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| <b>Lacy v My Midwife, PC</b>   |
| 2008 NY Slip Op 33465(U)   |
| December 11, 2008  |
| Supreme Court, Nassau County   |
| Docket Number: 1719/06   |
| Judge: William R. LaMarca  |
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**TIFFANY LACY and JAMES LACY,  
  
Plaintiffs,**

**Motion Sequence #7  
Submitted September 24, 2008**

**-against-**

**INDEX NO: 1719/06**

**MY MIDWIFE, PC, JANET L. TITMUS-DELETTERA,  
CNM, LM, LOUISA WALKER, LM, JULIA  
CHACHERE, RPND, BORIS M. PETRIKOVSKY, M.D.,  
NASSAU COUNTY HEALTH CARE CORPORATION  
and NASSAU UNIVERSITY HOSPITAL,**

**Defendants.**

**The following papers were read on this motion:**

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| <b>CHACHERE Notice of Motion.....</b>            | <b>1</b> |
| <b>Dr. Chasen Affirmation in Support.....</b>    | <b>2</b> |
| <b>Plaintiffs Affirmation in Opposition.....</b> | <b>3</b> |
| <b>Dr. Glubernick Physician Affidavit.....</b>   | <b>4</b> |
| <b>CHACHERE Reply Affirmation.....</b>           | <b>5</b> |

Defendant, JULIA CHACHERE, RPND (hereinafter referred to as "MS. CHACHERE"), moves for an order, pursuant to CPLR §3212, dismissing plaintiffs' complaint as against her on the ground that there are no triable issues of fact. The plaintiffs oppose the motion, which is determined as follows:

The plaintiffs, TIFFANY LACY and JAMES LACY, commenced this action for medical malpractice against the defendants, MY MIDWIFE, PC., JANET L. TITMUS-

DELETTERA, CNM, LM, LOUISA WALKER, LM, JULIA CHACHERE, RPND, BORIS M. PETRIKOVSKY, M.D., NASSAU COUNTY HEALTH CARE CORPORATION and NASSAU UNIVERSITY HOSPITAL. Plaintiffs allege the defendants' malpractice caused the sudden wrongful death of one of their infant twin sons. By Short Form Order, dated September 11, 2008, the Court granted summary judgment to defendants, BORIS M. PETRIKOVSKY, MD, NASSAU COUNTY HEALTH CARE CORPORATION and NASSAU UNIVERSITY MEDICAL CENTER, dismissing the action as against them.

In December, 2003, plaintiff, seeking a home birth, came under the care of defendant, JANET L. TITMUS-DELETTERA (hereinafter referred to as "MS. TITMUS-DELETTERA"), a midwife. On January 28, 2004, a sonogram revealed that plaintiff, TIFFANY LACY, was carrying twins. On June 24, 2004, MS. TITMUS-DELETTERA's examination of MS. LACY revealed that one of the twin babies had a deceleration of its fetal heart rate. The heart rate was rechecked at Stony Brook University Hospital and found to have stabilized. Plaintiffs and MS. TITMUS-DELETTERA sought to have the birth at NASSAU UNIVERSITY MEDICAL CENTER (hereinafter referred to as "NUMC") but MS. TITMUS-DELETTERA did not have birthing privileges there, nor was she credentialed for multiple births. Plaintiffs were told by the hospital that MS. LACY could be admitted under a physician's care and that of the NUMC staff. Plaintiffs allegedly refused and the plaintiffs and MS. TITMUS-DELETTERA left the NUMC. MS. LACY gave birth at home, on July 1, 2004. One twin child was stillborn. The death certificate listed the cause of death as "undetermined".

Plaintiffs allege that the defendants, including MS. CHACHERE caused the death of the infant child. MS. CHACHERE alleges that she was merely a lay student observer

at the birthing event, invited by MS. TITMUS-DELETTERA. MS. CHACHERE alleges that she observed, took pictures, made some charting entries, and injected Pitocin (to prevent hemorrhaging of MS. LACY after the delivery) at the direction of MS. TITMUS-DELETTERA. MS. CHACHERE states there is no nexus between her presence at the labor/delivery of MS. LACY and any harm to plaintiffs. MS. CHACHERE also states that she had no contact with plaintiffs or MS. TITMUS-DELETTERA's firm, MY MIDWIFE, PC.

MS. CHACHERE has offered the affidavit of Dr. Stephen Chasen, a board certified physician who specialized in maternal-fetal medicine and obstetrics and gynecology, who reiterates MS. CHACHERE's claim that she was at the labor/delivery as a student/observer and photographer. Dr. Chasen notes that MS. CHACHERE was not involved in any prenatal or postnatal care of MS. LACY. Dr. Chasen states that the problem with the childbirth stems from inappropriate documentation of the fetal heart rate in a house delivery setting and points to the fact that MS. CHACHERE was not involved with that aspect of the treatment. Dr. Chasen states that no injuries alleged by plaintiffs could have been caused by the acts/omissions of MS. CHACHERE since her behavior in her very limited role was appropriate.

The essential elements of a medical malpractice claim are a departure from good and accepted medical practice and evidence that such departure was a proximate cause of the plaintiff's injury (*Flaherty v Fromberg*, 46 AD3d 743, 848 NYS2d 687 [2<sup>nd</sup> Dept 2007]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2<sup>nd</sup> Dept. 2007]; *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2<sup>nd</sup> Dept. 2004]).

At her deposition, MS. LACY stated that MS. CHACHERE became actively involved in the labor/birth. Defendant, LOUISA WALKER (hereinafter referred to as "MS.

WALKER”) , co-owner of defendant, MY MIDWIFE, PC., was present at the birthing of the twins and testified that MS. CHACHERE did resuscitation efforts on the endangered twin newborn. MS. WALKER also stated that she solicited MS. CHACHERE’s expert opinion since the delivery of twins was at a house, and MS. LACY was past her due date . She testified that MS. CHACHERE expressed concern due to the high risk of the birth. Clearly, the above noted deposition testimony reflects that MS. CHACHERE was present for more than to only observe and take pictures.

If a medical malpractice defendant who moves for summary judgment submits proof in evidentiary form, i.e., a medical expert, affirmation, charts, etc., to demonstrate the absence of any material issues of fact that the defendant did not depart from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay, supra*), the burden shifts to the plaintiff to submit a medical expert’s affidavit alleging the defendant’s actions were a departure from accepted standard of care in the medical community and a proximate cause, i.e., a substantial factor in bringing about the injury (*Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2<sup>nd</sup> Dept. 2007]). MS. CHACHERE has submitted the affidavit of Dr. Chasen in support of her position. Therefore, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980] ). In a medical malpractice action, this burden is accomplished by submission of a medical expert’s affidavit that a defendant’s actions were a departure from the accepted standard of care in the medical community and such departure was a proximate cause or substantial factor in bringing about the injury (*Sisko*

*v New York Hospital*, 231 AD2d 420, 647 NYS2d 191 [1<sup>st</sup> Dept. 1996]).

Plaintiffs have offered the sworn affidavit of Dr. Martin Gubernick who states that he is an expert in the field of obstetrics and gynecology. He alleges that MS. CHACHERE did depart from her role as a doula<sup>1</sup>, registered nurses who are expert in the field of infant mortality and morbidity, and that such departures caused the death of the infant twin. Dr. Gubernick contends that MS. CHACHERE, as a registered nurse and expert, should have taken action and affirmative steps in ensuring MS. LACY received the emergency medical treatment that was required. Dr. Gubernick contends that MS. CHACHERE became an integral part of the birthing team wherein MS. TITMUS-DELETTERA relied on MS, CHACHERE's advice.

After a careful reading of the submission herein, it is the judgment of the Court that plaintiffs' expert has presented sufficient allegations in his eight (8) page affidavit, more than general allegations, that are supported by competent evidence tending to establish the essential elements of the claim (*see Taylor v Nyack Hospital*, 18 AD3d 537, 795 NYS2d 317 [2<sup>nd</sup> Dept. 2005]), that are sufficient to raise a question of fact as to MS. CHACHERE's claim of lack of involvement, i.e that there is no medical malpractice on her part.

Moreover, the deposition testimony of the other parties allege a larger role by MS. CHACHERE. The credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and

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<sup>1</sup>A doula focuses on the needs of the new mother as well as the newborn; the doula nurtures the mother by offering practical assistance and emotional support; the doula helps a new mother recover faster and enables her to feel more confident in meeting the new challenges of motherhood; the doula offers guidance and support in all aspects of newborn care.

accuracy of the testimony, whether contradicted or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662, 839 NYS2d 773 [2<sup>nd</sup> Dept. 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397, 667 NYS2d 766 [2<sup>nd</sup> Dept. 1997]). This also pertains to a credibility battle between the parties' experts where such issues are properly left to the trier of fact for resolution (*Barbuto v Winthrop University Hospital*, 305 AD2d 623, 760 NYS2d 199 [2<sup>nd</sup> Dept. 2003]).

Indeed, *Flaherty v Fromberg, supra*, the recent Second Department case, held that, as to causation, the plaintiff's evidence in a medical malpractice action may be deemed legally sufficient even if her expert cannot qualify the extent to which the defendant's act(s) or omission(s) decreased the plaintiff's chance of a better outcome as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury sustained (*Flaherty v Fromberg, supra*). Thus, questions of fact remain as to whether MS. CHACHERE's conduct diminished the chance of a better outcome or increased the injuries herein.

MS. CHACHERE contends that she was merely a "volunteer" at the birthing of MS. LACY's twins and that the Good Samaritan Law should apply to her.

The Good Samaritan Law, § 690 of the Education Law, states in relevant part as follows:

1. Notwithstanding any inconsistent provision of any general, special or local law, any licensed registered professional nurse or licensed practical nurse who voluntarily and without the expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or other emergency, outside a hospital, doctor' office or any other place having proper and necessary medical equipment, to a person

who is unconscious, ill or injured shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such first aid or emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such registered professional nurse or licensed practical nurse. Nothing in this subdivision shall be deemed or construed to relieve a licensed registered professional nurse or licensed practical nurse from liability for damages for injuries or death caused by an act or omission on the part of such nurse while rendering professional services in the normal and ordinary course of her practice. (emphasis supplied).

The issue of whether gross negligence occurred is an issue for the trier of facts to determine (*Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 842 NYS2d 558 [2<sup>nd</sup> Dept. 2007]). Additionally, there is an issue of fact as to whether MS. CHACHERE's status at the birth herein would actually fall under the Good Samaritan Law.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626, 620 NYS2d 500 [2<sup>nd</sup> Dept. 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062,

601 NYS2d 463, 619 NE2d 400 [C.A. 1993]). Based on the record before the court, MS. CHACHERE has not met her burden. Accordingly, it is hereby

**ORDERED**, that the motion by MS. CHACHERE for an order granting summary judgment dismissing the complaint as against her is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 11, 2008



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**ENTERED**

DEC 17 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE