

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index #: 1250/03

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

Plaintiffs,

- against -

BENEDICTINE HOSPITAL and **ANDREW**
LEFKOVITS, M.D.,

Defendants.

I.A.S. Justice BRADLEY

**PLAINTIFF’S REPLY
AFFIRMATION IN
OPPOSITION TO
DR. LEFKOVITS’
MOTION FOR PARTIAL
SUMMARY JUDGMENT,
AND
IN FURTHER SUPPORT
OF PLAINTIFF’S
APPLICATION FOR
SUMMARY JUDGMENT
AGAINST DR.
LEFKOVITS**

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Returnable 12/27/04

Mark R. Bower, an attorney admitted to practice before the Courts of this State affirms the truth of the following under the penalty of perjury:

I am affiliated with the firm of Law Offices of Mark R. Bower, P.C., attorneys for the plaintiff herein, and am generally familiar with the facts and circumstances of this action based on a review of the case file and the investigation materials contained therein.

This affirmation is submitted in reply to the papers of defense attorney Andrew Regenbaum (Feldman, Kleidman & Coffey, Esqs.) in connection with the plaintiff’s application for an Order:

- 1. Denying defendant Dr. Lefkovits’ Cross-Motion for summary judgment in his favor; and**
- 2. Granting plaintiff partial summary judgment on liability only as to defendant Dr. Lefkovits only.**

Our previous papers were based on the Affirmation of our board-certified OB/GYN consultant, the published practice bulletin on “Shoulder Dystocia” from the American College of

Obstetrics & Gynecology (ACOG), and the actual note and testimony of the defendant himself. Since Dr. Lefkovits testified that he is board-certified by ACOG, our references to ACOG's published standards are appropriate for the Court's consideration. The medical drawings contained in our prior papers are illustrative of our claims, and aid in understanding the theory of the case; and as such, are also appropriate for the Court's consideration. Mr. Regenbaum's belittling remarks insulting opposing counsel are merely a distraction. This reply will attempt to re-focus attention where it belongs: to the substantive questions surrounding of Dr. Lefkovits' alleged malpractice and defense, and attempt to restore dignity to the resolution of these motions.

**THE DEFENDANT MAY NOT IMPEACH THE PLAIN LANGUAGE
OF HIS OWN DELIVERY NOTE, OR CHANGE HIS STORY
ON A SUMMARY JUDGMENT MOTION:**

The sequence of events during this childbirth described in Dr. Lefkovits' delivery note is unmistakable and unambiguous:

“... After delivery of the head, the rest of the baby was undelivered. ... A moderate **shoulder dystocia was encountered. Both suprapubic and fundal pressure with flexion of the thigh was of no help.** Attempts at 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 arm appears to be slightly less active.”

The plain meaning of Dr. Lefkovits' note is that both suprapubic and fundal pressure were of no help in dislodging the shoulder dystocia. The defense's belated and strained efforts to suggest this somehow means that the fundal pressure was discontinued before the shoulder dystocia was recognized, is irreconcilably contrary to the text of the note. Furthermore, there is no Nurse's Note documenting the defense's contention, and exactly how Dr. Lefkovits' memory was supposedly

refreshed by viewing some unidentified (and we believe, non-existent) Nurse's Note, remains a mystery. There simply is no possible reasonable interpretation of the sequence of events *as the defendant himself documented them*, except that the pressure was applied to dislodge the shoulder dystocia but "was of no help."

Since plaintiff's expert, Dr. O'Leary, ACOG, and the defendant himself, all uniformly agree that fundal pressure is contraindicated in the presence of shoulder dystocia, the standard of care is not in dispute. The plain meaning of Dr. Lefkovits' note documents that fundal pressure was used *after* the dystocia was encountered. That was a mistake in delivery technique, period.

As such, we stand behind our contention that Dr. Lefkovits impermissibly changed his story for the purpose of his summary judgment motion. And we stand behind our citations showing that this is not allowed. Defense attorney Regenbaum utterly fails to address this legal point, as if ignoring it means it doesn't exist. But it does exist (according to controlling case authority) - Alvarez v. Prospect Hosp., 68 NY2d 320; Hartman v. Mountain Valley Brew Pub, 301 AD2d 570; Brown-Phifer v. Cross County Mall Multiplex, 282 AD2d 564; Novoni v. La Parma Corp., 278 AD2d 393; Barretta v. Trump Plaza Hotel & Casino, 278 AD2d 262, 263; Robinson v. Lupo, 261 AD2d 525. - and it applies directly to the facts herein. As a result, Dr. Lefkovits' new interpretation of the events of delivery must be disregarded.

If one gives any credence to Dr. Lefkovits' claim that the fundal pressure was discontinued when the dystocia was recognized - which one should not, for the legal reasons above - at best, it raises a contested question of fact as to when the fundal pressure was applied. As such, Dr. Lefkovits' motion for partial summary judgment must be denied.

THE KEY ELEMENTS IN PLAINTIFF’S EXPERT’S AFFIDAVIT ARE UNREFUTED:

In contrast to Dr. Lefkovits’ motion, which raises a disputed question of fact as to when the fundal pressure was applied, plaintiff’s application for summary judgment does not raise questions of fact. Plaintiff’s argument that the mother should have had a cesarian section without ever attempting a vaginal birth, has not been refuted.

There is nothing in Dr. Lefkovits’ testimony or affirmation that specifically addresses Dr. O’Leary’s points that:

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. Lefkovits) 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 pregnancy, Brittany’s mother should have been delivered by Cesarean Section, and he should never have attempted 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 in judgment; it was a departure from good and accepted standards of practice then and there prevailing. [emphasis original]

Dr. Lefkovits does not and cannot refute Dr. O’Leary’s statement that “Mrs. Roser previously delivered very large babies, and had even had a previous vaginal delivery (by Dr. Lefkovits) of a macrosomic [unusually large] baby that resulted in a shoulder dystocia, with a resulting Erb’s palsy in Brittany’s older sibling.” These unchallenged statements of fact are based

on the prior delivery records from both Benedictine Hospital and Dr. Lefkovits' own records. This history placed Mrs. Roser at unacceptably high risk for a complicated vaginal delivery of Brittany.

Dr. Lefkovits also does not and cannot refute Dr. O'Leary's basic statement that "the trend in pregnancies is to have larger babies with each subsequent delivery." This, too, is a simple and uncontradicted medical fact that is proved by Mrs. Roser's successively bigger babies. (See footnote #1 below.) For that reason, Dr. O'Leary concluded that this mother should not have had even an *attempt* at vaginal birth.¹

As a result, Dr. Lefkovits does not, and cannot, refute Dr. O'Leary's conclusion that "The decision to deliver this pregnancy vaginally was not an acceptable choice; it was not an error in judgment; it was a departure from good and accepted standards of practice then and there prevailing." On the contrary, the defendant's own testimony quoted in footnote 1 below confirms Dr. O'Leary's conclusion.

¹ The truth of Dr. O'Leary's statement is proved by Dr. Lefkovits' deposition in this very case. Mrs. Roser's third baby was big - nine pounds, three ounces (4,167 grams), her fourth (Brittany) was even bigger - ten pounds (4,536 grams), according to Dr. Lefkovits' EBT (pages 34 and 56, respectively).

Dr. Lefkovits admitted that he expected a macrosomic baby:

Q. Was it a surprise to you that this was a macrosomic newborn?
A. No.

Q. Did you expect a macrosomic baby?
A. Yes. [Lefkovits EBT, page 56]

And Dr. Lefkovits also admitted the macrosomia increases the risk of shoulder dystocia, just as Dr. O'Leary said:

Q. Is fetal macrosomia a known risk factor for shoulder dystocia?
A. Yes. [Lefkovits EBT, page 27]

Thus, Dr. O'Leary's factual premises and conclusion are bolstered by the defendant's own sworn testimony!

When defense counsel received our motion, he immediately requested a two-week adjournment to write opposing papers. We assumed that he needed that time to produce an expert's Affidavit in rebuttal. To our surprise, the defense has not put in any opposing expert's Affidavit - not even another self-serving affirmation from Dr. Lefkovits himself - leaving the bulk of Dr. O'Leary's Affidavit uncontradicted. We must conclude that the defense produced no expert's Affidavit because no legitimate expert could challenge our expert's facts or conclusions.

Indeed, the *only* contradiction offered by the defense, is an excerpt from the defendant's deposition testimony that there was "absolutely no connection" between the successive *shoulder dystocias* Dr. Lefkovits encountered in both the third and the fourth deliveries. The defense postures that two successive incidences of shoulder dystocia, producing two successive Erbs-palsied newborns delivered of the same mother by the same obstetrician, are *a remarkable coincidence!* **But this skirts the central issue of sequential pregnancies producing larger and larger babies** (as happened herein) - an uncontradicted medical fact - that made it unacceptable to even *attempt* a vaginal birth in this case. Dr. Lefkovits' deposition testimony does not address the problems that flow from the increasing size of babies in subsequent pregnancies, while it confirms that a macrosomic baby was expected, and that increased the risk of shoulder dystocia. These simple, core medical facts, and Dr. O'Leary's expert conclusion that flows from those facts, have not been directly addressed - far less refuted - and are crucial herein.

Dr. Lefkovits' deposition testimony also does not directly address whether a vaginal birth was appropriate at all, either. The defense is silent on this issue. We respectfully submit that it is not the Court's burden to "read between the lines" to overcome the shortcomings of the defendant's papers, nor hunt for inferences that might be helpful to the defense, nor scour the

voluminous medical records and deposition transcripts for exculpatory entries, when the defense cannot and did not submit a direct point-by-point refutation of the specific charges in plaintiff's expert's Affidavit.

The only direct evidence before this Court on whether an attempted vaginal delivery was permissible, is Dr. O'Leary's ringing declaration that it was not. This mother should have been delivered surgically. Attempting a vaginal delivery was itself a deviation and departure from the standard of care.

As this charge of malpractice is not refuted in any of Dr. Lefkovits' opposing papers, it stands before the court as uncontradicted.

Accordingly, the plaintiff is entitled to summary judgment on the issue of liability.

WHEREFORE, it is respectfully urged that Dr. Lefkovits' motion be denied entirely., and that plaintiffs' motion for partial summary judgment (on liability only) be granted.

Dated: New York, NY
 December 22, 2004

Mark R. Bower

