SHORT FORM ORDER

INDEX No. 03-24518
CAL. No. 08-01543-MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 1-7-09
ADJ. DATE 3-4-09
Mot. Seq. # 004 - MD

WILLIAM HALL, as Administrator of the Estate of DARLA HALL, deceased, WILLIAM HALL, as father and natural guardian of RANDALL HALL, an infant under the age of eighteen, WILLIAM HALL, as father and natural guardian of CLAUDIA HALL, an infant under the age of eighteen and WILLIAM HALL, individually, Plaintiff, - against - JEFFREY A. PORTE, M.D., STONY BROOK GYNECOLOGY & OBSTETRICS, P.C., ELLEN STEINBERG, M.D., IRINA LOKSHINA, M.D., DOMICIANO SANTOS, M.D., ROBERT D. BARRACO, M.D., JAMES A. VOSSWINKEL, M.D., ROBERT O'KEEFE, M.D., TIMOTHY HALE, M.D., JOANNA PAOLILLI, M.D., LIXIN LIU, M.D., DANIEL MENENDEZ, M.D., SNEZANA VELJIC, M.D. and JASON ROTUNNO, R.N., Defendants.	AVELINO NITKEWICZ, LLP Attorney for Plaintiffs 225 Broadway, Suite 2500 New York, New York 10007 BROWN & TARANTINO, LLP Attorneys for Defendants Irina Lokshina, M.D. & Ellen Steinberg, M.D. 1 North Broadway, 10th Floor White Plains, New York 10601 FUREY, KERLEY, WALSH, MATERA & CINQUEMANI, P.C. Attorneys for Defendant Robert D. Barraco, M.D. 2174 Jackson Avenue Seaford, New York 11783 GEISLER & GABRIELE, LLP Attorney for Defendant Jason Rotunno, R.N. 100 Quentin Roosevelt Boulevard P.O. Box 8022 Garden City, New York 11530

Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 12 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 19; 20 - 25 ; Replying Affidavits and supporting papers 27-29 ; Other Pltff's letter 3/5/09 - 26 ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (004) by the defendant Robert D. Barraco, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is denied.

The complaint of this action sets forth causes of action for medical malpractice causing the conscious pain and suffering of the plaintiff's decedent, Darla Hall; lack of informed consent; loss of consortium, pecuniary loss, loss of earnings and impairment of earning capacity on behalf of William Hall; loss of parental guidance and pecuniary loss on behalf of Randall Hall and Claudia Hall; and punitive damages. It is alleged that Darla Hall came under the care and treatment of the defendants named herein at Stony Brook University Hospital for the delivery of twin infants by cesarean section on March 11, 2003, after which delivery she hemorrhaged. Following an unsuccessful dilation and curettage, a hysterectomy was performed after which she was admitted to the surgical intensive care unit (SICU). While in SICU, the plaintiff's decedent's medical condition further deteriorated. It is claimed, inter alia, that blood products were not timely and sufficiently administered, causing Darla Hall to go into cardio/pulmonary arrest and suffer irreversible anoxic brain injury. On March 14, 2003, an exploratory laparotomy was performed on Darla Hall. Darla Hall died on April 19, 2003.

The moving defendant, Robert D. Barraco, M.D., seeks an order granting summary judgment dismissing the complaint asserted against him on the basis that he did not depart from good and accepted medical practice during his care and treatment of the plaintiff and that the injuries the plaintiff's decedent suffered were not proximately caused by any care and treatment rendered by him.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage, Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [1998], *app denied,* 92 NY2d 818. To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury, *see,* Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [1996]. Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury, *see,* Fiore v Galang, 64 NY2d 999 [1985]; Lyons v McCauley, 252 AD2d 516 [1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [1994].

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [1979] and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [1981]. Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment

in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

In support of this application, the moving defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings; defendant's answer; plaintiffs' bill of particulars; copy of medical records; a copy of the transcript of the examination before trial of Robert Barraco, M.D.; and the affirmation of Michael Leitman, M.D., defendant's medical expert.

