RENDERED: AUGUST 29, 2008; 2:00 P.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001616-MR

MAYSVILLE OBSTETRIC AND GYNECOLOGICAL ASSOCIATES, P.S.C. — APPELLANTS/CROSS-APPELLEES

APPEAL FROM MASON CIRCUIT COURT
v. HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 04-CI-00244

HARLAN LEE AND PENNY LEE — APPELLEES/CROSS-APPELLANTS

AND NO. 2007-CA-001617-MR

HARLAN LEE, ADMINISTRATOR OF THE ESTATE OF KATELYN MICHELLE LEE, AND HARLAN LEE AND PENNY LEE, INDIVIDUALLY — APPELLANTS/CROSS-APPELLEES

APPEAL FROM MASON CIRCUIT COURT
v. HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 04-CI-00244

LAURA L. SHOWER, M.D., AND

MAYSVILLE OBSTETRIC AND
GYNECOLOGICAL ASSOCIATES,
P.S.C. APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND REVERSING AND REMANDING
IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Maysville Obstetric and Gynecological Associates, P.S.C. (hereinafter "Maysville Obstetric") appeals the jury verdict rendered against it for negligence in the death of Katelyn Lee. Harlan Lee, administrator of the estate of Katelyn Michelle Lee, and Harlan Lee and Penny Lee, individually, separately appeal, arguing that they are entitled to a new trial on damages. After careful review of the record, we affirm in part and reverse in part.

In January 2003, Penny Lee consulted Maysville Obstetric for care and treatment during her pregnancy. At that time, the shareholders of the P.S.C. were David Doty, M.D.; Donald Wilson, M.D.; and Dr. Laura Shower, a board certified obstetrician and gynecologist. Penny Lee primarily saw Dr. Shower; however, it was Maysville Obstetric's practice to rotate patients among the various doctors to ensure that each doctor was familiar with all patients in the group.

On April 18, 2003, Penny had a twenty-week ultrasound, which revealed a posterior marginal previa, which is not uncommon, but the ultrasound

also did not allow an accurate reading of the four chambers of the heart. A second ultrasound was then scheduled for July 9, 2003, to follow the posterior marginal previa and the development of the heart. The July 9, 2003, ultrasound was read and interpreted by Dr. Shower as well within the normal limits, both with regard to the progression of the marginal previa and the four chambers of the heart.

On September 1, 2003, Penny went into labor when her water broke. After being advised to go to the hospital at 6:00 a.m. unless her contractions started, she arrived at the hospital between 7:00 and 7:30 a.m. She was seen by Nurse Cindy Ginn and Dr. Shower around 7:30 a.m. Nurse Ginn testified at trial that a vaginal examination revealed that Penny was three centimeters dilated. When Nurse Ginn conducted the exam, Penny did not bleed, which would have indicated previa covering all or part of the cervix.

Dr. Shower also performed a vaginal exam and testified that she felt the smooth surface of the baby's skull. Dr. Shower also testified that if part of the placenta had been overlapping the cervix, it would have felt like a piece of meaty sponge—very different from the feel of the baby's head. Dr. Shower testified that when the examiner's fingers are removed, the mother would bleed if part of the placenta were over the baby's head. Finally, Dr. Shower did not contact any blood vessels, which would have presented a pulsating feel. Dr. Shower testified that the vaginal exam did not indicate the presence of either placenta previa or vasa previa.

When Penny did not dilate more than three centimeters as expected, the concern arose that labor was not progressing as it should, and Dr. Shower

decided to use Pitocin, a hormone used to stimulate uterine contractions and speed up labor. Dr. Shower's intent was to use an intrauterine pressure catheter (IUPC), a soft flexible pressure sensor that slides between the baby's head and the back of the uterus to provide a reading of the strength of the contractions. As Dr. Shower inserted the IUPC, she expected to see a flashback of amniotic fluid, telling her she was in the right spot inside the membranes. However, as she inserted it, she did not observe a flashback and suspected that the IUPC was inserted between a normal membrane and the uterine wall, which would explain the lack of fluid. Therefore, she had to put a hole in the membrane so as to insert the tube. She used an amnio hook to put the hole in the membranes, but instead of seeing the expected clean amniotic fluid, Dr. Shower observed a small amount of dark red blood in the tube.

