Estate of Mitchell v Yonkers Gardens, LLC
2025 NY Slip Op 35425(U)
March 13, 2025
Supreme Court, Westchester County
Docket Number: Index No. 64797/2023
Judge: Gretchen Walsh
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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.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER
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The Estate of ALLIE MITCHELL, by her Administrator, WENDY DAOUD,

Plaintiff,

- against -

YONKERS GARDENS, LLC d/b/a YONKERS GARDENS CENTER FOR NURSING AND REHABILITATION; ABC CORPORATION; ABC PARTNERSHIP,[1]

Defendants.
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Index No. 64797/2023
Motion Seq. No. 2
Motion Date: 1/27/2025

DECISION & ORDER

WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 74–127, were read on this motion by Defendant Yonkers Gardens LLC d/b/a Yonkers Gardens Center For Nursing and Rehabilitation ("Yonkers Gardens," "Yonkers Gardens Center" or "Defendant") for an order dismissing the Verified Complaint of Plaintiff the Estate of Allie Mitchell ("Mitchell"), by her Administrator, Wendy Daoud (hereinafter "Plaintiff" or "Estate"), pursuant to CPLR 3211(a)(2), (5) and/or (7); or, in the alternative, granting summary judgment pursuant to CPLR 3212 dismissing the Verified Complaint. Plaintiff opposes the motion.

Upon the foregoing papers, Defendant's motion shall be granted in part and denied in part, as set forth more fully herein.

[1] Defendants ABC Corporation and ABC Partnership (together, the "ABC Defendants") are sued in their position as owners and operators of Yonkers Garden Center. The ABC Defendants have not submitted any answer to the Verified Complaint, nor otherwise appeared in this action. This is likely because there are no unknown defendants as Yonkers Gardens Center is both the owner and the operator of the nursing home. As such, for sake of clarity, the Court shall only refer to Defendant despite the addition of additional unknown defendants in the caption.

RELEVANT PROCEDURAL BACKGROUND

This action arises from the health care and nursing home services rendered to Mitchell at the Yonkers Gardens Center's facility located at 115 South Broadway, Yonkers, NY 10701 (the "Facility"). Mitchell was a resident at the Facility, and was under the care and management of Defendant.

Plaintiff initiated this action by filing the Summons and Complaint on August 7, 2023 (NYSCEF Doc. No. 1 [the "Verified Complaint" or "Complaint"]). Defendant Yonkers Gardens Center filed a motion for an order dismissing the Summons and Complaint with prejudice based on its failure to state a cause of action (NYSCEF Doc. Nos. 6-19; 21; 23-32 ["Motion Seq. No. 1"]). On January 26, 2024, Hon. Lewis Lubell, J.S.C. rendered a Decision and Order denying Motion Seq. No. 1 (NYSCEF Doc. No. 31 [the "January 2024 Decision and Order"]). The January 2024 Decision and Order found that "Defendant has not proffered any evidence to support the various assertions made by counsel," and that "it [was] not clear from the allegations of the complaint whether plaintiff is seeking to recover for personal injuries allegedly due to an act or omission that was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the COVID-19 outbreak" (January 2024 Decision and Order). Justice Lubell suggested that "[t]he application appears more appropriately considered under a motion pursuant to CPLR 3212, which may . . . be made at any time after issue has been joined" (*id.*).

Plaintiff and Defendant appeared for a Preliminary Conference before this Court on March 29, 2024 and a Preliminary Conference Order was issued requiring the conclusion of discovery by September 21, 2024. The Court presided over various compliance conferences and issued its Trial Readiness Order on October 2, 2024, certifying that all discovery was complete. On October 15, 2024, Plaintiff served and filed its Note of Issue and this motion ensued.

THE COMPLAINT'S ALLEGATIONS

In its Complaint, Plaintiff alleges that Defendant acted negligently, and in violation of New York Public Health Law, in failing to proffer the requisite, statutorily mandated standard of care for Mitchell, leading to, among other allegations, a fall and consequent injury, a COVID-19 infection and, ultimately, Mitchell's wrongful death (Complaint at ¶¶ 1-115). In particular, Plaintiff alleges that Defendant failed to provide adequate care, staffing, and infection control measures, violating state and federal regulations, including New York Public Health Law ("NYPHL") §§ 2801-d and 2803-c, and federal OBRA regulations (*id.* at ¶¶ 116-132). Plaintiff asserts that Defendant's facility was cited for multiple violations, including improper COVID-19 reporting and failure to maintain adequate infection control protocols (*id.* at ¶¶ 106-108). Plaintiff also asserts that, apart from the infection control procedures, Defendant was negligent in failing to provide Mitchell with proper care, giving as an example an undated incident where Mitchell "was neglected in such a manner that she suffered a severe fall [on September 8, 2019] which left her

with a fractured hip, causing her extreme conscious pain and suffering" (the "Underlying Fall") (*id.* at ¶¶ 114-115).[2] Moreover, prior to the pandemic, Plaintiff alleges Defendant failed to prepare for foreseeable infectious disease outbreaks, including inadequate staffing, lack of proper policies, and failure to separate residents effectively (*id.* at ¶¶ 140-145).

Plaintiff alleges eight separate Causes of Action. For its First Cause of Action pursuant to NYPHL §§ 2801-d and 2803-c, Plaintiff alleges that Defendant had statutorily mandated responsibilities to provide Mitchell with the rights inherently granted to New York State nursing home residents under NYPHL §§ 2801-d and 2803-c (*id.* at ¶¶ 116-118). Specifically, Plaintiff alleges that, at all relevant times, Defendant and its agents, employees, etc., violated these statutes and deprived Mitchell of her rights thereof by failing to provide the requisite standard of care – the violations of which constitute a proximate cause of Mitchell's injuries, conscious pain and suffering, and death (*id.* at ¶¶ 119-132). For the Second Cause of Action for Negligence Pre-COVID Pandemic, Plaintiff alleges that Defendant failed to meet its requisite duties under the Public Health Law through its failure to take preventative and protective measures from infectious diseases such as COVID-19 (*id.* at ¶¶ 133-148). For the Third Cause of Action for Negligence following the Beginning of the COVID-19 Pandemic, Plaintiff asserts that Defendant failed to meet the requisite standard of care, and negligently breached its duties by failing to implement proper COVID-19 isolation, infection control, and prevention procedures throughout the Facility (*id.* at ¶¶ 149-165). For the Fourth Cause of Action for negligence per se, Plaintiff alleges that Defendant violated federal and state regulations, including 42 C.F.R. § 483, which mandates adequate staffing and infection control, leading to Mitchell's injuries and death (*id.* at ¶¶ 166-176). For the Fifth Cause of Action alleging conscious pain and suffering, Plaintiff claims Mitchell suffered severe pain and suffering due to Defendant's negligence, including respiratory distress, pneumonia, and hypoxic respiratory failure, ultimately leading to her death (*id.* at ¶¶ 177-180). For the Sixth Cause of Action for wrongful death, Plaintiff claims Defendant's failure to protect residents from COVID-19 led to Mitchell's death, causing pecuniary damages to her surviving next of kin, including funeral expenses and loss of support (*id.* at ¶¶ 181-189). For the Seventh Cause of Action for gross negligence Plaintiff states Defendant acted with reckless disregard for resident safety, including failing to implement infection control measures, hiring insufficient staff, and knowingly exposing residents to COVID-19 (*id.* at ¶¶ 190-204). Finally, for the Eighth Cause of Action for nursing home malpractice, Plaintiff alleges that Defendant failed to meet the standard of care in treating Mitchell, including inadequate staffing, failure to monitor her condition, and delayed treatment, leading to her death (*id.* at ¶¶ 205-221).

