****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

KATZ, J., dissenting. Today the majority determines that the failure of the plaintiffs, Daniel R. Pekera, the administrator of the estate of Charlene Walker (decedent), and Earl Walker, the decedent's husband, to ''satisfy the applicable rules of practice because they did not file and serve upon the defendant [Allan Rodrigues][1] a written request for leave to amend their complaint with the amendment appended thereto''; see Practice Book § 10-60 (a);[2] meant that ''the trial court was not called upon to exercise its discretion . . . and [that] it correctly declined, as a matter of law, to consider the purported amendment.'' Essentially, the majority exalts form over substance in a way that I think is contrary to our pleading jurisprudence and is undermined by the record in this case. Accordingly, I respectfully dissent.

It is important to recognize the context in which the issue was raised at the trial court. In the defendant's motion for summary judgment, he acknowledged the plaintiffs' theory of negligence raised by Daniel M. Goodenberger, the plaintiffs' expert, that the defendant deviated from the standard of care by failing to inform the decedent properly of the consequences of her decision not to allow him to intubate her. The defendant claimed in support of his motion that this theory was not encompassed within the complaint and further asserted that ''the plaintiffs were not entitled to amend their complaint to conform to the expert's opinion that the defendant improperly had failed to inform the [decedent] of the consequences of her refusal to be intubated.'' *Pekera* v. *Purpora*, 80 Conn. App. 685, 688, 836 A.2d 1253 (2003). The parties briefed the issue of whether the relation back doctrine would apply, a principle relevant to whether the trial court could permit an amendment as a matter of law. In his reply brief, the defendant stated that the plaintiffs ''now [want] leave to amend.'' Thereafter, at the hearing on his motion for summary judgment, the defendant argued that, if the case were to go forward on the informed consent theory of negligence, the plaintiffs ''would have to amend the pleadings *as [they have] requested*.''[3] (Emphasis added.) Although the defendant went on to point out that there had been no *written* request to file an amendment, he nevertheless engaged in a dialogue with the trial court about why the relation back doctrine did not apply. After this debate on the merits of whether the plaintiffs should be permitted to amend the pleadings to conform with Goodenberger's opinion, the trial court granted the defendant's motion for summary judgment and then concluded that it did not need to address whether the complaint could be amended as a matter of law under the relation back doctrine because, upon granting summary judgment, ''there is no complaint left

to amend.''

Despite the aforementioned discussion on the proposed amendment, the majority concludes that the trial court properly declined to consider whether the plaintiffs were entitled to amend the pleadings in light of their failure to file a written request in accordance with the rules of practice. Additionally, the majority concludes that, because the plaintiffs orally failed to make a motion to amend their complaint at the summary judgment hearing or to state expressly their intention to make such a request, the Appellate Court properly affirmed the judgment of the trial court as a matter of law.[4] The majority reaches this conclusion by emphasizing the conditional nature of the plaintiffs' assertion that they ''would'' request the court's permission to amend the complaint. I disagree and would conclude that, based on the record before it, the trial court improperly granted the defendant's motion for summary judgment before considering whether the plaintiffs could amend their complaint and that the Appellate Court improperly affirmed that judgment.

Although the plaintiffs never filed a written request to amend their pleadings in accordance with § 10-60, nor did they *expressly* request permission to amend their complaint as permitted alternatively under § 10-60 (a) (1), it is clear that the trial court and both parties understood that the issue of whether the prospective amendment was permissible as a matter of law under the relation back doctrine was before the court, as was the question of whether there was a need to amend the pleadings. The record reflects that the trial court was well aware of the plaintiffs' primary position that no amendment was necessary and of their secondary and consequential interest in including more specific allegations to conform explicitly to Goodenberger's deposition testimony if the trial court were to conclude that the allegations in paragraph 5 (c) of count nine of the complaint did not include allegations regarding the defendant's deficient warnings. Under these circumstances, I disagree with the majority's reliance on the plaintiffs' failure formally to seek permission to amend as a basis for its decision affirming the granting of the motion for summary judgment.

