SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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JOHN PHILIP, as Administrator of the Estate of JOEY PHILIP, Deceased,

Plaintiff,

- v -

NEW YORK FOUNDLING, formerly known as NEW YORK FOUNDLING HOSPITAL, KAI HUANG, GARY M. PHILLIPS, MARIANNA GOLDEN, SHOLEH KAMALIAN, DANIEL SILOVITZ, and MONTEFIORE NYACK HOSPITAL,

Defendants.

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INDEX NO. 155478/2021

MOTION DATE 10/14/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 139, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 175, 176, 177, 178, 179, 181

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, common-law negligence, and wrongful death, and pursuant to Public Health Law § 2801-d for purported violations of statutes and regulations governing nursing homes, the defendant New York Foundling, formerly known as New York Foundling Hospital (NYF), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff opposes the motion. The motion is granted to the extent that NYF is awarded summary judgment dismissing the wrongful death cause of action insofar as asserted against it, so much of the common-law negligence cause of action as was predicated on its alleged failure to maintain its premises in a safe condition, and so much of the Public Health Law § 2801-d cause of action as was predicated upon alleged violations of Mental Hygiene Law §§ 13.07, 16.00, 16.03, 16.05, and 41.36, 10 NYCRR 415(h)(i), 14 NYCRR 624.1, 14 NYCRR part 635, 42 USC §§ 1395(l), *et seq*., and 12101, *et seq*., and 42 CFR part 415.19.

The motion is otherwise denied, since there are triable issues of fact as to whether NYF committed professional malpractice, whether it negligently failed to train and supervise its personnel in a proper manner, and whether NYF may be liable to the plaintiff pursuant to Public Health Law § 2801-d for violating Public Health Law § 2803-c, 10 NYCRR 415.12(a)(1)(ii), 10 NYCRR 415.12(e)(1), and 10 NYCRR 415.12(h)(2).

The crux of the plaintiff's claim against NYF is that, on April 25, 2019, as a consequence of NYF's failure to maintain its premises in a safe condition, and its negligent failure to monitor his decedent, Joey Philip, who was then a residential patient at NYF, his decedent fell while ascending a staircase at NYF's premises, thus sustaining a serious injury that led to the latter's hospitalization and ultimately to his death on January 15, 2020. The plaintiff further alleged that NYF violated statutes and regulations governing NYF's obligations to monitor his decedent's acts of daily living, and, thus, is liable to him pursuant to Public Health Law § 2801-d.

More specifically, in his complaint, the plaintiff alleged that NYF negligently owned, operated, managed, controlled, and maintained its residential nursing-care facility located at 101 Hammond Road, Thiells, New York, by creating and maintaining a dangerous, defective, and hazardous condition on those premises, and that it negligently permitted and allowed those premises to become and remain unsafe and in a dangerous condition. In this respect, he further alleged that NYF negligently allowed his decedent to ascend a staircase that was dangerous, defective, and hazardous, by negligently failing to supervise and monitor his decedent, and failed to implement and employ fall-prevention protocols, thus permitting, and even "ordering," his decedent to ascend those stairs unsupervised and in the absence of fall-prevention equipment. The plaintiff additionally alleged that NYF failed adequately to staff its facility, and failed adequately to train and supervise the staff that it did employ. Moreover, the plaintiff averred in his complaint that these acts and omissions in this regard constituted violations of numerous statutes, rules, and regulations governing nursing homes.

Although the plaintiff expressly asserted a medical malpractice cause of action against several of the other defendants, and did not expressly denominate his claims against NYF as malpractice claims, his common-law negligence cause of action, which he asserted only against NYF, contained certain allegations sounding in medical malpractice. A claim sounds in medical malpractice rather than general negligence where, as here, the alleged failures to act constituted "an integral part of the process of rendering medical treatment" and diagnosis (*Scott v Uljanov*, 74 NY2d 673, 675 [1989]; *see Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]). Thus, a nursing home's failure to monitor a patient constitutes medical malpractice, sinch such an omission constitutes a departure from good and accepted care in the provision of nursing services and nursing home services (*see Rosario v New York Presbyterian Hosp.*, 2025 NY Slip Op 32138[U], *3, 2025 NY Misc LEXIS 5600, *4 [Sup Ct, N.Y. County, Jun. 13, 2025] [Kelley, J.]; *Estate of Regina v Wedgewood Care Ctr., Inc.*, 2024 NY Misc LEXIS 58523, *8 [Sup Ct, Nassau County, Oct. 24, 2024]; *Moore v St. James Health Care Ctr., LLC,* 2014 NY Slip Op 31461[U], *5-6, 2014 NY Misc LEXIS 2532, *14 [Sup Ct, Suffolk County, May 22, 2014]; *see generally Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 727 [2d Dept 2011] [claim that nurses failed properly to monitor fetal heart rate sounds in medical malpractice]). Similarly, the claim of improprieties in NYF's staffing decisions sounds in medical malpractice, as it is not within the ordinary experience and knowledge of a lay person. The

> "standard for medical malpractice claims should apply to . . . claims . . . that defendants failed to 'provide proper services to the decedent[,] . . . *provide . . . adequate . . . staff[ing]* . . . change and/or adjust the decedent's care plan . . . [, and] adequately formulate and/or promulgate a care plan in accordance with a comprehensive assessment[ ]'"

(*Noga v Brothers of Mercy Nursing & Rehab. Ctr.*, 198 AD3d 1277, 1278-1279 [4th Dept 2021] [emphasis added]) since "they challenge defendants' assessment of the decedent's need for supervision" (*id*. at 1279; *see Duran v Isabella Geriatric Ctr., Inc.*, 2023 NY Slip Op 30500[U], *8, 2023 NY Misc LEXIS 669, *12 [Sup Ct, N.Y. County, Feb. 15, 2023 [Kelley, J.]; *cf. Muniz v*

American Red Cross, 141 AD2d 386, 387 [1st Dept 1988] [claim of inadequate blood-banking standards sounds in malpractice]).

Conversely, although a determination as to whether fall-prevention equipment is necessary in the first instance involves a medical determination (*see Scott v Uljanov*, 74 NY2d at 675 [determination as to whether to order bed rails or restraints involves medical judgment]; *Caso v St. Francis Hosp*., 34 AD3d 714, 715 [2d Dept 2006] [allegations that physician failed to order bed rails and/or restraints, and that hospital's staff failed to follow any such order, sounded in malpractice]), once that medical determination is made, any claim alleging that a facility otherwise failed to use any available safety devices or tools to protect an at-risk patient from the risk of falls sounds in ordinary negligence, as it does not involve specialized knowledge of medical science or diagnosis, and instead seeks to hold the facility liable simply for failing "'to exercise reasonable care to insure that no unnecessary harm befell the patient'" (*D'Elia v Menorah Home & Hosp. for Aged & Infirm*, 51 AD3d 848, 851-852 [2d Dept 2008], quoting *Papa v Brunswick Gen. Hosp*., 132 AD2d 601, 603 [2d Dept 1987]). Moreover, the plaintiff's claim alleging negligent hiring, training, supervision, and retention of healthcare employees, as set forth in his bill of particulars, sounds in general common-law negligence (*see Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015] [negligent hiring cause of action against private medical practice is subject to three-year limitations period]; *see also Burgos v Lau*, 2025 NY Slip Op 33250[U], *2 n2, 2025 NY Misc LEXIS 7290, *2 n 2 [Sup Ct, N.Y. County, Aug. 28, 2025] [Kelley, J.]; *Estate of Gebert v Huntington Hills Ctr. for Health*, 2024 NY Misc LEXIS 51911, *16 [Sup Ct, Suffolk County, Sep. 5, 2024]; *cf. Taylor v Methodist Hosp.*, 6 Misc 3d 1008[A], 2004 NY Slip Op 51750[U], *4, 2004 NY Misc LEXIS 2898, *9 [Sup Ct, Kings County, Nov. 1, 2004] [deeming allegation of "negligent credentialing" to constitute a cause of action independent of a medical malpractice cause of action]).

With this legal analysis in mind, the court notes that, in his bill of particulars addressed to NYF, the plaintiff essentially reiterated the allegations of negligence set forth in his complaint,

adding, among other things, that the staircase on which the subject accident occurred, which connected the first and second floors of NYF's facility, presented an unsafe, dangerous, and "trap-like" condition. He further asserted that NYF negligently failed to ensure the presence of environmental adaptations made to meet his decedent's needs, so as to permit the latter safely to ascend the staircase, and that it failed to provide adequate safety devices to protect against falls on that staircase, more specifically, that it failed to equip the staircase with continuous bilateral handrails running the full length of the staircase, which should have been installed at a consistent height above the steps of the staircase. In addition, the plaintiff alleged that NYF negligently maintained the risers of the staircase, since each riser had a height of 7 inches, which the plaintiff claimed was excessive, and the treads of each step had a depth of 11 inches, which the plaintiff claimed was insufficient. The plaintiff additionally averred that NYF negligently failed to provide the tread nosings with sufficient visual contrast to the remainder of the tread, causing an optical danger, failed to install slip-resistant coverings on the treads, and permitted the radius of curvature of the nosings to measure more than 6 inches, which he claimed was excessive. In this respect, he faulted NYF for failing securely to attach proper carpeting on the surface of the steps, as well as for failing to provide sufficient lighting over the staircase. According to the bill of particulars, all of these omissions meant that NYF failed to provide reasonably adequate and safe means for the plaintiff's decedent to ascend the particular staircase on the date of the accident.

