Hirt v Bellhaven Nursing Ctr., Inc.
2011 NY Slip Op 30489(U)
January 19, 2011
Supreme Court, Suffolk County
Docket Number: 08-3848
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 08-3848
CAL. No. 10-00187OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

Copy

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 6-17-10
ADJ. DATE 9-30-10
Mot. Seq. # 001 - MG; CASE DISP

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EVELYN HIRT and RICHARD SICUREZZA, as Administrators of the Estate of PIER SICUREZZA,

Plaintiff,

- against -

BELLHAVEN NURSING CENTER, INC. Individually and d/b/a BELLHAVEN CENTER FOR GERIATRIC AND REHABILITATION CARE and BELLHAVEN CENTER FOR GERIATRIC AND REHABILITATION CARE, INC.,

Defendants.

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Upon the following papers numbered 1 to 26 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 21 - 26; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

The defendants Bellhaven Nursing Center, Inc. d/b/a Bellhaven Center for Geriatric and Rehabilitation Care and Bellhaven Center for Geriatric and Rehabilitation Care, Inc. (hereinafter Bellhaven) are operators of a residential health care facility located in Suffolk County, New York. The plaintiffs' decedent entered Bellhaven on January 18, 2005, at 81 years of age, and remained a resident of the facility until the time of her death. On March 23, 2007, the decedent was taken from Bellhaven and admitted to the hospital. She died at the hospital on April 3, 2007. Pursuant to the death certificate, the immediate cause of the decedent's death was pneumonia, with onset approximately ten days prior, and another significant condition contributing to her death was Parkinson's Disease. Following the decedent's death, the plaintiffs commenced this action to recover damages against Bellhaven. The plaintiffs allege that the decedent suffered injuries, including aspiration pneumonia and death, as a result

of Bellhaven's deprivation of her rights pursuant to Public Health Law § 2801-d, negligence, and gross negligence. Specifically, by way of the bill of particulars, the plaintiffs allege that Bellhaven was negligent, reckless and careless, *inter alia*, in failing to properly monitor and recognize the decedent's condition; in failing to timely care for decedent; in failing to notify hospital or medical personnel of a change in the decedent's condition; in failing to obtain a consultation; in failing to properly train and supervise personnel; and in failing to properly administer decedent's medications. The plaintiffs allege that the decedent was also deprived of her rights under Public Health Law 2801-d as enumerated in Public Health Law 2803 (c), and that such denial caused her injury and death. The bill of particulars further specified that the decedent was deprived of her rights under Public Health Law 2801-d in that Bellhaven, *inter alia*, failed to comply with 42 CFR 483.20 (b)(1), which mandates the contents of the resident's comprehensive assessment; failed to comply with 42 CFR 483.40, which mandates that the resident must be seen by a physician at least once every 30-days for the first 90-days of admission and at least once every 60-days thereafter; failed to comply with 10 NYCRR 415.12, which mandates that each resident shall receive and the facility shall provide the necessary care and service to attain or maintain the highest practicable physical, mental, and psycho social well-being, in accordance with the comprehensive assessment and plan of care subject to the resident's right of self-discrimination; failed to comply with 10 NYCRR 415.12 (a)(1), which provides that a facility must ensure that a resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable; failed to comply with 10 NYCRR 415.3 (a), which mandates that a resident has a right to a dignified existence with respect, consideration and privacy in treatment and care for personal needs and communication with and access to persons and services inside and outside the facility; failed to undertake timely and proper tests, examinations, procedures, studies and/or surgery; failed to conform to accepted standards of care and skill in giving advice, rendering treatment, performing examinations and services; failed to use reasonable care in providing decedent with medical care, attention, services, treatment, diagnosis and other medical services, and failed to conform to the accepted standards of care and skill in providing, nursing, geriatric, nursing home and health-aide care to decedent. The supplemental verified bill of particulars further alleges, *inter alia*, that the defendants failed to follow the care plan and physician orders regarding the risk of aspiration pneumonia and failed to document the events immediately precipitating the pneumonia.