This court repeatedly has eschewed applying the law in such a hypertechnical manner so as to elevate form over substance. See, e.g., *Stepney Pond Estates, Ltd.* v. *Monroe*, 260 Conn. 406, 422, 797 A.2d 494 (2002) (''[t]o conclude . . . that the fact that the plaintiff invoked [a statute] instead of bringing a common-law action in equity deprived the trial court of jurisdiction would be to exalt form over substance''); *Zamstein* v. *Marvasti*, 240 Conn. 549, 557, 692 A.2d 781 (1997) (rejecting defendant's claim that plaintiff had not appealed from final judgment because plaintiff had not withdrawn remaining counts of his complaint until *after* filing

appeal because ''[u]nder these particular circumstances . . . it would unduly elevate form over substance to hold that no appealable final judgment existed''); *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 391, 685 A.2d 1108 (1996) (This court concluded that if the trial judge were ''required to grant a motion to restore the case to the docket before considering the motion for contempt, we can only regard his actions as the functional equivalent of the granting of such a motion. To conclude otherwise would be to elevate form over substance.''), overruled in part on other grounds, *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999). Although I do not condone the plaintiffs' failure to file a request to amend, to agree with the Appellate Court's affirmance of the summary judgment rendered in this case would be to exalt form over substance. See *Tedesco* v. *Stamford*, 215 Conn. 450, 462–63, 576 A.2d 1273 (1990) (concluding that Appellate Court should not have set aside judgment without considering whether defendant city had been misled or prejudiced by plaintiff's failure to allege constitutional violation resulting from municipal policy or custom when record revealed that defendant had sufficient notice that plaintiff was asserting claim on this basis, and that any variance between pleadings and proof was immaterial and was waived by defendant's failure to object at trial), remanded, 24 Conn. App. 377, 588 A.2d 656 (1991), rev'd on other grounds, 222 Conn. 233, 610 A.2d 574 (1992).

Our long-standing jurisprudence favoring amendments and scrutinizing judicial discretion informs the lens through which this issue should be considered. It is well settled that, ''[u]nder the statutes and rules of practice, the court may in its discretion, in a proper case, allow the filing of amendments to pleadings before, during and after trial. [*Wright* v. *Coe & Anderson, Inc.*, 156 Conn. 145, 155, 239 A.2d 493 (1968)]; see *Moore* v. *Sergi*, 38 Conn. App. 829, 835–37, 664 A.2d 795 (1995).'' (Internal quotation marks omitted.) *Kelley* v. *Tomas*, 66 Conn. App. 146, 174, 783 A.2d 1226 (2001). ''Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment.'' (Internal quotation marks omitted.) *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 364, 659 A.2d 172 (1995). ''Whether to grant a request to amend the pleadings is a matter within the discretion of the trial court, and this court will rarely overturn the decision of the trial court. . . . Judicial discretion . . . [however] is always legal discretion, exercised according to the recognized principles of equity. . . . While its exercise will not ordinarily be interfered with on appeal to this court, reversal is required where the abuse is manifest or where injustice appears to have been done.'' (Citations omitted; internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 239

Conn. 515, 521, 686 A.2d 481 (1996).

Despite the discretion afforded the trial court, in the interest of justice, ''our courts have generally been most liberal in allowing amendments. . . . Where a sound reason to amend is shown, the trial court must allow the amendment. Refusal under such circumstances constitutes an abuse of discretion. . . . The essential tests are whether the ruling of the court will work an injustice to either [party] and whether the granting of the motion will unduly delay a trial. . . . In the final analysis, the court will allow an amendment unless it will cause an unreasonable delay, mislead the opposing party, take unfair advantage of the opposing party or confuse the issues, or if there has been negligence or laches attaching to the offering party.'' (Citations omitted; internal quotation marks omitted.) *Moore* v. *Sergi*, supra, 38 Conn. App. 835–36.

