

**Delaurentis v Orange Regional Med. Ctr.-Horton  
Campus**

2012 NY Slip Op 33719(U)

May 3, 2012

Supreme Court, Orange County

Docket Number: 4875/2009

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ORANGE

COPY

-----x  
CHERYLANN F. DELAURENTIS as the Administratrix  
of the Estate of KATHLEEN ANN PEROUTKA  
KROMHOLZ, deceased,

To commence the statutory time period for  
appeals as of right (CPLR 5513[a]), you are  
advised to serve a copy of this order, with  
notice of entry, upon all parties.

Plaintiff,

DECISION and ORDER

-against-

Index No: 4875/2009

ORANGE REGIONAL MEDICAL CENTER-HORTON  
CAMPUS, REBECCA K. CALABRESE, M.D.,  
KWEON I. STAMBAUGH, M.D., HAITHAM  
MOHAMMAD NSOUR, M.D. and CRYSTAL RUN  
HEALTH CARE, LLP,

Motion Date: November 23, 2011

Defendants.



-----x  
HON. ROBERT A. ONOFRY, A.J.S.C.

The following papers numbered 1 to 16 were read and considered on the following motions:

(1) A Motion by Defendant, ORANGE REGIONAL MEDICAL CENTER (ORMC), for summary judgment, pursuant to CPLR §3212, seeking: (a) dismissal of Plaintiff's complaint, in its entirety; and (2) upon such dismissal severance of the action as against Defendant ORANGE REGIONAL MEDICAL CENTER and the entry of a judgment in favor of Defendant ORMC directing the Clerk of the Court to enter judgment accordingly;

(2) A Motion by Defendants, KWEON STAMBAUGH, M.D. and CRYSTAL RUN HEALTHCARE, LLP, for summary judgment, pursuant to CPLR §3212, seeking dismissal of the complaint, in its entirety, as against Defendants, KWEON STAMBAUGH, M.D. and CRYSTAL RUN HEALTHCARE, LLP; and

(3) A Cross-Motion by Plaintiff, filed pursuant to CPLR §3042, in which Plaintiff seeks an Order: (a) allowing her to amend her Bill of Particulars as against Defendant Orange Regional Medical Center in order to add the allegation that is it vicariously liable for the alleged negligence of John Ferguson, M.D.; and (b) to amend her Bill of Particulars as to Defendants Kweon I. Stambaugh, M.D. and Crystal Run Health Care, LLP, in order to add the allegation that Dr. Stambaugh negligently failed to install a sufficiently large tracheotomy tube:

Notice of Motion - Thompson-Tinsley Affirmation - Exhibits A-K.....1-3  
Notice of Motion - Konunchuk affirmation - Exhibits A-K.....4-6

Notice of Cross Motion - Tangredi Affirmation -Physician Affirmation (surgical) - Physician Affirmation (internal medicine) - Exhibits 1-8.....7-11  
 Thompson-Tinsley Affirmation in Opposition & Reply - Exhibits A-H.....12-13  
 Weiss Affirmation in Opposition & Reply - Exhibit A.....14-15  
 Tangredi Reply Affirmation .....16

Upon the foregoing papers, the pending motions are decided set forth below.

**Factual Background/Procedural History**

This is an action commenced by Plaintiff, on behalf of the decedent, for personal injuries allegedly sustained as a result of Defendants’ collective negligence and medical malpractice relative to Defendants’ treatment of the decedent, Kathleen Ann Peroutka Kromholz, during the course of her hospital admission in May of 2007.

In relevant part, Plaintiff alleges that employees of Defendant Orange Regional Medical Center - Horton Campus (hereinafter referred to as “ORMC”) deviated or departed from the accepted standards of medical practice; a deviation which proximately caused the dislodgment of decedent’s tracheotomy tube and, thereafter, their delay in reinserting it. Plaintiff further alleges that Defendant Kweon I. Stambaugh, who was employed by Defendant Crystal Run Health Care, LLP (hereinafter collectively referred to as the “Stambaugh Defendants”), deviated or departed from the accepted standards of medical practice in failing to properly advise, or train, their nursing staff to immediately contact a physician when there was a change in the position of decedent’s tracheotomy tube or a change in her respiratory condition. Plaintiff further alleges that the Stambaugh Defendants otherwise negligently allowed decedent to suffer respiratory failure and /or cardiac arrest.

