COURT OF APPEALS
STATE OF NEW YORK

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LILLIAN ZEIDES on behalf of the estate of BEATRICE ZEIDES,

Plaintiff-respondent,

PLAINTIFF-RESPONDENT'S BRIEF

-against-

THE HEBREW HOME FOR THE AGED AT RIVERDALE INC., a New York Corporation, and BETH ABRAHAM HEALTH SERVICES, a New York Non-Profit Corporation,

Defendants-appellants.

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PRELIMINARY STATEMENT

Plaintiff-respondent Lillian Zeides, on behalf of the estate of Beatrice Zeides (the "decedent" and/or "Beatrice") (collectively, the "plaintiff[s]"), submit this brief in connection with the appeal taken by defendant-appellant The Hebrew Home for the Aged at Riverdale Inc., a New York Corporation (the "defendant") from the December 24, 2002 order of the Appellate Division First Department (127-34)[1] which modified the June 29, 2001 order of the Supreme Court, Bronx County denying defendant's motion for summary judgment dismissing the complaint as time-barred, but granted leave to renew after further discovery without prejudice to plaintiff's motion to amend the complaint, and otherwise affirmed the order without costs (127). Defendant appeals to this Court by leave of the Appellate Division's June 3, 2003 order (125). We believe that the Appellate Division's order was correct and was actually generous toward the defendant; the majority's construction of the Public Health Law ("PHL") is in

[1] Numbers in parentheses refer to pages of the record on appeal.

accord with recent decisions from other Appellate Divisions. See, **Doe v. Westfall Health Care Center,** 303 AD2d 102 [4th Dept. 2002], overruling **Goldberg v. Plaza Nursing Home,** 222 AD2d 1082 [4th Dept. 1995]. Moreover, certain procedural issues, we believe, are beyond this Court's general power of review.

STATEMENT OF THE CASE

Original summons; amended summons and complaint.

Plaintiff's original complaint dated October 22, 1999 (14-29) alleged that defendant violated PHL §2801 and §2803[c] and New York Code of Rules and Regulations ("NYCRR") §415 (17-20), and was also guilty of common law negligence (20-22). The acts complained of included the following (19-20):

a. failing to provide physical therapy
b. failing to move, exercise and adjust decedent in her bed to prevent pressure sores
c. failing to provide adequate assistance to prevent falls
d. failing to provide proper nutrition
e. failing to monitor decedent's weight
f. failing to provide sufficient hydration
g. failing to monitor decedent's medical condition
h. failing to obtain adequate medical assistance and care where needed.

As a result, according to the complaint, decedent suffered contractures to the legs, decubitus on the left hip, severe weight loss, stroke, loss of ability to communicate, pain, discomfort, loss of mobility, loss of dignity and humiliation (20).

It was alleged generally that defendant failed to provide proper care to the decedent at the facility, such that she developed pressure sores; that defendant failed to provide proper physical therapy, such that decedent developed contractures

leading to loss of mobility and ability to perform daily activities; that defendant failed to respond to symptoms indicating injury and distress; that defendant failed to properly monitor and feed decedent, leading to severe weight loss; that defendant caused “unnecessary stress, both physically and mentally, resulting in an overall decline in Beatrice’s medical condition”; and that defendant failed to properly communicate with decedent’s family and personal physician (21-22).

It was alleged that defendant’s negligence occurred from January 16 to February 16 and March 26 through December 23, 1996 (17, 21), that decedent died on August 30, 1998 (17), and that Ms. Zeides was duly appointed administratrix of decedent’s estate on July 22, 1999 (16). There were specific claims of negligence and of violation of PHL §28 and NYCRR §415 (19).

Subsequently, plaintiff served an amended complaint dated December 22, 1999 repeating the general claims of negligence and breach of statutory and regulatory enactments, but adding claims for wrongful death (30-64).

The complaints asserted claims for abandonment – for example, it was stated that decedent’s skin was not properly cleaned, that she was not fed properly, not hydrated adequately and not exercised or moved in her bed, that she was not prevented from falling, that she was not given proper bedding, etc. The claim involved “overall poor care” as well as the “failure to assist with feedings” and the “failure to move [decedent] and keep [her] active”; she eventually suffered pneumonia as well as open sores

on her skin (66-67).

Defendant’s motion in the trial court.

On January 5, 2001, defendant moved for summary judgment (7-8), submitting a four page attorney affirmation (9-13) and pleadings, asserting that as the action was not commenced until October 22, 1999, and decedent’s treatment ended in December of 1996, the 2 1/2 year statute of limitations in CPLR §214[a] had run out and the action was time-barred.

Plaintiff, in opposition, submitted the affirmation of her attorney (86-93), the affidavit of Ms. Zeides (94-95), pleadings (96), a proposed third amended complaint that waa the subject of a pending motion to amend (97-112), and the affirmation of Gilbert Valdez RN (113-17). According to plaintiff, the action was one for negligence, not medical malpractice (86), so that the medical malpractice statute of limitations did not apply. Ms. Zeides stated that she had placed decedent in the defendant’s nursing home because she was unable to care for her; that she visited her 3-5 days per week and stayed 4-5 hours, yet she never saw decedent being repositioned, and never saw her diaper being checked; that decedent was not participating in any activities; that she complained of thirst. After decedent’s condition became so bad that she had to be hospitalized, Ms. Zeides learned that she had Stage IV pressure sores and lost far too much weight, and that her health was going into a precipitous general decline. This, according to plaintiff’s counsel, was not medical negligence, but

neglect on the part of the staff, giving rise to common law negligence claims as well as claims under the PHL (87, 94-95).

Plaintiff's counsel, in bold print, declared (88):

> **Most significantly, none of Lillian's claims relate to professional medical treatment rendered by a medical professional. This action was brought because of the negligent day to day care Beatrice received at the Hebrew Home, which was the exact purpose for which the nursing home residents' rights were adopted by the New York State Legislature. Plaintiff recently moved to amend the second amended complaint in this action to make absolutely sure the complaint was clear as to the cause of action for negligence and statutory violation, with absolutely no claim related to medical malpractice. The return date for said motion is February 23, 2001.**

The record, indeed, contains a third amended complaint which set forth causes of action for negligence and violation of the PHL and related regulations, without any claim for medical negligence (103-10), as well as the motion itself (99-102). Plaintiff's counsel pointed out that this complaint "does not seek damages for injuries sustained as a result of medical malpractice."[2]

Plaintiff's counsel pointed out that in §6521 of the Education Law, medical/dental malpractice claims were based on the practice of medicine, defined as "diagnosing, treating, operating or prescribing any human disease, pain, injury, deformity or physical condition" (89), and that care rendered in a nursing home, under that definition, did not constitute medical treatment. After all, counsel pointed out, PHL §2801 distinguished between a "hospital" and a "nursing home" on the basis that hospitals operate under the supervision of a physician and exist for the

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[2]Such admission was binding on plaintiff, pursuant to **Michigan National Bank**

"prevention, diagnosis or treatment of human disease, pain, etc.", while nursing home facilities "provide lodging, board and physical care including, but not limited to, the recording of health information, dietary supervision and supervised hygienic services incident to such services" to "sick, invalid, infirm, disabled or convalescent persons" (89-90).