[2] While a date is not provided for the Underlying Fall in the Verified Complaint, the parties agree that the fall occurred on September 8, 2019.

THE PARTIES' CONTENTIONS

A. Defendant Yonkers Gardens' Contentions in Support of Its Motion

In support of its motion, Yonkers Gardens submits: (1) an affirmation of Brandon D. Lynn, Esq. dated November 28, 2024 (NYSCEF Doc. No. 51 [the "Lynn Aff."]) with accompanying exhibits (NYSCEF Doc. Nos. 54-73), including the expert affirmation[3] of Diane Yastrub (NYSCEF Doc. No. 54 [the "Yastrub Affirmation"]) and the affirmation[4] of Yonkers Gardens Center's comptroller, Robert Schuck (NYSCEF Doc. No. 72 [the "Schuck Aff."]); (2) a memorandum of law dated November 28, 2024 (NYSCEF Doc. No. 52 [the "Def's Mem."]); and (3) a statement of material facts (NYSCEF Doc. No. 53 [the "Def's SOF"]).

The purpose of the Lynn Affirmation is to annex copies of, inter alia, the pleadings in this action, certain statutes and unpublished cases cited in Defendant's memorandum of law, and other documentary evidence (*see* Lynn Aff. and attached exhibits).

Diane J. Yastrub ("Yastrub") submits her qualifications in the practice of medicine and nursing (Yastrub Aff. at ¶¶ 1-7), and explains that she bases her opinion on a review of Mitchell's Death Certificate, Plaintiff's Verified Bill of Particulars, Defendant's Nursing and Rehabilitation records, and records from Calvary Hospital (*id.* at ¶ 8). Yastrub submits her conclusion, made with "a reasonable degree of nursing certainty, that Defendants did not deviate from the appropriate standard of nursing care in its treatment of Ms. Mitchell and that the care and treatment received by Ms. Mitchell at Defendants' facility (or any claimed lack of such) was not the proximate cause of any injuries that Ms. Mitchell sustained as alleged in the Bill of Particulars," and, moreover, "that Defendants provided Ms. Mitchell with appropriate care and treatment at all times, which met good and accepted standards of nursing practice" (*id.* at ¶¶ 10-11). Following a factual recount of Mitchell's initial admission and treatment at the Facility, and Plaintiff's claim of negligence leading to Mitchell falling, Yastrub iterates her opinion: (1) that the care and treatment rendered to Mitchell was within good and accepted standards of nursing home care; (2) that the facility exercised all care which was reasonably necessary to prevent and limit the deprivation of Mitchell's right and benefit to be free from accidents, pursuant to NYPHL; and (3) that, consequently, she "categorically" disagrees with the allegations that Defendant failed to appropriately assess Mitchell, develop a care plan for her, implement interventions, retain a sufficient level of staff to monitor and deliver care to Mitchell, or otherwise fail to treat and care for Mitchell within the good and acceptable standards of nursing home care (*id.* at ¶¶ 12-18).

Yastrub asserts that "[t]here is no evidence that Ms. Mitchell's care was mismanaged or deteriorated under the care of the staff at Yonkers Gardens. Her 3 year residency was at all times within good and accepted standards of nursing home care" (*id.* at ¶ 19). Yastrub asserts that, in

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[3] Although the document is labeled an affidavit, the document is actually an expert affirmation.
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fact, the documentation she reviewed demonstrates that "[t]he clinical team at Yonkers Gardens anticipated and addressed Ms. Mitchell's risk of falls, which was thoroughly identified upon her admission using the Briggs Fall Risk Evaluation, as per standards of care and the facility protocol. Ms. Mitchell scored as a high risk and interventions were introduced" (*id.* at ¶¶ 19-20). Yastrub disputes any claim that Defendants acted with willful or reckless disregard of Mitchell's rights, as she "was appropriately assessed, care plans to address her physical and mental capabilities were implemented and updated, and the incident on 9/8/2019 was an unfortunate accident" (*id.* at ¶ 24). Yastrub summarizes her findings, stating: (1) it is her opinion, to a reasonable degree of nursing certainty, "that Defendant complied fully with the standard of care regarding Ms. Mitchell"; (2) that "Defendants provided a team approach to physical, mental, and social well-being"; (3) that "nursing, medical, dietary, social work, recreation, physical, and occupation therapy provided a comprehensive care plan which was updated as needed"; and (4) that the risks made evident by Mitchell's history "were assessed, and interventions were implemented to prevent further falls and to improve Ms. Mitchell's ambulation" (*id.* at ¶ 26).

Yastrub provides a factual summary based on her review of the relevant medical records, stating: (1) Mitchell complained of pain to her right new after the Underlying Fall on September 8, 2019 and, following x-ray imagery showing "proximal femoral subcapital fracture and hip and knee arthritis" Mitchell was transferred to Calvary Hospital at 9:46 a.m.; (2) Mitchell was readmitted to Yonkers Gardens Center's Facility on September 12, 2019 at 7:00 p.m.; (3) surgery was not advised due to Mitchell's cardiac status, and she was instructed to remain on bed rest for 4-8 weeks with follow up orthopedic examination held within 14 days; (4) Mitchell was noted to be noncompliant with safety measures, including attempts to ambulate and jump after her injuries; (5) after speaking with Daoud, a palliative care referral was made on September 19, 2019; (6) Mitchell was referred to hospice care on October 17, 2019; and (7) Mitchell died due to cardiopulmonary arrest on May 28, 2020 at 1:28 p.m. Yastrub states her opinion that this was "a natural death, [which] had no relevancy to her right hip fracture which occurred over 8 months prior" (*id.* at ¶¶ 27-32). Yastrub argues: (1) that Defendant did not violate any Federal or State regulations; (2) that all appropriate and necessary measures to prevent falls or promote ambulation were put in place given Mitchell's fall risk; (3) that there is nothing in the record to indicate any delay by Defendant's staff in treating Mitchell after her fall, nor delay in contacting her family; (4) that the care and treatment rendered to Mitchell at the Facility was within good and accepted standards of nursing home care at all times; and (5) that there is no evidence on record indicating any negligence, improper treatment or lack of allocation of resources (*id.* at ¶¶ 33-37).