Bellhaven now moves for summary judgment dismissing the complaint on the grounds that it rendered appropriate care and treatment to the decedent and did not cause her any injury. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion Bellhaven submits, *inter alia*, the deposition testimony of the

decedent's daughter, Evelyn Hirt, the deposition testimony of the decedent's son, Richard Sicurezza, the deposition testimony of Bellhaven's director of nursing services, Diane Guidone, the deposition testimony of a certified nursing assistant and licensed practical nurse employed by Bellhaven, Ernest Mosley, the affirmation of Gisel Wolf-Klein, M.D., the decedent's nursing home records, a refusal form signed by Hirt on March 17, 2006, the decedent's medical records, and the decedent's death certificate. As is relevant to the instant motion, Hirt testified that the decedent first entered a residential nursing facility, Sunrest Health, shortly after she broke her hip on February 5, 2003. Prior to that time, the decedent had visited with a neurologist. The neurologist treated the decedent as if she had Parkinson's disease, although he could not give a definitive diagnosis. The decedent was also diagnosed with Dementia. The decedent was transferred from Sunrest to Bellhaven on January 19, 2005. Hirt attended the admission conference and also attended various care plan meetings at Bellhaven. According to Hirt, during the decedent's first year at Bellhaven she needed total assistance with her activities of daily living. The decedent had no problems with eating at this time. In 2006, Hirt was first made aware that the decedent required her food to be pureed. Hirt admitted that she was present during the performance of two separate swallow evaluations. She also admitted signing a "refusal form" with respect to the decedent's dietary restrictions on March 17, 2006. In this regard, she testified that she continued to bring food from home for her mother, but that she pureed the food.

Hirt visited the decedent on a daily basis and helped with her dinner feeding every day. For at least the last three months prior to the decedent's death she was fed only pureed food. According to Hirt, there came a point in time that the decedent stopped talking. In February of 2007, the decedent's treating neurologist recommended discontinuing the medications she was taking to treat her Parkinson's Disease because they were no longer of a significant value. Hirt admitted that it was recommended to them that the decedent be fed via a feeding tube and that they declined the recommendation. With respect to the decedent's treatment at Bellhaven, Hirt testified that she had conversations with the head of Bellhaven when she had a problem. On two occasions following the time that her mother began having swallowing difficulties she complained that a particular nursing assistant was feeding her mother too quickly. Following the complaint, she never saw that nursing assistant caring for her mother again. Hirt testified that she requested that her mother not be fed by any students or anyone that was not familiar with her. Hirt testified that on one occasion in February of 2007 an aide told her that her mom was still in the same clothes from the prior day and that although her chart indicated that she was fed, she did not believe that it was possible. Lastly, Hirt testified that on many occasions she found the decedent left in front of a television without volume or left in front of the air conditioner.

Hirt testified that she was present on March 24, 2007 and that on such date there was a choking incident when her mother was being given her medication. She testified that when the medication nurse, Ernest Mosley, did not show up at the regular time, 6:00 p.m., she went to find him and he said he was running late. Mosley arrived to the decedent at 6:55 p.m. He brought 4 ounces of Ensure in a plastic cup, 4 ounces of a red liquid that looked like Robitussen in a plastic cup, and medication crushed in applesauce. As Mosley began giving the decedent the red liquid Hirt remained in the room, but was over by the door. She heard the decedent give a coughing choke. She went over to the decedent and heard a deep gurgling and saw red bubbles coming out the side of her mouth. She told Mosley that she thought the decedent had aspirated and he responded "no" that she "just had a little cold" and patted the bubbles away from the decedent's mouth. She yelled for Mosley to get help and call the nurse. She went herself to get a nurse, who eventually came. In the interim, Mosley reluctantly went to get the

suction machine and suctioned the decedent. Hirt left the room while the decedent was treated. At some point, thereafter, the same evening Hirt requested that her mother be taken to the hospital, an ambulance was called, and the decedent was brought to the hospital.

The decedent's son, Sicurezza, testified that prior to the time the decedent was transferred to Bellhaven she was already confined to a wheelchair. A neurologist had diagnosed her with Dementia and suspected that she had Parkinson's disease. Sicurezza visited the decedent at Bellhaven approximately three times a week. He recalled Bellhaven staff telling him that the decedent had a problem swallowing. He testified that when the decedent first entered Bellhaven that she ate slowly. Her eating thereafter declined to the point that she had to be spoon fed and she had to sip everything. He testified that if you fed the decedent too quickly she would choke and that such condition got progressively worse. Sicurezza testified that he went to care plan meetings at Bellhaven to discuss the decedent's care. At these meetings, they discussed feeding the decedent, the need to mush food to make it softer, and the need to add a thickener to liquids. Bellhaven staff went over the decedent's swallowing difficulties in detail. Sicurezza testified that he was present at times when the decedent choked while she was eating. He testified that a certain aide fed her too quickly so he would often feed his mother in her place. His sister made posters to remind the aides to feed the decedent slowly and they spoke to people at Bellhaven. In January of 2007 he would sometimes feed his mother mush slowly when he visited. There were also occasions where the aides would feed his mother. During the time period of January 2007 to March 2007 the decedent's food was all mush and liquid. He also recalled them smashing her pills in order to give her medication. There were no problems during his last visit with the decedent on March 22, 2007. He was not present on March 24, 2007 during the purported choking incident.

