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SHORT FORM ORDER

INDEX No. 08-21263
CAL. No. 10-00028-MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-15-10 (#001)
MOTION DATE 5-24-10 (#002)
MOTION DATE 5-28-10 (#003)
ADJ. DATE 8-16-10
Mot. Seq. # 001 - MG
002 - MG
003 - MD

TATIANA DOKAS, deceased, by VASSILIKI GEORGIADOU, as Administrator of her estate and VASSILIKI GEORGIADOU, individually,	SALENGER SACK KIMMEL & BAVARO, LLP Attorney for Plaintiff 233 Broadway, Suite 950 New York, New York 10279
Plaintiff,	FUMUSO, KELLY, DeVERNA, SNYDER, et al. Attorney for Defendants Rengarajan & John T. Mather Memorial Hospital 110 Marcus Boulevard Hauppauge, New York 11788-3704
- against -	
USHA RENGARAJAN, M.D., KIMBERLY E. FENTON, M.D., ADELAIDE W. DURING, D.O., IVY I. BOYDSTUN, M.D., LAURA E. HOGAN, M.D., STEVEN PERLMUTTER, M.D., BRIAN DURKIN, D.O. and JOHN T. MATHER MEMORIAL HOSPITAL,	KELLY, RODE & KELLY, LLP Attorney for Defendants Fenton, Boydstun, Perlmutter & Durkin 330 Old Country Road, Suite 305 Mineola, New York 11501
	ANDREW M. CUOMO, ESQ., Attorney General By: Bridget E. Farrell, Esq. Attorney for Defendants During & Hogan 120 Broadway New York, New York 10271
Defendants.	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (#001) for summary judgment by Adelaide W. During D.O. and Laura E. Hogan M.D. dated May 3, 2010and supportingpapers numbered 1-17 ; (2) Notice of Cross Motion (#002)by Usha Rengarajan and John T. Mather Memorial Hospital dated April 30, 2010 and supporting papers 18-28 (including Memorandum of Law; and (3) Notice of Cross Motion (#003) by Kimberly E. Fenton M.D., Ivy I Boydstun, M.D., Steven Perlmutter, M.D. and Brian Durkin, M.D. dated May 4, 2010; (3) Affirmations in Opposition numbered 49-50, 51 -52; 53-54; 55-56; and 57-72; (4) Reply Affirmations numbered 73-74; 75-76; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by the defendants Adelaide W. During, D.O. and Laura E. Hogan, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against is hereby granted and the complaint asserted against them are hereby dismissed with prejudice; and it is further

ORDERED that this motion (002) by the defendants Usha Rengarajan and John T. Mather Memorial Hospital pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against them is hereby granted and the complaint asserted against them is dismissed with prejudice; and it is further

ORDERED that this cross-motion (003) by the defendants Kimberly E. Fenton M.D., Ivy I. Boydstun, M.D., Steven Perlmutter, M.D. and Brian Durkin, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the plaintiffs' complaint is hereby denied.

This is an action for medical malpractice with causes of action for negligence, wrongful death; negligent hiring; and a derivative claim asserted on behalf of the deceased infant plaintiff Tatiana Dokas, by Vassiliki Georgiadou as Administrator of her Estate, and Vassiliki Georgiadou Individually. Letters of Administration were issued January 17, 2008 to Vassiliki Georgiadou who was appointed Administrator of the Estate of Tatiana Dokas by the Surrogate's Court of the County of Suffolk. It is claimed that the defendants were negligent in providing medical care and treatment to the plaintiff's decedent, Tatiana Dokas, causing her death on February 3, 2007.

In motions (001), (002) and (003), the defendants are moving for summary judgment dismissing the complaint on the basis they bear no liability in this action.

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, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 538 NYS2d 843 [2nd Dept 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, 435 NYS2d 340 [2nd Dept 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, 416 NYS2d 790 [2nd Dept 1979]).

In support of motion (001), the defendants, Adelaide W. During, D.O. and Laura E. Hogan, M.D., have submitted, inter alia, an attorney's affirmation; the affirmation of Bruce Greenwald, M.D.; copies of the summons and complaint, the moving defendants' answers, plaintiff's verified bill of particulars; uncertified copy of the Mather T. Memorial Hospital record for Tatiana Dokas; certified copy of the Stony Brook Hospital

record for Tatiana Dokas for the February 3, 2007 admission; and copies of the transcripts of the examinations before trial of Ivy Isabel Boydstun, M.D. dated June 8, 2009, Laura E. Hogan, M.D. dated July 9, 2009, Adelaide W. During, M.D. dated June 25, 2009, Kimberly Fenton, M.D. dated June 11, 2009, and Cynthia Kaplan, M.D. dated November 6, 2009.

In support of cross-motion (002), the defendants Usha Rengarajan and John T. Mather Memorial Hospital have submitted, inter alia, an attorney's affirmation; affirmation of Anthony Musalish, M.D.; copies of the summons and complaint, answers of John T. Mather Memorial Hospital with various discovery demands, the answer of Usha Rengarajan, M.D. with various discovery demands, the plaintiff's bill of particulars; copy of the John T. Mather Memorial Hospital record for Tatiana Dokas for February 3, 2007; copy of the Stony Brook University Hospital record for February 3, 2007; an uncertified copy of the death certificate and report of the medical examiner for Tatiana Dokas; and a copy of the transcript of the examination before trial of Vassiliki Georgiadou.

