ANNUAL NURSING HOME LITIGATION AND ASSISTED LIVING UPDATE

2022 Seminar Material

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ANNUAL NURSING HOME LITIGATION AND ASSISTED LIVING UPDATE

Moderator/Speaker

Michael A. Ferrara, Jr., Esq.
Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
The Ferrara Law Firm
(Cherry Hill)

Speakers

Hon. Eugene J. McCaffrey, Jr., P.J.Cv. (Ret.)
McCaffrey ADR, LLC
(Mullica Hill)

Michael Brusca, Esq.
Davis & Brusca, LLC
(Ewing, Princeton, New Brunswick, Newark)

Monica C. Fillmore, Esq.
Burns White, LLC
(Cherry Hill)

David L. Gordon, Esq.
Buchanan Ingersoll & Rooney, P.C.
(Princeton, Newark; Philadelphia, PA)

Herbert Kruttschnitt III, Esq.
Dughi, Hewitt & Domaleski, P.C.
(Cranford, Moorestown)

Jonathan Lauri, Esq.
Stark & Stark
(Lawrenceville)

Alexandra Loprete, Esq.
O'Connor, Parsons, Lane & Noble LLC
(Springfield)

Francisco J. Rodriguez, Esq.
Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. (Springfield, Newark, Jersey City, Voorhees, Morristown, Newton, Freehold, Elizabeth, Hackensack; New York City; Atlanta, GA)

Barry R. Sugarman, Esq.
Sugarman Law, LLC
(Somerville, Marlton)

Richard J. Talbot, Esq.
Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
Law Office of Andrew A. Ballerini
(Cherry Hill)

In cooperation with the New Jersey State Bar Association **Medical Malpractice Committee**

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CAN A DOCTOR PREPARE AN AOM AGAINST A NURSE: WHAT AOM IS REQUIRED IN NURSING HOME AND LONG-TERM CARE CASES?

By: **Alexandra Loprete**

Question 1 – Can a doctor prepare an AOM against a Nurse? Short Answer: Yes.

I. **Affidavit of Merit Statute** N.J.S.A. § 2A:53A-27

a. N.J.S.A. 2A:53A-27 states that a plaintiff pursuing a claim for injuries "resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation," must provide an affidavit of merit by an appropriately-licensed person who attests "that there exists a reasonable probability that the care, skill or knowledge exercised" by the defendant deviated from accepted professional standards.

b. The statute defines "licensed person" to include physicians, podiatrists, chiropractors, registered professional nurse practitioners, physical therapists, dentists, registered nurses, healthcare facilities and many other professionals. N.J.S.A. 2A:53A-26

i. While the majority of "licensed professionals" are professions held by individuals, the statute identifies health care facilities as licensed professionals. Id.

ii. A health care facility is defined generally as a facility or institution engaged principally in providing services for the diagnosis or treatment of human disease. Id., N.J.S.A. § 26:2H-2.

iii. This definition can include most hospitals, extended care and rehabilitation facilities, nursing homes and diagnostic laboratories.

c. With respect to healthcare facilities, "Healthcare facility" includes, but is not limited to a general hospital, special hospital, skilled nursing home, and nursing home. N.J.S.A. 26:2H-2.

i. By designating different entities that provide services for the diagnosis or treatment of human disease, pain, injury, deformity, or physical conditions, some argue that the Legislature recognized differences among those diverse entities, and thus different qualifications are required for AOMs served against them.

ii. This is important because in the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in N.J.S.A. 2A:53A-41.

iii. In all other cases, the person executing the affidavit shall be licensed in this or any other state; ***have particular expertise in the general area or specialty involved in the action***, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years, and the person shall have no financial interest in the outcome of the case

d. In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in 2A:53A-41
    i. (Patient's First Act – discussed below).

II. Overview of Case Law

a. Estate of Lauckhardt v. Jeges, et al. No. A-1970-13T4, 2015 WL 6132987 (N.J. Super. Ct. App. Div. Oct. 20, 2015)
    i. Appellate Division reversed Middlesex Country trial court that entered judgment on a jury verdict for physician and dismissed complaint against hospital and nurses because it found doctor could not testify against nurses.
        1. Plaintiff served the report of an ER physician criticizing the care provided by the ER physicians and nurses that treated the deceased Plaintiff in the ER.
        2. Pre-trial exchanges included motions *in limine* by defendant physician and defendant nurses.
            a. Notably, none included a challenge to the qualifications of the plaintiff's expert physician to opine on standard of care of ER nurses.
        3. After Plaintiff's expert discussed his qualifications on direct, he was offered as an expert in the field of emergency medicine standards of care applicable to physicians and nurses.
            a. The defense did not object and reserved their questions for cross-examination, and
            b. The judge indicated the witness was acceptable as an expert witness in emergency medicine.
        4. After direct was complete, and before cross-examination, defense counsel for the nurses moved to bar Plaintiff's ER physician's testimony as to the accepted standards of emergency nursing care.
            a. The court first held that the Same Specialty requirement did not apply to nurses, and only applied to physicians, however…
            b. The Court granted the nurse's motion and dismissed the claims against the nurses, relying primarily on Rule 702.
        5. Interestingly, the court did not strike Plaintiff's witness's testimony regarding the nursing care.
            a. Instead, the court instructed the jury that he was qualified as an expert in the field of emergency medicine and that he can render and did render opinions as to deviations from the standard of care with regard to the ER physician but he cannot as a matter of law do that for either of the nurses.

ii. Appellate Division found the erroneous exclusion of expert's testimony warranted new trial.
    1. Appellate Division ruled that emergency room physician was qualified to testify as an expert in medical malpractice action regarding standard of care applicable to ER nurses;
    2. The Court noted the physician had worked with ER nurses for almost 35 years,
    3. He had held administrative positions in which he had promulgated standards for nurses to follow,
    4. He had ability to render competent care to his patients which required he know and understand duties and responsibilities imposed upon ER nurses by standard of care, and
    5. The case involved standard of care required in treating a chest trauma patient in an ER, a situation that physician had addressed on a regular basis as an ER physician.

iii. Appellate Division also found that there was no valid reason or justification for the failure of the Hospital and defendant nurses to comply with the clear mandate of *Rule* 4:25–7(b) to include their objection to Plaintiff's expert in their pre-trial exchange or sooner with a pre-trial motion
    1. Any delay which unfairly deprived the trial court and plaintiff's counsel of the opportunity to timely address this critical issue was improper.
    2. The Appellate Division therefore concluded that the doctrines of laches and equitable estoppel barred the nursing defendants and the Hospital from asserting their late challenge to plaintiff's expert witnesses' qualifications.

b. In Haviland v. Lourdes Med. Ctr. of Burlington Cty., Inc., 466 N.J. Super. 126 (App. Div. 2021), the plaintiff was injured during a radiological examination of his left shoulder when a radiology technician asked plaintiff to "hold weights contrary to physician's instructions."
    i. Plaintiff's Complaint alleged that the unidentified radiology technician and Lourdes Medical Center, "failed to properly perform … imaging and otherwise deviated from accepted standards of medical care" and claimed Lourdes Medical Center was vicariously liable for the radiology technician's negligent acts.
        1. Plaintiff advised he was proceeding against Lourdes Medical Center on a theory of vicarious liability *only* and Radiology technicians are not "licensed persons" as defined by N.J.S.A. § 2A:53A-26

ii. A Burlington County Court dismissed plaintiff's complaint for failure to serve an Affidavit of Merit, finding that Lourdes Medical Center is a "licensed professional."
iii. The Appellate Division reversed the trial court's decision and held that Haviland was not required to serve an Affidavit of Merit for his vicarious liability claims.
    1. The Appellate Division articulated that the standard of care at issue in a claim for vicarious liability is the standard of care of the employee, not that of the employer.
    2. Therefore because plaintiff's claims were solely based on vicarious liability of the radiology technician, the Affidavit of Merit statute did not apply to plaintiff's claim.
        a. The decision on appeal indicates that claims arising from the negligent actions of employees of health care facilities, whose professions are not delineated in the list of licensed professionals, may not be subject to the Affidavit of Merit statute, even if the defendant/employer is a "licensed professional."
        b. "An employer's standard of care is not directly implicated in vicarious liability, but is imputed from that of its employee." Haviland v. Lourdes Med. Ctr. of Burlington Cty., Inc., 466 N.J. Super. 126, 245 A.3d 630 (App. Div. 2021)

c. **Same Specialty Requirement "Patient's First Act"**
    i. Statutory Language: In an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit pursuant to the provisions of the AOM statute (2A:53A-26 et seq.) on the appropriate standard of practice or care unless the person is licensed as a physician *or other health care professional* in the United States and must meet certain criteria.
        1. Many Courts believe this statute only applies to physicians.
        2. However, Subsection b. has been found by some courts in rare and unaffirmed instances to apply to nurses as "general practitioners":
            a. "If the party against whom or on whose behalf the testimony is offered is a *general practitioner,* the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to:
                i. (1) active clinical practice as a general practitioner; or active clinical practice that encompasses the medical condition, or that includes performance of

the procedure, that is the basis of the claim or action; or

ii. (2) the instruction of students in an accredited medical school, health professional school, or accredited residency or clinical research program in the same health care profession in which the party against whom or on whose behalf the testimony is licensed; or

iii. (3) both." [N.J.S.A. § 2A:53A-41].

d. In 2011 the 3rd Circuit in Lomando v. United States, 667 F.3d 363 (3d Cir. 2011) found that the Same Specialty requirement applies only to physicians, and not non-physicians such as nurses and physician assistants
   i. Same specialty requirement for AOM only applies to a defendant if they are "a specialist or subspecialist recognized by the ABMS or the AOA and the care or treatment at issue involves that specialty or subspecialty recognized by the ABMS or AOA." N.J.S.A. § 2A:53A–41.
   ii. Nursing and long-term care are not ABMS or AOA specialties or subspecialties.

e. In 2016, in Oliver v. Main, 2016 WL 1305292 (D.N.J. Apr. 4, 2016) summary judgment motions to dismiss claims against RN defendants for failure to file correct AOM was denied, and AOM by neurologist was acceptable.
   i. Interestingly, the court believed that Patient's First Act's Same Specialty requirement applied to nurses as "general practitioners" and fell under the category of "other health care providers"
   ii. But, they also found Plaintiff's expert was qualified to offer an opinion against the 2 nurses in that case.
      1. In that case, the nurses worked in a prison and Plaintiff's expert was a neurologist.
      2. Because the claim was failure to diagnose and timely treat a stroke, and the neurologist had vast experience in the years prior treating stroke patients, the court found him qualified to offer opinions against the nurses

Question 2 – What type of AOM do you need in a nursing home or long-term care case? Short answer: It depends.

I. Review of Case Law:
   a. Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168 (App. Div. 2015)
      i. An affidavit of merit is not necessary to support a malpractice or negligence claim against a firm employing certain licensed professionals

whose employee or agent acted negligently if the claim against the firm is solely based on a theory of vicarious liability or agency;

ii. However, the plaintiff would need to serve an affidavit of merit from an expert with credentials equivalent to the employee or agent who is alleged to have deviated from an applicable professional standard of care. N.J.S.A. 2A:53A–26 et seq.

iii. Patient brought action against doctor and rehabilitation facility for negligence, malpractice, and negligent hiring, supervision, and training.

iv. Essex County Court dismissed the complaint based on false evidence that doctor was board certified in geriatric medicine and plaintiff's failure to file an affidavit of merit from an expert with similar qualifications, as required by statute.

v. Plaintiff appealed, and Appellate Division reversed finding the misstatement by defense counsel about doctor's board certification was exceptional circumstances and could not be used to bar plaintiff's claim.

b. Citing, Hill Int'l, Inc. v. Atl. City Bd. of Educ., 438 N.J. Super. 562 (App. Div. 2014). In this case against an architecture firm alleging vicarious liability but not naming the individual, the court found an AOM was not necessary against the firm

   i. But, an AOM was necessary by a like licensed architect equivalently qualified to the individual employees that are the basis of plaintiff's claims.

c. This means if you are filing suit against a NH or LTC center based on vicarious liability, who you get an AOM from will depend on the qualifications of the employee(s) that form the basis for your complaint.

   i. If RN, then would suggest RN, etc.

   ii. If claims involving administration or supervision of staff then you will most likely need an administrator and/or DON.

d. Schwartz v. Kessler Inst. for Rehab., No. A-1794-19, 2021 WL 2640617, at *1 (N.J. Super. Ct. App. Div. June 28, 2021), *cert. denied,* 248 N.J. 422, 259 A.3d 306 (2021)

   i. Confirms you do need an AOM in a case against NH or LTC when claim involves negligence by staff during a transfer or for failure to prevent a fall.

   ii. Here, AOM of Registered Nurse and Licensed Nursing Home Administrator was sufficient as to her qualifications

      1. But, her expert report was not because she did not discuss how the standard of care was breached by the individuals involved in the transfer of the patient and patient's fall.

Nursing Home Admissions & Arbitration Agreements

JONATHAN F. LAURI

Why Nursing Homes Want to Impose Pre-Dispute Arbitration Provisions

- To reduce liability costs
- To avoid class actions and systemic reform
- To hide wrongdoing from residents and families, as well as the public, the press and regulators
- To reduce settlement amounts
- To embed other unfair terms: cost-sharing, fees, loser pays provisions, one-sided clauses, shortened statute of limitations and enforcing distant forums
- To chose an arbitrator that rules in favor for the nursing home
- To maintain repeat player status with unilateral access to information on previous cases.

Admission Process at Nursing Homes

- Admissions Coordinator or Admissions Representative Approaches Resident or Resident's Family
  - Bring Many Documents, Including Arbitration Agreement as One 60+ Page Packet
    - Representative Designation
    - Consent for Treatment
    - Release of Information
    - Interpreter Request Form
    - Admission Agreement
    - Payment Options and Resident Fund Account
    - Etc.

Admission Process at Nursing Homes

- Admissions Coordinator or Admissions Representative Approaches Resident or Resident's Family
  - Make Representations that Suggest Everything Presented is Mandatory:
    - "I always knock on the door to make sure it's okay to enter, and then I introduce myself and explain I have admission paperwork to be signed." ~WJ
    - "I have some documents you need to sign for your admission."
    - "Can I bother you to sign some documents needed for your admission?"
  - Physically Turn the Pages and Handle the Documents for the Resident or Family:
    - "I typically turn the pages." ~WJ

Admission Process at Nursing Homes

- Admissions Coordinator or Admissions Representative Approaches Resident or Resident's Family
  - Fill Out and Check Off Sections on the Patient or Family's Behalf:
    - "I typically explain what it is and then I make the checkmark for the yes, and then ask for their initials in the initial area."
    - Use two pens.
  - Point Directly at Where Signatures and Initials Are Required:
    - Q. "And you point to where they're suppose to initial?"
    - A. "Right."

Admission Process at Nursing Homes

- Admissions Coordinator or Admissions Representative Approaches Resident or Resident's Family
  - Have No Idea What Arbitration Is:
    - Q. "What do you tell [the resident] about the dispute resolution and arbitration provision?"
    - A. "That if they initial, that they can't sue Care One."
    - Q. "Okay. You don't tell them that they, instead of suing, they have a right to arbitration?"
    - A. "**What do you mean, settling outside of court? Can you explain arbitration?"**

Admission Process at Nursing Homes

- Admissions Coordinator or Admissions Representative Approaches Resident or Resident's Family
  - No Copies Are Given to Resident or Family
    - "We give copies if the resident asks for them"
  - Resident and Family are NOT Told that Anything They are Present is Voluntary
  - Resident and Family Are NOT Told That They Are Permitted to Have Anything Reviewed by an Attorney Prior to Signature
  - Resident and Family Are NOT Told That Anything They Signed could Be Rescinded
  - Residents and Family Are NOT Told What Arbitration is

How do we find out that an Arbitration Agreement has been signed?

- Not in the medical records
  - Financial Folder
- Clients are not given copies of what they sign
  - They may have brochures and Residents' Rights document

How do we find out that an Arbitration Agreement has been signed?

- Questions to ask at Intake
  - Did you waive your right to a jury trial?
  - Were you told that you could or should have a lawyer review any of the admission documents before or after signing?
  - Were you told that you could rescind, “take back” or undo any of the documents you were signing or had signed?
  - What were you told you were signing?
  - Would you have signed a document that waived your dad’s right to sue the facility no matter what may happen to your dad, had someone presented that to you?

How do we find out that an Arbitration Agreement has been signed?

- Questions to ask at Intake
  - Were you given copies of what you signed?
  - Did you find any documents in your dad's room?

  Could your dad have called and paid for an attorney to review the admission documents prior to signing? Could he have afforded that?
  - What were the circumstances regarding how he was admitted? Were you told you were lucky to get a bed at this facility? Were others full?
  - What kind of condition was surrounding the execution of the documents

Contract Law Related to Arbitration Agreements

- FAA – supersedes
- Equal Footing, Not greater.
- Delegation Provision – specific attack
  - "In reviewing such orders, we are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013).

Contract Law Related to Arbitration Agreements

- Common Law Contract Defenses
  - It is black-letter law that arbitration is a favored means of dispute resolution both under federal and state law. Atalese v. U.S. Legal Servs. Grp., 219 N.J. 430, 440 (2014). States may, however, regulate arbitration agreements under general contract principles. Id. at 441 (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002)). Accordingly, arbitration clauses may be invalidated on grounds existing at law or equity that call for the revocation of any contract. Ibid.
  - Although the Federal Arbitration Act preempted that provision, the statute otherwise continues to protect rights of nursing home patients to sue in Court if they desire and common law contract defenses are available to them in arbitration agreement circumstances. Ruszala v. Brookdale, 415 N.J. Super. 272, 297-298 (App. Div. 2010).

Contract Law Related to Arbitration Agreements - Mutual Assent

- An arbitration agreement must be the product of mutual assent. Atalese at 442 (quoting NAACP of Camden Cty. East v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). Mutual assent requires that all parties understand the terms of the agreement they have signed. Ibid.
- "Moreover, because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" Atalese at 442-43 (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)). Any contractual waiver of rights, including arbitration provisions, must reflect that the parties have clearly and unambiguously agreed to the terms. Atalese at 443. The parties must have full knowledge of their rights and show an intent to surrender those rights. Ibid.

Contract Law Related to Arbitration Agreements - Mutual Assent

- "An agreement to arbitrate 'must be the product of mutual assent, as determined under customary principles of contract law.'" Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605-06 (App. Div. 2015) (quoting Atalese, 219 N.J. at 442). "Mutual assent requires that the parties understand the terms of their agreement[,]" and where the "agreement includes a waiver of a party's right to pursue a case in a judicial forum, 'clarity is required.'" Barr, 442 N.J. Super. at 606 (quoting Moore v. Woman to Woman Obstetrics & Gynecology, LLC, 416 N.J. Super. 30, 37 (App. Div. 2010)).

Facts Relevant to Mutual Assent

- Medical and Cognitive Condition of the Resident.
- Experience and Education of Resident.
- The Time it Took for Signing Process.
- Were Copies of Documents Given?
- What is the Facility's Representative's Understanding as to What is Being Waived and What Arbitration is?

Contract Law Related to Arbitration Agreements - Unconscionability

- An unconscionability analysis involves two ways in which a contract can be found unenforceable:
  - (1) unfairness in the formation of the contract or procedural unconscionability and
  - (2) and excessively disproportionate terms or substantive unconscionability. Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555 (Ch. Div. 2002).

Contract Law Related to Arbitration Agreements - Unconscionability

- Factors relevant to procedural unconscionability include:
  - age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the setting during contract formation. Sitogum at 564. The setting warrants consideration of the relationship between the parties and the services at issue. Moore v. Woman To Woman Obstetrics & Gynecology, 416 N.J. Super. 30, 45 (App. Div. 2010). Muhammad at 15-16. Factors relevant to substantive unconscionability are the subject matter of the contract, the bargaining positions of the parties, the degree of economic compulsion for the adhering party, and the public interest. Rudbart v. N. Jersey Dist. Water Supply Com, 127 N.J. 344, 356 (1992).

Contract Law Related to Arbitration Agreements - Unconscionability

- Factors relevant to substantive unconscionability include:
  - "When considered together, the restrictions on discovery, limits on compensatory damages, and outright prohibition of punitive damages form an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers. This is precisely the evil the Legislature sought to enjoin by passing N.J.S.A. 30:13-8.1. We thus hold that these provisions in the arbitration clause of the residency agreement are void and unenforceable under the doctrine of substantive unconscionability." Ruszala v. Brookdale, 415 N.J. Super. 272, 299 (App. Div. 2010).
  - cost-sharing, fees, loser pays provisions, one-sided clauses, shortened statute of limitations and enforcing distant forums

Contract Law Related to Arbitration Agreements - Fraud

- "It is the general rule that where a party affixes [her] signature to a written instrument, . . . a conclusive presumption arises that [she] read, understood and assented to its terms and [she] will not be heard to complain that [she] did not comprehend the effect of [her] act in signing." Peter W. Kero, Inc. v. Terminal Const. Corp., 6 N.J. 361 (N.J. 1951); see Morales v. Sun Constructors, Inc., 541 F.3d 218, 221 (3d Cir. 2008) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained." (quoting Upton v. Tribilcock, 91 U.S. 45, 50 (1875))).

Contract Law Related to Arbitration Agreements - Fraud

- There is an exception to this general rule when a party's "signature is obtained by fraud or imposition in the execution of the instrument." Kero, at 368. Fraud in the execution (or fraud in the factum) occurs when a party is compelled to sign the instrument "by reason of a misrepresentation intended to deceive [her] as to its purport or content[.]" Id. Because this rule is intended to protect both "the unwary and foolish as well as the vigilant," the signer's negligence in failing to read the instrument or "in trusting a representation" does not excuse the other party's intentional fraudulent act. Id. at 369. "This is particularly true where a relation of natural trust and confidence, though not strictly a fiduciary relation, exists between the [contracting] parties." Id. (citing 5 Williston on Contracts § 1516 (rev. ed. 1937)).
- *note - **Fraud in** the inducement occurs when someone signs the document they intended to sign, but their assent was induced by a material misrepresentation about facts external to that document.

Contract Law Related to Arbitration Agreements - Fraud

- Fraud in the execution may also be present "when a party executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms" by reason of "excusable ignorance." Connors v. Fawn Min. Corp., 30 F.3d 483, 490 (3d Cir. 1994) (applying the Uniform Commercial Code in a labor case arising out of the LMRA and ERISA) (quotation marks omitted); see also Restatement (Second) of Contracts § 163 (1981). Although excusable ignorance does not require an affirmative intent to defraud, it typically involves some sort of misconduct or imposition that cuts off the signer's opportunity to read, such as "significant time pressure" and reliance on an erroneous "assurance" that the parties' oral understanding had been or would be accurately memorialized in an instrument. Connors, 30 F.3d at 488, 492-93. In short, "[f]ailing to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading." New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358 (N.J. Super. Ct. 2018).

Contract Law Related to Arbitration Agreements - Fraud

- Claims of fraud in the execution as to the container contract or delegation provision are to be decided by the Courts.
- Claims of fraud in the inducement as to the delegation provision are to be decided by Courts.
- Claims of fraud in the inducement as to the container contract are to be decided by the arbitrator.

MXM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 397 (3d Cir. 2020)

Contract Law Related to Arbitration Agreements – Agency

- "Apparent authority arises 'when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable ***to the principal's manifestations***.'" Id. (emphasis added) (quoting Restatement (Third) of Agency, § 2.03). Critically, "an agent's apparent authority originates ***with expressive conduct by the principal toward a third party*** through which the principal manifests assent to action by the agent with legal consequences for the principal." Restatement (Third) of Agency, § 3.03 cmt. b (emphasis added).
- Generally, a trier of fact will determine "whether a reasonable person in the position of a third party would believe that an agent had the authority or the right to do a particular act. Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 28 (App. Div. 2021)

Defeating the Motion

- Get entire financial file
- Get affidavits from those with knowledge
- Review medical records to determine what was going on the day when signed
- Look at all documents signed by client
  - Time of signature (Ricciardi)

THE NEW JERSEY 'PATIENT SAFETY ACT' - POST-APPLEGRAD: PRIVILEGE HAS ITS PRICE

Herbert Kruttschnitt, III, Esq.*

Within healthcare there is a Catch-22 that has existed for many years - a tension between getting to the bottom of a bad outcome and, at the same time, not throwing one's self on a sword in an eventual courtroom battle. This tension is clearly felt whenever a hospital Risk Manager and a doctor or nurse discuss an untoward event. It is essential that our health care professionals continually strive to improve; and the ability to engage in open self-critical analysis is necessary to that end. To what degree, then, should our legal system thwart, or chill, that important process? In this article, we will address the nuances and pitfalls of (what is sometimes referred to as) the privilege of 'self critical-analysis', the Patient Safety Act (See: N.J.S.A 26H-12.25), and the recent case of Applegrad v. Bentolila, 428 N.J. Super. 115 (App. Div. 2012); cert. granted 213 N.J. 47 (2012).

Let's start with the premise that all privileged communications are a compromise between two established, and important, policy considerations. They all represent a clash between an absolute search for the truth, and the overriding sanctity of certain discussion. Cases like Applegrad will always be confusing because they are, essentially, attempts to reconcile two concepts that are almost by definition at odds.

Nobody can dispute that the cornerstone of our legal system is a search for the truth. Every litigated matter is an attempt to recreate an event in the past as accurately as it can be recreated. To that end, one could argue, anything that fosters that process should be encouraged. If, for example, the same witness gives an account of key facts on more than one occasion, to the extent they are inconsistent, what could be the reason to withhold either version from the trier of fact. In a genuine search for the truth, all versions should be discoverable. All inconsistencies are relevant. Admissions can be very damning. The truth will out.

On the other hand, there are to be exceptions to the general rule, that whatever has been said about the circumstances giving rise to a lawsuit should be brought into the light. They are communication privileges, of which there are several. The law recognizes that, in certain specific settings, communications should be unfettered by the fear of how those words will play out in court. Communication privileges are, almost by definition, in conflict with a no holds barred quest for the truth.

A couple of clear examples are statements made to one's priest, and statements made to one's attorney. Nobody would dispute that those are privileged communications. Yes, there are times when it would help in the search for the truth to know what a person said to their lawyer, or in the confessional; but we have deemed those settings off limits. Quite simply, in certain instances we have decided that it is more important to shield the communication than to disclose it, even if the words expose the truth.

The test for whether communications, in those two contexts, are privileged is a relatively black & white test. If it is a priest/penitent or lawyer/client setting, regardless of what was said, it can not be divulged, even if it aids in a search for the truth in a court of law. It is the *setting* that protects the communication, plain and simple. There may be instances in which the *setting* is open to interpretation, but that does not change the extent of the privilege once the setting is found to have been a privileged setting. Was Robert Kardashian, Esq., O.J. Simpson's lawyer, or was he just a friend who happened to have a law degree? Was former NFL player Rosie Greer, O.J. Simpson's spiritual advisor, or was he a friend who just happened to be a minister? Interesting issues, but the point is that once the nature of the setting has been determined, we don't parse the words. The words are all protected.

In healthcare, in theory at least, communications in the context of the Patient Safety Act are supposed to be similarly privileged. But, I would not necessarily count on that – at least not for the time being. At first glance, a fair reading of the Patient Safety Act is that it extends absolute confidential protection to all documents, materials and information developed by a health care facility through the PSA process. However, Applegrad v. Bentolila, the first

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significant court decision on the scope and interpretation of the
PSA, seems to be telegraphing that the Patient Safety Act privilege is going to be very strictly construed, and is not going to be easy to sustain.

The lawyer/client, priest/penitent setting, and Patient Safety Act are known as "absolute" privilege communications. By contrast to absolute privileges, there are also "qualified" privileges. In the setting of health care, there are examples of both. Peer Review documents, Root Cause Analysis documents and other investigations into "sentinel events" such as Risk Management investigations have been historically subject to a qualified privilege. On the other hand, Patient Safety Act inquiries are supposed to be subject to an absolute privilege. At least, that is what the Patient Safety Act seems to say. So, what does Applegrad tell us?

A good argument can be made that all such healthcare related inquiries are intended to improve patient safety and prevent future bad outcomes. That to the extent they promote patient safety they should all be free, open, and without fear of reprisal. However, until the Patient Safety Act, such discussions were subject only to a qualified privilege. Prior to the Patient Safety Act, health care related self-critical discussions were governed by case law which required a court to sort through the communications and distinguish between facts and opinions or conclusions. To the extent the investigative materials had preserved facts, they were discoverable. To the extent they contained opinions or conclusions, they were (in theory although not always in practice) not discoverable. See: Christy v. Salem Hospital, 366 N.J. Super. 535 (App. Div. 2004)

The Patient Safety Act arguably changed that, but in the last paragraph of the Statute, it circled back, and preserved the gray area of qualified privilege. The statute ends with a provision that nothing in the Act shall affect the discoverablity of any information otherwise discoverable in accordance with Christy v. Salem Hospital. However, Christy was actually a case involving the discoverability of "Peer Review" documents. The case was decided a couple of months before the Patient Safety Act was enacted into law.

When I first read the Patient Safety Act, and saw the reference to Christy, my first thought was, how does one reconcile a qualified privilege case into an absolute privilege statute without inviting the court to thwart the entire legislative intent of the Act. Christy and the Patient Safety Act undeniably represent a conflict between absolute and qualified privileges. Why did the legislature introduce confusion into the Patient Safety Act's absolute privilege by citing a qualified privilege court decision?

In determining if the priest/penitent or lawyer/client privilege applies to a communication, we go no further than to determine the setting in which the statements were made. We do not parse the words to decide which words are discoverable and which are privileged. That exercise, however, is exactly what Christy did in the context of health care related investigations, prior to the passage if the Patient Safety Act.

Proponents of the Patient Safety Act probably thought the legislature was finally creating an environment in health care in which backward looking discussions into untoward outcomes could be freely and openly discussed. Establish a process in accordance with the Act, and to the end that the discussions promote patient safety, the discussions would be absolutely privileged. Christy had turned heath care investigations into a minefield in which nobody could know for sure whether the discussions were privileged or whether the discussions were discoverable. Every motion Friday, judges would be left to make that decision well after the discussions had been held and memorialized.

Aside from the Patient Safety Act, in regard to other self-critical discussions within health care courts would look at the documents and determine which of the discussions deserve to be protected. Such is the nature of a qualified privilege. The Patient Safety Act was felt to have changed that. The recent case of Applegrad v. Bentolila recognizes the distinction between the absolute privilege accorded to Patient Safety Act investigations and the qualified privilege accorded to all other, albeit similar, investigations. But, (healthcare provider) don't make one wrong step or your Patient Safety documents will be as discoverable as all the rest.

The Court in Applegrad makes it very clear that if Patient Safety Act investigative communications are to be given an absolute privilege, those communications, and resulting investigative materials, must have been

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"developed exclusively by a health care facility through the PSA process. (NJSA 26:2H-12.25(f) & (g). (Said the Court) if, however, such items have been created or developed through any other, even similar, process then they are obtainable (if they meet the Christy test)" Said simply, PSA documents are absolutely privileged, but only if they are exclusively PSA documents, and only if they were created through strict adherence to the PSA process, and only if they are not even tangentially related to another non-PSA process.

Applegrad tells us that, in order to become entitled to the absolute PSA privilege, the investigation must meet a very strict test of the integrity of the PSA process. A health care facility can not cloak an investigation with an absolute PSA privilege by simply calling it a PSA investigation. Giving people titles like "Patient Safety Officer", when they are also performing functions that are not exclusively PSA related does not accord those activities with an absolute privilege. In short, while recognizing the PSA Absolute Privilege, Applegrad has created another minefield even less objective than the Christy test. If the PSA process was, in the least bit, influenced by the Peer Review Process, the Root Cause Analysis process, the Risk Management process, or any other preexisting self-critical analysis inquiry, the Patient Safety Act absolute immunity is lost.

The takeaway for now seems to be that any investigation which was performed before the Patient Safety Act, or any other investigation which is still being performed, can not be cloaked with absolute immunity by calling it a "Patient Safety" function. The only investigations that are given absolute immunity are those which are exclusive to the Patient Safety Act. Risk Managers, Quality Assurance Committees, Mortality and Morbidity Committees, Sentinel Event reports – these things existed before the Patient Safety Act, exist still, and can not be brought under the penumbra of the Patient Safety Act by calling them by a new name. Regardless of whether those investigations can be said to now pertain to 'patient safety', they will not be accorded the protection of the Patient Safety Act.

For the time being at least, within health care, there are still two types of privileges that apply to investigative materials. There is the Christy qualified privilege, which protects only opinions and conclusions but does not protect factual statements memorialized in such investigative materials. And, there is now the PSA absolute privilege, which protects all statements, facts learned, conclusions reached and opinions drawn from such investigations – but only if such investigation can be shown to have been conducted within the letter of, and exclusively in pursuit of, the Patient Safety Act. For the time being, on motion Fridays we will now have judges not only applying the Christy test to all non-PSA investigations, but we will also have judges dissecting PSA investigations and applying the Applegrad test. Even though it may be called a Patient Safety Act investigation, is it really, truly, to the satisfaction of the court an honest to goodness PSA document – or just a Peer Review document by another name.

Just a thought, and then we will withhold judgment until the Supreme Court has decided the issue. If an Episcopalian penitent confesses to a Catholic priest, would the court decide that the discussion is not privileged? Would the court decide that a discussion between a priest and penitent is not privileged because the penitent has also confessed other sins, at other times, to a lay person? Would the court decide that a confession between a priest and penitent is not privileged because the priest also serves as principal of the parish school? That is apparently the reasoning of the Applegrad decision.

Certification Granted – further clarification to be announced.

*** Herbert Kruttschnitt, III, Esq.**

Herb is Senior Litigation Attorney and Staff Counsel for CNA, specializing in the defense of medical negligence claims, and is chair of the NJDA's Professional Liability Committee.

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BRUGALETTA V. GARCIA: THE PATIENT SAFETY ACT PRIVILEGE DEFINED

BY HERBERT KRUTTSCHNITT III, ESQ.; ANTHONY COCCA, ESQ. & KATELYN CUTINELLO, ESQ.

Healthcare providers and healthcare institutions continually strive to improve. That must be an ongoing process with a common goal. To that end, a provider's ability to engage in open self-critical analysis is a necessary part of healthcare. To what degree, then, should that process be thwarted by the fear of those discussions becoming fodder in a court-room battle? When done in the appropriate setting, these discussions, and especially conclusions reached by the reviewing hospital committee, have long been accorded a qualified privilege from disclosure. More recently, that privilege has become absolute in certain circumstances. In this article, we will address the distinction between a qualified privilege and an absolute privilege, and discuss the recent, still frequently misunderstood case of Brugaletta v. Garcia, 234 N.J. 225 (2018), which interprets the application of the privileges created by the Patient Safety Act (the "PSA").

We start with the premise that all privileged communications are a compromise between two conflicting principles - a clash between the unbridled search for the truth in a courtroom, and the overriding sanctity of certain post-hoc reviews and discussions. To be sure, a common goal of our legal system is justice achieved with a search for the truth. Every litigated matter is an attempt to recreate an event in the past as accurately as it can be recreated. One could argue, therefore, that whatever information exists, which could aid in the search for the truth, should be considered.

Yet, we have established exceptions to the general rule that whatever has been said or written regarding the circumstances giving rise to a lawsuit should be brought to light. These are known as communication privileges and there are several. Quite simply, our legal system has determined that in certain settings, communication should be free and open, without fear of those words being repeated in a court room. We have the lawyer/client privilege, for one, and the priest/penitent as another. These are absolute privileges, meaning that nothing said is discoverable. In healthcare, we have been slow to understand absolute privileges, because for the longest time, healthcare only had qualified privileges. And, there is a world of difference between an absolute privilege and a qualified privilege. In drafting the PSA, the legislature changed this in the healthcare setting.

The test for an absolute privilege is relatively black and white. If the communications took place within the privileged setting, they are sacred and cannot be discovered in a lawsuit. It is the setting that protects the communication. We don't parse words like we do with a qualified privilege. In healthcare, a bad outcome can be reviewed in a number of different settings. In Peer Review Committees, Quality Assurance Committees, and a myriad of other hospital settings, bad outcomes are discussed and memorialized in Minutes. Case law has developed around which portions of those Minutes, Reports or Investigation memoranda are discoverable, and which portions are privileged. That exercise is necessary because communications in those contexts are entitled to a qualified privilege. See: Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004). The case stands for the proposition that to the extent the Committee Minutes or

Reports contains facts gathered in the investigation, those facts are discoverable. But, to the extent they contain opinions or conclusions, those things are protected. Such is the nature of a qualified privilege.

The Patient Safety Act, N.J.S.A. 26:2H-12.23 to 12.25, clearly changed that distinction as pertains to "any documents, materials, or information developed by a health care facility as part of its process of self-critical analysis", including, for example, Incident Reports regarding patient safety events and/or near misses, Patient Safety Committee discussions, and the Minutes and Reports of any such discussions. Those are entitled to an absolute privilege. It is not necessary to parse the PSA documents because that is an exercise required only in a qualified privilege setting. PSA Committee activities are an absolutely privileged setting. Once the setting has been established to have been PSA, the inquiry should end, yet it often does not. Perhaps there has been confusion over this because the Patient Safety Act preserves the Christy v. Salem exercise of parsing documents created in hospital discussions if done outside of the PSA setting. The Patient Safety Act, however, does not invite the Christy analysis when the documents were created in the PSA setting. That distinction, unfortunately, has been slow to catch on. See: Applegrad v. Bentolila, 428 N.J. Super. 115 (App. Div. 2012). And see: C.A. ex rel Applegrad v. Bentolila, 219 N.J. 449 (2014); and Conn v. Rebustillo, 445 N.J. Super. 349 (App. Div. 2016). Hopefully, any remaining confusion has been laid to rest by virtue of Brugaletta v. Garcia, supra.

We will now turn to our analysis of the Brugaletta decision, and the manner in which we believe PSA privilege issues can be easily resolved going forward. The process has had a bit of a tortured history, but we do believe Brugaletta has finally clarified the process.

In order to foster the reporting and investigatory process, the PSA established an absolute privilege shielding specific communications made in connection with the PSA process from discovery in litigation. The PSA privilege applies to two categories of documents. The ***first*** consists of documents received by the Department of Health ("DOH") pursuant to the statute's mandatory and voluntary reporting provisions, N.J.S.A. 26:2H-12.25(c) and (e). N.J.S.A. 26:2H-12.25(f) shields these documents from release. The ***second*** category of privileged documents are those developed by a health care facility as part of a process of self-critical analysis conducted pursuant to subsection b. of the section concerning preventable events, near-misses, and adverse events, but which may never be provided to the DOH. N.J.S.A. 26:2H-12.25(g). The discovery of such internal documents is prohibited by N.J.S.A. 26:2H-12.25(g) if they were created in compliance with N.J.S.A. 26:2H-12.25(b). N.J.S.A. 26:2H-12.25(g).

The analysis of whether the PSA's absolute privilege applies under subsection (f) is, therefore, relatively straightforward: documents received by the DOH are absolutely privileged. Although the analysis of the PSA's absolute privilege under subsection (g) was previously the subject of much litigation, the New Jersey Supreme Court's opinion in Brugaletta v. Garcia, 234 N.J. 225 (2018) has confirmed that the ***only*** precondition for application of the subsection (g) privilege is procedural compliance with N.J.S.A. 26:2H-12.25(b) and its implementing regulations. Brugaletta, 234 N.J. at 247. The Brugaletta court found that, application of the privilege to the documents developed through self-critical analysis, regardless of the conclusion reached–including the health care facility's conclusion as to type of patient safety event—is an integral part of the legislative scheme. Id. at 248.

In Brugaletta, the trial court, Appellate Division, and the Supreme Court all found that a certification of a healthcare provider who served as the Chair of the facility's Patient Safety Committee was sufficient to establish the facility's compliance with N.J.S.A. 26:2H-12.25(b) and its implementing regulations for application of the PSA privilege. Specifically, the certification in Brugaletta established that: (1) the facility at issue in that case was a health care facility as defined in the PSA; (2) the facility had in place a Patient Safety Plan in compliance with N.J.S.A. 26:2H-12.25(b); (3) the facility had a process for having teams of facility staff conduct ongoing analysis and application of evidence-based patient safety practices in order to reduce the probability of adverse events, and to conduct analyses of near-misses and adverse events, with particular attention to serious preventable adverse events; (4) the Patient Safety Committee was responsible for conducting those processes; (5) the Committee members assemble teams to review incident reports, conduct root cause analyses ("RCAs"), review the results and, as appropriate, recommend modification of facility systems, technology, policies or procedures; (6) the Incident Report relating to the patient's care was prepared pursuant to the Patient Safety Plan, which requires staff to report events concerning patient care or system issues; (7) the Incident Report was generated solely for purposes of compliance with the PSA; (8) the Report was created with the expectation of confidentiality, as evidence by confidentiality language on the document at issue; (9) the facility considers the Incident Report to be strictly confidential and does not share the documents outside of the PSA review process; and, (10) the Incident Report was not disclosed to individuals or committees that are not part of the Patient Safety Committee.

There is no additional information required for the court to determine the privilege applied, for example, no specified composition or membership of the Patient Safety Committee, no Committee documents or minutes produced for in-camera review, no depositions required, and no court testimony or hearing beyond oral argument of counsel. We have enumerated the points above because these points should form the construct of a certification in opposition to any motion to compel disclosure of PSA materials.

In addition to establishing the process for application of the PSA privilege, the Supreme Court in Brugaletta again confirmed that the privilege conferred by the PSA is ***absolute*** and that production of ***any*** portion of a document generated during the PSA process is prohibited. The Brugaletta court emphasized that "[a] court may not order the release of documents prepared during the process of self-critical analysis" conducted pursuant to the PSA "even if redacted." Brugaletta, 234 N.J. at 249. The Brugaletta court further explained that "[t]he trial court. . . in its effort to effectuate the release of purely factual information while simultaneously protecting the deliberative material * * * should not have used a self-critical-analysis document to achieve its goal." Brugaletta, 225 N.J. at 252.

