Neutral
As of: January 21, 2021 8:34 PM Z

Kamara v 767 Fifth Partners, LLC

Supreme Court of New York, Appellate Division, First Department

November 24, 2020, Decided; November 24, 2020, Entered

Appeal No. 12492N, Case No. 2020-01359

Reporter
2020 N.Y. App. Div. LEXIS 7149 *; 2020 NY Slip Op 06953 **; 188 A.D.3d 602; 132 N.Y.S.3d 762; 2020 WL 6877920

[1]** Haja Kamara, As Administratrix of the Estate of Abu Kamara et al., Plaintiffs-Appellants, v 767 Fifth Partners, LLC, Defendant-Respondent. Index No. 24677/15E

Prior History: *Kamara v. 767 Fifth Partners, LLC, 2019 N.Y. Misc. LEXIS 3936 (N.Y. Sup. Ct., May 8, 2019)*

Counsel: **[*1]** Edelman Krasin & Jaye, PLLC, Westbury(Aaron D. Fine of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Stacey L. Seltzer of counsel), for respondent.

Judges: Before: Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

Opinion

DAVID FERSTENDIG

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 21, 2019, which denied plaintiff's motion to amend the complaint to add a cause of action for wrongful death, unanimously affirmed, without costs.

To support the amendment sought here, plaintiff was required to submit competent medical proof of a causal connection between decedent's 2015 work-related injury and his death, which plaintiff claims was due to complications stemming from a 2018 epidural injection (*see* *Frangiadakis v 51 W. 81st St. Corp., 161 AD3d 478, 479, 73 N.Y.S.3d 420 [1st Dept 2018]*; *MBIA Ins. Corp. v* **[**2]** *Greystone & Co., Inc., 74 AD3d 499, 500, 901 N.Y.S.2d 522 [1st Dept 2010]*; *Gambles v Davis, 32 AD3d 224, 225, 820 N.Y.S.2d 18 [1st Dept 2006]*). Having reviewed the record, we agree with Supreme Court that plaintiffs failed to make this showing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: November 24, 2020

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Frangiadakis v 51 W. 81st St. Corp.

Supreme Court of New York, Appellate Division, First Department

May 8, 2018, Decided ; May 8, 2018, Entered

6496N, 150538/14

Reporter
161 A.D.3d 478 *; 73 N.Y.S.3d 420 **; 2018 N.Y. App. Div. LEXIS 3277 ***; 2018 NY Slip Op 03331 ****; 2018 WL 2106622

[**1]** Anastasia Frangiadakis, as Administratrix of the Estate of Constantine Bazas, Deceased, et al., Respondents, v 51 West 81st Street Corp. et al., Appellants, et al., Defendants. (And Third-Party Actions.)

Subsequent History: Summary judgment denied by *Frangiadakis v 51 W. 81st St. Corp., 2018 N.Y. Misc. LEXIS 6448 (N.Y. Sup. Ct., Dec. 20, 2018)*

Core Terms

cause of action, wrongful death, plaintiffs', causal connection, motion to amend, affirmation, costs

Headnotes/Summary

Headnotes

Pleading—Amendment—Personal Injury Complaint—Adding Wrongful Death Cause of Action

Counsel: **[***1]** Mauro Lilling Naparty, LLP, Woodbury (Matthew W. Naparty of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for respondents.

Judges: Concur—Sweeny, J.P. Renwick, Mazzarelli, Gesmer, Singh, JJ.

Opinion

[*478] **[**420]** Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered August 29, 2017, which granted plaintiffs' motion to amend the complaint to add a cause of action for wrongful death, unanimously affirmed, without costs.

The motion court properly granted plaintiffs' motion to **[*479]** amend the complaint to include a cause of action for wrongful death. *CPLR 3025 (b)* governs permissive leave to amend a pleading, and it states that leave "shall be freely given upon such terms as may be just including the granting of costs and continuances." Further, as we have stated, to support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit "competent medical **[**421]** proof of the causal connection between the alleged malpractice and the death of the original plaintiff" (*Gambles v Davis, 32 AD3d 224, 225, 820 NYS2d 18 [1st Dept 2006]*). The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, **[***2]** for the purposes of *CPLR 3025 (b)*, to establish a causal connection between the decedent's death and the originally alleged negligence by defendants (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P., 40 AD3d 363, 366, 836 NYS2d 68 [1st Dept 2007]*; *see also Matter of Tobin v Steisel, 64 NY2d 254, 259, 475 NE2d 101, 485 NYS2d 730 [1985]*). Plaintiff's submission of the expert's

affirmation on reply is not fatal to the motion, because defendant was permitted to submit a surreply.

We have considered and rejected defendants' remaining arguments. Concur—Sweeny, J.P. Renwick, Mazzarelli, Gesmer, Singh, JJ.

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Positive
As of: January 21, 2021 8:33 PM Z

NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.

Supreme Court of New York, Appellate Division, Third Department

November 9, 2017, Decided ; November 9, 2017, Entered

524581

Reporter

156 A.D.3d 99 *; 64 N.Y.S.3d 730 **; 2017 N.Y. App. Div. LEXIS 7854 ***; 2017 NY Slip Op 07918 ****; 2017 WL 5179061

[**1]** NYAHSA Services, Inc., Self-Insurance Trust, Respondent, v People Care Incorporated, Appellant. (And a Third-Party Action.) (Action No. 1.) NYAHSA Services, Inc., Self-Insurance Trust, Respondent, v Recco Home Care Services, Inc., Appellant. (And a Third-Party Action.) (Action No. 2.) (And Two Other Related Actions.)

Prior History: Appeal from an order of the Supreme Court, Albany County (Richard Platkin, J.), entered May 4, 2016. The order, among other things, granted plaintiff's motions for leave to amend the complaints.

NYAHSA Servs., Inc. Self Ins. Trust v People Care Inc., 45 Misc 3d 1225[A], 5 NYS3d 329, 2014 N.Y. Misc. LEXIS 5172, 2014 NY Slip Op 51711[U] (Dec. 5, 2014)

Core Terms

amend, bills, propose an amendment, quotation, accrued, marks, surprise

Case Summary

Overview

HOLDINGS: [1]-Defendants did not show that they would be prejudiced by, or suffer undue surprise attributable to, the delay in requesting that the trustees be permitted to join the identical claims raised by plaintiff, which would not subject defendants to new liability or new theories of recovery under CPLR 1002(a) and 1003; [2]-Defendants could not credibly claim surprise or prejudice from the added claims for the unpaid adjustment bills that accrued after the amended complaints were filed; [3]-Defendants were not prejudiced because the amendments would subject them to increased liability; [4]-Denial of the request to amend was not required because plaintiff failed to provide a reasonable excuse for the delay; [5]-The motion to amend did not fail with respect to the breach of contract and unjust enrichment claims on statute of limitations grounds under CPLR 203(a) and 213(2).

Outcome

Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN1 **Standards of Review, Abuse of Discretion**

Pursuant to CPLR 3025(b), a party may amend its pleadings at any time by leave of the court, which shall be freely given upon such terms as may be just. The decision whether to grant leave to amend pleadings rests within the trial court's sound discretion and, absent a clear abuse of that discretion, will not be lightly cast aside. The Appellate Division, Third Department, has adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a sufficient evidentiary showing to support the proposed claim. However, the Appellate Division, Third Department, is persuaded to depart from that line of authority and follow the lead of the other three Departments, and holds that no evidentiary showing of merit is required under CPLR 3025(b).

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

HN2 **Amendment of Pleadings, Leave of Court**

The rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. The rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the New York State Civil Practice Law and Rules is inconsistent with requiring an evidentiary showing of merit on such a motion. If the opposing party on a motion to amend wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment or to dismiss upon a proper showing.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3 **Amendment of Pleadings, Leave of Court**

Prejudice is more than the mere exposure of the opposing parties to greater liability. In the context of a motion to amend, a party's burden of showing prejudice requires some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4 **Judges, Discretionary Powers**

The trial court considering a motion to amend has considerable latitude in exercising its discretion and may consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered, particularly where the delay is on the eve of trial. However, the guiding principle is that in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Contract Actions

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Governments > Legislation > Statute of Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN5 **Breach, Breach of Contract Actions**

Where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute of limitations anew such that accrual occurs continuously. Likewise, the limitations period for unjust enrichment claims accrues six years from the occurrence of the wrongful acts that gave rise to the duty to make restitution.

Headnotes/Summary

Headnotes

Pleading — Amendment — Leave to Amend — No Evidentiary Showing of Merit Required

1. On a motion for leave to amend a pleading pursuant to *CPLR 3025 (b)*, the movant need not establish the merits of the proposed amendment, and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. The liberal standard for leave to amend adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit. However, if the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment or to dismiss upon a proper showing.

Pleading — Amendment — No Prejudice to Nonmoving Party

2. Supreme Court did not abuse its discretion in permitting plaintiff, a group self-insured trust formed to provide workers' compensation insurance to certain employers, to amend its complaint to add its trustees as party plaintiffs and to pursue recovery for defendant employers' unpaid adjustment bills that had accrued during the pendency of the action. In the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted. Defendants did not demonstrate that they would be prejudiced by, or suffer undue surprise attributable to, plaintiff's delay in requesting that the trustees be permitted to join the identical claims, or plaintiff's request to supplement its claims to include the unpaid adjustment bills that accrued subsequent to the filing of the amended complaints. Prejudice is more than the mere exposure of the opposing parties to greater liability. Here, the added plaintiffs would not subject defendants to new liability or new theories of recovery, and the added claims were premised upon the same legal theories and a common factual basis. Moreover, plaintiff's failure to provide a reasonable excuse for the delay did not require denial of the request to amend. While Supreme Court may consider how long the party seeking amendment was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered, particularly where the delay is on the eve of trial, here, discovery was ongoing and defendants had not demonstrated either prejudice or surprise.

Pleading — Amendment — Breach of Contract and Unjust Enrichment Claims — Statute of Limitations — Continuous Accrual

3. Supreme Court properly rejected defendant employer's claim that the motion by plaintiff, a group self-insured trust formed to provide workers' compensation insurance to certain employers, to amend its breach of contract and unjust enrichment claims to pursue recovery for unpaid adjustment bills that had accrued during the pendency of the action should be denied on statute of limitations grounds. Defendant claimed that the breach of contract and unjust enrichment claims accrued on July 14, 2008, when it initially refused to pay the adjustment bills, thereby making claims for unpaid bills after July 14, 2014, time-barred. However, where, as here, a contract provides for continuing performance over a period of time, each breach may begin the running of the statute of limitations anew such that accrual occurs continuously. Likewise, the limitations period for unjust enrichment claims accrues six years from the occurrence of the wrongful acts that gave rise to the duty to make restitution. Thus, the relevant alleged breaches and wrongful acts occurred and the claims accrued each time defendant refused to pay an assessment levied against it.

Counsel: **[***1]** *Barclay Damon, LLP*, Albany (*Linda J. Clark* of counsel), for appellants.

Bond, Schoeneck & King, PLLC, Albany (*Stuart F. Klein* of counsel), for respondent.

Judges: Before: Peters, P.J., McCarthy, Rose, Mulvey and Rumsey, JJ. Peters, P.J., McCarthy, Rose and Rumsey, JJ., concur.

Opinion by: Mulvey

Opinion

[*101] [732]** Mulvey, J.

Appeal from an order of the Supreme Court (Platkin, J.), entered May 4, 2016 in Albany **[****2]** County, which, among other things, granted plaintiff's motions for leave to amend the complaints.

Plaintiff in these actions is a group self-insured trust that was formed to provide workers' compensation coverage to, among others, employees of defendants, People Care Incorporated and Recco Home Care Services, Inc. Defendants are employers in the home health care industry who were, for a period of time, members of plaintiff. After defendants' membership in **[**733]** the trust ended, they refused to pay their respective adjustment bills issued by plaintiff for ongoing open claims from defendants' employees. Plaintiff commenced these collection actions, action Nos. 1 and 2, alleging breach of contract and unjust enrichment, and later served amended complaints. Defendants counterclaimed and commenced third-party actions, and the parties' **[***2]** various motions to dismiss were addressed in prior decisions of this Court (*141 AD3d 792, 36 NYS3d 270 [2016]*; *141 AD3d 785, 36 NYS3d 252 [2016]*).* Plaintiff thereafter moved to file a second amended complaint in each action to include its trustees as party plaintiffs and to update the allegations to pursue recovery of unpaid adjustment bills that have accrued during the pendency of these actions. Supreme Court granted plaintiff's motions, and defendants now appeal.

HN1[↑] **[1]** Pursuant to *CPLR 3025 (b)*, a party may amend its pleadings "at any time by leave of [the] court," which "shall be freely given upon such terms as may be just" (***see*** *Kimso Apts., LLC v Gandhi, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014]*). It has long been recognized that "[t]he decision whether to grant leave to amend pleadings rests within the trial court's sound discretion and[,] absent a clear abuse of that discretion, will not be lightly cast aside" (*Cowsert v Macy's E., Inc., 74 AD3d 1444, 1444-1445, 904 NYS2d 239 [2010]* [internal quotation marks and citations omitted]; ***see*** *Matter of Wechsler v New York State Adirondack Park Agency, 85 AD3d 1378, 1380, 925 NYS2d 247 [2011]*). We have previously adhered to a rule **[*102]** requiring the proponent of a motion for leave to amend a pleading to make a "sufficient evidentiary showing to support the proposed claim" (*Cowsert v Macy's E., Inc., 74 AD3d at 1445*), that is, to make an "evidentiary showing that the proposed amendments have merit" (*Dinstber v Allstate Ins. Co., 110 AD3d 1410, 1412, 974 NYS2d 171 [2013]*). However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, **[***3]** and we now hold that "[n]o evidentiary showing of merit is required under *CPLR 3025 (b)*" (*Lucido v Mancuso, 49 AD3d 220, 229, 851 NYS2d 238 [2d Dept 2008]*; ***see*** *Cruz v Brown, 129 AD3d 455, 456, 11 NYS3d 33 [1st Dept 2015]*; *Holst v Liberatore, 105 AD3d 1374, 1374-1375, 964 NYS2d 333 [4th Dept 2013]*). Thus, ***HN2***[↑] the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Lucido v Mancuso, 49 AD3d at 222*; ***see*** *Kimso Apts., LLC v Gandhi, 24 NY3d at 411*; *LaLima v Consolidated Edison Co. of N.Y., Inc., 151 AD3d 832, 834, 58 NYS3d 66 [2017]*; *Cruz v Brown, 129 AD3d at 456*). The rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion. "If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment [or to dismiss] upon a proper showing" (*Lucido v [**734] Mancuso, 49 AD3d at 229* [citation omitted]).

[2] Applying the foregoing principles, we discern no abuse of discretion in Supreme Court's determination to permit the requested amendments. Defendants have not demonstrated that they will be prejudiced by, or suffer undue surprise attributable to, the delay in requesting that the trustees be permitted **[***4]** to join the identical claims raised by plaintiff, which would not subject defendants to new liability or new theories of recovery (***see*** *CPLR 1002 [a]*; 1003). Likewise, defendants cannot credibly claim surprise or prejudice from plaintiff's request to supplement its claims to

* Motions to compel discovery from People Care are the subject of another appeal before this Court (*NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc., 155 AD3d 1208, 64 NYS3d 725 [2017]* [decided herewith]).

include the unpaid adjustment bills that accrued subsequent to the filing of the amended complaints. The added claims are premised upon the same legal theories and a common factual basis. Initially, defendants did not dispute that they had not paid the adjustment bills **[*103]** that accrued and were sent by plaintiff during the pendency of these actions. Defendants' argument that they would be prejudiced because the proposed amendments would subject them to increased liability is unavailing, as HN3[] "[p]rejudice is more than the mere exposure of the [opposing parties] to greater liability" (Kimso Apts., LLC v Gandhi, 24 NY3d at 411 [internal quotation marks and citation omitted]). In this context, a party's burden of showing prejudice requires "some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position" (id. [internal quotation marks, brackets and citation omitted]; *see* Noble v Slavin, 150 AD3d 1345, 1346, 54 NYS3d 200 [2017]). Defendants **[***5]** made no such showing and, indeed, they did not argue that they were hindered by the delay or prevented from taking measures to support their positions.

To the extent that People Care argues that plaintiff's failure to provide a reasonable excuse for the delay required denial of the request to amend, this is incorrect. HN4[] Supreme Court, which has "considerable latitude in exercising [its] discretion" (Kimso Apts., LLC v Gandhi, 24 NY3d at 411 [internal quotation marks and citation omitted]), may "consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered," particularly where the delay is on the eve of trial (Yong Soon Oh v Hua Jin, 124 AD3d 639, 640-641, 1 NYS3d 307 [2015] [internal quotation marks and citation omitted]). However, the guiding principle is that "in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (id. at 640; *see* LaLima v Consolidated Edison Co. of N.Y., Inc., 151 AD3d at 834; *Cruz v Brown, 129 AD3d at 456*; Lucido v Mancuso, 49 AD3d at 222). Discovery is ongoing, and defendants have not demonstrated either prejudice or surprise that plaintiff sought to update the ongoing unpaid adjustment bills, and we decline to disturb the court's discretionary ruling permitting **[***6]** the amendments.

[3] People Care further opposed plaintiff's motion to amend on statute of limitations grounds, contending that the breach of contract and unjust enrichment claims accrued, at the latest, on July 14, 2008, i.e., at the time that it initially refused to pay the adjustment bills levied by plaintiff, and that all such claims for unpaid **[**735]** adjustment bills after July 14, 2014 are time-barred **[*104]** (*see* CPLR 203 [a]; 213 [2]). Supreme Court properly rejected this as a basis upon which to deny the motion to amend. As the court recognized, HN5[] "where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute [of limitations] anew such that accrual occurs continuously" (Beller v William Penn Life Ins. Co. of N.Y., 8 AD3d 310, 314, 778 NYS2d 82 [2004] [internal quotation marks and citation omitted]). Thus, the relevant alleged breaches of contract occurred and the claims accrued each time that People Care refused to pay an assessment levied against it (*see* State of N.Y., Workers' Compensation Bd. v A & T Healthcare, LLC, 85 AD3d 1436, 1438, 927 NYS2d 165 [2011]; *see also* Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402, 615 NE2d 985, 599 NYS2d 501 [1993]). Likewise, the limitations period for unjust enrichment claims accrues "six years from the occurrence of the wrongful acts" that gave rise to the duty to make restitution (US Bank N.A. v Gestetner, 103 AD3d 962, 963, 960 NYS2d 227 [2013]; *see* CPLR 213 [1]). **[****3]** Accordingly, in this context—a motion to amend pleadings—People Care has not **[***7]** demonstrated that the proposed amendments were "palpably insufficient or patently devoid of merit" (Lucido v Mancuso, 49 AD3d at 222). Defendants' contentions on appeal that plaintiff's claims for damages for breach of contract are limited to six years before the filing of the respective complaints were not raised in their opposition to the motion to amend and, thus, they are unpreserved for our review (*see* Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc., 148 AD3d 1418, 1420, 49 NYS3d 792 [2017]) and, in any event, do not support denial of the motion to amend.