In support of cross-motion (003), the defendants Kimberly E. Fenton M.D., Ivy I. Boydstun, M.D., Steven Perlmutter, M.D. and Brian Durkin, M.D., have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers served by the respective defendants and the answers served by John T. Mather Memorial Hospital, Usha Rengarajan, M.D., plaintiff verified bill of particulars for the moving defendants; copies of the transcripts of the examinations before trial of Usha Rengarajan, M.D. dated June 18, 2009, Ivy I. Boydstun, M.D., dated June 8, 2009, Kimberly E. Fenton M.D. dated June 11, 2009, Brian Durkin, M.D. dated July 29, 2009, Julie Yousseff, D.O. dated June 12, 2009, Laura E. Hogan, M.D. dated July 9, 2009, Adelaide W. During, M.D. dated June 25, 2009, Cynthia Kaplan dated November 6, 2009, and Steven Perlmutter, M.D. dated July 21, 2009; John T. Mather Memorial Hospital record of February 3, 2007 for Tatiana Dokas; Stony Brook University Hospital record of February 3, 2007; and the affirmations of Katherine Biagas, M.D. and William Schechter, M.D.

The plaintiff's decedent, Tatiana Dokas, was born on February 6, 2001 and died on February 3, 2007.

CYNTHIA KAPLAN, M.D.

Cynthia Kaplan, M.D. testified at her examination before trial to the effect that she is a physician licensed to practice medicine in the State of New York and is board certified in anatomic and clinical pathology and has special qualification in pediatric pathology. She was a physician at Stony Brook University Hospital on February 3, 2007. She indicated that Tatiana's date of death was February 3, 2007. She participated in the autopsy performed on February 6, 2007 and that Dr. Takhalov was the resident at the time who either dictated or indirectly typed the report. She reviewed the report and signed it, but did not know if she made substantive changes to the report. She had no independent recollection of the autopsy. Although the clinical report is considered, she states the pathology stands on its own. She stated that "probably viral syndrome" meant that there were complications of having been infected by a virus in the past. She believed the child died from heart failure. She found myocarditis upon microscopic examination of the child's heart. One of the most common causes of myocarditis is a viral syndrome. There were two syndromes she identified, one being interstitial pneumonia and the second was myocarditis. The presence of inflammatory cells in the heart was consistent with there being an infection. Inflammation in the heart and the presence of dead cells and enlarged cells indicate poor myocardial function. She did not remember if the child received any anti-viral drugs during her admission. She also found hypertrophy of the heart and the heart weighed 180 grams, whereas an otherwise healthy six year old's heart would weight 100 grams. Pulmonary congestion was present wherein the blood vessels within the lungs were expanded as they had more volume in them than the average lung. Pleural

effusion or fluid in the lungs was noted. Ascites, 600 cc's of clear, straw-colored fluid was found in the abdominal cavity which was not normal. She stated that the source could have been that "children in heart failure ... there is often fluid that comes through the liver and is exuded from the blood vessels and the lymphatic and the abdomen." Her liver was enlarged and weighed 770 grams, and for a normal healthy six year old would be below 500 grams normally. Her spleen weighed 100 grams, or the weight of an adult spleen. Fluid was found in the pleural space. Dr. Kaplan's autopsy report listed among the final diagnoses as neuronal necrosis acute multifocal. Dr. Kaplan attributed it hypoxic-ischemic encelopathy, which could have been caused by the cardiac arrest. Thromobemboli acute in the pulmonary vessels were found which she attributed to DIC, disseminated intravascular coagulopathy, which she determined was acute and occurred close to the child's death. Dr. Kaplan further stated that the child was suffering from congestive heart failure prior to her death. She thought the child might have had the presence of a viral infection for at least a week due to the presence of hypertrophic cells in the heart, which takes several days. The magnitude of the enlargement of the heart suggest at least a week. She could not determine if there was an active viral infection or just the persistence of the reaction as the inflammation of the cells associated with viral infections often persist for longer than the active infection. It was her conclusion that the viral infection produced the myocarditis, and the interstitial pneumonitis. There was no evidence of a bacterial infection.

USHA RENGARAJAN, M.D.

Usha Rengarajan, M.D. testified at her examination before trial to the effect that she is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine, and board certified by the American Board of Physician Specialists in emergency medicine. In February 2007, she was employed as an attending physician in the Mather Memorial Hospital emergency department and was present on February 3, 2007 when Tatiana Dokas presented to the emergency room at 2:56 a.m. Upon examination, Tatiana was noted to be pale, had a normal blood pressure of 120/50, had abdominal tenderness and tachycardia or rapid heart rate. A CBC was obtained and revealed a white blood cell count of 19,900 which was considered elevated possibly indicative of some sort of infection. Her platelets were slightly elevated, blood sugar slightly elevated at 130, and her EKG revealed a sinus tachycardia of 170 with the normal rate for a six year old being 80-140. The chest x-ray showed bilateral interstitial infiltrates, and her oxygen saturation was normal at room air. A little cough was noted and her respirations were 16. She also had vomiting twice and complained of feeling nauseous. An abdominal x-ray was negative. Urine for culture and sensitivity was obtained. A blood culture was obtained x 2. Her liver function and kidney function tests were normal. Her temperature was 100, rectally, and was considered slightly elevated. Ceftriaxone, an antibiotic, was administered intravenously. Intravenous therapy of normal saline at 100 cc's per hour for two hours was commenced. Based upon laboratory results, she stated that there was no indication the child was dehydrated while at Mather Memorial. The trace ketones did not have any significance. She decided to have the child admitted to Stony Brook University Hospital due to the unexplained abdominal pain, bilateral lung infiltrates, tachycardia and elevated white blood cell count. Dr. Fenton's name was given to her as the contact at Stony Brook Hospital. At the time of her transfer at 5:45 a.m., Tatiana had received about 300 cc's intravenous fluid. It was Dr. Rengarajan's opinion that at the time the child was transferred, her condition was stable but she need further management under the care of a pediatrician.

JULIE YOUSSEF, D.O.

