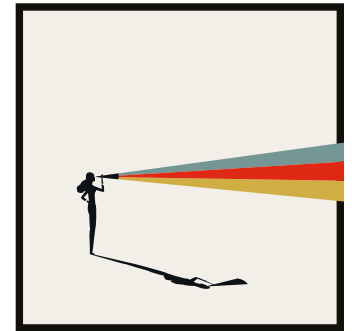


Tips from the Trenches | The Value of Standing Your Ground

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Sometimes the key factor in determining the outcome of a medical malpractice lawsuit is the health care provider's willingness to stand their ground in defense of the care they provided. Plaintiffs' attorneys make millions by intimidating health care providers into paying settlements to avoid the risk of trial, even though defendant health care providers win the overwhelming majority of medical malpractice trials. Although some facts have been modified to avoid disclosing sensitive information, the following scenario draws upon the core facts and issues from a lawsuit against a KAMMCO-insured physician.



The Incident

The Patient and Treatment in Issue

The patient first presented to a KAMMCO-insured OB/GYN with a pregnancy in which no abnormalities or risk factors were initially identified. The patient continued to follow up with the KAMMCO-insured physician during the pregnancy, although there were gaps in care when she did not come in as scheduled. In an office visit with the KAMMCO physician at approximately 38 weeks gestation, positive fetal movement was reported, and the physician had no concerns at that time.

The parents returned at 39+ weeks gestation for an office visit. The nurse recorded appropriate total weight gain and a fetal heart rate within normal range. However, the physician documented that the parents reported a relative lack of fetal movement for a week. The physician immediately sent them to the local hospital (also a defendant in the case, not insured by KAMMCO) nearby the physician's office.

The KAMMCO physician testified that they called the OB charge nurse after the parents left her office and reported decreased fetal movement and that the mother needed further evaluation and monitoring. A laborist OB/GYN (also a defendant, not insured by KAMMCO) at the hospital saw the mother and placed a monitor. The laborist noted decreased fetal movement and recorded relevant fetal vital signs. A tocodynamometer was placed, and the fetal heart rate was noted to be abnormal (although the appropriate interpretation and communication of the strips was an issue of dispute between competing expert witnesses in this case).

The laborist paged the KAMMCO physician, and the KAMMCO physician called the laborist to discuss the clinical picture. The patient was transferred to labor and delivery for delivery by C-section. The KAMMCO physician proceeded to the hospital after finishing up an office visit. The KAMMCO physician completed the baby's delivery by C-section approximately one hour following the telephone call with the laborist and approximately two hours after the patient's arrival at the hospital.

The baby was born in significant distress with markedly low APGAR scores. A neonatologist (also a defendant, not insured by KAMMCO) thereafter took charge of resuscitative efforts and further care of the baby over the following days and weeks.

Medical Outcome

The baby survived but unfortunately suffered severe and permanent brain damage and profound disabilities.

The Lawsuit

Defendants

1. The KAMMCO-insured OB/GYN
2. The Laborist (not KAMMCO-insured)
3. The Neonatologist (not KAMMCO-insured)
4. The Hospital (not KAMMCO-insured)

Allegations and Defenses

The plaintiff alleged the KAMMCO-insured OB/GYN, the laborist, and the hospital nursing staff failed to timely recognize the need for an emergency C-section delivery, failed to timely and fully communicate with each other, and failed to properly inform the NICU team of the baby's condition at birth. The plaintiff alleged the neonatologist failed to perform immediate and appropriate resuscitative efforts and failed to appropriately diagnose the baby's condition and provide timely and appropriate care in the hours and days following birth.

Each defendant denied these allegations and asserted that the care provided in this case was within the standard of care. Further, the defendants disputed that the baby's brain damage could have reasonably been prevented. Defendants asserted that the brain damage resulted from a fetal-maternal hemorrhage that occurred well before the delivery date and could not have been predicted by the KAMMCO-insured physician. The defendants also asserted that the baby's unfortunate outcome could not have been prevented or improved by a faster delivery or different care rendered by the neonatology team following delivery.

