

**State of New Hampshire
Board of Medicine
Concord, New Hampshire 03301**

In the Matter of:
Mathurin Malby, M.D.
No.: 13049
(Misconduct Allegations)

SETTLEMENT AGREEMENT

In order to avoid the delay and expense of further proceedings and to promote the best interests of the public and the practice of medicine, the New Hampshire Board of Medicine (“Board”) and Mathurin Malby, M.D. (“Dr. Malby” or “Respondent”), a physician licensed by the Board, do hereby stipulate and agree to resolve certain allegations of professional misconduct now pending before the Board according to the following terms and conditions:

1. Pursuant to RSA 329:17, I; RSA 329:18; RSA 329:18-a, and Medical Administrative Rule (“Med”) 206 and 210, the Board has jurisdiction to investigate and adjudicate allegations of professional misconduct committed by physicians. Pursuant to RSA 329:18-a, III, the Board may, at any time, dispose of such allegations by settlement and without commencing a disciplinary hearing.
2. The Board first granted Respondent a license to practice medicine in the State of New Hampshire on April 5, 2006. Respondent holds license number 13049. Respondent practices emergency medicine at Frisbie Memorial Hospital, at 11 Whitehall Road in Rochester, NH.
3. The Board received notice that Respondent was named as a defendant in a civil action alleging medical injury. Respondent had treated MB for a variety of complaints at the

Frisbie Memorial Hospital emergency room. MB passed away approximately 24 hours after being discharged from the emergency room.

4. In response to this, the Board conducted an investigation and obtained information from various sources pertaining to Respondent's failure to diagnose complicated pyelonephritis, early sepsis and pneumonia. These conditions ultimately led to MB's death.
5. Respondent stipulates that if a disciplinary hearing were to take place, Hearing Counsel would prove that Respondent violated RSA 329:17, VI (d) and (k) and Med 501.02 (d) and (e) by the following facts:
 - A. MB was admitted to the Frisbie Memorial Hospital Emergency Room with a chief complaint of a headache that had been worsening for two days and was reported by MB to be the worst of her life. The following additional symptoms were reported: fever, chills, left sided chest pain, left abdominal pain, left back pain, lightheadedness and dysuria. MB was febrile, anxious, pale and diaphoretic.
 - B. Respondent failed to order appropriate diagnostic testing with regard to MB's chest pain. Respondent did not order an EKG or chest x-ray and instead relied on one set of cardiac enzymes in determining that MB had a negative cardiac work-up. Following MB's death, it was learned that she had been suffering from pneumonia.
 - C. Respondent did not clearly evaluate or explain MB's anxiety, pallor or diaphoresis.

- D. Respondent did not adequately document his treatment of MB. There is no documentation regarding what Respondent considered to be an explanation for MB's headache, chest pain, abdominal pain, anxiety, pallor or diaphoresis. There is inadequate documentation of MB's vital signs prior to discharge. There is no documentation of Respondent's re-examination prior to discharge.
 - E. Respondent discharged MB despite his failure to explain the abnormal findings in the lab work. MB's results revealed abnormal peripheral leukocyte count, bandemia and low platelets, all of which are indicative of serious infection and sepsis. Respondent failed to consider whether MB's abnormal LFTs were chronic or suggestive of a multi-organ system failure.
- 6. The Board finds that Respondent committed the acts as described above and concludes that, by engaging in such conduct, Respondent violated RSA 329:17, VI (d) and (k) and Med 501.02 (d) and (e).
 - 7. Respondent acknowledges that this conduct constitutes grounds for the Board to impose disciplinary sanctions against Respondent's license to practice as a physician in the State of New Hampshire.
 - 8. Respondent consents to the Board imposing the following discipline, pursuant to RSA 329:17, VII:
 - A. Respondent is REPRIMANDED.
 - B. Respondent is assessed an ADMINISTRATIVE FINE in the amount of \$3,000. Respondent shall pay this fine in full within thirty (30) days of the effective date of this *Settlement Agreement*, as defined further below, by

delivering a money order or bank check, made payable to "Treasurer, State of New Hampshire," to the Board's office at 2 Industrial Park Drive, Suite 8, Concord, New Hampshire.

