence, a jury could consider and ultimately find a violation of the bill of rights applicable to that other type of facility. We reject this position. CareOne's facility is governed by the license issued to it as an assisted living residence. **Whether, during decedent's stay there, CareOne was**

> **operating something other than that should be determined only by the Department of Health, which possesses special expertise in these matters, not by either the trial judge or a jury.** Id. at 322.

In Burns, the plaintiff was admitted to defendant CareOne which was a licensed Assisted Living Facility. Mr. Burns filed suit against CareOne alleging that he had fallen several times, developed pressure wounds, and eventually met with his death due to substandard nursing care there. The plaintiff moved for partial summary judgment seeking an Order declaring that CareOne was a facility governed by the Rooming and Boarding House Act and/or the Dementia Care Home Act, because the facility included a separate dementia unit to which plaintiff was admitted. Id. at 310. Defendant CareOne argued that it was licensed as an Assisted Living Facility and was not subject to those Acts. Id. at 311. The Trial Court ruled that this issue was a question of fact for the jury to decide. The Appellate Division reversed. The Court found as a matter of law that the Department of Health licensed CareOne as an Assisted Living Facility only, that the ALF Bill of Rights did not create separate classes of residents, and that ALF regulations applied in the case. Id. at 312.

The Burns Court utilized the DOH regulations to inform its opinion. The Court found that New Jersey has a comprehensive scheme under which the Legislature regulates all healthcare which should not be disturbed. The Legislature granted exclusive authority to the Department of Health to license and oversee all

healthcare facilities in New Jersey, including nursing homes, through the Health Care Facilities Planning Act found at N.J.S.A. 26:2H-1 et seq.

The Health Care Facilities Planning Act states in part:

> In order to provide for the protection and promotion of the health of the inhabitants of the State, the Department of Health shall have the central responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services . . . and all public and private institutions, whether State, county, municipal, incorporated or not incorporated, serving principally as residential health care facilities, **nursing or maternity homes….**

The DOH does not allow a medical facility to operate without a license in NJ. N.J.S.A. 26:2H-12. In NJ, the DOH licenses all nursing homes as Long-Term Care Facilities. The DOH expressly states that Long-Term Care Facilities are nursing homes. N.J.A.C. 8:39-1.1(a). Under its regulations, the DOH explicitly identifies the kinds of patients permitted for admission when a facility is licensed as a nursing home. The regulations provide that that when a license is granted for long-term care, the applicant "shall" agree to occupy its beds with residents who require general nursing home care, and that applicants approved for long-term care "shall not" admit residents who require a different licensing category of care such as comprehensive rehabilitation. N.J.A.C. 8:33H-1.1(g). The regulations recognize that "[s]ome patients in nursing homes may, on occasion, require rehabilitative care, [however], the rehabilitative services offered to patients in most nursing homes are distinguished from comprehensive rehabilitation which may only be offered by a licensed rehabilitation hospital." N.J.A.C. 8:33H-1.1(e). **It clear that CareOne was not**

legally permitted to operate a sub-acute rehab unit out of it licensed nursing home during the time Ms. Early was a resident.

The Appellate Division in Ptaszynski engaged in a detailed examination of the rights and responsibilities sections of the NHA. Ptaszynski v. Atlantic Health Systems, 440 N.J. Super. 24 (2015). The Court found that N.J.S.A. 30:13-5, or the rights section of the NHA, allowed for a private cause of action by plaintiffs, but N.J.S.A. 30:13-3, the responsibilities section, did not confer such a right. Id. at 34.

On multiple occasions, Courts have found the rights section of the NHA to be clear and unambiguous and permitted evidence of a violation of this section to go to a jury. In re Jobes, 108 N.J. 394, 426 (1987); Gleason v. Abrams, 250 N.J. Super. 265, 270 (App. Div. 1991). The Ptaszynski Court considered the importance of dignity and individuality for nursing home residents as those words appear in section 5(j). Id. at 33-34. In considering whether this section was an appropriate cause of action, the Court concluded that proof of a violation of a patient's dignity presented an issue for the jury to decide. Id. at 37-38. The Court ruled that expert testimony was not necessary for a jury to determine if certain injuries constituted a deprivation of dignity as "dignity can play a role in loss of enjoyment of life" as explained to the jury through jury instructions. The Court recognized that an expert is not needed to help a jury understand what the statutory words mean when those words are completely

understandable to lay people. However, expert testimony was permissible regarding the violations. Id. at 38.

In the case at bar, the plaintiff's nursing expert opined in her report that CareOne violated the rights section of the NHA and the Federal Nursing Home Act explicitly citing to violations of the below provisions which should have been presented to a jury (Pa81-2):

> N.J.S.A. 30:13-5(j) – residents have the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that person's care consistent with sound nursing and medical practices.
>
> 42 C.F.R. 483.25 (1) a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

Further, during the Charge Conference the Trial Court also rejected plaintiff's request to instruct the jury pursuant to Model Civil Jury Charge 5.77 specifically created for nursing home cases. (12T131-6 to 13). The Charge was approved on November 10, 2022 by the Supreme Court Committee on Model Civil Jury Charges for use by the Bar and Trial Courts. It is the only instruction that deals with nursing home cases and their unique evidentiary issues which

include claims of both common law negligence and multiple statutory regulations.

Pertinent to CareOne's argument, Charge 5.77B provides "[t]he New Jersey Nursing Home Responsibilities & Rights of Residents Act, N.J.S.A. 30:13-1 et seq., applies to any facility licensed as a long-term care facility, whether the resident is in for long term care or sub-acute rehabilitation." The Charge further instructs that, if sufficient evidence is adduced at trial, all applicable regulations should be made part of the Charge to the jury. By example, it cites Federal and State regulations asserted in this case by the plaintiff's nursing expert to have been violated, and describes to the Trial Court the way in which the regulations should be made part of the instruction to the jury.

"A jury is entitled to an explanation of the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Viscik v. Fowler Equip. Co. 173 N.J. 1, 18 (2002). Jury instructions "must correctly state the applicable law, outline the jury's function and be clear in how the jury should apply the legal principles charged to the facts of the case at hand." The failure to instruct the jury correctly constitutes reversible error. Velazquez v. Portadin, 163 N.J. 677, 688 (2000).

By precluding testimony of violations of the NHA and Federal nursing home statutes, and denying the applicable Jury Charge, the Trial

Court did not allow the jury to consider multiple and permissible bases for plaintiff's claims against defendant CareOne, and wrongfully precluded possible application of the incentivizing fee-shifting provision created by the Legislature in the NHA for liable nursing homes. in the statute. The preclusion of these claims and Jury Charge were reversible error requiring retrial.

II. THE TRIAL COURT ERRED IN ITS DISMISSAL OF PLAINTIFF'S WRONGFUL DEATH CLAIM (4T251-268; 5T155-186)

Defendants moved by directed verdict to dismiss plaintiff's wrongful death claim arguing that the plaintiff's physician expert, Dr. Lloyd Krieger, offered net opinion and that his videotaped trial testimony was not sufficient to support the plaintiff's claim that the defendants caused her death. Plaintiff opposed. (Pa205; Pa213; Pa282; 4T251-5 to 11). The Court improperly granted the motion by ruling on the record at trial. (5T185-5 to 25; 5T186-1 to 9).

Dr. Krieger opined that nursing failures caused the plaintiff's pressure wound, which became infected and led to sepsis. He further opined that the sepsis was the cause of the plaintiff's death. (Pa115-7; Pa223-5; Pa232-3; 5T42-15). The plaintiff supplied an initial report of Dr. Krieger dated January 28, 2021, and supplemental reports dated April 15, 2021, June 19, 2021 and January 26, 2022. (Pa101; Pa116; Pa117; Pa118). Dr. Krieger also had his discovery deposition taken. (Pa120). Defendant Englewood moved for summary judgment

on the issue of causation of the plaintiff's death during discovery which was denied by Order dated February 17, 2023. (Pa156).

At trial, defendants moved to strike the de bene esse testimony as net opinion, and thereafter, moved to dismiss the wrongful death claim by directed verdict. (4T251-5 to 11; 5T156-1 to 13). The defendants had no new information at trial to support the dismissal of this claim. In fact, the plaintiff had additional evidence in its favor to present to the jury at the time of the defense motion as the Doctor had provided trial testimony by videotape. (Pa216). Despite this, the motion was still granted. (5T185-7 to 25).

During his de bene esse, Dr. Krieger testified to his qualifications on voir dire. He was an undergraduate from Stanford, a graduate of the Chicago School of Medicine, and did a surgical residency at UCLA. (Pa218). He began his private surgical practice in 2001 which continues to the present day, and he is attending at multiple hospitals, including Cedar Sinai and Northridge Hospitals in California where his practice is located. (Pa218-9).

Regarding his experience in wound care, the Doctor testified:

> Well, I see patients with pressure wounds in all phases. Sometimes I'm brought in a preventative fashion where they think that person is at high risk and they want an assessment done, some steps that they can take to minimize the risks of wounds. Other times, I'm brought in once wounds have been established. Either, pressure sores or other types of wounds and I might treat them with everything from medication, suggestions for management of body positioning, all the way up until excision or debridement of wounds and closing or covering the wounds with skin grafts, which is when we take skin

> from a distant part of the body and put it in another area so it can heal, or what we call flaps, which are wound vein nearby tissue, into an area to give that damaged area the stability of the fresh nearby tissue that we're moving in. So I'm involved in all phases of that type of wound healing and treatment. (5T11-17 to 25; 5T12-1 to 11; Pa219).

When asked if Dr. Krieger had undergone any education or training for the treatment of sepsis in his role as a surgeon, Dr. Krieger stated the following:

> Yes. During my training, there – I treated and took care of many patients that were suffering from sepsis. In general surgery, it was often about the cause being an internal organ that had some sort of malfunction that led to infection sepsis and then in plastic surgery, it was more about wounds, that were part of the sepsis syndrome either as a cause or sometimes as a complication of that severe illness. (5T14-3 to 10; Pa219).

When asked if his practice also included or involved treatment of individuals with sepsis or infection, Dr. Krieger replied:

> Yes. I generally am brought in – my role is generally that I'm brought in as a consultant for patients. That often do have sepsis. For example, I consult on patients who may have suffered severe injuries or they might have complex illnesses that leave them in critical condition, including sepsis. I don't treat the sepsis itself. Because I'm not an infectious disease specialist. But many of these patients have wound healing issues and that is the capacity where I'm brought in. (5T13-14 to 23; Pa219).

The Doctor was then qualified as an expert in the area of medicine and wound care. (5T22-17 to 20) He proceeded to explain the cause of pressure wounds as that being pressure, described pressure wound stages and accompanying pain, and characterized the interplay of infection, sepsis and pressure wounds. He testified:

> Well, it can vary but -- what the thing to bear in mind is that the skin is our outer protection barrier, that is our suit of armor is our skin. And when that is violated by breaks or damage or open wounds, we no longer have our shield

> of armor, and that means that organisms that ordinarily would be blocked out by the skin, now have access to deeper parts of our body. And when that happens, then you have what is called a local infection at the wound, and the local infection at the wound, the wound is supplied by blood, and some of those bacteria that are causing the infection invariably get in the blood, and that depending on the patient's condition, can spread the infection to other parts of the body and, in fact, lead to the sepsis that we have been describing. (5T30-21 to 25; 5T31-1 to 10; Pa223-4).

With regard to sepsis, the Doctor further explained:

> Sepsis is a situation where there is infection that is out of control, the body is not able to control the bacteria load, the amount of bacteria in the body, and it takes an infection which generally starts as local in such places as a wound or in the lungs, or somewhere else, and the bacteria becomes so overwhelming, that it spreads into the blood, and then the blood spreads the infection to the total body. That is a very severe infection that could colloquially be called sepsis. Leading to multisystem organ failure, meaning that the infection has spread to multiple organs and crucial parts of the body. Now, sepsis syndrome is part of this picture. Sepsis syndrome, is that the body in attempting to control this excess of bacteria, releases a lot of very toxic materials to try to kill the bacteria, and along the way it causes damage to the body itself. And that makes for a very difficult and highly critically ill patient because they not only have the problem from the infection, but then the body's own defense of the infection is, in fact, causing still more damage to the body. So that is what we call sepsis syndrome, which is the end point of what we call colloquially or just somewhat generally, I should say sepsis. (5T29-10 to 25; 5T30-1 to 10; Pa223).

Dr. Krieger then proceeded to list the documents he reviewed to provide his report and opinions in the matter. (5T31-11 to 25; 5T31-1 to 14; Pa224). When asked what history, if any, he learned from them he set forth the medical course for Ms. Early at Englewood and CareOne, failures in nursing care along the way, and her death on April 2018 at the hospital from sepsis. (5T33-5; Pa224-5). He described his reliance on a wound culture during her second visit

at the hospital taken from the infected wound which was positive for multiple bacteria. He explained:

> …a wound culture was taken in the hospital a few days after arrival and this was a positive for two different, what we call virulent or significant symptom or tissue damaging organisms called enterococcus and E. coli. It was determined that Ms. Early had no meaningful chance for recovery, and she was transferred home for home hospice care which is not medical care anymore. It is comfort care in preparation for dying.
>
> And then she died a little more than a week after she left the hospital on April 9th, 2018….. I think I was saying that on the death certificate, the cause of death was listed as sepsis. (5T34-25; 5T35-1 to 10; Pa225)

Ultimately, the Doctor was asked to a reasonable degree of medical probability what caused the plaintiff's pressure wounds to which he testified nursing deviations that had been identified that failed to relieve pressure. (5T42-15 to 24; Pa230). He was also asked about his opinions regarding infection and death of Ms. Early and he testified to the following:

> Q. Doctor, and then can you tell the jury if Ms. Early developed an infection in the wound (Pa231).
>
> A. She developed an infection of the wound. And that is the way that I know that is for two reasons. First of all, every wound that has necrotic or dead tissue in it is infected. Infected means that there is uncontrolled bacterial growth. Dead tissue does not have a blood flow to keep the tissue nourished and it universally overgrows with bacteria. So every wound that has necrotic tissue is infected. Additionally, this particular wound had what is called tissue cultures, and I will explain that in a minute, which were positive for growth of what we call virulent organisms. Now, a culture is a means of assessing an infection, both qualitatively in terms of a general what is going on and qualitatively in terms of how much bacterial overgrowth there is, what kind of bacteria is there, and what antibiotics may or may not work on the bacteria based on testing. A culture

provides a lot of information wherever it is drawn from on the body. In a wound, the way that a culture is done, is usually by taking a swab or a Q-tip and rubbing some of the tissue from the wound onto that, and then sending that to a laboratory where it is placed in a system that will allow whatever was retrieved to grow enough so that there is an assessment, of what I described, can be made. And again, so the process is to take some tissue generally but with a swab, sending it to a laboratory, they assess this tissue over a period of days to see how much bacteria is there, relative to normal, what kind of bacteria it is, and eventually if it is what we call susceptible and can be treated successfully by various antibiotics. (Pa231).

Q. Sir, did you form an opinion regarding the infection developed by Ms. Early in this matter (Pa232).

A. Opinion about what aspect of it (Pa232).

Q. Whether or not it played a part in her death (Pa232).

A. Well, as I explained, when there is an open wound, not only is that wound if it has necrotic tissue infected, in this case we have confirmation of infection with a culture, that means that the body's system has been compromised, that leads to just as pre-existing conditions or new onset complications, that means that the body is compromised in such that it has an impaired ability to sustain itself in a healthy state, including fighting off infection. Now, an open wound that is infected, not only has that constitutional effect or what could be called a general affect on the body. It also means that the wound is easily able and frequently does seed the blood with infected material, which compromises still further the general body and, in fact, can spread infection to other organ systems that are also supplied by blood which is all of them. (Pa232).

Q. To a reasonable degree of medical probability, can you tell the jury what injuries Ms. Early suffered as a result of the nursing malpractice by Englewood Hospital and CareOne (Pa232).

A. Yes. She developed new -- excuse me - new onset pressure injuries which led to full fledged pressure sores that were large, both in terms of the measurements of how their length and width was -- excuse me, how its measurement of length and width, so it was large, it was big. And it was also deep down to bone which is the staging, which was, in her case,

> stage four. These wounds were allowed to occur. They were allowed to worsen, and they never got significantly better and remained infected certainly until the end of her hospitalization and almost certainly until the time that she died. (Pa232).
>
> Q. To a reasonable degree of medical probability, can you tell the jury what was the cause of Ms. Early's death? (Pa232).
>
> A. Well, she died of sepsis, according to the death certificate. According to the medical records, they indicated multiple areas of her body were affected what we call multisystem organ failure, and those were the causes of her demise. (Pa232).
>
> Q. What part, if any, did the wound and infection play in her death (Pa232).
>
> A. Well, the wound certainly seeded the blood just because it was an infected deep wound and it always does. It also diminished her capacity to fight infection or sepsis, that even if it had developed someplace else such as in the kidneys or bladder, the fact that she had this open uncontrolled wound and that compromised her overall body system, meant that she was not able to resist sepsis, nearly as well as if then if she did not have that wound. (Pa232-3).

The defendants' argument rebutting the Doctor's trial testimony was that the information was not contained in his report served in discovery. (5T178-2 to 20). While both the Court and defense counsel indicated this at times, it was inaccurate. (5T185-10 to 25). In part, Dr. Krieger proffered in his report dated January 28, 2021:

> Wound culture on 3/19/2018 returned as positive for Enterococcus and E-coli. Ms. Early was referred for Hospice care. She ultimately transferred home and died on 4/9/18. The Death Certificate listed her cause of death as Sepsis. (Pa107-8).
>
> ...

> It is my opinion to a reasonable degree of medical certainty that failures of nursing staffs to provide timely, consistent and sufficient pressure relief and to properly assess and monitor Ms. Early's skin condition during her admissions to Englewood Hospital and Care One Teaneck caused her to develop the advanced pressure sore from which she suffered. The nursing lapses also failed to allow the pressure sore to heal, but rather to become worse. (Pa109)
>
> These nursing deviations allowed the ulcers to form and also allowed them to worsen -- causing additional sequelae including the need for larger, more extensive and more deforming interventions as well as pain, suffering and discomfort. The deviations allowed infections of these pressure sore to progress to the point of becoming chronic. The deviations also led to Ms. Kelly's increased risk for infections of other organ systems as well as systemic infection including sepsis. (Pa109).
>
> . . .
>
> The Death Certificate dated April 13, 2018 describes the cause of death as "sepsis." The poor care received at Englewood Hospital and Care One Teaneck caused Ms. Early's sacral decubitus ulcer to develop (Englewood) and worsen (Englewood and Care One). This created the clinical setting where infection occurred. (Pa115).
>
> With Ms. Early, the out of control infection led to systemic infection of the entire body (sepsis). Once someone like Ms. Early develops this sort total body infection it is very difficult to regain patient stability, and such patients often die from the infection. A large and under-treated pressure sore makes fighting this type of infection much more difficult. This was the case with Ms. Early. (Pa115).
>
> To a reasonable degree of medical certainty the improper care by Englewood Hospital and Care One Teaneck was the proximate cause of the death of Ms. Early. (Pa115).

Additionally, the defense conducted a discovery deposition of the Doctor that was 4 hours long and 133 pages during which time they could have asked the Doctor to explain any part of his report as plaintiff did on direct. (Pa120). Ironically, the

only other argument made by the defense related to one answer the Doctor provided during his discovery deposition, which was the same argument presented on the original motion for summary judgment that was denied. After a multitude of other questions and out of context, the Doctor ultimately indicated he did not have an opinion as to what caused the sepsis during his discovery deposition. (Pa150). Against the backdrop of all of the Doctor's opinions, reports, and his entire trial testimony, that one answer goes to the weighing process for the jury not admissibility.

However, the Court was hyper-focused on this one answer, as well as the words the Doctor used and order he placed them in when testifying, and continued to indicate that the Doctor failed to link the pressure wound to the sepsis. The plaintiff pointed out to the Court the multitude of times the Doctor discussed the local infection in the wound seeding the blood leading to sepsis and death of the plaintiff. The Court simply continued to weigh the evidence the way in which the jury should have been allowed to, including the credibility of the physician. (4T254-263; 5T172-83). In the Court's ultimate wrongful grant of the motion, Judge Geiger stated:

> He's very, he's qualified. He's an articulate witness. And he went through painstakingly sepsis in a general description, and the impact of sepsis to an individual and to their medical, how it impacts them medically.
>
> But he did not link or provide an opinion on the cause of plaintiff's sepsis. There was no explanation about sepsis being the cause of death, and he

> admitted he had no opinion on the cause of sepsis. He does acknowledge he reviewed the death certificate, which listed sepsis as the cause of death, but he did not relate sepsis to the pressure wounds or her death. He didn't. That's what Dr. Krieger, that's Dr. Krieger's testimony. That's Dr. Krieger's report. That's Dr. Krieger's deposition. He didn't link it for whatever reason. He didn't. (5T185-10 to 25).