Although a court may not order release in discovery of a report developed during self-critical analysis, even if redacted, the PSA does not, however, immunize from discovery information otherwise discoverable, such as the patient's non-privileged medical records. Brugaletta, 225 N.J. at 249-50. Under the narrow circumstances presented, the Supreme Court determined that, while

plaintiff in Brugaletta was ***not*** entitled to access to any part of the PSA-privileged incident report, "the trial court should have used its common law power, in administering the discovery rules to order defendants to provide plaintiff," id. at 252, in response to plaintiff's discovery requests, with a "narrative to accompany the approximately 4,500 pages of medical records turned over during discovery" so that the plaintiff would "be informed of an adverse incident related to her care," id. at 256.

To be clear, the narrative summary was ordered to be produced memorializing only the few relevant pages of non-privileged factual information contained within the many thousands of pages of medical records. Adhering to the PSA's absolute privilege, the Brugaletta court did not order a narrative summary of the privileged Incident Report. Instead, the Court expressly ruled that the contents of the PSA document, the Incident Report which served as the genesis of the review at issue, could not be released.

Significantly, the Brugaletta opinion does not require defendants to prepare a "narrative" informing the plaintiff "of an adverse incident related to her care" in every case and certainly not under the circumstances of the vast majority of cases. Brugaletta, 234 N.J. at 256. The plaintiff in Brugaletta was admitted to the hospital—one of several defendants against whom she asserted medical malpractice claims—for approximately one month. During that time, she underwent multiple pharmaceutic, surgical and radiologic interventions to treat a pelvic abscess which emanated from a perforated appendix. Necrotizing fasciitis of her thigh and right buttock developed as the abscess tracked downward. Id. at 231-32. Her hospital records consisted of approximately 4,500 pages. Id. at 257. "Discrete yet interconnected notations," id. at 257, containing "the raw underlying factual data," id. at 252, relating to missed doses of an antibiotic on a single day—the subject of the incident report at issue in that case—appeared on nine pages of the hospital records produced. See id. at 257. It is precisely for those reasons that the Supreme Court cautioned that "[w]e do not mean to suggest that such a narrative is to be routinely provided in discovery." Id. at 256.

In order to improve the delivery of healthcare, health care facilities, defined to include, not only hospitals, but skilled nursing facilities, assisted living facilities, and long term care facilities, utilize processes designed to minimize the occurrence of errors and to detect any errors that do occur. Those processes require a feedback mechanism allowing for the detection and analysis of all types of events. In enacting the PSA, the New Jersey Legislature sought to further the goal of patient safety.

The public safety objective is furthered by the PSA's guarantee of an absolute privilege to protect against the disclosure of investigations and investigatory materials. That, in turn, "create[s] a non-punitive culture focused on improving processes rather than assigning blame." See N.J.S.A. 26:2H-12.24(e). The PSA seeks to promote the disclosure of all events–the most routine events and the most serious events alike–and the self-critical analysis of those events. The PSA's guarantee of confidentiality and evidential privilege will increase the amount of information shared by healthcare providers about systems failures. In turn, healthcare providers and healthcare systems can better analyze the sources of these failures. They then can disseminate information on effective practices for reducing systems failures and improving the safety of patients. Id. The New Jersey Supreme Court in Brugaletta, supra, sought to foster the PSA's Legislative purpose and the common goal of patient safety by guaranteeing to a healthcare facility, who is in compliance with the mandates of the PSA and the Administrative Code, that its investigations and ***any*** documents created in association with investigations are absolutely privileged. That much is clear as a result of Brugaletta.

We end with a couple of thoughts that could, arguably, be logical outgrowths from Brugaletta, points which the Patient Safety Act might also control. In addition to the mandate to conduct an investigation, the PSA also mandates disclosure to the patient and/or family of an adverse event. However, the PSA clearly provides that any statement that constitutes disclosure shall not be disclosed in any civil proceeding. That said, these discussions are routinely set forth in plaintiff's answers to interrogatories, and a frequent fodder at depositions. Obviously plaintiff counsel are fully aware from their clients that a meeting took place but the Act affords the meeting absolute confidentiality. If the disclosure meeting does begin to become a side show to the litigation, the PSA should provide the basis for a motion seeking a Protective Order to preclude any discovery into the contents of the disclosure discussion and to preclude depositions of any of the participants. These issues are much better when nipped in the bud.

Finally, we note that the PSA references that the Patient Safety Plan shall also include a process for facility staff and members of various non-PSA disciplines to review serious safety events in order to reduce frequency. We might consider relying on that portion of the PSA to make the argument that Peer Review, heretofore considered to be entitled to a qualified privilege, should be afforded the absolute privilege under the PSA even though it doesn't always follow the process of the Patient Safety Committee. We have seen trial judges rule both ways on this issue, but since the PSA encourages these non-PSA reviews, a good argument can be made that the PSA should equally protect them.

The Patient Safety Act absolute privilege, unfortunately, continues to be a hard concept for practitioners and trial courts, both steeped in the Cristy v. Salem mindset, to grasp. Brugaletta v. Garcia was a giant step forward in our understanding of the PSA privilege. The devil, however, is still in the details; Brugaletta is probably not the last we will hear from our appellate courts about the Patient Safety Act.

Herbert Kruttchnitt III, Esq. is a partner in the firm of Dughi, Hewit & Domalewski, PC

Anthony Cocca, Esq. & Katelyn Cutinello, Esq. are partners in the firm of Cocca & Cutinello, PC

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TRELLA V. BRADISH: BRUGALETTA VERSION 2.0

BY HERBERT KRUTTSCHNITT III, ESQ., ANTHONY COCCA, ESQ., & KATELYN CUTINELLO, ESQ.

The Appellate Division in Trella v. Bradish, Docket No. A-3039-18T3 (App. Div. Oct. 8, 2019), recently ordered a hospital in a medical malpractice action to provide a "Brugaletta narrative"—a summary identifying where in the medical records the facts of an "adverse event" relating to the patient's treatment were located—even though the medical records at issue were not lengthy and the facts were readily evident.

Just last year, the New Jersey Supreme Court, in Brugaletta v. Garcia, 234 N.J. 225 (2018), applying the Patient Safety Act, N.J.S.A. 26:2H-12.23 to -12.25, prohibited the release of an Incident Report prepared as part of the statutory self-critical analysis process, even if redacted. The Supreme Court commented, however, that the Patient Safety Act does not immunize from discovery information otherwise discoverable, such as the facts within the medical record which constitute the "adverse event" which was reviewed by the Patient Safety Committee. The Supreme Court held that, while the plaintiff was not entitled access to any part of the Patient Safety Act-privileged incident report, "the trial court should have used its common law power, in administering the discovery rules to order defendants to provide," in response to plaintiff's discovery requests, a "narrative to accompany the approximately 4,500 pages of medical records turned over during discovery" so that the plaintiff would "be informed of an adverse incident related to her care," Brugaletta, 234 N.J. at 252.

In Brugaletta, "Discrete yet interconnected notations," Id. at 257, containing "the raw underlying factual data," Id. at 252, relating to missed doses of an antibiotic on a single day—the subject of the incident report at issue in that case—appeared on nine pages of the 4500 page hospital record produced. See Id. at 257. Justice LaVecchia's opinion drew a parallel between counsel's being compelled to identify key information responsive to interrogatories, rather than referring to voluminous business records as to which research is feasible only to one who is already familiar with the documents. See Id. at 254-55.

In the months following the Brugaletta decision, so-called "Brugaletta narratives" became the subject of considerable motion practice as plaintiffs and defendants were unable agree on whether a narrative must be provided in all cases in which an adverse event occurred at a hospital—as urged by plaintiffs—or only in cases in which the hospital records are voluminous and the underlying facts are not apparent—the defense position.

Recently, the Appellate Division in the unpublished two-judge Trella opinion affirmed the Law Division's order requiring the defendant hospital to provide the plaintiff with a written narrative of any "adverse incident" pertaining to her treatment described in her medical chart. The Appellate Division rejected defendant Newton Medical Center's argument that a narrative was unnecessary because, in the case at hand, unlike Brugaletta, plaintiff's medical records were neither voluminous nor complex. Furthermore, the provision of such a narrative summary would circumvent the Patient Safety Act privilege as applied the root cause analysis ("RCA") the hospital performed regarding the plaintiff's treatment. The Trella court concluded that the Brugaletta "Court's analysis applies to **any** patient's medical records, not simply patients whose medical records are voluminous." Trella, Docket No. A-3029-18T3 slip op. at 16. The Trella court further observed that "The trial court did not, however, order Newton Medical Center to produce the RCA or any documents, materials, or information developed in the process of self-critical analysis." Id. slip. op. at 17. As the Brugaletta Court observed, the Patient Safety Act "does not 'immunize from discovery information that would be otherwise discoverable.'" (Ibid. (quoting Brugaletta, 234 N.J. at 250).) The plaintiff in Trella therefore was "entitled to discovery of the data recorded in her medical records, including any 'adverse incidents' that were or should have been documented" in her hospital chart. Ibid.

Plaintiffs, relying upon the Appellate Division's decision in Trella, undoubtedly will routinely make discovery requests for a "Brugaletta narrative" in all cases in which an "adverse event" may have occurred at a hospital. Given that the facts of an adverse event are not privileged, and the lack of a dissent in the Trella decision, it is not anticipated that the Supreme Court will take up this issue at this time. Nevertheless, while the facts of an incident are not privileged, the recitation of the facts contained in an Incident Report remains privileged. That is to say, the language from the Incident Report remains privileged and access to that language remains protected. However, the event which is the subject of the privileged internal review may spawn a so-called "Brugaletta narrative."

While a patient certainly is entitled to know the facts concerning his or her medical treatment, the countervening goal of the Patient Safety Act was and is to improve patient outcomes. Indeed, the Supreme Court in applying the Patient Safety Act has emphasized that the facts and conclusions contained in Incident Reports or investigations are not

subject to disclosure—whether or not the event was reported to New Jersey's Department of Health. See Conn v. Rebustillo, 445 N.J. Super. 349 (App. Div. 2016).

Of course, the facts of a patient's care and treatment are not the subject of the Patient Safety Act privilege, and patients are entitled to know what treatment or mistreatment has been rendered. We should ask, however, whether we are headed down the slippery slope to full disclosure. The circumstances may be similar to the near total evisceration of the Affidavit of Merit Statute.

The Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, was adopted in 1995 as part of a tort reform package, in order to strike "a fair balance between preserving a person's right to sue and controlling nuisance suits" against certain licensed professionals "that drive up the costs of doing business in New Jersey." L. 1995, c. 139, Statement of Governor Whitman on Signing S. 1493 (June 29, 1995). The Affidavit of Merit Statute required plaintiffs, in an action against any of the sixteen types of "licensed persons" to whom the affidavit of merit requirement extends, to obtain an Affidavit of Merit from an "appropriate licensed person" who attests to a "reasonable probability" that the defendant's conduct deviated from the relevant standard of care in that profession. N.J.S.A. 2A:53A-27; see N.J.S.A. 2A:53A-26. Failure to file and serve an affidavit of merit within sixty days of the filing of the defendant's answer—extended to a maximum of 120 days upon a showing of good cause—is to result in the dismissal of the complaint with prejudice. See N.J.S.A. 2A:53A-29.

Since the passage of the Affidavit of Merit Statute, its tort reform impact has been systematically weakened by the case law interpreting the statute. In Ferreira v. Rancocas Orthopedics Associates, 178 N.J. 144 (2003), the Supreme Court initiated the practice of holding an accelerated case management conference within ninety days of service of an answer in all professional negligence cases, in order to instruct the plaintiff of the obligations imposed by the statute and to allow an opportunity to correct any deficiencies in an affidavit of merit that has already been served. The Ferreira Court also described two equitable exceptions to the affidavit of merit requirement, "extraordinary circumstances" and "substantial compliance," recognizing that "technical defects will not defeat a valid claim," so as to "temper the draconian results of an inflexible application of the statute." Ferreira, 178 N.J. at 151. More recently, in A.T. v. Cohen, 231 N.J. 337 (2017), the Supreme Court instructed that R. 4:5B-4 and the judiciary's electronic filing system should be modified in order to insure that Ferreira conferences are promptly scheduled in every professional negligence case.

In connection with these procedural practices and judicially created exceptions, the courts have, for example, allowed an automatic extension of the sixty-day time period for filing and service of the affidavit of merit to the statutory maximum of 120 days in all cases. Defendant physicians are required to advise plaintiffs of any relevant specialty or board certification in their Answers, if application of the equitable waiver doctrines is to be avoided. See, e.g., Nicholas v. Mynster, 213 N.J. 463 (2013) (applying same specialty provisions of the Patients First Act); Buck v. Henry, 207 N.J. 377 (2011) (requiring defendant physicians to identify their areas specialty in their answers and discussing statutory deadlines and application of equitable waiver doctrines in connection with the conduct of a Ferreira conference); Ferreira, 178 N.J. 144 (discussing statutory deadlines and substantial compliance and extraordinary circumstances exceptions to the affidavit of merit requirement). Over time, case law has riddled the Affidavit of Merit Statute with exceptions, and has imposed burdens on both the Court and the defense.

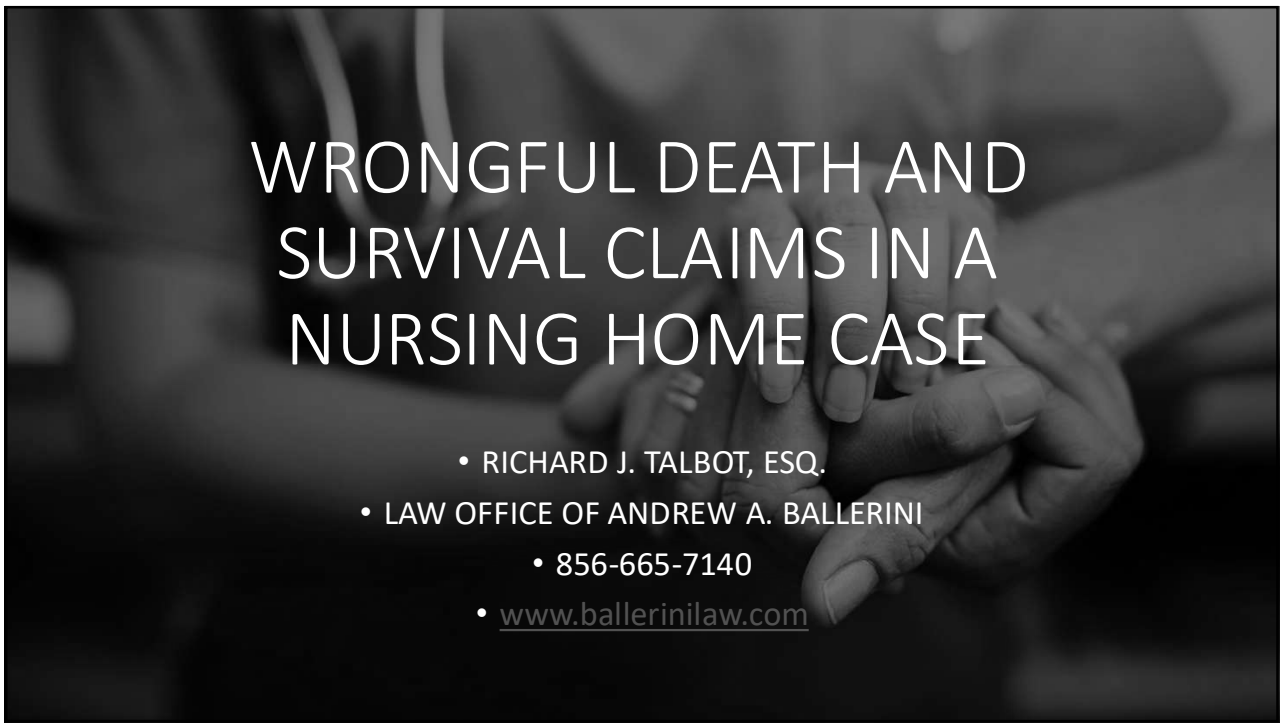
Both the Affidavit of Merit Statute and the Patient Safety Act serve laudable goals and legislative purposes. Although the Affidavit of Merit Statute was a tort reform provision designed to limit frivolous litigation, the Patient Safety Act aims to promote the delivery of quality, error-free health care. A privilege log identifying any Patient Safety Act-shielded documents, perhaps coupled with a court's in camera review of the privileged materials, should serve to cure any issues plaintiffs in a medical negligence case may have regarding access to the facts. Indeed, the so-called Brugaletta narrative is fraught with problems. Factual and evidential issues abound. Who is the best person to prepare the narrative? How detailed must it be? What is its evidential value? If neither the reporting of the event to the patient, nor the facts or conclusions of the reviewing committee are subject to discovery and may not be used as evidence in a civil proceeding, then the mere fact that an investigation occurred likewise should not be the subject of discovery. See N.J.S.A. 26:2H-12.25(f)-(g). Trella goes too far, but at the same time, it does not give plaintiffs anything that is reasonably calculated to lead to the discovery of admissible evidence.

Indeed, the Trella court's instruction that a "Brugaletta narrative" must be provided for every "adverse event" that occurs in a hospital setting has limited value and cannot be viewed as anything but a hollow marketing victory for the plaintiffs' bar. Further efforts to continue to seek to erode the Patient Safety Act privilege, however, serves no interest of plaintiffs, defendants, or, most importantly, of the health care organizations that seek to conduct internal review processes with confidentiality and candor, in order to foster better patient care and outcomes. These reviews are supposed to be held without fear that such communications will be used offensively in litigation, the primary interest the Patient Safety Act seeks to preserve.

It is delicate work to ask expert healthcare professionals to take a good hard look at themselves, to criticize their imperfections and to explore ways to be better when they already are doing their best. Take away the protections that encourage them to do that work, and they will not do that work. It takes being stupid to walk a high wire without a net. And people are not stupid. They will not do it. So, when the court has completely eroded the self critical analysis privilege we will have Root Cause Analysis Reports that say, "Cause of Death: His number came up".

Is that what the Patient Safety Act was supposed to be all about? When the moderator at a recent ICLE Medical Malpractice seminar called Trella an important decision he might as well have called it the beginning of the end for the Patient Safety Act. We should not repeat the mistakes of the past by having lawmakers pass groundbreaking legislation only to have the court erode that legislation's foundational underpinnings.

Herbert Kruttchnitt III, Esq. is a partner in the firm of Dughi, Hewit & Domalewski, PC. Anthony Cocca, Esq. & Katelyn Cutinello, Esq. are partners in the firm of Cocca & Cutinello, PC


WRONGFUL DEATH AND SURVIVAL CLAIMS IN A NURSING HOME CASE
• RICHARD J. TALBOT, ESQ.
• LAW OFFICE OF ANDREW A. BALLERINI
• 856-665-7140
• www.ballerinilaw.com

SENATE INSTITUTIONS, HEALTH AND WELFARE COMMITTEE

STATEMENT TO

SENATE, No. 944

STATE OF NEW JERSEY

DATED: JUNE 4, 1976

PURPOSE AND PROVISIONS

Residents of nursing homes are all too often given inferior treatment because they are old, feeble or poor. They are in need of a bill of rgihts similar to the bill recently passed by the Legislature and signed into law, enumerating certain rights of the mentally ill.

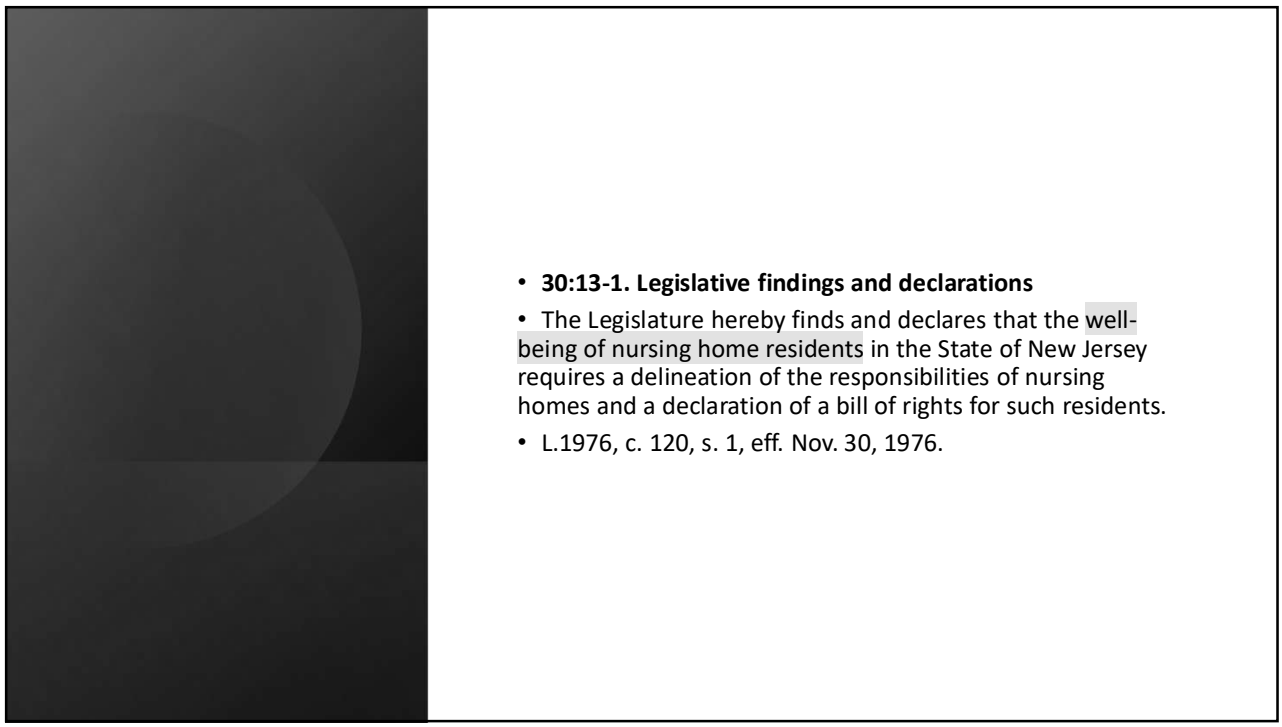
This bill not only declares that nursing home residents have certain rights; it also lists a number of responsibilities that nursing homes have with regard to the care of residents.

The Federal government has established clear standards of care for residents of skilled and intermediate care nursing facilities who are Medicaid or Medicare recipients. However, this bill makes similar standards of care applicable to *all* nursing homes and nursing home residents in the State and, moreover, makes such standards an expression of legislative policy and intent.

The responsibilities of nursing homes under the provisions of the bill include the following:

1. Maintaining a complete record of all funds and possessions deposited by residents for safekeeping;
2. Providing for the spiritual care of residents, if such care is desired;
3. Admitting only that number of residents which can be safely accommodated;
4. Ensuring that no physical restraints are used, except upon written order of a physician, and that drugs are not used for purposes of punishment;
5. Permitting members of certain groups which render assistance without charge to nursing home residents, full access to nursing homes at reasonable hours and under specific conditions; and
6. Ensuring compliance by the nursing home with all applicable State and Federal statutes and rules and regulations.

The rights of nursing home residents under the provisions of the bill


• **30:13-1. Legislative findings and declarations**
• The Legislature hereby finds and declares that the well-being of nursing home residents in the State of New Jersey requires a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents.
• L.1976, c. 120, s. 1, eff. Nov. 30, 1976.


NURSING HOME RESIDENTS RIGHTS UNDER N.J.S.A. 30:13-5 ARE BROADER THAN, BUT INCLUDE,
THE RIGHT TO PROPER, INDIVIDUALIZED CARE.

30:13-5 Rights of nursing home residents.

5.Every resident of a nursing home shall:

a.Have the right to manage his own financial affairs...

b.Have the right to wear his own clothing...

c.Have the right to retain and use his personal property...

d.Have the right to receive and send unopened correspondence...

e.Have the right to unaccompanied access to a telephone...

f.Have the right to privacy.

g.Have the right to retain the services of his own personal physician...

h.Have the right to unrestricted communication, including personal visitation with any persons of his choice, at any reasonable hour.

i.Have the right to present grievances...

j.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.

k.Have the right to refuse to perform services...

l.Have the right to reasonable opportunity for interaction with members of the opposite sex...

m.Not be deprived of any constitutional, civil or legal right solely by reason of admission to a nursing home.

n.Have the right to receive, upon request, food that meets the resident's religious dietary requirements...

- **30:13-5 Rights of nursing home residents.**
- 5. Every resident of a nursing home shall:

- j. 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.

A=Substandard Care

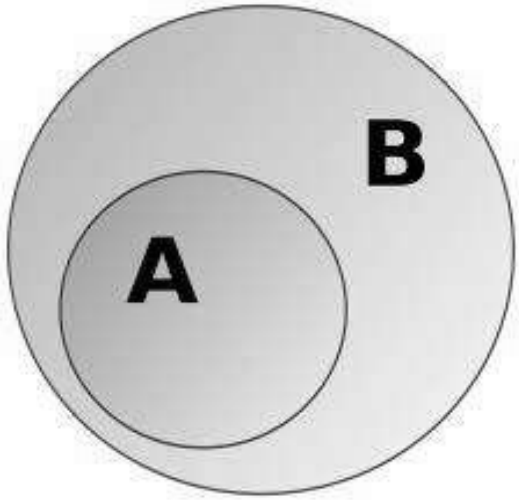
Negligent care that represents deviation(s) from standards of care under the strong regulatory framework that applies to ALL nursing homes in New Jersey

All nursing home residents are entitled to proper care, at the very least.

B= Rights

These rights include:
right to a safe and decent living environment; right to care that recognizes dignity; right to care that recognizes individuality
See, N.J.S.A. 30:13-5 (j)

VIOLATIONS OF RIGHTS AND NEGLIGENCE CAUSES OF ACTION



- THERE IS A REAL DISCONNECT BETWEEN WHAT A TRIAL LAWYER PRESENTS IN “DEATH CASES” AND WHAT IS OFTEN UNDERSTOOD ABOUT THE CLAIMS.

- **2A:31-1. When action lies**

- When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.
- L.1951 (1st SS), c.344.

• WRONGFUL DEATH-THE OLD STATUTE

- **2A:31-2. Persons entitled to sue or make claim**

- Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.
- L.1951 (1st SS), c.344.

• SURVIVAL CLAIMS-THE OLD STATUTE

• **2A:15-3 Actions which survive; torts to decedent; funeral and burial expenses; statute of limitations.**

• 2A:15-3. Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living.

• In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.

• Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter, provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time.

• Amended 1969, c.266; 2009, c.266.

CHANDLER v. KASPER

- We reverse that determination and remand for entry of orders dismissing plaintiff's Survivor's Act action for lack of standing because plaintiff's original complaint was a nullity and any amendment sought after the statute of limitations ran could not relate back to that complaint.

- Under these acts, the [A]dministrator Ad [P]rosequendum is the proper party to bring a lawful death action and a [G]eneral [A]dministrator is the proper party to institute a survival action.

- Here, plaintiff did not have that legal right as to the Survivor's Act action at the time the complaint was filed and did not acquire it until after the statute of limitations had run on the estate's claim under that act. Regardless of the fact that defendants had notice of the claim through service of the original complaint, that pleading remained a nullity and could not have been asserted once the statute of limitations had run. Although we appreciate the motion judge's endeavor to attain an equitable result, the governing law simply does not authorize it.

STATE OF NEW JERSEY

ASSEMBLY, No. 6133

219th LEGISLATURE

INTRODUCED DECEMBER 6, 2021

Sponsored by:
Assemblyman JON M. BRAMNICK
District 21 (Morris, Somerset and Union)
Assemblyman RAJ MUKHERJI
District 33 (Hudson)
Assemblywoman JOANN DOWNEY
District 11 (Monmouth)
Senator NICHOLAS P. SCUTARI
District 22 (Middlesex, Somerset and Union)

SYNOPSIS
Allows certain persons not yet appointed as administrator of estate to pursue lawsuit for damages for wrongful death on behalf of deceased's survivors.

CURRENT VERSION OF TEXT
As introduced.

(Sponsorship Updated As Of: 1/10/2022)

AN ACT concerning certain actions for wrongful death and amending N.J.S.2A:15-3 and N.J.S.2A:31-2.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.2A:15-3 is amended to read as follows:

2A:15-3. a. (1) Executors [and], administrators, and administrators ad prosequendum may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living. In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor [or], administrator, or administrator ad prosequendum may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.

(2) In the case of a plaintiff qualified for appointment as administrator who was not yet appointed administrator at the time the plaintiff commenced an action under this section, the court may allow the plaintiff to be designated administrator for the purposes of this section and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.

b. Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter, provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time. (cf: P.L.2009, c.266)

2. N.J.S.2A:31-2 is amended to read as follows:

2A:31-2. a. Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum or administrator of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

b. In the case of a plaintiff who is qualified for appointment as administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, but who was not yet appointed as such at the time the plaintiff commenced an action under this

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

chapter. 5[he court may allow the plaintiff to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.] 6

(cf: P.L.1951, c.344)

3. This act shall take effect immediately and shall apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date. 12

STATEMENT

This bill would allow certain persons to pursue a lawsuit for damages for wrongful death on behalf of the deceased's survivors.

Pursuant to current law, civil actions for damages arising from a person's wrongful death may be brought under two separate statutes: (1) Under the "wrongful death act," N.J.S.2A:31-1 et seq., economic damages may be awarded to persons who would be entitled to the deceased's property under the intestacy laws; and

(2) Under the "survivor's act," N.J.S.2A:15-3, damages for the decedent's pain and suffering from the time of the injury until death may be awarded to the decedent's estate.

When a person dies without a will, the county surrogate will appoint a general administrator of the estate who, among other duties, is authorized to file any civil actions under the survivor's act. The surrogate will appoint an administrator ad prosequendum (generally the same person who is appointed general administrator) to file any civil actions under the wrongful death act.

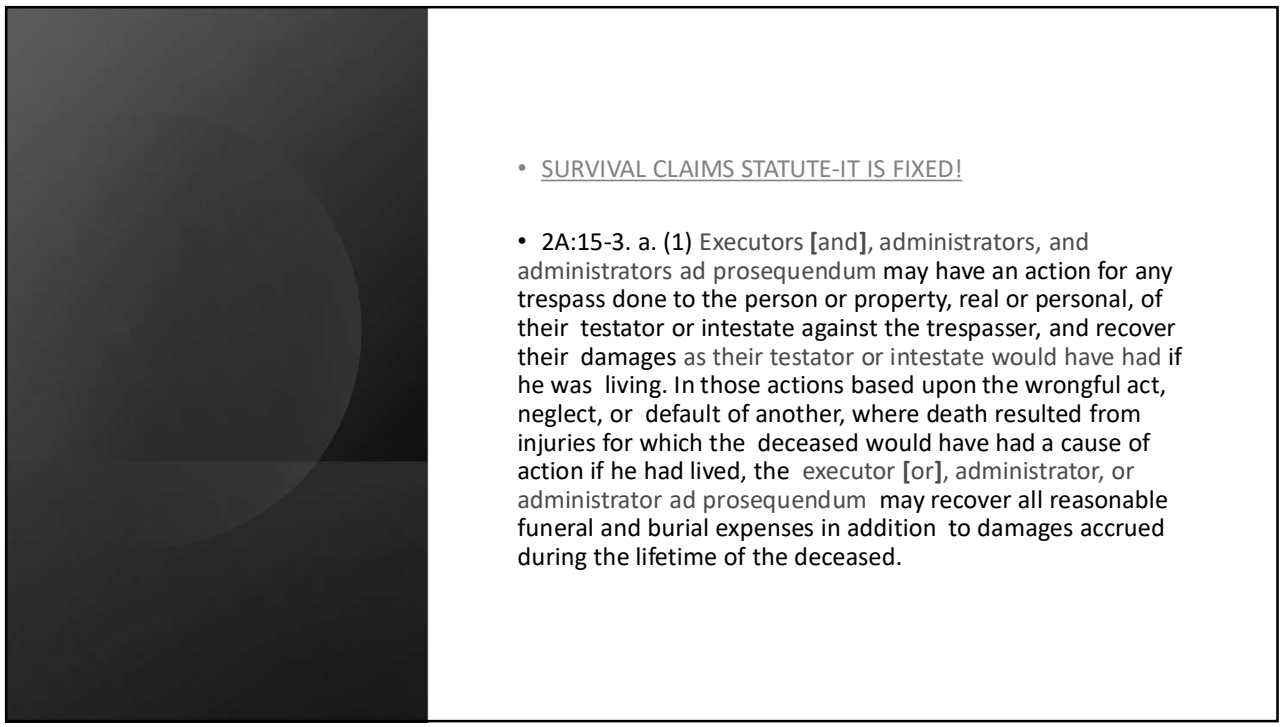
In an unpublished decision, Chandler v. Kaunez, Docket No. A-2143-20 (decided October 7, 2021) the Appellate Division held that the decedent's daughter did not have standing to file a lawsuit under the survivor's act because she had not yet been appointed general administrator of her father's estate; she had been appointed only as administrator ad prosequendum, which entitled her to file suit under the wrongful death act (but not under the survivor's act). According to the daughter, the county surrogate had advised that it was necessary for her only to be appointed as administrator ad prosequendum in order to file the lawsuit, and disagreements with her siblings had led to a delay in her being able to seek appointment as general administrator.

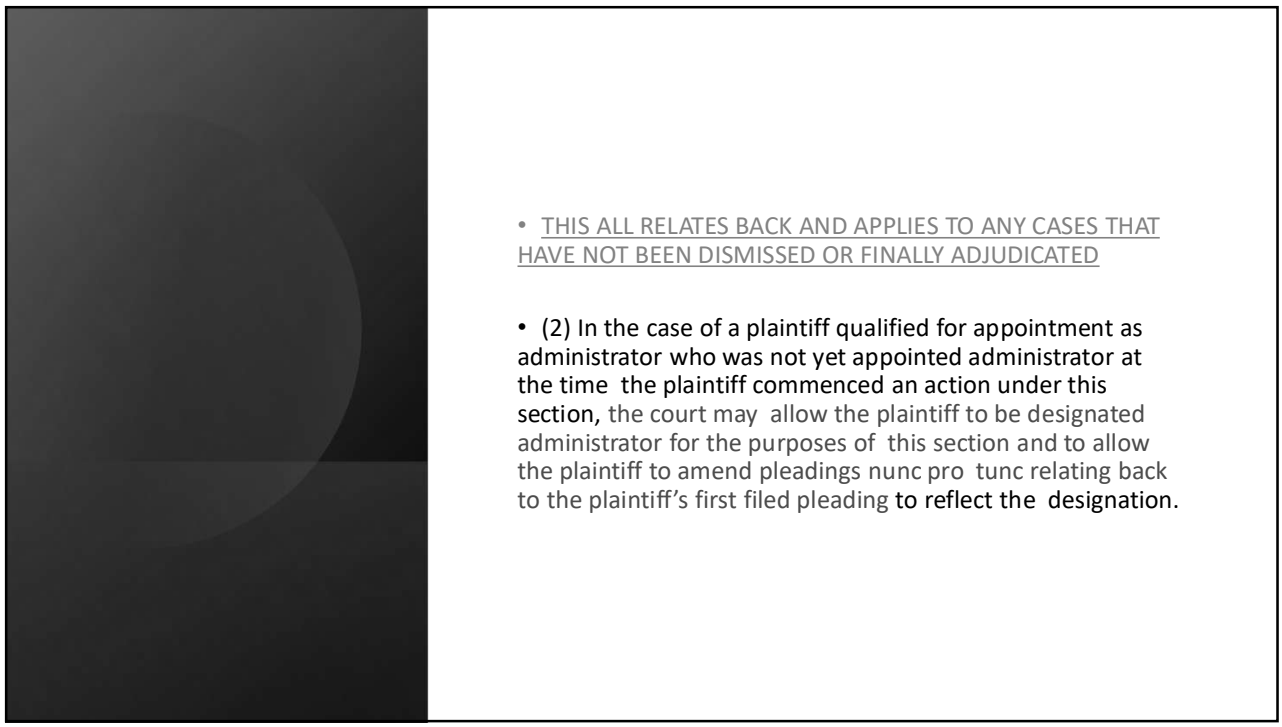
In the view of the sponsor, the Chandler decision can lead to many cases brought under the wrongful death act or the survivor's act being dismissed on a technicality.

This bill is intended to address the issue by providing that the court may appoint a person as an administrator or administrator ad

prosequendum even if the person was not yet appointed as such at the time the person filed a lawsuit under the wrongful death act or survivor's act. The bill provides that the court could allow the person filing suit to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend any pleadings relating back to the plaintiff's first filed pleading to reflect the designation.

The bill would take effect immediately. It would apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date.


• SURVIVAL CLAIMS STATUTE-IT IS FIXED!
• 2A:15-3. a. (1) Executors [and], administrators, and administrators ad prosequendum may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living. In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor [or], administrator, or administrator ad prosequendum may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.


• THIS ALL RELATES BACK AND APPLIES TO ANY CASES THAT HAVE NOT BEEN DISMISSED OR FINALLY ADJUDICATED
• (2) In the case of a plaintiff qualified for appointment as administrator who was not yet appointed administrator at the time the plaintiff commenced an action under this section, the court may allow the plaintiff to be designated administrator for the purposes of this section and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.

- WRONGFUL DEATH STATUTE IS ALSO FIXED!

- 2. N.J.S.2A:31-2 is amended to read as follows:
- 2A:31-2. a. Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum or administrator of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

- b. In the case of a plaintiff who is qualified for appointment as administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, but who was not yet appointed as such at the time the plaintiff commenced an action under this chapter, the court may allow the plaintiff to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.
- (cf: P.L.1951, c.344)

- 3. This act shall take effect immediately and shall apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date.

- **3B:10-11. Administration ad prosequendum on death by wrongful act**

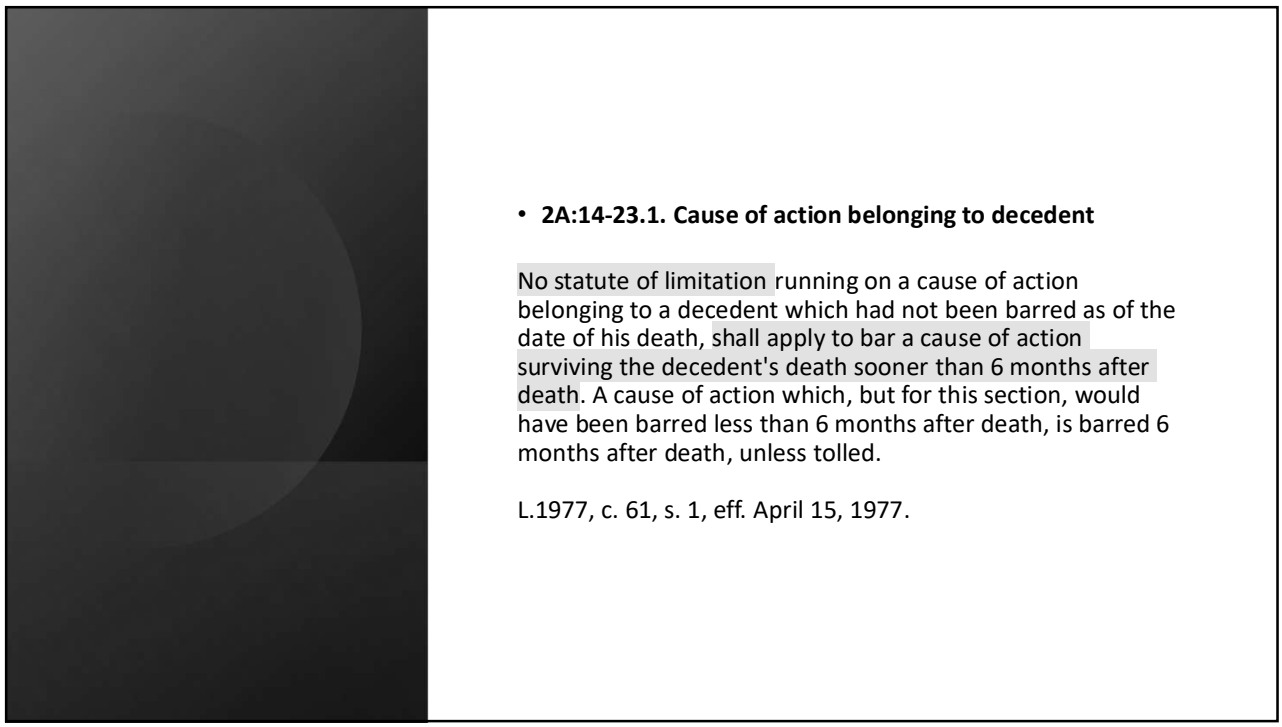
- The surrogate's court of the county wherein an intestate resided at his death, or, if the intestate resided outside the State, the surrogate's court of the county wherein the accident resulting in death occurred, or the Superior Court, may grant letters of administration ad prosequendum to the person entitled by law to general administration. An administrator ad prosequendum shall not be required to give bond.
- L.1981, c. 405, s. 3B:10-11, eff. May 1, 1982.

- **2A:31-3. Limitation of actions; exceptions**

- 2A:31-3 Every action brought under this chapter shall be commenced within 2 years after the death of the decedent, and not thereafter, provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time.
- L.1951 (1st SS), c.344; amended 2000, c.157.