The procedural history of this action reveals that the instant action was commenced by the

service of a Summons and Verified Complaint on or about November 17, 2009. Issue was thereafter joined by Defendant ORMC by the service of its Verified Answer on or about December 9, 2009 and by Defendants Rebecca K. Calabrese, M.D., Kweon I. Stambaugh, M.D., Haitham Mohammad Nsour, M.D. and Crystal Run Health Care, LLP by the service of their Verified Answer on or about December 18, 2012. In response to Defendants' demands, Plaintiff served its Verified Bill of Particulars on Defendant ORMC on or about April 9, 2010 and on Defendants Rebecca K. Calabrese, M.D., Kweon I. Stambaugh, M.D., Haitham Mohammad Nsour, M.D. and Crystal Run Health Care, LLP on or about April 8, 2010. Thereafter, depositions were conducted and, on March 31, 2011, Trial Note of Issue and Statement of Readiness filed. By Stipulation dated August 1, 2011, the action against Defendants Rebecca K. Calabrese, M.D. and Haitham Mohammad Nsour, M.D. was discontinued.

The record, insofar as it is relevant to the pending motions, reveals that the Plaintiff was a morbidly obese 47 year old woman who was transported by ambulance to ORMC on April 19, 2007, complaining of shortness of breath. She was admitted to the hospital for several days and thereafter released without incident.<sup>1</sup> Thereafter, and on the evening of May 4, 2007, she was again transported to ORMC by ambulance exhibiting a fever and shortness of breath. She was again admitted to ORMC and, shortly after admission and on May 6, 2007, began to experience respiratory distress, which necessitated her intubation. After remaining intubated for several days, it was determined that the decedent would require mechanical ventilation for an extended period of time. Based upon the

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<sup>1</sup>In its moving papers, Plaintiff conceded that she has no claims against either Defendant regarding decedent's hospital admission of April 19, 2007 and further limits her claims to the events which occurred on May 11 and 12, 2007.

foregoing, decedent's mother<sup>2</sup> gave consent for the doctors to perform a tracheotomy; a procedure that was performed by Defendant Stambaugh, an otolaryngologist, on May 11, 2007.

On the afternoon of May 12, 2007, while decedent was receiving routine care by several Registered Nurses, and while being repositioned on her side, decedent's oxygen saturation level dropped precipitously to 72%. Thereafter, the nurses, along with Dr. Ferguson, a critical care specialist who was not decedent's physician but who was present at the unit, undertook various measures in an attempt to raise decedent's oxygen levels; attempts that ultimately proved unsuccessful. The decedent was pronounced dead at approximately 4:10 p.m. on May 12, 2007.

Plaintiff now moves for permission to file an Amended Bill of Particulars to include the allegation that Defendant ORMC is vicariously liable for the alleged negligence of John Ferguson, M.D. and that Dr. Stambaugh negligently failed to install a sufficiently large tracheotomy tube. In so moving, Plaintiff argues that, notwithstanding the timing of the proposed amendment, neither Defendant will suffer any prejudice or surprise. Moreover, although the amendment sought is made post Note of Issue, the amendment is not being made on the eve of trial.

Specifically, and as to Defendant ORMC, plaintiff alleges that ORMC will not be prejudiced or surprised since the original bill of Particulars provided ORMC with notice that she was claiming that they were negligent for, among other things, delaying treatment when the tube became dislodged, allowing her to suffer respiratory failure, allowing and permitting her to suffer cardiac arrest and their delay in reintubating her. Moreover, although the Bill of Particulars initially failed to allege that ORMC was vicariously liable for Dr. Ferguson's delay in restoring the decedent's

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<sup>2</sup>The record further reflects the decedent suffered from other serious medical illnesses and mental illness and was not able to consent to any medical procedures on her own behalf.

airway, ORMC will not suffer any prejudice since Dr. Ferguson's involvement has been documented at length, during discovery. To buttress her argument, Plaintiff cites Dr. Ferguson's appearance at a deposition; a deposition at which Dr. Ferguson was represented ORMC's counsel and insurance carrier. Plaintiff further argues that she had a reasonable excuse for not supplementing the Bill of Particulars at an earlier date in that Dr. Ferguson was not deposed until April 14, 2011.