While the Doctor is not required by caselaw to state any specific words in any specific order, he did proffer a link between the wound, infection and sepsis on several occasions in his testimony. A reasonable jury could have determined that the Doctor was qualified, relied on the appropriate materials, and found that the cause of death was due to sepsis that developed from the wound as explained by him. That information was contained in the Doctor's report and was available for exploration at his discovery deposition by defense.

In deciding a motion for directed verdict, the Trial Judge must "accept as true all evidence presented...and the legitimate inferences drawn therefrom, to determine whether the proofs are sufficient to sustain a judgment." Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super.558,569 (App. Div. 2014). The standard that applies to summary judgment motions applies to directed verdict motions made under R. 4:37-2(b); Brill v. Gurardian Life, 142 N.J. 520, 540 (1995). In its review, neither the Trial Judge nor the Appellate Court is concerned with the weight, worth, nature or extent of evidence, but must accept as true all the evidence supporting the party opposing the motion, and accord him the benefit of all favorable inferences. Polyard v. Terry, 160 N.J. Super. 497

(App.Div. 1978). The Appellate Division's review of a Trial Court's grant of summary judgment is de novo, employing the same standard used by the Trial Court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

Summary judgment is a stringent remedy and should be denied unless the right to it appears so clearly as to leave no room for controversy. Judson v. Peoples Bank, 17 N.J. 67, 74-5 (1954); Shanley & Fisher v. Sisselman, 215 N.J. Super. 200, 212 (App. Div. 1987). It must be palpable that no factual dispute exists. Evidence of the non-movant must be of a mere scintilla, fanciful, or frivolous for dismissal. Judson at 74-5. The Supreme Court has stressed that it is critical that a summary judgment ruling by a Court not shut out a deserving litigant from trial, nor usurp the role of the jury as the fact finder. The Court's role is not to weigh the evidence, but solely to determine if the case should proceed to trial. Judson at 77; Brill at 540. Courts are to draw all reasonable inferences in the light most favorable to the opposing party. Maher v. NJ Transit, 125 N.J. 455 (1991); Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1994). The papers supporting the motion are to be closely scrutinized and opposing papers are to be indulgently treated. Judson at 74-5.

Even strong evidence supporting a movant's claim presents only a jury question. The motion judge's function is not to weigh the evidence and

determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The motion judge is not permitted to evaluate the "preponderance or credibility" of the evidence. Rather, upon a defendant's motion for summary judgment, the motion judge is only to sift through and analyze the evidential materials to ensure that there is a sufficient factual dispute of the elements of the plaintiff's claim. Brill at 540.

Assessing the credibility or weight of the evidence is strictly a jury task. Vitrano by Vitrano v. Schiffman, 305 N.J. Super. 572, 579 (App. Div. 1997). It is not within the province of the Court to make credibility judgments about the testimony of witnesses. This should be left solely to the jury. Schelcusky v. Garjulio, 172 N.J. 185 (2001); Hagne v. Met Prop. Ins., 202 N.J. 369 (2009).

N.J.R.E. 702 allows testimony by experts at trial with specialized knowledge if it will assist jurors to understand evidence or determine facts in issue. A witness qualified by knowledge, skill, experience, training or education may testify in the form of opinion pursuant to this Rule. Moreover, an expert may rely upon facts or data made known to him in order to render his opinion. The facts or data must be the type reasonably relied upon by experts in his field and they are not required to be admissible. N.J.R.E. 703.

The Supreme Court has held these expert Rules should be liberally construed in light of their tilt in favor of admissibility of expert testimony. State

v. Jenewicz, 193 N.J. 440, 454 (2008). The modern tendency is to permit expert testimony wherever it would help the jury to decide the issues in the case. Jobes v. Evangelista, 369 N.J. Super. 384, 399 (App. Div. 2004). The discretion of the Court to reject expert testimony should be used with great caution in light of the strong policy in favor of admission of all relevant evidence. Germann v. Matriss, 55 N.J. 193 (1970).

The net opinion rule is not a standard of perfection. The rule does not mandate that an expert organizes or supports an opinion in a particular manner that opposing counsel deems preferable. An expert's proposed testimony should not be excluded merely because it fails to account for something which the adversary or even the Court considers relevant. Buckelew v. Grossbard, 87 N.J. 512, 529 (1981); State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988). When a qualified expert bases his opinion on sufficient and reliable data, his opinion should be admitted. Gore v. Otis Elevator Co, 335 N.J. Super. 296, 303-4 (App. Div. 2000). In the event the Court finds that expert testimony should be excluded, it must be so lacking in foundation as to be considered "worthless." Anderson v AJ Friedman Supply, 416 N.J. Super. 46, 74-5 (App. Div. 2010).

The failure 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 he offers sufficient reasons that support his opinion. Townsend v. Pierre, 221 N.J.

36, 54 (2015); Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002). Instead, the lack of any factor which the adversary deems necessary becomes the proper subject of cross-examination in front of the jury. Townsend at 54; Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990); State v. Harvey, 151 N.J. 117, 277, 699 (1997). It is axiomatic that "the weight to be given to the evidence of experts is within the competence of the fact-finder." LaBracio Family v. 1239 Roosevelt Ave., 340 N.J. Super. 155, 165 (App.Div. 2001).

Dr. Krieger provided a thorough report with his opinions, had his discovery deposition taken by the defense, and was properly qualified as an expert in medicine and wound care by the Court. He testified to his education, knowledge, and the documents he relied upon to formulate his opinion that Ms. Early's cause of death was sepsis. The Trial Court erroneously precluded his opinion because the Court improperly weighed the facts, testimony, and credibility and made its own decision. It did not review the evidence in the light most favorable to the non-movant. There was more than a mere scintilla of evidence, and it was more than fanciful. The Doctor's opinion was not so baseless as to be worthless. Aa a result, this claim should have been presented to the jury for their determination and requires remand.

III. THE TRIAL COURT ERRED IN PRECLUDING TESTIMONY OF PLAINTIFF'S EXPERTS REGARDING THE DEATH CERTIFCATE (4T97-106; 4T251-269; 6T172-4; Pa225)

The Death Certificate of the plaintiff in this matter is dated April 9, 2018 and listed the cause of death as sepsis of three weeks duration. (Pa35). Both plaintiff and defense experts relied upon the Death Certificate in forming their opinions in the case as noted in their reports and at trial. (Pa76; Pa102; 4T92; 5T31; 6T172-3; 8T23-1 to 8). However, during trial, the Court sustained the defendants' objection to testimony regarding the content of the Certificate by plaintiff's experts claiming hearsay, but nonetheless, allowed the testimony by defense expert Dr. Brett Gilbert. (4T92-106; 4T254-64; 5T31-2; 6T172-4).

The defendants objected to the plaintiff's expert, Nurse Charlotte Sheppard, testifying at trial as to the cause of death listed in the Death Certificate. (4T104-8 to 11). The same objection with regard to Dr. Krieger was made, whose testimony regarding the Death Certificate and his reliance upon same for his cause of death opinions were noted above. (Pa225-6; 4T251-12 to 18). The plaintiff argued to admit testimony of both witnesses at side bar for Nurse Sheppard, and upon motion for redaction with respect to Dr. Krieger's videotaped testimony. (4T101-2 to 7; 4T254-264). The Trial Court permitted Nurse Sheppard to list the records she reviewed in offering her opinions, which included the Death Certificate, but granted the defense's objection regarding recitation to the jury of the cause of death noted within. (4T106-7 to 11). The Court further sustained the objection of the defense and struck those portions of

the Doctor's de bene esse testimony regarding the Death Certificate and its cause of death. (4T269-24 to 25; 4T270-1 to 3). The objections should have been overruled as to the Death Certificate and the cause of death stated therein as they were admissible for the following reasons.

Pursuant to N.J.R.E. 803(c)(9), a Death Certificate on its face is considered an admissible hearsay record as a vital statistic as long as the Certificate is duly filed with the State Office of Vital Statistics. However, an expert opinion included in an otherwise admissible hearsay statement may be barred, including an opinion reciting a cause of death, since such an opinion is often disputed and should not be admitted without the opportunity to cross-examine the author of the opinion. Quail v. Shop-Rite, 455 N.J. Super. 118 (App. Div. 2018). Under those circumstances, the Death Certificate itself may be admissible as a vital statistic but the portion that contains subjective opinions from a non-testifying medical expert are typically excluded under N.J.R.E. 808.

While New Jersey Courts have continued to adhere to the strict application of excluding opinions of non-testifying experts, there are exceptions where the Trial Court is permitted to admit such opinions into evidence under N.J.R.E. 808. For instance, the Court may allow the opinion of a non-testifying expert in an admissible hearsay document into evidence if the Court finds that the circumstances involved in rendering the opinion tend to establish its trustworthiness. Id.

The physician who provided the opinion that Ms. Early's cause of death was sepsis on the Death Certificate in this matter was Dr. Stephen Brunnquell. (Pa35). Dr. Brunnquell was Ms. Early's admitting physician from defendant Englewood Hospital. (4T102-8 to 15). Dr. Brunnquell had no motive nor interest in making his determination other than the care of the plaintiff while she was at Englewood. The opinion is, in fact, a statement against the defendants' interest which causes it to be inherently reliable. As the admitting physician, Dr. Brunnquell was responsible for assessing Ms. Early's condition, reviewing her medical history, and initiating the admission process. Dr. Brunnquell's opinion of the cause of death is supported by his firsthand account of Ms. Early's condition. Unlike the physician who provided the opinion in the Death Certificate in Quail, supra, which was argued as support by the defense (Pa225-6), Dr. Bunnquell's opinion was trustworthy and reliable.

Further, Dr. Brunnquell was an attending physician at defendant Englewood Hospital. (4T102-8 to 15). The Death Certificate is, thus, admissible due to the hearsay exception of admission by a party-opponent. Pursuant to N.J.R.E. 803(b)(4), a statement made by a party's agent or servant, concerning a matter within the scope of the agency or employment, made during the existence of the relationship, that is now being offered against a principal party-opponent, is not excluded by the hearsay rule. Simply put, any statement made by a party's agent or employee that is being offered against that party is not hearsay.

The Trial Court erred when it precluded plaintiff's experts from testifying with regard to the Death Certificate, its contents, and the manner in which it supported their opinions in the case. Specifically, the plaintiff's case was prejudiced by the Court disallowing the testimony of the plaintiff's expert physician who relied upon the document which corroborated his opinion regarding the cause of death. This was further compounded by the Court inequitably allowing defense expert Dr. Gilbert to testify to the Death Certificate and its contents because he relied upon it. This was the same reasoning plaintiff set forth in support of her own experts testifying, as well as the exceptions to the hearsay rules, but the Court sustained the objection for them and overruled it for Dr. Gilbert. (6T172-21 to 25).

The plaintiff's hands were tied as to what could be argued related to the Death Certificate and cause of death because her experts' testimonies were limited, despite plaintiff's burden of proof, and the defendant was able to set forth its defense regarding the same document without rebuttal. The unfair treatment was confusing for the jury and undermining to the plaintiff's experts and case. The Death Certificate and its contents were admissible, were relied upon by all experts, and testimony regarding same should have been permitted for the above reasons.

IV. THE TRIAL COURT ERRED IN STRIKING THE PHOTOGRAPH OF PLAINTIFF'S PRESSURE WOUND FROM THE RECORD (9T238-277)

At trial, the Court allowed the plaintiff to lay a foundation for the photo of the pressure wound that was shared in discovery through testimony of a witness, the plaintiff's nurse aide, who saw the wound and testified to taking the photo. (9T247-7 to 15). The photo was allowed to be published to the jury, but subsequently struck after cross-examination. (9T255-14 to 25; 9T277-10 to 22). This is similar to the problem noted above with the Death Certificate wherein the Court found it not admissible and changed course during the trial. Here, the Court found the photo admissible and again changed course during the trial. These decisions and changes by the Court are errors, but more concerning is that they are inequitable as between the parties, undermine the plaintiff's case, and serve to confuse the jury requiring a retrial.

The wound photograph was served as an attachment to plaintiff's Interrogatories on July 27, 2019, and at the top of the photo was typed that it was taken by Ms. Early's aide. (Pa36). To authenticate the photograph, the plaintiff called fact witness, Kosie Adjei-Frimung, the subject nurse aide who had provided care to Ms. Early and took the photograph. Ms. Adjei-Frimung testified that she remembered Ms. Early, and that she was hired to provide care for Ms. Early about six years ago, which would have been in and around 2018,

the operative time period. (9T250-22 to 25; 9T251-1 to 8). She testified she remembered seeing Ms. Early at the hospital and that she had observed the pressure wound on her back. (9T251-15 to 16; 9T251-23 to 25). She remembered that Ms. Early's wound was "quite deep." (9T263-24 to 25; 9T264-1). Finally, Ms. Adjei-Frimung testified that she took multiple photos of the wound, and after being shown the photograph, she agreed that it was a photo she had taken. (9T253-8 to 12). The Court then allowed the photo to be published to the jury. (9T255-14 to 25).

However, after the photo had been published and during cross-examination, Ms. Adjei-Frimung stated that she was not certain that the photo was the exact one she took out of all the photos she had taken of Ms. Early's wound. (9T259-7 to 10). As a result, the Trial Court improperly struck the photo from the record and instructed the jury not to consider it. (9T277-10 to 20).

New Jersey has a long-standing tradition of allowing attorneys to introduce demonstrative evidence when the proffered demonstrative evidence aids the jury in understanding relevant aspects of their case. Cross v. Robert E. Lamb, 16 N.J. Super. 53 (App. Div. 1960). New Jersey Courts have recognized that a stringent authentication process obstructs the justice system, as it can prevent the presentation of evidence. As a result, the authentication of evidence has become less stringent over the years. Proof of authentication may proceed

with relatively little attention to detail and technicality. "The authentication rule does not require absolute certainty or conclusive proof." State v. Brown, 463 N.J. Super 33, 51-2 (App. Div. 2020); State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999).

Pursuant to N.J.R.E. 801(e), a photograph must be authenticated to be admissible. The authentication of a photograph requires testimony that it is an accurate reproduction of what it purports to represent. N.J.R.E. 901; State v. Wilson, 135 N.J. 4, 15 (1994). The Supreme Court has found that the photographer need not testify, and that "any person with the requisite knowledge of the facts represented in the photograph…may authenticate it." Wilson at 14.

The judicial role in assessing the credibility of evidence is limited, particularly concerning the authentication of photographs. State v. Hockett, 443 N.J. Super. 605 (App. Div. 2016). The Hockett Court made clear that the Trial Judge has a gatekeeping role to play in assessing the credibility of testimony in support of authentication generally, but that the role is limited in the case of photographs. If the witness's testimony supplies a sufficient foundation for authentication, the photograph speaks for itself. Thus, the weight to be accorded the evidence rests with the fact-finder and there is no credibility determination to be made by the Trial Judge. Id. at 614-5.

In this case, the plaintiff's nursing aide testified she was a caretaker for her during the operative time period, that she saw her wound, she recalled it being particularly deep, and she did take multiple photos of it. She identified the photo as showing the wound, so she was able to say it was what it purported to be, and believed she was the photographer. While on cross she may have wavered slightly, the account by the witness was more than six years ago and she had taken multiple photographs of it. It was understandable that she may not be able to recall one specific photograph of the wound she had taken. Nonetheless, that she was the photographer is unnecessary for authentication, only that she could recall Ms. Early, her wound, taking photos of it, and her wound being what was represented in the photo. The plaintiff satisfied the admissibility standard and the photo should not have been stricken.

V. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT CAREONE'S REQUEST TO ADMIT INTO EVIDENCE HUNDREDS OF PAGES OF EXHIBITS THAT WERE NOT MARKED NOR TESTIFIED TO AT TRIAL (11T87-150)

Defendant CareOne moved at the close of its case to admit exhibits into evidence for the jury's consideration. (11T87-8; 11T116-8). The Trial Court improperly admitted the exhibits into evidence over the objection of the plaintiff. (11T93-108; 11T120-1; 11T126-130; 11T143-150; 11T200-201).

There were only two exhibits listed by this defendant noted as D17 and D18. (11T88-12 to 14). The plaintiff does not glean from the record nor recall

any exhibits being marked by the defendants with those numbers nor the presentation of those numbered exhibits to any witness at trial for testimony. It is unclear the reason those numbers were chosen and exhibits marked D1-16 do not appear in the record.

The first exhibit that defendant labeled D17 consisted of CareOne medical records, pages 399-421, 511-515, 595, 610; Prospect Heights medical records, pages 55, 56, 77, 78 and 96; and Englewood Hospital medical records, pages 4874-77. (11T89-90). This amounts to 39 pages of medical records as one exhibit. Exhibit D18 consisted of CareOne medical records, pages 172-174, 223-249, 255-288, 295-309, 346-365, 422-509, 526-7, 662-99, and 708-55. (11T143-16). This amounts to 275 pages of medical records as one exhibit. In total, the two exhibits contained 314 pages of complex medical records. (11T143-144). This amount of records, without being marked nor presented or described through testimony, was returned with the jury for deliberation allowing them to speculate resulting in severe prejudice to the plaintiff's case.

Defendant CareOne did not mark exhibits during the course of trial that they identified as being provided to a witness. Often co-counsel would call out a Bates stamp for some pages presented but not for all pages. When asked about the Bates stamp numbers presented to the witnesses for testimony during the motion, the defendant never identified those particular documents. (11T132-3).

While the exhibits were not marked, they were often not presented to witnesses for testimony either. They were simply scrolled through on a screen as a packet of documents with no accompanying testimony. Defendant CareOne conceded this by stating "I'm not going to represent to Your Honor that we went through each and every nursing note." (11T139-23 to 25). Even the Trial Court found that the medical records were "perhaps not" shown "in [their] entirety" admitting "I can't answer as to each and every one." (11T131-10 to 14; 11T131-10 to 14; 11T94-18 to 20). Nonetheless, the Trial Court overruled plaintiff's objections and specifically found scrolling adequate, despite the Court admitting that for certain groups of records the Court did not recall any testimony regarding specific pages of the group. (11T99-7 to 10; 11T100-7 to 8; 11T123-15 to 18).

It was never determined by the Court which exhibits were shown to witnesses for testimony. Despite this, more than 300 pages were improperly returned with the jury for their deliberations which bolstered the defendant's position that there was constant care provided to the plaintiff, in a case where plaintiff asserted she was not moved and repositioned every two hours as required by the nursing standard. This significantly prejudiced the plaintiff's case and allowed the jury to speculate about care that may have been provided at certain times having nothing to do with the nursing standard at issue. In fact,

some of the largest packets of records moved into evidence related to physical, speech and occupational therapy. (11T121-4 to 9;11T150-3 to 14).

In New Jersey, R. 1:2-3 governs exhibits. Under this Rule, the Court has held that all exhibits referenced at trial should be marked, even if not introduced to evidence. Manata v. Pereira, 436 N.J. Super. 330, 336 (App. Div. 2014). This was reinforced in N.J. Div. of Youth & Family Servs. v. J.Y., 352 N.J. Super. 245, 264 (App. Div. 2002), where it was held that documents that were reviewed but not identified for the record "not only violate basic rules of trial practice . . . but inhibit the appellate process." Courts have found that properly marking exhibits in evidence is crucial in ensuring that everyone understands exactly what is being referenced. It is necessary for the jury and reviewing Court to easily understand the references made to an exhibit in evidence. S.R.H. Corp. v. Roger Trailer Park, Inc., 54 N.J. 12, 18-19 (1969).

In S.R.H, the defendant tenant filed an appeal of a grant to the plaintiff landlord of the right to collect unpaid rent in accordance with the terms of the parties' agreement. Id. at 14. On both direct and cross examination, witness testimonies referred to surveys introduced as exhibits and the location of various lines, monuments, streets, etc. Id. at 18. The Court found that these passing references were "far from satisfactory" as there was no "identifying mark made on the map then being discussed to show what was referred to by the question

and answer." Id. The Court further found that "it is almost impossible, without an identifying sign on an exhibit, for the reviewing court to ascertain to what counsel or witness were referring. There is grave doubt that the jury could retain any clear recollection of what the questions and answers contemplated upon its retirement for deliberation." Id. 18-19. The Court found improper marking of exhibits was a fundamental issue that disallowed proper trial proceedings to occur and remanded the case for retrial. Id. at 24.

