

5.77 VIOLATIONS OF NURSING HOME STATUTES OR REGULATIONS – NEGLIGENCE AND VIOLATIONS OF NURSING HOME RESIDENTS’ RIGHTS CLAIMS
(Approved 11/2022)

A. Negligence Claims

NOTE TO JUDGE

In *Ewing v. Burke*, 316 N.J. Super. 287 (App. Div. 1998), the Appellate Division held that the trial court committed plain error in failing to modify the model charges to include reference to a relevant motor vehicle statute that was applicable to the facts and circumstances of the particular case. The Appellate Division stated: “Ordinarily, therefore, if there is evidence tending to establish that a vehicle was operated in violation of a motor vehicle statute, the statutory duty should be charged to the jury in order to assist the jury in arriving at the appropriate verdict.” *Id.* at 294. The Appellate Division also held that violation of statute can constitute evidence of deviation from the standard of care. *DiGiovanni v. Pessel*, 104 N.J. Super. 550, 562-63 (App. Div. 1969), *aff’d in part, reversed in part* 55 N.J. 188 (1970) (holding that N.J.S.A. 30:4-3 sets “standard to be observed” for a physician certifying to patient’s insanity for purposes of commitment); *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318 (1985) (holding that Board of Medical Examiners’ rules established for chiropractic practice set the standard of care). The Appellate Division also held that an administrative code provision can provide a minimum standard of safety and has the force of law. *Cassanello v. Luddy*, 302 N.J. Super. 267, 272 (App. Div. 1997). Similarly, if a plaintiff in a nursing home malpractice action alleges violations of statutes or regulations by a nursing home (licensed long term care facility), the jury should be charged on how violation(s) of a statute or regulation can be considered to be evidence of negligence.

In this case, aside from asserting that the Defendants violated the Plaintiff’s nursing home resident rights, the Plaintiff claims the Defendants

were also negligent. In support of the Plaintiff's claims of negligence, it is asserted that the Defendants also violated various nursing home statutes/regulations. The Plaintiff alleges Defendants violated a statute and regulations, including the *New Jersey Nursing Home Responsibilities and Rights of Residents Act*, state regulations, and federal regulations, which set up standards of conduct for nursing homes in our state. If you find that the Defendants violated any such standards of conduct, any such violation or violations is evidence to be considered by you in determining whether negligence, as I have defined that term to you, has been established. You may find that such violation or violations constituted negligence on the part of the Defendants, or you may find that they did not constitute such negligence. Your finding on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon that issue, you may consider such violation or violations together with all such evidence in arriving at your ultimate decision as to the Defendants' negligence.

1. Evidence of Negligence

The Plaintiff alleges the Defendants violated federal law under the *Code of Federal Regulations*, as follows:

1. 42 C.F.R. 483.24 Quality of Life¹. This regulation states, in part:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care.

2. 42 C.F.R. 483.25(b) Skin Integrity. This regulation states, in part:

(1) Pressure ulcers. Based on the comprehensive assessment of a resident, the facility must ensure that - -

(i) A resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and

(ii) A resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new ulcers from developing.

The statutes/regulations in question set up standards of conduct for nursing homes. If you find that the Defendants have violated any of these laws, such conduct is evidence of negligence on the Defendants' part.

Cases:

Philips v. Scrimente, 66 N.J. Super. 157 (App. Div. 1961). The above may be modified to cover violations of certain other statutes or ordinances which set up a standard of conduct to be observed in given circumstances for the benefit of the class to which plaintiff belongs. *Evers v. Davis*, 86 N.J.L. 196 (E. & A. 1914); *Moore's Trucking Co. v. Gulf Tire & Supply Co.*, 18 N.J.

¹ The foregoing regulations serve as common examples often alleged to have been violated in nursing home negligence cases. Trial judges should use their discretion to alter or edit these regulations so that the charged regulations fit the facts of the case. Furthermore, the listed regulations are not exhaustive, but illustrative.

Super. 467 (App. Div. 1952). See numbered paragraph 2, which follows, pertaining to those cases in which the violation of a statute is negligence and not merely evidence of negligence.

B. Violations of Nursing Home Residents’ Rights Claims

NOTE TO JUDGE

The Appellate Division in *Ptaszynski v. Atlantic Health*, 440 *N.J. Super.* 24 (App. Div. 2015), *certif. den’d* 227 *N.J.* 357 (2016), held that *N.J.S.A.* 30:13-8a of the *New Jersey Nursing Home Responsibilities & Rights of Residents Act*, *N.J.S.A.* 30:13-1 *et seq.*, specifically permits a private right of action under the statute for a resident whose rights as defined under the statute are violated. *Ptaszynski*, 24 *N.J. Super.* at 34. The Court in *Ptaszynski* specifically stated that

[t]hus, under the NHA as initially enacted, a person could only bring a claim for a violation of a nursing home resident’s “rights” as defined by law.

Id. Resident’s “rights” are defined within the statute itself at *N.J.S.A.* 30:13-5 to include the following:

Every resident of a nursing home shall:

- a. Have the right to manage his own financial affairs unless he or his guardian authorizes the administrator of the nursing home to manage such resident’s financial affairs. Such authorization shall be in writing and shall be attested by a witness that is unconnected with the nursing home, its operations, its staff personnel and the administrator thereof, in any manner whatsoever.
- b. Have the right to wear his own clothing. If clothing is provided to the resident by the nursing home, it shall be of a proper fit.

c. Have the right to retain and use his personal property in his immediate living quarters, unless the nursing home can demonstrate that it is unsafe or impractical to do so.

d. Have the right to receive and send unopened correspondence and, upon request, to obtain assistance in the reading and writing of such correspondence.

e. Have the right to unaccompanied access to a telephone at a reasonable hour, including the right to a private phone at the resident's expense.

f. Have the right to privacy.

g. Have the right to retain the services of his own personal physician at his own expense or under a health care plan. Every resident shall have the right to obtain from his own physician or the physician attached to the nursing home complete and current information concerning his medical diagnosis, treatment and prognosis in terms and language the resident can reasonably be expected to understand, except when the physician deems it medically inadvisable to give such information to the resident and records the reason for such decision in the resident's medical record. In such a case, the physician shall inform the resident's next-of-kin or guardian. The resident shall be afforded the opportunity to participate in the planning of his total care and medical treatment to the extent that his condition permits. A resident shall have the right to refuse treatment. A resident shall have the right to refuse to participate in experimental research, but if he chooses to participate, his informed written consent must be obtained. Every resident shall have the right to confidentiality and privacy concerning his medical condition and treatment, except that records concerning said medical condition and

treatment may be disclosed to another nursing home or health care facility on transfer, or as required by law or third-party payment contracts.

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

i. Have the right to present grievances on behalf of himself or others to the nursing home administrator, State governmental agencies or other persons without threat of discharge or reprisal in any form or manner whatsoever. The administrator shall provide all residents or their guardians with the name, address, and telephone number of the appropriate State governmental office where complaints may be lodged. Such telephone number shall be posted in a conspicuous place near every public telephone in the nursing home.

j. Have the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that person's care consistent with sound nursing and medical practices.

k. Have the right to refuse to perform services for the nursing home that are not included for therapeutic purposes in his plan of care as recorded in his medical record by his physician.

l. Have the right to reasonable opportunity for interaction with members of the opposite sex. If married, the resident shall enjoy reasonable privacy in visits by his spouse and, if both are residents of the nursing home, they shall be afforded the

opportunity, where feasible, to share a room, unless medically inadvisable.

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

n. Have the right to receive, upon request, food that meets the resident's religious dietary requirements, provided that the request is made prior to or upon admission to the nursing home, and if the resident is not a Medicaid recipient, that the resident agrees to assume any additional cost incurred by the nursing home in order to meet those dietary requirements. If the resident is a Medicaid recipient upon admission, or becomes eligible for Medicaid after admission, the nursing home shall include the cost of the religious dietary requirements in its Medicaid cost report for consideration under applicable reimbursement processes. As used in this section, "Medicaid" means the Medicaid program established pursuant to P.L.1968, c.413 (C.30:4D-1 et seq.).

Relative to Section M and the deprivation "any constitutional, civil or legal right," the Third Circuit held in *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520, 525 (3d Cir. 2009), that Congress intended the *Federal Nursing Home Reform Amendments to the Omnibus Budget Reconciliation Act of 1987 (OBRA)*, codified at 42 U.S.C. § 1396r et seq. ("FNHRA") and the regulations promulgated in the *Code of Federal Regulations* under said statute, which places certain requirements (standards of care) on nursing homes with respect to the care provided to residents, to constitute a bundle of rights actionable under 42 U.S.C. 1983 against state and county-operated nursing homes. *Ptaszynski and Brehm v. Pine Acres Nursing Home, Inc.*, 190 N.J. Super. 103, 109 (App. Div. 1983) (holding that a violation of any federal or state rights afforded to nursing home resident are actionable under N.J.S.A. 30:18a).

The *New Jersey Nursing Home Responsibilities & Rights of Residents Act*, N.J.S.A. 30:13-1 et seq., applies to any facility licensed as a long-term care facility, whether the resident is in for long-term care or sub-acute rehabilitation. N.J.S.A. 30:13-2 defines a nursing home as “any institution, whether operated for profit or not, which maintains and operates facilities for extended medical and nursing treatment or care for two or more nonrelated individuals who are suffering from acute or chronic illness or injury, or are crippled, convalescent, or infirm and are in need of such treatment or care on a continuing basis. Infirm is construed to mean that an individual is in need of assistance in bathing, dressing or some type of supervision.”

