CASE INFORMATION SHEET
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COUNTY AND COURT:

Circuit Court, 9th Judicial Circuit, Orange County, Florida

NAME OF CASE:

TRACIE TURNER JACKSON and ULYSSES BERNARD JACKSON, individually and as parents and natural guardians of their minor daughter, JACQUELINE SIMONE JACKSON,

Plaintiffs,

v.

ALEJANDRO J. PENA, M.D., and PHYSICIAN ASSOCIATES OF FLORIDA, INC.,

Defendants

CASE DOCKET NO.: 2002-CA-6770 **JUDGE:** Honorable Thomas W. Turner

PLAINTIFF(S) ATTORNEY(S)/TRIAL COUNSEL [full names, firm and city]:

Christian D. Searcy and Darryl L. Lewis
Searcy, Denney, Scarola, Barnhart & Shipley, P.A.
West Palm Beach, FL

Terry C. Young
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
Orlando, FL

DEFENDANT(S) ATTORNEY(S)/TRIAL COUNSEL [full names, firm and city]:

Jennings L. Hurt III
Henry W. Jewett II
Karissa L. Owens
Rissman, Barrett, Hurt, Donahue & McLain, P.A.
Orlando, FL

AGE/SEX/OCCUPATION OF PLAINTIFF OR DECEDENT [at time of accident or occurrence]:

Jacqueline Jackson, 8 years old (date of birth: 12/8/99).

Tracie Jackson, 41 years old (date of birth: 3/16/67). In December 1999, Ms. Jackson was employed by the City of Sanford Police Department as a community service officer. At the time of trial, she was a housewife.

Ulysses Jackson, 42 years old (date of birth: 7/13/66). Mr. Jackson was, and is, employed by the City of Sanford's Public Works Department.

FOR WRONGFUL DEATH CASES, PLEASE GIVE AGE AND RELATIONSHIP OF SURVIVORS:

N/A

DATE, TIME AND PLACE OF ACCIDENT OR OCCURRENCE:

This case arose out of the December 8, 1999 birth of Jacqueline Jackson at Arnold Palmer Hospital in Orlando, Florida. Dr. Pena was the delivering obstetrician. Dr. Pena was employed by Physician Associates of Florida, Inc.

Jacqueline was delivered at 5:38 a.m. during an emergency C-section performed by Dr. Pena. Dr. Pena discovered at the time of delivery that Ms. Jackson had suffered a rupture of her uterus along the scar from her prior C-section performed in March 1990.

The medical evidence was that Jacqueline had suffered a severe anoxic brain injury within 15-20 minutes of her delivery at 5:38 a.m. Thus, the rupture of the uterus probably occurred about the same time (5:18 – 5:23 a.m.), although Plaintiffs contended it occurred at about 4:55 a.m.

CAUSE OF INJURY: [factual description including allegations and defenses on liability]:

Plaintiffs' cause of action was controlled by Section 766.303(2), ***Fla. Stat.***, which is part of the NICA statutes. Because Jacqueline suffered a birth-related neurological injury and because the Defendants were participants in NICA, the Defendants had immunity from suit for any claims based on ordinary medical negligence.

Plaintiffs proceeded under the exception to NICA immunity set forth in Section 766.303(2) which allows for a civil action so long as plaintiffs prove by clear and convincing evidence that the defendant doctor acted with bad faith or malicious purpose or willful and wanton disregard of human rights or safety. The only claim that went to the jury was that Dr. Pena had acted with willful and wanton disregard of Plaintiffs' human rights or safety.

During opening statements, Plaintiffs dropped their claim that Defendants had acted with malicious purpose. Plaintiffs also dropped their bad faith claim during the charge

conference at the end of the trial. Plaintiffs made four main liability claims during trial. There was also one major causation issue.

1. Improper to Induce Ms. Jackson's Labor:

Plaintiffs claimed that there was no medical indication to induce Ms. Jackson's labor beginning on December 7, 1999. A key reason for Dr. Pena's decision to induce Ms. Jackson's labor was that an ultrasound performed on the morning of December 7, 1999 showed an amniotic fluid index (AFI) of 7.7. Plaintiffs argued that this was a normal AFI that did not show oligohydramnios (low amniotic fluid). They argued that Dr. Pena should have simply sent Ms. Jackson home and let her go into labor on her own.

The defense countered this argument by pointing out that Ms. Jackson was in the 38th week of her pregnancy and, therefore, was at term. An AFI of 7.7 is in the 5th percentile for a 38-week pregnancy, which many obstetricians consider to be borderline oligohydramnios. Moreover, Ms. Jackson's AFI had significantly decreased from her prior ultrasound performed six weeks before. Since the AFI was likely to get worse over the remaining two weeks of Ms. Jackson's pregnancy, Dr. Pena felt that the risk to the baby of a potential cord accident outweighed the risk of inducing labor.