Further, evidence must be shown and proved to the jury so that jurors are not left to speculate. Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 145 (1950). With regard to medical records being submitted into evidence, New Jersey Courts have found that medical records can be voluminous and complex, and therefore require explanatory testimony. Heinzerling v. Goldfarb, 359 N.J. Super. 1 (Super. Ct. 2002). In Heinzerling, the plaintiff filed a medical malpractice lawsuit against two defendant doctors. The Court found that the medical records which were exhibits in the case were extensive, highly technical and not readily understood by jurors without substantial definition and explanation. If the records were admitted as exhibits at trial without explanatory testimony, the Court found they could cause serious confusion in the jury room. Id. at 6. A motion was made by the plaintiff in the case to allow his nursing expert to testify to a group of records that were marked and presented to her for

testimony at trial and this procedure was allowed over the objection of the defense. Id. at 16.

It was error for the Court to allow the defense exhibits into evidence and this error had the ability to result in an unfavorable verdict to the plaintiff due to the prejudice explained above. As a result, the case should be remanded for proper treatment of exhibits during retrial.

VI. THE TRIAL COURT ERRED IN PROVIDING AN IMPROPER SCAFIDI CHARGE AND VERDICT SHEET TO THE JURY (Pa288; Pa315; 11T151-199; 12T4-15; 12T104-196)

The Trial Court provided the Increased Risk/Loss of Chance Charge, also known as the Scafidi Charge, found under the Model Civil Charges 5.50E to the jury and supplied a lengthy, confusing and arduous verdict form reflecting this Charge. (12T5-16 to 21; Pa288; Pa315). This was done at the request of defendants and over plaintiff's objection. (11T160-18 to 25; 11T161-1 to 2; 11T160-8 to 17; 12T6-8 to 16).

The plaintiff's claim in this case was that the systematic failure to provide the standard nursing pressure relief of repositioning every 2 hours by both defendants caused the plaintiff's pressure wound, which became infected and led ultimately to sepsis and her death. While the plaintiff had some medical conditions that caused her to be at risk for development of pressure wounds, those conditions in and of themselves cannot cause a pressure wound. The

plaintiff asserted pressure wounds are caused by pressure and do not occur in the absence of pressure.

The defense argued that the plaintiff's pre-existing conditions were the cause of the pressure wound and they requested the Scafidi Charge as a result. The defense claimed things such as the plaintiff's diabetes and sepsis for which she was initially treated and had resolved were the cause of the plaintiff's pressure wound. Interestingly though, defendant Englewood did not request the Charge initially admitting it did not believe it to be applicable in this matter. (11T151-2). That was correct and the Scafidi Charge was misplaced for the following reasons.

The Scafidi Charge is to be used in cases where the preexisting condition **itself** could result in the ultimate harm or loss to the plaintiff. Scafidi v. Seiler, 119 N.J. 93 (1990). As the Court explained in Scafidi, when the plaintiff's injury can be traced to a single cause, the standard proximate cause Charge should be given. Id. at 101-2. The language of the standard Charge assumes that the defendant's negligence began a chain of events leading to the plaintiff's injury, which is what was claimed by plaintiff in the case at bar. On the contrary, the Scafidi Charge under 5.50E reads in part:

> The plaintiff had a pre-existing condition which, **by itself**, had a risk of causing the plaintiff the harm the plaintiff ultimately experienced in this case.

Clearly, this Charge is not applicable to the present case. This Charge indicates that the pre-existing conditions by themselves could have caused Ms. Early's wound but that is not what the plaintiff alleged. The plaintiff alleged that the failure to relieve pressure caused her wound. The Judge charging the jury that the plaintiff had a pre-existing condition that by itself could have caused the wound is the Court choosing and declaring to the jury that the defense position is accurate. It is as if the Judge has made a decision as a matter of law as to the issue of causation and is now instructing the jury the pressure wound could be caused solely by something other than pressure. It is an explicit rejection of plaintiff's position that they cannot.

In every medical and nursing malpractice case, a plaintiff will have an infirmity or condition, as they have come in contact with the medical system for a reason. However, not every such case requires a Scafidi Charge. The Charge is not referred to as a the medical or nursing malpractice Charge for a reason, because it is not warranted in the large majority of those cases. By example, Scafidi fits a case wherein the plaintiff has been diagnosed with cancer which has the ability, itself, to cause her pain and death. The intervening malpractice simply causes a lost chance of longer survival or for less pain.

In Komlodi v. Picciano, 217 N.J. 387 (2014), a physician prescribed a Fentanyl Patch to an addict and the patient died after ingesting it. The Trial

Court provided the Scafidi Charge to the jury. The Supreme Court held that the Trial Court erred in its use of a Scafidi and described the types of cases where such a charge would be applicable:

> The Scafidi charge is typically used in medical malpractice cases in which progressive diseases, such as cancer, are not properly treated or timely detected and thus the measure of damages is the patient's lost chance of recovery. Id at 394.
>
> ...
>
> In the typical Scafidi case, the plaintiff seeks treatment for a preexisting condition, and the physician, through negligence, either fails to diagnose or improperly treats the condition, causing it to worsen and sometimes causing the plaintiff to lose the opportunity to make a recovery. *See, e.g.*, Reynolds, supra, 172 N.J. at 275, 798 A.2d 67 (failure to conduct appropriate test increased risk of nerve damage and paralysis from undiagnosed and untreated condition); Scafidi, supra, 119 N.J. at 98, 574 A.2d 398 (failure to properly treat premature labor resulted in early birth and death of infant); Evers, supra, 95 N.J. at 404, 471 A.2d 405 (delay in treating breast cancer "enhanced the risk that the cancer would recur"). Scafidi-type cases generally do not implicate fault on the part of the plaintiff. The physician must take the patient as presented to her and cannot blame the patient for the preexisting condition or disease for which the patient has sought treatment. Id at 415.

Further in Komlodi, the Supreme Court held that the Trial Court did not properly follow Model Jury Charge 5.50E:

> That charge requires that the principles of law be charged with reference to the specific facts of the case. The charge instructs the trial court to provide "a detailed factual description of the case." Model Jury Charge (Civil) § 5.50E. That was not done here. The charge also indicates that the preexisting condition or disease should be identified. That was not done here. For example, the Model Jury Charge reads:
> If you determine that the defendant was negligent, then you must also decide what is the chance that: [(1) the plaintiff would not be dying of

> cancer; or (2) the plaintiff's husband would not have died of the heart attack et cetera], if the defendant had not been negligent. . . .
>
> When the plaintiff came to the defendant, he/she had a preexisting condition [here describe the condition, e.g., breast cancer; heart attack et cetera] which by itself had a risk of causing the plaintiff the harm he/she ultimately experienced in this case. Id. at 416.

Importantly, the Charge directs that the preexisting condition or disease should be identified in instructing the jury. Neither the Trial Court in Komlodi, nor the Trial Court in this matter should have used the Scafidi Charge, but in doing so, neither Court used the charge properly. The jury instructions given in this matter lacked any reference to the pre-existing conditions or facts of the case as required. The parenthesis in the Charge allowing for input of the pre-existing conditions by the Court and parties were not completed in this case. The Court simply instructed:

> In this case the plaintiff had preexisting conditions, **which by themselves** had a risk of causing the plaintiff the harm the plaintiff ultimately experienced in this case. However, the plaintiff contends that the plaintiff lost the chance of a better outcome because of the defendants' nursing staffs' deviations from accepted standards of nursing care. Plaintiff alleges that nursing malpractice caused a pressure wound at Englewood Hospital and Medical Center and caused the wound to worsen and become infected at CareOne Teaneck. (Pa302-3; T180-7 to 17)

The plaintiff's pre-existing conditions were not listed here as indicated by the Model Civil Jury Charge. In this regard, the Komlodi Court found:

> As is evident from the model charge, in instructing the jury, the trial court is expected to review facts relevant to the charge and to identify the preexisting disease or condition. Had the court attempted to do so,

> the inadvisability of giving the charge might have become apparent. However, even if the charge were appropriate, the failure to tailor the legal theories and facts to the law on preexisting conditions would raise serious questions about the verdict. Reynolds, supra, 172 N.J. at 288-89, 798 A.2d 67. Id. at 417.
>
> Importantly, the Court further found:
>
> Erroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily **presumed to be reversible error.** Das v. Thani, 171 N.J. 518, 527, 795 A.2d 876 (2002) (quoting State v. Afanador, 151 N.J. 41, 54, 697 A.2d 529 (1997))." Id.

Accordingly, the Supreme Court in Komlodi held that the Scafidi Charge, even if appropriate, was misapplied and therefore required remand for new trial. Id. While the plaintiff vehemently objected to the use of the Scafidi Charge, the plaintiff submits that even if the Charge was appropriate, it was not tailored to fit the facts specific to this case. It follows that the arduous verdict sheet also improperly completed by the jury, evidencing their confusion, was error. The matter should therefore be remanded for retrial with proper instruction and verdict form.

Here, it should be noted that while the improper Jury Charge in and of itself is reversible error, the accumulation of errors in this case should lead to remand for new trial. Whether each alone would be cause for reversal, certainly taken together they had the ability to undermine the plaintiff's case and cause an unfavorable verdict. An Appellate Court may reverse a Trial Court's judgment if the cumulative effect of a series of errors is so great as to deprive a

party of a fair trial. Pellicer v. Saint Barnabas Hosp., 200 N.J. 22 (2009). Due to all errors at the Trial Court level, including the error in providing the improper Jury Charge, this matter should be remanded for retrial.

CONCLUSION

For all the foregoing reasons, the appellant Early respectfully submits that this matter should be remanded for retrial with the Federal, NJ NHA and wrongful death claims intact, the photograph and Death Certificate admissible, the proper exhibits entered into evidence, and the appropriate Jury Charge provided.

Respectfully submitted,
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ESTATE OF JEAN M. EARLY by Executor DOREEN MCCULLOUGH and DOREEN MCCULLOUGH individually, Plaintiffs/Appellants, v. ENGLEWOOD HOSPITAL AND MEDICAL CENTER, CAREONE AT TEANECK, JOHN DOE (1-10), JANE ROE, RN (1-20), and ABC CORP, said names John Doe, Jane Roe and ABC Corp being fictitious, jointly, individually and in the alternative, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3244-23 On Appeal from a Final Order of Judgment Filed June 18, 2024 from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-3923-19 Sat Below: Hon. Peter Geiger, J.S.C. Civil Action

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PRELIMINARY STATEMENT

Decedent, Jean Early was admitted to Care One at Teaneck, LLC d/b/a Care One at Teaneck ("Care One") for subacute rehabilitation following an Englewood Hospital and Medical Center ("EHMC") admission. Suit was brought against EHMC based on the claim that decedent developed a sacral pressure injury at the hospital. Against Care One, the claim was that the sacral wound did not improve and/or worsened. In addition to survivorship claims, plaintiff also filed a wrongful death claim.

At the conclusion of trial, the jury found that defendants EHMC and Care One did not deviate from the applicable standard of care in their treatment of decedent Ms. Early, and also allocated Ms. Early's injuries 100% to Ms. Early's preexisting conditions.

Plaintiffs now appeal, asserting that errors relating to the admission of evidence, dismissal of certain claims and issues with the jury charges and verdict sheet require a new trial. Each of plaintiffs' arguments is without merit. The trial court's order of judgment on the jury verdict must be affirmed.

PROCEDURAL HISTORY

Plaintiffs' complaint was filed on May 22, 2019. (Pa1-6.) Defendant EHMC answered the complaint on June 26, 2019. (Pa7-15.) Defendant Care One answered the complaint on July 26, 2019. (Pa16-24.)

On February 17, 2023, the Honorable David V. Nasta, J.S.C. denied defendant EHMC's motion to dismiss plaintiffs' wrongful death claims, but granted EHMC's motion to dismiss the Nursing Home Responsibilities and Rights of Residents Act ("NHA"), N.J.S.A. 30:13-1 to -17, claims, all other statutory claims and punitive damages claims as they pertained to EHMC. (Pa156-157; Pa160-161.)

Judge Nasta also on February 17, 2023 granted Care One's motion for partial summary judgment ruling, directing as follows:

> **ORDERED** that the portion of ¶5 of the first count and second count of the complaint alleging violations of the federal and state statutes, codes, rules, regulations and guidelines, including Title 42 of the U.S.C. and C.F.R. and New Jersey's Nursing Home Responsibilities and Rights of Residents Act ("NHA"), N.J.S.A. 30:13-1 to -17 are **DISMISSED WITH PREJUDICE** as it pertains to defendant Care One; and it is further
>
> **ORDERED** that the claims for punitive damages, including those set forth in [the] wherefore clauses of the first count and second count of the complaint are **DISMISSED WITH PREJUDICE** as they pertain to defendant Care One; and it is further

> **ORDERED** that Plaintiffs may offer alleged statutory and regulatory violations as evidence of negligence in support of their remaining claims. . . .

(Pa159; see Pa158-159.) Judge Nasta denied Care One's motion for summary judgment dismissing all claims against Care One, in which Care One asserted that there was no competent expert opinion to establish that any negligence attributable to Care One proximately caused harm to plaintiffs' decedent Ms. Early. Care One's motion emphasized that plaintiffs' physician expert Lloyd Krieger, M.D. at his discovery deposition indicated that the cause of Ms. Early's death was sepsis, but could give no opinion as to the cause of her sepsis. (See CODa126-133; CODa208.)

On May 13, 2024, EHMC submitted its pretrial exchange, including a motion to preclude Dr. Krieger from giving opinions regarding the cause of Ms. Early's alleged sepsis and death. (Pa41.)[1]

On May 22, 2024, Care One submitted its pretrial information exchange and two motions in limine, one to bar plaintiffs' experts from giving deviation opinions—including opinions based upon assertions that federal and state statutes were violated—that were not supported by a causation opinion or had

[1] As noted in EHMC's respondent's brief, EHMC submitted a similar pretrial exchange and request that Dr. Krieger's testimony be limited on July 23, 2023, but the case did not go to trial at that time. (See EHMCDb1-2.)

been dismissed with prejudice, and one to prohibit plaintiffs from recovering wrongful death and survival damages. (See Pa55-166; Pa198-216.)

On May 24, 2024, plaintiffs submitted opposition to Care One's motions in limine, including opposition to Care One's "motion regarding applicable state and federal regulations as evidence of negligence" although Care One had filed no such motion. (See Pa55-166; Pa167-172; Pa198-199; CODa206-216.)

Care One submitted a reply in support of its motions in limine on May 28, 2024, noting that plaintiffs' additional "opposition" "apparently is an improper motion for reconsideration of the February 17, 2023 order dismissing with prejudice plaintiffs' claims alleging violation so federal and state statutes and regulations including the [NHA]." (Pa198; see Pa198-204).

Jury selection commenced before the Honorable Peter Geiger on May 28, 2024. Opening statements and testimony began on June 3, 2024. (See 1T.)[2] On June 4, 2024, EHMC filed a motion to strike the opinions of Dr. Krieger as net opinions. (See Pa205-212.) On the morning of June 5, 2024, Care One filed a motion for rulings on the evidential objections made at the

[2] Trial transcripts are cited as follows:

1T	June 3, 2024	7T	June 10, 2024 vol. 2
2T	June 4, 2024	8T	June 11, 2024 vol. 1
3T	June 5, 2024	9T	June 11, 2024 vol. 2
4T	June 6, 2024	10T	June 12, 2024
5T	June 7, 2024	11T	June 13, 2024
6T	June 10, 2024 vol 1	12T	June 14, 2024

videotaped de bene esse deposition of Dr. Krieger, which had been taken on May 31, 2024, requesting that testimony on three topics be excluded: (1) deviations from the nursing standards of care, (2) new opinions not previously expressed in Dr. Krieger's reports or elsewhere and (3) regarding the cause of Ms. Early's sepsis and death. (See Pa213-215; CODa217-219.)

Also on June 5, 2024, shortly after 5:30 p.m., the day before plaintiffs' nursing expert Charlotte Sheppard, RN was to testify, plaintiffs submitted opposition to defendants' motions regarding Dr. Krieger's de bene esse testimony, also including a request that Nurse Sheppard be allowed to give testimony regarding purported violations of the NHA and a request that Model Civil Jury Charge 5.77 for so-called "nursing home cases" be used, enclosing a proposed jury charge and verdict sheet. (See Pa282-314.)

Judge Geiger on June 6, 2024, treated plaintiffs' applications regarding Nurse Sheppard's testimony and related issues as a motion made at trial for reconsideration of the February 17, 2023 order dismissing the NHA claims while confirming "that Plaintiffs may offer alleged statutory and regulatory violations as evidence of negligence in support of their remaining claims." (Pa159.) Judge Geiger sustained Care One's objections to Nurse Sheppard's proposed testimony regarding violations of the NHA, given that the NHA claim clearly had been dismissed with prejudice. (See 4T50:18-54:19.)

Judge Geiger also on ruled on defendants' motions regarding Dr. Krieger's testimony, finding that while Dr. Krieger did mention sepsis in his report, he did not give an opinion that sepsis was the cause of Ms. Early's death. Dr. Krieger at his discovery deposition admitted he had no opinion regarding the cause of Ms. Early's sepsis, and did not make any connection between the alleged pressure injury and her sepsis and death. The portions of the de bene esse deposition discussing those topics accordingly were excluded. (See 4T268:20-269:23, 4T284:18-285:6.) Dr. Krieger's opinions about culturing the wound were first given during his de bene esse deposition, and accordingly also were stricken. (See 4T292:19-294:14.) Dr. Krieger was, however, permitted to give testimony regarding deviations from the nursing standard of care identified by plaintiffs' nursing expert. (See 4T301:23-302:19.)

On June 7, 2024, at the conclusion of Dr. Krieger's testimony and the close of plaintiffs' case, the court granted defendants' motion for a directed verdict dismissing the wrongful death claim. As articulated by the court, although Dr. Krieger was qualified as an expert, he did not opine that Ms. Early died due to sepsis. He thoroughly described the condition of sepsis, its impact on the patient and how it impacts the patient medically. However, he neither offered an opinion regarding the cause of sepsis, nor did he opine that

sepsis was the cause of Ms. Early's death. He did testify that he reviewed the death certificate, which listed sepsis as the cause of death, but he did not relate sepsis to the pressure wounds or to Ms. Early's death. (See 5T185:5-186:9.)

On June 14, 2024, the jury returned a verdict finding that defendants EHMC and Care One did not deviate from the applicable standard of care in their treatment of decedent Ms. Early, and also allocated Ms. Early's injuries 100% to Ms. Early's preexisting conditions. (See Pa315-317; 12T198-201:14.) A final order of judgment in favor of defendants thus was entered on June 18, 2024. (Pa318-319.)

STATEMENT OF FACTS

Plaintiffs in this action asserted nursing malpractice and associated claims arising from allegations that during a hospitalization at EHMC from December 11, 2017 to January 17, 2018, decedent Jean Early developed a sacral pressure ulcer, which worsened or failed to resolve during a January 17 to March 14, 2018 admission to Care One for subacute rehabilitation, leading to her death on April 9, 2018. (See Pa1-6; Pa25-36; Pa75-87; Pa101-118.)

Ms. Early was sixty-seven (67) years old when her physician directed her to go to the emergency room at EHMC on December 11, 2017 due to an abnormal EKG and flu-like symptoms. She was admitted to the hospital with atrial fibrillation with rapid ventricular response and diagnosed with sepsis.

She had undergone a podiatric debridement of her left foot wound a few days earlier. She was treated for methicillin sensitive staphylococcus aureus (MSSA) bacteremia and acute renal failure, associated with administration of ACE inhibitors and NSAIDS. She also had a medical history of recurrent methicillin resistant staphylococcus aureus (MRSA) soft tissue infections, atrial fibrillation, depressive episodes, hypertension, hyperlipidemia, diabetes, falls and difficulty swallowing and walking. At EHMC, she developed a sacral deep tissue injury of the sacral and buttocks area. (See Pa76-78; Pa102-105.)

On January 17, 2018 Ms. Early was admitted to Care One at Teaneck for short-term subacute rehabilitation with the intent to return home. (See Pa78; Pa105-107.) On March 14, 2018, she was transferred to Prospect Heights Care Center. (See Pa79-80; Pa107.) She returned to EHMC for wound evaluation on March 16, 2018. Hospice care commenced and she ultimately was transferred home and passed away on April 9, 2018 from sepsis. (See Pa80; Pa107-108.)

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY DECLINED TO VACATE THE FEBRUARY 17, 2023 ORDER DISMISSING PLAINTIFFS' NURSING HOME ACT CLAIM AND OTHER STATUTORY AND REGULATORY CLAIMS, PROHIBITED PLAINTIFFS' NURSING EXPERT FROM GIVING TESTIMONY REGARDING NONCOMPLIANCE WITH STATUTES AND REGULATIONS AND DECLINED TO GIVE THE MODEL JURY CHARGE FOR "NURSING HOME" CASES.