Dr. Robert Barraco testified at his examination before trial that he is board certified in surgery, surgical critical care, and hospice and palliative medicine, and he was on the staff of Stony Brook University Hospital from 1999 through 2004. However, he was not sure if he was an employee of Stony Brook University Hospital or a surgical group which was the primary surgical group for Stony Brook Hospital. He could not remember the name of the group. Dr. Barraco stated Darla Hall was admitted to Stony Brook University Hospital pregnant with twins for which she underwent a cesarean section, later followed by a hysterectomy, and that she came under his care on March 11, 2003 when she was admitted to the surgical intensive care unit about 2:00 or 2:30 in the afternoon, still intubated, tracking with her eyes. He stated that she possibly appreciated his presence in the room when he first saw her. He did not write a note at that time. She had, he stated, by one report, a large blood loss but was doing very well, and the intra-operative hemoglobin report was acceptable. He had discussions with the obstetrics attending, Dr. Porte, or one of the obstetrical team, who advised him that Ms. Hall lost a significant amount of blood due to post-partum hemorrhage and placenta accretea, and that a total hysterectomy was done and that thereafter, there were no other surgical sources of bleeding after the surgery. He spoke with the anesthesia attending, Dr. Steinberg, who advised that Mrs. Hall lost 2,500 to 3,500 cc's of blood since her deliveries but not intra-operatively, the intra-operative hemoglobin was 20 and hematocrit 22, that Mrs. Hall received three units of blood and that she did not feel it was necessary to give the three units of blood that were additionally ordered as she was doing well.

Dr. Barraco examined Ms. Hall at about 4:00 p.m. and found her to be arousable and her vital signs to be stable. His note indicates life-threatening hemorrhage, check H&H (hemoglobin and hematocrit) and coags (blood coagulation), if not require (sic) more volume, wean, extubate. He stated Mrs. Hall was to be given a couple units of FFP (fresh frozen plasma) that had already been ordered and that he would then he would check laboratories to see if she required more. Her physical status would be watched. He testified that obvious signs of coagulation problems would be bleeding from IV sites and surfaces, a drop in blood pressure, and increased heart rate due to hypovolemia. He did not write any orders at 4:00 p.m. nor did he verbally relay orders to the resident, but did indicate to the nurse in the unit, Jason Rotunno, that he wanted a whole panel of SICU labs (blood work). It was his opinion that Mrs. Hall was not actively bleeding at that time. He left SICU after the 4:00 p.m.examination to attend an unmandated symposium about social work at the hospital and stated he advised the staff that he would return at 7:00 p.m. The resident who had been on earlier was scheduled to leave at 5:00 p.m. and was replaced by a surgical resident, but he did not know if it was a first or second year resident. He testified he was reachable by pager and that no one called him between 5 and 6 p.m.

Dr. Barraco noted that Plaintiff's Exhibit 4 dated March 11, 2003 at 5:05 p.m. indicates "M.D. aware" and an order of 2U (units) PRBC (packed red blood cells) was ordered, waiting for blood arrival.

He did not know who wrote the order and there were no other attending surgical intensivists present or accountable to write the order. The note at 6:30 p.m. indicates the blood had still not arrived on the floor. No further intervention was given. At 7:20 p.m., he received a stat page while he was in his private office across the hall from the ICU. When he went to the SICU he found quite a panic and a commotion outside of Ms. Hall's room, and was advised Mrs. Hall had some periods of hypotension and had obviously arrested, and that she had been waiting for blood and had not received it at that point. He then directed the care of Ms. Hall, and stated that at that point, they were putting in a right subclavian. He testified that he asked them to get blood in the room even if it was uncross-matched. Someone was performing CPR. Mrs. Hall's heart beat returned to a life-sustaining level, but the resuscitation did not end that night.