Robert Schuck affirms that he is Defendant's Comptroller and that the information he provides is based upon his own personal knowledge (Schuck Aff. at ¶ 1). He states that Yonkers Gardens Center "endeavored to operate to the best of its ability in accordance with the directives and information provided by the Federal Government [specifically the CDC] and the State of New York [specifically the New York State Department of Health]" as they were made known to the Facility's management (*id.* at ¶¶ 2-3). Schuck claims the following allegations in the Complaint are false, namely that Defendant: (1) failed to initiate appropriate infection control protocols; (2)

failed to maintain appropriate staffing levels; (3) failed to procure sufficient PPE; (4) failed to isolate residents suspected to be infected with COVID-19; (5) failed to appropriately to screen residents for the virus; and (6) negligently accepted admissions and readmissions of residents who symptomatic and positively-testing for COVID-19 (*id.* at ¶ 4). Schuck asserts that Defendant did not negligently nor willfully fail in ensuring appropriate levels of staff, and that any staffing shortages in April 2020 – to the extent that any such shortages existed – were "beyond the control of the administration at Yonkers Gardens" (*id.* at ¶ 5). Further, "whe[n] employees left their jobs or were forced to take leaves of absence, it was extremely difficult to replace them, despite the best efforts of the [F]acility administrators" (*id.*). Schuck states the allegation that "the Facility negligently and/or willfully failed to procure an appropriate supply [of PPE]" is similarly false as "[d]uring the time-period relevant to the Complaint, Yonkers Gardens was able to procure and maintain sufficient levels of PPE for staff and residents" (*id.* at ¶ 6). Schuck further asserts that the claims that Defendant failed to effectuate its isolation and infection control procedures are false, as residents known or suspected to be infected with COVID-19 were isolated from the general population of the facility "and received only one-on-one contact," with the Facility "also institut[ing] droplet precautions in accordance with the directives and information available to the [F]acility at the time and endeavored to comply with infection control measures utilizing the resources and personnel available at the [F]acility" (*id.* at ¶ 7). Last, Schuck disputes the characterization of the Facility's admission or readmission of COVID-19 positive residents as set forth in the Complaint, stating that "Yonkers Gardens was operating under a DOH directive, issued on March 25, 2020, which explicitly prohibited the facility to deny admission or re-admission of residents based on a confirmed or suspected diagnosis of COVID-19. The directive also prohibited nursing homes from requiring a hospitalized resident who was determined to medically stable to even be tested for COVID-19 prior to admission or re-admission" (*id.* at ¶ 8).

For its legal argument Yonkers Gardens Center argues that the Complaint should be dismissed with prejudice under CPLR § 3211(a)(7) as it is immune from liability regarding the causes of action asserted by Plaintiff (Def's Mem. at ¶ 7). Yonkers Gardens cites Executive Order 202.10, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency" ("EO 202.10"), which provided, in pertinent part, that "'all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional'" (*id.* at ¶ 8, *quoting* EO 202.10). Yonkers Gardens explains that the New York State Legislature enacted the Emergency or Disaster Treatment Protection Act on April 6, 2020, codified as NYPHL §§ 3080, 3081, and 3082 and in effect from March 7, 2020 through April 6, 2021 (*id.* at ¶ 9). It asserts that it is "immune from liability in this action because the allegations pertain to the 'diagnosis, prevention, or treatment of COVID-19' and/or 'the assessment of care of an individual with a confirmed or suspected case of COVID-19'" (*id.* at ¶ 12 [citations omitted]). It explains that it was providing health care in accordance with the applicable law and the COVID-

19 emergency rules and that any of the purported acts or omissions which form the basis of Plaintiff's lawsuit "would have occurred 'in the course of arranging for or providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives'" (*id.* at ¶ 13 [citations omitted]). Yonkers Gardens Center relies upon the Second Department cases of *Mera v New York City Health & Hosps. Corp.* (220 AD3d 668 [2d Dept 2023]) and *Martinez v NYC Health & Hosps. Corp.* (223 AD3d 731 [2d Dept 2024]) (*id.* at ¶ 14). *Mera* and *Martinez* both found that the EDTPA provided the defendants with immunity from lawsuits which were, purportedly, based upon nearly identical fact patterns to this case (*id.* at ¶¶ 14-15). Yonkers Gardens Center claims that the Schuck Affirmation demonstrates Yonkers Gardens Center complied with the applicable, relevant laws and guidelines in relation to the COVID-19 pandemic and that it acted entirely in good faith in complying with these directives and caring for its residents "while enduring the strain and hardship placed on healthcare workers and facilities by the pandemic" (*id.* at ¶ 16). Accordingly, Yonkers Gardens Center states that it is in the same position as the defendants in *Mera* and *Martinez* and, like the defendants in those cases, it has established its immunity from liability in Plaintiff's action and the underlying Complaint should be dismissed (*id.* at ¶¶ 17-18).

Yonkers Gardens Center states that while the EDTPA does provide exceptions to its grant of immunity, Plaintiff has failed to demonstrate this case fits within one of those exceptions (*id.* at ¶ 19). It asserts that the EDTPA provides exceptions to immunity in cases where "'harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm'" (*id.* [citations omitted]). Defendant states that, as explained in the Schuck Affirmation, the allegations in the underlying Complaint are "general and speculative," and thus do not fit the requisite pleading requirements of the gross negligence exception to the EDTPA (*id.* at ¶¶ 20-21). According to Defendant, the Schuck Affirmation demonstrates that the claims are speculative, non-specific and relate to "treatment rendered to the Decedent during the onset of the COVID-19 pandemic" and makes clear "that the Defendant facility endeavored to operate within the applicable state and federal directives and rules, as they were known at the time" (*id.* at ¶ 21). Defendant further argues that the Schuck Affirmation demonstrates that the Facility "did not negligently or willfully fail to ensure sufficient staffing levels during the beginning of the pandemic" – staff was forced to abstain from work when they contracted COVID-19 and that these staffing problems "were beyond the control of the administration at Yonkers Garden and it was virtually impossible to hire additional healthcare workers at the time" (*id.* at ¶ 22). Defendant also uses the Schuck Affirmation to dispute any claims that it did not maintain a proper level of PPE or that it "failed to utilize appropriate isolation and infection control procedures" as "[w]hen residents were suspected or known to have contracted COVID-19, those residents were isolated from the general population" and Defendant instituted "droplet precautions in accordance with the directives and information available to the [F]acility

at the time and also endeavored to comply with infection control measures with limited resources and staff" particularly given the unavailability of COVID testing kits and that any testing had to be conducted through the Department of Health (*id.* at ¶¶ 23-24). Finally, Defendant points out that the Schuck Affirmation disputes that the Facility negligently accepted new residents or readmitted residents who were symptomatic or known to be infected with COVID-19, particularly in light of the Department of Health's Advisory issued on March 25, 2020 "which mandated that no nursing home in the state could deny admission or re-admission to a resident based upon a confirmed or suspected COVID-19 infection" (*id.* at ¶ 25).

Yonkers Gardens Center argues that based upon the Schuck Affirmation and the directives, instructions, statutes and regulations of New York State, it "comported to the standards set forth in the EDTPA and is immune from liability in this matter," and that Plaintiff may only overcome this immunity through a showing that Yonkers Gardens Center acted outside applicable law or in contravention of a COVID-19 emergency rule, or that the treatment it rendered to Mitchell was not impacted by the COVID-19 pandemic or the consequent response (*id.* at ¶¶ 26-27). Yonkers Gardens Center asserts that this position has been upheld by "five appellate rulings spanning all four Departments pertaining to the scope and applicability of the EDTPA" (*id.* at ¶ 28).

Yonkers Gardens Center next states that the claims regarding negligence should be dismissed. It asserts that, in violation of Second Department precedent, Plaintiff asserted a claim for negligence, based on the alleged fall at the facility, through a Bill of Particulars on August 7, 2023, which was not addressed in the operative Complaint (*id.* at ¶¶ 29-31). It submits that, "because Plaintiff only alleged wrongful death in their complaint," they may not maintain a cause of action based on negligence (*id.* at ¶ 31).[5] It explains that, if the Bill of Particulars was considered to be properly pled, the cause of action for negligence would nevertheless fail as the underlying allegations "are too vague and nonspecific" – specifically, Plaintiff's Bill of Particulars "fails to include the date of the alleged fall, the location of the alleged fall, or any other particular facts which would properly put Defendant and the court on notice of the allegations" (*id.* at ¶¶ 33-34).

