

Newborn Suffers Hypoxic Ischemic Brain Injury During Delivery

Doe*, Infant and Noe*, Mother Individually v. Toe*, M.D.

Type of Case: Hypoxic, Ischemic Encephalopathy, Newborn During Delivery

Court: Confidential

Attorneys: William E. Artz and
Thomas M. Wochok

Settlement: \$1,526,500.00

Summary: 35 year old woman sought out service of an infertility practice to assist in achieving a pregnancy. After several attempts, Mrs. Noe and her husband conceived and she was advised of a twin pregnancy. Following conception, she was referred to the defendant OB/GYN. At 30 weeks, Dr. Toe hospitalized Mrs. Noe since she was high risk by age with a twin pregnancy and a short cervix. At 36 weeks the adult plaintiff went into labor. The defendant was advised by a resident assigned to assist in the labor and delivery that the adult female was fully dilated, 100% effaced, and at a +2 station and waiting to push. The defendant advised that he was tied up in another procedure (an elective D & C) and instructed the patient to wait until he arrived. No instructions were given to move the patient into an operating room so the adult plaintiff remained in the delivery room.

Forty minutes later, the defendant arrived and the patient was then allowed to push. A first-year resident was instructed to deliver the first twin and did so without incident. The second twin changed from a head down position to a double footling breech presentation. This occurs in 20-40% of all twin pregnancies and is a reason to deliver twins in an operating room where a C-section remains a viable option.

Within a few minutes of delivery of the first twin, the fetal heart pattern of the infant plaintiff reflected "severe bradycardia." A fourth-year resident was managing the delivery under the supervision of the defendant OB/GYN. The oxygen status of the second twin mandated a prompt delivery either by C-section or breech extraction within 5-6 minutes following the

delivery of the first twin. The delivery took 28 minutes with a forceps application to the head of the infant.

The baby was born with Apgars of 2, 2, 3, and a cord pH gas of 6.77. The child was intubated and transferred to Children's Hospital for brain cooling. Excellent care at Children's saved the baby's life and reduced the degree of brain damage to a mild to moderate degree.

The defense moved the case to the Virginia Neurological Birth Related injury fund where we battled the issue of whether the infant had a qualifying injury (i.e., in need of services in all aspects of daily living.) The matter was submitted to a panel of the University of Virginia Physicians who found the child did not have a qualifying injury and recommended against acceptance into the fund. We utilized "a day in the life" video to show the infant could use a spoon to feed himself, play with certain toys, etc.

Resolution: The defendant withdrew his petition and the case was returned to the circuit court for trial. The defense then tried to have a Guardian ad Litem appointed in place of plaintiff's counsel arguing there was a conflict of interest representing the infant plaintiff and the adult plaintiff even with a double-cap availability. The motion was denied. The plaintiff had a large life care plan and strong causation testimony that a prompt delivery would have avoided brain damage. The defense had an eroding malpractice insurance policy with costs of defense diminishing coverage and a single claim provision for an injury to mother and baby. The case was settled the Friday before a Monday trial.



William E. Artz



Thomas M. Wochok