Although inadvertently failing to include in her moving papers the basis for amending the Bill of Particulars as against Stambaugh, Plaintiff, in her reply affirmation, nevertheless argues that such omission neither prejudiced nor surprised Stambaugh since he was already on notice that the dislodgment of the tube was alleged to have occurred as a result of his negligence and malpractice in that, among other things: (1) he failed to require that the nursing personnel notify the treating physicians of changes in the position of the tube, changes in respiratory condition or in the immediate onset of changes in general; and (2) his general failure to have a qualified nursing staff on duty which could properly recognize the seriousness of decedent's change in the tube position or decedent's respiratory condition. As such, Plaintiff argues that, because the thrust of her original Bill of Particulars alleged that the dislodging of the trachea tube caused decedent's respiratory distress, these allegations were sufficient to encompass Defendant's failure to install a sufficiently large tube in the first instance. Moreover, the original Bill provided adequate notice that his failure to notify the nursing staff of these inherent risks constituted an even greater departure from accepted medical practice, when viewed in the context that the installed tube, due to its insufficient size, was virtually assured of becoming dislodged.

Defendants oppose these proposed amendments on several grounds. First, they argue that, Plaintiff failed to make the requisite showing necessary to warrant her entitlement to the amendment

in the first instance. Second, they argue that, regardless of how she characterizes their content, both amendments include new theories of recovery. Third, since they constitute new theories of recovery [theories articulated and advanced for the first time after the completion of discovery] both proposed amendments, if granted, constitute surprise and will correspondingly result in prejudice to the Defendants.

Specifically, Defendant ORMC argues that Plaintiff had constructive notice of Dr. Ferguson's involvement in the procedure for over two (2) years, since her receipt of the medical records; records retrieved before the action was even commenced [on May 5, 2009] and upon which, after consultation with their expert, their Certificate of Merit was premised. The records, which clearly delineated Dr. Ferguson's involvement in the code, were further buttressed by the deposition testimony of all of the Defendants; depositions conducted as far back as November of 2010.

Additionally, the Stambaugh Defendants argue that notwithstanding the foregoing, Plaintiff nevertheless failed to establish any of the required criteria necessary to support the proposed amendment as against them. In sum, Plaintiff offered no legal and/or factual arguments to support her application in her moving papers. Regardless, Stambaugh argues, since Plaintiff has been in possession of all decedent's medical records for over two years and has had the benefit of the deposition testimony from all the medical staff involved in her care, for nearly as long, Plaintiff has failed to establish a reasonable excuse for the delay or a reasonable basis for the inclusion of the new theory of recovery. As such, they argue, Plaintiff's application for leave to amend the Bill of Particulars should be denied.

Additionally, the remaining Defendants collectively seek dismissal of Plaintiff's Complaint and all causes of action embraced therein, pursuant to CPLR § 3212. Defendant ORMC argues that

the cumulative consideration of its expert [Dr. Anita Bhola] opinion, and the deposition testimony of ORMC employees Laurel Weber, R.N., Susan DelVecchio, R.N., Co-Defendant Kweon Stambaugh, M.D. and non-party witness John Ferguson, M.D., together with the relevant medical records, warrant the granting of summary judgment and dismissal. Defendant Stambaugh similarly argue that the testimony elicited during the above referenced depositions, along with the testimony of prior defendants Calabrese and Nsour, together with the relevant medical records, likewise warrant the granting of summary judgment and dismissal of the claims as and against Defendant Stambaugh.

Defendant ORMC argues it has established, *prima facie*, that Plaintiff's causes of action should be dismissed in that Dr. Bhola has opined, to a reasonable degree of medical certainty, that the actions of the Hospital and the care and treatment which it provided to decedent Kathleen Ann Peroutka Kromholz [including both the techniques and safeguards used in cleaning the decedent and the critical care implemented in an attempt to revive decedent] at all times comported with applicable standards of medical care.

