SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

RAFAEL CONCEPCION, DECEASED BY ADMINISTRATOR, NEIL CONCEPCION,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, JAMES F. WILLIAMS, ST. BARNABAS HOSPITAL, LEDING YAP, M.D., EFIGENIA SOLIVEN, M.D., AND MICHAEL WEITZEN, D.O.,

Defendant(s).

----------x

DECISION AND ORDER

Index No: 16298/07

THE CITY OF NEW YORK AND JAMES F. WILLIAMS,

Third-Party Plaintiff(s),

- against -

ST. BARNABAS HOSPITAL, LEDING YAP, M.D., EFIGENIA SOLIVEN, M.D., NEIL WEINTRAUB, RONALD H. MCLEAN, M.D., MICHAEL WEITZEN, M.D., QUARRY ROAD EMERGENCY SERVICES, P.C., AND ST. BARNABAS ANESTHESIA, P.C.

Defendant(s).

----------x

Index No: 42091/08

In this action for alleged negligence, medical malpractice, and wrongful death, defendant/third-party defendant ST. BARNABAS HOSPITAL (SBH) moves seeking an order pursuant to CPLR § 3212 granting it summary judgment with respect to plaintiff's complaint, defendants/third-party plaintiffs THE CITY OF NEW YORK (the City)

and JAMES F. WILLIAMS's (Williams) third-party complaint, and any cross-claims on grounds that it bears no liability for the medical malpractice alleged. Saliently, SBH avers that inasmuch as all medical treatment provided to plaintiff's decedent RAFAEL CONCEPCION (Rafael) was within the standard of good and accepted medical care, the treatment provided to Rafael within its hospital was not tortious and as such, SBH cannot be vicariously liable for the same. The City, Williams and plaintiff oppose SBH's motion averring, *inter alia*, that inasmuch as the evidence tendered establishes that the treatment provided to Rafael within SBH's hospital involved, *inter alia*, the failure to timely treat Rafael's injuries, SBH departed from good and accepted standards of medical care, such departure proximately causing Rafael's death. Thus, plaintiff, the City, and Williams aver that questions of fact preclude summary judgment in favor of SBH.

Defendant/third-party defendant MICHAEL WEITZEN, D.O. (Weitzen) moves seeking an order granting him summary judgment with respect to plaintiff's complaint, the City and William's third-party complaint, and any cross-claims asserted against him. Weitzen avers that insofar as all medical treatment he provided to Rafael was within the accepted standard of care, he is entitled to summary judgment. Plaintiff, the City, and Williams oppose Weitzen's motion averring that insofar as the evidence establishes that Weitzen failed to timely stop Rafael's bleeding, he departed

from the accepted standard of care, such departure proximately causing Rafael's death. Thus, plaintiff, the City, and Williams assert that questions of fact preclude summary judgment in Weitzen's favor.

Third-party defendant NEIL WEINTRAUB, M.D. (Weintraub) moves seeking seeking an order granting him summary judgment with respect to the City and William's third-party complaint and any cross-claims asserted against him. Weintraub avers that insofar as all medical treatment he provided to Rafael was within the accepted standard of care, he is entitled to summary judgment. Plaintiff, the City, and Williams oppose Weintraub's motion averring that insofar as the evidence establishes that Weintraub failed to timely arrive at the hospital to treat and stop Rafael's bleeding, he departed from the accepted standard of care, such departure proximately causing Rafael's death. Thus, plaintiff, the City, and Williams assert that questions of fact preclude summary judgment in Weintraub's favor.

Defendant EFIGENIA SOLIVEN, M.D. (Soliven) and third-party defendant ST. BARNABAS ANESTHESIA, P.C. (SBA) move seeking an order granting them summary judgment with respect to plaintiff's complaint, the City and William's third-party complaint, as well as any cross-claims asserted against them. Saliently, Soliven avers that insofar as all medical treatment she provided to Rafael was within the accepted standard of care, she is entitled to summary

judgment. SBA avers that as Soliven's employer, whose liability is only vicarious, to the extent that Soliven did not depart from the accepted standard of care in treating Rafael, it is entitled to summary judgment. Plaintiff, the City, and Williams oppose Soliven and SBA's motion averring that insofar as the evidence establishes that Soliven failed to properly monitor Rafael's fluid levels while she treated him, she departed from the accepted standard of care, such departure proximately causing Rafael's death. Thus, plaintiff, the City, and Williams assert that questions of fact preclude summary judgment in Soliven's favor and as such also preclude such, relief in favor of SBA.

Defendant/third-party defendant LEDING YAP, M.D. (Yap) moves seeking an order granting him summary judgment with respect to plaintiff's complaint, the City and William's third-party complaint, and any cross-claims asserted against him. Yap avers that insofar as all medical treatment he provided to Rafael was within the accepted standard of care, he is entitled to summary judgment. Plaintiff, the City, and Williams oppose Weitzen's motion averring that insofar as he failed to properly monitor Rafael's fluid levels while he treated him, he departed from the accepted standard of care, such departure proximately causing Rafael's death. Thus, plaintiff, the City, and Williams assert that questions of fact preclude summary judgment in Yap's favor.

Third-party defendant RONALD H. MCLEAN (McLean) moves seeking

an order granting him summary judgment with respect to the cross-claims asserted against him by SBH[1]. McLean avers that he is entitled to summary judgment inasmuch as the medical treatment he provided to Rafael was within accepted standards of medical care. McLean's motion is unopposed.

Third-party defendant QUARRY ROAD EMERGENCY SERVICES, P.C. (Quarry) moves seeking an order granting it summary judgment with respect to the claims asserted by the City and Williams within the third-party complaint, and any cross-claims asserted against it. Quarry avers that it is entitled to summary judgment insofar as the treatment provided by non-party Dr. Thomas Klie (Klie), its employee, in accordance with good and accepted medical standards. Thus, Quarry avers that since it is only vicariously liable for the acts of Klie, summary judgment is warranted. Quarry's motion is unopposed.

For the reasons that follow hereinafter, with the exception of the motions by Quarry and McLean, the foregoing motions are hereby denied.

