

Conforti v Oak Hollow Nursing Ctr.

2014 NY Slip Op 31629(U)

June 19, 2014

Supreme Court, Suffolk County

Docket Number: 10-259

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-18-14
ADJ. DATE 4-24-14
Mot. Seq. # 003 -MD

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GREGORY CONFORTI, as Administrator of the
Estate of FRANCIS ANTHONY CONFORTI,
deceased,

Plaintiffs,

- against -

OAK HOLLOW NURSING CENTER,
individually, OAK HOLLOW NC CORP.,
Individually and d/b/a OAK HOLLOW
NURSING CENTER, BROOKHAVEN
MEMORIAL HOSPITAL MEDICAL CENTER,
INC., and M. HANI SALAM, M.D.,

Defendants.

PARKER WAICHMAN LLP
Attorney for Plaintiff
6 Harbor Park Drive
Port Washington, New York 11050

KAUFMAN, BORGEEST & RYAN, LLP
Attorney for Defendant Oak Hollow
200 Summit Lake Drive
Valhalla, New York 10595

KERLEY, WALSH, MATERA and
CINQUEMANI, P.C.
Attorney for Defendant Brookhaven Memorial
2174 Jackson Avenue
Seaford, New York 11783

ANTHONY P. VARDARO, P.C.
Attorney for Defendant Salam, M.D.
732 Smithtown Bypass, Suite 203
Smithtown, New York 11787

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Upon the following papers numbered 1 to 18 read on this motion to renew and reargue; Notice of Motion/ Order to Show Cause and supporting papers (003)1 - 9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10-16; Replying Affidavits and supporting papers 17-18; Other 19 a, 19b (hard copies of documents contained on CD; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (003) by defendants Oak Hollow Nursing Center, Oak Hollow NC Corp, d/b/a Oak Hollow Nursing Center, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is denied.

In this medical malpractice action, the plaintiff, Gregory Conforti, alleges that the defendants negligently departed from good and accepted standards of care and treatment of the plaintiff's decedent, Francis Anthony Conforti, during his admission to Oak Hollow NC Corp d/b/a Oak Hollow Nursing Center

(Oak Hollow). Causes of action for negligence, gross negligence, and violation of Public Health Law 2801-d have been asserted, inter alia. It is alleged that the plaintiff's decedent was caused to aspirate and suffer irreversible brain injury, choking, dehydration, malnutrition, cardiac and pulmonary arrest, and death, as a result of the defendants' negligence. It is further alleged that defendants had prior knowledge of the decedent's aspirating and difficulty swallowing, and failed to take proper precautions to prevent aspiration, choking, and sequelae, then failed to properly and adequately provide emergency measures and medical care to properly treat the decedent. Francis Conforti was admitted to Oak Hollow on February 23, 2003 at age 58. Defendant Dr. Salam was his primary care physician. The decedent experienced two prior choking events on February 8, 2008 and September 3, 2008 at Oak Hollow. He was admitted to Mather Hospital for choking on September 3, 2008. Thereafter, on September 18, 2008, while the decedent was hospitalized at another hospital, Brookhaven Memorial, he experienced a third choking episode and suffered anoxic brain injury. He was placed on life support, which was withdrawn after several weeks, and died on October 11, 2008.

The moving defendants previously sought summary judgment. They submitted exhibits G, H, I, J, K, P, Q, and R on a CD in support of their motion. By order dated February 25, 2014, defendants were granted leave to reserve their application with paper submissions of the exhibits contained on the CD, and they have timely submitted this application with paper copies of the exhibits (Exhibits 19a and 19b). In support of this motion, the moving defendants submitted, inter alia, an attorney's affirmation; copy of the notice of motion, the attorney's affirmation in support; affirmation of Barbara C. Tommasulo, M.D.; copies of the summons and complaint, defendants' respective answers, plaintiff's verified bill of particulars; transcripts of the examinations before trial of Richelle Rugolo dated July 12, 2011, Maria Glynthzy Inovero, R.N. dated January 12, 2012; unidentified exhibit Q which has not been provided in paper form as previously directed by the court, but instead it is on an unlabeled, unauthenticated CD; various documents from unrelated cases; plaintiff's affirmation in opposition with the expert affidavits of Dr. Tristan Dacuhna and nurse Kathleen Hill-O'Neill; one page consult sheet which is not certified or identified; defendant's reply affirmation with limited expert reply by Barbara C. Tommasulo, M.D.; unidentified and uncertified medical records; deposition transcripts of Gregory Conforti dated February 23, 2011 and M. Hani Salam, M.D. dated July 19, 2012 which are unsigned but certified.

