

MEDICAL MALPRACTICE

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FEATURED VERDICT

Failure to Communicate

Docs overlooked
damage of patient's
colon, suit alleged

Verdict \$62,000,000

Actual \$64,300,000

Galette v. Byrne

Kings County Supreme Court, N.Y.

Plaintiff's Attorneys Ira M. Newman (co-lead)
and Edward J. Sanocki (co-lead), Sanocki, Newman
& Turret, LLP, New York; and Sanford A. Rubenstein,
Rubenstein & Rynecki, Brooklyn, N.Y.

Defense Attorneys Peter DeNoto, Heidell,
Pittoni, Murphy & Bach, LLP, Garden City, N.Y.; Guido
Gabriele, Gabriele & Marano LLP, Garden City, N.Y.; and
John D. Paterniti, Shab, Ahmuty, Citrin & Spratt LLP,
New York

Full report on page 22

CASES of NOTE

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The Crowell family then filed a suit against the hospital, Kriner, and an apparently affiliated practice group.

The family's counsel argued that during the time the vacuum was being used, the fetal monitoring was showing a prolonged period of significant hypoxia.

It was argued that Sharon Crowell was a small woman and that there thus was a clear chance, given that the baby's due date had passed, that the baby was too large to be born vaginally. Counsel argued the use of oxytocin in such cases is not recommended, because it can cause contractions to become too forceful, resulting in trauma to the baby, who doesn't have as much room to move through the birth canal.

A spokesperson for the hospital has stated publicly the hospital's position that the staff provided appropriate care to the Crowells and did not cause any harm to the baby.

INJURIES/DAMAGES *cerebral palsy; encephalopathy; fine motor skills, impairment; hypoxia; ischemia; speech/language, impairment of*

The Crowells' suit contended that Matthew's lack of oxygen to the brain during delivery caused him to be born limp and colorless. He was diagnosed at delivery with hypoxic-ischemic encephalopathy. He now suffers from cerebral palsy, impaired gross- and fine-motor skills, and difficulty speaking, and requires assistance going to the bathroom.

Counsel for the Crowells also raised at trial concerns over Matthew's expected challenges in the future with respect to education and social scenarios, as well as the psychological effects of his condition.

The defense contended that the injury occurred before Sharon Crowell presented at the hospital.

The defense also argued that the umbilical cord blood gas level was recorded at 7.221; cord blood gas must be at less than a 7 before an intrapartum event is indicated as a cause of injury, the defense maintained.

RESULT The jury found in favor of the Crowells and determined that the damages in the case totaled \$55 million.

There was a confidential high-low agreement in place.

MATTHEW CROWELL \$55,000,000

TRIAL DETAILS Trial Length: 11 days
Trial Deliberations: 165 minutes
Jury Vote: Unanimous

**PLAINTIFF
EXPERT(S)** S. Charles Bean, M.D., pediatric neurology, Newark, DE
Anthony J. Smith, M.D., ob-gyn, Richmond, KY

**DEFENSE
EXPERT(S)** Harold E. Fox, obstetrics, Baltimore, MD
Steven A. Ringer, M.D., pediatrics, Boston, MA
Donald P. Younkin, M.D., pediatric neurology, King of Prussia, PA

EDITOR'S NOTE This report is based on an article previously published in the Pennsylvania Law Weekly, a fellow ALM publication, and on information that was provided by defense counsel. Plaintiffs' counsel did not respond to the reporter's phone calls.

—Max Mitchell

BIRTH INJURY

Failure to Monitor — Hospital — OB-GYN — Failure to Treat

Baby's CP due to docs' failure to administer steroids: parents

MIXED VERDICT \$41,661,083

CASE Ebony Harris and Roy Fortson, as parents and natural guardians of Phinees Fortson, a minor v. Chestnut Hill Hospital, Department of Maternal Fetal Medicine, Doris Chou, M.D., Chestnut Hill OB/GYN Associates d/b/a Chestnut Hill Women's Health Associates, Kwandaa Roberts, D.O., The Hospital of the University of Pennsylvania, The University of Pennsylvania Health System, Trustees of the University of Pennsylvania, and Irene A. Riordan, C.N.M., No. 100400284

COURT Philadelphia County Court of Common Pleas, PA

JUDGE Mark I. Bernstein

DATE 12/20/2013

**PLAINTIFF
ATTORNEY(S)** Thomas R. Kline (lead), Kline & Specter, Philadelphia, PA
Regan S. Safier, Kline & Specter, Philadelphia, PA

**DEFENSE
ATTORNEY(S)** Douglas A. Brockman, Christie, Pabarue and Young, Philadelphia, PA (The Hospital of the University of Pennsylvania, The University of Pennsylvania Health System, Trustees of the University of Pennsylvania) Andrew R. McCumber, McCumber, Daniels, Buntz, Hartig & Puig, P.A., Eagleville, PA (Chestnut Hill Hospital, Chestnut Hill OB/GYN Associates, Irene A. Riordan, C.N.M.) Daniel F. Ryan III, O'Brien & Ryan, LLP, Plymouth Meeting, PA (Doris Chou, M.D.) Tracie A. Vizza, O'Brien & Ryan, LLP, Plymouth Meeting, PA (Doris Chou, M.D.) Joseph G. Zack, Post & Post LLC, Berwyn, PA (Kwandaa Roberts, D.O.)