- **2A:31-4 Persons entitled to amount recovered.**

- The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same except if there is a surviving spouse of the decedent and one or more surviving descendants of the decedent they shall be entitled to equal proportions for purposes of recovery under this chapter notwithstanding the provisions of Title 3B of the New Jersey Statutes. If any of the persons so entitled in accordance with this section were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among them, taking into account in such determination, but not limited necessarily thereby, the age of the dependents, their physical and mental condition, the necessity or desirability of providing them with educational facilities, their financial condition and the availability to them of other means of support, present and future, and any other relevant factors which will contribute to a fair and equitable apportionment of the amount recovered.
- Amended 1960, c.194, s.1; 2007, c.261, s.1.



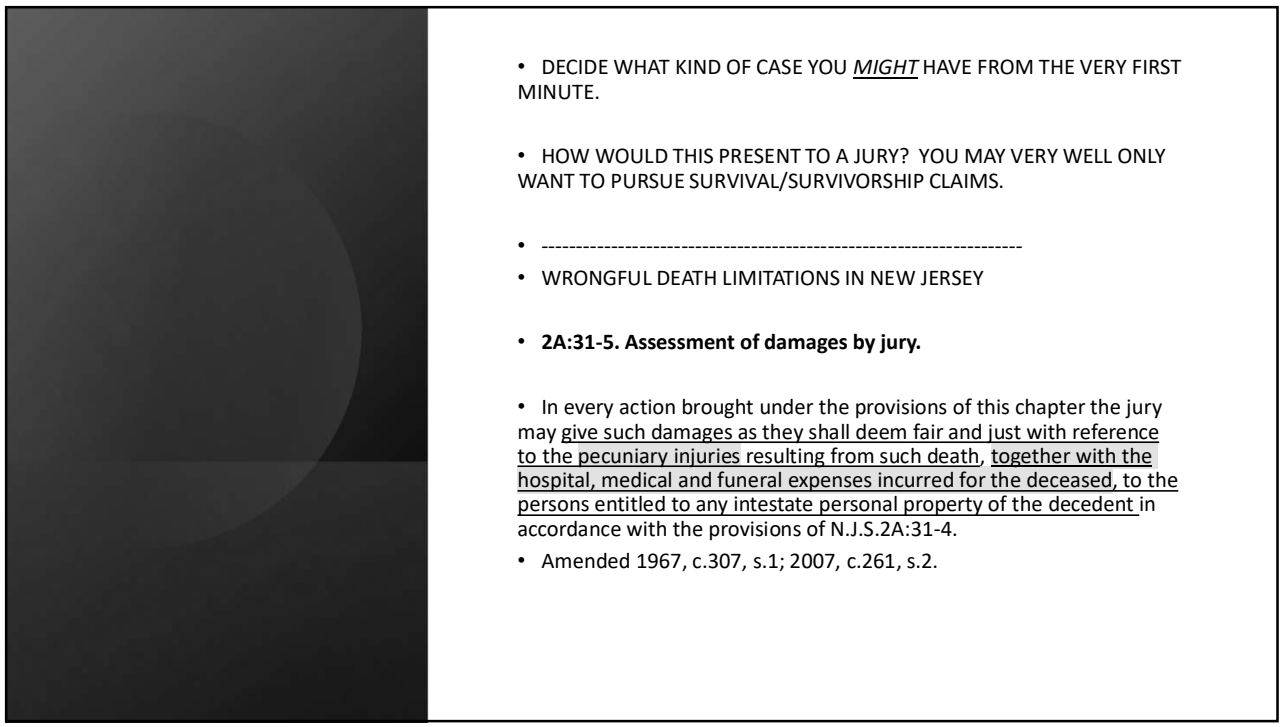
- **2A:14-23.1. Cause of action belonging to decedent**

No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than 6 months after death. A cause of action which, but for this section, would have been barred less than 6 months after death, is barred 6 months after death, unless tolled.

L.1977, c. 61, s. 1, eff. April 15, 1977.

- **2A:31-6. To whom amount recovered paid; release or cancellation of judgment**

- When an action is commenced by an administrator ad prosequendum under this chapter, no payment in settlement thereof or in satisfaction of a judgment rendered therein shall be made to him, but such payment shall be made only to the duly appointed general administrator of the estate of the decedent, who has filed a bond or supplemental bond adequate to protect the persons entitled to receive the amount so paid.
- No release or cancellation of a judgment, whether by warrant or otherwise, by an administrator ad prosequendum or by his attorney of record or attorney in fact shall release the person making payment from liability to the persons entitled to any intestate personal property of the decedent, shall operate as a valid cancellation of the judgment or be an authority to the clerk of any court to cancel the judgment of record.
- L.1951 (1st SS), c.344.



- DECIDE WHAT KIND OF CASE YOU *MIGHT* HAVE FROM THE VERY FIRST MINUTE.

- HOW WOULD THIS PRESENT TO A JURY? YOU MAY VERY WELL ONLY WANT TO PURSUE SURVIVAL/SURVIVORSHIP CLAIMS.

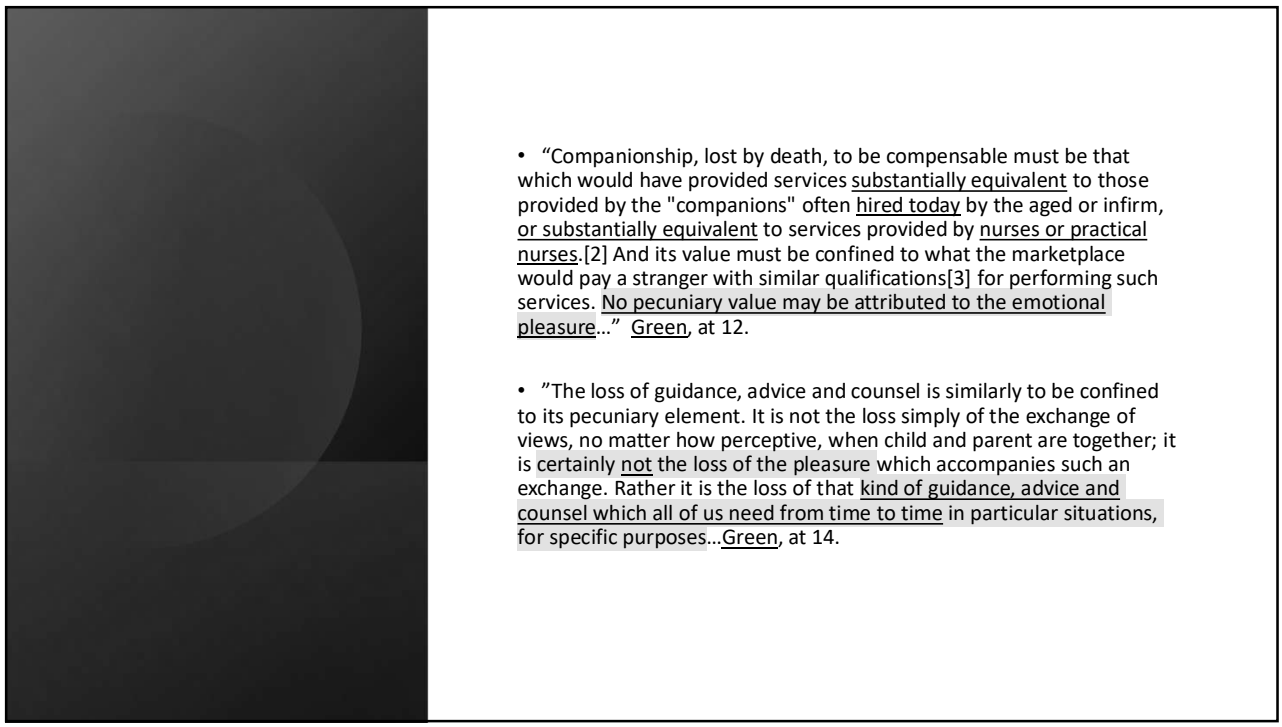
- ---
- WRONGFUL DEATH LIMITATIONS IN NEW JERSEY

- **2A:31-5. Assessment of damages by jury.**

- In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent in accordance with the provisions of N.J.S.2A:31-4.
- Amended 1967, c.307, s.1; 2007, c.261, s.2.

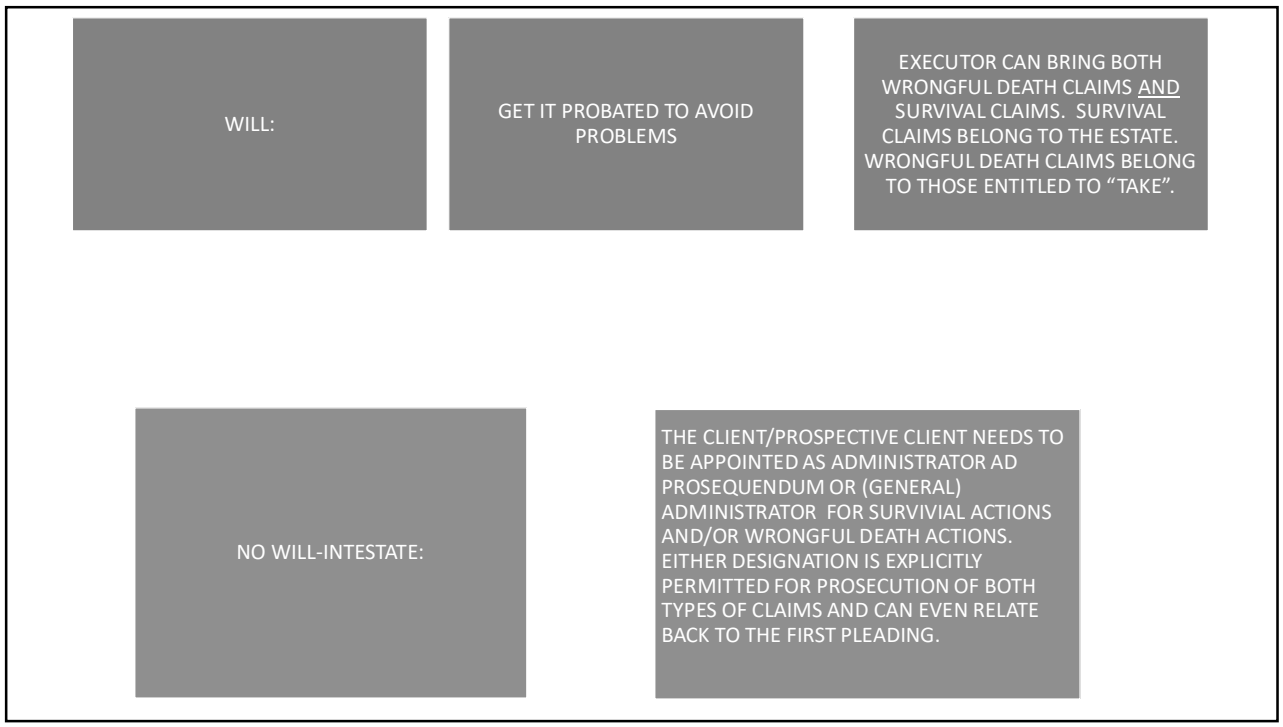
- Green v. Bittner, 85 N.J. 1, 4 (1980)

- "We hold that when parents sue for the wrongful death of their child, damages should not be limited to the well-known elements of pecuniary loss such as the loss of the value of the child's anticipated help with household chores, or the loss of anticipated direct financial contributions by the child after he or she becomes a wage earner. We hold that in addition, the jury should be allowed, under appropriate circumstances, to award damages for the parents' loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it. As noted later, these other losses will be confined to their pecuniary value, excluding emotional loss."



- "Companionship, lost by death, to be compensable must be that which would have provided services substantially equivalent to those provided by the "companions" often hired today by the aged or infirm, or substantially equivalent to services provided by nurses or practical nurses.[2] And its value must be confined to what the marketplace would pay a stranger with similar qualifications[3] for performing such services. No pecuniary value may be attributed to the emotional pleasure…" Green, at 12.

- "The loss of guidance, advice and counsel is similarly to be confined to its pecuniary element. It is not the loss simply of the exchange of views, no matter how perceptive, when child and parent are together; it is certainly not the loss of the pleasure which accompanies such an exchange. Rather it is the loss of that kind of guidance, advice and counsel which all of us need from time to time in particular situations, for specific purposes…Green, at 14.


WILL:
GET IT PROBATED TO AVOID PROBLEMS
EXECUTOR CAN BRING BOTH WRONGFUL DEATH CLAIMS AND SURVIVAL CLAIMS. SURVIVAL CLAIMS BELONG TO THE ESTATE. WRONGFUL DEATH CLAIMS BELONG TO THOSE ENTITLED TO "TAKE".
NO WILL-INTESTATE:
THE CLIENT/PROSPECTIVE CLIENT NEEDS TO BE APPOINTED AS ADMINISTRATOR AD PROSEQUENDUM OR (GENERAL) ADMINISTRATOR FOR SURVIVIAL ACTIONS AND/OR WRONGFUL DEATH ACTIONS. EITHER DESIGNATION IS EXPLICITLY PERMITTED FOR PROSECUTION OF BOTH TYPES OF CLAIMS AND CAN EVEN RELATE BACK TO THE FIRST PLEADING.

REMEMBER, WRONGUL DEATH ACTIONS ARE FOR PECUNIARY (FINANCIAL) DAMAGES.

SURVIVAL CLAIMS ARE THE CLAIMS FOR WHAT THE DECEDENT SUFFERED, AS WELL AS FUNERAL AND BURIAL EXPENSES (THOSE CAN BE BROUGHT UNDER EITHER TYPE OF CLAIM). THIS ACTION BELONGS TO THE ESTATE.

- *SURVIVAL CLAIMS
- *WHAT ARE WE ALL ABOUT?
- *YOU DON'T THROW A PARTY AND KICK PEOPLE IN THE TEETH AT THE END!
- *TERROR DAMAGES
- *SLOW IT DOWN-WHEN IS 60 SECONDS A LONG TIME?

"…The law also recognizes as proper items for recovery, the pain, physical and mental suffering, discomfort, and distress that a person may endure as a natural consequence of the injury. Again, this item of recovery is what a reasonable person would consider to be adequate and just under all the circumstances to compensate *[Plaintiff]*…"

- **8.11 DAMAGES CHARGES — GENERAL**
- **E. DISABILITY, IMPAIRMENT AND LOSS OF THE ENJOYMENT OF LIFE, PAIN AND SUFFERING**
- (Approved 12/1996; Revised 05/2017)

- EXAMPLE OF EXPERT OPINION ON TERROR DAMAGES

- Pain is also the most basic of sensations that the brain registers and even in a victim not fully aware of their surroundings, the injured brain will still react to pain. In fact, this forms the basis of a common medical test of the most basic level of consciousness and failure to withdraw or react to pain is considered the hallmark of coma…

- …must also have begun to be aware of the extent of ____ injuries and the implications for _____, namely that ___ life was in the process of ebbing away.

NURSING HOME LIABILITY MEDIATION

Hon. Eugene J. McCaffrey, Jr. (Ret)

There is perhaps no area of alternative dispute resolution that contains more emotionally charged issues than nursing home cases. In most matters, the resident's adult children have decided to place their parent in the care of a nursing home, a decision that is usually difficult for the family and associated with emotions of guilt, and perhaps disagreement as to the choices made when the parent's health may be rapidly deteriorating. When the parent suffers injury, illness, or death at the facility, emotions such as anger or the desire for retribution can be significant. At mediation, it may be difficult for the resident's family members to consider potential defenses or arguments raised by the nursing home. The injury, illness, or death may have resulted from the resident's deteriorating medical condition and co-morbidities. Given the emotion involved in these matters and the significant factual and legal issues, the resolution requires a skilled and well-prepared mediator. It is critical that counsel, in these matters, properly prepare their clients for what will take place at mediation.

Litigating nursing home cases is expensive for both parties. The anxiety of trial is considerable for the relatives of the resident. Experienced litigators understand and appreciate litigation's delay, cost, and uncertainty. Mediation is always a preferred option. A skilled mediator with substantive knowledge of the law and the facts of the specific case should allow all parties to be heard with respect and evenhandedness. In some instances, preparing clients for mediation is not the same attention as preparing them for trial. It is essential that Plaintiff's counsel is realistic with their clients and discussed reasonable expectations. Clients should be made aware of what to expect in the mediation process and problems typically experienced in the beginning when the demand is too high and the offers too low. In advance of the mediation, they should also be made aware of the anticipated defenses and positions of Defendant so that they aren't surprised when the mediator raises them. Also, neither party should expect to win at mediation. Instead, the goal should be a fair process where all parties are satisfied with the result.

Many excellent mediators handle nursing home matters in New Jersey, each with different styles and approaches. Today I will be discussing a few practical tips that I believe will increase your chances of having a successful mediation.

TEN PRACTICAL TIPS ON BEING MORE EFFECTIVE AT NURSING HOME MEDIATIONS

1) Pre-Mediation telephone Conference
   - Live or Zoom
   - Which clients/decision-makers will be present and participate?
   - Mediation Statements
   - Medical Liens
   - Demand

2) Mediation Statements – Less is usually more.

3) Don't ignore Zoom preparation with your client.

4) Client dos and don'ts.

5) Attorney dos and don'ts.

6) Understand the midpoints.

7) Don't be afraid of brackets.

8) Don't be afraid to ask for private conversations with the Mediator.

9) Live for another day.

10) Willingboro Mall LTD v. 240/242 Franklin Avenue, 215 NJ 242 (2013)

Hon. Eugene J. McCaffrey, Jr. (Ret)
McCaffrey ADR, LLC
207 Forest Woods Drive | Mullica Hill, New Jersey 08062
(609) 642-9194
https://www.eugenemccaffreyadr.com

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1344-20

ESTATE OF JAMES BURNS,
by and through BRIAN BURNS,
EXECUTOR,

Plaintiff-Respondent,

v.

CARE ONE AT STANWICK, LLC
d/b/a CARE ONE HARMONY
VILLAGE AT MOORESTOWN
and CARE ONE, LLC,

Defendants-Appellants.

APPROVED FOR PUBLICATION

June 15, 2021

APPELLATE DIVISION

Argued April 27, 2021 – Decided June 15, 2021

Before Judges Fisher, Gilson and Gummer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2044-17.

Anthony Cocca argued the cause for appellants (Cocca & Cutinello, LLP, attorneys; Anthony Cocca and Katelyn E. Cutinello, of counsel and on the briefs).

Jonathan F. Lauri argued the cause for respondents (Stark & Stark, attorneys; Denise Mariani and Jonathan F. Lauri, of counsel and on the briefs).

Herbert Kruttschnitt, III, argued the cause for amicus curiae New Jersey Defense Association (Dughi, Hewitt & Domalewski, attorneys; Herbert Kruttschnitt, III and Ryan Alan Notarangelo, of counsel and on the brief).

Sherry L. Foley argued the cause for amicus curiae New Jersey Association for Justice (Foley & Foley, attorneys; Sherry L. Foley and Timothy J. Foley, on the brief).

The opinion of the court was delivered by

FISHER, P.J.A.D.

In this interlocutory appeal, we consider whether inhabitants of an assisted living residence may assert a private cause of action for the facility's alleged breach of their statutory bill of rights. After closely analyzing the statutes applicable to assisted living residences as well as other legislative enactments for similar facilities, we conclude the Legislature did not intend to create a private cause of action despite having done so in similar circumstances; we also decline the invitation to incorporate such a private cause of action into the common law.

I

James Burns was eighty-eight years old when admitted to Care One Harmony Village at Moorestown on December 29, 2014. He had a history of Lewy body dementia, a disorder that has mental and physical effects. Burns was

transferred to another facility for long-term care on September 6, 2015, and died eleven days later. His estate commenced this wrongful death action on September 13, 2017, alleging Burns had fallen several times and developed pressure ulcers and infections during his stay at Care One,[1] and that he died because of the substandard care Care One provided.

In the complaint, plaintiff asserts claims sounding in negligence and intentional torts; it does not allege any statutory causes of action. When discovery ended in early January 2020, Care One moved for summary judgment, seeking a determination that plaintiff could not assert a claim based on Care One's breach of any state or federal statutes or regulations. During oral argument, plaintiff's attorney confirmed that no statutory or regulatory violation had been or could be asserted, that plaintiff had only a medical negligence claim for the alleged treatment Burns received at Care One, and that he anticipated his experts may refer to a breach of statutes or regulations as evidence of the applicable standard of care. Care One's motion was denied.

In April 2020, plaintiff moved for partial summary judgment, seeking an order declaring that Care One is subject to the rights granted those who reside in a facility falling within the parameters of the Rooming and Boarding House

[1] For simplicity's sake, we refer to all defendants as Care One.

Act, N.J.S.A. 55:13B-1 to -21. Plaintiff also sought a ruling permitting the jury to consider whether decedent's rights under this Act – the opportunity to "achieve the highest level of independence, autonomy, and interaction with the community," N.J.S.A. 55:13B-19(j), and "a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident," N.J.S.A. 55:13B-19(l) – were violated by Care One. The Rooming and Boarding House Act expressly authorizes a private cause of action for enforcement of these and other rights and allows for an award of attorneys' fees to a prevailing plaintiff. N.J.S.A. 55:13B-20.

The trial judge granted plaintiff's motion, subject to plaintiff proving at trial that Care One was a facility that, by legislation, allowed plaintiff a private cause of action. The judge concluded that the Rooming and Boarding House Act, as well as the Dementia Care Home Act, N.J.S.A. 26:2H-148 to -157, expressed the Legislature's determination that persons suffering from dementia – like decedent – are vulnerable and in need of protections enhanced by the existence of a private cause of action for their breach.

In seeking leave to appeal the judge's grant of plaintiff's motion for partial judgment, Care One argues that it operates an assisted living residence and that although the Legislature enacted a bill of rights for assisted living residents,

N.J.S.A. 26:2H-128(b), the Legislature did not expressly incorporate a right to pursue a private cause of action. We granted leave to appeal.

II

The path through numerous statutes and regulations leading to the conclusion Care One would have us reach – that a resident or the personal representative of a resident has no private cause of action for a breach of an assisted living resident's bill of rights – is not entirely clear. In seeking illumination, we look to the legislation concerning residential health care facilities, rooming and boarding houses, dementia care homes, and nursing homes.

As early as 1953, the Legislature granted the Department of Health or the Department of Community Affairs, "as appropriate," N.J.S.A. 30:11A-1, licensing and regulatory authority over the State's "residential health care facilities," N.J.S.A. 30:11A-3. These facilities were defined, in part, by the fact that their residents were "not in need of skilled nursing care" and were not to be given "skilled nursing care." N.J.S.A. 30:11A-1. The Rooming and Boarding House Act was enacted in 1979 to give the Department of Community Affairs authority over otherwise unregulated rooming houses and boarding houses. The Rooming and Boarding House Act incorporated a bill of rights for "residents of

rooming houses, boarding houses and residential health care facilities," N.J.S.A. 55:13B-17, delineated in N.J.S.A. 55:13B-19.[2] This legislation also affirmatively declared that a resident "shall have a cause of action against any person committing" a violation of the bill of rights, that

> may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for their violation. Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action.
>
> [N.J.S.A. 55:13B-21.]

In 1976, the Legislature enacted the Nursing Home Responsibilities and Residents' Rights Act, N.J.S.A. 30:13-1 to -17, by virtue of having found that "the well-being of nursing home residents" in this State required "a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents." N.J.S.A. 30:13-1. This Act established the many rights of nursing home residents, N.J.S.A. 30:13-5, and expressly declared that residents' "shall have a cause of action against any person" violating their rights that would include the right to "recover actual and punitive damages" and "reasonable

[2] N.J.S.A. 55:13B-19 sets forth a bill of rights possessed by "[e]very resident of a boarding facility." In N.J.S.A. 55:13B-18, the Legislature declared that "boarding facility" means "rooming house, boarding house or residential health care facility."

attorney's fees and costs" incurred by a prevailing plaintiff in such an action, N.J.S.A. 30:13-8; see also N.J.S.A. 30:13-4.2.

In 1997, the Legislature acted to ensure the protection of the residents of these three types of facilities – rooming houses, boarding houses, and residential health facilities – who were afflicted by Alzheimer's disease, dementia or other related disorders by including definitions of those conditions, see N.J.S.A. 55:13B-3(k) and (l), in the existing legislation and by authorizing the Commissioner of the Department of Community Affairs to establish standards. N.J.S.A. 55:13B-6(n).

Nearly twenty years later, in 2016, the Legislature enacted the Dementia Care Home Act, N.J.S.A. 26:2H-148 to -157. In its definitional provision, this Act defined the residents of "a dementia care home" as adults "with Alzheimer's disease and related disorders or other forms of dementia," who also: are "ambulant with or without assistive devices"; have been "certified by a licensed physician . . . not in need of skilled nursing care"; and "except in the case of a person 65 years of age or over, [are] in need of dietary services, supervision of self-administration of medications, supervision of and assistance in activities of daily living, or assistance in obtaining health care services." N.J.S.A. 26:2H-150(b). This Act further establishes that a resident of a dementia care home

"shall not be given skilled nursing care while a resident" except in cases of "emergencies or during temporary illness for a period of one week or less." Ibid.

The Dementia Care Home Act also incorporated a bill of rights for the residents of those homes, N.J.S.A. 26:2H-154(a), and expressly allows for a private cause of action on a breach of those rights for both "actual and punitive damages" as well as the right of a prevailing plaintiff to recover reasonable attorney's fees. N.J.S.A. 26:2H-154(c).

In 2002, prior to enactment of the Dementia Care Home Act, the Legislature recognized the existence of "assisted living residence[s]," defining them as facilities that "provide apartment-style housing and congregate dining." N.J.S.A. 26:2H-7.15. The Legislature defined "assisted living" as "a coordinated array of supportive personal and health services, available 24 hours per day, which promote resident self-direction and participation in decisions that emphasize independence, individuality, privacy, dignity, and homelike surroundings to residents who have been assessed to need these services, including residents who require formal long-term care." Ibid. The Department of Health, which regulates assisted living residences, has determined that they must be capable of providing: "assistance with personal care, nursing, pharmacy, dining, activities, recreational, and social work services to meet the

individual needs of each resident." N.J.A.C. 8:36-8.2(b). Regulations allow such facilities to establish programs to meet the needs of residents with Alzheimer's disease and other forms of dementia, providing individualized care in light of the cognitive and functional abilities of residents admitted to the program. N.J.A.C. 8:36-19.

In 2011, as it had with these other types of facilities, the Legislature enacted a bill of rights for assisted living residents. See N.J.S.A. 26:2H-128(b). Unlike all its enactments concerning other facilities, the Legislature neither expressly authorized nor expressly precluded an assisted living resident's right to pursue a private cause of action for the violation of the rights enumerated in N.J.S.A. 26:2H-128(b).

III

In considering the parties' arguments – as well as those asserted by amici` – we acknowledge that the answer to the issues posed is not readily apparent. Our review of various similar legislation set forth above reveals that the Legislature, over the course of many decades, repeatedly extended its reach, encompassed various types of facilities within its protection, and refined its regulation of residences for the elderly and infirm. To summarize, the Legislature:

- in 1953 began regulating "residential health care facilities";
- in 1976 enacted the Nursing Home Responsibilities and Residents' Rights Act;
- in 1979 expanded its regulation of "residential health care facilities" to include rooming and boarding houses;
- in 1997, folded patients afflicted with Alzheimer's disease, dementia, and other related disorders into the protections provided for residents of residential health care facilities, rooming houses, and boarding houses; and
- in 2016, began regulating what it described as dementia care homes.

In all these instances, the Legislature declared bills of rights for residents and expressly authorized a resident's right to pursue a private cause of action for violations of those bills of rights. But when it recognized assisted living residences in 2002 and enacted a bill of rights applicable to those residences in 2011, the Legislature did not expressly authorize private causes of action for violations of those rights.

By the same token, the Legislature did not prohibit private causes of actions for assisted living residents. It just didn't say anything about it. There are two ways a court may proceed in this circumstance. A court might either (a) adopt into the common law a private cause of action based on the legislative

policy of protecting the elderly and infirm or (b) ascertain whether, through application of statutory-interpretation guidelines, the Legislature intended to create a private cause of action despite its silence.

A

As we have observed, the Legislature was silent about the existence of a private cause of action for assisted living residents but it was not entirely silent about its desire to create rights and protect those residents; far from it. The 2011 bill of rights for assisted living residents created forty-two rights that focus on the retention of their rights: to "independence" and "individuality," N.J.S.A. 26:2H-128(b)(3); to "be treated with respect, courtesy, consideration, and dignity," N.J.S.A. 26:2H-128(b)(4); to "make choices with respect to services and lifestyle," N.J.S.A. 26:2H-128(b)(5); to "personalized services and care," N.J.S.A. 26:2H-128(b)(1); to "a level of care and services that address the resident's changing physical and psychosocial status," N.J.S.A. 26:2H-128(b)(2); and to "retain and exercise all constitutional, civil, and legal rights to which the resident is entitled by law," N.J.S.A. 26:2H-128(b)(39).

In so many words, plaintiff and amicus New Jersey Association for Justice argue that we should be responsive to the thrust of these statutes and the Legislature's establishment of these rights in determining whether or how the

common law should provide remedies to vindicate these interests. This process is nothing new. Indeed, it presents an age-old question, as revealed by what Justice Holmes had to say in similar circumstances while riding the circuit more than a century ago:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.
>
> [Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).]

Justice Cardozo later restated this concept, asserting it would be "a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied"; "[t]here are times," Justice Cardozo observed, "when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51 (1937).

Our approach toward the common law's recognition of new causes of action in the face of legislative recognition of an important policy but silence in

the recognition of remedies is not dissimilar. See Jarrell v. Kaul, 223 N.J. 294, 307-08 (2015); In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 40-41 (1987); Renz v. Penn Central Corp., 87 N.J. 437, 456 (1981); Haynes v. First Nat'l State Bank, 87 N.J. 163, 188-89 (1981); Lally v. Copygraphics, 85 N.J. 668, 670-71 (1981), aff'g, 173 N.J. Super. 162 (App. Div. 1980); Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 137 (App. Div. 2003).

And so, the Legislature's silence about the right of assisted living residents to bring an action for enforcement of the statutory bill of rights does not, as Care One argues, end the inquiry. It may, in fact, require no great leap – considering the Legislature's recognition of a public interest in the care and protection of the elderly, particularly those lacking the ability to voice their complaints – to recognize an implied private cause of action for a breach of the assisted living resident's bill of rights.

In support of such a theory, it would be sensible to view the statutory bill of rights as establishing, as it states, "rights," not just, as Care One would apparently have it, mere "suggestions" that a facility would be permitted to either comply with or not without fear of a resident's pursuit of a civil remedy.[3]

[3] We are mindful that a facility's failure to abide by the bill of rights may affect its licensing. See, e.g., Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 548 n.5 (App. Div. 2016). Additionally, we need not – and therefore do not –

The very use of the phrase "bill of rights" – an allusion to the first ten amendments to our federal constitution that limit or prohibit government intrusion into individual liberties – conjures up for the American mind more than mere suggestions. Considering this broad creation of rights – both great and small – it would not be inconsistent with the approach of the common law that a private cause of action be recognized for a violation of those rights.

B

Looking at the issue as a matter of statutory interpretation, we are counseled to read statutes sensibly in light of their surroundings and other similar or even unrelated legislation. See, e.g., Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 175-76 (2006). The former highest court of this State once said, "[a] statute must be construed with reference to the entire system of which it forms a part[;] . . . statutes upon cognate subjects may be considered in arriving at the legislative intention, though not strictly in pari materia." Modern Indus. Bank v. Taub, 134 N.J.L. 260, 263 (E. & A. 1946). See also 2B Norman J. Singer, Sutherland Statutory Construction, § 53:3 (7th ed. 2012) (recognizing that "the interpretation of a doubtful statute may be influenced by the language

---

determine whether the Department of Health may sue for the enforcement of this bill of rights.

of other statutes which are not specifically related, but which apply to similar persons, things, or relationships").

The Legislature has repeatedly demonstrated its ability to create private causes of action and, in this same general context, has chosen to expressly declare what types of facilities that house the elderly and infirm may be the subject of a private cause of action for breaching applicable bills of rights and appended regulations. It would not be outside our general approach toward statutory interpretation to view the Legislature's silence about private causes of action against assisted living residences as an ambiguity and to reach a conclusion that the failure to authorize a private cause of action might have been an oversight. In this way, a private cause of action could be found by a logical implication of what the legislation meant, see 2B Sutherland Statutory Construction, § 55:3 (recognizing that "[i]f a statute creates a right but does not indicate expressly the remedy, one is usually implied, and courts may resort to the common law"), there being no other evidence that the Legislature intended to treat assisted living residences in a manner different from how it had treated nursing homes, dementia care homes, residential health care facilities, rooming houses, and boarding houses.

C

We are persuaded against either concluding the common law should recognize a private cause of action or that the Legislature intended to include a private cause of action in its enactments concerning assisted living residences. In proceeding in either direction we cannot ignore the legislation concerning other similar facilities that we have already mentioned. As to each of these types of facilities, the Legislature expressly declared both a bill of rights and a private cause of action. It was only when it considered assisted living residences that the Legislature enacted a bill of rights – nine years later – and, in doing so, said nothing about whether it intended to create a private cause of action. Moreover, having departed from the template previously employed in regulating other facilities, the Legislature later felt the need to expressly declare a private cause of action when regulating dementia homes. We find its one departure from the norm to be telling.

When considering the meaning of legislation, we assume the Legislature is "thoroughly conversant with its own legislation and the judicial construction of its statutes." Brewer v. Porch, 53 N.J. 167, 174 (1969); see also Lozano v. Frank DeLuca Constr., 178 N.J. 513, 532 (2004). As the examples we have provided reveal, the Legislature certainly knows how to authorize private causes

of action when it desires to do so. We, thus, find meaning when the Legislature acts differently from what it normally does in similar settings. See State v. Harper, 229 N.J. 228, 238 (2017). Like the dog that didn't bark in the night, we are satisfied that by not expressly declaring a private cause of action for assisted living residents, the Legislature consciously chose not to create one.

This interpretation counsels against the adoption into the common law of a private cause of action for a breach of N.J.S.A. 26:2H-128. Even though there is no doubt the Legislature has recognized and acted on a strong public interest in protecting the elderly and infirm, and even though that legislative recognition infuses the common law with "a new generative impulse," Van Beeck, 300 U.S. at 350-51, we should nevertheless tread lightly before pushing the common law to the recognition of such a new cause of action. In this regard, we must weigh what we have found to be the Legislature's presumably conscious decision not to recognize this new cause of action. That circumstance counsels in favor of a more modest approach.

Analytically, our courts will recognize an implied private cause of action emanating from legislation by employing a three-part test that asks:

> whether the plaintiff is "one of the class for whose especial benefit the statute was enacted"; whether there is any evidence that the Legislature intended to create a private cause of action under the statute; and whether

> implication of a private cause of action in this case would be "consistent with the underlying purposes of the legislative scheme."
>
> [State Comm'n of Investigation, 108 N.J. at 41 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)); see also Jarrell, 223 N.J. at 307.]

In employing this test here, there is no doubt that decedent falls within the class of individuals the bill of rights was intended to protect. It also seems likely that the implication of a cause of action would be consistent with the reason the bill of rights was enacted. It is the second part of the test, however, that calls into doubt the soundness of our recognizing a private cause of action.

The Legislature is, as we have already said, presumed to be cognizant of its existing related laws designed to protect the rights of the elderly and infirm. But, unlike other circumstances where private causes of action have been recognized despite legislative silence, the Legislature would be familiar with the fact that someone like decedent would be entitled to press a negligence claim against an assisted living residence which has failed to provide proper care. Additionally, many of the rights delineated in the statutory bill of rights already present judicially cognizable causes of action without the creation of a private cause of action for all those enumerated. See, e.g., N.J.S.A. 26:2H-128(b)(16) (the right to "be free from physical and mental abuse and neglect").

To be sure, those individuals who are benefited by the statutory bill of rights likely lack the ability to voice their concerns about their treatment and are dependent on others for the very reason they reside in these types of facilities. But we simply cannot ignore that the Legislature was appreciative of that fact and chose not to expressly recognize a private cause of action despite its contrary approach in enacting other similar legislation. In short, we find absent the second part of the applicable three-part test, and in the final analysis, we reject the argument that the common law should recognize a private cause of action in this instance.[4]

[4] It may be that the interest in our recognition of a private cause of action is generated by the statutory authorization – accompanied in the other legislation we have referred to – of fee-shifting in favor of prevailing plaintiffs. Even if we were to recognize a private cause of action here, we could not take the further step of declaring its incorporation of a prevailing plaintiff's right to an award of fees. Our jurisprudence has long remained committed to the American rule that litigants bear their own legal fees, Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 404 (2009), and the Supreme Court has recognized a "strong public policy against shifting counsel fees," Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). A party may be compelled to pay the legal fees of another only: in those types of cases described by rule, R. 4:42-9(a); when the parties contractually agree; in other cases falling with recognized and "carefully limited" exceptions from the American rule, In re Estate of Vayda, 184 N.J. 115, 121 (2005); and when authorized by statute, R. 4:42-9(a)(8). While the Supreme Court may expand the scope of these American rule exceptions – through either its rule-making authority or by decisional law that expands the additional fonts for such an award recognized in cases like Saffer v. Willoughby, 143 N.J. 256, 271 (1996) – other courts cannot.

The common law may spread to places where the Legislature has not ventured but not without great and careful consideration for the wisdom of the extension, lest before long courts and legislative bodies find themselves on divergent and conflicting paths. If today's judgment is overly cautious or mistaken about the legislative intent, the Legislature is in the best position to correct or alter our course. See Plastic Surgery Ctr., P.A. v. Malouf Chevrolet-Cadillac, Inc., 241 N.J. 112, 113 (2020). Until then, we conclude there is no private cause of action for the breach of the assisted living facility's bill of rights contained in N.J.S.A. 26:2H-128(b).

IV

The order states that the grant of Care One's motion for partial summary judgment is "subject to proof at trial." The meaning of this is revealed by the judge's oral decision in which, in sum or substance, he distinguished between assisted living residents who suffer from Alzheimer's, dementia or some other similar malady, and those who do not. Those in the former class, in the judge's view, possess a private cause of action; the latter does not. We disagree. There is nothing in the legislation to reveal an intent to create separate classes of assisted living residents.

The judge's oral decision also suggests that if plaintiff can prove Care One 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. Care One's facility is governed by the license issued to it as an assisted living residence. Whether, during decedent's stay there, Care One was operating something other than that should be determined only by the Department of Health, which possesses special expertise in these matters, not by either the trial judge or a jury. See Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 269 n.1 (1978). In a circumstance like this, a court must determine whether the agency has exclusive or primary jurisdiction. Muise v. GPU, Inc., 322 N.J. Super. 140, 158-59 (App. Div. 2000). When the claim itself falls within the agency's exclusive jurisdiction, it is subject to dismissal because of the failure to exhaust administrative remedies. But, when a court has jurisdiction over the claim and a pivotal aspect presents a question falling within an agency's expertise, a court will retain jurisdiction, stay the action, and allow for the agency's determination of that aspect. See generally Curzi v. Raub, 415 N.J. Super. 1, 20-21 (App. Div. 2010).

In this case we need not decide whether it is exclusive or primary jurisdiction that the Department of Health would possess over a claim that Care

One acted other than as licensed because the claim should not proceed in either event. If the former, dismissal would follow. And, although a finding of primary jurisdiction would not require dismissal, we are satisfied it is too late here to allow for a stay and a time-consuming detour into an administrative proceeding.

Our reason for reaching this conclusion dovetails with Care One's last argument in which it argued we should bar plaintiff's bill-of-rights claim because it was not asserted until an extremely late point in the litigation, indeed, well after plaintiff said in response to an earlier summary judgment motion that no such claim had been asserted. Although we reject Care One's argument that the claim is barred by the applicable statute of limitations,[5] plaintiff's delay in its pursuit of such a claim justifies our conclusion that this nearly four-year-old litigation should not be further delayed.

* * *

[5] Care One's statute-of-limitations argument is without merit because the original complaint was timely filed and a bill-of-rights claim would relate back to the time of the original filing because it arises from the same transactions or occurrences that gave rise to the allegations in the original complaint. See R. 4:9-3; Harr v. Allstate Ins. Co., 54 N.J. 287, 299-300 (1969).

The trial court's December 2, 2020 order is reversed. We remand for further proceedings consistent with this opinion but do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1753-19

HAZEL PATRICK, Administrator Ad Prosequendum of the ESTATE OF ALFONZER PATRICK, deceased,

Plaintiff-Appellant,

v.

ELMWOOD EVESHAM ASSOCIATES, LLC, d/b/a CARE ONE AT EVESHAM, CARE ONE, LLC, HEALTHBRIDGE MANAGEMENT, LLC, KESSLER INSTITUTE FOR REHABILITATION, d/b/a MARLTON REHABILITATION HOSPITAL, VIRTUA MEMORIAL HOSPITAL MT. HOLLY, VIRTUA MEMORIAL HOSPITAL, VIRTUA MARLTON HOSPITAL, and VIRTUA HEALTH, INC.,

Defendants-Respondents.

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Argued September 15, 2021 – Decided January 6, 2022

Before Judges Hoffman, Geiger, and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2764-17.

Anton Tupa argued the cause for appellant (Swartz Culleton, PC, attorneys; Christopher J. Culleton, on the briefs).

Anthony Cocca argued the cause for respondents Elmwood Evesham Associates, LLC, d/b/a Care One at Evesham, Care One, LLC, and Healthbridge Management, LLC (Cocca & Cutinello, LLP, attorneys; Anthony Cocca and Katelyn E. Cutinello, of counsel and on the brief).

Brian D. Pagano argued the cause for respondents Kessler Institute for Rehabilitation and 92 Brick Road Operating Company, LLC, d/b/a Marlton Rehabilitation Hospital (Burns White, LLC, attorneys; Brian D. Pagano, of counsel and on the brief; Meghan E. Sibiski, on the brief).