Within seconds of seeing the blood, the baby's heartbeat dropped. Dr. Shower then had Penny maneuver from side to side, get on her knees, and gave her oxygen in an attempt to get the baby's heartbeat to increase. When these efforts failed, Dr. Shower prepared for a c-section, which was delayed due to the anesthetist not being at the hospital on the Labor Day holiday. By the time Katelyn was finally delivered by c-section, she had lost at least half her blood volume and had to be resuscitated. She was transferred to Cincinnati Children's Hospital, where she remained in the pediatric intensive care unit until she died three weeks later. The cause of death was listed as hypoxic ischemic

encephalopathy, or lack of oxygen and blood flow to the brain, which occurred at birth.

The July 9 ultrasound, which revealed resolution of the marginal placenta previa, was performed by Carol McCord, an employee of Maysville Obstetric. Ms. McCord testified that in 2003, ultrasounds were performed on a total of about fifty patients per week, which were divided between her and another technician, Tamala Humphries. Tamala had performed the initial ultrasound on Penny, which revealed the marginal previa. Ms. McCord testified that in 2003 it was routine to perform a second ultrasound following the twenty week ultrasound only if there was a suspected anomaly such as the placenta being low, which occurred in Penny's case. She further testified that the patient's physician would have sole responsibility for checking and reading the ultrasound results and scheduling follow up studies. The report she completed was not a final report; it would then be completed by the physician.

Ms. McCord reviewed Dr. Shower's notes on the initial twenty week ultrasound prior to conducting the follow-up ultrasound on July 9th. Dr. Shower had noted, "[n]ormal anatomy with limited views of four chamber, low posterior placenta. Review at 32 weeks." Further, Ms. McCord reviewed Tamala Humphries' notes on the first ultrasound, which were "lower uterine segment" and "marginal," which means that the placenta was touching the cervical os, an opening of the cervix. The external os is the opening between the cervix and the vagina. The internal os is the opening between the uterus and the cervix.

Ms. McCord testified that there was no indication by Dr. Shower for a transvaginal ultrasound to be performed in July. Furthermore, she did not have the authority to perform one without the order and approval of one of the group's physicians. Dr. Shower never indicated that a transvaginal ultrasound needed to be performed.

Four experts testified in this case. The plaintiffs called Dr. Beverly Coleman, a radiologist, who agreed with everyone that a marginal placenta previa will resolve itself in 95% of the cases. She further testified that the problem here was with the second insertion of the IUPC, which punctured a vessel of the umbilical cord at the velamentous insertion. Velamentous insertion of the umbilical cord is a condition in which the major umbilical cord vessels break up in the fetal membranes around the placenta before reaching the placental disk. The umbilical cord inserts on the chorioamniotic membranes rather than on the placental mass. Such a condition is of no major consequence in utero, but can lead to a greater chance for cord trauma with bleeding during delivery.

Dr. Coleman was critical of the delay in repeating the ultrasound and testified that good medical practice would have suggested that it be repeated within four weeks. However, she was somewhat ambivalent in this criticism and stated that different people follow up in different ways and that if you are going to follow up later, you should ensure that you are accurate.

The plaintiffs also presented testimony from Dr. Cetrulo, an obstetrician/gynecologist. Dr. Cetrulo found fault with everything Dr. Shower did

in her care and treatment of Penny. He testified that a vaginal ultrasound should have been performed after the April ultrasound showed the marginal previa; that the c-section was not done soon enough; that there was no reason to employ the amnio hook or the IUPC; and that the maneuver should have been avoided in the interest of an earlier c-section. He acknowledged, however, that none of the pictures or other demonstrative evidence from the second ultrasound showed the placenta near the os; but in spite of that, his testimony was that it was there. It was Dr. Cetrulo's testimony that when there is a vasa previa or a velamentous insertion, an amniohook should not be used.