In rendering her opinion, to a reasonable degree of medical certainty, Dr. Bhola has opined, *inter alia*, to the following: (1) the tracheotomy care performed by RN Weber, which included changing the inner cannula and cleaning of the area, without going under or otherwise disrupting the collar, conformed to accepted standards of care and would not result in dislodging of the tracheotomy; (2) the enlisting of assistance by three other RN's to reposition the decedent on her side, with an RN assisting in turning and watching decedent's airway was entirely in conformity with good and accepted standards of care and demonstrated an appreciation for the possibility that a tracheotomy tube can become dislodged, further opining that appropriate measures were taken to

guard against accidental decannulation; and (3) the measures taken after decedent's oxygen saturation dropped, including assessing the airway, Ambu-bagging the patient, paging a respiratory STAT and summoning a critical care specialist, were likewise in conformity with good and accepted standards of care and did not cause or contribute to decedent's death.

Defendant ORMC further offers the testimony of Laurel Weber, R.N. who testified that she has thirty-five years experience as a Registered Nurse and was the nurse in charge of decedent in the Critical Care Unit on May 12, 2007. Between 2:00 and 3:00 in the afternoon, she performed care on decedent which included bathing, administering Foley care, mouth care and tracheotomy care. She changed the inner cannula of the tracheotomy and excess bloody drainage was cleaned with saline. Because the tracheotomy was new, she did not give any care which would go under the collar or disrupt the tracheotomy in any way. Due to the size of the decedent, Weber enlisted the assistance of several other nurses to reposition the decedent on her right side. She testified that one of the nurses assisted by watching decedent's airway as she was being repositioned. After being repositioned on her right side, Weber was stationed at decedent's back, to wash her back, when decedent's oxygen level dropped to 72% and she appeared dusky. Upon assisting the other nurses in returning decedent to her back, she observed that the oxygen saturation decrease had not been corrected. Weber further testified that she assessed the airway and found the tracheotomy to be in place, so she disconnected the ventilator and Ambu-bagged the decedent in an attempt to dislodge a suspected mucus plug. When she concluded that the desaturation was not being caused by a mucus plug, she called a respiratory STAT, summoned Dr. Ferguson, a critical care specialist who was present in the unit and also paged Doctors Nsour, Kothari and Stambaugh, who collectively represented respiratory, pulmonology, anesthesiology and critical care specialities. She further

testified that after Dr. Ferguson became involved, the tracheotomy tube was located and removed, and an endotracheal tube was inserted through the tracheotomy stome. However, decedent's oxygen saturation levels never rose above 80% and she was pronounced dead at 4:10 p.m.

In opposition to Defendant ORMC's motion, Plaintiff argues that it established, through the opinion of its expert [a physician board certified in internal medicine] that, to a reasonable degree of medical certainty, there was substandard care and departures from accepted medical practice at ORMC which caused significant injury to and, ultimately, the death of decedent. Specifically, he opined that the nursing staff failed to implement policies and procedures promulgated by ORMC in failing to properly observe and secure the tracheotomy site while bathing the patient, and that there was substandard practice on the part of ORMC administration in their failure to properly train, instruct and supervise the clinical staff in implementing the policies and procedures promulgated by the hospital regarding proper safety measures that were required in the care of the patient prior to, during and after bathing. The expert also opined: that there was a negligent delay in notifying a physician that the tracheotomy tube was dislodged; that the nursing staff did not recognize, in a timely fashion, that the tube was dislodged; that it was substandard and a departure from accepted practices for the nurses to fail to observe that the patients airflow was impeded; that the nursing staff departed from accepted practice in failing to properly maintain the tracheotomy ties or stay sutures that were placed by Dr. Stambaugh; that such ties were displaced due to the negligent care of the nursing staff; and that the nursing staff deviated from accepted standards of practice in their care, causing the tracheotomy tube to become dislodged. Plaintiff's expert, in sum, opines, with a reasonable degree of medical certainty, that the substandard care of the nurses was a significant factor in causing the dislodging of the tube and the inability to re-position the tubing in a timely

manner, and were a substantial factor in causing the events that lead to her death.

Plaintiff further argues that there exists material questions of fact in that ORMC employee Susan Del Vecchio, who at the time of the incident was a nursing student assisting with the care of decedent, testified at her deposition that she did not see anyone touching or caring for the tracheotomy tube while the decedent was being turned. This testimony, she argues, is in contrast to that of Nurse Weber's testimony, and as such, material questions of fact exist, thus warranting a denial of Defendant ORMC's motion .

