

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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EILEEN FLAHERTY, Individually and as the Mother and
Natural Guardian of ROBERT M. FLAHERTY, III, an infant,
and ROBERT FLAHERTY, individually,

Plaintiff,

Index No.
00-05600

against-

EDEN G. FROMBERG, D.O., THEODORE L.
GOLDBERG, M.D., ROBERT H. KRAMER, D.O.,
NORTH HARBOR OB/GYN ASSOCIATES, INC,
ST. CHARLES HOSPITAL AND REHABILITATION
CENTER and GUSTAVO SAN ROMAN, MD.

Defendants.

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Judge:

Ralph F. Costello, J.S.C
Suffolk County Supreme Court

Plaintiff's Attorney:

Kevin M. Fox
Russo, Fox & Karl
400 Town Line Rd.
Hauppauge, NY 11788
tel. (631) 265-7200
fax (631) 265-7578

Defendant Attorneys:

Attorney for - Eden Fromberg, DO:

Raymond Furey
Furey, Kirley, Walsh, Matera & Cinquemani, P.C.
2174 Jackson Ave.
Seaford New York 11783

Attorney for - Theodore L. Goldberg, MD and Robert H. Kramer, DO and

North Harbor Ob/Gyn Associates, Inc:

Howard Snyder
Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP
110 Marcus Blvd.
Hauppauge NY 11788-3704

Attorney for - St. Charles Hospital and Rehabilitation Center

Warren Sanger
Bower, Sanger & Lawrence
261 Madison Avenue
New York NY 10016

Attorney for - Gustavo San Roman, MD

Anthony Vadaro
Vadaro & Helwig
732 Smithtown Bypass
Suite 203
Smithtown NY 11787

Verdict: 6/29/05

Length of Trial: Six weeks

Total Award: \$ 212,580,000.00

Skilled nursing, therapy & personal care:	\$ 145,000,000 over 57 years
Prescription Drugs:	\$ 9,720,000 over 57 years
Medical supplies:	\$ 920,000 over 57 years
Medical care:	\$ 21,290,000 over 57 years
Durable Medical Equipment	\$ 1,140,000 over 57 years
Assistive devices	\$ 1,260,000 over 57 years
Loss of income and benefits	\$ 13,000,000
Past Pain and Suffering	\$ 250,000
<u>Future Pain and Suffering</u>	<u>\$ 20,000,000 over 57 years</u>

Total **\$ 212,580,000.00**

Liability Percentages:

Dr. Fromberg	75 %
St. Charles Hospital	20 %
Dr. San Roman	5 %
Dr. Goldberg	-0-
Dr. Kramer	-0-

Jury:

Jury was composed of 5 men and 1 women
Jury was unanimous
Jury deliberated over 1 days

Facts:

Eileen Flaherty's first child was born in 1996. The baby was delivered by cesarean section due to failure to descend caused by cephalo pelvic disproportion. Dr. Kramer and Dr. Goldberg managed the first labor and delivery and Mrs. Flaherty delivered a healthy baby girl.

In 1998, Mrs. Flaherty was pregnant with her second child. Her prenatal care was provided by Dr. Kramer and Dr. Goldberg as well as a new member of their practice, Dr. Eden Fromberg. The name of their group was North Harbor Obstetrics and Gynecology.

Because her first child was delivered by cesarean section, her doctors suggested that she would be a good candidate to attempt a VBAC (vaginal birth after cesarean section). Her doctors claimed that they advised Mrs. Flaherty that, attempts at VBAC are associated with a higher risk of uterine rupture. Mrs. Flaherty's prenatal course was uncomplicated.

On 6/5/98 at about 2:00 am, Mrs. Flaherty was admitted to St. Charles Hospital in labor. Fetal Heart Rate Monitoring showed a reactive and healthy fetus.

At 4:00 am Dr. Goldberg examined Mrs. Flaherty and found that she was 5 cm dilated and the baby's head was not engaged. The fetal heart rate was reassuring. At 4:45 am, Dr. Goldberg performed an artificial rupture of membranes (AROM). At 7:00 am, he noted that Mrs. Flaherty was still 5 cm dilated and the baby's head was not descending properly.

At 8:00 am, Dr. Goldberg went off shift and transferred Mrs. Flaherty's care to Dr. Fromberg. Fromberg and Dr. Kramer were at the hospital for an unrelated surgery. At 8:45 am, Dr. Kramer left the surgical procedure and checked on Mrs. Flaherty's status. He determined she was still 5 cm dilated. He placed an intrauterine pressure catheter to measure the strength of contractions. Dr. Kramer then left the hospital and went to his office.

