

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, FRIDAY, APRIL 22, 2011

VOL 243 • NO. 78 \$5.00 An ALM Publication

## Record \$21.6 Mil. Verdict in Erie Birth Defect Case

BY ZACK NEEDLES

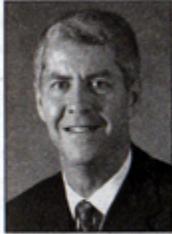
Of the Legal Staff

An Erie County jury has delivered what is believed to be a record \$21.6 million verdict in the case of a boy who suffers from cerebral palsy as a result of a lack of oxygen during birth.

According to *The Erie Times-News*, the verdict is the largest in the county's history.

On April 20, following a trial that was just over a week long and deliberations that lasted about three hours and 40 minutes, a unanimous 12-member jury delivered the \$21,573,993.10 verdict against defendant Hamot Medical Center of the City of Erie in President Judge Ernest J. DiSantis Jr.'s courtroom.

According to the verdict slip in *Graham v. Townsend*, \$19,588,217 was awarded for future medical expenses and is to be paid in annuities through 2081, while \$1,424,314.10



SPECTER

was for past medical expenses and \$561,462 was for lost earning capacity. "I was gratified that the jury found against the hospital and gratified that the jury awarded a substantial amount of money for future medical expenses. ... I was not gratified by the fact that the jury awarded nothing for pain and suffering and nothing for loss of pleasures of life, which clearly is a nullification of the court's charge," said the plaintiffs' attorney, Shanin Specter of Kline & Specter in Philadelphia, who added that the parties had reached a high-low agreement with a high of \$33 million — Hamot Medical's \$31 million policy limits plus the defendant obstetrician's \$2 million limits — and a low of \$5.75 million.

A scan of *The Legal's* annual magazine, *PaLAW*, over the last decade shows that only two other Erie County verdicts cracked the top 50 statewide: A \$4.18 million verdict in a 2003 medical malpractice case and a \$2.5 million verdict in a 2008 trip and fall case.

According to *PaLAW*, the last eight-digit jury award in a Pennsylvania birth defect case was a \$20.5 million verdict in Lackawanna County in 2009.

Lackawanna County Common Pleas Court Judge Terrence R. Nealon later molded that verdict to include delay damages, increasing it to \$27.35 million.

In *Graham*, according to the plaintiffs' papers, minor-plaintiff Ja'Kareon Graham, a twin, suffered a brain injury due to lack of oxygen during his birth.

On Nov. 13, 2006, according to the plaintiffs' papers, Ja'Kareon's mother, plaintiff Tina Graham, was scheduled for an induction

Verdict continues on 10

(continued from page 1) of labor.

After defendant Christine Hornstein, a nurse midwife, administered Cervidil to induce labor, she, along with Hamot Medical Center's nursing staff and defendant obstetrician Dr. Mark E. Townsend, failed to monitor the twins' fetal heart rates, according to plaintiffs' papers.

From about 7:40 a.m. to 9:45 a.m., while Tina Graham was under the care of Hamot Medical Center's nurses, only one twin's fetal heart rate showed on the fetal heart monitor, plaintiffs papers said.

The same occurred from approximately 10:10 a.m. to 10:36 a.m., according to the plaintiffs papers, and again from approximately 11 a.m. to 3:29 p.m.

At about 3:31 p.m., one of Hamot Medical Center's nurses adjusted the heart monitors and briefly traced both twins' heartbeats, as well as Tina Graham's contraction pattern, which was every one to two minutes, according to the plaintiffs' papers.

Once again, from about 4 p.m. to 4:46 p.m., the fetal heart rate of only one of the twins was traced on the fetal heart monitor, according to plaintiffs' papers.

The plaintiffs papers said Tina Graham's contraction pattern was "indicative of uterine hyperstimulation and/or excessive uterine activity" and the one twin that was monitored showed a decelerating heart rate.