After citing to certain case law (90-91), plaintiff's counsel noted that the services decedent required at defendant's facility included "assistance with feeding, hydration, bathing, bowel and bladder function, ambulating and repositioning", services ordinarily provided by "orderlies and nursing assistants", and the second and third amended complaints contained allegations related to such non-medical services. Failure to properly supply such services "does not constitute medical malpractice" and, as the affidavit of Mr. Valdez made clear, "orderlies generally provide these services or nursing assistants", and these individuals "are not health care professionals" (91).

Mr. Valdez, a registered nurse, practiced primarily in the geriatric field, and was "trained and experienced in the care and treatment of elderly persons" (114). He reviewed defendant's records and concluded that decedent developed "Stage IV pressure sores due to ordinary neglect", that she was not regularly repositioned, that she was "not assisted with bowel and bladder function", that she was "not provided with adequate amounts of food and water" (114-15). He wrote that such services were "generally provided by orderlies and nursing assistants, not

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v. Oakland v. American Cent. Ins., 89 NY2d 94 [1996] and cases cited therein.

licensed physicians." Because of her physical condition, decedent needed help with "feeding, hydration, bathing, bowel and bladder function, ambulating and repositioning", and was dependent on the nursing home staff for such help. Pressure sores arose mainly as a result of failure to reposition the patient at regular intervals (115). Thus the gravamen of the action was ordinary negligence, not professional negligence.

In a reply affirmation, defendant repeated its argument to the contrary, and explained that the care involved here bore a "substantial relationship to a patient's overall medical treatment" (118-23).[3]

Decision.

Justice Janice R. Bowman, to whom the case was referred by Justice Kenneth L. Thompson, denied the motion for summary judgment, finding that the "claims sound in negligence", which has a 3 year statute of limitations, but also apparently granted the motion with regard to any medical malpractice claim (6).

Appeal; Appellate Division decision.

Defendant appealed to the Appellate Division, First Department (4-5), which on December 24, 2002 modified the trial court's order "to the extent of granting defendant leave to renew its motion after further discovery, without prejudice to plaintiff's motion to amend the complaint", and otherwise affirmed the order (127) (300 AD2d 178 [1st Dept. 2002]). The majority in

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[3] Both parties also argued the issue of prematurity of summary judgment based on the fact that depositions were not held (92, 120-21); we discuss this in

the Appellate Division (Justices Ellerin, Rubin and Gonzalez) noted that the complaint asserted "causes of action for violations of the Public Health Law, ordinary negligence and wrongful death"; it specified that PHL §2801-d "conferred a private right of action on a patient in a nursing home for injuries sustained as a result of the deprivation of specified rights set forth in PHL §2801-d[1].

Pursuant to PHL §2803-c[3][e], the deprivation of the "right to receive adequate and appropriate medical care" sets forth the basis of plaintiff's claim, as do violations of 10 NYCRR §415.12[c][1],[I][2] based on the development of pressure sores and the lack of adequate nutrition. The majority therefore found that the complaint stated a "cognizable cause of action under the statute." Because defendant failed to address either these claims or the allegations of ordinary negligence, the mere assertion that the entire complaint should be dismissed was also procedurally improper. The majority noted that health-related services were to be distinguished from "professional nursing care", and that the PHL "contains nothing that would indicate an intent to equate its private right of action with one for either medical malpractice or ordinary negligence" (127-29). The majority concluded: "The statutory basis of liability is neither a deviation from accepted standards of medical practice nor breach of duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the 'facility exercised all care

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the context of the Appellate Division's decision.

reasonably necessary to prevent and limit the deprivation and injury to the patient.'" Thus, since violation of PHL §2801 et. seq. constituted a "liability…created or imposed by statute", plaintiff's "statutory cause of action is governed by the three year period of limitation of CPLR §214[2]."

The majority also noted that defendant failed to discuss the complaint in detail to show how it sounded in medical malpractice, and did not distinguish the various allegations therein. A party moving for summary judgment, of course, has the burden of establishing initially its prima facie entitlement to such relief (**Alvarez v. Prospect Hospital,** 68 NY2d 320 [1986]; **Olan v. Farrell Lines,** 64 NY2d 1092 [1985]; **Winegrad v. NYU,** 64 NY2d 852 [1985]). Thus, a "deficiency in the affidavits on both sides cuts against the [moving party]…because…the burden rests on him to establish affirmatively that his adversary does not have a viable cause of action against him" (**O'Connor-Sullivan Inc. v. Otto,** 283 AD 269 [3d Dept. 1954]), and even "worthless" opposition papers suffice to defeat summary judgment where defendant fails to make the initial showing required (**Trepuk v. Frank,** 56 NY2d 779 [1982], **revg. on dissnt. at AD,** 86 AD2d 578-9 [1st Dept. 1982]). Here, defendant did not "identify which causes of action it considers time-barred", preferring to conclude that the "entire action sounds in medical malpractice and must, therefore, be dismissed." At the very least, the complaint stated a cause of action for violation of PHL §2803-c[3], the remedy for which is "in addition to and cumulative with any other remedies available to the

patient” under PHL §2801-d[4].

The majority found that the viability of the general negligence claim was “less clear” because it was not shown whether the acts and omissions were committed by physicians or by nurses who might be deemed skilled medical professionals; here, too, however, defendant “offered no authority for extending the class of skilled medical professionals to include practical nurses, orderlies and others who assist in patient care but do not exercise independent medical judgment” (129-30). Accordingly, the majority found that plaintiff also had “impermissibly intermingled allegations of medical malpractice and ordinary negligence”; however, because plaintiff moved to serve an amended complaint which “serves to sharpen the issues”, further discovery was needed, and upon completion of same, defendant could renew its application (130-31).

Justice Friedman authored a two-person dissent with which Justice Andrias concurred. The dissent agreed with the majority regarding general negligence, finding it “impossible, on the sparse record before us, to determine whether the conduct at issue constituted an integral part of the process of rendering medical treatment to plaintiff’s decedent” (132). With regard to the PHL §2801-d claim, the dissent noted that the briefs did not discuss the issue, and accused the majority of “reaching out, on its own initiative, to opine that the statutory cause of action is governed by a third provision of the statute of limitations.” The dissent held that this statute was not intended to “create a new

personal injury cause of action based on negligence when that remedy already existed", relying on **Goldberg v. Plaza Nursing Home, supra.** That decision, however, was overruled by the Fourth Department itself in **Doe v. Westfall Health Care Center, supra.**

Defendant's motion to appeal to this Court.

After the Appellate Division's order was served with notice of entry, defendant moved in the Appellate Division for leave to appeal to this Court. The motion was granted, with the First Department asking this Court to consider the following: "Was the order of this Court, which modified the order of the Supreme Court, properly made?" (125). It is plaintiff's position that the Appellate Division majority's decision was unassailably correct; that, as the PHL was specifically pled, a cause of action was stated under the statute; and that summary judgment would be premature given the sparse record; and that the Appellate Division's grant of leave to renew the motion following discovery was not only unassailable but not properly before this Court. Plaintiff also questions whether the Appellate Division's decision to review a cause of action which allegedly was not part of the parties' submissions below is properly before this Court, as it involved the exercise of discretion which is generally beyond the purview of this Court. Accordingly, the order should be substantially affirmed and otherwise dismissed as not reviewable.