The refusal form, dated March 17, 2006, was signed by Hirt and indicated her refusal to comply with the dietary consistency prescribed for the decedent by Bellhaven. The form specified that swallow examinations had recommended pureed food, but that Hirt was resistant and wanted the decedent to remain on chopped food.

Bellhaven's director of nursing services, Guidone, testified that she was responsible for overseeing resident care and the nursing staff at Bellhaven. Guidone testified as to the daily staffing of certified nursing assistants and nurses throughout the units. She testified with respect to the federal regulations, deemed acceptable nursing guidelines for acceptable practice and patient care, which were followed by Bellhaven. She testified that Bellhaven has a policy and procedure manual that is updated to ensure the enforcement of federal regulations. She testified that Bellhaven also educated its staff at in-services which were held three or four times a month. Guidone reviewed the decedent's chart. As is relevant, she testified that on November 2, 2006 there is a note from the charging nurse stating that the decedent's sponsor requested her liquids be thickened and that a nectar thickened fluids plan had been instituted as per the request. According to Guidone, liquids are thickened to reduce the chance of fluid entering the lungs, also known as aspiration. Guidone testified that notes were added to the decedent's dinner and medicine plans with respect to nectar thick liquids being instituted on this date. According to Guidone, it would be a violation of policy for changes in diet not to be reflected in the care plan. On November 3, 2006 the decedent's chart documents that there were no signs of swallowing difficulties but that a swallow evaluation was ordered. Following the swallow evaluation, the physician recommendations were that the decedent continue with purees and nectar thick liquids, that the decedent would do better with moist puree one bolus per swallow, and no cup drinking of thin liquid. The chart

indicates to educate pertinent staff with respect to patient dysphagia and one to one swallow delivery. Another swallow evaluation was performed on November 30, 2006. The recommendation following the exam, on December 2, 2006, was to continue with puree and nectar thick liquids. According to the chart, the physician had a conversation with the decedent's daughter with respect to her mother not being able to swallow well and the daughter requested not to have a feeding tube. Lastly, the chart indicates that Colace liquid was prescribed to the decedent to be given by mouth twice daily. The decedent first received this medication on March 19, 2007 and continued to receive this medication through March 24, 2007. The most recent medication sheet pertaining to the decedent indicated that medication should be crushed or thickened to a nectar consistency. According to Guidone, there was no note with respect to spoon feeding the decedent thin liquids because all liquids the decedent was to receive were to be a nectar consistency.

Ernest Mosley, a certified nursing assistant and a licensed practical nurse, began working for Bellhaven in August of 2006. Mosley testified that the nursing units had educational in-services that provided actual policy and procedure information. Bellhaven had policies and procedures in effect with respect to administering medications to someone with swallowing difficulties. Mosley was aware that the decedent had swallowing problems pursuant to her medical assessment. According to Mosley, medical assessment books listed each patient and how they received medication. If you wanted to give a particular patient medication you were required to look up their information in the medical assessment book. The decedent's chart indicated that medication was required to be crushed and liquid medication was to be thickened to a nectar consistency. On March 23, 2007 he administered medication to the decedent in accordance with her chart. He first gave her Levoquin that was crushed in apple sauce. She seemed to be taking it slowly at first but he had no more problems than usual administering it. He next administered the Colace liquid medication. Prior to giving the decedent the Colace he thickened it to a nectar consistency. The Colace came just above the bottom of a medicine cup and he gave it to the decedent in small sips. According to Mosley, the decedent did appear to have a quiet cough at the time he was almost finished administering the Colace. She was not, however, gagging, wheezing or short of breath. The Colace was not bubbling out of her mouth, but a little could have come out when she coughed. After administering the Colace he began to give the decedent a dose of Ensure. She was only able to consume approximately one quarter of the Ensure. She seemed to have difficulty with opening her mouth and her mouth was pursed.