Similarly, Defendants Stambaugh argues that he has established, *prima facie*, that Plaintiff's causes of action should be dismissed. Specifically, he argues that the first and only time he provided any medical care to decedent was on May 11, 2007 when he was contacted by Dr. Hmidi to perform a consultation on the decedent with reference to the propriety of the placement of a tracheotomy tube, and upon agreeing that the tracheotomy was appropriate, ultimately performed the procedure, on May 11, 2007. Dr. Stambaugh's testimony, together with his operative report, confirms the placement of the tube, and thereafter, the securing of the collar with two sutures on each side and the use of cloth tape to further secure the tube. Additionally, Defendant Stambaugh 'suture-tagged' the trachea to assist in finding the stoma (opening in the trachea) should the tube become dislodged. The tracheotomy was performed without any difficulty or complications and decedent was sent to the intensive care unit in satisfactory condition with post operative orders for the nursing staff to perform tracheotomy care as needed. Thus, he argues, this was the last contact he had with the decedent. Defendant further offers decedent's ORMC hospital records, including nursing notes, oxygen saturation levels and physician progress notes, together with the deposition testimony of the nursing staff and other attending physicians, to demonstrate that the tracheotomy tube was working

properly at all times following the placement of the tube up to the time of the Code.

Specifically, Dr. Calabrese examined decedent at 8:30 a.m. on May 12, 2007 and noted that the tube was working appropriately and that the decedent was well ventilated, with her oxygen level at 100%. Thereafter, and at approximately 11:00 a.m., Dr. Nsour performed a physical examination of decedent and noted that her tracheotomy tube was properly placed and intact, the ventilator settings were proper and that she was oxygenating well, with no leakage around that tracheotomy site. Defendant Stambaugh further argues that it was not until the afternoon of May 12, 2007 that decedent's tracheotomy tube became dislodged during routine nursing care, which ultimately led to a decrease in oxygen saturation level, the necessity of a Code being called and thereafter, her death. As such, Defendant Stambaugh asserts that despite conforming to good and accepted practice in the performance of the tracheotomy, and a demonstration that the tube was properly working subsequent to its placement and prior to the nursing care, decedent died. Her death was not, however, caused by Doctor Stambaugh's negligence.

In opposition to Defendant Stambaugh's motion, Plaintiff argues that it established, through the opinion of its expert [a physician board certified in general surgery] that, to a reasonable degree of medical certainty, the death was caused by decedent's tracheotomy tube becoming dislodged and, in turn, that a substantial factor in causing it to become dislodged was Defendant Stambaugh's selection of a tracheotomy tube that was too small, which was a departure from accepted standards of medical care. Although acknowledging that the insertion of a tracheotomy tube carries with it the inherent risk that it may be dislodged, Plaintiff's expert nevertheless opines that Defendant Stambaugh's procedure substantially, and negligently, increased the risk of dislodgment by his tube choice; a choice that rendered its eventual dislodgment virtually inevitable.

Parenthetically, the Court notes, in assessing the substantive content of the proposed Amended Bill, that the expert's opinion is premised predominately, if not exclusively, on the alleged selection of the wrong sized tube; an issue which was not raised in Plaintiff's Bill of Particulars and which will be addressed below.

In summary, Plaintiff argues that, through her experts, she has established the existence of triable issues of fact with regard to the claims against both Defendants, and it is for the jury, not the Court, to determine the credibility of the respective expert opinions. As such, she argues, Defendants' motion must be denied.

#### Discussion/Legal Analysis

The Court, as a preliminary matter, will address Plaintiff's cross-motion, first, in which she seeks leave to file an Amended Bill of Particulars to include the allegation that Defendant ORMC is vicariously liable for the alleged negligence of John Ferguson, M.D. and that Dr. Stambaugh negligently failed to install a sufficiently large tracheotomy tube, since it materially affects the lense through which the summary judgment motion will be viewed as to certain party defendants.

CPLR §3042(b), in relevant part, permits the amendment of a Bill of Particulars once as a matter of course prior to the filing of a Note of issue. Leave to amend, thereafter, is ordinarily freely granted, absent prejudice or surprise, unless the amendment sought is on the eve of trial. *See, Alvarado v Beth Israel Medical Center*, 78 A.D.3d 873, 911 N.Y.S.2d 174 [2<sup>nd</sup> Dept. 2010]; *Ito v. 324 East 9<sup>th</sup> Street Corp.* 49 A.D.3d 816, 857 N.Y.S.2d 578 [2<sup>nd</sup> Dept. 2008].

