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## 04/21/95 IEZHJA HARTSELL v. FORT SANDERS REGIONAL

April 21, 1995

**IEZHJA HARTSELL, B/N/F JERRY UPTON, PLAINTIFF-APPELLANT**

**v.**

**FORT SANDERS REGIONAL MEDICAL CENTER AND DR. RICHARD O. MANNING, DEFENDANTS-APPELLEES**

KNOX COUNTY. HON. DALE C. WORKMAN, JUDGE.

Houston M. Goddard, P.j. (e.s.), Concur: Herschel P. Franks, J., Don T. McMurray, J.

The opinion of the court was delivered by: Goddard

Goddard, P.J. (E.S.)

This action arises from a complaint filed April 7, 1989, by the Plaintiff, Iezhja Hartsell, a minor, by next friend Jerry Upton, against Fort Sanders Regional Medical Center, Dr. Richard O. Manning and certain nurses in attendance at the Plaintiff's birth.

The Plaintiff was born on Sept. 28, 1983, at Fort Sanders. Dr. Manning was the mother's obstetrician. The complaint, as amended, alleged alternate theories of relief for medical malpractice, battery, outrageous conduct, and a violation of T.C.A. 39-4-206 [now 39-15-206] (rights to medical treatment of infant prematurely born during abortion). The Circuit Court for Knox County dismissed the Plaintiff's causes of action for outrageous conduct and violation of T.C.A. 39-15-206. The Court later dismissed the Plaintiff's cause of action for battery. The issue of medical malpractice was subsequently tried on March 2, 1993. The Plaintiff took a voluntary non-suit as to the nurses on March 3, 1993. At the close of the Plaintiff's proof, the Trial Court directed a verdict for Fort Sanders. The jury returned a verdict for Dr. Manning. This appeal followed.

The Plaintiff alleges that the Trial Court improperly limited her causes of action to medical malpractice, that it improperly excluded as unduly prejudicial certain proof that was offered, and excluded proof as to the Hospital's standard of care. Further, the Plaintiff claims that the Judge erred by failing to instruct the jury on a physician's duty not to abandon his patients. Specifically, the Plaintiff submits the following issues on appeal:

I. Did the trial court err in limiting Plaintiff's causes of action to medical malpractice?

A. Did the trial court err in sua sponte dismissing Plaintiff's Complaint for Battery when she was harmfully and offensively touched without her consent, either express or implied in law or fact?

B. Did the trial court err in dismissing Plaintiff's Complaint for civil remedies under Tenn. Code Ann. § 39-4-206

(now 39-15-206), when the Tennessee Legislature had mandated a statutory minimum standard of care for live born infants?

C. Did the trial court err in dismissing Plaintiff's Complaint for Outrageous Conduct when Defendant left the newborn Plaintiff to die in a hospital apart from her mother, unsupported and gasping for breath from approximately 7:35 a.m. until 8:20 a.m.?

II. Even if the trial court did not err in limiting Plaintiff's causes of action to medical malpractice, did it err in its instructions to the jury and evidentiary rulings on medical malpractice?

A. Did the trial court err in failing to instruct the jury on a physician's duty not to abandon his patients?

B. Did the court err in excluding evidence that Defendants did nothing for the newborn Plaintiff until she "did not stop gasping at the end of five minutes" and further that Defendants stopped their resuscitation efforts when she "had a heart rate in excess of 100?"

C. Did the trial court err in prohibiting any impeachment of Defendant's witnesses with the Hospital's claim of having kept a 2 lb, 14 oz premature baby alive in 1924?

D. Did the trial court err in excluding proof of the Standard of Care as enunciated by Judicial Council of the American Medical Association when Defendant Doctor had admitted the accuracy of the A.M.A.'s ethical rulings and had contractually agreed to abide by them?

III. Did the trial court err in directing a verdict in favor of Defendant Hospital when there was material evidence in the record which would support a verdict for the Plaintiff?

Iezhja Hartsell was born prematurely September 28, 1983, weighing only 1 pound, 5-3/4 ounces at birth. Her mother was an admitted cocaine and marijuana user and, as such, a high-risk patient. Dr. Manning was not in the delivery room at the time of the delivery. The nurses who delivered the baby began pumping oxygen to her lungs through a tube in her throat. When Dr. Manning learned this he ordered the removal of her breathing tube (called "extubation"), saying the infant was too premature to be viable. Almost one hour later, the baby was still breathing. The baby's mother had received Demerol shortly before giving birth, which made it more difficult for the baby to breathe on her own after birth. However, no drugs were given to the baby to counteract the effect, and no efforts were made to assist the baby in breathing. After the baby had been extubated, she was weighed and tagged in preparation for her death. Approximately one hour after her birth, the baby was still breathing, and was transported to the Premature Nursery at Fort Sanders. A neonatologist from nearby East Tennessee Children's Hospital was called in. The baby survived, with only a loss of hearing and accompanying speech problem, allegedly due to the lack of oxygen during the first hour of her life. The Plaintiff is in most other respects a normal, healthy child today.

The three sets of issues raised by the Plaintiff will be dealt with in the order presented. The first deals with the Trial Court's limiting the Plaintiff's cause of action to medical malpractice.

The Plaintiff first contends that the Trial Court erred in dismissing the Plaintiff's cause of action for battery. \*fn1 The Plaintiff contends that the act of administering Demerol to the mother and consequently to the Plaintiff via her mother's bloodstream, and the ...

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