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. The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.*, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Medical records are required to be certified pursuant to CPLR 3212 and 4518.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Oak Hollow submitted the deposition testimony of Nurse Richelle Rugolo, who testified that she was a nursing supervisor at Oak Hollow. She noted that an entry into decedent's chart dated February 6, 2008 indicated that the decedent was able to feed himself. He was alert with confusion. She indicated that the nutritional progress note of July 6, 2008, by Inu Radu, a registered dietician, indicated that on February 8, 2008, the decedent was admitted to Brookhaven Memorial Hospital with a hemoglobin of 6.6 and a diagnosis of anemia. Thereafter, the nurse's note of July 6, 2008, indicated that the decedent was transferred to the emergency room on July 3, 2008, and returned back to Oak Hollow on July 5, 2008, with no change in diet orders, intake was noted to be good, and he was on a regular diet with no salt added. She stated that the dietician prepared a quarterly report. She continued that the dietician can make a dietary recommendation, but the physician has to order it. Dr. Hami Salam was the decedent's doctor.

Nurse Rugolo testified that on August 23, 2008, the decedent's diet was regular, but was a pureed consistency with thin liquids. On August 28, 2008, following another hospital admission, the decedent returned to Oak Hollow and was placed on aspiration precautions. A swallowing evaluation was ordered by Dr. Nixon, the medical director, on August 29, 2008, and was conducted on September 2, 2008. The report by Joan Bliss, who she did not believe was employed by Oak Hollow, indicated that the decedent had full teeth, and his current diet was puree, thin, which he was refusing. When presented with chopped and regular solids, it was determined that the decedent's swallow function was within normal function. Removal of aspiration precautions, a regular diet and a dietary supplement was recommended by Bliss.

Nurse Rugolo further testified that the decedent's diet was changed on September 2, 2008 to a regular diet with thin liquids, by telephone order by Dr. Salam, so he was no longer eating pureed food. That order was signed by Dr. Nixon. Nurse Rugolo continued that on September 3, 2008, there was an incident at Oak Hollow wherein the decedent choked on his meal at lunch, lost consciousness and became unresponsive. He was suctioned, the Heimlich maneuver was employed, and after two minutes, he regained consciousness. He

was sent to Mather Hospital by ambulance where he was admitted. He returned to Oak Hollow on September 4, 2008 at which time his diet was changed back to a pureed diet with no added salt, and with a nutritional supplement added, by physician's order.

Nurse Rugolo continued that on September 16, 2008, the decedent was transferred to Brookhaven Memorial Hospital, for transfusions. She set forth that the face sheet, any advance directives physician's orders, medication administration sheet, treatment administration sheet, labs or x-rays immunization record, MAR/TAR, and transfer summary form are provided from Oak Hollow to the transfer facility. A nurse from Oak Hollow calls the hospital to advise that the resident is going to arrive, and advises of the transfer summary and circumstances.

M. Hani Salam, M.D. testified to the extent that he has been on staff at Brookhaven Memorial Hospital since 1997. He also opened his own practice in 2004 or 2005, and has had privileges at Oak Hollow facility since approximately 2001. He testified that when a resident is admitted or readmitted to Oak Hollow, typically the same diet the resident had been on would be ordered, however, diets can be upgraded or changed. A swallow evaluation is ordered before modifying or upgrading a diet, or upon receiving a concern from the nursing staff about a patient.

Dr. Salam continued that when a resident is transferred from Oak Hollow into the hospital, transfer documents are sent from the facility. Diet changes can be ordered which may be different from what the resident was receiving at the facility, usually based upon the medical condition of the resident, mental status, lethargy, dysphagia, or whether or not the resident has teeth. He testified that anyone is at risk of choking, and he has never seen a transfer document which indicated that a resident is at risk for choking. Dr. Salam had been seeing the decedent from about January 2005. He did not remember a choking incident in September 2008, but found out about it later.

At Dr. Salam's deposition, referencing an interim physician's order form dated August 29, 2008, it was noted that there was an order to evaluate decedent's diet, signed by another physician. Dr. Salam could not recall why a swallow evaluation was ordered, unless it was to upgrade his diet or something happened. He recalled one swallow evaluation and an upgrade of the decedent's diet, but did not know when that was. In reading the order dated September 2, 2008, it indicated a regular diet was ordered, but that order was signed by the medical director, Dr. Glen Nixon. He did not recall if he gave a telephone order for a regular diet, although the order indicated he did. If he is upgrading a diet from pureed, he considers the swallow evaluation and recommendation. The speech pathologists usually provide the swallow evaluation, which becomes part of the patient record.

