At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of June, 2006.

P R E S E N T:

HON. MARK PARTNOW,
Justice.

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PATSY WILLIAMS, by her Agent DAWN WILLIAMS under a power of attorney from PATSY WILLIAMS, principal,

Plaintiff,

- against -

RUBY WESTON MANOR, DR. FRANCOIS TELLUS, DR. MOSTAQUE AHMED, DONNA CHAMPAGNE, MARGARITA RIVERA, PRECISION HEALTH, INC., and DR. YEFIM VAYNSHELBAUM,
Defendants.

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Index No. 6667/05

The following papers numbered 1 to 18 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 12-13
Opposing Affidavits (Affirmations)	3-6, 9, 10, 15
Reply Affidavits (Affirmations)	7, 8, 11, 17, 18
Affidavit (Affirmation)	
Other Papers Memoranda of Law	14, 16

Upon the foregoing papers, plaintiff Patsy Williams, by her agent Dawn Williams, moves for an order, pursuant to CPLR 3025, granting her leave to serve and file a third amended complaint, adding, for the first time: (1) language asserting reliance upon the

doctrine of *res ipsa loquitur*; (2) a claim for attorneys' fees and punitive damages; and (3) a claim of negligent hiring against defendant Precision Health, Inc. (Precision Health).

Precision Health cross-moves for an order, pursuant to CPLR 3211 (a) (7), striking the reference to breach of contract/breach of warranty in plaintiff's first cause of action, and dismissing plaintiff's second and third causes of action as against it.

Background

According to plaintiff's complaint, the facts in this case are as follows. From 2002 to 2004, plaintiff was a resident of defendant Ruby Weston Manor (Ruby Weston), a Kings County nursing home. During this time, plaintiff was a heavy-set woman who was "a disabled person, with physical and mental impairments and limitations." Ruby Weston had a "Care Plan" for plaintiff requiring two people to provide "constant supervision and/or physical lift for transfers of the plaintiff." Defendants Dr. Francois Tellus and Dr. Mostaque Ahmed were physicians employed by Ruby Weston; defendants Donna Champagne and Margarita Rivera were aides employed by Ruby Weston.

On April 11, 2004, Rivera and Champagne took plaintiff to the bathroom and put her on the toilet. Afterwards, they left plaintiff alone in the bathroom with the door closed. While left alone on the toilet, plaintiff fell, sustaining "serious, permanent" injuries.

On April 12, 2004, Precision Health and defendant Dr. Yefim Vaynshelbaum took and/or read x-rays of plaintiff, at Ruby Weston's request. Plaintiff alleges these initial x-rays were "non-diagnostic and completely inadequate," and should have been immediately re-done. Because the initial x-rays were inadequate, some of plaintiff's injuries were not discovered and hence she "was caused to suffer for a greater period of time than she would

have" had defendants taken proper x-rays. Apparently, on April 22, 2004, further x-rays were taken and revealed that plaintiff had more serious injuries than previously thought, including a fracture of the right humerus. Plaintiff alleges that, between April 12 and April 22, 2004, Ruby Weston failed to have follow-up x-rays taken despite the fact that plaintiff was "crying and complaining of pain."

On March 7, 2005, plaintiff filed a summons and complaint against all the named defendants, although plaintiff incorrectly identified defendants Ruby Weston and Dr. Vaynshelbaum. In her initial complaint, plaintiff raised three causes of action: (1) "Negligence and Conscious Pain and Suffering"; (2) "Violation of Statutes"; and (3) negligence "in the taking of x-rays" (against Precision Health and Dr. Vaynshelbaum). On April 7, 2005, plaintiff filed an amended summons and complaint correcting Dr. Vaynshelbaum's name and, on May 25, 2005, plaintiff filed a second amended summons and complaint correcting Ruby Weston's name.

On August 5, 2005, plaintiff attempted to serve a third amended complaint. The defendants objected to this third proposed amended complaint on various grounds, leading to plaintiff's current motion for leave to amend her complaint. Precision Health also cross-moves to dismiss certain causes of action from the second amended complaint for failure to state a claim.[1]

[1] These causes of action are also included in plaintiff's proposed third amended complaint.

Discussion

Leave to amend pleadings is governed by CPLR 3025 which provides, in applicable part, that:

> "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]).

