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Adams, Coogler
1555 Palm Beach Lakes Boulevard
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West Palm Beach, FL 33401

AGE/SEX/OCCUPATION OF PLAINTIFF OR DECEDENT:

Minor Plaintiff: Jordan MacDonald, 13 years old (DOB: 3/6/98).

Mother: Melissa MacDonald, 41 years old at time of trial (28 years old at time of incident); Program Coordinator for telecommunications service bureau

Father: Robert MacDonald, 43 years old at time of trial (30 years old at time of incident); construction worker

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

Not applicable.

DATE, TIME AND PLACE OF ACCIDENT OR OCCURRENCE:

This case arose out of the delivery of Jordan MacDonald by the Defendant, Samuel Kaufman, M.D., at West Boca Medical Center at approximately 1:00 p.m. on March 6, 1998. Plaintiffs claimed that Dr. Kaufman was negligent for choosing to use a vacuum device to assist in Jordan's delivery. They also claimed that Dr. Kaufman negligently used the vacuum device without first obtaining proper informed consent from Ms. MacDonald.

Plaintiffs further contended that the use of the vacuum during Jordan's delivery caused disruption in the blood flow in Jordan's brain at the time of delivery, resulting in a hypoxic ischemic injury to Jordan's brain. This hypoxic injury ultimately manifested as cerebral palsy, which Jordan first began to manifest at about eight months of age.

The defense argued that it had been reasonable for Dr. Kaufman to offer and use the vacuum to assist in Jordan's delivery. In Dr. Kaufman's reasonable clinical judgment, Ms. MacDonald was exhausted and no longer able to adequately push to help deliver the baby. Moreover, the baby's head was in the ideal location for the use of a vacuum since it was at +2 station with a direct occipital anterior presentation. The defense further argued

that Dr. Kaufman had followed his routine practice in obtaining proper informed consent from Ms. MacDonald before the vacuum was utilized.

Additionally, the defense argued that there was no evidence that Jordan's cerebral palsy was caused by the use of the vacuum. Although Jordan was taken to the NICU after delivery, he improved rapidly. Jordan was discharged on day 6 with no apparent problems. It was generally undisputed at trial that the cause of a child's cerebral palsy cannot be determined at least 80% - 90% of the time. Jordan, unfortunately, fell into that large category.

Jordan was Ms. MacDonald's second pregnancy. She was a patient of Dr. Kaufman's group, Women's Healthcare Associates. It was generally undisputed that she had no significant prenatal problems.

Ms. MacDonald went into labor at approximately 1:30 a.m. on March 6, 1998. At the time, she was 35 weeks pregnant. Ms. MacDonald called Women's Healthcare Associates's answering service and was ultimately connected with Dr. Kaufman, who directed her to go to West Boca Medical Center for evaluation.

Ms. MacDonald was evaluated by a nurse in WBMC's labor and delivery unit at approximately 2:25 a.m. Ms. MacDonald was determined to be in early active labor, so Dr. Kaufman ordered that Ms. MacDonald be admitted for labor and delivery.

Dr. Kaufman was not at West Boca Medical Center from the time that Ms. MacDonald was admitted until about 12:15 p.m. on March 6, 1998. However, Dr. Kaufman was in frequent contact with the nursing staff by telephone and was kept informed of Ms. MacDonald's condition.

On admission, Ms. MacDonald's cervix was dilated 1-2 cm. and was 90% effaced. The baby's head was determined to be at -1 to -2 station. At 5:15 a.m., Ms. MacDonald was 3 cm. dilated and 70% effaced, with the baby's head at 0 station. Ms. MacDonald was given Stadol and Phenergan at that point for pain and nausea control.

At 6:30 a.m., Ms. MacDonald was 5 cm. dilated and completely effaced. The baby was still at 0 station. Ms. MacDonald requested an epidural.