I recognize that the issue before this court is not whether the trial court abused its discretion in not allowing the plaintiffs to amend their complaint. To be sure, the trial court never exercised its discretion in that regard because it granted the defendant's motion for summary judgment. The same considerations underlying our jurisprudence favoring amendments and scrutinizing judicial discretion, however, should bear on whether the Appellate Court properly affirmed the summary judgment rendered on the basis of the trial court's refusal to exercise its discretion at all. Indeed, applying those considerations to this case, I am struck by the injustice that is realized as a result of today's decision. It is apparent that the plaintiffs did not state expressly that they would seek permission to file an amendment were one necessary because they either were intent on convincing the trial court that that the allegations in paragraph 5 (c) of count nine of the complaint already encompassed the defendant's deficient warnings or were convinced that any allegations regarding the consequences of the decedent's refusal to allow the intubation would be a mere amplification or expansion of what had been alleged. It is equally apparent, however, beginning with the plaintiffs' opposition to the defendant's motion for summary judgment, that the plaintiffs alerted the court to their position regarding the amendment and that the plaintiffs, the defendant and the trial court all understood that the issue of the proposed amendment was under consideration.[5] Indeed, the defendant argued extensively in his memoranda in support of his motion for summary judgment why the plaintiffs should not be given the opportunity to amend their complaint.

Under the circumstances of this case, the trial court should not have rendered summary judgment without affording some consideration to the proposed amendment. For the Appellate Court to conclude that the trial court ''also addressed and rejected the plaintiffs'

suggestion that they should be permitted to amend their complaint to allege that the defendant negligently had failed to inform the [decedent] of the urgency of intubation''; *Pekera* v. *Purpora*, supra, 80 Conn. App. 692; is a far too generous characterization of what transpired. As the Appellate Court noted, the trial court *refused* to consider an amendment to the complaint because it already had granted the motion for summary judgment. Like the majority here, the Appellate Court relies on the plaintiffs' failure formally to file a written request to amend as determinative for purposes of the trial court's ruling. I recognize that, ''[p]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them.'' (Internal quotation marks omitted.) *Heim* v. *California Federal Bank*, 78 Conn. App. 351, 363, 828 A.2d 129, cert. denied, 266 Conn. 911, 832 A.2d 70 (2003). To apply the law in such a hypertechnical manner as has been done in this case, however, is to elevate form over substance. Indeed, there was no legal impediment to the trial court considering whether the additional allegation at issue would create a material issue of fact along with the complaint as it stood before granting the motion for summary judgment.[6] Certainly, there would have been no unfair surprise to the defendant in light of his having raised the issue in the first instance.

Additionally, the Appellate Court's determination that, ''even if the court's ruling were to be construed as a refusal of an implied request to amend, the plaintiffs have not addressed the court's discretionary control over amendments to complaints''; *Pekera* v. *Purpora*, supra, 80 Conn. App. 693; both imposed an improper burden on the plaintiffs and trivialized the plaintiffs' claim before that court. The issue of whether the trial court properly could deny a request to amend the complaint in the exercise of its discretion was not before the Appellate Court, as the trial court never crossed beyond the legal threshold of deciding that it could no longer exercise its discretion having rendered summary judgment.[7] The plaintiffs have yet to be given the opportunity to offer proof to be tested against our standards regarding an abuse of discretion, the essential elements of which are whether the ruling of the court will work an injustice to either party and whether the granting of the motion to amend will cause an unreasonable delay, mislead the opposing party, take unfair advantage of the opposing party or confuse the issues. One factor is clear from the record, however, the injustice to the plaintiffs. Thus, the trial court would need to consider that factor against whether the defendant's rights would have been prejudiced based upon surprise and whether the defense would have been hampered had the court allowed the plaintiffs to amend their complaint. The

bare assertion of prejudice in the defendant's brief to this court is not sufficient to support a claim of prejudice as a matter of law. See *Southington '84 Associates* v. *Silver Dollar Stores, Inc.*, 237 Conn. 758, 768, 678 A.2d 968 (1996). Therefore, I would conclude that the Appellate Court improperly determined that the trial court properly refused to exercise its discretion to consider whether the plaintiffs could amend their complaint.

