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ESTATE OF EUGENE BOEHM, through Genevieve Clifton, Executor,

Plaintiff-Appellant,

v.

CARE ONE AT WALL, LLC d/b/a CARE ONE AT WALL, CARE ONE, LLC, DES HOLDING CO. INC., DES 2009 GST TRUST and DES-C 2009 GRAT,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-003901-22T4

CIVIL ACTION

On Appeal from the Law Division, Monmouth County

Docket No. MON-L-002248-17

Sat Below:

Hon. Linda Grasso Jones, J.S.C.

BRIEF IN SUPPORT OF THE APPEAL

On the brief and of counsel:

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PRELIMINARY STATEMENT

This appeal involves the death of Eugene Boehm while a patient at defendant, Care One at Wall, LLC. Plaintiff, his daughter and executrix of his estate, Genevieve Boehm Clifton, brought claims for negligence against the defendant and its nursing staff and for violations of Mr. Boehm's rights pursuant to the Nursing Home Responsibilities and Rights of Residents Act ("NHA"). After a trial spread out over three weeks, the jury found defendant had violated the standard of care, but its failures were not a proximate cause of Mr. Boehm's death. The jury also found that the nursing staff did not violate the standard of care and that there was no violation of Mr. Boehm's rights under the NHA. Plaintiff appeals the jury's verdict and the denial of her motion for a new trial because of several erroneous evidentiary rulings of the trial court, the effect of which was to deprive plaintiff of a fair trial.

The most egregious error involved defendant's use on cross examination of documents purporting to be the results of an investigation by the State of New Jersey Department of Health ("DOH") finding defendant committed no violations of federal and state law with regard to Mr. Boehm's death. The documents were the subject of a motion in limine by plaintiff to prohibit defendant from using those documents at trial. The Honorable Kathleen A. Sheedy, J.S.C., prior to trial, ruled that the hearsay documents could come in **if and only if** a proper foundation was

laid for their admission into evidence. Defendant claimed it would produce at trial the alleged author of one of the documents, Kimberly Strong, R.N. The other document was unsigned.

At trial, defendant did not call Nurse Strong as a witness nor did defendant call any witness with personal knowledge of the hearsay documents and the conclusions they contained. Nevertheless, the Honorable Linda Grasso Jones, J.S.C., the trial judge, allowed defendant to use the documents on cross examination of plaintiff's witnesses and read from them in their entirety while asking the various witnesses, is this what the document says. The documents were hearsay; they were used for the truth of the matter asserted, i.e., defendant did not cause Mr. Boehm's death or violate his rights under the NHA. Defendant, however, got every word of those documents into evidence numerous times and then used the results stated in those hearsay documents as the cornerstone of its summation. Moreover, defendant undermined plaintiff's case by asserting plaintiff hid those documents from the jury.

The trial was plagued by defendant's speaking objections and the trial judge's many, lengthy sidebars – even when there was no objection. Defendant sought to relitigate at trial every issue on which it lost pretrial. The trial judge made preemptive rulings prohibiting plaintiff's experts from saying certain words and then telling the expert what words he could use instead. In particular, the trial

court so limited Mr. Youles, plaintiff's expert on the violation of rights under the NHA, that the claim got lost amid endless sidebars and the random striking of his answers on direct examination. That the jury found defendant deviated from the standard of care but failed to find those deviations were also a violation of Mr. Boehm's rights underscores the inconsistency in the jury's findings.

The trial court also had recurring problems with plaintiff's experts because they were, in her words, voicing their "personal opinions" without citing any authority. Between them, plaintiff's experts had over 100 years' experience in their respective fields. The judge did not seem to understand that an expert witness can have opinions based on their experience without resort to outside authorities. Similarly, two of plaintiff's experts had extensive backgrounds in respiratory care but could not opine on the respiratory care given because they were not respiratory therapists. No motion was ever made to bar those experts from giving opinions on respiratory care.

Specifically, the trial court's allowance of use of the DOH's investigation results without proper foundation and the severe and unreasonable limiting of the experts' testimony led the jury to find no proximate cause, no violation of Mr. Boehm's rights under the NHA, and that the nursing staff was not negligent. The combined impact of the erroneous rulings and the overall conduct of the trial produced an unjust result that should be vacated.

PROCEDURAL HISTORY

On June 12, 2017, plaintiff, Estate of Eugene Boehm, through Genevieve Clifton, Executrix, filed a four-count complaint against defendants, Care One at Wall, LLC d/b/a Care One at Wall (Care One), Care One, LLC, DES Holding Co., Inc., DES 2009 GST Trust and DES-C 2009 GRAT (collectively Care One defendants). Pa11. Plaintiff asserted negligence of the Care One defendants (Count I), violation of New Jersey Nursing Home Responsibilities and Rights of Residents Act (NHA) of the Care One defendants (Count II), wrongful death as a result of the actions of the Care One defendants (Count III), and a claim against the Care One defendants for punitive damages. Pa15-20. All defendants filed an answer and cross-claims. Pa22. By Order dated May 13, 2021, Count IV was dismissed as to all defendants and the remaining counts were dismissed as to the corporate defendants, leaving Care One as the sole defendant for trial.

In July 2022, the court held a second pretrial hearing on defendant's seven remaining motions in limine, one had been decided previously, and plaintiff's one motion in limine. 12T. Plaintiff's motion sought to exclude testimony regarding the conclusions reached by the Department of Health and Kimberly Strong in their July 6, 2016, Survey and August 18, 2016, letter to Genevieve Clifton. Pa42. The court denied the motion while stating "that will be in, so long as a proper foundation is laid. I am not making a determination right now that, in fact, it goes

in. The proper foundation actually has to be laid." 12T56:3-6. The court denied defendant's motion to bar reference to and use of alleged violations of federal and New Jersey statutory and regulatory standards at trial. Pa81. "Experts could cite standards if they relied on those standards as evidence of negligence but not negligence per se." Ibid. The court denied defendant's motion to bar plaintiff's experts from presenting opinions to the jury that are beyond the scope of their expertise. Pa84. "While the Court agrees that experts cannot testify beyond the scope of their expertise, Dr. Diamant [sic] is permitted to testify about nursing home standards of care and about the care and treatment received by plaintiff while he was at the nursing home." Pa84-85.

The case was tried before a jury in March and April 2023. Pa1. On April 4, 2023, the jury returned a verdict in favor of defendant. Pa131-34. On April 10, 2023, the court entered judgment for defendant. Pa1. Plaintiff timely moved for a new trial. Pa36. That motion was denied with a Statement of Reasons. Pa2-10. Plaintiff timely filed a Notice of Appeal. Pa135.

STATEMENT OF FACTS

On November 15, 2015, Eugene Boehm suffered a stroke. Pa3. He was sixty-nine. Pa3. He was treated in the hospital and then released and admitted to defendant Care One, a long-term care facility, on January 13, 2016, for

rehabilitation and respiratory services. Pa3. He was pronounced dead less than two days later, on January 15, 2016. Pa3.

According to plaintiff's expert witnesses, defendant and its nursing staff deviated from the standard of care owed to Mr. Boehm and violated his rights under the NHA. Instead of being placed in the appropriate sub-acute unit where he would have access to superior care, Mr. Boehm was shunted off to the overflow unit where long-term care residents were housed. 7T110:2-14. That unit did not have registered nurses (RNs) administering to patients; only licensed practical nurses (LPNs), who do not have the same education and training as registered nurses. 5T66:16-67:10; 5T74:2-22.

No individualized care plan was in place for Mr. Boehm's extensive respiratory care needs. Out of a 28-page care plan, only one page had anything to do with Mr. Boehm's respiratory care. 5T82:1-8. The care plan did not meet the nursing standard of care. 5T86:23-87:1. No appropriate assessments by a registered nurse were done. 5T75:10-13. Doctors orders were not followed. 5T102:25-103:1. Defendant's own policies on suctioning were not followed. 5T102:7-14. Most damaging of all, Mr. Boehm did not get the level of respiratory care that he needed. 5T33:5-11.

Mr. Boehm had a tracheostomy and as a result required trach care and suctioning to prevent a buildup of fluid in his lungs. A respiratory therapist was

supposed to be monitoring Mr. Boehm every 2-3 hours. 5T146:2-6. Medications were to be given to loosen any mucus buildups and close monitoring was required when those medicines were administered. 6T185:1-186:2; 6T208:17-209:22. None of that was done.

Defendant had only one respiratory therapist on staff, Alyssa Mauro. Although she saw Mr. Boehm on the day he entered the unit, she was off the next day and so could not provide the care Mr. Boehm required. 3T277:7-9. The night before he died, his daughter was visiting when her father signaled her that he needed suctioning. Ms. Clifton had to go find a nurse and ask her to suction her father. After a period of time, when the nurse had failed to come to Mr. Boehm's room after Ms. Clifton's specific request, she again went out to find the nurse. She was at the nurses' station on her phone. Ms. Clifton asked again that her father be suctioned. It turned out that nurse, an LPN, had no idea what to do and sought assistance from another LPN. The other LPN could not get the suctioning machine to work. After further delays, Mr. Boehm finally was suctioned. 2T42:21-48:23.

The next morning, Mr. Boehm was in respiratory distress but was not given any respiratory treatment. 6T224:12-15. Instead, the EMTs were called and the Director of Nursing was told that Mr. Boehm was in respiratory distress. 4T60:6-11. He stopped breathing and then his heart failed. 6T238:5-10. He was pronounced dead at 8:45 a.m. on January 15, 2016. 2T259:2-3.

Plaintiff's expert Jacob Dimant, M.D., opined that Mr. Boehm asphyxiated on his own respiratory secretions because there was not appropriate care to remove those secretions. 6T99:6-10. His cause of death was respiratory failure due to mucus plugging. 6T99:12-18. The respiratory therapist for defendant, Alyssa Mauro, agreed that mucus plugging could lead to rapid respiratory failure that could lead to death due to asphyxiation. 3T227:13-16.

LEGAL ARGUMENT

POINT I

EVIDENTIARY ERRORS REGARDING LIABILITY WARRANT A NEW TRIAL. (PA1-2)

A. Standard of Review.

Evidentiary decisions are reviewed for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). In particular, "[c]ourts have a broad discretion in determining the scope of cross-examination." State v. Silva, 131 N.J. 438, 444 (1993). An appellate court may overturn the trial court's evidentiary decision if there is a clear error of judgment or the decision lacks the support of credible evidence in the record. Estate of Hanges v. Met. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010); see also State ex rel. J.A., 195 N.J. 324, 340 (2008) (finding abuse of discretion in admitting hearsay statement as present sense impression); State v. Kemp, 195 N.J. 136, 149 (2008) (finding abuse of discretion in admitting N.J.R.E. 404(b) evidence). A judgment based on an evidentiary error will be

reversed if the error "was 'clearly capable of producing an unjust result.'" Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 502 (1999) (quoting R. 2:10–2); see also Kemp, supra, 195 N.J. at 149–50 (finding admission of N.J.R.E. 404(b) evidence to be harmful error).

Review of a judge's conclusions of law is plenary. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

"The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge -- whether there was a miscarriage of justice under the law." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011); accord R. 2:10-1 ("The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law."). A "miscarriage of justice" can arise when there is a "manifest lack of inherently credible evidence to support the finding," when there has been an "obvious overlooking or under-valuation of crucial evidence," or when the case culminates in "a clearly unjust result." Risko, supra, 206 N.J. at 521-22 (quoting Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996)). Moreover, "[w]here the issue does not involve the trial court's fact-finding role, but rather its exercise of discretion, [we] will not interfere unless the trial judge has 'pursue[d] a

manifestly unjust course.'" Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 36-37 (App. Div. 1998) (quoting Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523, 528 (App. Div.), certif. denied, 144 N.J. 174 (1996)).

B. Impermissible Use of Hearsay Documents.

Plaintiff moved in limine, well before trial, to exclude any testimony regarding the conclusions of an after-the-fact "investigation" by the Department of Health in response to a complaint made against defendant by Mr. Boehm's daughter. The conclusions were contained in an unsigned letter dated August 18, 2016, which referred to an alleged investigation that took place on July 6, 2016, six months after Mr. Boehm's death in January 2016. At trial, the unsigned letter was marked D-5 for identification. That unsigned and unauthenticated letter pertinently stated that the "surveyor was unable to identify a citable deficient practice related to your concerns based on the State and Federal regulations." Pa70.

The July 6, 2016, investigation referenced in that letter, but not included with that letter, was a multi-page, unnumbered document entitled "Unannounced Visit/Revisit Report." It was referenced as a "Complaint Survey" and the person who signed the form was identified as Kimberly Strong. Pa74-75. The surveyor's notes were not included. A form letter dated August 4, 2016, was included. Pa76-77. It stated that "no Federal deficiencies were cited based upon our visit." Pa76. At trial, the multi-page, unnumbered, unauthenticated document was marked D-6

for identification. Neither D-5 nor D-6 were moved into evidence. Moreover, no witness involved in the creation of the documents testified.

At oral argument, on July 12, 2022, on the various motions in limine filed by the parties, Judge Sheedy unequivocally found that the documents were hearsay and could be used at trial only "if you lay a proper foundation." 12T52:21-53:2. See also 12T56:5-6 ("The proper foundation actually has to be laid."). Defendant agreed and stated that Kimberly Strong could come in to provide the proper foundation. 12T53:4-6.

Nurse Strong never appeared at trial. Defendant, however, still got every word it wanted from the documents before the jury and into evidence. Every conclusion was read to the jury – most more than once. Defendant then highlighted the hearsay conclusions in the defense closing. Defense counsel even went so far as to cite "Nurse Strong" as if she had testified. The documents were used in the cross examination of plaintiff, Ms. Clifton, and plaintiff's expert witnesses, Barbara Darlington and Lance Youles. Incredibly, defense counsel was allowed to read line by line through D-5 and D-6 and ask the witness if what was read was what the letter said. As if that is the least bit relevant or allowable without the proper foundation.

The cross examination of Mr. Youles is most illustrative of how the defense got every word they wanted into evidence despite plaintiff's objections, Judge

Sheedy's ruling and the lack of any foundation showing the reliability or the trustworthiness of the statements made, let alone the conclusions made, in those documents. Although long, the excerpt is necessary to show the defense's use of the unauthenticated hearsay document to present the heart of its case.

> Q Okay. Well, let's look at D-6. D-6 is an unannounced visit/revisit report; is that correct?
>
> A Yes.
>
> Q And it says right on this document an unannounced visit was made to the above facility, correct?
>
> A Yeah, and they checked tour, so they did a tour, yes, ma'am.
>
> Q So they went to CareOne.
>
> A Yes.
>
> Q Okay. So there's no confusion, they actually went here. They didn't do this from a desk.
>
> A I agree. Well, they -- they did this portion of the survey from a desk, yes, ma'am.
>
> Q Okay. And they checked off medical records, right?
>
> A That's what it says.
>
> Q They checked off staff, resident interviews, right?
>
> A That's what it says, sure.
>
> Q They checked off review of other facility documents?
>
> A Yes, ma'am.

Q Okay. Go to the second, please -- page please, if you don't mind.

A Oh, glad to.

Q Okay.

A Hard to read though.

Q Well, let's give it a try. It says right here confidential resident sample list, right?

A Yes.

Q All right. And then there's one, two, three, four columns below.

A Yes.

Q And one of the columns is not blacked out. It says number 3, Eugene Boehm, right?

A Right.

Q And the other three are redacted, and those would represent other patients other than Mr. Boehm that they looked at.

A That's true.

Q And even though they looked at four different patients, their conclusion was, if you don't mind turning to the last page -- last page, please. I'll help you out. There we go.

A Thank you.

Q Was that the facility is in compliance with requirements of 42 CFR Part 483(b). Is that correct?

A That's what it says.

Q All right. And then let me show you D-5 one more time.

A Okay.

Q Now, we already established, I think, that the Department of Health -- and D-5, just so it's clear, D-5 is on standard the State of New Jersey Department of Health letterhead, right?

A That's what it says.

Q All right. And down at the bottom it says long-term care complaint program, survey and certification, and then it has two license numbers, doesn't it?

A Yes.

Q So those are the license numbers for the individuals that are sending this letter with regard to the conclusions from their survey, right?

A That's speculation. I believe so, but I'm not sure.

Q Well, you've done this process before. You've seen when a response gets sent to the individuals involved with their license numbers on it.

A Typically, ma'am, but I -- I hate to speculate. But typically, you're right.

Q Okay. And -- nope, stay there please.

A Oh, I'm sorry.

Q Thank you so much. And so, just so we're clear, when you said that you're not sure what they did or didn't do, it's very clear that what the investigation included was a tour, right?

A Well, a tour could be anything. They could walk in and walk out, but yes, it's a tour.

Q Okay. So you're saying they didn't do an appropriate tour?

A What I'm saying is this is so global that it leaves a lot to the imagination on what they did and didn't do, ma'am. I don't have any idea of what they did.

They're supposed to do certain things. A tour could be halfway down the hallway, through every hallway. I have no idea, so it just leaves a lot to the imagination, but –

Q So, are you –

A -- that's what they said.

Q Are you saying that the State of New Jersey didn't do an appropriate survey?

A I'm saying that there's discretion to how these surveyors do their surveys. And I can't assume that when they do a tour they go through every hallway. They may not. They may not go through every floor. I don't know.

In some cases I find that they don't, so it's hard to say. Like I said, this leaves a lot to the imagination.

Q Okay. Well, what's left to the imagination? Are you saying that the State of New Jersey Department of Health did not do an appropriate complaint survey in this case?