Alternatively, Defendant argues that if this Court elects not to dismiss the Complaint under CPLR 3211(a)(7), this Court should grant it summary judgment under CPLR 3212, dismissing the Complaint in its entirety, as the Facility "did not deviate from the good and accepted standards of care during decedent's residency" (*id.* at ¶ 35). Yonkers Gardens Center contends that liability in a negligence action based on the acts of a medical or nursing facility must contain both a deviation from accepted practice and an act or omission which is shown to be the proximate cause, or a substantial factor, in bringing about the underlying injury (*id.* at ¶ 36). Yonkers Gardens Center argues that it should be granted summary judgment because the Yastrub Affirmation "opines to a reasonable degree of nursing certainty that Defendant did not depart from the good and accepted medical and nursing standards in their care of decedent" (*id.* at ¶¶ 37-38). It argues that, like the

[5] As noted by Plaintiff in opposition, and as is evident in the causes of action of the Complaint, wrongful death was only one of the eight causes of action Plaintiff asserted in the Complaint.

defendant in the Second Department case of *Ciccotto v Fulton Commons Care Center, Inc.* (149 AD3d 1030 [2d Dept 2017]), the Facility did not depart from any accepted standard of care, and, in fact, "the decedent in this case was properly assessed for fall risk, provided with an appropriate care plan, and had all proper interventions in place" (*id.* at ¶¶ 39-40). After repeating Yastrub's expert opinion (*id.* at ¶¶ 41-55), Yonkers Garden Center asserts that her affirmation demonstrates that Mitchell's actions were the sole proximate cause of her alleged injuries (*id.* at ¶ 56).

B. Plaintiff's Contentions in Opposition

In opposition to Defendant's motion, Plaintiff submits an affirmation of Tia Garcia, Esq. dated January 20, 2025 (NYSCEF Doc. No. 75 ["Garcia Aff."]) with accompanying exhibits (*see* NYSCEF Doc. Nos. 78-127), including the expert affirmation[6] of Lorraine Blades, R.N. (NYSCEF Doc. No. 78 [the "Blades Aff."]); (2) a memorandum of law in opposition (NYSCEF Doc. No. 76 ["Plf's Opp. Mem."]); and (3) a counter-statement of material facts (NYSCEF Doc. No. 78). The purpose of counsel's affirmation is to briefly summarize Plaintiff's various legal arguments as well as to submit various exhibits in opposition (*see generally* Garcia Aff.)

In her Affirmation, Lorraine Blades ("Blades") summarizes her experience and the materials on which she relied in tendering her expert opinion, which were the Verified Bill of Particulars, the medical records maintained by Defendant, medical records from Calvary Hospital, medical records from Mitchell's hospice care, Mitchell's death certificate, the policies and procedures of the Facility, the transcripts of deposition testimony taken for this case, and the Yastrub Affirmation (Blades Aff. at ¶¶ 1-6). After briefly describing the Underlying Fall and the subsequent x-ray imagery taken of Mitchell, Blades states that Mitchell's health significantly declined after her injuries sustained on September 8, 2019 up until her death on May 28, 2020 (*id.* at ¶¶ 7-10). Blades states that the injuries were consistent with a fall, which is supported by the increased rate of falls sustained by Mitchell in the six months prior and the purported "lack of adequate staff and preventative measures put in place to prevent further incidents of falls" (*id.* at ¶ 11). Blades provides her opinion, with a reasonable degree of nursing certainty: (1) that Mitchell's injuries, including a right femoral neck fracture, "were caused by the Defendant's negligence, through their employees and staff, in the manner in which they evaluated, cared, and treated Ms. Mitchell . . . Ms. Mitchell's right femoral neck fracture was preventable, had the employees and staff used the proper and reasonable fall risk assessment and prevention measures"; (2) "Defendant failed to exercise all care reasonably necessary to prevent and limit the deprivation of Ms. Mitchell's right and benefit to be free from accidents, as required by the New York Public Health Law . . . [and] failed to retain and train sufficient staff to monitor and deliver care, or otherwise care for Ms. Mitchell within good and acceptable standards of nursing home care"; and (3) "Ms. Mitchell's injuries, most significantly the right femoral neck fracture, were a result of the departure from accepted standards of care" (*id.* at ¶¶ 12-14).

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[6] Although the document is labeled an affidavit, the document is actually an expert affirmation

As its legal argument, Plaintiff first explains the applicable standard of law in reviewing a motion to dismiss under CPLR 3211(a)(7) (Plf's Opp. Mem. at ¶¶ 1-2). Plaintiff submits that "it is unclear what relief Defendant is requesting" as it argues for summary judgment in a motion to dismiss, but asserts that, regardless of whether Yonkers Gardens Center seeks to dismiss a single cause of action or the underlying Complaint in its entirety, "its request fails to provide support and should be denied" (*id.* at ¶ 3). Plaintiff notes that the substance of Defendant's current motion and its requested relief are "almost entirely identical to [the] prior application for the same relief" (*id.* at ¶ 4). Plaintiff asserts that the submission of the "self-serving" Schuck Affirmation fails to provide sufficient support and, accordingly, the "claim of immunity under the EDTPA . . . should be denied" (*id.*).

Plaintiff argues that Defendant's assertion – that EDTPA applicability is implied in situations such as this – is "a mischaracterization of the law" as numerous cases make clear that a defendant is required to affirmatively demonstrate how the EDTPA immunizes it from liability in an action (*id.* at ¶¶ 5-6). Plaintiff states that the Schuck Affirmation is self-serving, and notes that affirmations authored by defendants "will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action" (*id.* at ¶ 7). Plaintiff argues that the Schuck Affirmation does not warrant dismissal of the Complaint "as Mr. Schuck fails to provide any context to what his employment duties entail, whether or not he was working at Yonkers at the time Ms. Mitchell was there, and whether or not he has an independent recollection of Ms. Mitchell," and that the Schuck Affirmation cannot be considered in support of Defendant's motion absent such specific detail (*id.*). Plaintiff notes Schuck's position as Defendant's Comptroller, a profession typically involving financial organizing without any other proffered demonstration of his relevant work duties supports that "Mr. Schuck lacks the requisite knowledge and skillset to make any claim about whether or [not] Yonkers was acting [properly for the purposes of this motion]" (*id.* at ¶ 8). Plaintiff further argues that even if the proper foundation for the Schuck Affirmation had been laid, the information submitted would nevertheless be insufficient "because the claims [therein] are vague, broad, and imprecise" (*id.* at ¶ 9). Plaintiff states that, while Schuck claims that Yonkers Gardens Center performed to its best ability, he "refuses to further detail how Yonkers cared for its residents, especially what care it gave to Allie Mitchell, specifically" and "fails to point to any personalized incident where the coronavirus pandemic, or the moving Defendant's response thereto, had an impact on any aspect of Ms. Mitchell's treatment or care" (*id.* at ¶¶ 9-10). Further, Plaintiff claims the Schuck Affirmation fails to establish when Yonkers Gardens first became aware of the presence of COVID-19 at the Facility, the specific measures taken thereafter, the policy for ascertaining effectuation of those measures, and other various, specific details regarding the impact of COVID-19, and the response thereto, its operations, while also failing to address the "multiple violations" it purportedly received regarding its COVID-19 response (*id.* at ¶ 11). Finally, Plaintiff claims Defendant has failed to indicate how its provision of health care services was made in good faith beyond stating that it was, and that this failure "is critical considering the OAG Report's finding that the broad immunity afforded by Article 30-D had the unintended effect of incentivizing for-profit nursing

homes to misappropriate public funding for personal gains, rather than investing in additional PPE, staffing, and other COVID-preventive measures or better care for patients" (*id.* at ¶ 12).