Although Plaintiff argues that the motion was not made on the eve of trial, the Court's records reflect the filing of a Note of Issue on March 31, 2011, with a jury trial scheduled to

commence May 7, 2012; a trial date adjourned, by necessity, for the sole purpose of addressing these pending motions. Indeed, the record is clear, and significantly so, that Plaintiff's motion seeking leave to amend her Bill of Particulars was made in response to Defendants' motions for summary judgment originally returnable November 3, 2011, seven (7) months after the filing of the Note of Issue.

Motions seeking leave to serve an Amend Bill of Particulars, after the filing of a Trial Note of Issue, although addressed to the discretion of the Court, require, by necessity, closer scrutiny and should be denied where there has been inordinate, unexplained delay coupled with a material change in their content, which is prejudicial to the adverse party. See, *Daud v. Forest and Garden Apts.*, 178 A.D.2d 578, 577 N.Y.S.2d 475 [2<sup>nd</sup> Dept. 1991]; *Dubisette v. Davis*, 158 A.D.2d 504, 551 N.Y.S.2d 267 [2<sup>nd</sup> Dept. 1990]; *Simpson v. Browning-Ferris Indus. Chem. Servs.*, 146 A.D.2d 769, 537 N.Y.S.2d 73 [2<sup>nd</sup> Dept. 1989]; *Alexander v. Seligman*, 131 A.D.2d 528, 516 N.Y.S.2d 260 [2<sup>nd</sup> Dept. 1987]. In exercising that discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay has been offered and whether material prejudice will result therefrom. See, *Navarette v. Alexiades*, 50 A.D.3d 869, 855 N.Y.S.2d 260 [2<sup>nd</sup> Dept. 2008], citing *Cohen v. Ho*, 38 A.D.3d 705, 833 N.Y.S.2d 542 [2<sup>nd</sup> Dept. 2007]; *Sampson v. Contillo*, 55 A.D.3d 591, 865 N.Y.S.2d 137 [2<sup>nd</sup> Dept. 2008].

Here, Plaintiff's failure to provide any excuse for her delay, reasonable or otherwise, is fatal to her application. *McGowan v. RPC Realty Corp.*, 46 A.D.3d 771, 848 N.Y.S.2d 332 [2<sup>nd</sup> Dept. 2007]; *Sewkarran v. DeBellis*, 11 A.D.3d 445, 782 N.Y.S.2d 758 [2<sup>nd</sup> Dept. 2004]. It is undisputed that both the nature of Dr. Ferguson's involvement with the "Code" and the discrepancy of the tube

size inserted by Defendant Stambaugh was included in the medical records; records that were first provided to Plaintiff prior to 2009. As such, Plaintiff has failed to explain the inordinate delay in seeking the proposed amendment; a proposed amendment which seeks to introduce, for the first time, a new theory of negligence and malpractice.

Further, the Courts have regularly held that when an amendment to a pleading or bill of particulars is sought near trial, judicial discretion in allowing such amendment should be 'discreet, circumspect, prudent and cautious'. See, *Clarkin v. Staten Island Univ. Hosp.*, 242 A.D.2d 552, 662 N.Y.S.2d 91 [2<sup>nd</sup> Dept. 1997]; *Volpe v. Good Samaritan Hospital*, 213 A.D.2d 398, 623 N.Y.S.2d 330 [2<sup>nd</sup> Dept. 1995]; *Morris v. Queens Long Island Med. Group, PC*, 49 A.D.3d 827, 854 N.Y.S.2d 426 [2<sup>nd</sup> Dept. 2008].

Here, discovery has been closed for several months. Predicated upon that closure and the totality of the evidence revealed during the course of discovery, Defendants have moved for summary judgment. Prompted by that motion, Plaintiff's now seek an amendment, the content of which can only be characterized as a radical addition to her pleadings and which alleges an entirely new theory of liability; a new theory that is being offered, for the first time, four years after the incident, more than two years after Plaintiff's receipt of decedent's medical records, and a year after depositions. Plaintiff's delay coupled with the content of the proposed change, at this late juncture, clearly prejudices the Defendants. To grant such a motion at this stage, would, in this Court's view, necessitate additional discovery, require the Defendants to substantially reorient their defensive strategy and result in a significant delay in trial. See, *Alrose Oceanside LLC v. Mueller*, 81 A.D.3d 574, 915 N.Y.S.2d 643 [2<sup>nd</sup> Dept. 2011], *Schreiber-Cross v. State*, 57 A.D.3d 881, 870 N.Y.S.2d 438 [2<sup>nd</sup> Dept. 2008]. Based upon the foregoing, the Court concludes, and so finds, that the