DISCUSSION

POINT I:
THE APPELLATE DIVISION'S UNANIMOUS FINDING THAT MORE

DISCOVERY WAS REQUIRED ON THE GENERAL NEGLIGENCE CLAIM SHOULD BE AFFIRMED ON THE MERITS OR AS BEING BEYOND THIS COURT'S JURISDICTION; THE MAJORITY'S HOLDING THAT A COGNIZABLE CLAIM WAS SET FORTH UNDER THE PUBLIC HEALTH LAW SHOULD BE AFFIRMED PURSUANT TO THE TERMS OF THE STATUTE AND APPLICABLE CASE LAW; THE ARGUMENT THAT THE APPELLATE DIVISION ERRED IN CONSIDERING A CLAIM NOT SET FORTH IN THE PARTIES' SUBMISSIONS INVOLVES AN ISSUE THAT IS UNPRESERVED AND BEYOND THIS COURT'S JURISDICTION.

Introduction.

As we have seen, the issue of whether the claims in the complaint sounded solely in medical malpractice or in ordinary negligence and wrongful death, is dispositive as to whether the action was brought within the appropriate statute of limitations period.

In this regard, CPLR §214-a requires that suits for medical malpractice be commenced within 2 years and 6 months of accrual of the cause of action. CPLR §214[5] requires that suits for ordinary negligence be commenced within 3 years of accrual. CPLR §214[2] provides a three year statute of limitations for "liability …created or imposed by statute." As the majority noted, and as the record shows, plaintiff has now officially disclaimed any medical malpractice cause of action, and is proceeding solely on the second two theories. All the justices in the Appellate Division noted that there was unclarity with regard to who at the nursing home committed the actions giving rise to the claim; hence the majority remarked (300 AD2d at 180):

> **The viability of plaintiff's general negligence claim is less clear. The record does not indicate whether the various acts and omissions alleged in the complaint were committed by physicians or by nurses possessing sufficient qualifications to be deemed medical professionals [cits.]; nor has defendant offered any authority for extending the class of skilled medical professionals to include practical**

nurses, orderlies and others who assist in patient care but do not exercise independent medical judgment. The record does not identify the persons who supervised the treatment of plaintiff's decedent; nor does it permit any assessment of the qualifications of the persons involved in providing her with care. However, it remains that for the purposes of the subject motion, it cannot be concluded that the action sounds exclusively in medical malpractice so as to require dismissal pursuant to CPLR §3211[a][5]. If defendant has failed to identify the particular causes of action it deems to be barred as untimely, plaintiff has also impermissibly intermingled allegations of medical malpractice and ordinary negligence [cits.]. The record indicates that, while the motion to dismiss was pending, plaintiff moved to amend the complaint a second time to state a cause of action seeking relief under the Public Health Law and a second cause of action alleging ordinary negligence. The proposed complaint better serves to sharpen the issues. However, further discovery is necessary to assess the nature of the alleged deficiencies in the care provided by the nursing home. Therefore, it would be appropriate to entertain the motion to amend and permit defendant to renew its application upon completion of discovery.

The dissent agreed with the denial of summary judgment with leave to renew. In a decision authored by Justice Friedman and joined by Justice Andrias, it stated (**id.** at 180-81):

I agree with the majority's modification of the order on appeal to provide that the denial of defendant nursing home's motion for summary judgment dismissing the complaint as time-barred is without prejudice to renewal after discovery. A claim based on the alleged negligence of non-physician health care workers is deemed to sound in medical malpractice and thus to be governed by the 2 ½ year statute of limitations [cits.]. If the alleged conduct of such workers bears a substantial relationship to the rendition of medical treatment by a licensed physician [cits.]. Stated otherwise, the limitation period for medical malpractice will apply to a claim based on negligence by a non-physician if the conduct at issue constituted an integral part of the process of rendering medical treatment to the patient [cits.]. Since it is impossible, on the sparse record before us, to determine whether the conduct at issue constituted an integral part of the process of rendering medical treatment to plaintiff's decedent, such determination must await further developments of the factual record through discovery [cits.].

The dissent disagreed, however, as to the propriety of the Public Health Law cause of action, finding that because the parties' "appellate briefs conspicuously share the assumption that the personal injury and statutory causes of action stand or fall together on the time bar issue", the majority "should not have reached, on its own initiative, to opine that the statutory cause of action is governed by a third provision of the statute of limitations." The dissent also agreed with the analysis of **Goldberg v. Plaza Nursing Home, supra,** and a trial court decision, **Begandy v. Richardson,** 134 Misc.2d 357 [Sup. Ct. 1987], stating that those decisions held that "The purpose of §2801-d was not to create a new personal injury cause of action based on negligence when that remedy already existed." Of course, the portion of the **Goldberg** decision which reached that conclusion was expressly overruled in **Doe.**

Procedural considerations.

Entirely absent from defendant's brief is a discussion of procedural issues regarding this Court's power of review, which we believe are important and possibly outcome-determinative. We discuss the jurisdictional issues at this point.

All the justices in the Appellate Division agreed that the trial court's order should be modified to allow defendant to renew its motion, because the record was too sparse to enable them to make an intelligent determination as to whether the negligence claims in the complaint were actually disguised claims

for medical malpractice. All the justices noted the service of the amended complaint, and found that the best procedure would be to allow discovery based on that complaint, and then have defendant renew its summary judgment motion, if it elected to do so, after discovery was completed. We believe that that portion of the Appellate Division's order which provided for this modification was the type of discretionary determination that this Court normally declines to consider pursuant to a self-imposed limitation on its powers. See, **Matter of Von Bulow,** 63 NY2d 221 [1984]; **Morris v. Dunham,** 35 NY2d 968 [1975]; **Kahn v. Samson Mgmt. Corp.,** 34 NY2d 749 [1974]; **Ameliva v. Roth,** 33 NY2d 682 [1973]; **Hellner v. Mannow,** 33 NY2d 897 [1973]. See, Cohen & Karger, Powers of the New York Court of Appeals, revd. ed. 1952, p. 582.

While this Court may accept cases involving discretion and reverse on the ground that the Appellate Division abused such discretion as a matter of law (**Barasch v. Micucci,** 49 NY2d 594 [1980]), this is rarely done, and the doctrine certainly does not apply here. The Appellate Division's order actually concerned discovery, as it held that the motion could not be either granted or denied until the record was fleshed out. "While discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse." On the other hand, this Court's power of review over such discretionary determinations is

"limited to whether the Appellate Division abused its discretion as a matter of law" (**Andon v. 302-304 Mott St.,** 94 NY2d 740,745 [2000], citing **Brady v. Ottaway Newspapers,** 63 NY2d 1031-2 1984]; **Phoenix Mut. Life v. Conway,** 11 NY2d 367,370 [1962]; **Kavanagh v. Ogden Allied Main.,** 92 NY2d 952,954 [1998]).[4]

We see no basis to overturn the unanimous finding of the Appellate Division here that summary judgment should be denied with leave to renew at the conclusion of discovery because the record was too sparse to determine whether the complaint sounded in malpractice or negligence – for this determination simply could not be an abuse of discretion.