The instant action is for alleged negligence, medical malpractice and wrongful death. Collectively, plaintiff's complaint, amended complaint and second amended verified complaint allege the following. On December 9, 2008, Rafael while employed by the City's Department of Sanitation, within a vehicle owned by

[1] All other claims against McLean have been discontinued.

the City - a sanitation truck - and operated by Williams, was involved in a motor vehicle accident. It is alleged that the vehicle within which Rafael was a passenger struck a permanent stanchion causing injury to Rafael. Thereafter, Rafael was transported to SBH - a hospital - where he was medically treated by doctors employed by SBH. Specifically, Rafael was treated by Yap, Soliven, and Weitzen. While within SBH, Rafael died. Based on the foregoing, plaintiff alleges that Williams was negligent in the operation of his sanitation truck, said negligence causing Rafael's injuries and death. Plaintiff also alleges that the City had notice that Williams was not fit to operate its vehicle and was therefore negligent in hiring and/or retaining him despite such notice, which negligence caused Rafael's injuries and death. Plaintiff further alleges that the medical care provided by Yap, Soliven, and Weitzen was not within the acceptable standard of good medical care and that such negligent care caused injury to Rafael and led to his death. Inasmuch as SBH held Yap, Soliven, and Weitzen out as duly qualified medical professionals and supervised them, plaintiff alleges that SBH is vicariously liable for their negligent acts and alleged medical malpractice.

The amended third-party complaint, by the City and Williams against SBH, Yap, Soliven, Weintraub, McLean, Weitzen, Quarry, and SBA alleges that the medical care and treatment provided to Rafael by the foregoing third-party defendants was negligently provided

insofar as it departed from good and accepted standards of medical care, such deviation causing Rafael's injuries and death. Accordingly, should the City and Williams be found liable to plaintiff under a theory of negligence and/or wrongful death, the City and Williams allege that they are entitled to contribution and indemnification for such liability from SBH, Yap, Soliven, Weintraub, McLean, Weitzen, Quarry, and SBA.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient

evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

A doctor is not the guarantor of successful treatment and good results (*Pike v Honsinger*, 155 NY 201, 210 [1898]; *Matosic v Gelb*, 232 AD2d 221, 221 [1st Dept 1996]). Accordingly, "[n]ot every instance of failed treatment or diagnosis may be attributed to a

doctor's failure to exercise due care" (*Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]). Instead, a doctor's obligation is to "use the skill and learning of the average physician , to exercise reasonable care and to exert his best judgment in the effort to bring about a good result." (*Pike* at 210). Hence, in treating a patient, a doctor's duty is to provide the level of care acceptable in the professional community where said doctor practices (*Schrempf v State of New York*, 66 NY2d 289, 295 [1985]). Accordingly, a doctor is not required to achieve success in every case and as such, cannot be held liable for mere errors in professional judgment (*id.* at 295). Liability will not, therefore, lie for honest errors in judgment, unless such judgment was not based on intelligent reasoning or on an adequate examination (*O'Sullivan v Presbyterian Hospital in the City of New York at Columbia Presbyterian Medical Center*, 217 AD2d 98, 100 [1st Dept 1995]). In such cases, where the doctor has failed to utilize intelligent reasoning or has failed to perform an adequate examination, there has been a failure to exercise any professional judgment as a matter of law (*id.* at 103). Stated differently,

> so long as a physician stays within the bounds of accepted practice, he or she is immune from liability for pure errors of judgment or for mere lack of success in his or her medical ministrations. But, when there is a departure from that standard, when the physician goes beyond its limits, the medical judgment so exercised carries no immunity against a claim that it constituted negligence. Moreover, when the judgment exercised is outside

> permissible range however good his intentions may have been, a physician will not thereby be rendered free from liability for this departure from approved methods in general use

(*Topel v Long Island Jewish Medical Center*, 55 NY2d 682,689-690 [1981] [internal citations and quotation marks omitted]). In sum, so long as a doctor considers the patients best interest after careful evaluation, he is not liable for mere errors in judgment (*Matosic* at 221).

In order to establish a prima facie case of medical malpractice, a plaintiff must establish that the doctor being sued departed from accepted standards of medical care and that such departures proximately caused plaintiff's injuries (*Flaherty v Fromberg*, 46 AD3d 743, 745 [2d Dept 2007]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept 1996]; *Fridovich v David*, 188 AD2d 984, 987 [3d Dept 1992], *lv dismissed* 86 NY2d 759 [1994], *rearg dismissed* 86 NY2d 839 [1995]). Expert testimony is generally required to prove the standard of care and a deviation therefrom (*James v Wormuth*, 21 NY3d 540, 547 [2013]; *Semel v Guzman*, 84 AD3d 1054, 1055 [2d Dept 2011]; *Goldberg v Horowitz*, 73 AD3d 691, 693 [2d Dept 2010]). Similarly, expert evidence is also generally required to establish that any deviation from the standard of care proximately caused plaintiff's injuries (*Mangiello v Ahmed*, 130 AD3d 583, 586 [2d Dept 2015]; *Semel* at 1055; *Goldberg* at 693). However, in "the very rare instances where the very nature of the acts complained of bespeaks

improper treatment and malpractice" (*Mangiello* at 210), medical malpractice may be established without the necessity of an expert's opinion (*id.* at 210 [internal quotation marks omitted]; *see Hammer v Rosen*, 7 NY2d 376, 380 [1960]; *Pipers v Rosenow*, 39 AD2d 240, 243 [2d Dept 1972]).

In an action premised upon medical malpractice, a defendant doctor establishes prima facie entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2008]; *Germaine v Yu*, 49 AD3d 685, 686 [2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2004]). A defendant can meet the required burden by providing proof by way of deposition testimony and other documentation (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 325 [1986] ["Dr. Stark's deposition testimony is supported by the hospital records and rebuts with factual proof plaintiff's claim of malpractice and thus is sufficient proof that he properly and timely diagnosed the plaintiff's condition and did not depart from the accepted standard of care in the medical community."]). A defendant also meets the requisite burden in a medical malpractice action by submitting evidence from an expert establishing that the medical treatment provided "comported with good and accepted

[medical] practice" (*Coronel v New York City Health and Hospitals Corporation*, 47 AD3d 456, 457 [1st Dept 2008]). Lastly, in an action for medical malpractice, an affidavit from a defendant doctor is

> sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care

(*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001] [Court held that affidavit from defendant doctor was sufficient to establish his prima facie entitlement to summary judgment because it established that "injury to the common bile duct is a well-recognized complication of a cholecystectomy procedure and even more common when the procedure is performed laparoscopically."]; *Sloane v Repsher*, 263 AD2d 906, 908 [3d Dept 1999]; *Machac v Anderson*, 261 AD2d 811, 812 [3d Dept 1999]; *Kelly v St. Peter's Hospice*, 160 AD2d 1123, 1124 [3 Dept 1990]).

With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v. Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1982]). Thus, a defendant in

a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Weingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie entitlement to summary judgment as a matter of law (*Cregan* at 108; *Wasserman* at *226*).