Kathryn A. Rivera argued the cause for respondents Virtua Health, Inc., Virtua Memorial Hospital Burlington County, Inc., and Vitrtua-West Jersey Health System, Inc. (Parker McCay, PA, attorneys; Kathryn A. Rivera, of counsel and on the brief).

PER CURIAM

In this medical negligence case, plaintiff appeals from trial court orders that collectively resulted in the dismissal of plaintiff's claims against defendants. Following our review of the record and applicable law, we vacate the trial court orders that denied plaintiff's motion to extend discovery to allow for a physician

expert to opine on causation and granted defendants' motions for summary judgment.

I.

On January 8, 2016, seventy-nine-year-old Alfonzer Patrick (decedent) underwent elective spine surgery at defendant Virtua Memorial Hospital of Burlington County (Virtua). Decedent had a lengthy medical history and numerous preexisting conditions, including atrial fibrillation, hyperlipidemia, chronic obstructive pulmonary disease, obstructive sleep apnea, coronary artery disease, gastroesophageal reflux disease, congestive heart failure, peripheral vascular disease, hyperglycemia, morbid obesity, and pulmonary hypertension. Decedent required surgery to address severe cervical stenosis and myelopathy that developed over the previous eight months, limiting his ability to walk and use his arms.

Following his surgery, decedent was admitted to Virtua's intensive care unit (ICU). On January 9, ICU nurses established decedent's plan of care, which identified the risk of a pressure ulcer as a problem. To address that issue, a pressure ulcer risk assessment was ordered every twelve hours, yielding scores of high risk to mild risk. ICU records show decedent was turned and positioned every two hours while in the ICU, but the records after decedent left the ICU

did not document turning and repositioning every two hours. ICU nurses noted four pink areas described as scarring from old pressure ulcers; however, decedent's son and wife (plaintiff) testified at deposition that decedent never had any wounds to his buttocks or sacrum at any time prior to this hospitalization.

On January 14, 2016, decedent was moved from the ICU to a regular hospital bed; the next day, Virtua discharged him to defendant Marlton Rehabilitation Hospital (Marlton Rehab). Virtua's discharge instructions and transfer form did not list any skin problems for decedent; in contrast, the admission records for Marlton Rehab indicated decedent had an open wound on his right buttock. On January 19, a nurse noted that decedent had a stage II pressure sore. This pressure sore was again documented on January 27, but with an increase in size.

While at Marlton Rehab, decedent experienced worsening respiratory problems; as a result, on February 6, 2016, he was transported to the emergency room at Virtua and then admitted to the ICU for "chronic respiratory failure, sepsis, atrial fibrillation, and acute renal failure syndrome, as well as MRSA pneumonia." The following day, an examination revealed "a stage II to stage III sacral buttock decubitus," with a nurse describing decedent "as having a boil

which is healed on his leg and a stage III-IV pressure ulcer." Another nurse documented two stage III pressure injuries.

Decedent continued to experience respiratory issues and because of his continued medical needs, on February 19, 2016, he was transferred to defendant Care One of Evesham (Care One), a skilled nursing facility, for further rehabilitation. Upon admission, decedent's sacral ulcers were documented at stage II. In March, these wounds grew and merged.

On March 12, 2016, decedent was discharged to his home, where Virtua Home Care continued to provide care. Throughout the month, decedent's pressure injury grew and worsened. On March 31, decedent reported respiratory difficulty, increased weakness, and "intolerable pain in his buttocks and hips." Decedent returned to Virtua. On April 4, 2016, decedent "underwent excisional debridement of the sacral decubitus and pulse irrigation of the wound . . . ." Thereafter, the pressure injury was larger and deemed stage IV.

Decedent's respiratory issues continued, and on April 17, 2016, decedent went into cardiac arrest, requiring resuscitation and intubation. Thereafter, decedent's family opted for comfort care and changed his status to do-not-resuscitate. He died on April 19 and his death certificate listed "acute [and] chronic respiratory failure" as the cause of death.

In 2017, plaintiff filed a complaint against defendants alleging decedent suffered injuries "caused by the negligence and carelessness of the [d]efendants' respective nursing and administrative staffs, and these injuries caused and/or contributed to his death." The complaint included identical counts against each defendant, asserting survival and wrongful death claims "[a]s a direct and proximate cause of" defendants' deficient care; in addition, plaintiff asserted a claim against Care One alleging a violation of the Nursing Home Residents' Bill of Rights Act, N.J.S.A. 30:13-5 to -11.

Discovery ensued; ultimately, the discovery period lasted 879 days, including five extensions. On August 16, 2019, the trial court entered an Order Extending Discovery, which established the following schedule for the completion of discovery:

> 1. Plaintiff's expert reports shall be served no later than September 16, 2019.
>
> 2. Defendants' expert reports shall be served no later than November 18, 2019.
>
> 3. All expert depositions shall be completed by January 3, 2020.
>
> 4. Discovery will end on January 17, 2020.
>
> 5. Trial is adjourned to March 2, 2020, to allow time for the filing of all dispositive motions.

On July 30, 2019, plaintiff served an expert report from Audrey M. Lalli, R.N. A registered nurse for over thirty years, Nurse Lalli's resume lists her extensive experience in geriatric care, including pressure injury prevention and treatment, as well as administrative experience including case management, care plan development, and nurse education and supervision.

In her report, Nurse Lalli opined that decedent "did not receive an acceptable level of nursing care and treatment from the nursing staff at Virtua Hospital, Marlton Rehab and Care One." She stated that decedent "had multiple risk factors for skin breakdown," but "[e]ven with these risks, if attention had been paid particularly to proper assessment and pressure relief, turning and a specialty mattress and sitting surface, monitoring more closely of nutrition, and controlling moisture, this pressure ulcer was preventable and could have been reversed in the early stages." Nurse Lalli also cited the nursing staffs' lack of communication, incorrect assessment of the pressure injury, and failure to implement programming to address incontinency as deficient care.

Nurse Lalli concluded the treating nurses' failure to provide care worsened decedent's wound, which "caused him intolerable pain and limited his ability to 'tolerate good positioning' and have 'active participation in therapeutic interventions."' She explained that defendants' substandard nursing care led to

the surgery performed on the wound, and such "activity ultimately affects a patient's respiratory status and contributes to a decline in that function and contributed[1] to his eventual death."

On October 23 and 31, 2019, defendants filed motions to bar Nurse Lalli from rendering opinions on medical causation. On November 8, 2019, the trial court heard oral argument on the defendants' motions to bar plaintiff's expert, Nurse Lalli, from offering opinions on causation. At the start of the hearing, the motion judge clarified that "[t]he defense is not arguing that the plaintiff's nursing expert can't express opinions on deviation. They're arguing that the nurse can't express opinions on proximate cause to damages." Thus, the judge framed the issue before the court as follows: "[I]s a nurse qualified to give any type of proximate cause opinion[?] And to make it worse in this case, it's not an obvious one."

Plaintiff argued that N.J.R.E. 702 allows Nurse Lalli's to use her specialized knowledge as a registered nurse with extensive nursing education

[1] While Nurse Lalli's report clearly addressed issues of causation, defendants did not advise plaintiff's attorney of any objection to her expression of causation opinions until they filed their motions to bar Nurse Lalli's testimony, in late October 2019, five weeks after the deadline for plaintiff's expert reports. Plaintiff served Nurse Lalli's expert report at the end of July 2019, six weeks before the deadline for plaintiff's expert reports.

and experience, including experience in geriatric care, to assist the jury to understand that defendants' substandard nursing care caused decedent's problems which led to his death.

The defense countered that New Jersey's statutes and regulations governing nursing practice prohibit nurses from opining on causation, diagnoses, and underlying causes of conditions. Thus, they argued that Nurse Lalli could not offer an opinion on the effect of nursing care on decedent's pressure injury and health since it would pertain to underlying cause and diagnosis, especially in light of decedent's numerous comorbidities.

The motion judge agreed with defendants, finding it inappropriate for a nurse to provide proximate cause testimony in this case, considering decedent's complicated medical history involving multiple serious comorbidities. The judge acknowledged "[t]here may be cases where a nurse is qualified to express an opinion that hits on proximate cause[,]" but "[t]his case [wa]s a very bad case to try to shoehorn that in." In short, the judge ruled that Nurse Lalli was not qualified "to give the punch line to the jury that these sores contributed to the decedent's death."

Plaintiff argued that Nurse Lalli should at least be permitted to testify that the nurses' breached duty of care caused decedent's pressure injury, but the judge

rejected that argument, concluding that only a doctor could parse what exactly was caused by the confluence of defendants' alleged substandard care and decedent's poor medical condition. Thus, the judge barred Nurse Lalli from testifying to "any and all causation opinions." Still, the judge stated that Nurse Lalli could testify about breach of care and stated, "[s]he may very well be qualified to testify about these sores and what potential impacts they have in terms of patient mobility."

At the conclusion of the hearing, the motion judge memorialized his decision by entering orders granting the motions to bar Nurse Lalli "from proffering any and all causation opinions." Based upon these orders, within a few days, each defendant filed a motion for summary judgment. On November 20, 2019, plaintiff filed a motion for reconsideration of the orders precluding Nurse Lalli from proffering any causation opinions, along with a motion to extend expert discovery. On November 25, plaintiff served defendants with a report and curriculum vitae from a proposed physician expert, Dr. Richard Stefanacci, D.O., and a certification of due diligence from plaintiff's counsel. In the certification, plaintiff's counsel set forth the following explanation for not providing a report from Dr. Stefanacci sooner:

> Plaintiff was unable to obtain the report of Dr. Stefanacci prior to the September 16, 2019 . . .

> expert[-]report deadline because, prior to November 8, 2019, plaintiff's counsel was unable to anticipate that the [c]ourt would require plaintiff to produce a physician expert to establish prima facie causation with respect to decedent's pressure wounds. Plaintiff did not anticipate the court's ruling because in the scores of New Jersey pressure wound cases that counsel has handled on behalf of patients and their families, no court had barred the plaintiff nursing care expert from providing opinions on the cause of the injured patient's pressure wounds, or ruled that a physician opinion was required to establish prima facie cause of a pressure wound, and no New Jersey appellate court has ruled that proof concerning pressure wound causation requires a medical opinion to establish a prima facie case.

On December 6, 2019, the motion judge heard oral argument on these motions. The judge first denied plaintiff's motion for the court to reconsider its earlier decision barring Nurse Lalli from rendering causation opinions. The judge noted the motion focused on unpublished opinions, and ruled that it would be inappropriate for him to reverse himself based on non-authoritative cases that he was prohibited from citing by Rule 1:36-3. Citing N.J.S.A. 45:11-23(b) and this court's opinion in One Marlin Rifle, 319 N.J. Super. 359 (App. Div. 1999),[2]

[2] In One Marlin Rifle, we held that a wife, who was a certified clinical nurse specialist and an advanced practice nurse in mental health and psychiatric nursing, was not qualified to render an expert opinion "with respect to a medical diagnosis of her former husband's mental condition[,]" at a gun forfeiture hearing. Id. at 368.

the judge reiterated that while nurses may identify and treat pressure injuries, they cannot opine as to their cause, as that involves a medical diagnosis of a disease process, the breakdown of skin.

Next, the judge denied plaintiff's motion to extend discovery to allow plaintiff to include the expert opinion of Dr. Stefanacci. Citing Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), the judge found there were no exceptional circumstances justifying the extension of discovery because plaintiff's counsel should have known a medical expert was necessary to establish proximate cause in this case. Since plaintiff had already submitted the report of her proposed physician expert with her motion papers, plaintiff argued there would be no need to move the trial date; however, the judge rejected this argument, reasoning the defense would necessarily need time to respond to the new expert's report.

Finally, the judge addressed the summary judgment motions. Since plaintiff now had "no expert testimony on the issue of proximate cause to anything," the judge granted defendants' summary judgment motions.

This appeal followed, with plaintiff presenting the following points of argument:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS TO BAR

PLAINTIFF'S EXPERT NURSE LALLI FROM OPINING A[S] TO CAUSATION.

II. THE TRIAL COURT ERRED IN REFUSING TO GRANT RECONSIDERATION OF ITS ORDERS GRANTING THE MOTIONS TO BAR PLAINTIFF'S EXPERT NURSE LALLI FROM OPINING AS TO CAUSATION; AS WELL AS ERRED IN DENYING PLAINTIFF'S MOTION TO EXTEND EXPERT DISCOVERY.

III. IN THE ALTERNATIVE, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT.

II.

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) (internal quotation marks and citation omitted). Such expert testimony "is permitted to 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" Ibid. (quoting N.J.R.E. 702). Further, an expert must be qualified to testify, meaning the expert must have the requisite "knowledge, skill, experience, training, or education . . . ." N.J.R.E. 702.

"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 (2015)

(citation omitted). "[W]e apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Id., 221 N.J. at 53 (second alteration in original) (citation and internal quotation marks omitted). The trial judge's determination will not be disturbed "unless a clear abuse of discretion appears." State v. Chatman, 156 N.J. Super. 35, 40 (App. Div. 1978) (quoting Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 411 (1960)); however, we accord no such discretion to a ruling that is "inconsistent with applicable law." Pressler & Verniero, Current N.J. Court Rules, cmt 4.7 on R. 2:10-2 (2022).

Moreover, an expert witness's conclusions can be based on his or her qualifications and personal experience, without citation to academic literature. State v. Townsend, 186 N.J. 473, 495 (2006) (allowing opinion testimony based on the expert's "education, training, and most importantly, her experience"); Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002) ("Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience."). "The requirements for expert qualifications are in the disjunctive. The requisite knowledge can be based on either knowledge, training

or experience." Bellardini v. Krikorian, 222 N.J. Super. 457, 463 (App. Div. 1988).

III.

On appeal, plaintiff argues the trial judge erred by barring Nurse Lalli's causation opinions, asserting her extensive background, training, and experience qualified her to render opinion testimony on the issue of causation, including decedent's death. Plaintiff contends the judge committed further error when he denied plaintiff's motion to extend discovery to allow for a physician expert to opine on causation and granted defendants' motions for summary judgment. We address these arguments in turn.

A.

Given the complexity of the medical causation in this case, we cannot conclude the motion judge clearly abused his discretion in concluding Nurse Lalli was not qualified to render the requisite opinion on causation, notwithstanding her extensive experience. We agree with the motion judge that

> [T]here are nurses out there, including perhaps Nurse Lalli, that in a real world sense may very well be able to competently determine a lot of proximate cause issues. But it seems to me, to the extent that the law encourages bright line tests, that everybody can understand and comply with, this is a very bad vehicle to argue that a nurse should be giving any proximate cause testimony.

. . . .

> There may be cases where a nurse is qualified to express an opinion that hits on proximate cause. This case is a very bad case to try to shoehorn that in.
>
> This patient had a complicated medical history. He was elderly, he was very sick, and he had a somewhat complicated history after the first cervical [surgery]. It's not like he had the surgery on Monday and died on Tuesday. It was months later[,] after three separate hospitalizations . . . .

We conclude the decision to bar the causation testimony of Nurse Lalli under N.J.R.E. 702 did not constitute a clear mistaken exercise of discretion, in light of "the claim involved, the specific allegations made, and the opinions that the expert propose[d] to offer at trial." Garden Howe Urban Renewal Assocs., L.L.C. v. HACBM Architects Eng'rs Planners, L.L.C., 439 N.J. Super. 446, 456 (App. Div. 2015). We therefore affirm the judge's orders barring Nurse Lalli from providing causation opinions at trial.

B.

Plaintiff next contends the motion judge committed reversible error when he denied plaintiff's motion to extend plaintiff's expert-witness deadline to allow for a physician expert to render the requisite opinion on causation. This argument has merit.

Our system of justice favors the fair disposition of cases on their merits. See Viviano v. CBS, Inc., 101 N.J. 538, 547 (1986). On the other hand, the system also strives to make litigation "expeditious and efficient." Leitner v. Toms River Reg'l Sch., 392 N.J. Super. 80, 91 (App. Div. 2007). The Rules of Court are designed to achieve, among other goals, certainty in trial dates. Ibid. As we have recognized, however, exceptional circumstances can arise, where trial dates or other litigation deadlines should be extended in the interests of justice and to avoid punishing litigants unfairly. Id. at 91-94. The fair balance between fairness and trial-date certainty is reflected in Rule 4:24-1(c) governing extensions of discovery, which provides in pertinent part: "No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown."

To demonstrate exceptional circumstances, we generally require a showing that the attorney diligently pursued the information sought during the discovery period but was frustrated from obtaining the discovery by circumstances largely beyond counsel's control. Bender v. Adelson, 187 N.J. 411, 429 (2006). Specifically, the moving party must show: (1) why discovery was incomplete and the diligence in pursuing discovery; (2) the additional discovery is essential; (3) an explanation for why an extension was not sought

within the original discovery period; and (4) the circumstances were beyond the party's and counsel's control. Garden Howe Urban Renewal Assocs., LLC, 439 N.J. Super. at 460.

As noted, because a trial date had already been set, plaintiffs were required to demonstrate "exceptional circumstances." At oral argument, it initially appeared that the judge was inclined to grant plaintiff's motion, based on these comments:

> I don't really mind reopening the case and postponing the trial. The earth is not [going to] spin off its axis. It's not like your decision to go with Nurse Lalli was malpractice and incompetent. You're representing to me that this is the first time you've ever had a judge disqualify the nurse on the issue of proximate cause. If that's true, then I certainly can't blame you . . .

After stating that he was inclined to grant plaintiff's motion and reopen discovery, the judge added, "I don't think the defense is prejudiced in the types of prejudice that normally bars reopening of discovery. I'll give them . . . ample time to get a response expert if they want. If [defendants] want to depose Dr. [Stefanacci], [plaintiff will] have to pay for it . . . ."

Notwithstanding these comments, the judge ultimately denied the motion to extend the deadline for plaintiff's experts to include Dr. Stefanacci, finding

plaintiff had not demonstrated exceptional circumstances justifying a further extension of discovery, including the deadline for serving expert reports.

In our view, the motion judge mistakenly exercised his discretion by refusing to extend the time-deadline for plaintiff's expert reports to include the report of Dr. Stefanacci. Plaintiff was diligent in pursuing discovery, and served an expert witness report addressing negligence and causation from Nurse Lalli, six weeks before the deadline for the report. Rather than inform plaintiff of their objections to the causation opinions included in the report, defendants waited until five weeks after plaintiff's expert-report deadline to file their motions to bar Nurse Lalli's testimony.

In Mellwig v. Kebalo, 264 N.J. Super. 168, 171 (App. Div. 1993), we held that "[i]t is inappropriate to treat objections to de bene esse deposition testimony as concealed weapons to brandish at a future trial." In the context of this case, we similarly find it inappropriate to treat unannounced objections to the competency of an expert witness as concealed weapons to brandish at future motions to preclude the witness from offering critical testimony, particularly when the filing of the motions appear to be tactically delayed. When motions to preclude expert testimony are pocketed until after the discovery deadline has passed, the trial court has less options available to "fashion a fair remedy

suggested by all of the circumstances, including the amount of time remaining before trial." Id. at 172.

Moreover, plaintiff's counsel provided a reasonable explanation for not having provided a report from Dr. Stefanacci sooner, based on his own experience "in the scores of New Jersey pressure wound cases" that he had handled. In none of those cases did a court bar his nursing care expert from providing opinions on causation of pressure wounds, or rule that a physician opinion was required to establish causation; in addition, no New Jersey appellate court had ruled that proof concerning pressure wound causation required a medical opinion to establish a prima facie case. Nothing in the record disputes the experience recounted by plaintiff's counsel with these types of cases. We therefore conclude that, under the circumstances, the discovery extension should have been granted.

Assuming the judge correctly decided that all of Nurse Lalli's causation opinions should be barred, as we have ruled, the judge mistakenly exercised his discretion when he denied plaintiff leave to proceed with Dr. Stefanacci as a causation expert. Considering the unsettled law in this area and the prior experience of plaintiff's counsel, along with the fact that defendants did not move to bar the causation opinions of Nurse Lalli until five weeks after the

discovery the deadline for plaintiff's expert reports, we are satisfied that plaintiff presented exceptional circumstances that warranted granting the requested extension of time. We further note that the motion judge could have granted plaintiff's motion to extend expert discovery without moving the trial date since defendants had the report of Dr. Stefanacci in hand and the scheduled trial date was almost three months way.

On remand, the trial court shall conduct a case management conference within thirty days and then enter an order allowing plaintiff to serve the expert report of Dr Stefanacci as within time, and a final management order establishing new deadlines for the completion of discovery and setting a new trial date.

Affirmed in part, vacated in part, and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

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CAM-L-000507-17 11/08/2019 8:55:52 AM Pg 1 of 3 Trans ID: LCV20192039095

RICHARD J. TALBOT, ESQUIRE ID#: 040771993
LAW OFFICE OF ANDREW A. BALLERINI
Attorney At Law
Cherry Tree Corporate Center
535 Route 38, Suite 328
Cherry Hill, New Jersey 08002
(856) 665-7140
Attorney for Plaintiff

JOSEPH L. CAPANO, Executor of the Estate of ANDREW P. CAPANO,	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION
Plaintiff,	: CAMDEN COUNTY
CARE ONE AT EVESHAM, ELMWOOD EVESHAM ASSOCIATES, LLC, JOSEPH MINA, ADMINISTRATOR, CARE ONE MANAGEMENT, LLC, JOHN/JANE DOE ADMINISTRATOR 1-100; JOHN/JANE DOE DIRECTOR OF NURSING 1-100; JOHN/JANE DOE NURSE 1-100; JOHN/JANE DOE CNA 1-10; JOHN/JANE DOE MANAGEMENT COMPANY 1-100; JOHN/JANE DOE MEDICAL DIRECTOR 1-100; JOHN/JANE DOES 1-100; JOHN/JANE DOE CORPORATION 1-100; individually, jointly, severally, and/or in the alternative,	: DOCKET NO. CAM-L-507-17 : Civil Action : : : ORDER ENTERING FINAL : JUDGMENT WITH ATTORNEY'S : FEES AND COSTS, AS WELL AS : PRE-JUDGMENT AND POST- : JUDGMENT INTEREST UNDER
Defendants.	: R.4:42-11

4

THIS MATTER brought by Richard J. Talbot, Esquire, attorney for the Plaintiff, Joseph L. Capano, Executor of the Estate of Andrew P. Capano, deceased, on a Motion Entering Final Judgment with Attorney's Fees and Costs, as well as Pre-Judgment and Post-Judgment Interest Under R.4:42-11, and Anthony Cocca, Esquire, counsel for Defendant, Care One at Evesham and Elmwood Evesham Associates, LLC, appearing, with a Jury Verdict of $200,000.00 for nursing home resident's violations of rights and negligence being awarded on September 5, 2019, with the Court entering an Order on October 25, 2019, awarding attorney's fees in the amount of $123,161.80 and costs of $49,264.88 in favor of the Plaintiff, representing a total of $372,425.55 before interest, Pre-Judgment Interest in the amount of $29,447.51 is hereby Ordered such that a total Judgment is hereby entered in favor of Joseph L. Capano, Executor of the Estate of Andrew P. Capano against Defendants, Care One at Evesham and Elmwood Evesham Associates, LLC., in the amount of $401,873.06.

IT IS HEREBY ORDERED that Final Judgment is Ordered in this case in the amount of $401,873.06 in favor of Plaintiff, Joseph L. Capano, Executor of the Estate of Andrew P. Capano, against Defendants, Care One At Evesham and Elmwood Evesham Associates, LLC.

Moody v. Voorhees Care & Rehab. Ctr.

Superior Court of New Jersey, Appellate Division

November 9, 2020, Argued; February 17, 2021, Decided

DOCKET NO. A-5561-18

Reporter
2021 N.J. Super. Unpub. LEXIS 267 *; 2021 WL 608903

DOROTHY L. MOODY, by and through her power of attorney, DOROTHY GATEWOOD-GABRIEL, Plaintiff-Respondent,

v.

THE VOORHEES CARE AND REHABILITATION CENTER and THE LAKEWOOD OF VOORHEES OPERATOR, LLC, Defendants-Appellants, and GINA KIRCHOFF, administrator, Defendant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Camden County, *Docket No*. L-3643-16.

Moody v. Voorhees Care & Rehab. Ctr., 2019 N.J. Super. Unpub. LEXIS 3442 (Law Div., Aug. 14, 2019)

Core Terms

defendants', nursing home, trial judge, blood sugar, discovery, dignity, resident, nurses, rights, standard of care, blood, regulations, expert testimony, end date, living environment, defense counsel, individuality, testifying, morning, decent, safe, certification, lab, instruct a jury, circumstances, violations, notice of appeal, expert report, expertise, patient's

Counsel: Susan J. Wall argued the cause for appellants (Gibley and McWilliams, PC, attorneys; Susan J. Wall, on the briefs).

Richard J. Talbot argued the cause for respondent (Law Office of Andrew A. Ballerini and Foley & Foley, attorneys; Richard J. Talbot, of counsel; Sherry L. Foley and Timothy J. Foley, on the brief).

Anthony Cocca argued the cause for amicus curiae New Jersey Defense Association (Cocca & Cutinello, LLP, attorneys; Anthony Cocca and Katelyn E. Cutinello, of counsel and on the brief).

Judges: Before Judges Fasciale and Rothstadt.

Opinion

PER CURIAM

Defendants the Voorhees Care and Rehabilitation Center and the Lakewood of Voorhees Operator, LLC[1] appeal from the Law Division's August 14, 2019 final judgment that awarded $349,687.45 to plaintiff Dorothy L. Moody, through her power of attorney, Dorothy Gatewood-Gabriel. The trial judge entered the judgment based upon a jury's determination that defendants were negligent in their care of plaintiff and that they violated the Nursing Home Responsibilities and Residents' Rights Act (NHA), *N.J.S.A. 30:13-1 to -17*. On appeal, defendants and amicus curiae, the New Jersey Defense [*2] Association (NJDA), argue that the trial judge improperly barred defendant's report and his testimony, that plaintiff's expert impermissibly testified about the NHA, was not qualified to testify as to a standard of care for nurses, and that it was improper for the trial judge to have denied defendants' motion for judgment notwithstanding the

[1] As of April 9, 2019, defendant Gina Kirchoff, Administrator, was dismissed from the case.

verdict (JNOV).[2]

Having considered defendant's and NJDA's arguments in light of the record and the applicable principles of law, we affirm as we conclude that defendants' expert's testimony was properly barred due to the untimely service of his report without explanation, and plaintiff's expert's testimony was properly admitted as the expert was qualified to present his opinions and he did not usurp the trial judge's responsibility to instruct the jury on the law. Finally, because defendants did not appeal from the denial of its JNOV motion, we have *no* reason to consider it on appeal.

I.

A.

The facts giving rise to plaintiff's claims are derived from the trial record and are summarized as follows. Plaintiff, who is eighty-nine years old, became a resident of defendants' nursing facility on February 13, 2014. Plaintiff entered the nursing facility due [*3] to her dementia and several medical issues, including diabetes.

On June 8, 2016, at approximately 8:00 p.m., Gloria Myers, a nurse at defendants' facility, administered a finger stick blood sugar test on plaintiff without a physician's order because plaintiff was "lethargic," "irritable," and had only eaten one quarter of her dinner. The test indicated a blood sugar count of 514.

The nurse then contacted a staff physician who ordered fast-acting insulin be administered immediately and a complete blood count to be conducted the following morning. According to the staff's records, after the insulin was given, plaintiff had "[n]o acute distress" and was "more alert," and she would continue to be monitored.

The next morning, another nurse, Teresa Higgins, observed that plaintiff was lethargic and "non-arousable by verbal and tactile stimuli." She did not respond to a "sternal rub, was unable to take any of her medications, and did not eat breakfast." She noted that plaintiff had refused to cooperate with the blood draw scheduled for that morning. Higgins was concerned about plaintiff's blood sugar, but she did not perform a finger stick blood sugar test because "she did not have a physician's [*4] order . . . and . . . an order would be needed to obtain . . . [plaintiff's] blood glucose." Instead, Higgins contacted the physician who again ordered lab work on a stat basis to obtain plaintiff's blood sugar levels among other things. Higgins thereafter contacted the lab and relayed the physician's order. Eventually, the lab was able to obtain only one vial of blood.

During this time, plaintiff was unable to urinate and after two hours, nurses gave her water, ginger ale, "five scoops of mashed potatoes and . . . ice cream." By 3:00 p.m., plaintiff became even more lethargic.

At approximately 4:30 p.m., lab results were received that indicated that plaintiff's blood sugar was 672, her blood urea nitrogen was 58, and her sodium was 154. The lab rechecked to verify the high number, which was again confirmed.

During Higgins's shift she administered two blood sugar tests, which indicated plaintiff's blood sugar was 76, however, she could not recall when the tests were administered. She testified that she did not need a physician's order to check plaintiff's blood glucose at that point because the "circumstances [we]re different" from those of that morning when the physician had been "managing [*5] all of [plaintiff's] care." Higgins notified the doctor of plaintiff's lab results and he ordered that plaintiff be transferred to the hospital immediately.

Once at the hospital, plaintiff's blood sugar was tested and it indicated her blood sugar level was 840. Her blood urea nitrogen was still 58, her ketones measurement was 29.7, and her bicarbonate was low at 19. Plaintiff developed severe hyperglycemia, which was the cause of her blood sugar rising to over 800. In addition, plaintiff suffered from dehydration, ketoacidosis, hyperosmolar nonketosis, and hypokalemia.

Once her blood sugars stabilized, plaintiff was discharged on June 19, 2016. Although plaintiff still required treatment at a long-term care facility, she never returned to defendants' facility.

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[2] We decline to address NJDA's argument that the jury should not have been instructed as to defendants' noncompliance with 42 C.F.R. § 483.25 because this argument was not addressed by the parties, and "as a general rule, the [c]ourt 'does not consider arguments that have not been asserted by a party, and are raised for the first time by an amicus curiae.'" *State in Interest of A.A., 240 N.J. 341, 359 n.1, 222 A.3d 681 (2020)* (quoting *State v. J.R., 227 N.J. 393, 421, 152 A.3d 180 (2017)*).

B.

Plaintiff filed her complaint on October 7, 2016, alleging negligence and violations of the NHA and several federal regulations dealing with nursing homes under the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4211, 101 Stat. 1330, 182, 182-221 (OBRA), codified under 42 C.F.R. §§ 483.1-483.480. Defendants filed their answer on February 13, 2017. Thereafter, the parties engaged in discovery.

The original discovery end date was April 14, 2018, [*6] which was then extended twice upon plaintiff's motions to extend the discovery end date such that the last discovery end date was October 31, 2018. Trial was scheduled for January 14, 2019, but in response to defendant's November 26, 2018 request, the trial judge relisted the trial first to February 11, 2019, and then to April 8, 2019.

More than four months after the discovery end date and after the first two trial dates passed, defendants served plaintiff with their expert's report on March 5, 2019, without amending their answers to interrogatories or explaining the reason for the late service as required by Rule 4:17-7. Plaintiff filed a motion to bar defendant's expert's report and his testimony. Defendants then filed a motion to bar plaintiff's medical expert from discussing alleged violations of the NHA. After considering the parties' oral arguments on April 9, 2019, the trial judge granted plaintiff's motion and reserved his decision on defendants', stating that he would make a final determination on the extent of plaintiff's medical expert's testimony when the expert testified and advising defendants to renew their objection during his testimony if they felt he was "going into some area [*7] that" they thought was "forbidden."

Trial began the next day with defendants filing an in limine motion to again exclude plaintiff's expert's testimony. The following morning, the trial judge denied the motion and allowed plaintiff's expert to testify about the alleged violations of plaintiff's rights under the NHA.

The jury returned its verdict on April 16, 2019, awarding $125,000 on plaintiff's negligence claim and $100,000 on her NHA claim. The following week, defendants filed their JNOV motion, which the judge denied on May 10, 2019, after considering the parties' submissions and oral arguments.

Plaintiff thereafter filed an application for attorney's fees under the NHA. The trial judge granted the application and entered the final judgment in the amount of $349,687.45, which included attorney's fees and costs in the amount of $124,687.45. This appeal followed.

II.

A.

Defendants' and the NJDA's arguments focus on the trial judge's determinations about whether and to what extent the parties' experts could testify at trial, if at all. We review a trial judge's decision whether to bar a party's expert's testimony for an abuse of discretion. Townsend v. Pierre, 221 N.J. 36, 52, 110 A.3d 52 (2015). An "abuse of discretion only arises on demonstration [*8] of 'manifest error or injustice,'" Hisenaj v. Kuehner, 194 N.J. 6, 20, 942 A.2d 769 (2008) (quoting State v. Torres, 183 N.J. 554, 572, 874 A.2d 1084 (2005)), and occurs when the trial judge's "decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Milne v. Goldenberg, 428 N.J. Super. 184, 197, 51 A.3d 161 (App. Div. 2012) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002)).

Applying that standard, we begin our review by addressing defendants' assertion that the trial judge improperly barred their expert from testifying. The expert report defendants served plaintiff on March 5, 2019 was from Dr. Richard G. Stefanacci and dated December 18, 2018. On March 8, 2019, the doctor issued a supplemental report that was also served on plaintiff.

In her motion to bar the doctor from testifying, plaintiff filed a supporting certification from her attorney that explained the facts leading up to defendants' service of Dr. Stefanacci's report just weeks before the third scheduled trial date. The certification stated that plaintiff's counsel had a conversation with defense counsel on November 20, 2018, during which plaintiff's counsel advised defense counsel of plaintiff's offer of judgment, his consent to defendant's request for an adjournment of the trial date, and his objection to any attempt to serve late expert reports. Plaintiff's counsel [*9] further explained that after trial was relisted for February 2019, defense counsel never filed a motion to extend the discovery end date and never provided a certification of due diligence when counsel emailed the doctor's report. He stated that defendants' expert report

was submitted four months after the October 2018 discovery end date, and the supplemental report was submitted only eighteen days before trial was to take place.

Defendants filed an opposing certification that did not dispute the fact that the report was untimely or that it was served without the required explanation for its delay. Instead, defendants argued there would be *no* prejudice by allowing in Dr. Stefanacci's report and testimony. By barring the report and testimony, defense counsel contended that defendants would have *no* defense and the case would not be heard on the merits.

As noted, after considering the parties' arguments, the trial judge granted plaintiff's motion. The judge cited to defendant's failure to comply with *Rule 4:17-7* and the report being served months after the latest discovery end date without any explanation for the delay that would justify denying plaintiff's motion.

B.

On appeal, defendants and NJDA [*10] argue that the trial judge erred in granting plaintiff's motion because the exclusion of Stefanacci's testimony prevented the case from being heard on its merits and the judge's strict reliance on the Court Rules created an injustice, especially since its admission would not have caused any prejudice to plaintiff. According to defendants, as trial was still a few weeks away and their expert was available to be deposed, plaintiff had adequate time to address the expert's report in anticipation of trial. Defendants further contend that plaintiff's motion to bar the expert's report and testimony was untimely and was equivalent to a summary judgment motion, which must be filed at a minimum of thirty days prior to trial. Last, defendants contend that the judge imposed too harsh a sanction, which is contrary to case law, and other sanctions should have been considered. We disagree.

It is beyond cavil that a trial judge can, in the exercise of his or her discretion, fix the date upon which expert reports must be served. *Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 488, 753 A.2d 1190 (App. Div. 2000)*. Moreover, equally true is that our Court Rules expressly provide for the extension of the discovery end date to allow for the late filing of expert reports or completion [*11] of other discovery where a motion to extend discovery has been filed prior to the close of discovery. Under *Rule 4:24-1(c)*, on "good cause shown," discovery extensions are granted where there is *no* scheduled trial or arbitration date and *no* showing of prejudice to the other party. *Leitner v. Toms River Reg'l Schs., 392 N.J. Super. 80, 93 (App. Div. 2007)*; *Ponden v. Ponden, 374 N.J. Super. 1, 9-11, 863 A.2d 366 (App. Div. 2004)*. Where a trial date is fixed, an extension can be obtained upon a showing of "exceptional circumstances." *R. 4:24-1(c)*.

Similarly, our Rules allow for an amendment to answers to interrogatories that is necessary to identify an expert and provide his or her report. *R. 4:17-7*. However, where the amendment is made after "the end of the discovery period, as fixed by the track assignment or subsequent order," the party serving the amendment must "*certif[y]* . . . that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties." *Ibid.* Disregarding the late report is required without any showing of prejudice by the opposing party. *See Ponden, 374 N.J. Super. at 8-9*.

Despite these requirements, defendants took absolutely *no* steps toward seeking the judge's permission to allow for [*12] an extension of discovery, nor did they make any showing of good cause or exceptional circumstances or provide any explanation by certification or otherwise as to why their expert's report was filed months after the close of discovery.

Under these circumstances, we conclude that the trial judge properly exercised his discretion by barring defendants' expert's report and testimony. While cases should always be determined on the merits where possible, defendants undermined that possibility by completely disregarding the Court Rules. Any injustice that occurred here was simply defendants' own creation.

We are not persuaded otherwise by defendants' additional argument that plaintiff's in limine motion was barred by our holding in *Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461, 471, 129 A.3d 350 (App. Div. 2015)* because the motion was a dispositive motion that should have been brought under *Rule 4:46-1* as a summary judgment motion. We note initially that defendants did not raise this issue before the trial court, and an appellate court will generally decline to address issues that the trial

court did not have the opportunity to address. *See* Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973); Correa v. Grossi, 458 N.J. Super. 571, 576 n.2, 206 A.3d 971 (App. Div. 2019). Even were we to consider the argument, defendants' contention has *no* merit. Plaintiff's motion was not based upon the merits of the claim, [*13] or upon defendants' expert's qualifications or any deficiency in his report.[3] Rather, it arose at the last minute because of defendants' conduct, and it sought relief for a discovery violation. Such motions are expressly provided for by our Court Rules. *See* R. 4:23-5(b) ("The court at trial may exclude the testimony of a[n] . . . expert whose report is not furnished pursuant to [*Rule*] 4:17-4(a) to the party demanding the same."). The judge's determination was supported by the Court Rules and not inconsistent with *Cho*.

III.

Next, we address defendants' argument that the trial judge abused his discretion by denying their motion to bar plaintiff's expert, Dr. John Kirby, from testifying about violations of the NHA. Again, we find *no* abuse of discretion.

A.

During discovery, plaintiff served defendants with Dr. Kirby's report. Although the report primarily focused upon defendants' staff's failure to properly monitor plaintiff's sugar level and to timely contact a physician and get her to a hospital sooner, it also included a discussion of the relevant federal and state statutes and regulations. As part of that discussion, the report described and quoted from N.J.S.A. 30:13-5(j) of the NHA as

> specif[ying] a patient's "right [*14] 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."

The report also stated that this section of the NHA "required that nursing facilities recognize the dignity of residents. The failure of [defendants] to monitor [plaintiff's] blood sugar appropriately was a failure to provide a safe and decent living environment that recognized and upheld [plaintiff's] dignity and individuality."

In their motion to bar Dr. Kirby from testifying, defendants argued that Dr. Kirby could not testify about whether defendants' actions were a violation of plaintiff's dignity under the NHA in N.J.S.A. 30:13-5(j).

The trial judge initially held that he was "going to permit Dr. Kirby to say that not checking the blood sugars over a period of [twenty] hours . . . did not afford the dignity that the statute requires." Relying on Ptaszynski v. Atlantic Health Sys., 440 N.J. Super. 24, 111 A.3d 111 (App. Div. 2015), defendants later argued that the testimony was not allowed as an "expert can't give extra weight to a statute by testifying [*15] as to what dignity is," as that would be usurping the role of the judge to give instructions on law to the jury. The judge found that *Ptaszynski* only prohibited an expert from providing an opinion on the meaning of "dignity," as also conceded by plaintiff, who agreed that the expert could not give definitions of words in a statute, but the expert was allowed to testify as to whether defendants' actions violated the statute.

Before ruling with finality, the judge informed defendants that if they could find any case law that focused specifically on this issue, he would consider it the next morning. Although there is *no* record that defendants ever produced any case law, the next morning, defendants requested a Rule 104 hearing to determine the extent of Dr. Kirby's testimony, which the judge would not allow as it was too late.

The judge further indicated that he was inclined to allow Dr. Kirby to testify about whether defendants' actions violated the statute but would consider any objections as Dr. Kirby's testimony went on. Defendants made a "standing objection in terms of [Dr. Kirby's] testimony . . . pursuant to [their] motions in limine and also [their]

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[3] Effective September 1, 2020, after the trial in this matter, our rules were amended to add Rule 4:25-8 to address motions in limine, which are "defined as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant's case." By the Rule's express terms, in limine motions do not include "an application to bar an expert's testimony in a matter in which such testimony is required as a matter of law to sustain a party's burden of proof."

request for a Rule 104 hearing."

During his testimony, [*16] Dr. Kirby,[4] who the judge determined was qualified as an expert in internal medicine and geriatrics and was called as an expert as to defendants' negligence and violation of the statutes, explained that he was familiar with federal and state statutes and regulations, including the NHA, as he "need[ed] to know what sort of the broad brush standard of care is [as] a physician's work and a nurse's work will fall under those regulations." After testifying in detail as to why he believed that defendants' staff deviated from the applicable standard of care, which caused harm to plaintiff, Dr. Kirby addressed the NHA and stated that plaintiff's "rights as a nursing home resident were violated," specifically "her rights to a safe and decent living environment," "her right to care that recognized her dignity," and "her right to care that recognized her individuality." On cross-examination, when defense counsel asked the doctor about the meaning of "dignity" under the NHA, plaintiff's attorney objected. The trial judge overruled the objection, but defense counsel decided not to pursue an answer to the question.

