Medical Malpractice

Court Upholds $27 Mil. Verdict in Lackawanna Birth Defect Case

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The Superior Court has upheld a $27.3 million award out of Lackawanna County that was given to a couple and their son over birth complications that led to brain injury and a diagnosis of cerebral palsy.

The jury in *White v. Behlke* initially awarded $20.5 million to Daniel and Laura White and their son Cody. Lackawanna County Common Pleas Court Judge Terrence R. Nealon later molded that verdict to include delay damages, increasing it to $27.35 million.

In an unpublished decision by a three judge panel of the Superior Court last week, the court dismissed the four issues raised on appeal by the defendants, doctor Richard Behlke of OB-GYN Consultants Ltd. and Community Medical Center. Behlke was found 60 percent liable for Cody's injuries and the medical center was found 40 percent liable.

Community Medical Center has since settled its portion of the award with the Whites and only Behlke and his practice pursued the appeal. In the interim, Behlke has assigned his rights to the Whites who just recently initiated a bad faith claim against his insurer, the Whites' attorney, Jeffrey Kornblau of Kornblau & Kornblau in Jenkintown, Pa. said.

The main issue in the case, as described by both sides in a joint pretrial memorandum, was whether a C-section should have been performed earlier to prevent Cody's injuries.

Behlke argued on appeal he should have received a judgment notwithstanding the verdict because the plaintiffs failed to prove causation under either a proximate cause analysis or under a theory of increased risk of harm. He argued the plaintiffs didn't present evidence to show that when a patient suffers a massive fetal/maternal hemorrhage, certain injuries could be avoided.

The panel, comprised of Judges Correale F. Stevens and John L. Musmanno and Senior Judge Stephen A. McEwen Jr., simply adopted the trial court's reasoning for dismissing that same issue when it was raised in post-trial motions.

Behlke also argued the trial court improperly allowed the plaintiffs to use a peremptory strike after closing arguments to remove a sitting juror and replace that juror with an alternate.

Though the Superior Court panel said in a footnote that it discourages the trial court's procedure regarding the juror substitution, it nevertheless concluded the court did not abuse its discretion in denying the defendants' motion for a new trial on that issue.

The panel also disagreed with the defense's argument that Nealon inappropriately charged the jury by instructing it that Behlke could be liable if his conduct increased the risk of harm. Behlke relied on the same argument used earlier that the plaintiffs never presented evidence to this point.

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Finally, the defendants argued one of the plaintiffs' expert witnesses was not qualified under MCARE to testify because she had never practiced or taught neonatology within the eight years before trial. Again, the Superior Court simply referenced Nealon's opinion in dismissing the defense's appeal on the expert witness issue.

The Case

Dan and Laura White were awarded $2 million for health care expenses and related costs associated with caring for Cody until he is 18. The jury did not award the parents anything for the pecuniary value Cody would have provided up until his 18th birthday.

The jury awarded Cody $10 million for health care expenses that would occur after he turns 18 and another $3.5 million for lost earning capacity after he turns 18. An additional $2.5 million each was awarded for past pain and suffering and future pain and suffering.

A claim by the parents for negligent infliction of emotional distress was dismissed at the summary judgment stage, according to court documents.

According to those documents, a pregnant Laura White went to the emergency room June 30, 2001, after calling her doctors at OB-GYN Consultants with concerns about her unborn son because of decreased fetal movement. She was due that July. White arrived at about 2:35 p.m. and monitoring showed some abnormalities, according to court documents. Behlke, who wasn't White's primary OB-GYN but was covering at the hospital that day, was called and, about two hours later, he ordered tests, Kornblau said at the time of the verdict. One of the tests was a biophysical profile that would have further demonstrated whether there was a lack of oxygen. When the results came in and showed further abnormalities, Kornblau had said, the doctor chose to induce White instead of performing an emergency Caesarean section.

It was after four hours, and the administration of the drug Pitocin — which the plaintiffs argued should have been known by the nursing staff to pose a threat to the already stressed fetus — that White was brought in for an emergency C-section. Kornblau said the Pitocin resulted in a dramatic drop in the baby's heart rate, forcing the need for a C-section.

The plaintiffs argued Cody suffered blood loss across the placenta and oxygen deprivation during the four-hour period. They argued, according to court documents, that performing a C-section sooner and not administering the Pitocin would have lessened the negative effects suffered by Cody at birth.

Cody was left with permanent brain damage and was later diagnosed with cerebral palsy. According to Kornblau, Cody will never be able to perform any activity of independent living. Kornblau said Cody is unable to walk or talk, is blind and can't use his arms or control certain bodily functions.

Howard J. Bashman, who writes a column for *The Legal* , worked with the Kornblau's on the appeal. James C. Sargent Jr. of Lamb McErlane represented Behlke on appeal. He said in an e-mail that he and his client are disappointed with the Superior Court's decision and feel the verdict below was "erroneous as a matter of law."

"Given the importance of the legal questions involved, which we believe to be issues of statewide importance, further appeals are being considered and are a strong possibility," Sargent said last week.

(Copies of the 11-page opinion in White v. Behlke *, PICS No. 10-3315, are available from* Pennsylvania Law Weekly *. 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. Tuesday.)* •