At an I.A.S. Term, Part MMTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of June, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

----------X

JAIDA BROWN-ALI, an infant by her mother and natural guardian, MONIQUE BROWN,
Plaintiff,

-against-

KINGS COUNTY HOSPITAL CENTER, et al.,
Defendants.

----------X

DECISION & ORDER

Index No. 20729/04

Cal. No. 2006-010935T

Motion Seq. No. 001

The following papers numbered 1 to 6 read on this motion.

	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed	1 - 2
Affirmation(s) in Opposition and Exhibits Annexed	3
Reply Affirmation(s)and Exhibits Annexed	4
Sur-Reply Affirmation(s)and Exhibits Annexed	5
Sur-Sur-Reply Affirmation(s)and Exhibits Annexed	6

Upon the foregoing papers, and upon oral argument, defendants New York City Health and Hospitals Corporation (HHC), s/h/a "New York City Health and Hospitals Corporation and Kings County Hospital Center" and Jaung Hwang, M.D. (Dr. Hwang) move pursuant to CPLR 3212 for an order granting summary judgment and dismissing the complaint.

This is a medical malpractice action, in which the plaintiff Monique Brown alleges that HHC departed from accepted standards of medical practice on December 31, 2002 and

January 1, 2003 with respect to the labor and delivery which resulted in the birth of the infant-plaintiff Jaida Brown-Ali. Specifically, plaintiff alleges that HHC failed "to timely diagnose fetal distress in a timely manner, and perform a more timely cesarean section (Verified Bill of Particulars, ¶2). Plaintiffs further allege departures against Dr. Hwang, who was the infant's pediatrician at Kings County Hospital, commencing on January 27, 2003 through April, 2004. Specifically, plaintiff alleges that Dr. Hwang failed "to timely diagnose developmental delay and cerebral palsy (Verified Bill of Particulars, ¶2); failed "to timely refer infant plaintiff for pediatric neurologic workup, including intervention with physical therapy not speech therapy on a timely basis" (¶3); and failed "to administer indicated treatment for the infant plaintiff's developmental delay and cerebral palsy" (¶ 5).

While not conceding that any departures were committed by them, defendants acknowledge plaintiff's allegations, yet chose to not address the question of departures in this motion. Rather, defendants focus on the issue of proximate cause, and argue that no issue of fact exists that the infant's alleged injuries were not the result of the care rendered by the defendants.

Analysis

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact (*Colely v Michelin Tire Corp.*, 99 AD2d 795 [1984]). A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to

warrant the court in directing judgment in favor of any party as a matter of law (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). Upon a showing by the movant of entitlement to judgment as a matter of law, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"To establish a prima facie case of liability in a medical malpractice action, the plaintiff must prove that the defendant physician deviated or departed from good and accepted standards of medical practice, and that the departure was the proximate cause of injury or damage" (*Roseingrave v Massapequa General Hospital* , 298 AD2d 377, 379 [2002]). In order to sustain this burden, the plaintiff "must present expert opinion testimony that the defendant's conduct constituted a deviation from the requisite standard of care" (*Pace v Jakus*, 291 AD2d 436, 436-437 [2002]; *see also Perrone v Grover*, 272 AD2d 312 [2000]). Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When that occurs, a credibility question is presented requiring a jury's resolution (*Feinberg v Feit*, 23 AD3d 517 [2005]; *Shields v Baktidy*, 11 AD3d 671, 672 [2004]).

In support of the motion, defendants submit the affirmation of Alfred Spiro, M.D., a board-certified Neurologist, who has reviewed, inter alia, the infant's records from Kings County Hospital and MRI films of the infant's brain from SUNY Downstate. Dr. Spiro states with a reasonable degree of medical certainty that no acts or omissions of HHC's

obstetricians or of Dr. Hwang were a substantial factor in bringing about any of the injuries from which the infant plaintiff allegedly suffers, including but not limited to, cerebral palsy, brain damage, hemiparesis, left hearing loss and various developmental delays.

Dr. Spiro notes that the infant plaintiff was born via cesarean section on January 1, 2003 at Kings County Hospital Center after a prolonged labor. On the MRI's of the infant plaintiff there is an area of periventricular leukomalacia (PVL), which he defines as a brain lesion typical in premature babies such as the infant plaintiff. Dr. Spiro states that this is the only abnormality present in these brain scans.