The dissent essentially held that the propriety of the statutory causes of action was waived by the parties' course of conduct, since CPLR §214[2] dealing with the statute of limitations for statutory causes of action was not raised in the briefs, and that the PHL §2801 claim was used merely to show that there was a cognizable negligence claim. This Court has held that it reviews only questions of law which have been duly preserved (**Baker v. W. Irondequoit C.S.D.,** 70 NY2d 314 [1987]; **Gramercy Equities v. Dumont,** 72 NY2d 560 [1988]; **Merrill v. Albany Med. Ctr.,** 71 NY2d 990 [1987]). Thus, where a case was pled and tried on one theory, this Court may not grant recovery on another theory (**Lichtman v. Grossbard,** 73 NY2d 792 [1988]). In **In Re: Shannon B.,** 70 NY2d 458 [1987], this Court explained:

[4] In **Andon,** a certification order stating that the order was made "as a matter of law" was held not binding on this Court, which considers whether the order "reflects a discretionary balancing of interests." See, **Small v. Lorillard,** 94

> **The Appellate Division did not explicitly address the constitutional argument upon which appellant hinders her appeal as of right to this Court – that even if the police possess authority to detain suspected truants, the seizure must be supported by probable cause. The record reveals that this argument was first raised on the appeal to the Appellate Division. <u>The issue is therefore not preserved for our review,</u> and the appeal of right must be dismissed…**[5]

Because this Court has held that it has "no power to review either the unpreserved error or the Appellate Division's exercise of discretion in reaching" an unpreserved issue (**<u>Feinberg v. Saks,</u>** 56 NY2d 206,210-1 [1982]), it appears that this Court may not have jurisdiction to decide whether the Public Health Law cause of action is cognizable, as the dissent's position was based on the fact that the issue was not discussed in the parties' briefs, i.e., that it was not preserved for appellate review.

Accordingly, we submit that this Court should decline to respond to the certified question on procedural grounds, or defer to the discretionary determination made by the Appellate Division majority.

Separate right of action under the PHL.

Contrary to defendant's claims, PHL §2801-d provides a separate right of action, and recent case law has so held. Defendant states in its brief, "The express purpose of the statute was to provide a remedy for deprivation of rights, and infringement of rights, not to provide a remedy for that for

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NY2d 43,53 [1999]; **<u>Brown v. NYC,</u>** 60 NY2d 893-4 [1983].

[5] The attorneys in **<u>Shannon B</u>** were prescient, and therefore moved "at oral argument" for leave to appeal, and this Court agreed to grant that oral application "to consider the important issue of the scope of police authority in these circumstances."

which there already was a remedy – medical malpractice and ordinary negligence" (Brief at 13), citing the now discredited decision of the Fourth Department in **Goldberg** (Brief at 11). Defendant also writes, disingenuously, we submit, that PHL §2803[c][3][e] "is inapplicable because Hebrew Home never deprived Mrs. Zeides of her right to receive medical care – in fact, the plaintiff has not alleged a single fact that would support such a claim." Appealing to "legislative intent" and principles of "statutory construction", defendant calls the Appellate Division decision "absurd", and dismisses **Doe** as "aberrational" and of "no precedential value" (Brief at 12-14, 17). Defendant also protests that recognizing a claim for nursing home abuse would "open the floodgates of litigation" (Brief at 20).

The fact is that PHL §2801 was enacted to stem a tide of abuse of nursing home patients who are too frail, infirm, sick or weak to aid themselves. A facility that accepts monetary compensation to care for such individuals has an obligation to provide them with proper care. Decedent's abandonment, as evidenced by her malnutrition, dehydration and bedsores, involved the type of deprivation that was specifically addressed in the PHL. It was, therefore, intended to "create new causes of action", contrary to defendant (Brief at 9). After all, PHL §2801[d][4] provides that the remedy is "in addition to and cumulative with any other remedies available to a patient."

The assertion that defendant never deprived decedent of

medical care is mystifying. The complaint asserts in detail how this happened.

PHL §2801-d[1][2] provides:

> **Any 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, except as hereinafter provided. For purposes of this section, a "right or benefit" of a patient of a residential health care facility shall mean any right or benefit created or established for the wellbeing 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 non-compliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted, shall be liable under this section.**
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> **Upon a finding that a patient has been deprived of a right or benefit, and that said patient has been injured as a result of said deprivation, 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 25% 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. In addition, where the deprivation of any such right or benefit is found to have been wilful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed.**

The law also provides for "injunctive and declaratory relief (PHL §2801-d[3]), and patients may band together and bring a class action suit, and any cause of action arising under the statute is "in addition to and cumulative with any other remedies available to a patient" (§2801-d[4]). The specific rights that

form the basis of such a cause of action are listed in §2803-c[3]. Subdivision [3][e] provides that one of those rights is the right "to receive adequate and appropriate medical care, to be fully informed of his or her medical condition and proposed treatment unless medically contraindicated, and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions." Subdivision [3][g] provides a right to "courteous, fair and respectful care and treatment and a written statement of the services provided by the facility, including those required to be offered on an as needed basis." Subdivision [3][h] provides a right to "be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized in writing by a physician for a specified and limited period of time or as are necessitated by an emergency, in which case the restraint may only be applied by a qualified licensed nurse who shall set forth in writing the circumstances requiring the use of restraint, and in the case of use of a chemical restraint, a physician shall be consulted within 24 hours." The patient's civil liberties must be respected (§2803-c[3][a]); he must be afforded the right to have "private communications and consultations with [his] physician, attorney and others" ([b]), to present grievances ([c]), to "manage his or her own financial affairs" ([d]), to have "privacy in treatment and caring for personal needs, confidentiality in the treatment of personal and medical records, and security in storing personal possessions", and various other technical

rights.

This statute, as the Appellate Division majority found, provides a separate cause of action, as the complaint alleges deprivation of the "right to receive adequate and appropriate medical care" (PHL §2803-c[3][e]). Defendant is unquestionably a nursing home (PHL §2801[2][3][4][b]). The complaint also alleges a violation of 10 NYCRR §415.12[c][1] in failing to prevent the development of pressure sores and bedsores, and a violation of §415.12[I][2] in failing to provide adequate nutrition. Since PHL §2801-d[4] provides that the right to recover under §2803-c[3] is "in addition to and cumulative with any other remedies available to a patient", principles of statutory construction clearly support the majority's finding that statutory claims were pled in the complaint at bar.

In interpreting a statute, courts should first of all "attempt to effectuate the intent of the Legislature" (**1605 Book Center Inc. v. Tax Appeals Trib.,** 83 NY2d 240,244 [1994], **cert. den.** 513 US 811 [1994]; **Doctors Council v. NYC Emp. Ret. System,** 71 NY2d 669,674-5 [1988]; **Patrolmens Benev. V. NYC,** 41 NY2d 205,208 [1976]).

Intent is derived, first and foremost, from a literal reading of the act itself (**Majewski v. Broadalbin-Perth,** 91 NY2d 577,583 [1998]), construing the words according to their most obvious meaning (See, McKinney, New York Statutes, §92[b], §94). After all, it is "a strong thing to read into a statute words which are not there and, in the absence of clear necessity, it is

a wrong thing to do" (**Palmer v. Spaulding,** 299 NY 368,372 [1949]). "The courts must take the language of statutes as they find it, and may not read into it a meaning not expressed by the Legislature [cits.]" (**Pierse v. Zimmerman,** 255 AD 708 [2d Dept. 1938]).

"Where the terms of a statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used…resort to legislative history will be countenanced only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment" (**Auerbach v. Bd. of Ed.,** 86 NY2d 198,204 [1995]; **Loyd v. Grella,** 83 NY2d 537,545-6 [1994]; **Matter of Kleefeld's Estate,** 55 NY2d 253,259 [1982], **rearg. den.** 56 NY2d 683 [1982]).