Mosley further testified that although the decedent had a quiet cough that was increasing, he did not see any signs of shortness of breath or respiratory difficulties while he was administering the medication. There were no unusual occurrences or difficulties as compared to his prior experiences administering medication to the decedent. Mosley testified that shortly after he completed administration of the medication, he saw some signs of congestion building up and shortness of breath. He obtained suction equipment and suctioned the decedent three times. He also called a physician. According to the chart, the physician prescribed medication, performed a nebulizer treatment and inserted a catheter. The medication was ordered at approximately 8:30 p.m. The treatments initially had some positive effect but shortly thereafter the decedent seemed short of breath again. It was agreed that hospitalization was appropriate. Shortly thereafter, the same evening, the decedent was transferred to the hospital.

Gisele Wolf-Klein, M.D., a physician licensed in New York and board certified in internal and

geriatric medicine, submitted an affirmation based on her review of the record, including the bill of particulars, supplemental bill of particulars, the decedent's records from Bellhaven, the decedent's medical records, the decedent's hospital records, and the deposition testimony. Upon review of the decedent's records, Dr. Wolf-Klein notes, among other things, that at the time of her admission to Bellhaven, the decedent's medical history was significant for Alzheimer's Disease, Osteoarthritis, Dementia, Parkinson's Disease, arteriosclerotic heart disease, hypertension, coronary heart disease, and status post bilateral hip fractures. The decedent had a pacemaker, was wheelchair bound, and had severe cognitive impairment. She was "complete feed" and required intermittent supervision while eating. She notes that the records further reveal that all activities of daily living were performed for the decedent and she saw a physician at regular intervals for the period from January 18, 2005 through the middle of 2006. There were no falls or problems of any nature. The record indicates numerous notes through this time period with respect to the family visiting daily and the decedent eating better when they were present. A note made on April 18, 2006 indicates that the family was noncompliant with dietary consistency recommendations and continued to bring in food that was not the recommended puree consistency. The chart reveals that numerous Comprehensive Care Plans were entered into for the decedent which included a one person assistance with bed mobility; transferring; toileting; eating, and personal care. The chart further reveals the existence of comprehensive care plans with respect to the decedent's risk of aspiration due to her swallowing difficulties. The record includes notes from physical therapy and occupational therapy with respect to various evaluations performed on the decedent.

Dr. Wolf-Klein also states that on March 14, 2006 the monthly summary regarding the decedent indicated that her activities of daily living had declined for the review period. The records indicated that on March 16, 2006, Bellhaven representatives spoke to Hirt, discussed the importance of complying with the decedent's diet, and suggested that a Swallow Evaluation be performed. On March 17, 2006 the results of the Swallow Evaluation were reviewed and it was noted that a puree diet was recommended. On the same date, Hirt signed a refusal form for the recommended diet. Dr. Wolfe-Klein notes that the Bellhaven records contain numerous consultation reports from neurologist, Michael Sauter, M.D., with whom the decedent treated with respect to her diagnoses of Dementia and Parkinson's Disease. On October 3, 2006, Dr. Sauter's report indicates that he diagnosed the decedent with Supranuclear Palsy, a rare brain disorder that causes serious and permanent problems with control of gait and balance.

Dr. Wolfe-Klein states that Parkinson's Disease, Dementia, and Supranuclear Palsy are all diseases which are progressive and incurable. She asserts that choking incidents are extremely common in elderly persons who have these diseases and that in the decedent's condition, a choking incident was to be expected. She affirms that Bellhaven appropriately enacted a comprehensive care plan with respect to the decedent's risk of choking and directed that the decedent receive medications in either applesauce or thick it, a thickening agent.

Dr. Wolfe-Klein opined, with a reasonable degree of medical certainty, that the care and treatment rendered by Bellhaven staff with respect to the plaintiff's swallowing evaluation and risk of choking was appropriate in all respects. In this regard, she averred that the decedent was appropriately assessed as being at increased risk for choking incidents. She found that the orders directing the decedent receive medication in thickened liquids and applesauce were within the realm of good and accepted practice. She further found that the procedures employed by Ernest Mosley in administering

medication to the decedent were within good and accepted practice. Dr. Wolfe-Klein opined that the care plan Bellhaven instituted with respect to the decedent's feedings and medications complied with good and accepted standards of care within the nursing home and medical community. She further opined, within a reasonable degree of medical certainty, that the care and treatment rendered with respect to the decedent's swallowing evaluations during the course of her admission of January 2005 through March 2007 was within accepted standards of nursing home care and medical practice and did not cause and/or result in the development of the plaintiff's claimed injuries. She concluded that, to a reasonable degree of medical certainty, the actions of Ernest Mosley in administering the Colace and other medications were within good and accepted practice. She found that based on the deposition testimony and records provided, there were no deviations on Mosley's part from good and accepted nursing practice. In conclusion, she finds that the actions of Bellhaven did not at any time constitute a deviation from accepted nursing home practice or medical standards of practice.