proposed amendments would be severely prejudice the Defendants. See, *Rosa v. Westchester County Medical Center*, 233 A.D.2d 311, 649 N.Y.S.2d 179 [2<sup>nd</sup> Dept. 1996]; *Lanni v. Sekar*, 191 A.D.2d 616, 595 N.Y.S.2d 242 [2<sup>nd</sup> Dept. 1993]. Thus, given the proximity of the motion to the original trial date, the length of time that has passed since both the incident and the commencement of this action, the completion of discovery, Plaintiff's failure to establish an excuse for the delay, and the resulting prejudice and surprise accruing to the Defendants, Plaintiff's motion, which seeks leave to amend her Bill of Particulars must be, and is hereby, denied.

Having addressed Plaintiff's motion to amend her Bill of Particulars as to both Defendants, the Court now turns to Defendants' summary judgment motions and Plaintiff's response.

It is well settled that a grant of summary judgment is appropriate only where the Court determines that there are no material or triable issues of fact. Issue identification not issue determination is controlling. Therefore, 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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See, *Weingard v. New York University Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]; *Stillman v. Twentieth Century Fox Film Corporations*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 [1957].

Correspondingly, in defeating a motion for summary judgment, the opponent must produce evidentiary proof, in admissible form, sufficient to require a trial of material questions of fact or must demonstrate [an acceptable] excuse for such failure to do so. See, *Alvarez v. Prospect Hospital* 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]; *City of New York v. Grosfeld Realty Company*, 173 A.D.2d

436, 570 N.Y.S.2d 61 [2d Dept. 1991]. *V. Savino Oil & Heating Co., Inc. v. Rang Management Corp.*, 161 A.D.2d 635, 555 N.Y.S.2d 413 [2d Dept. 1990].

The essential elements of a medical malpractice claim are a departure from good and accepted medical practice and evidence that such departure was the proximate cause of the Plaintiff's injuries. *Williams v. Sahay*, 12 A.D.3d 366, 783 N.Y.S.2d 664 [2<sup>nd</sup>Dept.2004]; *DiMitri v. Monsouri*, 302 A.D.2d 420, 754 N.Y.S.2d 674 [2<sup>nd</sup>Dept.2003]; *Holbrook v. United Hospital Medical Center*, 248 A.D.2d 358, 669 N.Y.S.2d 631 [2<sup>nd</sup>Dept.1998]. Accordingly, a defendant seeking summary judgment in a medical malpractice action has the initial burden of establishing the absence of any departure from good and accepted medical practice or that such departure was not the proximate cause of Plaintiff's injuries (*Sandmann v. Shapiro*, 53 A.D.3d 537, 861 N.Y.S.2d 760 [2<sup>nd</sup>Dept.2008]; *Winegard v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]; *Schaefer v. Marchiano*, 193 A.D.2d 664, 597 N.Y.S.2d 470 [2<sup>nd</sup>Dept.1993]; *Williams v. Sahay*, supra); a burden met by the introduction of an expert affirmation presenting the facts of the case coupled with an opinion that the defendant neither departed from accepted standards of medical care nor that such departure, if established, proximately caused plaintiff's injuries. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 308 N.Y.S.2d 923 (1986); *Wert v. Lennox Hill Hospital*, 151 A.D.2d 474, 542 N.Y.S.2d 264 [2<sup>nd</sup>Dept.1989]; *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 [2<sup>nd</sup>Dept.2011].

Here, the Court concludes, and so finds, that Defendant ORMC has, by the introduction of Dr. Anita Bhola's affidavit, together with the relevant medical records and deposition testimony, established, *prima facie*, that it did not depart from good and accepted medical practice regarding the standard of care provided to decedent.

Similarly, the Court concludes, and so finds, that Defendant Stambaugh has established, *prima facie*, that he did not depart from accepted medical standards in the performance of the tracheotomy, and further, did not fail to require that nursing personnel notify the treating physicians of changes in position of decedent trachea tube and respiratory condition or allow and/or permit her to suffer respiratory failure and cardiac arrest.