Peters, P.J., McCarthy, Rose and Rumsey, JJ., concur.

Ordered that the order is affirmed, with costs.

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Matter of Bynum v Camp Bisco, LLC

Supreme Court of New York, Appellate Division, Third Department

November 30, 2017, Decided ; November 30, 2017, Entered

524918

Reporter
155 A.D.3d 1503 *; 66 N.Y.S.3d 47 **; 2017 N.Y. App. Div. LEXIS 8484 ***; 2017 NY Slip Op 08433 ****

[**1]** Deborah Bynum, Individually and as Administrator of the Estate of Heather Bynum, Deceased, Respondent, v Camp Bisco, LLC, et al., Appellants.

Prior History: *Bynum v Camp Bisco, LLC, 151 AD3d 1427, 58 NYS3d 673, 2017 N.Y. App. Div. LEXIS 5085 (June 22, 2017)*

Core Terms

cause of action, wrongful death, propose an amendment, amend, quotation, marks, allegation of negligence, burden of demonstrating, causal connection, motion for leave, devoid of merit, motion to amend, leave to amend, primary cause, defendants', pleadings, festival, injuries, palpably, patently, surprise, freely

Case Summary

Overview
HOLDINGS: [1]-An estate of a concert attendee was permitted to amend its complaint to add a wrongful death claim against the organizers of a music festival because the attendee's dire condition and prognosis were known from the outset, discovery had been ongoing, the proposed amendment did not change the theory of recovery and, given its nature, obviously could not have been added prior to the attendee's death; the claim alleged that the attendee's injuries were caused by the organizers' failure to ensure that the attendee received adequate and timely emergency medical care.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[] **Standards of Review, Abuse of Discretion**

Pursuant to *CPLR 3025(b)*, a party may amend its pleadings at any time by leave of the court, which shall be freely given upon such terms as may be just. To that end, the decision whether to grant leave to amend pleadings rests within the trial court's sound discretion and, absent a clear abuse of that discretion, will not be lightly cast aside.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN2[] **Amendment of Pleadings, Leave of Court**

On a motion for leave to amend a pleading, the movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. The party opposing the amendment bears the burden of demonstrating prejudice.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3[] **Amendment of Pleadings, Leave of Court**

In the context of amending pleadings, prejudice is more than the mere exposure of the party to greater liability, as there must be some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Torts > Wrongful Death & Survival Actions

HN4[] **Amendment of Pleadings, Leave of Court**

Where a plaintiff seeks to amend a complaint alleging medical malpractice to add a cause of action for wrongful death, such motion must be accompanied by competent medical proof showing a causal connection between the alleged negligence and the decedent's death.

Headnotes/Summary

Headnotes

Pleading—Amendment—Wrongful Death Claim Based upon Negligence

Counsel: **[***1]** Roemer, Wallens, Gold & Mineaux LLP, Albany (Matthew J. Kelly of counsel), for appellants.

LaFave Wein & Frament, PLLC, Guilderland (Matthew T. Fahrenkopf of counsel), for respondent.

Judges: Before: Peters, P.J., Garry, Mulvey, Aarons and Pritzker, JJ. Peters, P.J., Garry, Aarons and Pritzker, JJ., concur.

Opinion by: Mulvey

Opinion

[48]** **[*1503]** Mulvey, J. Appeal from an order of the Supreme Court (Versaci, J.), entered April 10, 2017 in Schenectady County, which, among other things, granted plaintiff's motion to amend the complaint.

Plaintiff's daughter, Heather Bynum (hereinafter decedent), sustained serious permanent injuries in 2012 after reportedly ingesting a harmful substance while attending a music festival known as Camp Bisco. As a result, decedent entered a nonresponsive state from which she never recovered, and she died in 2016. Plaintiff, individually and as decedent's guardian, commenced actions in 2013, later consolidated, against defendants alleging, as relevant here, that defendants had breached their common-law duty to exercise reasonable care to, among other things, curtail the use of illegal drugs on the festival grounds, and negligence, based upon the failure to provide adequate onsite emergency **[***2]** medical services. This matter has previously **[*1504]** been before this Court (*151 AD3d 1427, 58 NYS3d 673 [2017]*; *135 AD3d 1066, 23 NYS3d 654 [2016]*; *135 AD3d 1060, 22 NYS3d 677 [2016]*)[1]

[1] On prior appeals, the municipal defendants were granted summary judgment dismissing the complaint against them (*135 AD3d at 1063*), the complaint was dismissed as against the co-owners of defendant MCP Presents, LLC and the fraudulent misrepresentation claim was dismissed (*135 AD3d at 1068*). Defendants were recently directed to comply with plaintiff's discovery request for festival ticket sale records (*151*

Following decedent's death, plaintiff moved for, among other **[****2]** relief, leave to amend the complaint to add a cause of action for wrongful death, which defendants **[**49]** opposed. After a brief oral argument, Supreme Court issued an order that amended the caption, substituted plaintiff, individually and as administrator of decedent's estate, as the plaintiff in this action, and granted the motion to amend.[2] Defendants now appeal.

We affirm. ***HN1***[] Pursuant to CPLR 3025 (b), a party may amend its pleadings "at any time by leave of [the] court," which "shall be freely given upon such terms as may be just" (*see* Kimso Apts., LLC v Gandhi, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014]). To that end, "[t]he decision whether to grant leave to amend pleadings rests within the trial court's sound discretion and[,] absent a clear abuse of that discretion, will not be lightly cast aside" (Cowsert v Macy's E., Inc., 74 AD3d 1444, 1444-1445, 904 NYS2d 239 [2010] [internal quotation marks and citations omitted]; *see* Matter of Wechsler v New York State Adirondack Park Agency, 85 AD3d 1378, 1380, 925 NYS2d 247 [2011]). As recently clarified by this Court, ***HN2***[] on a motion for leave to amend a pleading, the movant need not establish the merits of the proposed amendment and, " 'in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted **[***3]** unless the proposed amendment is palpably insufficient or patently devoid of merit' " (NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc., 156 AD3d 99, 101-104, 64 NYS3d 730, 2017 NY Slip Op 07918, *2 [2017] [brackets omitted], quoting Lucido v Mancuso, 49 AD3d 220, 222, 851 NYS2d 238 [2008]; *see* Kimso Apts., LLC v Gandhi, 24 NY3d at 411; LaLima v Consolidated Edison Co. of N.Y., Inc., 151 AD3d 832, 834, 58 NYS3d 66 [2017]; *Cruz v Brown, 129 AD3d 455, 456, 11 NYS3d 33 [2015]*; Holst v Liberatore, 105 AD3d 1374, 1374-1375, 964 NYS2d 333 [2013]). The party opposing the amendment bears the burden of demonstrating prejudice (*see* Kimso Apts., LLC v Gandhi, 24 NY3d at 411; Redd v Village of Freeport, 150 AD3d 780, 781, 53 NYS3d 692 [2017]).

Supreme Court providently exercised its discretion in granting plaintiff's motion to amend the complaint to add a cause of action for wrongful death following the death of **[*1505]** decedent. In support of her motion, plaintiff submitted an affirmation alleging that decedent died as a result of injuries suffered due to defendants' negligence, which defendants opposed by challenging the adequacy of proof of causation. In reply, plaintiff submitted decedent's death certificate, which lists as the primary cause of death acute respiratory failure due to sepsis and anoxic brain injury that occurred years earlier. Secondarily, it indicated that decedent had a seizure disorder that contributed to her death, but was not related to the primary cause of death. Decedent's dire condition and prognosis were known from the outset, discovery has been ongoing, the proposed amendment does not change the theory of recovery and, given its nature, obviously could not have been added prior to decedent's **[***4]** death (*see* Kimso Apts., LLC v Gandhi, 24 NY3d at 411). In this procedural context, ***HN3***[] "[p]rejudice is more than the mere exposure of the [party] to greater liability," as "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*id.* [internal **[**50]** quotation marks and citations omitted]; *see* Redd v Village of Freeport, 150 AD3d at 781).

As Supreme Court correctly found, defendants failed to meet their burden of demonstrating either prejudice or hindrance and, on these facts, they cannot credibly claim surprise from the proposed amendment (*see* Redd v Village of Freeport, 150 AD3d at 781; *see also* Noble v Slavin, 150 AD3d 1345, 1346, 54 NYS3d 200 [2017]; Lakshmi Grocery & Gas, Inc. v GRJH, Inc., 138 AD3d 1290, 1292, 30 NYS3d 743 [2016]). Moreover, we have previously recognized that plaintiff has a viable negligence cause of action based upon allegations that decedent's injuries were caused by defendants' failure to ensure that she received adequate and timely emergency medical care (135 AD3d at 1067). Defendants have not demonstrated that the amendment, which adds a cause of action for wrongful death based upon that negligence (*see* Gonzalez v New York City Hous. Auth., 77 NY2d 663, 668, 572 NE2d 598, 569 NYS2d 915 [1991]), is "palpably insufficient or patently devoid of merit" (NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc., 156 AD3d 99, 101-104, 2017 NY Slip Op 07918 at *2 [2017] [internal quotation marks and citation omitted]).[3]

AD3d at 1428-1429).

[2] We note that a written decision by Supreme Court would have assisted this Court in understanding the rationale for its determination.

[3] Defendants' papers in opposition to the motion to amend alluded to the need, in a wrongful death action, to show that one or more distributees had a reasonable expectation of

[*1506] To the extent that defendants argue that the motion for leave to amend to add a cause of action for wrongful **[***5]** death must be supported by competent medical proof showing a causal connection between their alleged negligence and decedent's death, they are incorrect. Prior decisions have held that, HN4[↑] "[w]here a plaintiff seeks to amend a complaint alleging *medical malpractice* to add a cause of action for wrongful death, such motion must be accompanied by 'competent medical proof showing a causal connection between the alleged negligence and the decedent's death' " (*Smith v Haggerty, 16 AD3d 967, 968, 792 NYS2d 217 [2005]* [emphasis added], quoting *Ludwig v Horton Mem. Hosp., 189 AD2d 986, 986, 592 NYS2d 842 [1993]*; *see Imperati v Lee, 132 AD3d 591, 592, 18 NYS3d 615 [2015]*). Given that plaintiff's wrongful death claim here is based upon negligence, that standard is inapplicable.

Peters, P.J., Garry, Aarons and Pritzker, JJ., concur. Ordered that the order is affirmed, with costs.

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support from the decedent and, thus, suffered pecuniary loss (*see McKenna v Reale, 137 AD3d 1533, 1535-1536, 29 NYS3d 596 [2016]*; *EPTL 5-4.1 [1]*; 5-4.3 [a]). Defendants did not clearly oppose the motion to amend based upon the failure to name the distributees or to request funeral expenses in the proposed amended complaint. Supreme Court's oral ruling appeared to recognize that this would ultimately be in issue, but did not expressly or clearly rule on it. In any event, defendants did not raise this claim in their brief to this Court and, accordingly, that challenge is deemed abandoned for purposes of this appeal (*see Gallagher v Cayuga Med. Ctr., 151 AD3d 1349, 1351, 57 NYS3d 544 n 1 [2017]*), although nothing in this decision precludes it from being raised as a challenge to the amended complaint in the trial court.

Lucido v. Mancuso

Supreme Court of New York, Appellate Division, Second Department

February 1, 2008, Decided

2005-07606

Reporter
49 A.D.3d 220 *; 851 N.Y.S.2d 238 **; 2008 N.Y. App. Div. LEXIS 587 ***; 2008 NY Slip Op 952 ****

[**1]** Grace Ruth Lucido, as Administratrix of the Estate of Thomas Lucido, Deceased, Appellant, v Mary Mancuso, Defendant, and Greenburgh Partnership No. 26 et al., Defendants and Third-Party Plaintiffs-Respondents. Delcon Construction Corporation, Third-Party Defendant-Respondent. (Index No. 2455/99)

Subsequent History: Appeal granted by, Question certified by *Lucido v. Mancuso, 2008 N.Y. App. Div. LEXIS 10313 (N.Y. App. Div. 2d Dep't, Apr. 9, 2008)*

Appeal withdrawn by *Lucido v. Mancuso, 12 N.Y.3d 804, 906 N.E.2d 1078, 908 N.E.2d 928, 2009 N.Y. LEXIS 145, 879 N.Y.S.2d 44 (2009)*

Appeal withdrawn by *Lucido v. Mancuso, 12 N.Y.3d 813, 908 N.E.2d 928, 2009 N.Y. LEXIS 5079, 881 N.Y.S.2d 20 (N.Y., Apr. 7, 2009)*

Prior History: Appeal from an order of the Supreme Court, Westchester County (Francis A. Nicolai, J.), dated December 7, 2004. The order, insofar as appealed from, denied that branch of plaintiff's renewed motion which was for leave to amend the complaint to add a cause of action alleging wrongful death.

Core Terms

cause of action, motion for leave, leave to amend, wrongful death, amend, propose an amendment, amend a pleading, evidentiary, cases, palpably, proposed amended complaint, motion to dismiss, devoid of merit, inter alia, renewed, summary judgment, opposing party, insufficiency, patently, surprise, courts, legal sufficiency, contributory, injuries, replead, freely, terms

Case Summary

Procedural Posture
In a personal injury action, plaintiff administratrix sought review of so much of an order entered by the Supreme Court, Westchester County (New York), as denied that branch of her renewed motion which was for leave to amend the complaint, inter alia, to add a cause of action alleging wrongful death against defendants, property owners and a general contractor. Third-party defendant, the decedent's employer, was also involved in the action.

Overview

The decedent, a carpenter, was injured in 1996 when he fell from a scaffold; he commenced the instant action, claiming violations of *Labor Law §§ 200*, *240(1)*, and *241(6)*. In 2003, the decedent passed away from a drug overdose. The administratrix made a motion for leave to amend to include a wrongful death claim on the basis that the injuries from the 1996 accident led to the decedent's relapse into substance abuse. While the administratrix submitted a doctor's affidavit in support of the motion to amend, the trial court denied the motion on the basis that the doctor's conclusion was speculative. On appeal, the court reversed. In reviewing *CPLR § 3025(b)* and the relevant case law, the court determined that an improper standard was applied to

proposed amendments to add wrongful death claims as a pleader should to establish the merit of the proposed amendment and overruled all cases applying that standard. Instead, the proper standard, regardless of the type of claim, was whether the proposed amendment was palpably insufficient to state a cause of action or defense or was patently devoid of merit. In the instant case, the amendment met the newly stated standard.

Outcome

The court reversed the trial court's order, granted the administratrix's renewed motion for leave to amend, and deemed the proposed amended complaint served.

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Torts > Wrongful Death & Survival Actions > General Overview

HN1[] Amendment of Pleadings, Leave of Court

In general, an application for leave to amend a pleading pursuant to CPLR § 3025(b) is governed by a substantially more permissive standard than that requiring a showing of merit. In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. Causes of action alleging wrongful death should not be treated differently. The standard of "palpably insufficient or patently devoid of merit" applies to motions made pursuant to CPLR § 3025(b) for leave to amend a complaint to add a cause of action for wrongful death.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN2[] Amendment of Pleadings, Leave of Court

Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. CPLR § 3025(b).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3[] Motions to Dismiss, Failure to State Claim

In the case of a motion for leave to amend a complaint by adding a new cause of action, the motion for leave to amend will be denied, in the absence of prejudice or surprise, only if the new cause of action would not withstand a motion to dismiss under CPLR § 3211(a)(7).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] Responses, Defenses, Demurrers & Objections

Where the lack of merit of a proposed defense is clear and free from doubt, a motion for leave to amend an answer to raise that defense should be denied.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN5[] Amendment of Pleadings, Leave of Court

Motions for leave to amend pleadings should be freely granted. In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is

palpably insufficient or patently devoid of merit. Additionally, the legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt. A plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN6[] Summary Judgment, Motions for Summary Judgment

Cases involving CPLR § 3025(b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR § 3025(b). The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing. CPLR § 3212.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Torts > Wrongful Death & Survival Actions > General Overview

HN7[] Amendment of Pleadings, Leave of Court

Bedarf v. Rosenbaum, 145 N.Y.S.2d 857 (1955), and its progeny are overruled.

Headnotes/Summary

Headnotes

Pleading -- Amendment -- No Evidentiary Showing of Merit Required

1. A party seeking to amend a pleading pursuant to CPLR 3025 (b) is not required to establish the merit of the proposed amendment. In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed.

Pleading -- Amendment -- Wrongful Death Cause of Action -- No Evidentiary Showing of Merit Required

2. A party seeking to amend a complaint pursuant to CPLR 3025 (b) in order to add a cause of action for wrongful death is not required to make an evidentiary showing by competent medical proof that a defendant's conduct caused the decedent's death. In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. An amendment to assert a cause of action alleging wrongful death should not be treated differently.

Pleading -- Amendment -- Addition of Wrongful Death Cause of Action -- No Evidentiary Showing of Merit Required

3. Bedarf v Rosenbaum (286 App Div 1103, 145 NYS2d 857 [1955]) and its progeny, which required a competent showing of merit as a prerequisite for leave to amend a complaint to add a cause of action alleging wrongful death, are overruled.

Pleading -- Amendment -- Addition of Wrongful Death Cause of Action

4. Plaintiff's motion for leave to amend her complaint in order to add a cause of action alleging wrongful death should have been granted, as she sufficiently alleged in the proposed amended complaint that defendants' negligence caused plaintiff's decedent to suffer injuries that ultimately resulted in his death. The proposed

amended complaint was neither palpably insufficient nor patently devoid of merit. Nor did defendants establish that the plaintiff delayed in seeking leave to amend the complaint, such that they were surprised or prejudiced. Although the medical affidavit submitted by plaintiff in support of her motion was speculative and did not constitute competent medical proof establishing a connection between the accident and decedent's death, she was not required to submit such proof in support of her motion.

Counsel: **[***1]** *Sacks and Sacks, LLP*, New York City (*Scott N. Singer* of counsel), for appellant.