At about this time, Ms. MacDonald was evaluated by Dr. Jane Rudolph, one of Dr. Kaufman's partners. Dr. Rudolph wrote a progress note which included a sterile vaginal examination consistent with the 6:35 a.m. evaluation by the nurse: 5 cm. dilated, completely effaced, and -1 station. Dr. Rudolph also countersigned telephone orders given by Dr. Kaufman earlier in the morning. Dr. Rudolph testified at trial that she would not have written the progress note or signed the orders if she had not actually seen Ms. MacDonald while she was in labor on the morning of March 6, 1998.

Despite this, Plaintiffs contended throughout the trial that Dr. Rudolph never saw Ms. MacDonald on the morning of March 6, 1998. This was based entirely on Mr. and Ms. MacDonald's adamant testimony that Dr. Rudolph never saw Ms. MacDonald that morning.

Dr. David Ritter, the anesthesiologist, placed the epidural at approximately 7:20 a.m. Ms. MacDonald's membranes ruptured at approximately 8:30 a.m. At 9:30 a.m., Ms. MacDonald was 9+ cm. dilated and completely effaced. The baby was still at 0 station. Dr. Kaufman was informed, and he directed that Ms. MacDonald be placed in the high Semi-Fowler's position so that the baby's descent could be assisted by gravity.

Dr. Ritter "topped off" the epidural at about 9:50 a.m. He returned shortly after 10:00 a.m. to add more medication to the epidural. Dr. Ritter testified the 9:50 a.m. dose had not been effective in controlling Ms. MacDonald's pain.

At 11:45 a.m., Ms. MacDonald was completely dilated, and completely effaced, but the baby was still at 0 station. Ms. MacDonald was instructed to begin pushing at that time.

Plaintiffs argued at trial that Ms. MacDonald did not enter the second stage of labor until 11:45 a.m. They argued that Ms. MacDonald had only been in the second stage of labor for less than an hour at the time that Dr. Kaufman assessed Ms. MacDonald as being exhausted. However, Dr. MacDonald testified that the second stage of labor more likely began around 10:30 a.m., based on the fact that Ms. MacDonald was 9+ cm. dilated and completely effaced at 9:30 a.m.

Based on his anesthesia record, Dr. Ritter testified that he "topped off" the epidural at approximately 12:10 p.m. In nearly 11 years of litigation, this "top off" had not been discussed by any fact or expert witness (Dr. Ritter was not deposed before trial). The 12:10 p.m. top off was not documented by Nurse

Gibbons, the nurse tending to Ms. MacDonald at the time, on either her progress note or the fetal monitoring strips.

Dr. Ritter said Ms. Gibbons probably had not seen him when he administered the top off. Dr. Ritter testified that since Ms. MacDonald was pushing at the time, he would have given her an epidural dose that would not have made her completely numb and pain-free so that she could continue pushing.

Dr. Kaufman arrived at Ms. MacDonald's bedside between 12:15 p.m. and 12:25 p.m. Nurse Gibbons documented Dr. Kaufman at bedside at 12:25 p.m. However, Mr. and Ms. MacDonald claimed that Dr. Kaufman had been on his cell phone when he entered the L&D room. Since Dr. Kaufman's cell phone records showed that he had been making a call at about 12:16 p.m., the defense argued that Dr. Kaufman actually entered Ms. MacDonald's room at that time. Using those same records, the defense argued that Dr. Kaufman did not leave Ms. MacDonald's room after delivery until 1:15 p.m.

Mr. and Ms. MacDonald, Mayra Breslowsky (Ms. MacDonald's step-mother), and Ron Breslowsky (Ms. MacDonald's father) essentially told the same story regarding Dr. Kaufman's actions regarding Ms. MacDonald's delivery. All four testified that Dr. Kaufman had been involved in four telephone calls between the time that he arrived in the L&D room and the time that he departed. Further, they testified that all four telephone calls had pertained to Dr. Kaufman's having car trouble.

Dr. Kaufman's first phone call these witnesses testified about at trial was when Dr. Kaufman first entered Ms. MacDonald's L&D room. They testified that Dr. Kaufman was speaking on his cell phone at the time.

The second phone call, according to the MacDonalds and the Breslowskys, occurred on a land line at the nurses' station outside Ms. MacDonald's L&D room.

