

**McFadden v Schmidt**

2025 NY Slip Op 35015(U)

December 19, 2025

Supreme Court, Kings County

Docket Number: Index No. 510520/22

Judge: Ellen M. Spodek

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of December, 2025.

P R E S E N T:

HON. ELLEN M. SPODEK,  
Justice.  
-----X

GWENDOLYN MCFADDEN,  
Plaintiff,

-against-

MARIE SCHMIDT, M.D.,  
TRIYUNG MALLA-THAKURI, M.D., and  
INTERFAITH MEDICAL CENTER,  
Defendants.  
-----X

DECISION AND ORDER

Index No. 510520/22

Mot. Seq. No. 3

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affirmation, and Exhibits Annexed . . . . .	36-49
Affirmation in Opposition and Exhibits Annexed . . . . .	51-60
Reply Affirmation . . . . .	61

Upon the foregoing papers in this action to recover damages for medical malpractice and lack of informed consent, and after oral argument held on September 11, 2025, the joint motion of defendants Marie Schmidt, M.D., Triyung Malla-Thakuri, M.D., and Interfaith Medical Center (IMC and collectively with Drs. Schmidt and Malla-Thakuri, defendants) for summary judgment dismissing all claims of plaintiff Gwendolyn McFadden (plaintiff or patient) against them is *granted to the extent* that the informed consent claim (as pleaded in the second cause of action of her verified complaint) is dismissed as abandoned, and the remainder of their motion is *denied*.

In the late evening of June 22, 2021, the patient, age 61, was brought by ambulance to defendant IMC from a nonparty nursing home with the chief complaint of pneumonia, which was radiographically confirmed by a chest X-ray taken in the emergency department. The patient's presenting medical history included right-sided hemiparesis from a prior (March 2021) stroke, a tracheostomy tube through which she was receiving humidified oxygen, and a feeding tube. She was admitted to the step-down service of IMC in the morning of June 23, 2021 in "guarded condition" for "[a]cute hypoxic respiratory failure likely due to pneumonia [versus] mucus plug[-]in" (IMC's records, pages 000405 and 000415). In the step-down service where she allegedly received close monitoring, she was breathing through her tracheostomy tube (secured to her throat by a cuffless tracheostomy collar) that was connected to a wall-mounted oxygen source which supplied her with humidified oxygen at the flow rate of ten liters per minute (IMC's records, page 000405). A resident's note, dated June 23, 2021 and timed at 1:45 p.m., reflected that the patient's "[oxygen] saturation improved significantly after repeat[ed] deep suctioning of [her] trach[eostomy]" (IMC's records, page 000403). Another resident's note, dated June 24, 2021 and timed at 2:15 p.m., indicated that the patient's oxygen saturation at the flow of ten liters per minute was 99% (IMC's records, page 000411). The 2:15 p.m. resident's note assessed the patient's neck as having a "[t]rach[eostomy] [tube] in place, blood[-]tinged secretion in the tracheostomy tube, supple [neck], no JVD [jugular venous distention], no thyromegaly, [and] no carotid bruits" (IMC's records, page 000412). The same note reviewed the patient's lungs as "B/L [bilaterally] adequate air entry, normal

vesicular breath sounds, no crepitations or rhonchi appreciated” (IMC’s records, page 000412).

During her stay on the step-down service, the patient received endotracheal suctioning as needed. In the early morning of June 25, 2021, the patient “coded.” A resident’s post-code note, dated June 25, 2021 and timed 2:45 a.m., described the code:

“Code 33 [cardiac arrest] was called by [the] PCT [personal care technician] in medical unit at 1:26 a.m. on 6/25/2021. Code was run by [the] BLS, ACLS protocol.

Initial rhythm was Asystole [absence of contractions of the heart]. *Patient had tracheostomy tube in place which was dislodged which led to hypoxia and likely cardiac arrest.* Surgery was immediately called[,] and [a] tracheostomy cannula was reinserted[,] and ventilation was resumed from the tube.

Patient ha[d] [measurable] [p]ulse [only one] time [ ] during the code for [a] short duration[,] then went into [the] PEA [pulseless electric activity] one time and [into] Asystole in another time. Code was continued. No shockable rhythm during code.

During code, 3 doses of Epinephrine, 1 dose of Sodium bicarbonate [were] given[.]

ROSC [return of spontaneous circulation] [w]as achieved at 1:39 a.m. Pulse was good with BP [blood pressure achieved] and sustaining[;] code was called off.

Patient was upgraded to [the] ICU [where her re-inserted tracheostomy tube was connected to a ventilator].”

(IMC’s records, page 000978 [Code 33 Note]) (emphasis added).

As the code note indicates, the patient was in continuous cardiac arrest for a total of 13 minutes from 1:26 a.m. to 1:39 a.m. on June 25, 2021. The consequences to her of the 13-minute-long cardiac arrest were: (1) “hypoxic encephalopathy”; (2) “[a]cute on chronic respiratory failure with hypoxia”; and (3) “myoclonic seizures” (IMC’s records,

page 000986). By post-code orders, entered at 3:24 a.m. and 3:23 a.m. on June 25, 2021 (respectively), the patient's suctioning was increased to every 30 minutes, and a mucolytic agent (by nebulizer) was prescribed (IMC's records, pages 000221 and 001540, respectively).

Ultimately, the patient pulled through and was discharged from IMC to a nonparty nursing home on August 5, 2021. After a change of nursing homes and two intervening hospitalizations at nonparty hospitals, the patient is currently residing at a nonparty nursing home.