Julie Yousseff, D.O. testified at her examination before trial to the effect that she just received her license to practice medicine in the State of Massachusetts in 2009. In February 2007, she was employed at Stony Brook University Hospital as a first year resident intern (PGY-1) and was assigned to the pediatric floor at 11 North. On February 3, 2007 she was on a Saturday call from 8 a.m until Sunday until about 9 a.m. Dr. Laura

Hogan was the senior resident. Dr. Jennifer Osipoff was the senior resident who picked the child up from Mather Hospital and gave a signout to them. Dr. Osipoff wrote the 6:30 a.m. progress note after transferring Tatiana from Mather Memorial Hospital for pneumonia with tachycardia.

LAURA E. HOGAN, M.D.

Laura E. Hogan, M.D. testified at her examination before trial to the effect that she is currently licensed to practice medicine in the State of New York and became board certified in pediatrics in 2007. In February 2007, she was the 11th floor senior resident at Stony Brook Hospital and was working 7 a.m. Saturday to 7 a.m. Sunday. On Saturday morning, Tatiana Dokas came under her care. It was decided to give Tatiana intravenous fluids and watch her heart rate to see if it responded to fluids. A plan for treatment was made and implemented, including administration of fluids, after she first checked with Dr. Boydstun, her supervising attending physician. Dr. Hogan stated that Tatiana looked great and was playful, getting up and talking. She was a gymnast and her Mom was the gymnast coach who was surprised Tatiana was in the hospital as Friday she was doing well, was at gymnastics and was looking forward to her birthday party on Monday.

Dr. Hogan stated no consults were considered and the subject of transfer to the pediatric intensive care unit (PICU) did not come up. She examined the child at 11:00 and found she was still had tachycardia of 160's, capillary refill two to three seconds, and oxygen saturation was greater than 95% on room air with no tachypnea, lungs were clear to ascultation, with good air entry, and she was alert and drinking and eating, and vomited once. She considered the increase in the heart rate due to dehydration and normal fluctuation. Tatiana had not voided after the 9:00 bolus of intravenous fluid. Another normal saline bolus was ordered in conjunction with Dr. Boydstun at 11:00. PICU transfer was not considered at that time as the patient has to be very sick, require some sort of intervention that cannot be done on the floor, or require a level of monitoring that cannot be done on the floor, and she did not appear sick. At that time she was not concerned with fluid overload and only became concerned about fluid overload after the resuscitation as Tatiana as she seemed to decompensate after the last bolus of intravenous fluid. Dr. Hogan testified that an overload of fluid can cause respiratory distress and that fluid overload is caused by either too much fluid in or not enough fluid out.

At 1:45 p.m. she was called to see Tatiana as she was requiring oxygen. Her oxygen sats were in the high 80's on room air but to 95% with the mask. Her heart rate was still 160's and respiratory rate in the 50's. Tatiana began having increased respiratory distress and was screaming with abdominal pain. Dr. Fenton and Dr. Boydstun were made aware of Tatiana's condition, and after discussion with them, it was decided by Dr. Boydstun and Dr. Fenton (who was on the phone) to transfer Tatiana to PICU. Dr. Hogan testified she told Dr. Fenton she was afraid Tatiana was going into shock, that she had been given three boluses of intravenous fluid, and was still very tachycardic, now had an oxygen requirement, her blood pressure was down, and she now looked sick. Dr. Hogan testified that Dr. Fenton thereafter agreed with giving a further bolus of normal saline intravenously, which was to be pushed as rapidly as possible. The bolus was given by fast push by the transport resident, Dr. Todman, as Tatiana was being transferred to PICU. She accompanied Tatiana on the transfer. She stated Tatiana did not look great, was breathing harder and faster, her color was not as good, but she was still talking and interactive and asking if she could eat. Tatiana went into arrest within five to ten minutes of arriving at PICU and was coded.

IVY ISABEL Boydstun, M.D.

Ivy Isabel Boydstun, M.D. testified at her examination before trial to the effect that in February 2007, she was licensed in the State of New York and the State of Texas to practice medicine. She became licensed to practice medicine in the State of Florida in 2008. She practiced in pediatric nephrology and general pediatrics,

and was board certified in both areas. She worked at Stony Brook University Hospital from 2001 until 2008 as an employee of the State University and cared for patients at the hospital. She remembered Tatiana Dokas as happy and talkative, interactive and playful, and excited about her birthday coming up, and wanted to have her nails done. She was Tatiana's attending physician from the time she was admitted to the hospital on 11 North until she was transferred to PICU. The resident, Dr. Osipoff, took care of the child during transportation from Mather Hospital to Stony Brook Hospital, and until about seven or eight in the morning. Then Dr. Hogan took over and was the senior resident taking care of Tatiana. Initially, she was advised by telephone by Dr. Osipoff that the child was in no distress, her abdominal pain resolved, she had an elevated heart rate and a diagnosis of pneumonia. Because her condition was stable, and the only concern was that of tachycardia at 160 beats with some concern for dehydration, Tatiana was not admitted to PICU. With Dr. Osipoff, she discussed pulse oximetry monitoring, fluid resuscitation for dehydration, and antibiotic therapy. The child had no fever, but her chest x-ray was suggestive of an infection, and the white blood cell count was elevated, however, the differential was more suggestive of a viral infection. A normal heart rate for a child that age is 100 and normal pulse oximetry is above 93%. She discussed with Dr. Hogan the intravenous bolus of fluid and improvement of the heart rate with the bolus, and that if her heart rate did not improve, she began to deteriorate, or had an increase in her respiratory problems, she would be transferred to PICU.