Plaintiffs assert as a first point of error that the trial court should not have precluded application of New Jersey's NHA, thus prohibiting plaintiffs from presenting expert testimony referring to to the NHA and other federal and state statutes and regulations as evidence of negligence and declining to use Model Civil Jury Charge 5.77, the so-called "nursing home" charge. (See Pb6-18.) Plaintiffs at trial and again on appeal reference no additional factual evidence in support of their position, but rely solely upon various caselaw and other legal authority in arguing that because Care One at Teaneck is licensed as a long term care facility pursuant to New Jersey's Standards for Licensure of Long-Term Care Facilities ("SLLTCF") at N.J.A.C. 8:39, Care One categorically is a "nursing home" subject to the NHA. (See, e.g., Pb8; see generally Pb6-18.) The material referenced, however, confirms that the trial court's conclusions were correct. There was no abuse of discretion requiring this court's intervention.

A. The Court's Rulings and the Standard of Review.

As an initial matter, plaintiffs misstate the procedural posture of plaintiffs' request that their nursing expert be allowed to give testimony regarding purported violations of the NHA and other federal and state statutes and regulations. Defendant Care One did ***not***, as plaintiffs claim, file "an in limine motion to preclude the plaintiff's nursing expert from testifying to violations of State and Federal statues and regulations including NJ Nursing Home Act claims." (Pb6 (citing Pa70, defendant Care One's certification of counsel in support of motions in limine).)

Rather, Care One submitted two motions in limine on May 22, 2024, one to bar plaintiffs' experts from giving deviation opinions—including opinions based upon assertions that federal and state statutes were violated—that were not supported by a causation opinion or had been dismissed with prejudice, and one to prohibit plaintiffs from recovering wrongful death and survival damages. (See Pa55-166; Pa198; CODa209-216.) On May 24, 2024, plaintiffs submitted opposition to Care One's motions in limine, including opposition to Care One's "motion regarding applicable state and federal regulations as evidence of negligence" although no such motion had been filed, as Care One noted in its reply. (See Pa167-172; Pa198-199.)

On June 4, 2024, EHMC filed a motion to strike the opinions of Dr. Krieger as net opinions. (See Pa205-212.) On the morning of June 5, 2024, Care One filed a motion for rulings on the evidential objections made at the de bene esse deposition of Dr. Krieger, which had been taken on May 31, 2024. (See Pa213-215; CODa217-219.) On the evening of June 5, 2024, plaintiffs submitted opposition to defendants' motions regarding Dr. Krieger's testimony, also again including a request that Nurse Sheppard be allowed to give testimony regarding purported violations of the NHA and a request that Model Civil Jury Charge 5.77 be given. (See Pa282-314.)

Judge Geiger on June 6, 2024, treated ***plaintiffs'*** applications regarding Nurse Sheppard's testimony—raised only in opposition to defendants' motions to otherwise limit the testimony of plaintiffs' experts, made prior to and at trial—as a motion made at trial for reconsideration of the February 17, 2023 order dismissing the NHA claims while confirming "that Plaintiffs may offer alleged statutory and regulatory violations as evidence of negligence in support of their remaining claims," and sustained Care One's objections to Nurse Sheppard's proposed testimony regarding violations of the NHA, given that the NHA claim clearly had been dismissed with prejudice by way of the February 17, 2023 order. (Pa159; see 4T50:18-54:19.)

As plaintiffs note (see Pb7-8), a decision which adjudicates fewer than all the claims as to all the parties is subject to reconsideration under R. 4:42-2. The standard to be applied by the Court, in its "sound discretion" is "the interest of justice" as expressly stated in R. 4:42-2. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). A "trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Lombardi v. Masso, 207 N.J. 517, 534 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)).

Reconsideration under R. 4:42-2 offers a "far more liberal approach" than R. 4:49-2, governing reconsideration of a final order. Lawson, 468 N.J. Super. at 134. On appeal, "A trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015).

B. The Legal Authority Plaintiffs Cite Does Not Support Their Position

Plaintiffs argue at length that because Care One is licensed as a long term care facility pursuant to New Jersey's SLLTCF at N.J.A.C. 8:39, Care One is categorically a "nursing home" subject to the NHA. (See, e.g., Pb8.)

The type of license is ***not***, however, relevant to the application of the NHA's definition of the term "nursing home". See N.J.S.A. 30:13-2(c). None of the authority plaintiffs cite actually supports their argument.

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

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

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

In Estate of Eagin v. CareOne at Evesham, Docket No. A-0426-23 (App. Div. Feb. 12, 2024) (Pa173-194), upon which plaintiffs rely (see Pb8; Pa170-

171; Pa173-194; Pa286-287), the Appellate Division summarized the Bermudez opinion as follows:

> In Bermudez, we granted the defendant health care facility leave to appeal from an order denying its motion for partial summary judgment regarding a patient's claims that asserted violations of the NHA. 439 N.J. Super. at 49. We considered whether the facility, which was licensed as "a comprehensive rehabilitation hospital," satisfied the definition of nursing home under the act. Id. at 50.
>
> Citing the NHA's legislative history, we observed "although the Legislature wrote a broad definition of 'nursing home,' it nevertheless intended to limit the statute's reach to nursing homes and similar facilities." Id. at 55. We noted the absence of anything in the legislative history "that the Legislature sought to include an entity such as a comprehensive rehabilitation hospital" in the NHA. Id. at 56. We were persuaded that "[h]ad the Legislature intended to apply the requirements of the [NHA] to institutions such as comprehensive rehabilitation hospitals, it would undoubtedly have used a more inclusive term than 'nursing home,' such as 'health care entity,' in the title and text of the legislature." Ibid. We therefore reversed the denial of summary judgment on the plaintiff's NHA claims. Ibid.

Eagin, Docket No. A-0426-23, slip op. at 11 (Pa184). The Ptaszynski opinion was discussed as follows:

> A few months after we issued our decision in Bermudez, we decided Ptaszynski v. Atlantic Health Systems, Inc., where we reversed a jury verdict, awarding the plaintiff damages and counsel fees against the defendant health care facility. 40 N.J. Super. 24, 29. (App. Div. 2015). We considered the defendant's contentions—raised i the context of its charitable immunity argument under N.J.S.A. 2A:53A-8—that its facility was not a nursing home within the meaning of the NHA. Id. at 43. The defendant argued its facility was "hospital-based. . . where persons are admitted for fewer than thirty days for sub[ ]acute

> rehabilitation." Ibid. The plaintiff countered the facility was "a hospital-based, long-term care facility," thereby satisfying the NHA's definition of a nursing home. Ibid.
>
> Referencing the record, we noted the defendant was licensed to operate both "a comprehensive rehabilitative hospital consisting of thirty-eight beds" and "a hospital-based, long-term care facility with forty beds." Ibid. However, neither license stated the facility "[wa]s licensed to operate as a nursing home." ibid. Nor was there any evidence in the record that the Department of Health (DOH) had "issued a separate certificate of need" to the facility "authorizing the establishment of a nursing home." Ibid. (citing N.J.S.A. 26:2H-2(a).
>
> We further observed there was no evidentiary support that the facility "would be permitted to provide care on a 'continuing basis,' which is an essential element of a 'nursing home' in the NHA." Id. We noted patients [we]re treated temporarily at [the facility], with the expectation that they w[ould] be moved to another facility for long-term care or 'continuing' care if needed." Ibid. Choosing not to decide the issue on the record presented on appeal, we remanded for the court to consider the arguments, guided by our decision in Bermudez. Id. at 44.

Eagin, Docket No. A-0426-23, slip op. at 11-12 (Pa184-185).

The Eagin court found it unnecessary to discuss the NHA's legislative history in detail, but noted that "the driving force of the enactment was the Legislature's intent to address concerns about 'the condition of the nursing homes and the personal care facilities for the aged in this state,'" id., slip op. at 9 (quoting Bermudez, 439 N.J. Super. at 53) (Pa182), and that "the NHA was enacted to protect our state's most vulnerable elderly individuals, most of

whose care is ***not managed with the same intensity as a subacute rehabilitation unit***," id., slip op. at 18 (emphasis added) (Pa191).

The Eagin court ***rejected*** the plaintiffs' contention that all licensed long-term care facilities are "nursing homes" under the NHA:

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

Eagin, Docket No. A-0426-23, slip op. at 15 (Pa188).

In Eagin, in the appellate court's view, it was disputed whether the term "any institution" as used in the NHA applied to the "institution as a whole" or only the unit to which the decedent was admitted, whether the institution as a whole or its subacute rehabilitation units fell under the remainder of the definition, and whether the unit to which the decedent was admitted was separate and apart from the facility as a whole. See id., slip op. at 18-19 (Pa191-192). The Appellate Division thus vacated the portion of the trial court's order granting defendant's motion for summary judgment on the NHA

claims, and remanded for additional discovery. See Eagin, Docket No. A-0426-23, slip op. at 4, 20-21 (Pa177; Pa193-194).

The Eagin court thus rejected the position advanced by plaintiffs in this case—that is, that a licensed long-term care facility categorically is a "nursing home" (Pb8)—as well as plaintiffs' argument—also advanced in this case—concerning the application of the Health Care Facilities Planning Act and associated regulations (see Pb13-14), and plaintiffs' contention that the Bermudez opinion and legislative history of the NHA require the statute to be applied to all licensed long-term care facilities (see Pb11-12).

Plaintiffs' reliance upon Estate of Burns v. Care One at Stanwick, LLC, 468 N.J. Super. 306 (App. Div. 2021), as demonstrating that type of license is controlling also is misplaced. (See Pb12-13). The Burns opinion does in fact state that a "facility is governed by the license issued to it as an ***assisted living residence***." Burns, 468 N.J. Super. at 322 (emphasis added). The Burns case did ***not***, however involve the application of the NHA, but instead indicated that the statutory bill of rights of assisted living facilities' residents by its plain language actually corresponds to a particular type of health care facility ***license***. See N.J.S.A. 26:2H-128 ("Each assisted living facility and comprehensive personal care home provider ***licensed*** pursuant to P.L.1971, c.136 (C.26:2H-1 et seq.)") (emphasis added). The assisted living statute,

unlike the NHA, includes the license in the definition of an assisted living facility subject to the law. Moreover, the assisted living bill of rights statute, N.J.S.A. 26:2H-128, itself ***prohibits*** a private cause of action for its enforcement and ***prohibits*** attorney fee shifting. There thus is ***no*** private cause of action for breach of the ***assisted living*** bill of rights statute, N.J.S.A. 26:2H-128. See Burns, 468 N.J. Super. at 320. Nor could the plaintiff in Burns pursue a similar action pursuant to a different statute, such as the Rooming and Boarding House Act, N.J.S.A. 55:13B-1 to -21 or the Dementia Care Home Act, N.J.S.A. 26:2H-148 to -157, by alleging and presenting evidence to show that the facility was operating other than as an assisted living residence. See Burns, 468 N.J. Super. at 313-14, 322.

The Legislature is more than capable of including the type of license as an element of a definition, as in the context of an assisted living facility. The Legislature chose ***not*** to include the type of license as a component of the definition of a "nursing home" subject to the NHA. See N.J.S.A. 30:13-2(c). The Burns opinion thus has no bearing on the issue of whether Care One Teaneck was a "nursing home" subject to the NHA with respect to Ms. Early's admission for short-term subacute rehabilitation. In fact, the Burns opinion, like Eagin, supports defendants' position in this case.

In plaintiffs' view, Bermudez involved a "comprehensive rehabilitative hospital" respectively, while Care One was "a Long-Term Care licensed facility" and thus must also be a "nursing home" subject to the NHA. (Pb11; see Pb11-12.) The term "nursing home" as defined in the NHA, however, is not limited to "long-term care facilities" licensed pursuant to the SLLTCF at N.J.A.C. title 8, chapter 39. Indeed, the phrase "nursing home" remains an undefined term in the statues. There is no separate license for subacute rehabilitation facilities or beds as opposed to long term care. See ibid. In fact, Ptaszynski involved the issue of whether the NHA extended to a hospital based, ***long-term care facility***, operated as a sub-acute rehabilitation unit, was a "nursing home" within the meaning of the NHA. The specific license at issue in Ptaszynski was for long term care beds, not a subacute rehabilitation unit. See Ptaszynski, 440 N.J. Super. at 43. The fact that it was "hospital based" did not change the fact that it was licensed as a long term care facility- it only affected how it was organized.

Plaintiffs' comments that Care One "was not legally permitted to operate a sub-acute rehab unit out of it[s] licensed nursing home during the time Ms. Early was a resident" are unfortunate and incorrect. (Pb14-15.) The Department of Health does not issue licenses to operate a "nursing home". Rather, the Department of Health ("DOH") issues licenses to operate several

different types of facilities, for example, to an assisted living residence pursuant to N.J.A.C. title 8, chapter 36, or to a long-term care facility pursuant to N.J.A.C. title 8, chapter 39. There is no "nursing home" license. As the Eagin Court observed, licensing regulations, which here, are cited by plaintiffs, (see Pb14) are completely irrelevant to the determination of what is a "nursing home" for purposes of the NHA, because those regulations are not referenced in the definition of a "nursing home" under the NHA. See Eagin, Docket No. A-0426-23, slip op. at 15 (Pa188). Nor are the courts entitled to make a determination as to whether a health care facility is acting in compliance with its license. As the Burns Court held, "Whether, during decedent's stay there, Care One was operating something other than" what its license allowed "should be determined only by the Department of Health, which possesses special expertise in these matters, not by either the trial judge or a jury." Burns, 468 N.J. Super. at 322.

Plaintiffs' reference to the NJDOH's April 18, 2024 memorandum "Applicability of N.J.A.C. 8:39 to Residents of a Subacute Unit" confirms that defendants' position is correct. (See Pb8-9; Pa170; Pa195-196; Pa286-287.) The memorandum expressly references that there are ***differences*** between "subacute care" and "long-term care" ***either*** of which properly can be provided by a "long-term care facility". (See Pa195-196) Plaintiffs' suggestions that

because the SLLTCF extend to both long-term care and subacute rehabilitation "residents", subacute rehabilitation patients also are "nursing home residents" is incorrect. (See Pb8-9.)

Model Civil Jury Charge 5.77 for so-called "nursing home cases", upon which plaintiffs also rely (see Pb16-18), has not been sanctioned or approved by the Supreme Court. "The New Jersey Supreme Court does not sanction or approve the Model Civil Jury Charges before publication by the Model Civil Jury Charge Committee, although the Supreme Court may, and frequently does, comment on the sufficiency of a charge in the context of a particular case." Flood v. Aluri Vallabhaneni, 431 N.J. Super. 365, 383 (App. Div.), certif. denied, 216 N.J. 14 (2013) (quoting Model Civil Jury Charges, General Comments). "Generally speaking, the language contained in any model charge results from the considered discussion amongst experienced jurists and practitioners." Ibid. (citing State v. R.B., 183 N.J. 308 (2005)). Unless the Supreme Court has had occasion to address the contents of an adopted charge, a trial court or intermediate appellate court cannot be confident that it is in fact consistent with the Supreme Court's instructions or reflects the Court's approved language. See Estate of Kotsovska v. Liebman, 221 N.J. 568, 595-96 (2015); Flood, 431 N.J. Super. at 384 (citing Verdicchio v. Ricca, 179 N.J. 1,

30 (2004)); Morlino v. Medical Ctr. of Ocean County, 152 N.J. 563, 582-90 (1998)).

The Notice to the Bar announcing the approval of New Jersey Model Civil Charge 5.77, "Violations of Nursing Home Statutes or Regulations – Negligence and Violations of Nursing Home Residents Rights Claims", dated ***November 10, 2022*** indicates that it was "created in response to a request from a member of the bar for a model civil jury charge for nursing home cases." The model charge presents an incorrect, skewed, one-sided interpretation of the law, heavily favoring plaintiffs, demonstrating that the "request from a member of the bar for a model civil jury charge for nursing home cases" was clearly from a "member of the bar" who represents plaintiffs in cases against facilities licensed as long term care facilities. Unlike the other charges listed in the notice, the charge was not adopted in response to a court's request, nor was it created in response to a recent court opinion. Critically, the recently adopted model charge is contrary to New Jersey and federal law in several aspects.

First and as a basic principle, the NHA, does ***not*** "appl[y] to any facility ***licensed*** as a long-term care facility, whether the resident is in for long-term care or sub-acute rehabilitation" as stated in the model charge. Rather, the requisite analysis considers whether the facility provides "***extended*** medical

and nursing treatment or care . . . on a ***continuing basis***" as set forth in N.J.S.A. 30:13-2. The model charge's instruction that a licensed long-term care facility is a "nursing home" is incompatible with the statutory definition, which contains ***no*** statement to that effect. Also notably, the model charge does not use the current statutory language but instead used a prior version revised to use more modern language.

Model Civil Jury Charge 5.77 incorrectly directs that a negligence or other claim can be sustained against a nursing home based ***solely*** upon allegations of noncompliance with applicable federal or New Jersey statutes and regulations. The Appellate Division in Ptaszynski, however, held that there is ***no*** private cause of action to enforce the "***responsibilities***" provision of the NHA, N.J.S.A. 30:13-3, including the "responsibility to ensure compliance with all applicable state and federal statutes, rules and regulations." N.J.S.A. 30:13-3(h). Rather, N.J.S.A. 30:13-8(a) provides "Any person or resident whose ***rights*** as defined herein are violated shall have a cause of action against any person committing such a violation (emphasis added)." N.J.S.A. 30:13-8 therefore allows a nursing home resident to bring suit to enforce the NHA's "bill of rights" for nursing home residents, set forth in N.J.S.A. 30:13-5, but ***not*** to enforce N.J.S.A. 30:13-3, listing the "responsibilities" of a nursing home. See Ptaszynski, 440 N.J. Super. at 32-36.

The NHA thus does ***not*** authorize a suit to enforce New Jersey regulations such as those set forth in New Jersey's SLLTCF, the provisions of the federal Nursing Home Reform Amendments to the Omnibus Budget Reconciliation Act of 1987 of 1987 ("FNHRA"), 42 U.S.C. § 1395i, § 1395r, or the associated federal Requirements for Long Term Care Facilities or "OBRA regulations" set forth at 42 C.F.R. § 483, which plaintiffs in this case sought to introduce as evidence of negligence. (Pb16.) The parties' experts may refer to statutes and regulations in presenting opinions regarding the standard of care under limited circumstances. Plaintiffs cannot, however, state or recover on a claim by simply alleging or showing that a statute or regulation was violated, as plaintiffs in this case claim.

In connection with the above point, the model charge's statements that the plaintiffs in a suit against a nursing home may introduce noncompliance with FNHRA and the associated federal regulations as ***evidence*** of negligence in a suit against a nursing home are misleading. To be evidential as to negligence, a statutory or regulatory violation must be causally related to the accident or injury at issue. See, e.g., Labega v. Joshi, 470 N.J. Super. 472, 489-91 (App. Div. 2022); Badalamenti v. Simpkiss, 422 N.J. Super. 86, 102-03 (App. Div. 2011). Additionally, in the medical malpractice context, reliance upon federal and New Jersey statutes as a basis for a negligence per se case is

prohibited, and their citation as evidence of negligence is strictly restricted because the plaintiffs in such a suit must establish the applicable standard of care, a deviation from the standard of care, and that the deviation proximately caused injury by way of competent expert testimony, as the Appellate Division recently confirmed in Labega v. Joshi, 470 N.J. Super. 472, 494-95 (App. Div. 2022). The model charge omits these basic and essential requirements.

Also critically, while Model Charge 5.77 correctly states that there is a cause of action to enforce the rights of a nursing home resident listed in N.J.S.A. 30:13-5, the model charge fails to clarify that those rights do ***not*** include a "right" to assert a medical or nursing malpractice claim or a "right" to enforce federal and New Jersey regulations as the model charge infers. Plaintiffs in an NHA case must identify and present evidence to establish a violation of one of the specific rights listed in N.J.S.A. 30:13-5, such as "the right to manage his own financial affairs", "the right to wear his own clothing" or "the right to receive and send unopened correspondence" or of the more generalized "right to privacy", "right to a safe and decent living environment" and to "not be deprived of any constitutional, civil or legal right". The plaintiffs in a suit against a nursing home must not, however, be permitted to recast a nursing or other medical negligence claims as an NHA "rights" claim. Thus, while the model charge makes an anemic attempt to address double

recovery concerns, the model charge—as well as plaintiffs' motion for leave to appeal—fails to address the issue of whether there is an actionable NHA "rights" claim in the first instance.