On April 11, 2022, the patient (as plaintiff) commenced this action to recover damages for medical malpractice and lack of informed consent. After defendants joined issue and after discovery was exchanged, plaintiff filed a note of issue/certificate of readiness on March 13, 2025. On June 10, 2025, plaintiff filed a supplemental bill of particulars further particularizing her claimed injuries in ¶ 9 thereof (the supplemental BOP) (NYSCEF Doc No. 35). On the same day, June 10, 2025, defendants jointly moved for an order granting them (among other things) summary judgment and striking the supplemental BOP. Plaintiff opposed.

The record before the Court (at this stage of litigation) is replete with multiple triable issues of material fact as to (among other issues):

(1) whether the patient's admission from the emergency department to the step-down service (instead of directly to the ICU) was appropriate, given the gravity of her condition on admission (pneumonia in the setting of tracheostomy and hemiplegia);

(2) whether the patient, while on the step-down service, suffered a mucous plug – a mass of mucous occluding a main or lobar bronchus – which obstructed her airway, which, in turn, resulted in the dislodgement of her tracheostomy, and which, in turn, resulted in the complete loss of her airway and the ensuing cardiac arrest;

(3) whether defendants took the proper and necessary steps, prior to the patient's cardiac arrest, to protect her airway, including whether defendants' suctioning of plaintiff's airway had been frequent and adequate, given the thickness of her mucus secretions and her other personal risk factors;

(4) whether any alarm was activated upon the patient's oxygen desaturation and/or upon her ensuing cardiac arrest and, if the alarm did activate, whether it was responded to timely; and

(5) whether the foregoing alleged omissions or substandard care (either individually or collectively) caused or contributed to the patient's suffering a mucus plug, tracheostomy dislodgement, cardiac arrest, and hypoxic encephalopathy.

Accordingly, dismissal of plaintiff's medical malpractice claim as against any/all defendants is unwarranted at summary judgment. *See Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912-914 (2d Dept 2022); *Parnell v Montefiore Med. Ctr.*, 63 AD3d 573, 574 (1st Dept 2009); *Porter v Cliffside Nursing Home, Inc.*, 2023 NY Slip Op 34520(U) (Sup Ct, Kings County 2023, Joseph, J.); *Adjetey v Jewish Home Lifecare*, 2014 NY Slip Op 32101(U) (Sup Ct, Bronx County 2014); *Crayton v Epstein*, 2012 WL 9515694 (Sup Ct, Nassau County 2012). *Accord Amber R. v Pediatric & Adolescent*

*Urgent Care of W. New York, PLLC*, 41 NY3d 1021, 1022 (2024) (“Triable issues of fact exist as to the claim for medical malpractice with respect to the placement of the endotracheal tube in the infant.”). *Cf. DeLaurentis v Orange Regional Med. Ctr.-Horton Campus*, 117 AD3d 774, 775 (2d Dept 2014).

Contrary to defendants’ contention, plaintiff’s expert did not improperly present new theories of liability for the first time in opposition to their motion. Rather, plaintiff’s expert’s additional opinions that defendants departed from the accepted standard of care by failing to obtain an ENT consult and by failing to prescribe a mucolytic agent merely expounded on the allegations in her original bill of particulars. *See Alao v Richmond Univ. Med. Ctr.*, 213 AD3d 722, 724-725 (2d Dept 2023).

Conversely, dismissal of plaintiff’s claim alleging lack of informed consent is appropriate, inasmuch as she failed to address or specifically oppose that branch of defendants’ motion. *See Clarke v New York City Health & Hosps.*, 210 AD3d 631, 633 (2d Dept 2022).

Lastly, striking of plaintiff’s supplemental BOP is inappropriate. The development of a decubitus ulcer was a maturing injury which, though not specifically listed in the original bills of particulars, dated June 25, 2022, was allegedly caused by the claimed malpractice of defendants. *See CPLR 3043 (b); Bermas v Long Beach Mem. Hosp.*, 131 AD2d 619 (2d Dept 1987); *Cardone v University Hosp.*, 78 AD2d 645 (2d Dept 1980), *lv dismissed* 52 NY2d 704 (1981) and 52 NY2d 899 (1981). At most, plaintiff’s supplemental BOP “expanded on the extent of [her] continuing disability rather than on

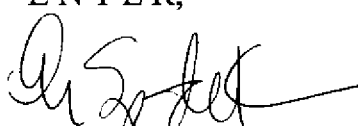
the nature of [her] injuries.” *Tate by McMahon v Colabello*, 58 NY2d 84, 87 (1983). Any purported surprise to defendants can be ameliorated by an IME of plaintiff in her current nursing home, Silvercrest Center for Nursing & Rehabilitation in Briarwood, New York. In that regard, the Court notes that the patient received Silvadene cream, which is a prophylaxis for decubitus ulcers, throughout her hospitalization at IFC (IFC’s records, pages 001584 to 002002, passim).

The Court considered the parties’ remaining contentions and found them either moot or unavailing in light of its determination. All relief not expressly granted herein is denied.

Plaintiff’s counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the defense counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The parties are directed to appear in person for a settlement conference in ICP-1 on Jan 17, 2025 at 2:30 p.m. *M MTRP*

This constitutes the Decision and Order of the Court.

ENTER,  
  
J. S. C.

HON. ELLEN M. SPODEK

KINGS COUNTY CLERKS OFFICE

DEC 22 2025

FILED