The order of September 3, 2008 indicated that the decedent was sent to Mather Hospital secondary to choking, but Dr. Salam testified that he did not remember that incident. He testified that the decedent had been on a regular diet before he went to Mather Hospital. Referring to the orders of September 4, 2008, relating to the decedent's readmission to Oak Hollow from Mather Hospital, he did not recall giving the telephone order for a no salt added pureed diet. He indicated that the readmission orders upon return to Oak Hollow can be done by the nurse practitioner and the orders from the hospital would be followed. Upon the decedent's return to Oak Hollow from Mather Hospital, the physician's assistant ordered a pureed diet, but did not order a swallow evaluation upon his return. No swallow evaluation had been done at Mather Hospital. He did not know the diet had been changed.

A third order dated September 16, 2008, by phone from Dr. Salam, ordered that the decedent was to be transferred to Brookhaven Memorial Hospital emergency room for a blood transfusion due to abnormal labs. He stated that the hospital would determine the decedent's diet from the record provided by Oak Hollow. Dr. Salam testified that when he transferred the decedent to Brookhaven Hospital on September 16, 2008, he did not recall if he knew of the September 3, 2008 choking incident. Dr. Salam testified that he provided an admitting order for a regular diet for the decedent on September 16, 2008, because he believed the decedent could eat a regular diet, and stated his reasons. He state that just because the decedent choked one time before, did not mean he was prevented from eating a regular diet. Dr. Salam also testified that on a prior admission to Brookhaven, a swallow evaluation was done and the decedent was sent back to Oak Hollow on a pureed diet. Thereafter, decedent lost 20 pounds and was crying out loud for a regular diet.

Oak Hollow submitted the expert affirmation of Barbara C. Tommasulo, M.D., CMD, LNHA, who affirmed that she is licensed to practice medicine in New York State and is board certified in internal medicine, geriatric medicine, and is a certified wound specialist. She set forth her education and training and the medical records and materials which she reviewed in rendering her opinions. It is noted, however, that Oak Hollow has not submitted copies of the Brookhaven Hospital or John T. Mather Memorial Hospital records referenced by Dr. Tommasulo. It is Dr. Tommasulo's opinion within a reasonable degree of medical certainty that there were no departures in the care and treatment rendered by Oak Hollow, its servants, staff, agents, and/or employees in connection with the treatment provided to the decedent, which proximately caused his death.

Dr. Tommasulo set forth the departures from good and accepted standards of care and practice alleged by the plaintiff in his bill of particulars, and opined that the decedent did not develop aspiration, irreversible brain injury, choke, or become dehydrated or malnourished, suffer cardiac pulmonary arrest, or die as a result of any alleged departures by Oak Hollow, or as a result of its purported failure to conform to the alleged statutory violations. Dr. Tommasulo continued that the decedent's medical condition declined secondary to his multiple co-morbidities, including chronic obstructive pulmonary disease (COPD), congestive heart failure (CHF), hypertension, chronic severe colitis, severe erosive esophagitis and gastritis. She stated that he did not develop dehydration or malnutrition while at Oak Hollow as the result of any negligence. Tommasulo opined that any aspiration/choking experienced by the decedent, and/or brain injury and death, was not the result of any deviation or neglect by Oak Hollow.

Dr. Tommasulo stated that Francis Conforti had schizophrenia with a long history of hospitalizations/inpatient residency since age twelve. She stated that he was admitted to Oak Hollow Nursing Center at age 58, on February 23, 2003, alert and oriented, but with mild cognitive impairment, and bowel and bladder incontinence. Dr. Tommasulo set forth the decedent's medical history, noting that on February 8, 2008, he had a choking episode at Oak Hollow, but spoke during the incident. For the next five months, he continued on a normal texture diet without issue. He was hospitalized on July 29, 2008, at which time he was noted to have hyponatremia (low sodium values). It was noted that he had gapping between his teeth, and he was placed on a pureed diet as he refused a trial of swallowing solid food. Upon his transfer back to Oak Hollow on August 23, 2008, his PRI provided by Brookhaven Hospital recommended a pureed diet, which Oak Hollow placed him on.