In addition, the plaintiff alleged in his bill of particulars that NYF was negligent in failing to supervise, monitor, assist, and instruct his decedent while the latter attempted to ascend the subject staircase, and, more particularly, in instructing his decedent to ascend the staircase by himself, despite his decedent's impaired cognitive skills in connection with daily decision making, as well as his decedent's history of an unsteady gait, a compromised ability to ambulate, and repeated actual falls over the 12 months immediately preceding the date of the

accident. He also asserted that NYF failed to ensure that his decedent was wearing the proper footwear at the time of the accident.

In his bill of particulars, the plaintiff further alleged that NYF negligently hired, trained, supervised, and retained its healthcare personnel by failing to ascertain the proficiency of those personnel, and was additionally negligent in failing to obtain proper licenses from the State of New York. He also asserted that NYF's personnel negligently failed to come to his decedent's aid in a timely fashion after the fall, to provide his decedent with appropriate post-accident care, and timely to act upon his decedent's complaints and symptoms subsequent to the accident. The plaintiff averred that NYF also was negligent in failing timely to transfer his decedent to an appropriate medical facility, and in failing timely, accurately, and properly to communicate, to the defendant Montefiore Nyack Hospital (MNH), where his decedent ultimately was taken, the nature and severity of his decedent's conditions, thus causing his decedent to be deprived of timely and necessary treatment. In connection with these allegations, the plaintiff further alleged that NYF negligently abandoned his decedent as a patient.

In connection with both the common-law negligence and Public Health Law § 2801-d causes of action, the plaintiff alleged in his bill of particulars that NYF negligently deprived his decedent of care, treatment, and services necessary for him to attain the highest practicable physical, mental, and psychological well-being, and negligently caused a diminution in his decedent's ability to perform activities of daily living, including a diminution in the range of motion in his arms and legs and in his ability to ambulate. He also faulted NYF for failing to implement a proper, individualized fall-precaution protocol for his decedent. The plaintiff further asserted that NYF negligently failed timely and properly to submit an incident report in connection with the subject accident to the New York State Vulnerable Persons' Central Register, the New York State Justice Center for the Protection of People with Special Needs (the Justice Center), and the New York State Office for People With Developmental Disabilities (OPWDD), which he claimed arose, in significant part, because it did not have in place proper

policies and procedures for investigating, recording, reviewing, monitoring, and reporting accidents involving its residents. He also asserted that NYF never prepared its own incident report. With further respect to the Public Health Law § 2801-d cause of action, the plaintiff alleged in his bill of particulars that NYF violated Public Health Law § 2803-c, Mental Hygiene Law §§ 13.07, 16.00, 16.03, 16.05, and 41.36, 10 NYCRR part 415, 14 NYCRR part 635, 42 USC §§ 1395(l), *et seq*. and 12101, *et seq*., and 42 CFR part 415.19.

It is well settled that the movant on 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" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Flanders v Goodfellow,* 44 NY3d 57, 62-63 [2025]; *Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]; *see Haymon v Pettit*, 9 NY3d 324, 327 n [2007]). Once the movant meets that burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).
"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st

Dept 1990]). Thus, a moving defendant does not meet the burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]). Moreover, where a party's submission itself reveals the existence of a triable issue of fact, that party is deemed to have failed to establish its prima facie entitlement to judgment as a matter of law (*see Gkoumas v Lewis Constr. & Architectural Mill Work,* 233 AD3d 609, 609-610 [1st Dept 2024] [by submitting employer's deposition testimony in support of his motion, plaintiff effectively adopted it as accurate and, thus, both called into question his own credibility regarding the manner in which his accident occurred and revealed the existence of a triable issue of fact]; *Reading v Fabiano,* 137 AD3d 1686, 1687 [4th Dept 2016]; *Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615, 617 [2d Dept 2008]).

Liability for failing to maintain premises in a safe condition must be based on occupancy, ownership, control, special use, statutory obligation, or contractual obligation (*see Jackson v Board of Educ. of City of N.Y*., 30 AD3d 57, 60 [1st Dept 2006]; *Gibbs v Port of Auth. of N.Y*., 17 AD3d 252, 254 [1st Dept 2005]). "'A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk'" (*Henriquez v Appula Mgt. Corp*., 234 AD3d 592, 593 [1st Dept 2025], quoting B*ranham v Loews Orpheum Cinemas, Inc*., 31 AD3d 319, 322 [1st Dept 2006], *affd* 8 NY3d 931 [2007]). It is undisputed that NYF owned the subject premises and, thus, owed a general duty to both its residents and the public to maintain it in a safe condition. Insufficient lighting conditions in an interior stairwell may constitute a dangerous, hazardous, or defective premises condition (*see Fitzmorris v Alexander*, 238 AD3d 994, 995-996 [2d Dept 2025]; *Detres v New York City Hous. Auth*., 271 AD2d 309, 309-310 [1st Dept 2000]), as may the absence of a properly installed handrail or banister (*see Detres v New York City Hous. Auth*., 271 AD2d at 310). In addition, a

dangerous, hazardous, or defective condition may be established by demonstrating the presence of uneven or excessively high risers on such a staircase (*see Mulligan v R&D Props. of N.Y. Inc.*, 162 AD3d 1301, 1302-1303 [3d Dept 2018]), insufficiently deep treads (*see Acton v 1903 Rest. Corp.*, 147 AD3d 1277, 1279 [3d Dept 2017]; *Rubinstein v 115 Spring St. Owners Corp.*, 146 AD3d 618, 619 [1st Dept 2017]), an excessively slippery surface on the staircase treads (*Rubinstein v 115 Spring St. Owners Corp.*, 146 AD3d at 619), protruding nosing on the face of a step (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 74 [2015]), and the creation of, or a failure to rectify, an optical illusion that could confuse a person ascending or descending a staircase and cause the person to miss a step (*see Bucklin v State of New York*, 83 Misc 3d 1255[A], 2024 NY Slip Op 50971[U], *1, 2024 NY Misc LEXIS 3216, *1-2 [Ct Claims, Jun. 25, 2024] [permitting plaintiff's expert engineer to testify as to presence of illusion]; *cf. McFeely v Mercy Hosp. of Buffalo & Catholic Health Sys., Inc.*, 177 AD3d 1279, 1280 [4th Dept 2019] [photograph of staircase dispositively rebutted plaintiff's contention that the appearance of the staircase created an illusion that she was traversing a flat surface at the time she fell]).

A defendant landowner may establish its prima facie entitlement to judgment as a matter of law in connection with a premises liability cause of action by demonstrating that the premises were not hazardous, dangerous, or defective, or that the alleged defect was trivial as a matter of law and, hence, not actionable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 77-78; *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Even where an otherwise actionable defect is present, a private landowner moving for summary judgment in a trip-and-fall or slip-and-fall action has the initial burden of showing that it did not create the hazardous condition and that it lacked actual or constructive notice of its existence (*see Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). To establish that it did not create an allegedly hazardous condition, the owner of real property must submit an affidavit of affirmation from someone with personal knowledge that it did not, in fact, create the condition (*see Kacki v 56th & Park (NY) Owner, LLC,* 242 AD3d 1071, 1072 [2d Dept 2025]). "A defendant establishes that

it lacked actual notice when it produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell" (*id*.; *see Frederick v New York City Hous. Auth.*, 172 AD3d 545, 545 [1st Dept 2019]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]; *see Molina v Loft 124 Condominium*, 230 AD3d 1064, 1064 [1st Dept 2024]).

In support of that branch of its motion seeking summary judgment dismissing so much of the common-law negligence cause of action as was premised upon its failure to maintain the subject staircase is a reasonably safe condition, NYF submitted the pleadings, the plaintiff's bill of particulars that was addressed to it, transcripts of the parties' deposition testimony, relevant medical and hospital records, the note of issue, and an attorney's affirmation. In her affirmation, counsel for NYF asserted that the parties' deposition testimony and NYF's records revealed that no person witnessed the decedent's fall on the subject staircase, that the decedent never described how he fell, and that, consequently, there is no basis upon which the plaintiff can now establish that NYF maintained the staircase in an unsafe condition, or that its failure to maintain the staircase and stairwell in a safe condition caused or contributed to the decedent's accident. In addition, NYF submitted the affidavit of its residence manager Georges Michel, who asserted that, in March 2018, NYF transferred the residents from its Ardsley, New York, facility, which was then under construction, to the Thiells facility, that at no point between March 2018 until April 25, 2019 were complaints made regarding the interior staircase at the Thiells facility, and that, prior to April 25, 2019, there were no incidents regarding the interior stairs. In this respect,

he alleged that, on a daily basis, both NYF residents and staff would traverse the steps multiple times each day, and had done so without incident. Michel asserted that, had there been any prior falls on the subject interior stairwell, or complaints with respect to, he would have been aware of them.

In opposition, the plaintiff submitted his own affidavit, and contended that, prior to the accident, he had complained to NYF's management that the stairs on the particular stairway were unsafe because they were too steep and narrow, that NYF thus had actual notice of the dangerous condition, and that a factfinder could infer that the excessive steepness of rise on the staircase or the narrowness of the treads caused or contributed to his decedent's slip-and-fall accident. The plaintiff stated that the decedent had explicitly stated that he had fallen, and the plaintiff adverted to documentation generated by NYF and others that reported that his decedent had indeed fallen on the staircase from a standing position as he ascended the first step, but he submitted no testimony, statements, or documentation as to the mechanism of the fall.

