MINNESOTA CASE REPORT

1.	TYPE OF CASE:	Medical Malpractice
2.	NAME OF CASE:	DP and LP for WP vs. Doctor R, Clinic and Hospital
3.	DATE OF VERDICT:	November 20, 2008
4.	LEGAL ISSUE OR HOLDING:	Inappropriate use of Cytotec to induce labor with no medical indication resulted in undiagnosed hyperstimulation leading to aggressive vacuum extractor and forceps delivery causing significant brain injury to newborn.
5.	PLAINTIFFS' EXPERT(S):	Maternal Fetal Specialist, Family Practice Physician, Pediatric Neurologist, Pediatric Neuroradiologist, Neonatologist, Internal Medicine Physician with specialty in Pharmacology and Toxicology, Life Care Planner, and Economist
6.	DEFENSE EXPERT(S):	Dr. Harry Farb, obstetrician, Dr. Patrick Barnes, pediatric neurology, Dr. Norman Virnig, neonatologist, Dr. Timothy Tracy, pharmacology, Dr. William Hay, neonatologist,
7.	DEMAND:	$3,000,000 from both defendants
8.	OFFER:	Policy limits high/low negotiated with Defendant Physician and Clinic days before the second trial started. First case tried with mistrial granted when jury could not reach a verdict. Both the high and the low were policy limits of $2,000,000. Physician wanted to try the case in order to obtain a defense verdict which would have avoided need to report case to the National Data Practices Board. Defendant Hospital offered nothing at any time and pursued post-trial relief and appeal. Verdict was affirmed on appeal. Minn. Ct. of Appeals decision is attached. Minnesota Supreme Court denied Petition for Review.
9.	VERDICT:	Minnesota – Stevens County District Court $9,566,500 Physician/Clinic – 70%, Hospital – 30%

10.	JUDGE:	Honorable Gerald J. Seibel
11.	DEFENSE ATTORNEY:	J. Richard Bland, Steven Schwegman
12.	INSURANCE COMPANY:	Midwest Medical Insurance Company for Defendant Physician and Clinic MHA Insurance Company for Defendant Hospital
13.	SUBMITTING ATTORNEY(S):	Terry L. Wade Robins, Kaplan, Miller & Ciresi L.L.P. 2800 LaSalle Plaza 800 LaSalle Ave. Minneapolis, MN 55402 612-349-8500 AND Brian Wojtalewicz, Esq. WOJTALEWICZ LAW FIRM LTD. 139 N. Miles Street, P.O. Box 123 Appleton, MN 56208 320.289.2363

DESCRIPTION OF THE CASE:

After an uneventful and normal pregnancy, LP was admitted to the hospital in May of 2002 for induction of labor because her husband was going away for a military weekend. Cytotec was utilized for the induction. Cytotec is inserted in the vagina near the cervix. It is long acting and so effective at inducing contractions, it is used as a first trimester abortifacient in higher doses. It is not FDA approved for inducing labor but is commonly used for this off-label purpose because it is so effective. One of the risks of the medication is hyperstimulation or too frequent contractions too close together with inadequate rest between contractions. Over time, this can lead to fetal hypoxia. Neither LP nor DP were apprised of the risks of induction nor was informed consent given regarding the off-label use of Cytotec. The most commonly recommended dose is 25 mcg. repeated every 4 to 6 hours until contractions begin. In some situations where the need for prompt delivery outweighs increased risk, 50 mcg. every 6 hours has been recommended. It is well known that the risk of hyperstimulation and potential fetal compromise is increased at the 50 mcg. level.

Dr. R inserted the first dose of 25 mcg. at 0840. At 1250, he decided to insert a 50 mcg. dose. No informed consent was obtained regarding increased risk with the increased dose. Following rupture of membranes at 1615, strong frequent contractions at least every 1 to 1-1/2 minutes, lasting 40 to 60 seconds with inadequate uterine relaxation between contractions developed and continued from approximately 1730 to delivery at 2147. Hospital nurses failed to recognize an abnormal uterine contraction pattern and did not call the physician or give medication

(Terbutaline) intended to reduce contraction frequency and duration despite a standing Cytotec induction order to do so. The physician also failed to identify this abnormal uterine contraction pattern on the two occasions he examined LP during the period tachysystole was ongoing.