The importance of adhering to precedent as well as the text of the subject statute is dramatically illustrated by the recent decision of this Court in **Desiderio v. Ochs,** 100 NY2d 159 [2003], affirming a judgment that increased future nursing care damages almost threefold based upon a 4% interest rate required by CPLR §5031[e], though the ultimate result was that defendant would have to pay far more than the amount awarded by the jury. Noting that its prior precedent (**Schultz v. Harrison Radiator,** 90 NY2d 311 [1997]; **Rohring v. City of Niagara Falls,** 84 NY2d 60 [1994]; **Bryant v. NYCHHC,** 93 NY2d 592 [1999]) endorsed this procedure, and that the method of calculating judgments was clearly set forth in the statute, this Court rejected the defendant's

alternative method which would run “afoul of the clear statutory language” and the court’s “holdings” in other cases. Because “Well established rules of statutory construction prevent [a court] from looking behind the unambiguous language of a statute”, this Court held that plaintiff’s method was correct, though it appeared that if plaintiff lived for 55 years, he would be paid far more than the jury awarded him. Justice Rosenblatt concurred, stating:

> **This appeal tests the separation of powers doctrine to its limits. It would have been easy enough for a less dutiful court to ignore the words of the statute and apply its own methodology, reasoning that the Legislature could not possibly have intended this result. The Court, however, has not done that. Instead, and commendably, it applies Article §50-A out of fidelity to the literal legislative language. I concur because the result (when the statute is read in combination with Schultz and Bryant) seems in escapable. Once Schultz held that the 4% additur was to be calculated on top of the jury’s projected rate of inflation, the die was cast. From that point, structured judgments took on the prospect of damage awards in excess of plaintiff’s damages. The case before us, however, dramatically demonstrates the ultimate and extreme consequences that may well have been beyond the Legislature’s intentions. Unless the Legislature amends the statute, awards will be comparably enlarged in all personal injury cases of this type.**

Not only the First Department but the Fourth Department too has now held that principles of statutory construction and the legislative history underlying the PHL permit a plaintiff to set forth a separate cause of action for violation of PHL §2801-d, even where that claim is asserted in conjunction with claims for ordinary negligence and medical malpractice. The Fourth Department had previously found to the contrary in **Goldberg,** a decision in accord with **Begandy,** but it later repudiated that

construction of the statute in **Doe,** stating, "We decline to apply the reasoning set forth in **Goldberg.** Instead, we conclude that the clear intent of §2801-d was to expand existing remedies for conduct that, although constituting grievous and actionable violations of important rights, did not give rise to damages of sufficient monetary value to justify litigation" (303 AD2d at 109).

Pursuant to this Court's decision in **Desiderio,** in which it adhered strictly to the terms of the statute, as well as **Zeides** and **Doe,** we believe there can be little question that PHL §2801-d[4] means precisely what it says, and affords nursing home patients who can show a violation of rights enumerated in PHL §2803-c[3] an additional statutory cause of action independent of any common law malpractice or negligence claim.[6]

On page 9 of its brief, defendant writes: "The fundamental issue that is thus presented for determination by this Court is whether the allegation that inadequate and improper care was provided automatically gives rise to a claim under the Public Health Law." It goes on to assert that plaintiff "has not alleged a single fact that would support" a claim that decedent was "deprived [of] her right to receive medical care", in that plaintiff was "unsatisfied with the care given, and that the highest practicable standard of nursing care was not provided"

[6] Federal law affords parallel protections. See, 42 USC §1396r[8] (Remedies provided therein "are in addition to those otherwise available under state or federal law, and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law"); 42 CFR §483.13.

(Brief at 11).

The complaints and bill of particulars, on the contrary, allege that decedent was not provided with appropriate safeguarding, nutrition, hydration, supervision, bedding or monitoring of her weight; that insufficient measures were taken to prevent her from falling; and that she was not moved in her bed and, as a result, developed bedsores (19, 25, 33-34, 36-37, 39-53, 65-68). Apparently, defendant is complaining of the lack of data as to who treated decedent and who was responsible for what aspect of her care.

To the extent defendant is arguing that only a claim that a nursing home resident who is completely deprived of any care can claim the right to assert a cause of action under the statute (not one who receives negligent or substandard care), the text of the statute refutes that argument. Moreover, we have found no case supporting any such doctrine. Defendant's attempt to distinguish "nonfeasance" from "misfeasance" in this context should be rejected by this Court out of hand.

Perhaps defendant's point is that plaintiff did not set forth evidence regarding who within the nursing home mismanaged decedent's condition and therefore is not entitled to benefits under the statute. Ignoring for the moment the affidavit of Mr. Valdez, we submit that defendant is seeking to muddy the waters, intermixing CPLR §3211 and CPLR §3212. Here, though defendant moved for summary judgment pursuant to CPLR §3212, the motion was actually decided on the basis of §3211, and the rules for

considering motions based on facial insufficiency must be employed by this Court in determining whether the First Department's decision is correct. See, **Paynter v. State,** 100 NY2d 434 [2003], fn. 1.

The distinctions are significant. In a §3211 motion, a plaintiff may choose "to stand on his pleading alone, confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action", and may not be penalized because "he has not made an evidentiary showing in support of his complaint." Yet, an inartfully pled complaint can also be supplemented by affidavits, and thus withstand a motion to dismiss. See, **Rovello v. Orofino Realty Co.,** 40 NY2d 633,635 [1976]. Plaintiff is entitled to the "benefit of every possible or favorable inference" that can be drawn from the complaint (**Leon v. Martinez,** 84 NY2d 83,87-88 [1994]). If the allegations in the complaint fall within any cognizable theory, the cause of action must be sustained (**Marone v. Marone,** 50 NY2d 481,484 [1980]; **Guggenheimer v. Ginzburg,** 43 NY2d 268,275 [1977]).

In a motion for summary judgment, defendant must establish by evidentiary facts, and usually through affidavits and other evidence admissible at trial, that the claim has no merit; once this is done, the plaintiff has the obligation of submitting evidence of the existence of a triable material issue of fact. Here, defendant's motion, though denominated as one for summary judgment pursuant to CPLR §3212, was actually a §3211 motion to dismiss on the ground that the complaint was facially

insufficient to establish a claim. As a result, defendant's use of the term "single fact" (Brief at 11) represents a summary judgment motion claim that is not appropriate in connection with this motion, especially as defendant conceded that the Appellate Division "correctly treated the motion as one for dismissal pursuant to CPLR §3211" (Brief at 22).

Moreover, even if §3212 standard had been employed, defendant would still lose. Under **Alvarez, Farrell, Winegrad** and **Trepuk** and their progeny, plaintiff is not required to submit evidentiary facts where defendant has not established its prima facie entitlement to judgment as a matter of law by doing so. The lack of evidence, then, cuts against the defendant and not the plaintiff. Defendant should not be permitted to raise a procedural point respecting summary judgment when in reality its claim is that the complaint facially does not state a cognizable cause of action pursuant to CPLR §3211.

Public policy considerations.