Between 4:46 p.m. and 5:03 p.m., no nurses monitored Tina Graham and from 5:03 p.m. to 6 p.m., only one twin's heart rate was indicated on the monitor, the plaintiffs' papers said.

At about 6:01 p.m., according to the plaintiffs' papers, Townsend arrived "completely and utterly unprepared" for the delivery and a nurse delivered Ja'Kareon Graham's sister because Townsend could not get into position in time.

Townsend failed to perform an ultrasound to determine Ja'Kareon Graham's status and position and no second obstetrician was present to help guide the fetus into the correct position for delivery, the plaintiffs' papers said.

At about 6:08 p.m., while his sister was being delivered, Ja'Kareon Graham's heart rate dropped to about 90 beats per minute and Townsend tried unsuccessfully to move the fetus into position, according to the plaintiffs' papers.

After about 20 minutes, Tina Graham was brought to the operating room for an emergency caesarian section and Ja'Kareon Graham was delivered between 6:39 p.m. and 6:41 p.m. with signs of metabolic acidosis — an excess of acid in the bodily fluids — caused by lack of oxygen, according to the plaintiffs' papers.

He suffered a seizure about two hours later while in Hamot Medical Center's neonatal intensive care unit, the plaintiffs' papers said.

According to Hamot Medical Center's records, Ja'Kareon Graham sustained "severe perinatal injury with profound metabolic acidosis, early seizure activity and apparent bulbar [involvement] with loss of gag reflex," the plaintiffs' papers said.

The plaintiffs alleged in their documents that Townsend and Hornstein "abandoned the care and management of [Tina Graham's] high-risk labor" and that the nursing staff "utterly failed to ensure that both of Tina Graham's twins were adequately and continuously monitored" during labor.

Hamot Medical Center said in its own pretrial statement that monitoring Tina Graham was difficult because she is overweight, but added that it is "clear that the nurses engaged in an ongoing, consistent and appropriate effort" to do so "as best they could."

Townsend's and Hornstein's pretrial statement said that the standard of care calls for an incision to be made within 30 minutes of a C-section being deemed necessary and that Townsend met this standard.

But Specter said that during the trial, Townsend testified that had he known about the decelerations of Ja'Kareon Graham's heartbeat and that the mother had been progressing rapidly in her labor before he arrived, he would have ordered an urgent C-section earlier.

"That would have knocked off about 20 minutes from the end of the labor," Specter said, adding that it was "undisputed that those 20 minutes were the causative factor" in Ja'Kareon Graham's brain injury.

The hospital maintained during the trial that its nurses had provided Townsend with all of the necessary information.

In the end, however, the jury found the hospital 100 percent negligent.

Specter said he believed Townsend's testimony went a long way toward swaying the jury toward its verdict.

"I thought that the obstetrician came across as a decent and caring physician who was put into a very bad position by his nurse," he said. "He didn't really want to say that because he now works for the medical center and he was implicating his employer and his fellow health care providers at the institution by saying that, but he felt that was the truth and he needed to be honest and the jury felt he was honest. Oftentimes, health care providers circle the wagons and sometimes juries see through that and end up finding against some of those who might be exonerated if they were candid and here was a case where the obstetrician was candid. I think his candor saved him from being found liable."

Specter, who tried the case with fellow Kline & Specter attorneys Robert Englert, Lisa Dagostino and Mark Polin, said he "raised a few eyebrows" by leaving two nurses on the jury.

"I don't think that a nurse will stick up for bad care and these nurses wouldn't, but there are some people who don't agree with me," he said.

Counsel for Hornstein, Townsend and his practice, Lake Erie Women's Center, Steven J. Forry of Marshall Dennehey Warner Coleman & Goggin in Pittsburgh, could not be reached for comment at press time.

Hamot Medical's attorney, David R. Johnson of Thomson Rhodes & Cowie in Pittsburgh, said he felt his client had a "very valid causation defense" because even the plaintiffs' obstetrics expert, Dr. John Elliott, testified that Ja'Kareon's injury occurred during the 30 minutes after Townsend arrived.