Once the defendant meets his burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez* at 324). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence" will not suffice (*id.* at 325). Specifically, to avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456, 457 [2008]; *Koeppel* at 289). As discussed above, in order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted

medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston* at 1001; *Myers* at 84; *Rebozo* at 458). As with defendant's opinion evidence, expert affidavits submitted in opposition to a motion for summary judgment can not be conclusory and must do more than simply make unsupported assertions(*Burt v Lenox Hill Hospital*, 141 AD2d 378, 380 [1st Dept 1988] [Court granted defendant's motion for summary judgment, because "the medical affidavit by Dr. Cohen [plaintiff's doctor] in opposition was merely conclusory and unsupported by competent medical evidence. Further it does not present any evidentiary facts tending to establish the essential elements of malpractice" (*id.* at 380 [internal quotation marks omitted]).

Generally, where the record contains conflicting medical affidavits on the issue of malpractice and causation, summary judgment ought to be denied (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]; *Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept 2004; *Barbuto v Winthrop University Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

It is well settled that no cause of action for medical malpractice exists in the absence of an express or implied physician-patient relationship (*McKinney v Bellevue Hospital*, 183 AD2d 563, 564 [1st Dept 1992]; *Lee v City of New York*, 162 AD2d 34, 36 [2d Dept 1990], *lv denied* 78 NY2d 863 [1991]; *Hickey v Travelers Insurance Company*, 158 AD2d 112, 116 [2d Dept 1990]). That

relationship is created when the professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment" (*Rodriguez v Saal*, 43 AD3d 272, 274-275 [1st Dept 2007][internal quotation marks omitted]; *Lee* at 36).

With respect to entities other than hospitals, vicarious liability for the negligent acts of physicians lies "only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 484 [2014]). Similarly a hospital is liable for the malpractice of those doctors it employs (*Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]), and generally cannot be held vicariously liable for the negligent acts of those doctors not within its employ (*id.* at 79; *Collins v Lenox Hill Hosp.*, 107 AD3d 473, 473 [1st Dept 2013]; Raschel *v Rish*, 69 NY2d 694, 697 [1986]). This, of course, is because "vicarious liability for medical malpractice generally turns . . . on agency or control in fact" (*Hill* at 80). However, with respect to hospitals, an exception to the foregoing, exists where the "patient enters the hospital through the emergency room seeking treatment from the hospital, not from a particular physician" (*Noble v Porter*, 188 AD2d 1066, 1066 [4th Dept 1992]; *Mduba v Benedictine Hospital*, 52 Ad2d 450, 453 [3d Dept 1976). Under those circumstances, where the patient reasonably believed that the doctors treating him were employed by the hospital or

acting on its behalf, liability for their malpractice can be imputed to the hospital under a theory of ostensible or apparent agency (*Noble* at 1066; *Raschel* at 391; *Mduba* at 453-454). Ostensible or apparent agency exists and gives rise to vicarious liability when person holds out another as his agent, even if there is no actual agency relationship (*Hannon v Siegel-Cooper Co.*, 167 NY 244, 246 [1901]). In other words,

> a person is estopped from denying his liability for the conduct of one whom he holds out as his agent against persons who contract with him on the faith of the apparent agency. . . [meaning that] [i]f A contracts with the ostensible agent of B for the purchase of goods, he relies, not only on the business reputation of B as to the goods he manufactures or sells, but on the pecuniary responsibility of B to answer for any default in carrying out the contract

(*id.* at 246-247). In the context of an action premised on medical malpractice, in New York,

> the theory of ostensible or apparent agency has been applied to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital or clinic, by New York courts

(*Hill* at 81).

Thus, a hospital can be held vicariously liable for negligent acts of independent physicians when the patient enters the hospital through the emergency room seeking treatment from the hospital,

rather than from a particular physician (*Noble* at 1066). Under these circumstances, where a hospital holds itself out to the public as an institution furnishing doctors, staff and facilities for emergency treatment, it is under a duty a duty to properly perform those services and is, thus liable for the negligent performance of those services by the doctors and staff it hired and furnished to decedent (*Mduba* at 529-530 ["Certainly, the person who avails himself of hospital facilities has a right to expect satisfactory treatment from any personnel who are furnished by the hospital."]).

Weitzen's Motion for Summary Judgment

Weitzen's motion seeking summary judgment is hereby denied. While the evidence tendered by Weitzen - namely his own affidavit - establishes that the care he provided to Rafael was within the accepted standard of medical care, extant questions of fact on this issue - raised by the evidence submitted by plaintiff - preclude summary judgment in Weitzen's favor. Specifically, plaintiff's evidence, if credited, establishes that Weitzen departed from good and accepted standards of medical care by failing to timely stop Rafael's bleeding, failing to prescribe adequate packed red blood cells, and prescribing more normal saline than required, such departure causing Rafael's abdominal compartment syndrome and his death.

In support of the instant motion, Weitzen submits an

affirmation, wherein he states, in pertinent part, based in part, on his review of Rafael's SBH records, as follows. On December 9, 2006, Weitzen, board certified in general surgery, treated Rafael while at SBH. While Weitzen was the on-call trauma surgeon Rafael arrived at SBH by ambulance at 2:45AM. Rafael had been involved in an accident in which he fell off and out of a sanitation truck and, thereafter, the truck ran over his left leg. Weinstein first saw Rafael in the trauma bay of SBH's Emergency Department and was informed by the surgical staff about the mechanism of Rafael's injury. Thereafter, upon examining Rafael, including his left leg Weitzen concluded that he likely had internal bleeding in his left leg. The basis for this diagnosis was Rafael's low blood pressure - 70/50 - the appearance of blood under the skin of his left thigh, the increasing size of his left thigh, and the absence of a pulse below the thigh. At 3AM, because Rafael's blood pressure was 65/30 - indicative of hemorrhagic shock, which if not addressed immediately would result in the diminution of oxygen to Rafael's brain and organs and, thus brain and heart damage, and perhaps death - Weitzen authorized that Rafael be intravenously given two liters of normal saline. The saline brought Rafael's systolic pressure to above 100, which was the goal. Thereafter, Rafael was physically examined and abdominal bleeding was ruled out via a rectal exam and a Focused Assessment with Sonography in Trauma (FAST) study; the results of which were received at 3:40AM.