In this case, aside from asserting that the Defendants were negligent, the Plaintiff claims that the Defendants violated the rights of the Plaintiff, as a nursing home resident, under the rights enumerated in the *New Jersey Nursing Home Responsibilities and Rights of Residents Act*. In support of these claims, the Plaintiff asserts that the Defendants violated N.J.S.A. 30:13-8(a), which states in part, “[a]ny person or resident whose rights as defined herein are violated, shall have a cause of action against any person committing such violation.” The Plaintiff asserts that the Defendants violated N.J.S.A. 30:13-5(j), 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 Plaintiff further asserts that the Defendants violated N.J.S.A. 30:13-5(m), which states that a resident shall “[n]ot be deprived of any constitutional, civil or legal right solely by reason of admission to a nursing home.” Plaintiff

claims that Section M was violated by the allegations that Defendants violated the following rights under *Federal Nursing Home Reform Amendments to the Omnibus Budget Reconciliation Act of 1987 (OBRA)*, codified at 42 U.S.C. § 1396r *et seq.* and the *Code of Federal Regulations*:

1. 42 C.F.R. 483.24 *Quality of Life*.² This Regulation states, in part:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care.

2. 42 C.F.R. 483.25 (b) *Skin Integrity*. This Regulations states, in part:

(1) Pressure ulcers. Based on the comprehensive assessment of a resident, the facility must ensure that - -

(i) A resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and

(ii) A resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new ulcers from developing.

If you find that the Defendants violated any of these statutes/regulations, you have found a violation of the *New Jersey Nursing*

² The foregoing regulations serve as common examples often alleged to have been violated in nursing home negligence cases. Trial judges should use their discretion to alter or edit these regulations so that the charged regulations fit the facts of the case. Furthermore, the listed regulations are not exhaustive, but illustrative.

Home Responsibilities and Rights of Residents Act, and a violation of the Plaintiff's nursing home residents' rights. Thus, if you conclude that Defendants violated Plaintiff's nursing home residents' rights, you must find for Plaintiff on this issue. If you conclude that Defendants did not violate Plaintiff's nursing home residents' rights, you must find for Defendants on this issue.

C. DAMAGES FOR BOTH NURSING HOME RESIDENTS' RIGHTS VIOLATIONS AND NEGLIGENCE CLAIMS

NOTE TO JUDGE

In *Ptaszynski*, the Appellate Division found that there was a double recovery for violations of the *New Jersey Nursing Home Responsibilities & Rights of Residents Act* and negligence due to the trial court's failure to instruct the jury that it could not award plaintiff damages for defendants' violations of the *New Jersey Nursing Home Responsibilities & Rights of Residents Act* and defendants' negligence based upon the same injuries or harm to Mrs. Ptaszynski. *Ptaszynski*, 440 N.J. Super. at 40. If the evidence of both causes of action is the same, the jury has already been instructed not to duplicate the damages and there is a determination as to whether one or both causes of action are established, with the violations of rights cause of action entitling the Plaintiff to an award of attorneys' fees and costs pursuant to N.J.S.A. 30: 13-8(a).

The Plaintiff has brought claims for damages under both violations of nursing home residents' rights and negligence. You are not to duplicate damages, which means that you may not compensate Plaintiff twice for the same injuries in the event you find in Plaintiff's favor on both negligence and

nursing home residents' rights. If you find that Plaintiff has sustained separate and independent injuries, losses, and/or harms for the negligence and nursing home residents' rights, you may award separate damage awards. However, if you find that Plaintiff did not sustain separate injuries or damages, then you may compensate Plaintiff once and only once. 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.

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”, proceed to answer question #3.

- 2) Was/were the violation(s) of Plaintiff’s nursing home residents’ rights a proximate cause of Plaintiff’s damages?

VOTE: YES _____

NO _____

Please proceed to question #3.

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

VOTE: YES _____

NO _____

If you answer “Yes”, proceed to answer question #4. If you answer “No”, but answered “Yes” to question #2, go to question #5. Otherwise, return your verdict for the Defendant.

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

VOTE: YES _____

NO _____

If you answered "Yes" to question #2 or question #4, proceed to question #5. Otherwise, return your verdict for the Defendant.

- 5) What amount of money would fairly compensate for Plaintiff's non-economic damages resulting from the violation(s) of Plaintiff's nursing home residents' rights and/or the negligence of the Defendants? You are not to duplicate damages.

\$ _____

VOTE: YES _____

NO _____

Please proceed to question #6.

- 6) What amount of money would fairly compensate for Plaintiff's economic damages (medical expenses, lost income, loss of services, guidance, counseling, companionship)?

\$ _____

VOTE: YES _____

NO _____

Please advise the jury attendant that you have reached a verdict.