At 9:15 am, Dr. Fromberg examined Mrs. Flaherty. She found that Mrs. Flaherty was still at 5 cm and had inadequate contractions. She noted that the baby's head had not engaged and that there was molding with caput. Plaintiff's experts testified that these were all signs of cephalo pelvic disproportion and that the trial of labor should have been stopped and cesarean section performed.

Dr. Fromberg chose to continue the labor and ordered Pitocin, a synthetic hormone used to enhance contractions. Between 10:30 am and 12:30 pm the Pitocin infusion was increased despite evidence that the Fetal Heart Rate pattern was becoming non-reassuring. Plaintiff's experts testified that during this period of time there were clear signs of a non-reassuring fetal heart rate, that the Pitocin should have been discontinued and a cesarean section performed.

At 12:30 pm Dr. Fromberg noted that Mrs. Flaherty was fully dilated and could begin to push. There was no notation as to whether or not the baby's head had engaged. Mrs. Flaherty continued pushing until 3:00 pm without progress. During this period the Fetal Heart Rate Monitor revealed clear signs of fetal distress, with a rising baseline, tachycardia and deep variable decelerations.

Plaintiff's testified that Dr. Fromberg did not check on Mrs. Flaherty while she was pushing. Plaintiff's experts testified that at this point, the nurse attending to Mrs. Flaherty deviated from accepted standards of nursing practice by not using the chain of command to have someone intervene in the case and review the Fetal Heart Rate strip.

At 3:00 pm Dr. Fromberg examined Mrs. Flaherty and discussed using a vacuum device to assist in delivering the baby. If the vacuum was not successful, she planned to perform a cesarean section. Dr. Fromberg testified that before attempting the vacuum she asked another doctor on the labor and delivery unit, Dr. Gustavo San Roman, if he would be available to assist her in the event a cesarean section was necessary. Dr. San Roman agreed to act as an assistant surgeon if needed.

Dr. San Roman was on the unit attending to a patient who required a non-emergent cesarean section. Two nurses, Eileen Keary and Kathleen Long had stayed past their shift to help him with the procedure. They were told by a charge nurse on the unit that they could not start their cesarean section until Mrs. Flaherty delivered.

At 3:14 pm Dr. Fromberg applied the vacuum device. She attached the vacuum to the top of the baby's head and with each contraction she pulled in an attempt to deliver the baby.

At 3:30 pm, Nurse Eileen Keary entered Mrs. Flaherty's room to check on her progress. Nurse Keary testified that when she entered the room, Dr. Fromberg asked her to apply fundal pressure. Nurse Keary admitted she applied fundal pressure during one contraction while Dr. Fromberg pulled with the vacuum. She testified that after applying fundal pressure, Mrs. Flaherty lost her contractions. Shortly thereafter, Mrs. Flaherty began to complain of shoulder pain. She was exhausted and was unable to continue pushing.

Dr. Fromberg testified that she never gave an order for fundal pressure and that the nurses applied fundal pressure without consulting her. She testified the fundal pressure was applied with great force and was applied several times by more than one nurse. At 3:45 pm Dr. Fromberg discontinued the attempted vacuum delivery.

Plaintiff's experts and Dr. Fromberg testified that application of fundal pressure was a

deviation from accepted standards of medical practice.

Nurse Long testified that she was asked to come into the room by Nurse Keary. When Long entered the room and learned that Mrs. Flaherty lost her contractions and was complaining of shoulder pain she suspected that Mrs. Flaherty had suffered a uterine rupture. She advised Dr. Fromberg that she suspected a uterine rupture. Dr. Fromberg then ordered a cesarean section and left the room.

All parties conceded, at trial, that uterine rupture is a life threatening emergency for both mother and baby that requires prompt delivery of the baby in order to avoid permanent injury.

Nurse Long went to the Operating Room to prepare for an emergency cesarean section. On her way to the OR she advised Dr. San Roman they had a uterine rupture and that he should get ready for the cesarean section.

Nurse Keary and another nurse, Laurie Faulhaber, prepared Mrs. Flaherty for the cesarean section. Although each of the nurses knew that a uterine rupture is an obstetrical emergency it took them 15 minutes to get her to the OR. During this time the baby's heart rate was deteriorating due to oxygen deprivation.

