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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, 17 years old (DOB: 3/6/98).

Mother: Melissa MacDonald, 44 years old at time of trial (28 years old at time of incident); Program Coordinator for telecommunications service bureau

Father: Robert MacDonald, 46 years old at time of trial (30 years old at time of incident); carpenter

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 12:59 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. Plaintiffs claimed that this hypoxic injury ultimately manifested as cerebral palsy, which Jordan first began to exhibit 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 "maternally 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 (OA) presentation. The

defense further argued that Dr. Kaufman, although he had no independent recollection, had followed his routine practice in obtaining proper informed consent from Ms. MacDonald before the vacuum was utilized.

Additionally, the defense argued that Jordan's cerebral palsy was not caused by the use of the vacuum. Jordan's clinical course in the NICU after delivery was not consistent with a significant hypoxic injury suffered during labor and delivery. Further, imaging of Jordan's brain, including an MRI performed in August 1999 at roughly 18 months of age did not show changes consistent with a hypoxic ischemic injury.

The defense argued that based on Jordan's clinical course and imaging of his brain, the brain injury that caused his cerebral palsy was most likely due to a subclinical viral infection that occurred in utero during the third trimester well before labor and delivery. This will be discussed in more detail in the "Cause of Injury" section below.

Jordan was Ms. MacDonald's second pregnancy but her first delivery. 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 (WBMC) 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 7 a.m., Ms. MacDonald was evaluated by Dr. Jane Rudolph, one of Dr. Kaufman's partners. Dr. Rudolph wrote a progress note which included the results of a sterile vaginal examination consistent with a 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 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 effaced and dilated but the baby was still at 0 station. Ms. MacDonald was instructed to begin pushing at that time. Dr. Kaufman was notified by phone and began making his way to WBMC.

There was a dispute at trial as to when Ms. MacDonald went into the second stage of labor. Dr. Kaufman said that based on the fact that Ms. MacDonald was 9+ cm. dilated and completely effaced at 9:30 a.m., she probably went into the second stage of labor in the 10:00 to 10:30 a.m. time period. Plaintiffs contended through Dr. Barry Schifrin, their maternal fetal medicine expert, that Ms. MacDonald did not enter the second stage of labor until shortly before 11:45 a.m. because that was the first time Ms. MacDonald was determined to be completely dilated and effaced.

Based on his anesthesia record, Dr. Ritter testified that he "topped off" the epidural at approximately 12:10 p.m. The 12:10 p.m. top off was not documented by Nurse Gibbons, the nurse

tending to Ms. MacDonald at the time, in either her progress notes or on the fetal monitoring strips.

Dr. Ritter testified that since Ms. MacDonald was pushing at 12:10 p.m., 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 that Dr. Kaufman was at bedside at 12:25 p.m. However, Mr. and Ms. MacDonald testified 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 once he arrived. Their combined testimony was 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. They all testified that the telephone calls had all pertained to Dr. Kaufman having car trouble.

Dr. Kaufman's first phone call about which these witnesses testified 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 (the "brick" cell phone) at the time, and that the subject was his car but the cell phone bill indicated this call was to Dr. Kaufman's home number.

The second phone call occurred on a land line at the nurses' station outside Ms. MacDonald's L&D room. According to Mr. Breslowsky, Dr. Kaufman talked about his car during this call.

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 testified that the land line on the night table (the princess phone) 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 deliver the

baby, and discussed his car troubles. The nurse then returned the phone to bedside at the end of the conversation.

According to Ms. MacDonald, the fourth phone call took place after delivery when Dr. Kaufman was leaving the L&D room. She testified that Dr. Kaufman was again discussing his car troubles on his cell phone.

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. They said their first knowledge of the vacuum was as it was being used by Dr. Kaufman to deliver the baby.

Plaintiffs also adamantly denied that Ms. MacDonald was exhausted at any time while she was pushing. They argued that Dr. Ritter's 12:10 p.m. anesthesia note showed that Ms. MacDonald could not have been in pain when Dr. Kaufman assessed her at 12:25 p.m. 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 unable to push effectively. 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.