FACTS & ALLEGATIONS In March 2007, plaintiff Ebony Harris, 27, began undergoing ultrasound examinations and management of her pregnancy at an antenatal testing unit at Chestnut Hill Hospital in Philadelphia.

At that time, her cervix was measured at five centimeters. Harris was considered a high risk for delivering a preterm baby since she had delivered a child at 26 weeks' gestation the previous summer. On May 30, a cervical cerclage was inserted in order to secure her cervix. Further erosion of her cervix was documented on June 21.

On July 2, Harris, with complaints of pelvic pressure but no contractions, presented at Chestnut Hill for a scheduled appointment with maternal-fetal medicine specialist Doris Chou. Harris was just beyond 24 weeks' gestation at this point in time. In examining Harris via an ultrasound, Chou reportedly observed that Harris' cervix had shorted to less than one centimeter, and excessive accumulation of amniotic fluid was discovered. However, the cervix was not observed to be dilated, and there was no tension on the cerclage.

Chou sent Harris to the hospital's labor-and-delivery floor under the care of obstetrician-gynecologist Kwandaa Roberts, for the purpose of evaluating Harris to determine whether she was in labor. Harris was monitored by midwife Irene Riordan and by several nurses for the next three-and-a-half hours, and Roberts examined Harris toward the end of her stay. Roberts determined that Harris was not in labor at that time, and that the results of a vaginal exam were unchanged from the one performed by Chou earlier. Roberts discharged Harris with instructions for modified bed rest, and to contact a physician if she began feeling any new abdominal pain or pressure.

On July 4, at around 10:00 p.m., Harris called her physician, complaining of frequent contractions. Harris was then taken by her husband to Chestnut Hill Hospital. On July 5, at 12:08 a.m., Harris gave birth to Phinees Fortson, via Caesarean section, at nearly 25 weeks' gestation; the baby was severely depressed, and in the days following delivery suffered bleeding in the brain and lungs. Phinees eventually was diagnosed as suffering from quadriplegia-form cerebral palsy.

Harris and her husband filed suit on Phinees' behalf against Chou, Roberts, Chou's employer (The Hospital of the University of Pennsylvania and apparent corporate affiliates), Roberts' employer (Chestnut Hill OB/GYN Associates), Chestnut Hill Hospital, and Riordan. Chestnut Hill Hospital and Riordan were voluntarily dismissed prior to trial, and the case proceeded as to the claims against Chou, Roberts, and their respective employers. (By the time of trial, a confidential high-low agreement was in place as between the family and Chou and Chou's employer.)

The family's counsel faulted Chou for failing to recognize the urgency of Harris' eroded cervix — a symptom which, it was argued, should have prompted Chou, at the time a relatively junior physician, to immediately begin Harris on a course of corticosteroids, so as to prevent the debilitating physical injuries that the baby ultimately sustained.

According to the plaintiffs' expert in fetal medicine, the standard of care, as outlined by the American Congress of Obstetricians and Gynecologists (ACOG), requires that a mother who is at 24 to 34 weeks' gestation and at risk for preterm birth must receive a full course of corticosteroids (two doses 24 hours apart) in order to mature the fetal brain and protect the lungs. In this case, it was argued, Harris, who suffered from significant cervical erosion, was at risk for delivery within the next seven days, but Chou failed to appreciate this when she saw Harris on July 2.

The family's expert in neonatology opined that 99 percent of Phinees' injuries resulted from a grade-four intraventricular hemorrhage and respiratory-distress syndrome — two conditions that corticosteroids either completely prevent or significantly ameliorate. According to the expert, had Chou administered the steroids as she was required to do, there would have been a dramatic impact on the child's outcome, which most likely would have prevented the brain hemorrhage and respiratory injury ultimately experienced.

The family's counsel called attention to portions of Chou's testimony in which she seemed to indicate that she believed that steroids are only administered when a mother is in labor.

Roberts was faulted for failing to perform an independent assessment of the propriety of giving Harris steroids, and for relying on Chou's flawed observations.

The defense maintained that there was no finding in Chou's July 2 examination of Harris indicating that delivery was likely to occur within the next seven days; therefore, according to Chou's expert in fetal medicine, the administration of corticosteroids had not been necessary.

Roberts' expert in maternal-fetal medicine opined that Roberts had appropriately determined that the patient was not in labor and had correctly concurred with Chou's assessment that there was no indication that delivery was likely to occur within the next seven days.

Defense counsel for Roberts faulted Harris for being noncompliant with Roberts' instruction for modified bed rest, and for failing to contact a physician when she began to feel contractions on July 3. On July 4, it was claimed, Harris and her husband went to see a movie and subsequently had dinner at a restaurant, where, during dessert, Harris reportedly began experiencing sharper contractions.

(Counsel for the family disputed that Harris began experiencing labor pains on July 3, and asserted that bed rest was not a recognized technique for preventing the onset of preterm labor.)

INJURIES/DAMAGES *brain damage; brain, internal bleeding; cerebral palsy; cognition, impairment; cortical blindness; gastroesophageal reflux; hemorrhage; hydrocephalus; leg; physical therapy; respiratory distress; seizure; spastic quadriplegia; speech/language, impairment of*

In addition to cerebral palsy and decreased lung function, Phinees reportedly suffers from cortical blindness, spastic quadriplegia, gastroesophageal reflux, seizures, and extensive cognitive impairment.

Following her birth, the child spent about 100 days in and out of neonatal intensive care units, where she was initially connected to an oscillating ventilator and later upgraded to jet ventilation, due to the severity of lung damage. To treat her hydrocephalus, a shunt was implanted in her brain, with this being followed by multiple shunt revisions. In response to her spasticity and the tightness in her legs, Phinees underwent multiple surgeries on her legs, which would be serially casted, and then operated on, and then casted again. She later required braces on her legs. The baby also had numerous feeding-tube revisions.

As Phinees got older, she underwent ongoing physical, occupational, and speech therapies. Additionally, she temporarily exhibited self-injurious behavior, in which she repeatedly struck her head; this necessitated medication and restraining the child. According to Harris' counsel, Phinees, who was 6 at the time of trial, has a 75 percent delay in all motor functions and has the mental capacity of a 2-year-old. Because she suffers from cortical blindness, it is undetermined what she can specifically see, but it is believed she can perceive shadows and sharp color contrasts.

The family's expert in life-care planning outlined Phinees' expected future medical costs, comprised of ongoing therapies and 24-hour care, based on a life expectancy of 40 years or longer (as estimated by an expert in pediatric neurology), with projections adjusted for inflation.

The expert gave jurors three inflation models — zero percent, four percent, and six percent — with \$41,661,083 representing the four-percent model, through 2057. The plan accounted for a nurse or a nurse's aide to be with Phinees during the overnight hours on some evenings during the week, in order to prevent the child's feeding tube from dislodging. Phinees' parents also sought to recover more than a million dollars in damages for future lost earnings, in addition to unspecified amounts of noneconomic damages, for past and future pain suffering.

The family's expert in neonatology causally related Phinees' impaired physical condition to Chou's failure to properly administer corticosteroids.

The defense's joint expert in pediatric neurology testified that steroids would not have made a difference as to Phinees' ultimate condition, since the baby's injuries were due in large part to her extreme prematurity and an infection in the fetal membranes called chorioamnionitis.

RESULT The jury found that the conduct of Chou fell below the applicable standard of care, and that her breach of the standard of care was a factual cause in bringing about harm to Phinees.

The jurors further determined that the conduct of Roberts did not fall below the applicable standard of care; 100 percent causal negligence was assigned to Chou.

The damages as determined by the jury consisted of an aggregate sum of \$41,661,083 for future medical expenses through 2057.

PHINEES

FORTSON

\$41,661,083 future medical cost
\$41,661,083

TRIAL DETAILS

Trial Length: 4 weeks
Trial Deliberations: 1.5 days
Jury Vote: 10-2
Jury Composition: 2 male, 10 female

PLAINTIFF

EXPERT(S)

David L. Hopkins, A.S.A., economics,
King of Prussia, PA
Robert L. McDowell Jr., M.D., neonatology,
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Jordan H. Perlow, M.D., fetal medicine,
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DEFENSE

EXPERT(S)

Frank J. Craparo, M.D., fetal medicine,
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Agustin Legido, M.D., pediatric neurology,
Philadelphia, PA
Nancy S. Roberts, M.D., fetal medicine,
Wynnewood, PA

POST-TRIAL Pursuant to the high-low agreement, the court marked the matter as settled with respect to the claims against Chou and her employer, court records indicate.

EDITOR'S NOTE This report is based on information that was provided by plaintiffs' counsel and by defense counsels for Kwandaa Roberts and for Chestnut Hill Hospital and Chestnut Hill OB/GYN Associates. Counsels for the other defendants did not respond to the reporter's phone calls.

—Aaron Jenkins

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