

[Cite as *Ferrell v. Ohio State Univ. Med. Ctr.*, 2021-Ohio-1899.]

MEGAN FERRELL, et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER, et al.

Defendants

Case No. 2018-00002JD

Judge Dale A. Crawford

DECISION

{¶1} Plaintiffs Megan Ferrell and Cameroun Ferrell, a minor son of Megan Ferrell, have sued Defendants The Ohio State University Center and The Ohio State University College of Medicine. Plaintiffs assert claims of medical negligence, lack of informed consent, loss of “services/consortium,” and a claim that Civ.R. 10 is unconstitutional.¹ The Court held a liability trial on Plaintiffs’ claims during which the parties presented testimony by expert and lay witnesses, as well as other evidence. Before trial began, the Court orally ruled on motions in limine filed by the parties.²

I. Introduction

{¶2} On November 4, 2005, Plaintiff Megan Ferrell presented to The Ohio State University Medical Center, Obstetric and Gynecology Department, as a nineteen-year-old woman, who was four feet eight inches in height, overweight, pregnant at thirty-five weeks, and who had a case of Pruritic Urticarial Papules and Plaques of Pregnancy (PUPPP). Following a review of Ferrell’s medical status, it was determined that later in the day Ferrell would return to the medical center to give birth by induction. Upon

¹ Plaintiffs’ claim challenging the constitutionality of Civ.R. 10 is not cognizable in this Court. See *You v. Northeast Ohio Med. Univ.*, 10th Dist. Franklin No. 17AP-426, 2018-Ohio-4838, ¶¶ 34-35 (constitutional claims are not within the jurisdiction of the Ohio Court of Claims).

² The Court GRANTED Plaintiffs’ Motion In Limine To Exclude Reference To Peer Review Censure of Dr. Barry S. Schifrin, M.D. and deferred ruling on the other motions in limine until the issues raised by the remaining motions in limine arose at trial.

Megan Ferrell's hospitalization, Pitocin was used to induce a vaginal delivery. While Megan Ferrell was in the birthing process, she was treated by nurses, Dr. Jessica Bullard (resident physician), and Dr. Jonathan Schaffir (attending physician). Ferrell gave birth to Cameroun Ferrell by vaginal delivery with the assistance of forceps. Cameroun Ferrell developed complications after birth, which, according to Megan Ferrell, have resulted in a diagnosis of cerebral palsy.

II. Discussion

A. Legal Standards

{¶3} The Court, as the trier-of-facts in this case, is free to give weight to the evidence and the Court also is free to believe all, part, or none of the testimony of the witnesses. See *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Green*, 10th Dist. Franklin No. 03AP-813, 2004-Ohio-3697, ¶ 24.

{¶4} Plaintiffs are required to establish their civil claims by a preponderance of the evidence. See *Weishaar v. Strimbu*, 76 Ohio App.3d 276, 282, 601 N.E.2d 587 (8th Dist.1991). A preponderance of the evidence "is defined as that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 54.

{¶5} To recover against a defendant in a tort action, a plaintiff "must produce evidence which furnishes a reasonable basis for sustaining his claim. If his evidence furnishes a basis for only a guess, among different possibilities, as to any essential issue in the case, he fails to sustain the burden as to such issue." *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, 118 N.E.2d 147 (1954), paragraph six of the syllabus. *Accord Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St. 125, 77 N.E. 752 (1906), paragraph three of the syllabus (the rule "is that he who affirms must prove, and when the whole of the evidence upon the issue involved leaves the case in equipoise, the

party affirming must fail”). A presumption of negligence “is never indulged from the mere fact of injury, but the burden of proof is upon the plaintiff to prove the negligence of the defendant and that such negligence is a proximate cause of injury and damage.” *Ault v. Hall*, 119 Ohio St. 422, 164 N.E. 518 (1928), paragraph one of the syllabus. *Accord Turner v. Children’s Hosp., Inc.*, 76 Ohio App.3d 541, 548, 602 N.E.2d 423 (10th Dist.1991), citing *Ault, supra* (no presumption of malpractice from the mere fact of injury).