A note written on March 11, 2003 at 8:15 p.m. by Dr. Barraco indicates prior to 6:00 p.m. Mrs. Hall had a blood pressure of 110/62 and at 6:00 p.m. her heart rate went up and the blood pressure gradually down; the resident gave an IV fluid bolus and ordered blood to stabilize Mrs. Hall. He was paged at 19:20 hours and came to SICU immediately to find Mrs. Hall in V fib and arrest for which ACLS protocol was performed to resuscitate her heart rate. His note further indicated "May be bleeding" since her hematocrit was16 after 3 units PRBCs. He stated he believed the resident who left at 5:00 p.m. gave the fluid bolus before she left and that the decrease of the hematocrit from the previous 22 down to 16 could have meant that there was bleeding between the two levels. He testified he had not asked anyone to call him upon receipt of the laboratory studies, but it was his understanding that the staff would have called him about the abnormal studies.

Dr. Baccaro testified that he did not recall specifically learning of a fibrin split with respect to Mrs. Hall and that this would have been of importance as it could be indicative of abnormal clotting. He stated disseminating intravascular coagulation (DIC) is where the clotting cascade does not work normally, and there may be a tendency to bleed without resolution, caused by many things, including post-partum hemorrhage or any sort of major bleeding that has been going on for a period of time. He stated he did not recall Mrs. Hall having been diagnosed with DIC, and although he gave her blood products including FFP-clotting factors, he did not recall if it was specifically for DIC.

Dr. Barraco testified that hemorrhagic shock occurs when there is enough bleeding to cause a decreased perfusion to the tissues, but Mrs. Hall was not experiencing hemorrhagic shock when he first examined her at about 2:30 to 2:45 p.m. on March 11, 2003. Although her urine output was low, her vital signs were normal. He stated the low urine output could mean either hemorrhagic shock, or an inadequate volume resuscitation even of just regular fluids; that her base deficit was minus one which speaks a little towards being actively in shock or that she had hemorrhaged and was recovering from shock, but he did not have sufficient evidence to determine entirely that she was in shock at that point in time. At 4:00 p.m. he felt her vital signs were stable and that she was not experiencing hemorrhagic shock which would be indicated by low urine output, later tacchycardia and hypotension.

Dr. Barraco testified that upon admission to SICU, Mrs. Hall was noted to have hypothermia with a temperature of 93 degrees for which a heating blanket was applied. Dr. Barraco testified there was mild hypotension which could indicate decreased perfusion. He opined that Ms. Hall was not actively bleeding between 2:00 and 2:30 p.m. on March 11, 2003 as her vital signs were stable and her belly was not distended. He did not order any blood transfusions between 2:30 and 4:00 p.m. as her vital signs were

normal, and her hematocrit was 22. When he did not receive the results of the blood tests he ordered upon Ms. Hall's admission to SICU by 4:00 pm, he did not go into the computer to get them and said it was understood that it was certainly the residents' and the nurses' responsibility to obtain the test results. He also testified that upon admission there were no tests performed to determine Mrs. Hall's cardiac output. He also testified that it was a medical judgment that he did not place a CVP line (central venous pressure line) upon admission of Mrs. Hall to the SICU.

Dr. Michael Leitman, Dr. Barraco's expert, testified that he is licensed to practice medicine in the State of New York and is board certified in Surgery and Surgical Critical Care. It is his opinion with a reasonable degree of medical certainty that the care and treatment rendered to the plaintiff's decedent, Darla Hall, by Dr. Barraco, was at all times within good and accepted standards of medical practice and that the injuries suffered by her were not in any way proximately caused by the care and treatment rendered to her by Dr. Barraco.

