



VERDICTSEARCH

NEW YORK

SUFFOLK COUNTY

MEDICAL MALPRACTICE

OB-GYN — Childbirth — Birth Injury — Brain Injuries

C-section's delay blamed for baby's brain damage

VERDICT **\$212,580,000**

CASE Eileen Flaherty, Indiv., & as m/n/g of Robert M. Flaherty III, Infnt. & Robert Flaherty, Indiv. v. Eden G. Fromberg, D.O., Theodore L. Goldberg, M.D., Robert H. Kramer, D.O., Jerry G. Ninia, M.D., Ronald Ostrove, M.D., North Harbor Assocs. P.C., North Harbor OB/GYN Assocs. Inc., & St. Charles Hosp. & Rehab. Center & Gustavo San Roman, M.D., No. 5600/00

COURT Suffolk Supreme

JUDGE Ralph F. Costello

DATE 6/29/2005

PLAINTIFF
ATTORNEY(S) Kevin M. Fox, Russo, Fox & Karl, Hauppauge, NY

DEFENSE
ATTORNEY(S) **Raymond J. Furey** (co-lead), Furey, Kerley, Walsh, Matera & Cinquemani P.C., Seaford, NY (Eden G. Fromberg)
Anthony P. Vardaro (co-lead), Vardaro & Helwig LLP, Smithtown, NY (Gustavo San Roman)
Warren J. Sanger, Bower, Sanger & Lawrence P.C., New York, NY (St. Charles Hospital and Rehabilitation Center)
Howard Snyder, Fumuso, Kelly, Deverna, Snyder, Swart & Farrell LLP, Hauppauge, New York (North Harbor OB/GYN Associates Inc., Robert H. Kramer, Theodore L. Goldberg)
None reported (Jerry G. Ninia, Ronald Ostrove)

FACTS & ALLEGATIONS In 1996, plaintiff Eileen Flaherty, a nurse in her 20s, underwent Caesarean delivery of her first child. Doctors had attempted to perform a vaginal delivery, but the baby's birth-canal descent was prevented by cephalopelvic disproportion—the baby was larger than the birth canal. Thus, the C-section was performed.

The next year, Flaherty developed a second pregnancy. Her prenatal care was managed by North Harbor OB/GYN Associates Inc., the Port Jefferson Station-based practice that had managed her first pregnancy. Her treating obstetricians, Drs. Eden Fromberg, Theodore Goldberg and Robert Kramer, opined that the second child could probably be delivered vaginally.

At about 2 a.m. on June 5, 1998, Flaherty was admitted to the maternity unit of St. Charles Hospital and Rehabilitation Center, in Port Jefferson. She was attached to a fetal-heart monitor.

At about 4 a.m., Goldberg determined that Flaherty's uterus dilation measured about 5 centimeters and that the baby's head had not engaged. At about 4:45 a.m., Goldberg performed an artificial rupture of Flaherty's amniotic membrane. At about 7 a.m., Goldberg observed that Flaherty's uterus dilation had not increased. He also opined that the baby's head was not descending properly.

Goldberg's shift concluded at 8 a.m., so Flaherty's care was transferred to Kramer. At about 8:45 a.m., Kramer determined that Flaherty's uterus dilation had not changed. He enabled an intrauterine pressure monitor that recorded the strength of Flaherty's contractions. He subsequently exited the hospital and traveled to his office.

At about 9:15 a.m., Fromberg arrived, examined Flaherty and determined that Flaherty's uterus dilation had not changed, that the contractions' strength was not adequate, that the baby's head had not engaged and that the baby was suffering caput succedaneum—swelling of its head. Fromberg commenced the administration of Pitocin—a synthetic hormone that enhances contractions. The dosage was increased at 10:30, and it was progressively increased until 12:30 p.m., when Flaherty's uterus was fully dilated. Flaherty began to perform uterine pushes, but the labor did not progress.

At about 3 p.m., Fromberg noted that the fetal-heart monitor was recording potentially troublesome readings that included deep variable decelerations of the baby's heartbeat and tachycardia—a heartbeat that exceeds 100 beats a minute. Fromberg opined that a C-section would have to be performed. Dr. Gustavo San Roman was summoned and told that his assistance would be necessary. However, Fromberg decided that she would initially attempt vacuum extraction of the baby. The vacuum was attached to the baby's head, and the suction was applied during each contraction. One or more nurses also applied supplementary fundal pressure, but no progress was achieved.

By about 3:45 p.m., Flaherty reported that she was suffering shoulder pain, that she had become exhausted and that she could not perform additional pushing. Fromberg was advised that shoulder pain is sometimes indicative of a uterine rupture, so she commenced preparation for a C-section.

At 4 p.m., Flaherty was transported to an operating room, but Fromberg visited the hospital's physician's lounge, where she snacked. The operating team waited in the operating room, and the anesthesiologist suggested that San Roman should have begun the C-section. San Roman refused. He contended that Flaherty was not his patient.

At 4:09 p.m., Fromberg arrived and began the procedure. She eventually delivered the baby, plaintiff Robert M. Flaherty III. Robert required immediate emergency resuscitation, and it was quickly determined that he suffers permanent brain damage.

Eileen Flaherty and her husband, Robert Flaherty II, acting individually and in their son's behalf, sued Fromberg, Goldberg, Kramer, San Roman, North Harbor OB/GYN Associates, the hospital and two other obstetricians who treated Ms. Flaherty, Drs. Jerry Ninia and Ronald Ostrove. The plaintiffs alleged that Fromberg, Goldberg, Kramer and San Roman failed to timely perform the C-section and that their failures constituted medical malpractice. They also alleged that the hospital failed to establish a proper emergency-response protocol and that it was vicariously liable for the actions of Fromberg, Goldberg, Kramer, San Roman and the nurses that treated Flaherty. They further alleged that North Harbor OB/GYN Associates was vicariously liable for the negligence of Fromberg, Goldberg and Kramer.

Prior to the trial, the plaintiffs discontinued their claims against Ninia

and Ostrove. The matter proceeded against the remaining defendants.

Plaintiffs' counsel claimed that the baby's brain damage was caused by oxygen deprivation that occurred several hours prior to the child's delivery. He contended that Fromberg's 9:15 examination produced several findings that established that the baby's birth-canal descent was being prevented by cephalopelvic disproportion. He further contended that the fetal-heart monitor had already begun to produce non-reassuring readings. As such, he claimed that an immediate C-section should have been performed.

Plaintiffs' counsel also claimed that Fromberg did not evaluate the fetal-heart-monitor readings that were being produced during the 2.5-hour period that preceded the failed vacuum extraction of the baby. He contended that the attending nurse should have intervened and summoned a person who would have reviewed the monitor's readings. He also contended that fundal pressure should not have been applied during the attempted vacuum extraction of the baby. He claimed that the hospital had not established a written policy and procedure that specified proper response to obstetrical emergencies.

Plaintiffs' counsel noted that Fromberg was aware that a uterine rupture might have occurred. All of the parties agreed that a uterine rupture threatens the lives of the mother and her baby, and, as such, plaintiffs' counsel argued that a C-section should have been commenced at 3:45 p.m.—when the rupture was first suspected. He claimed that Fromberg and San Roman unnecessarily delayed the procedure.

Fromberg, Goldberg and Kramer contended that Flaherty had been advised that her previous C-section increased her risk of a subsequent uterine rupture.

Nurse Eileen Keary acknowledged that she was present during the failed vacuum extraction of the baby, and she admitted that she performed one application of fundal pressure. She contended that Fromberg requested the pressure, but Fromberg contended that she was not consulted and that Keary was acting independently. Keary also contended that multiple nurses performed several applications of great fundal pressure.

San Roman contended that the baby's brain damage occurred before he was asked to commence the C-section.

After the conclusion of both sides' arguments, the plaintiffs, Fromberg, Goldberg, Kramer, North Harbor OB/GYN Associates and the hospital agreed to a settlement. Terms were not disclosed. The trial proceeded against San Roman.

INJURIES/DAMAGES *asphyxia; brain damage; cerebral palsy; encephalopathy; hypoxia; spastic quadriplegia*

Robert was transferred to the neonatal intensive-care unit of Stony Brook [N.Y.] University Hospital, where doctors determined that he had sustained hypoxic ischemic encephalopathy that stemmed from asphyxia that was caused by a uterine rupture. He also sustained an injury of his brain's basal ganglia. He suffers cerebral palsy and spastic quadriplegia. He is fed via a tube, and he is totally dependent on his family and his caretakers. However, his cognitive functions are intact, and doctors have opined that proper care will ensure that his life expectancy will be normal.

The plaintiffs sought recovery of a total of \$145 million for Robert's future skilled-nursing, therapeutic and personal-care needs; \$21,290,000 for his future medical expenses; \$9.72 million for his future prescription-drug expenses; \$1.26 million for his future assistive devices; \$1.14 million for his future durable medical equipment; \$920,000 for his future medical supplies; and \$13 million for his future lost earnings. They also sought recovery of damages for Robert's past and future pain and suffering. Robert's parents presented loss-of-services claims.

The defendants did not contest Robert's injuries.

RESULT The jury rendered a plaintiffs' verdict. It found that Flaherty's treating nurses did not respond to the fetal-heart monitor's non-reassuring readings, that they applied excessive fundal pressure and that they did not appropriately respond to an obstetrical emergency. It also found that the hospital was liable because it had not established a written policy and procedure that specified proper response to obstetrical emergencies. It further found that Fromberg and San Roman failed to perform a timely C-section, that Fromberg should not have

attempted vacuum extraction of the baby and that Fromberg negligently ordered the application of fundal pressure.

Fromberg was assigned 75% liability; the hospital was assigned 20% liability; and San Roman was assigned 5% liability. The remaining defendants were not assigned liability.

The jury found that the plaintiffs' damages totaled \$212,580,000, but the award was reduced by 95%, which represented the cumulative liability of the settling defendants. Thus, the plaintiffs' recovery totaled \$10,629,000, plus the amount of the in-trial settlement.

Plaintiffs' counsel opined that the jury's verdict was facilitated by the court's technical abilities, which included digitization of deposition testimony; scanned medical records that could be simultaneously viewed by attorneys, the judge, jurors and witnesses; and software that established relevant time lines.

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FLAHERTY III \$21,290,000 future medical cost
 \$13,000,000 future lost earnings
 \$250,000 past pain and suffering
 \$1,140,000 durable medical equipment (57 years)
 \$20,000,000 future pain and suffering (57 years)
 \$1,260,000 assistive devices (57 years)
 \$9,720,000 prescription-drug costs (57 years)
 \$145,000,000 skilled-nursing, therapeutic and personal-care expenses (57 years)
\$920,000 medical supplies (57 years)
 \$212,580,000

INSURER(S)

Physicians' Reciprocal Insurers for Fromberg, Goldberg, Kramer and North Harbor OB/GYN Associates
Medical Liability Mutual Insurance Co. for San Roman
American International Group Inc. for St. Charles Hospital and Rehabilitation Center (primary carrier)
Self-insured for St. Charles Hospital and Rehabilitation Center (excess)

TRIAL DETAILS

Trial Length: 6 weeks
 Jury Deliberations: 1.5 days
 Jury Vote: 6-0
 Jury Composition: 5 male, 1 female

PLAINTIFF EXPERT(S)

Leon Charash, M.D., pediatric neurology, Hicksville, NY
Joan Drukker Dauphinee, RNC, MS, nursing, Longwood, FL
Herbert Goldfarb, M.D., OB-GYN, New York, NY
Sandra Gonchar, MSN, life-care planning, Staten Island, NY
Alan M. Leiken, Ph.D., economics, Stony Brook, NY
Robert Zimmerman, M.D., pediatric radiology, Philadelphia, PA (pediatric neuroradiology)

DEFENSE EXPERT(S)

Dr. Sheldon Cherry, OB-GYN, New York, NY
Joel Cooper, M.D., OB-GYN, New Hyde Park, NY
Denise Guidetti, M.D., obstetrics, New Hyde Park, NY
Dr. Joseph Maytal, pediatric neurology, New Hyde Park, NY

POST-TRIAL San Roman's counsel has moved to set aside the verdict.

EDITOR'S NOTE Counsel for Goldberg, Kramer and North Harbor OB/GYN Associates did not respond to a faxed draft of this report and two phone calls. Counsel for Ninia and Ostrove were not asked to contribute to this report.

—Joanna Bonfiglio