A No. What I'm saying is if I had their surveyor notes and I had all the details of what they did, then I would be able to know how comprehensive it is. But not all surveys are comprehensive.

Q Right. So you don't know if it was comprehensive or not.

A I don't know, and that's the whole problem with this is we're suggesting that it's very comprehensive. It may not be. In some cases, I find it is not.

Q Well, you don't know in this case that they didn't do something that they were supposed to.

A No. But what I'm saying this process, with the forms that you've given me, the word that comes to mind is doubt. I have doubt, as an expert, of just what they did. There's a lot of doubt, so I can't assume anything. There's just a lot to the imagination.

Q Okay. So let's continue.

A Okay.

Q So then they also had discussions with residents and staff, right?

A That's what it says.

Q Okay. Well, it also says a review of medical records, right?

A Yeah, I mean, keep in mind these are form letters, but yes, ma'am. So, everyone I look at says the same thing. So, I'm assuming they did that, but they could have used the same form letter for all I know.

Q What do you mean for all you know? You have a letter in front of you that the State of New Jersey Department of Health sent to Ms. Clifton saying that they did these things. Are you saying that the State of New Jersey is misrepresenting what they did?

A I'm saying we really don't know what they did, ma'am.

Q Well, we do know what they did because –

A We know what –

Q -- they said what they did.

A We know what their conclusions were, but in terms of you're suggesting that certain details and issues -- I don't know what they are. There's a bit of doubt. I don't know what they did. I know what their conclusions are, but I don't know what they did. I can't make that assumption.

> Q They wrote on this letter what they did. Are you not willing to accept what's written on this letter from the State of New Jersey Department of Health? You won't accept that?
>
> A From a global standpoint, sure. But, like I said, a tour can be a hallway, it can be in a whole building. They could talk to a couple of people. I mean, who knows what they did. I don't know what they did, ma'am.
>
> Q Okay. And then let's -- let's just finish up because there's more things that they did. So, it says and other pertinent facility documents, including staffing reports, right?
>
> A That's what it says.
>
> Q Okay. And just so everyone's clear, they actually wrote in this letter that after evaluating this information and conducting interviews, the surveyor was unable to identify a citable deficient practice related to your concerns based on the State and federal regulations. Is that correct?
>
> A That's what it says.

7T295:24-302:20. There is no doubt from the exchange that the defense is introducing the substance of the unauthenticated hearsay document, which was not admitted in evidence, for the truth of the matter asserted, the purported investigation and conclusions. Even the trial judge acknowledged that the testimony was being used as proof of the results of the investigation. 7T318:1-2. The admission of that testimony was error and was critical to defendant's case.

In summation, the defense highlighted the investigation and the conclusions made to prove defendant was not liable, and to undermine plaintiff's case and credibility. 11T76:9 to 77:11. "[W]e talked about this a moment ago, the

Department of Health did not have any problem with the care and treatment that was given. All right. You saw that. No citable deficiencies. No state or federal citable deficiencies." 11T76:9-14. The defense cited to the Department of Health and characterized its findings as if the DOH had a representative at trial who testified to what they did and what they found. "Nurse Strong, on behalf of the DOH, looked at four separate charts. She looked at Mr. Boehm's chart as well, looked at staffing. Didn't find a single violation." 11T93:15-18. No such witness existed. There was no such testimony and, in reality, we have no idea what Ms. Strong did or did not do.

D-5 and D-6 were also used to create the impression that the nurses did nothing wrong because, if they had, they would have been disciplined by the DOH. 11T77:2-7. Essentially, the argument was who are you going to believe the plaintiff or the New Jersey Department of Health. The pertinent argument follows.

> Now despite Mr. Boehm's death -- we talked about this a moment ago, the Department of Health did not have any problem with the care and treatment that was given. All right. You saw that. No citable deficiencies. No state or federal citable deficiencies.
>
> And you heard how the Department of Health had his chart and you heard how the Department of Health would review the chart. Nurse Darlington told you that. And they would have seen, and they saw -- nobody hid this -- PN. Do you see that there? LPN, LPN, LPN. The note before it, LPN, LPN.
>
> Don't you think the agency that's supposed to see if you have compliance with the regulations, don't they think -- don't you think they

> would have had a problem with that? Don't you think that would have been a cited deficiency if what plaintiff says is true? They would have.
>
> Don't you think the LPNs would have gotten in trouble on their own license? Did you hear any evidence in this case that the LPNs were referred to the nursing board?
>
> No, you didn't. You know why? Because it didn't happen.
>
> Those are the people that are charged with the responsibility to make sure there's compliance with the statutes, compliance with the laws, and you didn't hear that.

11T76:9-77:11.

The defense even chastised Nurse Darlington in summation over alleged remarks made to disparage the non-existent witness.

> The State of New Jersey and Kimberly Strong, a nurse from the state of New Jersey, who is a state employee just like Ms. Clifton and who was -- and Nurse Strong, who was disparaged this courtroom by Nurse Darlington -- remember first she told you she does a good job -- or she does a good job and she sat with her? And then she said oh, no she's okay, after plaintiff objected. Remember that? And she's just like any other surveyor.
>
> So they want you to believe that the agency charged with knowing the statutes, the regulations, holding facilities and nurses accountable, can't be trusted. But Dr. Dimant, Nurse Darlington, Lance Youles, who relies on statutes that don't even apply, they're the ones to be trusted. Does that make any sense?

11T92:23-93:14.

The defense also used the hearsay documents to impugn plaintiff by claiming plaintiff hid those hearsay documents from the jury.

> And what else weren't you shown by plaintiff? Forget the half of the charting that was missing, but the complaint to the State of New Jersey and the response back was never mentioned to you by plaintiff ever. Never ever, ever, ever, ever.

11T92:7-11.

The defense used it to appeal to the jurors' common sense and hammer home that if defendant was liable for the death of Mr. Boehm, the DOH would have so found but they did not.

> And here comes common sense again. Isn't it interesting that the DOH, whose job it is to make sure that facilities comply, found none? They were in compliance.
>
> Instead, counsel or Nurse Darlington told you -- or they will tell you that the state of New Jersey did a poor investigation. And we don't know what they did, they say, and you can't use that, it's not trustworthy.
>
> But if there had been violations in the face of a dead patient -- that's why they went there. They had that information. They would have found a violation, if there was one, and they didn't find a single one.

11T94:1-14. The information improperly admitted was clearly central to the defense and used for the truth of its findings.

This case could serve as exhibit A in a master class on the dangers involved in the improper use of hearsay documents. No foundation was laid, no authentication was provided, and yet the substance was not just presented to the jury for the truth of the matter in issue, but became the cornerstone of defendant's case.

In similar circumstances, this Court held a new trial was warranted where a police report was used improperly in cross-examination and in summation. Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014). In Manata, the court found "that a new trial is required because of evidentiary errors pertaining to the issue of liability. In particular, plaintiff's counsel engaged in improper cross-examination when he confronted defendant with a police report that counsel did not offer in evidence, but whose substance he communicated to the jury." Id. at 330. The police report at issue was based solely on plaintiff's version of events and was used on cross examination and at closing to impugn defendant's credibility and to establish the accident happened exactly as plaintiff described. The police report was not entered into evidence and the police officer who took the report was not called as a witness. The court termed this tactic "phantom impeachment." Defendant employed the same tactic at bar.

"Instead of seeking to introduce the police report, plaintiff's counsel engaged in a form of 'phantom impeachment.' See James McElhaney, Phantom Impeachment, 77 A.B.A.J. 82 (Nov. 1991) (**describing "phantom impeachment" as the contradiction of a witness on "key testimony—by someone who never takes the stand and who never says a word in court"**). Plaintiff's counsel, over defense objection, presented to the jury the substance of the police report, which was represented to reflect the omission of defendant's version of the collision.

Counsel accomplished that by asking defendant himself what the report stated." Id. at 347 (emphasis supplied). That is exactly what was allowed here. As illustrated by Mr. Youles's cross examination, defense counsel simply read each portion of the documents she considered helpful to her case and asked Mr. Youles if that is what the document said.

In this case, like the Manata case, the court made no finding about the reliability or trustworthiness of the impeaching document. Plaintiff in Manata and defendant here made no effort to introduce it into evidence. In fact, in this case, defendant was expressly told by Judge Sheedy that it could **not** be admitted into evidence **or even used** without laying a proper foundation. 12T55:14 to 56:6. Further, Judge Sheedy prohibited defendant's experts from "any testimony regarding the conclusions reached by the Department of Health and Kimberly Strong." Pa42. Cleverly, defense counsel did not ask his own experts one question regarding those documents. Instead, he used them improperly to cross-examine plaintiff and her expert witnesses. The intent and prejudicial effect as evidenced by the defense closing could not be more clear.

As the court stated in Manata and is equally true here, "it is uncertain * * * that plaintiff could have laid a sufficient foundation for admission of the report as a business record. Without an officer's testimony, it is unclear whether the report was prepared in accordance with regular practice including governing guidelines."

Id. at 346-47. As to D-5, there is no signature on the letter. Pa70. We do not know who drafted it. As to D-6, it is a multi-page, unnumbered document that refers to other records allegedly reviewed but not provided. Pa74. It also refers to witness interviews, similarly unprovided. For all we know, Nurse Strong based her investigation on what someone else told her. Under those circumstances, the Manata court stated that "[e]ven if the report were otherwise admissible, the police officer's diagram of the accident was not based on his personal observations at the scene; rather, it relied on what another person told him. It therefore constituted either the inadmissible opinion of the officer or inadmissible embedded hearsay of plaintiff. Cf. Brown v. Mortimer, 100 N.J. Super. 395, 405-06 (App. Div. 1968)." Id. at 347. Likewise, D-5 and D-6 constituted either the inadmissible opinion of Nurse Strong or inadmissible embedded hearsay of another.

The cross examination of plaintiff's witnesses using D-5 and D-6 was improper and so was defendant's summation because it was based on the improper cross-examination. The Manata court said it best.

> Put another way, **"[i]t is improper 'under the guise of "artful cross-examination," to tell the jury the substance of inadmissible evidence**.'" United States v. Sanchez, 176 F.3d 1214, 1222 (9th Cir.1999) (quoting United States v. Hall, 989 F.2d 711, 716 (4th Cir.1993)); see also United States v. Check, 582 F.2d 668, 683 (2d Cir.1978). "**The reason for this rule is that the question of the cross-examiner is not evidence and yet suggests the existence of evidence . . . which is not properly before the jury.**" State v. Spencer, 319 N.J. Super. 284, 305 (App. Div. 1999); see also State v. Bowser, 297 N.J. Super. 588, 603-04 & n.3 (App. Div. 1997) (providing example of

> improper cross-examination based on a police report not in evidence); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 4 on N.J.R.E. 803(c)(6) (2013)."

Id. at 348-49 (emphasis added).

Even the trial judge recognized, at one point, that defendant could not get into evidence "indirectly" what it could not get in "directly." "What's not coming in here is what the State determined one way or another and you can't get it in indirectly when you can't get it in directly because the concept is you would have to have someone from the State come in and testify as to what they did." 3T185:22-186:2. See also 3T186:12-15 ("You're not getting in directly or indirectly what the State's conclusion was with reference to the Complaint."); 3T188:3-5 (You're not getting in the State's determination directly or indirectly."). Nonetheless, the trial judge ended up giving defendant carte blanche to use the impermissible hearsay. In the jury charge, the trial judge attempted to cure the extensive damage done but that attempt was weak at best. She merely stated: "Any testimony regarding the conclusions in that document are not binding on you." 11T162:9-11. Too little, too late. Like the defendant in Manata, plaintiff is entitled to a new trial.

POINT II

PLAINTIFF'S EXPERTS WERE QUALIFIED TO OPINE ON THE RESPIRATORY CARE PROVIDED TO MR. BOEHM. (PA1-2)

For the first time at trial, defendant objected to plaintiff's expert witnesses giving any testimony on the respiratory care given Mr. Boehm because they were not respiratory therapists. Defendant brought a total of eight motions in limine and not one addressed that critical issue. Rather, defendant waited until trial had begun to spring its objection on plaintiff. The entire crux of plaintiff's case was that the facility and its nursing staff failed to provide appropriate respiratory care to Mr. Boehm resulting in his death due to respiratory failure. If there were legitimate objections to their respiratory care opinions, they should have been raised well before trial in an appropriate motion. See R. 4:25-8 Motions in Limine ("In general terms and subject to particular circumstances of a given claim or defense, a motion in limine is 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**. A dispositive motion falling outside the purview of this rule would include, but not be limited to, 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.**) (emphasis supplied).

In Mellwig v. Kebalo, 264 N.J. Super. 168, 171 (App. Div. 1993), this Court 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, it is similarly inappropriate to treat unannounced objections to the competency of an expert witness as concealed weapons to brandish at trial to preclude the witness from offering critical testimony, particularly when the objections have been tactically delayed. The following colloquy at trial addresses that tactical delay at bar.

> MR. LAURI: Respiratory therapists don't have a standard of care. They're not licensed professionals under the affidavit of merit statute.
>
> MR. COCCA: Says who?
>
> MR. LAURI: The affidavit of merit statute. That's the only time that you appear to say I need to bring in a respiratory therapist. And here's the thing. This report was given in 2019. They have -- actually this counsel had a case where they failed to object and then objected later on It's Patrick, I think, versus something where you can't start cutting away expert testimony, especially at trial.
>
> We had no notice. If you had a problem that we didn't have a respiratory therapist -- I'm now learning right now at trial -- that's not acceptable. How can I prepare for that? That is the surprise. All these objections -- when was this -- they had multiple motions in limine and they never filed one as to this issue and now it's becoming very -- in my opinion -- obstruction -- we're stopped every single time.
>
> If this was an issue, it should have been handled before discovery was over so we had the opportunity to rectify it, if we felt we needed to. It wasn't.

5T154:10-155:11.

The trial court even acknowledged that a motion in limine should have been filed on the issue. She stated: "I guess this wasn't raised in front of Judge Sheedy when she did all those other motions in limine, and I'm not sure why, because it

wasn't hidden." 5T174:9-12. Nonetheless, the court barred the testimony. By barring plaintiff's expert witnesses from opining on the respiratory care given Mr. Boehm because they were not respiratory therapists, the trial court failed to recognize that the experts did not have to be respiratory therapists to opine on proper respiratory care for Mr. Boehm based on their extensive experience in that area.

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).

Licensed or even unlicensed individuals involved in another profession can testify as an expert depending on "the claim involved, the specific allegations made, and the opinions that the expert proposes 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) (Garden Howe). There may be an overlap between practices or disciplines. Any practitioner who is familiar with the situation in dispute and possesses "the requisite training and knowledge [can] express an opinion as an expert." Rosenberg v. Cahill, 99 N.J. 318, 331-32 (1985). New Jersey courts have recognized that "a doctor in one field would be qualified to render an opinion as to the performance of a doctor in another with respect to their common areas of practice." Wacht v. Farooqui, 312 N.J. Super. 184, 187-88 (App. Div. 1998); see Cahill, supra, 99 N.J. at 331-34; Sanzari v. Rosenfeld, 34 N.J. 128, 136 (1961).

Where the controversy involved the review of x-rays and the diagnosis of physical conditions, a medical doctor was held competent as an expert in a malpractice claim against a chiropractor because our Supreme Court recognized that a medical professional can provide an expert opinion where the professional has sufficient knowledge of the professional standard relevant to the situation under scrutiny. Cahill, supra, 99 N.J. at 334; see Khan v. Singh, 200 N.J. 82, 101 (2009); Sanzari, supra, 34 N.J. at 136-37 (noting overlap between fields of medicine and dentistry). In Garden Howe, a professional negligence action against an architect, this Court reversed a trial court's determination that an engineer was not qualified to give expert opinions in areas where the two professions overlapped. Garden Howe, supra, 439 N.J. Super. at 457.

In this case, plaintiff's experts proffered opinions as experts in respiratory care based on extensive personal experience dealing with patients requiring respiratory care in a long-term care facility environment. Notwithstanding the fact they were not respiratory therapists, those experts had sufficient expertise to testify on the respiratory care or lack thereof provided Mr. Boehm.

Dr. Dimant has been a doctor for over 50 years. He is licensed in New York and New Jersey and is Board Certified in internal medicine with a specialty in geriatric medicine. 6T35: 6-17. He is also the Chief of Geriatric Medicine at NYU. 6T56:25-57:5. He is a professor at New York University School of Medicine, with privileges at NYU Hospitals. 6T34:11-12. Dr. Dimant works in the ICU with older people on ventilators and on trachs. 6T41:6-14. Most recently, he ran the respiratory unit at NYU Augustana Center for Extended Care and Rehabilitation. 6T42:18-21. He developed and ran a 40-bed sub-acute Respiratory Unit, which had 12 beds dedicated to patients on ventilators, with complex respiratory issues. 6T44:9-12. The remaining 28 beds were used for patients with respiratory disease. Ibid. Most of the patients in that unit had tracheostomies and had complex pulmonary disease. 6T49:16-19. For the majority of his time at Augustana, Dr. Dimant supervised that respiratory unit. 6T45:1-3. He saw tracheostomy patients there. 6T45:4-6. He was responsible for developing policies and procedures for respiratory care in that unit. 6T45:14-16. He

supervised nurses providing respiratory care to patients in that unit. 6T45:25-46:3. He also supervised respiratory therapists. 6T46:4. The Chief of Respiratory Therapy directly reported to Dr. Dimant. 6T46:56.

Additionally, Dr. Dimant has extensive experience in working with nurses and respiratory therapists in nursing homes. 6T47:2-54:16. He saw patients at all the nursing homes where he worked as a doctor and as a medical director. 6T54:12-16. He treated patients for respiratory issues, tracheostomy issues and ventilator issues. 6T54:22-55:5.

Notwithstanding his overwhelming qualifications to testify in this area, when offered as an expert in respiratory care, defendant objected and a lengthy side bar ensued. The trial judge found Dr Dimant could not "provide testimony on respiratory therapy standards of care" and that Dr Dimant did not "do respiratory therapy." 6T87:23-24; 6T88:10-11. She also stated that "you can't call it respiratory care" because "that's not a thing." 6T88:14; 6T89:6-9. As will be demonstrated infra at Point III, the judge had certain trigger words that could not be spoken by plaintiff's witnesses.

Barbara Darlington is a registered nurse and a licensed nursing home administrator. She has been an RN since 1965. 5T4:14-16; 5T 6:2-8. She obtained her Bachelor's Degree in nursing in 1985 and her Master's Degree in 2000. 5T6:9-11. In 1985, she became a Licensed Nursing Home administrator

and has worked in nursing homes since that time. 5T6:22-25. During her career, Nurse Darlington has served as the Director of Nursing, the Nursing Home Administrator, a Regional Nursing Home Administrator and a Vice-President of Operations for one hundred nursing homes. 5T7:12-8:23. She was responsible for oversight and quality assurance for those nursing homes and developed policies and procedures for the operation and management of those homes. 5T8:18-23. As a Licensed Nursing Home administrator, she was responsible for all departments in her facilities. 5T10:6-10. She has consulted on sub-acute units in nursing homes and oversaw the respiratory care provided to patients requiring those services. 5T9:4-11; 5T19:6-14. She has directed care for patients with tracheostomies and has provided hands on care for tracheostomy patients. She has suctioned patients and performed nebulizer treatments and has performed trach care. 5T20:11-21:15. She has hired and fired respiratory therapists based on her evaluation of their performance. 5T20:11-18. She testified specifically with regard to her knowledge of respiratory therapy services in nursing homes that she hires respiratory therapists, she oversees respiratory therapists, she monitors and audits their charts, she supervises them, she has herself performed respiratory care and she reviews respiratory therapist's assessments. 5T63:13-66:6.

Notwithstanding Nurse Darlington's extensive background in supervising respiratory therapists and hands-on providing the care a respiratory therapist would

give, she was barred from opining on the respiratory care or lack thereof given Mr. Boehm. When Nurse Darlington was asked to elaborate on her opinion in her served report that "the staff of CareOne at Wall in regard to their care and treatment of Euguene Boehm failed to provide necessary care and treatment by a respiratory therapist during his stay at the facility," the Court sustained defendant's objection and barred Barbara Darlington from testifying that defendant had failed to provide respiratory care within acceptable standards. 5T60:17 to 61:2. The Court did not permit Nurse Darlington to describe the failures in respiratory care because she was not a respiratory therapist. That is in direct contradiction to case law which permits "[any practitioner who is familiar with the situation in dispute and possesses 'the requisite training and knowledge [can] express an opinion as an expert.'" Cahill, supra, 99 N.J. at 331-32. Both experts were more than qualified to testify to the standard of care for respiratory therapists. To bar that testimony was error and extremely prejudicial to plaintiff's case, especially being raised for the first time during trial.

POINT III

CONSTANT SPEAKING OBJECTIONS, SIDEBARS, LIMITING OF PLAINTIFF'S EXPERTS' TESTIMONY AND THE OVERALL CONDUCT OF THE TRIAL DEPRIVED PLAINTIFF OF A FAIR TRIAL. (PA1-2)

Taking the testimony of Lance Youles, plaintiff's expert on Nursing Home Administration, as an example of what transpired at this trial, his direct testimony encompasses 129 pages; of those pages, 68 pages, over half of his direct testimony, was spent on sidebars. What happened with Mr. Youles is indicative of the way in which plaintiff's witnesses were treated by the court.

In discussing his background, Mr. Youles mentioned that he did consulting and teaching on elder abuse and neglect. 7T3:15-18. No objection was raised when he made that fleeting reference, and he did not mention another word about it. Several questions later, however, defense counsel objected to his use of the terms "abuse and neglect." That led to a sidebar spanning over ten pages. The court began by saying: "I've got to tell you. I've read Mr. Youles' report. I think we're going to be spending a whole lot of time at sidebar during his testimony. A whole lot of time." 7T18:18-21. Therein begins an odyssey of meandering conversation that ends in Mr. Youles being banned from using the word "responsible" when there was no objection made. The court stated: "Basically what I'm saying is he can use the word oversee, as opposed to responsible. I'm telling you he can use the word oversee, but not that he is responsible." 7T27:17-20.

Plaintiff's counsel tried to explain that Mr. Youles is simply saying that "as administrator your job is to be responsible for the nurses." 7T28:21-23. He is cut

off. "I've just made the decision and I said I'm not letting him use the word responsible because I think there are legal implications to it in terms of legal responsibility and because this is a civil lawsuit for money damages. And there's -- and I'm making the ruling and you're free to disagree with it but I've made the ruling he can't use the word responsible when he's talking about the administrator's involvement. He can use the word that the administrator oversees." 7T28:24-29:9.

In front of the jury, the judge then instructs Mr. Youles as follows: "I'm going to instruct you, sir, that you're not going to use the word responsible when you talk about what the administrator does. You're not going to say that the administrator is responsible for something. And to the extent you said that, I'm going to strike that. I'm going to tell the jury not -- to disregard it. You can use the word if you feel it applies that the administrator oversees things that happen at the nursing home." 7T29:18-30:2. That was not the only discussion regarding what words Mr. Youles could use and not the only time his answer was stricken. He also was not allowed to say "corporate office." 7T123:9-11.

In fact, there were so many discussions of what Mr. Youles could not say that at one point plaintiff's counsel remarked, in a bit of foreshadowing, "I think we're mincing words to the point where, you know, he might as well just read what they want him to say." 7T114:25-115:2. That is exactly what happened on defendant's cross-examination of Mr. Youles. Regarding the DOH hearsay

documents, as discussed supra at 10-24, defense counsel had Mr. Youles reading exactly what they wanted him to say. Plaintiff's counsel was so confused by the judge's constant parsing of Mr. Youles's testimony that at one point he stated, "I'm trying to do what Your Honor is asking. When you say do that, I'm having trouble understanding what you're asking me to do." 7T124:17-19. The sidebars were not only lengthy: they were confusing as the judge ping-ponged between issues.

Although the NHA does not provide a private right of action for a violation of responsibilities as defined in the Act, there is no law or even common sense that would support the elimination of the word "responsibility" from an expert's lexicon while testifying at trial. That is like saying an expert cannot use the word "dignity," which is part of a right protected by the NHA. The 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). The trial court completely misconstrued Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24 (App. Div. 2015). Although an expert cannot define "dignity," he can certainly say the word. The same is true for responsibility. Further, there was no claim for a violation of responsibilities under the Act because, as a matter of law, there cannot be. What difference then does it make if Mr. Youles said responsibility when the jury was never going to be asked if there was a violation of responsibilities under the Act? The whole idea is absurd

and an unfortunately effective defense tactic to confuse the court and the factfinder.

On March 23, 2023, plaintiff brought Jacob Dimant, M.D., to testify. At a hearing six months prior to trial, the court had denied defendant's motion in limine to bar Dr. Dimant "from presenting opinions regarding the nursing standard of care." Pa84. The court expressly ruled "Dr. Dimant is permitted to testify about nursing home standards of care and about the care and treatment received by plaintiff while he was at the nursing home." Pa84-85. Nonetheless, on the morning of March 23rd, the court invited defense counsel to relitigate the issues of Dr. Dimant's qualifications to testify and scope of testimony, and defense counsel leaped at the chance. 6T4-30. After a half hour delay in the start of presentation, the court determined "we'll deal with what we have to deal with during trial as it comes up." 6T30:16-17. After plaintiff's counsel proceeded with voir dire and proffered Dr. Dimant as an expert, defense counsel immediately objected yet again to testimony regarding nursing home standards of care. 6T72:24 to 73:7.

Remarkably, the trial judge took the position that Dr. Dimant could not be qualified as an expert on nursing home standards of care. "You know, to me, someone's not an expert specifically on standards of care. Standards of care is what they apply." 6T76:7-9. The court, with defense counsel's prompting, had difficulty with the concept of a person being an expert on the very topic that Judge

Sheedy had ruled on pretrial. "I think you need to call it something different. You can't call him an expert on nursing home standards of care." 6T76:11-13. Instead, Dr. Dimant, who had 50 years of experience in this area of practice, had to be qualified as an expert in nursing home "operations" and a specific foundation had to be laid for each subcategory that he would address. 6T77:9-78:2. The court's moving target simply became impossible to hit. Finally, 96 pages into the day, Dr. Dimant was able to begin his direct testimony.

Defense counsel repeatedly raised circuitous arguments that had been rejected. For example, defense counsel continuously asserted that "facilities don't act * * * they act through their people," 6T119:4-6, while objecting to any testimony about what the nursing home staff did or did not do. Defense counsel objected via speaking objections to any mention of responsibility, even if it was only Dr. Dimant describing his work experience.

> I served in various capacities in the nursing home industry.
>
> First of all, I was a physician taking care of patients there and that's 50 years and up until 2018.
>
> Then I was also a medical director, really one of the first in the United States, right after the law passed in 1974 and I served in that capacity for about I think 45 years or so.
>
> So the medical director, according to the federal regulations, which also follow into state regulations because they're required to follow federal if they want Medicare Medicaid money, so you have to – so the medical director is actually responsible for all the care in the nursing home.

> MR. COCCA: Judge, I object. It's the captain of the ship doctrine. It's prohibited in this state. I object.

6T101:20 to 102:12. Although Dr. Dimant had not testified about Care One's medical director or any staff errors, another lengthy sidebar ensued, meandering again about the use of the word "responsibility" regardless of context, false allegations of reliance on specific federal and state regulations that had never been mentioned, criticism of the respiratory therapist that never happened, and eventually touches on CMS enforcement of regulations not being for the court or jury to decide, which, again, no one had ever asserted. 6T102:14 to 128:13. Finally, after continued argument and a break, the court finds that the captain of the ship doctrine has no application to the case. 6T138:13-17. The disruption of plaintiff's case, however, cannot be undone.

Defense counsel also used rejected arguments, lengthy sidebars and speaking objections to disrupt plaintiff's other witnesses. See, e.g., 5T51; 5T52; 5T104; 5T125: 5T126; 5T143. The impact was an unfair trial in which plaintiff was prevented from introducing relevant evidence in any cohesive manner. Defense counsel was permitted to testify without qualification while plaintiff's witnesses were prevented from testifying based on their demonstrated and relevant experience.

POINT IV

THE JURY VERDICT FINDING DEVIATIONS FROM THE STANDARD OF CARE BUT NOT A VIOLATION OF MR. BOEHM'S RIGHTS UNDER THE NHA IS INCONSISTENT. (PA131)

Model Jury Charge 5.77 in effect in March 2023 provides that: "You may rely upon the same evidence in rendering a verdict as to whether or not the Plaintiff's nursing home residents' rights were violated and whether or not the Defendants were negligent." Model Jury Charge (Civil) 5.77 "Violations of Nursing Home Statutes or Regulations" (Nov. 2022). The charge to the jury contained that same language. 11T189:4-8.

The jury found defendant deviated from the standard of care in its treatment of Mr. Boehm. The evidence adduced at trial showed that instead of being placed in the appropriate sub-acute unit where he would have access to superior care, Mr. Boehm was shunted off to the overflow unit where long-term care residents were housed. 7T110:2-14. That unit did not have registered nurses (RNs) administering to patients; only licensed practical nurses (LPNs), who do not have the same education and training as registered nurses. 5T66:16-67:10; 5T74:2-22.

No individualized care plan was in place for Mr. Boehm's extensive respiratory care needs. Out of a 28-page care plan, only one page had anything to do with Mr. Boehm's respiratory care. 5T82:1-8. The care plan did not meet the nursing standard of care. 5T86:23-87:1. No appropriate assessments by a

registered nurse were done. 5T75:10-13. Doctors orders were not followed. 5T102:25-103:1. Defendant's own policies on suctioning were not followed. 5T102:7-14. Most damaging of all, Mr. Boehm did not get the level of respiratory care that he needed. 5T33:5-11.

At trial, plaintiff asserted that defendant violated N.J.S.A. 30:13-5(j)(2), which states: "[e]very 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." The evidence establishing the breach of the standard of care also established the violation of Mr. Boehm's right to a safe and decent living environment with considerate and respectful care recognizing his dignity and individuality. That the jury found breach of the standard of care but no violation of rights is inconsistent and requires a new trial.

POINT V

UNDER THE NHA, ONCE A VIOLATION OF RIGHTS IS ESTABLISHED, PLAINTIFF IS ENTITLED TO DAMAGES WITHOUT ESTABLISHING PROXIMATE CAUSE. (PA131)

The charge to the jury stated that plaintiff had to show that any violation in any claim brought had to have proximately caused Mr. Boehm's death. 11T164:22-25. See also 6T28:17-23 ("If they did something wrong but it did not lead to Mr. Boehm's death, no one's talking about it."). Regarding the NHA claim, that is incorrect as a matter of law.

Section 8(a) of N.J.S.A. 30:13 states in part as follows: "Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation * * * . Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action." As recognized in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24 (App. Div. 2015), if a jury finds a violation of one of the enumerated resident's rights contained in N.J.S.A. 30:13-5, plaintiff shall be entitled to recover actual and punitive damages and reasonable attorney's fees. 440 N.J. Super. at 33-34.

Proving that the violation of Mr. Boehm's rights under the NHA caused Mr. Boehm's death is not necessary to prevail on the NHA cause of action. The violation is itself actionable pursuant to the plain language of the statute. To hold otherwise would negate the public policy and purpose of the remedial statute – and the availability of remedies of punitive damages and attorney's fees and costs – to deter violations that do not have a clearly defined mental, emotional or monetary value. The NHA is a remedial statute and provides for fee-shifting as a way to promote protection of beneficial purposes even in those cases where the monetary value of the claim may not be large.

In fact, the pertinent Model Jury Charge 5.77 has recently been revised to clarify that there is no proximate cause element to the cause of action under the NHA. The Jury Interrogatories under that charge provide as follows:

> JURY INTERROGATORIES
>
> Please answer the following questions in deliberations, noting the vote on the "Yes" or "No" line, as applicable. Please follow the instructions after answering the questions.
>
> 1) Did the Defendant Nursing Home violate Plaintiff's rights as a nursing home resident?
> VOTE: YES _____
> NO _____
>
> If you answer "Yes," proceed to answer question #2. If you answer "No" and Plaintiff is also alleging negligence, proceed to question #3. If Plaintiff is not alleging negligence, your deliberations are complete.
>
> 2) What amount of money would fairly compensate for Plaintiff's damages resulting from the violation(s) of Plaintiff's nursing home residents' rights? You are not to duplicate damages awarded under other theories of recovery.
>
> $ _____
>
> VOTE: YES _____
> NO _____
>
> If Plaintiff is also alleging negligence, proceed to question #3. If Plaintiff is not alleging negligence, your deliberations are complete.
>
> 3) Was the Defendant Nursing Home, or its staff, negligent?
>
> VOTE: YES _____
> NO _____

> If you answered "Yes," proceed to question #4. If you answered "No," your deliberations are complete.
>
> 4) Was the negligence of the above Defendant a proximate cause of Plaintiff's damages?
>
> VOTE: YES _____
> NO _____
>
> If you answered "Yes," proceed to question 5. If you answered "No," your deliberations are complete.
>
> 5) What amount of money would fairly compensate for Plaintiff's damages resulting from Defendant's negligence? You are not to duplicate damages awarded under other theories of recovery.
>
> $ _____
>
> VOTE: YES _____
> NO _____
>
> Please advise the jury attendant that you have reached a verdict.

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

The difference between the charge for negligence and the charge for an NHA violation is the elimination of the second question on proximate cause in the negligence charge from the NHA claim. Notably, the law has not changed; the new jury interrogatory simply clarifies what has always been the case. A plaintiff is entitled to damages flowing from the violation itself without resort to proximate causation. The charge to the jury was error as a matter of law.

POINT VI

PLAINTIFF IS ENTITLED TO A NEW TRIAL BASED ON CUMULATIVE ERRORS THAT RENDERED THE TRIAL UNJUST. (PA1-2)

If the combined effect of multiple errors deprives a party of a fair trial, an appellate court should order a new trial. Pellicer v St. Barnabas Hosp., 200 N.J. 22, 55-57 (2009); see also State v. Jenewicz, 193 N.J. 440, 473 (2008) (noting cumulative effect of individual errors can cast sufficient doubt on a verdict to require reversal); Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52-53 (App. Div. 2009) ("When legal errors are manifest that might individually not be of such magnitude to require reversal but which, considered in their aggregate, have caused [a party] to receive less than a fair trial, a new trial is warranted." (alteration in original)), certif. denied, 200 N.J. 210 (2009); Eden v. Conrail, 175 N.J. Super. 263, 267 (App. Div. 1980) (quoted in Barber), modified and affirmed, 87 N.J. 467 (1981).