Essentially, the plaintiffs below argued that had proper ultrasounds and follow ups been conducted, the velamentous insertion of the umbilical cord would have been discovered. Had this been the case, Penny would have been monitored differently throughout her pregnancy and once the catheter punctured an internal blood vessel, the c-section would have been ordered immediately. The plaintiffs argued that had this been done, Katelyn's life would have been saved.

The defense introduced the testimony of Dr. Baha M. Sibai and Dr. Stephen Hensley. Dr. Sibai is board-certified in obstetrics, gynecology, and maternal fetal medicine and a professor of obstetrics and gynecology at the University of Cincinnati. Dr. Sibai agreed with the other doctors that Penny had a velamentous insertion of the cord, but testified that there was nothing to indicate it was down near the cervical os. He testified that Penny did not have a vasa previa, that the likelihood of vasa previa is one in about 5,000 to 15,000, and that it is not

standard practice to screen for it. If Penny had a previa, it would have ruptured with the membranes. In the approximate 15,000 births Dr. Sibai has seen at the University of Cincinnati, he has not encountered one vasa previa.

Dr. Sibai testified that an initial ultrasound revealing a marginal previa only calls for a subsequent ultrasound; it does not require a transvaginal ultrasound. In his opinion, the follow-up ultrasound met the standard of care. He testified that an abdominal view provided by an ultrasound catches more previas than a transvaginal ultrasound. In Dr. Sibai's opinion, it was wise to wait at least 12 weeks for the second ultrasound to be performed, as four weeks may not give a marginal previa sufficient time to resolve.

When asked about whether Dr. Shower deviated from the standard of care by hitting the velamentous cord insertion with the IUPC, Dr. Sibai testified that it's unfortunate and a very rare event, but that it could happen to any doctor. He stated that an IUPC is used in labor and delivery every day and that this is an extremely rare complication but that they can happen.

Like Dr. Sibai, Dr. Stephen Hensley has never encountered a vasa previa in his practice. He also testified that even if a marginal previa is found, the standard of care does not require testing for a vasa previa or a velamentous insertion. In fact, his testimony indicated that a velamentous insertion is impossible to prove on ultrasound, whether transvaginal or not. He agreed with the other physicians that Penny did not have a placenta previa because no bleeding resulted from the cervical exams. Dr. Hensley testified that even if Dr. Shower had

known of a velamentous insertion, it should not have affected her management of the case. He would have performed a normal delivery and would not have hesitated to use an IUPC.

Finally, plaintiffs put on proof that other than the loss of blood that led to her death, Katelyn was a completely normal and healthy baby. The defense did not dispute that but for the injury that occurred during birth, Katelyn would have had a normal life expectancy. Plaintiffs then presented evidence of the loss to the estate of Katelyn's ability to earn money. Dr. William Baldwin, an economic expert, testified that over her lifetime, Katelyn would have earned from $1,115,751 to $2,744,301, depending on her ultimate educational attainment. The defense did not dispute this testimony.

At the close of the testimony, the jury found that Dr. Shower was not negligent and made no award against her. However, the jury found that Maysville Obstetric failed to exercise the degree and care and skill ordinarily expected of a reasonably competent obstetrical services provider acting in the same or similar circumstances, and that such failure was a substantial factor in causing the injuries to the plaintiffs. The jury awarded damages to Katelyn's estate for medical and funeral expenses incurred and to her parents for the loss of Katelyn's love, affection, companionship, and support. The jury did not award damages for Katelyn's loss of power to earn money.

Maysville Obstetric filed a motion to vacate judgment and the Lees filed a motion for a new trial. On August 2, 2007, the Mason Circuit Court denied

both motions. Maysville Obstetric now appeals the jury's award for negligence against it and Harlan Lee, Administrator of the Estate of Katelyn Michelle Lee, and Harlan Lee and Penny Lee, individually, appeal the jury's award, arguing that the undisputed proof was that Katelyn was a completely normal and healthy baby and that the law requires the jury to award damages for her loss of power to earn money.