The plaintiff also submitted the expert affirmation of professional engineer Vincent Pici, P.E., who reviewed incident reports concerning the accident, deposition testimony, and the decedent's medical records, and observed and measured the subject staircase and stairwell. Pici opined that the handrail height at the top newel post violated Section 307.1 of the 2015 New York State Property Maintenance Code, since the handrail was less than 30 inches in height, that the stairs' risers violated Section R311.7.5.1 of the 2015 New York State Residential Code, since each riser was more than 8¼ inches in height, that the riser height variance violated Section R311.7.5.1 of the 2015 New York State Residential Code, since the greatest riser height exceeded the smallest riser height by more than 3/8 of an inch, that the stairs' handrail height violated Section R311.7.8.1 of the 2015 New York State Residential Code because the handrail height at the top newel post, at the fourth step from the bottom, at the third step from the bottom, and at the second step from the bottom, measured less than 34 inches. In addition, Pici concluded that the stairs' handrail violated Section R311.7.8.2 of the 2015 New York State

Residential Code, since the space between the handrail and the wall was less than 1½ inches. Moreover, Pici further opined that the stairs' handrail violated R311.7.8.3 of the 2015 New York State Residential Code because its cross-section of dimension was more than 2¼ inches, and that the carpeting on the stairs violated ASTM F1637, Section 5.3.1, because it had loose edges and ASTM F1637, Section 5.3.2, as it was worn, particularly at the step nosing edges. Pici asserted that, to a reasonable degree of engineering certainty, all of these measurements and conditions constituted a deviation from good and accepted engineering practices. Although Pici did not know precisely what, if anything, caused the decedent's fall, he opined that these defective conditions did, in fact, cause the decedent to fall.

NYF established its prima facie entitlement to judgment as a matter of law in connection with the premises liability claim against it by demonstrating that no one was in a position to establish the cause of the accident, as there was no direct or circumstantial evidence as to how the accident happened (*see Public Adm'r of Queens County v 124 Ridge, LLC*, 203 AD3d 493, 494 [1st Dept 2022]; *Consolidated Edison Co. of N.Y., Inc. v Vilsmeier Auction Co., Inc.,* 21 AD3d 726, 729 [1st Dept 2005]; *see also Manzo v 372 Doughty Blvd. Corp*., 147 AD3d 930, 930, 47 NYS3d 137 [2d Dept 2017]). In opposition to that showing, the plaintiff failed to raise a triable issue of fact. "Since the accident may well have been caused by a misstep or loss of balance," rather than by a defectively maintained or insufficiently illuminated staircase, "any determination by the trier of fact as to the cause of the accident would be based upon speculation" (*Public Adm'r of Queens County v 124 Ridge, LLC*, 203 AD3d at 494; *see Scivoletti v New York Mercantile Exch., Inc*., 38 AD3d 326, 327 [1st Dept 2007]). The *Noseworthy* doctrine (*see Noseworthy v City of New York*, 298 NY 76, 80-81 [1948]), which posits that a plaintiff in a wrongful death action is not held to the same degree of proof as in a personal injury action (*see Cabrera v Golden*, 231 AD3d 149, 156 [1st Dept 2024]), is not applicable to this case, since NYF's knowledge as to the cause of the accident is no greater than the plaintiff's (*see Public Adm'r of Queens County v 124 Ridge, LLC*, 203 AD3d at 495; *Walsh v Murphy*, 267

AD2d 172, 172 [1st Dept 1999]). The *Noseworthy* doctrine can only be invoked where a plaintiff first makes a showing of facts from which negligence can be inferred (*see Cabrera v Golden*, 231 AD3d at 156). Although the plaintiff has adduced evidence that the stairway was maintained in an unsafe conditions because, among other things, the rise of the stairs was too steep, the treads were too narrow, the handrail was situated excessively high over the steps themselves, and the carpeting on the treads was loose and frayed, he has adduced no evidence of whether such steepness, narrowness, height, or condition of the carpeting caused or contributed to his decedent's accident, particularly in light of the fact that his decedent had a history of an unsteady gait, a compromised ability to ambulate, and repeated prior actual falls at NYF where there were no unsafe conditions on which he fell.

Consequently, that branch of NYF's motion seeking summary judgment dismissing so much of the common-law negligence cause of action as was premised on its alleged failure to maintain its premises in a reasonably safe condition must be granted.

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant healthcare provider moving for summary judgment must establish the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept 2019]; *Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]) or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *see generally Kristie M. v. Mercy Hosp. of Buffalo,* 240 AD3d 1228 [4th Dept 2025]; *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally

known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover, as noted, to satisfy the burden on a summary judgment motion, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Luu v Paskowski*, 57 AD3d 856, 857 [2d Dept 2008]; *see also Kristal R. v Nichter,* 115 AD3d 409, 411-412 [1st Dept 2014]; *Bacani v Rosenberg*, 74 AD3d 500, 501-502 [1st Dept 2010]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see also Pancila v Romanzi,* 140 AD3d 516, 516 [1st Dept 2016]; *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd sub nom. Callistro v Bebbington*, 20 NY3d 945 [2012]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

Public Health Law § 2801-d(1) provides, in relevant part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation." That subsection defines "right or benefit" as a

> "right or benefit created or established for the well-being of the patient by the terms of any contract, by any *state statute*, code, rule or regulation or by any applicable *federal* statute, *code, rule or regulation*, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority"

(*id*. [emphasis added]). Where a plaintiff alleges a deprivation of such right or benefit, the subsection further makes the residential healthcare facility's compliance with the relevant contract, statute, code, rule, or regulation an affirmative defense, so that the burden of proof is on the facility to prove compliance. The statute goes on to provide that

> "unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient, compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury, but in no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility under section twenty-eight hundred seven of this article or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists."

(Public Health Law § 2801-d[2]). The statute also permits a patient's legal representative to prosecute such an action to recover damages (*see* Public Health Law § 2801-d[4-a]). Stated another way, to establish the right to recover pursuant to the cause of action created by Public Health Law § 2801-d, a patient must allege and prove that a residential healthcare facility deprived him or her of a right or benefit established for his or her well-being, as set forth in the terms of any contract or in any state or federal statute, code, rule, or regulation (*see Cortez v Terrence Cardinal Cooke Health Ctr.,* 199 AD3d 450, 451 [1st Dept 2021]).

Public Health Law § 2803-c is a state statute that defines numerous rights of nursing home patients and articulates general duties and standards of care applicable to nursing home operators. As relevant here, it includes the "the right to receive adequate and appropriate

medical care" (Public Health Law § 2803-c[3][e]). The New York State Department of Health has promulgated several regulations governing the provision of care in residential healthcare facilities, including 10 NYCRR 415.12(a)(1) (provision of necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care, subject to the resident's right of self-determination, which ensures no diminution in a resident's ability to transfer and ambulate), 10 NYCRR 415.12(e)(1) (provision of care necessary to ensure that a resident who enters the facility without a limited range of motion does not experience reduction in range of motion, unless the resident's clinical condition demonstrates that a reduction in range of motion is unavoidable), 10 NYCRR 415.12(h)(1) (provision of services necessary to ensure that the resident environment remains as free of accident hazards as is possible), 10 NYCRR 415.12(h)(2) (assurance that each resident receives adequate supervision and assistive devices to prevent accidents), and 14 NYCRR 624.1, et seq. (establishing protocol for reporting of accidents by facilities that are operated, certified, sponsored, or funded by OPWDD for the provision of services to persons with developmental disabilities).

Where a demand for relief is predicated on that Public Health Law § 2803-c, and it is alleged that a nursing home violated 10 NYCRR part 415, "it states a cognizable cause of action under" Public Health Law § 2801-d (*Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178, 179 [1st Dept 2002]; *see Broderick v Amber Ct. Assisted Living,* 200 AD3d 840, 841 [2d Dept 2021] ["Public Health Law article 28 authorizes a private right of action by patients of 'residential health care facilities' for the deprivation of rights conferred by statute, regulation and contract, including those enumerated by Public Health Law § 2803-c"]; *Ward v Eastchester Health Care Ctr., LLC,* 34 AD3d 247, 248 [1st Dept 2006] [Public Health Law § 2801-d "authorizes a private right of action for the violation of rights enumerated in section 2803-c of the statute"]; *Goldberg v Plaza Nursing Home Co.,* 222 AD2d 1082, 1084 [4th Dept 1995], *overruled in part on other grounds*, *Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 AD3d

146 [4th Dept 2009] [statute affords remedy to patients denied rights enumerated in Public Health Law § 2803-c(3)]; *see also Begandy v Richardson*, 134 Misc 2d 357, 361-362 [Sup Ct, Monroe County 1987]).

In support of that branch of its motion which was for summary judgment dismissing the medical malpractice claims and the Public Health Law § 2801-d cause of action insofar as asserted against it, NYF relied on the same documents that it had submitted in support of the branch of its motion addressed to the premises liability claim, and also submitted factual affidavits from its disability specialist professional Sean Jack and residence manager Michel, as well as the expert affirmation of supervised care and behavioral health expert Danielle Dieterich. NYF argued that it provided sufficient and adequate supervision and monitoring of the decedent, that there was no proof that the decedent had actually fallen on the staircase, that nothing that it did or did not do caused or contributed to any accident, and that, since it was not technically a residential healthcare facitlity, it could not be held liable pursuant to Public Health Law § 2801-d.

Jack asserted in his affidavit that his responsibilities included assisting residents of group homes with their daily routines and monitoring, and supervising the residents with their daily activities. He characterized NYF's facility in Thiells as a "group home . . . where several individuals resided, including Joey Philip," who "had a bedroom located on the second floor of this home." Jack alleged that the only way to access this bedroom was by a staircase leading from the first floor to the second floor. He explained that, prior to April 25, 2019, he had been familiar with Joey Philip, as the decedent was one of the residents with whom he had regularly visited on a weekly basis, and that he had overseen the handling of his care and treatment at NYF. According to Jack, in providing supervision and care for the residents at NYF, he would be told if they required any special degree of supervision or assistance with any specific tasks, including ambulation. He explained that he had never been told that any physicians had ever restricted the decedent's ambulation, that no physician had recommended that the decedent's

ambulation be supervised, and that he was never told that his ambulation was to be restricted in the context of ascending and descending any staircase.