This is a case where the cumulative errors are such to require a new trial. In Pellicer, our Supreme Court acknowledged that cumulative error can lead to an unfair trial. The Court held as follows:

> Our conclusion that there was cumulative error in this record is based on several factors. First, our review of the matters as to which the trial court erred demonstrates that they pervaded the trial. Second, many of the troubling discretionary decisions permitted plaintiffs to shift the jury's focus from a fair evaluation of the evidence to pursue instead a course designed to inflame the jury, appealing repeatedly to

> inappropriate and irrelevant considerations that had no place in the courtroom. Third, the treatment of the parties was not even-handed, with defendants, but not plaintiffs, being limited in their proofs or criticized for their words. Finally, a review of the complete record, including the jury selection method and the quantum of the verdict, engenders the distinct impression that defendants were not accorded justice.

200 N.J. at 56.

Some of the same factors that led to the finding of cumulative error in Pellicer also exist here. First, the trial court's errors here pervaded the trial. Second, the trial court's discretionary decisions and the overall conduct of the trial prevented plaintiff from making his case. Third, the treatment of the parties was not even-handed, with plaintiff's counsel being relentlessly interrogated and corrected by the judge. Finally, a review of the complete record engenders the distinct impression that plaintiff was not accorded justice. Taken alone, the admission of the contents of the DOH investigation and its conclusions by improper cross examination is sufficient to warrant a new trial. Taken in toto, defense counsel's repeated speaking objections, the over-long pervasive sidebars on every objection, the attempted relitigation of every issue defendant lost pretrial, the limiting of plaintiff's experts including what words they could or could not use deprived plaintiff of a fair trial.

"As our Appellate Division has aptly observed, 'a trial is a dynamic organism which can be desensitized by too much error or too much curative

instruction.' Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 37 (App. Div. 1998). In the appropriate circumstances, therefore, a new trial may be warranted when 'there were too many errors [and] the errors relate to relevant matters and in the aggregate rendered the trial unfair.'" Pellicer, supra, 200 N.J. at 55. Plaintiff is entitled to a fair trial, which she did not get here.

CONCLUSION

For the foregoing reasons, plaintiff is entitled to a new trial.

Respectfully submitted,
STARK & STARK
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By: */s Denise Mariani*
Denise Mariani, Esq.

DATED: December 20, 2023

ESTATE OF EUGENE BOEHM, THROUGH, GENEVIEVE CLIFTON, EXECUTOR, Plaintiff, v. CARE ONE AT WALL, LLC D/B/A CARE ONE AT WALL; CARE ONE, LLC; DES HOLDING CO. INC.; DES 2009 GST TRUST; DES-C 2009 GRAT; ABC COMPANIES (1-10); DEF PARTNERSHIPS (1-10); JOHN DOE PHYSICIANS (1-10); JOHN DOE NURSES (1-10); JOHN DOE TECHNICIANS, CERTIFIED NURSING AIDES, AND PARAMEDICAL EMPLOYEES (1-10); Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3901-22T4 On Appeal from an Order of Judgment Filed April 10, 2023, and an Order Denying Plaintiff's Motion for a New Trial, Filed July 21, 2023 from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO.: MON-L-2248-17 Sat Below: Hon. Linda Grasso Jones, J.S.C. Civil Action

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

Plaintiff in this action asserted nursing malpractice and violations of New Jersey's Nursing Home Responsibilities and Rights of Residents Act ("NHA"), N.J.S.A. 30:13-1 to -17, arising from allegations that due to inadequate tracheostomy care, decedent Eugene Boehm developed a mucus plug causing his death during his January 13 to 15, 2016 admission to Care One at Wall.

At the conclusion of a three week trial, the jury found first, that defendant Care One deviated from the accepted standard of care applicable to a long term care facility, but that that deviation did ***not*** proximately cause any injury or damages to Mr. Boehm. Second, Care One's nursing staff did ***not*** deviate from the standard of care applicable to nurses. Third, Care One did ***not*** violate Mr. Boehm's rights under the NHA, specifically his right to a safe and decent living environment and considerate and respectful care that recognized his dignity and individuality. The jury thus did not answer the remaining questions on the verdict sheet, relating to proximate cause and damages, and returned a verdict in favor of the defendant. Thereafter, plaintiff's motion for a new trial was denied.

Plaintiff appeals, asserting that cumulative errors relating to the admission of evidence resulted in an inconsistent verdict holding that although

the defendant violated the standard of care, there was no proximate cause and no violation of the decedent's rights under the NHA. Plaintiff emphasizes that the defendant was allowed to introduce the results of a complaint survey investigation conducted by the New Jersey Department of Health ("NJDOH"), without presenting the testimony of the surveyor, Kimberly Strong, RN, thus allowing defendant to rely upon documentation "finding defendant committed no violations of federal and state law with regard to Mr. Boehm's death." (Pb1; see Pb1-2; Pb10-24.) Plaintiff further contends that her experts Jacob Dimant M.D. and Barbara Darlington, R.N. were prohibited from giving testimony regarding respiratory therapy.

Plaintiff's arguments are incorrect. The trial court, by way of its rulings on the parties' motions in limine and over the course of the trial, allowed plaintiff's experts to assert that the defendant violated various federal and New Jersey statutes and regulations. Also at plaintiff's request, the Court instructed and charged the jury that it could find "the facility" or the "nursing home", as well as its nursing staff, deviated from the standard of care applicable to a long term care facility. Defendants thus appropriately inquired as to plaintiff's experts' awareness of the results of the complaint survey conducted by the NJDOH in order to rebut and impeach plaintiff's expert's claims that defendant was noncompliant.

Defendant did not introduce the NJDOH survey's finding that there were no regulatory violations in connection with Mr. Boehm's care in order to establish the truth of that conclusion or into evidence. The jury nonetheless responded "yes" to the first question on the jury verdict sheet which addressed the standard of care for the facility, but further found proximate cause to be lacking, thus rejecting plaintiff's theory of the case, that the decedent died of a mucus plug, a theory that has nothing to do with the regulations or standard of care relating to staffing and the allocation of resources listed in the jury charge.

Significantly, the court allowed plaintiff's experts to present respiratory therapy opinions critical of the respiratory therapy care despite the fact that neither Dr. Dimant nor Nurse Darlington was qualified as a respiratory therapy expert. Plaintiff also was permitted to question defendant's fact witnesses in detail regarding respiratory therapy and medication issues. Plaintiff, having been afforded every opportunity to present her causes of action and theory of the case to the jury as she wished, cannot now complain that she has been a victim of prejudice constituting reversible error. The trial court's orders of judgment on the jury verdict and denying plaintiff's motion for a new trial must be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Plaintiff in this action alleged nursing negligence, violations of the NHA, wrongful death and punitive damages claims arising from allegations that due to inadequate tracheostomy care, decedent Eugene Boehm developed a mucus plug causing his death during his January 13 to 15, 2016 admission to Care One at Wall. (See Pa11-21; Pa44-61; see also Pb4 (citing Pa11-21).)

By way of background, the NJDOH, in response to plaintiff Genevieve Clifton's correspondence dated February 12, 2016, expressing concerns regarding her father Mr. Boehm's Care One admission, conducted an investigation including "a tour to assess resident care, discussions with residents and staff, a review of medical records and other pertinent facility documents including staffing reports." (Pa70; see Pa66-80.) By letter dated August 18, 2016, the NJDOH advised that "After evaluating this information and conducting interviews, the surveyor is unable to identify a citable deficient practice related to your concerns based on the State and federal regulations." (Pa70.) The NJDOH surveyor, Kimberly Strong, concluded that "The facility is in compliance with the requirements of 42 CFR Part 483, Subpart B, for

[1] The procedural history and statement of facts are combined for purposes of concision and clarity.

long term care facilities, based on this complaint visit." (Pa79.)[2] (See Pb10-11.)

By way of orders on the parties' in limine motions, the Honorable Kathleen A. Sheedy, J.S.C. ***denied*** plaintiff's motion in limine to prohibit defendants from eliciting testimony regarding the conclusions reached by the NJDOH and Ms. Strong, and directed

> that Defendant's experts are limited to exclude any testimony regarding the conclusions reached by Department of Health and Kimberly Strong in their July 7, 2016 Survey and the August 18, 2016 Letter to Genevieve Clifton.

(Pa42.) Judge Sheedy also ***denied*** defendant's motion in limine to bar reference to and use of alleged violations of federal and New Jersey statutory and regulatory standards at trial but directed "Experts could cite standards if they relied on those standards as evidence of negligence but not negligence per se." (Pa81.) The trial court explained its rulings as follows:

> With regard to the plaintiff's motion in limine to bar testimony regarding conclusions reached by the Department of Health, I'm going to deny that, but a proper foundation for admission must be provided.
>
> Defense counsel—strike that.

---

[2] The documents relating to Ms. Clifton's complaint were marked as defendant's trial exhibits D-4 (Ms. Clifton's February 12, 2016 complaint), D-5 (August 18, 2016 correspondence from NJDOH to Ms. Clifton) and D-6 (July 6, 2016 unannounced visit/revisit report and associated documents), and were used in questioning several witnesses for impeachment purposes, but were not admitted into evidence. (See Pa66-80; Pb10-11.)

Plaintiff's counsel has every right to cross examine in order to attack the opinion; however, it is part of this case and there was an investigation, and while it may have been done six months after the decedent died, it was still an investigation.

I agree with Ms. Cutinello. Just like experts will look at the case and look at records and make determinations, so can the Department of Health.

So that will be in, so long as a proper foundation is laid. I am not making a determination right now that, in fact, it goes in. The proper foundation actually has to be laid.

With regard to the defendant's motion to bar reference to and use of statutory and regulatory standards and facility policies and procedures that do not establish the standard of care, I agree that those regulations do not establish the standard of care.

Expert testimony is needed, in fact, for that standard of care, but the expert can, in fact, rely on them, so I am going to deny that portion that prevents the experts from relying on those standards and those standards can, in fact come in if an expert relied on them.

With regard to the barring reference to and use of alleged violations of Federal and New Jersey statutory and regulatory standards at trial, again this overlaps with the other motion. I'm to deny that as well.

Ptaszynski[3] said experts can cite specific federal and state statutes as support for opinions on applicable standard of care.

[3] Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016).

> That was reaffirmed in Moody, which is, in fact, an unreported decision, but the standards can, in fact, be used as evidence of neglect. Again, the experts have to establish the standard of care.

(12T55:14-57:4.)[4]

Judge Sheedy also ***denied*** defendant's motion in limine to bar plaintiff's experts from presenting opinions to the jury that were beyond the scope of their expertise, including, to prohibit Dr. Dimant from presenting opinions regarding the nursing standard of care, explaining that "While the Court agrees that experts cannot testify beyond the scope of their expertise, Dr. Dimant is permitted to testify about nursing home standards of care and about the care and treatment received by plaintiff while he was at the nursing home." (Pa84-85.)

[4] Trial and other transcripts are cited as follows:

1T Trial transcript, March 16, 2023
2T Trial transcript, March 20, 2023
3T Trial transcript, March 21, 2023
4T Trial transcript, March 22, 2023 (morning)
5T Trial transcript, March 22, 2023 (afternoon)
6T Trial transcript, March 23, 2023
7T Trial transcript, March 27, 2023
8T Trial transcript, March 28, 2023
9T Trial transcript, March 29, 2023
10T Trial transcript, March 30, 2023
11T Trial transcript, April 3, 2023
12T Transcript of motion, July 12, 2022

In an accompanying opinion, the court explained:

> With regard to barring plaintiff's experts from presenting opinions to the jury that are beyond the scope of their expertise, I'm going to deny that as well.
>
> I agree that Dr. Dimant can't testify about the nursing standard of care, but he is qualified to testify to nursing home standards of care, and he can testify about the treatment of plaintiff as to the nursing home care.
>
> And just like you said, [defense counsel], he can testify that Nurse Darlington said that the nursing home standard of care was, in fact, violated and therefore led to poor care of Mr. Boehm.

(12T98:2-14.)

A thirteen-day jury trial was conducted before the Honorable Linda Grasso Jones, J.S.C. from March 15 to April 4, 2023. As described in plaintiff's appellant's brief, Mr. Boehm, age sixty-nine, suffered a stroke on November 15, 2015. (See Pb5 (citing Pa3).) After a hospitalization, he was admitted to Care One for rehabilitation on January 13, 2016. (See Pb5-6 (citing Pa3).)[5] Plaintiff's theory of the case was that "defendant and its nursing staff deviated from the standard of care owed to Mr. Boehm and violated his rights under the NHA," (Pb6 (citing 7T110:2-14), that Mr.

[5] Although plaintiff indicates that Care One is a "long-term care facility" (see Pb5), it is uncontroverted that Mr. Boehm was admitted to Care One for short-term "rehabilitation and respiratory services." (Pb5-6). It thus remains the defendant's position that he was ***not*** admitted to a "nursing home" for "for ***extended*** medical and nursing treatment or care" "on a ***continuing basis***" in the meaning of the NHA. N.J.S.A. 30:13-2(c) (emphasis added).

Boehm's care was improperly managed by licensed practical nurses or "LPNs" rather than registered nurses or "RNs", (see Pb6 (citing 5T66:16-67:10; 5T74:2-22)), and that he did not receive adequate respiratory care in connection with his tracheostomy in order to prevent mucus buildup in his lungs, resulting in his death from respiratory failure due to a mucus plug on the morning of January 15, 2016 (see Pb5-8).

As noted in plaintiff's brief, plaintiff's complaint and the NJDOH's survey were first mentioned during the testimony of plaintiff Ms. Clifton on March 20, 2023. Defense counsel and Ms. Clifton reviewed her complaint to the state in detail. Ms. Clifton confirmed that she received a response and indicated that she was unhappy with the response. The Court sustained plaintiff's objection and directed the jury to disregard Ms. Clifton's testimony regarding the response to her complaint. (See Pa66-71; 2T86:24-98:24; 2T136:9-160:9; Pb11.)

In considering plaintiff's objections to defense counsel's questioning of Ms. Clifton, Judge Jones noted that the rulings on the motions in limine related to expert testimony, specifically the testimony of plaintiff's experts regarding alleged violations of statutes and regulations, as opposed to plaintiff's own testimony. (See 2T142:4-145:19; 2T148:1-4.) Additionally, the surveyor, Ms.

Strong, was now unavailable as a witness, and defendant did ***not*** intend to introduce the documents themselves as evidence. (See 2T145:20-147:8.)

Jill Monahan, LNHA testified, on questioning by defense counsel, that she received a complaint from the state regarding Mr. Boehm, and that it was part of her job to field such complaints. She was not further questioned regarding the NJDOH investigation. (See Pb6; 3T40:23-41:13.)

Plaintiff questioned all of the defense fact witnesses, including respiratory therapist Alyssa Mauro; director of nursing Dinah Libang, RN; nurses Asisat Aro, LPN and Audrey Lanier, LPN; and even administrator Jill Monahan, LNHA at length regarding respiratory care and medications, often over the defense's objections. (See 2T100:20-103:3; 2T103:19-106:18; 2T112:11-119:2; 2T124:23-128:9; 2T128:12-132:5, 2T197:10-203:15 (Nurse Aro); 2T219:14-222:5; 2T229:18-256:7 (Nurse Lanier); 2T39:5-43:15; 2T75:3-92:8 (Nurse Lanier); 2T111:7-115:10, 2T137:3-142:6 (Jill Monahan, LNHA); 2T145:1-148:2; 2T152:10-161:10; 2T164:22-177:14; 2T177:15-197:17; 2T252:2-254:11 (respiratory therapist Alyssa Maura); 2T21:19-39:19, 2T108:11-110:12 (Nurse Libang).

Plaintiff's expert Nurse Darlington was on the stand for nearly two days of trial, March 22 and 28, 2023. (See 5T; 8T.) Plaintiff's physician expert, Dr. Dimant, testified for roughly a day and a half—the first day live and the

second by video teleconference. (See 6T; 8T.) Both Nurse Darlington and Dr. Dimant were permitted to give extensive respiratory care opinions. (See, e.g., 5T19:6-22:11; 5T63:13-64:22-64:22; 5T143:13-145:19; 6T143:8-151:6; 6T184:25-186:15; 6T196:9-199:15; 6T205:13-214:14; 6T221:6-223:24; 8T6:6-27:20.) Among other things, Nurse Darlington and Dr. Dimant gave the opinion that the standard of care required a respiratory therapist to see Mr. Boehm every two to three hours. (See 6T222:9-223:24; 8T6:6-15:8.) The Court allowed the respiratory therapy testimony from Nurse Darlington and Dr. Dimant, over defendant's objections, although neither witness was qualified as a respiratory therapist or respiratory care expert, or in Dr. Dimant's case, a nurse or nursing expert. (See, e.g., 5T51:10-60:25, 5T143:13-145:19, 5T151:4-208:7 6T102:10-141:13; 6T178:1-184:22, 6T188:6-192:3, 6T199:16-205:10, 6T214:15-221:5, 6T254:23-270:21.)

Plaintiffs' experts, nursing home administrator Lance R. Youles and Nurse Darlington relied upon various federal and New Jersey regulations in their reports and again in giving their opinions at trial. (See, e.g., Pa44-52; 7T84:10-123:17, 7T132:24-134:21; 8T35:3-37:9, 8T83:22-84:4, 8T109:24-115:21.) A proper foundation for the admission of the documents in question was, indeed, laid.