Next, Plaintiff argues its claims of gross negligence and recklessness are not subject to any statutory immunity, noting that "the issue of gross negligence is [generally] a question of fact to be decided by the trier of fact" (*id.* at ¶ 14). Plaintiff states that the underlying Complaint provides the required elements for this cause of action ("*i.e.*, actions or inactions which amount to 'intentional wrongdoing or evince a reckless indifference to the rights of others'") (*id.* at ¶ 15 [citations omitted]). Plaintiff asserts Defendant acted with gross negligence and/or recklessness in its failure to implement and execute proper COVID-19 infection and prevention policies, its failure to properly train staff, and its failure to maintain equipment (*id.*). Plaintiff submits that "[w]hen a skilled nursing facility does not adequately and/or timely implement infection control procedures and prevention safeguards, it is foreseeable that residents of the facility will suffer from serious medical complications and death when there is an outbreak of a highly contagious and communicable respiratory illness" (*id.*). Plaintiff disputes Yonkers Gardens Center's claim that the cases of *Mera* and *Martinez* are analogous to the facts in this case because in those cases, the complainants did not allege any exception to the EDTPA's immunity exceptions, and accordingly the exceptions to the EDTPA were not analyzed in those cases (*id.* at ¶ 16). Instead, Plaintiff relies upon *Espinal v Jackson Heights Care Center LLC* (Ind. No. 714216/2022 [Sup Ct Queens County 2022]), where the trial court denied a motion to dismiss the underlying complaint because the defendant's proffered affidavits "failed to conclusively establish 'plaintiff's alleged facts regarding gross negligence were not facts at all'" (*id.* at ¶¶ 17-18 [citations omitted]). Plaintiff asserts that if this Court should find Defendant has met the requirements for immunity under the EDTPA, that the claims for gross negligence and reckless conduct would serve as a proper exception thereunder (*id.* at ¶ 19).

Next, Plaintiff claims that Yonkers Gardens Center's characterization of the underlying Complaint is false. Plaintiff explains that the Complaint clearly demonstrates eight causes of action, with one claim – the sixth – being for wrongful death (*id.* at ¶ 20). Plaintiff next states that the motion is statutorily deficient, as CPLR 3013 "does not even provide a proper foundation to dismiss a complaint" and, therefore, "Defendant fails to make a cognizable request and its motion should be denied accordingly" (*id.*). Plaintiff asserts that, had Yonkers Gardens Center made a proper request for relief, it was nevertheless placed on adequate notice of the claims through the underlying Complaint and Plaintiff's Bill of Particulars (*id.* at ¶ 21). Plaintiff explains that New York follows the "notice pleading" doctrine, and, accordingly, "specific detailed facts are not required in a complaint" (*id.* at ¶ 22). Plaintiff asserts that CPLR 3013 only requires that the statements contained in pleadings are sufficiently particular to give courts and other parties "'notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense'" (*id.*, *quoting* CPLR 3013). Plaintiff disputes Defendant's assertion that it did not mention Mitchell's fall in the Complaint by relying on paragraph 115, which states that the decedent "'was neglected in such a manner that she suffered a severe fall which left her with a fractured hip, causing her extreme conscious pain

and suffering'" (*id.* at ¶ 24 [citations omitted]). Plaintiff claims it also provided sufficient, specific details in its Bill of Particulars, noting the underlying fall is mentioned twelve times throughout the document and that "Defendant would have been on notice of Plaintiff's allegations related to a fall" "[a]fter a brief reading of the bill of particulars" (*id.* at ¶ 25). Plaintiff states that its Bill of Particulars was served on March 14, 2024, and Defendant failed to proffer any objection nor seek a supplemental bill of particulars (*id.* at ¶ 26). Plaintiff states that discovery continued and, at depositions, the underlying fall was specifically discussed (*id.*). Plaintiff asserts that "Defendant had ample time to make known its concern about the fall allegations sooner, but decided to voice its erroneous concern after the completion of discovery through the present motion to dismiss" (*id.*).

In response to the branch of Defendant's motion seeking summary judgment, Plaintiff argues that Defendant has not properly moved for summary judgment and, even it had, it nevertheless failed to meet its requisite burden under the applicable standard (*id.* at ¶¶ 28-29). Plaintiff notes that: (1) the moving party in a motion for summary judgment carries the burden of setting forth facts, supported by evidence on record, demonstrating their entitlement to a judgment as a matter of law; (2) that, prior to considering such a motion, the court must determine whether the moving party presented a prima facie entitlement to summary judgment; (3) that if the moving party fails to make this initial prima facie demonstration, the motion must be dismissed, even where the opposition is "worthless"; (4) the non-moving party is entitled to any and every favorable inference which may be drawn from the submissions before the court; (5) if there is any existence of an issue of fact that is even arguable, the summary judgment motion must be denied; (6) the nonmoving party must do more than simply point to gaps in the plaintiff's proof; and (7) a motion for summary judgment by a defendant must be denied where the prima facie case relies upon expert opinions stating, in conclusory terms, that Defendant did not deviate from the proper standard of care (*id.* at ¶¶ 30-39). Plaintiff argues that Yonkers Gardens Center has failed to meet this standard and its motion for summary judgment must be denied (*id.* at ¶ 40).

According to Plaintiff, Defendant's motion presents the Court with genuine issues of material fact which cannot be resolved on summary judgment (*id.* at ¶¶ 41-44). In support, Plaintiff contends the Yastrub Affirmation "claims the incident was an 'unfortunate accident' without providing any further detail or explanation for how the injuries [were] sustained" (*id.* at ¶ 45). In addition, Plaintiff relies upon Blades Affirmation, and Plaintiff submits this "is enough to create a material issue of fact" as Blades avers that, based on her review of the medical records, Plaintiff was documented to have fallen five separate times in 2019 yet in its expert affirmation, Yonkers Garden Center only acknowledges the fall on September 8, 2019 and that "[t]hese statements alone are enough to create a material issue of fact" (*id.* at ¶¶ 46-48).

Finally, Plaintiff argues that Defendant did, in fact, deviate from the applicable standard of care. Plaintiff claims that the representations otherwise, contained in the Yastrub Affirmation, are insufficient as the affirmation "is deficient and devoid of any specific detail that could support Defendant's claim" (*id.* at ¶ 49). Plaintiff asserts that Yastrub's opinions on the care and treatment

rendered to Mitchell "are vague and overbroad, lacking any specific detail that would proffer a sliver of proof to show Defendant's [sic] acted in accordance with good standards" (*id.* at ¶ 50). Plaintiff asserts that the Yastrub Affirmation contains "scattered" and "baseless" statements regarding the standard of care with which Defendant treated Mitchell (*id.* at ¶ 51). Plaintiff further argues that the Yastrub Affirmation lacks evidentiary support and "fails to cite to anything in the record that proves Defendant acted in a way that was aligned with the standard of care," in contrast with the Blades Affirmation which "provides sufficient evidence to show that Defendant[] did not act in alignment with the standard of care" (*id.* at ¶¶ 52-53). Specifically, the Blades Affirmation demonstrates the affiant's opinion that the underlying injuries were caused by the negligence of Yonkers Garden Center, along with its employees and staff, in its treatment of Mitchell, and that those underlying injuries would have been preventable with proper risk assessment and prevention measures (*id.* at ¶ 54). Plaintiff concludes by arguing that the proof offered by the parties has created a triable issue of material act which prevents the grant of a motion for summary judgment (*id.* at ¶ 55).

STANDARD OF REVIEW

The legal standards to be applied in evaluating a motion for summary judgment pursuant to CPLR 3212[7] are well-settled. "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this [prima facie] burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "On a motion for summary judgment, facts must be viewed 'in

[7] While Defendant moves pursuant to CPLR 3211(a)(7) and CPLR 3212, the Court shall limit its discussion to the branch which seeks summary judgment as both sides have submitted evidence in support of and in opposition to the motion. In addition, Defendant already moved to dismiss pursuant to CPLR 3211(a)(7), which was denied by Justice Lubell. To the extent Defendant is arguing that the Complaint fails to state a cause of action for negligence based on Mitchell's falls at the Facility, while there is only a single allegation concerning a fall causing Mitchell to fracture her hip (NYSCEF Doc. No. 1 at ¶ 115), there are causes of action alleging Defendant's violation of NYPHL § 2801-d (which has been found to support a claim based on a resident's falls (see *Currie v Oneida Health Sys., Inc.*, 222 AD3d 1284 [3d Dept 2023]) as well as Defendant's negligence, malpractice and professional negligence. Defendant's alleged negligence concerning Mitchell's falls was further amplified in the Bill of Particulars (NYSCEF Doc. No. 57 at ¶¶ 4, 5, 9). Defendant and Plaintiff were afforded ample discovery on this issue (see NYSCEF Doc. Nos. 56, 119, 125, 126) and Defendant cannot claim that it is surprised or prejudiced by this claim. Accordingly, to the extent Defendant is moving to dismiss Plaintiff's negligence claim arising from Mitchell's falls pursuant to CPLR 3211(a)(7), this branch of Defendant's motion shall be denied.

the light most favorable to the non-moving party'" (*Vega*, 18 NY3d at 503, *quoting Ortiz v Varsity Holdings, LLC,* 18 NY3d 335, 339 [2011]).

Accordingly, "summary judgment is appropriate 'where only one conclusion may be drawn from the established facts'" (*Jones v St. Rita's R.C. Church*, 187 AD3d 727, 729 [2d Dept 2020], *quoting Derdiarian v Felix Contr. Corp.,* 51 NY2d 308, 315 [1980]), or where a cause of action and/or the type of damages sought "fails as a matter of law" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008]; *see also M.V.B. Collision, Inc. v Allstate Ins. Co.*, 187 AD3d 881 [2d Dept 2020]).

DISCUSSION

A. Defendant is Immune from Liability Under the EDTPA for the Causes of Action Based on COVID-19 Policies

The EDTPA was enacted on April 3, 2020 in response to the COVID-19 pandemic, and it was retroactively applied to March 7, 2020 (*see* NYPHL Article 30-D, §§ 3080-3082). The stated purpose of the statute was to "broadly protect[] the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency" (NYPHL § 3080). The EDTPA confers broad immunity upon providers who rendered "health care services" during the COVID-19 pandemic. Specifically, EDTPA provides:

> [A]ny health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services, if:
>
> (a) the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law;
>
> (b) the act or omission occurs in the course of arranging for or providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives; and

> (c) the health care facility or health care professional is arranging for or providing health care services in good faith (NYPHL § 3082[1]).

Additionally, Section 3081(5) defines "health care services" as the following:

> [S]ervices provided by a health care facility or a health care professional, regardless of the location where those services are provided, that relate to:
>
> (a) the diagnosis, prevention, or treatment of COVID-19;
>
> (b) the assessment or care of an individual with a confirmed or suspected case of COVID-19; or
>
> (c) the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration (NYPHL § 3081[5]).

Accordingly, the EDTPA applies where: (1) the defendant is a "health care professional" or "facility"; (2) the defendant was arranging for or providing "health care services"; (3) the services were provided in accordance with law or a COVID-19 emergency rule; (4) the services were impacted by the defendant's response to COVID-19; and (5) the services were rendered in good faith and did not amount to gross negligence or recklessness.

Here, all five elements have been met, requiring the dismissal of Plaintiff's Complaint. First, the EDTPA defines "health care facility" to include "a hospital, nursing home or other facility licensed or authorized to provide health care services" (NYPHL § 3081[3]), such that Defendant, which owned and operated the Facility, is a "health care facility" as contemplated by the EDTPA. Second, because the EDTPA broadly applies to "arranging for" or providing services that "relate to," inter alia, "the diagnosis, prevention, or treatment of COVID-19" (NYPHL § 3081[5]), Defendant in its operation of the Facility and its conduct in seeking to prevent and treat COVID-19 were arranging for or providing "health care services" in connection with the EDTPA. With respect to the related third and fourth factors, both Plaintiff's allegations in his Complaint and Defendant's submissions on this motion demonstrate that Defendant was providing services to patients, including Mitchell, in accordance with law as a licensed nursing home, and that such services were impacted by Defendant's response to the COVID-19 pandemic. Fifth and finally, the Complaint does not include any allegation that Defendant failed to render its services in good faith, and Defendant have furnished the Schuck Affirmation, in which Schuck affirms that Defendant rendered its services in good faith.

Accordingly, a defendant is entitled to immunity pursuant to the EDTPA, on a motion for summary judgment, where it establishes that: "(1) 'the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, (2) the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives, and (3) the services were arranged or provided in good faith'" (*Campbell v Dumont Operating, LLC*, 84 Misc 3d 1238[A], 2024 NY Slip Op 51633[U] at * 5 [Sup Ct, Westchester County 2024], *quoting Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 [2d Dept 2024]; *see also Davis v Arya*, 2025 NY Slip Op 30457[U] [Sup Ct, Kings County 2025]; *Highsmith v Woodhull Med. Ctr.*, 83 Misc 3d 1203[A], 2024 NY Slip Op 50646[U] [Sup Ct, Kings County 2024]; *Figueroa v Nayak*, 2024 NY Slip Op 30871[U] [Sup Ct, New York County 2024]). There are exceptions to the protection of the EDTPA, namely "where an act or omission constituted willful or intention[al] criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm" (*Campbell,* 84 Misc 3d 1238[A] at *5). Here, Defendant has established, through its records and the Schuck and Yastrub Affirmations, that the causes of action alleging Defendant's negligence in failing to prevent Mitchell from contracting COVID-19, and the alleged negligence in providing related services, should be dismissed pursuant to the immunity provisions of the EDTPA (*see Campbell*, 84 Misc 3d 1238[A]; *see also Davis*, 2025 NY Slip Op 30457[U]; *DeJesus v Montefiore Med. Ctr.*, 83 Misc 3d 1282[A], 2024 NY Slip Op 51142[U] [Sup Ct, Bronx County 2024]). From March 7, 2020 through Mitchell's death on May 28, 2020, Defendant was providing health care services to residents, including the decedent, in accordance with COVID-19 emergency rules and applicable law (*see Campbell*, 84 Misc 3d 1238[A]; *see also DeJesus*, 83 Misc 3d 1282[A]). Defendant has established that its services to its residents, including Mitchell, was impacted by its response to the COVID-19 pandemic, and that the services were rendered in good faith (*see Campbell*, 84 Misc 3d 1238[A]).

