

## [Lawyers Weekly](#)



**Subscribe to Massachusetts Lawyers Weekly and never miss another issue**

Verdicts & Settlements

- [Del.icio.us](#)
- [Digg](#)
- [Email to a friend](#)
- [Printer friendly edition](#)

July 14, 2008

Welcome to the new Lawyers Weekly website. There is no need to register at this time. But in a few weeks you will need to register to gain full access to the site. Please enjoy the site and let us know what you think. To become a Lawyers Weekly subscriber, please [click here](#).

### **Baby born with serious physical, behavioral problems**

Published: July 10, 2008

#### **Now 7, he requires constant attention**

\$6 million settlement

The son of the plaintiff, now 7, is currently and for the foreseeable future at a residential therapeutic school in Northwester Essex County where he receives one-on-one care around the clock.

The plaintiff was expecting the birth of her first child in January 2001. Pre-natal biophysical profiles all demonstrated a reassuring fetus. On Dec. 27-28, 2000, however, the woman became concerned due to reduced fetal movement. Telephone calls and voice messages to her obstetrician, on vacation during Christmas week, and his practice during the morning and afternoon of Dec. 28 went unanswered and unreturned. Finally, after work, she appeared at his office at about 4 p.m. and encountered her obstetrician's partner, whom she had never met before.

A biophysical profile was performed and was improperly scored a 4/8 by the technician and read as such by the obstetrician on call at the office. The on-call obstetrician admitted during her deposition that the biophysical profile should have been scored 2/8. The woman was sent to UMass Memorial for a non-stress test, repeat biophysical profile and induction of labor with Pitocin. It was determined an expedited Caesarean section was needed based on the biophysical profile tests.

The woman was admitted to UMass Memorial at approximately 6:30 p.m. The non-stress test, performed by the covering attending obstetrician, who had never met the patient and who was not sharing in the global delivery fee, was non-reactive with total lack of accelerations. The defendant nurse monitoring the non-stress test testified that the fetus was in "grave" condition at that time.

A repeat biophysical profile was again scored 4/8, with points given for amniotic fluid and tone. The attending physician testified at his deposition that he believed tone was the same criterion as movement. The medical literature differentiates "movement" and "tone." No points can be awarded for tone when there is no movement.

The physician, despite being faced with unequivocal non-reassuring antenatal test results, decided to induce the

patient's labor with Pitocin after an OCT test. The OCT test was not performed pursuant to the UMass nursing protocol standard of care, and the nurses testified that they were not aware of the contents of the protocol. The physician testified that he was not required to know the contents of the protocol because they were nursing protocols. He testified that the OCT test lasted six hours.

Several defendant nurses who were providing care to the woman and her fetus, from 6:30 p.m. on Dec. 28 through 8 a.m. on Dec. 29, testified that they did not know what the term "reassuring" and "non-reassuring" meant in the context of interpreting fetal heart-rate monitor strips. These are the medical terms used by the American College of Gynecologists/Obstetricians, the Association of Women's Health Obstetric, and neonatal nurses in the UMass Memorial Nursing Standards of Care.

Several of the defendant nurses admitted that using those terms to interpret fetal heart-rate monitor strips was the standard of care but nevertheless did not use those terms. One of the defendant nurses testified that no supervisor at UMass Memorial had ever reviewed her ability to competently read and interpret fetal heart-rate monitoring strips. She testified that the first time her ability to read strips was questioned was at her deposition, and she concluded that she had misread them more than a few times on the morning in question.

Throughout the course of the evening and early morning, the defendant physician and the defendant labor and delivery nurse failed to note episodes of uterine hyperstimulation, late decelerations of the fetal heart rate, minimal long-term variability and a decreasing fetal heart-rate baseline and overall non-reassuring aspect of the fetal heart rate. The defendant nurse did not give the plaintiff oxygen, turn her side to side or otherwise turn down or discontinue the Pitocin infusion in the setting of the non-reassuring fetal heart rate.

In the 10-plus hours from her admission until the time of delivery, the patient's cervical dilation went from 0 to 1 cm. The doctor testified that the woman was in active labor, while other nurses and the second-year obstetrical resident testified that she was never in active labor. The doctor also testified at his deposition that during the evening/morning he had consulted with a high-risk physician (an allegation that was denied by that doctor), that after 8 a.m. he had made preparations to set up the Caesarean section, and that he met the patient to discuss options for the course of the delivery, none of which was documented or substantiated by other medical providers or the patient.

The physician's plan at 8 a.m. was to continue to induce vaginal delivery via Pitocin infusion, finding that the fetus' critical situation was reassuring. The woman's regular physician was off duty and did not arrive at the patient's bedside until approximately 8:20 a.m. He spoke by phone to the attending doctor at 8 a.m. and realized that the situation was not reassuring and had not been since admission. He elected to alter the management plan to a "semi-urgent" C-section and inquired why a C-section had not been performed by this time. He offered that, if the attending physician would prepare the woman for a semi-urgent C-section, he would assist him if he arrived at the hospital in time.

The attending physician testified that, at the time, the financial arrangement was that no on-call physician not in the doctors' practice group would be paid for obstetrical services rendered to a patient unless he was the admitting physician. Thus, he would not have shared in the global fee of those physicians if he had performed a C-section.

The woman's obstetrician arrived at approximately 8:25 a.m. For reasons unknown, he waited nearly 99 minutes from calling for a semi-urgent Caesarean section at 8 a.m., on the phone call with the attending physician, to actually performing the emergency C-section, with incision at 9:36 a.m. and delivery at 9:39-9:40 a.m. The patient carried a diagnosis of Von Willebrand's Factor VIII deficiency, a blood deficiency that in some instances can cause excessive bleeding after delivery.

The anesthesiology department said it was ready and available to perform the Caesarean section at 8:55 a.m. The fetal heart-rate monitoring strips indicated that the fetus was experiencing bradycardia at 9:17 a.m., and by 9:21 a.m. nursing could not detect a fetal heart rate. The incision was made on the woman at 9:36 a.m., while the anesthesiologist simultaneously began to administer general anesthesia.

The baby was delivered dead at 9:40 a.m., with no heartbeat, no respirations and an initial APGAR score of 0. The initial umbilical cord ph of 6.69 indicated severe metabolic acidosis. The neonatal intensive care unit team immediately began cardiopulmonary resuscitation and cardiac compressions. APGAR was 0 at one minute. The infant was intubated and positive pressure ventilation continued between 9:41 a.m. and 9:43 a.m. Epinephrine was administered via the endotracheal tube to stimulate a heartbeat. By 9:43 a.m., a heartbeat was detected. Chest compressions stopped at 9:46 a.m. APGARS were 1, 5, 5 and 5, at 5 min., 10 min., 15 min. and 20 min.

The plaintiffs were prepared to present expert testimony at trial that the baby's loss of earning capacity is approximately \$2 million and the cost of his future medical/attendant/therapeutic care is \$15 million.



The plaintiffs were prepared to present at trial expert testimony that pathology slides of the umbilical cord revealed a 75-90 percent occlusion of the vein by a thrombus and that the clot had begun to form as early as two to 24 hours before delivery. The venous thrombus was the cause of the fetus not receiving enough oxygenated blood, causing his presentation to be non-reassuring per the antenatal tests and fetal heart-rate monitoring strips, which should have been detected by the physicians and nurses. The lack of oxygenated blood to the baby caused his hypoxic ischemic encephalopathy and other injuries at birth.

The defendants were expected to present expert medical testimony that all the defendants acted appropriately in their care and treatment of the plaintiffs and that nothing they did caused the baby's injuries. Specifically, the defendants were prepared to present expert medical opinions stating that the child was injured before his mother arrived at the hospital for induction, as evidenced by brain edema on radiology shortly before birth and elevated nucleated red blood cells and platelets shortly after birth. The plaintiffs were expected to rebut these "markers" of timing hypoxic injury at trial with expert testimony and medical literature.

The defendants were also prepared to present expert medical testimony that, whatever physical injuries the baby suffered at birth, the sole cause of his current and future intractable behavioral problems was caused solely by an alleged diagnosis of bipolar disorder, genetically inherited from his mother. The child had never been diagnosed prior to litigation or during litigation by his treating physicians with bipolar disorder.

The case settled for \$6 million, after mediating on two occasions with Warren F. Fitzgerald of Fitzgerald Dispute Resolution. Medical Professional Mutual Insurance Co. agreed to pay \$500,000 on behalf of the defendant doctor. The insurer for UMass Commonwealth Professional Assurance Co. will pay \$4.9 million on behalf of a labor and delivery nurse and \$600,000 from the nurse's excess policy.

**Type of action:** Medical malpractice

**Injuries alleged:** Brain injury, neurological injury, cognitive delay, developmental delay, intractable behavioral problems

**Name of case:** Hanks, et al. v. Klein, et al.

**Court/case no.:** Superior Court, No. WOCV03-02240A consolidated with 07-370C

**Tried before judge or jury:** N/A (settled)

**Amount of settlement:** \$6 million

**Date:** Feb. 29, 2008

**Attorneys:** Frederic N. Halstrom and Matthew J. Andrade, Halstrom Law Offices, Boston (for the plaintiff); Catherine M. Geary, Geary & Geary, Scituate (guardian ad litem); Max Borten, M.D., Gorovitz & Borten, Waltham (at negotiation and for trial)


## Detailed Information

Date of Verdict or Settlement 22-Jul-08

## OTHER RESOURCES

- [Forum](#)
- [State Opinions](#)
  
- [Daily Alerts](#)
- [Judge Assignments](#)





Subscribe to Massachusetts Lawyers Weekly and never miss another issue

- [LOGIN](#)
- [SUBSCRIBE](#)
- [JUDGES & COURTS](#)
- [EMAIL ALERT](#)
- [FIND A LAWYER/FIRM](#)
- [EVALUATE A JUDGE](#)
- [ADVERTISE](#)
- [JOBS](#)
  
- [PRODUCTS & PUBLICATIONS](#)
- [LAW OFFICE RESOURCES](#)
- [SPECIAL FEATURES](#)
- [CLASSIFIEDS](#)

Search Archives

- [LEGAL NEWS](#)
- [OPINIONS and DIGESTS](#)
- [RESEARCH CENTER](#)
- [DIALOGUE](#)

- [EVENTS](#)
  
- [CONTACT US](#)
- [HELP](#)
- [PRIVACY POLICY INFO](#)

Massachusetts Lawyers Weekly | 10 Milk Street Suite 1000, Boston, MA 02108 | 1-800-451-9998