Maysville Obstetric argues that because Dr. Laura Shower was not found to be negligent, any negligence or liability cannot be imputed to it as the principal, as there was no negligence to impute. Furthermore, it argues that because Carol McCord was not a party, there were no jury instructions as to her and no evidence which would have supported a verdict based upon her negligence. The Lees argue that the evidence was sufficient and showed that Katelyn's death was caused by deficiencies in medical care rendered by the defendants.

In *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998), the Kentucky Supreme Court articulated the standard for reviewing jury determinations:

> [W]hen an appellate court is reviewing evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence.

> Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is palbably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice.

Furthermore, "[a]ll evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact." *Humana of Ky., Inc. v. McKee*, 834 S.W.2d 711, 718 (Ky.App. 1992) (internal citations omitted).

The Lees argue that their two experts stated unequivocally that Katelyn's death was caused by the negligence of Maysville Obstetric and that accordingly, the verdict was supported by substantial and competent evidence. A careful review of the trial record indicates that the jury was presented with conflicting expert medical testimony. According to the Lees, both Dr. Shower and Maysville Obstetric were negligent in their care of Penny and should have detected the velamentous insertion via ultrasound and should have conducted further and more complete ultrasound imaging. According to Dr. Shower and Maysville Obstetric, Penny did not have any type of previa and the velamentous insertion was not capable of being detected via ultrasound, whether abdominal or transvaginal. The question for this court to determine is "whether the estimation of the jury is supported by substantial and competent evidence." *Rogers v. Kasdan*, 612 S.W.2d 133, 135 (Ky. 1981). A review of the record indicates that it was, despite the conflicting evidence presented by the underlying defendants.

The jury was in the position to hear and weigh the evidence and to judge the credibility of the testifying witnesses. After doing so, it determined that the care provided by Maysville Obstetric amounted to negligence. It is not the role of this Court to supersede the jury and substitute its judgment of the conflicting testimony, and we decline to do so in this instance. Accordingly, we affirm the Mason Circuit Court's order in so far as it denied the underlying defendant's motion to vacate judgment.

The Lees argue that they are entitled to a new trial on damages because Kentucky law requires an award of lost earnings in a wrongful death action involving an infant, citing *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970). In *Rice*, the court found that "[t]he measure of damages in a wrongful death action involving an infant is the destruction of the infant's power to earn money. . . . There is an inference that the child would have had some earning power, and in this lies the basis for recovery." Id. at 735. *Rice* was a medical negligence case involving the death of a premature infant where the jury did not award anything for the destruction of the infant's power to earn money. Because of the finding of negligent causation against the doctor and the award for the other elements of damage of a wrongful death claim, the Court held that "[i]t follows that the jury should have made some award for the destruction of the earning capacity of infant Rice." *Id.* Furthermore, *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 671 (Ky. 1992) cites *Rice* with approval, finding that unless there is evidence that

the jury could reasonably believe that the decedent possessed no power to earn money, damages naturally flow from the wrongful death of a person.

Based on the fact that there was no dispute that other than the blood loss leading to her death, Katelyn was an otherwise normal and healthy child, we agree with the Lees that the case law in Kentucky provides that the jury must make some award for loss of earning capacity. Accordingly, we reverse the Mason Circuit Court's order denying the underlying plaintiffs a new trial on damages and instruct that the parties be allowed to present evidence as to the damage to the estate by virtue of the destruction of Katelyn's power to earn money. Furthermore, we find the instructions found in *Turfway*, 834 S.W.2d at 673 to be appropriate as argued in the Lee's brief on appeal. Thus, the trial court is instructed to model the jury instructions accordingly.

For the foregoing reasons, the order of the Mason Circuit Court is hereby affirmed in part and reversed and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-APPELLEES:	BRIEF FOR APPELLEES/CROSS-APPELLANTS:
Frank V. Benton IV Newport, Kentucky	Jerome P. Prather Lexington, Kentucky
William P. Swain Louisville, Kentucky	