Dr. Spiro opines that it is the PVL which resulted from the infant's premature birth that caused her relatively mild cerebral palsy and any developmental delays from which she suffers. He states that PVL is thought to be a disorder of cells in the "white matter" of the brain, which controls a person's motor function. In other words, PVL refers to a condition related to prematurity in which there is a lack of normal myelin (white matter formation) that compromises a person's motor function. PVL manifests on an MRI as bilateral white matter "highlights" in the area surrounding the ventricles of the brain, and the lack of normal myelin appears as abnormal density on the scan. Dr. Spiro opines that in the infant-plaintiff's case, her PVL has resulted in her cerebral palsy and right hemiparesis, and it is also likely that her PVL has caused the other developmental delays and conditions claimed by plaintiffs.

Dr. Spiro further opines that there is no evidence of any hypoxic insult in the MRI's, because the only abnormality is the PVL, and hypoxic brain damage would have left lesions

dispersed around the brain. The infant's PVL is simply a result of the baby's prematurity, and was not caused by any of the defendants' acts or omissions. Therefore, neither a cesarean section, nor any of the other procedures mentioned in the plaintiff's Bills of Particulars, could have prevented this condition and none of the defendants herein caused the infant's developmental delays in the first instance.

Dr. Spiro also reports that the plaintiff subsequently received outpatient pediatric care with Dr. Hwang beginning in January 2003 and continuing until April 2004. Dr. Hwang performed developmental screening of the infant such that she did detect, at the age of nine months, that the infant was below the projected trajectory for development. Dr. Hwang then promptly referred her for a neurological and orthopedic workup at Kings County Hospital Center, which was performed in November 2003.

Plaintiff testified at her examination before trial that she first informed Dr. Hwang that the infant was "fisting" on her right side when she was five or six months old. Plaintiff also testified that she expressed concerns to Dr. Hwang that her daughter had not begun to crawl or stand up. None of these communications are confirmed in the Kings County Hospital chart or in the testimony of Dr. Hwang. Dr. Spiro opines that even if plaintiff's testimony is regarded as true, and Dr. Hwang was informed of these deficits at five and six months, Dr. Hwang's failure to refer the child to specialists or for early intervention at that time was not a substantial factor in the outcome of the infant's alleged developmental delays, because earlier diagnosis and treatment of these conditions would not have changed her prognosis.

Regardless of whether a child has PVL (as the infant plaintiff does) or suffered from hypoxic brain injury in utero (as plaintiffs allege), the damage is static, not progressive, i.e., it does not get better or worse on its own. Therefore, Dr. Spiro opines that in failing to refer the infant plaintiff for therapy or treatment by specialists before she was nine months old, Dr. Hwang certainly did not make her condition worse.

Dr. Spiro further opines that starting early intervention at five or six months of age, as opposed to nine or ten months of age (or even at one year old), would make absolutely no difference because the neurological impairment is not affected by a few months of such treatment. It takes years of intervention to effect an appreciable improvement in the range of motion and other deficits of a delayed child, if she or he experiences any improvement at all. So, whether a child starts treatment at six, nine or twelve months is immaterial. Additionally, starting intervention when children are between nine and twelve months is as effective in helping them reach their potential as starting intervention at five or six months.

In conclusion, Dr. Spiro states that any deficits that Jaida Brown-Ali has experienced are unrelated to her care by any of the defendants.

In opposition to defendants' motion, plaintiff submits expert affirmations from a board-certified Pediatric Neurologist and a board-certified Obstetrician/Gynecologist.[1]

Preliminarily, plaintiff concedes that as "there is no issue as to proximate cause related to [Dr. Hwang's] treatment that can be opined to with a reasonable degree of medical

---

[1] The names of plaintiff's experts have been redacted from the submitted affirmations (see, *Marano v Mercy Hospital*, 241 AD2d 48 [1998]).

certainty" that portion of defendants' motion as to Dr. Hwang should be granted. Based on the defendants' unopposed submission as to Dr. Hwang, the court agrees. Accordingly, summary judgment is granted to Dr. Hwang.

With respect to HHC, plaintiff's board certified Obstetrician/Gynecologist[2] states with a reasonable degree of medical certainty that HHC failed to expeditiously deliver the infant-plaintiff by performing a cesarean section by 8:30 p.m. on December 31, 2002 and by allowing the infant plaintiff to suffer from hypoxemia (lowered levels of oxygen in the blood) and hypoxia (lower levels of oxygen in the cells) causing acidosis from that time for nearly 24 hours, until the infant was delivered at 6:05 p.m. on January 1, 2003.

Plaintiff's expert states that the plaintiff presented with a non-reassuring fetal heart monitor pattern, and refers to the fetal monitor strips beginning at 6:58 p.m. on December 31, 2002 and continuing until the last fetal monitor strip was generated. Plaintiff's expert observes that there is some evidence that the fetal distress was noted in the labor and delivery record at 5:15 a.m. on January 1, 2003, which reads "NR tracing continues" (i.e. non-reassuring tracing continues), and that no treatment other than repositioning of the plaintiff was effectuated. Then at 6:00 a.m. the record reads "Late decelerations noted on tracing." Despite this, Pitocin was administered, placing greater stresses on the fetus by increasing uterine contractions. This stress was evidenced just 45 minutes later at 6:00 a.m. when late decelerations, an indication of fetal distress, continued. Plaintiff's expert opines that late

---

[2] The names of plaintiff's experts have been redacted from the submitted affirmations (see, *Marano v Mercy Hospital*, 241 AD2d 48 [1998]).

decelerations are a manifestation of hypoxic slowing of the heart, which is an indication that the fetus may be developing acidosis. Yet Pitocin was discontinued and then re-instituted at 2:00 in the afternoon, despite numerous indications of late decelerations. Plaintiff's expert opines that the fetus was in distress, was hypoxic and therefore acidotic, not receiving enough oxygen, and should have been delivered by cesarean section to avoid neurological complications among other perinatal injury. In support, plaintiff's expert refers to the lack of anything more than minimal beat-to-beat variability shown on the strips coupled with a complete absence of accelerations from 6:58 p.m. until the cesarean section was performed almost 24 hours later, as well as an abnormal cord pH and base excess values.

Plaintiff's board-certified Pediatrician is additionally board-certified in Neurology with Special Qualifications in Child Neurology. This expert opines with a reasonable degree of medical certainty that the defendants caused the infant plaintiff to suffer from a prolonged period of hypoxia. This expert states that this child, who was born at 34 weeks and 2 days weighing 1715 grams, did not develop PVL as a result of prematurity. The overwhelming majority of infants born at 34 weeks and weighing 1715 grams do not develop PVL, which is not caused simply by prematurity. Plaintiff's expert opines that PVL is a finding that represents a brain injury occurring as a result of complications including prolonged hypoxia.

Plaintiff's pediatric expert further states that the only time the infant plaintiff was subjected to hypoxia was during the perinatal time frame as enumerated in the Obstetrician/Gynecologist's affidavit, and that there is no evidence of a prenatal insult or

injury that occurred after the infant's delivery which could account for this type of neurologic damage. Had the infant been delivered in a timely fashion, the PVL and neurologic injuries which the infant plaintiff is now exhibiting and which will permanently disable her would have been significantly mitigated if not wholly avoided.

In a Reply Affirmation defendants submit an additional affirmation from Dr. Spiro in which he states that he is aware of no medical literature supporting the statement of plaintiff's Neurologist's that PVL can be caused by an hypoxic insult. Moreover, even if that proposition were valid as a general matter, the opinion that the infant plaintiff's PVL was due to prolonged hypoxia rather than to prematurity is unreliable, because plaintiff's expert did not utilize proper scientific technique in reaching that conclusion.

This is so because Dr. Spiro's interpretation of the infant's MRI manifests deficits related to PVL, not hypoxia, and PVL is not itself caused by hypoxic brain damage. According to Dr. Spiro, the infant's PVL manifests on the MRI as a discrete focal lesion, which rules out a diagnosis of hypoxic brain damage, because the latter condition would appear on the MRI as multiple, diffuse lesions around the brain. Dr. Spiro notes that plaintiff's neurologist fails to address or comment upon the MRI.

Dr. Spiro also points to the four criteria relied upon by the American College of Obstetricians and Gynecologists (ACOG) to determine whether a perinatal hypoxic event resulted in brain damage.[3] Dr. Spiro opines that all of these criteria must be met for a

---

[3] Dr. Spiro states that according to ACOG's 2003 monograph there are four criteria, all of which must be met for a diagnosis of an intrapartum (perinatal) hypoxic event to be sufficient

diagnosis of an intrapartum (perinatal) hypoxic event to be sufficient to cause cerebral palsy, and in this case nothing in the records, films or testimony confirms that all four criteria have been met. Thus, plaintiff's neurologist failed to utilize scientific methodology, since s/he fails to comment specifically about what the records reveal as to these four criteria.

In addition, Dr. Spiro disputes plaintiff's Neurologist's claim that the overwhelming majority of infants with this infant's gestational age and weight do not develop PVL as imprecise and groundless. Even if this allegation was true, it does not exclude the infant plaintiff from that group of infants who develop PVL due to their prematurity.

Additional papers were submitted by each side with the Court's permission. Plaintiff's Neurologist submitted an affirmation wherein s/he cites portions of a medical textbook, *Neurology of the Newborn*, 4th Ed., by Joseph J. Volpe, M.D. (the Volpe text), in support of plaintiff's position and in opposition to Dr. Spiro's position that there is no medical literature to support the opinion that PVL can be caused or related to hypoxic brain damage. Specifically, plaintiff refers to a chapter on Hypoxic-Ischemic Encephalopathy[4] (HIE) where

---

to cause cerebral palsy: (1) evidence of metabolic acidosis in fetal umbilical cord arterial blood, as revealed by a blood cord pH less than 7 and base deficit greater than or equal to 12 mmol/L; (2) early onset of several or moderate neonatal encephalopathy in infants born at 34 weeks or more gestation, as revealed by certain abnormalities, such as decreased level of consciousness and seizure activity, among other things; (3) cerebral palsy of the spastic quadriplegic type (paralysis or weakness in all extremities accompanied by spasmodic movement) or dyskinetic variety (i.e., difficulty in performing voluntary muscular movements); and (4) exclusion of other identifiable etiologies, e.g., trauma, coagulation disorders, infectious conditions or genetic disorders.

[4] Defined in the ACOG 2003 monograph as "a subtype of neonatal encephalopathy for which the etiology is considered to be limitation of oxygen and blood flow near the time of birth."

it is stated that "Additional evidence supportive of a relation between impaired blood flow and the occurrence of [PVL] includes the association of a lesion with markers of hypoxic-ischemic events (e.g., neonatal acidosis, elevations of plasma uric acid on the first day of life)." Plaintiff's expert opines that the infant plaintiff did in fact display neonatal acidosis, the very HIE marker referred to in the Volpe text, as evidence of a relationship between PVL and a hypoxic insult at the time of birth. Both the cord blood pH and base excess values were outside the normal range and acidotic as affirmed to by plaintiff's Obstetrician/Gynecologist. Plaintiff's Neurological expert also cites page 323 of the Volpe text to attack as unsubstantiated Dr. Spiro's claim that a focal lesion on the MRI "rules out a diagnosis of hypoxic brain damage", claiming that the MRI report refers not to a discrete focal lesion but instead to "multiple foci, which if correct would be most consistent with a hypoxic brain injury according to the Spiro affirmation."

Lastly, plaintiff's expert states that the ACOG criteria cited by Dr. Spiro are in no way authoritative, but in any event, the infant plaintiff substantially fits within the ACOG criteria set forth by Dr. Spiro.

Defendant submits a supplemental affirmation by Dr. Spiro, in which he opines that there is simply no evidence of HIE contained in the infant's MRI. He states that hypoxic brain damage will manifest in areas of the brain other than the ventricles, including the cerebral cortex, basal ganglia and thalamus. In the infant's MRI the PVL manifests as "highlights" about the ventricles, with no cystic lesions, and no damage to the cortex, basal

ganglia or thalamus. The infant therefore has none of the radiological markers associated with hypoxic brain injury resulting from birth trauma.

Conclusion

Here, upon the properly supported papers of both sides (*Marano v Mercy Hospital,* 241 AD2d 48, supra), the court finds that issues of fact exist which preclude the granting of summary judgment. These complex medical issues are set forth in the affirmations of the parties' respective experts, among them whether the defendants failed to timely diagnose fetal distress and perform a more timely cesarean section, and whether PVL can result from an hypoxic event, as claimed by the plaintiff, or resulted from the infant plaintiff's prematurity, as claimed by the defendants. Where as here the parties adduce conflicting opinions of medical experts, a credibility question is presented requiring a jury's resolution, and summary judgment may not be awarded (*Graham v Mitchell,*37 AD3d 408, 409 [2007]).

Accordingly, that portion of the motion by defendant HHC seeking summary judgment is denied. That portion of the motion which seeks summary judgment with respect to Dr. Hwang is, as noted above, granted. The complaint is severed and dismissed as to Dr. Hwang, and she may enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

HON. GERARD H. ROSENBERG

J. S. C.