Dr. Leitman set forth that Mrs. Hall's condition was stable when she was admitted to SICU and that the care and treatment rendered by Dr. Barraco once she was admitted to the SICU was within good and accepted medical standards of medical care. He states that on March 11, 2003 from 2:40 p.m until 4:00 p.m., that Dr. Barraco properly monitored her blood pressure, pulse and vital signs, and that SICU laboratory panels were ordered. At 4:00 p.m when Dr. Barraco left the SICU to attend a symposium, he left Ms. Hall in the care of the SICU residents and nursing staff as he was not required to be present continuously, and that he left instructions to contact him via his pager should the patient's condition change. While Dr. Barraco was gone from SICU, Dr. Leitner states that Mrs. Hall was not under Dr. Barraco's direct care and her condition began to deteriorate. Laboratory studies were returned which showed that the patient's blood volume was decreasing. Therefore, blood products were ordered by the residents, but were not timely received in the ICU, and the nurse in SICU failed to make sure the blood was timely obtained and administered. Thereafter, Mrs. Hall arrested about 7:15 p.m. Dr. Barraco was not contacted until 7:20 p.m. at which time he learned of the arrest, helped to resuscitate her, but that she suffered irreversible anoxic brain injury. Over the course of the next few days Mrs. Hall was closely monitored in the SICU, an exploratory laparotomy was considered by Dr. Barraco, but given the patient's condition, it was not believed that surgical intervention would be beneficial. Dr. Barraco performed the exploratory laparotomy on March 14, 2003 and evacuated clots, changed packs for hemostasis, ligated bleeding vessels and performed a temporary abdominal closure. Dr. Leitner states these procedures were timely and appropriately performed given Mrs. Hall's medical condition.

Based upon the foregoing, there are factual issues presented in the moving papers which preclude summary judgment. Dr. Barraco testified that he was the consulting physician and that Dr. Porte, the obstetrician, was the attending physician for Ms. Hall while she was in SICU. Defendant's expert, Dr. Leitman, set forth in his affirmation that Dr. Barraco was the attending physician, and that allegations regarding any failure by Dr. Barraco to alert the attending physician of the patient's condition are without merit. He further states that Dr. Barraco was an attending physician at Stony Brook University Hospital at the time of Darla Hall's admission and as such, was not responsible for the care and treatment rendered by other agents, servants, employees and associates of the hospital. However, Dr. Barraco testified that it was his responsibility as an attending physician in the surgical intensive care unit to oversee the care of the surgical ICU patients and to oversee the performance of the residents and students assigned to the

rotation. Dr Barraco further testified that he was responsible as the primary decision-maker for the medical care and treatment of the SICU patients. Orders written by the residents would be under his oversight.

Further factual issues are raised in the moving papers as Dr. Barraco testified that Mrs. Hall was not experiencing hemorrhagic shock when he first examined her at 2:30 to 2:45 p.m. on March 11, 2003 and although her urine output was low, her vital signs were normal. He stated the low urine output could mean either hemorrhagic shock, or an inadequate volume resuscitation even of just regular fluids; that her base deficit was minus one which speaks a little towards being actively in shock or she had hemorrhaged and was recovering from shock, but he did not have sufficient evidence to determine entirely that she was in shock at that point in time. Dr. Leitman states in a conclusory manner that Dr. Barraco appropriately monitored and treated Mrs. Hall from the time she was admitted to the SICU until he left at approximately 4 p.m., however, Dr. Leitman does not address the scant amount of or lack of urine output demonstrated by Mrs. Hall during that time and whether it was indicative of some stage of hemorrhagic shock upon admission to the SICU and whether it warranted any treatment. The SICU note submitted by the moving defendant indicates there is scant bloody urine draining from the foley catheter. The consultation note of Dr. Porte on March 12, 2003 indicates that following the hysterectomy, she continued to have some "oozing." Dr. Leitman does not address the presence or the significance, if any, of the scant bloody urine and the continued oozing and whether or not this is indicative of a clotting problem related to the previous hemorrhage or that she was beginning to have signs and symptoms of hemorrhagic shock or DIC which Dr. Barraco did not know if he was treating her for when giving the fresh frozen plasma shortly after her admission to SICU. Nor does Dr. Leitman opine whether or not the CVP line (central venous pressure line) should have been inserted. Dr. Barraco testified that the CVP line would be used to administer fluids, to acquire a pressure in the central veins of the body such as the superior vena cava or atrium, and to draw blood from, but he did not consider the use of one prior to 4 p.m. Central access was not obtained until after the resuscitation efforts were started pursuant to the hospital record.