As to the alleged threat of a flood of nursing home litigation, the legislative history point in the opposite direction. As the Fourth Department stated in **Doe** (303 AD2d at 111-2):

> **The legislative history of §2801-d reveals a recognition of that vulnerability, and of the abuses that preceded the enactment of that legislation in 1975. The Legislature thereby provided that vulnerable population with an easier route by which to enforce [any contractual, statutory or regulatory right]…[cits.] Indeed, by the language in §2801-d[4], that "The remedies provided in this section are in addition to and cumulative with any other remedies available to a patient…" The Legislature has explicitly expressed its intent to add to the available tort remedies. It is**

> **precisely because of the inadequacy of the existing common law causes of action to redress the abuse of patients in nursing homes that Public Health Law §2801-d was enacted (See, Mem. Of State Executive Dept., 1975, McKinney's Session Laws of New York, at 1685-1686; Governor's Mem. Approving L. 1975, chs. 648-660, 1975 McKinney's Session Laws of New York, at 1764). We are convinced that the Legislature could not have intended that plaintiff be prevented from asserting a cause of action under that section merely because her simultaneously asserted common law causes of action survived the motion to dismiss where, as here, those common law causes of action ultimately may not survive a motion for summary judgment. Plaintiff concedes that such a situation may exist in this case.**

The same situation exists here, where defendant asserts that plaintiff's case is barred by the statute of limitations. The vulnerable situation of decedent, and the fact that she and her family were dependent upon defendant's nursing home for proper care, surely contributed to that situation.

The Division of Budget report on the bill, in paragraph 2 entitled "Summary of Provisions" (189), states:

> **Current law does not specifically accord a right of private action to nursing home and health-related facility patients who feel they are being inadequately or improperly cared for. Such patients can, however, like other aggrieved [persons], institute ordinary negligence proceedings, either on their behalf, or, under recently enacted legislation, as a class action.**

The report goes on to state that the bill would "specifically grant patients of residential health care facilities…the right to sue the facility for any injury resulting from the avoidable deprivation of benefits and rights…established for their wellbeing in contract and/or state or federal law." Thus, the Legislature clearly knew that nursing home patients could bring common law actions, and intended to afford separate

statutory rights of action. Paragraph 4 states: “This bill would encourage civil action suits in cases where patients of nursing homes and health-related facilities are injured as a result of denial of adequate and proper care and treatment. While patients can currently sue a facility for negligence, either individually or in a class action, there is no specific statutory recognition of the legal rights of this vulnerable population. In addition to providing for such recognition, this bill, by establishing Medicaid-exempt minimum damage awards and highlighting class action and awarding attorneys’ fees as appropriate principles for the court, would increase the willingness of patients and the legal profession to undertake such action.” The committee also wrote: “The intent of this bill is weakened by making damage awards contingent upon patient injury, a term which this bill leaves undefined. The Department of Health and the State Consumer Protection Board indicate that this term will probably be interpreted narrowly by the courts as including physical injury only. Hence, the intent of the sponsors to expand patient rights to include any right or benefit established by contract or federal or state law…is likely to remain unfilled…” (187-90). The memorandum with accompanying comments (192-93) also specifically notes that the bill would authorize a “private action for damages”, and the bill was strongly supported because it provided “an effective means of assuring that patients in residential health facilities receive the quality care for which they are paying.”

The Department of Health wrote that the bill provided patients with a private right of action to sue for damages (197). The Department of Law (198) and Department of State (199) noted this new right, as did comments solicited from various agencies and groups, most of which were supportive (200-15).

The case law also supports our argument in this regard. Defendant refers continuously to the Fourth Department's decision in **Goldberg** as reflective of the true legislative intent, but, of course, same was expressly overruled by the same court in **Doe,** which found that the history and text of the statute supported plaintiff's claim that nursing home residents were to be afforded an additional right of action.

This Court's decisional law is in accord. This Court has held that the institutional custodian of a person with physical, emotional or mental limitations owes a duty of reasonable care to protect the person from injury with the "degree of care owed – commensurate with the [person's] capacity to provide for his or her own safety" (**Killeen v. State,** 66 NY2d 850-2 [1985]). In **NX v. Cabrini Med. Ctr.,** 97 NY2d 247,252-3 [2000], this Court referred to a "sliding scale of duty" with respect to such individuals. The rule is not novel, and has been applied by the intermediate appellate courts. See, **Campbell v. Cluster Hous. Dev.,** 247 AD2d 353-4 [2d Dept. 1998]; see generally, **Reavey v. State,** 125 AD2d 656-7 [2d Dept. 1986]. Home care agencies, for example, may be liable when an attendant's absence or lack of attention causes an elderly person or a person with a disability

to suffer traumatic injury. See, **Esposito v. Personal Touch,** 288 AD2d 337 [2d Dept. 2001]; **Willis v. NYC,** 266 AD2d 207 [2d Dept. 1999].

Indeed, "The overwhelming majority of civil cases against nursing homes arising from the treatment of residents involve falls" and other incidents which do not involve strictly medical care (**Eads v. Heritage Enterprise,** 204 Ill.2d 92,106-7 [2003]). Statutory mandate and developing common law increasingly recognize the "vulnerability and dependence of abused and neglected elders, especially those whose infirmities – mental or physical – leave them at the mercy of their caregivers, and those who are physically isolated in their own homes or homes of their relatives" (**Easton v. Sutter Coast Hospital,** 80 Cal.App.4th 485,494 [2000]). See also, **Jacobs v. Newton,** 2003 NY Misc. LEXIS 891 [Sup. Ct. 2003].

Based upon the foregoing, we respectfully submit that the Appellate Division correctly found that plaintiff pled and possessed a cognizable claim under PHL §2801 et. seq.[7]

[7] We should also note that the three-year statute of limitations provided under CPLR §214[2] for statutory claims is applicable in any event. This statute of limitations "does not apply to liabilities existing at common law which have been recognized or implemented by statute"; for these, the statute of limitations "is that for the common law cause of action which the statute codified or implemented" (**Aetna v. Nelson,** 67 NY2d 169,174 [1986]; **State v. Cortelle Corp.,** 38 NY2d 83,86-7 [1975]). In **MVAIC v. Aetna,** 89 NY2d 214,220-1 [1996], this Court contrasted "[1] claims which, although provided for in a statute, merely codify or implement an existing common law liability, which are not governed by CPLR §214[2] but by the statute of limitations applicable to their common law sources, with [2] claims which, although akin to common law causes of action, would not exist but for the statute…in which case CPLR §214[2] applies." Thus, where a statutory cause of action provides for a "far greater range of claims" which were "never legally cognizable before its enactment, CPLR §214[2] applies (**Gaidon v. Guardian Life,** 96 NY2d 201 [2001]). The new rights established by the PHL include recovery of attorney fees, as well as statutory damages in the amount of the facility's daily charges (PHL §2801-d[2][6]). Accordingly, the three year statute of

Regarding common law negligence.

Defendant does not directly criticize the Appellate Division's unanimous finding that summary judgment was not proper on the sparse record before it. Indeed, the decision was favorable to defendant in that the trial court's categorical denial of the motion for summary judgment was reversed and defendant afforded a right to renew same upon completion of discovery.

A court has discretion to deny a summary judgment motion as premature. See, **Ross v. Curtis-Palmer,** 81 NY2d 494 [1993] ("Plaintiff had not yet deposed defendant's representatives when the motion for summary judgment suspended discovery. Further, the contract…had not yet been reduced…Thus, any conclusion that plaintiff cannot produce evidence to justify submitting the question of…control and/or supervision to a trier of fact is, manifestly, premature, despite…submission of an affidavit by [a] safety superintendent disclaiming supervision…"); **Groves v. Lands End,** 80 NY2d 978 [1992] ("Given that defendants in their affidavits asserted that they needed more discovery time to depose witnesses as to the use and existence of safety devices, and given that the discovery timetable set forth in the preliminary conference order had not yet expired, we cannot conclude that the Appellate Division erred in its disposition [holding that the motion for summary judgment was] premature").