2. Improper to Use Misoprostol to Ripen Ms. Jackson's Cervix:

Ms. Jackson's cervix was not favorable for induction on December 7, 1999. Dr. Pena chose to ripen her cervix with Misoprostol pursuant to Arnold Palmer Hospital's Misoprostol Cervical Ripening Protocol. Plaintiffs argued that this was improper for two reasons.

First, Plaintiffs argued that using Misoprostol for cervical ripening was an improper off-label use of the drug. Misoprostol had been developed for treatment of gastric ulcers and not for obstetrical purposes. In fact, the manufacturer had specifically warned that the use of Misoprostol on pregnant women was contraindicated because it could cause uterine contractions resulting in miscarriages. The product information included a "black box warning" to this effect.

The defense countered this argument with evidence showing that by December 1999, using Misoprostol for cervical ripening was a valid off-label use. It presented evidence that the black box warning was intended to prevent inadvertent miscarriages during the first and second trimester, so it was not applicable to obstetrical use at the end of pregnancy, such as cervical ripening.

Additionally, the defense showed that using Misoprostol for cervical ripening had been extensively studied by December 1999, and that it was being widely used for this purpose in the United Stages and abroad. In fact, in the four years preceding this incident (between August 1995 and November 1999), the perinatology staff and OB/GYN residency program at Arnold Palmer Hospital had performed large prospective randomized studies on Misoprostol. Those studies involved over 1,700 patients, of which 190 had undergone prior C-sections like Ms. Jackson. None of those patients had suffered uterine ruptures.

Plaintiffs' second Misoprostol argument was that it was improper to use Misoprostol on patients such as Ms. Jackson who had undergone prior cesarean delivery (VBAC, or vaginal birth after cesarean patients). They relied on medical literature published before December 7, 1999 which suggested that using Misoprostol on patients who had had prior cesarean deliveries significantly increased their risk of uterine ruptures. In fact, in November 1999, the American College of Obstetricians and Gynecologists (ACOG) had issued a Committee Opinion and a Practice Bulletin which had recommended against the use of Misoprostol on patients who had undergone a prior cesarean delivery.

The defense countered this claim by showing that the medical literature did not conclusively establish that using Misoprostol in this context increased the patient's risk of uterine rupture. For example, the articles relied upon by Plaintiffs were case studies with limited numbers of patients. Moreover, ACOG admitted that its recommendation was based on "limited or inconsistent" evidence.

The defense also presented evidence that the experience at Arnold Palmer Hospital, which included the experiences of Dr. Pena personally, his 15 partners, the hospital's perinatology staff and OB/GYN residency program, and the other obstetricians practicing at the hospital, was not consistent with the ACOG publications or the medical literature relied upon by the Plaintiffs.

3. Informed Consent:

Plaintiffs claimed that Dr. Pena had not provided Ms. Jackson with adequate information to obtain her informed consent to use Misoprostol for cervical ripening. They argued that Dr. Pena should have told Ms. Jackson about the manufacturer's warnings and the medical literature regarding the risk of uterine rupture. Dr. Pena admitted he did not provide Ms. Jackson with specific information about the drug.

The defense presented evidence that the standard of care did not require Dr. Pena to provide that information. Instead, it was sufficient to tell the patient that her cervix would be ripened using a prostaglandin (the family of drugs of which Misoprostol is a member). There was no need to go into detail about the medical literature because that literature was not consistent with the experience at Arnold Palmer Hospital.

Additionally, the defense presented evidence that as of December 1999, it was reasonable for Dr. Pena to have not told Ms. Jackson that Misoprostol increased the risk of uterine rupture in VBAC patients beyond the risk inherent in VBAC, in and of itself. The experience at Arnold Palmer Hospital was that Misoprostol and other cervical ripening agents did not significantly increase the risk of uterine rupture.

4. Dr. Pena Did Not Properly Monitor or Respond to Ms. Jackson's Condition:

Plaintiffs argued that Dr. Pena did not properly monitor or respond to Ms. Jackson's condition during her labor on December 7 and 8, 1999. For example, Plaintiffs claimed that due to Ms. Jackson's morbid obesity (she weighed between 350-400 lbs.), her contractions and the baby's heart rate could not be adequately monitored with external

monitoring. They also argued that Ms. Jackson was a high risk patient who required much more careful monitoring, particularly in light of her induction with Misoprostol.