Mr. Youles testified that he was familiar with the Medicare and Medicaid compliance annual survey process in giving his negligence—not proximate cause—opinions. (See 7T123:24-125:18.) Mr. Youles testified that the regulations, which in his opinion were violated, "serve as the basis for survey activities for purposes of determining whether the facility meets the requirements for participation in Medicare and Medicaid". (7T134:4-7; see 7T86:15-88:21; 7T123:18 to 125:18.) Mr. Youles also was aware that Ms. Clifton submitted a complaint to the NJDOH regarding her father's care, and that in response, a survey was conducted, including a tour to assess resident care, discussions with residents and staff, a review of medical records and other pertinent facility documents, including staffing reports. (See 7T125:9-130:3, 7T190:7-198:24; Pa66-80.) The surveyor concluded that the facility was in compliance with the requirements of 42 C.F.R. Part 483, Subpart B, for long term care facilities, and Ms. Clifton was advised that the surveyor was unable to identify a citable deficient practice related to her concerns, based upon the evidence reviewed. (See 7T130:4-132:23; 7T136:3-145:22; 7T197:25-198:24; Pa70; Pa79.)

Plaintiff's other deviation expert, Barbara Darlington, R.N., also relied on the NHA and the related regulatory framework in arriving at her deviation opinions. Like Mr. Youles, Nurse Darlington was an LNHA and confirmed

that she was familiar with annual and complaint surveys. (See 8T70:21-76:12.) A complaint survey was performed in this case, including a tour and a review of medical and staffing records. (See 8T76:13-78:5; 8T118:1-129:16; Pa72-79.) Nurse Darlington initially agreed that she knew the surveyor, Ms. Strong, and that she "does a good job", but later, after an objection, Nurse Darlington modified her response to state that Ms. Strong "does her job" "the same job that every other surveyor does". (8T78:11; 8T79:16-18; see 8T76:13-81:6.) The surveyor found no federal deficiencies, and specifically, that the facility was in compliance with the requirements of 42 C.F.R. 483 Subpart B for long term care facilities, the same regulation upon which Nurse Darlington relied in her report. (See 8T81:7-84:4; Pa72-79.) Additionally, a letter to Ms. Clifton, dated August 18, 2016, advises that no citable deficient practices related to her concerns were found based upon the state and federal regulations, including requirements with respect to licensed practical nurses providing certain care and documentation, contrary to Nurse Darlington's opinions. (See 8T 84:5-85:21; 8T128:25-129:5.) (See generally Pb4; Pb10.)

The trial court, in its rulings associated with the testimony of plaintiff's experts, confirmed the rulings on the motions in limine in the context of the testimony presented at trial. For example, Mr. Youles, as a nursing home administration expert, was permitted to give opinions regarding compliance

with applicable statutes and regulations, but could not give opinions about the nursing standard of care, because he was not a nurse. (See 7T145:23-177:8.)

The jury charge directed that plaintiff, in support of the claims of negligence, asserted that Care One violated applicable federal regulations. If the jury found that Care One violated any such standards of conduct, such violations could be considered as evidence as to whether negligence had been established. (See Pa107.) Specifically, plaintiff alleged that Care One violated the following federal regulations:

> 1. 42 C.F.R. 483.30 Quality of Life. This regulation states, in part:
>
> The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans: licensed nurses and other nursing personnel.
>
> 2. 42 C.F.R. 488.301 Resident Neglect. This regulation states, in part:
>
> If you find that Care One has violated either of these regulations, you may consider such conduct as evidence of negligence on the part of Care One.

(Pa108.)[6]

[6] One or more of plaintiff's experts—specifically Mr. Youles—also relied upon a regulation, N.J.A.C. 13:37-6.5, titled "non-delegable nursing tasks," as prohibiting a registered professional nurse or RN from delegating the assessment or care plan for the patient. This regulation had an effective date after Mr. Boehm's admission to Care One and his death and thus had no application to this litigation as a matter of law and was not to be considered by the jury in its deliberations. (See Pa102.)

The jury answered the following interrogatories.

A. Negligence Claims:

> 1) Has the Plaintiff proven by a preponderance of the evidence that Care One at Wall deviated from the accepted standard of care applicable to a long term care Facility?

(Pa87.) The jury responded "Yes" to this question, with one of the eight jurors voting "No". (See ibid.)

> 2) Has the plaintiff proven by a preponderance of the evidence that Care One at Wall's deviation from the accepted standard of care applicable to a long term care facility was a proximate cause of Eugene Boehm's damages and death?

(Ibid.) The jury unanimously responded "No" to this question. (See ibid.)

> 3) Has the Plaintiff proven by a preponderance of the evidence that Care One at Wall's nursing staff deviated from the accepted standard of care applicable to nurses?

(Pa88.) The jury answered this question "No", with one juror answering "Yes". (See ibid.) Based on the "No" responses to questions 2 and 3, the jury did not answer questions 4 and 5, relating to proximate cause and damages. (See ibid.)

The jury responded as follows to the NHA interrogatories:

B. Nursing Home Act rights claim:

> 6) Has the Plaintiff proven by a preponderance of the evidence that Care One at Wall violated Eugene Boehm's rights under the Nursing Home Act,

> specifically Eugene Boehm's right to a safe and decent living environment and considerate and respectful care that recognizes his dignity and individuality?

(Pa89.) The jury responded "No", with one juror responding "Yes". (See ibid.) Based upon the "No" response, the jury did not answer the remaining questions, regarding proximate cause and damages. (See Pa89-90.)

By order and rider filed July 21, 2023, Judge Jones denied plaintiff's motion for a new trial. (See Pa2-10.)

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW.

"The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011); see R. 2:10-1 ("The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.") "This standard applies whether the motion is based upon a contention that the verdict was against the weight of the evidence, or is based upon a contention that the judge's initial trial rulings resulted in prejudice to a party." hr v. N.J. Dep't of Corrections, 342 N.J. Super. 273, 302 (App. Div. 2001) (citing Crawn v. Campo, 136 N.J. 494, 510-12 (1994)), certif. denied, 171 N.J. 338 (2002). If there was a legal error

during the trial, deference is accorded to the trial judge's evaluation of the prejudice, and whether it contributed to an unjust result. Ibid. (citing Crawn, 136 N.J. at 512).

A trial court must order a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a); see Caldwell v. Haynes, 136 N.J. 422, 432 (1994). The standard to be applied on a motion for a new trial under R. 4:49-1 is whether the jury verdict was against the weight of the evidence. See Dolson v. Anastasia, 55 N.J. 2, 5 (1969).

> [I]n ruling on a motion for a new trial, the trial judge takes into account, not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain, so-called "demeanor evidence," and the intangible "feel of the case" which he has gained by presiding over the trial.

Id. at 6. The object of a motion for a new trial is to correct clear error or mistake by the jury. See ibid. "[T]he judge may not," however, "substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror." Ibid. The judge's function on a new trial motion is not mechanical. The court must consider both tangible and credibility factors and the feel of the case to determine whether the jury's verdict was the product of a clear error or

mistake. See Kita v. Borough of Lindenwold, 305 N.J. Super. 43, 49 (App. Div. 1997).

The standard for granting a new trial has been articulated as requiring a determination that the jury's verdict was "contrary to the weight of the evidence or clearly the product of mistake, passion, prejudice or partiality." Lanzet v. Greenberg, 126 N.J. 168, 175 (1991). Cumulative errors, including as to the admission of evidence, considered in the aggregate may render the proceedings unfairly prejudicial so as to require a new trial. See Crawn, 136 N.J. at 511-12 (1994); see discussion in Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 51-57 (2009). Counsel's merely enumerating a large number of inconsequential mistakes or repeating the same objection is not, however, equivalent to cumulative and prejudicial error. See Pellicer, 200 N.J at 55.

A trial court's exercise of its broad discretion in making evidentiary determinations as to relevance and admissibility will not be disturbed absent a manifest denial of justice. See Lancos v. Silverman, 400 N.J. Super. 258, 275 (App. Div.), certif. denied, Lydon v. Silverman, 196 N.J. 466 (2008). No such discretion, however, is accorded to a ruling that is incompatible with the applicable law. Pressler & Verniero, Current N.J. Court Rules, comment 4.7 on R. 2:10-2 (2024).

Plaintiff in this case asserts that cumulative errors relating to the admission of evidence resulted in an inconsistent verdict holding that although the defendant violated the standard of care, there was no proximate cause and no violation of the decedent's rights under the NHA. Plaintiff emphasizes that the defendant was allowed to introduce the results of a complaint survey investigation conducted by the NJDOH, without presenting the testimony of the surveyor, Kimberly Strong, RN, thus allowing defendant to rely upon documentation "finding defendant committed no violations of federal and state law with regard to Mr. Boehm's death" (Pb1.) Plaintiff further contends that her experts Dr. Dimant and Nurse Darlington were prohibited from giving testimony regarding the conduct of individual members of defendant's nursing staff, particularly the respiratory therapist.

In fact, the trial court, by way of its rulings on the parties' motions in limine and over the course of the trial, allowed plaintiff's experts to assert that the defendant violated various federal and New Jersey statutes and regulations. Also at plaintiff's request, the Court instructed and charged the jury that it could find "the facility" or the "nursing home", as well as its nursing staff, deviated from the standard of care applicable to a long term care facility. Defendants thus appropriately inquired as to plaintiff's experts' awareness of

the results of the complaint survey conducted by the NJDOH in order to rebut and impeach plaintiff's expert's claims that defendant was noncompliant.

Defendant did not introduce the NJDOH survey's finding that there were no regulatory violations in connection with Mr. Boehm's care in order to establish the truth of that conclusion or into evidence. The jury nonetheless responded "yes" to the first question on the jury verdict sheet, but further found proximate cause to be lacking, thus rejecting plaintiff's theory of the case, that the decedent died of a mucus plug, a theory that has nothing to do with the regulations relating to staffing and the allocation of resources listed in the jury charge.

Similarly, the trial court allowed plaintiff's experts to present their respiratory therapy opinions against "the facility" or "the nursing home" although neither Dr. Dimant nor Nurse Darlington was qualified as a respiratory therapy expert. Plaintiff also was permitted to question defendant's fact witnesses in detail regarding respiratory therapy and medication issues. Plaintiff, having been afforded every opportunity to present her causes of action and theory of the case to the jury as she wished, cannot now complain that she has been a victim of prejudice constituting reversible error. The trial court's orders of judgment on the jury verdict and denying plaintiff's motion for a new trial must be affirmed.

II. THE TRIAL COURT CORRECTLY ALLOWED DEFENDANT TO INTRODUCE PLAINTIFF'S EXPERTS' OWN TESTIMONY THAT THE NEW JERSEY DEPARTMENT OF HEALTH, IN RESPONSE TO PLAINTIFF'S COMPLAINT REGARDING HER FATHER'S CARE, FOUND NO VIOLATION OF APPLICABLE REGULATIONS.

Plaintiff in moving for a new trial asserts that the trial court erred in allowing defendant to use, in cross examining plaintiff's experts and in summation, the results of a NJDOH complaint investigation, with no foundation and without presenting the testimony of surveyor Ms. Strong, thus allowing defendant to introduce the surveyor's "hearsay" conclusion that the NJDOH found no regulatory deficiencies in connection with Mr. Boehm's care in connection with its investigation of Ms. Clifton's complaint. (See Pb1-2; Pb10-24.) According to plaintiff, the defense, in connection with the parties' motions in limine, misled the motion judge by representing that Ms. Strong would be called as a witness a trial to lay the foundation for the admission of the evidence. (See Pb11.) The defendant then relied heavily upon the NJDOH's conclusion in cross examining plaintiffs' experts, and again closing argument, leading the jury to incorrectly determine that Care One's deviations from the standard of care did not proximately cause Mr. Boehm's death. (See Pb11-20.)

Plaintiff's position conflates deviation with causation. Judge Sheedy, in rulings on the parties' in limine motions, first, ***denied*** plaintiff's motion in

limine to prohibit defendants from eliciting testimony regarding the conclusions of the NJDOH and Ms. Strong. (See Pa41-43.) Judge Sheedy also ***denied*** defendant's motion in limine to bar reference to and use of alleged violations of federal and New Jersey statutory and regulatory standards at trial but directed "Experts could cite standards if they relied on those standards as evidence of negligence but not negligence per se." (Pa81.) In an accompanying oral opinion, Judge Sheedy confirmed that the NJDOH's conclusions could be admitted provided that a proper foundation was laid. Moreover, while statutory and regulatory standards do not establish the standard of care, the parties' experts were permitted to rely upon such standards to support their opinions regarding the standard of care, consistent with the Appellate Division's decision in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24, 36-38 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016). (See 12T55:14-57:4.)

The trial court thus held that there was no substantive cause of action to be made based upon the various statutes and regulations upon which plaintiff intended to rely. The court nonetheless also, and at plaintiff's insistence, allowed plaintiff to use the statutes and regulations as evidence of the standard of care. If the statues and regulations were an element of the standard of care, but plaintiff did not have a cause of action to enforce those standards,

defendants had to be permitted to rebut the implication that defendant violated the statutes and regulations, which plaintiff in turn represented established the standard of care. As a matter of ***fact***—not expert opinion—Ms. Strong, on behalf of the NJDOH—an agency authorized to enforce the applicable statues and regulations—found there was ***no*** violation. (See Pa66-80.)

As a matter of fairness, defendant had to be allowed, upon laying the necessary foundation, to present the ***fact*** that NJDOH found no relevant violation in order to rebut the implication that there were violations. A trial is a search for the truth and the facts. The orders on the motions in limine as applied at trial, properly allowed that process to occur. To be sure, it was defendant's position that the statutes and regulations should not be introduced to the jury at all, but once plaintiff introduced those statutes and regulations to the jury they opened the door to impeachment of their experts' opinions on purported violations of those statutes and regulations. Defendant thus properly was allowed to rebut plaintiff's implication that the statutes and regulations establish the standard of care by introducing evidence, by way of plaintiff's experts own testimony, that the regulations relied upon by plaintiff's experts were not violated in the first instance. (See 7T123:24-132:23; 7T136:3-145:22; 7T190:7-198:24; 8T70:21-85:21; 8T118:1-129:16.)

The trial court then proceeded, at plaintiff's request, to charge the jury that it could find "the facility" or the "nursing home", Care One at Wall, as well as its nursing staff, deviated from the standard of care applicable to a long term care facility. (See generally Pa87-129.) Additionally, the jury was specifically instructed that it could consider, as evidence of negligence, defendant's violation, if any, of federal regulations relating to staffing and the allocation of resources. (See Pa107-108.) Defendant thus, once again appropriately and consistent with the rulings on the in limine motions and at trial, inquired as to plaintiff's experts awareness of the results of complaint survey conducted by NJDOH—the agency authorized to enforce and apply the regulations—as extrinsic evidence relevant to the issue of credibility pursuant to N.J.R.E. 607, in order to rebut and impeach plaintiff's expert's claims that defendant failed to comply with the regulations. (See 7T123:24-132:23; 7T136:3-145:22; 7T190:7-198:24; 8T70:21-85:21; 8T118:1-129:16.)

Hearsay "is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). All hearsay is inadmissible unless it falls within an exception recognized in the New Jersey Rules of Evidence or other law. N.J.R.E. 802. A statement or writing is not, however, hearsay when it is offered as evidence for reasons other than the truth of its content. See, e.g.,

Sanzari v. Rosenfeld, 34 N.J. 128 (1961); Bonitsis v. New Jersey Institute of Technology, 363 N.J. Super. 505, 524-25 (App. Div. 2003), rev'd on other grounds, 180 N.J. 450 (2004); Millison v. E.I du Pont de Nemours & Co., 226 N.J. Super. 572, 591-98 (App. Div. 1988), aff'd, 115 N.J. 252 (1989); McQuaid v. Burlington County Memorial Hosp., 212 N.J. Super. 472, 475 (App. Div. 1986). In this case, the defendant did ***not*** introduce the NJDOH survey's finding that there were no regulatory violations in connection with Mr. Boehm's care in order to establish the truth of that conclusion. The documents were never entered into evidence or submitted to the jury. Rather, defendant introduced plaintiff's experts' own testimony regarding their awareness of the NJDOH's investigation and its conclusions in order to impeach, pursuant to N.J.R.E. 607, plaintiff's experts who opened the door by talking about purported regulatory violations that were solely within the province of the NJDOH, which found none. The jury had to consider that evidence when assessing credibility.

Additionally, several exceptions to the general rule that hearsay is inadmissible also vouch for the reliability of the documents. For example, N.J.R.E. 803(c)(8) provides a hearsay exception for public records, reports and findings, as follows:

> Subject to Rule 807 [prior notice of intention to introduce evidence], (A) a statement contained in a writing made by a public

> official of an act done by the official or an act, condition, or event observed by the official if it as within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

This exception to the prohibition on hearsay is based on the trustworthiness of official written statements prepared in the course of official duties, and seeks to avoid compelling officials to leave their daily functions to testify about events which they may not remember. New Jersey Dep't of Envtl. Prot. v. Duran, 251 N.J. Super. 55, 65 (App. Div. 1991).