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 intracranial hemorrhage as a potential 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 explained that the baby was in the ideal position for the use of the vacuum since the baby's head was at +2 station and "direct OA" which essentially meant that the baby was face down, his head was midline in the birth canal within the vaginal outlet.

Dr. Kaufman explained the vacuum device and how it was used. 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 cup on the baby's head. The doctor would then direct the nurse as to the amount of pressure, while he used the vacuum's cup 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. Based on the fetal monitoring strips, the vacuum cap would have been affixed to the baby's head for no more than about six minutes.

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 signs of hypoxic injury at birth. 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 44 hours of life 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 appeared to do 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, 41 days after delivery.

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 claimed that the use of the vacuum caused two injuries. The first was some kind of intracranial hemorrhage. That was never specified or identified on any imaging studies.

The second was a derangement of the internal circulation of the brain due to negative pressure exerted by the vacuum. This derangement then led to a hypoxic brain injury and a "cascade of chemical changes" which further damaged the brain. The ultimate result was Jordan's cerebral palsy.

The defense contended that Jordan's cerebral palsy was caused by a brain injury that probably had occurred in utero during the third trimester well before labor and delivery. This brain injury was most likely caused by a subclinical viral infection.

The defense presented evidence that each year, approximately 12,000 babies are diagnosed in the United States with cerebral palsy. Only 10% of these cerebral palsy cases are due to events during labor and delivery. The other 90% are due to events which occur in utero and which are not caused by or related to labor and delivery.

Of the "in utero" cerebral palsy cases, the cause of the brain injury cannot be determined in approximately 50% of the cases. In 50% of those "in utero cases", the brain injury is likely caused by a subclinical viral infection which is always undetected.

In most in utero cerebral palsy cases, the babies appear to be normal at birth and for the first six to eight months of life. The cerebral palsy does not become apparent until late in the

first year of life when demands placed on the maturing brain reveal the prior in utero brain injury.

Jordan's clinical history and his brain imaging were consistent with an in utero cerebral palsy. An MRI performed in August 1999, at approximately 18 months of age, only showed white matter damage, which is typical of an in utero infection. The MRI did not show changes consistent with a hypoxic ischemic injury, such as injury to the gray matter and in the "watershed" areas of the brain.

Clinically, Jordan did well in the NICU, which was not consistent with a significant hypoxic ischemic brain injury at the time of delivery. He then appeared to be developing normally until he began missing milestones at about eight months of age. Subsequent workup resulted in the cerebral palsy diagnosis.

NATURE OF INJURY:

Jordan currently suffers from cerebral palsy with autistic features.

PLAINTIFF'S EXPERT WITNESSES:

Barry Schifrin, M.D.
Obstetrics & Gynecology
Los Angeles, CA

Dr. Schifrin was Plaintiffs' only standard of care expert against Dr. Kaufman. Dr. Schifrin testified that a vacuum assisted delivery was not clinically indicated since there was no documentation that Ms. MacDonald was maternally exhausted and/or unable to effectively push. Dr. Schifrin said that Dr. Kaufman should have allowed Ms. MacDonald to continue laboring, and that if he had done so, Ms. MacDonald would have delivered the baby without assistance within an hour.

Dr. Schifrin also testified that the fetal monitoring strips for the last half hour before delivery showed the mother's heartbeat and not the baby's heartbeat. Dr. Schifrin testified that Dr. Kaufman was negligent for not realizing this and for not taking steps to evaluate the baby's well-being. However, Dr. Kaufman, Ms. Gibbons, the labor and delivery nurse, and every other expert who reviewed the strips testified that the strips showed the baby's heartbeat during the last half hour before delivery.

Dr. Schifrin testified that if the vacuum had not been used, Jordan would not have suffered cerebral palsy.