Because Weitzen is not a vascular surgeon and because he suspected that Rafael was bleeding internally, he paged Weintraub, the on-call vascular surgeon. Upon speaking to Weintraub and advising him that he suspected that Rafael was afflicted with a vascular injury, Weintraub stated that he wanted an angiogram performed in order to pinpoint the location of the vascular injury. Wietzen then informed the radiology resident that Rafael needed an angigram, at which point, the resident began to assemble a team and contact the interventional radiologist who would perform the angiogram, but who was not at the hospital at the time. At 3:40AM, Rafael consented to the angiogram and because his systolic blood pressured dipped below 100, Weitzen authorized that two more liters of normal saline be intravenously given to Rafael. At 4:05AM, Rafael was transported to the radiology suite for an angiogram, at which time his blood pressure was 82/47. At 4:20AM Weitzen also authorized that Rafael be given 250cc of packed red blood cells and did the same at 4:35, 4:50, and 5AM. The angiogram was performed at 4:45AM and concluded at 5:15AM. The study revealed that Rafael's superficial femoral artery was completely transected with brisk bleeding. During the procedure, a balloon was inserted to stop the bleeding. At 5:50AM, Rafael was brought to the operating room and at 6:46AM Weintraub performed vascular surgery. Altogether, prior to surgery and under Weitzen's care, he authorized and Rafael received 6 liters of fluid.

During his surgery, Weintraub encountered a large amount of subcutaneous and subfascial hematoma, but was nevertheless able to restore circulation to the leg by inserting a bypass graft and performing a faciotomy to the calf. During the surgery, Rafael was given 10.45 liters of fluid. His fluid loss during the procedure was 4.35 liters and Rafael's net fluid balance was noted as 6.1 liters. Rafael was then brought to the ICU where he went into cardiac arrest. He was resuscitated but his blood pressure remained low. At that point, Rafael's hemacrit had fallen, his urine output was zero, his abdomen was rigid and distended and the pressure therein was elevated. McLean, who had replaced Weitzen as the on-call trauma surgeon and who was now caring for Rafael called Weitzen to see if there had been prior evidence of an abdominal injury. Weitzen, however, indicated that he had performed a FAST study, ruling out any abdominal injury. At 1:50PM, McLean brought Rafael back to the operating room and performed an exploratory laparotomy to ensure that there was no intra-abdominal bleeding and to relieve the pressure. McLean discovered that Rafael was afflicted with abdominal compartment syndrome secondary to third spacing with a large quantity of fluid in the peritoneal cavity. Compartment syndrome is an emergency requiring surgical correction. It occurs when excessive pressure builds inside an enclosed space in the body. This causes dangerously high pressure and impedes the flow of blood to and from the affected area. Third spaces refers

to areas in the body where little if any fluids are normally found, such as the peritoneal cavity - the potential space between the membranes separating the organs in the abdominal cavity from the abdominal wall. McLean upon relieving the abdominal pressure and ensuring that there was no bleeding into the abdomen closed the incision with a Bogota Bag so as to continue to allow for the relief of intra-abdominal pressure. As the procedure concluded, Rafael went into cardiac arrest, resuscitation measures were unsuccessful and he died.

To the extent that plaintiff alleges that Weitzen was negligent in allowing Rafael to develop compartment syndrome, Weitzen opines to that this assertion are, to a reasonable degree of medical certainty, meritless. Specifically, with regard to plaintiff's claim that Weitzen committed medical malpractice in failing to monitor the infusion of fluids into Rafael's system - more specifically, by infusing him with more than five liters in less than 24 hours and in failing to detect that Rafael's intra-abdominal pressure exceeded 20mm of Hg - Weitzen opines that the amounts of fluids given to Rafael did not lead to compartment syndrome inasmuch as Rafael never developed the same until well after Weitzen ceased treating him. Moreover, Weitzen asserts that based on Rafael's blood pressure at 3AM - 65/30 - he had lost 40 percent of his blood volume, such that the 6.1 liters of fluids authorized by Weitzen, was not more than five liters of fluid in a

24 hour period. Weitzen avers that given Rafael's blood pressure - 65/30 - the two liters of fluids given to him at 3AM and the additional four liters given after his blood pressure again dropped at 3:40AM, were necessary to ensure he live long enough to undergo vascular surgery. Weitzen opines that had he not given Rafael 6.1 liters of fluids during the time that Weitzen was responsible for his care, Rafael would have died prior to the vascular surgery.

Weitzen also submits the hospital records evincing the treatment received by Rafael at SBH upon which he relies, which upon review by this Court, accurately reflect the factual assertions made by Weitzen in his affirmation.

Based on the foregoing, inasmuch as in an action premised upon medical malpractice, a defendant doctor establishes prima facie entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Thurston* at 1001; *Myers* at 83; *Germaine* at 686; *Rebozo* at 458; *Williams* at 368), Weitzen establishes prima facie entitlement to summary judgment.

Here, Weitzen's affidavit establishes, citing to relevant portions of Rafael's SBH medical records, that in treating Rafael, he did not depart from accepted standards of good medical care. Specifically, Weitzen asserts that to the extent plaintiff alleges that Weitzen over-infused Rafael with liquids thereby causing

Rafael's compartment syndrome, which syndrome led to Rafael's death, Weitzen's infusion of liquids did not exceed five net liters in a 24 hour period and the 6.1 liters he did infuse were necessary to keep Rafael alive. Since in a medical malpractice action, provided that the affirmation submitted be detailed, specific and factual in nature, and not assert in simple conclusory form that the physician acted within the accepted standards of medical care (*Toomey* at 755; *Sloane* at 908; *Machac* at 812; *Kelly* at 1124), a defendant doctor can negate his own malpractice, here, Weitzen's affidavit does just that. Accordingly, Weitzen establishes prima facie entitlement to summary judgment.

In opposition to Weitzen's motion, plaintiff submits an affirmation from Ronald J. Simon (Simon), a board-certified surgeon, with a sub-certification in surgical critical care, wherein he states, in pertinent, part as follows. Based, in part, upon his review of Rafael's SBH records and Weitzen's deposition testimony, Simon states that on December 9, 2006, at 2:30AM, Rafael was ejected from a sanitation truck and, thereafter, had his left leg run over by the front wheel of the truck. Rafael was transported to SBH by an ambulance, where he arrived at 2:45AM. An examination timed at 3AM indicated that Rafael complained of pain to his left leg and that an examination indicated the his left thigh was swollen, cold, and afflicted with an expanding hematoma. According to Simon, a hematoma is an abnormal collection of blood

into an anatomic space outside the blood vessels. Because the abnormal collection of fluid - compartment syndrome - creates a pressure gradient on surrounding tissues that normal body pressure cannot overcome, surgical treatment is required so as to avoid cell death, which if left untreated is fatal. A note timed at 3AM indicates that Rafael's left thigh was swollen, that he had decreased movement thereat, had no palpable pulse to the left foot, and that he complained of pain. Another note further indicated that Rafael's blood pressure was 65/30, which was critically low, thereby, necessitating two liters of normal saline, in addition to the two liters he had already received. A notes then indicate that at 4:05AM, Rafael was brought to radiology suite for an angiogram.