In addition, Jack averred that he frequently had observed the decedent ambulating without any issues, and never had observed him fall or have difficulty walking up and down the staircase that led to his bedroom. He further stated that the decedent had not been prescribed or given any ambulation devices that were intended to assist a patient with limited mobility. Moreover, Jack stated that at no time did any member of decedent's family express concerns to him regarding the decedent's inability to traverse stairs.

In connection with the date of the accident, Jack asserted that, while both he and the decedent were on the first floor of the NYF facility, he had been preparing to take the decedent "to a program in Tarrytown from the home where he lived in Thiells, New York," but that, before they began to leave the premises, the decedent needed to go upstairs from the first floor to his second-floor bedroom to change his clothing. As Jack described it, the decedent walked into the first-floor living room in order to head upstairs, while Jack himself walked to the first-floor closet, located in the next room. He asserted that, almost immediately after the decedent walked towards the staircase, he heard a loud noise, but that, prior to hearing it, he had never heard the decedent walking up the stairs. Jack asserted that

> "I heard the noise immediately after I left the living room to go to the closet and Joey did not have any time to step onto the staircase. The noise I heard was only one impact and not consistent with a fall down stairs. When I observed Joey after hearing the loud noise, his legs were on the ground beneath the staircase. He did not have any bruising on any part of his body. Based upon Joey's location when I last saw him before the accident and my location when I heard the loud noise, Joey did not have sufficient time to enter onto the staircase prior to falling."

Michel stated in his affidavit that he had been a residence manager with NYF since 2017, in which capacity he was in charge of supervising the staff within the group home, as well as billing, providing oversight, and taking care of the individual residents. He asserted that he also had participated in formulating and implementing the residents' individual support and

behavioral plans in conjunction with the residents' treating healthcare providers, families, and NYF staff. Michel further asserted that, when any complaints had been reported in connection with the condition of a resident or the condition of the group home, he was made aware thereof, and reported the complaints to appropriate persons "according to the proper standards and procedures." Michel confirmed that he was the residence manager of the Thiells group home on April 25, 2019. He reiterated Jack's description of the decedent's second-floor bedroom and the means of access to that bedroom from the first floor of the facility.

Michel explained that, prior to April 25, 2019, he had been familiar with the decedent for 10 years, as the latter was one of the residents that he had seen on a daily basis on every Monday through Friday. He stated that the decedent had a room on the second floor of every residence in which he had lived, including his family home. Michel further asserted that he had regularly visited with the decedent on a weekly basis, and had overseen the handling of his care and treatment at NYF. He averred that, over the years that he had been working with the decedent, the decedent's ambulation was "never restricted nor was he required to have 1:1 supervision or line of sight supervision while in the group home," and that he had frequently observed the decedent ambulating without issue, and had never observed him fall or have difficulty walking up and down the staircase that led to his bedroom. Moreover, Michel asserted that the decedent had not been prescribed or given any ambulation devices meant to assist a patient with limited or restricted mobility, and that no member of the decedent's family had ever communicated any concerns regarding the decedent's inability to traverse a staircase.

Dieterich has a master's degree in psychology, and is an attorney as well. She asserted that she had two decades of experience in the management of clinical programs and residential care facilities, including day habilitation, community-based, supportive apartments, and respite care. She further averred that, in her experience as an applied behavior specialist, she has been responsible for the creation and implementation of behavior support plans for adults with developmental disabilities residing in 24-hour supervised residences and supported apartments,

and has been involved in the training of staff in connection with the implementation of the behavior support plans and required documentation, as well as the completion of staff observations to ensure compliance with such implementation. Dieterich further asserted that she has served as an assistant vice president at Family Residences & Essential Enterprises and has served as that organization's director of family services for more than 15 years, with respect to which she provided administrative supervision to assistant directors of nursing and licensed psychologists in connection with individuals suffering from developmental disabilities and psychiatric disorders, specifically ensuring that care plans were accurate and followed.

Dieterich asserted that she had reviewed the decedent's care and treatment records from the Westchester Institute of Human Development (WIHD), NYF, and Westchester Medical Center, as well as the pleadings and bills of particulars in this action, along with discovery responses and deposition transcripts. Dieterich concluded that NYF complied with all applicable rules and regulations, undertook reasonable behavioral reviews, adhered to the medication regimen of the decedent's external treating physicians and healthcare providers, adequately supervised the decedent, properly implemented the decedent's individualized services plans, and adequately supervised the decedent.

Dieterich initially described the decedent's history as a multi-year resident at the NYF group home in Ardsley due to developmental and behavioral disabilities, describing them as "an impulse control disorder and severe intellectual disability." She noted that, since 2009, the decedent had been treated by a podiatrist, neurologist, and psychiatrist at WIHD, and that NYF employees had accompanied him to every medical appointment, and followed the WIHD physicians' directives regarding treatment. Dieterich further explained that the decedent had a history of seizures, and was being administered medications since 2011 to treat them, with dosages and administrations "constantly monitored" by the decedent's neurologist, with input from the decedent's mother. She asserted that the decedent's 2017 individualized service plan

was approved by his family, and indicated that he was able to walk independently, to live in a group home having two floors, and to walk without any assistive devices.

According to Dieterich's interpretation of NYF's records, NYF had developed a behavior support plan specific to the decedent, with an effective date from May 26, 2017 through May 25, 2018, which imposed no restrictions or safeguards safely to support the decedent in managing behavioral crises. She reiterated that, in March 2018, the decedent temporarily was relocated from NYF's Ardsley facility to NYF's Thiells facility, and resided there in a second-floor bedroom. Although Dieterich conceded that the decedent's individualized service plan required NYF staff to assist him with his activities of daily living, she noted that the plan made no mention of any ambulatory difficulties, did not require supervision for ambulating or traversing stairs, and did not report that the decedent had a history of falls that would have required additional supervision at the facility. She asserted that, on April 25, 2018, that is, one year prior to the subject accident, the records of a semi-annual meeting conducted at the decedent's day habilitation program at YAI, formerly the Young Adult Institute, revealed that his tasks included making deliveries to various classrooms, which he was able to accomplish without incident and without the need of ambulatory assistance or supervision. Moreover, Dieterich asserted that these records indicated that, during this time frame, the decedent frequently had been "bolting from his room," thus supporting the conclusion that the decedent manifested no concerning ambulatory issues.

According to Dieterich, in September 2018, a NYF nutritional note recited that the decedent "actively participates in activities in the program and community outings. He walks around a lot and goes up/down the stairs as part of his physical activities," and that this documentation further reported that the decedent was "walking up and down the stairs, and walking a lot at the program and at home." In addition, she asserted that the decedent's ambulation continued to be unassisted through the end of 2018 and into 2019. Dieterich further asserted that in the decedent's "March 2018-March 2019 nursing note, which was executed on

April 17, 2019, days before [his] incident, indicated that [he] had no swelling of joints/stiffness; abnormal movements, pain or swelling in any extremity."

Dieterich additionally asserted that psychiatrist Robert F. Grambau, M.D., wrote in the decedent's chart, at the decedent's December 7, 2018 psychiatry examination, that the decedent's gait was steady and did not require assistance with ambulation, while Dieterich further noted that there was no history of any falls during this time frame. She also asserted that relevant records reflected that the decedent last presented to podiatrist Christopher Orlando, DPM, on April 3, 2019, at which time Dr. Orlando visually examined the decedent's feet, and reported that, although the decedent had recently been suffering from swelling and ecchymosis in his left hallux, those conditions had resolved. Dieterich reported that the decedent's podiatry plan of care did not include any limitations to his ambulation or any requirement to increase his supervision due to any ambulation issues. As Dieterich interpreted the relevant medical records, on April 23, 2019, that is, two days before the accident, the decedent again met with Dr. Grambau, who noted that "Joey is at his best." She further concluded that the decedent's external healthcare providers were aware that his room was located on the second floor of the group home, and asserted that, at no point during their years of caring for and treating the decedent did any of them express concern about his ability to navigate steps and stairs in a safe manner.

Dieterich averred that the cardio-pulmonary resuscitation and first-aid training certifications for NYF staff who were present on the date of the accident were sufficient and had been valid for a two-year period, which encompassed the accident date. As she explained it, the underlying training sessions included instruction as to various medical treatments, as well as how one should respond to situations in which a resident had fallen, "inclusive of training to not move the resident." She further opined that NYF ensured an adequate number of trained staff members were on shift on the date of the accident.

In addition, Dieterich asserted that of all of the relevant records indicated that the decedent's family was actively involved in his care and treatment, including multiple discussions with all of the decedent's treating healthcare professionals. According to Dieterich, none of the records that she had reviewed included any reference to concerns raised by a member of the decedent's family members in connection with the decedent's ambulation needs.