During his charge to the jury, the judge instructed the jury as to their right to accept [*17] or reject any expert's opinions and that it had to accept the judge's instructions as to the law. The trial judge instructed the jury as to the NHA as follows:[5]

> The plaintiff . . . asserts that the defendant violated NJSA 30:13-5(j) which states, "Every resident of a nursing home shall have the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident."
>
> If you find that the defendant has violated any of these statutes, you have found a violation of the New Jersey Nursing Home Responsibilities and Residents Rights Act and a violation of Dorothy L. Moody's rights. You are not, however, simply to duplicate damages for the negligence claims.
>
> Evidence of violations. The plaintiff alleges that the defendant violated various laws under the federal regulations and the New Jersey Nursing Home Responsibilities and Residents Rights Act. The plaintiff also alleges that the defendant violated NJSA 30:13-5, Nursing Home Responsibilities and Rights of Residents, including paragraph j of that statute which states that nursing home residents "have the right to a safe and decent living environment and considerate and respectful care that recognizes [*18] the dignity and individuality of the resident."
>
> In support of the claims of violation of rights, the plaintiff alleges violation of federal law under the code of federal regulations. One federal regulation, for example, that the plaintiff has claimed was violated is that of 42 CFR Section 483.25, Quality of Care. That regulation states that, "Each resident[] must receive and the facility might [sic] provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being consistent with the resident's comprehensive assessment and plan of care."
>
> The statutes and regulations in question set up standards of conduct for nursing homes. If you find that the defendant has violated any nursing home law which caused harm to Ms. Moody, the defendant violated the plaintiff's nursing home rights.

As to damages, the judge instructed that if the jury found a violation under the NHA, they were not to "simply . . . duplicate damages for the negligence claims." He explained that the jury could not "award . . . plaintiff damages for . . . defendant[s'] violations of the [NHA] and its negligence based upon the same injuries or harm to [plaintiff]." Consistent [*19] with that instruction and defendants' request, the verdict sheet separated the negligence claim from the NHA claim. The jury found defendants were negligent and violated the NHA, and made separate awards for each claim, in different amounts.

B.

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[4] Plaintiff also presented testimony from a different expert, Nurse White, as to the nurses' breach of the applicable standard of care. The trial judge ruled that the nurse expert could testify as to the negligence claim, but not as to plaintiff's violation of NHA rights claim.

[5] Defendants insisted that specific language from *Ptaszynski* be added to the charge. The judge granted defendants' request, modifying the charge and verdict sheet to include the language, "You, the jury, cannot award the plaintiff damages for the defendant's violations of the Nursing Home Act and its negligence based upon the same injuries or harm to [plaintiff]."

On appeal, relying on *Ptaszynski*, defendants contend that it was improper for the trial judge to allow "Dr. Kirby to provide opinion testimony interpreting a pertinent section of the NHA," after they objected to the testimony. Specifically, defendants argue that plaintiff's expert should not have been allowed to testify about "dignity," "safe and decent living environment," and "individuality." They contend that Dr. Kirby usurped the responsibility of the judge to instruct the jury on the law by discussing the NHA. We disagree.

The NHA "was enacted in 1976 to declare 'a bill of rights' for nursing home residents and define the 'responsibilities' of nursing homes." *Ptaszynski, 440 N.J. Super. at 32*. The patient's "rights" are enumerated in *N.J.S.A. 30:13-5(a) to (n)*. The nursing home's "responsibilities" are enumerated in *N.J.S.A. 30:13-3(a) to (j)*. Under *N.J.S.A. 30:13-8(a)*, a person can only bring an action for violation of one of the enumerated residents' "rights," set forth in *N.J.S.A. 30:13-5*. *Ptaszynski, 440 N.J. Super. at 33-36*.

While there are several rights enumerated under the act, in relevant part, *N.J.S.A. 30:13-5(j)* specifically [*20] states:

> Every resident of a nursing home shall . . . [h]ave 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.

In discussing these rights in *Ptaszynski*, we determined that expert testimony would generally not be allowed on domestic law. *440 N.J. Super. at 38*. For that reason, we found the trial judge "erred by permitting [the expert] to testify extensively as an expert in 'nursing law'" and "to provide her opinion of the meaning of the word 'dignity' in *N.J.S.A. 30:13-5(j)*" without the judge "provid[ing] any guidance to the jury," other than telling "the jury that it was not bound by the testimony of an expert, . . . [and] merely read[ing] *N.J.S.A. 30:13-5(j)* to the jurors." *Id. at 37*. By doing so, we found "the jury was left with only [the expert's] interpretation of the statute to guide its deliberations." *Ibid.*

We also observed that "the trial judge has the exclusive responsibility to instruct the jury on the law to be applied to avoid the 'danger . . . that [*21] the jury may think that the expert in the particular branch of the law knows more than the judge[.]'" *Ibid.* (alteration and omission in original) (quoting *State v. Grimes, 235 N.J. Super. 75, 80, 561 A.2d 647 (App. Div. 1989))*. However, we made clear that while the expert was allowed to cite to specific laws "as support for her opinions on the applicable standard of care," she was not able to testify "extensively as an expert in 'nursing law.'" *Ibid.* To that end, we held "[t]he judge . . . erred because he permitted [the expert] to provide her opinion of the meaning of the word 'dignity' in *N.J.S.A. 30:13-5(j)*." *Ibid.* We also concluded that the judge failed to properly instruct the jury as to their being required to "allocate[] the damages to the separate claims, based on the different theories of liability being asserted." *Id. at 40*.

Here, the testimony of Dr. Kirby involving the NHA did not contravene our holding in *Ptaszynski*. Dr. Kirby was not qualified as an expert in nursing home law or any law. Rather he was questioned extensively about his professional experience and familiarity with nursing home procedures and was found to be "qualif[ied] as an expert in internal medicine and geriatrics." Moreover, he never defined "dignity" or any other words in the NHA.

Dr. Kirby only confirmed [*22] that he believed plaintiff's rights under the NHA to "a safe and decent living environment," "to care that recognized her dignity," and her "right to care that recognized her individuality" were violated. It was defense counsel who attempted to question Dr. Kirby on the meaning of "dignity," but after the trial judge overruled plaintiff's objection to the question, defense counsel thought better not to ask. There were ***no*** definitions given by the doctor, as there were in *Ptaszynski*, that could have misled the jurors from applying the plain meaning of the act's language as instructed by the trial judge. And, the jury was properly instructed that they could not award plaintiff damages for defendants' violation of the NHA and its negligence based on the same injuries, unlike in *Ptaszynski*. Permitting Dr. Kirby to testify as he did was not an abuse of discretion.

IV.

We turn to defendants' argument that the judge erred in allowing Dr. Kirby to testify beyond his expertise. According to defendants and the NJDA, as a doctor, Dr. Kirby was not in a position to discuss the expertise, training of nurses, and the nursing standards of care. They

contend that this contradicted the judge's prior ruling [*23] that barred Dr. Kirby from testifying about the nurses' standards of care. We disagree.

A.

While testifying to his qualifications at trial, Dr. Kirby explained that not only was he a physician, but he also specialized in geriatric medicine and had experience in working "in long-term care facilities [where he took] care of patients . . . who [were] undergoing rehabilitation after an acute illness." During his career, he had privileges at three different nursing homes and was a former medical director at two nursing homes. Dr. Kirby testified that seventy percent of his "patients [fell] into the geriatric age category, age [sixty-five] and older." He indicated that he had "been working intimately with nurses . . . for over [thirty] years." He also described his familiarity with federal and state laws and regulations that apply to nursing homes that was based upon his work in nursing homes being subject to those standards. However, he never had an "administration license" for nursing, he was not part of any nursing professional association, and he never worked as a nurse.

After being qualified by the judge, Dr. Kirby testified in detail about plaintiff's medical conditions, the test results, [*24] and her need for specific treatment. According to Dr. Kirby, if the nurses would have rechecked plaintiff's blood sugar anywhere from one to four hours after the original check, they would have been aware of plaintiff's rising blood sugar and would have been able to treat it with further insulin, without having to go to the hospital.

Dr. Kirby also explained that *no* physician's order would be needed to administer a blood sugar test. He described a sternal rub as a maneuver that was "very, very painful" and plaintiff's failure to respond to it demonstrated how serious her condition was at the time. Dr. Kirby found that plaintiff's lethargy and her inability to eat or urinate from the morning to early afternoon of June 9, 2016, was consistent with dehydration due to high blood sugar. He stated that it made *no* sense why the nurses would have given "her ginger ale and . . . ice cream" and analogized the act to "taking gasoline and throwing it on a fire." In general, if sugar-free drinks and food were given, Dr. Kirby explained that most nurses would note that in their documentation.

He further explained that plaintiff's high blood urea nitrogen verified that plaintiff was dehydrated. It [*25] also did not make sense to him that the blood sugar test conducted by the nurses on June 9, 2016, would only be 76, when the lab results stated 672 and he observed that this likely "indicate[d] a malfunction of the glucose meter." The ketones that tests identified in plaintiff's blood when she was in the hospital were a further consequence of high blood sugar.

On cross-examination, Dr. Kirby stated it was an impossibility for plaintiff's blood sugar to go from 672 to 76 and back up to 840. Even though a physician's note did not tell the nurses to continuously check plaintiff's blood sugar, he stated that most nurses he worked with would logically conduct a blood sugar test with plaintiff's high numbers.

B.

"To prove medical malpractice, 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, 64 A.3d 536 (2013)* (quoting *Gardner v. Pawliw, 150 N.J. 359, 375, 696 A.2d 599 (1997)*). Where the claim is against a nurse,

> in the hierarchal setting of a multi-disciplinary medical team providing care to a [nursing home] patient, . . . [t]o assess a deviation in the standard of care in such a setting, one must know the procedures, [*26] protocols, and scope of duties of the licensed professional nurses in such circumstances. An expert is required for that explanation. Such information is outside of the realm of common knowledge.
>
> [*Cowley v. Virtua Health Sys., 242 N.J. 1, 20, 230 A.3d 265 (2020)*.]

As to nursing homes, the NHA established standards of care for the treatment of such facilities' residents. *Estate of Ruszala ex rel. Mizerak v. Brookdale Living Cmtys., Inc., 415 N.J. Super. 272, 293, 1 A.3d 806 (App. Div. 2010)*. The breach of those standards also requires expert explanation as the subject matter is beyond the "ken of the average juror." *Townsend, 221 N.J. at 55* (quoting *Polzo v. Cnty. of Essex, 196 N.J. 569, 582, 960 A.2d 375 (2008)*).

A witness qualifies "as an expert by knowledge, skill, experience, training, or education." N.J.R.E. 702. "[E]xpert testimony must meet three basic requirements" for admissibility: "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." Polzo, 196 N.J. at 582 (quoting State v. Townsend, 186 N.J. 473, 491, 897 A.2d 316 (2006)). A "trial court has discretion in determining the sufficiency of the expert's qualifications and [its decision] will be reviewed only for manifest error and injustice." Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 68, 203 A.3d 114 (2019) (quoting Torres, 183 N.J. at 572).

Here, plaintiff produced two experts: Nurse White as to the nurses' standard of care, and [*27] Dr. Kirby as to the nursing home's standard under the NHA. Moreover, the trial judge specifically ruled that neither could testify as to the other's profession's standard. As the judge stated, "nurses testify about nurses" and "doctors testify about doctors." Dr. Kirby never testified to the expertise, training of nurses, or the nursing standards of care. However, because both experts by necessity had to address the treatment of plaintiff while at the nursing home and by definition, under the nurses' care, there was a natural overlap between their testimonies when addressing why they believed that the nurses and the nursing home violated their respective standards of care. The discussions about plaintiff's treatment in that context did not breach the required separation of their testimony about their specific areas of expertise.

V.

Finally, we address defendants' contention that the trial judge erred by denying their motion for JNOV. However, as noted we cannot review the judge's order because defendants did not include in their notice of appeal the judge's May 10, 2019 order denying their motion, nor did they mention it in their appellate case information statement.[6] They also never [*28] provided us with a transcript from oral argument or with the judge's decision.

Under these circumstances we are constrained to not consider their appeal from that order. *See* R. 2:5-1(e)(3)(i) (stating that a notice of appeal "shall designate the judgment, decision, action or rule, or part thereof appealed from"); Fusco v. Bd. of Educ., 349 N.J. Super. 455, 461-62, 793 A.2d 856 (App. Div. 2002) (stating that appellate review pertains only to judgments or orders specified in the notice of appeal); Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66, 635 A.2d 1004 (App. Div.) (holding that an issue raised in a brief but not designated in the notice of appeal was not properly before the court), *aff'd o.b.*, 138 N.J. 41, 648 A.2d 482 (1994). *See also* Silviera-Francisco v. Bd. of Educ. of Elizabeth, 224 N.J. 126, 142, 129 A.3d 1032 (2016) (stating an order "clearly identified [in a] Case Information Statement submitted with [a] Notice of Appeal" is deemed properly before the court for review).

Affirmed.

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[6] On January 31, 2020, our court clerk wrote to defense counsel advising of this deficiency. Defendants took *no* action in response to the letter.

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BURNS WHITE LLC
By: William J. Mundy, Esquire
Attorney ID #035981989
By: Ahsan A. Jafry, Esquire
Attorney ID #040222004
By: Lauren S. Angeles, Esquire
Attorney ID #025532011
457 Haddonfield Road, Suite 510
Cherry Hill, NJ 08002
(856) 382-6006 / Fax (856) 382-6007

Attorneys for Defendants, Tallwoods Care Center and Riverfront Healthcare Inc.

ESTATE OF MARGARET BOLGER by and through EXECUTRIX KATHY SUAREZ, Plaintiff, v. MERIDIAN NURSING AND REHABILITATION AT OCEAN GROVE a/k/a MANOR BY THE SEA; MERIDIAN NURSING AND REHABILITATION, INC.; QUALITY CARE MANAGEMENT, LLC; HACKENSACK MERIDIAN HEALTH, INC.; TALLWOODS CARE CENTER and RIVERFRONT HEALTHCARE ASSOCIATES, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MONMOUTH COUNTY DOCKET NO. MON-L-2975-17 Civil Action **ORDER**

THIS MATTER having been opened to the Court on the Motion of Ahsan A. Jafry, Esquire, of the law firm Burns White LLC, attorneys for Defendants, Tallwoods Care Center and Riverfront Healthcare Inc., and the Court having considered the moving papers and any opposition filed thereto, having heard oral argument and for good cause shown:

IT IS on this 22nd day of December, 2021

ORDERED that Defendant's Motion for Summary Judgment as to Count Six is hereby **DENIED**; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to R. 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

The motion is hereby **DENIED** for reasons expressed in the attached rider.

/s/ Kathleen A. Sheedy

HON. KATHLEEN A. SHEEDY, J.S.C.

[X] OPPOSED

Statement of Reasons Under *R.* 1:6-2(f)

Re:	Estate of Margaret Bolger v Meridian Nursing & Rehabilitation Center
Docket No.:	MON-L-2975-17
Motion Type:	Motion for Summary Judgment
Return Date:	December 3, 2021

This matter comes before the Court by way of Defendant Tall Woods Care Center and Riverfront Healthcare Associates Inc.'s Motion for Summary Judgment. Plaintiff, the Estate of Margaret Bolger, filed a timely opposition to the motion to which Defendant timely replied.

Facts

This matter arises out of a claim alleging negligence on the part of Defendants, Tallwoods Care Center and Riverfront Healthcare Inc., arising from decedent Margaret Bolger's residency at Tallwoods Care Center. The present motion seeks summary judgment on Count Six of the Complaint which states in part, "Plaintiff, The Estate of Margaret Bolger, by and through its Executrix, Kathy Suarez demands Judgment for damages generally, compensatory damages, punitive damages, attorney's fees and costs of suit against the Defendants, Tallwoods Care Center and Riverfront Healthcare Associates, Inc., individually, jointly, severally, or in the alternative, together with costs of suit."

Legal Arguments

Defendants' Arguments in Support of the Motion for Summary Judgment

Defendant argues that the New Jersey Legislature did not intend for the Nursing Homes Rights and Responsibilities Act ("NHA") to apply to professional malpractice claims. Defendant asserts that there was no intention by the Legislature for fee shifting provisions to be applicable in malpractice actions. Defendant submits that N.J.S.A. 30:13-8(a) and 30:13-2(e) use present tense instead of past tense, indicating that the Legislature's intent was to provide quasi-injunctive relief to wrongs that were being committed during the individual's residency. Additionally, during the four (4) days of public hearings by the New Jersey Nursing Home Study Commission on the "Personal Care Facilities for the Elderly in New Jersey," there was never a discussion on whether fee shifting provisions should be permitted in nursing home professional malpractice cases.

When Senate Bill 944 was introduced, its purpose was to ensure that Federal government standards applicable to facilities with Medicaid and Medicare recipients applied to all nursing homes and residents in New Jersey. The intent was to standardize the level of care in nursing homes and to provide a method for residents to obtain relief if certain rights were not honored. It was not the intent to create a way for Plaintiff's attorneys to obtain costs and fees in a standard nursing home professional malpractice action. The purpose and provisions of the Act, written in 1976, also makes no mention of malpractice actions or fee shifting. The Health and Welfare

Committee made several amendments to the Act but made no mention of fee shifting for malpractice actions.

In 2015, in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24 (App. Div. 2015), the appellate division settled the interpretation of the phrase "this act" as used in a 1991 amendment to the Nursing Home Act. For years, Plaintiffs interpreted the phrase "this act" to apply to all portions of the Nursing Home Act, which led to inconsistent decisions in trial courts regarding fee shifting. The Ptaszynski court held that the phrase refers only to the amendments and not the entire Act.

Defendants submit that the Ptaszynski decision changed the way Plaintiffs use the NHA and they have now amended their strategy to focus on the language in the Bill of Rights section which provides a right to a "safe and decent living environment." Defendant argues that Plaintiff here misconstrues the language in order to assert a claim for a violation of rights and seek costs and fees. Defendant submits that Plaintiff is merely changing the label of the professional malpractice claim to "rights" in order to trigger the fee shifting provision.

Defendant also argues that the Executor of the Estate of Margaret Bolder does not have standing to bring a claim under the NHA. In Hope v. Royal Healthgate Nursing and Rehabilitation Center, 2008 N.J. Super. Unpub. Lexis 1798 at *6 (N.J. Super. Ct. A.D. Dec 22, 2008), the Appellate Division concluded that the right of recovery in N.J.S.A. 30:13-8 was only available to the resident or someone asserting his legal rights. The Hope Court stated, "we believe the phrase 'persons ... whose rights are defined herein' was intended to refer only to the resident or one asserting rights in his stead, such as a legal guardian." Hope at 17. Additionally, the court concluded, "we believe it is clear that the Legislature intended only the resident or his proxy to be able to vindicate infringement of these rights..." Id. at 17-18.

Defendant also relies on Brehm v. Pine Acres Nursing Home, Inc., 190 N.J. Super. 103, 110 (App. Div. 1983), which held that the plaintiff "did not have standing individually to recover damages from Pine Acres for a violation of the Nursing Home Bill of Rights." Defendant claims that only a living nursing home resident or his legal guardian or proxy may bring a claim under this Act. Defendant asserts that because Plaintiff is not Ms. Bolger's proxy or guardian, she has no standing to bring this claim.

Finally, Defendants argue that applying the NHA to allow fee shifting would violate Defendant's equal protection rights under the New Jersey and United States Constitutions. Defendant submits that if Ms. Bolger fallen at any other type of health care facility (hospital, rehab center, etc.) those providers would be able to defend themselves without the specter of potential fee shifting. Since the subject location is a long-term "nursing home" facility, Defendants are forced to defend themselves against potential fee shifting claims as well.

Plaintiff's Argument in Opposition to the Motion for Summary Judgment

Plaintiff submits that Defendants failed to prove that N.J.S.A. 30:13-5(j) is ambiguous and therefore consideration of the Legislative History is unnecessary. "It is only when there is ambiguity in the [statutory] language that we turn to extrinsic evidence, such as legislative history." Johnson v. Rosele EZ Quick LLC, 226 N.J. 370, 386 (N.J. 2016).

Plaintiff submits that the NHA is unambiguous. The statute established rights of nursing-home residents and expressly declared that residents "shall have a cause of action against any

person" violating their rights and they were permitted to "recover actual and punitive damages" and "reasonable attorney's fees and costs" incurred in bringing such an action. N.J.S.A. 30:13-8(a). Further, section 30:13-5(j) unambiguously provides that every nursing-home resident has the right to "a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident." N.J.S.A. 30:13-5(j). If the Legislature intended to exclude negligence by nursing homes' staff as a reason for unsafe conditions, it could have done so.

Plaintiff argues that even if the Court were to consider the legislative history, the history supports Plaintiff's claim. Plaintiff submits that the witness statements made during the public hearings held by Nursing Home Study Commission show that the purpose of the Act was to provide residents with a Bill of Rights. Among those rights is a resident's right to "a safe and decent living environment and considerate and respectful care," which encompasses the right to not be injured by the negligence of the nursing-home staff. The well-being of the residents is what prompted the hearings prior to the adoption of the NHA.

Plaintiff argues that the Executor of the Estate has standing under the Survivor's Act to assert claims on behalf of the decedent, Ms. Bolger. The Survivor's Act provides, "Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living." N.J.S.A. 2A:15-3.

The Appellate Division in Repko v. Our Lady of Lourdes Med. Ctr., Inc., 464 N.J. Super. 570 (App.Div. 2020) stated, "the Survivor's Act preserves to the decedent's estate any personal cause of action that decedent would have had if he or she had survived." Repko 464 N.J. Super. at 577. "The remedy adopted by the Legislature to preserve a decedent's claim against a tortfeasor ... addresses the fortuity ... of grounding a person's right to recover ... on the contingency of the party injured surviving to the date of trial." Id. at 578. The Repko Court held that Plaintiff's estate still had a viable claim against the Defendant at decedent's death. Thus, Plaintiff here has standing under the Survivor's Act to sue Defendants for violating Mrs. Bolger's rights under the NHA.

Plaintiff argues that the cases cited by Defendants are inapposite. The Profeta, Brehm, and Hope cases all deal with Plaintiffs asserting claims on their own behalf. Plaintiff here is asserting claims on behalf of Plaintiff's decedent, not on its own behalf.

Plaintiff submits that Defendant's argument that the relief is "quasi-injunctive in nature" contradicts the plain language of the NHA, which expressly provides that nursing-home residents "shall have a cause of action against any person" violating their rights and that they are permitted to "recover actual and punitive damages" and "reasonable attorney's fees and costs" incurred in bringing such an action. N.J.S.A. 30:13-8(a). Nothing in the NHA suggests that a plaintiff's rights to recover damages for NHA violations expires upon her death or that the Survivor's Act does not apply to such claims.

Plaintiff also submits that Defendant has failed to prove that the NHA violates Defendant's Equal Protection rights. Plaintiff argues that this case does not involve a suspect classification and Defendants point to no fundamental constitutional rights at issue, so the rational basis test applies. Accordingly, the NHA satisfies equal protection if it "rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination..." Bd. of Educ. v. Caffiero, 86 N.J. 308, 324.

The classification of nursing home residents is rationally related to the legitimate governmental objective of protecting the rights and well-being of residents of nursing homes. Caffiero, 86 N.J. at 324-25. Defendants have failed to prove that the Legislature's classification of nursing-home residents was irrational. Therefore, the motion for summary judgment should be denied.

Defendant's Arguments in Reply to Plaintiff's Opposition

Defendant submits that the NHA only allows for enforcement actions and not the creation of a new tort action. Defendant asserts that the NHA is similar to the New Jersey Environmental Rights Act (ERA) in that the NHA permits a citizen to step into the shoes of the regulatory agency and seek enforcement of their rights without going through the whole regulatory process. Defendant admits that in this context, the fee shifting provision makes sense, since it encourages a resident to take immediate action without fear of the costs associated with a lawsuit to enforce their rights. Defendant argues that allegations of past violations are insufficient to state a claim under the NHA, just like they are insufficient under the ERA. See Bowen Engineering v. Estate of Reeve, 799 F. Supp. 467, 479 (D.N.J. 1992).

Defendant argues that an NHA cause of action is not available once the resident dies. Defendant submits that any other interpretation would be contrary to the rulings in Profeta and Brehm. Defendant claims that a NHA rights claim after a resident's death is effectively moot because the NHA only applies while the resident lives at the facility.

Defendant submits that Plaintiff's counsel misuses the comments from the hearing transcripts of the New Jersey Nursing Home Study Commission and cherry picks portions of testimony by a few individuals in order to support her position. Defendant submits that the comments from the hearing transcripts shows that the NHA did not create a cause of action for nursing home professional negligence and that it is not necessary in order for a resident's family to seek damages for wrongful death.

Defendant argues that Plaintiff's broad interpretation of the fee shifting provision would allow a nursing home defendant to be subject to fee shifting even when they are codefendants with another type of healthcare facility in the same cause of action. Plaintiff's interpretation would allow fee shifting against a nursing home but not the hospital in the same litigation where the same medical issues and harm is being alleged.

Defendant submits that Plaintiff's interpretation of the phrase "safe and decent living environment" does not comport with the plain meaning of the word "environment" as used by the New Jersey Department of Health. Defendant claims that the language of N.J.S.A. 30:13-5(j) has defined parameters for interpretation, but Plaintiff ignores these parameters. Defendant argues that the State Operation Manual (SOM) published by The Centers for Medicare and Medicaid Services states that the phrase "safe and decent living environment" pertains to problems with the physical surroundings such as noise, temperature, storage and cleanliness. No portion of the SOM suggests a consideration of breaches in the standard of care or injuries when determining a resident's right to a safe environment.

Plaintiff's interpretation of the NHA, would allow any claim for professional malpractice or negligence against a nursing home to also include a separate cause of action for violation of a "right" articulated in N.J.S.A. 30:13-5 and subject the nursing home to punitive damages, recovery of attorney's fees and costs and treble damages.

Legal Standard

The purpose of the summary judgment procedure is to provide a prompt, businesslike, and inexpensive means of disposing of a case. Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67, 74 (1955); Rothman v. Silber, 90 N.J. Super. 22, 33 (App. Div. 1966). R. 4:46-2 states that where it appears that there is presented no genuine issue of material fact, it is for the Court to determine the motion on the applicable law.

In Judson, Justice Brennan quoted the following from Clark, The Summary Judgment, 36 Minn. L. Rev. 567, 579 (1952):

> ...what is needed is the application of common sense, good judgment, and decisive action, on the one hand and, on the other, not to allow harassment of an equally deserving suitor for immediate relief by a long worthless trial.

[Judson, 17 N.J. at 77.]

Rule 4:46-2(c) states, in pertinent part, that a motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that moving party is entitled to a judgment or order as a matter of law

Once the moving party has demonstrated that there is no genuine issue of fact, the burden of going forward with the evidence shifts to the opponent of the motion. The opponent must show controverting facts, not merely *ipse dixit* representations or allegations in pleadings without affidavit or other evidentiary support. The opponent of the motion must establish the existence of a genuine issue of material fact. Failure to discharge this duty will entitle the movant to the relief sought. Judson, 17 N.J. at 75.

Once the burden has shifted, certain requirements as set forth in R. 4:46-5(a) must be met. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest on mere allegations or denials of his pleadings, but his response by affidavits must set forth specific facts showing that there is a genuine issue for trial.
[Id.]

Summary judgment is a procedure which requires careful consideration and due deliberation and should be granted with caution. Devlin v. Surgent, 18 N.J. Super. 148, 154 (1955); Friedman v. Friendly Ice Cream Co., 133 N.J. Super. 333 (App. Div. 1975). Where, however, the moving party demonstrates by competent evidential material that no genuine issues of fact exists, the Court, as a matter of law, should grant the party's motion for summary judgment.

The Supreme Court of New Jersey revisited the standard to be applied by the trial judge when determining a motion for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). Specifically, the Court focused on whether an existing issue of fact is to be considered "genuine" under R. 4:46-2 or, in the alternative, merely "of an insubstantial nature" thereby allowing the granting of summary judgment. Id. at 530. The Supreme Court stated that, although summary judgment is based solely on documentary evidence, the essence of the inquiry by the trial judge should be the same as is applied in motions for directed verdicts: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-

sided that one party must prevail as a matter of law." Id. at 536 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986)).

Thus, the new standard for determining whether a "genuine issue" of material fact exists in a summary judgment motion requires the trial court to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." Id. at 540. However, where there "exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for the purposes of R. 4:46-2." Id. The Court concluded by stating, "[t]he thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

Conclusion

This matter comes before the Court by way of Defendant Tall Woods Care Center and Riverfront Healthcare Associates Inc.'s Motion for Summary Judgment. Plaintiff, the Estate of Margaret Bolger, filed a timely opposition to the motion to which Defendant timely replied.

The Court has considered the submissions made in support of, and opposition to, the instant motions. Based on the reasons that follow, Defendant's Motion for Summary Judgment is hereby **DENIED**.

Rule 4:46-2(c) states, in pertinent part, that a motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that moving party is entitled to a judgment or order as a matter of law.

Once the moving party has demonstrated that there is no genuine issue of fact, the burden of going forward with the evidence shifts to the opponent of the motion. The opponent must show controverting facts, not merely ipse dixit representations or allegations in pleadings without affidavit or other evidentiary support. The opponent of the motion must establish the existence of a genuine issue of material fact. Failure to discharge this duty will entitle the movant to the relief sought. Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67, 75 (1955).

Here, the Court agrees with Plaintiff that Defendants fail to prove that N.J.S.A. 30:13-5(j) is ambiguous and therefore consideration of the Legislative History is unnecessary. Further, the Court agrees with Plaintiff that the Executor of the Estate has standing under the Survivor's Act to assert claims on behalf of the decedent, Ms. Bolger. The Survivor's Act provides, "Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living." N.J.S.A. 2A:15-3. Defendant erroneously relies upon cases that deal with Plaintiffs seeking relief on their own behalf, while the Plaintiff here is seeking relief on behalf of the Plaintiff's decedent. Additionally, nothing in the NHA suggests that a Plaintiff's rights to recover damages for NHA violations expires upon her death or that the Survivor's Act does not apply to such claims. Thus, the Survivor Act is applicable here and the Plaintiff has standing to bring suit against Defendants for violation of the decedent's rights under the NHA.

Defendant attempts to convince the court that because a federal court ruled that a Plaintiff cannot bring an action for a past violation of the ERA that a Plaintiff should not be allowed to bring an action for a past violation of the NHA. Defendant justifies this by drawing other connections between the ERA and NHA, but fails to show any ruling or provision in the Act that prohibits a Plaintiff from bringing an action based on a past violation of the NHA.

Defendant attempts to connect federal court cases that deal with the ERA to this state court action involving a completely different issue. Defendant fails to address the fact that the Survivor's Act is applicable to an NHA action in ways that it could not be to the ERA. The ERA addresses environmental issues and the NHA by nature typically effects elderly or debilitated people. Bringing an action pursuant to a past environmental law violation is not akin to a past violation of the NHA. The basic purpose of the NHA is to protect the rights and well-being of nursing home residents. It must be considered that a violation of the NHA could potentially result in the wrongful death of the resident. The Defendant states that a decedent's relatives could bring a wrongful death action on their own behalf outside of the NHA provisions. However, Defendant misses the point that the present action is not for the Plaintiff's own benefit, but for the benefit of the decedent's estate. The Court finds that the Survivor's Act allows a decedent's estate to pursue an action as if the decedent were alive. A Plaintiff is not precluded from bringing an action on behalf of the decedent's estate merely because they can bring a wrongful death action on their own behalf. Thus, the fee shifting provision in the NHA is applicable here since the Plaintiff is essentially bringing the action as if the decedent were still alive. The Defendant's interpretation of the law is not incorrect, but the Defendant fails to apply it properly to the case at hand.

In Profeta v Dover Christian Nursing Home, 189 N.J. Super. 83 (App.Div.) certify. denied, 94 N.J. 576 (1983), the court discussed the NHA and what the legislature intended in enacting the statute. "The provisions delineating the responsibilities of nursing homes (N.J.S.A. 30:13-3) and declaring the rights of their residents (N.J.S.A. 30:13-5) are the heart of the act. The remaining provisions serve only to implement these two sections. The sense of a statute is to be gathered from the whole of the expression. Martell v. Lane, 22 N.J. 110, 117 (1956). Once the "internal sense" of the law is clear it will prevail over the words of the act and "particular terms are to be made responsive to the essential principle of Law." San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148, 155 (1958). See, also, State v. Carter, 64 N.J. 382, 390-391 (1974); New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972); Wright v. Vogt, 7 N.J. 1, 6 (1951). The act at issue is clear in its purpose, and that is to advance the well-being of nursing home residents. Because the sense of the law, gathered from all internal indicia, is to aid residents, we believe the phrase "persons ... whose rights are defined herein" was intended to refer only to the resident or one asserting rights in his stead, such as a legal guardian." Id at 88.

The Court further held "For this reason we believe it is clear that the Legislature intended only the resident or his proxy to be able to vindicate infringement of these rights by an action for damages." Id. At 88 It is clear that Plaintiff's proxy can maintain this action for a violation of plaintiff's rights while at the nursing home. The court further agrees with plaintiff that the plain language of the NHA, expressly provides that nursing-home residents "shall have a cause of action against any person" violating their rights and that they are permitted to "recover actual and punitive damages" and "reasonable attorney's fees and costs" incurred in bringing such an action. N.J.S.A. 30:13-8(a). If the Legislature had intended to limit residents' remedy to injunctive relief it could have done so. And there is nothing in the NJA to even suggest that a plaintiff's right to recover damages for NHA violations expires upon her death or that the Survivor's Act does not apply to such claims.

Defendant argues that Plaintiff's broad interpretation of the fee shifting provision would allow a nursing home defendant to be subject to fee shifting even when they are codefendants with another type of healthcare facility in the same cause of action. However, Defendant fails to reconcile that the fee shifting provision is only pursuant to an NHA cause of action regarding a violation of a resident's rights which, by nature, cannot be claimed against a hospital in the first place. Thus, Defendant's hypothetical is inconceivable.

Further, the Court disagrees with Defendant that applying the NHA to allow fee shifting would violate Defendant's equal protection rights under the New Jersey and United States Constitutions. This case does not involve a suspect classification and Defendants point to no fundamental constitutional rights at issue, so the rational basis test applies. The court finds that the classification of nursing home residents is rationally related to the legitimate governmental objective of protecting the rights and well-being of residents of nursing homes. Defendants submit no argument to show that the Legislature's classification of nursing-home residents was irrational.

While the issues presented in the moving papers are generally issues of law and not fact, the Court disagrees with Defendant's application of the law to the form of the present suit. Therefore, Summary Judgment cannot be granted in favor of Defendant.

The law requires that a jury cannot award the plaintiff damages for the defendant's violations of the Nursing Home Act and its negligence based upon the same injuries or harm to the plaintiff. Ptaszynski v. Atlantic Health Sys., 440 N.J. Super. 24 (App. Div. 2015)

"[I]t is fundamental that no matter under what theories liability may be established, there cannot be any duplication of damages." *P. v. Portadin,* 179 N.J.Super. 465, 472, 432 A.2d 556 (App. Div.1981). The common law prohibits a double recovery for the same injury. *Buccheri v. Montgomery Ward & Co.,* 19 N.J. 594, 605, 118 A.2d 21 (1955). Furthermore, it would be inconsistent with well-established principles to require a tortfeasor to pay twice for the same damages caused by a single wrong. *Alfone v. Sarno,* 87 N.J. 99, 115, 432 A.2d 857 (1981). Id.

Accordingly, the defendant is entitled to object at the time of trial should plaintiff attempt to produce damages pursuant to the NHA that are duplicative of damages for the negligence claims.

For the foregoing reasons, Defendant's Motion for Summary Judgment is hereby **DENIED**.

RICHARD J. TALBOT, ESQUIRE ID#: 040771993
LAW OFFICE OF ANDREW A. BALLERINI
Attorney At Law
Cherry Tree Corporate Center
535 Route 38, Suite 328
Cherry Hill, New Jersey 08002
(856) 665-7140
Attorney for Plaintiff

JOSEPH L. CAPANO, Executor of the Estate of ANDREW P. CAPANO,	: SUPERIOR COURT OF NEW JERSEY
	: LAW DIVISION
Plaintiff,	: CAMDEN COUNTY
CARE ONE AT EVESHAM, ELMWOOD EVESHAM ASSOCIATES, LLC, JOSEPH MINA, ADMINISTRATOR, CARE ONE MANAGEMENT, LLC, JOHN/JANE DOE ADMINISTRATOR 1-100; JOHN/JANE DOE DIRECTOR OF NURSING 1-100; JOHN/JANE DOE NURSE 1-100; JOHN/JANE DOE CNA 1-10; JOHN/JANE DOE MANAGEMENT COMPANY 1-100; JOHN/JANE DOE MEDICAL DIRECTOR 1-100; JOHN/JANE DOES 1-100; JOHN/JANE DOE CORPORATION 1-100; individually, jointly, severally, and/or in the alternative,	: DOCKET NO. CAM-L-507-17 : Civil Action : ORDER ENTERING FINAL JUDGMENT WITH ATTORNEY'S FEES AND COSTS, AS WELL AS PRE-JUDGMENT AND POST-JUDGMENT INTEREST UNDER
Defendants.	: R.4:42-11

4

THIS MATTER brought by Richard J. Talbot, Esquire, attorney for the Plaintiff, Joseph L. Capano, Executor of the Estate of Andrew P. Capano, deceased, on a Motion Entering Final Judgment with Attorney's Fees and Costs, as well as Pre-Judgment and Post-Judgment Interest Under R.4:42-11, and Anthony Cocca, Esquire, counsel for Defendant, Care One at Evesham and Elmwood Evesham Associates, LLC, appearing, with a Jury Verdict of $200,000.00 for nursing home resident's violations of rights and negligence being awarded on September 5, 2019, with the Court entering an Order on October 25, 2019, awarding attorney's fees in the amount of $123,161.50 and costs of $49,264.05 in favor of the Plaintiff, representing a total of $372,425.55 before interest, Pre-Judgment Interest in the amount of $29,447.51 is hereby Ordered such that a total Judgment is hereby entered in favor of Joseph L. Capano, Executor of the Estate of Andrew P. Capano against Defendants, Care One at Evesham and Elmwood Evesham Associates, LLC., in the amount of $401,873.06.

IT IS HEREBY ORDERED that Final Judgment is Ordered in this case in the amount of $401,873.06 in favor of Plaintiff, Joseph L. Capano, Executor of the Estate of Andrew P. Capano, against Defendants, Care One At Evesham and Elmwood Evesham Associates, LLC.

IT IS FURTHER ORDERED THAT Post-Judgment interest is to accrue at a rate of $35.71 per diem beginning November 23, 2019, through the end of the year and $45.79 per diem for the year 2020, such that this daily rate is to be added to this Judgment every day, up to the date of payment (receipt of draft made payable to Plaintiff, Joseph L. Capano, Executor of the Estate of Andrew P. Capano, and his attorney, the Law Office of Andrew A. Ballerini).

J.S.C.

Anthony M. Pugliese, J.S.C.

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Dubois v. Senior Living Solutions

Superior Court of New Jersey, Appellate Division

March 1, 2021, Submitted; August 5, 2021, Decided

DOCKET NO. A-1194-19

Reporter
2021 N.J. Super. Unpub. LEXIS 1654 *; 2021 WL 3412621

ELVIRA DUBOIS, as the administratrix of the estate of MARGARET SEBASTIAN

Plaintiff-Appellant/Cross-Respondent

v.

SENIOR LIVING SOLUTIONS, LLC d/b/a BRIDGEWAY CARE AND REHABILIATION AT HILLSBOROUGH,[1]

Defendant-Respondent/Cross-Appellant,

and

ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL NEW BRUNSWICK, ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL SOMERSET, SHEHZANA ASHRAF, M.D., and JULIET LWANGA, M.D.,
Defendants-Respondents.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5987-16.

Core Terms

ulcer, causation, summary judgment, motions, hematoma, pseudoaneurysm, discovery, skin, nursing care, staff, defendants', malpractice, contends, substantial factor, standard of care, vascular, surgery, orders, conservative treatment, oral argument, reconsideration, contributed, deviation, sacral, blood, groin, opine, wound, summary judgment motion, plaintiff's claim

Counsel: Lance Brown and Associates, LLC, attorneys for appellant/cross-respondent (Lance D. Brown, Sherry L. Foley, and Timothy J. Foley, of counsel and on the briefs; Sommer L. Spillane and David Schwadron, on the briefs).

Marks, O'Neill, O'Brien, Doherty & Kelly, PC, attorneys for respondent/cross-appellant (Frances Wang Deveney and Shannon B. Adamson, on the briefs).

Rosenberg Jacobs Heller & Fleming, PC, attorneys for respondents Robert Wood Johnson University Hospital New Brunswick and Robert Wood Johnson University Hospital Somerset (Raymond J. Fleming, of counsel; Christopher Klabonski, on the brief).

Farkas & Donohue, LLC, attorneys for respondents Shehzana Ashraf, M.D., and Juliet Lwanga, M.D. (Evelyn C. Farkas, of counsel; Christine M. Jones, on the brief).

Judges: Before Judges Messano, Hoffman, and Suter.

Opinion

PER CURIAM

Plaintiff Elvira Dubois, administratrix of the estate of Margaret Sebastian, filed this medical malpractice action against defendants Robert Wood Johnson University Hospital New Brunswick and Somerset

[1] Incorrectly pleaded as "Bridgeway Senior Healthcare d/b/a Bridgeway Care and Rehabilitation Center at Hillsborough" and "Bridgeway." Defendants-Respondents.

(RWJ), Doctors Shehzana Ashraf and Juliet Lwanga, and Senior Living Solutions, LLC [*2] d/b/a/ Bridgeway Care and Rehabilitation Center at Hillsborough (SLS). The allegations in the complaint involved the medical and nursing care defendants provided to eighty-six-year old Sebastian following a fall in her home on November 1, 2014.