Thus, both Defendants having made their *prima facie* showing, it was incumbent upon the Plaintiff to establish the existence of a triable issue of fact by the submission of a physician's affidavit attesting to Defendants' deviation and departure from accepted medical practice and that such departure proximately caused Plaintiff's injuries. *Alvarez v. Prospect Hospital*, supra @324; *Rebozo v. Wilen*, 41 A.D.3d 457, 458, 838 N.Y.S.2d 121 [2<sup>nd</sup>Dept.2007]; *Domaradyki v. Glenco OB/GYN Associates*, 242 A.D.2d 282, 660 N.Y.S.2d 739 [2<sup>nd</sup>Dept.1997]; *Cerkvenik v. County of Westchester*, 200 A.D.2d 703, 607 N.Y.S.2d 66 [2<sup>nd</sup>Dept.1994].

In determining the extent to which, if at all, triable issues of fact exist, general allegations of a conclusory nature, unsupported by competent evidence, are insufficient to defeat a defendant's motion for summary judgment. Summary judgment is nevertheless inappropriate where the parties adduce conflicting medical expert opinions. In such cases, issues of credibility are and should be reserved for the jury's determination, not the court. *See, Bengston v. Wang*, 41 A.D.3d 625, 839 N.Y.S.2d 159 [2<sup>nd</sup>Dept.2007]; *Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 [2<sup>nd</sup>Dept.2005]; *Fotinas v. Westchester County Med. Ctr.* 300 A.D.2d 437, 752 N.Y.S.2d 90 [2<sup>nd</sup>Dept.2002].

Here, the Court concludes, and so finds, that Plaintiff has met its burden of rebutting Defendant ORMC's *prima facie* showing. Plaintiff has offered the opinion of its expert, a physician, Board Certified in Internal Medicine, which raises issues of fact regarding the standard of care

provided by the attending nurses and the procedures followed in assuring protection of the tracheotomy tube while turning the patient. Plaintiff has also raised a triable issue of fact in the testimony of the two of the nurses who attended to decedent, regarding the care given while decedent was being turned on her side; issues which must be left for jury determination. Thus, by reason of the foregoing, Defendant ORMC's motion must be, and is hereby denied.

However, with regard to Defendant Stambaugh, the Court concludes, and so finds, that Plaintiff failed to rebut Defendant Stambaugh's *prima facie* showing and failed to raise a triable issue of fact. Plaintiff's expert limited his opinions and findings predominately, if not exclusively, to the size of the tube inserted; a theory of liability which, based upon the Court's denial of Plaintiff's proposed amendment, is not before this Court. Plaintiff offered no other competent evidence that would suggest that Stambaugh departed from good and accepted medical practice, in treating the decedent, or deviated from the required standard of medical care. As such, Defendant Stambaugh's motion for summary judgment must be, and is hereby, granted.

Therefore, and in conformity with the foregoing, it is hereby

ORDERED, that Defendant Orange Regional Medical Center's motion to dismiss Plaintiff's complaint, and all causes of action embraced therein, is denied; and it is further

ORDERED, that Defendants, Kweon Stambaugh, M.D. and Crystal Run Healthcare, LLP's motion for summary judgment which seeks dismissal of Plaintiff's complaint, and all causes of action embraced therein, is granted, in its entirety; and it is further

ORDERED, that Plaintiff's cross-motion which seeks leave to amend her Bill of Particulars as to Defendant Orange Regional Medical Center, in order to add the allegation that is it vicariously liable for the alleged negligence of John Ferguson, M.D., and to amend her Bill of Particulars as to

Defendants Kweon I. Stambaugh, M.D. and Crystal Run Health Care, LLP, so as to add the allegation that Dr. Stambaugh negligently failed to install a sufficiently large tracheotomy tube, is denied, in its entirety; and it is further

ORDERED, that the remaining parties, through their respective counsel, are directed to appear for a Pre-Trial Conference on May 30, 2012 at 9:15 A.M, such Conference to be held at the Orange County Surrogate Court House, 30 Park Place, Goshen, New York.

This constitutes the decision and order of this Court.

Dated: May 3, 2012  
Goshen, New York

ENTER

  
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