Leave to amend pleadings is committed to the discretion of the court and should be freely granted unless the amendment sought would cause substantial prejudice or is palpably improper or insufficient as a matter of law (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Thone v Crown Equip. Corp.*, 27 AD3d 723, 723 [2006]). As little discovery has been completed and plaintiff is not alleging, for the most part, any new or different transactions, there is little likelihood of substantial prejudice by any of the proposed amendments (*see e.g. Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [2006]; *Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d 439, 440 [2005]). Defendants' arguments rely instead mostly on the legal insufficiency of plaintiff's new claims. Each contested claim and proposed additional claim will be addressed in turn.

I. Precision Health's Cross Motion to Dismiss

Breach of Warranty/Contract

In her second amended complaint (and proposed third amended complaint), plaintiff includes the following paragraph:

> "At all times hereinafter mentioned, upon information and belief, the defendant, RUBY WESTON MANOR, its agents, servants and/or employees and the individual defendants, breached their agreement, contract, independent

> contractors, representations and warranties by failing to render proper nursing home care, treatment including x-rays, treatment after a fall, and supervision to PATSY WILLIAMS."

Precision Health cross-moves to strike this paragraph, arguing that breach of contract and warranty claims are inapplicable to personal services, such as those rendered here, in the absence of an express agreement or promise (*see e.g. Dobisky v Rand*, 248 AD2d 903, 905 [1998]).[2]

This court need not decide whether a legal claim for breach of contract or warranty is merited here as plaintiff states in her papers that she "is willing to stipulate with all defendants, that plaintiffs are not proceeding on a legal theory or a cause of action for breach of warranty or breach of contract." Accordingly, based on plaintiff's stipulation that she makes no legal claim based on breach of warranty or contract, that part of Precision Health's cross motion seeking to strike this paragraph has been rendered moot.

Duplicative Causes of Action

Precision Health also cross-moves to dismiss the third cause of action as duplicative of the first cause of action. Plaintiff counters this part of Precision Health's cross motion by arguing, essentially, that Precision Health and Dr. Vaynshelbaum are not actually implicated in the first cause of action.[3] Given plaintiff's stipulation that the first cause of action is not

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[2] In their oppositions to plaintiff's motion to amend her complaint, the other defendants in this action also object to this paragraph. However, Precision Health is the only defendant to bring a motion to strike this paragraph.

[3] The court notes that, despite plaintiff's claim that the negligence paragraph of that section, paragraph 60, "leaves out" Precision Health and Dr. Vaynshelbaum, both defendants, although excepted in the beginning of the paragraph, are later named. Moreover, both are named in the caption of this cause of action.

being asserted against Precision Health or Dr. Vaynshelbaum, both claims will be allowed to stand. The court notes, however, that the first cause of action, to the extent asserted against Precision Health or Dr. Vaynshelbaum, would otherwise be struck as duplicative of the third cause of action, as both basically assert negligence in the taking and reading of x-rays (*see e.g. Mecca v Shang*, 258 AD2d 569, 570 [1999]).

Accordingly, that part of Precision Health's cross motion seeking to strike the third cause of action has also been rendered moot by plaintiff's present representations.

Public Health Law § 2801 (d)

Plaintiff asserts, as a second cause of action, violation of statutes, particularly Public Health Law (PHL) § 2801 (d). In its cross motion, Precision Health argues that PHL 2801 (d) does not support a cause of action here because such section creates a private cause of action "only where no such right previously existed." Since plaintiff possesses claims for medical malpractice and negligence, Precision Health argues that plaintiff's claim for violation of PHL 2801 (d) must be dismissed as against it.

PHL 2801 (d) provides in relevant part:

> "1. Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a "right or benefit" of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable

under this section. . . .

> "4. . . . The remedies provided in this section are in addition to and cumulative with any other remedies available to a patient, at law or in equity or by administrative proceedings. Exhaustion of any available administrative remedies shall not be required prior to commencement of suit hereunder."

Precision Health's argument relies on *Goldberg v Plaza Nursing Home Comp., Inc.* (222 AD2d 1082 [1995]) and *Begandy v Richardson* (134 Misc 2d 357 [Sup Ct, Monroe County 1987]). In those cases, the courts did hold that the purpose of PHL 2801 (d) "was to provide a remedy to patients in residential health care facilities who are denied the rights and benefits enumerated in Public Health Law § 2803-c (3); the purpose was not to create a new personal injury cause of action based on negligence when that remedy already existed" (*Goldberg*, 222 AD2d at 1084). However, that holding was later overruled.