Dr. Boydstun first saw the child at 10:50 on February 3, 2007 and wrote her note at 12:45. She reviewed the chest x-ray obtained at Mather Memorial Hospital which she stated was relatively normal with a question of some increased markings in the right lung area consistent with a possible pneumonia. Breath sounds were clear upon examination. Her heart rate was 140 and her capillary refill was three seconds, with the normal being two seconds or less. There was no hepatomegaly or enlargement of the liver. She stated diagnostic results were consistent with dehydration; infection with increased white blood cell count, and electrolytes were normal. Blood cultures and urine cultures were obtained either at Mather or Stony Brook. Her plan was for hydration and continue fluid boluses until Tatiana's heart rate and perfusion improved, monitor her respiratory status, Ceftriaxone for pneumonia, and to follow with an abdominal exam. At 2:00 she was called by the resident, Dr. Hogan, who advised her that Tatiana suddenly developed a need for oxygen. She was concerned about her condition, so it was decided to transfer the child to PICU, but before Tatiana was transferred to PICU, she began decompensating. Intubation was not considered at that point as there was no indication. Tatiana was described as agitated, anxious, speaking, sitting up in bed, crying, responsive and breathing on her own. She had oxygen by nasal cannula and was saturating 94 to 98% when Dr. Boydstun accompanied her to PICU. She left the child with the PICU staff and then heard the announcement of the arrest about a half hour later and went to ICU to make sure appropriate personnel were there, then left again to go to the floor patients. She heard Tatiana arrested again, and went to PICU to see the family.

Dr. Boydstun stated that Dr. Hogan was treating Tatiana under her supervision as the attending physician and that Dr. Hogan did not fail to follow any of her instructions or orders in treating Tatiana, and did not make any independent medical decisions in treating Tatiana that were not approved by her.

ADELAIDE W. DURING, M.D.

Adelaide During, M.D. testified at her examination before trial to the effect that in February 2007 she was employed by Stony Brook Medical Center as a third year pediatric resident (PGY3), a three year program, a was assigned to the pediatric intensive care unit (PICU), and dictated the discharge summary for Tatiana Dokas. She did not see the child prior the her transfer from 11 North to PICU. According the I&O sheet, 1,745 cc's of IV solution was administered at Stony Brook prior to her transfer to PICU. The infant's output was 60 cc's and one unmeasured amount that was flushed in the toilet. At 2:15, the child's respiratory rate was in the 50's

indicating tachypnea.

She spoke to Dr. Hogan, the resident on 11 North, who indicated the child had tachycardia and tachnypea and there were concerns for impending shock. She was present upon transfer of Tatiana to PICU at 2:45 p.m. Tatiana's oxygen saturation upon arrival was 80 and she was cyanotic. The child coded at 2:45; she lost spontaneous respiration and developed seizure-like activity; followed by cardiac arrest. Dr. Fenton was the PICU attending but was not present upon the child's arrival, but arrived at 3:05 p.m. Anesthesiology was requested to come to the PICU. There were no other residents in the ICU at the time. A foley catheter was placed but no urine was obtained. Intravenous fluids were continued to be administered, and she was placed on a cardiac monitor. Initially they had difficulty obtaining her blood pressure. Delayed capillary refill was noted which she stated could be caused by hypovolemic shock and decreased tissue perfusion due to low fluids in the body or cardiac distress. An endotracheal tube was placed, but the tube was in the right-stem bronchi and should have been at the level of the carina.

Dr. During testified that at no time prior to the child's admission to Stony Brook or prior to her admission to PICU did she receive the diuretic Lasix or antiviral medication. She stated that the hospital record entitled pediatric antimicrobial prescription form indicates the first dose was administered 2/4/07, but the child was already dead. She ordered Dopamine to be given but did not know if it was administered. Dr. During stated Tatiana's admitting diagnosis was shock, r/o septic shock. She did not arrive at a differential diagnosis as to the cause of death, but arrived at a differential diagnosis upon her arrival to PICU: impending shock. When she dictated her discharge summary later that evening, she felt the child likely had viral myocarditis (based upon her discussions with the cardiologist and attending physicians), acute respiratory failure, oxidases, severe septic shock and cardiac arrest. She testified that she and Dr. Fenton discussed that the child has respiratory acidosis secondary to respiratory arrest, as distinguished from metabolic acidosis. She also testified that an overload of fluid can cause an enlarged heart.

KIMBERLY FENTON, M.D.

Kimberly Fenton, M.D.'s PICU attending interval note written on February 3, 2007 at 7:43:41 p.m. indicates to the effect that the 5 year old female was transferred from 11 North secondary to pneumonia, respiratory distress and poor perfusion with presumed septic shock. Dr. Fenton also notes that when she arrived at 15:05, the patient was in full cardiac arrest. After CPR, three doses of epinephrine and IV fluids, she returned to a spontaneous cardiac rhythm after about twenty five minutes. After a chest x-ray, the ET tube was pulled back 1 cm by anesthesia, who subsequently reintubated her with a cuffed ET secondary to a large air leak and hypercarbia. An epinephrine drip was started secondary to hypotension and poor perfusion, and a second cardiac arrest ensued but spontaneous circulation returned after a few minutes of CPR and multiple doses of epinephrine and calcium chloride were given. The arterial blood gases revealed severe metabolic acidosis. She remained hypotensive post arrest and epinephrine was increased and she was given an empiric dose of stress dose hydrocortisone and one unit of uncrossmatched blood. One unit of FFP was also administered secondary to a prolonged PT. A third cardiac arrest was experienced and epinephrine and calcium were administered without improvement of her condition. She expired at 17:20.

BRIAN DURKIN, D.O

Brian Durkin, D.O. testified at his examination before trial to the effect that he became licensed to practice medicine in the State of New York in 2005 and became board certified in anesthesiology in 2008. In February 2007, he was employed by Stony Brook University Department of Anesthesiology. On February 3, 2007, he was the on call, in-house anesthesiologist attending, and responded to the code for Tatiana, arriving

about 3:30, about four to five minutes after the code blue was called. Dr. Fenton was running the code. The child was not breathing on her own, so he passed a 5.0 uncuffed endotracheal tube between compressions.

