

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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TONI **ROSER**, as mother and natural guardian
Of BRITTANY ROSER, an infant,

Plaintiff,

-against-

BENEDICTINE HOSPITAL and
ANDREW LEFKOVITS, M.D..

Defendant.
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**PHYSICIAN'S
AFFIRMATION IN
OPPOSITION TO
DEFENDANT
DR. LEFKOVITS'
CROSS-MOTION**

Index No.:03-1250

State of Florida

County of Collier:ss:

James O'Leary, M.D., being duly sworn, deposes and says:

I am board-certified in Obstetrics and Gynecology, and in Maternal-Fetal Medicine. I am licensed to practice medicine in Florida.

This affidavit is submitted in opposition to the cross-motion by defendant Dr. Lefkovits for partial summary judgment in his favor.

I have reviewed Dr. Lefkovitz's deposition transcript, the medical records of Brittany Roser's delivery and subsequent care, and the obstetrical records of her mother, Toni Roser. I base the opinions and conclusions herein on my review of these relevant documents, as well as my education, many years of clinical experience, and particular interest in the subject of the obstetrical management of shoulder dystocia, having published extensively on this specific subject. Everything below is stated with reasonable medical certainty.

Assuming that the hospital record is accurate, as recorded in Dr. Lefkovits' own handwriting describing the delivery, and further assuming that Dr. Lefkovits' testimony at deposition was truthful, then fundal pressure was used after the shoulder dystocia was encountered. **There is no ambiguity in the meaning of the delivery note, that says "A moderate shoulder dystocia was encountered. Both suprapubic and fundal pressure with flexion of the thigh was of no help."** The application of fundal pressure after encountering shoulder dystocia constituted a distinct departure from accepted standards of medical care, and was a direct, competent producing cause of Brittany Roser's Erb's palsy, because it worsened the impaction and necessarily increased the forces applied to the brachial plexus. It is universally acknowledged that fundal pressure is unacceptable in the presence of shoulder dystocia.

However, based on my review of the records relating to this case, I disagree with Dr. Lefkovits' contention that fundal pressure was acceptable even before the shoulder dystocia was encountered. **The use of fundal pressure at any point in the delivery of Brittany Roser was a clear departure and deviation from the standard of care, because Brittany's mother, Toni Roser, should never have been permitted to have a vaginal delivery based on her prior obstetrical history.**

Mrs. Roser previously delivered very large babies, and had even had a previous vaginal delivery (by Dr. Lefkovitz) of a macrosomic baby that resulted in a shoulder dystocia, with a resulting Erb's palsy in Brittany's older sibling. This history placed Mrs. Roser at high risk for a complicated vaginal delivery of Brittany. Because the trend in pregnancies is to have larger babies with each subsequent delivery, and specific to

Brittany's antenatal assessments, Dr. Lefkovitz knew in advance that Brittany was going to be a very large baby. Brittany'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 Toni Roser, 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. **The decision to deliver this pregnancy vaginally was not an acceptable choice; it was not an "error of judgment"; it was a departure from good and accepted standards of practice then and there prevailing.**

Of course, had the indicated Cesarean section been performed, there would have been no possibility of shoulder dystocia, and no possibility of Erb's palsy. There is no question that Brittany's injury was directly caused by the complications of this contra-indicated vaginal delivery.

The injury to the nerves to Brittany's right arm, i.e., Erb's Palsy, was predictable and totally preventable, had Dr. Lefkovitz provided Toni Roser with a Cesarean section as is the standard of care for managing macrosomic babies in a mother, such as Toni, who had a history of macrosomic babies in prior pregnancies and especially with problems with prior complicated deliveries, as Toni had.

Arguing over when supra-pubic pressure was used, and when fundal pressure was used in this case, is a misconceived quarrel. Neither one should have been used, as the mother should have been delivered by Cesarean section.

In conclusion, it is my opinion with reasonable medical certainty that the use of fundal pressure at any point in the delivery of Brittany Roser demonstrated negligence management of her delivery by Dr. ANDREW LEFKOVITS, M.D. and any of the medical personnel and nurses involved in implementing this intervention.

Dated: Nov. 24, 2004

James O'Leary, M.D.