At about 2025, the physician was called as mother was approaching delivery. By 2115, the physician recognized concerning fetal heart rate decelerations and thought it imperative to effect delivery. He did not have cesarean section privileges and an operating crew was not present in any event. He applied a vacuum assisted delivery device five times. He could not deliver the baby and whispered to a nurse to get a senior partner (who did have c-section privileges) to come help. That partner came and unsuccessfully attempted to use forceps to effect delivery. The forceps were abandoned and the vacuum extractor was utilized two more times resulting in delivery of a blue, flaccid baby with slow, irregular respirations. Apgars were 3 at 1 minute and 4 at 3 minutes.

Multiple vacuum applications, particularly when combined with attempted forceps, is recognized to increase the risk of traumatic injury—particularly bleeding just outside the skull known as a subgaleal bleed. This injury can range from minor to moderate causing a drop in blood pressure and reduced perfusion to the brain, to severe resulting in fetal exsanguination. This bleed typically progresses over several hours following delivery.

The baby was initially resuscitated with a bag/mask ventilation for 90 seconds. The baby was taken to a newborn nursery in this small community hospital. Experts for the family opined that intensive monitoring and treatment was required. Baby W was treated as a normal newborn. Blood pressures were not recorded despite the risk of subgaleal bleeding. Though taken to his mother twice during the night to breast feed, he did not eat. Around 7:30 a.m. as a nurse was walking by the nursery, she happened to look into the nursery and saw that W was blue and not breathing. A Code was called. Shortly thereafter the baby seized and continued to have apneic and bradycardic spells with seizures. Near 10:00 a.m. a glucose was drawn indicating significant hypoglycemia believed to exacerbate hypoxic injury according to the testifying pediatric neurologist and neonatologist for plaintiffs. It wasn't until 10:30 a.m. that a tertiary care facility was contacted and the baby was airlifted to the specialty care hospital. A CT scan done at 17 hours of life (reported as normal by the local radiologist) demonstrated brain swelling according to plaintiffs' pediatric neurologist and pediatric neuroradiologist. They also identified a subgaleal bleed on this imaging. Plaintiffs' experts opined that W had decreased blood pressure as a result of this bleed which decreased perfusion to the brain further exacerbating W's brain injury. He spent 12 days in the hospital. At 3 months of age, it was determined that W had significant brain damage. At 6-1/2 years of age, W cannot speak, drools constantly, has motor impairment on both sides, right side greater than left, and has difficulty eating. He will never live independently or be competitively employed. He is not bowel or bladder trained. He lives at home with his parents and two younger, healthy siblings.

The defense experts opined that the care provided by both the defendant physician and the nurses was exemplary. While ultimately conceding that there was brain swelling on the CT scan at 17 hour of life, it was the defense "theory" that some undefined event occurred some 4 to 6 days before delivery which accounted for W's injury. Defense experts opined that neither the period of hypoglycemia nor trauma contributed to the child's brain injury.

This case was initially tried in July of 2007 in the community of 2,100 where the hospital and clinic are located. Many of the jurors knew the physician and nurses or their families—including a teacher of the defendant physician's children. Change of venue motions prior to the initial trial were denied. Repeated motions for a mistrial and change of venue during the three days of voir dire and periodically during the first trial were denied. Extended family members of the physician and nurses and other supporters of the defendants packed the courtroom day after day and watched the trial and the community jury of neighbors and acquaintances. The family sat alone. Despite the not so subtle community pressure, this initial local jury could not reach a verdict and a mistrial was declared. A change of venue motion to Stevens County was granted. After a three week second trial in Morris, MN, the jury returned a unanimous verdict against both defendants after deliberating two and a half hours. The jury verdict for the plaintiffs was $9,566,500.