Dr. Durkin testified that the carina is the breakout point of the right and left main stem bronchi, and that when an endotracheal tube is passed it should be at the level of the carina or just above. When he intubated the child, he did not remember encountering any difficulty, and after intubation, hand ventilated the child with the bag with 100% oxygen. Breath sounds were heard bilaterally and none over the abdomen. He taped the endotracheal tube (ET). A portable chest x-ray was ordered to confirm the placement of the tip of the ET and position. That x-ray, completed at 3:25, revealed that the ET was at the orifice of the right main stem bronchi, which he stated was not the proper location, but it is not in the wrong place-just not in the optimum location.

After intubation he could not determine the pulse oximeter reading as to do so assumes a pulse and there was none. During the first twenty minutes, based upon the code sheet, there is no pulse recorded and the record indicates there is no pulse present from 14:55 to 15:07. However, there was a blood pressure which indicates there was a pulse, and if there was a pulse, then there should be an O2 sat reading, which he states was not documented. He testified that the end tidal CO2 positive was indicative that CO2 being produced by the body is being expelled by the lungs, which is an indication that the tube is in the right place. He noticed the air leak around the ET and determined that the initial tube needed to be replaced with a cuffed tube, which he did at about 3:35. After completion, he listened to the lungs and heard bilateral sounds on both sides, no sounds in the stomach, and there was end tidal CO2 that was used to detect that the tube was in the trachea. He was satisfied with the position of the tip of the endotracheal tube at that time. A second chest x-ray was ordered at 3:40 and was completed at 4:28, but that x-ray indicated that the tip of the endotracheal tube was again in the right main stem bronchus, which was not the optimal position. However, he stated that just putting the chest x-ray on the patient will move the endotracheal tube. He had left the code after that at about 4:00 and stated the child had a pulse, a blood pressure and a heart rhythm that was sustainable to life. He returned after the child died. He acknowledge that the record indicated that at 3:45 and 3:50 there were no recordings for heart rate, blood pressure and respirations.

STEVEN PERLMUTTER, M.D.

Dr. Perlmutter testified at his examination before trial to the effect that he is a physician licensed to practice in the State of New York and is board certified in radiology, nuclear medicine, and diagnostic radiology with special competency in nuclear radiology. In 2007 he was an attending at Stony Brook University Hospital, and although he did not personally see Tatiana, he reviewed three radiographs, reviewed the reports of a resident in radiology and signed those reports, and then individually reviewed a radiograph. He reviewed the film of February 3, 2007, 3:35 chest x-ray, signed by him at 5:57, which indicates that the ETT is at the orifice of the right mains tem bronchus, which he stated is not the optimal location as it would be preferred to have it a little bit above the bronchus. The cardiomediastinal silhouette was enlarged, indicating possibly that the heart could be enlarged, there could be pleural effusion around the heart, or there could be something else in the mediastinum causing enlargement. Bilateral infiltrates were also noted indicating something in the lung, either fluid or infection or a combination or something else. He was not aware of any other chest x-rays or studies done at Stony Brook University Hospital. Concerning his reading of the February 3, 2007 abdominal film, there was a suggestion that the liver was enlarged. A third imaging study of February 3, 2007, 4:28, was reviewed on February 4, 2007 at 3:00 p.m. but he did not know if any other physician reviewed it prior to then. The report states "the endotracheal tube tip is in the right main stem bronchus." He indicates that is not the optimal location, but he had been advised the patient already expired.

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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, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [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, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [1994]). In a medical malpractice action, the moving defendant's papers must set forth everything that the defendant does during the treatment of the patient and indicate that the treatment is not the proximate cause of the patient's complaints. A defendant meets this burden by establishing, as a matter of law, that there was no duty of care breached to the patient (***Kleinert et al v Begum,*** 144 AD2d 645, 535 NYS2d 43 [2nd Dept 1988]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, 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, 776 NYS2d 907 [2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.,*** 242 AD2d 282, 660 NYS2d 739 [1997]).

Turning to motion (001), Adelaide W. During, D.O and Laura E. Hogan, M.D. seek summary judgment dismissing the complaint asserted against them. Bruce Greenwald, M.D. has submitted a physician's expert in support of the application.

Bruce Greenwald, M.D. sets forth that he is a physician licensed to practice medicine in the State of New York and is board certified in pediatrics with a sub-board in critical care medicine. He opines with a reasonable degree of medical certainty that Dr. During and Dr. Hogan were at all times physicians in training as residents in the field of pediatrics and all treatment in question was performed under the direction and supervision of Dr. Boydstun and Dr. Fenton and was within the standard of good and proper medical care in 2007 as performed by residents. Both During and Hogan were obligated to report and consult on all treatment regarding Tatiana to their attending physicians and that both Dr. Boydstun and Dr. Fenton testified that During and Hogan acted as directed by them, and that they made no independent decisions regarding the care of the child. Dr. Greenwald opines that there were no independent acts of negligence by During and Hogan.

Based upon the foregoing, Dr. During and Dr. Hogan have each established prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against them and the plaintiff has failed to raise a factual issue to preclude summary judgment.

A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (***Muniz et al v Katiowitz, et al,*** 49 AD3d 511, 856 NYS2d 120 [2nd Dept 2008]). A private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the

private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (***Freeman et al v Mercy Medical Center et al,*** 2008 NY Slip Op 31337U; 2008 Misc Lexis 10141 [Supreme Court of New York, Nassau County]). Here the plaintiff's expert has not demonstrated that neither Dr. Hogan nor Dr. During, as residents, exercised independent medical judgment. Here the record supports that they were working under the supervision and control of their respective attendings, Dr. Boydstun and Dr. Fenton, and only acted within the scope relating to what care and treatment was approved by the attendings after consultation with them. Here the plaintiff has raised no factual issue to preclude summary judgment.