The third purported telephone call occurred after Dr. Kaufman had donned his gown and gloves and was positioned to deliver the baby. The MacDonalds and Ms. Breslowsky all testified that the land line on the night table next to Ms. MacDonald's bed rang, and that the nurse answered the call because Dr. Kaufman was gowned and gloved. The nurse then purportedly held the phone to Dr. Kaufman's ear while Dr. Kaufman remained seated on a stool, in position to delivery the baby, and discussed his car

troubles. The nurse then returned the phone to bedside at the end of the conversation.

The MacDonalds and Ms. Breslowsky testified that the fourth phone call took place after delivery when Dr. Kaufman was leaving the L&D room. Dr. Kaufman was again discussing his car troubles on his cell phone.

The defense presented Ms. MacDonald's 2003 deposition testimony, Mr. MacDonald's 2004 deposition testimony and Ms. Breslowsky's 2006 deposition testimony to show that none of them had mentioned Dr. Kaufman being involved in any telephone calls other than the first cell phone call when he entered Ms. MacDonald's room. For example, both Mr. MacDonald and Ms. Breslowsky specifically testified in their respective depositions that they had no recollection of Dr. Kaufman making any telephone calls after the first telephone call.

Mr. and Ms. MacDonald and Ms. Breslowsky also testified that Dr. Kaufman never said anything to them about using a vacuum to assist in the delivery. For example, Ms. MacDonald contended that she did not know that a vacuum was being used until after the baby was born, when she saw that the vacuum was still attached to the baby's head. The evidence at trial, though, was that the vacuum device was removed from the baby's head at the time the baby's head was delivered, but before the rest of his body was delivered.

Plaintiffs also adamantly denied that Ms. MacDonald was exhausted when assessed by Dr. Kaufman at around 12:25 p.m. to 12:30 p.m. They relied on Dr. Ritter's 12:10 p.m. anesthesia note to argue that Ms. MacDonald was not in pain when Dr. Kaufman assessed her. As discussed above, Dr. Ritter said that he would not have given an epidural dose that would have completely numbed Ms. MacDonald since she was pushing at the time.

Dr. Kaufman had no independent recollection of Ms. MacDonald's delivery, but based on his routine practice and the hospital chart, he testified that he had properly assessed Ms. MacDonald as being exhausted. Dr. Kaufman could not recall whether he was aware at the time that Ms. MacDonald had received an epidural top-off at 12:10 p.m., roughly 15-20 minutes before his assessment. However, Dr. Kaufman said this fact was not important because at the time of **his** assessment, Ms. MacDonald was complaining of pain and requesting another epidural.

Dr. Kaufman pointed out that Ms. MacDonald received an epidural "top off" at 12:45 p.m., as documented on the fetal monitoring strips. Plaintiffs argued that Ms. MacDonald did not receive an epidural top-off at that time because it was not documented by Dr. Ritter on the anesthesia record. However, Dr. Ritter testified that one of his partners could have given the epidural at 12:45 p.m. and then not documented it on the anesthesia record. In fact, Dr. Ritter has testified that this "happened all the time".

Dr. Kaufman testified that he had never used a vacuum to assist in delivery without first discussing it with the patient and obtaining the patient's consent. Thus, he was confident that he discussed the use of a vacuum with Ms. MacDonald before the delivery.

Dr. Kaufman explained that he would have discussed with the MacDonalds the most common complications from the use of the vacuum, which were molding of the baby's head (caput) and cephalohematoma, which essentially is a bruise between the scalp and the skull. Dr. Kaufman testified that he would not have discussed the risk of brain injury associated with vacuum-assisted delivery because such an injury would be highly unlikely if the vacuum was used correctly. Dr. Kaufman was confident that Ms. MacDonald understood the discussion and gave him the consent to utilize the vacuum.

Dr. Kaufman allowed Ms. MacDonald to continue pushing while they prepared for the use of the vacuum. It was possible that Ms. MacDonald would have been able to deliver the baby without the use of the vacuum.

Dr. Kaufman explained that the baby was in the ideal position for the use of the vacuum since his head was at +2 station and "direct OA" which essentially meant that the baby was face down and his head was midline in the birth canal.