Rafael was to undergo an angiogram as per Weitzen's discussion with Weintraub, the vascular surgeon on-call. Wietzen called Weintraub at 3:05AM because he suspected that Rafael had a vascular injury and because Rafael was in hemorrhagic shock. Weintraub told Weitzen that an angiogram was necessary in order to find the precise location of the vascular injury. Wientraub, according to Weitzen was not at the hospital and did not arrive until 5:30AM. Because Rafael was in hemorrhagic shock and surgery to stop the bleeding could not be undertaken, Weitzen administered fluids to resuscitate Rafael. Weitzen also ordered the angiogram, which did not occur until 4:45AM because the interventional radiologist was

not at the hospital until that time. As per the Radiological Report, Rafael underwent an angiogram which indicated that he had a completely transected superficial femoral artery in his left medial thigh. Because the angiogram indicated extravasation into the medial thigh from the superficial femoral artery, Simon concludes that Rafael bled continuously from 2:30AM until 5:15AM when he had an angiography balloon inserted to stop the bleeding.

According to the SBH operative report, at 5:50AM, Rafael underwent surgery performed by Wientraub. The procedure performed was a femoropopliteal artery bypass with reversed right greater saphenous vein graft and a four compartment fasciotomy. The report indicates that the procedure was performed using an intraoperative arteriogram and Simon states that the foregoing procedure was performed to restore blood flow to Rafael's leg. During the foregoing procedure, which concluded at 11:55AM, the anesthesia record evinces that Rafael was given 10,450ccs of fluid, that he lost 4,350ccs, and had a net fluid balance of 6,100ccs. Sometime after 12:20PM, when Rafael left the intensive care unit, he went into cardiac arrest and was resuscitated. Because Rafael's abdomen was distended, McLean, a trauma surgeon was called. Upon examining Rafael, McLean diagnosed him with abdominal compartment syndrome. McLean recommended and performed immediate surgery. As per McLean's operative report, because he noted that Rafael's stomach

was distended and rigid, his urine output was zero, his peak airway pressure had gone up to 67, and his intra-abdominal pressure was 47, McLean suspected that Rafael was bleeding into his abdomen. McLean, thus, performed an exploratory laparotomy, which as per his surgical report revealed that Rafael had abdominal compartment syndrome secondary to third spacing with large quantities of fluid in the peritoneal cavity. McLean concluded that the foregoing was the result of the fluids Rafael was given prior to, during, and after his vascular surgery. As McLean concluded his procedure, Rafael once again arrested and died.

Based on the foregoing, with respect to Weitzen, Simon opines to a reasonable degree of medical certainty, that Weitzen departed from good and accepted standards of medical and surgical practice by failing to timely obtain control of Rafael's bleeding. Specifically, Simon opines despite testifying that as early as 3AM, he considered Rafael to be in hemorrhagic shock, requiring that attempts to stop the source of the bleeding be undertaken, he did nothing to stop the bleeding. Simon opines that despite Weitzen's assertion that he was not a vascular surgeon, Weitzen, who assumed Rafael's care, as a general surgeon, employed at SBH - a Level 1/Regional Trauma Center - should have had some proficiency in the surgical treatment of bleeding due to blood vessel injuries. Simon further opines that as a general surgeon in the United States, Weitzen

> should have the minimum skill to have brought Rafael to the operating room, open his leg, and achieve proximal surgical control of the superficial femoral artery until a Vascular Surgeon arrived; and, he could have asked for an intra-operative angiogram since it was available. At the very minimum, he could have brought Rafael to the Operating Room and applied a tourniquet.

This, as well as Weitzen's failure to timely give Rafael packed red blood cells, led to Weitzen's over-reliance on normal saline, causing the abdominal compartment syndrome that led to Rafael's death. Simon opines that the latter constitutes a departure from accepted standards of good medical practice because normal saline does not replace the oxygen carrying capacity of whole blood, and here, Weitzen acknowledged that Rafael's low blood pressure was indicative of hemorrhagic shock and a lack of oxygen. Despite this acknowledgment, Weitzen did not prescribe packed red blood cells until 4AM, and only after giving Rafael four liters of normal saline.

Based on the foregoing, insofar as plaintiff's evidence establishes medical malpractice by Weitzen, extant questions of fact preclude summary judgment in Weitzen's favor. To be sure, once the defendant meets his burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez* at 324) by demonstrating that the defendant did in fact commit malpractice and that the malpractice

was the proximate cause of the plaintiff's injuries (*Coronel* at 457; *Koeppel* at 289). Here, Simon, relying on both Weitzen's testimony and the records evincing the treatment he provided, which evidence was also submitted and accurately cited by Simon, he establishes that in failing to timely stop Rafael's bleeding, failing to timely prescribe packed red blood cells, and overly relying on the use of normal saline, Weitzen's medical treatment - a departure from good and accepted standards - caused Rafael's abdominal compartment syndrome, which syndrome caused Rafael's death. Thus, with Simon's affirmation, plaintiff met his burden in that Simon, a medical doctor, opines that the Weitzen departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston* at 1001; *Myers* at 84; *Rebozo* at 458). Since generally, where the record contains conflicting medical affidavits on the issue of malpractice and causation, summary judgment ought to be denied (*Feinberg* at 519; *Shields* at 672; *Barbuto* at 624), Weitzen's motion is denied.

Given denial of Weitzen's motion upon the foregoing, the Court need not address the City and William's opposition papers.

Weintraub's Motion for Summary Judgment

Weintraub's motion seeking summary judgment is hereby denied. While the evidence tendered by Weintraub - namely his expert's affirmation - establishes that the care he provided to Rafael was within the accepted standard of medical care, extant questions of

fact on this issue - raised by the evidence submitted by plaintiff - preclude summary judgment in Weintraub's favor. Specifically, plaintiff's evidence, if credited, establishes that Weintraub departed from good and accepted standards of medical care by failing to timely report to the hospital to perform surgery on Rafael and requesting an angiogram instead of intraoperative angiograms, which were available, such departure delaying control of Rafael's injury - a transected superficial femoral artery - and requiring that Rafael receive massive amounts of fluid, which fluids caused Rafael's abdominal compartment syndrome and his death.