Plaintiff has not proffered evidence to demonstrate genuine triable issues of fact concerning its allegations surrounding the COVID-19 pandemic and Defendant's response thereto (*see Campbell,* 84 Misc 3d 1238[A]; *see also Highsmith*, 83 Misc 3d 1203[A]). Plaintiff's expert affirmation does not even discuss the COVID-19 pandemic, nor whether Defendant's response was sufficient, made in good faith, etc. – rather, the Blades Affirmation deals exclusively with the falls sustained by Mitchell at the Facility and the resulting plan of care, or lack thereof. Additionally, and contrary to Plaintiff's contentions, the Schuck Affirmation is not conclusory – Schuck affirmed that the Facility took measures to prevent the spread of COVID-19, and provided the steps taken to provide care and treatment to residents, including Mitchell, in good faith.

In terms of Plaintiff's claim for gross negligence (i.e., an exception to the immunity afforded by the EDTPA), it is well settled that a claim of gross negligence must be supported by factually allegations evincing "'a reckless indifference to the rights of others'" or smacking of "'intentional wrongdoing'" (*John v Varughese*, 194 AD3d 799, 802 [2d Dept 2021], *quoting Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011]; *Mancusso v Rubin*, 52 AD3d 580 [2d Dept 2008]). Here, Plaintiff fails to allege any facts supporting a finding of gross negligence with regard

to the COVID-19 related claims and Plaintiff's sole legal argument in opposition to this portion of Defendant's motion is a wholly conclusory allegation that Defendant failed to implement and execute COVID-19 infection and prevention procedures, yet Plaintiff does not proffer any evidence in support of this point (*see* Plf's Mem. Law at ¶ 15). As such, Plaintiff's terse and cursory allegations of "gross negligence" are insufficient to support that Defendants are exempt for the immunities afforded by the EDTPA (*see, e.g.*, *Martinez v New York City Health & Hosps. Corp.*, 223 AD3d 731 [2d Dept 2024]; *Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668 [2d Dept 2023]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104 [3d Dept 2023]; *Kalogiannis v New York Ctr. for Rehabilitation & Nursing*, 80 Misc 3d 1219[A] at *2 [Sup Ct, NY County 2023]).

Accordingly, as Defendant has established its prima facie entitlement to a grant of immunity under the EDTPA and Plaintiff has failed to submit evidence raising a triable issue of fact, the branch of Defendant's motion seeking summary judgment dismissing the claims to the extent they are predicated on the COVID-19 pandemic based on Defendant's immunity shall be granted.

B. Plaintiff's Claims Based Upon NYPHL Shall Be Dismissed

"With regard to the cause of action premised on an alleged violation of Public Health Law § 2801–d, liability under the Public Health Law 'contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the "facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient"'" (*Van DeVeerdonk v N. Westchester Restorative Therapy & Nursing Ctr.*, 223 AD3d 702, 705 [2d Dept 2024]; *quoting Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178, 179 [1st Dept 2002], *quoting* NYPHL § 2801-d). "Here, the defendants established their prima facie entitlement to judgment as a matter of law on that branch of their motion which was for summary judgment dismissing the cause of action alleging violation of Public Health Law § 2801–d by submitting the affirmation of their expert physician, who opined that the defendants exercised 'all care reasonably necessary to prevent and limit the deprivation and injury to' the decedent and did not violate the various federal and state regulations set forth in the plaintiffs' bill of particulars as the basis for this cause of action" (*Van DeVeerdonk*, 223 AD3d at 705, *quoting Zeides,* 300 AD2d at 179). In opposition, Plaintiff failed to raise a triable issue of fact, as "the affidavit of their expert offered conclusory and unsubstantiated allegations of violations of certain regulations" (*Van DeVeerdonk*, 223 AD3d 702, 705-706; *see also Schwartz v Partridge*, 179 AD3d 963 [2d Dept 2020]). Accordingly, the First Cause of Action brought pursuant to New York Public Health Law §§ 2801-d and 2803-c shall be dismissed.

C. Plaintiff's Remaining Causes of Action

In the original Complaint, the sole factual basis invoked for Plaintiff's claim for Nursing Home Malpractice and Professional Negligence is Mitchell's COVID-19 infection (*see generally* the Complaint). However, through its Verified Bill of Particulars, Plaintiff asserts that Defendant was "careless, negligent, grossly negligent, wanton, reckless and committed medical and nursing malpractice and deviated from medical and nursing standards and practice in the care and treatment of the plaintiff-decedent by, among many other things, failing to recognize that the plaintiff's decedent was a fall risk and take appropriate steps to prevent a fall. Defendant failed to consider plaintiff's decedent fall risk and history of difficulty ambulating" (NYSCEF Doc. No. 57 at 5). Plaintiff alleges numerous improper acts and omissions by Defendant which "allowed [Mitchell] to suffer multiple falls as a result of [Defendant's] neglect, negligence and malpractice" (*id.*).

"The critical factor to be decided here is the nature of the duty owed to the plaintiff that the hospital is alleged to have breached. 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" (*Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338, 1339 [2d Dept 2019]). "'The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts'" (*id.* at 1339, *quoting Miller by Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977, 978 [3d Dept 1983]). "Although there is no rigid line that separates a medical malpractice claim from an ordinary negligence claim, each claim rests on the principle that healthcare providers 'have a 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'" (*Currie v Oneida Health Sys., Inc.*, 222 AD3d 1284, 1286 [3d Dept 2023], *quoting Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603 [2d Dept 1987]). "Generally, a cause of action will be deemed to sound in medical malpractice 'when the challenged conduct "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician"'" (*Jeter*, 172 AD3d at 1339-40 [2d Dept 2019], *quoting Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996], *quoting Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). "[W]hen the complaint challenges the medical facility's performance of functions that are 'an integral part of the process of rendering medical treatment' and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice" (*Jeter*, 172 AD3d at 1340, *quoting Scott v Uljanov*, 74 NY2d 673, 675 [1989]). Conversely, "where it is alleged that the breach occurred not while 'furnishing medical treatment to a patient, but the failure to fulfill a different duty, the claim sounds in ordinary negligence'" (*Currie*, 222 AD3d at 1284, *quoting Kelty v Genovese Drug Stores, Inc.*, 214 AD3d 776, 777 [2d Dept 2023]). As such, in distinguishing between medical malpractice and ordinary negligence, 'the critical question . . . is the nature of the duty to the plaintiff which the defendant is alleged to have breached'" (*Currie*, 222 AD3d at 1284, *quoting Martuscello v Jensen*, 134 AD3d 4, 11 [3d Dept 2015]).

