

labor and delivery. On September 25, 1997, at 5:14 a.m., Charles' head was delivered, but his shoulder was lodged against plaintiff's pubic bone. This problem, known as "shoulder dystocia" is life-threatening for the infant. With Dr. Hillard observing, a resident, Dr. Mava Robinson-Walton, attempted to free Charles from the shoulder dystocia. In doing so, Dr. Walton exerted firm, downward traction on Charles' head. Dr. Hillard ultimately stepped in and delivered Charles six minutes after his head was delivered. Charles' Apgar score, which measures a newborn's physical condition, was zero (poor) at one minute after birth, and he suffered cardiopulmonary arrest for five minutes after delivery. Charles was born with a permanent brachial plexus (shoulder) injury and a mild brain injury.

{¶ 4} Plaintiff asserts that because the fetal monitoring strips showed signs of fetal distress, including "repetitive late decelerations," a Cesarean-section (C-section) should have been performed by 4:00 a.m. on September 25, 1997. Plaintiff further asserts that Dr. Hillard's actions fell below the standard of care because she did not order a C-section by 4:00 a.m. and because she mismanaged the shoulder dystocia.

{¶ 5} The court notes that on November 3, 1999, the court issued a decision and judgment entry finding that Dr. Hillard was entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). The parties agree that the residents' actions are not at issue in this case.¹

{¶ 6} Dr. Walton testified that she was a third-year resident at defendant's hospital at the time of delivery; that plaintiff's labor was induced because she had elevated blood pressure, diabetes and mild pre-eclampsia; and that she had presumed that plaintiff's poor contraction pattern was a result of an infection.

1

Defendant argues that none of the residents were employees of defendant because they were employed by a private entity. In addition, plaintiff states in her reply brief to defendant's closing argument, that "as a practical matter, the co-negligence of the residents has no bearing on the outcome of this matter. Dr. Hillard is entitled by statute to a set-off of any amounts that the residents have paid Plaintiff for the settlement of Plaintiff's meritorious claims as to their negligence." (Plaintiff's reply brief, pp. 3-4.)

{¶ 7} Dr. Walton testified that there is a 50 percent chance of shoulder dystocia when no risk factors are present but that factors such as maternal obesity and maternal diabetes increase the risk. According to Dr. Walton, once Charles' shoulder dystocia was discovered, she performed the "McRoberts" maneuver, (where plaintiff's legs were pushed toward her chest), applied supra pubic pressure, used moderate to firm downward traction, performed a second degree episiotomy and attempted rotation of the anterior shoulder. When her efforts did not free Charles, she asked Dr. Hillard to intervene. Dr. Hillard then extended the episiotomy to the fourth degree and successfully delivered Charles by using the "corkscrew maneuver."

{¶ 8} Paula Hillard, M.D., board-certified in Obstetrics and Gynecology (OB/GYN), testified that she had delivered thousands of babies and that as the attending physician on-call she was responsible for supervision of the overall care delivered to clinic patients in labor, which included the observation of fetal monitoring strips. Dr. Hillard explained that based on the medical records, plaintiff's first stage of labor, the "latent phase" where cervical dilation pace is slow, started at 9:45 a.m. on September 24, 1997; that plaintiff's second stage of labor, when the cervix is completely dilated, started at 3:25 a.m. on September 25, 1997; and that she was present at plaintiff's bedside throughout the second stage of labor until Charles was delivered at 5:20 a.m.

{¶ 9} In Dr. Hillard's opinion, the risk of complications from a C-section was greater than the risk of complications from a vaginal birth because plaintiff was an insulin-dependent diabetic who suffered from an infection of the amniotic fluid. Dr. Hillard testified that when she discovered the shoulder dystocia, Dr. Walton and she performed the appropriate maneuvers to attempt to deliver Charles, and that the shoulder dystocia was the most severe that she had encountered in her career.

{¶ 10} Dr. Hillard opined that the struggle to alleviate the shoulder dystocia was the likely cause of Charles' neurological injury; that the brachial plexus injury occurred as a direct result of the shoulder dystocia; that due to plaintiff's medical condition, a vaginal delivery involved less risk than a C-section; and that Dr. Walton did not apply excessive downward traction. Dr. Hillard further opined that she met the standard of care in treating plaintiff and that nothing in the fetal monitoring strips warranted a C-section for plaintiff.