Quirk and Bakalor, P.C., New York City (*Gloria B. Dunn* of counsel), for defendants and third-party plaintiffs-respondents.

Ford Marrin Esposito Witmeyer & Glesser, LLP, New York City (*Joseph D'Ambrosio* and *Andrew I. Mandelbaum* of counsel), for third-party defendant-respondent.

Judges: STEPHEN G. CRANE, J.P., STEVEN W. FISHER, DAVID S. RITTER, JOSEPH COVELLO, THOMAS A. DICKERSON, JJ. FISHER, RITTER, COVELLO and DICKERSON, JJ., concur.

Opinion by: Crane, J.P.

Opinion

[*221] **[**239]** Crane, J.P.

More than 50 years ago, this Court held that a plaintiff seeking leave to amend a complaint to add a cause of action alleging wrongful death must make a competent showing of merit. HN1[↑] In **[*222]** general, however, an application for leave to amend a pleading pursuant to CPLR 3025 (b) **[***2]** is governed by a substantially more permissive standard. In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. We hold in this case that causes of action alleging wrongful death should not be treated differently. The standard of "palpably insufficient or patently devoid of merit" applies to motions made pursuant to **[****2]** CPLR 3025 (b) for leave to amend a complaint to add a cause of action for wrongful death. In so holding, we trace, and overrule, the line of authority requiring a plaintiff to make an evidentiary showing by competent medical proof that a defendant's conduct caused the decedent's death.

I

On May 7, 1996, Thomas Lucido (hereinafter Thomas), a 35-year-old carpenter, allegedly was injured when he fell from a scaffold in the Town of Greenburgh. He commenced this action by service of a summons and complaint on or about August 25, 1998, naming as defendants the property owners and the general contractor. The complaint alleged, inter alia, that the defendants had violated Labor Law §§ 200, 240 (1) and § 241 (6). Issue was **[***3]** joined and, on or about July 12, 1999, Thomas's employer, Delcon Construction Corporation, was impleaded as a third-party defendant. On January 24, 2003, Thomas died. The death certificate lists, **[**240]** as the cause of death, "Acute Mixed Drug Intoxication (Cocaine and Heroin)."

The action was stayed until letters testamentary were issued, and Grace Lucido, as administratrix of the estate (hereinafter the plaintiff), moved to be substituted as the plaintiff, to lift the automatic stay due to Thomas's death, and to be granted leave to amend the complaint in the form annexed to the motion by, inter alia, adding a cause of action to recover damages for wrongful death. By order dated June 29, 2004, the Supreme Court (Nicolai, J.) granted the first two branches of the motion but denied the third "without prejudice to renewal within 30 days of the date of this order, upon proper proof, including a physician's affidavit which demonstrates the causal connection between the decedent's death in 2003 from an overdose of cocaine and heroin, as set forth in the death certificate, and [Thomas's] fall from the scaffold in 1996."

In support of its decision, the Supreme Court relied upon this Court's decision in *Witonski v Feirstein (76*

AD2d 920, 429 NYS2d 260 [1980]), **[***4] [*223]** in which we held, in connection with a motion for leave to amend a complaint by adding a cause of action for wrongful death, that the affirmation of a nontreating physician was sufficient to establish the causal connection between the accident and the decedent's death.

The plaintiff renewed her motion, submitting, inter alia, an affidavit and a letter from Dr. Douglas Anderson, which were based on his review of Thomas's medical records. Dr. Anderson recounted that Thomas had a history of substance abuse, but asserted that Thomas had "maintain[ed] abstinence and attend[ed] [Alcoholics Anonymous] regularly for six years prior to the 1996 accident." The injuries from the construction accident, and consequent pain, led to a relapse into substance abuse. Dr. Anderson opined that Thomas's fatal overdose "was a chronological progression of events as documented in my report and was directly and causally related and connected to the accident of May 7, 1996 and the injuries sustained therein." In the proposed amended complaint, the plaintiff alleged, inter alia, that the defendants' negligence caused the injuries that resulted in Thomas's death.

The Supreme Court denied that branch of **[**241]** the plaintiff's **[***5]** renewed motion which was for leave to amend the complaint, holding that Dr. Anderson's conclusion was speculative:

> "There is no objective support cited for his statement, other than a general statement as to his review of the medical records, that [Thomas] was in full recovery from substance abuse at the time of the accident, or for his statements that [Thomas's] use of cocaine and heroin arose as a result of unremitting pain from his injuries which could not be controlled by prescription pain medications, or from his depression **[****3]** caused by the accident."

In support of this holding, the Supreme Court cited our decision in *Feinberg v Walter B. Cooke, Inc. (240 AD2d 623, 658 NYS2d 698 [1997])*. In similar procedural circumstances, we held in *Feinberg* that the medical affidavits failed to establish anything but a speculative connection between the defendant's alleged negligence and the decedent's death.

We agree with the Supreme Court that Dr. Anderson's affidavit is speculative and does not constitute competent medical proof establishing the connection between the accident and Thomas's death (*see Ortiz v Bono, 101 AD2d 812, 475 NYS2d 145 [1984]*; *cf. Kordonsky v Andrst, 172 AD2d 497, 498-499, 568 NYS2d 117 [1991]*). Thus, if **[*224]** competent medical proof were required **[***6]** at this stage of the action, we would affirm the Supreme Court's denial of that branch of the plaintiff's renewed motion which was for leave to amend the complaint to add a cause of action alleging wrongful death.

II

A motion for leave to amend a pleading under *CPLR 3025 (b)* and its predecessor statutes (*see* former Civ Prac Act §§ 245, 245-a, 245-b) was traditionally held to be completely separate and apart from a motion to test the legal sufficiency of a pleading (*see CPLR 3211 [a] [7]*). Thus, a court deciding a motion for leave to amend a pleading was not required to give any consideration at all to the legal sufficiency of the allegations that the movant sought to add by way of the proposed amendment. To obtain review of the sufficiency of the allegations, the opposing party was required to make a separate motion (*see e.g. Grandview Constr. Corp. v Roreck Constr. Co., 14 AD2d 909, 221 NYS2d 571 [1961]*; *Newman v Goldberg, 250 App Div 431, 431-432, 294 NYS 211 [1937]*; *Doyle v Chatham & Phenix Natl. Bank, 219 App Div 522, 525-526, 220 NYS 231 [1927]*; *Milliken v McGarrah, 164 App Div 110, 111, 149 NYS 484 [1914]*). In some cases, however, a slightly less liberal standard was stated. For example, in *Amherst Bowling Ctr. v Dolce (11 AD2d 1079, 206 NYS2d 193 [1960]*), the Fourth Department stated **[***7]** that it declined to review the sufficiency or merits of the amended pleading, but went on to observe that "[i]t cannot be said as a matter of law that the insufficiency of the pleading is clear on its face and free from doubt. Under these circumstances, defendant should have an opportunity to assert the defense and the plaintiff to make such motions against it as it may deem advisable" (*id.*).

Even with liberality already accorded to motions for leave to amend pleadings under the Civil Practice Act, the drafters of the Civil Practice Law and Rules believed it appropriate to provide expressly for a liberal standard. In 1957, the Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts (hereinafter the Committee) issued its First Preliminary Report to the Governor and Legislature. The Committee suggested that amendments or supplements to pleadings by leave of the court or by stipulation of all of the parties be permitted at any time. The last sentence of the proposed section emphasized the liberality with which such applications should be granted: "Leave shall

be freely given upon terms that may be just" (First Prelim Rep of Advisory Comm on **[***8]** Prac & Pro, 1957 NY Legis Doc No. 6[b], at 77). The Committee **[*225]** explained that the last sentence "more explicitly states the policy of liberality" (*id.* at 78). And, the Committee wrote, the proposed rules "are intended to grant the widest possible discretion to the court in granting leave to serve supplemental pleadings and imposing terms" (*id.*).

When the CPLR was enacted (*see* L 1962, ch 308), CPLR 3025 (b) contained the language of the Advisory Committee's recommendation almost verbatim:

> HN2[] "Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall **[****4]** be freely given upon such terms as may be just including the granting of costs and continuances."

Nevertheless, in East Asiatic Co. v Corash (34 AD2d 432, 312 NYS2d 311 [1970]) the First Department held that, in the interest of judicial economy, some scrutiny must be given a proposed amendment under CPLR 3025 (b). That this was a departure from the general rule was pointed out by Justice **[**242]** (as he then was) Owen McGivern in dissent: "I have always understood it to be the rule that barring surprise or **[***9]** prejudice, a timely application to amend a complaint will never be denied" (34 AD2d at 437).

Following East Asiatic Co. v. Corash (34 AD2d 432, 312 NYS2d 311 [1970]), the courts began to combine the analysis of a motion for leave to amend a pleading under CPLR 3025 (b) with the analysis of a motion to test the validity of that proposed amended pleading under CPLR 3211 (a) (7). Thus, the opponent of a motion for leave to amend a pleading was considered to have made, in effect, a cross motion to test the legal sufficiency of the proposed amendment. Under this approach, the court was supposed to review the legal sufficiency of the proposed amendment at the time that the motion for leave to amend itself was being decided. The rule was that a motion for leave to amend would be denied "in cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit" (*Norman v Ferrara, 107 AD2d 739, 740, 484 NYS2d 600 [1985]*). This means that, HN3[] in the case, for example, of a motion for leave to amend a complaint by adding a new cause of action, the motion for leave to amend will be denied, in the absence of prejudice or surprise, only if the new cause of action would not withstand a motion to dismiss under CPLR 3211 (a) (7).

[*226] In **[***10]** Island Cycle Sales v Khlopin (126 AD2d 516, 510 NYS2d 637 [1987]), the decedent had been killed in a motorcycle accident. His estate brought an action against the plaintiff, a seller of motorcycles and motorcycle equipment, for breach of warranty, relating to the allegedly defective helmet the plaintiff had sold to the decedent. The plaintiff had a garage liability policy, but the defendant, its insurance broker, allegedly had failed to renew it or obtain other insurance coverage. The expired policy contained a liability limit of $ 100,000. The plaintiff commenced an action against the defendant for negligence in allowing the policy to expire and in not obtaining other insurance coverage. At some point, the plaintiff sought leave to serve an amended complaint with an ad damnum clause in the amount of $ 20,100,000, on the ground that the plaintiff might be found to be liable to the decedent's estate in that amount. The Supreme Court granted the motion for leave to amend, but we reversed. Observing that under New York law, a broker who fails to obtain insurance would be liable only up to the amount of what the policy would have covered, the defendant's liability would have been limited to the $ 100,000 of **[***11]** the policy it had allowed to lapse. Thus, the $ 20,100,000 ad damnum clause in the proposed amended complaint was far beyond the amount the plaintiff actually would be allowed to recover against the defendant. Consequently, citing *Norman v Ferrara (107 AD2d 739, 484 NYS2d 600 [1985])*, we held that the lack of merit of the proposed amended complaint was clear and free from doubt (*see* Island Cycle Sales v Khlopin, 126 AD2d at 517-518).

Similarly, HN4[] where the lack of merit of a proposed defense is clear and free from doubt, a motion for leave to amend an answer to raise that defense should be denied. In *Norman v Ferrara*, the defendant admitted in his initial answer that he owned the vehicle that allegedly was at fault in an accident. Later, he sought leave to amend his answer to deny that he was the owner of the car, although he admitted that the registration was in his name. The Supreme Court granted the defendant leave to amend, but we reversed. We noted that under New York law, the person in whose name a vehicle is registered is estopped from denying ownership. Consequently, the defendant's **[**243]** proposed amended answer, in which he denied ownership, was "palpably insufficient as a matter of law"

(*107 AD2d at 740*; **[***12]** *cf. Fisher v Carter Indus., 127 AD2d 817, 512 NYS2d 408 [1987]*).

We adhere to the rule applied in *Norman v Ferrara (107 AD2d at 740)* as an accurate reflection of the Legislature's express **[*227]** policy that HN5[↑] motions for leave to amend pleadings should be **[****5]** freely granted (*see* G.K. Alan Assoc., Inc. v Lazzari, 44 AD3d 95, 99, 840 NYS2d 378 [2007] ["(i)n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"]; Trataros Constr., Inc. v New York City Hous. Auth., 34 AD3d 451, 452-453, 823 NYS2d 534 [2006]). Additionally, "[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (Sample v Levada, 8 AD3d 465, 467-468, 779 NYS2d 96 [2004]; *see Sleepy's Inc. v Orzechowski, 7 AD3d 511, 775 NYS2d 581 [2004]*; Zacma Cleaners Corp. v Gimbel, 149 AD2d 585, 586, 540 NYS2d 268 [1989]). These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance.

III

Somewhere along the line, the economical approach advanced in East Asiatic Co. v Corash (34 AD2d 432, 312 NYS2d 311 [1970]), morphed into a rule, applied in some cases, that, from the standpoint **[***13]** of the party seeking the amendment, is significantly more exacting. Several recent cases state that the party seeking leave to amend must make "some evidentiary showing" of merit (*Butt v New York Med. Coll., 7 AD3d 744, 745, 776 NYS2d 897 [2004]*; *see* Buckholz v Maple Garden Apts., LLC, 38 AD3d 584, 585, 832 NYS2d 255 [2007]; Emilio v Robison Oil Corp., 28 AD3d 417, 418, 813 NYS2d 465 [2006]; Toscano v Toscano, 302 AD2d 453, 453, 754 NYS2d 888 [2003]; Morgan v Prospect Park Assoc. Holdings, 251 AD2d 306, 674 NYS2d 62 [1998]).

The courts that express the rule in these terms apparently require that a party seeking leave to amend a pleading make a showing that would not only be sufficient to withstand a motion to dismiss based on legal insufficiency (*see* CPLR 3211 [a] [7]), but would also be sufficient to withstand a motion for summary judgment (*see* CPLR 3212). The first tests whether a cause of action has been stated. The second tests whether a cause of action exists in fact. The courts applying this more stringent rule of "some evidentiary showing," in effect, deem the opponent of a motion for leave to amend not only to have made a cross motion to dismiss for legal insufficiency, but also to have made a cross motion for summary judgment. In fact, the courts that apply this rule seem to be **[***14]** implicitly treating the opponent of a motion for leave to amend as not only having made a motion for summary judgment, but also as having made a prima facie demonstration **[*228]** of entitlement to judgment as a matter of law with respect to the proposed amended cause of action or defense, so that the burden shifts to the proponent of the amendment to make an "evidentiary showing" of merit.

The origin of this "evidentiary showing" rule can be traced to a statement contained in Cushman & Wakefield v John David, Inc. (25 AD2d 133, 267 NYS2d 714 [1966]). In *Cushman & Wakefield,* a First Department decision, the defendant already had made a motion to dismiss parts of the plaintiff's complaint based on the legal insufficiency of the allegations (*see* CPLR 3211 [a] [7]). The plaintiff responded **[**244]** by requesting leave to replead. This procedural context implicated CPLR 3211 (e), which stated, * in part:

> "Where a motion [to dismiss the complaint or a defense] is made [under CPLR 3211 (a) (7) or (b)] . . . if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in **[****6]** support **[***15]** of a new pleading; *leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence* to justify the granting of such leave" (emphasis added).

CPLR 3211 (e) was, by its terms, applicable only to situations in which the party opposing the "amendment" had already made a motion to dismiss under CPLR

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* The entire provision for repleading was deleted by Laws 2005 (ch 616), in recognition that Rovello v Orofino Realty Co. (40 NY2d 633, 357 NE2d 970, 389 NYS2d 314 [1976]) had nullified the need for sustaining proof on a CPLR 3211 (a) (7) motion (*see* Siegel, NY Prac § 275, at 457 [4th ed], 2007 Pocket Part, at 24; 170 Siegel's Practice Review, *Amendment Lets Party Moved Against Under CPLR 3211 Await Court's Treatment as Summary Judgment Before Gathering Up Effective Opposition Proof*, at 1 [Feb. 2006]).

3211 (a) (7), and where the party seeking the "amendment" was seeking leave to "plead again" in response to such a motion to dismiss. It had no application in a case where a plaintiff sought leave to amend (*see* CPLR 3025 [b]) without there ever having been a motion by the defendant to dismiss the complaint based on legal insufficiency.

In cases following *Cushman & Wakefield,* including some from our Court (*see e.g.* Joyce v McKenna Assoc., 2 AD3d 592, 594, **[*229]** 768 NYS2d 358 [2003]; **[***16]** Morgan v Prospect Park Assoc. Holdings, 251 AD2d 306, 674 NYS2d 62 [1998]; Virelli v Goodson-Todman Enters., Inc., 159 AD2d 23, 24-25, 558 NYS2d 314 [1990]; Martin v County of Madison, 88 AD2d 162, 165-166, 453 NYS2d 814 [1982]; *Harry Levine Corp. v Gimbel Accessories, 41 AD2d 637, 637-638, 341 NYS2d 114 [1973]*), the courts applied the "evidentiary showing" standard in reviewing what were in fact requests for leave to replead pursuant to CPLR 3211 (e). Some of those cases, however, referred to the relief that was being sought by the plaintiff as being both leave to "replead," and as being leave to "amend." The use of this language eventually led to a blending of the standard then to be applied under CPLR 3025 (b), in reviewing motions for leave to amend, with the more exacting standard to be applied under CPLR 3211 (e) in reviewing applications for leave to replead in opposition to a motion to dismiss. The elimination from CPLR 3211 (e) of the leave to replead provisions, saps these cases of their vitality, both as applied to CPLR 3211 (e) and as applied to motions for leave to amend a pleading under CPLR 3025 (b).

As early as Alexander v Seligman (131 AD2d 528, 516 NYS2d 260 [1987]), this Court was mentioning the absence of an affidavit of merit as a factor to be considered in support of denying **[***17]** a motion pursuant to CPLR 3025 (b) for leave to amend a complaint, at least where the motion was made at the commencement of trial. This Court eventually applied the "evidentiary showing" standard to motions for leave to amend made under CPLR 3025 (b), even where the motion was not particularly untimely. This standard has, as noted above, sporadically been repeated ever since (*see e.g.* Joyce v McKenna Assoc., 2 AD3d at 594; Morgan v Prospect Park Assoc. Holdings, 251 AD2d 306, 674 NYS2d 62 [1998]).

[1] [245]** ***HN6***[↑] Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense, or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, **[***18]** that party may later move for summary judgment upon a proper showing (*see* CPLR 3212).