After a protracted discovery period, SLS moved for summary judgment, and RWJ cross-moved for partial summary judgment. The essence of the arguments was that plaintiff's expert, Dr. Perry Starer, board certified in internal medicine and geriatrics, was unqualified to opine as to the appropriate standard of nursing care. After considering oral argument, the judge granted SLS's motion in part, dismissing plaintiff's claim of vicarious liability for Dr. Lwanga's alleged negligence because she was not an employee of SLS, and plaintiff's claim for punitive damages. The judge otherwise denied the motions without prejudice, concluding that a *N.J.R.E. 104* hearing on Dr. Starer's qualifications was necessary at or before the time of trial, which was set for September 30, 2019. The judge's July 19, 2019 orders (the July orders) preserved SLS's and RWJ's right to file a formal motion to bar Dr. Starer as an expert on the subject of nursing care.

Defendants subsequently [*3] filed a flurry of motions and cross-motions. Drs. Ashraf and Lwanga challenged the adequacy of the opinions rendered by Dr. Starer and sought to bar him from testifying on issues of causation. They also argued that lacking adequate expert evidence on the issue of causation from Dr. Starer and Dr. Charles E. Metzger, plaintiff's other expert who was board certified in internal medicine, summary judgment was appropriate. SLS's cross-motion sought summary judgment on similar grounds. RWJ's cross-motion sought to bar the testimony of Dr. Starer "concerning nursing care." RWJ subsequently filed a cross-motion for summary judgment. The notice of motion sought dismissal of all claims for medical malpractice "apart from those for failure to properly treat and prevent pressure ulcers." SLS subsequently moved to bar Dr. Starer's testimony regarding nursing malpractice.

The motions were to be heard on August 30, 2019. However, on the afternoon of August 29, plaintiff apparently emailed to defendants an expert report dated the same day by board-certified vascular surgeon Dr. Antonios P. Gasparis, who was never previously identified by plaintiff in discovery.[2] Defendants immediately objected.

After [*4] hearing oral argument, the judge entered an order on September 16, 2019 (the September order), supported by a lengthy written opinion. The order granted the motion to bar Dr. Starer's testimony and granted all defendants summary judgment dismissing plaintiff's complaint with prejudice.

Plaintiff moved for reconsideration. Counsel certified to the following:

> After [d]efendants' summary judgment motions were filed, I retained a different vascular surgeon who advised me on August 23, 2019 that he would not serve as our expert. This left me with an incredibly short period of time to attempt to find a competent expert who could review voluminous records and potentially write a report, which we were able to do by August 29, 2019.

Plaintiff also urged the judge to reconsider the dismissal of its "pressure ulcer" claim against RWJ, arguing Dr. Starer was competent to provide expert opinions on the subject and that his report and testimony was sufficient to establish a prima facie case of medical malpractice on this discrete issue. The judge denied the motion for reconsideration by order dated October 25, 2019 (the October order), spreading his reasons orally on the record.

Plaintiff appeals from [*5] the September and October orders. She contends the judge violated her due process rights by "sua sponte" dismissing the "pressure injury claim" without ever conducting the *N.J.R.E. 104* hearing, and even though RWJ never sought this relief. Plaintiff also contends the judge erred by applying the "but for" standard of proximate cause instead of the "increased risk doctrine"; according to plaintiff, the expert reports of Drs. Metzger and Starer established a prima facie case of malpractice if the proper standard were applied. Finally, plaintiff argues that it was error to grant summary judgment to SLS and Drs. Ashraf and Lwanga without considering Dr. Gasparis' late report, and, even without that report, plaintiff contends she established a genuine issue of material fact as to whether those defendants "contributed" to Sebastian's

[2] The appellate record includes the report and the responses from defense counsel, but not any transmittal correspondence from plaintiff's counsel.

death.

Defendants oppose these arguments. Additionally, SLS filed a cross-appeal from the July order. It contends the judge erred in ordering an *N.J.R.E. 104* hearing on whether Dr. Starer was qualified to opine on the appropriate standard of nursing care because he was not, and, therefore, the judge should have granted SLS's original summary judgment motion.

Having considered these arguments [*6] in light of the motion record and applicable legal standards, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

We limit our review to the record before the motion judge. *See Ji v. Palmer, 333 N.J. Super. 451, 463-64, 755 A.2d 1221 (App. Div. 2000)* (holding appellate review of the grant of summary judgment is limited to the record that existed before the motion judge (citing *Bilotti v. Accurate Forming Corp., 39 N.J. 184, 188, 188 A.2d 24 (1963)*)).

On the day following her fall, Sebastian presented at RWJ Somerset with atrial fibrillation, two fractured ribs, and a non-ST elevation myocardial infarction. Dr. Ashraf was her attending physician. Three days later, she underwent cardiac catheterization, and, on November 7, Sebastian was discharged to SLS. A nurse there noticed purple discoloration on Sebastian's groin area near the site of the catheterization. By November 9, the staff noticed the area had become a "large, hard, shiny hematoma" that extended "down [one-third] of [Sebastian's] thigh." The area was "painful to minimal touch." SLS staff call 9-1-1, and Sebastian was transported back to RWJ Somerset.

Records demonstrated that plaintiff had suffered significant blood loss and ultrasound examination of her groin area was read as presenting a "pseudoaneurysm."[3] Sebastian [*7] underwent surgical repair at RWJ New Brunswick on November 9, and her wound became infected and required debridement a few days later. Additionally, by November 14, she had developed a Stage Two sacral pressure ulcer, which worsened during Sebastian's stay at RWJ New Brunswick. Sebastian was transferred to the ICU after suffering respiratory distress; she died on December 1, 2014.

Dr. Starer prepared two reports. As to Dr. Ashraf and RWJ, he opined that they failed to properly address Sebastian's risk for bleeding following the catheterization procedure, resulting in her loss of blood and developing anemia. This resulted in her hospitalization, during which Sebastian "developed a pressure ulcer, became infected, and died." According to Dr. Starer, these defendants "failed to develop and implement a comprehensive care plan to prevent skin wounds from occurring and . . . deteriorating."

As to Dr. Lwanga and the SLS staff, Dr. Starer opined they failed to diagnose Sebastian's loss of blood and failed "to properly develop and implement a care plan to address [her] risk for bleeding." This led to conditions that "contributed to [Sebastian's] death."

Dr. Metzger's [*8] report criticized Dr. Ashraf's failure to examine Sebastian's groin area to "rule out a pseudoaneurysm," "a known potential complication of cardiac catheterization." Had the condition been detected earlier, Dr. Metzger concluded it would have "required only conservative treatment rather than surgery . . . and [Sebastian] would have survived." Dr. Metzger reached the same conclusions about Dr. Lwanga.

Defendants' motions were supported with portions of Dr. Metzger's and Dr. Starer's deposition testimony. Dr. Metzger acknowledged being uncertain as to what factors determine whether a patient requires surgery for a pseudoaneurysm versus conservative treatment; he would defer to a vascular surgeon or interventional radiologist on the issue. He would also defer to a vascular surgeon regarding what conservative treatment options might exist and the factors to consider in deciding whether conservative treatment was warranted.

Dr. Starer offered no opinions about the treatment

[3] The parties disputed whether plaintiff had a pseudoaneurysm or a hematoma. A pseudoaneurysm is defined as "[a] cavity due to ruptured myocardial infarction that has been contained by an intact parietal pericardium and communicates with the left ventricle by a narrow neck." *Stedman's Medical Dictionary* 1450 (26th ed. 1995). A hematoma is "[a] localized mass of extravasated blood that is relatively or completely confined within an organ or tissue, a space, or a potential space; the blood is usually clotted (or partially clotted), and, depending on how long it has been there, may manifest various degrees of organization and decolorization." *Id.* at 772.

options available for Sebastian's hematoma or pseudoaneurysm, but he believed it was more likely that a hematoma did not develop until the early morning of November 9, the day Sebastian left SLS's care. However, he could [*9] not be sure because the SLS staff failed to properly monitor the situation.

Dr. Gasparis is board-certified in general and vascular surgery. In his report, Dr. Gasparis opined that the early bruising on Sebastian's groin should have been investigated further. A physical examination and consideration of "a significant drop in her blood count from admission and from post-catheterization levels" should have "warrant[ed] investigation for [a pseudoaneurysm] with an ultrasound" prior to Sebastian's discharge to SLS. According to Dr. Gasparis, the condition could have been treated then with "a non-surgical option," such as "compression or thrombin injection." Avoiding surgery would have avoided the complications that subsequently occurred and led to Sebastian's death.

II.

We first address the issues raised by plaintiff's service of Dr. Gasparis' report the afternoon before the summary judgment motions were to be heard. During oral argument on defendants' motions, the judge asked counsel, "[H]ow is it that I should even consider that [report]?" Plaintiff's counsel contended the late report was simply rebuttal of issues regarding causation raised by defendants' motions, and Dr. Gasparis' report [*10] was consistent with Dr. Metzger's opinions. Counsel alternatively orally sought to reopen discovery.

During oral argument, the judge expressed a firm belief that pursuant to *Rule* 4:17-7, he should disregard Dr. Gasparis' report. In a footnote in his written opinion, the judge explained that he did disregard the report in considering the motions.

Before us, plaintiff reiterates the contention that the late-served report was proper rebuttal of an argument "presented for the first time in the opposing party's case." We disagree and conclude the report was properly disregarded by the judge in his consideration of the pending summary judgment motions.

"An appellate court applies 'an abuse of discretion standard to decisions made by [the] trial courts relating to matters of discovery.'" *C.A. by Applegrad v. Bentolila, 219 N.J. 449, 459, 99 A.3d 317 (2014)* (alteration in original) (quoting *Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371, 25 A.3d 221 (2011)*). "It 'generally defer[s] to a trial court's disposition of discovery matters unless the court has abused its discretion[,] or its determination is based on a mistaken understanding of the applicable law.'" *Ibid.* (first alteration in original) (quoting *Pomerantz Paper Corp., 207 N.J. at 371*).

Rule 4:17-7 prohibits a party from amending interrogatory answers within twenty days of the discovery end date unless the party

> certifies . . . [*11] that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. . . . Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties.

Obviously, plaintiff's late service of an expert vascular surgeon's report violated every provision of the rule. Nothing further needs to be said. *R.* 2:11-3(e)(1)(E).

Furthermore, arguing the report was proper rebuttal of the defendants' motions does not compel a different conclusion. "Generally, summary judgment is inappropriate prior to the completion of discovery[,]" *Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496, 820 A.2d 669 (App. Div. 2003)* (citing *Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193, 536 A.2d 237 (1988)*), and, absent good cause, the motion should be made returnable no later than thirty days before trial. *R.* 4:46-1. This procedural framework limits the parties' ability to continue to seek further discovery or serve additional discovery in response to arguments raised by opponents shortly before trial.

The thrust of defendants' [*12] arguments was that plaintiffs' experts failed to establish that any alleged deviation from post-catheterization standards of care was a proximate cause of plaintiff's surgery, hospitalization and ultimate death. Plaintiff clearly

should have anticipated that proximate cause was a critical element in establishing a prima facie case of medical negligence. *Komlodi v. Picciano, 217 N.J. 387, 409, 89 A.3d 1234 (2014)*. Furthermore, generally, expert opinion is necessary to establish causation. *Gardner v. Pawliw, 150 N.J. 359, 375, 696 A.2d 599 (1997)* (citing *Germann v. Matriss, 55 N.J. 193, 205, 260 A.2d 825 (1970)*). Curing this deficiency in her case was the true, indeed the only reason why plaintiff belatedly sought to have Dr. Gasparis' report and potential testimony admitted. Counsel admitted as much in his certification filed in support of the motion for reconsideration.[4] The judge properly refused to consider Dr. Gasparis' report.

III.

Plaintiff contends that even without Dr. Gasparis' report and testimony, she established a prima facie case of medical negligence through the reports and testimony of Drs. Starer and Metzger pursuant to the "increased risk doctrine," and the judge erred by dismissing her complaint because he mistakenly utilized the "but for" causation standard. We disagree.

In a medical malpractice action, "[a]s a general rule, it is the causation [*13] element that is the most complex." *Verdicchio v. Ricca, 179 N.J. 1, 23, 843 A.2d 1042 (2004)*. Because the traditional "but for" causation standard "has its limitations in situations where two or more forces operate to bring about a certain result," our courts have adopted the "substantial factor" causation standard in such situations. *Id. at 24*.

> The substantial factor test allows the plaintiff to submit to the jury not whether "but for" defendant's negligence the injury would not have occurred but "whether the defendant's deviation from standard medical practice increased a patient's risk of harm or diminished a patient's chance of survival and whether such increased risk was a substantial factor in producing the ultimate harm."
>
> [*Ibid.* (quoting *Gardner, 150 N.J. at 376*).]

Here, during oral argument, the judge asked counsel if the causation issue implicated the Court's decision in *Scafidi v. Seiler, 119 N.J. 93, 574 A.2d 398 (1990)*;[5] all answered affirmatively. It is clear the judge understood the proper causation standard to be applied.

The judge concluded, however, that both Drs. Starer and Metzger were unable to render anything other than net opinions about how alleged deviations from the standard of care — defendants' failure to check plaintiff's groin area and treat the hematoma or pseudoaneurysm sooner — were substantial [*14] factors in the ultimate harm, i.e., plaintiff's death. As to Dr. Metzger, the judge noted that he rendered his opinion "in the admitted absence of qualifications to testify in the disciplines of vascular surgery and interventional radiology, which, he readily concede[d], are specialties that could opine on what 'conservative treatment' modalities could have been, but were not rendered[.]"

The judge reached a similar conclusion with respect to Dr. Starer.

> Dr. Starer does not offer an opinion in this matter that the decedent sustained a pseudoaneurysm. Dr. Starer did not make a finding as to when [decedent] had acute blood loss. Dr. Starer did not make a finding as to when [decedent] had a hematoma. Dr. Starer has not made a determination as to how much sooner the hematoma could have been diagnosed.
>
> Moreover, . . . Dr. Starer does not offer any opinions on the type of interventions that would have been available . . . to address the hematoma. Dr. Starer could not say that the type of treatment available upon earlier diagnosis would have been different from that which was ultimately rendered to [decedent].

The judge did not misapply the proper causation analysis nor did he improperly place [*15] the burden of proof upon plaintiff. In an increased risk case, the burden remains on the plaintiff to establish in the first instance that "defendant's negligence was a substantial contributing cause of the injury." *Koseoglu v. Wry, 431 N.J. Super. 140, 158, 67 A.3d 646 (App. Div. 2013)*

[4] SLS argues that even if Dr. Gasparis' report was admitted, he never rendered an opinion about SLS' negligence. We agree.

[5] In *Scafidi*, the Court held, "Evidence demonstrating within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a preexistent condition raises a jury question whether the increased risk was a substantial factor in producing the ultimate result." *119 N.J. at 108* (citing *Evers v. Dollinger, 95 N.J. 399, 417, 471 A.2d 405 (1984)*).

(citing *Verdicchio, 179 N.J. at 25*). The burden shifts to the defendant only on the issue of "apportionment of damages between his conduct and any pre-existing condition." *Ibid.* (citing *Verdicchio, 179 N.J. at 37*).

The judge correctly recognized the shortcomings of the experts' opinions based upon their lack of qualifications and admitted lack of expertise. Neither had the ability to address, except in broad generalities untethered to the facts of the case, how a delay in the diagnosis of a hematoma or pseudoaneurysm increased the risk of harm to plaintiff and led to her death.

With one exception, which we explain below, we affirm the grant of summary judgment to defendants substantially for the reasons expressed by the judge in the written decision that accompanied his September order.

IV.

As noted, RWJ's notice of motion for summary judgment specifically excluded plaintiff's claims regarding defendant's alleged failure to properly treat and prevent a pressure ulcer during her hospitalization at defendant's institutions. In [*16] its brief supporting the motion, RWJ reiterated that it was not seeking summary judgment on this claim.

During oral argument on the motions, plaintiff understandably never addressed the issue. RWJ's counsel did not either, except in the broadest terms, noting the causation arguments raised by co-defendants and arguing "everything flows from . . . the alleged negligence with regard to the pseudoaneurysm or hematoma and . . . if causation hasn't been shown with regard to that, . . . [plaintiff] failed to prove causation required as to all the other claims."

In a footnote in his comprehensive written decision disposing of the motions, the judge took note of his earlier July order, in which he preserved the right of SLS and RWJ to bar Dr. Starer as an expert on nursing care after a *N.J.R.E. 104* hearing. The judge noted defendants' earlier motion "did not raise the causation issue." He further wrote that for the present motions, the court assumed arguendo that Dr. Starer was "qualified to render the opinions he proffer[ed]; however, . . . his report and opinions . . . are devoid of any valid, substantial facts and admissible expert opinion on the critical element of *causation*." In a second footnote, [*17] the judge agreed with SLS that the previously ordered *N.J.R.E. 104* hearing "ha[d] no bearing on . . . the demonstrated lack of expert opinion across-the-board on the critical element of *causation*." However, the judge only analyzed the causation issue as it applied to the development of the hematoma or pseudoaneurysm in plaintiff's groin and the need for surgery versus conservative treatment of the condition.

When plaintiff moved for reconsideration, the following colloquy occurred between plaintiff's counsel and the judge:

> Counsel: Your Honor, we believe, respectfully, that with regard to the pressure ulcer case, which was a separate case essentially within this case against [RWJ], that the Court may have inadvertently thrown out the baby with the bath water. The opinion doesn't specifically address that aspect of the case and —
>
> . . . .
>
> Judge: The pressure ulcer was the last of the continuum of complications that arose from the outset of the . . . treatment that was alleged to have been malpractice.
>
> . . . .
>
> Counsel: We believe it's a separate action entirely because of the fact that the case — the pressure ulcer went from a stage 2 to an unstageable pressure ulcer case in and of itself is a separate [*18] issue from the hematoma.
>
> Judge: But there was no — there was no opinion that that was the case.
>
> Counsel: Dr. Starer's opinion, Your Honor.
>
> Judge: [B]ut fatally, Dr. Starer, even assuming he was qualified to render an opinion about the nursing care aspect of it, couldn't make the causal connection.
>
> Counsel: Well, as to the — as to the pressure ulcer we believe he did . . . . As to the hematoma and the pseudoaneurysm, Your Honor was quite thorough in analyzing that issue and I believe that that was the bulk of the issues.

The judge reiterated that plaintiff failed to produce

> that causal link from finding a standard of care that was deviated from, that the deviation was a substantial factor in producing the ultimate outcome here . . . and . . . you never get to the question as to whether or not the pressure ulcers as a residual manifestation of a complication post-surgery was

> itself the efficient cause of the death or contributed towards it . . . .

The judge cited a footnote in his written opinion deciding the earlier motions, in which he outlined plaintiff's claims, including "the development of a pressure ulcer that contributed to her death." The judge entered the October order denying reconsideration, [*19] concluding that he had not overlooked nor failed to appreciate probative evidence in deciding the summary judgment motions. *See, e.g.,* *Triffin v. SHS Grp., LLC, 466 N.J. Super. 460, 466, 247 A.3d 7 (App. Div. 2021)* (noting reconsideration is only appropriate when the court's decision is "palpably incorrect or irrational," or the court "did not consider, or failed to appreciate the significance of probative, competent evidence" (quoting *Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60 (App. Div. 1996)*)).

Plaintiff raises several arguments in urging us to reverse summary judgment in favor of RWJ on her claim of malpractice regarding the sacral pressure ulcer that developed during Sebastian's hospitalization.[6] She contends that the judge's sua sponte grant of summary judgment on this discrete claim violated her due process rights, that Dr. Starer is qualified to render opinions on the subject of nursing care, or, alternatively, the court should have conducted the *N.J.R.E. 104* previously ordered, and, ultimately, that she presented a prima facie case that should have survived summary judgment.

RWJ contends based on all the motions filed plaintiff was on notice that defendants were challenging every claimed injury Sebastian suffered because of a lack of expert testimony regarding causation. It contends that Dr. Starer's opinions were [*20] merely net opinions, and, therefore, the previously ordered *N.J.R.E. 104* hearing was unnecessary. RWJ argues the judge correctly determined that the pressure ulcer claim failed for lack of expert causation evidence.

"The net opinion rule is a 'corollary of [*N.J.R.E. 703*] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" *Townsend v. Pierre, 221 N.J. 36, 53-54, 110 A.3d 52 (2015)* (alteration in original) (quoting *Polzo v. Cnty. of Essex, 196 N.J. 569, 583, 960 A.2d 375 (2008)*). "An expert's conclusion 'is excluded if it is based merely on unfounded speculation and unquantified possibilities.'" *Id. at 55* (quoting *Grzanka v. Pfeifer, 301 N.J. Super. 563, 580, 694 A.2d 295 (App. Div. 1997)*).

Dr. Starer's report described in detail the standard of care, RWJ's deviation from that standard, and the injuries that resulted:

> [T]he staff of [RWJ] failed to ensure that [decedent] received appropriate routine medical and nursing care . . . .
>
> The failure of the staff of [RWJ] to comply with the applicable standards of care caused, within a reasonable degree of medical certainty, [decedent] to suffer a skin wound. This injury to [decedent] could have, within a reasonable degree of medical certainty, been prevented or detected/addressed earlier if the standards of care had been followed. It should have been clear to the staff of [RWJ] that [decedent's] [*21] condition was not improving under the care and treatment plan and they should have made necessary changes in [decedent's] care and treatment . . . [and] should have ensured that [decedent's] skin was not subjected to friction and shearing forces and that she was turned and repositioned frequently enough to prevent skin damage and promote healing.
>
> The failure of the staff of [RWJ] to meet the standards of care for skin care resulted in the deterioration of the integrity of [decedent's] skin, causing pain and suffering . . . [and] resulted in a decline in [decedent's] clinical condition. As a result of the staff of [RWJ] not properly addressing the external forces which can damage skin, [decedent's] skin condition deteriorated . . . [and] caused pain, suffering, clinical deterioration, and substantially contributed to her death.

At his deposition, Dr. Starer testified that Sebastian had numerous comorbidities including dementia of the Alzheimer's type, and before the hospitalization, high blood pressure, hypolipidemia, coronary atherosclerosis, arthritis, hypothyroidism, cervical disc disease, lower

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[6] In relation to the pressure ulcer injury, plaintiff's brief only addresses RWJ's alleged negligence. We deem the claim waived as to SLS or any other defendant. *See, e.g.,* *N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2, 105 A.3d 1145 (App. Div. 2015)* ("An issue that is not briefed is deemed waived upon appeal." (citing *Fantis Foods v. N. River Ins. Co., 332 N.J. Super. 250, 266-67, 753 A.2d 176 (App. Div. 2000)*)).

back pain, two rib fractures, and she was diagnosed at the hospital with atrial fibrillation. [*22] Dr. Starer testified that some pressure ulcers are unavoidable and not all are due to failure to reposition the patient. He stated that his criticism of defendant RWJ was strictly related to their prevention and treatment of Sebastian's sacral pressure ulcer because Sebastian was at high risk for developing a skin ulcer.

Dr. Starer stated that considering decedent's comorbidities and a recent myocardial infarction, the pressure ulcer put stress on decedent's heart because her body now had a wound that "require[d] nutrients to be brought to it and waste materials to be taken away and protein to be brought to it, this is an additional burden putting on an already damaged heart[.]" While Dr. Starer acknowledged that defendants RWJ's nurses appropriately turned and repositioned decedent every two hours as called for in the nursing treatment plan and the doctors' orders, he also stated that "as the wound began to deteriorate, there should have been a revision of that treatment plan."

We conclude that Dr. Starer was qualified to render these opinions based on his years of experience and his board certification in geriatrics. With one exception, these were not net opinions and should have vaulted [*23] plaintiff over the summary judgment threshold on this discrete claim of injury.

However, we agree with the motion judge in one respect. Dr. Starer's opinion that the pressure ulcer was a substantial factor contributing to Sebastian's death is a net opinion unsupported by requisite factual underpinnings. Dr. Starer's report contains nothing more than a conclusory statement. His deposition testimony, quoted above, describes a "cascading" series of events that culminated in Sebastian's death. However, Dr. Starer was unable to explain how given all her other ailments, a small pressure wound on Sebastian's sacral skin area was a *substantial* contributing factor of her death. *See, e.g.,* *Verdicchio, 179 N.J. at 25* ("[M]erely establishing that a defendant's negligent conduct had some effect in producing the harm does not automatically satisfy the burden of proving it was a substantial factor[.]") We have carefully examined the record, and there is nothing but conclusory statements to support the opinion that a small sacral pressure ulcer was a substantial factor in causing Sebastian's death.

In sum, we partially reverse the September and October orders only as to RWJ and only as to plaintiff's claim for Sebastian's pain [*24] and suffering caused by the sacral pressure ulcer that allegedly resulted from RWJ's negligence. In all other respects, we affirm those orders that resulted in summary judgment in defendants' favor. We dismiss SLS's cross-appeal as moot.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.

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Bundy v. Bentley Senior Living at Pennsauken

Superior Court of New Jersey, Appellate Division

January 11, 2021, Argued; February 5, 2021, Decided

DOCKET NO. A-1639-19T1

Reporter
2021 N.J. Super. Unpub. LEXIS 204 *; 2021 WL 408761

LLOYD BUNDY by and through his Power of Attorney, LLOYD BUNDY, JR., Plaintiff-Appellant,

v.

BENTLEY SENIOR LIVING AT PENNSAUKEN, BENTLEY ALP, and KDG OPERATING COMPANY, LLC, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-045016.

Core Terms

inspection, standard of care, expert opinion, walker, trial court, inadmissible

Counsel: Brian P. Murphy argued the cause for appellant.

William J. Mundy argued the cause for respondents (Burns White, LLC, attorneys; Frantz J. Duncan, William J. Mundy, and Ahsan A. Jafry, on the brief).

Judges: Before Judges Sabatino and DeAlmeida.

Opinion

PER CURIAM

This appeal arises out of a malpractice case against an assisted living facility. The trial court dismissed the lawsuit after ruling that plaintiff's liability expert's opinion concerning the critical standard of care was inadmissible. For the reasons that follow, we affirm.

These are the pertinent facts and circumstances. Plaintiff Lloyd Bundy, Sr., an eighty-one-year-old man with Alzheimer's, was a resident of defendants' assisted living facility known as Bentley Senior Living in Pennsauken. At about 11:30 a.m. on March 10, 2015, plaintiff had an unwitnessed fall in his room when he tripped over his roommate's walker. Plaintiff, who was injured in the fall, was taken to a hospital and diagnosed with a hip fracture, resulting in hip replacement surgery.

Plaintiff alleges defendants were negligent in allowing his roommate's walker to be left on his [*2] side of the room, contrary to his care plan to guard against such tripping hazards or "clutter." He surmises that a technician moved the walker when she came into the room at an unspecified time that morning to do cardiac testing on the roommate, and then failed to put the walker back in a safe place. At her deposition, the technician did not outright deny she moved the walker, but rather stated if she had done so it was her practice to move it back after she was finished testing. Plaintiff himself did not see the technician or anyone else move the walker.

To support his liability theory of negligence, plaintiff relied on the expert opinions of a registered nurse he retained for the litigation. The expert has fifty years of experience as a nurse and thirty years as a nursing administrator, although not in an assisted living facility. She issued two expert reports, only one of which is in our record. In that supplied report, the expert opines defendants breached standards of care by failing to inspect plaintiff's room and allowing a tripping hazard to be present. She contends that failure violates state regulations, including *N.J.A.C. 8:36-7.3*, by failing to

assure a patient's room is clutter free.

The [*3] expert's report does not specify a standard of care with respect to how frequently an assisted living facility must inspect a resident's room for tripping hazards. At the expert's deposition, defense counsel tried to pin her down on a time frame, but she repeatedly equivocated on the subject. Ultimately, the expert stated that a visual inspection of the room is "supposed to be" performed "every hour."[1] However, she did not mention any source for that purported time standard.

Defendants moved in limine to bar the nurse's expert testimony as inadmissible net opinion. They concurrently moved for summary judgment.

After hearing oral argument, the trial court granted both motions. Plaintiff then moved for reconsideration, asserting the judge had critically erred in overlooking plaintiff's expert's deposition testimony attesting to the "once per hour visual inspection" standard—a point plaintiff's counsel had not brought up at the oral argument on the motion. The judge denied reconsideration,[2] and this appeal ensued.

We first address the net opinion issue. The Supreme Court has published a series of recent cases with guidance on the subject.

The doctrine [*4] barring the admission at trial of net opinions is a "corollary of [*N.J.R.E. 703*] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." *Townsend v. Pierre, 221 N.J. 36, 53-54, 110 A.3d 52 (2015)* (alteration in original) (quoting *Polzo v. Cnty. of Essex, 196 N.J. 569, 583, 960 A.2d 375 (2008)*). The net opinion doctrine requires experts to "give the why and wherefore" supporting their opinions, "rather than . . . mere conclusion[s]." *Id. at 54* (quoting *Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)*).

Experts must "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." *Id. at 55* (quoting *Landrigan v. Celotex Corp., 127 N.J. 404, 417, 605 A.2d 1079 (1992)*). An expert's conclusion should be excluded "if it is based merely on unfounded speculation and unquantified possibilities." *Ibid.* (quoting *Grzanka v. Pfeifer, 301 N.J. Super. 563, 580, 694 A.2d 295 (App. Div. 1997)*).

Bearing in mind "the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." *Ibid.; see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 401, 98 A.3d 1173 (2014)* ("[T]he standard of care [the expert] set forth represented only his personal view and was not founded upon any objective support. His opinion as to the applicable standard of care thus constituted an inadmissible net opinion."); *Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373, 25 A.3d 221 (2011)* ("[I]f an expert [*5] cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is 'personal,' it fails because it is a mere net opinion.").

That said, experts may base their opinions upon unwritten industry standards without violating the net opinion doctrine. *See, e.g., Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 333, 334 n.4, 162 A.3d 311 (App. Div.)* (noting that an expert's opinion may be based on unwritten "generally accepted standards, practices, or customs of the . . . industry") (citing *N.J.R.E. 702*), *certif. denied, 230 N.J. 595 (2017)*; *Davis, 219 N.J. at 413* (quoting *Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103, 770 A.2d 1258 (App. Div. 2001)*) (recognizing

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[1] At other points in her deposition, the expert alluded to a fifteen-minute standard, but she appears to have ultimately settled on a one-hour period, and that is the period advocated by counsel.

[2] Plaintiff argues as a procedural matter that the motion judge should have reconsidered his original ruling because he "overlooked" portions of the expert's deposition testimony that had not been pointed out during oral argument. *See Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60 (App. Div. 1996)* (concerning the grounds for reconsideration under *Rule 4:49-2*). We do not hinge our analyses of the substantive issues on that alleged procedural oversight. It is well established that appellate courts must review the correctness of trial court decisions, not simply the reasons cited in opinions by trial judges. *See, e.g., Hayes v. Delamotte, 231 N.J. 373, 387, 175 A.3d 953 (2018)* (citing *Isko v. Planning Bd. of Livingston Twp., 51 N.J. 162, 175, 238 A.2d 457 (1968)*, *abrogated on other grounds by Com. Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546, 585 A.2d 928 (1991)*). Having carefully reviewed the merits of the appeal, we discern no necessity to remand this matter back to the trial court for additional reconsideration, as the deficiencies of plaintiff's expert's opinion are manifestly apparent.

that the expert's conclusions might not have been inadmissible net opinion if he had referenced an "unwritten custom" of the industry). The critical ingredient is that the expert's opinion must be based upon written or unwritten objective standards recognized in the field. The opinion cannot be merely an expression of the expert's personal subjective view.

In the present case, the expert nurse's once-per-hour standard for inspecting a resident's room is a net opinion that lacks adequate objective support. That time interval is not specified in any federal or state statutes or regulations. Nor is it specified in guidelines set forth by the American Nursing Association. The regulations and state guidelines [*6] are more general, expressing overall policies of providing adequate services to meet the needs of residents. *See, e.g.*, N.J.A.C. 8:36-5.1.

Here, plaintiff's expert provided no specifics for why the standard of inspection frequency was hourly, as opposed to, say, daily or once per shift. The omission of the hourly standard from her written report is telling.[3] Her reluctance at deposition to commit to a time period further bespeaks the absence of an objective foundation for the opinion.

We appreciate, as did the trial court, that inspecting a patient's room at least once per hour may well be a reasonable standard, depending on how large or intensive the facility is, staffing levels,[4] patient care demands, and other variables. But the expert did not say where the one-hour standard comes from, other than her own personal subjective experience. She did not identify others in the field that utilize such a standard, or places where she has worked as an administrator that have done so. The number seems to have come out of thin air. The net opinion doctrine is not overcome by such conclusory and unmoored commentary, even from a person such as this nurse who we appreciate has many [*7] years of experience in the field.

For these reasons, we conclude, albeit for reasons slightly different than those stated by the trial court, that the nurse's personal expression of a one-hour standard of care is inadmissible net opinion. The court did not misapply its discretion in excluding such an expert. Hisenaj v. Kuehner, 194 N.J. 6, 12, 942 A.2d 769 (2008) (applying an abuse-of-discretion scope of review to a trial court's ruling on the admissibility of expert opinion in a civil case).

Having upheld the exclusion of plaintiff's liability expert, we readily agree that the court had a sound basis to grant summary judgment to defendants on the issue of malpractice liability. Plaintiff concedes that defendants are a licensed professional provider subject to statutory limitations on tort actions. They cannot be found liable for malpractice without appropriate expert opinion to support an alleged deviation from the appropriate standard of care. *See* N.J.S.A. 2A:53A-26 (encompassing within this statutory protection, among other occupational categories, a "health care facility as defined in [N.J.S.A. 26:2H-2]," which includes extended care facilities, skilled nursing homes, nursing homes, intermediate care facilities, residential health care facilities, and dementia care [*8] homes). There is no argument here that this is a "common knowledge" case that can go to a jury without proper expert support. Hence, defendants are entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 666 A.2d 146 (1995).

Affirmed.

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[3] We acknowledge that a court may permit an expert to supplement through deposition testimony the contents of her written expert reports, so long as the reports contain "the logical predicates and conclusions" for such testimony. Conrad v. Robbi, 341 N.J. Super. 424, 441, 775 A.2d 562 (App. Div. 2001) (quoting Velazquez ex rel. Velazquez v. Portadin, 321 N.J. Super. 558, 576, 729 A.2d 1041 (App. Div. 1999), *rev'd on other grounds*, 163 N.J. 677, 751 A.2d 102 (2000)); *see also* McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171, 521 A.2d 851 (App. Div. 1987). Here, there is no hint within the contents of the expert's report about how frequently a facility should inspect a resident's room for clutter, but instead generalities that are not time specific. The "logical predicates" for the one-hour standard were not previewed in a meaningful way.

[4] We recognize the expert's report opines that defendants must have lacked adequate staffing levels because plaintiff had managed to elope from the facility on two occasions. However, that likewise is an inadmissible net opinion, as the expert performed no numerical analysis of the facility's resident population and staffing levels. In addition, the fact that plaintiff eloped in the past must be understood in the context that a facility has an obligation to allow residents a certain degree of autonomy and freedom of movement. *See* N.J.A.C. 8:36-6.1 (requiring respect for "resident rights"). In any event, the focus of the appeal is on alleged inadequate inspections, not whether defendants employed sufficient staff to perform such inspections.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2143-20

DAMARIS CHANDLER,
as administrator ad prosequendum
of the estate of JOSEPH E.
CHANDLER, JR., deceased,

Plaintiff-Respondent,

v.

TODD W. KASPER,

Defendant-Appellant,

and

THOMAS C. KASPER,

Defendant,

and

KAZZ, INC., d/b/a KASPER'S
CORNER and KASPER
AUTOMOTIVE,

Defendants-Respondents.

Argued September 13, 2021 – Decided October 7, 2021

Before Judges Sabatino and Rothstadt.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4710-18.

Neal A. Thakkar argued the cause for appellant (Sweeney & Sheehan, PC, attorneys; Frank Gattuso and Jacqueline M. DiColo, on the briefs).

Robert Douglas Kuttner argued the cause for respondent Damaris Chandler.

Mark R. Sander argued the cause for respondent Kazz, Inc. (Thomas, Thomas & Hafer, LLP, attorneys; Mark R. Sander, of counsel and on the brief).

PER CURIAM

In this wrongful death, N.J.S.A. 2A:31-1 to -6, and Survivor's Act, N.J.S.A. 2A:15-3, action, we granted defendants Todd W. Kasper, Kazz, Inc. d/b/a Kasper's Corner, and Kasper Automotive, leave to appeal from two January 22, 2021 orders entered by the Law Division, denying defendants' motion for partial summary judgment, and permitting plaintiff to amend her previously filed complaint to correct her standing by designating herself both as Administrator Ad Prosequendum and the General Administrator of her deceased father's estate. According to defendants' arguments before the motion judge and now on appeal, plaintiff could not have standing to bring the Survivor's Act

action because no estate existed at the time she filed her complaint. And, by the time letters of administration were issued to plaintiff and she sought to amend her complaint, the statute of limitations for the Survivor's Act action ran years before. The motion judge acknowledged the deficiency in plaintiff's initial standing but still denied defendants' motion to dismiss as a matter of equity. We reverse that determination and remand for entry of orders dismissing plaintiff's Survivor's Act action for lack of standing because plaintiff's original complaint was a nullity and any amendment sought after the statute of limitations ran could not relate back to that complaint.

The undisputed facts giving rise to the complaint in this action are taken from the motion record and summarized as follows. The decedent, Joseph E. Chandler, was struck by an automobile while crossing a street on December 21, 2016. The vehicle that struck the decedent was driven by defendant Todd W. Kasper and owned by defendant Thomas C. Kasper. As a result of being struck by that vehicle, the decedent suffered significant injuries and passed away six days later.

Just prior to the statute of limitations running as to the decedent's and his heirs' claims, on December 18, 2018, the decedent's daughter, plaintiff Damaris Chandler, filed a two-count complaint as Administrator Ad Prosequendum of

her father's estate. The complaint alleged that the decedent died on December 27, 2016, intestate and that plaintiff had been appointed as Administrator Ad Prosequendum prior to the filing of the complaint. The first count asserted a claim under the Survivor's Act for the personal injuries and pain and suffering the decedent experienced prior to his death. The second count asserted a wrongful death action, which claimed that the decedent's daughters, plaintiff and India Ruhlman, his son Kerri Chandler, and his other "survivors and next of kin" were entitled to damages. In response, defendants filed answers to the complaint. Defendants Todd and Thomas Kasper's answer asserted as a separate defense that plaintiff's claims were statutorily barred by both the wrongful death statute and by the Survivor's Act. Thereafter the parties engaged in discovery. At no time prior to the filing of the subject summary judgment motions did defendants otherwise assert that plaintiff lacked standing to bring the Survivor's Act action.

Thereafter, in November 2020, defendants filed a motion for summary judgment seeking dismissal of the Survivor's Act action because plaintiff lacked standing to bring that claim as letters of general administration had never been issued to her. Plaintiff filed opposition to the motion and a cross-motion to file

a second amendment complaint to reflect that on December 8, 2020, plaintiff obtained letters of general administration.

In a certification filed in support of her cross-motion and in opposition to defendants' motion, plaintiff explained that there was a delay in her being able to seek appointment as both Administrator Ad Prosequendum and as General Administrator of her father's estate due to disagreements between her and her siblings. Moreover, she understood from discussions with representatives of the county surrogate's office that because there were no assets in the estate, it was only necessary for her to be appointed as Administrator Ad Prosequendum to file the lawsuit and later be appointed as General Administrator to distribute any recovery. According to plaintiff, only when the estate had assets would she need to be appointed as general administrator, which she began to pursue only when defendants "made a small offer in mediation" to settle this case in August 2020. However, it took additional time to persuade her siblings to agree to her appointment.

After further submissions, the motion judge considered the parties' oral arguments on January 22, 2021. Afterward, the motion judge denied defendants' motion and granted plaintiff's cross-motion, placing his reasons on the record that same day. In his oral decision, the motion judge discussed the case law

relied on by the parties and raised by the judge, before concluding that plaintiff acted diligently and "provided [defendants] timely notice of the [Survivor's Act] claim by the initial complaint and . . . perhaps there's a defect in the standing of . . . plaintiff, but [she] was seeking to proceed diligently. [And,] New Jersey Law holds that it would be inequitable to deny [a] party their day in court because of ignorance."

The judge also determined that "[a] deceased party['s] claim[] can only proceed through either [A]dministration [A]d [Proseqeundum] or through an estate being raised." He stated that defendants' argument as to standing was at best a "technical argument" and that "[s]tatute of limitations defenses are not permitted where mechanical application would inflict an obvious and unnecessary harm on . . . the party who holds the claim without advancing the legitimate purpose." And, according to the judge "[t]o deny a relation back . . . serves no legitimate purpose." The judge also relied on the fact that the parties participated in an arbitration and in discovery for years without defendants raising any issues as to standing. However, the judge found that "because standing's a threshold issue [that is] very similar to jurisdiction, it cannot be waived." Nevertheless, a defect in standing did not "mandate [] . . . the sanction of dismissal."

The judge also found support in the fact that plaintiff had difficulty in pursuing the issuance of letters of general administration because of disagreements between her and her siblings. He found that the siblings only agreed to renounce their rights to being named Administrator Ad Prosequendum immediately before the filing of the complaint, but "they wouldn't permit full representation of the estate by [plaintiff.]" Moreover, plaintiff relied on information she received from the surrogate's office that seemed to indicate that she could initially pursue the action as Administrator Ad Prosequendum and later could seek letters of administration that would allow for distribution of any funds that may be recovered in the action. It was not until December of 2020 that plaintiff's siblings renounced and allowed her to proceed to seek letters of administration. Therefore, the judge concluded that he should "permit the cure of the standing issue" by allowing the amendment of the complaint to relate back to remedy any issue as to standing. This appeal followed.