In connection with this point, defendant notes that plaintiffs emphasize that the NHA is a broad remedial statute that seeks to protect vulnerable nursing home residents, and thus, among other things, protects the "dignity and individuality" of "nursing home residents" (Pb15). This is a reference to N.J.S.A. 30:13-5(j)'s recognition of a nursing home resident's right to "a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident." Plaintiffs in this case have ***not***, however, alleged or presented any evidence to support an NHA "rights" claim that is ***not*** negligence based. Plaintiffs have ***only*** alleged that as a consequence of negligent nursing care and treatment, Ms. Early's pressure ulcers failed to resolve at Care One. Based on the facts here, double recovery would occur despite any attempt to instruct a finder of fact against awarding damages twice for the same conduct. More to the point, nursing malpractice has nothing to do with the NHA, including N.J.S.A. 30:13-5(j)'s right to "dignity" and "individuality". The statute does not incorporate a common law standard of care, and is not informative of the standard of care, contrary to plaintiffs' assertions. (See Pb15-16.)

In fact, N.J.S.A. 30:13-5(j) and the related "rights" can have no relationship to a professional malpractice case or the nursing standard of care, in general, or as it pertains to this case specifically, including interventions to prevent pressure ulcers. "Safe and decent" is not the standard embodied by the medical malpractice model jury charge. It is more akin to a common knowledge standard which is inconsistent with a professional negligence case. Nor does 42 C.F.R. § 483.25, directing that "a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing" provide any meaningful guidance on that point. (See Pb16.) Plaintiffs are required to provide proof of duty, breach, causation and damages by way of competent expert testimony. Plaintiffs cannot avoid those requirements or recover separately by recasting the medical negligence claim as arising a under a statute or regulation which does not encompass a common law standard of care, including the NHA. Allowing plaintiffs to proceed on such a theory, instead or in addition to a negligence theory, would permit plaintiffs to assert a negligence per se claim, a strategy that is expressly prohibited by this Court's recent opinion in Labega v. Joshi, 470 N.J. Super. 472 (App. Div. 2022). See Labega, 470 N.J. Super. at 484; see also Howard v. Univ. of Med. & Dentistry of N.J., 172 N.J. 537, 545 (2002).

Instructing the jury that double recovery is prohibited is not sufficient to prevent the recovery of damages on this prohibited theory because there is only one theory – malpractice. See Labega, 470 N.J. Super. at 484; Ptaszynski, 440 N.J. Super. at 39-40. Moreover, because there is no separate conduct or harm that flows from the medical negligence claim as opposed to the purported NHA "rights" claim, a jury instruction will not cure the underlying lack of proof. For these reasons as well, the trial court properly declined to reconsider the dismissal of the NHA claim and prohibited plaintiffs' nursing expert from referring to N.J.S.A. 30:13-5(j) and 42 C.F.R. § 483.25 in her testimony.

Finally, the model charge misleadingly suggests that the NHA's "rights" provision, at N.J.S.A. 30:13-5(m), recognizing the right to "Not be deprived of any constitutional, civil or legal right solely by reason of admission to a nursing home" in combination with 42 U.S.C. § 1983 allows an action against any nursing home for noncompliance with FNHRA and the associated regulations. As noted in the model charge itself, the Third Circuit in Grammer v. John J. Kane Regional Centers-Glen Hazel, 570 F.3d 520, 525 (3d Cir. 2009), held that FNRHA and the associated regulations are actionable under 42 U.S.C. § 1983 against ***publicly*** operated state and county nursing homes ***only***. There must be a finding, first, that the defendant facility is a nursing home

and, second, that it is operating under color of state law. There simply is ***no*** cause of action against a ***private*** nursing home or other health care facility pursuant to 42 U.S.C. § 1983 because the element of action under color of law is lacking. These portions of the model charge yet again inappropriately imply that any allegation of noncompliance with a federal or state statutory or regulatory provision affords a basis for the recovery of damages from a nursing home. Plaintiffs in this case cannot pursue a claim pursuant to the NHA or for violations of federal and state statutes and regulations pursuant to 42 U.S.C. § 1983 because, first, Care One was not a "nursing home" in the meaning of the NHA with respect to Mr. Early's admission, and, second, because Care One did not act under color of state law. Model Civil Jury Charge 5.77 thus is contrary to the law on point and does not support a reversal of the trial court's rulings.

In connection with the motion for summary judgment on the NHA claim, Care One explained that Ms. Early was sixty-seven years old when she was admitted to Care One after a hospitalization for with atrial fibrillation with rapid ventricular response, with further treatment for MSSA bacteremia and acute renal failure. (See Pa76-78; Pa102-108.) Ms. Early ultimately spent less than ***two months*** at Care One. (See ibid.; Pa144 at 98:7-9.)

The New Jersey Department of Health recognizes the distinction between a "nursing home" and "sub-acute care". (See CODa83.) Plaintiffs' nursing and physician experts at their depositions confirmed, consistent with Ms. Early's Care One records, that Ms. Early was admitted to Care One at Teaneck for short-term subacute rehabilitation, with the expectation that she would be discharged home. (See Pa78; Pa105-107; Pa144 at 96:1-97:20; CODa32 at 68:4-69:7; CODa46-47 at 125:23-126:12; CCODa2-4.) She was not expected to live out her days as a long-term care patient at Care One and ultimately was transferred to Prospect Heights. (See Pa79-80; Pa107; Pa144-145 at 96:21-98:6; CODa47 at 126:4-127:2.) Acute care patients in a hospital and skilled therapy or subacute rehabilitation patients are distinguished from nursing home or long-term care residents expected to live out their life in one place unless they choose to go to a different facility or setting. (See CODa32 at 66:9-68:4.) At Care One, Ms. Early's care was managed by her physicians, including attending and consulting geriatricians, a psychologist, a wound care physician, a physiatrist, a podiatrist, and renal and nephrology specialists. (See CCODa5-89.)

It is ***undisputed*** that Ms. Early was admitted to the subacute rehabilitation unit within the skilled nursing facility at Care One for short-term subacute rehabilitation with the expectation that she would be discharged

home, and ultimately spent less than ***two months*** at Care One. She thus was not admitted to a "nursing home" for ***extended*** care on a ***continuing*** basis. Nor was she an extremely elderly patient who suffered from chronic or crippling disabilities and mental impairments in need of assistance with the activities of daily living and requiring the special protections provided by the NHA. N.J.S.A. 30:13-2(c); Ptaszynski, 440 N.J. Super. at 42; see In re Conroy, 98 N.J. 321, 374-77 (1985). Instead, Ms. Early was admitted to Care One for short term rehabilitation, a higher and more intensive standard of care under the close supervision of her physicians. The trial court thus properly declined to reconsider the order dismissing the NHA claims with prejudice prior to trial, thereby prohibiting plaintiffs' expert from referring to the NHA and federal regulations regarding pressure ulcers at trial.

II. THE TRIAL COURT CORRECTLY LIMITED THE TESTIMONY OF PLAINTIFFS' PHYSICIAN EXPERT AND DISMISSED THE WRONGFUL DEATH CLAIM.

Plaintiffs next assert that the trial court erroneously prohibited plaintiffs' physician expert Dr. Krieger from giving testimony regarding the cause of Ms. Early's purported sepsis and death, resulting in the improper dismissal of plaintiffs' wrongful death claims. (See Pb18-31).

A. Dr. Krieger's Opinions and the Trial Court's Rulings

Dr. Krieger in his reports initially offered the opinion that the nursing deviations identified by Nurse Sheppard allowed Ms. Early's pressure ulcers to form at EHMC and to worsen at Care One, leading to an increased risk of infections of other organ systems and systemic infections including the sepsis that was the cause of her death. (See Pa109, Pa113-114; see also Pa116-118)

Dr. Krieger at his discovery deposition confirmed that Ms. Early's death certificate states that the cause of her death was sepsis. He had ***no*** opinion, however, as to what caused the sepsis. Specifically, Dr. Krieger testified as follows:

> Q. The—you reviewed the death certificate in this case?
>
> A. Yes.
>
> Q. And the cause of death on the death certificate is sepsis, right?
>
> A. Correct.
>
> Q. Okay. do you have any opinion as to what cause the sepsis?
>
> A. I—I do not.
>
> Q. Okay. And you would agree that a person can die with a locally infected wound and not have sepsis as a result of that?
>
> A. Yes.

(Pa150 at 121:2-17.) Blood cultures taken during Ms. Early's hospitalizations prior to and after her Care One admission did ***not*** establish that bacteria from the sacral wound spread to her blood so as to cause systemic infection or sepsis. (See Pa148-149 at 113:19-117:12.)

At Dr. Krieger's de bene esse deposition, plaintiffs' counsel nonetheless elicited testimony from Dr. Krieger as to the cause of Ms. Early's death, again the cause of death listed on the death certificate. (See Pa224 at 34:20-35:14.) Plaintiffs' lawyer also elicited from Dr. Krieger ***new*** opinions regarding the topics of the value and methodology of culturing techniques (see Pa231 at 59:19-61:6), and the standard of nursing care Ms. Early's preexisting conditions required (see Pa233 at 66:23-67:16).

On June 6, 2024, Judge Geiger, ruling on EHMC's to strike the opinions of Dr. Krieger as net opinions (Pa205-212), and Care One's motions for rulings on the objections made at Dr. Krieger's de bene esse deposition (Pa213-215; CODa217-219), found that while Dr. Krieger did write the word "sepsis" in his report, he did opine as to the cause of sepsis and did not opine that sepsis was the cause of Ms. Early's death. At his discovery deposition, Dr. Krieger admitted he had no opinion regarding the cause of Ms. Early's sepsis, and did not make any connection between the alleged pressure injury and her sepsis and death. The portions of the de bene esse deposition

discussing those topics accordingly were excluded. (See 4T268:20-269:23, 4T284:18-285:6.) Dr. Krieger's opinions about culturing the wound were first given during his de bene esse deposition, and also were stricken. (See 4T292:19-294:14.) Over our objection, Dr. Krieger was, however, permitted to give testimony regarding deviations from the nursing standard of care identified by plaintiffs' nursing expert. (See 4T301:23-302:19.)

On June 7, 2024, at the conclusion of Dr. Krieger's testimony and the close of plaintiffs' case, the Court granted defendants' motion for a directed verdict dismissing the wrongful death claim, explaining as follows:

> As was articulated by this Court earlier in the trial, Dr. Krieger did not have an opinion on the cause of the plaintiff's sepsis. He's very, he's qualified. He's an articulate witness. And he went through painstakingly sepsis in a general description, and impact of sepsis to an individual and to their medical, how it impacts them medically.
>
> But he did not link or provide an opinion on the cause of plaintiff's sepsis. There was no explanation about sepsis being the cause of death, and he admitted he had no opinion on the cause of sepsis. He does acknowledge he reviewed the death certificate, which listed sepsis as the cause of death, but he did not relate sepsis to the pressure wounds or her death. He didn't. That's what Dr. Krieger, that's Dr. Krieger's testimony. That's Dr. Krieger's report. That's Dr. Krieger's deposition. He didn't link it for whatever reason. He didn't.

(5T185:8-25.)

B. The Standard of Review and Application

A determination on the admissibility of expert testimony is committed to the sound discretion of the trial court. See Townsend v. Pierre, 221 N.J. 36, 52 (2015)). A trial court's grant or denial of a motion to preclude expert testimony thus is entitled to deference on appellate review. See ibid.

Two rules of evidence frame the analysis for determining the admissibility of expert testimony. N.J.R.E. 702 identifies when expert testimony is permissible and requires the experts to be qualified in their respective fields. N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions must "be grounded in facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts." Townsend, 221 N.J. at 53 (quoting Polzo v. County of Essex, 196 N.J. 569, 583 (2008)).

The corollary of Rule 703 is the net opinion rule, which provides that an expert's bare conclusions, unsupported by factual evidence or other data, constitute a mere net opinion and are inadmissible. See Townsend, 221 N.J. at 53-54. The net opinion rule "requires an expert 'to give the why and wherefore' of his or her opinion, rather than a mere conclusion." Townsend, 221 N.J. at 54; see Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App.

Div. 2002). The net opinion rule directs 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." Townsend, 221 N.J. at 55. The inquiry frequently focuses "on the failure of the expert to adequately explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

An expert must identify the factual bases for his or her conclusions, explain his or her reasoning or methodology, and demonstrate that both are reliable in terms of generally accepted objective standards of practice, not merely standards personal to that expert. See Creanga v. Jardal, 185 N.J. 345, 360 (2005); Riley v. Keenan, 406 N.J. Super. 281, 295-96 (App. Div.), certif. denied, 200 N.J. 207 (2009).

Three principal motions for judgment are available at trial: A motion for a judgment at the close of plaintiff's case pursuant to R. 4:37-2(b), a motion for a judgment at the close of all evidence pursuant to R. 4:40-1; and a motion for a judgment notwithstanding the verdict, R. 4:40-2(b). All three are governed by the same evidential standard:

> [I]if, accepting as true all the evidence which supports the opposition of the party defending against the motion and according him the benefit of all inferences which can reasonable and

> legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied."

Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) (quoting Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 415 (1997)). The court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but at most with its mere existence, viewed most favorably to the party opposing the motion. See Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999). The reviewing court applies the same standard on appeal. See ADS Assocs. Group v. Oritani Savings Bank, 219 N.J. 496, 511 (2014).

It is well established that an expert witness whose opinions are not timely disclosed by way of an expert report may be prohibited from presenting those opinions at trial. See, e.g., R. 4:23-5(b) ("the court at trial may exclude the testimony of a treating physician or of any other expert whose report is not furnished pursuant to R. 4:17-4(a) to the party demanding the same."); Delvecchio v. Township of Bridgewater, 224 N.J. 559, 580, 582-83 (2016) (expert witnesses including treating physicians must be properly identified and provide an expert report to be served during discovery in order to testify at trial); McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 370-76 (2001) (observing that a party has a continuing duty to disclose the opinions of its experts and that failure to do so may result in the exclusion of that expert's

evidence, in a case in which treating physicians significantly departed from their deposition testimony at trial).

While plaintiffs recite Dr. Krieger's qualifications and repeat his testimony at length, there is no indication that the trial court abused its discretion in limiting Dr. Krieger's testimony so as to erroneously dismiss the wrongful death claim (see Pb18-31). Dr. Krieger simply did ***not***—at least at any time before his de bene esse deposition was taken—give an opinion on the cause of Ms. Early's sepsis and death, beyond stating that he had reviewed the death certificate, which stated that sepsis was the cause of her death. (See 4T268:20-269:23, 4T284:18-285:6; 5T185:8-25.)

It is well established under New Jersey law that the plaintiff in a medical negligence action normally must establish a deviation from accepted standards of care and proximate causation by way of competent expert testimony. See, e.g., Bender v. Adelson, 187 N.J. 411, 435 (2006); Caldwell v. Haynes, 136 N.J. 422, 436 (1994); Sanzari v. Rosenfeld, 34 N.J. 128, 134-34 (1961). Absent a competent expert opinion to establish the cause of Ms. Early's death, the trial court properly dismissed the wrongful death claim at the close of plaintiffs' case. Moreover, any error in the dismissal of the wrongful death claim is harmless given that the jury found that Care One's nursing staff did

not deviate from the standard of care in the first instance, another crucial element of any negligence claim.

III. THE TRIAL COURT PROPERLY PRECLUDED THE TESTIMONY OF PLAINTIFFS' EXPERTS REGARDING THE DEATH CERTIFICATE.

Plaintiffs next assert that their experts should have been permitted to refer to the death certificate and the cause of death indicated therein in giving their testimony at trial. (See Pb31-35.)

A trial court has broad discretion with respect to the admission of evidence. See, e.g., Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999). Its rulings should not be overturned on appeal unless there has been a palpable abuse of that discretion, i.e., a finding so wide of the mark as to amount to a manifest denial of justice. See ibid.; see also, e.g., State v. Kuropchak, 221 N.J. 368, 385 (2015); State v. J.D., 211 N.J. 344, 354 (2012).

The Appellate Division in Quail v. Shop-Rite Supermarkets, Inc., 455 N.J. Super. 118 (App. Div. 2018), certif. denied, 236 N.J. 242 (2019), affirmed the trial court's application of the hearsay exception for vital statistics, at N.J.R.E. 803(c)(9), and the rule regarding disputed complex opinions embedded in otherwise admissible hearsay records, at N.J.R.E. 808, to prohibit the introduction of the hearsay opinion of the medical examiner contained in

the death certificate from being admitted as evidence of the cause of death. N.J.R.E. 808 provides:

> Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

The caselaw applying N.J.R.E. 808 has repeatedly enforced the prohibition of the admission of ***complex expert opinions*** contained in hearsay documents, where there are disputed issues concerning the trustworthiness of those opinions. See, e.g., James v. Ruiz, 440 N.J. Super. 45, 62 (App. Div. 2015) (a radiologist's hearsay opinion finding a disc bulge was inadmissible); New Jersey Div. of Youth & Family Servs. v. M.G., 427 N.J. Super. 154, 173-75 (App. Div. 2012) (a psychologist's hearsay assessment of psychological and bonding evaluations was inadmissible); Brun v. Cardoso, 390 N.J. Super. 409, 421 (App. Div. 2006) (hearsay interpretation of MRI of the spine was inadmissible); Nowacki v. Community Med. Ctr., 279 N.J. Super. 276, 281-83 (App. Div.) (a radiologist's hearsay opinion within a hospital record addressing whether patient's fractures were "pathologic" or "non-traumatic" was inadmissible), certif. denied, 141 N.J. 95 (1995).

James, Nowacki and related cases—most notably Quail—prohibit the parties' experts from "bootstrapping" complex medical opinions and diagnoses contained in the medical records through the expert's own testimony. In contrast, the Appellate Division in Konop v. Rosen, 425 N.J. Super. 391 (App. Div. 2012), found that the specific notation in a consulting physician's report contained in the medical records that "Pt. has tics and was moving too much at time of procedure" was a factual statement, not an opinion and thus could not properly be excluded under N.J.R.E.-808. See Konop, 425 N.J. Super. at 405.[3]

In this case, unlike Konop, the opinion given in the death certificate as to the cause of death is a complex expert opinion that must be supported by an expert opinion if it is to be considered. Dr. Krieger at his discovery deposition specifically disavowed that he gave an opinion as to the cause of Ms. Early's death. (See Pa150 at 121:2-17.) He properly was prohibited from introducing the death certificate's conclusion as to the cause of death consistent with his own prior testimony and the Quail opinion.

Plaintiffs' argument draws no meaningful distinction between this case and Quail. (See Pb27-31.) Furthermore, plaintiffs' counsel was permitted to refer to the death certificate, over defendant Care One's objection, in

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

questioning defense expert Brett Gilbert, D.O., because Dr. Gilbert not only indicated that he had reviewed the death certificate, but also disagreed with its conclusion and gave his own opinion on the cause of Ms. Early's death. (See 6T172:4-175:8.) There was no abuse of discretion in the trial court's prohibiting plaintiffs from introducing the death certificate's conclusion as to the cause of death by way of plaintiffs' experts' testimony that they had reviewed it, while admitting the defense experts own opinions as to the cause of death.

IV. THE TRIAL COURT PROPERLY EXCLUDED THE PHOTOGRAPH OF THE WOUND.

Plaintiffs next contend that the trial court erred in directing the jury to disregard a photograph purportedly showing Ms. Early's sacral wound after plaintiffs failed to authenticate the document by way of the testimony of certified nursing assistant and home health aide Adjei Frimung. (See Pb36-39; Pa36.)

"The admissibility of any relevant photograph rests on whether the photograph fairly and accurately depicts what it purports to represent, an evidentiary decision that properly lies in the trial court's discretion." Brenman v. Demello, 191 N.J. 18, 21 (2007); see Saldana v. Michael Weinig, Inc., 337 N.J. Super. 35, 46 (App. Div. 2001). "In addition to proving the evidence's relevance and that its probative value is not substantially outweighed by the

risk of undue prejudice, the persuasive representational nature of photographs demands that the foundation for the admission of photographs must be properly laid." Brenman, 191 N.J. at 30.

"Generally, to justify admissibility of a photograph, it must accurately represent the conditions existing at the time of the happening of the incident in question." Saldana, 337 N.J. Super. at 46. Further, "the authentication of a photograph requires verification by a qualified individually, one who has made personal observations, thereby establishing that the conditions reproduced existed at the time of the [incident]." Id. at 46-47. In the absence of foundational testimony, a photograph is properly excluded.