[*230] IV

In the absence of a requirement of an evidentiary showing of merit in support of a motion for leave to amend a pleading under CPLR 3025 (b), it is difficult to see why a species of evidentiary showing of merit--competent medical proof--is required when the motion is to add a cause of action alleging wrongful death. Our decision in Feinberg v Walter B. Cooke, Inc. (240 AD2d 623, 658 NYS2d 698 [1997]), upon which the Supreme Court relied, cited a line of authority dating back to Bedarf v Rosenbaum (286 App Div 1103, 145 NYS2d 857 [1955]). In *Bedarf,* we first required a competent showing of merit as a **[****7]** prerequisite for leave to amend a complaint to add a cause of action alleging wrongful death: "In our opinion some competent showing that the proposed cause of action has merit should have been made. . . . In the absence of such evidence, the granting of leave to add the cause of action for alleged wrongful death was an improvident exercise of discretion" (*Id. at 1103*). We stated no reason for this requirement, but merely asserted it. And, we relied on no authority. An earlier First Department case, *Apicella v Merolla's Mkt., Inc. (283 App Div 1056, 131 NYS2d 774 [1954]*), **[***19]** which was not cited in *Bedarf*, had applied the same rule but also did not state any reasoning or rely on any authority. Since then, the requirement has become entrenched in our precedents (and those of the other Departments of the Appellate Division): "A motion seeking leave to amend a personal injury complaint to assert a cause of action for wrongful death must be supported by competent medical proof of the causal connection between the alleged negligence and the death of the original plaintiff" (Shapiro v Beer, 121 AD2d 528, 528, 503 NYS2d 593 [1986]; *see* Paolano v Southside Hosp., 3 AD3d 524, 525, 771 NYS2d 152 [2004]; Griffin v New York City Tr. Auth., 1 AD3d 141, 767 NYS2d 15 [2003]; *Collura v Good, 243 AD2d 441, 665 NYS2d 276 [1997]*; Dembo v Health Ins. Plan of Am., 239 AD2d 382, 383, 658 NYS2d 887

[1997]; *Ludwig v Horton Mem. Hosp., 189 AD2d 986, 986-987, 592 NYS2d 842 [1993]*; *Nowak v Sherman, 167 AD2d 843, 844, 562 NYS2d 250 [1990]*; *Sweeney v Henry F. Gardstein, Jr., M.D., P.C., 160 AD2d 1002, 554 NYS2d 720 [1990]*; *McGuire v Small, 129 AD2d 429, 513 NYS2d 691 [1987]*; *McCarthy v Downes, 17 AD2d 919, 233 NYS2d 402 [1962]*). No case since *Bedarf* has supplied, or attempted to supply, a rationale for the rule, much less a contemporary one. Nonetheless, it has persisted, until now.

Prior to *Bedarf*, only two rationales had been advanced for the rule, and neither can justify persistence of the rule **[***20]** today. First, in *Pearlstein v Priest (132 NYS2d 541 [1954])*, the **[*231]** Supreme Court, Bronx County, expressed doubt as to the underlying merit of the plaintiff's proposed cause of action **[**246]** for wrongful death, given the four-year lapse between the accident, which required "only" six days of hospitalization, and the original plaintiff's death (*id. at 542*). We find that the general rule applicable to motions for leave to amend pleadings under *CPLR 3025 (b)* and the availability of summary judgment (*see CPLR 3212*) amply address this concern.

Second, in *La Placa v B.L. & C. Corp. (130 NYS2d 504 [1952])*, the Supreme Court, Kings County, noted that the addition of a wrongful death cause of action to the personal injury action would shift the burden of proving contributory negligence in the personal injury action to the defendant (*see also Doragia v Lauri, 130 NYS2d 835 [1951]*). At that point, the plaintiff bore the burden of establishing the absence of contributory negligence in a personal injury action, but the defendant bore the burden of establishing the presence of contributory negligence in a wrongful death cause of action (*see Rossman v La Grega, 28 NY2d 300, 303-304, 270 NE2d 313, 321 NYS2d 588 [1971]*). By statute, however, when a personal injury **[***21]** action was joined with an action alleging wrongful death, the defendant bore the burden of proving contributory negligence with respect to both (*see* Decedent Estate Law § 119; *cf. EPTL 11-3.2 [b]*). Thus, the Supreme Court, in *La Placa*, was concerned not merely with the addition of the wrongful death cause of action, but with its effect, if added, on the procedural burdens in the personal injury cause of action. The court nevertheless noted that the plaintiff was free to bring an independent action for wrongful death. In 1975, however, New York changed its standard from contributory to comparative negligence in both personal injury and wrongful death actions (*see CPLR 1411*; L 1975, ch 69). Moreover, *CPLR 1412* places the burden of pleading and proving comparative negligence on the party asserting the defense (*see CPLR 1412*). Accordingly, the concern expressed by the court in *La Placa*is no longer applicable.

V

[2, 3] As our review of the history of motions for leave to amend pleadings has shown, the **[****8]** rule adopted in *Bedarf v Rosenbaum (286 App Div 1103, 145 NYS2d 857 [1955])* was anomalous even when it was adopted. Our examination of the wrongful death exception to the general standard applicable to motions for **[*232]** leave **[***22]** to amend pleadings under *CPLR 3025 (b)* convinces us that there is no reason wrongful death causes of action should be treated differently from any other motion for leave to amend a pleading under *CPLR 3025 (b)*, as we have implicitly recognized in at least one recent case (*see Hines v City of New York, 43 AD3d 869, 871, 841 NYS2d 374 [2007]*). **HN7**[↑] Consequently, *Bedarf v Rosenbaum (286 App Div 1103, 145 NYS2d 857 [1955])* and its progeny are overruled.

VI

[4] In the proposed amended complaint, the plaintiff sufficiently alleged that the defendants' negligence caused Thomas to suffer injuries that ultimately resulted in his death. The proposed amended complaint is neither palpably insufficient nor patently devoid of merit (*see G.K. Alan Assoc., Inc. v Lazzari, 44 AD3d at 99*). Nor did the defendants establish that the plaintiff delayed in seeking leave to amend the complaint, such that they were surprised or prejudiced. Consequently, the plaintiff's motion for leave to amend the complaint, inter alia, to add a cause of action alleging wrongful death should have been granted.

We of course express no opinion as to the ultimate merit of the plaintiff's cause of action alleging wrongful death (*see* **[**247]** *Douglas v New York City Tr. Auth., 91 AD2d 1057, 1058, 458 NYS2d 667 [1983]*; **[***23]** *cf. Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38, 827 NYS2d 231 [2006]*).

The defendants' remaining contention, raised for the first time on appeal, is not properly before us (*see Wolff v New York City Transit Auth., 21 AD3d 956, 957, 801 NYS2d 345 [2005]*; *DeLeon v New York City Transit Auth., 5 AD3d 531, 532-533, 772 NYS2d 874 [2004]*).

Accordingly, the order is reversed insofar as appealed from, on the law and in the exercise of discretion, with

one bill of costs payable to the appellant by the respondents appearing separately and filing separate briefs, that branch of the renewed motion which was for leave to amend the complaint, inter alia, to add a cause of action seeking damages for wrongful death is granted, and the proposed amended complaint is deemed served.

Fisher, Ritter, Covello and Dickerson, JJ., concur.

Ordered that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, with one bill of costs payable to the appellant by the respondents appearing separately and filing separate briefs, that branch of the **[*233]** renewed motion which was for leave to amend the complaint, inter alia, to add a cause of action seeking damages for wrongful death is granted, and the proposed **[***24]** amended complaint is deemed served.

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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONTGOMERY

CHRISTOPHER SEELEY, as Temporary Administrator of The Estate of JENNIFER KACZOR, and as Guardian of JOCELYN KACZOR, a child under the age of 18 years,

Plaintiffs,

-against-

JIAN SHEN M.D., MOHAWK VALLEY ORTHOPEDICS, P.C., RONALD STRAM, M.D., and ST. MARY'S HEALTHCARE, p/k/a ST. MARY'S HOSPITAL AT AMSTERDAM, JOHN CHARLES TIETJEN, D.O., BENJAMIN S. KATZ, M.D., ALLEN L. CARL, M.D., TANYA NEEDHAM, M.D., ALBANY MEDICAL COLLEGE and ALBANY MEDICAL CENTER HOSPITAL,

Defendants.

DECISION AND ORDER

Index No.: 2014-0986
RJI No.: 28-1-2015-0116

On or about July 30, 2020, Plaintiffs, Christopher Seeley, as Temporary Administrator of The Estate of Jennifer Kaczor, and as Guardian of Jocelyn Kaczor, a child under the age of 18 years by and through their attorneys, Cherundolo Law Firm, PLLC, John C. Cherundolo, Esq., of counsel, filed a motion pursuant to Civil Practice Law and Rules ("CPLR") § 3025 seeking an order granting: (1) leave to serve and file an Amended Complaint in the above captioned matter; (2) leave to serve and file an Amended and Supplemental Bills of Particular as against Defendants Jian Shen, M. D. and Mohawk Valley Orthopedics, P.C. (hereinafter "Defendant Shen"), and Defendants John Charles Tietjen, D.O., Benjamin S. Katz, M.D., Allen L. Carl, M.D., Albany Medical Center Hospital/Albany Medical College, (hereinafter "AMC Defendants"); and (3) such other and further relief as this Court deems just and proper. In support of the motion Plaintiff filed a Notice of Motion dated July 29, 2020; Affirmation sworn to by John C. Cherundolo, Esq. on the 29th day of July, 2020 with annexed Exhibits 1 through

40; and Memorandum of Law in Support of Plaintiff's Motion for Leave to Served [sic] an Amended Complaint and Amended and/or Supplemental Bill of Particulars dated July 29, 2020 and signed by Attorney Cherundolo.

On or about August 20, 2020, the AMC Defendants by and through their attorneys, Maynard, O'Connor, Smith & Catalinotto, LLP, Adam T. Mandell, Esq., filed their opposition to the motion. The AMC Defendants' opposition papers consisted of an Attorney Affirmation sworn to by Adam T. Mandell, Esq. on the 18th day of August, 2020 with Exhibits A through D annexed thereto.

On or about August 24, 2020, Defendant Shen, by and through their attorneys, Thorn Gershon Tymann and Bonanni, LLP filed their opposition to the motion. Defendants Shen and Mohawk Valley Orthopedics, P.C.'s opposition consisted of an Attorney Affidavit sworn to by Mandy McFarland, Esq. sworn to on the 20th day of August, 2020.[1]

On or about August 25, 2020 a flurry of emails began to circulate regarding the fact that the motion papers served and filed by Attorney Cherundolo failed to include "the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleading" (CPLR § 3025). Mr. Cherundolo requested a conference to address the fact that the amended pleadings attached to the motion failed to show the changes or additions. A conference was scheduled for August 28, 2020 to address the issue presented by the failure to highlight the proposed additions and changes.

On or about August 26, 2020, Attorney Cherundolo filed a set of new Exhibit Numbers 25, 26, 27, 28 & 29 to replace the Exhibits annexed to his original Affirmation dated July 29, 2020. He filed the new exhibits because the original exhibits annexed to his affirmation failed to

[1] Plaintiff was in the process of executing and filing a stipulation of discontinuance against the remaining Defendants, and they have taken no position on the pending motion.

include yellow highlighting of the proposed changes or additions to be made to the amended complaint and amended/supplemental bills of particulars.[2] In his cover letter dated August 26, 2020, Attorney Cherundolo indicated that he had "thought and intended" to have yellow highlighted exhibits attached to his original filed with the Court and copies served upon counsel. He further apologized for "this glaring error made by our copy service and any inconvenience this has caused to all parties involved, including the Court".

At the conference on August 28, 2020 Attorney Cherundolo explained that he had instructed the copier service he used to make color copies, bind the motion and ship it out for filing and service. He did not realize that the copier had simply made black and white copies until he reviewed the AMC Defendants' opposition. Attorney Michael E. Catalinotto, Esq. who appeared at the conference for the AMC Defendants vehemently opposed allowing the corrected, highlighted papers to be filed and served. He noted he already submitted his opposition and should not be required to review the over 1,000 pages again to determine what the proposed changes are and respond a second time. I directed that Plaintiff serve the highlighted exhibits so as to be received on or before September 1, 2020, and further granted the AMC Defendants until October 2, 2020 to file a supplemental opposition. Plaintiff's time to submit a reply was extended to October 16, 2020. Attorney Cherundolo attempted to raise another issue on the conference regarding expert affidavits. I did not entertain the second issue as it was not the reason I scheduled the conference on short notice.

[2] It is noted that the original motion papers consisting of the Plaintiff's Exhibit Numbers 1 through 40 were broken into two separately bound compilations measuring four inches and six inches in height respectively. The newly served replacement Exhibit Numbers 25 through 29 measured 5½inches in height. This is meant to indicate the enormous volume of pages as a standard ream of paper consisting of 500 sheets measures two inches.

On or about September 1, 2020, Attorney Cherundolo submitted a three page letter with two expert affidavits enclosed. The affidavits were sworn to by Marvin Galler, M.D. and Douglas W. Gibson, M.D. Attorney Cherundolo was:

> request[ing] the Court grant leave to allow us to serve, upon the remaining Defendants in the case the two affirmations that are attached to this letter. . . . We respectfully request the Court grant leave to serve these affirmations upon Defense Counsel, so as to form part of the original motion papers that the plaintiff served upon the Defense to amend and supplement the Bills of Particulars and the Complaint in this matter.

(*See* Attorney Affirmation sworn to by Adam T. Mandell on the 19th day of October, 2020 at Exhibit D, p. 1). Attorney Mandell sent a three page letter dated September 2, 2020 opposing the relief requested by Attorney Cherundolo's September 1, 2020 letter (*see* Attorney Affirmation sworn to by Adam T. Mandell on the 19th day of October, 2020 at Exhibit E). This Court denied the requested relief in a nine page, written Decision and Order dated September 4, 2020 and ordered that the expert affidavits be rejected as an improper reply and stricken from the record.

On or about October 1, 2020 the AMC Defendants filed a Further/Supplemental Attorney Affirmation in Opposition sworn to by Adam T. Mandell, Esq. on the 29th day of September, 2020 with annexed Exhibits A through F. On or about October 16, 2020 Plaintiff filed a Reply Attorney Affirmation sworn to by John C. Cherundolo, Esq. on the 15th day of October, 2020 with annexed Exhibits A through I.

On or about October 19, 2020 Attorney Mandell sent a letter to the Court on notice to all counsel objecting to the Plaintiff's Reply Attorney Affirmation which annexed the Affirmations of both Douglas W. Gibson, M.D. and Marvin Galler, M.D. Attorney Cherundolo responded in a letter dated October 19, 2020. Attorney Cherundolo simply argues that the Court was wrong, and he should be allowed to include the papers. He simply ignores the directive that the

affirmations were rejected and stricken. The Court did not review the stricken affidavits in arriving at its conclusion in this Decision and Order.

On or about October 14, 2020 Plaintiff filed a second motion seeking an order pursuant to

> New York Civil Practice Law and Rules, and in the interests of justice, vacating, setting aside, and reversing the Order of Supreme Court Justice Rebecca Slezak dated September 4, 2020, upon the grounds that said Order, and the actions leading up to the Decision and Order, amount to an abuse of discretion by the Court in denying the plaintiff's request to file and serve the affirmations of two medical physician experts, Douglas Gibson, MD, and Marvin Galler, MD,

and for such other and further relief this Court deems just and proper (*see* Notice of Motion dated October 13, 2020). In support of the motion to vacate, set aside, and reverse Plaintiff filed a Notice of Motion dated October 13, 2020; and an Affirmation sworn to by John C. Cherundolo, Esq. on the 13th day of October, 2020 with annexed Exhibits A through M.

The AMC Defendants filed an Attorney Affirmation sworn to by Adam T. Mandell, Esq. on the 19th day of October, 2020 with annexed Exhibits A through F. Attorney Cherundolo filed a Reply Affirmation sworn to by him on the 26th day of October, 2020.

Oral arguments were held on October 26, 2020. Plaintiff appeared by Attorney Cherundolo and his co-counsel on the motion to vacate, Michael H. Hutter, Esq. of Powers and Santola. Defendant Shen appeared by Mandy McFarland, Esq. The AMC Defendants appeared by and through Attorney Mandell and Attorney Catalinotto. At the conclusion of the oral arguments, the Court reserved decision.

The Court shall issue one decision on both pending the motions, as they are sufficiently related and lend themselves to being disposed of in one decision. I will, however, decide them in reverse order of filing as the motion to set aside could affect the motion to amend/supplement the pleadings.

I. Motion to Vacate, Set Aside and Reverse

A court of record has the inherent power to make determinations and rulings to control its calendar and the "disposition of business before [it]" (*Gabrelian v Gabrelian*, 108 AD2d 445). The Appellate Division, Second Department in *Gabrelian v Gabrelian*, outlined the inherent powers of a Court as follows:

> It is our view that courts of record (Judiciary Law § 2) are vested with inherent powers, which are neither derived from nor dependent upon express statutory authority, and which permit such courts to do all things reasonably necessary for the administration of justice within the scope of their jurisdiction (*Langan v First Trust & Deposit Co.*, 270 App Div 700, *affd* 296 NY 1014). The so-called "inherent powers doctrine" has been aptly described as follows: "Under the inherent powers doctrine a court has all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court *is*, therefore, it has the powers reasonably required to act as an efficient court. Inherent judicial powers derive not from legislative grant or specific constitutional provision, but from the fact it is a court which has been created, and to be a court requires certain incidental powers in the nature of things. (Carrigan, Inherent Powers of the Courts, National College of the State Judiciary, Reno, Nevada [1973].)" (*Matter of People v Little*, 89 Misc 2d 742, 745, *affd* 60 AD2d 797.) A court's inherent powers are derived from the very fact that the court has been created and charged with certain duties and responsibilities; they are those powers which a court may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its own independence and integrity; such powers have been recognized since the days of the Inns of Court in common-law English jurisprudence (*Eichelberger v Eichelberger*, 582 SW2d 395, 398-399 [Tex]; *see also, Jacobson v Avestruz*, 81 Wis 2d 240, 244-248, 260 NW2d 267, 269-270; 20 Am Jur 2d, Courts, §§ 78-79).
>
> Despite the broad language employed in those cases to describe the "inherent powers doctrine", the doctrine has not been widely applied. It has, however, been utilized as a basis for calendar control, e.g., the dismissal of actions for nonprosecution and the granting of preferences. In *Plachte v Bancroft Inc.* (3

AD2d 437, 438), the Appellate Division, First Department, stated: "It is ancient and undisputed law that courts have an inherent power over the control of their calendars, and the disposition of business before them" (*see also, Travelers Ins. Co. v New York Yankees*, 102 AD2d 851, 852; *Judson v Three D Bldg. Corp.*, 18 AD2d 232, 234; *Taks v Stern*, 14 AD2d 585, 586; *cf. People v Douglass*, 60 NY2d 194). Similarly, in *Link v Wabash R.R. Co.* (370 U.S. 626, 630), the United States Supreme Court held that dismissal of a case due to plaintiff's attorney's failure to appear at a pretrial conference constituted a valid exercise of inherent power "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs".

A closely related aspect of the inherent power is that which vests the court with the authority to assign individual cases or classes of cases to a particular justice or part thereof (*see, e.g., People v Granatelli*, 108 Misc 2d 1009, 1018; *Bankers Trust Co. v Braten*, 101 Misc 2d 227, 235-236).

Further, courts have the inherent power to formulate and promulgate rules of practice (*Hanna v Mitchell*, 202 App Div 504, *affd* 235 NY 534; *see generally*, Cratsley, Inherent Powers of the Courts, National Judicial College [1980], at 37-39), including rules which authorize the imposition of sanctions for conduct by lawyers which falls short of contempt of court (*In re Sutter*, 543 F2d 1030, 1037-1038).

In addition, a court has the inherent power to take necessary steps to permit it to exercise its jurisdiction and to protect it from unreasonable restraint. For example, a court has the inherent power to make an ex parte order requiring the legislative branch of government to secure suitable facilities for the transaction of court business (*In re Courtroom & Off. of Fifth Branch Circuit Ct.*, 148 Wis 109, 134 NW 490), to order the legislative body empowered to approve fiscal appropriations to authorize payment for necessary supplies to conduct court business (*State ex rel. Kitzmeyer v Davis*, 26 Nev 373, 68 P 689), to order the county clerk to enter a judgment directing the county treasurer to pay a court stenographer for a transcript for an appeal in a criminal case (*Matter of People v Little*, 89 Misc 2d 742, *affd* 60 AD2d 797, *supra*), and to order the county sheriff to provide security services for courts sitting within the county (*Matter of Spike*, 99 Misc 2d 178; *see generally, Pena v District Ct.*, _ Col _, _, 681 P2d 953, 957; Cratsley, Inherent Powers of the Courts, National Judicial College [1980]).

> The power to correct mistakes or errors in judicial records is also said to be among the powers that are inherently possessed by courts (*People v Minaya*, 54 NY2d 360, 364, *cert denied* 455 U.S. 1024), as is the power to seal and expunge records (*Matter of Dorothy D.*, 49 NY2d 212, 215), the power to correct ambiguities in judgments (*People v Stoesser*, 92 AD2d 650, 651), and the power to vacate judgments, for sufficient reason, in the furtherance of justice (*Ladd v Stevenson*, 112 NY 325, 332; *cf. Matter of McKenna v County of Nassau*, 61 NY2d 739, 742).
>
> . . . .
>
> The foregoing examples are merely illustrative, and are not meant to define the exact perimeters of the power inherent in the courts of record of this State. Indeed, the inherent power, is, by its very nature, not susceptible to precise definition (*De Lancey v Piepgras*, 141 NY 88, 96, *supra*). . . .

(*id.* at 448-451] [footnote omitted]).

When a matter is pending before a court, counsel will inevitably seek relief for any manner of requests affecting the litigation such as adjourning a conference, setting a discovery schedule, extending a deadline, or as in the above captioned matter, leave to file and serve expert affidavits on reply in response to opposing counsel's opposition, "as to form part of the original motion papers" (*see* Letter of Attorney Cherundolo dated September 1, 2020 at p. 1, annexed to the Attorney Affirmation of Adam T. Mandell, Esq. sworn to on the 19th day of October, 2020 as Exhibit D). Rulings on such requests often fall within the rubric of the "discretionary powers" of the court (*Matter of Lavell v Jaeger*, 2017 NY Misc LEXIS 3069, at *9-*10 [

> . . . it is well settled that trial courts have the broad discretion to accept or reject supplemental briefings as part of their inherent authority to regulate motion practice before them (*Pena-Vazquez v Beharry*, 82 AD3d 649, 919 NYS2d 336 [1st Dept 2011]). In fact, every court is vested with powers that permit them to do things necessary for the administration of justice, including, but not limited to, accepting late papers, sur-reply papers or otherwise regulate proceedings before it (*Liotti v Peace*, 36 Misc3d 1218[A], 959 NYS2d 90, 2003 NY Slip Op 51762 [U] [Sup. Ct. Nassau Co.

> 2003]; *Gabrelian v Gabrelian*, 108 AD2d 445, 489 NYS2d 914 [2nd Dept 1985]).

In determining a request for relief, whether it is in writing or oral, a judge must necessarily issue a ruling to allow counsel to proceed with knowledge of the determination made by the Court in response to the request made. Such interlocutory rulings may or may not affect a substantial right of a party. In the event a ruling does in fact affect a substantial right of a party, there is generally no recourse for the aggrieved party as appeals only lie from a judgment or order (CPLR § 5512 ["No appeal lies from a decision, verdict, report, or ruling—a disposition must be contained in either a judgment or order or it will not be appealable." [Richard C. Reilly, 2019 Practice Commentaries, McKinney's Consolidated Laws of NY Book 7B, CPLR 5512, 2020 Pocket Part at 47]]; *see also Matter of Grisi v Shainswit*, 119 AD2d 418 [granting an Article 78 mandamus proceeding to compel a court to sign a written order memorializing ruling to allow appeal]).

What constitutes an "appealable paper" has evolved, in no small part because the Legislature saw fit to amend CPLR § 2219 (a) in 1996 to provide a mechanism to allow counsel to request rulings be reduced to a written order (*see Hammerstein v Henry Mt. Corp.*, 11 AD3d 836, 837-838 ["Regardless of the label employed by Supreme Court, we deem the paper a mixed decision and order. This order 'affect[ed] a substantial right' of the parties, making it appealable." [citations omitted]]; *Herbert v New York*, 126 AD2d 404, 406 [finding a signed transcript is an appealable paper]; *Matter of Grisi*, 119 AD2d at 421-422 [

> Since they wish to appeal from the denial of their application for a physical examination and further deposition, and no appeal lies from a ruling, as distinct from an order (*CPLR 5512 [a]*; *Lee v Chemway Corp., 20 AD2d 266*), which must be in writing (*CPLR 2219*; *Le Glaire v New York Life Ins. Co., 5 AD2d 171*), the defendants, petitioners herein, thereupon commenced this proceeding seeking a judgment in the nature of a writ of

> mandamus directing the court to issue a written order reflecting its denial of their application.
>
> . . . .
>
> Finally, we note that this decision should not be construed as encouraging the practice of conditioning the making of written motions on prior judicial consent. We believe that under the present system that determination is best left to the discretion of the particular trial court. We merely require that when a request to make a formal motion is refused or the motion is considered on the merits, but orally, a record, as already indicated, be made.

]; *cf. de Hernandez v Bank of Nova Scotia*, 76 AD3d 929, 931 ("No appeal lies from a ruling . . . and the transcript was not 'so ordered' by the court." [citations omitted]).

CPLR § 2219 provides the specific format to be used in drafting an order for it to be deemed an "order" that is appealable (Civ. Prac. L. & R. § 2219 [a]; *Charalabidis v Elnagar*, 2020 N.Y. App. Div. LEXIS 5082 at *4-*8 [outlining in great detail the six identified requirements in drafting an order that make it an appealable paper). In 1996, the Legislature amended CPLR § 2219 (a) to add:

> . . . Except in a town or village court or where otherwise provided by law, upon the request of any party, an order or ruling made by a judge, whether upon written application or sua sponte, shall be reduced to writing or otherwise recorded.

(CPLR § 2219 [a]; *see* L 1996, ch 38, as amended). The New York State Assembly Memorandum in Support of Legislation that was submitted in accordance with Assembly Rule III, Sec 1 (f) with Bill Number A7535 regarding the above addition to CPLR § 2219 (a) states in pertinent part:

> This is one of a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Civil Practice.
> The Committee recommends that rule 2219(a) of the CPLR, relating to the time and form of an order determining a motion, be amended to provide that a determination or order made by a judge

> of a court of record, in an action, whether upon written or oral application or motion of a party
> or
> **SUA SPONTE**, shall, upon request of any party, be reduced to writing or otherwise recorded.
> *Oral rulings frequently are made by judges, often during conference in chambers with no court reporter present. If the court disposes of an application or motion of a party orally, or makes an oral*
> ***SUA SPONTE***
> *determination or order affecting a party, and if such oral ruling or order is neither recorded nor reduced to writing, it becomes almost impossible for the party to preserve objections for purposes of appeal. The Committee believes that a party is entitled to preserve all rulings and objections for possible appeal and that the CPLR should provide a procedure to do this. The procedure should come into play only upon request of a party, since it is not necessary that every oral ruling by a judge be so recorded, but upon request of a party, it should be.*
> The Committee notes that it is not intended by this amendment that the requirement apply to jury selection because, at the end of
> **VOIR DIRE**,
> an appeal may be taken upon affidavit of an attorney who states that the jury panel is not satisfactory. Also, as noted, this measure applies only to determinations or orders made by judges of courts of record. Thus, it does not apply to town or village court judges or justices. This measure, which would have no fiscal impact on the State, would take effect on the first day of January next succeeding the date on which it shall have become a law.

(*See* Mem of Assembly Rules Comm, Bill Jacket, L 1996, ch 38 [emphasis added].) In so modifying the statute, the Legislature created a mechanism to preserve a party's right to appeal a ruling that would not otherwise be preserved. It is necessary for an aggrieved party to request a written order if the Court does not reduce the ruling to a written order, but it is not limited to only those instances where counsel requests the ruling "be reduced to writing or otherwise recorded" (CPLR § 2219 (a); Mem of Assembly Rules Comm, Bill Jacket, L 1996, ch 38). A Court has the inherent power to reduce any ruling it makes to a written order to maintain its calendar, the record and its control over the process of any litigation pending before it. In the

above captioned matter, this Court reduced its ruling to deny Mr. Cherundolo's request for leave to serve and file expert affidavits on reply.

A secondary argument presented by Mr. Cherundolo in his motion seeking to vacate, is that this Court's September 4, 2020 Decision and Order is without any force or effect because it was issued without a proper motion having been made. In essence, Mr. Cherundolo argues that an order may only be issued upon a written motion, made on notice. Such an argument, however, is belied by the very language of CPLR § 2219, and the supporting memorandum that was submitted with the bill to amend in 1996. The very reason CPLR § 2219 (a) was amended was to provide a mechanism to record a ruling and avoid the ephemeral nature of an interlocutory ruling made in conference or at an otherwise unrecorded interaction with a Court, that can unequivocally alter the very nature of a particular party's position in a case in a lasting and negative manner. The ruling which escapes appellate review may so severely impede a party that the 1996 Advisory Committee on Civil Practice and the Legislature saw fit to provide a means to allow a so aggrieved party with a process to record the ruling and preserve an appeal. Thus, an order may result from any ruling made upon a "written or oral application" or even a "sua sponte" ruling. As noted by the late Professor David D. Siegel:

> The requirement that the order be in writing is explicit in CPLR 2219 (a). Practitioners nevertheless report instances in which oral directions are issued by judges, such as in the course of conferences or proceedings in chambers, or even by telephone, which amount to orders but are not reduced to a writing or otherwise recorded (as when no stenographer is present). This practice impedes appellate review, should an aggrieved party seek it. A 1996 amendment of CPLR 2219 (a) responded to the situation by requiring that any such "order or ruling" made by a judge "be reduced to writing or otherwise recorded" if any party requests it.

(Siegel, NY Practice § 250 at 484 [6th ed 2018].)

Furthermore, what is considered a motion, is also broadly defined. Black's Law Dictionary defines the term "motion" as:

> Motion. 1. A written or oral application requesting a court to make a specified ruling or order. 2. A proposal made under formal parliamentary procedure.

(Black's Law Dictionary 1031 [7th ed1999]). CPLR § 2211 specifically defines a motion as:

> A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served.

(CPLR § 2211; *see also* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2211:1, at p. 50 ["According to the opening sentence of CPLR 2211, a motion is merely an application for an order."]). Courts have also loosened the definition of an appealable paper to allow transcripts or other signed orders meeting the requirements of CPLR § 2219 (a), which affect the substantial rights of a party to be considered under CPLR § 5512 as appealable (*Hammerstein*, 11 AD3d at 837-838; *see also Herbert*, 126 AD2d at 406 [

> It should be noted that although we have in the past been inclined to read CPLR 5512 strictly and so have required as appealable paper a duly entered order or judgment, we have since our recent decision in *Grisi* taken a less restrictive approach (*Matter of Grisi v Shainswit*, *supra*, at p. 422). As a transcript of the court's directions at a preliminary conference is deemed to "have the force and effect of an order of the court" (22 NYCRR 202.12 [e]), it may be considered an appealable paper pursuant to CPLR 5512, provided it is signed (*supra*, at p 422).

]).

In submitting his letter request on September 1, 2020 Attorney Cherundolo specifically wrote:

> I write now to request the Court grant leave to allow us to serve, upon the remaining Defendants in the case the two affirmations that are attached to this letter. . . . We respectfully request the

> Court grant leave to serve these affirmations upon Defense Counsel, so as to form part of the original motion papers that the plaintiff served upon the Defense to amend and supplement the Bills of Particular and the Complaint in this matter.

(*See* Attorney Affirmation sworn to by Adam T. Mandell on the 19th day of October, 2020 at Exhibit D, p. 1). The letter was sent to the Court on notice to all counsel. In response, Attorney Mandell sent a three page letter dated September 2, 2020 opposing the relief requested by Attorney Cherundolo's September 1, 2020 letter (*see* Attorney Affirmation sworn to by Adam T. Mandell on the 19th day of October, 2020 at Exhibit E). The Court, was therefore, being asked to make a ruling on whether the Plaintiff should be allowed to supplement its original motion pursuant to CPLR § 3025 with expert affidavits on *reply*. The timing of the request, essentially seeking an opportunity to supplement Plaintiff's motion "so as to form part of the original motion papers" evidences that Attorney Cherundolo was seeking permission to style his reply as a part of the original motion. Clearly, this move was in response to the Defendants specifically raising the fact that the Plaintiff's motion failed to provide proof in evidentiary form that the proposed amendments to assert a cause for action for wrongful death had merit. The Plaintiff argues that because Defendants were provided thirty-one additional days to respond to Plaintiff's *other* mistake in its initial motion, to wit: the failure to properly mark the proposed changes in its proposed supplemental/amended bills of particulars and proposed amended complaint, no prejudice could result from this additional task of responding to the expert affidavits being proffered by Plaintiff on reply. This begs the question of how many errors by the movant requiring further response by opposing counsel would constitute prejudice?

The argument that the AMC Defendants had thirty-one days to respond to the highlighted submissions and therefore, could not suffer any prejudice in responding to the expert affidavits simply has no merit. The AMC Defendants had opposed the motion and then were tasked

reviewing over 1,000 pages again to discern the modifications, additions and supplemental pleadings. Attorney Cherundolo asks this Court to ignore the extent of his mistakes, and direct the AMC Defendants to continue to simply respond without end.

This Court reviewed Attorney Cherundolo's letter request, which was sent on notice to all opposing counsel, as a written application to the Court seeking a ruling granting leave to file expert affidavits "so as to form part of the original motion papers". The intent of Plaintiff was to file the letter in lieu of a motion, and it was deemed a motion, on notice, by this Court. A motion may be made orally, or in writing, and the lack of a notice of motion and the usual papers in support is of no moment. In issuing the Decision and Order on September 4, 2020 this Court rendered its ruling and issued an order implementing its ruling.

In denying the request of Mr. Cherundolo this Court ruled that the expert affidavits were an improper reply as they raised new issues to which Defendants would not have an opportunity to respond without further leave of Court. The Court in issuing the written decision followed the language of CPLR § 2219 (a) and provided all counsel with: (1) a written determination; (2) signed by me; (3) dated September 4, 2020; (4) identifying that it was issued from the Montgomery County Supreme Court with the proper caption and Index Number of the above captioned matter; (5) recited the papers which were considered by the Court in issuing the order, *i.e.*, the letters and submissions of counsel; and (6) specifically gave the litigants a detailed explanation of the Court's decision and a clear directive on how to implement the decision (*see Charalabidis*, 2020 NY App. Div. LEXIS 5082, at *4-*8 [stating the six basic criteria of an order]; *Kaczor v Shen, et al.*, Sup Ct, Mont. County, Sept. 4, 2020, Slezak, J., index No. 2014-0986). The Court did not wait to receive a request from Counsel to issue the written decision, but the Court is not required to wait for a request prior to issuing a written decision. The Court

has the inherent power to issue oral, or written rulings, and further issue written orders implementing its rulings.

Attorney Cherudolo subsequently filed a Motion to Vacate, Set Aside and Reverse this Court's Decision and Order signed on September 4, 2020. He argues that the order was issued without any motion, and was an abuse of this Court's discretion. The gist of the Plaintiff's argument appears to be the Court had to accept the new filings and abused its discretion in denying the relief requested in his September 1, 2020 letter. It is correct to admit that Plaintiff did not file a formal motion request to file his expert affidavits in reply under the guise of "supplementing his original motion", but the legal definition of a motion was met. His request was in writing, seeking a ruling to allow him to file the affidavits, and was made on notice to Defendants. It was further opposed by Defendants, in writing on notice to Plaintiff. The Court was presented with a situation requiring a ruling. The requested ruling would certainly prejudice one side or the other, as accepting the affidavits would require Defendants to take their focus off the hundreds of pages of proposed changes they were tasked with reviewing on August 28, 2020 after having already submitted their opposition; and denying the request would prejudice the Plaintiff by eliminating her right to offer proof that the proposed amended complaint has merit. Faced with this dilemma, created wholly by Plaintiff, the Court chose to draft an order pursuant to CPLR § 2219 (a) which allows a Judge to reduce a ruling to a writing "to produce an appealable paper" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2219:3, at p. 230; *see also* Seigel, NY Prac §250 at 484 [6th ed 2018]). This Court's written order protected the aggrieved party from a ruling which could effectively gut the motion to amend the complaint to add a cause of action for wrongful death.