- C. Respondent is required to meaningfully participate, at his own expense, in a pre-approved program of continuing medical education in the areas of documentation and recognition of sepsis. Respondent shall complete a total of 10 live credits in this area. The Board shall pre-approve Respondent's continuing education courses. These credit hours shall be in addition to the hours required by the Board for renewal of licensure and shall be completed within one (1) year from the effective date of this *Settlement Agreement*. Within fifteen (15) days of completing these hours, Respondent shall notify the Board and provide written proof of completion.
- D. Within ten (10) days of the effective date of this agreement, as defined further below, Respondent shall furnish a copy of the *Settlement Agreement* to any current employer for whom Respondent performs services as a physician or work which requires a medical degree and/or medical license or directly or indirectly involves patient care, and to any agency or authority which licenses, certifies or credentials physicians, with which Respondent is presently affiliated.
- E. For a continuing period of one (1) year from the effective date of this agreement, Respondent shall furnish a copy of this *Settlement Agreement* to any employer to which Respondent may apply for work as a physician or for

work in any capacity which requires a medical degree and/or medical license or directly or indirectly involves patient care, and to any agency or authority that licenses, certifies or credentials physicians, to which Respondent may apply for any such professional privileges or recognition.

9. Respondent's breach of any terms or conditions of this *Settlement Agreement* shall constitute unprofessional conduct pursuant to RSA 329:17, VI (d), and a separate and sufficient basis for further disciplinary action by the Board.
10. Except as provided herein, this *Settlement Agreement* shall bar the commencement of further disciplinary action by the Board based upon the misconduct described above. However, the Board may consider this misconduct as evidence of a pattern of conduct in the event that similar misconduct is proven against Respondent in the future. Additionally, the Board may consider the fact that discipline was imposed by this Order as a factor in determining appropriate discipline should any further misconduct be proven against Respondent in the future.
11. This *Settlement Agreement* shall become a permanent part of Respondent's file, which is maintained by the Board as a public document.
12. Respondent voluntarily enters into and signs this *Settlement Agreement* and states that no promises or representations have been made to him other than those terms and conditions expressly stated herein.
13. The Board agrees that in return for Respondent executing this *Settlement Agreement*, the Board will not proceed with the formal adjudicatory process based upon the facts described herein.

14. Respondent understands that his action in entering into this *Settlement Agreement* is a final act and not subject to reconsideration or judicial review or appeal.
15. Respondent has had the opportunity to seek and obtain the advice of an attorney of his choosing in connection with his decision to enter into this agreement.
16. Respondent understands that the Board must review and accept the terms of this *Settlement Agreement*. If the Board rejects any portion, the entire *Settlement Agreement* shall be null and void. Respondent specifically waives any claims that any disclosures made to the Board during its review of this *Settlement Agreement* have prejudiced his right to a fair and impartial hearing in the future if this *Settlement Agreement* is not accepted by the Board.
17. Respondent is not under the influence of any drugs or alcohol at the time he signs this *Settlement Agreement*.
18. Respondent certifies that he has read this document titled *Settlement Agreement*. Respondent understands that he has the right to a formal adjudicatory hearing concerning this matter and that at said hearing he would possess the rights to confront and cross-examine witnesses, to call witnesses, to present evidence, to testify on his own behalf, to contest the allegations, to present oral argument, and to appeal to the courts. Further, Respondent fully understands the nature, qualities and dimensions of these rights. Respondent understands that by signing this *Settlement Agreement*, he waives these rights as they pertain to the misconduct described herein.

19. This *Settlement Agreement* shall take effect as an Order of the Board on the date it is signed by an authorized representative of the Board.

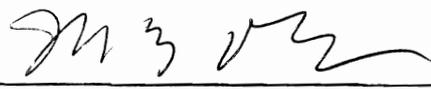
FOR RESPONDENT

Date: 12/1/2009



Mathurin Malby, MD
Respondent

Date: 12/4/09

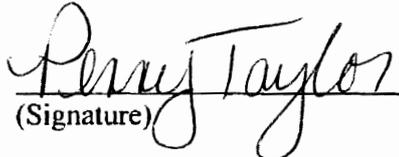


Michael B. O'Shaughnessy, Esquire
Counsel for Respondent

FOR THE BOARD/*

This proceeding is hereby terminated in accordance with the binding terms and conditions set forth above.

Date: January 8, 2010



(Signature)

PENNY TAYLOR

(Print or Type Name)
Authorized Representative of the
New Hampshire Board of Medicine

/* Board members, recused:
Amy Feiteison, MD