In support of the instant motion, Weintraub submits an affirmation from William Duffy Suggs (Suggs), a board certified vascular surgeon, who based in part on his review of Rafael's SBH medical records and deposition transcripts of depositions taken from various parties - including Weintraub - states, in pertinent part, as follows. On December 9, 2006, at 2:45AM, Rafael was brought to SBH After falling off a sanitation truck. Rafael, as per the SBH Emergency Department record, presented with complaints of to his left lower extremity as well as decreased sensation thereto. Rafael was seen by Klie, who noted that Rafafel had deformity in his left leg, that Rafael's left thigh was swollen, that his left foot was cold, and that the same had no distal pulse on palpation. Klie's impression was an expanding hematoma of

Rafael's left thigh and thus, he consulted with Weitzen, a trauma surgeon. Weitzen's examination yielded results similar to Klie's and he suspected that Rafael had a vascular injury. Weitzen called, Weintraub, the on-call vascular surgeon, who upon being apprised of the results of Rafael's examination, directed that Rafael undergo an angiogram in order to pinpoint the injured blood vessel. At 4:45AM, Rafael underwent an angiogram, performed by Charles, who discovered that Rafael had sustained a complete transection of his left superficial femoral artery at mid-thigh. Charles inserted an occlusion balloon to stop the bleeding. The angiogram concluded at 5:45AM and Weintraub was advised of the results. Weintraub, now knowing where the injury was and how to repair it, reported to the hospital, arriving at 5:30AM. After speaking to Weitzen, Weintraub, at 6:45AM, performed surgery upon Rafael's left leg. Specifically, he performed a popliteal artery bypass with a reverse greater saphenous vein graft. He then performed a four compartment fasciotomy to prevent muscle swelling. At the conclusion of the procedure, at 11:10AM, Weintraub had restored blood to Rafael's leg and his prognosis was guarded. Rafael was taken to ICU and at 12:26PM, he went into cardiac arrest. Rafael was resuscitated and Darryl Adler, the attending doctor in the ICU, noted that Rafael's blood pressure was low and his stomach was distended. McLean, the trauma surgeon then on-call, was notified and he suspected that Rafael was afflicted with

abdominal compartment syndrome. McLean performed an exploratory laporatomy, and relieved plaintiff's intra-abdominal pressure. Just prior to the completion of the procedure, plaintiff again went into cardiac arrest and died.

Based on the forgoing, Suggs, to a reasonable degree of medical certainty, opines that Weintraub did not depart from the applicable standards of care in treating Rafael, and that no action or inaction on Weintraub's part caused Rafael's injuries and death. Specifically, Suggs opines that Weintraub timely responded to Weitzen's call for the surgical/vascular consult and that Weintraub's decision to have Rafael undergo a angiogram to pinpoint the location of his vascular injury was within the applicable standard of care. This, Suggs states, is because Rafael had suffered blunt trauma to his leg and the location of any vascular trauma could not be ascertained clinically. Suggs also opines that once apprised of the results of the angiogram, Weintraub timely responded to the hospital and within a reasonable degree of medical certainty properly repaired Rafael's leg, using an appropriate procedure. Lastly, Suggs asserts that while compartment syndrome is a risk of fluid resuscitation, the administration of fluids was not performed by Weintraub.

With the foregoing, namely, Suggs, who accurately relies on the record and asserts that in treating Rafael Wientraub did not depart from accepted and good standards of medical practice such

that he did not cause Rafael's injuries. Weintraub, therefore, establishes prima facie entitlement to summary judgment insofar as in an action premised upon medical malpractice, a defendant doctor establishes prima facie entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Thurston* at 1001; *Myers* at 83; *Germaine* at 686; *Rebozo* at 458; *Williams* at 368), and a defendant meets the requisite burden, where as here, by submitting evidence from an expert establishing that the medical treatment provided "comported with good and accepted [medical] practice" (*Coronel* at 457).

Plaintiff's opposition, however, namely Simon's affirmation, which is discussed in detail above, raises an issue of fact sufficient to preclude summary judgment in Weintraub's favor. Specifically, with regard to Weintraub, Simon opines that it took Weitzen over an hour to get to the hospital to perform surgery upon Rafael and that rather than utilize intraoperative angiograms to determine the source of Rafael's bleeding, Weintraub ordered an angiogram, which was not performed until almost two hours later. Simon opines that the foregoing constitute departures from good and accepted standards of medical practice, such departures delaying the cessation of Rafael's bleeding, thereby, causing shock and hypotension, and, thus, requiring massive amounts of fluid

replacement. Simon opines, within a reasonable degree of medical certainty, that the foregoing delay caused Rafael's abdominal compartment syndrome and his death.

Thus, with Simon's affirmation, plaintiff met his burden in that Simon, a medical doctor, opines that the Weintraub departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston* at 1001; *Myers* at 84; *Rebozo* at 458). Weintraub's motion is denied.

Given denial of Weintraub's motion upon the foregoing, the Court need not address the City and William's opposition papers.

Soliven and SBA's Motion for Summary Judgment

Soliven's motion seeking summary judgment is denied. While Soliven's evidence establishes prima facie entitlement to summary judgment, the City and William's evidence submitted in opposition raises a triable issue of fact with regard to Soliven's negligence, namely whether she committed medical malpractice in failing to properly monitor Rafael's fluid levels, thereby, over-infusing him with the same, and causing the abdominal compartment syndrome alleged to have caused his death.

In support of her motion, Soliven submits an affirmation from Lisa A. Ross (Ross), a board-certified anesthesiologist, who upon a review of, *inter alia*, Rafael's SBH medical records and deposition testimony of the parties and other witnesses, asserts the following. Upon his arrival at SBH, Rafael, who had been

involved in an accident where he fell off a sanitation truck, after which, the same ran over his leg, had lost 40 percent of his blood. Rafael was in shock upon his arrival to the operating room at 5:50AM, where he was to have to have a surgical procedure - exploration of the left femoral artery and a venous graft from the superficial vein to the right saphenous vein. At that time, his anesthesia evaluations indicated that his blood pressure was 80-90/60, he was tachycardic, and he had no urine output, which condition had existed for several hours. At this point the infusion of fluids was essential. Soliven came into the procedure at 8:47AM and relieved Yap, who had been the anaesthesiologist prior thereto. At that point total blood loss was 4,000ccs and total urine output was 300-500ccs. Soliven began to administer fluids, giving Rafael eight units of packed red blood cells, four units of fresh frozen plasma, and 9,750ccs of crystalloids, or normal saline. The procedure ended at 12:23PM, at which time Rafael's chest was clear, his heart rate was 150 beats per minute, respiration was 12 per minute on controlled respiration, blood pressure was 93/60, and saturation was 98-99 percent. Soliven noted that Rafael had satisfactorily recovered from anesthesia and that he experienced no complications related thereto. Thereafter, Rafael went into cardiac arrest, he was resuscitated but was then diagnosed with abdominal compartment syndrome. A second surgical procedure was required, an exploratory laparotomy, to eluate

internal bleeding an relieve intra-abdominal pressure. Fluids were again administered but plaintiff nevertheless died during the procedure.

Based on the foregoing, Ross opines, to a reasonable degree of medical certainty, that Soliven did not depart from good and accepted medical standards when treating Rafael. She opines that Rafael's injuries as a result of his accident were such that death was inevitable. Nevertheless, in order to maximize Rafael's chances of survival, the infusion of fluids was required. Had the fluids not been given, in the amounts that they were infused, Ross opines that there would have no possibility of improving Rafael's functioning and would have negated any efforts to save his life. Because of Rafael's blood loss - 4,000ccs - the four units of packed red blood cells, four units of fresh frozen plasma, and 9,750ccs of crystalloids - a 1:1 ratio of blood and 3:1 ratio of other fluids - was appropriate.

Based on the foregoing, insofar as Ross, upon accurately citing the documents in the record, establishes that Soliven's medical treatment was neither a departure from good and accepted medical practice nor the proximate cause of his death, Soliven establishes prima facie entitlement to summary judgment.

In opposition to Soliven's motion, the City and Williams submit an affirmation from Sheldon H. Deluty (Deluty), a board-certified anesthesiologist, who upon a review of Rafael's SBH

records and deposition testimony of the parties and witnesses, states, the following. On December 9, 2006, at 2:25AM, Rafael was involved in an accident wherein he fell off a sanitation truck, after which, the truck ran over his left leg. Rafael was transported to SBH via ambulance, where he arrived at 2:45AM. Upon examination by Weitzen, a trauma surgeon, Rafael had an expanding hematoma in his left thigh and no femoral pulses below it. Believing that Rafael had sustained a life threatening vascular injury, which had caused Rafael to lose 40 percent of his blood volume, Weitzen called Weintraub, the on-call vascular surgeon, who was at home, and directed that Rafael undergo an angiogram to identify the location of the injured vessel. While in the Emergency Department, Rafael was given six liters of fluid - one liter of packed red blood cells and five liters of normal saline. At 4:45AM, Charles, the hospital's interventional radiologist performed an angiogram, discovered that Rafael had completely transected his left superficial femoral artery at the thigh and plugged the vesel with an occlusion balloon. At 6:05AM, anesthesia was started by Yap, another anesthesiologist and at 6:46AM, Weintraub began surgery to repair Rafael's artery. Between 6:57AM and 12:20PM Rafael was given 2,000mL of packed red blood cells, 1000mL of fresh frozen plasma, and 9,750mL of normal saline. 500mL of the blood product was ordered by Yap, who was relieved by Soliven at 8:47AM, and who infused the remainder of the above-

mentioned fluids, which were in addition to the 6000mLs Rafael had already received in the Emergency Room. Records of the surgical procedure performed by Weintraub, which concluded at 11:55AM, fail to indicate that neither Yap nor Soliven sought and obtained any intra-operative laboratory testing for hemoglobin, hematocrit, platelets, coagulation, electrolytes, arterial blood flow, or kidney functions. The records further fail to note how much fluid Rafael was given prior to Weintraub's surgery. Lastly, during the surgery, no arterial line was inserted and no other attempts made to obtain central venous access so as to measure central venous pressure.

At 12:20PM, Rafael was transported to the ICU, where at 12:26PM, he went into cardiac arrest but was promptly resuscitated. It was noted that Rafael's abdomen was distended and rigid, with an abdominal pressure of 47Hg - normal pressure being less than 12Hg. McLean was consulted and upon examination, he suspected that Rafael had abdominal compartment syndrome, requiring an immediate exploratory laparotomy. Prior to this procedure, Rafael was given five more units of packed red blood cells, and 3500ml of normal saline. Upon opening Rafael's abdomen, McLean noted that Rafael's intestines were pale and pushed out. He also noted that Rafael had a large volume of fluid in his peritoneal cavity, which he aspirated. McLean noted that Rafael's abdominal compartment syndrome was the result of acute abdominal compartment syndrome due

to third spacing and that the same was caused by the massive amounts of blood and fluids that Rafael had been given. As the procedure ended, Rafael went into cardiac arrest and died.

Based on the foregoing, Deluty opines, within a reasonable degree of medical certainty, that Rafael's death was caused by abdominal compartment syndrome, which syndrome was caused by Yap and Soliven's infusion of fluids, far in excess of what was reasonable. The over infusion of fluids was a departure from good and accepted standards of medical practice insofar as the same was caused by the failure of Yap and Soliven to note the amounts of fluids given to Rafael prior to the surgical procedure which brought him under their care and in failing to use a central venous pressure catheter and an arterial line. Good and accepted standards of medial care require the foregoing as well as intraoperative laboratory data - which Yap and Soliven also failed to perform. Had the foregoing been done, Yap and Soliven would have known that Rafael was being given too much fluid. As a result of the foregoing, Deluty opines that Rafael became afflicted with abdominal compartment syndrome, which, thereafter, caused his death.

Based on the foregoing with Deluty's affirmation, the City and Williams met their burden in that Deluty, a medical doctor, opines that Soliven departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged *(Thurston*

at 1001; *Myers* at 84; *Rebozo* at 458). Since generally, where the record contains conflicting medical affidavits on the issue of malpractice and causation, summary judgment ought to be denied (*Feinberg* at 519; *Shields* at 672; *Barbuto* at 624), Soliven's motion is denied.

Insofar as the motion by Soliven has been denied, the Court must also deny the motion by SBA. Although not fully articulated by SBA, it appears that it employed Soliven and as such it is vicariously liable for his negligence, if any. With respect to a entities other than hospitals, liability for the negligent acts of physicians is generally only vicarious, meaning that an entity is liable for the acts of its employee-doctor "only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*Doe* at 484)). Since the only argument made by SBA in support of summary judgment is that because Soliven did not commit malpractice, any claim against SBA must be dismissed, it is clear that SBA is arguing that it is only vicariously liable for the Soliven's acts. As such, having concluded that the record precludes summary judgment in favor of Soliven, the Court must also deny SBA's motion for the same relief.