The plaintiff and all defendants each produced multiple expert witnesses in support of their respective allegations and defenses. These witnesses provided opinions relating to OB/GYN standard of care, placental pathology, genetics, neonatology, pediatric neurology, life care planning, and economic damages.

Damages Claimed by the Plaintiff

Over \$50 Million, primarily consisting of lifetime future medical care needs for the child.

Defense Team Assembled by KAMMCO

- **Medical Liability Analyst (MLA).** KAMMCO MLA Kim Davenport, relying on more than 17 years of experience handling medical liability claims, managed the defense of this claim for KAMMCO.
- **Medical Records Staff.** KAMMCO medical records staff coordinated the collection and organization of all relevant medical records.
- **Nurse Reviewer.** KAMMCO Nurse Reviewer Lisa Thompson, RN, evaluated the medical records, identified medical literature resources, and created a thorough medical chronology and memorandum to support the defense team and medical experts.
- **Defense Attorney.** KAMMCO retained one of the most capable and effective medical malpractice defense attorneys in Kansas to defend the KAMMCO-insured defendant.
- **Expert Witnesses.** KAMMCO retained multiple medical expert witnesses on behalf of the KAMMCO-insured OB/GYN.

Amount KAMMCO Paid to Defend Insured Physician

\$210,158.67.

Resolution: Case Dismissed Against KAMMCO Physician Just Before Trial

After two years of extensive pretrial investigation and litigation, including deposition testimony from all defendants and staff involved in the care, as well as multiple expert witnesses on behalf of all parties, the case approached the date of the scheduled four-week trial with all defendants remaining in the case.

Two non-KAMMCO-insured defendants then paid settlements to the plaintiff rather than risk proceeding to trial. However, the KAMMCO-insured defendant stood firm, withstanding threats made by the plaintiffs' attorney that a verdict in the plaintiffs' favor would be well in excess of her insurance coverage.

The plaintiffs' attorney made a final attempt to muscle settlements out of the two remaining defendants by "saber-rattling" about the upcoming trial and the potential for an 8 figure verdict. When this did not cause the two remaining defendants to budge an inch from their "no settlement" position, the plaintiffs' attorney dismissed the case weeks before trial the trial was scheduled to start.

The allegations against the KAMMCO-insured physician can never be re-filed, and the KAMMCO-insured physician will have no malpractice settlement reported to the licensing board or the National Practitioner Databank.

Litigation Tip: The Value of Standing Up to Plaintiff Attorney Intimidation Tactics

Plaintiffs' attorneys profit from fear. More specifically, the fear and uncertainty inherent in any jury trial. Like most brands of fear, the fear tends to exert a disproportionately stronger power to influence actions than the actual risk that triggers it. Historically, more than 90% of medical malpractice cases that go to trial result in a defense verdict. Yet plaintiffs' attorneys make the vast majority of their money from settlements paid by defendants to avoid the risk of trial.

The fact most lawyers don't like to talk about is that most cases that settle would likely result in a defense verdict if they proceeded to a jury trial. Plaintiffs' attorneys know this. They know that, in order to have a profitable practice, they need to maximize the percentage of their cases that settle and minimize the percentage of their cases that go to trial. The threat of trials makes them money in the long term, not trials. In order to get their 40-50% cut of the settlement they claim will provide their client "justice" (plaintiffs' attorneys leave out that nearly half of the "justice" goes into their pockets and never reaches their injured clients...), they must leverage fear.

In high damages cases, a common tactic is to trigger the fear of a jury verdict in excess of the health care provider's malpractice insurance coverage. The plaintiffs' attorney demands a settlement in an amount that falls within the insurance coverage limits of the insured health care provider and pairs this demand with a threat that they will go after the personal financial assets of the insured health care provider if they win a jury verdict that exceeds the insurance coverage limits. However, historical facts don't tend to back up such threats – in more than 30 years of defending KAMMCO-insured health care providers against medical malpractice lawsuits, there has never been a case in which a plaintiff attorney collected a jury trial judgement from the personal assets of a KAMMCO-insured health care provider.

In this particular case, the KAMMCO-insured physician won the case because the physician stood firm in defending the physician's care – and defending good medicine in Kansas. ■