In this case, Ms. Frimung testified as follows on cross examination:

> Q. Okay. And if I heard you right, I'm sorry I couldn't her you clearly, you told me you took photographs such as that one every time there was a dressing change.
>
> A. Okay. I [can't] say for sure that this is one of the ones I took because in April my daughter was having a wedding in Dallas so I left.
>
> Q. Okay. so you don't know whether that's a photograph that you took?
>
> A. So, I mean it's similar, but I can't tell if this is one of those.

(9T257:7-17; see 9T258:18-259:12.) After defendants renewed their objections (9T259:13-261:6), the Court allowed plaintiffs to conduct a redirect examination of the witness, but she was still unable to identify the photograph

or describe the wound other than to say it was "quite deep" (9T264:1; see 9T263:18-264:3.) The court therefore found that the witness did not know if she took the photograph, did not know if it had been circulated to others or the method of circulation, and was unable to authenticate it. It thus was stricken. (9T277:5-22.)

Here, no witness was able to establish that the photograph was a fair and accurate representation of Ms. Early's sacral pressure ulcer. Multiple witnesses testified that they had not seen Ms. Early's sacral wound and thus were unable to establish the proffered photograph was a fair and accurate depiction. Ms. Frimung testified that she was unable to confirm that it was a photograph she took of Ms. Early or whether it accurately depicted the wound. Ms. Frimung further, and as the court noted, testified that she "texted" photographs, and at other times referred to "e-mails" further contributing to a lack of clarity, leading the trial court to strike the photograph. Thus, while the court afforded plaintiffs a generous opportunity to lay a foundation for the photograph to be admitted into evidence, plaintiffs ultimately were unable to establish that it fairly and accurately depicted Ms. Early's purported wound. The trial judge properly struck the photograph and instructed the jury to disregard it. There is no indication of any abuse of discretion supporting a different outcome.

V. THE TRIAL COURT DID NOT ERR IN ALLOWING DEFENDANT CARE ONE TO ADMIT PLAINTIFF'S CARE ONE CHART INTO EVIDENCE.

Plaintiffs next assert that the trial court improperly allowed defendant Care One to "admit into evidence hundreds of pages of exhibits that were not marked nor testified to at trial" specifically, trial exhibits D-17 and D-18, consisting of 314 pages of Ms. Early's medical records, which were made available to the jury during their deliberations although defense counsel was unable establish that witness testimony had been presented at trial regarding each page of records. (Pb39; see Pb39-44.)

Plaintiff claims that Care One's own chart for Ms. Early was presented in order to "bolster[ ] the defendant's position that there was constant care provided to the plaintiff, in a case where plaintiff asserted she was not moved and repositioned every two hours as required by the nursing standard" of care as described by plaintiffs' nursing expert (Pb41), plaintiffs mischaracterize the context of defendant's request that the evidence be admitted. The trial court reviewed with counsel each category of documents included in exhibits D-17 and D-18. In some instances, plaintiffs' counsel did not object. In other instances, the court admitted the documents over plaintiffs' objections that the documents were not individually marked as exhibits when they were shown to

the jury and used in the questioning of witnesses and that defense counsel was unable to establish that every page was shown to the witnesses, as follows:

> Pressure ulcer records, no objection (11T87:14-89:24;
>
> Plastic surgeon's notes regarding debridement procedures, no objection (11T89:25-92:16);
>
> Documentation of vital signs such as blood pressure, temperature and heart rate, upon which the defense medical experts based their opinions that there were no signs of sepsis or infection while Ms. Early was a patient at Care One, admitted over plaintiffs' objection (11T92:17-113:24);
>
> Wound measurements taken at Prospect Heights, no objection (11T113:25-115:7);
>
> Documentation relating to turning and repositioning at Prospect Heights, no objection (11T115-116:4);
>
> EHMC records indicating that there was no osteomyelitis or bone involvement, no objection (11T116:5-17);
>
> Confirmation that exhibit D-17 is admitted in its entirety (11T116:18-117:15);
>
> Minimum data set excerpt regarding pressure relieving surfaces, used in questioning nursing experts and fact witnesses, no objection (11T116:18-119:4);
>
> Physical and other therapy notes relating to turning and repositioning, nursing notes, activities of daily living sheets, medication and treatment administration records and care plan, admitted over plaintiffs' objection (11T119:5-150:24; 11T199:22-201:24).

Plaintiffs' counsel ***never*** objected to ***any*** of the documents as containing hearsay accounts of complex medical opinions barred by N.J.R.E. 808 and

precedent applying that rule, such as Nowacki v. Community Med. Ctr., 279 N.J. Super. 276, 281-83 (App. Div.), as defense counsel remarked. (See 11T123:22-23; see supra at 39-40.) Defense counsel further explained that the documents had been produced several years ago, were reviewed by all experts in informing their opinions, and were offered in order to rebut or impeach plaintiffs' experts representations suggesting that Ms. Early essentially received no assistance in turning and repositioning at all at Care One. (See 11T119:5-16; 11T123:19-125:19; 11T143:8-142:16.)

The court's decision to admit the records was consistent with Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 584-88 (App. Div. 2014), aff'd as mod., 223 N.J. 245 (2015), confirming that medical records are routinely admissible as business records pursuant to N.J.R.E. 803(c)(6)'s hearsay exception and for purposes of rebutting, on cross examination, plaintiffs' experts' opinions that Ms. Early was given no assistance in turning and repositioning Again, plaintiffs made no objection to the admission of the records pursuant to N.J.R.E. 808 at trial, although plaintiffs now complain that the documents "were extensive, highly technical and not readily understood by jurors without substantial definition and explanation." (Pb43.) There was no abuse of discretion in admitting the two exhibits.

VI. THE USE OF A SCAFIDI CHARGE AND VERDICT SHEET WERE APPROPRIATE.

Lastly, plaintiffs claim error in allowing the jury to consider the preexisting condition charge. See, Scafidi v. Seiler, 119 N.J. 93 (1990) and Model Civil Jury Charge 5.50E. Plaintiff concedes that Ms. Early had preexisting conditions. It is beyond dispute that plaintiff's own expert conceded that preexisting conditions increased the risk of the development of Ms. Early's pressure injury. However, plaintiff complains that none of the conditions alone caused the sacral wound at issue and because the charge was not suitably tailored to the case. Plaintiff also claims that the jury verdict interrogatories were too long and too complex. (See Pb44-50.)

In a medical/nursing malpractice case where a preexisting condition poses a risk of harm to the patient, the provider of medical services is liable only if the malpractice, as distinguished from the preexisting condition, was a "substantial factor" in producing the ultimate harm or injury. The plaintiffs' recovery will be limited to the extent (expressed in a percentage determined by the jury) to which the medical malpractice increased the risk of harm posed by the preexisting condition. See, e.g., Model Civil Jury Charge 5.50E; Scafidi, 119 N.J. at 109. Only minimal evidence is required in order to obtain an apportionment charge to permit the jury to rationally and fairly quantify the percentage of damages proximately caused by the defendant's negligence and

the decedent's preexisting condition. See Koseoglu v. Wry, 431 N.J. Super. 140, 158 (App. Div.), certif. denied, 431 N.J. Super. 140 (2013).

The Scafidi charge was appropriately given in this case. Without question, plaintiff's expert, Dr. Krieger, confirmed that Ms. Early's comorbidities increased the risk. He further opined that the sepsis, diagnosed prior to the development of any pressure injury, created more than a forty percent (40%) chance of death. (See Pa88; Pa109; 5T52:8-22; 5T66:10-69:75; 5T70:17-24; 5T76:4-7; 5T89:17-21; 5T95:24-96:25.) Defendants' physician experts further gave opinions that Ms. Early's sepsis upon her admission to EHMC caused the sacral ulcer. (7T45:6-46:20; 7T51:19-25; 7T54:17-55:16; 7T56:12-59:7; 8T34:1-36:2; 8T38:12-39:15; 11T23:17-306; 11T31:7-32:7; 11T34:23-36:16; 11T39:2-18.)

Considering the jury charge and verdict sheet as a whole, it cannot be said that any particular interrogatory or the charge as a whole was so misleading, confusing, or ambiguous that it was clearly capable of producing an unjust result. See, e.g., Flood v. Aluri-Vallabhani, 431 N.J. Super. 365, 397 (App. Div.), certif. denied, 216 N.J. 14 (2013). "Courts uphold even erroneous jury instructions when those instructions are incapable of producing an unjust result or prejudicing substantial rights." Sons of Thunder, Inc. v. Borden, 148 N.J. 396, 418 (1997) (quoting Fisch v. Bellshot, 135 N.J. 374, 392 (1994)).

The jury returned a verdict finding that defendants EHMC and Care One did not deviate from the applicable standard of care in their treatment of decedent Ms. Early, and also allocated Ms. Early's injuries 100% to Ms. Early's preexisting conditions, a result that is logically consistent and demonstrates that there was nothing confusing or misleading about the charge, the verdict sheet or the jury's responses. (See Pa315-317; 12T198-201:14.) Also and crucially, any flaw in the use of the allocation instruction and interrogatories is harmless given that the jury, as an initial matter, found no deviation from the standard of care. Finally, and as noted by plaintiff's own experts, the pre-existing conditions in this case increased Ms. Early's chances for the development of pressure injury and death.

CONCLUSION

For the reasons set forth above the trial court's order of judgment should be affirmed.

Respectfully submitted,

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Attorneys for Defendant/Respondent
Care One at Teaneck, LLC d/b/a
Care One at Teaneck

Dated: January 16, 2025

By: _____
Anthony Cocca, Esq.

ESTATE OF JEAN M. EARLY BY EXECUTOR DOREEN MCCULLOUGH AND DOREEN MCCULLOUGH INDIVIDUALLY, Plaintiff,	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION DOCKET NO. A-003244-23T4
vs.	On Appeal from:
ENGLEWOOD HOSPITAL AND MEDICAL CENTER, CARE ONE AT TEANECK, JOHN DOE (1-10), JANE ROE, RN (1-20) AND ABC CORP (1-10), SAID NAMES JOHN DOE, JANE ROE AND ABC CORP BEING FICTITIOUS, JOINTLY, INDIVIDUALLY AND IN THE ALTERNATIVE,	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: BERGEN COUNTY : DOCKET NO.: BER-L-3923-19 SAT BELOW: : Hon. Peter Geiger, J.S.C.
Defendants.	

BRIEF FOR DEFENDANT/RESPONDENT ENGLEWOOD HOSPITAL AND MEDICAL CENTER

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PROCEDURAL HISTORY RELEVANT TO DEFENDANT ENGLEWOOD HOSPITAL AND MEDICAL CENTER

On May 22, 2019 Plaintiffs, Estate of Jean M. Early and Doreen McCullough, filed this medical negligence action. Pa1. Englewood Hospital and Medical Center ("EHMC") filed an answer to the Complaint June 26, 2019. Pa7. Defendant CareOne at Teaneck filed an answer to the Complaint July 26, 2019. Pa16.

On August 4, 2021, EHMC moved to invoke the limited liability afforded to Hospitals under the Charitable Immunity Act. That motion was granted on September 10, 2021. Da1.

On November 30, 2022, EHMC moved for partial summary judgment seeking to dismiss: (1) the wrongful death claims, (2) the Nursing Home Act claims, (3) Statutory Claims, and (4) Punitive Damage claims. Da3 On February 17, 2023, the Court denied the motion to dismiss the wrongful death claims but granted the motion(s) dismissing the Nursing Home Act, Statutory and Punitive Damage claims. Da4a. [1]

On July 23, 2023 EHMC filed its Rule 4:25-7 Pre-Trial Memorandum objecting to testimony by Dr. Lloyd Krieger and filing a motion in limine seeking to bar the testimony of Dr. Lloyd Krieger on the cause of sepsis in light

[1] Plaintiff has not appealed this order.

of Dr. Krieger's deposition testimony stating that he had no opinion on the cause of the plaintiff's sepsis. Based on this testimony, EHMC objected to Dr. Krieger offering opinion testimony that the alleged sacral wound caused the sepsis and moved to bar any such opinion at time of trial. The case was not reached for trial. On May 13, 2024, EHMC re-filed its Pre-trial Motion and Memorandum seeking to limit and bar testimony of Dr. Lloyd Krieger to the extent it related to any opinion concerning the cause of plaintiff's alleged sepsis. Pa37. The trial was rescheduled for May 28, 2024. On May 28, 2024, this matter proceeded to trial and the motion was adjudicated June 6, 2024. 4T2512:4-362:3. Dr. Lloyd Krieger testified on June 7, 2024 via *de benne esse* deposition. 5T9:14-154:14.

On June 14, 2024, the jury returned a verdict in favor of the defendant finding: (1) no deviation on the part of EHMC, (2) no deviation on the part of CareOne at Teaneck, and (3) finding that 100% of plaintiff's claimed injury was caused by her pre-existing co-morbidities. 12T198:6-201:14. Judgement was entered by the Court June 18, 2024. Pa318. Plaintiff filed a notice of appeal June 21, 2024 seeking to appeal, among other issues: (1) the dismissal of the Wrongful Death Act claims on June 6, 2024, (2) preclusion of the death certificate on June 6, 2024, (3) the striking of a photograph on June 11, 2024, and (4) the jury charge and questionnaire provided to the jury June 14, 2024. An Amended Notice of Appeal was filed by Plaintiffs June 28, 2024. Pa320

STATEMENT OF FACTS RELEVANT TO EHMC

This is a medical malpractice action in which the Plaintiff alleges that Defendant EHMC's nursing staff negligently failed to turn and position the decedent, Jean Early, during her December 12, 2017 admission to EHMC and, as a result, a sacral pressure injury developed. Pa1. The case was tried before the Honorable Peter Geiger between May 28, 2024 and June 14, 2024, and culminated with a defense verdict and the jury findings that: (1) EHMC did not deviate from applicable standard of care in its treatment of the plaintiff Jean Early, (2) CareOne Teaneck did not deviate from applicable standard of care in its treatment of the plaintiff Jean Early, and (3) the jury allocated Jean Early's ultimate injury 100% to Jean Early's preexisting condition(s). 12T198:6-201:14. The court memorialized the verdict by entering judgment in favor of the Defendants, EHMC and CareOne Teaneck, on June 18, 2024. Pa318.

Facts Relevant to Decision Barring Dr. Krieger Opinion on Cause of Sepsis and Dismissal of Wrongful Death Claim

Plaintiff sought to introduce trial testimony concerning the cause of sepsis in the *de benne esse* deposition of Dr. Lloyd Krieger after Dr. Krieger testified, at deposition, that he had no opinion on the cause of Ms. Early's sepsis. Plaintiff attempted to do so without any basis and without any notice to defendants that Dr. Krieger would be changing his expected trial testimony following his

discovery deposition. The Defendants objected and moved to limit Dr. Krieger's trial testimony.

Dr. Krieger issued a report dated January 28, 2021. Pa101. In his report Dr. Krieger wrote: "The deviations allowed infections of [the] pressure sore to progress to the point of becoming chronic. The deviation also led to Ms. Early's increased risk for infections of other organ systems as well as systemic infection including sepsis." Pa109. Notably absent was any opinion stating that the wound caused her sepsis which caused her death.

At deposition, Dr. Krieger was asked whether he ever saw evidence of Ms. Early's pressure sore being infected at EHMC. Pa131 (43:18-21). Dr. Kreiger's response was to differentiate between local infection and systemic infection but he then testified that he only saw evidence of a local infection and he did not see any signs of a systemic infection (i.e. sepsis). Pa131(44:19-45:12). This is the second data point indicating that there is no basis for any opinion that Ms. Early's sepsis was caused by her alleged sacral pressure wound. The third and fatal data point is that Dr. Krieger then testified at deposition, when questioned on his opinions regarding alleged sepsis:

Q: Okay. Do you have any opinion, as to what caused the sepsis?

A: I –I do not.

Q. Okay. And you would agree that a person can die with a locally infected wound and not have sepsis as a result of that?

A: Yes

Pa150(121:11-17). Dr. Krieger noted that the cause of death was sepsis in the death certificate (Pa115), but had no opinion on the cause of that sepsis. Since sepsis was the only identified cause of death and there was no expert opinion on the cause of the sepsis and thus, the cause of death, and because the plaintiff's only causation expert acknowledged that a wound could be infected without sepsis developing, there was no causal nexus for the wrongful death claim and it was properly dismissed.

The above set of facts puts Dr. Krieger's opinions in context. Dr. Krieger saw no sign of systemic infection at EHMC. While his report referenced that a wound could, potentially, create a clinical setting where systemic infection (i.e. sepsis) occurred, he did not offer an opinion that anything at EHMC did or failed to do created a clinical setting for systemic infection (sepsis) and further definitively stated and admitted that he had no opinion on the cause of decedent's sepsis.

At trial, during argument addressing redactions of Dr. Krieger's *de benne esse* deposition testimony, EHMC sought to preclude Dr. Kreiger from now offering opinions on the cause of her sepsis and cause of death arguing that Dr.

Krieger should not have been allowed to offer opinion testimony in his *de benne esse* trial testimony concerning the cause of death or cause of sepsis given this prior testimony. 4T251:25-253:9, 253:23-254:10. Specifically, EHMC argued the admission that he had no opinion was definitive. And, EHMC argued that the absence of notice of a change in testimony should further preclude any change in testimony. No notice of an expected change in testimony was provided in advance of the *de benne esse* deposition.

The Court found that while Dr. Krieger mentioned sepsis in his report but that "there is no explanation about sepsis being the cause of death. And Dr. Krieger admits he has no opinion on the cause of death of her sepsis. It noted Krieger did describe sepsis, the alleged cause of death in this case, generally, but Dr. Krieger "doesn't relate it...to the alleged pressure injury or her death." 4T268:20-269:6. The court then goes on to find that: "The ---he has no opinion. He's indicated that on the record as to what caused the sepsis..." 4T269:7-270:3. Because Dr. Krieger admitted he had no opinion on the cause of Ms. Early's sepsis and because he failed to relate the sepsis to the alleged sacral pressure sore, the defense motion seeking to limit and bar Dr. Krieger's testimony on the cause of sepsis and the cause of death was granted. 4T:268:20-273:25.

With Dr. Krieger's testimony limited, there was no expert testimony to establish a causal nexus between the alleged pressure injury and the cause of death. Absent expert testimony establishing a cause of death, defendant EHMC moved to dismiss the wrongful death claim arguing there is no evidence linking Ms. Early's death to any act of negligence on the part of EHMC. 5T156:1-13. The Court granted the motion because: (1) Dr. Krieger did not have an opinion on the cause of the plaintiff's sepsis, and (2) did not link or provide an opinion on the cause of sepsis 5T185:4- 186:9

Facts Relating to the Court Striking the Photograph

Plaintiffs sought to introduce a photograph of a sacral wound allegedly suffered by Jean Early. Pa36. However, Plaintiff failed to establish a foundation for the admission of the photograph and specifically, the witness offered by Plaintiff, Ms. Adjei Frimung, to attempt to establish the foundation expressly testified on cross-examination that she did not know if the photograph she was shown was: (1) actually a photograph she took of Jean Early's sacral wound and (2) was otherwise unable to identify the offered photograph as depicting a wound on Jean Early. 9T257:7-18, 9T258:18-259:12 and 9T277:5-22. Accordingly, EHMC moved to strike the photograph. Based on the deficiencies in the testimony of the witness, the Trial Court granted the motion to strike the

photograph and instructed the jury to disregard it. 9T257:7-18, 9T258:18-259:12 and 9T277:5-22.

Specifically, Ms. Adjei Frimung testified as follows on cross-examination:

Q: Okay. And if I heard you right, I'm sorry I couldn't hear you clearly, you told me you took photographs such as that one every time there was a dressing change.

A: Okay. I [can't] say for sure that this is one of the ones I took because in April my daughter was having a wedding in Dallas so I left.

Q: Okay. So you don't know whether that's a photograph that you took?

A: So, I mean it's similar, but I can't tell if this is one of those.

9T257:7-17, 9T258:18-259:12. There is then a motion to strike the photograph. 9T259:13. The Court afforded plaintiff counsel time to conduct re-direct and on re-direct the witness again said she could not identify the photograph and this time indicated that she could not describe the wound other than to say it was "quite deep". 9T263:24-264:3 In sum, the witness had no basis to opine that the picture accurately depicted a wound on Ms. Early because she could not describe the wound and she could not say the picture was a picture she took of Jean Early. The court found that the witness did not know if it was her

photograph, did not know how it was circulated to anyone, and was unable to authenticate the photograph. 9T277:5-22. It was then stricken.