Dr. Tommasulo continued that on September 2, 2008, the decedent was refusing to eat the pureed diet, so a swallowing evaluation was performed, and when presented with chopped and regular solid food, he

exhibited appropriate sized bite, good mastication, and clear cohesive swallow for both textures, without any signs or symptoms of difficulty swallowing, or airway penetration. His diet was changed to regular solids, and aspiration precautions were removed. However, the following day, September 3, 2008, the decedent choked during lunch, began vomiting and lost consciousness. Staff attempted to clear his throat with suctioning, employed the Heimlich maneuver, and after two minutes, the decedent regained consciousness and was transferred to John T. Mather Hospital. His blood pressure and oxygen saturation levels were low, and he was diagnosed with "Steakhouse Syndrome." Upon return to Oak Hollow a day later, he was kept on a pureed diet.

Maria Glhynchzy Inovero, RN, a nurse at Brookhaven Memorial Hospital, indicated the decedent had been on a pureed diet at Oak Hollow prior to his admission to Brookhaven on September 16, 2008. Dr. Tommasulo stated that on September 18, 2008, while at Brookhaven Memorial Hospital, the decedent choked on a piece of chicken, lost consciousness, and went into respiratory and cardiac arrest. He was resuscitated and transferred to ICU. Blood work suggested he had experienced an acute myocardial infarction and cardiac arrest. He was diagnosed with anoxic encephalopathy, never regained consciousness, and died on October 11, 2008.

Dr. Tommasulo opined that while it is asserted that Oak Hollow caused and contributed to decedent's malnutrition, he remained above his ideal body weight, and a nutritional care plan was appropriately implemented. Dr. Tommasulo opined that Oak Hollow did not cause the choking incident of February 8, 2008; that decedent received appropriate care after the February 8, 2008 incident; underwent a swallowing evaluation, and his diet was changed to a pureed diet, which, she stated, is a medical responsibility, not a nursing responsibility. Thus, Oak Hollow did not deviate from the standard of nursing home care. Dr. Tommasulo also opined that Oak Hollow did not cause or contribute to the decedent's choking incident of September 3, 2008 as he was properly placed on a pureed diet upon his return from Brookhaven Memorial Hospital. When he refused the pureed diet, it was his physician who ordered a regular texture diet.

Dr. Tommasulo stated that no further choking incidents occurred while the decedent was a patient at Oak Hollow. When the decedent was transferred to Brookhaven Memorial Hospital on September 18, 2008, copies of records were provided to Brookhaven indicating the decedent had been receiving a pureed diet. Nurse Invero at Brookhaven Hospital completed the interdisciplinary assessment and care plan and handwrote "pureed" at the special diet section. Therefore, stated Dr. Tommasulo, Oak Hollow followed the standard of care in notifying Brookhaven Hospital of the decedent's dietary history. She stated, with regard to Public Health Law §2801 (d), predicated upon 10 NYCRR § 415.12, which provides for nutrition and hydration of a resident, Oak Hollow did not deviate from these provisions.

While on its face, Dr. Tommasulo's affirmation appears to establish prima facie entitlement to summary judgment, she does not address the issue of whether Oak Hollow had a duty to advise Brookhaven Memorial Hospital about decedent's known choking episodes, and, if so, did Oak Hollow advise Brookhaven of these prior choking episodes, including one of which required hospitalization at John T. Mather Memorial Hospital on September 3, 2008.

In opposing defendant Oak Hollows' motion for summary judgment, the plaintiff submitted the affidavit of Tristan Dacuhna, M.D., a physician duly licensed to practice medicine in New York. Dr. Dacuhna set forth his education and training, as well as his work experience, including providing direct care to patients

in an outpatient, hospital, and nursing home setting, and as a geriatrician. He set forth the materials and records which he reviewed. It is Dr. Dacuhna's opinion that Oak Hollow departed from the appropriate standards of care in failing to provide proper care and diet, and in failing to warn Brookhaven Memorial Hospital of the decedent's prior choking incidents and risk for aspiration, and thus, proximately caused the decedent's final choking incident which resulted in permanent brain injury secondary to hypoxia, loss of quality of life, and a premature death.

Dr. Dacuhna set forth decedent's prior diagnoses and health issues. He noted that on September 2, 2008, the decedent, a resident at Oak Hollow Nursing Home, was seen for a swallowing evaluation. At the time, the decedent was taking a pureed, thin liquid diet. The speech pathologist determined that the decedent's swallow function was normal and recommended that he be placed on a regular solids and that aspiration precautions be discontinued immediately. That same day, by physician order, the diet was changed as recommended. It was requested that the nursing staff notify the speech pathologist of any changes in status. He continued that there is no documentation in the medical record that the decedent's meals were monitored or supervised in any manner after the diet was changed from pureed to regular. The very next day, September 3, 2008, at lunch, the decedent choked on a piece of chicken and was rushed to the emergency room at John T. Mather Hospital where his pulse oximetry was far below normal limits. He remained in the hospital until his condition stabilized. Upon return to Oak Hollow the following day, the decedent was placed back on a pureed diet.

Dr. Dacuhna stated that on September 8, 2008, a note was made reflecting the decedent's need for a pureed diet, and a nurse practitioner noted that the decedent was at risk for aspiration. The only preventive measure ordered and implemented was for a pureed diet. On September 16, 2008, the decedent was transferred to Brookhaven Memorial Hospital for treatment of a low hemoglobin and hematocrit. Dr. Dacuhna noted Dr. Salam, decedent's admitting physician, ordered a regular diet. There is no indication in the records that information regarding his prior episodes of choking on February 8, 2008 and September 3, 2008 were noted on any transfer documents or communicated by any medium to Brookhaven Hospital at the time of transfer. Two days later following the decedent's admission to Brookhaven Memorial Hospital, the decedent was found choking on a piece of chicken, a prolonged CODE with life saving measures was employed, including intubation. The decedent was placed on a vent, and died on October 11, 2008.

Dr. Dacuhna opined that the medical staff at Oak Hollow failed to conduct and oversee an appropriate swallowing evaluation on September 2, 2013. Specifically, he stated, the physician at Oak Hollow should have ordered additional diagnostic testing to be conducted so as to confirm the finding that the decedent had "normal swallowing function." He continued that it was inappropriate and a significant deviation from the standard of care for the physicians at Oak Hollow to blindly follow the evaluation and determination by others, including nutritionists, on such an important issue as swallowing function for a resident who had a history of choking and aspiration, and specifically after the event of February 8, 2008. At a minimum, the facility should have conducted a Dynamic Swallowing Study in which the patient is asked to swallow food of various consistencies that have been coated with barium, providing a visual image of the food being tested as it travels through the mouth and down the throat, and thereby allowing for accurate evaluation of the relevant muscles. Such diagnostic testing would help identify whether any materials were going into the trachea in the course of swallowing so as to evaluate the risk for aspiration. No diagnostic testing of any kind was ever ordered, nor was any such testing conducted.

Dr. Dacuhna continued that the implementation of aspiration precautions was critically important to protect Mr. Conforti from injury. As a matter of course, the physician oversees and supervises the nursing staff who tend to be the daily caretakers for the residents. To that end, the medical staff at Oak Hollow should have taken the necessary steps to ensure that the decedent remained on aspiration precautions for his safety and well-being, and failed to do so. Dr. Dacuhna continued that the standard of care requires that the physician thoroughly review all swallowing evaluations for completeness and accuracy so as to allow for the appropriate orders to be implemented. It is a significant deviation from the standard of care for a physician to blindly follow the recommendations of the speech pathologist without his/her own evaluation and independent judgments as to the appropriate measures to be ordered, and this failure constitutes negligence, recklessness, and is a patent violation of the resident's rights pursuant to the applicable regulations. Dr. Dacuhna stated that it was inappropriate for the speech pathologist to recommend "to remove aspiration precautions" at that time, based upon the decedent's history of choking and aspiration and medical status. At a minimum, even if the diet was going to be changed from pureed to regular on September 2, 2008, the aspiration precautions should have remained in place. He continued that Oak Hollow nursing staff should have closely observed and monitored the decedent during meals, particularly during the meals following his change in diet from pureed to regular, and failed to do so. He opined that it was a violation from the standard of care and 10 NYCRR 415.11 in failing to revise the decedent's care plan when his diet was changed from a pureed diet to regular consistency diet on September 2, 2008.

Dr. Dacuhna stated that there was a failure by Oak Hollow to make reference to aspiration precautions or the two prior choking incidents that took place on February 8, 2008 and September 3, 2008 when the decedent was transferred to Brookhaven Memorial Hospital on September 16, 2008. This, he stated, was a substantial departure from the standard of care as Oak Hollow, as a long term care facility, had a duty to communicate to Brookhaven Memorial Hospital any and all information necessary to keep him safe, including information pertaining to his risk for choking, need for aspiration precautions, and history of prior choking incidents. This failure also violated the decedent's rights and was a reckless disregard for his safety and well being, and placed him at great risk for choking and aspiration, as occurred.

Based upon the foregoing, it is determined that the plaintiff raised factual issues which preclude summary judgment from being granted to the Oak Hollow Nursing Center defendants.

Accordingly, motion (003) is denied.

Dated: June 19, 2014



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION