[Cite as *Kuhbanani v. Ohio State Univ. Med. Ctr.*, 2017-Ohio-9417.]

NEWSHA KUHBANANI, et al. Plaintiffs v. THE OHIO STATE UNIVERSITY MEDICAL CENTER, et al. Defendants	Case No. 2011-08547 Judge Patrick M. McGrath Magistrate Anderson M. Renick DECISION

{¶1} On March 20, 2017, the magistrate issued a decision recommending judgment in favor of defendant. Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." On March 29, 2017, plaintiffs Newsha Kuhbanani and Shahram Gharibshahi, M.D. (plaintiffs) filed objections to the magistrate's decision. On April 7, 2017, defendant Ohio State University Medical Center (OSUMC) filed a motion for leave to file a memorandum in opposition to plaintiffs' objections to the magistrate's decision. Upon review, the motion is GRANTED, and the court accepts OSUMC's memorandum in opposition.

{¶2} When ruling on objections to a referee's decision, a "court shall undertake an independent review as to the objected matters to ascertain that the [referee] has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). Further, when the court independently reviews objections to a magistrate's decision, the court may give weight to a magistrate's assessment of witness credibility in view of a magistrate's firsthand exposure to the evidence. *See Siegel v. State,* 2015-Ohio-441, 28 N.E.3d 612, ¶ 12 (10th Dist.). "Although the trial court may appropriately give weight to the magistrate's assessment of witness credibility

in view of the magistrate's firsthand exposure to the evidence, the trial court must still independently assess the evidence and reach its own conclusions." *Sweeney v. Sweeney,* 10th Dist. Franklin No. 06AP-251, 2006-Ohio-6988, ¶ 15, citing *DeSantis v. Soller,* 70 Ohio App.3d 226, 233, 590 N.E.2d 886 (10th Dist.1990)"). Thus, it is proper for the court to give weight to the magistrate's assessment of the credibility of the parties' witnesses.

{¶3} Plaintiffs, parents of plaintiff Sooshyance Gharibshahi, a minor, brought this action alleging negligence by the medical staff at OSUMC. Their claims arise from the delivery and care provided to Sooshyance, who was born on May 17, 2008 at OSUMC. Newsha was admitted to OSUMC on May 16, 2008, with a full-term, normal weight baby. During the afternoon of May 16, 2008, Dr. Sarah Artman, M.D. induced labor and initiated fetal heart monitoring. Prior to 1:00 a.m. on May 17, 2008, there was no concern about the fetal heart rate readings and the monitoring strips initially showed normal, moderate variability, meaning fluctuations in amplitude and frequency from the heart rate "baseline," which indicated that the baby was well-oxygenated. However, between 1:10 and 1:20 a.m., fetal heart rate "decelerations" were apparent, an indication of a transient interruption of the fetal oxygen supply. When meconium (fecal matter) was detected in the amniotic fluid a pediatric resuscitation team (peds team) was summoned to the delivery room.

{¶4} By 1:30 a.m., delivery was in progress and Dr. Artman became concerned by a change in heart rate variability to minimal or absent variability, followed by recovery and a rise in heart rate. The fetal heart rate continued to deteriorate and by 1:40 a.m. it was low with prolonged decelerations and little variability. At 1:43 a.m., Dr. Artman removed the scalp electrode that detected fetal heart tracings so that she could begin use of a vacuum system to extract the baby. After the scalp electrode was removed, an external ultrasound device was used periodically to detect a minimal fetal heart rate in

the minutes before delivery at 1:52 a.m. When Sooshyance was born, he was not breathing and his heart rate was either dangerously low or non-existent.

{¶5} Sooshyance's condition was assessed using Apgar scores, a numerical rating system that reflects an assessment of a newborn's condition of breathing, tone, reflexes, movement, and color. The Apgar scores at 1, 5, and 10 minutes after birth were 0, 0, and 1, respectively. The members of the peds team followed an established protocol, the Neonatal Resuscitation Program (NRP), by first suctioning the airway to remove meconium and then administering oxygen with a "bag-mask" device to create positive pressure ventilation (PPV). The peds team continued using the bag-mask and applied chest compressions for approximately three minutes. After Sooshyance did not respond, the residents performed an endotracheal intubation for ventilation. At 1:56 a.m., four minutes after delivery, Daniel Malleske, M.D., who was in his second year of a neonatology fellowship and had experience in resuscitating severely depressed neonates, arrived to assist with resuscitation. Dr. Malleske determined that Sooshyance was not adequately ventilated and he inserted a second endotracheal tube and then administered two doses of epinephrine (at 1:58 and 1:59 a.m.) to stimulate Sooshyance's heart. Approximately three minutes later, Sooshyance showed the first signs of a returning heart rate.