Dr. Scott Sherman, the attending anesthesiologist, helped move Mrs. Flaherty to the OR. He testified that they were in the OR by 4:01 pm. By 4:02 pm Dr. San Roman was in the OR and they could have started the procedure. At that time Dr. Sherman realized that Dr. Fromberg was not in the OR. Fromberg admitted she was in the doctors lounge getting a snack.

Because of the life threatening emergency and Dr. Fromberg's absence, Dr. Sherman asked Dr. San Roman to start the procedure. San Roman refused saying it was not his patient.

Just before 4:09 pm, Dr. Fromberg entered the OR. She started the procedure and delivered Robert Flaherty at 4:10 pm. He was pale and lifeless. A neonatal nurse started an emergency resuscitation. Robert's APGAR score at 1 minute was "1". His APGARs at 5 and 10 minutes were 5 and 5 respectively.

Robert was placed on a ventilator. His cord PH was 6.89 confirming that he had been deprived of oxygen and had probably suffered brain damage. Robert was transferred to Stony Brook University Hospital NICU where he was diagnosed with Hypoxic Ischemic Encephalopathy (HIE) caused by Asphyxia due to uterine rupture. Robert suffered injury to the Basal Ganglia area of his brain. He has been diagnosed with Cerebral Palsy and Spastic Quadriplegia. He is fed through a G-tube. He is dependent on others for all his daily needs. Despite his brain injury, his higher cognitive functions are intact. With proper care he has a normal life expectancy.

Defendants argued that they did not deviate from accepted standards of medical care. Dr. San Roman and his experts argued that by the time he was asked to start the cesarean section, Robert had already suffered severe brain damage so that any delay caused by his refusal to act could not have contributed to the injury.

The jury found that the nurses were liable for failing to act in response to the baby's non-reassuring fetal heart rate patterns, applying excessive fundal pressure and failing to respond appropriately to the obstetrical emergency. The jury found that the hospital was negligent for failing to have a written policy and procedure for responding to obstetrical emergencies. Dr. Fromberg was held liable for failing to order a cesarean section earlier, attempting a vacuum assisted delivery, ordering fundal pressure and leaving the patient to get a snack rather than going to the OR. Dr. San Roman was found responsible for not starting the cesarean section when asked by the anesthesiologist. Dr. Goldberg and Dr. Kramer were found not liable.

Settlement:

After resting their cases, Dr. Fromberg, Dr. Goldberg, Dr. Kramer, North Harbor and St. Charles Hospital entered into a confidential settlement with plaintiffs.

Dr. San Roman was the only defendant who did not settle. The jury was asked to determine the liability of all named parties.

Post-Trial Motions:

Dr. San Roman has filed a post - trial motion

Plaintiff's Experts:

Herbert Goldfarb, MD - obstetrics and gynecology, NY, NY
Robert Zimmerman, MD - pediatric neuro-radiology, Philadelphia, PA
Joan Drukker Dauphinee, RNC, MS - nursing, Longwood, Fla.
Sandra Gonchar, MSN - life care planning, Staten Island, NY
Alan M. Leiken, Ph.D. - economics, Stony Brook, NY
Leon Charash, MD - pediatric neurology, Hicksville, NY

Defense Experts:

Denise Guidetti, MD - obstetrics and gynecology (for San Roman)
Joseph Maytal, MD - pediatric neurology (for San Roman)
Sheldon Cherry, MD - obstetrics and gynecology (for Goldberg and Kramer)
Joel Cooper, MD - obstetrics and gynecology (for St. Charles Hospital)

Other Comments:

Plaintiff's counsel prepared this case to take advantage of the High-Tech Courtroom in Suffolk County Supreme. The courtroom incorporates trial presentation equipment installed by DOAR Inc., Lynbrook, NY. All depositions were video taped. They were then digitized and the

transcripts synchronized by DOAR Litigation Consulting, for use in Sanction trial presentation software. All medical records and documents produced during discovery were scanned and loaded into Sanction allowing immediate access and simultaneous viewing by witness, jury, counsel and court. Time Map software was used to present relevant time lines and Case Map software was used as a database and case management tool. Static Exhibits were prepared by WMA Graphics, Glen Head, NY. Video depositions and Day in the Life Video were done by Fred Heller.

The jury commented that the use of the presentation technology allowed them to quickly learn and understand the medical testimony and fact pattern.