In **Held v. Kaufman,** 91 NY2d 425,432 [1998], which dealt with the interplay between CPLR §3211 and §3212, this Court declared:

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limitations in CPLR §214[2] applies to the facts of this case.

Defendant's final assertion is that plaintiff's underlying claims were barred by UCC §8-319 which requires contracts for the sale of securities to be in writing. If the statute of fraud applies, it could render the underlying claim completely worthless and preclude a fraud in the inducement cause of action. Although plaintiff ultimately will have the burden to submit evidentiary facts taking the agreement outside the statute of frauds, by exception or otherwise, at this CPLR §3211 motion stage, we must credit the assertions in plaintiff's sur-reply papers suggesting certain factual grounds which may defeat the statute of frauds defense. Hence, dismissal of the fraud in the inducement cause of action at this point is premature..

Given the procedural posture of this case, no conclusions or inferences should be drawn about the ultimate merit of the statute of frauds defense, or any other defense to the first cause of action asserted by defendants in their motion to dismiss, which defendants will have the opportunity to reassert in a motion for summary judgment pursuant to CPLR §3212, or as affirmative defenses under CPLR §3018[b].

Here, we submit that defendant's concession that "Although denominated a motion for summary judgment pursuant to CPLR §3212, the Appellate Division correctly treated the motion as one for dismissal pursuant to CPLR §3211, inasmuch as the motion is based upon a statute of limitations defense" (Brief at 22), precludes reversal of the Appellate Division's order regarding the common law negligence claim.

It is often difficult to discern the difference between claims for common law negligence and for medical malpractice. But it has been held that an action sounds in medical malpractice only where it concerns medical treatments or acts bearing a substantial relationship to the rendition of medical treatment by a licensed physician. See, **Weiner v. Lenox Hill,** 88 NY2d 784 [1996]; **Scott v. Auljanov,** 74 NY2d 673 [1989]; **Blieler v. Bodnar,** 65 NY2d 65 [1985]. Defendant contends that "Both case law and

common sense suggest that in actuality this is a claim of medical malpractice" because allegations "regarding repositioning, nutrition, monitoring and assisting with bowel and bladder function" all involve professional medical care (Brief at 21-23).

We disagree. Here, plaintiff's claims deal exclusively with abandonment and general non-medical negligence on the level of everyday physical care. Plaintiff, in fact, successfully moved to amend the complaint to make it clear that no claim was being asserted against defendant for medical malpractice. Therefore, the Appellate Division correctly refused to dismiss plaintiff's negligence claim. As the Appellate Division noted, orderlies and attendants often reposition nursing home patients. These persons have no substantive medical training and are often not college graduates. Physicians do not feed patients – that also is a job given to attendants and orderlies, and where they fail to feed and hydrate their patient, or abandon or fail to watch or safeguard him or her, they are guilty of negligence which does not implicate theories of medical malpractice.

Defendant's assertion that "If professional skill and judgment are involved, the more particularized theory of medical malpractice applies", citing **Bleiler v. Bodnar,** **Smee v. Sisters of Charity,** 210 AD2d 966-7 [4th Dept. 1994], **Zellnar v. Tompkins Comm. Hospital,** 124 AD2d 187 [3d Dept. 1986] (Brief at 2), actually supports plaintiff's claim. An orderly attendant, who receives no professional training, cannot be guilty of malpractice. Thus, though a nursing home can function as a

hospital,[8] where a personal injury cause of action is grounded upon the negligence of its personnel who are not performing medical services, the medical malpractice statute of limitations does not apply.

"Although a hospital in a general sense is always furnishing medical care to patients…not every act of negligence toward a patient would be medical malpractice" (**Weiner v. Lenox Hill, supra**). Even where both medical judgment and ordinary physical care are involved in a negligent act, the failure to perform it does not always involve a malpractice claim. As noted in **Miller v. Albany Med. Ctr.,** 95 AD2d 977,979 [3d Dept. 1983], "When the risk of harm has been identified through the exercise of medical judgment, a failure to follow through by taking measures to prevent the harm, may constitute actionable ordinary negligence."

In **Karasek v. LaJoie,** 92 NY2d 171,174-5,177 [1998], this Court held that a patient's claim against a psychologist, as opposed to a psychiatrist, sounded in ordinary negligence and not medical malpractice, under the facts of the case, even though the psychologist's services were "classifiable as medical services" or "professional" services. This Court ultimately observed:

> **In sum, while it may be reasonable to infer that the diagnostic treatment and services provided by – or under the supervision of – medically trained psychiatrists are 'medical' in nature, the same cannot be said about the services rendered by psychologists and other mental health care professionals, whose training and professional experience are much more diverse…Psychologists and psychiatrists may provide some of the same mental health-related services [cits.]. However, in the final analysis, once the element of medical training is removed, there is no**

[8] See, **Florence Nightingale NH v. Hynes,** 38 NY2d 260 [1975].

meaningful way to distinguish among the mental health services provided by the various non-physician providers for purposes of classifying some sub-group of those services as 'medical.' Thus, we are persuaded that, absent further legislative clarification, the sounder course is to hold that the services provided by psychologists, however scientifically-based they may be, are not 'medical' services within the meaning of CPLR §214-a.

Surely, if a psychologist is not guilty of medical malpractice where he allegedly departs from accepted standards of care in treating a patient, then orderlies, attendants, nurses' aides, etc., with no substantive training and perhaps not even a high school degree, do not come under the rubric of medical professionals against whom a medical malpractice claim can be brought. See, **Chase Scientific Research v. N/A Group,** 96 NY2d 20 [2001] (Insurance broker and agents not professionals for purposes of applying CPLR §214[6]).

It was not error, therefore, for the Appellate Division here to modify the trial court's order by permitting plaintiff to amend the claim, or to grant defendant leave to renew its summary judgment motion upon completion of discovery. In any event, as we have shown, such discretionary determinations are not ordinarily within this Court's power of review.

Defendant argues as a matter of procedure, however, that plaintiff has the burden of establishing that his claim is not time-barred, citing to **Massie v. Crawford,** 78 NY2d 516 [1991] (Brief at 24). That case is actually favorable to plaintiff. There, this Court held that the moving party had the initial burden of proof on the issue of summary judgment, but since it

was apparent that plaintiff did not commence the action within 2 ½ years from the date of the negligent medical treatment, the burden shifted to plaintiff to demonstrate continuous treatment and thus show that the tolling exception was applicable. Here, plaintiff asserted a negligence cause of action which defendant argued was a disguised medical malpractice cause of action; the record was found too sparse to permit determination of the issue. Thus, it was the defendant that failed to meet its initial burden on the motion.

Contrary to defendant's implication (Brief at 24), the plaintiff does not have an initial burden to establish that the action was within the statute of limitations – defendant must first show that it was not, and the allegations in the complaint must be accepted as true until it does. It is not right to say, therefore, that the Appellate Division erred in "remanding this case for further proceedings" because "it was plaintiff's burden to establish that her case was [not] time-barred" (Brief at 24).