Dieterich opined that, in terms of the overall care provided to the decedent throughout his residency at NYF, NYF and its staff appropriately supervised, cared for, and monitored the decedent in a consistent fashion. She also concluded that the decedent was properly transported to and from his day program. Dieterich further opined that NYF's staff-to-resident ratio was proper and sufficient to support the number of residents at the Thiells group home, while her review of the records provided to her for review confirmed her conclusion that the decedent was being treated by outside healthcare providers for his various comorbidities and behavioral challenges, that these providers had prescribed various medications to treat the decedent's history of seizures and his psychiatric symptoms, and that these medications were properly administered by NYF staff. Dieterich further stated that the decedent's individual service plan was developed and reviewed in a timely manner in accordance with regulatory requirements, specifically noting that his family and interdisciplinary team were provided with the opportunity to participate in the process and contribute to the contents of the plan. She again noted that both the 2017 and 2018 individual service plans made no mention of any requirement that the decedent should be supervised while ascending or descending any staircase, and averred that these plans did not require line-of-sight supervision or any other type of enhanced supervision. In this respect, she explained that the "24/7 designation indicates that a resident requires general supervision in a facility that provides and makes available staff support and oversight on a seven day a week/24-hour basis, such as the TNYF group home."

Dieterich further asserted that the decedent had been a resident at NYF for a period of 10 years, which she concluded had allowed the NYF treatment team, consisting of direct

support professionals, management, and clinical staff, to become familiar and comfortable with the decedent and his level of care. She opined that, based on the decedent's lack of history of falls, as well as his overall history, NYF's general supervision of the decedent at the group home was reasonable and appropriate. Dieterich further concluded that all of the decedent's records confirmed that the decedent had demonstrated the ability to ascend and descend a staircase without concern, and without additional support or assistance.

In opposition to that branch of NYF's motion which was for summary judgment dismissing so much of the common-law negligence cause of action as was premised upon alleged departures from good and accepted residential healthcare facility practice, the plaintiff again relied upon his own affidavit and his attorney's affirmation. He also submitted additional medical and hospital records, a counter statement of material facts, and discovery demands and responses, as well as the expert affirmation of registered nurse Angelica Marmanillo, who asserted that she was a certified developmental disabilities nurse who had been a member of both the Developmental Disabilities Nurses Association and the New York State Intellectual Disabilities/Developmental Disabilities Nurses Association. She explained that she also had been the Director of Nursing Informatics at the Center for Discovery in Harris, New York, and the Director of Nursing for the Mental Health Association of Westchester.

The plaintiff asserted that he was the decedent's brother, that the decedent was born in 1980, and that the decedent suffered a traumatic brain injury as a child. He explained that, due to that injury, the decedent's father, Philip Daniel, and the decedent's mother, Sosamma Philip, were appointed guardians of the decedent's person and property on July 16, 2001. The plaintiff stated that, in 2002, the decedent was placed in NYF's group home in Ardsley, and that, when the Ardsley facility was to be razed in 2018, the decedent and his fellow residents were moved to NYF's facility in Thiells.

The plaintiff further asserted that, shortly after the subject accident on the morning of April 25, 2019, the decedent was taken to the emergency department at the defendant MNH, at

which a physician noted that the decedent was “status post-fall” and was unable to walk on his own as he normally could. According to the plaintiff, the physician ordered a neurology consultation, but failed to examine the cause of the decedent’s “paralysis.” According to the medical records that the plaintiff submitted, a magnetic resonance imaging (MRI) scan of the decedent’s cervical spine taken at that hospital on April 27, 2019 revealed that the decedent had experienced spinal canal stenosis and cord compression at the C3-C6 level of his spine, with a “left sided disc herniation at C5-C6 which was compressing the left side of the spinal cord.” The chart further revealed that the emergency room physician "[d]iscussed [the] case with Dr. Holland of neurosurgery from Montefiore Medical Center and Dr. Degen neurosurgery from Montefiore Nyack Hospital,” and that both of those latter physicians agreed that the decedent would benefit from surgery “within the next twenty-four hours for decompression.” The hospital chart reported that, on April 29, 2019, the decedent was transferred from MHN to Montefiore Medical Center in the Bronx, where Kateryna Fedorov, M.D., examined him and found that he was experiencing: “quadriparesis post fall, imaging suggestive of central canal stenosis acute on chronic pathology.” She wrote in his chart that the decedent was “[s]een by neurosurgery who has scheduled him for a decompressive surgery . . . prior to the fall was ambulating,” and she formulated a differential diagnosis that included quadriparesis, compressive myelopathy, and central cord syndrome. The chart further revealed that, on April 29, 2019, the decedent underwent decompressive cervical laminectomies from C2 to C7 and a posterior lateral instrumented arthrodesis, with the placement of bilateral cervical lateral mass screws, bilateral thoracic pedicle screws, rods, an autograft, and an allograft from C3 to T2. The decedent wasn’t discharged from Montefiore Medical Center until July 8, 2019, when he was transferred to the Dumont Center for Rehabilitation and Nursing Care (Dumont) in New Rochelle, New York. The decedent’s medical records further reported that, on the morning of January 15, 2020, was taken by ambulance from Dumont to Montefiore New Rochelle Hospital with a high-grade fever, where he died at 10:40 a.m. The decedent’s death certificate reported

the immediate cause of his death was "[s]eptic [s]hock (clinical) and bronchopneumonia in a quadriplegic individual following cervical fracture."

In her affirmation, nurse Marmanillo asserted that, based on her review of the decedent's medical records, the parties' deposition transcripts, and statements made by NYF employees to State regulatory agencies, there was no doubt that, contrary to the affidavits submitted by Jack and Michel, the decedent fell at the Thiells facility on the morning of April 25, 2019. She further concluded that NYF was negligent and careless in instructing the decedent to ascend the stairs of the Thiells residence without assistance on April 25, 2019 because his ambulation "was restricted by a number of different factors which, both individually and collectively, increased the risk of a fall occurring while climbing stairs on his own." She averred that these factors included the fact that the decedent had just soiled himself, he already required supervision 24 hours per day, 7 days per week, both of his feet were deformed, he wore bilateral supramalleolar orthoses and bilateral leg braces, the dorsiflexion of his feet at his ankles was restricted, and he had abnormalities of gait and mobility. She further adverted to the affirmation of the plaintiff's engineer, who had opined that the staircase itself was defective and maintained in violation of applicable property maintenance codes and regulations. In addition, Marmanillo opined that NYF personnel were negligent and careless in the manner in which they moved the decedent immediately after his fall, and that NYF was negligent in the manner in which it trained its personnel as to whether to move a resident after a fall. She further faulted NYF for failing accurately inform to inform subsequent medical providers of the decedent's post-fall condition.

Contrary to the contention of NYF's counsel, Marmanillo concluded that the Thiells facility was indeed residential nursing healthcare facility within the meaning of Public Health Law § 2801, and was subject to statutes, rules, and regulations governing such facilities, because it provided the decedent and other residents with health-related services such as lodging, board, and physical care including, but not limited to, the recording of health information, dietary supervision, the administration of medications, and supervised hygienic services.

Marmanillo concluded that NYF violated 10 NYCRR 415.12(a)(1)(ii) by allowing the decedent's abilities in activities of daily living and ability to ambulate to diminish, since it was uncontested that the decedent was rendered quadriplegic as a result of his April 25, 2019 fall at the Thiells facility and subsequently died on January 15, 2020, that it violated 10 NYCRR 415.12(e)(1) by allowing the decedent to experience reductions in the range of motion of both his upper and lower extremities, that it violated 10 NYCRR 415.12(h)(1) by failing to ensure that the premises remained free from accident hazards, that it violated 10 NYCRR 415.12(h)(2) by failing to ensure that the decedent received adequate supervision and assistive devices to prevent his fall down the stairs, and that it violated 14 NYCRR 624.1, *et seq.*, by failing timely to report the fall to the Vulnerable Persons Central Registry.

Marmanillo recounted the decedent's medical history prior to the date of the fall, explaining that, on March 15, 2012, more than seven years prior to the accident, WIHD internist Cynthia Brown, M.D., noted that "[s]taff is concerned that Joey is having frequent bowel movements. He has been soiling his clothing as well. Nurse requested adjustment in medication." She further referred to an October 10, 2012 visit with WIHD internits Anne Beth Litt, M.D., who reported a call from NYF informing her that the decedent was "coughing, dry, no sob, no fever" and that NYF was attempting to administer pulmicort via nebulizer and inhaler, but that he was unable to tolerate it. Marmanillo also explained that the decedent presented to WIHD nurse practitioner Kim Gembecki, N.P., on October 24, 2012 "for follow-up of emergency room evaluation. pt came back to agency from a home visit with sx's . . . they have been elevating foot at home," and that Gembecki wrote in the relevant chart that the decedent was brought to an emergency department with "right foot limp & edema, 3" l[eft] toe ecchymosis," that he was provided with a boot for his right foot, and that he was directed to continue wearing the "right foot boot as per er" after his discharge.

In addition, Marmanillo pointed out that, on February 13, 2015, the decedent's neurologist at WIDH, Baldev Singh, M.D., received a call from the decedent's mother, who

informed Dr. Singh that although the decedent had "no seizure but seem she does not feel that hungry/appetite gone down," upon which Dr. Singh recommended that the NYF staff "observe at agency and home about appetite an [sic] bring written note with patient during next visit or bring earlier if major problem." She further adverted to a June 25, 2015 note from WIHD psychiatrist Dr. Grambau, who documented that "[t]he residence staff are increasing Joey's level of physical activity, starting with some vigorous walking. Joey doesn't like to exercise, and will only comply when males are leading the way," along with a July 17, 2015 note from Dr. Singh, who reported concerns articulated by the decedent's mother that the decedent was not "walking right," as well as an October 2, 2015 note by Dr. Grambau, who noted that "[d]uring the past month, JOEY was unsteady on his feet only after rising rapidly from a supine position" because of orthostatic hypotension, which could be rectified by having the decedent first rise to a sitting position for several seconds after arising from a supine position.

