

Leng v Shah

2024 NY Slip Op 32893(U)

August 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 503047/2022

Judge: Genine D. Edwards

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At MMESP-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York on the of 14th August 2024.

P R E S E N T :

Hon. Genine D. Edwards, Justice

CINDY LENG, as mother and natural guardian of K.V.,
an Infant and CINDY LENG, Individually,

Plaintiff,

Index No: 503047/2022

- against -

Decision & Order

SHWETA SHAH, M.D., LIZBETH GRADO
GUITERREZ, M.D. and MAIMONIDES MEDICAL
CENTER,

Defendants.

<u>The following e-filed paper(s) read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion.....	58
Affirmation in Opposition, and Exhibits.....	66-68
Reply Affirmation and Exhibits.....	69-73

In this action to recover damages for medical malpractice and negligence, Shweta Shah, M.D. (“Dr. Shah”) moved for an order granting summary judgment, pursuant to CPLR §3212 dismissing the complaint. Cindy Leng, as mother and natural guardian of K.V., and Individually, (“plaintiff”), opposed the motion.

Facts

On May 16, 2021 at 2:54 PM, plaintiff called an ambulance stating that she was experiencing contractions every 3-5 minutes for an hour. She was admitted to Maimonides Medical Center (“Maimonides”) at 3:47 PM, with an admission diagnosis of “Encounter for full-term uncomplicated delivery.” At 3:53 PM, Dr. Shah examined plaintiff and ruptured her membranes, and by 4 PM, plaintiff was in the labor room and began delivery. At 4:29 PM, the infant’s head was delivered, but after one minute of attempted delivery of the infant’s body, Dr. Shah noticed that the infant’s right shoulder was impacted under the pubic symphysis. She testified that she called a shoulder dystocia code and requested the on-call nurses to perform a McRoberts maneuver, including applying pressure on plaintiff’s supra pubic region. Dr. Shah discerned that the attempted McRoberts maneuver was unsuccessful, and she began to receive the infant’s posterior arm by using her left hand to find and release the infant’s left shoulder. This was also unsuccessful. Dr. Shah then performed an episiotomy, thereafter Dr. Alina Fuchs (“Dr. Fuchs”) performed a Rubin maneuver, and the baby was delivered. The delivery differentiation of the infant’s head to body was noted at two minutes. Plaintiff has alleged that these actions caused her infant to have permanent Erb’s Palsy.

Analysis

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact.” *Goldin Real Estate, LLC v. Shukla*, 227 A.D.3d 674, 212 N.Y.S.3d 117 (2d Dept. 2024). It is not the function of a Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact, or point to the lack thereof. *Abruzzi v. Maller*, 221 A.D.3d 753, 766, 199 N.Y.S.3d

190, 202 (2d Dept. 2023). The Court is required to view the evidence in the light most favorable to the nonmovant. *Silveri v. Glaser*, 166 A.D.3d 1044, 87 N.Y.S.3d 254 (2d Dept. 2018).

“The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury”. *Neumann v. Silverstein*, 227 A.D.3d 914, 209 N.Y.S.3d 584 (2d Dept. 2024). “On a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.” *Sunshine v. Berger*, 214 A.D.3d 1020, 1022, 186 N.Y.S.3d 326, 329 (2d Dept. 2023)

Where a defendant makes a prima facie showing, “the burden then shifts to the plaintiff to raise a triable issue of fact as to those elements on which the defendant met its prima facie burden of proof.” *Armond v. Strangio*, 227 A.D.3d 758, 210 N.Y.S.3d 491, 493 (2d Dept. 2024). To rebut the defendant's prima facie showing, plaintiff must submit an expert opinion that specifically addresses the defense expert's allegations. *Daniels v. Pisarenko*, 222 A.D.3d 831, 832, 199 N.Y.S.3d 693, 694 (2d Dept. 2023).

Here, defendant's expert¹, Charles T. Mann, M.D. (“Dr. Mann”) opined that Dr. Shah met the standard of care at all times during her treatment of plaintiff. Dr. Mann first addressed plaintiff's allegation of failing to account for the size of the infant in a gestational diabetic mother and failing to perform a caesarian section (“C-section”). Dr. Mann discussed Dr. Shah's deposition testimony that on April 22, 2021, the Attending Attestation indicated the estimated fetal weight to be approximately 3600 grams at birth. Dr. Mann opined that under these circumstances, a

¹ Defendant failed to submit an Attorney's Affirmation in addition to the Notice of Motion.

prophylactic C-section is only warranted if the estimated fetal weight is 4500 grams or greater. At birth, the infant weighed 4230 grams, thus Dr. Shah appropriately delivered the infant vaginally. Dr. Mann expounded that there was no evidence that Dr. Shah applied excessive lateral force and/or traction to the infant's head during her attempted delivery of the infant's body; the medical records do not indicate the amount of force used by Dr. Shah at any point during plaintiff's delivery.

Dr. Mann propounded that where an attempt to deliver an infant's body is thwarted due to shoulder dystocia, the applicable standard of care is to perform the McRoberts maneuver, to be immediately followed with supra pubic pressure. If those maneuvers fail, the delivering physician should attempt to deliver the posterior arm, and if that is unsuccessful, then the Rubin maneuver should be employed to deliver the infant's body. Dr. Mann also opined that the physician may use her judgment in deciding whether to perform an episiotomy to facilitate vaginal maneuvers, such as the Rubin maneuver. In reviewing the records, Dr. Mann posited that Dr. Shah abided by the standard of care in managing the infant's shoulder dystocia by properly performing the maneuvers in the correct order and ensured timely delivery by doing same within two minutes.

Where a delivering physician determines that an episiotomy is necessary to facilitate vaginal maneuvers, the standard of care neither specifies when an episiotomy should be performed nor a specific length to which it must be cut, according to Dr. Mann. Yet, Dr. Mann also asserted that prior to performing an episiotomy, the McRoberts maneuver should be done, immediately followed by applying pressure to the supra pubic region. Additionally, an episiotomy should be a length sufficient to allow room for performance of the vaginal maneuvers; and is ultimately a judgment call for the delivering physician. Thus, Dr. Mann opined that since Dr. Shah performed the episiotomy after attempting the McRoberts maneuver and applying pressure to the supra pubic

region, and the episiotomy allowed for the performance of the Rubin maneuver, Dr. Shah acted within the standard of care.

In opposition, plaintiff raised a triable issue of fact as to whether excessive traction was applied to the infant's head during one of the several maneuvers used. Plaintiff's expert opined that Dr. Shah caused the infant to have a permanent brachial plexus injury, or Erb's Palsy, due to applying excessive lateral traction and/or torsional force to the infant's head during delivery. The existence of Erb's Palsy, plaintiff expert stated, only occurs due to negligence, and does not occur from the natural forces of labor. Plaintiff's expert submitted that the use of any traction following the recognition of shoulder dystocia is a departure from the standard of care and must be avoided. But Dr. Shah admitted to applying "[g]entle traction... parallel to the cervical thoracic junction," which was a deviation from the standard of care. *George v. Plotnitskiy*, 222 A.D.3d 730, 201 N.Y.S.3d 205 (2d Dept. 2023); *Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d dept. 2022); *Loaiza v. Lam*, 107 A.D.3d 951, 968 N.Y.S.2d 548 (2d Dept. 2013). Since the experts adduced conflicting opinions, credibility questions exist that must be resolved by a factfinder. *Id.*

Conclusion

Based upon the foregoing, it is

ORDERED that Dr. Shweta Shah's motion for summary judgment is denied, and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on counsel for all parties and to electronically file an affidavit of service thereof with the Kings County Clerk, and it is further

ORDERED that the parties are directed to appear for an Alternative Dispute Resolution Conference on November 7, 2024, at 11:30 AM.

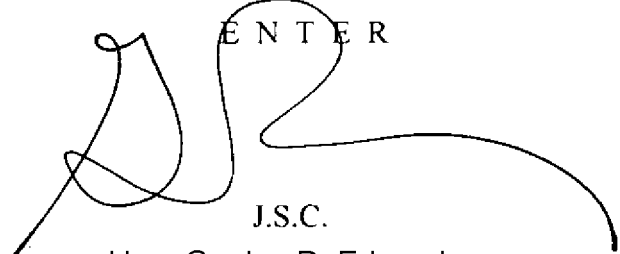
This constitutes the Decision and Order of this Court.

For Clerks use only

MG ___

MD ___

Motion Seq.#: 2

ENTER

J.S.C.
Hon. Genine D. Edwards