It is further noted that Mr. Cherundolo's written request contained within his September 1, 2020 letter presented this Court with a binary choice of yes or no. In deciding to deny his letter request to serve and file the affidavits, the Court further implemented the ruling by rejecting the papers and striking them from the record. It is presumed had the request been granted Mr. Cherundolo would not see my decision as an abuse of discretion. The Court's discretion, however, cannot be judged as abusive or correct by the outcome. Judicial discretion is a court's power to act or not act, based upon what is fair under the circumstances, and guided by the rules and principles of law. Discretionary determinations will be deemed abusive if they are grossly unsound, unreasonable or not supported by the law. In this instance, the expert affidavits were not procured by Mr. Cherundolo until he realized that they may in fact be necessary on a motion to amend a complaint to add a cause of action for wrongful death in a medical malpractice action. He argues that the affidavits should be allowed to supplement his original motion, and not be deemed a reply, despite the obvious conclusion that they were in fact being offered as an improper reply. But for his review of the opposition papers, he would not be offering the affidavits. Mr. Cherundolo further argues that any prejudice would be de minimis since Defendants were already granted a thirty-one day extension to respond to his first error of not providing "the proposed amended or supplemental pleading[s] clearly showing the changes or additions to be made to the pleading[s]" (CPLR § 3025[b]). The ruling to reject the expert affidavits is supported by the law, and from this Court's perspective was not grossly unsound or unreasonable. The Court also did specifically provide Mr. Cherundolo an appealable paper, as it was clear his motion may not survive the ruling to reject his improper reply (*Kaczor v Shen, et al.*, Sup Ct, Mont. County, Sept. 4, 2020, Slezak, J., index No. 2014-0986).

Finally, the current motion to vacate, set aside and reverse this Court's written Decision and Order dated September 4, 2020 is actually a motion to reargue, but due to the unclear appellate decisions regarding orders rendered without a formal notice of motion the Court does not fault Mr. Cherundolo for seeking a motion to vacate as opposed to following the strict requirements of a motion to reargue pursuant to CPLR § 2221. Plaintiff's motion to vacate, set aside and reverse the September 4, 2020 Decision and Order in the above captioned matter is denied in its entirety.

II. Motion to Amend/Supplement Pleadings Pursuant to CPLR § 3025

A motion seeking to amend pleadings pursuant to CPLR § 3025 is to be "freely granted" absent prejudice (*Kismo Apts., LLC v Gandhi*, 24 NY3d 403, 411). The burden to show that prejudice exists is on the party opposing the motion (*id.*). The Court of Appeals has upheld amendments granted "during or after trial" as prejudice is more than a mere late application (*id.* [

> This Court has in the past recognized that, absent prejudice, courts are free to permit amendment even after trial (*Murray*, 43 NY2d at 405 ["[w]here no prejudice is shown, the amendment may be allowed 'during or even after trial'"], *citing Dittmar*, 20 NY2d at 502, and David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:15 at 487 [1974 ed]). Prejudice is more than "the mere exposure of the [party] to greater liability" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 429 NE2d 90, 444 NYS2d 571 [1981]). Rather, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*id.*).

]). The decision whether to allow the amendment is left to the sound discretion of the trial court (*id.* at p. 413-414 [

> "While a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where there is no prejudice (*Dittmar*, 20 NY2d at 503). The statute permitted [Defendant] to request leave 'before or after judgment to conform [the pleading]to the evidence' (CPLR 3025 [c]), and absent prejudice to the corporations the request should have been

> granted (*see Murray*, 43 NY2d at 405, *citing Dittmar*, 20 NY2d at 502).

]; *see also Lazzari v Qualcon Constr., LLC*, 62 Misc3d 1082, 1085 defining

> "Prejudice" in this context means "that the [party opposing the motion] has been hindered in the preparation of [his or her] case or has been prevented from taking some measure in support of [his or her] position"; mere exposure to greater liability does not constitute prejudice (*Kismo Apts., LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014], *quoting Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 429 NE2d 90, 444 NYS2d 571 [1981]

]). Determining whether a party's delay in seeking to amend or supplement a pleading is prejudicial to the opposing party is left to the sound discretion of the trial court (*see Fahey v County of Ontario*, 44 NY2d 934, 935 [finding the lower court's denial of motion to amend was abuse of discretion]; *Murray*, 43 NY2d at 405 ["An application to amend . . . is addressed to the sound discretion of the court . . . ."]).

In determining whether a proposed amendment is prejudicial, the court must determine if it presents "operative" prejudice, *i.e.*, "prejudice traceable to the fact that the original pleading did not contain what the pleader seeks to add in the amended one" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3025:6, pp. 94). When the amendment (or supplement) is based upon the same facts or occurrence in the original complaint, it is more likely to be allowed as the original pleading has provided the requisite notice to the opposing party (*Phipps v Michalak*, 57 AD3d 1374, 1375-76 [allowing addition of new theories to be added as no prejudice will occur]; *Rife v Union College*, 30 AD2d 504, 505 [holding amendment adding new theory based upon already plead facts is not prejudicial]; *cf. Cohen v Ho*, 38 AD3d 705, 706 [upholding denial of motion to amend because change of theory during trial was not readily discernable from the original complaint and bill of particulars]). Delay *and* the

assertion of new theories not readily discernable from the original pleadings, together may be sufficient to constitute operative prejudice requiring a motion to amend to be denied as the opposing party is unable to obtain testimony or documents to defend against the newly asserted theory due to the delay (*Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828-829 [upholding denial of amendment on basis that new theory being sought after note of issue was filed, plaintiff was aware of facts since inception and new theory not discernable from the original bill of particulars]; *Markarian v Hundert*, 262 AD2d 369, 369-370 [upholding denial of motion to amend as provident exercise of discretion because plaintiff's new theory was not discernable from original papers and delay of eleven years to consult with the type of expert that should have consulted with years before is not an acceptable excuse]).

In determining if a proposed amendment to assert new theories is prejudicial a Court must weigh the determination of whether the original pleadings provided sufficient notice of the new theory against the amount of delay in asserting the new theory, while also considering the excuse proffered for the delay (*Haga v Pyke*, 19 AD3d 1053, 1054-1055 [

> "A party may amend a pleading at any time by leave of court, and such leave shall be freely given (CPLR 3025 [b]), unless prejudice would result to the nonmoving party or the proposed amendment is plainly lacking in merit" (*Bobrick v Bravstein*, 116 AD2d 682, 682, 497 NYS2d 749 [1986]). The proposed amendment, based upon information that came to light during discovery, will not prejudice defendants (*see Grosse v Friedman*, 118 AD2d 539, 541, 498 NYS2d 863 [1986]), and it is not plainly lacking in merit (*see Bobrick*, 116 AD2d at 682). Further, the proposed cause of action alleging lack of informed consent is timely, because it relates back to the date on which the causes of action in the original complaint were interposed (*see Ecker v Hopkins*, 161 AD2d 1163, 555 NYS2d 959 [1990]; *Grosse*, 118 AD2d at 541). We further agree with plaintiff that the court erred in denying her motion insofar as it seeks leave to amend the complaint to amplify her allegations of negligence and medical malpractice. "To the extent the proposed amendments merely reflected new facts uncovered during discovery and were consistent with the plaintiff['s] existing

> theories sounding in [negligence and medical malpractice], they were not devoid of merit and would not result in significant prejudice or surprise" (*Saldivar v I.J. White Corp.*, 9 AD3d 357, 359, 780 NYS2d 28 [2004]).

]; *see also Meyer v University Neurology*, 133 AD3d 1307, 1309 [

> As plaintiff correctly contends, this is not a situation in which a party is seeking to defeat a motion for summary judgment by offering a new theory of liability not contained in the complaint or bill of particulars (*cf. Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770, 902 NYS2d 286 [2010], affd 16 NY3d 729, 942 NE2d 305, 917 NYS2d 95 [2011]). Rather, the proposed amendment is based on the same factual allegations contained in the complaint, is "'consistent with . . . plaintiff['s] existing theories sounding in [breach of contract, unjust enrichment, and quantum meriut], [is] not devoid of merit[,] and [will] not result in significant prejudice or surprise'" (*Haga v Pyke*, 19 AD3d 1053, 1055, 796 NYS2d 507 [2005]).

]). In sum, a party's request to amend pursuant to CPLR § 3025 cannot simply be denied if it is late, especially if the requested amendments are discernable from the original allegations in the complaint (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 653-654 & 655 [finding no prejudice when the original complaint included list of medications, and amendment set forth new theory based on the medication, Dilantin, which was in list of original post-operative medications]; *Rutz v Kellum*, 144 AD2d 1017, 1018, 534 NYS2d 293 [1988])

> Leave to amend pleadings should be freely granted upon such terms as may be just (CPLR 3025 [b]). While the motion to amend is one addressed to the court's discretion, mere lateness is not a barrier to the amendment. "'It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, *quoting* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:5, at 477; *see also, Cardy v Frey*, 86 AD2d 968).
>
> Here, defendants had actual notice of the additional claimed injury within a reasonably short time after the diagnosis. Defendant Kellum now contends that he has not prepared a defense to the new claim of injury because of his belief that the claim had

> been "abandoned". That argument is not persuasive and, in any event, the need for additional discovery, or additional time to prepare a defense, does not constitute prejudice sufficient to justify the denial of a motion to amend pleadings *(see, Perkins v New York State Elec. & Gas Corp.*, 91 AD2d 1121). Defendant Kellum has not shown that he has been "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801). It was thus an abuse of discretion to deny the motion to amend the bill of particulars.

]). Increasing the ad damnum clause is also not deemed to be the type of operative prejudice that would lead to a court denying a motion to amend (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [holding amendment of ad damnum clause is not prejudicial]; *Secore v Allen*, 27 AD3d 825, 829 ["Moreover, the only prejudice accruing to defendants was the potential for increased liability, and that exposure alone cannot constitute sufficient reason to deny the motion (*see Warrensburg Bd. & Paper Corp. v Adirondack Hydro Dev. Corp.*, 186 AD2d 305, 306 587 NYS2d 449 [1992].)"]).

Courts have found differences between amending pleadings to add new theories, and amending pleadings to add new defendants. As outlined above, a new theory will be allowed, if it is discernable from the original complaint and, in the event of a delay if a reasonable excuse for the delay is offered (*see MBIA Ins. Corp. v J.P. Morgan Sec., LLC*, 144 ad3d 635, 639 [

> Finally, the defendant cannot legitimately claim surprise or prejudice. The proposed amendments are premised upon the same facts, transactions, or occurrences as alleged in the original complaint (*see Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27, 869 NYS2d 572 [2008]; *Whitehorn Assoc. v One Ten Brokerage*, 264 AD2d 516, 694 NYS2d 466 [1999]), and the plaintiff's delay in raising the new theories of liability was not prolonged, as those theories were first asserted in opposition to the defendant's motion for summary judgment made just over one year after the action was commenced (*see Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046, 1047, 32 NYS3d 595 [2016]).

]). The addition of a new defendant, however, may be barred by the statute of limitations requiring the moving party to show that the new allegations relate back to the original complaint (*Duffy v Horton Memorial Hospital*, 66 NY2d 473, 477 [adding new theory from same transaction or occurrence is not the same as adding a new defendant:

> Thus, if the new defendant has been a complete stranger to the suit up to the point of the requested amendment, the bar of the Statute of Limitations must be applied (*see*, *Arnold v Mayal Realty Co.*, 299 NY 57; *Bringing in Party – Limitations*, Ann., 8 ALR2d 6, §§ 53, 58). But where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations (*Boyd v United States Mtge. & Trust Co.*, 187 NY 262, 270, *supra*; *cf. Williams v United States*, 405 F2d 234, 236-237). In such cases, there is room for the exercise of a sound judicial discretion to determine whether, on the facts, there is any operative prejudice precluding a retroactive amendment (Green Basic Civil Procedure *op. cit.*, at 135; *see*, *Loomis v Corinno Constr. Corp.*, 54 NY2d 18, 23; Donnici, *Amendment of Pleadings – A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S Cal L Rev 529).

]; *see also Wise v Greenwald*, 194 AD2d 850, 851 [amending complaint to add defendant must relate back to original complaint if after statute of limitations has expired]).

If extensive delay exists, however, the party seeking to amend is required to provide a reasonable excuse for the delay (*Edenwald Contracting Co. v New York*, 60 NY2d 957 [holding lateness alone is not prejudicial, lateness with significant prejudice is basis to deny]; *Rocha v GRT Constr. of NY*, 145 AD3d 926, 928-929 [holding delay is not prejudicial as proposed amendment arises of the same facts set forth in the complaint]; *cf. Arguinzoni v Parkway Hosp.*, 14 AD3d 633, 633 [holding failure to provide a reasonable excuse for the delay and new theory not readily discernable from original bill of particulars]). "Although 'delay alone is insufficient to deny a motion [for leave] to amend, when unexcused lateness is coupled with prejudice to the

opposing party, denial of the motion is justified'" (*Stewart v Dunkleman* 128 AD3d 1338, 1339; *see also Navarette v Alexiades*, 50 AD3d 869, 870-871 [requiring exercise of discretion be used sparingly when new theories are not discernable from original papers and asserted on the eve of trial without excuse]; *Slavet v. Horton Mem. Hosp.*, 227 AD2d 465, 466 [finding delay is prejudicial and discretion requires court to consider "how long the party seeking amendment was aware of the facts upon which the motion was based and whether a reasonable excuse for the delay was offered" (citation omitted)])

The decision to grant an amendment is within the discretion of the trial court (*Thompson v Connor*, 178 AD2d 752, 753). Discretion should be more sparingly used when the motion to amend is on the eve of trial, or after an extended delay, without a reasonable excuse being shown (*id.* at 754 [

> We also reject the claim that Supreme Court should have granted the application with respect to both theories because defendants were fully aware of the facts underlying the requested amendment. In view of the fact that the motion "seeks to add * * * new theories of recovery which [were] not readily discernable from the allegations in the * * * bill of particulars [as supplemented]" (*Leon v Central Gen. Hosp.*, 156 AD2d 338, 339), and with no satisfactory explanation for the lateness of the application made 2½ years after the filing of the note of issue, Supreme Court's denial of the application was not an improvident exercise of discretion (*see, Napoli v Canada Dry Bottling Co. of N.Y.*, 166 AD2d 696, 697; *Dubissette v Davis*, 158 AD2d 504, 505; *Leon v Central Gen. Hosp., supra*, at 339; *Bosch v City of New York*, 143 AD2d 607, 608; *Reynolds v Towne Corp.*, 132 AD2d 952, *lv denied* 70 NY2d 613).

]). In the event of an extended delay, the moving party must show a reasonable excuse for the delay in seeking to amend the pleadings (*Harris v Jim's Proclean Serv., Inc.*, 34 AD3d 1009, 1011-1012 [upholding denial of motion to amend because of the unexcused five year delay, completion of discovery and amendments changed theory drastically beyond original

allegations]; *Mathiesen v Mead* 168 AD2d 736, 737 [finding failure to make the proper showing of any reasonable excuse for the delay is fatal to the application]).

The failure to comply with the requirements of CPLR § 3025 may also be fatal to an application for leave to amend or supplement. A motion to amend,

> . . . shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

(Civ. Prac. L. & R. § 3025 [b]). Failure to include the proposed pleading with the changes and additions clearly marked is a basis to deny the application (*G4 Noteholder, LLC v LDC Props., LLC*, 153 AD3d 1326, 1327; *Messersmith v Tate*, 59 Misc3d 203).

Finally, the Appellate Division, Third Department used to require a party seeking to amend a complaint to make an "evidentiary showing of merit" to support the proposed claim (*Cowsert v Macy's E., Inc.*, 74 AD3d 1444, 1445 ["As the proponent of the motion, plaintiff was required to make a sufficient evidentiary showing to support the proposed claim (*see Bast Hatfield, Inc. v Schalmont Cent. School Dist.*, 37 AD3d 987, 988, 830 NYS2d 799 [2007] . . . ."]; *Smith v Haggerty*, 16 AD3d 967, 968 [

> Where a plaintiff seeks to amend a complaint alleging medical malpractice to add a cause of action for wrongful death, such motion must be accompanied by "competent medical proof showing a causal connection between the alleged negligence and the decedent's death . . . ."

] [citations omitted]; *Ludwig v Horton Mem. Hosp.*, 189 AD2d 986, 986 [

> [A] court will not grant a motion to amend a complaint to allege a cause of action for wrongful death unless it is supported by competent medical proof showing a causal connection between the alleged negligence and the decedent's death . . . .

] [citations omitted]). In November, 2017, however, the Appellate Division, Third Department specifically overruled "that line of authority" and decided no evidentiary showing of merit is

required (*NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, 156 AD3d 99, 102). In adopting the holdings of the other three Departments, and the statutory "liberal standard" for leave to amend, the Appellate Division, Third Department eliminated the early "test of the merits" of a proposed amendment to a pleading, agreeing that such a test is more appropriately applied in either a motion to dismiss or motion for summary judgment (*id.*). The Appellate Division, Third Department in *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, made it abundantly clear that it was adopting a blanket rule eliminating the need for a movant on a motion to amend a pleading to make an evidentiary showing of merit:

> Pursuant to CPLR 3025 (b), a party may amend its pleadings "at any time by leave of [the] court," which "shall be freely given upon such terms as may be just" (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014]). It has long been recognized that "[t]he decision whether to grant leave to amend pleadings rests within the trial court's sound discretion and[,] absent a clear abuse of that discretion, will not be lightly cast aside" (*Cowsert v Macy's E., Inc.*, 74 AD3d 1444, 1444-1445, 904 NYS2d 239 [2010] [internal quotation marks and citations omitted]; *see Matter of Wechsler v New York State Adirondack Park Agency*, 85 AD3d 1378, 1380, 925 NYS2d 247 [2011]). We have previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a "sufficient evidentiary showing to support the proposed claim" (*Cowsert v Macy's E., Inc.*, 74 AD3d at 1445), that is, to make an "evidentiary showing that the proposed amendments have merit" (*Dinstber v Allstate Ins. Co.*, 110 AD3d 1410, 1412, 974 NYS2d 171 [2013]). However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that "[n]o evidentiary showing of merit is required under CPLR 3025 (b)" (*Lucido v Mancuso*, 49 AD3d 220, 229, 851 NYS2d 238 [2d Dept 2008]; *see Cruz v Brown*, 129 AD3d 455, 456, 11 NYS3d 33 [1st Dept 2015]; *Holst v Liberatore*, 105 AD3d 1374, 1374-1375, 964 NYS2d 333 [4th Dept 2013]). *Thus, the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"*

> (*Lucido v Mancuso*, 49 AD3d at 222; *see Kimso Apts., LLC v Gandhi*, 24 NY3d at 411; *LaLima v Consolidated Edison Co. of N.Y., Inc.*, 151 AD3d 832, 834, 58 NYS3d 66 [2017]; *Cruz v Brown*, 129 AD3d at 456). *The rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion.* "If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment [or to dismiss] upon a proper showing" (*Lucido* v *Mancuso*, 49 AD3d at 229 [citation omitted]).