In response, the defense presented evidence that Ms. Jackson's labor proceeded normally from the time that she was admitted to the antepartum unit at 10:00 a.m. on December 7, 1999, through about 5:15 a.m. on December 8, 1999, when her membranes were artificially ruptured in the labor and delivery unit and scalp electrodes were placed. A fetal heart rate of 58-60 was noted at 5:18 a.m., which was the first time that there was any indication of any problems with the fetal heart rate.

The defense also presented evidence that Dr. Pena had adequately responded to Ms. Jackson's condition. At 4:00 a.m., Nurse Furgus called Dr. Pena from the antepartum unit to report what appeared to have been late decelerations in the baby's heart rate. Dr. Pena responded by ordering that Ms. Jackson be moved from antepartum to labor and delivery, where she arrived at approximately 4:30 a.m. Both Nurse Furgus and Nurse Elkins-Birmele, the labor and delivery nurse, agreed that Ms. Jackson was not in an emergent condition at that time.

Dr. Pena was next called at 4:48 a.m., when Nurse Elkins-Birmele requested Dr. Pena rupture Ms. Jackson's membranes and place fetal scalp electrodes in order to better monitor the baby's heart rate. Ms. Elkins-Birmele was having some difficulty monitoring the baby's heart rate externally at that time. She testified that this was not an emergency. Dr. Pena said that he would come to rupture the membranes and place the scalp electrodes.

Dr. Pena did not immediately go to Ms. Jackson's room, though. The defense presented evidence that Dr. Pena was probably supervising an OB/GYN resident, Dr. Tina Pham, in the delivery of another patient at that time. That patient's record showed that her baby's heart rate had dropped into the 60s. That baby was born at 4:59 a.m.

In the meantime, Nurse Elkins-Birmele had requested an epidural evaluation for Tracie Jackson. At 4:55 a.m., a CRNA was in Ms. Jackson's room performing that evaluation. The CRNA wrote his note at 5:00 a.m.

Ms. Jackson testified that during most of her labor, she was in excruciating pain because of extremely strong contractions. However, none of the nurses recalled or documented that Ms. Jackson was making these complaints. On the contrary, the nurses consistently documented that Ms. Jackson's contractions were "mild" and that she reported pain consistent with her stage of labor.

Ms. Jackson also testified that when she sat up at 4:55 - 5:00 a.m. for the epidural, she felt a burning pain on the left side of her abdomen that extended to her left thigh, and this resulted in her having to lie back down. Nurse Elkins-Birmele and the CRNA did not document any such complaint by Ms. Jackson.

Around this time, Dr. Pena looked into Ms. Jackson's room and saw that she was apparently undergoing an epidural. He had previously reviewed Ms. Jackson's monitoring strips at the nurses' station and felt that they were reassuring. At that point,

Dr. Pena felt that he could wait until after the epidural to rupture the membranes and place the scalp electrodes.

After checking with the charge nurse to determine if there were any other patients that needed his attention, Dr. Pena went to the physicians' call room to take a shower. He testified that if there had been any indication of a problem or an impending catastrophe with Ms. Jackson, he would not have left her room.

At 5:05 a.m., Nurse Elkins-Birmele requested Dr. Pham, the resident, to rupture Ms. Jackson's membranes and place the scalp electrodes. At that point, the external monitor was not tracing a fetal heart rate on the strips. However, Nurse Elkins-Birmele testified that the heart tones were probably audible through the monitor and that they were certainly not in the ominous range.

At 5:15 a.m., Dr. Pham ruptured the membranes and placed the scalp electrodes. At 5:18 a.m., the scalp electrodes showed that the baby's heart rate was in the 60s. Nurse Elkins-Birmele testified that this was completely unexpected since there had been no indication up to that point of fetal bradycardia.

Dr. Pham then made the decision to take Ms. Jackson to the operating room for an emergency C-section. Dr. Pena was notified, and met Ms. Jackson in the hallway as they were taking her to the operating room. Dr. Pena delivered the baby at 5:38 a.m., 20 minutes after the first indication of fetal bradycardia. Upon opening Ms. Jackson's abdomen, Dr. Pena discovered the rupture of Ms. Jackson's uterus. It appeared the rupture was along the old low-transverse C-section scar. The back of the baby's head was exposed through the opening.

5. Causation: Timing of Brain Injury:

The undisputed evidence at trial was that MRIs of Jacqueline's brain showed classic changes indicating almost total anoxia. The event that caused the anoxia could not have occurred any more than 15-20 minutes before birth because otherwise Jacqueline would not have been born alive.

Plaintiffs claimed that the MRIs also showed changes indicating brain damage caused by partial prolonged hypoxia that had occurred more than 15-20 minutes before birth. Plaintiffs contended that Jacqueline may have been suffering from hypoxic brain injury beginning as early as 3:30 a.m. when the first late decelerations were noted by the nurse.