On appeal, defendants challenged the judge's legal conclusion that despite the running of the statute of limitations plaintiff should be allowed to amend the complaint to relate back to its initial filing. "Because the question presented, whether decedent's estate could avoid the running of the statute of limitations by having its amended complaint relate back to the complaint filed in [plaintiff's]

name [as Administrator Ad Prosequendum years after the running of the statute of limitations] is solely a question of law, our review is de novo." Repko v. Our Lady of Lourdes Med. Ctr. Inc., 464 N.J. Super. 570, 574 (App. Div. 2020).

In Repko, the plaintiff's attorney had filed a complaint in the name of his deceased client without knowing she was dead. When he learned of her passing, he sought to amend the complaint to substitute the client's estate and to add a claim under the Survivor's Act, but did so three years after the cause of action arose and after the statute of limitations had run. In our opinion, we reversed the denial of defendant's motion to dismiss the complaint as barred by the statute of limitations and remanded for the entry of an order dismissing the complaint with prejudice. Id. at 578. There, we observed that the original complaint was a "nullity" because a deceased person cannot be a plaintiff. Id. at 575. We concluded there was nothing for an amendment of the complaint to relate back to, which warranted dismissal of the Survivor's Act claim. Id. at 573.

In the present action, the motion judge and plaintiff on appeal rejected defendants' argument that our holding in Repko was applicable to this case. We disagree.

At the outset, we note the important distinction between a wrongful death action and a Survivor's Act action; the former belonging to the individual

survivors of the decedent and the later belonging only to the decedent's estate. "[T]he Survivor's Act preserves to the decedent's estate any personal cause of action that decedent would have had if he or she would have survived." Smith v. Whitaker, 160 N.J. 221, 233 (1999). The Survivor's Act permits only an "executor, suing on behalf of [an] estate, to recover the damages [the] testator would have had if [the testator] was living." Repko, 464 N.J. Super. at 577 (quoting Smith, 160 N.J. at 233). On the other hand, a wrongful death action must "be brought in the name of an [A]dministrator [A]d [P]rosequendum of the decedent for whose death damages are sought," or by an executor where the decedent's will has been probated, N.J.S.A. 2A:31-2, and any recovery belongs to the decedent's heirs. See N.J.S.A. 2A:31-4.

As explained by Judge Milton A. Feller many years ago in Kern v. Kogan, 93 N.J. Super. 459 (Law Div. 1967), there is a significant difference between the two actions:

> The death statute gives to the personal representatives a cause of action beyond that which the deceased would have had if he had survived, and based upon a different principle, a new right of action. The recovery goes, not to the estate of the deceased person, but to certain designated persons or next of kin. In the recovery the executor or administrator as such has no interest; the fund is not liable to the debts of the deceased, nor is it subject to disposition by will, for the reason that the primary concern of the [A]ct . . . is to provide for those

> who may have been the dependents of the deceased. . . .
>
> [The Survivor's Act] contemplates compensation to the deceased person's estate. It is in the interval between injury and death only that loss can accrue to the estate, and in that alone is the personal representative interested. . . . The damages for personal injury and the expense of care, nursing, medical attendance, hospital and other proper charges incident to an injury as well as the loss of earnings in the life of the deceased are the loss to his estate and not to [his widow or next of kin].
>
> [Id. at 471-72 (citation omitted).]

"Under these acts, the [A]dministrator Ad [P]rosequendum is the proper party to bring a lawful death action and a [G]eneral [A]dministrator is the proper party to institute a survival action." Id. at 473.

Notably the Survivor's Act includes a provision "to toll any statute of limitations on a claim belonging to a decedent for up to six months following death for the 'salutary purpose of providing executors and administrators with a limited period of time after death to evaluate potential claims available to the estate.'" Repko, 464 N.J. Super. at 577 (quoting Warren v. Muenzen, 448 N.J. Super. 52, 67-68 (App. Div. 2016) (citing N.J.S.A. 2A:14-23.1)).

Applying these well settled principals to the facts in the matter before us, we must reverse the motion judge's determination that the complaint in this matter could have been amended to correct what was obviously plaintiff's lack

of standing to bring the Survivor's Action in her capacity as Administrator Ad Prosequendum. Her reasons for not pursuing letters of general administration are of no moment. Like the complaint filed on behalf of the deceased plaintiff in Repko, here, the filing of the complaint prior to the establishment of an estate was a "nullity." Id. at 573. Any delay caused by a dispute among the heirs or siblings could have been avoided with the filing of an appropriate probate action long before the statute of limitations expired for the filing of the Survivor's Act claim, which as noted provides for a tolling of that time period to allow for such arrangements to be made or issues to be addressed.

As we noted in Repko, the "issue . . . of standing [is] succinctly defined . . . as 'the legal right to set judicial machinery in motion,'" id. at 574 (quoting Eder Bros. v. Wine Merchs. of Conn., Inc., 880 A.2d 138, 143 (Conn. 2005)). Here, plaintiff did not have that legal right as to the Survivor's Act action at the time the complaint was filed and did not acquire it until after the statute of limitations had run on the estate's claim under that act. Regardless of the fact that defendants had notice of the claim through service of the original complaint, that pleading remained a nullity and could not have been asserted once the statute of limitations had run. Although we appreciate the motion

judge's endeavor to attain an equitable result, the governing law simply does not authorize it.

Reversed and remanded for entry of an order dismissing the Survivor's Act action count of the complaint.

ASSEMBLY, No. 6133
STATE OF NEW JERSEY
219th LEGISLATURE

INTRODUCED DECEMBER 6, 2021

Sponsored by:
Assemblyman JON M. BRAMNICK
District 21 (Morris, Somerset and Union)
Assemblyman RAJ MUKHERJI
District 33 (Hudson)
Assemblywoman JOANN DOWNEY
District 11 (Monmouth)
Senator NICHOLAS P. SCUTARI
District 22 (Middlesex, Somerset and Union)

SYNOPSIS

Allows certain persons not yet appointed as administrator of estate to pursue lawsuit for damages for wrongful death on behalf of deceased's survivors.

CURRENT VERSION OF TEXT

As introduced.

AN ACT concerning certain actions for wrongful death and amending N.J.S.2A:15-3 and N.J.S.2A:31-2.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.2A:15-3 is amended to read as follows:

2A:15-3. a. (1) Executors **[**and**]**, administrators, and administrators ad prosequendum may have an action for any trespass done to the person or property, real or personal, of their testator

or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living. In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor **[**or**]**, administrator, or administrator ad prosequendum may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.

(2) In the case of a plaintiff qualified for appointment as administrator who was not yet appointed administrator at the time the plaintiff commenced an action under this section, the court may allow the plaintiff to be designated administrator for the purposes of this section and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.

b. Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter, provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time.

(cf: P.L.2009, c.266)

2. N.J.S.2A:31-2 is amended to read as follows:

2A:31-2. a. Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum or administrator of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

b. In the case of a plaintiff who is qualified for appointment as administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, but who was not yet appointed as such at the time the plaintiff commenced an action under this chapter, the court may allow the plaintiff to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.

(cf: P.L.1951, c.344)

3. This act shall take effect immediately and shall apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date.

STATEMENT

This bill would allow certain persons to pursue a lawsuit for damages for wrongful death on behalf of the deceased's survivors.

Pursuant to current law, civil actions for damages arising from a person's wrongful death may be brought under two separate statutes: (1) Under the "wrongful death act," N.J.S.2A:31-1 et seq., economic damages may be awarded to persons who would be entitled to the deceased's property under the intestacy laws; and

(2) Under the "survivor's act," N.J.S.2A:15-3, damages for the decedent's pain and suffering from the time of the injury until death may be awarded to the decedent's estate.

When a person dies without a will, the county surrogate will appoint a general administrator of the estate who, among other duties, is authorized to file any civil actions under the survivor's act. The surrogate will appoint an administrator ad prosequendum (generally the same person who is appointed general administrator) to file any civil actions under the wrongful death act.

In an unpublished decision, Chandler v. Kasper, Docket No. A-2143-20 (decided October 7, 2021) the Appellate Division held that the decedent's daughter did not have standing to file a lawsuit under the survivor's act because she had not yet been appointed general administrator of her father's estate; she had been appointed only as administrator ad prosequendum, which entitled her to file suit under the wrongful death act (but not under the survivor's act). According to the daughter, the county surrogate had advised that it was necessary for her only to be appointed as administrator ad prosequendum in order to file the lawsuit, and disagreements with her siblings had led to a delay in her being able to seek appointment as general administrator.

In the view of the sponsor, the Chandler decision can lead to many cases brought under the wrongful death act or the survivor's act being dismissed on a technicality.

This bill is intended to address the issue by providing that the court may appoint a person as an administrator or administrator ad prosequendum even if the person was not yet appointed as such at the time the person filed a lawsuit under the wrongful death act or survivor's act. The bill provides that the court could allow the person filing suit to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend any pleadings relating back to the plaintiff's first filed pleading to reflect the designation.

The bill would take effect immediately. It would apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date.

President Biden's Nursing Home Quality Initiative

David L. Gordon, Esq.

In President Joe Biden's first State of the Union address on March 1, 2022, the President pledged that his administration would set higher standards for nursing homes and improve care, while specifically calling out private equity's role in nursing home care decline.

> "[A]s Wall Street firms take over more nursing homes, quality in those homes has gone down and costs have gone up. That ends on my watch. Medicare is going to set higher standards for nursing homes and make sure your loved ones get the care they deserve and that they expect."[1]

A day before the President's speech, on February 28, 2022, the White House released a comprehensive statement, detailing a twenty-one point plan to reform nursing home care. The statement explains that the Department of Health and Human Services through the Centers for Medicaid & Medicaid Services (CMS), will implement measures aimed at increasing required staffing levels, holding poorly performing nursing homes accountable, and providing better information to the public about nursing home conditions, with an emphasis on "cracking down" on private equity owned facilities.

The numerous proposed reforms fall under five goals of reform: (1) appropriate utilization of taxpayer dollars, (2) increasing nursing home accountability and oversight, (3) increasing public transparency of facility ownership, (4) creating pathways to jobs, and (5) ensuring pandemic and emergency preparedness. These specific reforms and plans for implementation include:

1. *Initiatives focused on appropriate utilization of taxpayer dollars*:

   (a) **Establish Minimum Staffing Requirement:** CMS will conduct a research study to determine the level and type of staffing needed to ensure safe and quality care and will issue proposed rules within one year. This section emphasizes that nursing homes will be held accountable if they fail to meet this standard.

   (b) **Reduction in Shared Rooms:** CMS will explore ways to discontinue the default practice of shared rooms with three or more residents and instead promote single-occupancy rooms.

   (c) **Strengthen SNF Value-Based Purchasing (VBP) Program**: By way of background, this program awards financial incentives to SNFs based on the quality of care they provide to Medicare recipients. The "quality" measure is currently based on resident rehospitalization rates. The proposal would add "staffing adequacy, the resident experience, as well as how well

[1] https://www.nytimes.com/2022/03/01/us/politics/biden-sotu-transcript.html https://www.whitehouse.gov/state-of-the-union-2022/

facilities retain staff" as relevant considerations in awarding these incentives.

(d) **Unnecessary Medications and Treatments Prevention**: While the statement noted the "dramatic decrease" in the use of antipsychotic drugs in nursing homes in recent years, the proposal includes CMS initiating a new plan to "identify problematic diagnoses" and "continue to bring down the inappropriate use of antipsychotic medications."

2. *Accountability and Oversight*:

(a) **Increase Funding for Health and Safety Inspections**: Initiatives include increasing CMS funding by 500 million, an almost 25% budget increase for health and safety inspections. *This proposal will require Congressional approval.*

(b) **Overhaul of CMS's Special Focus Facility (SFF) Program**: By way of background, the SFF Program identifies habitually low performing nursing homes and subjects them to increased scrutiny. Currently, in order to "graduate" from the program the facility must pass two consecutive inspections. Initiatives include overhauling the SFF Program to become "tougher and more impactful," with quicker time frames and facilities that fail to improve will be subject to harsher enforcement actions including enhanced risk of termination from the Medicare and Medicaid programs.

(c) **Expanding/Increasing Financial Penalties and Enforcement Sanctions**: For poor-performing facilities, CMS will expand financial penalties and other enforcement sanctions, including exploration of per-day fines for each day that a facility is out of compliance with regulations, and exploring this as the default penalty. The plan includes an increase in per-instance penalties from $21,000 to $1,000,000, *which will require Congressional action.*

(d) **Prevent Poor Performing Corporate Owners from Expanding**: Currently, CMS only reviews facilities on an individual basis, Biden is asking for legislation that would allow CMS to evaluate the track records of multiple-facility owners, before allowing them to acquire or open new facilities. Particularly, the proposal calls on Congressional action to give CMS new authority to require "minimum corporate competency" to participate in Medicare and Medicaid. This includes prohibiting "an individual or entity from obtaining a Medicare or Medicaid provider agreement for a nursing home (new or existing) based on the Medicare compliance history of their other owned or operated facilities (previous or existing)." Significantly, the plan also calls on Congress to expand CMS enforcement authority on owners and operations of persistent substandard and noncompliant facilities, to include enforcement actions even after facility closure.

(e) **Technical Assistance Expansion**: The proposal includes expanding technical assistance to nursing homes, through Quality Improvement Organizations which can provide training and individualized assistance to facilities.

3. *Increase Public Transparency of Facility Ownership*:

(a) **Facility Ownership Public Database**: Create a new public database, utilizing provider enrollment and health and safety survey inspection information, in order to track and identify owners and operators across states.

(b) **Facilitate Transparency of Facility Ownership and Finances**: CMS will implement Affordable Care Act requirements regarding transparency in nursing home corporate ownership. Provide "robust" corporate ownership data and make the data easier to find on Nursing Home Compare.

(c) **Improve Nursing Home Compare Website**: Nursing Home Compare Website, allows the public to compare nursing homes based on a quality rating system, which provides each nursing home an overall rating between 1 and 5 stars, based on ratings in three categories: health inspections, staffing levels, and quality measures. Once implemented, the Care Compare website will disclose compliance with the new minimum staffing requirements that will be developed. CMS will improve the website's readability and usability. CMS will ensure that ratings more closely reflect data that is verifiable, rather than self-reported. Finally, the proposal calls on Congressional action to provide CMS authority take enforcement action against facilities that submit incorrect information.

(d) **Examine Private Equity Role**: A prominent focus of the White House's statement included citations to research that private equity ownership is tied to "worse outcomes" for nursing home residents "while costing taxpayers more. The proposal includes federal examination of the role of private equity, real estate investment trusts and other investment ownership arrangements and "inform the public when corporate entities are not serving their residents' best interests."

4. *Create Pathway to "Good-paying" Jobs*:

(a) **Nurse-Aid Training Opportunities**: Increase education about nurse-aide training reimbursement, and ensure reimbursement is being distributed and free trainings are being publicized.

(b) **Encourage Tie of Medicaid Payment to Wages**: CMS will develop a "template" to assist and encourage states requesting to tie Medicaid payments to clinical staff wages and benefits, including additional pay for experience and specialization.

(c) **Launch National Nursing Career Pathways Campaign**: CMS in conjunction with the Department of Labor, will work with external organizations to create a "robust nationwide campaign" in order to "recruit, train, retain, and transition workers into long-term care careers, with pathways into health-care careers like registered and licensed nurses."

5. *Ensuring Pandemic and Emergency Preparedness*:

(a) Continue COVID-19 testing, vaccinations, and boosters in nursing homes.

(b) Strengthen requirements for on-site infection prevention specialists

(c) Enhance emergency preparedness requirements, for both future pandemic and weather –related emergencies

(d) Integrate pandemic lessons into nursing home requirements, including standards of care relating to fire safety, infection control, and other areas.

Industry Response

In a March 8, 2022 letter to the HHS Secretary Xavier Becerra, American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) President and CEO Mark Parkinson wrote in response to the Biden-Harris Administration's new proposals. In summary, the letter voiced appreciation of the "Administration's focus on improving the quality of care" in SNFs, but went on to negatively react to certain measures and correct what the organizations deemed were "factually incorrect statements." As indicated in the letter, the AHCA/NCAL, is comprised of "14,000 long term care member providers—including more than 10,000 nursing homes." In order to facilitate collaborative reform and ensure stakeholder's input is considered, the letter requested a formal meeting between AHCA/NCAL, the President, CMS Administrator Brooks-LaSure, and HHS Secretary Xavier Becerra.

The letter focused on two points, highlighting SNFs "considerable progress" in improving quality of nursing homes and the negative implications of proposing staffing minimums in light of the current long term care workforce crisis. First, the letter stated that the Administration's fact sheet's suggestion that nursing home quality has declined "is simply factually incorrect." Evidencing this point, the letter pointed to the association's work with CMS ten years ago in developing the Nursing Home Quality Initiative, and how before the pandemic, SNFs improved in 16 of the 20 CMS quality measures. Furthermore, the letter highlighted that one of quality initiatives was reducing off-label use of antipsychotic medications, which has been reduced in SNFs by 40%. The letter underscored that when federal regulators and the nursing home industry work together "great things can occur for the residents."

The letter refuted the Administration fact sheet's implications that COVID-19 prevalence and deaths were related to the quality provide by nursing home facilities and staff. The association was "particularly shocked by statements regarding the COVID-19 pandemic, placing blame on

nursing home caregivers and criticizing the care provided."[2] The association wrote that the "tragic" infections and deaths among nursing homes were the outcome of "a series of horrible public health policy decisions" that did not prioritize long-term care and left facilities without testing, personal protective equipment, staffing support and treatments.[3]

In response to the Administration's proposal for staffing minimums, the letter highlighted that "there are no workers to hire" due to nursing homes losing over 200,000 workers since the beginning of the pandemic, a problem that has effected nursing home more harshly than the rest of the healthcare industry. Further, the letter argues that even if there were workers to hire, there is an absence of financial resources to employ them because Medicaid does not adequately fund the actual cost of care.

The letter further stated that "[i]ncreasing staffing minimums in the midst of this workforce crisis without corresponding resources does little to help residents and would result in nearly every nursing home being out of compliance. . . Facilities, especially in rural communities, would be forced to further limit access to care for residents in order to meet arbitrary staffing ratios or close altogether."

Mark Parkinson on behalf of AHCA/NCAL, also provided responsive statement on the same date of the Administration's fact sheet release. This statement also included comments about staffing minimums:

> Long term care was already dealing with a workforce shortage prior to COVID, and the pandemic exacerbated the crisis. We would love to hire more nurses and nurse aides to support the increasing needs of our residents. However, we cannot meet additional staffing requirements when we can't find people to fill the open positions nor when we don't have the resources to compete against other employers.[4]

Criticism to staffing minimums were echoed by others in the industry. Wanda Prince, senior vice president of government affairs at Brickyard Healthcare, said the lack of funding for the post-acute care industry to provide competitive wages has been largely due to decades of underfunding.[5] She states that underfunding has not only negatively affected wages but also the ability to provide "tuition forgiveness, childcare relief for healthcare workers, access to educational programs, investment in advanced nursing degree education to provide more nursing instructors for the significant need for nurses that will continue for years to come."[6] Cynthia Morton, executive vice president of the National Association for the Support of Long-Term Care

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[2] https://www.fiercehealthcare.com/providers/ahcancal-biden-nursing-home-long-term-care-group-pushes-back-factually-incorrect-quality

[3] https://www.fiercehealthcare.com/providers/ahcancal-biden-nursing-home-long-term-care-group-pushes-back-factually-incorrect-quality

[4] https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/Nursing-Home-Industry-Reacts-to-the-Biden-Administration%E2%80%99s-Nursing-Home-Reform-Plan.aspx

[5]https://skillednursingnews.com/2022/03/rhetoric-vs-reality-nursing-home-leaders-denounce-staffing-private-equity-aspects-of-reform-package/

[6] https://skillednursingnews.com/2022/03/rhetoric-vs-reality-nursing-home-leaders-denounce-staffing-private-equity-aspects-of-reform-package/

(NASL), agrees with the Administration's focus on staff, she voiced concerns that establishing a staffing minimum, in the current environment, will set nursing homes up for failure. "We're in the middle of a shortage, and the shortage, I believe, is going to be with us for a while. We're seeing it in therapy and nursing with respect to long-term care facilities."[7]

In response to President Biden's speech and the fact sheet's focus of criticizing private equity nursing home ownership, a spokeswoman for the American Investment Council, a trade group representing the private equity industry, echoed that lawmakers should focus on the foundational issues and stated that "[p]rivate equity firms only own about 9% of nursing home facilities nationwide and blaming private equity obscures the real problems at hand. . .The research cited by the Biden administration — including a working paper that has not been peer-reviewed — only focuses on a very narrow subset of nursing home patients."[8]

Others in the industry attributed the current issues facing nursing homes to government and Medicaid's inadequacies. Katie Smith Sloan, LeadingAge president and CEO, called on officials to keep in mind Medicaid's insufficiencies when it comes to covering the cost of service:

> We know that transparency, quality improvement, and workforce investments are critical to building better nursing homes for America's older adults and families. . . Yet Medicaid, the dominant payer of long-term care services, doesn't fully cover nursing homes' cost of quality care. Regulations and enforcement, even with the best intentions, just can't change that math.[9]

Beth Martino, Senior Vice President of Public Affairs for the American Health Care Association / National Center for Assisted Living, voiced similar criticisms:

> Calls for increased government scrutiny, regulations and fines do not recognize the nature of COVID-19 and how public health officials failed to prioritize nursing homes for resources before and during the pandemic. Private equity firms only own a small percentage of nursing homes, and, in fact, deals are overwhelmingly focused on other aspects of the healthcare system. . . .The real issue is that Medicaid has chronically underfunded nursing homes for years, leaving facilities on the brink of closure. More will close soon if they don't receive proper government support coming out of this pandemic.[10]

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[7] https://skillednursingnews.com/2022/03/rhetoric-vs-reality-nursing-home-leaders-denounce-staffing-private-equity-aspects-of-reform-package/

[8] https://www.pionline.com/washington/biden-addresses-infrastructure-nursing-home-investments-state-union

[9] https://skillednursingnews.com/2022/02/stop-blaming-nursing-homes-bidens-proposed-reforms-garner-mixed-reactions/

[10] https://www.mcknights.com/news/biden-targets-wall-street-nursing-home-owners-in-sotu-address/

About the Panelists…

Michael Brusca is a Partner in Davis & Brusca, LLC with offices in Ewing, Princeton, New Brunswick and Newark, New Jersey. He concentrates his practice representing vulnerable individuals and their families in wrongful death, serious personal injury, medical and professional malpractice, and negligence and abuse claims arising in nursing homes, assisted living facilities, hospitals and group homes. He was lead trial counsel for the plaintiff in *Dwyer v. Harborview*, which generated the largest nursing home verdict to date in New Jersey.

Mr. Brusca is admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of Pennsylvania. He has served on the Executive Board of the American Association of Justice's Nursing Home Litigation Group and has been a member of the New Jersey State, Pennsylvania and Mercer County Bar Associations. Prior to entering private practice he served as a Judge Advocate in United States Air Force, where he tried numerous cases to verdict all over the world, including in Japan, Qatar and Kuwait. His articles have appeared in the *New Jersey Law Journal* and *Trial* (the attorney magazine published by the American Association for Justice), and he has lectured to fellow attorneys on issues regarding care in nursing homes and assisted living facilities, as well as technology issues.

Mr. Brusca received his B.S. from the Pennsylvania State University and his J.D. from Temple University Beasley School of Law.

Michael A. Ferrara, Jr., Certified as a Civil Trial Attorney by the Supreme Court of New Jersey and as a Trial Advocate by the National Board of Trial Advocates, heads The Ferrara Law Firm, LLC in Cherry Hill, New Jersey. A lawyer for more than 45 years, he represents clients who have been harmed by defective products, defective drugs, medical and nursing home malpractice, bad drivers, construction site injuries and automobile, bus or tractor trailer incidents. He also handles general civil litigation and arbitration, and in his years of practice has tried more than 250 jury trials.

Mr. Ferrara is admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania, the Third Circuit Court of Appeals and the United States Supreme Court. The founder and former Chair of the Association of Trial Attorneys of America–New Jersey Legal PAC, he is Past President of the Association of Trial Attorneys of America–New Jersey (now NJAJ), a Fellow of the American Board of Trial Advocates (ABOTA) and a past President of the South Jersey Chapter. Mr. Ferrara is a member of the Million Dollar Advocates Forum, a past President of the Civil Justice Foundation and Past Chair of the New Jersey State Bar Association Medical Malpractice Committee. He is a Fellow of the International Academy of Trial Attorneys, has served on the Federal Judicial Selection Advisory Committees for four New Jersey Senators and was appointed to the Burlington County Judicial and Prosecutorial Selection Committee. He has also served on the Board of the Amigos de Jesús orphanage in Honduras.

A Master of the Camden American Inns of Court, Mr. Ferrara is the recipient of the Gold Medal for Distinguished Achievement from ATLA-NJ, the Trial Bar Award from the Trial Attorneys of New Jersey and ICLE's Distinguished Service Award in 2015. He has lectured for ICLE, the American Association for Justice, the National College of Trial Advocacy, the Practicing Law

Institute (PLI) and a number of state trial lawyer organizations, and is the author of articles on law matters.

Mr. Ferrara received his B.S. from Villanova University and his J.D. from the University of San Diego School of Law, where he is a member of the Board of Visitors. He is a former Lieutenant in the United States Navy and attended the Naval Officers Submarine School.

Monica C. Fillmore is a Member of Burns White LLC in the firm's Cherry Hill, New Jersey, office. A skilled litigator who represents healthcare providers and institutions in long-term care, medical malpractice, and dental malpractice matters, she also has experience successfully representing her clients throughout professional board proceedings and in personal injury cases.

Admitted to practice in New Jersey, Pennsylvania and Maryland, Ms. Fillmore is a member of the New Jersey State Bar Association. She is a Fellow of the Leadership Council on Legal Diversity and has lectured for professional organizations.

Ms. Fillmore received her B.A. from Vassar University and her J.D. from Villanova University's Charles Widger School of Law.

David L. Gordon is a Shareholder in Buchanan Ingersoll & Rooney P.C. with offices in Princeton and Newark, New Jersey, and Philadelphia, PA. Co-Chair of the firm's Litigation Section and Healthcare Litigation Practice Group, he concentrates his practice in defending long-term care facilities and physicians, nurses and hospitals in professional malpractice actions. His other areas of experience include premises liability, products liability and subrogation, and he heads the firm's Princeton office.

Mr. Gordon is admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the Eastern District of Pennsylvanian, and the Third Circuit Court of Appeals. He has been a member of the New Jersey State and Pennsylvania Bar Associations, and has lectured for ICLE and the Pennsylvania Bar Institute.

Mr. Gordon received his B.S. from The Pennsylvania State University and his J.D. from Temple University's Beasley School of Law. He clerked for the Federal Magistrate the Honorable Edwin E. Naythons.

Herbert Kruttschnitt III is a Partner in Dughi, Hewit & Domalewski, P.C. with offices in Cranford and Moorestown, New Jersey, where he is Co-Chair of the Medical Malpractice Department and represents physicians and other healthcare providers in malpractice, disciplinary and licensing disputes. He has tried more than 150 cases on behalf of physicians, nurses, hospitals and long-term care facilities throughout most of New Jersey. Prior to joining his current firm he was senior litigation counsel to the CNA Insurance Company and was the recipient of the prestigious CNA Chairman's Award.

Mr. Kruttschnitt is admitted to practice in New Jersey and Colorado, and before the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals. He is a member of the Board of Directors of the New Jersey Defense Association, Co-Chair of the

Association's Professional Liability Committee and has been the New Jersey Defense delegate to the New Jersey Supreme Court Civil Practice Committee.

Mr. Kruttschnitt has authored several peer-reviewed articles on medical malpractice which have appeared in the *New Jersey Defense Journal*. He has lectured locally and nationally on medical malpractice, professional liability, nursing home litigation and trial advocacy topics.

Mr. Kruttschnitt received his B.S., *magna cum laude*, from Monmouth University and his J.D., *summa cum laude*, from Seton Hall University.

Jonathan Lauri is an associate with Stark & Stark in Lawrenceville, New Jersey, where he is a member of the firm's Nursing Home Negligence Group. He concentrates his practice in wrongful death, negligence, and abuse and neglect claims arising in nursing homes, assisted-living facilities, psychiatric facilities, hospitals, boarding and group homes.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals, Mr. Lauri is a member of the New Jersey State and Mercer County Bar Associations, and the American and New Jersey Associations for Justice. He is also a member of the District VII Ethics Committee and a Board Member of the Greater Lambertville Chamber of Commerce.

Mr. Lauri received his B.A. from Rutgers University and his J.D. from Temple University School of Law and served as a member of 2013 *Temple Journal of Science*. He was a Judicial Fellow for the Honorable Rose Marie Defino-Nastasi, Court of Common Pleas for Philadelphia County.

Alexandra Loprete is an associate with O'Connor, Parsons, Lane & Nobel, LLC in Springfield, New Jersey. She focuses her practice in plaintiffs' personal injury and medical malpractice cases and has experience pursuing claims against doctors, hospitals, nurses, nursing homes and anyone that has negligently caused avoidable harm to others. She has acted as a pivotal part of many medical malpractice and catastrophic injury cases that have resulted in multi-million-dollar settlements, including a medical malpractice trial that resulted in a $5.1 million jury verdict awarded to a patient that had experienced a stroke after undergoing an unnecessary procedure.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York., Ms. Loprete is a member of the New Jersey Women Lawyers Association (NJWLA), the New Jersey Association for Justice, and the New Jersey State, Essex County and Hudson County Bar Associations. She was elected by her peers to serve in leadership positions in both the NJWLA and the NJSBA Young Lawyer's Divisions, and was the recipient of the Trial Attorneys of New Jersey (TANJ) Scholarship.

Ms. Loprete received her undergraduate degree from Auburn University and her J.D. from Seton Hall University School of Law, where she wrote for the *Legislative Journal* and was a member of the Interscholastic Moot Court Board. She clerked for the Honorable Patrick J. Arre, J.S.C., Civil Division, Hudson County.

Honorable Eugene J. McCaffrey, Jr., P.J.Cv. (Ret.) founded McCaffrey ADR, LLC in Mullica Hill, New Jersey, upon his retirement from the bench in 2017, and has mediated and arbitrated more than 100 nursing home neglect cases. He was appointed to the Superior Court of New Jersey in June 2004, sat in Woodbury, New Jersey, and was Presiding Judge of the Civil Division of the Cumberland, Gloucester and Salem vicinage. Prior to his appointment he was a Partner in McCaffrey and Renner in Woodbury, New Jersey, and was Certified as a Civil Trial Attorney by the Supreme Court of New Jersey.

Judge McCaffrey served on the District IV Ethics Committee and the Gloucester County Civil Practice and Municipal Law Committees, and is a Past Chair and former member of the Supreme Court Arbitration Advisory Committee. He also served on the Supreme Court Advisory Committee on Expediting Civil Actions and the Judiciary Advisory Committee on Information Technology. He has for ICLE and the New Jersey State Bar Association, and at the New Judge Orientation Program.

Judge McCaffrey received his B.A. from Catawba College and his J.D. from Rutgers University School of Law-Camden.

Francisco J. Rodriguez, Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, is a Partner in Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. with offices in Springfield, Newark, Jersey City, Elizabeth, Voorhees, Morristown, Newton, Freehold and Hackensack, New Jersey; New York City; and Atlanta, GA. He concentrates his practice in medical malpractice, nursing home malpractice, mass torts and *Federal Tort Claims Act* matters.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, Mr. Rodriguez is Past President of the New Jersey Association for Justice (formerly the Association of Trial Lawyers of America-New Jersey) and has been a member of the Association's Executive Committee and a member of the Board of Directors of the American Association for Justice. He has served on the New Jersey Supreme Court's Model Civil Jury Charge Committee and the Civil Certification Committee of the New Jersey Supreme Court Board on Attorney Certification. He was also general counsel, a Trustee-at-Large and Regional Trustee for the Hispanic Bar Association of New Jersey.

Mr. Rodriguez's articles have appeared in *The Verdict*, the *ATLA Professional Negligence Law Reporter* and other publications. He has lectured for ICLE, the New Jersey Association for Justice and the American Association for Justice.

Mr. Rodriguez received his undergraduate degree from Rutgers College and his law degree from New York University School of Law, where he was Executive Editor of the *Review of Law and Social Change*.

Barry R. Sugarman, Sugarman Law, LLC in Somerville and Marlton, New Jersey, represents individuals and families in elder abuse and neglect cases against nursing homes, assisted living facilities, home health aide agencies and hospitals. of those who have suffered injury and wrongful death. He was trial counsel in Ptaszynski v. Atlantic Health System, where New Jersey's Appellate Division first affirmed a nursing home resident's statutory cause of action

pursuant to New Jersey's *Nursing Home Responsibilities and Residents' Rights Act* for the facility's violations and right to counsel fees and costs.

Admitted to practice in New Jersey and New York, Mr. Sugarman is Co-Chair of the New Jersey Association for Justice's (NJAJ) Nursing Home Litigation Group, an NJAJ Board Member and a Board Member of the Public Interest Law Center of New Jersey. He has been a member of the New Jersey State and Middlesex County Bar Associations and is a former Barrister in the Joseph Halpern American Inn of Court. He has lectured on elder abuse and neglect topics for ICLE and NJAJ.

Mr. Sugarman received his B.A. from The American University and his J.D. from Rutgers School of Law-Newark.

Richard J. Talbot, Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, practices with the Law Office of Andrew A. Ballerini in Cherry Hill, New Jersey, where he pursues medical malpractice and nursing home cases.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the United States Supreme Court, Mr. Talbot is a member of the Board of Governors of the New Jersey Association for Justice (NJAJ) and Co-Chair of the NJAJ Nursing Home Negligence Committee. He is also a member of the Camden County Bar Association, The American Association for Justice Nursing Home Litigation Group and the Million Dollar Advocates Forum.

Mr. Talbot has been featured on a local cable television station as a guest speaker on nursing home litigation. He is also a lecturer on the use of demonstrative evidence for NJAJ and has been a speaker at nursing home litigation seminars presented by the organization. He is the recipient of several honors.

Mr. Talbot received his B.S. from Rutgers University School of Business-Camden and his J.D. from Rutgers School of Law-Camden.

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COVID NPIAP Papers

Mike Brusca

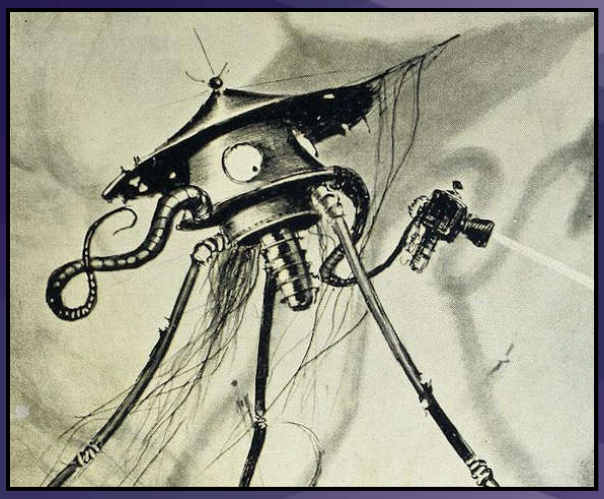
609.786.2540 • mbrusca@dbtriallawyers.com

But some trivia first… What is Grover's Mill N.J. famous for?

Grover's Mill

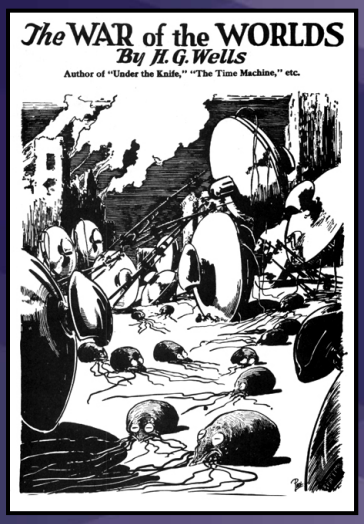
Famous for:

- Attempted Destruction of Mankind by a Martian Alien Race
- H.G. Wells' War of the Worlds
- We were getting crushed!



What saved us?

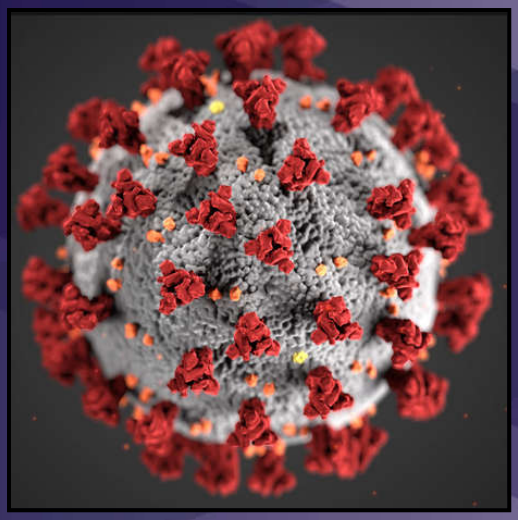
- Earthly pathogens!
- "…slain, after all man's devices had failed, by the humblest things that God, in his wisdom, has put upon this earth".



Grover's Mill

COVID-19

- Caused a few problems



NPIAP

- Produced three papers specifically discussing wounds and COVID 19
  - Skin Manifestation with COVID-19: The Purple Skin and Toes that you are seeing may not be DTI
  - Unavoidable Pressure Injury during COVID-19 Pandemic
  - Tip for Proning

Why should I care?

- You may see these issues
- Make sure you're suing someone who earned it
- Helpful information

NPIAP℠
NATIONAL PRESSURE INJURY ADVISORY PANEL

Roadmap

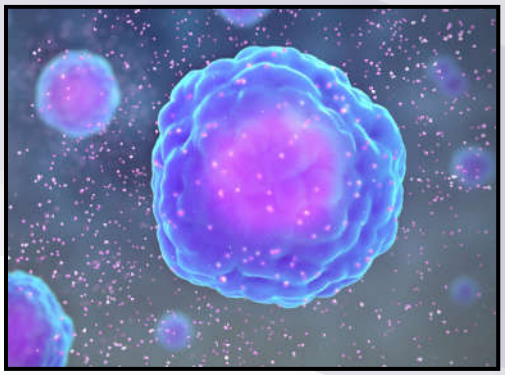
- COVID inside your client
  - How it works
  - What can happen
- COVID “on” your client
  - COVID “wounds”
  - How it presents
- COVID impact
  - Intrinsic and Extrinsic Factors
- Does it apply?
  - Specificity of scenarios
- NPIAP Tips Paper

COVID in your client

COVID in your client

What happens is:

- Severe pneumonia
- “Cytokine Storm”
  - Over-secretion
  - Severe adverse effects
  - Damages lung tissue
  - Leading COD 1918 Flu



COVID in your client

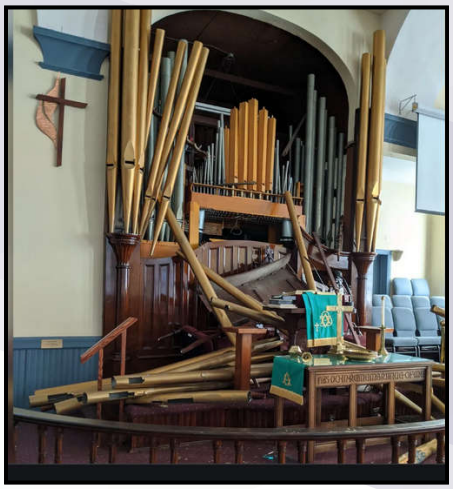
…which looks like

- Acute Respiratory Failure
- **Systemic Coagulopathy**
  - Hypercoagulation
    - Blood clots forming-DVTs
  - Clots seen throughout the body
- Organ Failure

COVID in your client

Organ Failure

- Skin is an organ
- Other organs compensate for damaged ones



COVID “on” your client

COVID can look like

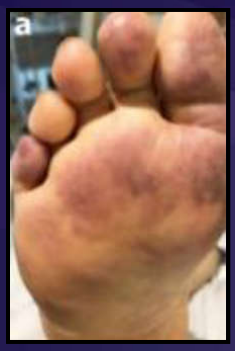
- **Purpura Fulminans**
  - Purple Discolorations
  - May appear “lacelike”
  - Similar to a DTI
  - Skin can open

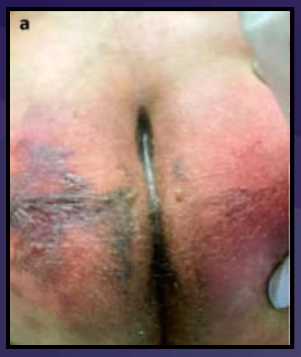
Establish Goals

Purpura Fulminans

Establish Goals

Purpura Fulminans





COVID Impact

NPIAP Papers

- List risk factors for COVID patients
  - Need to know if these factors exist in your case
  - Split into **Intrinsic** and **Extrinsic** Factors

Intrinsic Factors

- Coagulopathy can involve skin
  - Makes shear and stress more damaging
- Other organ damage drags down body responses
- Nutrition is compromised
  - Infections cause hypermetabolic state
  - Feeding in prone position is difficult
- Hemodynamic instability from COVID can make turning difficult

Extrinsic Factors

- Hospitals needed to adapt in "hotspots"
  - Hospitals had difficulty getting supplies
- Use of agency staff
- Forced providers into "unknown territory and crisis care mode."

Extrinsic Factors

- “lack of information”
- “no known cure”
- “complex care”
- “resource and personnel shortages”
- “emotional toll”
- “affected the ability to prevent skin injury”

Does it Apply?

Does it Apply?