The evidence submitted established Bellhaven's *prima facie* entitlement to summary judgment dismissing the complaint. Bellhaven demonstrated an entitlement to judgment, as a matter of law, dismissing the plaintiffs' cause of action for negligence. A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety (*see*, ***D'Elia v Menorah Home & Hosp. for the Aged & Infirm***, 51 AD3d 848, 859 NYS2d 224 [2008]). The distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two (***Rey v Park View Nursing Home, Inc.***, 262 AD2d 624, 692 NYS2d 686 [1999]). A review of the plaintiffs' allegations of negligence in this matter reveals that the challenged conduct primarily constitutes the medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis, and thus sounds in medical malpractice (*see*, ***D'Elia v Menorah Home & Hosp. for the Aged & Infirm***, *supra*; ***Rey v Park View Nursing Home, Inc.***, *supra*). To establish a prima facie case of liability in a medical malpractice action, a plaintiff must establish (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was the proximate cause of the injury (*see*, ***Heller v Weinberg***, 77 AD3d 622, 909 NYS2d 477 [2010]; ***Dolan v Halpern***, 73 AD3d 1117, 902 NYS2d 585 [2010]; ***Cohen v Kalman***, 54 AD3d 307, 863 N.Y.S.2d 63 [2008]; ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2007]; ***Rosen v John J. Foley Skilled Nursing Facility***, 45 AD3d 558, 846 NYS2d 208 [2007]). On a motion for summary judgment dismissing the complaint, a defendant physician or dentist has the burden of establishing the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (*see*, ***Terranova v Finklea***, *supra*; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2007]; ***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2004]). The evidence submitted demonstrated a *prima facie* entitlement to summary judgment dismissing the cause of action sounding in negligence and/or medical malpractice, by establishing that Bellhaven did not depart from the accepted standards of care in treating the plaintiff (*see*, ***Rosen v John J. Foley Skilled Nursing Facility***, *supra*; ***Yamin v Baghel***, 284 AD2d 778, 728 NYS2d 520 [2001]; ***Gold v Park Ave. Extended Care Ctr. Corp.***, 2010 NY Slip Op 31376U [Sup Ct, Nassau County 2010]; *cf.*, ***D'Elia v Menorah Home & Hosp. for the Aged & Infirm***, *supra*; *compare*, ***O'Dea v Terrence Cardinal Cooke Health Care Ctr.***, 2009 NY Slip Op 33052U [Sup Ct, New York County 2009]).

The evidence submitted also established Bellhaven's entitlement to summary judgment dismissing the cause of action for gross negligence. To constitute gross negligence, a party's conduct

must evince a reckless indifference to the rights of others (*see*, ***Goldstein v Carnell Assoc., Inc.***, 74 AD3d 745, 906 NYS2d 905 [2010]). Stated differently, a party is grossly negligent when it fails "to exercise even slight care" or "slight diligence" (*see also*, ***Goldstein v Carnell Assoc., Inc.***, *supra*). Here, Bellhaven's conduct cannot be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others (*see*, ***Everett v Loretto Adult Community, Inc.***, 32 AD3d 1273, 822 NYS2d 681 [2006]; ***Anzolone v Long Is. Care Ctr., Inc.***, 26 AD3d 449, 810 NYS2d 514 [2006]).

Lastly, the evidence submitted established Bellhaven's entitlement to summary judgment dismissing the cause of action alleging a deprivation of rights pursuant to Public Health Law § 2801-d (*see also*, ***Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.***, 61 AD3d 146, 873 NYS2d 819 [2009]; ***Sullivan v Our Lady of Consolation Geriatric Care Ctr.***, 60 AD3d 663, 875 NYS2d 116 [2009]). Public Health Law § 2801-d provides, in pertinent part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation." For purposes of this section a "right or benefit" of a patient of a residential health care facility shall mean "any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation..." (Public Health Law § 2801-d[1]). The statute further provides that "[n]o person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section" (Public Health Law § 2801-d[1]). Contrary to the plaintiffs' contentions, the evidence submitted here was sufficient to establish that Bellhaven is not liable under Public Health Law § 2801-d. In this regard, the evidence submitted was sufficient to establish that the decedent did not sustain an injury as a result of Bellhaven's purported non-compliance with any of the statutes or regulations relied on by the plaintiffs (*compare*, ***Vaynberg v St. Vincents Catholic Med. Ctrs. of N.Y.***, 2009 NY Slip Op 32371U [Sup Ct, Kings County 2009]).