(*id.* [emphasis added]). In adopting this new standard which eliminates the need for an evidentiary showing of merit as part of a motion to amend a pleading, the Appellate Division, Third Department cited to, and adopted the rationale in the Appellate Division, Second Department case of *Lucido v Mancuso* (49 AD3d 220). In *Lucido v Mancuso*, the Appellate Division, Second Department noted that the rule requiring a showing of merit had no rational basis and simply was an offshoot of an anomalous ruling in a wrongful death cause of action determined in the early 1950s:

> As our review of the history of motions for leave to amend pleadings has shown, the rule adopted in *Bedarf v Rosenbaum* (286 App Div 1103, 145 NYS2d 857 [1955]) was anomalous even when it was adopted. Our examination of the wrongful death exception to the general standard applicable to motions for leave to amend pleadings under CPLR 3025 (b) convinces us that there is no reason wrongful death causes of action should be treated differently from any other motion for leave to amend a pleading under CPLR 3025 (b), as we have implicitly recognized in at least one recent case (*see Hines v City of New York*, 43 AD3d 869, 871, 841 NYS2d 374 [2007]). Consequently, *Bedarf v Rosenbaum* (286 App Div 1103, 145 NYS2d 857 [1955]) and its progeny are overruled.

(*Id.* at 231-232.) The Appellate Division, Second Department in overturning *Bedarf* and its progeny, overruled all cases applying the evidentiary showing of merit standard, and specifically stated that causes of action founded in wrongful death should not be treated differently than any

other cause of action (*id.*). Defendants seek to have this Court ignore the Appellate Division, Third Department's clear holding overturning the rule for an evidentiary showing of merit by citing to *Matter of Bynum v Camp Bisco, LLC*, which states in dicta[3]:

> To the extent that defendants argue that the motion for leave to amend to add a cause of action for wrongful death must be supported by competent medical proof showing a causal connection between their alleged negligence and decedent's death, they are incorrect. Prior decisions have held that, "[w]here a plaintiff seeks to amend a complaint alleging *medical malpractice* to add a cause of action for wrongful death, such motion must be accompanied by 'competent medical proof showing a causal connection between the alleged negligence and the decedent's death'" (*Smith v Haggerty*, 16 AD3d 967, 968, 792 NYS2d 217 [2005] [emphasis added], quoting *Ludwig v Horton Mem. Hosp.*, 189 AD2d 986, 986, 592 NYS2d 842 [1993]; *see Imperati v Lee*, 132 AD3d 591, 592, 18 NYS3d 615 [2015]). Given that plaintiff's wrongful death claim here is based upon negligence, that standard is inapplicable.

(155 AD3d 1503, 1506 [emphasis in original].) The holding in *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, clearly overturns the familiar rule of an evidentiary test stated in both *Smith v Haggerty* and *Ludwig v Horton Mem. Hosp.* matters and, simply referenced in dicta in *Matter of Bynum v Camp Bisco, LLC* quoted above (*compare NYAHSA Servs., Inc., Self-Insurance Trust*, 156 AD3d at 102 *with Smith*, 16 AD3d at 968; *Ludwig*, 189 AD2d at 986). In reading the Appellate Division, Second Department decision in *Lucido v Mancuso* the Court specifically cited to *Ludwig v Horton Mem. Hosp.* as an example of the line of cases that use the incorrect standard and are the irrational progeny of *Bedarf* (*see Lucido*, 49 AD3d at 230). In adopting the reasoning in *Lucido v Mancuso*, in its decision in *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, the Appellate Division, Third Department

[3] It is important to note that dictum (plural dicta) "is by definition no[t] part of the doctrine of the decision" but simply a reference to a familiar rule or maxim. In contrast, a holding is "[a] court's determination of a matter of law pivotal to its decision" (Black's Law Dictionary 465 & 737 [7th ed1999]).

held that its prior line of cases using an evidentiary test of merit to support a motion to amend are overturned, on the rationale outlined in *Lucido v Mancuso*, which specifically cited to *Ludwig v Horton Mem. Hosp.* ., **which is a medical malpractice case decided by the Third Department**, as using an incorrect standard (*compare NYAHSA Servs., Inc., Self-Insurance Trust*, 156 AD3d at 102 *with Lucido*, 49 AD3d at 230). It is further noted that in the Appellate Division, Third Department decision of *Matter of Bynum v Camp Bisco, LLC*, decided only 21 days after *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, it cites the holding in *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.* outlining the newly adopted rule regarding amendments pursuant to Civil Practice Law & Rules § 3025 no longer needing an evidentiary showing of merit (*Matter of Bynum v Camp Bisco, LLC*, 155 AD3d 1503, 1504). The dicta at the end of the decision in *Matter of Bynum v Camp Bisco, LLC*, clearly dismisses the prior line of cases, and it does not carve out an exception for wrongful death in medical malpractice cases to the blanket rule in the holding of *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, (*compare NYAHSA Servs., Inc., Self-Insurance Trust*, 156 AD3d at 102 *with Matter of Bynum*, 155 AD3d at 1506). To read the cases otherwise would not be properly interpreting the seminal case of *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, and its holding to adopt, wholesale, the holding in *Lucido v Mancuso* which clearly says no exceptions for actions founded in wrongful death or any other cause of action shall be made. It is noted that the Third Department has not issued a decision on point in a motion to amend a complaint to assert a cause of action for wrongful death in an underlying medical malpractice claim, but this Court is of the opinion that no exceptions exist based on the strong language used in *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.*, specifically:

> We have previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a "sufficient

> evidentiary showing to support the proposed claim" (*Cowsert v Macy's E., Inc.*, 74 AD3d at 1445), that is, to make an "evidentiary showing that the proposed amendments have merit" (*Dinstber v Allstate Ins. Co.*, 110 AD3d 1410, 1412, 974 NYS2d 171 [2013]). *However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that "[n]o evidentiary showing of merit is required under CPLR 3025 (b)"* (*Lucido v Mancuso*, 49 AD3d 220, 229, 851 NYS2d 238 [2d Dept 2008]; *see Cruz v Brown*, 129 AD3d 455, 456, 11 NYS3d 33 [1st Dept 2015]; *Holst v Liberatore*, 105 AD3d 1374, 1374-1375, 964 NYS2d 333 [4th Dept 2013]).

(156 AD3d at 101-102 [emphasis added]). In reading the relevant caselaw, therefore, this Court finds that Plaintiff is not required to submit competent medical proof to show a causal connection between the alleged negligence of the Defendants and decedent's death.

The above captioned action was initially commenced as two separate medical malpractice actions. One action was commenced against Dr. Shen, Mohawk Valley Orthopedics, P.C., Dr. Stram, Ms. Tracy, P.A. and St. Mary's Hospital/St. Mary's Healthcare. The Second action was commenced against the Dr. Tietjen, Dr. Katz, Dr. Carl, and Albany Medical Center Hospital/Albany Medical College. Both actions were filed on or about December 12, 2014. At some point the actions were joined for discovery, and the bulk of discovery was completed by June, 2018 with only depositions regarding damages witnesses having occurred since June, 2018 after Plaintiff died.

The Amended Complaint filed improperly by Plaintiff's counsel on May, 22, 2020, as Mr. Cherundolo had been specifically instructed to circulate the proposed amended complaint to determine if any Defendants would object to its filing first combined the two actions in one complaint. The AMC Defendants did object, and Mr. Cherundolo was directed to file the within motion seeking permission to amend/supplement the pleadings.

It is not clear exactly to the Court on the papers submitted in this motion, when the matters were consolidated,[4] but the proposed Amended Complaint does more than modify the caption to reflect the Administrator of the Estate of the original Plaintiff/Decedent and combine the prior two separately filed complaints against the above captioned Defendants. The first major distinction in the Amended Complaint is that it asserts a sixth cause of action as against all the Defendants founded upon wrongful death. Plaintiff in sum or substance alleges that the medical malpractice of all the Defendants led to Decedent's death on or about June 8, 2018. The second major distinction is that the specific allegations of malpractice as against the AMC Defendants include newly added allegations regarding an MRI scan conducted on June 12 or June 13, 2012, and names three additional medical providers purported to be associated with Albany Medical Center Hospital.

In reviewing the submissions, three main objections to the proposed amended and or supplemental pleadings offered by Plaintiff are raised. The first objection is that the motion by Plaintiff to add the wrongful death cause of action was not supported by any expert medical proof evidencing that the proposed amendment has merit. Essentially all of the Defendants argue that the Court must deny the application because Plaintiff failed to support her motion with sufficient evidence to show that the proposed amendment adding a claim for wrongful death has merit. This argument, however, fails as the Appellate Division, Third Department has specifically overturned the rule requiring an evidentiary showing of merit in its decision of *NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc.* as outlined above. The only test of the merits of a proposed amendment is whether it is palpably insufficient or patently devoid of

[4] It is noted that I am the fourth Judge to have been assigned to this case. Shortly after my first conference on this case, the worldwide COVID-19 Pandemic occurred, causing further delays and interruptions to a case that has been pending for over six years at this point.

merit. The Court finds that the proposed amendment, although weak, is not palpably insufficient or devoid of merit. The Court finds that in the simplest of terms: but for the "botched" injection by Dr. Shen, Plaintiff's infection would not have occurred; and but for the misdiagnosis by the AMC Defendants the initial infection would not have become systemic and life-threatening sepsis requiring Plaintiff to undergo additional surgeries, medical interventions and use of addictive opiate medication to treat the resulting pain; and but for the addictive opiate medication to treat the resulting pain Plaintiff would not have died of a drug overdose on June 8, 2018. The Defendants are free to argue that there were intervening causes leading to Plaintiff's death, but certainly under the free and liberal standard of review on a motion to amend or supplement a pleading, the Court cannot find that the proposed amendment is palpably insufficient or patently devoid of merit. The Court further finds that the Plaintiff was not required to make an evidentiary showing of merit.

The second objection raised by all the Defendants is Plaintiff has failed to offer a reasonable excuse for her delay in amending and/or supplementing the pleadings, resulting in prejudice to the Defendants. Dr. Shen's argument regarding the extended delay is that no reasonable excuse has been offered by Plaintiff. The AMC Defendants argue that the amendments and supplemental pleadings raise issues of fact not readily discernable from the underlying pleadings, and the extended delay is unexcused resulting in prejudice or surprise requiring the Court to deny Plaintiff's motion. The Defendants point to the fact that this case was commenced in 2014, and more than five years elapsed before the amended and/or supplemental pleadings were served. Furthermore, Defendants argue that the excuses offered by Mr. Cherundolo regarding his law office downsizing in 2018 and his COVID related illness

between December, 2019 and May, 2020, are not reasonable excuses to account for the delay in filing the proposed amended complaint and supplemental pleadings.

In reviewing the record before the Court, however, it is noted that the depositions of the various Defendants in this matter were not completed until May, 2018, which was shortly after the then assigned judge had directed the depositions of the Defendants be completed (*see* Affirmation sworn to by John C. Cherundolo, Esq on the29th day July, 2020 at Exhibit 11). Shortly thereafter on June 8, 2018, Ms. Kaczor died. It is noted that her death came at a critical moment when the Plaintiff would have been expected to begin the legal analysis to determine if the pleadings, *i.e.*, the complaint and bills of particulars should be amended or supplemented. This process was interrupted by Plaintiff's unexpected death. It is also noted that immediately upon her death, Mr. Cherundolo had to determine whether or not a viable action for wrongful death existed (*id.* at Exhibit 15). It is worth noting that the amended complaint adding the wrongful death cause of action was filed on May 22, 2020 (although improperly before the motion seeking to amend was filed) which is within the two year statute of limitations period applicable to wrongful death causes of action (Estates, Powers and Trusts Law § 5-4.1). The delay of the above captioned matter in Plaintiff's decision to file an amended complaint may not have a reasonable excuse from the Defendants' perspective, but the action for wrongful death was timely filed.

Additionally, a review of the timeline of this case shows that Plaintiff had been directed by Hon. Richard T. Aulisi, who was the second judge to be assigned to this matter, to file a Note of Issue in March, 2018, prior to discovery being completed (*id.* at Exhibit 11). Judge Aulisi further set a Trial Day Certain on September 5, 2018 (*id.*). The original return date for dispositive motions was set in July, 2018 (*id.*). The depositions of all the Defendants were

completed by May, 2018. The death of Ms. Kaczor occurred shortly thereafter, and it was unclear if the case would be discontinued after the death of the Plaintiff of if a wrongful death claim would be added. On or about August 2, 2018 Judge Aulisi appointed Mr. Seeley as a Temporary Administrator in an attempt to keep this case moving toward a trial in 2018 (*id.* at Exhibit 14). It became apparent towards the end of 2018 that a trial would not occur, and due to the impending retirement of Judge Aulisi at the end of 2018, he administratively closed this case (*id.* at Exhibit 16).

On or about May 22, 2019 counsel for Dr. Shen, Jeffrey J. Tymann, Esq. sent letter to Hon. Vito C. Caruso, Administrative Judge of the Fourth Judicial District seeking to restore this case to the active calendar and assigned it to a different judge (*id.* at Exhibit 17). Hon. Richard A. Kupferman was assigned, and he held an initial conference on or about July 11, 2019. At this initial conference Mr. Cherundolo reported he was having difficulty contacting Mr. Seeley to determine if he would like to continue the case. The matter was adjourned to August 27, 2019 to allow Mr. Cherundolo more time to contact his client and decide what the next step would be (*id.* at Exhibit 18).

On August 27, 2019, Mr. Cherundolo reported that Mr. Seeley had decided to move forward with this action (*id.*). Mr. Cherundolo further advised that he was planning to file a wrongful death action, including a wrongful death claim against the drug manufacturer for the opiod pills prescribed to Plaintiff (*id.*). Judge Kupferman was unclear of making the above captioned Defendants wait for a case against the manufacturer to proceed before their case could be tried, as that appeared to be a separate cause of action that would only needlessly complicate this case, and he directed Mr. Cherundolo to file a motion seeking permission to amend (*id.*).

Without a firm answer on whether the case was moving forward after Ms. Kaczor's death until in or about August, 2019, it is reasonable that Mr. Cherundolo may not have met with an expert until a little over one year after Ms. Kaczor's death to avoid unnecessary expenses. It is also clear from the transcript of the hearing on August 27, 2019, that Defendants were still seeking to depose some of the Plaintiff's family members regarding the damages portion her medical malpractice action (*id.*). Judge Kupferman directed all discovery to be completed by December 31, 2019 and the Note of Issue to be filed on or before January 10, 2020 (*id.*). Judge Kupferman further directed all dispositive motions to be filed on or before May 26, 2020 (*id.*).

This matter was assigned to the undersigned on or about January 2, 2020 and the first conference that I held was on February 13, 2020. At the conference it was clear that Defendants were still seeking to depose the "damages" witnesses and that the Note of Issue had not been filed on January 10, 2020 per Judge Kupferman's order on August 27, 2019. Plaintiff had also failed to file a motion to amend the pleadings. All counsel had issues with the current status of this case at the conference held in February of this year. It was at this same time that Mr. Cherundolo was experiencing health issues that appeared to be an undiagnosed COVID-19-like illness, and he did not appear in person on February 13, 2020. Instead he sent an associate, who at the conclusion of the conference had been directed to file any amended pleading or a motion to amend on or before March 30, 2020. No amended pleading or motion was not filed, due in part to the COVID-19 pandemic and Governor Andrew M. Cuomo's issuance of various Executive Orders which resulted in the shut down of the Montgomery County Clerk's Office and curtailment of court proceedings from on or about March 16, 2020 through mid-June, 2020 with restrictions continuing, as modified through today.

Mr. Cherundolo advised the Court in advance of a May, 2020 conference that he had not filed an amended complaint or motion due to the government shut down. He was directed to circulate a proposed complaint in order to determine if a motion would be required, or if opposing counsel would consent to its filing. Mr. Cherundolo filed the proposed amended complaint on May 22, 2020 as opposed to circulating it to counsel. He was advised by the AMC Defendants that they would not consent to the amended complaint and supplemental bills of particulars and he was directed to file a motion pursuant to CPLR § 3025.

The delay in filing the motion to amend the complaint, in the context of this particular case is explained by the sudden and unexpected death of the Plaintiff and her father being appointed within two months of her death. The unopposed statement of fact that Mr. Seeley was also raising his minor granddaughter, Ms. Kaczor's daughter, also adds a dynamic to the timeline. A grieving parent cannot be expected to make quick decisions affecting not only a pending lawsuit, but a lawsuit that could have an affect on his granddaughter's future financial stability. The unique facts of this case do present a reasonable excuse for Mr. Cherundolo not meeting with an expert until he was assured by Mr. Seeley that he was willing to proceed The resultant delay by Mr. Seeley was exacerbated by the worldwide pandemic, which has affected legal proceedings and ordinary transactions in an extraordinary way throughout 2020. The Court finds that the motion seeking to amend the pleadings to assert a cause of action for wrongful death shall be granted. The Plaintiff has outlined a reasonable excuse for the delay, and the branch of the motion seeking to amend the complaint to add a cause of action for wrongful death shall be granted

In addition to the motion to add the wrongful death cause of action, Plaintiff is seeking to amend or supplement the medical malpractice allegations as against the AMC Defendants to

assert a new theory of liability and name three new medical providers. The AMC Defendants argue Plaintiff has failed to offer any excuse, let alone reasonable excuse for the delay in moving to amend and/or supplement the pleadings with regard to the newly plead allegations. They argue the unexcused delay is prejudicial by itself. They further argue newly plead allegations change the legal theory so extensively that it creates prejudice and surprise, at the end of the discovery process. The AMC Defendants argue that Plaintiff's late attempt to supplement and amended the original complaint, and the various bills of particulars, creates prejudice and surprise as the new theory focuses on an MRI scan taken on either June 12 or June 13, 2012, *and* the naming of three previously unnamed doctors, completely alters the course of the litigation which had previously focused on the Plaintiff's abdominal cavity as the source of infection. They stated the prejudice and surprise requires this Court to deny the motion.