Additionally, N.J.R.E. 803(c)(6) provides a hearsay exception for records of regularly conducted activity or business records. See, e.g., Konop v Rosen, 425 N.J. Super. 391, 403 (App. Div. 2012), certif. denied, 218 N.J. 530 (2014); DeBartolomeis v. Board of Review, 341 N.J. Super. 80, 86 (App. Div. 2001); Gunter v. Fischer Scientific American, 193 N.J. Super. 688 (App. Div. 1984). Such materials are admissible if (1) the writing was made in the regular course of business, (2) it was prepared within a short time of the act, condition or event described, and (3) the source of the information and the method and

circumstances of the preparation of the writing must justify allowing it into evidence. See, e.g., Konop, 425 N.J. Super. at 402.[7]

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[7] N.J.R.E. 803(c)(6) references N.J.R.E. 808, which in turn provides that

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

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

James, Nowacki and related cases prohibit the parties' experts from "bootstrapping" complex medical opinions and diagnoses contained in a non-testifying physician's report through the expert's own testimony. In contrast, however, the Appellate Division in Konop v. Rosen, 425 N.J. Super. 391 (App. Div. 2012), found that the specific notation in a consulting physician's report contained in the medical records that "Pt. has tics and was moving too much at time of procedure" was a ***factual statement***, ***not*** an ***opinion*** and thus could not properly be excluded under N.J.R.E.-808. See Konop, 425 N.J. Super. at 405. The statement nonetheless was excluded because the declarant was not present during the colonoscopy at issue, and therefore had no direct knowledge to support the notation. See Konop, 425 N.J. Super. at 406. In this case, like

It must be emphasized, however, that the NJDOH's investigation and conclusion was used for the purposes of impeachment only, ***after*** plaintiff opened the door. The NJDOH's conclusions were never admitted as substantive evidence to prove the truth of the matter asserted. The Supreme Court's recently applied this doctrine in the July 25, 2023 opinion in Hrymoc v. Ethicon, Inc., 254 N.J. 446 (2023). Hrymoc was a products liability matter involving "pelvic mesh" medical devices. See id. at 452. The trial court, ruling on the parties' motions in limine, barred all evidence of "Section 510(k) clearance" allowing the devices to be marketed without premarket clinical trials, because the 510(k) process determines substantial equivalency only, not safety and efficacy. See id. at 452-453. The Appellate Division reversed and remanded for a new trial, and the Supreme Court affirmed that ruling, holding that the exclusion of any 510(k) evidence deprived the defendant of a fair trial on the issue of negligence, particularly on the issue of the reasonableness of the manufacture's conduct in not performing clinical trials or studies. See id. at 453.

In reaching that conclusion, the Supreme Court confirmed that evidence relating to the 510(k) process normally is not admissible because that

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Konop, however, the NJDOH investigator's conclusion that no regulatory violations were found may be viewed as a statement of ***fact*** rather than a complex expert opinion.

procedure determines substantial equivalence, not the safety and efficacy of the product. See id. at 473-74. The 510(k) materials were, however, highly relevant to the issue of reasonableness of the manufacturer's conduct in not performing clinical theories or studies. See ibid. Plaintiffs had "opened the door" by making the defendant's failure to conduct clinical trials or studies a central theme of plaintiff's case, although studies are not required by the Food and Drug Administration in the 510(k) clearance process. See id. at 462, 473-74. The defendant therefore had to be allowed to use the 510(k) information to rebut the plaintiff's case.

In State v. James, 144 N.J. 538 (1996), cited in Hyrmoc, 254 N.J. at 473, the Supreme Court explained

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

James, 144 N.J. at 554. The doctrine of opening the door has been applied in conjunction with the doctrine of "completeness", which provides that when a witness testifies on cross-examination as to part of a conversation, statement, transaction or occurrence, the party calling the witness may elicit on redirect "the whole thereof, to the extent it relates to the same subject matter and concerns the specific matter opened up." Ibid. (quoting Virgin Islands v. Archibald, 987 F.2d 180 (3d Cir. 1993)). The also related "curative admissibility" doctrine "provides that when one party introduces ***inadmissible evidence***, thereafter the opposing party may introduce otherwise inadmissible evidence to rebut or explain the prior evidence." Id. at 556 (citing United States v. Nardi, 633 F.2d 972, 977 (1st Cir. 1980)).

In this case, plaintiff's expert Mr. Youles testified that he was familiar with the Medicare and Medicaid compliance annual survey process in giving his negligence—not proximate cause—opinions. (See 7T123:24-125:18.) Mr. Youles testified that the regulations, which in his opinion were violated, "serve as the basis for survey activities for purposes of determining whether the facility meets the requirements for participation in Medicare and Medicaid". (7T134:4-7; see 7T86:15-88:21; 7T123:18 to 125:18.)[8] Plaintiff thus "opened

[8] 42 C.F.R. § 483.1(b) provides:

the door" by using her experts' opinions that the regulations were violated in order to establish the defendant's negligence. Defendant thus properly introduced the conclusion of the NJDOH—an agency authorized to perform compliance survey functions—that no federal regulations were violated in connection with Mr. Boehm's care for purposes of impeachment and in order to rebut plaintiff's experts' position.

The evidence did not address the nursing standard of care or respiratory therapy standard of care or any other individual person's standard of care, and the jury found that Care One at Wall's nursing staff did ***not*** violate the standard of care. (See Pa88.) Plaintiff was permitted to, and did, present opinions that defendant failed to comply with various state and federal regulations as evidence of negligence, and was permitted to pursue a cause of action against "the facility" or "nursing home", Care One at Wall, in addition to a vicarious liability claim for the conduct of its nursing staff. The jury, having heard plaintiff's experts' opinions regarding the purported regulatory noncompliance, as well as the fact that the NJDOH found no such violation,

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> The provisions of this part contain the requirements that an institution must meet in order to qualify to participate as a [skilled nursing facility] in the Medicare program, and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid.

did in fact hold that Care One at Wall was negligent. Plaintiff, having allowed present her causes of action and theory of the case to the jury as she wished—thus inviting the errors now complained of—cannot, under these circumstances, establish that she has been prejudiced in a fashion that requires a new trial.

Plaintiff contends that the defense's reliance on the NJDOH's conclusions in closing arguments improperly influenced the jury's conclusion that, although Care One deviated from the standard of care, such a deviation did not proximately cause harm to Mr. Boehm. (See Pb17-20; Pb39-40.) Plaintiff thus appears to argue that the admission of the conclusion that there was no violation spoiled plaintiff's proximate cause argument. That makes no sense. Under the facts of this case, the alleged regulatory violations relate to the standard of care, not proximate cause. In spite of the introduction of the information that plaintiff now submits should have been excluded, the jury responded "yes" to the first question on the jury verdict sheet, thus finding that defendant Care One at Wall deviated from the standard of care applicable to a long term care facility. (See Pa87.) Clearly, plaintiff was not prejudiced by the impeachment of her experts with the NJDOH's surveys, because the jury disregarded the NJDOH's conclusions and found that the facility deviated from

the standard of care, including the statutes and regulations which plaintiff presented as evidence of the standard of care.

The jury did not, however, find proximate cause in favor of Mr. Boehm, a separate and distinct inquiry. (See ibid.) The jury thus rejected plaintiff's theory of the case, that the decedent died of a mucus plug, a theory that has nothing to do with the regulations listed in the jury charge as having potentially been violated, which relate to staffing and the allocation of resources. (See Pa102.) Proximate cause had nothing to do with the statutory and regulatory violations. The only relationship between standard of care and proximate cause is that if there is no deviation from the standard of care, there is no proximate cause question to be evaluated. In this case, however, the jury found that the facility deviated from the standard of care based, in part, on regulations cited by plaintiff's experts. Testimony concerning alleged regulatory violations was separate from the medical proximate causation testimony. The evidence plaintiff claims was improperly admitted was used against the facility, Care One at Wall, and the jury found that Care One at Wall deviated from the standard of care. (See Pa87.) Because the jurors found a deviation, they then considered whether that negligence, including deviations from the common law standard of care and any noncompliance with regulatory standards, was a proximate cause of harm. Plaintiff's theory of proximate

cause was that due to the deviations, plaintiff suffered a mucous plug and died. The jury rejected plaintiff's proximate cause theory of the case. Even if we were to assume there was error, which we do not, the fact that the jury ***agreed*** with plaintiff's deviation theory of the case proves that any error in the admission of evidence did ***not*** contribute to the jury's decision.

Plaintiff's reliance on Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014), is misplaced. (See Pb21-24.) Manata was a car accident case in which, as described by plaintiff in this case, "plaintiff's counsel engaged in improper cross-examination when he confronted defendant with a police report that counsel did not offer in evidence, but whose substance he communicated the jury." (Pb21 (citing Manata, 436 N.J. Super. at 330).) The police report "did not contain any statements from the defendant conveying his version of the accident," Manata, 436 N.J. Super. at 335, but instead "was based solely on plaintiff's version of events," (Pb21). Plaintiff's lawyer nonetheless was allowed to use the report to attempt "to demonstrate that defendant, in discussions with the police, omitted the version of the collision that he later asserted at trial." Manata, 436 N.J. Super. at 435. As a consequence, a new trial was "required because of evidentiary errors pertaining to the issue of ***liability***." Ibid. (emphasis added); see Pb21.)

Defendant in this case did ***not*** use the NJDOH investigation documents in order to inaccurately imply that plaintiff or her experts had previously taken an inconsistent position, as defense counsel in Manata did. Moreover, the error in allowing the police report to be used cross examination in Manata affected the jury's determination on the issue of ***liability***, whereas plaintiff in this case claims that despite the jury's determination that Care One at Wall deviated from the standard of care, the resolution of the ***proximate cause*** question was somehow adversely affected by the discussion of the NJDOH investigator's conclusions.

Notably, in McLean v. Liberty Health System, 430 N.J. Super. 156 (App. Div. 2013), the Appellate Division found that the trial court erred in limiting each of the parties to presenting the testimony of only one expert witness in each area of specialty, observing, among other things, that

> An attorney may not take advantage of a favorable evidentiary ruling and make statements that are "contrary to facts which [the other party] was precluded from adducing." State v. McGuire, 419 N.J. Super. 88, 144, 16 A.3d 411 (App. Div.) (quoting State v. Ross, 249 N.J. Super. 246, 250, 592 A.2d 291 (App. Div.), certif. denied, 126 N.J. 389, 599 A.2d 165 (1991)), certif. denied, 208 N.J. 335, 27 A.2d 948 (2011). Having successfully moved before trial to exclude one of plaintiff's two emergency department experts, defense counsel made an inaccurate statement to the jury that plaintiff was powerless to disprove because of the court's ruling.
>
> The trial court recognized the impropriety of the remark, but it concluded that it was "not critical" to the plaintiff's case.

> Plaintiff's case was that a doctor performing up to the accepted standard of care would have considered an infection as a potential cause of Kevin's otherwise undiagnosed back and leg pain, that the doctor would have ordered additional tests to confirm or exclude that potential cause. Defense counsel's false assertion succinctly summarized the defense position that such a diagnosis as not warranted. The remark struck at the core of the dispute. It required a response, which plaintiff was prepared to give before the trial began. The court should have reconsidered the limitation it placed on expert testimony and allowed plaintiff to present Dr. Schecter as an expert witness. His testimony would not have been a waste of time and would not have ***unduly*** delayed the trial.

168-69 (alteration in original). The admission of plaintiff's experts' and other testimony regarding the NJDOH's conclusions, in order to rebut and respond to plaintiff's assertions that "the facility" Care One at Wall failed to comply with applicable statutes and regulations thus does not and cannot mandate a reversal. The jury verdict and denial of plaintiff's motion for a new trial must be affirmed.

III. THE TRIAL JUDGE ALLOWED PLAINTIFF'S EXPERTS TO GIVE RESPIRATORY CARE OPINIONS AGAINST "THE FACILITY" OR "THE NURSING HOME" ALTHOUGH THEY WERE NOT QUALIFIED.

Plaintiff further contends that plaintiff's experts Dr. Dimant and Nurse Darlington were improperly prohibited from giving testimony regarding the conduct of individual members of defendant's nursing staff, particularly the respiratory therapist, and in linking that conduct to Mr. Boehm's death. Plaintiff contends that her experts were qualified to testify, based upon their

professional experience, about the respiratory care provided to Mr. Boehm although plaintiff's experts were not respiratory therapists. The limitations placed upon plaintiff's experts' trial testimony were inappropriate in plaintiff's view because, among other things, Judge Sheedy previously denied defendant's motion in limine to prohibit Dr. Dimant from giving nursing opinions. (See Pb3; Pb24-32.)

Plaintiff on appeal disregards, however, that plaintiff at trial was permitted to question the defense fact witnesses extensively regarding the respiratory care services provided. Furthermore, plaintiff's experts were permitted to discuss in detail the failures of "the facility", including purported failures to provide respiratory care, thus leading the jury to conclude that although "the facility" deviated from the standard of care, nothing "the facility" did caused the death and damages at issue.

There was only one defendant in this case, Care One at Wall, LLC d/b/a Care One at Wall. Plaintiff did not name respiratory therapist Alyssa Mauro as a defendant and did not obtain an affidavit of merit against the facility or a respiratory therapist, but instead provided only one from Nurse Darlington against the nursing staff. When the plaintiff's claim of vicarious liability hinges upon allegations of a deviation from professional standards of care by a licensed individual who was an employee of the named defendant, an affidavit

of merit and an expert opinion from a person qualified in the same profession as the ***employee*** must be provided. See, e.g., Haviland v. Lourdes Medical Center of Burlington County, 250 N.J. 368 (2022). The jury thus should not have been asked to assess Care One's own liability, and then again the liability of the defendant's employees. (See Pa87-90.)

Judge Sheedy, in ruling on the parties' motions in limine, ***denied*** defendant's motion to bar plaintiff's experts from presenting opinions to the jury that are beyond the scope of their expertise, specifically, to prohibit Dr. Dimant from presenting opinions regarding the nursing standard of care, explaining that ""While the Court agrees that experts cannot testify beyond the scope of their expertise, Dr. Dimant is permitted to testify about nursing home standards of care and about the care and treatment received by plaintiff while he was at the nursing home." (Pa84-85.) In an accompanying opinion, the Court explained:

> With regard to barring plaintiff's experts from presenting opinions to the jury that are beyond the scope of their expertise, I'm going to deny that as well.
>
> I agree that Dr. Dimant ***can't testify about the nursing standard of care***, ***but he is qualified to testify to nursing home standards of care***, and he can testify about the treatment of plaintiff as to the nursing home care.
>
> And just like you said, Ms. Cutinello, he can testify that Nurse Darlington said that the nursing home standard of care was, in fact, violated and therefore led to poor care of Mr. Boehm.

(12T 98:2-14 (emphasis added).)

At trial, plaintiff questioned all of the defense fact witnesses, including respiratory therapist Alyssa Mauro; director of nursing Dinah Libang, RN; nurses Asisat Aro, LPN and Audrey Lanier, LPN; and even administrator Jill Monahan, LNHA at length regarding respiratory care and medications, often over the defense's objections. (See 2T100:20-103:3; 2T103:19-106:18; 2T112:11-119:2; 2T124:23-128:9; 2T128:12-132:5, 2T197:10-203:15 (Nurse Aro); 2T219:14-222:5; 2T229:18-256:7 (Nurse Lanier); 2T39:5-43:15; 2T75:3-92:8 (Nurse Lanier); 2T111:7-115:10, 2T137:3-142:6 (Jill Monahan, LNHA); 2T145:1-148:2; 2T152:10-161:10; 2T164:22-177:14; 2T177:15-197:17; 2T252:2-254:11 (respiratory therapist Alyssa Maura); 2T21:19-39:19, 2T108:11-110:12 (Director of Nursing Dinah Libang, RN).

Plaintiff's expert Nurse Darlington was on the stand for nearly two days of trial, March 22 and 28, 2023. (See 5T; 8T.) Plaintiff's physician expert, Dr. Dimant, testified for roughly a day and a half—the first day live and the second by video teleconference. (See 6T; 8T.) Both Nurse Darlington and Dr. Dimant were permitted to give extensive respiratory care opinions. (See, e.g., 5T19:6-22:11; 5T63:13-64:22-64:22; 5T143:13-145:19; 6T143:8-151:6; 6T184:25-186:15; 6T196:9-199:15; 6T205:13-214:14; 6T221:6-223:24; 8T6:6-27:20.) Among other things, Nurse Darlington and Dr. Dimant gave the

opinion that the standard of care required a respiratory therapist to see Mr. Boehm every two to three hours. (See 6T222:9-223:24; 8T6:6-15:8.)

The court allowed the jury to hear expert respiratory therapy opinion testimony from both Nurse Darlington and Dr. Dimant, over defendant's objections, although the witnesses were ***not*** qualified as respiratory therapy or respiratory care experts. In addition, Dr. Dimant was ***not*** qualified as a nursing expert, in accordance with Judge Sheedy's ruling on the motions in limine. (See, e.g., 5T51:10-60:25, 5T143:13-145:19, 5T151:4-208:7 6T102:10-141:13; 6T178:1-184:22, 6T188:6-192:3, 6T199:16-205:10, 6T214:15-221:5, 6T254:23-270:21.) The jury, having heard this evidence, found that Care One at Wall was negligent in deviating from the standard of care applicable to a long term care facility. (See Pa87.)

Plaintiff never obtained a respiratory therapist's opinion against the respiratory therapist directly or vicariously against the facility. Neither Nurse Darlington and Dr. Dimant were qualified as respiratory therapy experts, because they did not have the appropriate training or experience. Despite the fact that plaintiff had no qualified respiratory therapy expert, plaintiff was still permitted to introduce criticisms of the respiratory therapist and the respiratory therapy care against the facility. Plaintiff yet again argues that it was error to prevent plaintiff's experts from criticizing the nursing and respiratory therapy

staff. Plaintiff was not, however, prevented from offering those same criticisms against "the facility", Care One at Wall, even though plaintiff had no suitably qualified expert to do so. Furthermore, the jury found that Care One at Wall deviated from the standard of care. (See Pa87.)

Plaintiff cannot now complain that the trial court, by allowing Nurse Darlington and Dr. Dimant's respiratory care opinions to be presented against "the facility" or the "nursing home" committed reversible error by declining to allow plaintiff to also present those same opinions against the nursing staff directly. Again, plaintiff—having been afforded every opportunity to present her causes of action and theory of the case to the jury as she wished, thus inviting the "errors" now complained of—cannot demonstrate that she has been prejudiced in a fashion that requires a new trial. Plaintiff's motion must be denied and the April 10, 2023 order of judgment on the jury verdict confirmed.

