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Phila. Lawyers Win \$16 Mil. Verdict in N.Y. Med Mal Case

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A New York judge has rendered a \$16 million verdict in an obstetrics medical malpractice case in which lawyers from Feldman Shepherd Wohlgelernter Tanner & Weinstock represented the claimants.

Judge Diane L. Fitzpatrick of the New York Court of Claims found that the doctor taking care of Mary DuPont, the mother of Kayla DuPont, during her high-risk pregnancy breached the standard of care by not delivering Kayla DuPont earlier despite several risk factors and by not considering those risk factors.

Kayla DuPont was delivered Jan. 14, 1993, by Caesarean section after the placenta separated from the wall of Mary DuPont's uterus and disrupted the oxygen flow to Kayla DuPont during labor, according to the judge's opinion in *DuPont v. State of New York*.

Fitzpatrick found Dr. Richard Aubry, professor and director of obstetrics at the State University of New York Health Science Center's Perinatal Center, 100 percent liable for DuPont's injuries because he did not consider that placental abruption was a risk factor in Mary DuPont's pregnancy and did not deliver the baby as soon as the baby's heart strength could be assured for a safe delivery.

Kayla DuPont, now 15, will never be able to speak or walk and will always need a gastrointestinal tube to receive both food and medicine, Fitzpatrick said. DuPont has cerebral palsy, mental retardation and a seizure disorder. She was born in full arrest without any detectable heartbeat or breathing and had to be revived in the delivery room, the judge said.

The judge said \$16,033,811 should be awarded, including \$10,551,389 for a life care plan to take care of Kayla DuPont during her life expectancy, \$1.2 million for past pain and suffering, \$1.58 million for loss of future earnings and \$1.5 million for future pain and suffering.

Daniel S. Weinstock and Edward S. Goldis of Feldman Shepherd tried the case for the

claimants. The local counsel was Edward S. Leone of Bottar & Leone in Syracuse, N.Y.

"This child has very severe cerebral palsy," Weinstock said. "I do a lot of brain injured baby cases. That's the majority of my practice. This is one of the most severely injured children I've seen."

The judge's award will take care of Kayla DuPont for the rest of her life, he said.

Patrick F. MacRae, a then-assistant attorney general, tried the case on behalf of the attorney general of the state of New York.

The risk factors in Mary DuPont's pregnancy included: a congenital abnormality in DuPont's uterus that divided her uterus into two cavities by a 10-millimeter-thick septum that descended into the uterus 2.5 centimeters; a risk of intrauterine fetal growth restriction (IUGR), or growth during the pregnancy resulting in the baby weighing less than the 10th percentile weight of other babies of the same age; and a prior history of miscarriages, Fitzpatrick said.

During Aubry's deposition, which was summarized in the judge's decision, the doctor said that he did not find that the bicornuate uterus placed her at a higher risk of placental abruption and that he did not factor the divided uterus into his treatment of the pregnancy; however during cross-examination in the trial, Aubry said that placental abruption is a known complication that increases two- to four-fold for women with bicornuate uteruses, Fitzpatrick said.

Aubry's care of Mary DuPont had no "established issue" until 38 weeks of gestation, but the standard of care was breached when Aubry did not consider that DuPont's bicornuate uterus placed her at risk of placental abruption, Fitzpatrick said. A term pregnancy varies between 38 to 41 weeks of gestation.

Aubry also testified that the risks of delivering a 38-week-old fetus include a lack of fetal lung maturity and problems with conducting the lung test at that stage of pregnancy, according to the judge's opinion. But the judge said that under standard of care the evidence of IUGR at 38 weeks of gestation and the risk of placental abruption far outweighed the lung issue and warranted delivery at that stage of pregnancy.

"Dr. Aubry, who clearly holds himself an exceptional practitioner, stated twice, unequivocally that with documented fetal lung maturity and a diagnosis of IUGR, the standard of care requires delivery of 38 weeks," the judge said. "He then held up the risks of testing for lung maturity as a shield to any negligent decision of when to deliver Mrs. DuPont's baby. Yet, looking behind the shield, it was undisputed that the risks of amniocentesis to test for lung maturity were less than one percent, and the test was described, by all who testified, as a very 'low risk procedure' at that point in the pregnancy. In fact, the risks for the amniocentesis were less than a risk for a placental abruption in a woman with a bicornuate uterus with a pregnancy not attached to the septum."

Claimants' expert witness Dr. Curtis L. Cetrulo, a professor at Tufts University School of Medicine specializing in high-risk patients, said that after 38 weeks the risks of placental abruption and IUGR outweighed risks of inducing delivery, Fitzpatrick said. Cetrulo also concluded Aubry's care of Mary DuPont during her high-risk pregnancy fell below the

standard of care between Dec. 28, 1992, to the date of delivery because only one nonstress test and no ultrasound test was performed during that time period and because delivery was not induced at 38 weeks of gestation.

The defense's expert witness, Dr. Eva K. Pressman, a practicing doctor at the University of Rochester and board-certified in obstetrics, gynecology and maternal fetal medicine, opined that it was within the standard of care to wait for labor to begin spontaneously since test results were good and Mary DuPont's cervix was not yet in a condition favorable to delivery, Fitzpatrick said. Pressman also said that the fetus' IUGR was not the result of the bicornuate uterus but because of genetic disposition to be small.

Fitzpatrick's decision was rendered Jan. 22, but the case was not filed with the clerk's office until March 20. The trial was held in December 2006, Weinstock said.

A concomitant lawsuit is pending against the doctor, personally, but that case — which had \$1 million in the doctor's insurance coverage at stake if liability could be proven at trial — was deferred in favor of trying this case of vicarious liability and with no limits on recovery, Weinstock said.

"We believe collateral estoppel will apply so this result will essentially be binding," Weinstock said.

Weinstock said he believes the Attorney General's Office will appeal the judge's decision, but he predicted her decision will be held up on appeal because of her thorough, 60-page opinion.

A call requesting comment from the New York Attorney General's Office was not returned Tuesday.

(Copies of the 60-page opinion in Kayla DuPont, an Infant Under the Age of Ten Years by and through Mary and Michael T. DuPont, her parents and Natural Guardians v. State of New York, PICS No. 08-0476, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.) •