Here, the complaint clearly sets forth ordinary negligence claims involving non-medical workers; thus, defendant was required first to establish prima facie entitlement to judgment as a matter of law by showing that the claims involved medical malpractice. As all the justices of the Appellate Division noted, there was no conclusive proof on the issue; hence, the decision was plainly proper.

Erroneous claims in defendant's brief.

Defendant's brief, though meticulously written and well

researched, contain certain factual and legal conclusions with which we disagree. For the sake of completeness, we discuss these below.

A. Defendant writes, "Until **Zeides** was decided, the courts had held that PHL §2801-d was not intended to create new personal causes of action", citing to **Goldberg** and **Begandy** (Brief at 9). However, d[4] states, as we have noted, that the remedies provided therein are in addition to other remedies; thus, the prior holdings did not correctly reflect the intent thereof. The Fourth Department recognized that when it overruled the portion of the **Goldberg** decision which held that the statute did not set forth an independent cause of action, and the **Zeides** court scrupulously adhered to the text of the statute and its legislative history in coming to the same conclusion. In this case, too, plaintiff set forth specific violations of statutes and regulations sufficient to establish such an independent claim.

PHL §2801-d[1] defines a "right or benefit" of a patient to mean "any right or benefit created or established for the wellbeing of the patient by the terms of any contract, by any statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation…" Here, 10 NYCRR §415.12[c][1] requires nursing homes to prevent the development of pressure sores; §415.12[I][ii] requires proper nutrition; PHL §2803-c[3][e] requires that appropriate medical care be provided.

In **Fleming v. Barnwell Nursing Home,** 2003 NY AD LEXIS 11209

[3d Dept. 2003], the Third Department held that class action certification was appropriate for the statutory claim only, under CPLR §§901, 902 in a case where decedent died from septic shock, and a cause of action under PHL §2801-d was belatedly added to the complaint.

B. Defendant claims that the **Goldberg Begander** paradigm should be followed, for the alternative would "stretch" the statute "beyond its intended limits" and convert "any common law claim" to a "statutory claim" (Brief at 9-10). The argument does not bear scrutiny.

As we have shown, it was the intent of the Legislature to provide additional causes of action, and this is clear from the language of the statute itself as well as its history. This situation is similar to other areas of law, such as the elevation-related risks involved in some construction work, in which the imposition of broad-based liability has been found appropriate. See, **Ross v. Curtis-Palmer, supra; Spano v. Perini Corp.,** 25 NY2d 11 [1969]. In other situations, limitations have been legislatively imposed upon claimants for public policy reasons. See, **Lauer v. NYC,** 95 NY2d 95 [2000]. Surely, the desire to put an end to nursing home abuse justifies the imposition of both common law and statutory liability upon nursing homes that perpetrate such harm.

C. Defendant writes that there is "no allegation that Mrs. Zeides was denied access to treatment or some benefit", only that she "did not receive adequate treatment" (Brief at 11). This

amounts to an assertion that denial of any treatment triggers the statute, but receipt of inadequate treatment does not.

However, as stated previously, the "right or benefit of a patient" in a "residential health care facility" is "any right or benefit created or established for the wellbeing of the patient by the terms of any contract, by any…statute…" Where there has been a deprivation of such a right or benefit which results in injury, "damages shall be assessed in an amount sufficient to compensate such patient for such injury (PHL §2801-d[1][2]). §2803-3[e] provides that every patient "shall have the right to receive adequate and appropriate medical care." Thus, there is no distinction between misfeasance and nonfeasance in this context. And, with regard to decedent's bedsores and malnutrition, 10 NYCRR §415.12[c][1] and §[I][2] are definitionally implicated. In sum, the distinction offered by defendant has no merit.

D. Defendant asserts that this is "a typical personal injury action, outside the scope and intent of the drafters of §2801-d"; this begs the question. The Appellate Division found that that statute afforded plaintiff an independent cause of action. Defendant's retort (Brief at 12) that a general negligence claim cannot also support a claim of a statutory violation is contrary to the text of the enabling statute itself as well as the most recent case law. The related claim that the injuries "do not fall within the scope of the type of claim envisioned by the Legislature when it enacted §2801-d" (Brief at 12) is a bare conclusion unsupported by facts or legal analysis.

E. The purpose of the statute, as set forth in the legislative history, was clearly to provide a cause of action for deprivation of proper care, not only for refusal to provide any care; thus, plaintiff's complaint falls within the ambit of the statute. It is clearly not true that the statute was to provide relief only where there was no other cause of action available (Brief at 13).

F. Defendant's "absurd results" argument (Brief at 13-15) is unavailing. This Court in **Desiderio v. Ochs, supra** at 169, specifically held that plain language in a statute should not be sacrificed to "equivocal evidence of legislative intent", and that a court may not "rewrite the statute." In **Desiderio,** this Court cautioned that appellate courts may not "look behind" unambiguous statutory language (**id.** at 172). Defendant has failed to explain how it is absurd for frail and infirm nursing home residents to be afforded additional rights of action where the Legislature deems it appropriate. While a court "must consider whether the Legislature intended that allegations sounding in medical malpractice were intended to simultaneously state a statutory claim under PHL §2801-d" (Brief at 16), that examination has been made, and the issue has been decided properly based on the language of the statute, the legislative history, and the most recent decisional law.

G. Defendant attempts to distinguish **Doe** because there, recovery under the common law was "almost impossible" (Brief at 17). But if **Doe** was to be distinguished on its facts, there would have been no need to overrule **Goldberg.** Moreover, the argument itself

runs afoul of **NX v. Cabrini, supra,** where defendant hospital was held potentially liable for a resident's rape of a patient in the recovery room, though the act was obviously not within the scope of his duties.

Nor is it true that **Doe** supports defendant's argument that the statute "is only to be used for viable statutory claims and only refers to separate claims that are not predicated on each other" (Brief at 19), for the **Doe** court stated: "Indeed, by the language in §2801-d[4] that 'the remedies provided in this section are in addition to and cumulative with any other remedies available to a patient, at law or in equity, or by administrative proceedings', the Legislature has explicitly expressed its intent to add to the available tort remedies. It is precisely because of the inadequacy of the existing common law causes of action to redress the abuse of patients in nursing homes that Public Health Law §2801-d was enacted."

Here, since defendant argues that the common law negligence claim is a disguised medical malpractice claim, the holding in **Doe** that "The Legislature could not have intended the plaintiff to be prevented from asserting a cause of action under that section merely because her simultaneously asserted common law causes of action survived a motion to dismiss" is applicable. Here, as in **Doe,** it can be said that plaintiff's common law causes of action "ultimately may not survive a motion for summary judgment" (303 AD2d at 114).

H. Again, the "floodgate of litigation" argument does not withstand scrutiny (Brief at 20-21). As defendant well knows, courts do not reach out to decide issues not placed before them; thus, the fact that it may have taken 25 years for a court to rule that an independent PHL cause of action was cognizable has no bearing on the issues presented here. Moreover, there is simply no rule of law forbidding changes in the law. After all, "It is the duty of the court to bring the law into accordance with present day standards of wisdom and justice", not to adhere to some "outworn and antiquated rule of the past" (**Woods v. Lancet,** 303 NY 349,354-5 [1951]).

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the order of the Appellate Division should be affirmed to the extent it is reviewable by this Court, and that this Court should dismiss those claims it finds are not properly before it.

Respectfully submitted,
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