

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

764

CA 19-02270

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND BANNISTER, JJ.

DIANNA PETRELLA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FAIRPORT BAPTIST HOME, AS OPERATOR OF FAIRPORT
BAPTIST HOMES, DEFENDANT-RESPONDENT.

LADUCA LAW FIRM, LLP, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(William K. Taylor, J.), entered May 21, 2019. The judgment awarded
plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for
pain and suffering arising from a bedsore she developed during a stay
at defendant's nursing home. The amended complaint asserted causes of
action for negligence and violation of Public Health Law § 2801-d.
The matter proceeded to trial, where the jury awarded plaintiff
damages of \$50,000 for past pain and suffering on her negligence cause
of action. The jury did not find that defendant violated Public
Health Law § 2801-d. On appeal, plaintiff contends that Supreme Court
abused its discretion in refusing to instruct the jury on 10 NYCRR
415.12 (c) as a basis to find defendant liable on the section 2801-d
cause of action.

Even assuming, arguendo, that the court abused its discretion in
denying plaintiff's request for that charge, we nevertheless affirm
inasmuch as plaintiff stipulated that she sought only a "judgment as a
matter of law" and the remedy for the alleged error would be a new
trial on the Public Health Law cause of action, which is separate and
distinct from the negligence cause of action (*see Zeides v Hebrew Home
for Aged at Riverdale*, 300 AD2d 178, 179 [1st Dept 2002]), not a
judgment on a claim that was never considered by the jury (*see
generally Peguero v 601 Realty Corp.*, 58 AD3d 556, 564 [1st Dept

20091).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court