WYATT PERSEKE VS. ALLAN E. ROSS, M.D. AND THE CITY OF ORTONVILLE, D/B/A ORTONVILLE HOSPITAL – LESSONS LEARNED

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On November 20, 2008, a unanimous jury in Morris, MN, returned a verdict in favor of Wyatt Perseke in the amount of $9,566,500. A copy of the Special Verdict Form is attached. This was the second time the case was tried to conclusion. On the first occasion, a little over a year earlier, the matter was tried in Ortonville, MN and resulted in a hung jury. Also attached is a Case Report which summarizes additional background regarding the case. The judge in both trials was the Honorable Gerald Seibel. Terry Wade and Brian Wojtalewicz represented plaintiffs, Dick Bland represented Dr. Ross and Steve Schwegman represented the City of Ortonville, d/b/a Ortonville Hospital.

Civility Matters

Over 30 years of trial practice, I have tried more cases with Dick Bland than any other single lawyer. He usually wins. He is a formidable opponent. The trial in Ortonville was my first trial with Steve Schwegman. In the second trial, his cross-examination of our maternal-fetal specialist was one of the finest cross-examinations of an opposing expert I have ever seen. At that moment I thought his cross-examination would end any possibility of a plaintiffs' verdict. Judge Seibel was and is a good and capable jurist who objectively umpired the case in as impartial a manner as is possible for any human being. Were it not for the mutual civility and respect exemplified by counsel and the court throughout this case, the experience would have been pure torture. As it was, it damned near killed me. By the end of this case, my respect and affection for all of the professionals involved was never higher. All were good people doing outstanding work at the highest ethical level. Maintaining such professionalism is important to us all. Remember the old adage "What goes around comes around." As a young lawyer, I was too adversarial. To those experiencing the abrasive side of my flawed character, I apologize. As the level of testosterone has fallen with age, I have become gentler and more respectful. I commend gentler and more respectful to you all.

Venue Matters

I never thought this case could be won in Ortonville. Suing a municipality with a population of 2,100 people is unlikely to garner cheers from the jury panel. Asking a very small town jury to award millions of dollars against the hospital which they effectively own and against a physician who has grown up in the town, was the son of one of the most popular high school teachers in the community, is the nephew and partner of another family practice physician who has spent his whole career providing care for his fellow citizens, who was, along with his brothers, a popular high school athletic star, and who returns to his small home town to tend to the ailments of the

neighbors with whom he has spent his entire life, is a fool's errand. So what do lawyers do when a case believed to be truly meritorious and involving enormous damages arises in such a context? Develop a strategy to try it elsewhere.

Depositions were taken with the purposes of establishing negligence, causation, and a solid basis for a change of venue. A change of venue motion was brought on what plaintiffs' counsel believed to be a solid factual basis, always recognizing that changing venue in such circumstances was an uphill battle. While the facts were compelling, the case law was not. Judge Seibel denied the motion. In my opinion, he was right on the law and wrong on the facts. Without question, his decision would have been sustained on any appeal—but a foundation for appeal was beginning.

Despite believing the case could not be won in Ortonville, it is better to die a martyr than a coward. Any possibility of prevailing was enhanced if local counsel, with the outstanding reputation of Brian Wojtalewicz, would try the case with me. Generally, referring counsel in small towns maintain a nearly invisible role. Concern about impairment of business and reputation takes precedence over the best interests of the client. Not so with Brian Wojtalewicz. When asked to co-try the case, he immediately said he would have it no other way.

Brian did voir dire. I have had the privilege of watching Solly Robins and Mike Ciresi and Dick Gill and Tyrone Bujold voir dire prospective juries. None were better than Brian in Ortonville. Into the second day of voir dire, Brian had exhausted the initial enlarged panel of jurors and Judge Seibel was compelled to expand his conscription. The second panel was consumed as well with only one potential juror left available.

Brian was very effective at having thoughtful, conscientious jurors recognize the enormous psychological difficulty they would have in being fair and impartial. A great many of the prospective jurors admitted their own concerns and expressed the view that they thought they would be unable to be fair. In some respects, such thoughtful, honest, conscientious jurors may have been the best ones plaintiff could have hoped for. One of the jurors who was certain she could be fair was the mother of a nurse who worked in the labor and delivery unit of the defendant hospital. She took them cookies when they worked the night shift. After finally being struck from the panel, she returned to sit with the defendant side of the audience and cheer with and comfort nurses involved in the case. Despite Brian's skills, the evolving panel was not comforting.

So here sits plaintiffs' counsel in the middle of the prairie. Tens of thousands of dollars have been invested and experts are in planes or on the road traveling to Ortonville. Witnesses and parties are lined up and counsel are fully engaged. In many respects, the easiest thing to do is to proceed and get the inevitable loss over with. Too easy. Not quality lawyering. Throughout voir dire, plaintiffs' counsel repeatedly moved for a mistrial and change of venue. As anticipated, the motions were denied and without question, Judge Siebel's decision in denying those motions would be sustained on any appeal. He was right on the law—but the facts were evolving. Unfortunately, so was plaintiffs' counsel's conviction that prevailing was impossible.

Luck is Better Than Brains

The chemical leading to the cascade of tragedy in this case is known as Misoprostol (also known by the brand name "Cytotec"). Misoprostol is a drug that is inserted vaginally, ripens the cervix, and often causes contractions to begin. It sometimes causes the contractions to be too strong and come too close together and can lead to hypoxia. The claim in this case was that excessive Misoprostol caused excessive uterine contractions, which process was neither recognized nor abated, and brain injury to the child ensued. In addition to Brian, my nurse legal consultant and second chair colleague throughout trial, was Registered Nurse, Bonnie Grzeskowiak. As is her practice, Bonnie had provided me with extensive medical research about Misoprostol. Much of it was from the midwife literature. At the time, and even today, a great majority of midwives are not fans of Misoprostol. To the contrary, many consider it terribly dangerous. The midwife literature is rife with cautionary, if not highly critical, tales of tragedy. One of the panel members ending up on the jury was a lay midwife. As Brian was beginning to ask her questions which had led to the disqualification of other jurors, Bonnie leaned over to me and said "Tell Brian to go easy—we want her." I passed on the message. This lay midwife juror and one other juror she persuaded refused to exonerate the defendants. Without her on the jury, I have no doubt but that a defense verdict would have resulted.

Mistakes Happen

It is impossible to try a case without asking a question, failing to make an objection, or not pursuing a strategy which in hindsight would be viewed as a mistake. With good fortune, the mistake is not determinative of the outcome. Whether determinative or not, we all aspire to learn from mistakes and not make them again. Let me confess some of mine:

1. After the first trial I thought the maternal-fetal specialist I called was weak. While his opinions were solid, I found him to be much too compliant on cross-examination and only marginally successful at withstanding the cross-examination of these skilled defense lawyers. To replace him, I would have needed to find a maternal-fetal specialist who would read both deposition and trial transcripts of hundreds of pages in length. I would have deemed it necessary for that specialist to review dozens of medical articles and learned treatises. I would have spent hours discussing the issues, preparing expert disclosures, and then would have struggled to persuade the expert to travel to Morris, MN. Additional tens of thousands of dollars would have been spent in the process. For all of these reasons and many more, I quelled my discomfort and persevered with the same expert at the second trial. Steve Schwegman crushed him. I will not make that mistake again. If you are uncomfortable with an expert and options are available, trust your instincts!

2. Throughout the trial in Ortonville (and Morris), the defense side of the courtroom was packed. Some of the community members in attendance were easy to identify. There were teams of nurses probably with extended family members. There was the defendant physician along with his extended family including brothers who had been high school athletic stars

in Ortonville. The hospital administrator was present. But there were more. The crowd itself was cohesive and congenial. The Perseke family, rarely numbering more than two or three people, sat alone on their side of the courtroom except for a staff member or two from Brian's office attending to lend moral support for the family.