{¶6} Under Ohio law to succeed on a medical malpractice claim a plaintiff is required to establish the following: (1) the standard of care within the medical community; (2) a defendant’s breach of that standard of care; and (3) proximate cause between the breach and the plaintiff’s injuries. *Carter v. Vivyan*, 10th Dist. Franklin No. 11AP-1037, 2012-Ohio-3652, ¶ 16.

{¶7} Ohio law “imposes on physicians engaged in the practice of medicine a duty to employ that degree of skill, care and diligence that a physician or surgeon of the same medical specialty would employ in like circumstances. * * * Whether negligence exists is determined by the relevant standard of conduct for the physician. That standard is proved through expert testimony. * * * Neither the expert nor the standard is limited by geographical considerations. * * *.” *Berdyck*, 66 Ohio St.3d at 579. And because nurses “are persons of superior knowledge and skill, nurses must employ that degree of care and skill that a nurse of ordinary care, skill and diligence would employ in the same or similar circumstances.” *Carter*, 10th Dist. Franklin No. 11AP-1037, 2012-Ohio-3652, ¶ 16, citing *Berdyck* at paragraph three of the syllabus. Moreover, in a negligence action involving the professional skill and judgment of a nurse, expert testimony “must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurse’s negligence, if any, was the proximate cause of the patient’s injury.” *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 1992-Ohio-109, 592 N.E.2d 828, paragraph one of the syllabus.

{¶8} The Supreme Court of Ohio has discussed the concept of standard of care for a medical doctor:

“The standard of care required of a medical doctor is dictated by the custom of the profession:

‘In order to establish medical malpractice, it must be shown by a preponderance of 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 * * *.’”

Littleton v. Good Samaritan Hosp. & Health Ctr., 39 Ohio St.3d 86, 93, 529 N.E.2d 449 (1988), quoting *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976), paragraph one of the syllabus. With respect to nurses, the standard of conduct is that applicable to the community of persons engaged in that occupation. See *Berdyck v. Shinde*, 66 Ohio St.3d 573, 613 N.E.2d 1014 (1993), paragraph four of the syllabus.

B. Plaintiffs have not proven their claims of medical negligence by a preponderance of the evidence.

{¶9} At trial Plaintiffs presented experts who generally offered credible testimony. Plaintiffs’ expert witnesses collectively opined that Cameroun Ferrell sustained hypoxic ischemic encephalopathy (HIE) sometime during the labor and delivery process. Plaintiffs’ experts testified that, if a Cesarean section (C-section) had been performed, then HIE would not have occurred. Plaintiffs’ experts opined that the conduct of nurses who cared for Megan Ferrell during the labor process fell below the standard of care because the nurses failed to inform the attending residents, or the attending physician, of information necessary for the physicians to conclude that a C-Section should be performed. Plaintiff’s experts also opined that, given the available objective monitoring

information, the attending physician should have performed a C-section instead of proceeding with a vaginal delivery.

{¶10} Plaintiffs' experts offered the following testimony, as summarized below:

- Dr. Michelle Murray – Murray, a nurse who holds a Ph.D., testified that the nursing standard of care was violated because nursing staff continued to use Pitocin in the face of excessive uterine activity.
- Dr. Yitzchak Frank – Dr. Frank, a pediatric neurologist, opined that Cameroun Ferrell experienced newborn encephalopathy in the perinatal period, most likely during the end of Megan Ferrell's labor and delivery.
- Dr. Jill Hunter – Dr. Hunter, a pediatric radiologist, testified about brain-imaging findings, which, in her view, showed that Cameroun Ferrell experienced newborn encephalopathy in the perinatal period, most likely during the end of labor and delivery. According to Dr. Hunter, hypoxia caused primary injury to Cameroun Ferrell's brain, but it was not possible to determine how much injury was caused by hypoxia.
- Dr. Marcus Hermansen – Dr. Hermansen, a pediatrician neonatologist, testified that trauma to Cameroun Ferrell's head, which presumably occurred during labor and delivery, led to decreased blood flow to and from Ferrell's head.
- Dr. Lucy Bayer-Zwirello – Dr. Bayer-Zwirello, a maternal fetal medicine physician, testified that, given the progression of Megan Ferrell's labor, a C-Section should have been performed around 5 p.m., and Dr. Schaffir should have evaluated Megan Ferrell before the time that he eventually did so. In Dr. Bayer-Zwirello's view, the length of labor, coupled with Megan Ferrell's small pelvis and Megan Ferrell's pushing during labor, resulted in brain damage to Ferrell's fetus. Dr. Bayer-Zwirello commented that photographs showing soft tissue damage sustained by Cameroun Ferrell, which were taken shortly after Ferrell's birth, were among the "worst" that she had ever seen.

- Dr. Barry Schifrin – Dr. Schifrin, an obstetrician/gynecologist, testified that, based on his review of contraction patterns and fetal heart rate, Ferrell’s fetus crossed the threshold of injury and Pitocin should have been stopped.

{¶11} Defendants dispute Plaintiffs’ claims. Defendants contend that Plaintiffs’ arguments on the timing of Cameroun Ferrell’s injury are not supported by the medical record, that there is no credible data that fetal monitoring strips show evidence of actual brain damage, and that Defendants’ fact witnesses’ testimony debunks Plaintiffs’ claim of substandard obstetrical care. Like Plaintiffs, Defendants offered expert witnesses who generally presented credible testimony.

{¶12} Defense experts offered the following testimony, as summarized below:

- Dr. John P. Elliott – Dr. Elliott, an obstetrician/gynecologist specializing in maternal fetal medicine, testified about absolute and relative indicators for determining when a C-section is required. According to Dr. Elliott, relative indicators for a C-section are subject to a physician’s judgment. In Dr. Elliott’s view, Megan Ferrell’s pelvic measurements were within normal limits, and nurses involved in Megan Ferrell’s care were not required to lower the dose of Pitocin because the fetus did not exhibit signs of lack of oxygen.
- Dr. Richard J. Martin – Dr. Martin, a pediatrician with a practice in neonatology, testified that, although he is uncertain what caused injury to Cameroun Ferrell, the injury occurred at least 6-12 hours before delivery. Dr. Martin noted that, if Cameroun Ferrell had experienced an acute loss of blood, then—unlike the circumstances in this case—Cameroun Ferrell’s Apgar score would have been abnormal and other issues would have been present. In Dr. Martin’s view, Cameroun Ferrell’s soft tissue injuries were significant, but the soft tissue injuries did not cause Cameroun Ferrell to sustain brain injury.

- Dr. Dennis Dlugos – Dr. Dlugos, a child neurologist, testified that Cameroun Ferrell's injury occurred on November 4, 2005. However, Dr. Dlugos was uncertain what caused Ferrell's injury and, according to Dr. Dlugos, an inability to find a cause for HIE is not unusual. In Dr. Dlugos's view, an Apgar score of 6-7 is not compatible with HIE insult. According to Dr. Dlugos, respiratory distress in an infant of 35 weeks is not uncommon and extra fluid may be needed to help with perfusion. Dr. Dlugos testified that, according to the medical records, there was no evidence of acidosis and fetal monitoring appeared normal. In Dr. Dlugos's view, a CT scan taken on November 7, 2005, showed evidence of injury that occurred three days before.
- Dr. Gordon Sze – Dr. Sze, a neuroradiologist, disagreed with the view of Dr. Hunter (Plaintiffs' expert witness) that Cameroun Ferrell's injury occurred on November 5, 2005. And Dr. Sze disagreed with Dr. Hunter's assessment that Cameroun Ferrell sustained bleeding on the brain. Dr. Sze testified that there was evidence of trauma at birth, but a subdural hematoma resulting from a vaginal birth is normal and, in Cameroun Ferrell's case, Dr. Sze did not see trauma beyond normal birth.
- Dr. Michael Belfort – Dr. Belfort, an obstetrician/gynecologist with expertise in maternal fetal medicine, testified that fetal heart monitoring strips cannot show brain damage. Dr. Belfort noted that fetal monitoring techniques have improved to prevent intrapartum deaths, but there has been no reduction in cerebral palsy. According to Dr. Belfort, "No one really knows what's happening during delivery." Dr. Belfort opined that he did not think that Cameroun Ferrell sustained hypoxic injury during labor and delivery based on the evidence related to metabolic acidosis. And in Dr. Belfort's view, the compression-head theory of trauma is not credible and such theory is based on a flawed study. Dr. Belfort testified that Megan Ferrell's pelvis was not too small for a vaginal delivery, that there is

nothing inappropriate with a forceps delivery at 35 weeks, and that markings associated with a forceps delivery are not uncommon.

- Dr. Jonathan Schaffir – Dr. Schaffir, an obstetrician/gynecologist, who served as Megan Ferrell’s attending physician and supervised Dr. Bullard during Megan Ferrell’s labor and delivery, testified that he had no independent recollection of Cameroun Ferrell’s birth, but, as part of Dr. Schaffir’s normal routine, Dr. Schaffir would exam a woman’s pelvis to determine whether it was adequate for a vaginal birth. Dr. Schaffir testified that there was no evidence that the fetal head was too large for a vaginal delivery and that there was no evidence of cephalopelvic disproportion (CPD) that would have contraindicated a vaginal delivery with forceps.
- Dr. Jessica Bullard – Dr. Bullard, an obstetrician/gynecologist, testified that, at the time she cared for Megan Ferrell, Dr. Bullard was a second-year resident physician. Dr. Bullard testified that she did not remember specifics of the case at issue. Dr. Bullard estimated that she saw Megan Ferrell about seven times before Megan Ferrell delivered. And, based on Dr. Bullard’s review, Dr. Bullard noted that the medical records show that, after she corrected a malposition of Megan Ferrell’s fetus, Megan Ferrell’s labor progressed. Dr. Bullard further noted that a patient has a choice whether to have C-section, but if family members of patient ask for a C-section, then a physician may not be required to perform a C-section.

{¶13} In the Court’s view, Dr. Hunter’s testimony and Dr. Sze’s testimony provide a good example of opposite expert opinions, with both experts offering differing opinions on the size of Cameroun Ferrell’s subdural hematoma, the presence of bleeding on Cameroun Ferrell’s brain, the time of peak edema, and the date of injury to Cameroun Ferrell. Additionally, in the Court’s view, while Dr. Schifrin’s testimony appears to be based on reliable, scientific, medical data, Dr. Schifrin’s testimony is not reliable enough

to counterbalance reliable opinions of other experts that are opposed to it. And, while some of Plaintiffs' witnesses testified that CPD was the cause of Cameroun Ferrell's injury, the evidence shows that Megan Ferrell's cervix was of a normal size. Moreover, it does not appear to the Court that during labor Megan Ferrell requested a C-section. The Court finds that the submitted evidence leaves this case in equipoise. Under Ohio law, if the weight of the evidence is equally balanced, the party who has the burden of proof has not established such issue by a preponderance of the evidence. See *Klunk*, 74 Ohio St 125, at paragraph three of the syllabus; *Ottgen v. Garey*, 41 Ohio App. 499, 506, 181 N.E. 485 (6th Dist.1932) ("if the evidence for and against an issue involved in a case on trial is of equal weight, the burden of proof has not been maintained").

{¶14} Some reasons for medical injuries are best answered by the Almighty or by future medical advances. After considering the evidence submitted, the Court is unable to determine the proximate cause of Cameroun Ferrell's injuries. Plaintiffs thus have failed to sustain claims of medical negligence by a preponderance of the evidence. Because Plaintiffs have not proven medical negligence, Plaintiffs' derivative claim of loss of consortium fails.

III. Conclusion

{¶15} The Court holds that judgment should be issued in favor of Defendants.

DALE A. CRAWFORD
Judge

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JUDGMENT ENTRY

{¶16} For the reasons set forth in the decision filed concurrently herewith, the Court renders judgment in favor of Defendants. 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.

DALE A. CRAWFORD
Judge

Filed April 28, 2021
Sent to S.C. Reporter 6/4/21