Although Marmanillo agreed that NYF's plan during the time reported that the decedent could walk without assistance, at his November 12, 2014 and December 11, 2015 visits with WIHD physiatrist Audrey Sofair, M.D., the latter visit which was for a "[b]race re-check," Dr. Sofair concluded that the decedent required continued use of leg braces, and that the decedent presented with "[o]ther acquired deformities of unspecified foot." Marmanillo explained that, on May 24, 2016, NYP formulated an individualized service plan that recited that

> "Joey requires supervision and assistance from staff to complete his ADL's [sic] and tasks around the residence.
>
> "In order to assure Joey's health and safety, he is provided with 24/7 supervision and care from residence staff . . . Joey can walk independently without any assistive devices and wears New Balance sneakers and braces on both legs."

She stated that, on August 3, 2016, the decedent's parents provided NYF with a written consent for the decedent's medical care and treatment. Marmanillo then noted that the decedent had again presented to Dr. Litt on October 11, 2016 "for follow up and foot pain," after which Dr. Litt reported that "mom noted over the weekend that he is limping on his left foot and almost falls

when he walks, she stated Joey appears to be in pain and is requesting that he be evaluated, otherwise Joey has been doing well, no asthma exacerbations, no documented falls." Dr. Litt's diagnosis was left foot pain, and she formulated a plan to refer the decedent back to the physiatry clinic "for shoe and gait assessment." Despite this development, NYF's October 12, 2016 individualized service plan essentially reiterated the provisions of the prior plan with respect to the decedent's ability to walk. On November 1, 2016, the decedent again saw a physiatrist "for gait evaluation" and was diagnosed with "[u]nspecified abnormalities of gait and mobility" and "[p]ain in left foot."

On March 2, 2017, the decedent underwent a podiatry evaluation by Dr. Orlando at WIHD, after which Dr. Orlando wrote in the relevant chart that "[d]orsiflexion of foot at ankle restricted. Wears bilateral S[uper]M[alleolar] O[rthosis] devices bilaterally. Wearing New Balance shoes 10 wide," and he diagnosed the decedent with"[o]ther acquired deformities of right foot" and "[o]ther acquired deformities of left foot." Dr. Orlando's plan was to "[c]ontinue orthotics and current footwear."

NYF's 2017 annual nursing summary with respect to the decedent, which was dated April 3, 2017, recited that

> "Joey remains medically stable. With the exception of one episode of gastroenteritis in January, no medical issues have been noted. Sleep pattern is good. His appetite is good. He continues to receive low fat reduction diet . . . MD recommends that he continue to work on his diet and exercise,"

while that summary recommended that the decedent should continue with the weekly weight-control program requested by the NYF dietician, and continue his current meal plan and bowel movement protocols, and that NYF would continue to provide medical services. The decedent's April 4, 2017 individualized service plan effectively reiterated the details of his two prior plans with respect to ambulation, and noted the fact that the decedent continued to walk with braces on his legs. Marmanillo asserted that the site-specific plan included the following:

> "The Ardsley IRA has Direct Support Professionals (DSPs) that provide

> protective oversight, assigned 24 hours a day and 7 days a week . . . On each shift there is at least one DSP who is certified in SCIP-R, CPR and First Aid according to state mandated requirements as well as agency wide requirements . . . . There is a nurse on-call 24 hours a day including weekends and holidays to answer any questions DSPs may have regarding medication or medical issues . . . In addition to residential DSPs, a Medicaid Service Coordinator is also available to Joey.
>
> "The RN, in conjunction with the residential DSPs, is responsible for scheduling all routine medical appointments and follow ups. DSPs are responsible for transporting Joey to appointments and making certain that he attends all scheduled appointments."

According to Marmanillo, on May 5, 2017, NYF finalized the decedent's 2017-2018 behavior support plan, which did not specifically address any issues with his ambulation. On June 2, 2017, the decedent returned to Dr. Orlando for "[g]eneral pedal evaluation and management," after which Dr. Orlando reiterated the findings, diagnosis, and plan that he had documented in his prior chart entry. Dr. Grambau saw the decedent on June 13, 2017, and thereafter documented that the decedent had "lost 50 pounds with diet managed by his residence staff." NYF's October 19, 2017 individualized service plan essentially reiterated the contents of the prior plans in connection with the nature and extent of supervision, and also documented that the decedent wore "braces on both legs." Dr. Orlando conducted a follow-up examination on November 1, 2017, and carried over the findings, diagnosis, and plan from prior visits, as he did in connection with a March 22, 2018 examination, which was conducted after the decedent had been transferred from the Ardsley facility to the Thiells facility.

As Marmanillo explained it, NYF finalized the decedent's 2018 individualized service plan on April 25, 2018, which provided that, "[i]n the residence, Joey requires supervision and assistance from staff to complete his ADL's [sic] and various tasks," while a residential habitation plan generated that same date provided that NYF's direct support professionals would ensure that the decedent received his medication as prescribed by his physician, that his activities of daily living skills were completed regularly, that he attended day habilitation service as scheduled, and that he ate foods in accordance with his recommended diet. The latter plan

further recited that "[t]he DSPs will provide Joey with transportation to all activities and medical appointments" and that "[t]he DSPs will ensure Joey's rights are protected at all times." According to Marmanillo, on May 14, 2018, NYF finalized the decedent's 2018-2019 behavior support plan, which primarily addressed the decedent's needs and desires in connection with showering and dressing. On June 22, 2018, and again on September 21, 2018, Dr. Orlando reexamined the decedent, and made the same findings, diagnosis, and plans as had been made in connection with his previous examinations. The individualized support plan that NYF generated on September 21, 2018 mostly involved diet and nutrition goals, and did not address ambulation issues.

On October 4, 2018, Dr. Litt again met with the decedent, and reported that NYF "[s]taff says Joey is still having fecal accidents after colace stopped, thinks less frequently, since decreasing the miralax." The decedent's appointments later in 2018 with WIHD medical personnel were unrelated to ambulation issues.

On January 2, 2019, the decedent again saw Dr. Orlando for a podiatry evaluation, after which Dr. Orlando reiterated his prior findings, diagnosis, and plan. When the decedent returned to see Dr. Orlando on January 25, 2019, the latter documented that "[p]atient seen on urgent basis 1/16/19 for evaluation of swollen left tow (left Hallux). X-rays taken 1/17/19 at Westchester Medical Center. Report negative for fracture." Dr. Orlando nonetheless repeated his prior findings, diagnosis, and plan, with no active treatment indicated, as he did again after an April 3, 2019 follow-up appointment. As Marmanillo described it, on April 17, 2019, NYF generated its annual nursing summary with respect to the decedent, and that, other than a provision that the decedent should "continue working on diet, weight loss and exercise, reviewed labs," there was nothing new about his ability to ambulate.

According to Marmanillo's interpretation of relevant medical records, governmental reports, and deposition testimony, on the morning of April 25, 2019, the decedent's mother received a phone call from an NYF nurse informing her that the decedent had experienced a

seizure, and was being taken by ambulance to MHN, and that, "[w]hen Joey's mother arrived to the hospital she was told that Joey fell down the stairs and was screaming," but that, "[b]efore the fall Joey was able to walk around independently." As Marmanillo explained it, according to the OPWDD,

> "[t]he preliminary findings determined that Nana Adams (DSP) and Shawn Jack (DSP) moved Joey Philip (Individual) from the floor to the chair after a fall (contrary to their training). EMS was never notified of the fall, therefore did not secure Joey's neck with a neck brace or evaluate for a spinal injury. Gabby (House Nurse) provided Joey's mother with false information, she reported he had a seizure, which he did not. The agency failed to report this incident accurately and in a timely manner."

Records reflected that an ambulance finally arrived NYF at approximately 9:03 a.m. on April 25, 2019, and transported the decedent to MHN, upon which the ambulance personnel reported as follows: "U/A to scene, found 38 yo M on floor under care of staff. Staff relate pt had a seizure @bottom of staircase. Pt appears alert and nonverbal . . . Staff relate postictal state." When the decedent was triaged at 10:15 a.m. at MHN, hospital personnel wrote that the cause of his condition was "ambulatory dysfunction" and "possible seizure," noting that "Pt b[rought] i[n] b[y] a[mbulance] for possible seizure from group home. EMS reports fal [sic] and possible seizure both unwitnessed." The nursing assessment sheet noted that the decedent was "[n]on-[a]mbulatory" and that the decedent "arrived to ED via stretcher . . . patient arrives awake alert. As per staff member form [sic] facility, patient tripped walking up the stairs and has [sic] the patient was getting up, patient was seen with his legs shaking."

According to MHN records, the decedent was next seen by the defendant Kai Huang, M.D., an emergency department physician, whose differential diagnosis included "[a]cute possible seizure" and "[a]cute ambulatory dysfunction," with a history of present illness described as a person "who reportedly was at his facility when he fell to the ground from standing position. Staff state patient may have had a seizure; however, it is unclear what happened." Huang further wrote that "aide at bedside notes patient seems a little stiff and expresses concern for patient's return to group home." Huang discussed the decedent's case

with the defendant internist Gary M. Phillips, M.D., after which the decedent was placed in scattered observation for acute possible seizure and acute ambulatory dysfunction. A computed tomography (CT) scan of the decedent's brain, taken without intravenous contrast, purportedly revealed "[n]o CT evidence for significant focal mass effect or acute intracranial hemorrhage." At approximately 4:25 p.m. on April 25, 2019, the defendant neurologist Earl L. Zeitlin, M.D., wrote that the decedent had been "found by his attendant on the ground on steps with shaking of one leg ? which [sic] but was able to reply and seemed to remain in his usual state," and that "[f]ocal seizure is a possibility but not definite. Doubt GM seizure, CAT scan of the head is negative." The decedent was next examined by Phillips at 4:43 p.m., who wrote in the decedent's chart that his "C[hief] C[omplaint] s[tatus]/p[ost] fall, is lethargic, unable to offer history," and that the decedent "is unable to walk, is usually able to walk on his own, per associate employee of group home." Phillips's assessment was essentially the same as the other physicians at MHN.