IV. DEFENDANT DID NOT WAIVE ITS OBJECTIONS TO PLAINTIFF'S EXPERTS' RESPIRATORY THERAPY OPINIONS BY FAILING TO RAISE THEM BY WAY OF A PRETRIAL MOTION IN LIMINE.

Plaintiff further asserts that defendant waived the ability to object to plaintiffs' experts' respiratory care opinions by failing to submit, prior to trial, a motion in limine to bar that testimony. (See Pb25-27.) Plaintiff submits that R. 4:25-8 provides that motion in limine is a motion, which "if granted would

not have a dispositive impact on a litigant's case," whereas "A dispositive motion falling outside the purview of this rule would include, but not be limited to, 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," (emphasis added), and that plaintiff thus was unfairly prohibited from presenting respiratory therapy opinions at trial due to defendant's tactical maneuvering. (See Pb25-26.)

Plaintiff's characterization is incorrect. The New Jersey Court Rules do in fact define a motion in limine "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." R. 4:25-8(a)(1) (emphasis added). A motion in limine "is not a summary judgment motion that happens to be filed on the eve of trial. When granting a motion will result in the dismissal of a plaintiff's case. . . . the motion is subject to Rule 4:46, the rule that governs summary judgment motions." Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461, 471 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016). Rule 4:46-1 in turn states that "All motions for summary judgment shall be returnable no later than 30 days before the scheduled trial date" and on an extended twenty-eight day briefing schedule.

The limitations on motions in limine expressed in R. 4:25-7 and R. 4:25-8, and caselaw such as the Cho opinion, are intended to prevent lawyers from making motions to dispose of an ***entire*** case on the eve of trial and without affording the adversary due process protection of the timing requirements of R. 4:46-1. Plaintiff confuses the application of the Court Rules governing motions in limine with the evidentiary rules regarding the admission of expert testimony, including N.J.R.E. 702 and N.J.R.E. 703, potentially in the context of an N.J.R.E. 104 hearing to assess the expert's qualifications ***at trial***. Oftentimes, the qualifications and scope of opinions of an expert and the admissibility of expert testimony are left to the discretion of the trial judge. See, e.g., State v. Torres, 183 N.J. 554, 572 (2005); State v. Summers, 176 N.J. 306, 312 (2003). A motion to confine an expert to his or her areas of expertise thus is expectant, to be made at any time, as the proponent of the expert seeks to qualify the witness and the issues present themselves at trial.

Mellwig v. Kebalo, 264 N.J. Super. 168 (App. Div.), certif. denied, 134 N.J. 478 (1993), upon which plaintiff relies (see Pb25-26), involves entirely different procedural circumstances. In Mellwig, an auto negligence action, the plaintiff's surgeon expert at his de bene esse deposition gave an opinion, not presented in his report, that the plaintiff would probably need additional

surgery. See Mellwig, 264 N.J. Super. at 171. Defense counsel objected to this testimony at the de bene esse deposition and again at trial, but no motion to exclude that testimony was filed during the intervening eight months, within the thirty day period prescribed by R. 4:14-9(f) or otherwise.

The Mellwig court noted that, had the surgeon "appeared live at trial, a motion to exclude the testimony might well have been taken seriously." Mellwig, 264 N.J. Super. at 171. Under the circumstances presented, however, it was "inappropriate to treat objections to de bene esse deposition testimony as concealed weapons to brandish at a future trial." Ibid. Instead, there was a discovery problem that should have been resolved by a prompt motion for an appropriate ruling. See id. at 171-72. The objections plaintiff attempts to raise in the present case, in contrast, involve the scope of the presentation of live testimony at trial.

It also should be noted that the Court Rules allow and anticipate the possibility the entry of a judgment of involuntary dismissal at trial, at the close of plaintiff's case pursuant to R. 4:37-2(b), at the close of all evidence pursuant to R. 4:40-1, or by way of a judgment notwithstanding the verdict pursuant to R. 4:40-2(b). See Verdicchio v. Ricca, 179 N.J. 1, 30 (2004); Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). Not all dispositive motions are

motions for summary judgment that must be submitted in accordance with R. 4:46-1 or forfeited.

Plaintiff's argument that defendants were required to file a pretrial motion in limine to limit the scope of plaintiff's experts' testimony to their areas of expertise enjoys no support in law and is impractical as applied. Again, trials are a dynamic process. Plaintiff's proposed requirement would unfairly limit that process and force this Court to find that the defense waived its fundamental right to object to an adverse expert witness' qualifications at trial. Such a finding, however, enjoys no support in fact or law.

Moreover, and as has already been noted, defendant did file a motion in limine to bar plaintiff's experts from presenting opinions to the jury that are beyond the scope of their expertise, and specifically, to prohibit Dr. Dimant from presenting opinions regarding the nursing standard of care. Judge Sheedy, in denying that motion, explained that while "Dr. Dimant ***can't*** testify about the ***nursing*** standard of care, but he is qualified to testify to ***nursing home*** standards of care, and he can testify about the treatment of plaintiff as to the nursing home care." (12T98:6-10 (emphasis added); see Pa84-85.)

Judge Jones at trial, consistent with the ruling on the motion in limine, allowed the respiratory therapy testimony from Nurse Darlington and Dr. Dimant, over defendant's objections, to be presented against defendant Care

One at Wall, "the facility" or "the nursing home" although the witnesses were ***not*** qualified as respiratory therapy or respiratory care experts, or in Dr. Dimant's case, as a nurse or nursing expert. (See, e.g., 5T51:10-60:25, 5T143:13-145:19, 5T151:4-208:7 6T102:10-141:13; 6T178:1-184:22, 6T188:6-192:3, 6T199:16-205:10, 6T214:15-221:5, 6T254:23-270:21.) Judge Jones, in denying plaintiff's motion for a new trial, thus recognized that defendant had in fact filed a motion in limine on point, and that additional rulings were an essential part of the trial process:

> The parties submitted a number of motions in limine, which were ruled on by the court. The Requirement that motions in limine must be filed prior to trial in accordance with the pretrial order does not mean that evidentiary issues will not arise at trial; as noted in plaintiff's brief, the parties were engaged in a number of lively disputes at sidebar on evidentiary issues during trial. Parties cannot predict every conceivable way in which an expert may exceed the scope of their testimony. Holding otherwise would allow parties no recourse during trial to prevent a witness from exceeding the scope of their admissible testimony. The court is satisfied that no issues were raised at trial and ruled on by the court that should not have been entertained by the court.

(Pa10.)

V. EXCESSIVE SPEAKING OBJECTIONS, SIDEBARS AND OVERALL CONDUCT DID NOT DEPRIVE PLAINTIFF OF A FAIR TRIAL.

Likewise, plaintiff cannot properly complain that excessive "speaking objections, sidebars and the overall conduct of the trial" unfairly deprived the plaintiff of a fair trial. (Pb32; see Pb32-38.) Plaintiff complains, for example,

that the trial judge instructed plaintiff's expert Mr. Youles that he could not imply that a licensed nursing home administrator or "LNHA" is "responsible" for the conduct of the facility's nurses. (See Pb33.) Plaintiff agrees, however, that pursuant to this Court's opinion in Ptaszynski v. Atlantic Health Systems, Inc., 440 N.J. Super. 24 (App. Div. 2015), certif. denied, 227 N.J. 357, 227 N.J. 379 (2016), there is no private cause of action to enforce the "responsibilities" provision of the NHA, N.J.S.A. 30:13-3, including the responsibility to "ensure compliance with all applicable state and federal statutes, rules and regulations," N.J.S.A. 30:13-3(h). (See Pb35-36.)

Plaintiff further suggests that while the trial court ultimately concluded that the plaintiff was ***not*** improperly seeking to use the discredited "captain of the ship" theory to impose liability on the medical director or administrator for the conduct of Care One at Wall's nursing staff, the judge took too long to reach that conclusion. (See Pb38.)[9] Plaintiff cites absolutely ***no*** authority in support of the proposition that the trial court's rulings, while correct, somehow

[9] The "captain of the ship" theory, which suggests imposing vicarious liability on a doctor for the negligence of other health care personnel not under the doctor's control or supervision, has been uniformly rejected by the New Jersey courts for at least the past forty years. See, e.g., Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 345-46 (1992); C.W. v. Cooper Health Sys., 388 N.J. Super. 42, 65-66 (App. Div. 2006); Diakamopoulos v. Monmouth Medical Center, 312 N.J. Super. 20, 35 (App. Div. 1998). (See 6T136:14-138:17.0

deprived the plaintiff of a fair trial simply because they were too time consuming. (See Pb32-38.)

Again, the jury, having heard the evidence, found that Care One at Wall was negligent in deviating from the standard of care applicable to a long term care facility, although that deviation did not proximately cause harm to the plaintiff. (See Pa87-88.) Plaintiff—having been afforded every opportunity to present her causes of action and theory of the case to the jury as she wished, cannot complain that the Court, by allowing plaintiff to present Nurse Darlington and Dr. Dimant's respiratory care opinions against "the facility" or "the nursing home"—but not its professional nursing staff including respiratory therapists—harmed the plaintiff in a fashion that requires a new trial. There is no error requiring a reversal or new trial.

CONCLUSION

For the reasons set forth above the trial court's orders of judgment on the jury verdict and denying plaintiff's motion for a new trial must be affirmed.

Respectfully submitted,

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Dated: February 21, 2024

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ESTATE OF EUGENE BOEHM, through Genevieve Clifton, Executor,

Plaintiff-Appellant,

v.

CARE ONE AT WALL, LLC d/b/a CARE ONE AT WALL, CARE ONE, LLC, DES HOLDING CO. INC., DES 2009 GST TRUST and DES-C 2009 GRAT,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-003901-22T4

CIVIL ACTION

On Appeal from the Law Division, Monmouth County

Docket No. MON-L-002248-17

Sat Below:

Hon. Linda Grasso Jones, J.S.C.

REPLY BRIEF IN SUPPORT OF THE APPEAL

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POINT I

DEFENDANT DID NOT PROVIDE A PROPER FOUNDATION FOR THE ADMISSION OR THE USE OF THE DEPARTMENT OF HEALTH'S ALLEGED INVESTIGATION.

Defendant, Care One at Wall, LLC, claims that it was entitled to use unauthenticated, unsubstantiated, unsigned hearsay documents to "rebut" the testimony of plaintiff's experts on certain federal and state regulations generally cited to establish the standard of care. Defendant claims that Mr. Youles, the nursing home expert, and Nurse Darlington, the nursing expert, "relied upon various federal and New Jersey regulations in their reports and again in giving their opinions at trial. A proper foundation for the admission of the documents in question was, indeed, laid." Db11. That is the sum and substance of defendant's claimed "foundation for the **admission** of the documents." Ibid. At trial, however, defense counsel admitted that no witness was coming to provide a foundation for admission of the documents so those documents were **not** being admitted into evidence. 2T146:20-25. In fact, they **never** were admitted into evidence.

Defendant made that same argument to the court on a motion in limine to preclude the use of the inadmissible hearsay. The trial court was unpersuaded. This Court should be similarly unpersuaded. In ruling on the motion, the trial court was abundantly clear that the conclusions of the Department of Health

("DOH") allegedly contained in those documents could **not** be used unless "a proper foundation for admission" was provided. 12T55:14-18. "So that will be in so long as a proper foundation is laid * * * . The proper foundation actually has to be laid." 12T56:3-6. There was **no** finding that defendant could use the hearsay, standing alone, for rebuttal purposes. That defendant was required to bring in a DOH witness to lay the proper foundation cannot seriously be disputed.

The trial court expressly excluded defendant's experts from testifying to the conclusions reached by the DOH and Kimberly Strong. Defendant cheekily concludes from that, that it was, therefore, somehow appropriate to use with plaintiff's experts. What that logically meant, however, was that Ms. Strong, who allegedly performed the investigation for the DOH, or some other representative of the DOH with personal knowledge, had to provide the proper foundation for any testimony regarding the conclusions of that investigation and the investigation in general. Defense counsel agreed that, without a proper foundation, the documents were inadmissible hearsay and represented to the court that: "Kimberly Strong has been named in all of our pretrial. If she needs to come in and authenticate the documents, I think it shouldn't be an issue." 12T53:4-6.

That the only way those documents could be used was if they were authenticated by a DOH witness is further demonstrated by the fact that the trial court acknowledged that "Plaintiff's counsel has every right to cross examine in

order to attack the opinion." 12T55:20-21. Plaintiff, however, was deprived of her due process right to cross examine the DOH witness because defendant produced **no** such witness. That is the glaring problem with defendant's persistent use of the hearsay, one which no limiting instruction could possibly ameliorate.

A. Plaintiff Was Denied her Fundamental Right to Cross-Examine Ms. Strong.

The opportunity to cross-examine adverse witnesses is a fundamental component of the right to due process and a fair trial. See, e.g., Alves v. Rosenberg, 400 N.J. Super 553, 563-65 (App. Div. 2008) (reversing a jury verdict and remanding for a new trial where the judge had unfairly allowed the wholesale admission of numerous hearsay statements, thereby depriving the appellant of the "the opportunity for full and effective cross-examination at trial"). A "trial, although inevitably an adversarial proceeding, is above all else a search for truth." State v. Fort, 101 N.J. 123, 131 (1985). Our courts have long recognized that "[c]ross-examination is the most effective device known to our trial procedure for seeking the truth." Peterson v. Peterson, 374 N.J. Super. 116, 124-125 (App. Div. 2005) (internal quotations omitted). "In the absence of this critical safeguard, 'the integrity of the fact-finding process' is compromised denying the fact finder the ability to fully and fairly assess credibility." Id. at 125.

Ms. Strong's out-of-court opinions were offered for the truth of the matter asserted and were being used as direct evidence that defendant did nothing wrong.

One need look no further than the defense closing argument for proof. 11T76:9 to 77:11. Pb26-29. Plaintiff was left with no ability to test Ms. Strong's opinions, to impeach those opinions or to ask clarification of those opinions because Ms. Strong was not produced. Ms. Strong's credibility was never tested. The result was an unfair and inconsistent jury verdict.

B. Defendant Engaged in Phantom Impeachment.

Essentially, defendant argues that because plaintiff's experts opined on nursing home violations, defendant was entitled, without calling Ms. Strong as a witness, to use Ms. Strong's unsubstantiated opinion that there were no violations. Once again, the defense argument is not only flawed but belied by defense counsel's own admissions. Defense counsel correctly observed before trial that, "Mr. Youles is the only expert in this case that gives the opinion regarding violation of the New Jersey residents rights. He is the only one." 12T24:18-20. "Nurse Darlington, their nursing expert, has no opinions regarding the NHA rights." 12T25:3-4.

Why then was defendant able to use Ms. Strong's opinions to "rebut" Nurse Darlington when Nurse Darlington had not offered any opinion on the violation of Mr. Boehm's NHA rights? Even *arguendo* if defendant could use the hearsay to cross-examine Mr. Youles, there was no basis for using it with Nurse Darlington. As a matter of law, however, defendant was **not** permitted to use those opinions in

any manner without producing Ms. Strong. As demonstrated in plaintiff's Opening Brief, defendant used plaintiff's witnesses to parrot the contents of Ms. Strong's opinions. Pb20-26.

Defendant's argument is further belied by the fact that defense counsel also used the hearsay documents in the cross-examination of plaintiff and Jill Monahan, both fact witnesses, not experts. Neither testified about any statutory or regulatory violations. In fact, **none** of the witnesses defense counsel cross-examined using the hearsay testified on direct examination about anything remotely related to the after-the-fact DOH investigation and the results of that investigation. Nor did any of plaintiff's experts rely on those hearsay documents for their opinions. Nor does defendant make those claims; nor can defendant make those claims.

Defendant manufactured the issue it sought to rebut. For example, on the cross-examination of plaintiff, defense counsel raised for the first time the Complaint she filed with the DOH. Defendant then introduced the unsigned letter plaintiff received back and asked how she "felt" about the DOH response. 3T193:19-25. The same tactics were employed with Jill Monahan, the Administrator at Care One who was called by plaintiff. On cross-examination, for the first time, the issue of Ms. Monahan's "knowledge" of DOH surveys was broached by defendant as a way to bring in the unsubstantiated DOH survey.

3T181:19-21. Plaintiff objected. The following exchange between the trial court and defense counsel ensued.

> THE COURT: -- the concept -- I mean the thing is rolling back. You can't bootstrap in the concept of oh, someone came in, they talked to you, oh, did you have to do anything –
>
> MR. COCCA: Right.
>
> THE COURT: -- as a result of that.
>
> MR. LAURI: Yeah.
>
> **THE COURT: You can't get that in**
>
> **MR. COCCA: No, that's hearsay.**
>
> **THE COURT: -- because the concept is you can't what's not coming in here is what the state determined one way or another and you can't get it in directly when you can't get it in indirectly because the concept is you would have to have someone from the state come in and testify as to what they -- what they did.**

3T185:11-186:2 (emphasis added).

The sidebar continued with the trial court repeating several times that, without producing the appropriate witness, defendant was "not getting in directly or indirectly" the State's "conclusion" or "determination" regarding Mr. Boehm's care. 3T186:12-15; 3T188:3-5. Defense counsel then asks whether he can ask the witness "if she was cited or if there's any fines as a result of that complaint." The trial court unequivocally states that he cannot ask those questions because that would "basically" be "bringing in the determination by the State," the "result of the

investigation and there is no one coming in here to testify as to the investigation that was performed." 3T188:16-25.

Defendant claims it was justified in its carte blanche use of the hearsay because both Nurse Darlington and Mr. Youles were generally "familiar" with annual and complaint "surveys." Db at 12-13. Once again, defendant created the issue it sought to rebut. 8T86:20-21 (on cross, defense counsel asked Nurse Darlington "and what do surveyors do at the facility?"); 7T134:4-8 (on cross, defense counsel asked Mr. Youles about the "basis for surveys."). Defendant created the issue it sought to rebut as a pretext to place the hearsay survey evidence before the jury for the truth of the matter asserted.

Notwithstanding the trial court's prior rulings, defense counsel was then permitted to quote the documents chapter and verse and ask the witness if that is what the document said. Pb20-26. Even defense counsel had acknowledged that he could not ask a witness about what the document says "because that's someone else speaking." 2T149:22-25. Counsel had no problem, however, asking what the document said to plaintiff's witnesses and the trial court ultimately, unbelievably, allowed it.

Defendant tries to distinguish Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014). It cannot. This case is on all fours with Manata. Like Manata, defendant here got in every word of the DOH investigation's findings without ever

having to produce a witness who could attest to the authenticity of the documents, whether the documents were complete or whether they were produced in the ordinary course of business. There was no testimony regarding what actually was done. No one testified about what records, if any, were reviewed, who, if anyone, was interviewed, or how the conclusion was reached. Plaintiff was left powerless to refute the findings of the investigation because there was no one to cross-examine.

> Instead of seeking to introduce the police report, plaintiff's counsel engaged in a form of 'phantom impeachment.' See James McElhaney, Phantom Impeachment, 77 A.B.A.J. 82 (Nov. 1991) (**describing "phantom impeachment" as the contradiction of a witness on "key testimony—by someone who never takes the stand and who never says a word in court"**). Plaintiff's counsel, over defense objection, presented to the jury the substance of the police report, which was represented to reflect the omission of defendant's version of the collision. Counsel accomplished that by asking defendant himself what the report stated.

Id. at 347 (emphasis supplied). Defendant, by its own admission, used Ms. Strong's opinions to contradict the findings of plaintiff's experts that defendant's negligence caused Mr. Boehm's death. Counsel accomplished that by asking the experts what the report stated. There can be no legitimate debate that that was phantom impeachment.

The only argument defendant could potentially have for using the hearsay documents to impeach or to rebut plaintiff's expert witnesses is if the witness testified that the DOH conducted no investigation or if the witness testified that the

DOH found a violation of Mr. Boehm's rights. No such testimony was given. Permitting the phantom cross-examination was error.

POINT II

PLAINTIFF DID NOT "OPEN THE DOOR" FOR THE IMPERMISSIBLE USE OF HEARSAY.

Defendant's meager attempts to justify the trial court's error in allowing carte blanche use of the hearsay center on the argument that both Nurse Darlington and Mr. Youles were generally "familiar" with annual and complaint "surveys." Db at 12-13. Any knowledge they had that there was a survey done here or that there was an investigation was not first-hand. Rather, the documents were produced in discovery. That, in and of itself, does not make them a proper subject of inquiry. More importantly, it does not establish their reliability or admissibility without the testimony of Ms. Strong. It does not "open the door" for their use.

Unlike the cases cited by defendant for its newly minted "open the door" argument, defendant was **not barred** from offering the testimony of Ms Strong. That is the fatal flaw in defendant's use of that argument. The case of Hrymoc v. Ethicon, Inc., 254 N.J. 446 (2023), cited by defendant, demonstrates exactly why that doctrine does **not** apply. Defendant correctly describes the issue in the Hrymoc case and then incorrectly equates it to the case sub judice.

> Hrymoc was a products liability matter involving "pelvic mesh" medical devices. See id. at 452. The trial court, ruling on the parties' motions in limine, **barred all evidence** of "Section 510(k) clearance"

> allowing the devices to be marketed without premarket clinical trials, because the 510(k) process determines substantial equivalency only, not safety and efficacy. See id. at 452-453. The Appellate Division reversed and remanded for a new trial, and the Supreme Court affirmed that ruling, holding that the exclusion of any 510(k) evidence deprived the defendant of a fair trial on the issue of negligence, particularly on the issue of the reasonableness of the manufacturer's conduct in not performing clinical trials or studies. See id. at 453.

Db28 (emphasis added). Simply put, the evidence excluded would have shown that clinical trials were not required. Plaintiff in Hrymoc took advantage of the fact that defendant could not show that and claimed defendant's lack of clinical trials was negligent.

Based on Hrymoc, then, to apply the so-called opening the door doctrine at bar, defendant first must demonstrate that it was "barred" from offering Ms. Strong as a witness to testify about her "investigation" and her findings. That is **not** the case and renders Hrymoc inapplicable. After noting that Ms. Strong was identified as a witness in its pretrial submission and that defendant could call her as a witness, defendant chose not to call Ms. Strong as a witness. That was defendant's choice. Tactically speaking, it was an excellent choice because defendant was able to use the hearsay documents to establish the DOH's findings of no wrongdoing without having to worry about plaintiff impeaching the witness on cross. Clever, but ultimately unsustainable and just plain wrong.

A la Hrymoc, not only does defendant need to establish the preclusion of pertinent evidence, which it cannot, it also must show that plaintiff took unfair

advantage of that preclusion. At bar, that would mean that plaintiff's witnesses had to have testified that there was no investigation done by the DOH or the DOH conducted an investigation that was favorable to plaintiff. No such evidence was adduced at this trial. That slams the door shut on defendant's contrived argument.

POINT III

THE DOH DOCUMENTS WERE INADMISSIBLE HEARSAY OFFERED FOR THE TRUTH OF THE MATTER ASSERTED.

The DOH documents were hearsay. They were used for the truth of the matter asserted, i.e., defendant did not cause Mr. Boehm's death and did not violate his rights under the New Jersey Nursing Home Rights & Responsibilities Act (NHA). Defendant repeats ad nauseum that the documents were not used to prove the truth of the matter asserted, but that is hokum. At one point in defense counsel's cross-examination of Mr. Youles, Mr. Youles states that he is not sure what the DOH did or did not do. In response, defense counsel stated: "Well, we do know what they did because they said what they did." 7T301:15-17. "They wrote on this letter what they did." 7T301:25. "Are you not willing to accept what's written on this letter from the State of New Jersey Department of Health?" 7T301:25-302:2. The defense treated the DOH documents as gospel, chapter and verse. If DOH says it, it must be true. The alleged DOH investigation and

findings were the centerpiece of defendant's summation. There is no clearer example of using hearsay for the truth of the matter asserted.

If further proof is necessary, defendant uses what was contained in the DOH documents as facts in its Statement of Facts in its appeal brief. Here on appeal, defendant continues as if what was contained in those documents was evidence actually adduced at trial when, in reality, it was defense counsel testifying by reading from the documents. Defendant states in its Brief: "As a matter of **fact * * *** Ms. Strong, on behalf of the NJDOH—an agency authorized to enforce the applicable statutes and regulations—found there was **no** violation." Db at 23 (emphasis in original). There is absolutely no other conclusion than that defendant is using that hearsay for proof of the matter asserted.

As indicated in plaintiff's initial brief and bears repeating here, in summation, defense counsel highlighted the investigation and the conclusions to prove defendant was not liable. Defense counsel unabashedly used the DOH documents for the truth of the matter asserted. 11T76:9 to 77:11. "[W]e talked about this a moment ago, the Department of Health did not have any problem with the care and treatment that was given. All right. You saw that. No citable deficiencies. No state or federal citable deficiencies." 11T76:9-14. The defense cited to the Department of Health and characterized its findings as if the DOH had

a representative at trial who testified to what they did and what they found. Clearly, defendant used the hearsay to prove the ultimate issue at trial.

"Nurse Strong, on behalf of the DOH, looked at four separate charts. She looked at Mr. Boehm's chart as well, looked at staffing. Didn't find a single violation." 11T93:15-18. No such witness existed. There was no such testimony. In reality, we have no idea what Ms. Strong did or did not do. The DOH documents, marked for identification as D-5 and D-6, also were used to show that the nurses did nothing wrong because, if they had, they would have been disciplined by the DOH. Defendant hailed the DOH as the agency "that's supposed to see if you have compliance with regulations." 11T77:2-7. Defendant then uses the non-existent DOH witness to establish that the DOH found there were no deficiencies in the care rendered to Mr. Boehm.

> Now despite Mr. Boehm's death -- we talked about this a moment ago, the Department of Health did not have any problem with the care and treatment that was given. All right. You saw that. No citable deficiencies. No state or federal citable deficiencies.
>
> And you heard how the Department of Health had his chart and you heard how the Department of Health would review the chart. Nurse Darlington told you that. And they would have seen, and they saw -- nobody hid this -- PN. Do you see that there? LPN, LPN, LPN. The note before it, LPN, LPN.
>
> Don't you think the agency that's supposed to see if you have compliance with the regulations, don't they think -- don't you think they would have had a problem with that? Don't you think that would have been a cited deficiency if what plaintiff says is true? They would have.

> Don't you think the LPNs would have gotten in trouble on their own license? Did you hear any evidence in this case that the LPNs were referred to the nursing board?
>
> No, you didn't. You know why? Because it didn't happen.
>
> Those are the people that are charged with the responsibility to make sure there's compliance with the statutes, compliance with the laws, and you didn't hear that.

11T76:9-77:11.

Defendant urges the jury to "trust" the DOH's conclusions and to distrust plaintiff's experts.

> So they want you to believe that the agency charged with knowing the statutes, the regulations, holding facilities and nurses accountable, can't be trusted. But Dr. Dimant, Nurse Darlington, Lance Youles, who relies on statutes that don't even apply, they're the ones to be trusted. Does that make any sense?

11T92:23-93:14.

The defense also used the hearsay documents to impugn plaintiff by claiming plaintiff hid those hearsay documents from the jury.

> And what else weren't you shown by plaintiff? Forget the half of the charting that was missing, but the complaint to the State of New Jersey and the response back was never mentioned to you by plaintiff ever. Never ever, ever, ever, ever.

11T92:7-11.

The defense used it to appeal to the jurors' common sense and hammer home that if defendant was liable for the death of Mr. Boehm, the DOH would have so found but, as a matter of fact, they did not.

> And here comes common sense again. Isn't it interesting that the DOH, whose job it is to make sure that facilities comply, found none? They were in compliance.
>
> Instead, counsel or Nurse Darlington told you -- or they will tell you that the state of New Jersey did a poor investigation. And we don't know what they did, they say, and you can't use that, it's not trustworthy.
>
> But if there had been violations in the face of a dead patient -- that's why they went there. They had that information. They would have found a violation, if there was one, and they didn't find a single one.

11T94:1-14. The information improperly admitted was clearly central to the defense and used for the truth of its findings. The defense position that the hearsay was not used to prove the truth of the matter asserted is simply not credible.

POINT IV

NO HEARSAY EXCEPTION APPLIES.

Contrary to defendant's newly conceived contentions, there are **no** hearsay exceptions applicable at bar. Likewise, there was nothing reliable or trustworthy about those documents. The alleged DOH conclusions were contained in an unsigned letter dated August 18, 2016, which referred to an alleged investigation that took place on July 6, 2016, six months after Mr. Boehm's death in January 2016. Pa70. At trial, the unsigned letter was marked D-5 for identification. That unsigned and unauthenticated letter pertinently stated that the "surveyor was unable to identify a citable deficient practice related to your concerns based on the State and Federal regulations." Pa70.

The July 6, 2016, investigation referenced in that letter, but not included with that letter, was a multi-page, unnumbered document entitled "Unannounced Visit/Revisit Report." It was referenced as a "Complaint Survey" and the person who signed the form was identified as Kimberly Strong. Pa74-75. The surveyor's notes were not included. A form letter dated August 4, 2016, was included. Pa76-77. It stated that "no Federal deficiencies were cited based upon our visit." Pa76.

Defendant claims N.J.R.E. 803(c)(8) as a basis for **admission** of the hearsay documents, although that argument was **not** made at trial. As a preliminary matter, all of defendant's after-the-fact "hearsay exception" arguments must fail because the hearsay was **never** offered into evidence and, axiomatically, was **not** admitted into evidence. Defendant did not seek to admit the hearsay at trial because, admittedly, there was no one to provide a proper foundation for admission. 2T146:20-25. Moreover, even *arguendo* if defendant had sought admission based on N.J.R.E. 803(c)(8), that rule has no application at bar. That rule refers to official writings of "public officials." "A 'public official' includes an official of the United States, its territories, the District of Columbia and states, as well as political subdivisions, regional and other governmental agencies thereof." N.J.R.E. 801(f).

There is nothing in the record to support the notion that Ms. Strong is a "public official." Other than referring to Ms. Strong as a nurse, there is no

evidence of who Ms. Strong is, her employment status or otherwise. The case cited by defendant is inapposite. In New Jersey Dep't of Envtl. Prot. V. Duran, 251 N.J. Super. 55 (App. Div. 1991), the document at issue was a certificate regarding the accuracy of a lobster gauge utilized by State and federal agents to bring criminal charges against defendant for the sale of "illegal short lobsters." The State official testified to its use and accuracy. By statute, the gauge had to be measured, and a certificate of correctness issued. The certificate of correctness was allowed under the precursor to N.J.R.E. 803(c)(8). Describing the trial court's findings, the Appellate Division stated as follows:

> Regarding the accuracy of the gauge, he found fault with the certificate because it was dated over three years prior to this incident. Moreover, he did not understand what the certificate said and how it applied to the gauge in this particular case. Finally, he concluded it was not sealed as required by N.J.S.A. 51:1-102. However, since Chicketano did testify regarding the validity of the solid metal measuring gauge which he produced and it was apparently, 'a simple device that is not really subject to change,' even though the certificate of accuracy was not 'sealed' in compliance with the statute, the judge felt 'safe' in concluding that it complies with the required standard and admitted it under Evid.R. 63(15).

Id. at 60-61.

The reviewing court agreed with the trial court. "The rationale of this rule reflects the special trustworthiness attributed to official statements made in accordance with an official's duty. Also, it avoids requiring a public official to testify to an event he probably cannot remember. Here the Superintendent of the

Bureau of Weights and Measures is just such a public official, Evid.R. 62(3), and this **certification** was made as part of his official duties." Id. at 65 (emphasis supplied). A certification is a sworn statement. There was no such statement here. There was no official document relied on by a witness with knowledge. Rather, there was no witness, and there was no indicia of reliability at bar. Moreover, at trial, there was no finding that the documents were reliable.

Next, defendant relies on another argument **not** made at trial. Defendant claims N.J.R.E. 803(c)(6) applies because the documents are allegedly "business records." Db26. Again, there was no testimony whatsoever that the writing was made in the regular course of business nor was there any testimony that the source of the information and the method and circumstances of the preparation were such as to justify allowing it into evidence. And, of course, defendant never sought to have the documents admitted into evidence. The post-hoc rationalizations fall flat when confronted with the reality at trial – defendant knew and conceded that the DOH documents, absent authentication, were inadmissible hearsay. Their use was error and requires a new trial.

POINT V

DEFENDANT DOES NOT DISPUTE PLAINTIFF'S NHA CLAIMS RAISED IN THE OPENING BRIEF.

The inadmissible hearsay on which defendant so clearly relied struck straight at the heart of plaintiff's case, especially her violation of rights claim under

the New Jersey Nursing Home Rights and Responsibilities Act. By repeatedly emphasizing that the State of New Jersey DOH found that defendant did not violate Mr. Boehm's rights, the jury was convinced that that was the case and so found, as demonstrated by the verdict. Notably, defendant does not address plaintiff's claim that the verdict was inconsistent because the jury found that defendant deviated from the standard of care but did not find a violation of Mr. Boehm's rights under the NHA. The evidence was the same on both counts and yet the jury came to different conclusions based on that same evidence. Pb49-51. Similarly, defendant does not address plaintiff's claim that proximate cause was not an element of the NHA claim. Pb51-54. Those contentions, then, may be considered unopposed.

POINT VI

DEFENDANT'S MISTRIAL MOTION UNDERSCORES THE EXCESSIVENESS OF THE DEFENSE OBJECTIONS AND THEIR "CUMULATIVE EFFECT."

That the trial was plagued by defendant's multiple speaking objections and the trial judge's many, lengthy sidebars is obvious from a complete review of the trial transcripts. Plaintiff's witnesses were continually interrupted. Even defense counsel recognized the excessiveness of his objections when he moved for a mistrial. He was concerned about the "cumulative effect" on the jury. 6T256:14-

22. Unfortunately, it was not defendant that was hurt by the "cumulative effect" of those objections and their aftermath.

If the combined effect of multiple errors deprives a party of a fair trial, an appellate court should order a new trial. Pellicer v St. Barnabas Hosp., 200 N.J. 22, 55-57 (2009); see also State v. Jenewicz, 193 N.J. 440, 473 (2008) (noting cumulative effect of individual errors can cast sufficient doubt on a verdict to require reversal); Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52-53 (App. Div. 2009) ("When legal errors are manifest that might individually not be of such magnitude to require reversal but which, considered in their aggregate, have caused [a party] to receive less than a fair trial, a new trial is warranted." (alteration in original)), certif. denied, 200 N.J. 210 (2009); Eden v. Conrail, 175 N.J. Super. 263, 267 (App. Div. 1980) (quoted in Barber), modified and affirmed, 87 N.J. 467 (1981). A new trial is warranted here.

CONCLUSION

For the foregoing reasons and those stated in plaintiff's opening brief, plaintiff is entitled to a new trial.

Respectfully submitted,

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