Accordingly, motion (001) by the defendants Adelaide W. During, D.O. and Laura E. Hogan, M.D., for summary judgment dismissing the complaint against them is granted and the complaint and cross-claims asserted against them are dismissed with prejudice.

Turning to motion (002) the defendants Usha Rengarajan and John T. Mather Memorial seek summary judgment dismissing the complaint against. In support of this motion, the moving defendants have submitted the affirmation of Anthony Mustalish, M.D.

Anthony Mustalish, M.D. has set forth in his affirmation to the effect that he is a physician licensed to practice in the State of New York and is board certified in preventive medicine and emergency medicine. He sets forth the plaintiff's condition and tests results while a patient in Mather Memorial Hospital emergency department from 2:15 a.m. to 4:45 a.m. The infant plaintiff was seen by Dr. Rengarajan. It is Dr. Mustalish's opinion with a reasonable degree of medical certainty that Dr. Rengarajan's evaluation of Tatiana and the care and treatment given by Dr. Rengarajan to Tatiana and by the staff of Mather Memorial Hospital was entirely appropriate and consistent with accepted standards of emergency room medicine. It is the responsibility of the emergency department physician and hospital to perform an appropriate initial evaluation, provide appropriate initial therapy, stabilize the patient and make arrangements for a timely referral for continued management by the appropriate medical specialty. In this circumstance, Tatiana was seen and examined by Dr. Rengarajan shortly after arrival to the emergency department. She obtained an appropriate history and physical examination. Given the complaints and findings, x-rays, EKG, replacement fluid, an intravenous line, cultures and laboratory testing was ordered and performed. By 4:00 a.m. the test results were back. The chest x-ray showed bilateral interstitial infiltrates of the lungs. She continued to have abdominal pain and the x-ray of the abdomen was negative. Her heart rate was elevated at about 166. Her white blood count was elevated. The child was appropriately transferred to Stony Brook University Hospital for admission and treatment.

Based upon the foregoing, it is determined that Dr. Rengarajan and Mather Memorial Hospital have established prima facie entitlement to summary judgment dismissing the complaint.

The plaintiff does not raise a factual issue to preclude summary judgment and the plaintiff's expert does not opine concerning the care and treatment rendered to the infant plaintiff by Dr. Rengarajan and Mather Memorial Hospital.

Accordingly, motion (002) is hereby granted and the complaint and cross-claims asserted against the moving defendants Rengarajan and Mather Memorial Hospital are dismissed with prejudice.

Turning to motion (003) wherein the defendants Kimberly E. Fenton M.D., Ivy I. Boydstun, M.D., Steven Perlmutter, M.D. and Brian Durkin, M.D. seek summary judgment dismissing the complaint, the defendants have submitted the affirmations of Katherine Biagas M.D. and William Schechter, M.D.

Katherine Biagas M.D. affirms that she is licensed to practice medicine in the State of New York and is certified in pediatric critical care medicine. She sets forth to the effect that the autopsy report indicates that the cause of the infant plaintiff's death was end stage heart failure secondary to myocarditis or dilated myopathy. Tatiana presented to the Emergency Department at Mather Memorial Hospital with abdominal pain and several episodes of vomiting without diarrhea and severe sinus tachycardia suggesting shock. Her laboratory results were most notable for an elevation in white blood cell count on her peripheral blood smear, and was thought to have possible pneumonia and dehydration. She was treated with antibiotics and intravenous fluids, and upon continuation of her shock state, was transferred to Stony Brook University Hospital on the morning of February 3, 2007, where she was admitted to the general pediatric ward. Dr. Biagas sets forth the course of some of the care at Stony Brook and the infant's transfer to the Pediatric Intensive Care Unit. It is her opinion that the cause of the infant's death was severe end stage heart failure. However, her opinion does not indicate the cause of the heart failure, although she notes the child was in previous good health, that there was some chronic inflammation suggestive of myocarditis upon microscopic examination of the heart, but the diagnosis of congenital dilated cardiomyopathy cannot be excluded. She states that Tatiana presented with tachycardia which is indicative of shock, which is a nonspecific diagnosis, and can be caused by septic shock or systemic infection or hypovolemic shock as with severe dehydration. The initial assessment at Mather Memorial Hospital and upon presentation to Stony Brook University Hospital was that Tatiana suffered from sepsis or pneumonia with possible dehydration from fluid loss. She discusses the general or generic treatment for shock and requirements for treatment with cardiogenic shock, and states Tatiana presented for medical care late in the course of her illness. Dr. Biagas states that Tatiana did not respond to treatment as expected and that Dr. Fenton made arrangements to transfer her to intensive care, which was appropriate. She states that review of the record indicates appropriate medications were administered, consultation with a cardiologist was sought and an echocardiogram was obtained.

Based upon the foregoing, it is determined that Dr. Biagas has not demonstrated prima facie entitlement to summary judgment for the moving defendants as she has not set forth the specific care and treatment by each of the defendants and does not opine that the specific care and treatment by each defendant did not depart from the proper standard of care. She does not opine that the infant was properly evaluated, tested and treated by each of the defendants, or that the infant's diagnosis was established or causes of her condition were set forth and ruled out. Any issues concerning the appropriateness of fluid replacement, fluid overload, the development of cardiomegaly and hepatomegaly are not addressed. Also, there is no discussion concerning the progression of the infant plaintiff's symptoms, the cause for her decompensation and the appropriateness of specific treatment for those symptoms. The affirmation sets forth opinions in general, conclusory terms, but does not address the specific care and treatment relating to each of the defendants. It is additionally determined that the plaintiff's expert raises factual issue which preclude summary judgment.