The results of an MRI scan of the decedent's brain, taken at 1:27 p.m. on April 26, 2019, were reported to be normal. The results of an electroencephalogram taken at 3:20 p.m. on April 26, 2019 were also reported to be normal. The defendant internist Sholeh Kamalian, M.D., the defendant neurologist Marianna Golden, M.D., and the defendant internist Daniel Silovitz, M.D., all reported that, as of April 27, 2019, the decedent was unable to walk. Silovitz wrote that

> "Patient brought in from a group home due to fall and altered mental status with lethargy. Patient is unable to walk, is usually able to walk on his own, per associate employee of group home. Dr. Zeitlin was called for neurology consultation. Patient is from New York Foundling group home. Patient is admitted for fall, ambulatory dysfunction and suspected seizure activity. However he has become febrile and tachycardic today suggestive of sepsis, chest x-ray shows a prominent minor fissure and supportive mycoplasma atypical pneumonia. UA is negative."

At 4:02 p.m. on April 27, 2019, physical therapist Daniel Duffy, P.T., examined the decedent, and documented that the decedent was wearing ankle foot orthoses due to foot pronation and that the decedent had "no strength demonstrated in arms or legs." An MRI that Silovitz ordered

shortly thereafter was read as depicting "congenital fusion at C2-3," while the chart reported that "[t]he images obtained . . . suggest that could be spinal stenosis at C3-4, C4-5 and C5-6, possibly a disc protrusion[ ] abut there is excessive motion in this could be in part due to artifact." MHN Neurosurgeon Jeffrey Degen, M.D., examined the decedent at 5:47 p.m. on April 27, 2019, and thereafter reported that, at the time of the accident, the decedent

> "was found to have soiled himself. He was told to go upstairs and change but the patient fell and was unable to get back up afterwards. According to the patient's case manager, he has been unable to move his upper or lower extremities since the event,"

while the decedent himself was "unable to give any history and the history was obtained from his brother and his case manager." Dr. Degan diagnosed the decedent with quadriplegia and severe cervical spinal cord compression, and explained to the decedent's family that "even with immediate surgery, the patient's paralysis and loss of bowel and bladder function may be permanent" and might result in a "poor neurologic outcome." An April 28, 2019 MRI scan of the decedent's cervical spine reflected the presence of "[c]ongenital canal stenosis with superimposed discogenic disease with moderate to severe spinal cord compression at C3-4, C4-5 and C5-6 with abnormal intramedullary signal intensity at these levels and faint contrast enhancement at C3-4 and C4-5" and "[l]eft-sided disc herniation at C5-6 compressing the left side of the spinal cord."

Marmanillo went on to describe the decedent's transfer to Montefiore Medical Center in the Bronx, where healthcare personnel wrote that the decedent had sustained a "[c]-spinal cord compression after fall: fall was mechanical but not witnessed; seizure and intracranial pathology ruled out at Nyack hospital." On April 29, 2019, neurologist and neurosurgeon Merritt D. Kinon, M.D., met with the decedent, and noted "[d]ense quadraparetic [sic] near quadriplegic after fall at residential facility . . . MRI cervical spine with severe stenosis and cord signal from C2-3 down through C7. CT cervical spine without fx or dislocation." Dr. Kinon explained to the decedent's family that:

> "[C]ervical myelopathy is a progressive neurologic issue due to spinal cord compression. The treatment is surgical decompression and fusion. Without treatment, the pt stands to continue to deteriorate neurologically. Surgery will hopefully prevent further worsening and will give the best chance of some recovery . . . [and] CCS [central cord syndrome] is basically a trauma and 'concussion' to the spinal cord causing weakness in the arms and legs and the treatment is surgical."

Marmanillo described the further treatment that the decedent received at Montefiore Medical Center, and his discharge therefrom on July 8, 2019, with diagnoses of central cord syndrome, cervical stenosis of spinal canal, cervical spinal cord compression, sepsis, ventilator associated pneumonia, anoxic brain injury, quadriplegia, pneumonia due to infectious organism, acute respiratory failure, adult respiratory distress syndrome, acute cerebral vascular accident, sinus tachycardia, percutaneous endoscopic gastrostomy, and tracheostomy. She further described the course of his rehabilitation care at Dumont, his subsequent transfer to Montefiore New Rochelle, and his death on January 15, 2020.

Marmanillo further described some of the testimony given by various NYF witnesses to several State agencies who investigated the incident, in which they explained that the decedent had indeed fallen at the Thiells facility. More particularly, she adverted to Jack's testimony that, after the decedent had fallen, the latter "was laying on the stairs with his head facing the top of the stairs and his legs at the bottom of the stairs," and Adams's testimony that the decedent's head was "against the wall and Mr. Philip [was] laying vertically on the steps," as well as Adams's statement that "[a]s he went back inside the house, he observed Joey Philip laying on the stairs." She explained that, as a result of its investigation, the Justice Center initially determined that the decedent had indeed fallen at the Thiells facility, and substantiated an allegation of "Category 4 Neglect." The Justice Center, in its determination, explained that this classification was appropriate

> "because of substantial systemic problems at the time of the incident, including inadequate management, training and supervision at the facility that exposed Mr. Philip to harm or risk of harm and mitigated individual staff culpability. This includes the provider's failures to adequately train staff on the requirement not to pick a service recipient up following a fall. Both subjects indicated they were not

> trained on a fall protocol prohibiting staff from picking a service recipient up following a fall. The RN, VP of Nursing and House Manager couldn't definitively state whether the staff were provided such training prior to the incident. This has since been remedied with training on preventing and responding to falls which occurred on 9/5/19."

On NYF's administrative appeal, however, the finding of neglect was reversed by the Justice Center's Administrative Appeals Unit (AAU), based on the absence of substantial evidence. The AAU, however, affirmed an initial finding "Category 4 Obstruction," premised on

> "substantial systemic problems including inadequate management, training and supervision at the facility that exposed Mr. Philip to harm or risk of harm and mitigated individual staff culpability. This includes the provider's internal practice of having staff call incidents into an internal hotline as opposed to calling them in directly to the VPCR. While staff aren't specifically prohibited from calling the Justice Center directly, staff indicate that they call incidents in to the hotline who then triages the incidents for reporting to the Justice Center."

Marmanillo expressly opined that there was physical evidence that the decedent indeed suffered from a fall, specifically Dr. Degen's testimony that the decedent suffered from central cord syndrome and acute quadriparesis, both as a result of trauma caused by a fall. She also based her opinion on testimonial evidence from Jack that he had told the decedent to go upstairs to change his clothing after he had soiled himself, heard a loud noise that a reasonable person could infer was caused by a fall, and agreed that a photograph depicting the bottom of the staircase showed the location where the decedent had been found. Jack also admitted to medical personnel at MHN that the decedent fell. Marmanillo further adverted to a statement by NYF employee Karlene Pressley, who reported that Adams had admitted to her that the decedent had fallen. Although she referred to many other subsequent medical chart entries that referred to a fall, those were based on simple repetitions of information provided by NYF's employees or the copying of prior chart entries.

Marmanillo reiterated her opinion that NYF was negligent and careless in instructing the decedent to ascend the stairs of the Thiells residence without assistance on April 25, 2019. She opined that it was a deviation from good and accepted nursing practice to instruct or permit the decedent to attempt to ascend the stairs without assistance because his ambulation was

restricted by a number of different factors which, both individually and collectively, increased the risk of a fall occurring while climbing stairs on his own. She explained that the fact that the decedent had just soiled himself before being instructed to go upstairs, standing alone, restricted his ambulation. She further asserted that, in the years preceding his fall, the decedent was treated for ambulation issues numerous times, and was diagnosed with the "abnormalities of gait and mobility" that were described in the various charts of physicians and a podiatrist who had been treating and monitoring him, all of which are set forth above in detail. Marmanillo further referred to the plaintiff's deposition testimony, in which he asserted that the decedent not only required special shoes for at least one year prior to the accident, but ankle supports as well, and that the decedent's "feet were definitely not as stable as they were before because of the medications" and "[h]e had done physical changes as he became more sedentary and less mobile. And so that affected his ability to walk." In addition, she premised her opinion on NYF's own individualized service reports that noted that the decedent needed leg braces to walk.

Marmanillo further concluded that NYF's employees were negligent and careless in moving the decedent after he fell down the stairs, particularly because, prior to the accident, NYF never instructed its staff that they should not move a service recipient after a fall. In this respect, she adverted to documentation by the OPWDD to the effect that

> "[t]he preliminary findings determined that Nana Adams (DSP) and Shawn Jack (DSP) moved Joey Philip (Individual) from the floor to the chair after a fall (contrary to their [required] training). EMS was never notified of the fall, therefore did not secure Joey's neck with a neck brace or evaluate for a spinal injury,"

a finding that was corroborated by The Justice Center. Moreover, Marmanillo noted that Justice Center investigator Monique Reid was actually present at the Thiells facility on April 25, 2019, at which time she "observed Shawn [sic] Jack and Nana Adams pick up Mr. Philip and place him on a chair," a finding that both Jack and Adams conceded was accurate. Marmanillo concluded that the standard of care required that the decedent not be moved after the fall so that

emergency medical services personnel could properly stabilize him prior to transporting him to the ambulance. She opined that, instead, the decedent should have been left where he fell.