Facts Relating to Ruling Barring Introduction of Hearsay Opinion Concerning Cause of Death

Plaintiff attempted to introduce the death certificate through Nurse Charlotte Shepperd. Plaintiff was permitted to have Nurse Shepperd identify the document as a document she reviewed and relied upon, but was precluded from allowing her to opine on the cause of death (i.e. sepsis) as stated in the death certificate. Nurse Shepperd was a standard of care expert and was not offering any causation opinions. In fact, she specifically testified:

Q: We agree that you are not offering any opinion on the cause of death, correct?

A Correct

Q And we can agree you are not offering any opinion on a cause of any infection Jean Early may have had; correct?

A Correct

4T148:17-23. And as set forth above, Dr. Krieger, the plaintiff's causation expert, was limited in providing testimony because he specifically testified that he had no opinion on the cause of Ms. Early's sepsis. Thus, plaintiff's attempt to introduce hearsay opinion testimony in the form of a complex medical opinion

by "bootstrapping" a hearsay opinion to the death certificate was rejected by the Court. Likewise, efforts to have experts who either were not offering opinions on causation issues or formed no opinion on the issue was properly rejected by the court.

Plaintiff then argues that Dr. Brunnquell was an agent or employee of EHMC, but offered no facts to substantiate that Dr. Brunnquell was anything other than an attending physician with privileges at EHMC. He was not shown to be an agent or employee of EHMC. Thus, his opinion on the cause of death is not binding as a statement of a party opponent as argued by plaintiff and was not anything more than a hearsay statement contained in the death certificate based on the record. That opinion remains hearsay absent competent testimony to establish its admissibility, and that testimony would be required from Dr. Brunnquell who was not called as a witness by Plaintiff.

Finally, Plaintiff's statement of facts tries to allege as justification for admission of the report a reference to Dr. Gilbert being permitted to testify about the death certificate. This assertion to this court is misleading! Plaintiff's counsel introduced the death certificate during Dr. Gilbert's testimony on her cross-examination of Dr. Gilbert. She cannot now be heard to claim that it was error for the court to allow his testimony after Plaintiff's counsel attempted to cross-examine Dr. Gilbert on it to try to contradict his opinion that Jean Earlyu

did not die of sepsis. 6T172:4 -175:8. Whether she was trying to impeach Dr. Gilbert's testimony or establish causation through the cross-examination, the fact remains that Plaintiff's counsel is the one who introduced the issue during Dr. Gilbert's testimony. Plaintiff's counsel strategic decision cannot now form the factual basis for an appeal issue.

Facts Relating to the Jury Instruction and Jury Questionnaire

Plaintiff argues that the Scafidi charge should not have been given because plaintiff did not have conditions that "in and of themselves" could cause a pressure wound. That argument simply belies the record evidence with defense experts Dr. Barnes, Dr. Brem and Dr. Gilbert all testifying that Ms. Early's pre-existing infection and sepsis, which existed upon her entry into EHMC, caused ischemia and hypoperfusion to the sacral tissue, and the ischemia and/or hypoperfusion resulted in the formation of the deep tissue pressure injury at issue in the lawsuit. 8T34:1-36:2, 38:12-39:15 (Barnes Testimony), 6T45:6-46:20, 51:19-25, 54:17-55:16, 56:12-59:7(Gilbert testimony) and 11T23;17-30:6, 31:7-32:7, 34;23-36:16 and 39:2-18 (Brem testimony). These experts specifically explained how Plaintiff's co-morbidities caused the formation of the deep tissue pressure injury. And, while Plaintiff's expert contended the pressure injury resulted from unrelenting pressure (5T267:17), the jury was free to accept and/or reject the expert testimony and to consider the extent to which these co-

morbidities, which were undisputed, caused or contributed to the formation of the deep tissue pressure injury. In fact, Dr. Krieger, Plaintiff's expert, conceded these co-morbidities "increased the risk" of skin breakdown. 5T52:8-22, 5T66:10-69:75, 5T70:17-24, 5T89:17-21, 5T95:24-96:25. Dr. Krieger did not recall when Ms. Early developed sepsis, 5T75:18-24, but acknowledged the mortality rate of a patient with sepsis was "over 40%". 5T76:4-7. Based on this record evidence, the jury instruction was appropriate since Ms. Early had a 40% chance of mortality upon admission to the hospital from her sepsis and had co-morbidities that increased the risk of skin breakdown and contributed to the formation of skin breakdown and the Deep tissue pressure injury, all of which were acknowledged by Plaintiff's expert and testified to by defense experts. Further, the jury went on to find that 100% of the injury was, in fact, caused by these co-morbidities, obviously accepting the testimony provided by the defense experts. This finding, which is unchallenged, makes any argument about the jury charge unfounded if not moot. The jury clearly understood the charge and found the comorbidities caused the deep tissue pressure injury when the sacral tissue was deprived of oxygen and nutrition, exactly as testified to by the defense experts.

LEGAL ARGUMENT

POINT I

THE JURY DETERMINED THAT THE DEFENDANTS DID NOT DEVIATE FROM ACCEPTED STANDARDS OF CARE RENDERING ANY APPEAL BY PLAINTIFF MOOT

As a general proposition, an issue is moot when the decision sought in a matter, if rendered, can have no practical effect on the existing controversy. Comando v. Nugiel, 436 N.J.Super. 203, 219 (App. Div. 2014); N.J. Div. of Youth & Family Servs. v. J.C., 423 N.J. Super. 259, 263 (App. Div. 2011). Where the issues of negligence and causation are distinct and separate, a new trial on liability issues will not be warranted because of an alleged erroneous instruction on proximate cause. See Tindal v. Smith, 299 N.J.Super. 123 (App. Div. 1997) (citing Ahn v. Kim et al., 145 N.J. 423, 434 (1996). We submit this is so because in this case because even if this Court were to determine that the charge given on the proximate cause issue were erroneous, that would not affect the outcome. The Court should look no further than the determination that there was no deviation from accepted standard of care and thus, no negligence. In answering the question on liability in the negative, there is no need to even address proximate cause. The issue of proximate cause is moot given this finding. There is nothing in this record indicating that the jury's determination

that EHMC did not deviate from the accepted standards of care was the result of confusion engendered by the proximate cause, i.e. Scafidi charge

By way of example, in Karanasos v. Meridian Health, DOCKET NO. A-4215-15T2 (N.J. Super. App. Div. May 01, 2018), a medical negligence case involving a fall post-operatively, the Appellate Court noted that on the verdict sheet, the jury was asked to determine whether plaintiff had proven that defendant Hanley deviated from the accepted standards of nursing care. The jury then was asked to determine whether plaintiff had proven that defendant Hanley's deviation increased the risk of harm posed by Mrs. Karanasos's preexisting conditions and, if so, whether the increased risk was a substantial factor in causing Mrs. Karanasos's ultimate injury. The jury was asked the same questions regarding Meridian. The jury answered "No" to the first of these three questions as to both Hanley and Meridian. Thus, the jury found that plaintiff had not proven that Hanley or Meridian deviated from the accepted standards of nursing care. The Court then noted that "therefore, the jury was not required to answer whether any such deviation increased the risk of harm posed by Mrs. Karanasos's preexisting conditions, or whether the increased risk was a substantial factor in causing her ultimate injury. Consequently, the jury was not required to determine the percentage of Mrs. Karanasos's ultimate injury attributable to her preexisting conditions and the percentage attributable to

defendants' alleged deviations from the accepted standard of care." The Court then held that the question of whether the judge erred by charging Scafidi was moot as a result of the no cause verdict: "There is, however, nothing in the record indicating that the jury's determinations that Hanley and Meridian did not deviate from the accepted standards of care were the result of confusion engendered by the Scafidi charge." Karanasos v. Meridian Health, DOCKET NO. A-4215-15T2 (N.J. Super. App. Div. May 01, 2018).

Similarly, Hayser v. Parker, DOCKET NO. A-5531-17T1 (N.J. Super. App. Div. Feb 03, 2021), another medical negligence case involving a post-surgical bowel leak, a jury found no deviation from the accepted standards of practice on the part of the defendant. Having found no deviation, the jury did not reach the remaining questions on the verdict sheet regarding proximate causation or damages. The Hayser court held:

> "Because the jury found no deviation from a standard of care, we need not consider plaintiffs' arguments relating to proximate cause, damages, or other questions not reached by the jury. Thus, we do not consider plaintiff's arguments regarding Dr. Gingold's testimony or jury charges on Scafidi v. Seiler, 119 N.J. 93 (1990), vicarious liability, or mitigation. To the extent we do not address any of plaintiffs' remaining arguments, it is because we find insufficient merit in them to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Our disposition of plaintiff's appeal renders defendant Lake's cross-appeal moot. Accordingly, we do not address it."

Hayser v. Parker, DOCKET NO. A-5531-17T1 (N.J. Super. App. Div. Feb 03, 2021)(emphasis supplied).

Here, all of the issues raised on appeal by Plaintiff are moot as a result of the jury's findings that there was no deviation from accepted standards of care on the part of EHMC. Even if this Court were to find the proximate cause charge was incorrect, which it was not, a reversal would have no impact on the ultimate outcome if reversed since the determination that there was no deviation from accepted standards of care is separate and distinct from any proximate cause issue. Plaintiff raises no issue on appeal that would affect the jury's liability finding. All issues raised on this appeal, as they relate to EHMC, relate to issues involving proximate cause or damages, rendering the appeal moot as to EHMC. Because mootness is a justiciability issue for this Court, the appeal should be rejected as moot and the judgment affirmed in favor of EHMC.

POINT II

THE JURY CHARGE AND JURY INTERROGATORIES WERE PROPER

a. The Standard of Review

"The proper standards of review of jury instructions are well-settled: if the party contesting the instruction fails to object to it at trial, the standard on appeal is one of plain error; if the party objects, the review is for harmless error." Willner v. Vertical Reality, Inc., 235 N.J. 65, 192 A.3d 1011 (N.J. 2018). When a party has brought an alleged error to the attention of the trial court, the error will not be grounds for reversal if it was "harmless". State v. J.R., 227 N.J. 393,

417 (2017) (quoting State v. Macon, 57 N.J. 325, 338, 273 A.2d 1 (1971). An error will not be harmless if there is "some degree of possibility that the error led to an unjust result." State v. Lazo, 209 N.J. 9, 26 (2012). For an error to be reversible under the harmless error standard, "[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a verdict it otherwise might not have reached. Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018).

Here, the alleged error does not rise to a level to meet this threshold. The jury returned a verdict of no cause of action finding there was no deviation on the part of EHMC. Nothing raised on appeal undermines that finding. Nothing allows this reviewing court to conclude that the jury would have reached a different result if the challenged evidence, which relates to proximate cause, or the jury instruction on proximate cause had been different. Neither ruling affected the jury's obligation to determine whether EHMC deviated from accepted standards of practice. That finding is insurmountable and fatal to plaintiffs' appeal. Nothing about the jury charge led to an unjust result given the jury's finding that EHMC did not deviate from accepted standards of care.

Further, nothing about the charge led the jury to a verdict it might not have reached. The evidence established that Jean Early was admitted to EHMC with sepsis. The evidence established that the sepsis caused an ischemic condition

and that the hypoperfusion injury resulting in skin breakdown and a deep tissue pressure injury. The evidence established pre-existing conditions caused and/or contributed to the pressure injury developing. Plaintiff's expert even referenced that the pre-existing conditions the defense experts pointed to increased the risk of skin breakdown. In fact, after hearing all of the evidence from all experts, the jury concluded and found that 100% of the injury, i.e. the pressure sore was proximately caused by the pre-existing conditions and co-morbidities as testified to by the defense experts. There is no demonstration that the jury was confused by the jury instruction and thus, no grounds for reversal. The evidence presented established there was no deviation and further established that plaintiff had pre-existing conditions upon entry into EHMC and that those pre-existing conditions caused and/or contributed to her developing a pressure injury as a result of the ischemic event testified to by the defense experts. Multiple experts, Dr. Barnes, Dr. Gilbert and Dr. Brem, all testified that this deep tissue pressure injury was due to an ischemic event induced by her prolonged 10-day period with infection and sepsis. While Plaintiff elected to try to present an alternate theory, i.e. that only unrelenting pressure could cause this pressure sore, the Court and jury had evidence that there were pre-existing conditions that warranted a Scafidi charge, and ultimately found those conditions caused 100% of the pressure sore.

b. The Court Properly Instructed the Jury Using an Increased Risk Charge and the Interrogatories were properly Constructed

In Scafidi v. Seiler, 119 N.J. 93, 108, (1990), the Supreme Court held that "'[e]vidence demonstrating within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a preexistent condition raises a jury question whether the increased risk was a substantial factor in producing the ultimate result.' Where there is such proof, the doctor 'must produce evidence tending to show that the [ultimate injury] could have been attributable solely to the preexistent condition, irrespective of defendant's negligence,' Id. at 113-14, and the jury must be instructed to determine, 'on a percentage basis,' the extent to which the ultimate result is attributable to the pre-existing condition and the extent to which it is attributable to the doctor's negligence in treating the patient. Id. at 114, 574 A.2d 398; see also Weiss v. Goldfarb, 295 N.J.Super. 212, 230 n. 4, 684 A.2d 994 (App.Div.1996)." See Tindal v. Smith, 299 N.J.Super. 123, 134 (N.J. Super. App. Div. 1997). That is precisely the situation presented in the within case. In fact, Dr. Krieger in his report (Pa88, Pa109) referred to increased risk, and in his testimony admitted the co-morbidities increased the risk and that sepsis created more than 40% chance of death alone. Plaintiff's objection to an increased risk charge is undermined by the testimony of Plaintiff's own expert witness on causation, and clearly undermined by the defense expert testimony.

That is, Plaintiff's expert testified that plaintiff's pre-existing condition(s) increased the risk of skin breakdown. And Defendant EHMC presented testimony from Dr. Harold Brem, a General Surgeon and Wound Care Expert, and Dr. Brett Gilbert, an Infectious Disease specialist, establishing that the plaintiff, Jean Early, had sepsis upon admission to EHMC and that her pressure injury developed as a result of her sepsis and specifically, as a consequence of the sepsis causing the body to shunt blood away from her sacral area resulting in the development of a Deep Tissue Pressure Injury. EHMC also presented testimony from its nursing expert, Dr, Marcia Barnes, who testified the Deep Tissue Pressure Injury was a consequence of an ischemic event secondary to the patient having sepsis. The Trial Court properly applied the increased risk-substantial factor proximate cause jury instruction in this case.

Relative to the verdict sheet, when reading a verdict sheet it must be read as a whole, accompanied by the jury charge. It cannot be said that an interrogatory alone was so misleading, confusing, or ambiguous that it was clearly capable of producing an unjust result if the charge is correct. See Flood v. Aluri-Vallabhaneni, 431 N.J. Super. 365, 379 (App. Div.) (holding that "[b]ecause the charge was correct, and the questions posed on the jury verdict sheet correctly stated the law, any deviation was insignificant"), certif. denied, 216 N.J. 14 (2013). Here, the verdict sheet followed and subscribed to the model

jury charge. There was nothing confusing or misleading about the verdict form or questions.

POINT III

THE TRIAL COURT PROPERLY DISMISSED THE WRONGFUL DEATH CLAIMS

a. The Standard of Review for Limiting Dr. Krieger's Expert and Dismissing the Wrongful Death Act Claim

The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (N.J. 2015) "[A] trial court's grant or denial of a motion to strike expert testimony is entitled to deference on appellate review." Id. Accordingly, we review a trial court's decision whether to admit expert testimony under "'an abuse of discretion standard.'" Id. at 53. See also State v. Berry, 140 N.J. 280, 293 (1995); Bender v. Adelson, 187 N.J. 411, 428 (2006); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371–72 (2011) ("we apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard."). See also Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 247 (App. Div. 2014) (citing Carey v. Lovett, 132 N.J. 44, 64 (1993)(The determination to admit testimony, including expert testimony, is committed to the sound discretion of the trial court and "Absent a clear abuse of discretion, an appellate court will not interfere with the exercise of that discretion.").

b. Dr. Krieger's Opinion was a Net Opinion and Properly Excluded Resulting in the Wrongful Death Claim Being Dismissed

The net opinion rule 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 Corp., 127 N.J. 404, 417 (1992). An expert's conclusion "'is excluded if it is based merely on unfounded speculation and unquantified possibilities.'" Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997) (quoting Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 N.J. 333 (1990)), certif. denied, 154 N.J. 607 (1998). Unsubstantiated expert testimony cannot provide to a jury the benefit that N.J.R.E. 702 envisions: a qualified specialist's reliable analysis of an issue "beyond the ken of the average juror." Townsend v. Pierre, 221 N.J. 36 (2015) (citing Polzo v. County of Essex, 196 N.J. 569, 582 (2008)).

Here, Plaintiff sought to prove that the alleged sacral ulcer caused Jean Early's sepsis, and that sepsis caused her death. However, Plaintiffs' causation expert, Dr. Krieger, testified at deposition that he had no opinion on what caused the sepsis:

Q Okay. Do you have an opinion—do you have an opinion as to what caused the sepsis?

A I do not.

T39:8-11 (5/31/24 Trial Testimony Lloyd Krieger, M.D.) He could not provide a basis for an opinion he did not hold. Based on Dr. Krieger's testimony, a motion to preclude Dr. Krieger from offering opinions, and specifically from offering opinion on the cause of death, was made and appropriately granted by the Court.

Dr. Krieger had no opinion on the cause of Jean Early's sepsis. Contending that Jean Early died from sepsis, and lacking evidence as to the cause of the sepsis, the wrongful death claim was properly dismissed by the trial court as there was no evidence to establish a causal nexus between the alleged sacral wound and her developing and dying as a result of sepsis. Dr. Krieger could not provide a "why or wherefore" explanation concerning a cause of death, admitted he held no opinion. He could not opine that the wound caused the sepsis. He did not know when sepsis first existed. He stated he had no opinion on the cause of the sepsis. There was no other testimony offered to establish a causal nexus between the alleged pressure sore, sepsis and Jean Early's alleged cause of death.

"To prevail in a medical malpractice action, 'ordinarily, 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.' Nicholas v. Mynster, 213 N.J. 463, 478 (2013)(emphasis supplied)." Here, Dr. Krieger offered no causation opinion on the cause of Jean Early's sepsis, and no other expert was proffered by plaintiff to establish any causal nexus between the alleged negligence and the alleged death.

Further, in McKenney v. Jersey City Med. Center, 330 N.J. Super. 568, 587 (App. Div. 2000), it was held that a party has a continuing duty to disclose the opinions of its experts and a failure to do so may, in the trial judge's discretion, result in the exclusion of that expert's opinion evidence. The McKenney court pointed to Waters v. Island Transp. Corp., 229 N.J. Super. 541, 548 (App.Div. 1989); Fanfarillo v. East End Motor Co., 172 N.J. Super. 309, 312 (App.Div. 1980); Maurio v. Mereck Construction Co. Inc., 162 N.J. Super. 566, 569 (App.Div. 1978); Hamilton v. Letellier Construction Co., 156 N.J. Super. 336, 338; and Clark v. Fog Contracting Co., 125 N.J. Super. 159, 161 (App.Div.), certif. denied, 64 N.J. 319 (1973) and then wrote: "Even if no written report is prepared, we have said that a party must disclose the substance of its expert's report in advance of trial. Clark v. Fog Contracting Co., 125 N.J. Super. at 161-62. Where, as here, an attorney knows that his client or a material

witness intends to deviate from his deposition testimony in a crucial way, we believe that the attorney has an ethical obligation to convey that fact to his adversary." Id. at 588. No such notice occurred prior to the *de benne esse* deposition. Here, Plaintiff's failed to disclose the purported change in Dr. Krieger's de benne esse deposition so the objections were proper and the rulings on those objections barring such opinions were proper.

c. The dismissal of the wrongful death claim is moot given the fact that the jury determined EHMC did not deviated from accepted standards of practice

As outlined above, we submit this issue is moot in light of the jury determination that there was no deviation from standard of care by EHMC nursing staff. The first element of any claim is proof of a deviation. In this instance, the jury found that EHMC's nursing staff did not deviate. This renders any argument about an alleged cause of death moot as there was no negligent act to cause the death and thus, no basis for a wrongful death claim. Thus, there can be no abuse of discretion and there exists no basis for disturbing the trial court's ruling or otherwise revisiting this issue on appeal. Were this court to reject this argument, there is no competent expert testimony to establish a causal nexus between the alleged death and the alleged negligent act and thus, the wrongful death claims were properly dismissed for failure to establish a prima facie case, i.e. absence of causal nexus.

POINT IV
THE TRIAL COURT PROPERLY EXCLUDED THE PHOTOGRAPH AND INSTRUCTED THE JURY TO DISREGARD IT AS PLAINTIFF FAILED TO LAY THE REQUIRED FOUNDATION FOR ITS ADMISSION INTO EVIDENCE

a. The Standard of Review

Considerable latitude is afforded to a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion. See State v. Feaster, 156 N.J. 1, 82 (1998). Appellate Courts will disturb evidentiary rulings pertaining to the admission or exclusion of evidence only upon a finding of abuse of discretion. See e.g. State v. Rose, 206 N.J. 141, 157, 177-78 (2011). Under this standard, a reviewing court should not substitute its own judgment for that of the trial court unless the trial court's ruling was "so wide of the mark that a manifest denial of justice resulted." See State v. Kuropchak, 221 N.J. 368, 385 (2015). See also Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016). A reviewing court must uphold a trial judge's determination unless that ruling is "'so wide of the mark' as to result in a manifest injustice." State v. J.D., 211 N.J. 344, 354 (2012) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

In this instance, there was no abuse of discretion and no manifest denial of justice. The trial court did not err in excluding or, more specifically striking the photograph because no witness was proffered to properly authenticate and

lay the foundation for admission of the photograph into evidence. In fact, the Trial Court afforded Plaintiff's counsel great leeway in trying to establish a proper foundation, affording her repeated efforts at direct examination and re-direct examination. Despite this, Plaintiff was unable to elicit a sufficient foundation to admit the photograph. Given the failure to lay a proper foundation for admission of the photograph after repeated attempts, there was no abuse of discretion and no manifest denial of justice in striking the photographs after the witness indicated she could not identify the photograph as a photograph she took of the Plaintiff, and after her testimony disclosed she had no basis to compare what was depicted in the photograph to any recall of Jean Early's actual condition. Instructing the jury to disregard the photograph because it had been displayed to the jury previously was proper given the developments in the testimony. The Court's decision should be affirmed.

b. The Ruling Striking the Photograph Was Correct

"The admissibility of any relevant photograph rests on whether the photograph fairly and accurately depicts what it purports to represent, an evidentiary decision that properly lies in the trial court's discretion." Brenman v. Demello, 191 N.J. 18, 21 (2007). It has been held: "In addition to proving the evidence's relevance and that its probative value is not substantially outweighed by the risk of undue prejudice, the persuasive representational

nature of photographs **demands that the foundation for the admission of photographs must be properly laid**." Brenman v. Demellow, 191 N.J. at 30. The admissibility of any relevant photograph rests on whether the photograph fairly and accurately depicts what it purports to represent. See Saldana v. Michael Weinig, Inc., 337 N.J. Super. 35, 46 (App. Div. 2001).

"Generally, to justify admissibility of a photograph, it must accurately represent the conditions existing at the time of the happening of the incident in question." Saldana v. Michael Weinig, Inc., 337 N.J. Super. at 46. Further, "[t]he authentication of a photograph requires verification by a qualified individual, one who has made personal observations, thereby establishing that the conditions reproduced existed at the time of the [incident]." Id. at 46-47. Photographs need not be admitted solely through the testimony of the photographer; they can be admitted through the testimony of another "**so long as a proper foundation is laid**". State v. Wilson, 135 N.J. 4, 14 (1994) ("The person testifying need not be the photographer, because the ultimate object of an authentication is to establish its accuracy or correctness. To that end, any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it.")(emphasis added); See also State v. Joseph, 426 N.J. Super. 204, 220-221 (App. Div.), certif. denied, 212 N.J. 462 (2012).

In order to authenticate a photograph, a witness' testimony must establish that: (1) the photograph is an accurate reproduction of what it purports to represent; and (2) the reproduction is of the scene – or in this case the injury--at the time in question. Whether a photograph is a sufficiently accurate representation is a preliminary issue for the court. State v. Wilson, 135 N.J. 4, 15 (1994). "The admissibility of any relevant photograph rests on whether the photograph fairly and accurately depicts what it purports to represent, an evidentiary decision that properly lies in the trial court's discretion." Brenman, 91 N.J. at 21. We submit, in the absence of such foundation testimony, it is properly excluded.

Here, no witness was able to establish that the photograph was a fair and accurate representation of Jean Early's alleged sacral pressure ulcer. Witness after witness testified that he/she had not seen Jean Early's sacral pressure ulcer and thus, were unable to establish the proffered photograph was a fair and accurate depiction of Jean Early's sacral ulcer. The home healthcare aid and alleged photographer, Adjei Frimung, testified she was unable to identify the photograph as a photograph she had taken of Jean Early. She was also unable to and did not testify the photograph accurately depicted Jean Early's sacral pressure ulcer. She could not even describe Jean Early's wound other than to say it was "quite deep". Thus, she had no basis to testify that the photograph

depicted Jean Early's pressure sore. Further, as the court noted, the witness testified she "texted" the photograph whereas other testimony related to "e-mails" and thus, there were unknown or unresolved issues creating questions regarding whether the photograph sought to be admitted even actually depicted Jean Early. These combined factors influenced the Court's decision and caused it to strike the photograph. In sum, Plaintiff failed to lay a proper foundation for the photograph to be admitted into evidence because no witness was able to establish it fairly and accurately depicted Jean Early or her alleged pressure ulcer.

That decision by the Trial Judge is entitled to deference and should not be disturbed given the absence of any foundation for admission of the photograph and, more specifically, because there was no testimony to establish the photograph offered was actually taken by any proffered witness, or that it fairly and accurately depicted Jean Early's alleged pressure ulcer. No witness was able to testify that the photograph accurately depicted Jean Early's alleged deep tissue pressure injury, anno witness was otherwise able to perform a comparative analysis based upon a review of the photograph and a recall of Jean Early's actual condition. The photograph was properly stricken and the jury properly instructed to disregard it in the discretion of the Trial Judge. That decision

should be affirmed absent an abuse of discretion, and no such abuse is demonstrated here.

POINT V

THE CAUSE OF DEATH IDENTIFIED IN THE DEATH CERTIFICATE WAS HEARSAY AND PROPERLY EXCLUDED

In Quail v. Shop-Rite Supermarkets, Inc., 455 N.J.Super. 118 (N.J. Super. App. Div. 2018), the Court determined that N.J.S.A. 52:17B–92 does not provide an absolute right to a civil plaintiff to admit the full contents of a death certificate and that hearsay opinions within the death certificate were properly excluded by the trial court under N.J.R.E. 808, the net opinion doctrine, and pertinent case law. It further held that the hearsay exception for vital statistics did not require admission of the examiner's opinions. Id. at 122. Not only is the death certificate inadmissible hearsay as a matter of law, but the embedded hearsay statement (i.e. hearsay within hearsay) is inadmissible absent some exception.

Clearly any opinion on a complex medical diagnosis is hearsay when the deponent is not called to testify. Under Evid. R. 808, expert opinion included in a hearsay statement shall be excluded if the declarant has not been produced as a witness. In this instance, Plaintiff neither identified the declarant in pre-trial discovery, nor produced the declarant as a witness. Expert opinion relating

to the diagnosis of a complex medical condition is not admissible as part of the hospital record in which they are contained. See Gunter v. Fischer Scientific American, 193 N.J. Super. 688, 694 (App. Div. 1984). Plaintiff would have this court ignore the complexity of the issue. And further, Plaintiff would have this Court ignore the fact that no evidence establishes that Dr. Brunnquell was the agent or employee of EHMC.

Here, Plaintiff was attempting to bootstrap opinion testimony to testimony of other witnesses by suggesting they relied upon the death certificate. But that does not justify the admission of the hearsay opinion regarding the alleged cause of death. The experts were allowed to testify they relied upon the death certificate, but prohibited from commenting on the cause of death. Nurse Shepperd expressly testified she was offering no opinion on the cause of death so she was properly prohibited from testifying regarding any cause of death. And Dr. Krieger stated he had no opinion on the cause of death, so he was properly prohibited from testifying about the embedded statement. Plaintiff could have easily rectified the situation by calling the declarant as a witness, but chose not to do so. That strategic error in not calling the witness cannot now be visited upon defendants and form a basis for appeal, especially where the two experts plaintiff called did not offer or hold opinions on causation. One cannot argue prejudice resulted where: (1) Nurse Shepperd had no opinion on causation,

and (2) Dr. Krieger had no opinion on the cause of sepsis. Further, even if admitted the death certificate statement that the cause of death was sepsis does not establish any causal nexus between the alleged pressure injury and the death so there is no error that confused the jury or prejudiced plaintiff. The death certificate did not identify the cause of the sepsis, just like Dr. Krieger was unable to identify the cause of the sepsis.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the court deny plaintiffs' appeal and affirm the jury verdict and judgment entered in favor of the Defendant, EHMC.

Respectfully submitted,

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By: /s/John R. Scott
John R. Scott, Esq.

DATED: November 13, 2024

ESTATE OF JEAN M. EARLY by Executor DOREEN MCCULLOUGH and DOREEN MCCULLOUGH individually, Plaintiffs/Appellants v. ENGLEWOOD HOSPITAL AND MEDICAL CENTER, CAREONE AT TEANECK, JOHN DOE (1-10), JANE ROE, RN (1-20), and ABC CORP, said names John Doe, Jane Roe and ABC Corp being fictitious, jointly, individually and in the alternative, Defendants/Respondents	SUPERIOR COURT OF NJ APPELLATE DIVISION DOCKET NO. A-3244-23 ON APPEAL FROM JURY VERDICT AND FINAL JUDGMENT OF SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, LAW DIVISION, CIVIL PART SAT BELOW: HONORABLE PETER GEIGER, J.S.C.

REPLY BRIEF IN SUPPORT OF APPEAL OF APPELLANT EARLY

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BRIEF STATEMENT OF THE CASE

This is a nursing malpractice claim brought by plaintiff/appellant Estate of Jean Early by Executor Doreen McCullough against defendant/respondents Englewood Hospital and CareOne at Teaneck that resulted in an approximate 10 day trial with the jury finding in favor of the defendants. To briefly summarize the claim, the plaintiff-appellant asserted that, due to failures in nursing care, she developed a significant and avoidable pressure wound which became infected and caused her pain, suffering, loss of life quality and dignity, and resulted in her death.

The plaintiff/appellant has appealed the jury verdict and final judgment of the Court asserting multiple, reversible errors below requesting remand for retrial. The plaintiff/appellant filed an appellate brief citing to six main errors under six corresponding headings. Each defendant/respondents filed an opposition brief relating to those assertions they determined applied to them. The plaintiff/appellant now files this permitted reply with respect to both oppositions.

The plaintiff/appellant relies upon and incorporates herein both volumes of her previously filed appendices and any and all arguments made in the plaintiff/appellant's original appellate brief including the recitations of the procedural history and statement of facts, as well as all arguments set forth in this reply herein, in support of her appeal.

LEGAL ARGUMENT

I. THE JURY'S DETERMINATION WITH RESPECT TO DEVIATION/LIABILITY DOES NOT PRECLUDE PLAINTIFF/APPELLANT'S CONTENTIONS REGARDING THE SCAFIDI JURY CHARGE, DISMISSAL OF THE WRONGFUL DEATH CLAIM, OR ANY ASSERTION OF ERROR BELOW THAT COULD BE DEEMED TO RELATE TO CAUSATION AND DAMAGES

Both defendant/respondents appear to argue that, in consideration of the jury's findings of no deviation for the both of them, the plaintiff's request for remand and retrial due to the improper Jury Charge on causation, specifically the Scafidi Charge, is moot. They assert since the jury found no deviation, the causation question which includes Scafidi, was not reached and is of no consequence on this appeal. The respondents also seem to assert that any argument the plaintiff/appellant makes regarding errors of the Trial Court with respect to issues of causation and damages, including dismissal of the wrongful death claim on directed verdict and possibly the striking of the photo as well as preclusion of the testimony related to the Death Certificate, are also moot as a result. This argument is misplaced for the following reasons.

The respondent Englewood cites to two unpublished Appellate Division decisions as support for this position – Karanasos v. Meridian Health, Docket No. A-4215-15T2 (App. Div. 2018)(Da5) and Hayser v. Parker, A-5531-17T1 (App. Div. 2021)(Da16). The defendant Englewood points to the conclusions of those

Courts that nothing in the record indicated the jury's finding of no deviation was the result of confusion engendered by the Scafidi Charge. Those cases are unpublished and not precedential but are also distinguishable from the case at bar. Here, there is evidence in the record that the jury's findings were the result of confusion due to Scafidi. As noted in plaintiff/appellant's original brief, the jury answered the questions on their verdict sheet regarding deviation in favor of the defendants, but instead of turning their sheets in as directed, the jury went on to answer the Scafidi question on the verdict form. (Pa315-6; 12T198-200) While lawyers understand the distinction between liability and causation as elements of negligence and the importance of that distinction as it relates to a proper understanding of negligence, jurors as laypeople do not. In this case, the jury's completion of the verdict sheet regarding both liability and causation demonstrates that they were confused and improperly intertwined and conflated these issues. Their answers evidence the influence the Scafidi Charge had on their overall consideration in the case and the overriding importance it held, despite the impropriety of it.

To the contrary, the plaintiff asserted the published New Jersey Supreme Court decision of Komlodi v. Picciano, 217 N.J. 387 (2014), in her favor. The Komlodi Court held and went so far as to make clear that the charging of Scafidi in a non-Scafidi case was reversible error, and that even if the Charge were warranted, if it was not or could not be tailored to fit the facts of the case, the error still required

remand. Id. at 417. The circumstance in the case at bar is both that Scafidi was not warranted and not given in the appropriate form, and further, that it confused this jury. As a result, the arguments of plaintiff on this and other issues on this appeal are not moot and the matter should be remanded for retrial.

II. THE STANDARD OF REVIEW FOR THE DIRECTED VERDICT DECISION OF THE COURT BELOW DISMISSMING THE PLAINTIFF'S WRONGFUL DEATH CLAIM IS NOT ABUSE OF DISCRECTION BUT THE SUMMARY JUDGMENT REVIEWED DE NOVO BY THIS COURT

The defendant/respondents suggest that the preclusion of the opinions of Dr. Krieger, the plaintiff's medical expert, regarding wrongful death should be reviewed on an abuse of discretion standard because it relates to the barring of expert testimony. This is incorrect.

The plaintiff bears the burden of proof for the wrongful death claim. The defendants moved to dismiss this claim in its entirety from the case and based their argument upon what they deemed to be a net opinion by plaintiff's expert. As plaintiff/appellant indicated, directed verdict is permitted by R. 4:37-2(b). Caselaw is clear that the standard that applies to a directed verdict motion is the same as that which applies to summary judgment. Brill v. Guardian Life, 142 N.J. 520, 540 (1995). That means on both summary judgment and directed verdict, all inferences must be drawn in the light most favorable to the non-movant and the Court is to review the matter de novo, employing the same standard as the Trial Court below.

Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 569 (App. Div. 2014); Polyard v. Terry, 160 N.J. Super. 497 (App. Div. 1978); Prudential Prop & Cas Ins Co v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

When viewing in this light, as set forth in plaintiff/appellant's initial brief, there is much more than a mere scintilla of evidence to support the cause of plaintiff's wrongful death. The plaintiff's expert was qualified by the Court, set forth a thorough explanation of the medical issues, the bases for his opinions, and testified to a reasonable degree of medical probability that the wound culture produced a showing of infection in the wound, which seeded the blood, caused sepsis and resulted in part in the plaintiff's death. As a result, the matter should be remanded for retrial with this claim intact.

III. DEFENDANT/RESPONDENT'S ARGUMENT THAT THE DEATH CERTIFICATE IS HEARSAY FAILS AS THE DEFENDANT ADMITTED DR. BRUNNQUELL WAS AN AGENT OF ENGLEWOOD HOSPITAL SO THE CERTIFICATE IS ADMITTED AS AN EXCEPTION TO THE HEARSAY RULE

Defendant/respondents continue to assert that the Death Certificate in this matter is an inadmissible hearsay document. However, it is unequivocally admissible as an exception to hearsay through N.J.R.E. 803(b)(4), admission of a party opponent. On the initial sidebar for the subject objection, defendant Englewood admitted Dr. Brunnquell, who completed and signed the Death Certificate, was a member of the Englewood physician network and was an attending

physician at the hospital. (4T101-2) Pursuant to the above Evidence Rule, a statement made by a party's agent or servant concerning a matter in the scope of the agency during the existence of the relationship offered against the principle is excluded from the hearsay rule as a party admission. This Certificate was explicitly relied upon by all experts in the case, was reliable and an exception to hearsay, was pertinent to the claims being asserted, and testimony should have been permitted for the jury to hear and not concealed from them.

IV. DEFENDANT/RESPONDENTS CONTINUE TO ARGUE THAT A FOUNDATION WAS NOT LAID FOR ADMISSION OF THE PHOTO IN THIS MATTER WHICH IS SIMPLY UNTRUE

The plaintiff/appellant relies on its initial brief regarding this issue which cites to the testimony of the witness laying the foundation for admission of the photo. As the caselaw made clear, the trend is toward less arduous admission standards and a liberal threshold for documents and materials such as photos that are pertinent to a jury's determination and understanding of the case. The testimony of the witness who took the photo speaks for itself and the Court is referred to that testimony as cited originally. The arguments of defense on opposition do not defeat plaintiff's position already asserted on this issue.

V. DEFENDANT/RESPONDENT'S CAREONE'S CONTINUED ASSERTION THAT ITS EXHIBITS WERE ADMISSABLE IS MISPLACED AS SUPPORT FOR ITS POSITION

Defendant/respondent CareOne conflates the question of whether medical

records may be generally admissible with the question of whether proper trial procedure was followed to mark the documents as exhibits and lay a foundation for their admissibility into evidence and review by the jury during deliberation. Here, the defendant concedes that D-17 and D-18 were not marked, nor presented, identified or explained by any witness at trial other than by a passing bates stamp reference or a scrolling through on a projector screen in the Courtroom. The Trial Court agreed this was true but still granted the defendant's request. (11T94; 11T99-100; 11T1234; 11T131-2; 11T139).

As a result, the jury was left to speculate about the hundreds of pages of complex medical records physically provided to them and with which they returned to the jury room to utilize in their deliberations. Courts have held this is confusing, prejudicial and impermissible. Rempfer v. Deerfield Parking Corp,, 4 N.J. 135, 145 (1950); Heinzerling v. Goldfarb, 359 N.J. Super. 1 (Super. Ct. 2002). Consequently, on remand only those documents properly marked, identified and for which a foundation is laid and/or they are explained should be returned to the jury room for deliberation.

VI. DEFENDANT/RESPONDENT CAREONE'S ARGUMENT REGARDING INAPPLICABILITY OF THE NJ NURSING HOME AND FEDERAL ACTS AND NURSING HOME JURY CHARGE FAILS

The plaintiff/appellant incorporates in its entirety the arguments related to

this issue set forth in her original appellate brief. The plaintiff would add that the issue of the applicability of the NHA is in the exact posture as that of Eagin v. CareOne, 2024 N.J. Super. Unpub. LEXIS 209 (App. Div. Feb. 12, 2024) (Pa173). While Eagin is unpublished, it was a recent decision of this Court, was a case involving the identical issue, the same plaintiff and defense counsel, and the same nursing home defendant CareOne. The case remains persuasive in its application. Since the Trial Court Order dismissing the NHA claims in Eagin was vacated, same should be done in this matter as a measure of consistent and uniform application of law. At the very least, this case should be returned for further discovery proceedings related to this issue before retrial is scheduled.

The plaintiff would also note since Eagin, the NJ Department of Health Memo supplied to the Court upon plaintiff's motion and made a part of plaintiff/respondent's appendices (Pa195) is a new and important development. The plaintiff submits the Memo should be considered by this Court as a direction of the agency in charge of licensing and regulation of medical facilities in this State that CareOne is a nursing home and the use of the word "continuous" does not mean length or duration as suggested by the defense, but its natural definition of consecutive, round the clock nursing care. It is a directive to the nursing home facilities the agency governs to assure they are treating all residents at the facility equally no matter what unit they deem them to be a part. As a result, the plaintiff

suggests that this is sufficient for a remand on the issue of the NHA with the Court's direction that the statute is applicable without further discovery.

CONCLUSION

For all the foregoing reasons and those set forth in plaintiff/appellant's original brief supported by appendices, the plaintiff/appellant Early respectfully requests reversal and remand for a new trial in this matter with its NJ Nursing Home Act, Federal Nursing Home Act and Wrongful Death claims intact, with admission of the wound photo and Death Certificate, with proper exhibits returned for deliberation, and with appropriate Jury Charges including the Nursing Home Charge but excluding Scafidi. We thank the Court for its time and consideration.

Respectfully Submitted,
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