In 2002, the Appellate Division, Fourth Department, revisited its prior holding in *Goldberg*, in the matter of *Doe v Westfall Health Care Ctr., Inc.* (303 AD2d 102 [2002]). In that case, the court noted that the statute itself states that the remedies it provides "*are in addition to and cumulative with any other remedies* available to a patient, at law or in equity" (PHL 2801 [d] [4] [emphasis added]). Thus, the court stated:

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

The court went on to note similar situations wherein the Legislature established more than one remedy for a wrong. Ultimately, the court overruled its decision in *Goldberg* to the extent that *Goldberg* granted summary judgment dismissing a PHL 2801 (d) claim simply

because a common law cause of action may also be stated (*id.* at 112). Thus, the court reversed the trial court's dismissal of plaintiff's PHL 2801 (d) claim in a case where plaintiff had alleged that she had been raped by a nursing home employee.

In *Morisett v Terence Cardinal Cooke Health Care Ctr.* (8 Misc 3d 506 [Sup Ct, New York County 2005]), the court, after examining the text of PHL 2801 (d) and the legislative history relating thereto, explicitly concluded that a plaintiff may state a cause of action under PHL 2801 (d) "even if the plaintiff has simultaneously asserted traditional medical malpractice and negligence claims" (*id.* at 507). Accordingly, the court denied defendants' motion for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's PHL 2801 (d) claim.

Based on the plain text of the statute, as well as *Doe* and *Morisett*, this court finds cross-movant's contention that plaintiff's PHL 2801 (d) claim is barred since plaintiff also asserts claims for medical malpractice and/or negligence to be without merit. However, the court does find that the second cause of action alleging violation of PHL 2801 (d) must be dismissed as against Precision Health since it is not a "residential health care facility" as defined within the statute.

Section 2801 (d) specifically refers only to the liability of the "residential health care facility." Nowhere does this statute state that it provides for liability against other organizations. Moreover, PHL 2808 (a) provides that any person who is a "controlling person of any residential health care facility liable under any provision of this article" shall be jointly and severally liable with the facility, and goes on to define such a person as

someone with an "ownership interest" who can direct the management or policies of the facility. If the legislature had wanted to extend liability to any other individual or entity, it could easily have done so. By specifically delineating "controlling persons" as jointly and severally liable, the statute implies that no other individuals or entities should be so liable. If all employees or contractors could be liable along with the facility, PHL 2808 (a) would be rendered meaningless. A statute should not be read so as to render any part of it meaningless or redundant (*see e.g. Centennial Restorations Co. v Wyatt*, 248 AD2d 193, 196 [1998]).

Plaintiff does not allege in her complaint that Precision Health is a "controlling person" of Ruby Weston pursuant to PHL 2808 (a). While plaintiff does suggest that Precision Health is a "residential health care facility" pursuant to PHL 2801 (d) because it provided a "health-related service," plaintiff alleges no facts that would show that plaintiff ever "resided" with Precision Health. As such, on its face, Precision Health would not appear to be a "residential" facility. Moreover, the statute defines a residential health care facility as "a nursing home or a facility providing health-related service" (PHL 2801 [3]). The definitions of both "nursing home" and "health-related service" include lodging patients (PHL 2801 [2], [4] [b]). As nothing indicates that Precision Health ever provided lodging to plaintiff, Precision Health does not qualify as a "residential" facility for purposes of this case.

Accordingly, that part of Precision Health's cross motion seeking dismissal of plaintiff's second cause of action as against it is granted.

II. Plaintiff's Motion to Amend

Res Ipsa Loquitur

In her first cause of action, plaintiff proposes to add a paragraph stating that "plaintiffs will rely on the doctrine of Res Ipsa Loquitur."[4] All defendants object to this addition, arguing that the facts here do not meet the elements required for application of the *res ipsa loquitur* doctrine.

To succeed on a theory of *res ipsa loquitur*, plaintiff must establish three elements: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *see also e.g. Rondeau v Georgia Pacific Corp.*, ___ AD3d ___, 814 NYS2d 775, 778 [2006]).

Plaintiff has not established that the doctrine of *res ipsa loquitur* applies here, especially in light of plaintiff's "failure to identify the instrumentality that caused her fall" or to establish that such instrumentality was under defendants' exclusive control (*McCloghrie v B.E. Rock Corp.*, 262 AD2d 240, 240 [1999]).[5] As defendants argue, plaintiff may have fallen because she was attempting to stand on her own instead of waiting for or seeking

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[4] *Res ipsa loquitur*, meaning "the thing speaks for itself,"allows a jury to infer negligence even in the absence of direct proof.

[5] Plaintiff appears to be arguing that plaintiff herself was the "agency within the defendant's exclusive control." The mere fact that plaintiff was in defendant's care in insufficient to support this novel theory.

assistance.

Because plaintiff has not demonstrated that *res ipsa loquitur* applies here, that part of plaintiff's motion seeking to add a paragraph pleading *res ipsa loquitur* to her complaint is denied. However, the doctrine of *res ipsa loquitur* is "evidentiary in nature" and not a separate cause of action, and so it "may be raised at any time when warranted by the facts" even if not pleaded in a complaint or bill of particulars (*Porter v Huntington Hosp.*, 148 AD2d 510, 511 [1989]; *Butler v Martins*, 10 Misc 3d 1064[A], *2 [Sup Ct, Nassau County 2005]; *Weeden v Armor Elev. Co., Inc.*, 97 AD2d 197, 201-202 [1983]).

Punitive Damages/Attorneys' Fees

In her second cause of action alleging "violation of statutes," plaintiff proposes to add the following two paragraphs:

> "That defendant, RUBY WESTON MANOR'S conduct entitles the plaintiffs to attorneys' fees based on the reasonable value of legal services rendered as a result of prosecution of this civil law suit.
>
> "That defendant, RUBY WESTON MANOR'S conduct entitles plaintiffs to punitive damages, as well as compensatory damages under Public Health Law Section 2801(d), and under the Common Law of the State of New York."

The section of plaintiff's complaint alleging violation of statutes relies mainly on PHL 2801 (d), which states in relevant part:

> "2. Upon a finding that a patient has been deprived of a right or benefit and that said patient has been injured as a result of said deprivation, and . . . . where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed. . . .
>
> "6. If judgment in an action maintained under this section is rendered in favor

> of the plaintiff, in its discretion the court may, if justice requires, award attorneys' fees to the plaintiff based on the reasonable value of legal services rendered and payable by the defendant."

All defendants object to the addition of a claim for punitive damages, arguing that this case is an ordinary medical malpractice/negligence action, for which punitive damages are not appropriate. They argue that punitive damages are only appropriate for "exceptional misconduct which transgresses mere negligence," such as actual malice or wanton disregard. They note that there has rarely been a case upholding punitive damages for medical malpractice in New York state (*see e.g. Spinosa v Weinstein*, 168 AD2d 32 [1991]). They argue that "nothing contained in the factual allegations alleged in the pleadings [] sets forth allegations which might even be remotely construed as gross negligence and giving rise to recovery for punitive damages."

Doctors Tellus, Ahmed, and Vaynshelbaum also argue that, to the extent the complaint appears to be seeking punitive damages or attorneys' fees pursuant to PHL 2801 (d) as against them, it is palpably without merit because PHL 2801 (d) applies only against a "residential health care facility," not against individual doctors.

Punitive Damages

Plaintiff's proposed amendment seeking punitive damages is palpably without merit. "In a medical malpractice action, punitive damages are only recoverable where the conduct in question shows a wrongful motive on the defendant's part, willful or intentional misdoing, or a reckless indifference equivalent to willful or intentional misdoing" or a "conscious disregard of the rights of others" (*Brooking v Polito*, 16 AD3d 898, 899 [2005] [internal

quotation marks and citations omitted]). Similarly, PHL 2801 (d) only allows for punitive damages where the defendant's actions were "willful or in reckless disregard of the lawful rights of the patient"(PHL 2801 [d] [2]). Although not barred as a matter of law, punitive damages are rarely awarded in medical malpractice actions because, as the court in *Spinosa* explained, "[a] doctor in a malpractice case is ordinarily not an actor who intends to inflict an injury on his patient" (*Spinosa*, 168 AD2d at 43 [internal quotation marks and citation omitted]).

Plaintiff alleges that she was left alone in a bathroom despite her diminished physical and mental condition, and in contradiction of a care plan which required her to be supervised in the bathroom at all times. Plaintiff also alleges that her x-rays were improperly taken and read. These alleged failures by defendants to provide proper care, although serious, do not in themselves evince such reckless indifference that would transcend normal negligence or malpractice and justify punitive damages (*see e.g. Rey v Park View Nursing Home, Inc.*, 262 AD2d 624, 627 [1999]; *Thone*, 27 AD3d at 723; *Zabas v Kard*, 194 AD2d 784, 784 [1993]; *cf. Graham v Columbia-Presbyterian Med. Ctr.*, 185 AD2d 753 [1992]).

Therefore, at this time, plaintiff's proposed attempt to include a demand for punitive damages is without merit, and is denied.

Attorneys' Fees

Plaintiff appears to be resting her claim for attorneys' fees on PHL 2801 (d). PHL 2801 (d) does provide for attorneys' fees should plaintiff be meritorious in her claim (PHL 2801 [d] [6]). Various defendants have argued, however, that Section 2801 (d) does not apply to them. This proposed amendment appears to seek attorneys' fees only from Ruby

Weston, as evidenced by the express language of paragraph 82 of the proposed third amended complaint. Since Ruby Weston appears to be a "residential health care facility" as defined in the Public Health Law, that part of plaintiff's motion seeking leave to plead a claim for attorneys' fees against Ruby Weston is granted. To the extent such leave is sought against the remaining defendants, that request is denied because those defendants are neither residential health care facilities nor controlling persons.

Negligent Hiring

In her third cause of action, alleging negligence against Precision Health and Dr. Vaynshelbaum, plaintiff proposes to add the following paragraph:

> "At all times hereinafter mentioned upon information and belief, defendant, PRECISION HEALTH, INC., was negligent in the hiring and supervision of its agents, servants, independent contractors and/or employees."

Precision Health objects to the inclusion of this new cause of action, arguing that Dr. Vaynshelbaum is an independent contractor, not an employee, and that plaintiff has not alleged that Dr. Vaynshelbaum was not properly qualified to read and analyze x-rays. Plaintiff admits that this is a new cause of action, but argues that she has good cause to add it in light of the recent publication of a decision involving Dr. Vaynshelbaum and his alleged misreading of certain mammograms.

Regardless of the sufficiency of this excuse, the court finds that Precision Health will not be prejudiced by the addition of this claim as substantial discovery in this case has not yet been completed (*see e.g. Antwerpse*, 27 AD3d at 207). Nor is the claim totally devoid of merit on the face of the complaint. "The merit of a proposed amended pleading must be sustained [] unless the alleged insufficiency or lack of merit is clear and free from doubt"

(*Detrinca v De Fillippo*, 165 AD2d 505, 509 [1991] [internal quotation marks and citation omitted]). In this case, plaintiff has alleged sufficient facts such that the insufficiency of this claim is not "free from doubt."

In this regard, plaintiff has alleged that the x-rays in this case were so poor in quality that any reasonable person would not have relied on them and would have ordered them re-done. Construed liberally, plaintiff has thereby asserted that Dr. Vaynshelbaum's failure to recognize the deficiency of the x-rays demonstrates a lack of experience and knowledge in the radiology field. If proven, such an allegation could render Precision Health liable for the negligent hiring of Dr. Vaynshelbaum if it was aware or should reasonably have been aware of Dr. Vaynshelbaum's lack of qualifications (*Maristany v Patient Support Servs., Inc.*, 264 AD2d 302, 303 [1999]).[6]

Therefore, that part of plaintiff's motion seeking leave to add this paragraph is granted.

Conclusion

Accordingly, plaintiff's motion for leave to serve and file a third amended complaint is resolved as follows: (1) leave to add the paragraph alleging reliance on the doctrine of *res ipsa loquitur* is denied; (2) leave to add a claim for punitive damages is denied; (3) leave to add a claim for attorneys' fees is granted, but only against Ruby Weston; and (4) leave to add

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[6] If Dr. Vaynshelbaum is found to be an employee acting within the scope of his employment, as opposed to an independent contractor, and is found to be negligent, plaintiff will only be able to prevail against Precision Health on a claim of *respondeat superior*, not negligent hiring. "The rationale is that if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training" (*Rossetti v Bd. of Educ. of Schalmont Cent. School Dist.*, 277 AD2d 668, 670 [2000] [internal quotation marks and citation omitted]). In her complaint, plaintiff alternatively pleads that Dr. Vaynshelbaum is an employee of or an independent contractor for Precision Health.

a claim of negligent hiring against Precision Health is granted. Plaintiff's third amended complaint will not be considered filed *nunc pro tunc*. Instead, plaintiff will have thirty days from the date of entry of this order to file and serve an amended complaint that comports with the guidelines set out above.

Precision Health's cross motion to dismiss is granted only to the extent that the second cause of action relying upon PHL 2801 (d) is dismissed as against Precision Health. The cross motion is otherwise denied or has been rendered moot.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. MARK I. PARTNOW