Here, the cause of action labelled as Nursing Home Malpractice and Professional Negligence "as amplified by the bill of particulars . . . , [asserts] mixed allegations of medical malpractice and ordinary negligence" (*Currie*, 222 AD3d 1284, 1284). Specifically, Plaintiff asserts that Defendant,

> through its agents, servants and/or employees, were careless, negligent, grossly negligent, wanton, reckless and committed medical and nursing malpractice and deviated from medical and nursing standards and practice in the care and treatment of the plaintiff-decedent by, among many other things, failing to recognize that the plaintiff's decedent was a fall risk and take appropriate steps to prevent a fall. Defendant failed to consider plaintiff's decedent fall risk and history of difficulty ambulating. The defendants allowed the plaintiff's decedent to suffer multiple falls as a result of their neglect, negligence, and malpractice failing to properly treat the deceased plaintiff and to timely respond to her symptoms; improperly allowed plaintiff's decedent to fall; failed to have a Care Plan in place that was individualized to plaintiff's decedent's high fall risk status; improperly used a template Care Plan for falls; failed to timely place plaintiff's decedent on one-on-one monitoring, which was done after the fall for reasons that existed before the fall; failed to timely have floor mat(s) in place in failing to provide proper and adequate medical treatment; in failing to provide physicians and staff which were experienced; in providing inexperienced physicians and staff on said premises; in failing to insure that the scope of practice of the registered nurses were appropriate in view of the fact that registered nurses were permitted to order tests without communication or orders from plaintiff's doctor; in failing to adequately communicate test results and respond to those test results; in allowing, causing and/or permitting the deceased plaintiff to remain on said nursing home facility premises without the proper and adequate treatment of said conditions; in failing to properly diagnose and treat the plaintiff-decedent in accordance with generally accepted, standards of medical care; in failing to provide prompt treatment to the plaintiff-decedent based upon plaintiff-decedent's symptoms; in carelessly and negligently failing to heed signs, symptoms and/or complaint; in failing to take adequate measures and precautions; in unreasonably delaying in providing proper treatment based upon the plaintiff-decedent's symptoms; in failing to timely intervene when the plaintiff-decedent's symptoms worsened; in failing to properly respond to plaintiff-decedent's condition and symptoms by providing timely medical treatment; in failing to provide proper and adequate supervision over the plaintiff-decedent in that they disregarded its duty and obligation to plaintiff-decedent to care for her and protect her health and well- being; in negligently caring for and attending to the needs and safety of the plaintiff-decedent in that the defendant, its agents, servants and/or employees, knew of plaintiff-decedent's medical condition and failed to provide necessary care and attention to the plaintiff-decedent; in failing to conduct a proper and thorough assessment to ascertain

> plaintiff-decedent's condition promptly; in failing to provide prompt medical intervention in view of the symptoms exhibited by the plaintiff-decedent; in delaying treatment and/or admission to a hospital when they knew or should have known that plaintiff-decedent's critical condition warranted immediate action; in failing to properly supervise, monitor, assess, manage, control and/or provide the necessary assistance in the care and treatment of the plaintiff-decedent; in failing to provide adequate and proper treatment, assessment and supervision to plaintiff-decedent; in failing to properly supervise those examining and treating the plaintiff-decedent; in failing to properly train, supervise and/or oversee their personnel; in negligently caring for and attending to the needs and safety of the plaintiff-decedent in that the defendant, its agents, servants and/or employees, knew of the plaintiff-decedent's medical condition and failed to provide the necessary care and attention to the plaintiffdecedent; failed to take any and all measures to prevent the plaintiff's decedent from suffering multiple falls at their facility. This includes but is not limited to providing proper supervision and assistance to the plaintiff's decedent. This also includes but is not limited to the use of proper chairs, proper transfer techniques, failing to properly use bed rails, failing to use proper floor slip prevention; failing to utilize bed alarms and otherwise other steps to preventing the plaintiff-decedent from ambulating independently; in failing to provide adequate medical treatment which resulted in pain, suffering and death to claimant, and the defendants, their agents, servants and/or employees, were in other ways negligent, wanton, reckless and careless (*see* Verified Bill of Particulars at ¶ 5).

Some of these allegations relate "to '[t]he assessment of a patient's risk of falling as a result of his or her medical condition, and the patient's consequent need for assistance, protective equipment or supervision, are medical determinations that sound in malpractice'" (*Currie*, 222 AD3d 1284, 1284, *quoting Martuscello,* 134 AD3d at 12). Others, including the failure to follow the care plan, failure to appropriately supervise Mitchell, failure "to maintain and provide a safe environment to prevent falls," failure "to provide adequate safety measures or utilize necessary assistive devices to prevent fails," failure "to properly document and investigate fails," and the failure "to maintain adequate staffing levels and [] follow proper procedures to avoid and prevent decedent from falling . . . sound in ordinary negligence, as they do not involve specialized knowledge of medical science or diagnosis" (*Currie*, 222 AD3d at 1284).

"In evaluating these allegations through the lens of ordinary negligence, even assuming that defendants met their burden as to these allegations that sound in ordinary negligence, the record contains several glaring questions of fact precluding summary judgment" (*id.*). Notably, Blades notes that the five incident of falls took place at an increasing rate, up until Mitchell's fall on September 8, 2019, while also noting "the lack of adequate staff and preventative measures put in place to prevent further incidents of falls" (Blades at ¶ 11). Blades asserts that this injury was preventable given proper and reasonable fall risk assessment and prevention procedures. "Considering this evidence in a light most favorable to the nonmovant, where the gravamen of

these allegations in the [cause of action] concern 'the alleged failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell' decedent," this Court denies the motion for summary judgment as it relates to allegations sounding in ordinary negligence (*Currie*, 222 AD3d at 1284, *quoting Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603 [2d Dept 1987]).

With regard to the claim of nursing home malpractice, "Defendants established their prima facie entitlement to summary judgment with respect to the specific allegations sounding in medical malpractice, by and through an expert's affidavit . . . opining that decedent was provided with fall prevention interventions throughout her admission that met or exceeded the standard of care, and that, following [her] fall, decedent was rendered the appropriate medical care and treatment. Moreover, this physician opined that the treatment plan developed for decedent and the care rendered to her were within the standard of [nursing home] care" (*Currie,* 222 AD3d at 1284). "In opposition, the plaintiffs' expert did not raise a triable issue of fact to defeat summary judgment, as the plaintiffs' expert's affidavit failed to rebut the defendants' expert's specific assertions, and was otherwise speculative, [and] conclusory" (*Van DeVeerdonk*, 223 AD3d at 705).

Accordingly, to the extent that Plaintiff's allegations and causes of action, as made in the Complaint and bolstered by the Bill of Particulars, relate to Defendant's alleged ordinary negligence as opposed to malpractice arising from Mitchell's September 9, 2019 fall, or any other falls at the Facility, Defendant's motion shall be denied, but in all other respects, Defendant's motion shall be granted

CONCLUSION

Based on the foregoing and for the reasons stated above, it is hereby

ORDERED that Defendant's Motion is granted in part and denied in part; and it is further

ORDERED that Defendant's motion is denied except to the extent that the Complaint asserts a claim of ordinary negligence based upon the falls of Allie Mitchell, but in all other respects, Defendant's motion is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 13, 2025

ENTER:

HON. GRETCHEN WALSH, J.S.C.

21

APPEARANCES:

NAPOLI SHKOLNIK, PLLC
Attorneys for Plaintiff
400 Broadhollow Road, Suite 305
Melville, NY 11747

CAITLIN ROBIN & ASSOCIATES, PLLC
Attorneys for Defendant
30 Broad St, Suite 702
New York, NY 10004