

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

TONI ROSER, as mother and natural
guardian of BRITTANY ROSER, an infant,

Plaintiff,

-against-

BENEDICTINE HOSPITAL and
ANDREW LEFKOVITS, M.D.,

Defendants.

(Supreme Court, Ulster County, All Purpose Term)

DECISION AND ORDER

Index No. 03-1250
RJI No. 55-03-01135

APPEARANCES:

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McCarthy, J.:

Defendant Benedictine Hospital (hereinafter “Hospital”) moves for summary judgment dismissing the complaint as against it. Defendant Andrew Lefkovits, M.D. (hereinafter “defendant Doctor”) cross-moves for summary judgment dismissing the complaint as against him. Plaintiff Toni Roser (hereinafter “plaintiff”) cross-moves for partial summary judgment on the issue of defendant Doctor’s liability. Plaintiff does not oppose the Hospital’s motion but does oppose defendant Doctor’s cross motion for summary judgment. Defendant Doctor opposes plaintiff’s cross motion.

This medical malpractice action arises from care provided to plaintiff during the birth of her fourth child, infant Brittany Roser (hereinafter “infant”), on June 7, 1995. Plaintiff alleges that the infant sustained an Erb’s palsy of her right arm as a result of the negligent care provided her during the infant’s birth. Plaintiff raises two theories of negligence. First, plaintiff alleges that, during plaintiff’s delivery, defendant Doctor improperly directed nurses to apply fundal pressure once shoulder dystocia was encountered.¹ Secondly, plaintiff alleges that defendant Doctor breached the standard of care when he allowed a vaginal birth and did not perform a Cesarian section.

“To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care at the facility where the treatment occurred, (2) that the defendant breached the standard of care, and (3) that the breach was the proximate cause of the injury” (*Elliott v Long Is. Home, Ltd.*, 12 AD3d 481, 482 [2d Dept 2004]). Moreover, in a motion for summary judgment in a medical malpractice action, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

¹ Fundal pressure is pressure applied to the upper portion of the uterus during delivery (see Rodd Affirmation, Exhibit G [Dr. Lefkovits, EBT at 50-51]).

issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon such a showing, the “burden shifts to the opponent to come forward with appropriate evidentiary material establishing the existence of a triable issue of fact” (*Toomey v Adirondack Surgical Assocs.*, 280 AD2d 754, 754 [3d Dept 2001]).

As to its motion for summary judgment, Hospital argues that plaintiff is unable to establish a prima facie case of medical malpractice against it. First, Hospital argues that defendant Doctor was not an employee of Hospital. Next, Hospital argues that the nursing staff at Hospital carried out the orders and directives given them by defendant Doctor. Thus, Hospital argues that plaintiff cannot establish liability against Hospital.

As Hospital submits, “[i]n the absence of an employment relationship, a hospital cannot be held legally responsible for the actions of a private physician attending his private patient so long as the hospital staff properly carries out the physician’s orders” (*Hicks v Ronald Fraser Clinic*, 169 AD2d 558, 559 [1st Dept 1991]; see *Rodrigo v Brookdale Hosp.*, 194 AD2d 774, 776 [2d Dept 1993]; see also *Nagengast v Samaritan Hosp.*, 211 AD2d 878, 880 [3d Dept 1995]). Through its submissions of admissible evidence, Hospital has demonstrated its prima facie entitlement to summary judgment by demonstrating that it has no liability. As the evidence shows, defendant Doctor was not employed by Hospital. Further, the nurses on the Hospital Staff carried out the directives given them by defendant Doctor as defendant Doctor noted in his deposition testimony. Plaintiff does not oppose this motion. Moreover, defendant Doctor fails to raise any argument to defeat Hospital’s prima facie showing. Accordingly, this Court grants Hospital’s motion for summary judgment.

Defendant Doctor cross-moves for summary judgment dismissing the complaint as to him.

First, defendant Doctor argues that, if this Court grants Hospital's motion for summary judgment, the Court is obligated to grant its motion since he directed the actions of the nurses of the Hospital. This Court rejects this argument. The Hospital is released from this action, in part, because the proof demonstrated that the nurses followed the directives of defendant Doctor (*see Rodrigo*, 194 AD2d at 776; *Hicks*, 169 AD2d at 559; *see also Nagengast*, 211 AD2d at 880). No determination was made regarding the appropriateness of such directives (*see Elliott*, 12 AD3d at 482).