The defense countered this argument with evidence that the MRIs did not show "watershed" brain changes, which would have been consistent with partial prolonged hypoxia. Thus, the objective evidence was that Jacqueline's brain damage was due to an acute, unexpected and unpreventable event.

NATURE OF INJURY [please be specific concerning injuries, treatment and medical testimony]:

Jacqueline suffered a severe anoxic brain injury to the central part of her brain (the putamen and thalamus). This resulted in significant impairment. Jacqueline is permanently and totally disabled and is, and will be, totally dependent upon caregivers.

Ms. Jackson also made a personal injury claim for her uterine rupture. However, there was no evidence presented at trial showing any kind of permanent injury, disability, or impairment related to the uterine rupture. In fact, the rupture was successfully repaired, and Ms. Jackson did not require a hysterectomy.

PLAINTIFF'S EXPERT WITNESSES [include full name, degree, specialty and city]:

Frank Bottiglieri, M.D., obstetrics and gynecology
Baltimore, MD

Esam Dajani, Ph.D., pharmacology
Chicago, IL

Ira Lott, M.D., pediatric neurology
Irvine, CA

Mary Edwards-Brown, M.D., pediatric neuroradiology
Indianapolis, IN

Craig Lichtblau, M.D., physiatry/life care planning
West Palm Beach, FL

Bernard Pettingill, Ph.D., economist
West Palm Beach, FL

Ronald Davis, M.D., treating pediatric neurologist
Orlando, FL

Jane Martinez, RPT, treating physical therapist
Orlando, FL

Chris Schultze, treating occupational therapist
Orlando, FL

DEFENDANT'S EXPERT WITNESSES [include full name, degree, specialty and city]:

Arnold Lazar, M.D., obstetrics and gynecology
Orlando, FL

Gordon Sze, M.D., neuroradiology
New Haven, CT

Michael Painter, M.D., pediatric neurology
Pittsburgh, PA

Daniel Buffington, Ph.D., pharmacology
Tampa, FL

Marc Bischof, M.D., treating obstetrician/gynecologist
Orlando, FL

CHECK APPROPRIATE SPACE: ____X_____ Verdict

DATE OF VERDICT:

July 16, 2008

VERDICT:

For Defendants, Dr. Alejandro Pena and Physician Associates of Florida.

COMPARATIVE NEGLIGENCE [if applicable]:

N/A

JUDGMENT:

For Defendants, Dr. Alejandro Pena and Physician Associates of Florida.

DATE OF JUDGMENT:

July 28, 2008

DEFENDANT'S OFFER:

$1 million was first offered in August 2002. The offer remained open through the beginning of trial.

PLAINTIFF'S DEMAND:

Plaintiffs' last demand before trial was $7 million. Plaintiffs' counsel asked the jury for an award of $42 - $60 million.

ATTORNEY'S COMMENTS:

This was a unique case with many issues of first impression. To our knowledge, no other case based on the exception to NICA immunity found in Section 766.303(2), ***Fla. Stat.***, has gone to verdict, much less been addressed at the appellate level.

This meant that the Court and the parties were addressing many issues for the first time. For example, there were no standard jury instructions, nor any case law, setting forth the definitions of "bad faith", "malicious purpose" or "willful and wanton disregard" in the context of this cause of action.

Another novel issue involved the use of medical literature. The trial court allowed Plaintiffs to use medical literature, over the defense's objection, as affirmative evidence. The Court's rationale was that the literature was not hearsay because it was not being used to prove the truth of the matter asserted. Instead, the literature was admissible to show what information would have been available to Dr. Pena at the time that he decided to use Misoprostol.

The trial court also prohibited the admission of any evidence regarding standard of care and medical literature after December 8, 1999, the date of the incident. The Court ruled that any post-incident evidence was irrelevant to what Dr. Pena knew or should have known as of the date of the incident. By 2001, most obstetricians had stopped using Misoprostol on VBAC patients because of the risk of uterine rupture.

Trial began on June 2, 2008 and ended on July 16, 2008. The jury deliberated for 7 hours, 25 minutes.

On July 25, 2008, the trial court denied Plaintiffs' Motion for New Trial and Motion to Interview the Jurors. Defendants have filed motions for attorney's fees and costs pursuant to Proposals for Settlement served in 2002, 2003 and 2006.

Plaintiffs have appealed to the 5th DCA.

Submitted By:	**Jennings L. Hurt III, Esquire** **Henry W. Jewett II, Esquire** **Karissa L. Owens, Esquire**	**Date: August 28, 2008**
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