Based upon the foregoing, it is determined that the defendant's expert has set forth in a very broad, vague and conclusory manner that Dr. Barraco did not depart from accepted standards of medical practice in his care and treatment of Darla Hall. He has not set forth the appropriate standards of care to demonstrate how Dr. Barraco complied with the same. Accordingly, Dr. Barraco has not established prima facie entitlement to summary judgment dismissing the complaint as asserted against him.

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff, *see*, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [1997]. Here, where the defendants have not established prima facie entitlement to summary judgment, the burden has not shifted to the plaintiffs to raise a triable issue of fact. However, it is determined that the plaintiff done so.

Plaintiff's expert, duly licensed to practice medicine in the State of New York, is board certified in internal medicine with a sub-certification in pulmonary disease and critical care medicine, sets forth that

on March 11, 2003, Darla Hall underwent delivery of her twins by caesarean section followed by the development of post-operative bleeding for which and emergent hysterectomy was performed. She lost an estimated 3700 mls. of blood and received three units of packed red cells. She was kept intubated and on mechanical ventilation for concerns that she may not remain stable, was transferred to SICU where vital signs were to be monitored and recorded every hour, physicians were to be notified in the event of any changes in the blood pressure, heart rate or urine output parameters suggestive of continued bleeding. By 3:00 p.m., two units of fresh frozen plasma had been infused, at 3:20 p.m. sedation and pain medication were administered, and at 3:37 p.m. Darla Hall's heart rate was noted to have increased to 101. She had been attended to by Dr. Barraco from about 2:00 p.m. to 4:00 p.m. Subsequent to his leaving, her hemodynamic condition continued to worsen with increases in heart rate and decreases in blood pressure and the absence of urine production, until 7:18 p.m. when she suffered cardiac arrest from which she was successfully resuscitated with chest compressions, cardioversion and aggressive fluid resuscitation. At 7:20 p.m. Dr. Barraco was called back to SICU. A series of maneuvers were instituted over the next few days to stop the continued bleeding and to assist her recovery from the hypotensive episode/cardiac arrest.

Plaintiff's expert opines that Dr. Barraco had a duty to assure that Mrs. Hall was clinically stable before leaving her bedside, and that he left her when her clinical condition was deteriorating. Upon presentation to SICU, her heart rate was normal and the blood pressure was stable, but there was evidence of inadequate organ perfusion based on reduction of urine output as indicated in the record. By 3:37 p..m., when Dr. Barraco was still present, the urine output had not improved, the heart rate was increasing reaching 101 and exceeding the parameter for which physician notification was ordered. Plaintiff's expert opines that the absence of urine output was an early indicator of the ongoing bleeding and the subsequent instability in the patient's status, and that Dr. Barraco departed from the standard of care by leaving the ICU when he should have first addressed the clinical signs of bleeding that were obviously present and available to him.

Plaintiff's expert opines that the massive blood loss suffered by Mrs. Hall was only partially replaced by the previous blood transfusions and that Dr. Barraco departed from accepted standards of care by leaving the unit without guiding the ancillary health care personnel in choosing the correct amount of fluid to be replaced and by only suggesting "monitoring" of the volume status.

Plaintiff's expert further opines that Dr. Barraco had an obligation as the critical care attending not to solely rely upon staff to call him, but instead, he should have proactively contacted the SICU to check up on his patient during the prolonged period he was absent from the SICU.

Plaintiff's expert further opines that the significant departures from the standard of care attributable to Dr. Barraco had a direct consequence on the patient's continued deterioration and death.

Jason Rotunno, R.N. has opposed the motion of Dr. Barraco, and has also raised triable issues of fact to preclude summary judgment in this action. Jason Rotunno testified that he is a registered professional nurse licensed to practice nursing in the State of New York, and last worked at Stony Brook Hospital on March 11, 2003 in surgical intensive care. He stated Darla Hall became a patient of his on March 11, 2003 in SICU from the surgical birthing room, and was on a ventilator as a stable patient. She lost considerable blood, which he estimated to be about four liters. The attending doctors were with Mrs.