Otherwise, defendant Doctor concedes that fundal pressure ordinarily is not appropriate after shoulder dystocia is encountered. Here, defendant Doctor argues that he neither applied such pressure nor directed any nurse to apply such pressure once shoulder dystocia was encountered. Thus, he contends no breach of the standard of care occurred. In support of this position, defendant Doctor presents his own affidavit in which he avers: "I am not aware of fundal pressure being applied after impaction was encountered. I do not recall making any request of the nurses to apply fundal pressure after I encountered [infant's] shoulder dystocia" (Lefkovits Affidavit at ¶ 6). In addition, defendant Doctor relies on the Labor Nursing Notes, which state ". . . 1750 – fundal pressures – shoulder dystocia – 1754 – . . ." (*see Regenbaum Affirmation*, Exhibit B [Nursing Note]). According to defendant Doctor, the notes are done in chronological order and, thus, the application of the pressure preceded the knowledge of should dystocia.

Here, defendant Doctor's one page affidavit is insufficient as it lacks detail as to the treatment of plaintiff and merely concludes that he did not violate a standard of care (*see Toomey*, 280 AD2d at 755). In any event, as plaintiff argues, the deposition testimony of defendant Doctor, in part, contradicts his affidavit, rendering summary judgment improper on these submissions (*see Phillips v Bronz Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]). For example, in his examination

before trial, defendant Doctor testified that he had no present recollection of plaintiff's delivery and relied on the hospital chart and his common practices for his testimony. During his testimony, defendant Doctor read from his post-delivery note that states:

A moderate shoulder dystocia was encountered. Both suprapubic and fundal pressure with flexion of the thigh was of no help. Attempts to the Wood's maneuver was also unsuccessful. The posterior shoulder was then found and the arm identified thus allowing the delivery of the baby without further difficulty. The right arms appears to be slightly less active. No fractures were felt by myself (Rodd Affirmation, Exhibit G [Dr. Lefkovits EBT at 60]).

Defendant Doctor further testified that he wrote the note all at once after the delivery for himself to recount the events of the delivery, which he noted "was not exactly a typical, routine, normal delivery" (*id.* at 62). Defendant Doctor clearly testified that "fundal pressure is not to be applied until shoulder is disimpacted" because a doctor does not "want to further impact the shoulder" (*id.* at 96-97). When asked when he "encountered and recognized that there was a shoulder dystocia in this instance did [he] instruct the nurse or nurses to stop applying fundal pressure," defendant Doctor replied: "I don't know if did that or not" (*id.* at 97). After review of this testimony, this Court denies defendant Doctor's cross motion for partial summary judgment on this issue (*Phillips*, 268 AD2d at 320).

Plaintiff cross-moves for partial summary judgment on the issue of defendant Doctor's liability. In support of its motion, plaintiff submits her counsel's affirmation and the affidavit of an expert obstetrician. Plaintiff contends that, even if defendant Doctor appropriately directed the nurses to apply fundal pressure, defendant Doctor breached the relevant standard of care by failing to perform a Cesarean section. In support of this contention, plaintiff's expert avers that plaintiff "should have never been permitted to have a vaginal delivery based on her prior obstetrical history" (O'Leary Affirmation). Plaintiff's expert explains that plaintiff had previously delivered very large

babies and had a previous vaginal delivery of a macrosomic baby where plaintiff experienced shoulder dystocia resulting in Erb's palsy in that infant (*see id.*). Moreover, plaintiff's expert noted that this history placed plaintiff at high risk for a complicated vaginal delivery of infant. Plaintiff's expert opined:

Because the trend in pregnancies is to have larger babies with each subsequent delivery, and specific to [infant's] antenatal assessments, [defendant Doctor] knew in advance that [infant] was going to be a very large baby. [Infant's] mother should have been delivered by a Cesarean section, and never left to attempt a vaginal delivery. The single greatest predictor of shoulder dystocia is a prior incident of shoulder dystocia. A mother such as [plaintiff] with a past history of shoulder dystocia, presents a particularly (and unacceptably) high risk for having shoulder dystocia again, especially with a known macrosomic fetus as in this case (*id.*).

Through this affidavit, plaintiff has established prima facie entitlement to partial summary judgment on this issue (*see Toomey*, 280 AD2d at 754).

In response, defendant Doctor references his examination before trial testimony, which he contends is sufficient to raise an issue of fact whether a Cesarean section was warranted. As such, defendant Doctor argues that this Court should deny plaintiff's cross motion for partial summary judgment.

To support his argument regarding the significance of the prior instance of shoulder dystocia in plaintiff's third child, defendant Doctor notes a portion of his testimony during his examination before trial. In that portion of his testimony, defendant Doctor was asked: "[W]as it a coincidence that [plaintiff's] third pregnancy – third delivery was characterized by an impacted shoulder and a shoulder dystocia and her fourth was also or is there a connection between the two?" (Rodd Affirmation, Exhibit G [Dr. Lefkovits EBT at 109]). Defendant Doctor replied that there was "[a]bsolutely no connection" (*id.*). Again he was asked if there was a connection, to which he

replied: “None whatsoever. Totally unpredictable both cases” (*id.*).

In another portion of that same testimony, however, he was asked: “During the fourth pregnancy did [plaintiff] present any of the risk factors for shoulder dystocia?” (*id.* at 19). Defendant Doctor replied: “The only risk factor was that she had a prior shoulder dystocia and that she had a history of gestational diabetes” (*id.*). Defendant Doctor disagreed that a history of prior shoulder dystocia in a previous pregnancy is the single greatest risk factor for shoulder dystocia (*see id.*). Further, when asked whether he determined “that this fourth pregnancy of [plaintiff] should be delivered vaginally rather than surgically,” defendant Doctor replied “[y]es” (*id.* at 32).

With regard to whether defendant Doctor expected plaintiff to deliver a macrosomic infant, his testimony is again inconsistent. In one part of his testimony, defendant Doctor testified that the infant fulfilled his definition of a macrosomic infant and that he was not surprised that the infant was macrosomic (*see id.*). In another part of his testimony, he testified that, while it was possible that plaintiff would have a “big baby,” it was “not necessarily [his] contention [plaintiff] have a big baby” (*id.* at 74).

In opposing a motion for summary judgment, a party “must lay bare affirmative proof demonstrating that the matters he alleges are real and are capable of being established at trial” (*Kelly v St. Peter’s Hospice*, 160 AD2d 1123, 1124 [3d Dept 1990], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although a defendant physician may in part rely on his deposition testimony (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]), inconsistent deposition testimony regarding material issues is insufficient to rebut a prima facie showing of entitlement to summary judgment (*see Hamilton v Hunt*, 288 AD2d 86, 87 [1st Dept 2001]; *see also Boguszewski v Solo Salon and Spa*, 309 AD2d 777, 778 [2d Dept 2003]; *Barber v Kennedy Gen. Contrs.*, 302

AD2d 718, 719 [3d Dept 2003]; *cf Phillips*, 268 AD2d at 320).

Here, as exemplified above, defendant Doctor's testimony regarding the issues surrounding whether he breached a standard of care by failing to perform a Cesarean section on plaintiff is inconsistent. As such, this testimony is insufficient to rebut plaintiff's prima facie showing of entitlement to summary judgment (*see Hamilton*, 288 AD2d at 87). Moreover, this testimony fails to address the relevant standard of care discussed by plaintiff's expert (*see Toomey*, 280 AD2d at 755). In addition, defendant Doctor's affidavit does not even address the issue of a Cesarean section (*see id.*). In total, the evidence submitted by defendant Doctor fails to rebut plaintiff's prima facie showing (*Winegrad*, 64 NY2d at 853; *see Kelly*, 160 AD2d at 1124). Accordingly, this Court grants plaintiff's motion for partial summary judgment on the issue of liability.

Therefore, it is

ORDERED that defendant Benedictine Hospital's motion for summary judgment dismissing the complaint as to it is granted; and it is further

ORDERED that the complaint as to defendant Benedictine Hospital is dismissed; and it is further

ORDERED that defendant Andrew Lefkovits, M.D.'s cross motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff Toni Roser's cross motion for partial summary judgment is granted; and it is further

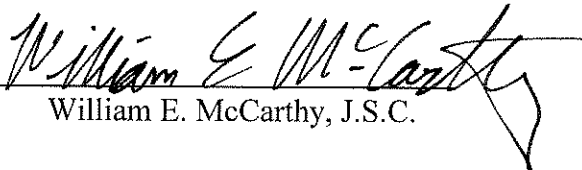
ORDERED that plaintiff Toni Roser is directed to file a Note of Issue within 60 days of entry of this Order (*see* 22 NYCRR 202.21), which upon receipt of the same the Court will direct a time for an inquest to be held to assess damages in this matter.

This shall constitute both the decision and order of the Court. All papers, including this decision and order, are being returned to plaintiff. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ORDERED!

ENTER.

Dated: *APRIL 13, 2005*
Albany, New York


William E. McCarthy, J.S.C.

Papers Considered:

1. Notice of Motion dated October 8, 2004;
2. Affirmation of Adam L. Rodd, Esq., affirmed October 8, 2004, with accompanying Exhibits A-H;
3. Affidavit of Dori Krolick sworn to October 6, 2004;
4. Affirmation of Mark R. Bower, Esq., dated October 12, 2004;
5. Notice of Cross Motion for Summary Judgment dated November 18, 2004;
6. Affirmation of Andrew S. Regenbaum, Esq., affirmed November 18, 2004 with accompanying Exhibits A-B (including Affidavit of Andrew Lefkovits, M.D. sworn to December 10, 2004);
7. Notice of [Cross] Motion dated November 29, 2004;
8. Affirmation of Mark R. Bower, Esq., affirmed November 29, 2004;
9. Affirmation of James O'Leary, M.D., affirmed November 29, 2004;
10. Affirmation of Andrew S. Regenbaum, Esq., affirmed December 17, 2004;
11. Affirmation of Mark R. Bower, Esq., affirmed December 22, 2004.