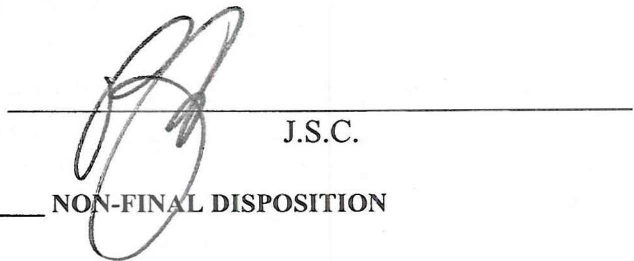
In opposition to Bellhaven's *prima facie* showing of entitlement to summary judgment dismissing the complaint, the plaintiffs failed to submit sufficient evidence to raise a triable issue of fact as to whether Bellhaven is liable for the decedent's injuries and death based on its deprivation of the decedent's rights pursuant to the Public Health Law, gross negligence and negligence and/or malpractice. In opposition to the motion, the plaintiffs rely on the affidavit of Charlotte Sheppard, RN-BC , BSN, LHRM, WCC and the affidavit of Joseph Namey, D.O. Sheppard avers that she is a registered nurse practicing in the area of geriatrics who is familiar with the standards of practice pertaining to Nursing Facilities and acute care hospitals across the United States. At the outset, the Court notes that Sheppard's qualifications and her ability to render an expert opinion as to whether Bellhaven deviated from the requisite standard of care and deprived the decedent of her rights pursuant to the Public Health Law is questionable (*see*, ***Yamin v Baghel***, *supra*; ***Gold v Park Ave. Extended Care Ctr. Corp.***, *supra*; *compare*, ***Kung v Zheng***, 73 AD3d 862, 901 NYS2d 334 [2010]; ***Hranek v United Methodist Homes of Wyo. Conference***, 27 AD3d 879, 810 NYS2d 544 [2006]). Notwithstanding the foregoing, Sheppard's affidavit is insufficient to raise a triable issue of fact as to whether Bellhaven departed from the requisite standard of care or deprived or infringed on the decedent's rights because her opinions are conclusory, speculative, and unsupported by the record (*see*, ***Alvarado v Miles***, 9 NY3d 902, 843 NYS2d 532 [2007]; ***Eckman v Cipolla***, 77 AD3d 704, 910 NYS2d 446 [2010]; ***Simmons v Brooklyn Hosp. Ctr.***, 74 AD3d 1174, 903 NYS2d 521 [2010]; ***Sheenan-Conrades v Winifred***

[* 9]

Masterson Burke Rehab. Hosp., 51 AD3d 769, 858 NYS2d 280 [2008]; ***Gold v Park Ave. Extended Care Ctr. Corp.***, *supra*). Indeed, Sheppard fails to detail how Bellhaven's conduct deprived the decedent of her rights and/or departed from the requisite standard of care (*see*, ***Yamin v Baghel***, *supra*; *compare*, ***Hranek v United Methodist Homes of Wyo. Conference***, *supra*; *see also*, ***Andrews v New York City Hous. Auth.***, 66 AD3d 619, 887 NYS2d 180 [2009]). In addition, she fails to explain how the decedent's injuries would have been prevented if these alleged deficiencies had not occurred. For similar reasons, the affidavit of Dr. Namey, a physician licensed to practice medicine in the State of Florida, is insufficient to raise a trial issue of fact. Dr. Namey fails to provide any foundation or medical basis for his conclusory and speculative conclusion that the aspiration event and subsequent pneumonia was a direct and proximate result of inappropriate medication administration by Bellhaven (*see*, ***Alvarado v Miles***, *supra*; ***Eckman v Cipolla***, *supra*; ***Simmons v Brooklyn Hosp. Ctr.***, *supra*; ***Sheenan-Conrades v Winifred Masterson Burke Rehab. Hosp.***, *supra*; ***Gold v Park Ave. Extended Care Ctr. Corp.***, *supra*).

Based on the foregoing, the motion by Bellhaven for summary judgment dismissing the complaint is granted.

Dated: 1/19/11



J.S.C.

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**