Hall when she arrived with Dr. Barraco who helped transport her, and then they dispersed, at which time he did his assessment of her. He described her as somewhat responsive but sedated, vital signs were stable and she was very hypothermic with a temperature of 93 degrees for which a warming blanket was applied. Her blood pressure was 107/61, heart rate 67, and respiratory rate 16. Scant bloody urine drainage was noted in the bag along with light vaginal bleeding. Routine blood work was ordered, but he had a difficult time getting access because she didn't have much blood volume in her system and they had to get IV fluid into her. Her IV fluid was wide open. Her hemoglobin was 7.2 and hematocrit was 23.3 according to blood work done prior to admission to SICU. It was 5.9 and 17.7 respectively as noted at 5:00 p.m. No blood work was done before that specimen as they had difficulty drawing blood from her. A coagulation profile was also drawn at that time.

Nurse Rotunno further states that upon admission, there was no order to transfuse Mrs. Hall with any blood products, but fresh frozen plasma was ordered at 2:45 p.m. The first unit arrived at 2:48 p.m. and was given and the second unit was started at 3:00 p.m. He told the residents Mrs. Hall's blood pressure at 5:05 p.m. was low at 63/21 and that she needed blood products based on the blood test results. They ordered an IV bolus and two units of packed red blood cells at 5:30 p.m., but the blood was not ordered stat. He had difficulty obtaining blood needed to perform the blood tests ordered and advised the resident. Three nurses attempted to draw the blood. At 6:00 p.m., Mrs. Hall's blood pressure was 63/21 and her heart rate was 130, however, the blood for the transfusion was not hung until 7:00 p.m. He left the unit at 7:00 p.m. at the end of his shift.

Susan McGrath, a registered nurse working in charge of the SICU at Stony Brook University Hospital during the 7:00 a.m. to 7:30 p.m. shift on March 11, 2003, testified that a progress note written by Jason Rotunno at 5:05 p.m. indicated that Mrs. Hall's H & H were 5.9 and 17.7 and that the M.D. was aware. At 5:05 p.m., Mrs. Hall's blood pressure was 88/48, which she considered hypotensive. Two units of packed red blood cells were ordered at 5:23 p.m., but it was not ordered stat, which meant that it had to be given within one hour; urgent was within two hours and routine was within four hours. The first unit of packed red cells was administered at 7:15 p.m. Another nurse in the SICU, Marie Alercon, noted that she was unable to obtain Mrs. Hall's blood pressure by monitor cuff, bradycardia of greater than 50 and less than 60 was noted, then v-fib (ventricular fibrillation) started, oxygen saturation levels could not be obtained, and a code was called. She also testified that at 8:15 p.m., Dr. Barraco indicated in his note that Mrs. Hall's hematocrit was 16 after three units of packed red blood cells and that she may be bleeding.

In that Nurse Rotunno had difficultly obtaining the blood needed for the blood work ordered, and in that there was an alleged delay in obtaining the blood to be administered for the transfusions, factual issues are raised concerning Mrs. Hall's blood volume, whether fluid replacement was being properly monitored and treated as addressed by the plaintiff's expert in his affirmation, and whether the CVP line should have been placed earlier.

Based upon the foregoing, the plaintiff has demonstrated the existence of a triable issues of fact to preclude summary judgment.

Dr. Barraco has submitted a Reply containing an additional affirmation from Dr. Leitman wherein new issues are raised which were not addressed in Dr. Leitman's affirmation submitted with the moving

papers, and wherein Dr. Leitman sets forth his disagreements with the plaintiff's expert's qualifications and opinions. Although the plaintiff opposes this further expert submission, it is determined that where the motion papers present a credibility battle between the competing experts, summary judgment is appropriately denied as credibility issues are to be left for the jury to determine resolution, and where conflicting medical expert opinions are presented denial of summary judgment is proper, see, Barbuto v Winthrop University Hospital et al, v Klein et al, 305 AD2d [2003].

Accordingly, motion (004) by the defendant Dr. Barraco is denied.

Dated: March 27, 2009

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION,**