Dr. Kaufman explained the vacuum device and how it was used. He testified that given the vacuum device's size and configuration, it would have been impossible for the vacuum to have been used without being noticed by Ms. MacDonald and her family. Operating the vacuum required two people: the nurse to work the non-sterile pressure pump; and the doctor, under sterile conditions, to place the vacuum's cap on the baby's head. The doctor would then direct the nurse on the amount of suction pressure, while he used the vacuum's hose and cap to apply

gentle traction during contractions and guide the baby through the birth canal.

Dr. Kaufman testified that he used the vacuum for no more than three contractions preceding Jordan's delivery. He would have applied traction while Ms. MacDonald pushed. The vacuum cap would have been affixed to the baby's head for no more than six to ten minutes.

Dr. Kaufman testified that Jordan's appearance at delivery, as shown by photos taken shortly after delivery, were typical for a vacuum-assisted delivery.

A neonatologist, Dr. Albert Tano, was present at delivery because Jordan was premature at 35 weeks. Dr. Tano testified at trial that there had been no sign of hypoxic injury at birth. In fact, Dr. Tano gave Jordan Apgar scores of 9 and 9 at one and five minutes.

Dr. Tano did have Jordan admitted to the NICU because of respiratory distress, but Dr. Tano testified that this distress was typical for a 35-week premature baby, and not due to a hypoxic brain injury. Dr. Tano then testified that Jordan's course in the NICU was also not consistent with a hypoxic brain injury caused at the time of delivery. Jordan never needed to be ventilated, and by day three, he no longer needed supplemental oxygen. He developed some jaundice, but his overall condition was within normal limits by the time of discharge.

Mr. and Ms. MacDonald agreed that Jordan did well without any apparent problems for about the first eight months of life. Ms. MacDonald did not discuss any concerns with delivery with Dr. Kaufman when she returned for her first postpartum visit on April 16, 1998. The MacDonalds sought evaluation after Jordan appeared not to be hitting milestones at about eight months. Jordan was subsequently diagnosed with cerebral palsy.

CAUSE OF INJURY:

Plaintiffs contended that Jordan Macdonald's cerebral palsy was caused by Dr. Kaufman's use of a vacuum device to assist in Jordan's delivery.

NATURE OF INJURY:

Jordan currently suffers from cerebral palsy with autistic features.

PLAINTIFF'S EXPERT WITNESSES:

John Mastrantonio, M.D. - Obstetrics & Gynecology
New York City, NY

Dr. Mastrantonio was the Plaintiffs' only standard of care expert against Dr. Kaufman. Dr. Mastrantonio testified that a vacuum-assisted delivery was not clinically indicated, and that Dr. Kaufman had been negligent for not allowing Ms. MacDonald to continue laboring. Dr. Mastrantonio also criticized Dr. Kaufman for not obtaining appropriate informed consent for the use of the vacuum.

Houchang Modanlou, M.D. - Neonatology
Los Angeles, CA

Dr. Modanlou was a causation expert. He testified that Jordan's cerebral palsy was caused by the use of the vacuum. Dr. Modanlou claimed that Jordan suffered an hypoxic ischemic injury because pressure from the vacuum disrupted the normal blood flow within the brain. Dr. Modanlou also said there had been bleeding within the brain, and between the scalp and the skull, which he characterized as a subgaleal hemorrhage.

Robert Cullen, M.D. - Pediatric Neurology
Miami, FL

Dr. Cullen was another causation expert. He also testified that Jordan's cerebral palsy was caused by the use of the vacuum. Similar to Dr. Modanlou, Dr. Cullen claimed that the negative pressure of the vacuum caused a disruption of blood flow within the brain, as well as hemorrhages within the brain, all of which resulted in hypoxic ischemic brain injury.

Dr. Cullen also examined Jordan in 2009 and then testified at trial regarding his assessment of Jordan's condition and prognosis. Dr. Cullen was allowed to perform a limited examination of Jordan in front of the jury during trial, over the defense's objection.

Barry David Pressman, M.D. - Neuroradiology
Los Angeles, CA

Dr. Pressman is an adult neuroradiologist. He testified that a March 10, 1998 head ultrasound performed while Jordan was in the NICU showed changes consistent with hypoxic ischemic injury. He then testified that MRI scans performed in 1999 and 2010 also showed patterns consistent with hypoxic ischemic injury. Dr. Pressman found no evidence of any intracranial bleeds, which was inconsistent with the testimony of Dr. Modanlou and Dr. Cullen.

Aubrey Milunsky, M.D. - Genetics
Boston, MA

Dr. Milunsky testified that, based on genetic studies performed in 2009 on Jordan and his parents, Jordan's cerebral palsy was not due to any genetic abnormality. Dr. Milunsky declined to give an opinion as to the actual cause of Jordan's cerebral palsy, but he conceded that the cause of cerebral palsy cannot be determined in the majority of cases.

Larry Forman - Life Care Planning
Miami, FL

Mr. Forman testified regarding Jordan's current and future life care needs.

Bernard Pettingill, Ph.D. - Forensic Economics
Palm Beach Gardens, FL

Dr. Pettingill testified regarding the Plaintiffs' economic losses. He calculated the past medical bills as \$247,017, the present value of the future medical expenses as \$10.8 million and \$12.8 million, and the present value of Jordan's future diminished earning capacity as \$964,270.

DEFENDANT'S EXPERT WITNESSES:

Glenn Salkind, M.D. - Obstetrics & Gynecology
Miami, FL

Dr. Salkind was the only standard of care expert to testify for Dr. Kaufman. Dr. Salkind testified that it had been reasonable to use the vacuum to assist in Jordan's delivery given Dr. Kaufman's assessment of Ms. MacDonald's clinical picture. Dr. Salkind also testified that Dr. Kaufman took reasonable steps to

obtain Ms. MacDonald's informed consent for the use of the vacuum device.

David J. Seigler, M.D. - Pediatric Neurology
Tulsa, OK

Dr. Seigler testified that Jordan's cerebral palsy was not caused by the March 6, 1998 vacuum delivery. Jordan's clinical course in the NICU was not consistent with a hypoxic ischemic injury occurring at the time of delivery since Jordan essentially improved during that admission. Moreover, none of the radiologic studies, including the March 10, 1998 head ultrasound, nor the August 1999 MRI showed patterns typical for a hypoxic ischemic injury.

Richard Polin, M.D. - Neonatology
New York City, NY

Dr. Polin testified that Jordan's cerebral palsy was not caused by the use of the vacuum on March 6, 1998. As with Dr. Seigler, he relied on Jordan's clinical course in the NICU. Dr. Polin did not have an opinion within a reasonable degree of medical probability as to the actual cause of Jordan's cerebral palsy, but he said that the event probably occurred in utero, well before Jordan's birth. The leading possibility was subclinical infection.

Marvin Nelson, M.D. - Pediatric Neuroradiology
Los Angeles, CA

Dr. Nelson was the only pediatric neuroradiologist to testify at trial. He testified that the March 10, 1998 head ultrasound was normal, and that the purported abnormalities identified by Dr. Pressman were actually artifact. Further, Dr. Nelson demonstrated how the changes shown on the August 1999 MRI were not consistent with a hypoxic ischemic injury, but were consistent with an injury due to an in utero infection.

CHECK APPROPRIATE SPACE: X Verdict

DATE OF VERDICT:

October 13, 2011

VERDICT:

Verdict for the defense.

COMPARATIVE NEGLIGENCE:

Not applicable.

JUDGMENT:

Not yes entered.

DATE OF JUDGMENT:

Not entered yet.

DEFENDANT'S OFFER:

\$250,000 (policy limits applicable to Dr. Kaufman and Women's Healthcare Associates)

PLAINTIFF'S DEMAND:

\$30 million

ATTORNEY'S COMMENTS:

Plaintiffs' motion for new trial and renewed motions for mistrial were heard December 14, 2011 and are under advisement.

Submitted Jennings L. Hurt III Date: January 30, 2012
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