William Schechter, M.D. sets forth in his affirmation that he is a physician licensed to practice medicine in the State of New York and is board certified in anesthesiology, pediatrics, and palliative medicine with a sub-board certification in critical care medicine and pain management. Based upon his review of the medical records, and various deposition transcripts as set forth, he opines with a reasonable degree of medical certainty that the care and treatment rendered by Dr. Durkin, D.O. conformed to good and acceptable medical practice and standards of care in anesthesiology, and that none of the care rendered by Dr. Durkin constitutes a deviation or departure from the acceptable medical standards and that nothing Dr. Durkin did caused the plaintiff's decedent any harm or contributed to her death. Dr. Schechter states that Dr. Durkin arrived to see the infant after her arrest and that he did not cause her arrest or death. He appropriately and swiftly intubated Tatiana with an appropriately sized laryngoscope blade, chose an appropriately sized endotracheal trube (5.0) as the initial

tube, confirmed placement within the airway by capnometry and auscultation of bilateral breath sounds. Because of a large leak around the endotracheal tube, which is not uncommon, he appropriately changed the tube to a larger size and reconfirmed the position within the airway. Dr. Schechter sets forth that it is not uncommon to place an endotracheal tube deeper within the airway during an arrest to prevent accidental dislodgement, and it is PICU's responsibility to obtain a confirmatory x-ray and adjust the tube if deemed necessary. He stated it would be highly unusual for the laryngoscopist to wait for a confirmatory x-ray. The x-ray order time was 15:40 and the x-ray was performed at 16:48. The x-ray report by Dr. Perlmutter states the "tube tip is in the right mainstem bronchus", which Dr. Schechter states that even if a tube is in the mainstem bronchus, if 100% oxygen is being delivered, there should be enough collateral airflow to the contralateral lung to sustain life. He also states that the arterial blood gases at 16:44 indicates the absence of respiratory acidosis and that although the endotracheal tube is not "ideally positioned" it indicates that there is no evidence to indicate that there was any failure to ventilate or oxygenate despite sub-optimal tube placement. He further states that although the blood gases indicates a very significant alveolar-arterial oxygen gradient which is likely a consequence of cardiac failure and some intrapulmonic shunting and a significant pulmonary interstitial process triggered by the presumed viral infection, the blood gases indicate that the ventilation and oxygenation was adequate for resuscitation.

Dr. Schechter has not established prima facie entitlement to summary judgment dismissing the complaint against Dr. Durkin as there are factual issues raised in the moving papers. Although Dr. Schechter opines that the blood gases indicate the absence of respiratory acidosis to support his opinion that the placement of the endotracheal tube did not affect the oxygenation of the infant plaintiff, Dr. During testified that she and Dr. Fenton discussed that the child has respiratory acidosis secondary to respiratory arrest, as distinguished from metabolic acidosis. Additionally, the plaintiff's expert raises factual issues which preclude summary judgment being granted to Dr. Durkin.

Neither of the moving defendants' experts, Biagas nor Schechter, has set forth any opinion concerning the radiological care and treatment with regard to the defendant Steven Perlmutter, M.D. and have accordingly not demonstrated entitlement to summary judgment dismissing the complaint as asserted against him.

Accordingly, that part of motion (003) for summary judgment dismissing the complaint as asserted against Dr. Perlmutter is denied.

In opposing these motions, the plaintiff has submitted, inter alia, the affirmation of their expert physician. This affirmation and the opinions of plaintiff's expert expressed therein raise factual issues to preclude summary judgment as to Dr. Fenton, Dr. Boydstun, and Dr. Durkin.

Plaintiff's expert physician is licensed to practice medicine in the State of New York and is board certified in pediatrics and opines within a reasonable degree of medical certainty. He opines that Dr. Boydstun, Dr. Hogan and Dr. Fenton all failed to properly recognize that Tatiana was in need of being transferred to the PICU earlier than 2:45 p.m. and such failure was a departure from good and accepted practice as Tatiana's presumed dehydration should have been ruled out at 11:00 a.m. following the completion of the second bolus administered to Tatiana at SBUH. The failure to properly treat Tatiana's symptoms, and the continued administration of fluids to treat the presumed diagnosis of dehydration was a cause of her respiratory arrest, cardiac arrest and ultimate death.

By 11:00 a.m. Tatiana's fluid intake/output ratio was a cause for concern to be watched closely as fluid overload can be dangerous to a person's heart. When Tatiana's presumed dehydration did not improve with the bolus, other causes of her symptoms should have been considered. At 11:00 a.m., after the completion of the second bolus at SBUH, Tatiana's heart rate was still documented to be in the 160's which was essentially her heart rate upon admission at 6:00 a.m. Other causes for the tachycardia, other than dehydration, should have been explored and were not. There were no clear clinical indications suggestive of significant dehydration, nothing in her laboratory work at Mather indicated she was suffering from dehydration, and her kidney function tests were within normal limits. Electrolytes were normal as documented at SBUH at the 10:50 examination by Dr. Boydstun.

At 11:00 a.m., Tatiana required supplemental oxygen at 28% via face mask, marking a significant change in her clinical status warranting a transfer to PICU for close monitoring which would have alerted the PICU staff of her deteriorating medical condition before she suffered the cardiac arrest. The policy and procedure manual at SBUH defines the criteria need for transfer to the PICU and underscores this point, and application of the hospital's own guidelines clearly suggests Tatiana's transfer was made too late. By 11:00 a.m. the differential diagnoses of sepsis and heart failure should have been made, with the proper treatment of medication to help treat the heart by stimulating the heart muscles in an attempt to increase the blood flow in the body, including administration of Dopamine, Dobutamine, or similar vasopressor therapy to increase her cardiac output and respiratory status. Antibiotics would have been administered to treat the presumed diagnosis of sepsis, and had she been in PICU, more than likely this would have been accomplished before she arrested.

At 11:00 a.m., an echocardiogram should have been ordered to assess the overall function of Tatiana's heart as she had now been suffering from documented tachycardia for approximately eight hours, and such further investigation was warranted. When the echocardiogram was eventually conducted at 4:09 p.m. after her cardiac arrest, it showed severe cardiac dysfunction and enlargement of the heart. More likely than not, an echocardiogram performed earlier would have shown less heart enlargement but would have alerted the physicians to the potential heart failure which ensued, and thus would have increased her chances for survival.

The plaintiff's expert further opines that the SBUH physician's treating Tatiana on the pediatric floor, Dr. Boydstun and Dr. Hogan, caused Tatiana to suffer fluid overload. After completion of the second bolus at 11:00 a.m., no further boluses should have been administered. Tatiana was not responding to the fluid resuscitation, and given her symptoms at that time, heart failure and sepsis should have been the differential diagnoses. It is plaintiff's expert's opinion that the administration of additional boluses of fluid order by these physicians was a cause of Tatiana's increasing respiratory distress and ultimate cardiac arrest as their administration exacerbated her cardiac arrest and were a cause of Tatiana's untimely death. Tatiana was already suffering from a virus which put her at risk for heart failure, and the administration of these continuous fluids to her were a departure from good and accepted medical practice. She was not suffering from any significant dehydration and this overload of fluid eventually enters the air spaces in the lungs, reduces the amount of oxygen that can enter the blood, and causes shortness of breath and heart failure. This heart failure can affect many organs of the body causing diminished kidney function and retention of more fluid, lung congestion or pulmonary edema, accumulation of fluid in the liver impairing the ability of the liver to rid the body of toxins and produce essential proteins.

It is the plaintiff's expert's further opinion that Tatiana was suffering acute heart failure as a result of an infection that had affected her heart. Her fatigue, weakness, decreased intake, and especially her rapid heart rate all indicate acute heart failure, and nothing before that day suggests that she was suffering from heart failure.

Fluid boluses are contraindicated with heart failure. Tatiana's fluid intake was 830 cc's prior to the bolus ordered at 9:13 a.m. By 11:00 a.m., her intake was 1,345cc's and she had only voided 60 cc's, resulting in an extremely dangerous intake/output ratio. By this time both Dr. Hogan and Dr. Boydstun should have been concerned with fluid overload given the ratio, and failure to do so resulted in Tatiana's cardiac arrest and respiratory arrest due to the collection of fluid in her lungs.

The finding upon autopsy of 600 cc's of fluid in the abdominal cavity, ascites, is consistent with fluid overload. Additionally, the spleen and liver were enlarged also indicative of fluid overload. At Mather Memorial Hospital, the chest x-ray did not show cardiac enlargement or heart failure and therefore belies Dr. Biagas' opinion that Tatiana was at end stage heart failure or had severe heart failure prior to admission. The chest x-ray taken at SBUH at 3:25 p.m. noted that the cardiomediastinal silhouette was enlarged. Plaintiff's expert further notes that Dr. Fenton testified that Tatiana had a normal sized heart at Mather. Therefore, indicating that the enlargement and appearance of her heart changed throughout her course of treatment and that as her heart enlarged, her heart's ability to supply blood to the body decreased.

The plaintiff's expert further opines that Dr. Fenton, Dr. During and Dr. Durkin failed to ensure proper intubation for Tatiana which failure was a departure from good and accepted medical practice. Improper placement of the endotracheal tube can result in brain damage, cardiac arrest and death and interferes with the ability of the lungs to inflate with each ventilation. A chest x-ray should be obtained immediately after completion of endotracheal intubation to assess parameters such as tube position and possible procedure related complications. Although the code blue was called about 2:55 p.m., the chest x-ray was not interpreted until 3:25 and revealed the endotracheal tube was not in the correct position, therefore Tatiana was not receiving proper respiratory function. Neither Dr. Fenton, the PICU attending, nor Dr. During, the PICU resident, took steps to correct their responsibility to obtain a confirmatory x-ray and adjust the tube if necessary.

The plaintiff's expert further opines that although Dr. Durkin testified that although the tube was in suboptimal position, but was providing oxygen to Tatiana's lungs, in a critically ill patient such as Tatiana, suboptimal placement of the endotracheal tube is insufficient. Additionally, Dr. Durkin did not record the presence of end tidal CO2 findings which are relevant to the adequacy of placement, and the mere presence of end tidal CO2 does not confirm correct placement of the endotracheal tube: it merely confirms that there is some air going in and out of Tatiana's lungs. Tatiana's outcome suggests that whatever air was reaching her lungs was insufficient. Dr. Fenton was aware the placement of the tube was unsatisfactory, but did nothing to correct it. Thereafter, the second x-ray again noted improper placement of the endotracheal tube. Plaintiff's expert states that although Dr. Durkin's expert opines that with one lung intubation on certain patient that the patient can survive, such comparison is improper as here Tatiana was a patient who required oxygenation of both lungs which could be achieved only with proper treatment. An absence of respiratory acidosis does not mean she was receiving adequate oxygen into her body, but simply means she is able to exhale adequate amounts of carbon dioxide. The failure to properly place the endotracheal tube by Dr. Durkin, and the failure of Dr. Fenton and Dr. Durkin to correct the placement and maintain adequate oxygenation, was a substantial factor and proximate cause of Tatianas' pain, suffering and ultimate death. Delaying proper intubation by 63 minutes significantly decreased Tatiana' chances for survival and contributed to her death.

Based upon the foregoing, the plaintiff's expert has raised multiple factual issues concerning the alleged departures as set forth above, precluding summary judgment to the moving defendants, Boydstun, Fenton and Durkin.

Accordingly, motion (003) for summary judgment dismissing the complaint as asserted against the defendants Kimberly E. Fenton M.D., Ivy I. Boydstun, M.D., and Brian Durkin, M.D. is denied.

Dated: 9/8/10

PETER H. MAYER, J.S.C.