Yap's Motion for Summary Judgment

Yap's motion seeking summary judgment is denied. While Yap establishes prima facie entitlement to summary judgment in that he negates malpractice and causation, the City and William's evidence

establishes that Yap departed from good and accepted standards of medical practice in, *inter alia*, failing to properly monitor Rafael's fluid levels, thereby contributing to the over infusion of fluids, which led to the abdominal compartment syndrome causing Rafael's death.

In support of his motion Yap submits an affirmation from Anne Catherine Kolker (Kolker), a board-certified anesthesiologist, who upon a review of Rafael's SBH records and deposition testimony given by the parties and other witnesses chronicles Rafael's admission to SBH, the reason he was there, the procedures he underwent, who treated him and when. Since the Court has already discussed the foregoing at length, it shall focus on Kolker's statements insofar as pertinent to the treatment provided by Yap to Rafael. Rafael first came under Yap's care at 5:45AM, when he was to undergo the surgical procedure by Wientraub to repair Rafael's artery. Between 5:45AM and 7:45AM, Yap, as the anesthesiologist, gave Rafael 1250mL of normal saline. Thereafter, at 8:47AM, Yap was relieved by Soliven. Prior to that, Rafael received 750mL of packed red blood cells. After Yap was relieved, he had no further involvement in Rafael's care.

Based on the foregoing, Kolker opines, to a reasonable degree of medical certainty that Yap acted within the standard of care in treating Rafael. Kolker opines that Yap's administration of fluids was appropriate given that Rafael had lost 3000ccs of blood prior

to the surgery to repair Rafael's artery. Kolker also opines that during the time Yap cared for Rafael, he properly monitored Rafael's vital signs and via the administration of fluids, managed to maintain Rafael's cardiovascular stability. Kolker further opines that no acts or omissions by Yap caused Rafael's abdominal compartment syndrome.

Based on the foregoing, Yap establishes prima facie entitlement to summary judgment.

In opposition, the City and Williams submit Deluty's affirmation, which has already been discussed above. As already noted, Deluty opines, within a reasonable degree of medical certainty, that Rafel's death was caused by abdominal compartment syndrome, which syndrome was caused by Yap and Soliven's infusion of fluids, far in excess of what was reasonable. The over infusion of fluids was a departure from good and accepted standards of medical practice insofar as the same was caused by the failure of Yap and Soliven to note the amounts of fluids given to Rafael prior to the surgical procedure which brought him under their care and in failing to use a central venous pressure catheter and an arterial line. Good and accepted standards of medial care require the foregoing as well as intraoperative laboratory data - which Yap and Soliven also failed to perform. Had the foregoing been done, Yap and Soliven would have known that Rafael was being given too much fluid. As a result of the foregoing departures, Deluty opines that

Rafael became afflicted with abdominal compartment syndrome.

Based on the foregoing with Deluty's affirmation, the City and Williams met their burden in that Deluty, a medical doctor, opines that Yap departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged. Yap's motion is denied.

SBH's Motion for Summary Judgment

SBH's motion seeking summary judgment is hereby denied. SBH saliently seeks summary judgment on grounds that it is not vicariously liable for the acts of Weitzen, Weintraub, Yap, and Soliven on grounds that those doctors were neither employed nor supervised by SBH. However, insofar as the record makes it clear that Rafael was brought to SBH's Emergency Department after having been involved in a traumatic car accident, the treatment received by Rafael makes SBH vicariously liable irrespective of whether it controlled the doctors who treated Rafael. Thus, SBH fails to establish prima facie entitlement to summary judgment.

Here, in support of its motion SBH submits the records evincing treatment received by Rafael thereat. Such records establish that Rafael was brought to SBH's Emergency Department via ambulance after he had been involved in a motor vehicle accident at 2:25AM on December 9, 2006 and that all the treatment he received at SBH was related to his admission via SBH's emergency room. The two expert affirmations also submitted by SBH also establish the

foregoing.

While it is true that a hospital is only liable for the malpractice of those doctors it employs (*Hill* at 79), and generally cannot be held vicariously liable for the negligent acts of those doctors not within its employ (*id.* at 79; *Collins* at 473; *Raschel* at 697), it is also true that with respect to hospitals, where the "patient enters the hospital through the emergency room seeking treatment from the hospital, not from a particular physician" (*Noble* at 1066), such that the patient reasonably believes that the doctors treating him are employed by the hospital or acting on its behalf, liability for their malpractice can be imputed to the hospital under a theory of ostensible or apparent agency (*id.* at 1066; *Raschel* at 391; *Mduba* at 453-454). Thus, a hospital can be held vicariously liable for negligent acts of independent physicians when the patient enters the hospital through the emergency room seeking treatment from the hospital, rather than from a particular physician (*Noble* at 1066).

Here, while SBH seeks summary judgment on grounds that those doctors it did employ did not commit malpractice, it also seeks summary judgment on grounds that even if those doctors it did not employ committed malpractice, inasmuch as SBH did not employ them, it cannot be liable for the same. Whether SBH establishes the former is irrelevant since its own evidence establishes that because Rafael treated at SBH as a result of an emergency, SBH is

liable for the acts of those doctors who did treat Rafael under the theory of ostensible or apparent authority (*id.* at 1066). Since summary judgment with respect to Weitzen, Weintraub, Soliven, and Yap has been denied, questions of fact as to whether SBH is vicariously liable for their alleged malpractice are extant and preclude summary judgment on SBH's favor.

McLean and Quarry's Motion for Summary Judgment

McLean and Quarry's motions seeking summary judgment is hereby granted. Preliminarily, the instant motions are unopposed and are granted for this reason alone. Moreover, McLean submits an affirmation from Dan S. Reiner (Reiner), a medical doctor board-certified in surgical critical care, who based on his review of the pertinent portions of the instant record, opines that the care provided by McLean - namely the exploratory laparotomy - was within the applicable standard of care and in no way cause Rafael's injuries and death. Similarly, Quarry submits an affirmation from Gregory Mazarin (Mazarin), a medical doctor board-certified in the field of emergency medicine, who opines that the treatment received by Rafael at SBH by Klie, Quarry's employee, was within good and accepted standards of medical care. Thus, both McLean and Quarry merit summary judgment because they establish prima facie entitlement to the same. Because no opposition is submitted, nothing precludes such relief. It is hereby

ORDERED that the City and William's third-party compliant, and

any cross-claims as against McLean and Quarry, be hereby dismissed, with prejudice. It is further

ORDERED that McLean and Quarry serve a copy of this Decision and Order with Notice of Entry all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : October 9, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.