Avoidability analysis is similar

- "Before any decision is made about avoidability or unavoidability of a pressure injury that developed during the COVID-19 crisis, ***all factors should be considered on a case-by-case basis***."

Does it Apply?

These people are very, very, very sick!

- NOT SNF residents!
- "Critically ill"
- Hypotensive and Hypoxic
- Hospital – for a long time
- ICU
- Intubated and vent dependent – for ***weeks***
- In catastrophic decline

Does it Apply?

You don't hypercoagulate in one place

- With hypercoagulation
  - VTE
  - DVT
  - Pulmonary Embolism
  - A-Fib

Does it Apply?

Purpura Fulminans

- Splotchy and lacelike appearance
- **Limited to the outer skin layer** – no damage below the skin

Does it Apply?

Extrinsic Factors - Was the facility overwhelmed?

- COVID data
  - CMS Tracking back to June
  - https://data.cms.gov/covid-19/covid-19-nursing-home-data
- New Jersey tracked data
- Staffing data

Does it Apply?

Extrinsic Factors - Was the facility overwhelmed?

- Admitting they were understaffed?
- Admitting they did they not have the necessary recourses?
- Did they tell the family?
  - Unlike a hospital, for LTC the **FAMILY HAD A CHOICE**
- Did they stop admissions?
- What did they do to prepare?
  - Infection control program

Does it Apply?

Extrinsic Factors

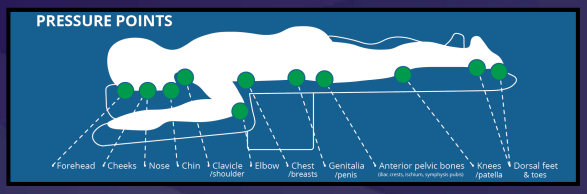
- Remember
  - They are talking about hospitals
  - They are talking about critically ill patients
  - Not just a positive COVID test

NPIAP Tips for Proning

Does it Apply?

NPIAP Tips for Prone Positioning

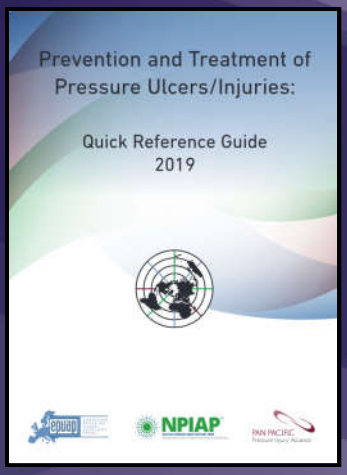
- Helpful
- Wound risks in prone position



Does it Apply?

Tips and Repositioning Principles

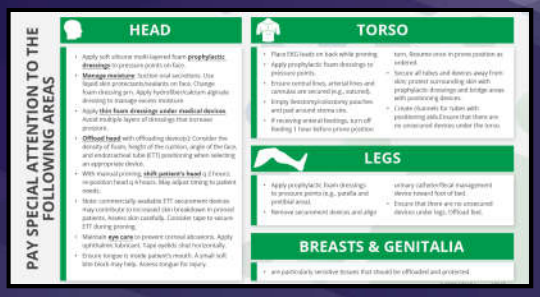
- Comes from NPIAP
- "Prevention and Treatment of Pressure Ulcers/Injuries: Quick Reference Guide 2019



Does it Apply?

General Tips

- Applies to:
  - Head
  - Torso
  - Legs
  - Breasts & Genitalia



Does it Apply?

General Tips

- "Involve enough trained staff to avoid friction-shear when repositioning"
- "Microshifts and small position changes should be preformed while proned especially in non-rotating beds."

Does it Apply?

Repositioning Principles

- Determine repositioning frequency with consideration to the individual's level of activity, ability to independently reposition and tissue tolerance.
- Reposition the individual to relieve or redistribute pressure using manual handling techniques and equipment that reduce friction and shear.
- Reposition individual in such a way that optimal offloading of all bony prominences and maximum redistribution of pressure is achieved.
- Consider using continuous bedside pressure mapping as a visual cue to guide positioning.
  - device that provides real-time feedback of optimal body position though a pressure-sensing mat

Does it Apply?

Repositioning Principles

- Use a soft silicone multi-layered foam dressing to protect the skin for individuals at risk of pressure injuries.
- Do not use ring or donut-shaped positioning devices.
- Avoid extended use of prone positioning unless required for management of the individual's medical condition.
- Reposition unstable critically ill individuals who can be repositioned using slow, gradual turns to allow time for stabilization of hemodynamic and oxygenation status.
- Initiate frequent small shifts in body position for unstable critically ill individuals who are too unstable to maintain a regular repositioning schedule and to supplement regular repositioning.

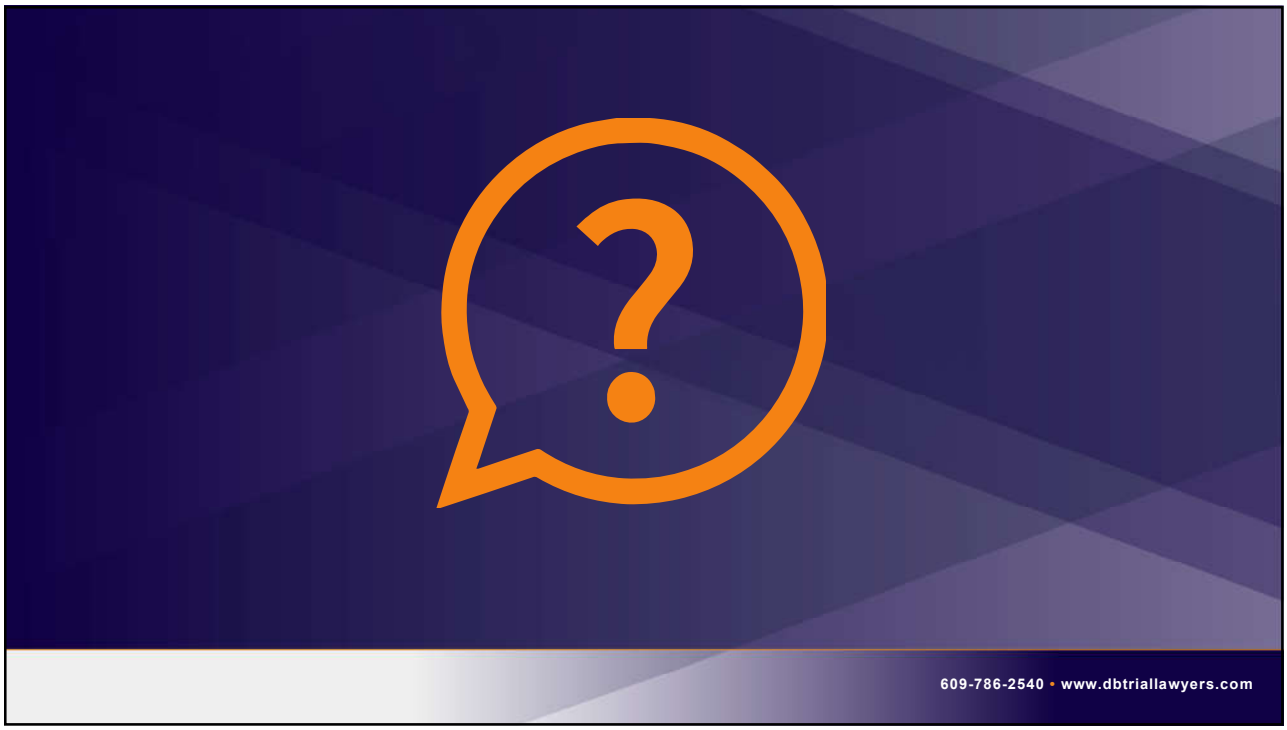
Does it Apply?

Medical Devices

- Regularly monitor the tension of medical device securements.
- Assess the skin under and around medical devices.
- Use a thin prophylactic dressing beneath a medical device.
- Avoid multiple layers of dressings that increase pressure.
- Regularly rotate or reposition the device if possible.
- Avoid positioning the individual directly onto medical devices.

Roadmap

- COVID inside your client
  - How it works
  - What can happen
- COVID “on” your client
  - COVID “wounds”
  - How it presents
- COVID impact
  - Intrinsic and Extrinsic Factors
- Does it apply?
  - Specificity of scenarios
- NPIAP Tips Paper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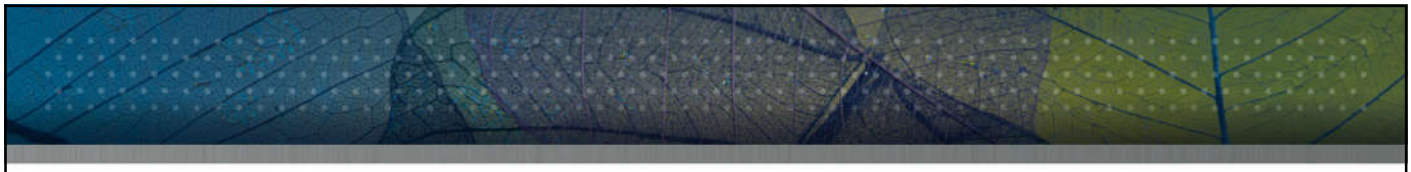
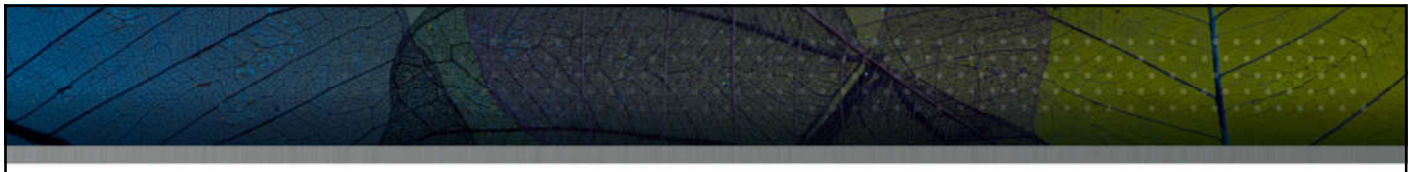
M.D. or R.N.?
A Closer Look at "Net Opinion" and Who Can Qualify as an Expert Witness in Nursing Home/Long Term Care Cases

Monica C. Fillmore



N.J.R.E. 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

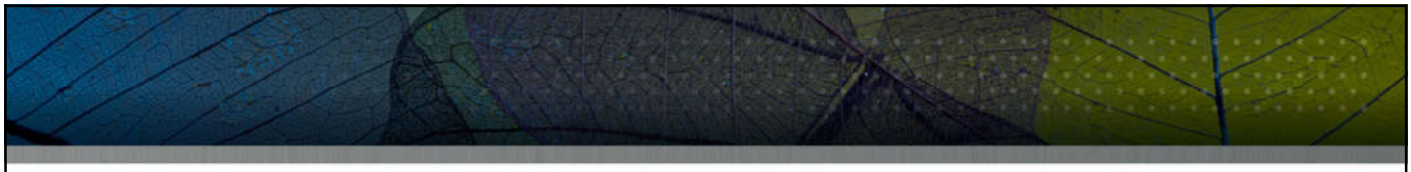


The net opinion rule mandates that experts "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Landrigan v. Celotex Com., 127 N.J. 404, 417 (1992).

An expert's conclusion "is excluded if it is based merely on unfounded speculation and unquantified possibilities." Vuocolo v. Diamond Shamrock Chem. Co.. 240 N.J. Super. 289, 300 (App. Div. 1990).

N.J.R.E. 702 requires that an expert witness be qualified as such by knowledge, skill, experience, training or education. See Agha v. Feiner, 198 N.J. 50, 62, (2009) (finding that an expert must be suitably qualified and possess sufficient specialized knowledge to be able to express an opinion and to explain the basis of that opinion).

When an expert speculates, “he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror.” Jimenez v. GNOC, Corn.. 286 N.J. Super. 533,540 (App. Div.) certif. denied. 145 N.J. 374 (1996), overruled on other grounds; Jerista v. Murray, 185 N.J. 175 (2005).



AMA Code of Medical Ethics Opinion 9.7.1

Medical evidence is critical in a variety of legal and administrative proceedings. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

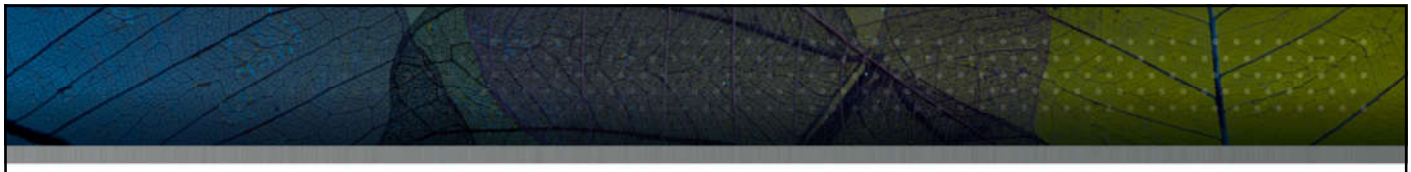
Whenever physicians serve as witnesses they must:

(a) Accurately represent their qualifications.

(b) Testify honestly.

(c) Not allow their testimony to be influenced by financial compensation. Physicians must not accept compensation that is contingent on the outcome of litigation.

Physicians who testify as fact witnesses in legal claims involving a patient they have treated must hold the patient's medical interests paramount by:

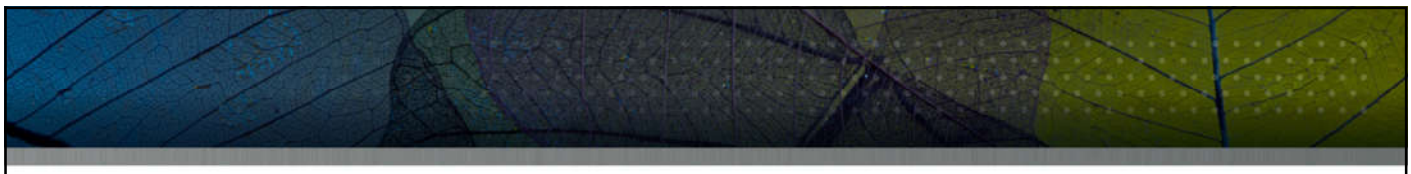


(d) Protecting the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

(e) Delivering honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case.

(f) Declining to testify if the matters could adversely affect their patients' medical interests unless the patient consents or unless ordered to do so by legally constituted authority.

(g) Considering transferring the care of the patient to another physician if the legal proceedings result in placing the patient and the physician in adversarial positions.



Physicians who testify as expert witnesses must:

(h) Testify only in areas in which they have appropriate training and recent, substantive experience and knowledge.

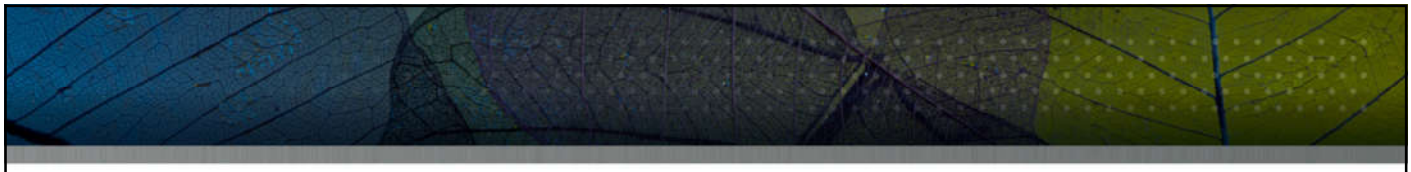
(i) Evaluate cases objectively and provide an independent opinion.

(j) Ensure that their testimony:

Reflects current scientific thought and standards of care that have gained acceptance among peers in the relevant field.

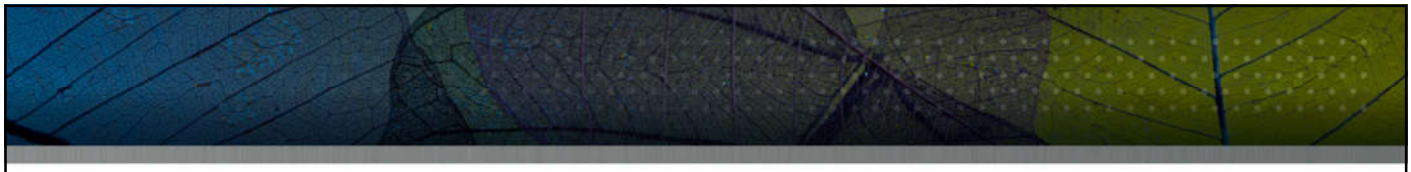
Appropriately characterizes the theory on which testimony is based if the theory is not widely accepted in the profession.

Considers standards that prevailed at the time the event under review occurred when testifying about a standard of care.



Organized medicine, including state and specialty societies and medical licensing boards, has a responsibility to maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate.

Website: https://www.ama-assn.org/delivering-care/ethics/medical-testimony



Code of Ethics and Conduct with Interpretive Discussion

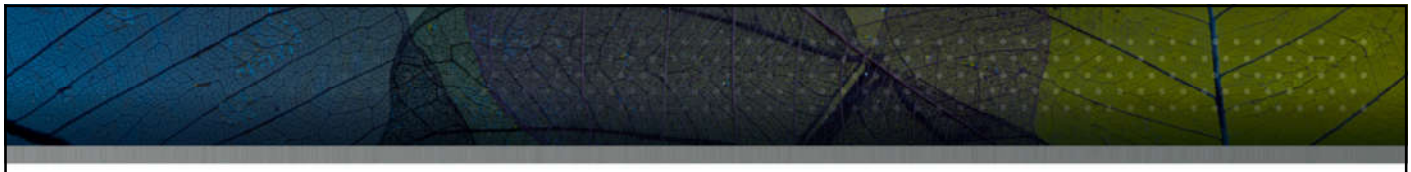
Preamble

The Code of Ethics and Conduct of the American Association of Legal Nurse Consultants (AALNC) establishes the ethical standard for the specialty practice and provides a guide for legal nurse consultants to use in ethical analysis and decision-making in their practice. It provides guidelines for the professional performance and behavior of legal nurse consultants. The esteem of this specialty practice of nursing results from the competence and integrity of its practitioners. Thus, AALNC sets forth this code to impart its ethical expectations for legal nurse consultants and to set the standards of accountability.

1. **The legal nurse consultant maintains professional nursing competence.** The legal nurse consultant is a Registered Nurse and maintains an active nursing license. The legal nurse consultant is knowledgeable about the current scope and standards of legal nursing practice and advocates for these standards.

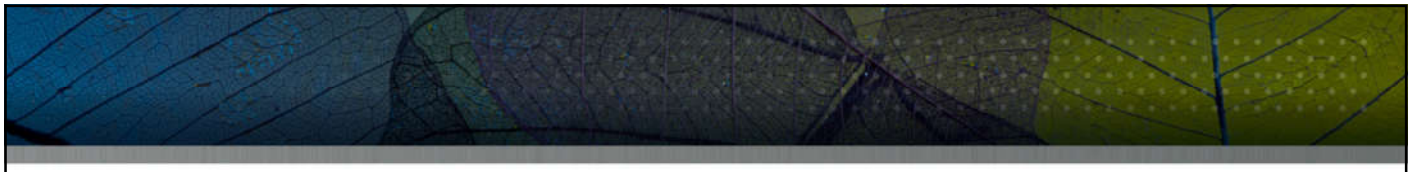
2. **The legal nurse consultant uses informed judgment, objectivity and individual professional competence as criteria when accepting assignments.** The legal nurse consultant does not purport to be competent in matters in which he or she has limited knowledge or experience. Only services that meet high personal and professional standards are offered or rendered. The legal nurse consultant is accountable for his or her decisions and actions.

3. **The legal nurse consultant does not engage in activities that could be construed as the unauthorized practice of law**. The legal nurse consultant refrains from offering opinions that could be deemed legal opinions requiring a law license (e.g. opining directly to a potential plaintiff without an attorney being involved regarding whether a claim may have merit).



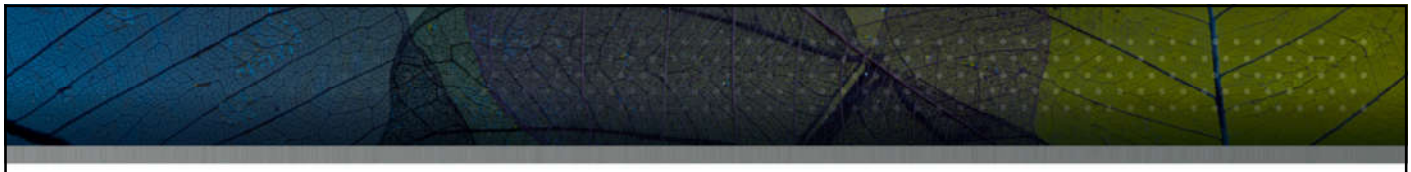
4. **The legal nurse consultant's work products and opinions are free from bias**. The legal nurse consultant does not discriminate against any person based on race, creed, color, age, gender, sexual orientation, national origin, social status or disability. The legal nurse consultant does not allow personal attitudes or individual differences to interfere with professional performance and practice. Financial and/or other relationships that may give an appearance of or create a conflict of interest will be considered and disclosed when practicing.

5. **The legal nurse consultant performs his or her work with the highest degree of integrity.** Integrity is exemplified by uprightness, honesty, and sincerity. The legal nurse consultant applies these attributes to the specialty practice. Integrity is a personal and sacred trust and the standard against which the legal nurse consultant must ultimately measure all actions and decisions. Honest errors and differences of opinion may occur, but deceit, poor judgment, and/or lack of principles are unacceptable.



6. **The legal nurse consultant respects and protects the privacy and confidentiality of the individuals involved in a medical-legal case or claim.** The legal nurse consultant uses confidential materials with discretion and abides by applicable statutes, regulations, and professional codes of conduct that pertain to confidentiality. The legal nurse consultant does not use any case information for personal gain.

7. **The legal nurse consultant maintains standards of personal conduct that reflect honorably upon the profession of nursing and the specialty practice of legal nurse consulting.** The legal nurse consultant abides by all local, state and federal laws and other regulatory requirements. The legal nurse consultant who knowingly becomes involved in unethical or illegal activities prioritizes personal interest or personal gain over professional responsibility. Such activities jeopardize the public confidence and trust in the nursing profession and are unacceptable to the profession and to this specialty nursing practice.

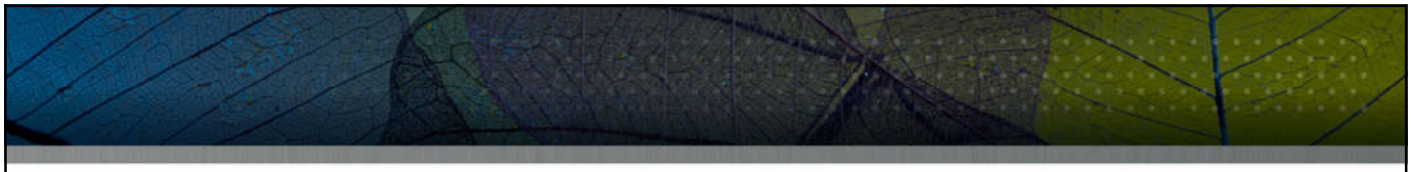


8. **The legal nurse consultant integrates ethical considerations into his or her practice.** The legal nurse consultant works to achieve client goals while upholding the responsibility to provide accurate information, independent and sound opinions, and professional recommendations. The legal nurse consultant contributes to resolving ethical issues in practice; reports illegal, incompetent or impaired practice; and promotes respect for the judicial system.

Conclusion

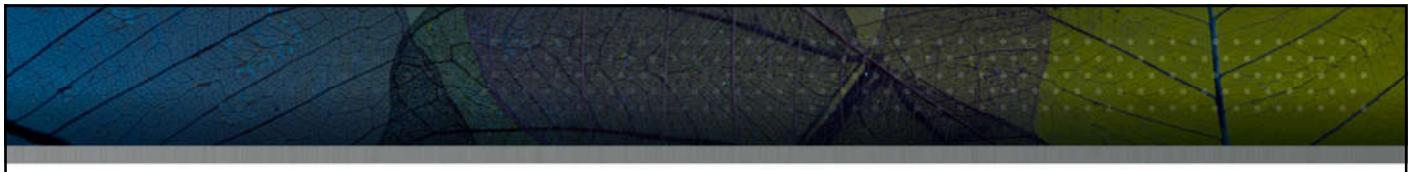
By promulgating this Code of Ethics and Conduct, the American Association of Legal Nurse Consultants sets forth the level of professional behavior and conduct expected of legal nurse consultants. Each legal nurse consultant's personal commitment to this Code of Ethics and Conduct safeguards the continued honor and integrity of both the nursing profession and this specialty nursing practice.

American Association of Legal Nurse Consultants
Toll free: 877-402-2562
Web site: **http://www.aalnc.org**



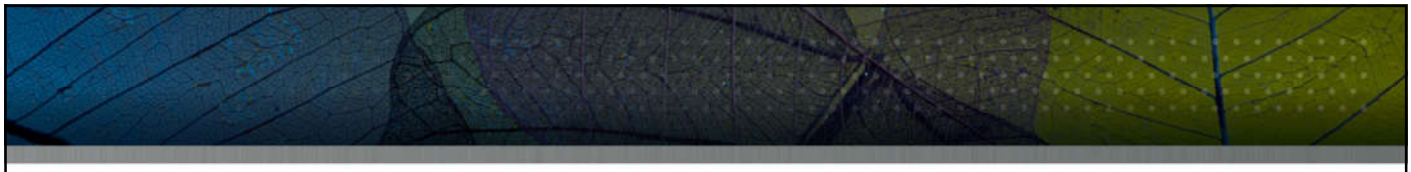
N.J.S.A. 45:11-23(b) defines the practice of nursing as

> diagnosing and treating human responses to actual or potential physical and emotional health problems, through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed or otherwise legally authorized physician or dentist.

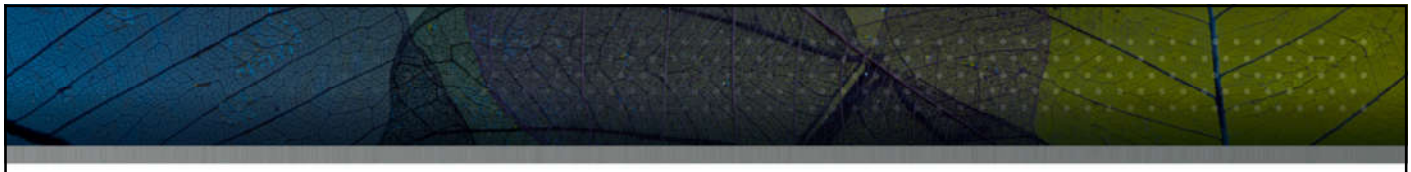


"Diagnosing in the context of nursing practice means the identification of and discrimination between physical and psychosocial signs and symptoms essential to effective execution and management of the nursing regimen within the scope of practice of the registered professional nurse…Such diagnostic privilege is distinct from medical diagnosis."

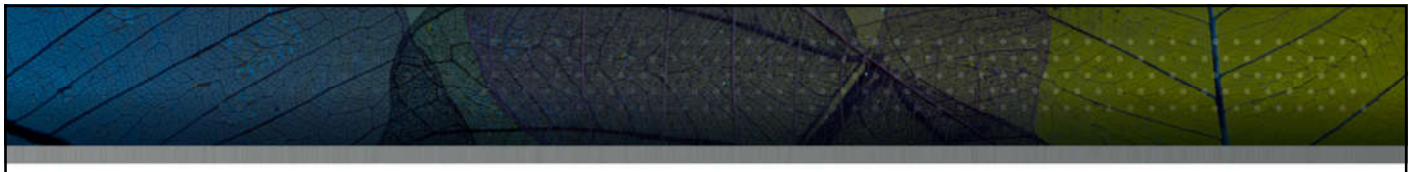
N.J.S.A. 45:11-23(b)



When determining if a Nurse may offer medical causation opinions, it is important to note that prevention, treatment, and healing injuries vastly differs from explaining the medical reasons **causing** those injuries.

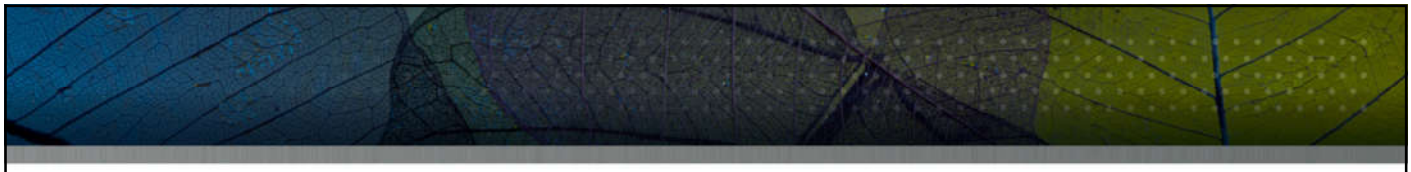


In One Marlin Rifle, the Appellate Division analyzed whether, in the context of a weapons forfeiture action, a nurse may offer expert testimony concerning her estranged husband's mental condition. 319 N.J. Super. 359, 368. (App. Div. 1999). As the basis for her assessment, the nurse, Mrs. Silvaria, cited her qualifications as a certified clinical nurse specialist and as an advanced practice nurse in mental health and psychiatric nursing. Id. at 365. She also worked under the supervision of doctors, performed psychiatric evaluations, prescribed medication at outpatient facilities and possessed a master's degree. Id.

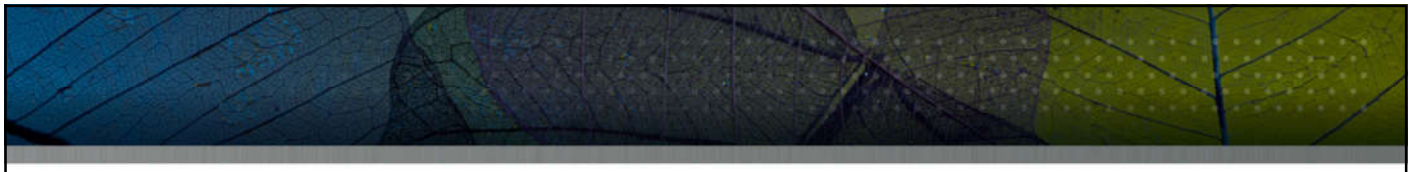


As the basis for her assessment, the nurse, Mrs. Silvaria, cited her qualifications as a certified clinical nurse specialist and as an advanced practice nurse in mental health and psychiatric nursing. Id. at 365. She also worked under the supervision of doctors, performed psychiatric evaluations, prescribed medication at outpatient facilities and possessed a master's degree. Ibid.

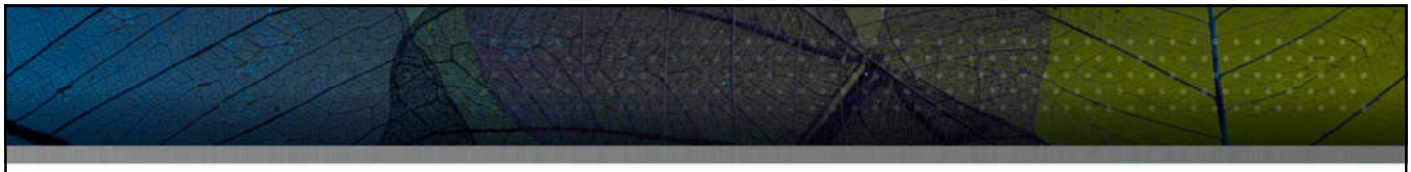
The trial court accepted Mrs. Silvaria as an expert in the field of psychiatric behavioral problems, and with the help of her testimony, ordered the forfeiture of her husband's weapons. Ibid.



The Appellate Division reversed, finding that Mrs. Silvaria lacked the requisite qualifications regarding "a medical diagnosis of her former husband's mental condition." Id. at 359. The Appellate Division explained "N.J.S.A. 45:11-23(b) permits nurses to diagnos[e] human responses to health problems, however, **it prohibits them from providing a medical diagnosis."** Ibid. (emphasis added). "Hence, the statute recognizes a firm distinction between nursing diagnosis and medical diagnosis." Ibid.

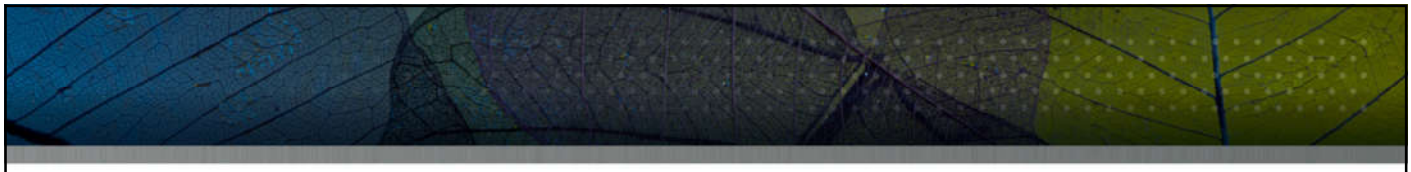


The Appellate Division further explained that "[a] nursing diagnosis identifies signs and symptoms only to the extent necessary to carry out the nursing regimen rather than making final conclusions about the identity and cause of the underlying disease." Ibid. (emphasis added).

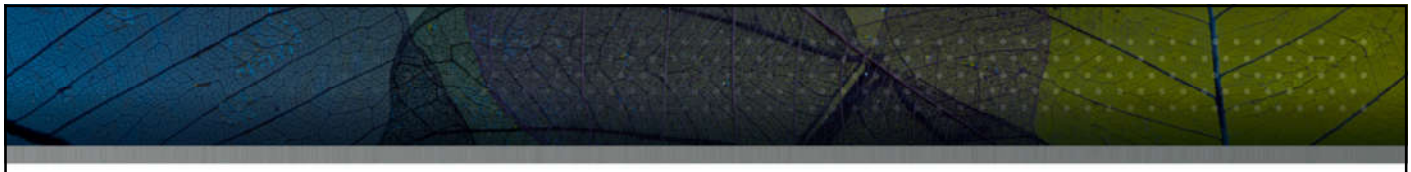


The Plaintiffs' bar has relied on the unpublished case of Detloff v. Absecon Manor Nursing Center and Rehabilitation Center to argue that a nurse can make causation opinions.

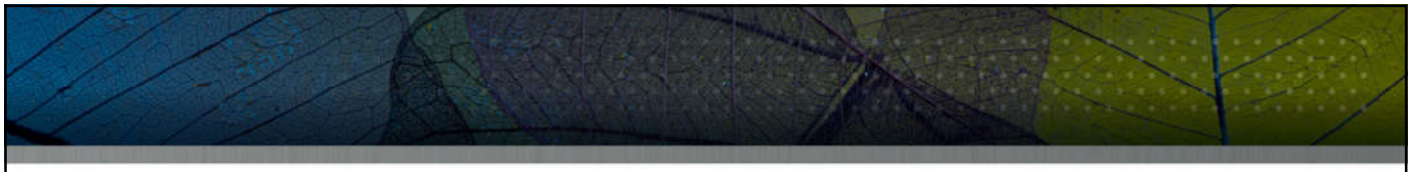
Detloff involved a nursing home resident being treated for pressure ulcers and a fractured hip. See Detloff 2009 WL 2366048 at *2-3. After the plaintiff retained a nurse, Nurse Abner, to opine on causation, the defendant moved to bar her testimony at trial on the basis that she was "statutorily prohibited from rendering a medical diagnosis or providing an opinion as to the cause of an underlying disease." Id. at *3. The trial judge agreed with the defendant and barred Nurse Abner's opinions. Ibid.



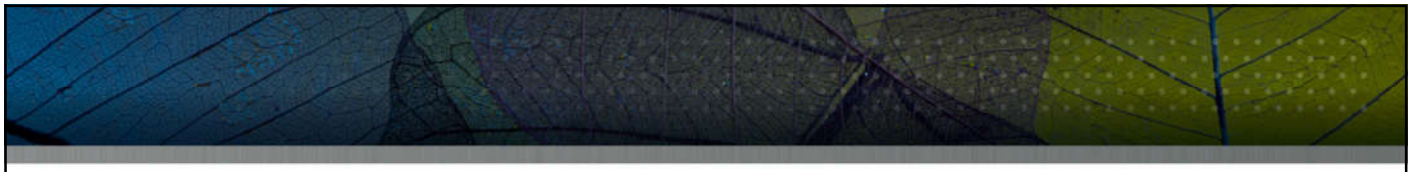
The Appellate Division reversed, finding that the allegations addressed by Nurse Abner's reports were "directly related to the 'provision of care supportive to or restorative of life and well-being'" under N.J.S.A. 45:11-23(b) and thus did not "require a medical diagnosis." Id. at *5-6.



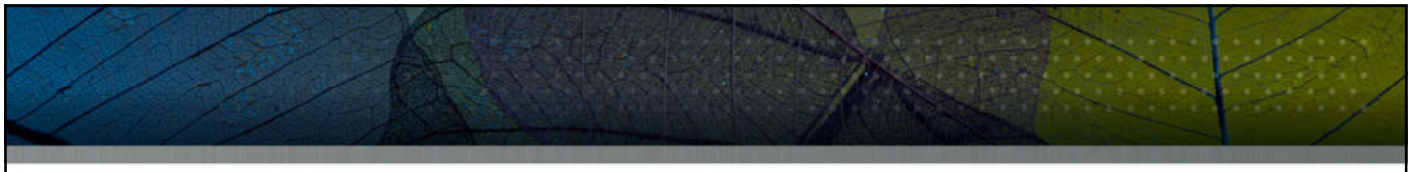
Nonetheless, the court concluded that N.J.S.A. 45:11-23(b) "does not prohibit her testimony on the issue of causation under the facts of this case." Id. at *6. The court noted, however, that Nurse Abner's opinions did not extend to the plaintiff's wrongful death claim, "as such an opinion would be beyond the scope of her expertise and prohibited under N.J.S.A. 45:11-23(b)." Ibid.



In Rodriguez, the plaintiff brought suit after the plaintiff's decedent -- a partial quadriplegic confined to state prison who required frequent repositioning and pressure redistribution equipment -- developed scrotal pressure wounds. Rodriguez v. New Jersey Dept. of Corrections, 2019 WL 6522397 at *1 (App. Div. Unpub. December 4, 2019). Supporting its case, the plaintiff offered the opinion of Nurse Bonnie Tadrick, who opined that due to his partial quadriplegia, the decedent required frequent preventive wound care which nursing staff failed to provide. Id. at *2.

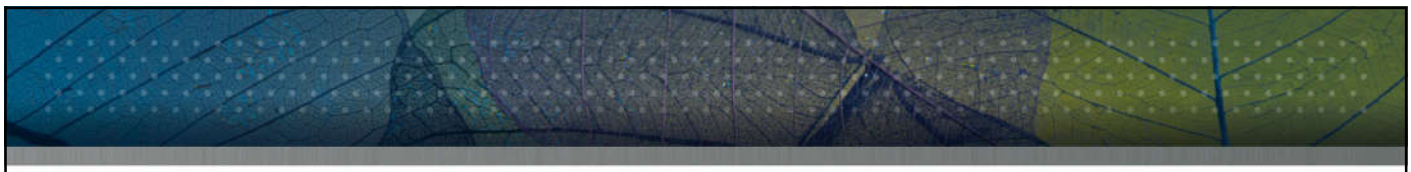


The trial court found Nurse Tadrick "did not have the qualifications to give 'a medical opinion' regarding the cause of the decedent's injuries." Id. at *3. Finding that the plaintiff lacked a causation opinion necessary to prove medical malpractice, the court entered summary judgment in defendant's favor. Ibid.



The Appellate Division reversed. Ibid. The court determined that the "[t]he specific deviations Tadrick addressed in her . . . report directly related to 'the provision of care supportive to or restorative of life and well-being' and the execution of 'medical regimens as prescribed by a licensed or otherwise legally authorized physician . . . .'" Ibid. (quoting N.J.S.A. 45:11-23(b).

Ultimately, the court held that Nurse Tadrick's opinion fell "squarely within the diagnostic privilege of the nursing practice contemplated in N.J.S.A. 45:11-23(b), does not require a medical diagnosis, and provides the requisite causation opinion to prove a medical malpractice case." Ibid.



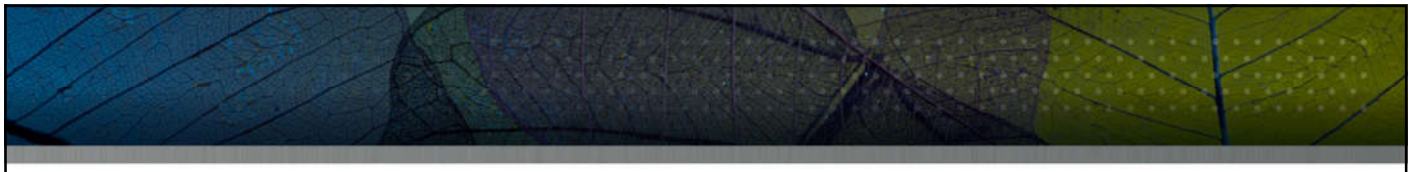
Recent Unpublished Cases

Recent Unpublished Cases

- **Dubois v. Senior Living Solutions, LLC, 2021 WL 3412621 at *1 (App. Div. Unpub. August 5, 2021)**

- **Bundy v. Bentley Senior Living at Pennsauken, 2021 WL 408761 at * (App. Div. Unpub. February 5, 2021)**

- **Estate of Jacobs v. Princeton Med. Ctr., 2021 WL 482081 at *1 (App. Div. Unpub. (October 18, 2021)**



QUESTIONS?

If you have any questions, please contact:

William J. Mundy
wjmundy@burnswhite.com

Brian D. Pagano
bdpagano@burnswhite.com

Ahsan A. Jafry
aajafry@burnswhite.com

Monica C. Fillmore
mcfillmore@burnswhite.com