Marmanillo further opined that NYF was negligent in failing properly to train its employees on the correct protocol for addressing the situation in which a resident had fallen, particularly because both Jack and Adams conceded that they had not been trained in connection with fall protocols, while NYF's vice president for nursing and house manager couldn't definitively state whether the staff were provided such training prior to the incident. Marmanillo expressly characterized this failure as a deviation from good nursing practice, and asserted that the fact that NYF staff did indeed move the decedent "could worsen a spinal injury which can lead to permanent paralysis."

Marmanillo further faulted NYF for failing accurately to inform ambulance and medical personnel at MHN of the decedent's actual condition after his fall, as well as its failure to inform emergency medical services personnel that its employees had moved the decedent, agreeing with the Justice Center's determination that this omission deprived the decedent of "proper medical care." Marmanillo reiterated her opinion that NYF was a residential healthcare faciilty within the meaning of the Public Health Law because it provided medical care, the decedent's parents signed several consent forms authorizing NYF staff to render medical treatment to the decedent, NYF staff frequently accompanied the decedent to his numerous medical appointments, and NYF staff were authorized to administer medication to the decedent as prescribed by his physicians.

In reply, NYF relied on the same attorney's affirmation that it relied upon in connection with the premises liability claim, and submitted a supplemental affirmation from Dieterich. Counsel argued that, inasmuch as the plaintiff did not oppose that branch of the motion seeking summary dismissal of the wrongful death cause of action, that cause of action should be dismissed. She further contended that the plaintiff raised new theories of liability in his opposition papers that had not been raised in the complaint or bill of particulars, characterizing

his claims of nursing malpractice as "new" theories. She further asserted that Marmanillo was not qualified to render the opinions that were propounded in her affirmation. Counsel reiterated her contention that NYF was not a residential healthcare facility subject to the strictures of the Public Health Law. Dieterich essentially reiterated her prior opinions.

The court concludes that NYF established its prima facie entitlement to judgment as a matter of law in connection with the plaintiff's medical malpractice claims, as set forth in his common-law negligence cause of action. Contrary to NYF's contention, the plaintiff's allegations of malpractice were not "new" allegations raised for the first time in his opposition papers. Rather, he clearly articulated a medical malpractice cause of action against NYF that was subsumed in his common-law negligence cause of action, and specified in his bill of particulars. It is irrelevant as to how he characterized those claims, or that he failed to denominate them as "malpractice" claims. Summary judgment is not appropriate where the facts alleged in the complaint set forth a cognizable, but misidentified, cause of action (*see Mega Group, Inc. v Halton*, 290 AD2d 673, 675 [3d Dept 2002] [even a failure to state a cause of action in pleadings is not a sufficient basis upon which to permit unconditional summary judgment in favor of defendant, as a matter of law, if plaintiff's submissions provided evidentiary facts making out a cause of action]; *Pullin v Feinsod*, 142 AD2d 561, 562 [2d Dept 1988] [citing CPLR 3026 and 3013, and holding that "(s)ufficient facts are stated to make out a cause of action for breach of contract and it does not matter that the plaintiffs have mislabeled their cause of action"]). The plaintiff clearly alleged deviations from applicable standards of nursing care in both his common-law negligence cause of action and in his bill of particulars.

Initially, NYF did not make a prima facie showing that the decedent did not fall in the first instance, since its submissions included statements by its own employees that the decedent did, in fact, fall. In any event, the plaintiff raised a triable issue of fact in connection with this issue both with the statements made by Jack and Adams, and by reference to a neurosurgeon's

records reporting that the decedent's injuries were caused by a trauma that could only have been related to the subject accident.

The court rejects NYF's contention that Marmanillo was not qualified to render an opinion as to whether NYF deviated from applicable standards of nursing care, and whether those deviations caused or contributed to the decedent's fall. The determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law (*see Guzman v 4030 Bronx Blvd. Assoc., LLC*, 54 AD3d 42, 49 [1st Dept 2008]). A practitioner who is put forward by a party as an expert qualified to support or oppose a summary judgment motion must assert that he or she possesses the necessary knowledge and training in the relevant specialty, or explain how he or she came to it, and also must articulate the standard of care that allegedly was applicable (*see Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014]). Marmanillo did so here, and articulated nonspeculative opinions that NYF's failure to supervise the decedent, its directive to the decedent that he ascend the staircase unassisted, its employees' decision to move the decedent after he fell, and its employees' failure properly and accurately to inform ambulance and hospital personnel of the underlying facts of the accident and their immediate response thereto, constituted deviations from accepted standards of care that caused or contributed both to his fall and an aggravation of his injuries.

Hence, the court must deny that branch of NYF's motion which sought summary judgment dismissing so much of the common-law negligence cause of action as was predicated on its malpractice in failing to monitor and supervise the decedent on the date of the accident, and in failing properly to inform ambulance and hospital personnel of the details thereof.

The court, however, concludes that NYF failed to establish its prima facie entitlement to judgment as a matter of law in connection with so much of the plaintiff's common-law negligence cause of action as was predicated upon allegations that it negligently failed properly to train and supervise its employees. In this regard, NYF's submissions revealed the existence

of a triable issue of fact as to whether Jack and Adams were fully trained in the protocol for attending to residents who had fallen, and whether the deficiencies in their training caused or contributed to an aggravation of the decedent's injuries. In any event, Marmanillo further raised triable issues of fact in connection with this claim, inasmuch as she adverted to testimony that neither Jack nor Adams were properly trained in this respect, and opined as to whether their lack of training, and their concomitant determination to move the decedent after his fall, exacerbated the decedent's spinal injuries.

Although the court concludes that NYF established its prima facie entitlement to judgment as a matter of law in connection with the plaintiff's Public Health Law § 2801-d cause of action, the plaintiff nonetheless raised a triable issue of fact in opposition to that showing, with Marmanillo's affirmation, that NYF was indeed a residential healthcare facility within the meaning of the Public Health Law, that it violated 10 NYCRR 415.12(a)(ii), 10 NYCRR 415.12(e)(1), and 10 NYCRR 415.12(h)(2), and that those violations caused or contributed to the decedent's accident and the consequent aggravation of his injuries. Hence, summary judgment must be denied to NYF in connection with that branch of its motion seeking to dismiss so much of the Public Health Law § 2801-d cause of action as was predicted on alleged violations of Public Health Law § 2803-c and those regulations. Although NYF may indeed have violated 10 NYCRR 415.12(h)(1) by failing to maintain the subject staircase in a safe condition, the plaintiff failed to raise a triable issue of fact as to whether any unsafe condition caused or contributed to the accident. Moreover, although NYF may have violated the reporting requirements articulated in 14 NYCRR 624.1, the failure to report could not have caused the accident itself, and the plaintiff failed to raise a triable issue of fact as to whether the failure timely and properly to report the incident to appropriate authorities in any way aggravated his injuries. In addition, the plaintiff did not address, in his opposition papers, whether any of the other statutes or regulations cited in his complaint or bill of particulars were violated in any particular manner, or whether any such violation caused or contributed to the plaintiff's accident

and injuries. Hence, summary judgment must be awarded to NYF dismissing so much of the Public Health Law § 2801-d cause of action as was predicated on alleged violations of those statutes and regulations.

In opposition to the NYF's prima facie showing that it did not cause or contribute to the decedent's death, the plaintiff did not address the issue. In any event, although a wrongful death cause of action may be premised upon medical malpractice (*see Roques v Noble*, 73 AD3d at 207), "'[i]n a wrongful death action, an award of damages is limited to the fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought'" (*Leger v Chasky*, 55 AD3d 564, 565 [2d Dept 2008], quoting *Plotkin v New York City Health & Hosps. Corp.*, 221 AD2d 425, 426 [2d Dept 1995]; *see* EPTL 5-4.3 [a]). Since the decedent was not employed, and was not supporting any potential distributees of his estate, the plaintiff will not be able to establish any pecuniary loss to the decedent's estate that was caused by the decedent's death. The court notes that, moreover, in general, a parent's loss of a child's companionship is not compensable (*see S.M. v Madura,* 223 AD3d 486, 487 [1st Dept 2024]; *Devito v Opatich*, 215 AD2d 714, 715 [2d Dept 1995]; *cf. Samela v Post Rd. Entertainment Corp.*, 100 AD3d 857, 858 [2d Dept 2012] [a parent may recover for loss of a child's services upon submitting proof that child had an obligation to support his or her parents, the child contributed to household income, or the child paid a part of household expenses]). Hence, NYF must be awarded summary judgment dismissing the wrongful death cause of action insofar as asserted against it.

NYF's remaining contentions are without merit.

Accordingly, it is,

ORDERED that the motion of the defendant New York Foundling, formerly known as New York Foundling Hospital, for summary judgment dismissing the complaint insofar as asserted against it is granted only to the extent that it is awarded summary judgment dismissing the wrongful death cause of action insofar as asserted against it, so much of the common-law

negligence cause of action as was predicated on its alleged failure to maintain its premises in a safe condition, and so much of the Public Health Law § 2801-d cause of action as was predicated upon alleged violations of Mental Hygiene Law §§ 13.07, 16.00, 16.03, 16.05, and 41.36, 10 NYCRR 415(h)(i), 14 NYCRR 624.1, 14 NYCRR part 635, 42 USC §§ 1395(l), *et seq*., and 12101, *et seq*., and 42 CFR part 415.19, that cause of action and those claims are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the attorneys for all of the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on February 18, 2026, at 2:15 p.m., at which time they shall be prepared to discuss resolution of the action, the scheduling of a future two-hour settlement conference with the court, and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

1/14/2026
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE