At an IAS 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 13th day of November, 2009.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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LAVADA KEARSE AND TEKLE VICKERIE AS PARENTS AND NATURAL GUARDIANS OF NAVAEH VICKERIE, AN INFANT, AND LAVADA KEARSE AND TEKLE VICKERIE,INDIVIDUALLY,

Plaintiffs,

- against -

BERNARDITH A. RUSSELL, M.D., ISOLDA TSAPOK, M.D. AND LONG ISLAND COLLEGE HOSPITAL,

Defendants.

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DECISION & ORDER

Index No. 19767/07

Motion Seq. No. 001

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

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 3
Opposing Affidavits (Affirmations)	4 - 5
Reply Affidavits (Affirmations)	6
Other Papers	

Upon the foregoing papers, defendants Bernadith Russell, M.D. (Dr. Russell), Isolda Tsapok, M.D. (Dr. Tsopak) and Long Island College Hospital (LICH) move for an order, pursuant to CPLR 3212, granting said defendants' motion for summary judgment and dismissing the complaint on the ground that there are no triable issues of fact.

Background

In this action, plaintiffs seek damages for the infant plaintiff's right Erb's palsy brachial plexus injury which occurred at birth on October 7, 2005. Dr. Tsapok was an obstetrical resident who delivered the infant plaintiff. Dr. Russell was an attending physician who was present at the delivery.

Plaintiffs allege that the defendants failed to properly manage and perform the delivery of the infant; failed to properly detect and manage shoulder dystocia; failed to perform rotational maneuvers to deliver the infant plaintiff; failed to properly position the mother for delivery; improperly performed delivery, applying excessive traction to the infant's head; failed to perform an episiotomy in the presence of a shoulder dystocia; failed to place the mother in the McRoberts position; failed to perform the Woods maneuver; and improperly performed maneuvers at delivery which resulted in injury to the brachial plexus nerve.

Defendants, on the other hand, claim that the Erb's palsy sustained by the infant plaintiff is inconsistent with the records of the labor and delivery, was not caused by malpractice, and instead was the result of maternal fetal forces.

Defendants' Motion

In support of their motion for summary judgment, defendants submit the affirmation of Dr. Natalie Roche, a physician board certified in obstetrics and gynecology, who has reviewed the pertinent medical records, pleadings and deposition transcripts.

Dr. Roche observes that the plaintiff-mother's pre-natal history was benign and she had no maternal risk factors for shoulder dystocia. Dr. Roche observes that the mother did not have an abnormal pelvic anatomy, gestational diabetes, was not post date, had no previous shoulder dystocia delivery, and was not extremely short of stature. Dr. Roche opines:

- There was no assisted vaginal delivery or protracted active phase of first stage labor or second stage labor;

- The delivery note indicated that the child was delivered with a non-reducible nuchal cord wrapped once around the child's neck, which was clamped and cut upon the head's delivery. This is significant because in the presence of nuchal cord, the mother was directed to stop pushing after delivery of the head in order to have the cord cut prior to the delivery of the child's body;

- Base upon the charting, a shoulder dystocia was not encountered. Had there been any complications or the need for maneuvers to be undertaken because shoulder dystocia was encountered, or for any other reason, it would have been documented in the physician's notes, nursing notes, or pediatric notes. The absence of any of this documentation is clear and convincing evidence that maneuvers and/or excessive traction were not used and shoulder dystocia not encountered;

- The work-up from admission to delivery was well within the standards of care, and there were no departures from the standard of care from the time of delivery through the delivery itself, based upon the records;

- Following the delivery, the mother had a first-degree vaginal laceration which was repaired with 3.0 chromic sutures, which indicates that this was a superficial laceration without muscle involvement and was not one which indicated that a trapped shoulder had to be delivered;

- Further support and perhaps the best proof that a shoulder dystocia was not encountered or caused by any of the physicians or the hospital's staff is the fact that the child was delivered in the right occipital anterior position (ROA), meaning that the back of the baby's head was facing the mother's right side. The significance of this observation is that if there had been a shoulder dystocia as plaintiffs contend, the

anterior shoulder would have been stuck up under the pubic bone and would have had to be released by downward traction. In such a case there would be pulling on the nerves supplying the **left** shoulder and if there had been Erb's palsy as a result of shoulder dystocia, it would have been the left arm, and not the right arm which would have been affected. In this case, Erb's palsy of the **right** shoulder is claimed. Since this is the opposite arm or the posterior arm that is allegedly affected, any Erb's palsy came about absent any deviation or departure from the standard of care in the absence of any shoulder dystocia;

- Dr. Roche cites medical literature that makes it quite clear that there can be an intrauterine origin of obstetrical brachial plexus, unrelated to lateral traction during delivery. This literature (several examples of which are appended to the motion papers) states that Erb's palsy can occur without associated shoulder dystocias and maternal forces are the most likely cause of both situations with and without dystocia. Some articles indicate that shoulder dystocia can occur from propulsion rather than traction forces. Other studies conclude that intrauterine maladaptation may play a role in brachial plexus impairment and brachial plexus impairment should not be taken as prima facie evidence of birth process injury.

Dr. Roche therefore concludes that whatever injuries allegedly occurred in this case occurred absent any deviation or departure from the standard of care, and in the absence of shoulder dystocia. The only explanation that could support the alleged Erb's palsy, as the literature indicates, is maternal fetal forces and not shoulder dystocia and/or the intervention by any physicians.

Plaintiffs' Opposition

In support of their opposition to the motion of the defendants, plaintiffs submit the affirmation of Philip Bresnick, M.D., a physician board certified in obstetrics and gynecology, who, after review of the pleadings, medical records and deposition transcripts states the following within a reasonable degree of medical certainty.

Dr. Bresnick opines that Dr. Tsapok, the delivering doctor, failed to recognize the presence of a shoulder dystocia, and then failed to take appropriate steps to deliver the shoulders, and utilized excessive traction upon the infant's head and neck to deliver this baby. Dr. Bresnick also opines that maternal forces of labor did not cause this Erb's palsy and brachial plexus injury.

Dr. Bresnik states that Erb's palsy in the absence of shoulder dystocia is an extremely rare event, and that the medical literature which he has read and reviewed indicates that the chance that an Erb's palsy was caused by intrauterine events approaches zero. He opines that incidents of shoulder dystocia often go unreported and it is often the case that injured infants with Erb's palsy are the product of deliveries where shoulder dystocia was not recognized or charted by the delivering doctor.

Dr. Bresnik opines that his review of the mother's birth records and the newborn's records raises a suspicion of doubt regarding the validity of the charting - the condition of the baby at birth does not equate with the record of delivery. He states:

> I find it critically important to note that the infant was born with a loop of cord wrapped around her head. It is well recognized that a nuchal cord will cause the infant's head to retract at birth and will cause the delivering physician to exert a greater amount of traction upon the head than normal. This factor coupled with the fact that the delivering physician was an obstetrical resident with limited experience, leads me to opine that the infant's injury resulted from excessive traction by the delivering physician who failed to recognize that the shoulder became impacted and was not the result of maternal expulsion forces.
>
> It is my opinion that Dr. Tsapok was required to perform specific maneuvers to safely deliver the impacted shoulder and avoid an injury to the infant and failed to do so. In my opinion good and accepted practice mandated

> that excessive traction be avoided. In my opinion Dr. Tsapok should have performed an episiotomy, placed the mother in the McRoberts position and delivered the infant with gentle traction utilizing the Woods maneuver.
>
> Instead, Dr. Tsapok utilized excessive traction upon the infant's head and neck resulting in a stretching of the Brachial Plexus nerves and causing Erbs Palsy in this infant which was noted immediately after birth. The fact that the right shoulder is the affected shoulder simply means that it was the first shoulder to deliver upon Dr. Tsapok's exertion of excessive traction. It is my opinion that the foregoing is a departure from accepted obstetrical practice and was the proximate cause of the infant's birth injury.

Dr. Bresnik further cites what he calls a crucial discrepancy in the mother's chart which raises doubts about the veracity of Dr. Tsapok's charting of this delivery. Specifically, Dr. Tsapok's delivery note reports a 1st degree vaginal laceration, whereas the obstetrical nurse present at the delivery indicates it was a 2nd degree laceration. Dr. Bresnik opines that this suggests a more traumatic delivery which would further explain the presence of an impacted shoulder being forcibly delivered causing injury to both infant and mother. Dr. Bresnik states that the reality is that obstetricians do not indicate in their charting when excessive traction is utilized to deliver an infant and shoulder dystocia often goes unreported.

Dr. Bresnik states that he does not agree with the opinion of defendants' expert Dr. Roche that the injury in this case was caused by the maternal forces of expulsion. Also, he opines that when this occurrence is documented, which is in only the rarest of occasions, there is the presence of macrosomia and a prolonged second stage of labor, neither of which are noted to have occurred herein.

Dr. Bresnik therefore concludes that the only legitimate explanation as to what occurred herein was that a shoulder dystocia went unrecognized by the delivering doctor, who exerted excessive traction upon the infant's head and neck to deliver the infant, thus causing a stretching injury to the nerves of the brachial plexus resulting in an Erb's palsy.

Analysis

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury or damage" (*Wiands v Albany Med Ctr.*, 29 AD3d 982, 983 [2006]; *see also Furey v Kraft*, 27 AD3d 416, 417- 418 [2006], *lv denied* 7 NY3d 703 [2006]; *Taylor v Nyack Hosp.*, 18 AD3d 537, 538 [2005]; *Williams v Sahay*, 12 AD3d 366, 368 [2004]; *Cahill v County of Westchester*, 226 AD2d 571, 572 [1996]). Accordingly, defendants in a medical malpractice action are able to fulfill "their prima facie burden of establishing their entitlement to summary judgment by adducing expert opinion evidence that they did not deviate from good and accepted medical practice in their treatment of the [plaintiff]" (*Dandrea v Hertz*, 23 AD3d 332, 332 [2005]). "In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury" in order to defeat the defendant's motion (*Rebozo v Wilen*, 41 AD3d 457, 458 [2007]).

It is well settled that "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" as "[s]uch

credibility issues can only be resolved by a jury" (*Feinberg v Feit*, 23 AD3d 517, 519 [2005]; *accord Bengston v Wang*, 41 AD3d 625, 626 [2007]; *Graham v Mitchell*, 37 AD3d 408, 409 [2007]; *Dandrea*, 23 AD3d at 332; *Barbuto v Wintrop Univ. Hosp.*, 305 AD2d 623, 624 [2003]; *Fotinas v Westchester County Med Ctr.*, 300 AD2d 437, 439 [2002]; *Halkias v Otalaryngolgy-Facial Plastic Surgery Assocs.*, 282 AD2d 650, 651 [2001]; *Viti v Franklin General Hosp.*, 190 AD2d 790, 790-791 [1993]).

In the instant case, the conflicting medical expert opinions submitted by the parties preclude the grant of summary judgment to defendants. Defendants rely primarily upon the expert affirmation of Dr. Roche to establish, prima facie, that they did not deviate from good and accepted medical practice in their care and treatment of the infant mother and plaintiff during labor and delivery. Dr. Roche's affirmation focuses on the lack of evidence that a shoulder dystocia occurred in this labor and delivery, and on medical literature which supports the proposition that the Erb's palsy which occurred in this case was the result of maternal fetal forces rather than improper excessive traction on the infant. Although the court finds that such affirmation is sufficient to establish the defendants' prima facie case, it also determines that the expert affirmation proffered by plaintiff raise issues of fact sufficient to support denial of the instant motion for summary judgment.

Dr. Bresnik opines in his affirmation that Erb's palsy in the absence of shoulder dystocia is an extremely rare event, and that the medical literature which he has reviewed indicates that the chances that an Erb's palsy was caused by intrauterine events approaches

zero. He opines that when this rarest of events is documented, there is the presence of macrosomia and a prolonged second stage of labor, neither of which was present in this case. He also opines that he has a doubt as to the validity of the charting, pointing to the discrepancy as to whether the vaginal laceration was first or second degree, and that he believes that the charting does not equate with the condition of the baby at birth. Contrary to the assertion of defendants' counsel, this is not a speculative opinion, since plaintiff's expert opines that Dr. Tsapok, an obstetrical resident, failed to recognize that the shoulder became impacted and applied excessive traction. Further, Dr. Bresnik offers a cogent opinion why the Erb's palsy manifested on the right shoulder, rather than the left.

Conclusion

Such conflicting expert affirmations necessitate resolution by the finder of fact. Accordingly, the motion for summary judgment by Dr. Tsapok, Dr. Russell and LICH is denied.

The foregoing constitutes the decision and order of the court

E N T E R,

HON. GERARD H. ROSENBERG
J. S. C.