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 negative pressure from the vacuum had deranged the normal blood flow within the brain. Dr. Modanlou also said there had been bleeding 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 had caused a derangement of blood flow within the brain, as well as hemorrhages within the brain, all of which resulted in hypoxic ischemic brain injury.

Dr. Cullen 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 a 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.

Bernard Gerstman, Ph.D.
Physics
Miami, FL

Dr. Gerstman was a causation expert. He is a Professor of Physics at Florida International University. Dr. Gerstman testified that when the "mushroom" cap of the vacuum is applied, and the vacuum is pumped into the "green zone" on the device's gauge, between 23 and 35 pounds per square inch are exerted on the baby's head. Dr. Gerstman did not offer any other opinions. The defense countered that the same pressure is exerted on the other 300,000 babies born via vacuum in the U.S. each and every year.

Larry Forman
Life Care Planning
Miami, FL

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

Frederick Raffa, Ph.D.
Forensic Economics
Orlando, FL

Dr. Raffa testified that Plaintiffs' total economic damages were between \$11,554,259 and \$15 million, assuming a life expectancy in the mid-60s.

DEFENDANT'S EXPERT WITNESSES:

William Roberts, M.D.
Chattanooga, TN
Obstetrics & Gynecology

Dr. Roberts was the only standard of care expert to testify for Dr. Kaufman. Dr. Roberts testified that Dr. Kaufman had met the standard of care with regard to the decision and recommendation to use the vacuum, as well as in obtaining Ms. MacDonald's informed consent. Dr. Roberts said that the vacuum was a reasonable recommendation given that this was a low outlet delivery since the baby's head was on the "pelvic floor."

While Dr. Roberts personally would have allowed Ms. MacDonald to continue pushing for about another hour, he also said that it was just as reasonable to use the vacuum because the baby was so close to delivery.

Dr. Roberts said it was also reasonable for Dr. Kaufman to have only discussed the most likely injuries that could be caused by

the vacuum such as caput and cephalohematoma, as opposed to discussing much less likely injuries, such as intracranial hemorrhage.

Michael Duchowny, M.D.
Pediatric Neurology
Miami Children's Hospital
Miami, FL

Dr. Duchowny testified that Jordan's cerebral palsy was not caused by the March 6, 1998 vacuum delivery. Instead, Jordan's cerebral palsy was most likely caused by a subclinical viral infection that occurred during the third trimester of Ms. MacDonald's pregnancy well before labor and delivery.

Dr. Duchowny testified that Jordan's clinical course in the NICU and the imaging of his brain was not consistent with a hypoxic ischemic injury occurring at the time of delivery. Dr. Duchowny said the August 1999 MRI only showed injury to the white matter which was consistent with an in utero infection.

There were no changes consistent with a hypoxic ischemic injury at the time of delivery, such as injury to the gray matter (which is most sensitive to decreased oxygen) or along the border zones of the cerebral vasculature.

Richard Polin, M.D.
Neonatology
Columbia University
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. Dr. Polin relied on Jordan's clinical course in the NICU. Dr. Polin said the actual cause of Jordan's cerebral palsy was an event that had probably occurred in utero, well before Jordan's birth. The leading probability was subclinical infection.

Marvin Nelson, M.D.
Pediatric Neuroradiology
USC
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:

March 31, 2015

VERDICT:

Defense verdict

COMPARATIVE NEGLIGENCE:

Not applicable.

JUDGMENT:

Not yet 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:

In closing argument, Plaintiffs' counsel asked the jury to award economic damages in the amount of \$280,000 for past medical bills; \$1.7 million to \$1.8 million in future lost earning capacity; and \$11.5 million for future medical costs. Plaintiffs' counsel did not suggest a specific amount for Plaintiffs' non-economic damages.

ATTORNEY'S COMMENTS:

This was the third trial of the case and the second time the case had been tried to verdict. The first trial in August 2011 ended in a mistrial after two weeks. The second trial, between September 12, 2011 and October 13, 2011, resulted in a defense