{¶6} Sooshyance was diagnosed with a significant and permanent brain injury caused by hypoxic ischemic encephalopathy (HIE) which, according to plaintiffs' pediatric neurology expert, resulted in a diagnosis of spastic quadriparesis, a type of cerebral palsy which affects all four limbs and fine motor activity. As a result, Sooshyance is fed primarily through a gastric tube in his abdomen, although he can eat some food by mouth. Sooshyance also has a significant cognitive abnormality that impedes learning, seizure disorder which is partially controlled by medication, and a significant problem with speech and language.

{¶7} Plaintiffs' raise the following four objections:

a. Objection 1: Plaintiffs object to the Magistrate's finding that the treatment provided by the OSU medical staff complied with the relevant standard of care.

{¶8} Plaintiffs present a variety of arguments to support this objection, and the court discusses each argument as it appears in plaintiffs' objections.

Standard of Care for the OB Nurses

{¶9} Plaintiffs argue that the magistrate ignored the evidence by failing to find that the standard of care required the OB nurses to tell the peds team of the reasonable expectation of birth depression. Plaintiffs assert that "[i]t was undisputed that the standard of care required the OB nurses to update the peds team if the fetal monitor tracings were such that there was a greater likelihood of birth depression than when the team was originally called." (Objections, pp. 2-3). Further, "[i]f the peds team had been informed of this reasonable chance of severe birth depression, the standard of care required them to summon the fellow with enough time so he could be present at the delivery." (Objections, p. 3).

{¶10} In its response, defendant argues that "it was very much disputed whether the standard of care required the OB nurses to update the peds team *and* it was also disputed whether there was anything new to report." (Response, p. 1). The court agrees with defendant that these two issues were in dispute at trial.

{¶11} The magistrate found that "the delivery room nurses met the standard of care in this case and that the variations shown on fetal monitoring strips did not require an update because the peds team members were already aware of the presence of decelerations and meconium." (Decision, pp. 22-23). A review of the evidence shows that there was ample trial testimony that there was no new information that required the nurses to update the peds team. Defendant's nursing expert, Susan Drummond, R.N., M.S.N., opined that the standard of care did not require the nurses to inform the

peds team of any additional information because the team was already aware of the presence of decelerations and meconium. Plaintiffs' nursing expert, Laura Mahlmeister, R.N., Ph.D., testified that she did not have any criticisms of the nursing staff if Nurse Cox, an experienced obstetrical nurse in the labor and delivery room, notified the peds team of the decreased fetal heart tracings.

{¶12} At trial, Nurse Cox testified that she personally communicated her concerns about the fetal monitoring strips to the peds team, and said that the peds team should be prepared for the baby to not do well. Nurse Drummond testified that the fetal monitoring strips were, in fact, concerning, however there was nothing on the strips to indicate to the OB nurses that the baby would be born with a 0 Apgar score. Further, Nurse Drummond stated that she would expect the baby to be somewhat depressed at birth, but not to require resuscitation involving chest compressions, ventilation, or intubation for ventilation and epinephrine.

{¶13} The court finds that there is sufficient evidence to conclude that Nurse Cox informed the peds team of the status of the fetal monitoring strips, and the OB nurses did not breach their standard of care regarding their duty to update the peds team. Further, the OB nurses did not breach their standard of care by not having the fellow, Daniel Malleske, M.D., present at the delivery. The court finds that with respect to the standard of care for the OB nurses, the magistrate properly determined the factual issues and appropriately applied the law.

Experience of the Peds Team

{¶14} Plaintiffs argue that the magistrate erred in finding that the peds team had the appropriate level of experience to handle the resuscitation of a severely depressed neonate. Plaintiffs argue that "it is beyond dispute that the standard of care required the most experienced person to handle the resuscitation of a severely depressed neonate." (Objections, p. 4). In support of this argument, plaintiffs cite to a textbook co-authored by plaintiffs' and defendant's neonatology experts. Plaintiffs argue that the textbook

states that the longer the delay in providing the baby with oxygen, circulation, and adequate cardiac output, the greater the opportunity for brain damage, and the longer it will take for the baby to establish a normal respiratory pattern and normal cardiac vascular equilibrium. Thus, the most experienced person present for the resuscitation of a severely depressed infant is required by the standard of care.

{¶15} Further, plaintiffs claim that the fact that each member of the peds team was NRP certified or that Dr. Christine Dugan (nka Adams) was weeks away from completing her residency does not establish that the peds team was competent to resuscitate a severely depressed newborn. Plaintiffs conclude this argument by stating that "[t]he negligence here was always the failure to summon the fellow prior to delivery." (Objections, p. 6). Defendant argues that there was ample dispute on whether the standard of care required the most experienced person to handle the resuscitation of a severely depressed neonate "because it was the crux of the two week trial." (Response, pp. 4-5).

{¶16} The court concludes that there is insufficient evidence to support the argument that the standard of care in this case required the most experienced person in resuscitating depressed neonates to be present at the time of Sooshyance's birth. However, there was evidence presented regarding the experience and care provided by the peds team. First, there is no dispute that every member of the peds team, as well as every nurse in the delivery room, were certified in the NRP protocol. Second, is was undisputed that the residents followed the NRP protocol in their efforts to resuscitate Sooshyance. Finally, plaintiffs' experts acknowledged that they had no criticism of the treatment provided by the peds team. While Joseph Ouzounian, M.D., plaintiffs' obstetrics and gynecology expert, testified that he was critical of the level of experience of the peds team, he did not have any criticism of the peds team. Thus, the court finds this argument in support of plaintiffs' objection unpersuasive, and with respect to the

experience of the peds team, the magistrate properly determined the factual issues and appropriately applied the law.

Dr. Malleske

{¶17} Plaintiffs argue that "[t]he magistrate erred in finding that Dr. Malleske would not have intubated the baby within 1 1/2 minutes after birth and would not have performed the resuscitation in a different manner than the peds did team." (Objections, p. 6). The magistrate concluded that if Dr. Malleske was present at delivery, he would not have performed the resuscitation any sooner or differently than the peds teams performed resuscitation. Much of this objection and its opposition relies on Dr. Malleske's video deposition testimony, as he did not testify at trial.

{¶18} Plaintiffs direct the court to Dr. Malleske's testimony that if he was present during delivery, he would have suctioned for meconium, then tried resuscitation via bag and mask, and then, if there was no response, he would have done no more than 30 seconds of bag and mask before intubating. This leads to plaintiffs' claim that Dr. Malleske would have intubated at 1 1/2 minutes of life. Plaintiffs argue that the magistrate "discredited this testimony because Dr. Malleske testified he would have followed the NRP guidelines, and in his instructional role, would have allowed the residents to attempt intubation." (Objections, p. 7).

{¶19} Defendant claims that plaintiffs ignore the totality of Dr. Malleske's testimony, pointing to Dr. Malleske's testimony where he stated that even if he was present at the time of delivery, he would have instructed the residents to perform the intubation in the same manner as they did at Sooshyance's birth. Defendant argues that at his deposition, Dr. Malleske testified that if he was present at Sooshyance's birth, his role would have been instructional in nature. According to Dr. Malleske, "his general practice is to allow two attempts, unless it's critical, then one attempt. If there's nobody in the room who has ever intubated before, and it's critical, then I may just supersede and take the intubation." (Response, p. 6).

{¶20} Upon review, the court agrees with the magistrate's analysis, and finds that the magistrate did not err when he weighed Dr. Malleske's video deposition testimony. In this case, the member of the peds team who did the initial intubation, Edward Nehus, M.D., had experience intubating newborns. Furthermore, the testimony of Dr. Malleske supports the magistrate's finding that if Dr. Malleske was present at delivery, he would have followed the NRP, as the peds team did, and instructed the residents to perform the intubation in the same manner that they did in this case. This supports the conclusion that if Dr. Malleske was present at delivery, Dr. Malleske would not have performed the intubation in 1 1/2 minutes after delivery. As such, the court finds that with respect to Dr. Malleske, the magistrate properly determined the factual issues and appropriately applied the law.

{¶21} The court considered all of plaintiffs' arguments in support of their first objections and the objection is OVERRULED.

b. Objection 2: Plaintiffs Object To The Magistrate's Finding That Sooshyance's HIE Was Caused By Prolonged Hypoxia During An Intrauterine Cord Compression Event, Rather Than The 9-10 Minute Delay In Resuscitation.

{¶22} Plaintiffs argue that "[t]he Magistrate erroneously found that '[p]laintiffs' experts did not provide any credible evidence to contradict Dr. Goldsmith's calculations, which objectively demonstrate there was significant metabolic acidosis present at the time of birth.'" (Objections, p. 9). Plaintiffs argue that defendant's theories of Sooshyance's HIE changed because the cord gases taken at OSU hurt the defense's theory that the brain injury happened prior to birth. Plaintiffs also argue that the magistrate "erroneously found that Shooshyance's HIE occurred in utero based on the defense theories of cord compression and lack of perfusion." *Id.* at p. 11. Plaintiffs claim that "[t]he defense causation experts initially formed their opinions under the mistaken belief that Sooshyance lacked a heart rate immediately before and after birth." *Id.* at 11-12.

{¶23} Defendant argues that the magistrate carefully reviewed all of the evidence presented at trial on this issue, and "[t]he interpretation of the cord gases is not the only basis for the finding that the injury occurred prior to delivery rather than during the resuscitation." (Response, p. 8). Further, defendant claims that "[p]laintiffs neglect to include other evidence of an injury prior to birth such as the severely depressed heart rate, the total or near total umbilical cord compression reveal by the umbilical cord blood gases, and the abysmal Apgar score at birth." *Id.*

{¶24} Upon review of the magistrate's decision, and the voluminous evidence presented at trial, the court finds that the magistrate did not err in finding that Sooshyance's injury occurred prior to delivery. The court cannot find that the magistrate's analysis of all of the expert testimony was flawed. In fact, the magistrate devoted numerous pages of his decision to discussing each expert's testimony, and was reasonable in concluding that Jay Goldsmith, M.D.'s, defendant's neonatology expert, testimony was more credible and more persuasive than plaintiffs' experts.

{¶25} Further, the court reviewed the expert testimony in this case, and the court cannot conclude that Sooshyance's injury occurred due to the resuscitation efforts of the peds team. The court agrees with defendant that there was other evidence to support the magistrate's conclusion in addition to the interpretation of the blood cord cases. There was sufficient evidence that there was significant metabolic acidosis present at the time of birth, a 0 Apgar score at the time of birth, and a severely depressed heart rate. As such, plaintiffs' second objection is OVERRULED.

c. Objection 3: The Magistrate Erred In Finding "it was not reasonably probable that Sooshyance would have regained circulation within two minutes if resuscitation had been handled differently."

{¶26} Plaintiffs argue that the only pediatric neurologist to testify in this case "opined that Sooshyance's permanent brain injury occurred around five minutes of life, and that if Sooshyance had been effectively ventilated prior to four minutes of life, he

would not have suffered brain damage." (Objections, p. 14). The magistrate determined, based on the testimony of Dr. Goldsmith, that "it was not reasonably probable that Sooshyance would have regained circulation within two minutes if resuscitation had been handled differently." (Decision, p. 28).

{¶27} First, the court determined above that it agrees with the magistrate that the peds team and the OB nurses followed the applicable standard of care leading up to and during the resuscitation of Sooshyance. Second, plaintiffs' objection relies on the argument that Sooshyance's brain injury occurred around five minutes of life. (Objections, p. 14). However, the court determined that it agrees with the magistrate's conclusion that Sooshyance sustained prolonged hypoxia which caused HIE during an intrauterine cord compression event prior to birth. As such, plaintiffs' third objection is OVERRULED.

d. Objection 4: Plaintiffs object to the Magistrate's failure to award damages for the plaintiffs as a result of the defendant's causal negligence.

{¶28} Plaintiffs request that the court either make an independent finding on damages based on the evidence discussed at pages 33 to 40 of plaintiffs' post-trial brief, or refer the matter of damages back to the magistrate for determination. As the court finds that the magistrate did not err in his determination of liability, this objection is OVERRULED.

PATRICK M. MCGRATH
Judge

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{¶29} Upon review of the record, the magistrate's decision, plaintiffs' objections and OSUMC's memorandum in opposition, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, plaintiffs' objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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