Accordingly, I dissent.

[1] Although the plaintiffs brought their action against eight defendants; see footnote 3 of the majority opinion; references herein to the defendant are to Rodrigues only.

[2] Practice Book § 10-60 (a) provides: "Except as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner:

"(1) By order of judicial authority; or

"(2) By written consent of the adverse party; or

"(3) By filing a request for leave to file such amendment, with the amendment appended, after service upon each party as provided by Sections 10-12 through 10-17, and with proof of service endorsed thereon. If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by consent of the adverse party. If an opposing party shall have objection to any part of such request or the amendment appended thereto, such objection in writing specifying the particular paragraph or paragraphs to which there is objection and the reasons therefor, shall, after service upon each party as provided by Sections 10-12 through 10-17 and with proof of service endorsed thereon, be filed with the clerk within the time specified above and placed upon the next short calendar list."

[3] The defendant added that a revised pleading was "not formally before the court [because] [t]here is no request to file an amended complaint." I read that statement, however, in conjunction with the defendant's earlier recognition that, "just as [the plaintiffs' counsel] seemed without making a formal request, he certainly asked for relief to amend his complaint should the court find that appropriate."

[4] The majority also notes that the plaintiffs failed to move to open the judgment for the purpose of restoring the case to the docket and amending the pleadings to include the untimely informed consent allegation. In my view, it is improper to draw automatically an adverse inference from this inaction. A motion to open is not granted as of right. Practice Book § 17-4; see *Wilkes* v. *Wilkes*, 55 Conn. App. 313, 325–26, 738 A.2d 758 (1999) ("A motion to open and vacate a judgment filed during the four months after which judgment was rendered is addressed to the court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." [Internal quotation marks omitted.]). Thus, this situation is not akin to a party's failure to replead after the court has granted a motion to strike, a remedy available as of right; Practice Book § 10-44; where an adverse inference is warranted that the plaintiff in a particular case has nothing further to substantiate its claims. Additionally, because the relation back doctrine in connection with the proposed amendment was a focal point of the plaintiffs' written and oral argument in the present case, it is hard to imagine what else the plaintiffs might have argued in support of their claim. In this case, any motion to open only would have alerted the trial court that the plaintiffs were serious about wanting to amend their complaint, a desire already expressed during the summary judgment proceedings.

[5] The plaintiffs also claimed in the trial court that the defendant had waived his right to claim any "surprise" by Goodenberger's testimony because the defendant had failed to move that the plaintiffs' complaint be made more specific. They further claimed that, should the trial court determine that the allegations in paragraph 5 (c) of count nine of the complaint did not include allegations regarding the consequences of the decedent's refusal to allow the intubation, and even if the trial court were to determine that an

amendment would not be a mere amplification of the original pleadings, the defendant had fair notice of that claim.

[6] For this reason, I disagree with the majority that the Appellate Court's decision in *Cardi Materials Corp.* v. *Connecticut Landscaping Bruzzi Corp.*, 77 Conn. App. 578, 823 A.2d 1271 (2003), supports its conclusion. In that case, the issue was one of standing, thus implicating the court's jurisdiction to entertain the action. Id., 581–82. No such jurisdictional bar precluded the trial court from considering whether to permit the plaintiffs to amend the complaint before rendering summary judgment.

[7] In light of the plenary review exercised by the Appellate Court in addressing such an issue of law, a more appropriate burden to impose on the plaintiffs might have been to demonstrate whether, even if the trial court improperly had refused to consider the amendment, the trial court nonetheless would have been required to find as a matter of law that the amendment did not relate back to the original complaint. With regard to that issue, however, I agree with the plaintiffs that the relation back doctrine applies in this case as a matter of law.

"The relation back doctrine has been well established by this court. A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. . . . A change in, or an addition to, a ground of negligence or an act of negligence arising out of the single group of facts which was originally claimed to have brought about the unlawful injury to the plaintiff does not change the cause of action. . . . It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but where an entirely new and different factual situation is presented, a new and different cause of action is stated. . . . Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims . . . ." (Internal quotation marks omitted.) *Alswanger* v. *Smego*, 257 Conn. 58, 64–65, 776 A.2d 444 (2001).

Three cases best illustrate this court's approach to the relation back doctrine. In *Gurliacci* v. *Mayer*, 218 Conn. 531, 546, 590 A.2d 914 (1991), this court applied the doctrine because the plaintiff's original complaint alleged that the defendant had acted negligently in operating his automobile while he was intoxicated, and the plaintiff later amended her complaint to add allegations that the defendant had acted either wilfully, wantonly and maliciously, or outside the scope of his employment. Prior to *Gurliacci*, in *Sharp* v. *Mitchell*, 209 Conn. 59, 73, 546 A.2d 846 (1988), this court rejected application of the doctrine because "[t]hese complaints involve two different sets of circumstances and depend on different facts to prove or disprove the allegations of a different basis of liability. . . . The defendants did not have fair notice of the claim of negligent construction and design of the underground storage area when the original complaint merely alleged that [the defendant] was negligent in ordering the employees to enter the area." In *Gurliacci*, we distinguished *Sharp*, explaining that the amendment to the complaint in *Sharp* was more than an amplification because "the defendant would have been required to gather different facts, evidence and witnesses to defend the amended claim." *Gurliacci* v. *Mayer*, supra, 549. In *Gurliacci*, however, the amendment "did not inject two different sets of circumstances and depend on different facts . . . ." (Citation omitted; internal quotation marks omitted.) Id.

In *Alswanger* v. *Smego*, supra, 257 Conn. 67, we concluded that the trial court properly disallowed the relation back of the amended complaint. "Although the focus of the original complaint was on the informed consent as it related to the surgical procedure itself, the amended complaint shifted the focus to consent by the patient to the participation of the individuals involved in the surgery. For example, the amended complaint would have required evidence as to [the] actual and specific role [of a surgical resident] in the surgery, his experience, whether the plaintiffs were informed of the role he would play and his experience, whether the [defendant physician and hospital] were required to provide that information to the plaintiffs, and the hospital's policy, as a teaching hospital, regarding a resident's involvement in surgery. Any discussion as to much of this evidence, however, would have been irrelevant under the original complaint, which asked whether the defendants adequately informed the plaintiffs regarding the surgical procedure. As in *Sharp*, the amendment in the present case would have forced the defendants to gather different facts, evidence and witnesses to defend the amended claim." (Internal quotation marks omitted.) Id., 66–67.

In the present case, the allegation that the defendant failed adequately to inform the decedent of the consequences of her decision not to intubate constitutes an act of negligence based on essentially the same set of facts as those alleged in the original complaint. Although the focus of the original complaint was on the failure timely to intubate and properly manage the decedent's pulmonary condition, Goodenberger's testimony addressed the type of information the decedent needed in order properly to make the decision whether to allow the intubation. Part of the defendant's failure to intubate timely related to his inability to get the decedent's consent, which Goodenberger attributed to poor advice by the defendant. Therefore, I would determine that an amendment addressed to the defendant's failure to inform the decedent of the consequences of her refusal to allow the intubation would not be time barred and therefore not futile. Finally, I note that, because the issue of the timing of intubation was in the case from its onset, the conversations surrounding the decedent's decision not to intubate necessarily would have been a part of the investigation. Whether the defendant would be prejudiced by the need to take additional discovery on this issue when he waited nine months after Goodenberger's testimony before moving for summary judgment would be a matter for the trial court to consider on remand.