The presence of the former jury panel member who was the mother of a nurse at the defendant hospital was raised with the judge during trial as concerning to plaintiffs' counsel about the influence such a person could have on the remaining jurors. She was obviously aligned with the defense. During recesses, it was not uncommon for jurors to sit amidst the congenial crowd. On at least one occasion, this was brought to the attention of the court. The facts supporting jury bias continued to evolve.

In hindsight, we ought to have asked the court to have the congenial crowd register as they entered the courtroom so that plaintiffs' counsel had a record of the nature of the crowd observing and obviously communicating the crowd's preference for a defense verdict to their neighbors on the jury. I should have made a record of the size of the congenial crowd and requested an opportunity to establish the community prominence of members of the congenial crowd. With that record, I ought to have renewed the motion for a mistrial and a change of venue. I view my failure to do so as a mistake—fortunately not a determinative one.

3. There is nothing like a good focus group to refine one's approach. In the first trial, I used far too much medical literature. The jury didn't like it. I used much less at the second trial.

4. In the first trial, Dr. Virnig, a defense neonatologist, surprised me with a chart he had "just drawn". His testimony in connection with the chart was incredibly effective. Brian will show you the chart that he used. All of us on the plaintiffs' side thought the chart was very effective. In hindsight, I should have objected to the use of the chart as having not been disclosed.[1] During the second trial, now with time to think more rationally, and with the benefit of the focus group of the first jury, Dr. Virnig's chart turned into one of plaintiffs' best exhibits. In future trials, I will certainly be more attentive to objecting to evidence which has not been disclosed.

These are the mistakes I am willing to confess to. There were others. We all made them and will again in future trials. So will you.

[1] Throughout both trials, Judge Seibel had been quite strict in not allowing testimony about the matters or subjects that had not been disclosed. He had issued fair warning that he would do so before the first trial and he enforced the rule of full disclosure decisively throughout both trials. All attorneys ought keep this in mind both for purposes of ensuring that they fully disclose their case to the opposing party if they intend to introduce it into evidence, and in thinking about objections which should be asserted during trial to exclude matters not reasonably disclosed. There is, I should note, substantial variation between judges on this topic.

Use of Depositions—Should You Videotape?

As has been my practice in recent years in major matters, I videotape all of the depositions that I obtain. In my view, depositions are more important than trial. If well done and effective, a trial becomes unnecessary in many cases. When trial is necessary, the best testimony is often that obtained in deposition if it has been preserved effectively. The videotaped depositions in Perseke, particularly of the nurses, simply could not be duplicated in effectiveness. One of the focal nurses chewed gum throughout much of the deposition examination. In the first trial, I called some of the nurses in my case. As compared to the depositions, they were hardly recognizable. New hairdo's, make-up, and well sand-papered by Mr. Schwegman. Rather than call any of the nurses in our case in the second trial, we played their depositions. By the time the deposition replays were complete, reclaiming credibility was a formidable task.

Hung Jury and Change of Venue

The jury in the first trial was immediately dysfunctional by all available accounts. There was an immediate and unwavering refusal to discuss the merits by the majority voting to return a defense verdict. The lay midwife and her single ally held their ground. Judge Seibel declared a mistrial.

Following the trial in Ortonville, a letter supporting the defendants in this case was published in the local Ortonville newspaper. It was signed by 139 citizens, including some of the most prominent citizens of the Ortonville community. Judge Seibel now changed venue to Morris. He was right on the law and the facts.[2] The strategic goal of trying this case elsewhere was put to the test. The case was tried for the second time over a year later. Candidly, it took that long for the wounds of the first trial to heal. It was certainly tried differently. Less medical literature. An additional expert witness. Perhaps more effective cross-examination of defense experts. The jury returned a verdict for more than $9,500,000 in less than 3 hours.

Morris is a small town too—but not so small. The congenial crowd was in Morris too-but they were strangers to the jury, not neighbors. Morris didn't own the hospital nor did the defendants "own" the town.

More than the skill of the lawyers, more than the quality of the experts, more than the truth of the matter, venue matters.

[2] Plaintiffs' Memorandum of Law in Support of Renewed Motion for Change of Venue is attached.