The relevant caselaw interpreting CPLR § 3025 motions, supports allowing a Plaintiff to assert a new theory of recovery, even after discovery is complete, if the new theory relates back to the occurrence which is the subject of the litigation and factual allegations in the original complaint, but the analysis is more difficult if a plaintiff seeks to *add new* defendants (*see Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477-478 ["It is quite another thing to permit an amendment to relate back to when a new party is sought to be added by the amendment against whom the Statute of Limitations has run." [citations omitted]]). If the original pleading provided sufficient notice of the facts supporting the new theory, allowing the amendment is consistent with the policy considerations of a statute of limitations. It is also axiomatic that if the new theory arises out the same facts or occurrence that form the basis of the underlying complaint, the defendant will have retained all the evidence relating to the new theory. If the new theory is not discernable from the original pleading prejudice and/or surprise may form the basis to deny

requested amendment or supplement because the lack of notice is prejudicial and the relevant evidence to defend the newly proposed amendment may be lost. If the original pleading provides sufficient notice, a delay may still be prejudicial if it is akin to the delay that is akin to the doctrine of laches[5], *i.e.*, the delay in and of itself may constitute the prejudice (*Slavet v Horton Mem. Hosp.*, 227 AD2d 465, 466).

In circumstances where an extensive delay exists, it is incumbent upon the proponent of the amendment and/or supplement to proffer a reasonable excuse for the delay. Mr. Cherundolo states many reasons for the delay in seeking to amend or supplement the pleadings. The personal reasons related to the counsel's downsizing of his office and personal illness this past year, are really not the type of excuse that would be reasonable for a delay in supplementing the pleadings to change the theory of the litigation or add the three newly named practitioners, Dr. Parisien, Dr. Thomas and Dr. Bhounala. The only reasonable excuse is that Ms. Kaczor died unexpectantly in June, 2018 and the decision to move forward with the litigation was left to her grieving father, Mr. Seeley, who was named the Temporary Administrator by Judge Aulisi within months of his daughter's death. As stated above, Mr. Seeley did not truly decide if he was proceeding with this case until in or about, August, 2019. The delay is reasonable, and the fact that Mr. Cherundolo

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> "Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' . . . The essential element of this equitable defense is delay prejudicial to the opposing party" (*Matter of Barabash*, 31 NY2d 76, 81).
>
> Because the effect of delay on the adverse party may be crucial, delays of even under a year have been held sufficient to establish laches (*see, Matter of Eberhart v La Pilar Realty Co.*, 45 AD2d 679; *Finn v Morgan Is. Estates*, 283 App Div 1105).

(*Schulz v. State*, 81 N.Y.2d 336, 348.)

did not engage an expert until after the decision to proceed is reasonable. The Court finds the extended delay has been reasonably explained.

With regard to the new theory, the Court further finds that the original complaint and bills of particular had a focus on the AMC Defendants failing to find the source of the infection Plaintiff was suffering from within a few days after the "botched" injection by Dr, Shen. The injection site was in her lumbar back area near her spine. The original bills of particulars reference that Plaintiff was complaining of pain near the injection site in her lumbar spine or in the epidural space and the AMC Defendants initially thought this was the sight of her infection. It is also stated in the bills of particular served in 2015 that the AMC Defendants were aware of the injection and tenderness and swelling in the area where the injection occurred. The original pleadings also do reference the MRI having been taken on either June 12 or 13, 2012, and the fact that the "Doctors at R L5/S1 region question MRI with contrast question ESR-CRP level question ID evaluation infection disease evaluation" (*see* Further/Supplemental Attorney Affirmation in Opposition sworn to by Adam T. Mandell, Esq. on the 29th day of September, 2020 at Exhibit B, p. 27; and pp. 25, 28, 43 & 60 for examples). The main argument against the AMC Defendants in the original pleadings is their failure to find the source of infection when Plaintiff was originally hospitalized from June 13 through June 18, 2012 and released on June 18, 2012 with symptoms of infection. It was alleged that the AMC Defendants failed to engage an infectious disease protocol and failed to properly evaluate Plaintiff, before releasing her. Upon her return to AMCH, on June 20, 2012 it is alleged that she had systemic sepsis and her abdomen was the location of the sepsis. It is no doubt that prior to all the discovery being complete that Plaintiff was focused on the abdominal area of her body, where the AMC Defendants were focused on the second admission on June 20, 2012 through July 31, 2012

because of the organ failure and other related complications with Plaintiff's systemic sepsis, or "full blown sepsis" as it is referred to by Plaintiff. Plaintiff further alleged in her original bills of particulars:

> . . . Defendants, and each of them, failed to obtain the consult of a qualified physician who is familiar with sepsis, and the true nature of epidural injections and the possibility of the development of an extra-peritoneal hematoma, and other such injuries as may be resultant for a botched epidural injection, including such possible physicians as an infectious disease specialist, and other such specialists who might have had training and experience in the finding and treatment of injection based abscesses and injuries such as the Plaintiff suffered herein as a result of the botched epidural injection.
>
> . . . .
>
> The orthopedic spine surgery consultation sheet that was apparently filled out by Dr. Carl shows 33-year-old female with history of low back pain and multiple surgeries in the past now presents with acute episode transferred from St. Mary's in Amsterdam received Franco/CTX at 014. Previously had Dilaudid laminectomy/discectomy by Dr. Genovese in 5/10 and the assessment and plan was 33-year-old female with acute or chronic back pain likely herniated nucleus pulpouses. Pain and spasm secondary to one; ambulate as tolerated; no orthopedic intervention at this time; patient has left shift with increased white blood count and fevers pain possibly secondary to recent injection recommend hospitalist admit and infectious within normal hours.
>
> Then at 8:00 a.m. on 6/13/2012 Dr. Carl writes the following note in the patient progress sheet 34-year-old female multiple spine injuries seen by me once (one time) in April 2011. Has been seen or treated by Dr. Shen – Amsterdam who has performed epidurals recently. Now complaining of increased temperature with increased pain by history, with no significant lower extremity weakness. White blood cell count 15,300. Apparently by patient's statement, the doctor in Amsterdam did not think it was related to her spine. She was sent home. MRI for soft tissue. Doctors R L5/S1 region question MRI with contrast question ESR-CRP level question ID evaluation infection disease evaluation.

> Dr. Carl then sees her apparently on 6/14/2012 at 5:00 a.m. and at that time makes the assessment of marked pain status post epidural injections pain control, spasm control, PT/OT – out of bed – low suspicion for infectious process and again that's signed by apparently a resident and Dr. Carl. Resident's number is 63158 and Dr. Carl countersigned . . . .

(id. at pp. 65 & 74). The original bills of particulars further state that they will be updated upon the completion of discovery and depositions.

Upon completion of the depositions in May, 2018 and review by Plaintiff's experts, which was delayed by her death, it is not at all surprising that the focus of the litigation turned to the back area of Plaintiff's body near the injection site. It is also not surprising that the amended and supplemental pleadings focused on the MRI taken on June 12 or June 13, and it possibly showing the area of infection started in the area near the injection site. The AMC Defendants sudden claim of prejudice and surprise are not supported by the record. The new allegations are consistent with the original occurrence and transaction, to wit: the AMC Defendants failure to properly diagnose and treat Plaintiff's infection on her initial admission to their facility, prior to her release on June 18. When she returned on June 20, with life-threatening complications due to systemic sepsis, it is alleged that had the AMC Defendants properly diagnosed and treated the infection on the first admission, Plaintiff would not have suffered the systemic sepsis and complications that lasted for years after her treatment. Plaintiff's new theory is not surprising, especially considering that during the deposition phase of this case, both the case against Dr. Shen and the case against the AMC Defendants were consolidated and all Defendants were involved in the discovery together. Dr. Shen's involvement was treating Plaintiff for back pain, and his alleged "botched" injection which is alleged to have caused the infection. The original pleadings gave notice to the occurrence that the new theory is based upon and the AMC

Defendants cannot deny that Plaintiff's back was the initial focus of the infection that led to the MRI in question being ordered and reviewed by them. There is no prejudice either as the medical records have all been preserved, including the MRI now being focused on by the Plaintiff. The new theory is all focused on the initial occurrence already detailed in the original bills of particulars.

The AMC Defendants arguments that they are further prejudiced by this new theory of liability being asserted after Ms. Kaczor's death is also of no moment. Even if they could depose Ms. Kaczor about the MRI taken on June 12 or June 13, her testimony would not be probative. She did not order the MRI and she was certainly not qualified to review and interpret the MRI. Her only involvement in the MRI was the fact that it was her body that was subjected to the imaging process. The argument that she is no longer able to be deposed with regard to this new theory of medical malpractice is without merit.

Plaintiff's motion papers and proposed supplemental pleadings do name three additional medical providers that apparently were involved in the MRI imaging and/or interpreting the MRI scan conducted on June 12 or June 13. It is well beyond the statute of limitations period for Plaintiff to bring any action against the individual providers. It is noted that the current AMC Defendants were aware of the MRI, and it may be possible to argue that the hospital itself is vicariously liable for the actions of these other providers, but it is not as simple as adding a new theory on the same underlying occurrence. The Court does find that the original pleadings referenced an ID number for a resident, and it is unclear from the number who is being identified, and it is speculative if it is the newly named resident, Dr. Bhounala. Plaintiff, however, is not seeking to add the three new providers to the action. Instead, it is alleged that the

hospital is vicariously liable or liable pursuant to the theory outlined in *Mduba v Benedictine Hospital* (52 AD2d 450). The original bills of particulars against the AMC Defendants stated:

> Plaintiff believes and thereby alleges that the Defendants and each of them, jointly, severally, together or otherwise, acting on their own behalf or as agent officer or employee to the Defendant AMCH, and the Defendant AMCH itself, were all negligent careless and reckless in that said Defendants failed to take a full and complete history; failed to conduct adequate and required tests and evaluations of same to adequately treat the Plaintiff for maladies as she then and there presented; said Defendant and Defendants by and through agents, servants and/or employees of the hospital, and in conjunction with agents, officers and/or employees of the Hospital staff, negligently and carelessly failed to treat plaintiff in accordance with good and accepted medical practice; negligently and carelessly allowed plaintiff to be seen and treated by physicians without the requisite experience, skill, qualification and training to treat the conditions plaintiff was suffering from; failed to timely and properly obtain a proper medical history; failed to properly review the patient's medical chart and other pertinent medical records; failed to use their best judgment; . . . .

(*id.* at p. 15-16). The original bills of particulars provide notice that any and all employees or agents providing care are ultimately the responsibility of the hospital itself. Plaintiff has already stated in oral argument that no further depositions are needed for her case. The Plaintiff has been and continues to rely on the theory that

> . . . defendant hospital, having held itself out to the public as an institution furnishing doctors, staff and facilities for emergency treatment, was under a duty to perform those services and is liable for the negligent performance of those services by the doctors and staff it hired and furnished to decedent. Certainly, the person who avails himself of hospital facilities has a right to expect satisfactory treatment from any personnel who are furnished by the hospital.

(*Mduba*, 52 AD2d at 453). As such, the naming of the three other medical providers involved in allegedly misreading the MRI, is simply supplementing the original bills of particulars to provide more information to the AMC Defendants on how the *hospital* was negligent. It is not

expanding the actual defendants in the action. It is noted that the aforementioned is a matter of perspective, but Plaintiff's motion is not seeking to add defendants to the caption, and not seeking any further discovery with regard to the other providers, as it was confirmed during oral arguments.

The original bills of particulars filed as against the AMC Defendants include many references to the decedent's sepsis not being properly diagnosed and/or treated in June, 2012 resulting in serious complications requiring an extended hospital stay, multiple surgeries to treat the numerous complications that arose from the systemic sepsis. The original bills of particulars do focus on the sepsis which was located in the abdominal cavity and the failure of the AMC defendants to properly diagnose the infection that led to sepsis during her initial hospital admission. These allegations are not that drastically different from the newly asserted theory that the infection and later sepsis was missed on the MRI, and was initially located in the decedent's back, near the area of the alleged "botched" injections. The joined actions, and the fact that the AMC Defendants, who are no strangers to this litigation, have always been aware of the epidural injections that occurred prior to decedent's admission on June 12 as "botched" leads to the conclusion that the original bills of particulars are only amplified by the discovery that ensued since 2015 and the supplemental/amended pleadings are consistent with the initial facts and occurrences outlined in the initial bills of particulars (*see Duffy*, 66 NY2d at 477).

The third argument raised by the AMC Defendants is the Plaintiff's failure to properly provide "the proposed amended or supplemental pleading *clearly* showing the changes or additions to be made to the pleading" is fatal to Plaintiff's application herein (CPLR § 3025 [emphasis added]). It may be fatal to an application to amend if the moving party fails to provide clearly marked proposed pleadings. In this case there are over 1,000 pages in the

original bills of particulars and even more pages in the proposed supplemental bills of particulars. The first set of papers did not include any markings to show the changes, deletions or amendments to the proposed bills of particulars. As addressed in Part I of this decision, it was law office failure on the part of Mr. Cherudolo for not having the yellow highlights properly copied and served. This Court granted Mr. Cherundolo permission to re-serve the properly highlighted documents, and granted the AMC Defendants an additional thirty-one days to review and file a further opposition to the motion. In their review, they did find other changes that were not properly marked and it is clear that Plaintiff did not take proper care to clearly mark each and every change. However, in reviewing the yellow highlighted submissions, it is noted that the majority of the changes are marked and the AMC Defendants have sufficient notice of the changes. The failure to mark all the changes is *de minimis* and this Court finds that any error is not such that it should deny the motion *in toto*. The Court also rejected the expert affidavits of the Plaintiff but it is presumed the AMC Defendants retained a copy of the rejected submissions. The AMC Defendants have the benefit of Plaintiff's expert affidavits to assist them in any dispositive motions they may make after the Note of Issue is filed and in their trial preparations if the dispositive motion is denied. No prejudice will ensue if the Court grants the motion, despite some modifications being missed by Plaintiff. Based upon the foregoing, Plaintiff's Motion for Leave to Serve and File an Amended Complaint and Amended and/or Supplemental Bill of Particulars is granted in its entirety.

Based upon the Notice of Motion dated July 29, 2020; Affirmation sworn to by John C. Cherundolo, Esq. on the 29th day of July, 2020 with annexed Exhibits 1 through 40; Memorandum of Law in Support of Plaintiff's Motion for Leave to Served [sic] an Amended Complaint and Amended and/or Supplemental Bill of Particulars dated July 29, 2020 and signed

by Attorney Cherundolo; Attorney Affirmation sworn to by Adam T. Mandell, Esq. on the 18th day of August, 2020 with Exhibits A through D annexed thereto; Attorney Affidavit sworn to by Mandy McFarland, Esq. sworn to on the 20th day of August, 2020; the second set of new Exhibit Numbers 25, 26, 27, 28 & 29 to replace the Exhibits annexed to his original Affirmation dated July 29, 2020, filed on August 27, 2020; the Decision and Order *Kaczor v Shen, et al.*, Sup Ct, Mont. County, Sept. 4, 2020, Slezak, J., index No. 2014-0986; Attorney Affirmation in Opposition sworn to by Adam T. Mandell, Esq. on the 29th day of September, 2020 with annexed Exhibits A through F; Reply Attorney Affirmation sworn to by John C. Cherundolo, Esq. on the 15th day of October, 2020 with annexed Exhibits A through I—but specifically NOT except for the affidavits were sworn to by Marvin Galler, M.D. and Douglas W. Gibson, M.D; Notice of Motion dated October 13, 2020; and an Affirmation sworn to by John C. Cherundolo, Esq. on the 13th day of October, 2020 with annexed Exhibits A through M; Attorney Affirmation sworn to by Adam T. Mandell, Esq. on the 19th day of October, 2020 with annexed Exhibits A through F; Reply Affirmation sworn to by John C. Cherundolo, Esq. on the 26th day of October, 2020; and the oral arguments held on October 26, 2020; and all the prior proceedings and papers had herein, it is

ADJUDGED that the motion to vacate is not sustained in its entirety; and it is futher

ADJUDGED that the motion to amend pursuant to CPLR § 3025 is sustained in its entirety; therefore, it is hereby,

ORDERED that Plaintiff's motion seeking an order pursuant to the New York Civil Practice Law and Rules, and in the interests of justice, vacating, setting aside, and reversing the Order of Supreme Court Justice Rebecca Slezak dated September 4, 2020, is denied in its entirety; and it is further

ORDERED that Plaintiff's motion seeking an order pursuant to the New York Civil Practice Law and Rules § 3025 seeking leave to file an amended complaint and amended/supplemental bills of particular is granted in its entirety; and it is further

ORDERED that Plaintiff shall be and hereby is granted leave to serve and file the Amended Complaint previously filed on May 22, 2020, in the above captioned matter; and it is further

ORDERED that Plaintiff shall be and hereby is granted leave to serve and file an Amended and Supplemental Bills of Particular as against Defendants Jian Shen, M. D. and Mohawk Valley Orthopedics, P.C. (hereinafter "Defendant Shen"); and it is further

ORDERED that Plaintiff shall be and hereby is granted leave to serve and file an Amended and Supplemental Bills of Particular as against Defendants John Charles Tietjen, D.O., Benjamin S. Katz, M.D., Allen L. Carl, M.D., Albany Medical Center Hospital/Albany Medical College, (hereinafter "AMC Defendants").

This Decision and Order shall constitute the Order of the Court.

PLEASE TAKE NOTICE that the original Decision and Order denying Plaintiff's motion seeking an order pursuant to the New York Civil Practice Law and Rules, and in the interests of justice, vacating, setting aside, and reversing the Order of Supreme Court Justice Rebecca Slezak dated September 4, 2020 filed on October 14, 2020; and further granting Plaintiff's motion pursuant to Civil Practice Law and Rules ("CPLR") § 3025 seeking an order granting: (1) leave to serve and file an Amended Complaint in the above captioned matter; (2) leave to serve and file an Amended and Supplemental Bills of Particular as against Defendants Jian Shen, M. D. and Mohawk Valley Orthopedics, P.C. (hereinafter "Defendant Shen"), and Defendants John Charles Tietjen, D.O., Benjamin S. Katz, M.D., Allen L. Carl, M.D., Albany Medical Center

Hospital/Albany Medical College, (hereinafter "AMC Defendants"); is being mailed by this Court to Counsel for Plaintiff, John C. Cherundolo, Esq. for filing and service. The original submissions shall be sent to the Supreme Court Clerk for filing by him in the Montgomery County Clerk's Office. Plaintiff's counsel is hereby directed to comply with the requirements of CPLR §2220.

DATED: December 23, 2020

ENTER

HON. REBECCA A. SLEZAK
Justice of the Supreme Court