{¶ 11} “In order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things.” *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, at paragraph one of the syllabus.

{¶ 12} Plaintiff presented the expert testimony of Stuart C. Edelberg, M.D., an OB/GYN at Maryland General Hospital. Dr. Edelberg testified that he delivered one or two babies per month; that he had witnessed shoulder dystocia at least 50 times; and that he frequently testified as an expert regarding brachial plexus injuries. Dr. Edelberg explained that the brachial plexus consists of nerves from the neck and chest that extend to the arm and that these nerves may become stretched during a shoulder dystocia. Dr. Edelberg opined that the standard of care dictates that a physician should not pull excessively on a baby during a shoulder dystocia unless every other maneuver has failed; that Dr. Walton used excessive lateral traction on Charles; and that Dr. Hillard’s failure to intervene and perform a C-section before the vaginal delivery was attempted proximately caused Charles’ injuries.

{¶ 13} Dr. Edelberg stated that a C-section is three to five times more dangerous than a vaginal delivery because there is a higher death rate for the mother, a higher risk of wound infection, and a higher risk of pulmonary embolism but that C-sections have become routine procedures. Dr. Edelberg testified that at 3:10 a.m. the fetal monitoring strips showed a significant late deceleration of the fetal heart rate after a contraction, which could have indicated a placental deficiency (i.e., failure to adequately deliver oxygen) and that by 3:20 a.m., the signs were not reassuring. He opined that it was a breach of the standard of care not to have performed a C-section by 4:00 a.m. because the fetal monitoring strips showed evidence of fetal distress, that it was the attending physician’s responsibility to order a C-section, and that 4:55 a.m. was the last point when Charles would most likely have been neurologically intact.

{¶ 14} On cross-examination, Dr. Edelberg testified that shoulder dystocia is unpredictable and creates an emergency situation. He agreed that early in plaintiff's labor, a vaginal delivery would have been the best method because of plaintiff's risk factors; that Dr. Walton, as a resident, was correct to attempt to alleviate the shoulder dystocia herself before asking for assistance; and that the standard of care allowed Dr. Walton to use a reasonable amount of downward traction. Dr. Edelberg was not critical of the maneuvers that Drs. Walton and Hillard tried, but criticized the fact that Dr. Walton did not exhaust all possible procedures before applying downward traction.

{¶ 15} Dr. Edelberg testified that, according to the medical records, it took six minutes from the time that Charles' head was delivered to resolve the shoulder dystocia and completely deliver Charles; that during a shoulder dystocia, it is assumed that there is either decreased or no flow of oxygen to the baby because the umbilical cord is compressed; and that he could not tell exactly when the neurological injury occurred.

{¶ 16} Plaintiff also presented the expert testimony of Daniel G. Adler, M.D. Dr. Adler testified that he was a pediatric neurologist who also worked at a specialty clinic for children with brachial plexus injuries; that he was board-certified in pediatrics, pediatric neurology and electro diagnostic medicine; and that he had examined Charles. He opined that Charles suffered neurological injury at the time of his birth; that if Charles had been delivered an hour or two before 5:20 a.m., he would not have suffered a brain injury; and that based upon an examination of the fetal monitoring strips, Charles suffered a minimum of 60 minutes of intermittent compounding hypoxia (oxygen deficiency) before the shoulder dystocia occurred. Regarding the permanent brachial plexus injury, Dr. Adler opined that Charles sustained a paralyzing injury to his left arm when nerves were torn as a proximate result of excessive downward traction, and that this type of injury could not have happened in-utero prior to the shoulder dystocia.

{¶ 17} Plaintiff's final expert, Stephen Schifrin, M.D., OB/GYN, testified that he had published approximately 200 articles on fetal monitoring and that he frequently testified as an expert regarding brachial plexus injuries. He opined that the standard of care dictated that a C-section be performed before 4:00 a.m.; that due to repetitive late decelerations on the fetal monitoring strips, the

doctors should have intervened at about midnight; that between 4:45 and 4:55 a.m., Charles suffered neurological injury; and that the moderate to firm downward traction most likely caused the brachial plexus injury.

{¶ 18} On cross-examination, Dr. Schifrin testified that the maneuvers performed by Drs. Walton and Hillard were appropriate and that he could not say that the entire neurological injury did not occur during the six to ten minutes of the shoulder dystocia.

{¶ 19} Defendant presented the expert testimony of Frederick E. Harlass, M.D. Dr. Harlass testified that he was board-certified in OB/GYN and Maternal-Fetal Medicine; that he had delivered over 10,000 babies during his career; and that he was not critical of the decision to induce plaintiff's labor over a period of days. Dr. Harlass explained that shoulder dystocia is neither predictable nor preventable; that the decision to perform a C-section should not be taken lightly; that obesity is a major risk factor for a C-section; that diabetics do not heal well and are prone to develop infection and blood clots; that plaintiff had presumed chorioamnionitis (infection of the membranes of the placenta and amniotic fluid due to the presence of meconium), and that chorioamnionitis is the single biggest risk factor with a C-section. Dr. Harlass opined that the maneuvers taken by Drs. Walton and Hillard to resolve the shoulder dystocia were "textbook" and complied with the standard of care; that Dr. Hillard did not do anything to cause the brachial plexus injury; that nothing in the monitoring strips required the doctors to perform a C-section; that a fetal heart rate monitor cannot show the exact time of brain injury; that Dr. Hillard's conduct complied with the standard of care for appropriate supervision; and that there was no reason to perform a C-section.

{¶ 20} Dr. Harlass stated that the fetal heart monitor tracings must be examined in their entirety and not be taken out of context; that as long as there is recovery from a late deceleration to "baseline," that the sequence is reassuring and that 90 percent of babies with abnormal tracings are born normal. He also testified that if Charles' brain injury occurred before delivery, then he would have experienced seizures in the nursery, but that he did not.

{¶ 21} Defendant's other expert witness, Gary Trock, M.D., testified that he was a pediatric neurologist. Dr. Trock evaluated Charles and testified that Charles currently suffers from a

significant brachial plexus injury on the left side and a “speech and language” delay with impaired articulation. Dr. Trock opined that Charles’ speech and language abilities will significantly improve over the next ten years with speech therapy; that the hypoxia and ischemia (blood flow deficiency) to which Charles was subjected had transient effects but no long-term effects and that it did not cause his speech and language deficits. Dr. Trock also opined that the speech and language delay was caused by a congenital abnormality and that both the travel down the birth canal and the downward traction during delivery could have caused the brachial plexus injury.

{¶ 22} Upon review of all the evidence, the court finds that the risks of a C-section with this particular plaintiff were greater than the risks of a vaginal birth because she was diabetic and obese, and because she had an infection. The court further finds that the testimony of defendant’s expert, Dr. Harlass, was more credible and persuasive than the testimony of plaintiff’s experts. Although the fetal heart monitoring strips were interpreted differently by each physician, the court finds that based upon Dr. Harlass’ testimony, they do not show that a C-section was warranted. Accordingly, the court finds that plaintiff has failed to prove by a preponderance of the evidence that Dr. Hillard breached any duty of care owed to plaintiff.

{¶ 23} The Tenth District Court of Appeals has stated that foresight, not hindsight, is the standard of diligence. The court explained that “[i]t is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence.” *Grabill v. Worthington Industries, Inc.* (1994), 98 Ohio App.3d 739, 744.

{¶ 24} The court further finds that although there are certain risk factors for shoulder dystocia, shoulder dystocia is unpredictable and that Dr. Hillard acted reasonably when she allowed Dr. Walton to attempt to resolve the shoulder dystocia before she stepped in. For the foregoing reasons, the court finds that plaintiff has failed to prove that defendant breached any duty of care and, accordingly, judgment shall be rendered in favor of defendant.

LAWANDA FRYE, Individ., etc. :

Plaintiff :

v. :

UNIVERSITY OF CINCINNATI :

Defendant :

.....

CASE NO. 98-09508

Judge Fred J. Shoemaker

JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER
Judge

Entry cc:

Richard D. Lawrence
Patrick J. Beirne
Robert D. Lewis
2100 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202

Attorneys for Plaintiff

Larry Y. Chan
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorneys for Defendant

Stephen P. O'Keefe
Special Counsel to Attorney General

Case No. 98-09508

- 2 -

JUDGMENT ENTRY

7 West 7th Street, Suite 1990
Cincinnati, Ohio 45202

HTS/cmd
Filed September 14, 2004
To S.C. reporter October 12, 2004