

BRIEYONNA KENNEDY
4417 Forest View Avenue
Baltimore, MD 21206

Plaintiff

v.

ROBERT ATLAS, M.D.
Mercy Medical Center
Mary Catherine Bunting Center
345 St. Paul Place
Baltimore, MD 21202

and

MICHELLE L. KUSH, M.D
Maryland Perinatal Associates, P.C.
7610 Carroll Ave, Ste. 470
Takoma Park, MD 20912

and

KRISTIN L. ATKINS, M.D.
University of MD OBGYN Associates, PA
120 South Penn Street
Baltimore, MD 21201

and

JEROME KOPELMAN, M.D.
University of MD OBGYN Associates, PA
120 South Penn Street
Baltimore, MD 21201

and

MERCY MEDICAL CENTER, INC.
301 St. Paul Place
Baltimore, MD 21202

* **IN THE CIRCUIT COURT**
* **FOR** 2017 JAN 25 PM 10: 07
* **BALTIMORE CITY CIVIL DIVISION**
* **MARYLAND**
* **CASE NO.**

24C17000350

Case # 24-C-17-000350	
CV File No	
RLF-New Case	\$80.00
APPEAR Fee	\$30.00
MISC	\$10.00
TOTAL	\$120.00

Receipt #20170000111
Cashier: REJ COBCKSE
01/26/17 10:36am

SERVE ON: RESIDENT AGENT
Linda H. Jones *

218 N. Charles St., Ste. 400
Baltimore, MD 21201 *

Defendant Health Care Providers *

* * * * *

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Brieyonna Kennedy, by her attorneys, Zev T. Gershon, Shannon A. Slater, and Gershon, Willoughby, Getz & Smith, LLC, hereby bring this action against Defendant Health Care Providers, Robert Atlas, M.D., Michelle Kush, M.D., Kristin Atkins, M.D., Jerome Kopelman, M.D. and Mercy Medical Center, Inc., and in support thereof states:

JURISDICTION AND VENUE

1. Damages are in the excess of the required jurisdictional amount.
2. Venue is appropriate in Baltimore City pursuant to Md. Code, Cts. & Jud. Pro. Art § 6-201, *et seq.* Defendant Health Care Providers Robert Atlas, M.D., Michelle Kush, M.D., Kristin Atkins, M.D. and Jerome Kopelman, M.D. carry on a regular business, are employed, or habitually engage in a vocation in Baltimore City, the alleged negligence occurred in Baltimore City, and the principal offices of Defendant Health Care Provider Mercy Medical Center, Inc. are located in Baltimore City.
3. The medical specialties involved are obstetrics and gynecology and maternal-fetal medicine.
4. Plaintiffs commenced this action by filing their Statement of Claim with the Health Care Alternative Dispute Resolution Office (HCADRO) on or about December 16, 2016. The matter was assigned case number 2016-605 before the HCADRO.

5. On or about December 16, 2016, Plaintiffs filed a Certificate of Merit and report of a qualified expert witness (collectively Exhibit A hereto) and an Election to Waive Arbitration (Exhibit B hereto), pursuant to Maryland law.

PARTIES

6. On November 8, 2014, Plaintiff Brieyonna Kennedy gave birth to a baby girl suffering from severe and permanent injuries as a direct and proximate result of the Defendant Health Care Providers' negligence alleged herein.

7. At all times pertinent hereto, Defendant Health Care Provider Robert Atlas, M.D. ("Dr. Atlas"), was a physician engaged in the practice of medicine holding himself out to the public as a specialist in maternal-fetal medicine and obstetrics and gynecology competent to provide care to patients such as Ms. Kennedy.

8. At all times pertinent hereto, Defendant Health Care Provider Michelle Kush, M.D. ("Dr. Kush"), was a physician engaged in the practice of medicine holding herself out to the public as a specialist in maternal-fetal medicine and obstetrics and gynecology competent to provide care to patients such as Ms. Kennedy.

9. At all times pertinent hereto, Defendant Health Care Provider Kristin Atkins, M.D. ("Dr. Atkins"), was a physician engaged in the practice of medicine holding herself out to the public as a specialist in maternal-fetal medicine and obstetrics and gynecology competent to provide care to patients such as Ms. Kennedy.

10. At all times pertinent hereto, Defendant Health Care Provider Jerome Kopelman, M.D. ("Dr. Kopelman"), was a physician engaged in the practice of medicine holding himself out to the public as a specialist in maternal-fetal medicine and obstetrics and gynecology competent to provide care to patients such as Ms. Kennedy.

11. At all times pertinent hereto, Defendant Health Care Provider Mercy Medical Center, Inc. ("Mercy"), held itself out to the public, including Ms. Kennedy, as a competent provider of medical care through its agents, servants and employees, including Defendant Health Care Providers, Dr. Atlas, Dr. Kush, Dr. Atkins, and Dr. Kopelman.

12. At all times pertinent hereto, Defendant Health Care Provider Robert Atlas, M.D. acted as the actual and/or apparent agent, servant and/or employee of Defendant Health Care Provider, Mercy Medical Center, Inc.

13. At all times pertinent hereto, Defendant Health Care Provider Michelle Kush, M.D. acted as the actual and/or apparent agent, servant and/or employee of Defendant Health Care Provider, Mercy Medical Center, Inc.

14. At all times pertinent hereto, Defendant Health Care Provider Kristin Atkins, M.D. acted as the actual and/or apparent agent, servant and/or employee of Defendant Health Care Provider, Mercy Medical Center, Inc.

15. At all times pertinent hereto, Defendant Health Care Provider Jerome Kopelman, M.D. acted as the actual and/or apparent agent, servant and/or employee of Defendant Health Care Provider, Mercy Medical Center, Inc.

FACTS RELEVANT TO ALL COUNTS

16. On or about July 11, 2014, twenty year old Brieyonna Kennedy presented to Defendant Mercy Medical Center in Baltimore, Maryland for a routine fetal anatomy screening ultrasound.

17. Defendant Dr. Atlas reviewed the sonogram and documented "suboptimal views" of heart and spine limited due to fetal position; follow up scan was recommended in 4 weeks. Dr. Atlas failed to report out that the HC (head circumference) was just on the curve and that

other head measurements were significantly below the curve and abnormal, including OFD (occipitofrontal diameter) and TCD (transverse cerebellar diameter).

18. The standard of care for a physician, such as Dr. Atlas, under the same or similar circumstances is to report out all abnormalities and provide this information to the pregnant mother and her Nurse Midwife (here Tarnisha Hemphill, C.N.M.), along with warning them of a potential diagnosis of microcephaly (abnormally small head), the serious possibility that the child would be born with brain damage/mental retardation, and the advisability of further testing.

19. A follow up ultrasound performed at Mercy on August 11, 2014 was reviewed by Dr. Kush. Dr. Kush's report documents adequate visualization of spine and heart and reported out a normal anatomic survey. However, she failed to report out that various head measurements were significantly below the curve and abnormal, including BPD (biparietal diameter) and OFD, and that the HC in particular was very low.

20. The standard of care for a physician, such as Dr. Kush, under the same or similar circumstances is to report out all abnormalities and provide this information to the pregnant mother and her Nurse Midwife (here Tarnisha Hemphill, C.N.M.), along with warning them of a potential diagnosis of microcephaly (abnormally small head), the serious possibility that the child would be born with brain damage/mental retardation, and the advisability of further testing.

21. An additional follow up ultrasound was performed at Mercy on September 12, 2014 and reviewed by Dr. Atlas. Similar to the August ultrasound, several head measurements fell significantly below the curve, which would have indicated to a reasonably prudent practitioner that additional testing was warranted to confirm fetal health and that a discussion with the patient was required.

22. The standard of care for a physician, such as Dr. Atlas, under the same or similar circumstances is to report out all abnormalities and provide this information to the pregnant mother and her Nurse Midwife (here Tarnisha Hemphill, C.N.M.), along with warning them of a potential diagnosis of microcephaly (abnormally small head), the serious possibility that the child would be born with brain damage/mental retardation, and the advisability of further testing.

23. An additional follow up ultrasound was performed at Mercy on October 3, 2014 and reviewed by Dr. Atkins. Once again, several head measurements fell significantly below the curve, which would have indicated to a reasonably prudent practitioner that additional testing was warranted to confirm fetal health and that a discussion with the patient was required.

24. The standard of care for a physician, such as Dr. Atkins, under the same or similar circumstances is to report out all abnormalities and provide this information to the pregnant mother and her Nurse Midwife (here Tarnisha Hemphill, C.N.M.), along with warning them of a potential diagnosis of microcephaly (abnormally small head), the serious possibility that the child would be born with brain damage/mental retardation, and the advisability of further testing.

25. An additional follow up ultrasound was performed at Mercy on October 23, 2014 and reviewed by Dr. Kopelman. As with each preceding ultrasound, several head measurements fell significantly below the curve, which would have indicated to a reasonably prudent practitioner that additional testing was warranted to confirm fetal health and that a discussion with the patient was required.

26. The standard of care for a physician, such as Dr. Kopelman, under the same or similar circumstances is to report out all abnormalities and provide this information to the pregnant mother and her Nurse Midwife (here Tarnisha Hemphill, C.N.M.), along with warning them of a potential diagnosis of microcephaly (abnormally small head), the serious possibility

that the child would be born with brain damage/mental retardation, and the advisability of further testing.

27. Thereafter, Ms. Kennedy continued with additional ultrasounds showing again that head circumference and other measurements were extremely low. When she was approximately 35 weeks, Ms. Kennedy presented to Mercy for induction of labor.

28. Ms. Kennedy had a spontaneous vaginal delivery on November 8, 2014. Baby Payton weighed 2160 grams (4 lbs 12 oz) at birth with Apgars of 9 at both 1 min and 5 min.

29. On physical exam, baby Payton had mild facial bruising at birth; facial jaundice was documented on November 9th and Payton was admitted to the NICU for observation; active diagnoses at that time were "preterm infant, sepsis suspect, physiologic jaundice." She also did not pass her hearing screening test with demonstrated bilateral abnormality.

30. On May 18, 2015, baby Payton had a brain MRI at University of Maryland Medical Center (UMMC) that demonstrated extensive polymicrogyria, and probable microcephaly and suggested correlation with head circumference measurement.

31. On June 8, 2015, at 7 months of age, baby Payton was evaluated at Mercy for possible cerebral palsy; she exhibited "poor neck control" and diagnosis of microcephaly was confirmed.

32. Thereafter, baby Payton was evaluated on numerous occasions due to seizures, and for developmental delays and was started on Keppra by Johns Hopkins Hospital (JHH) Children's Center.

33. Had Defendants, Robert Atlas, M.D., Michelle Kush, M.D., Kristin Atkins, M.D., Jerome Kopelman, M.D. and Mercy Medical Center, Inc. adhered to the standard of care and directly informed Ms. Kennedy and Nurse Midwife Hemphill of the information described

above, Ms. Kennedy would have had the opportunity to consider how and whether to proceed with her pregnancy.

34. Indeed, had Ms. Kennedy been properly informed of the test results, the potential diagnosis of microcephaly, the serious possibility that her child would be born with brain damage/mental retardation, and the advisability of further testing, as required by the applicable standards of care, Ms. Kennedy would have chosen to terminate the pregnancy.

35. In the alternative, had Ms. Kennedy elected to undergo further testing, then microcephaly, genetic issue(s), and/or polymicrogyria would have been timely diagnosed and Ms. Kennedy would have elected to terminate the pregnancy.

36. In the alternative, had Ms. Kennedy elected to undergo further testing and the testing been inconclusive, Ms. Kennedy would have elected to terminate the pregnancy.

COUNT I
MEDICAL MALPRACTICE
(Wrongful Birth)

37. Plaintiff incorporates by reference herein all of the facts and allegations contained in paragraphs one through thirty-six (36) as if fully set forth herein, and further alleges as follows:

38. Defendants, Robert Atlas, M.D., Michelle Kush, M.D., Kristin Atkins, M.D., Jerome Kopelman, M.D., and Mercy Medical Center (directly and through their actual and/or apparent agents, servants, and employees), owed Plaintiff the duty to exercise that degree of care and skill which like health care providers would have exercised in meeting the standard of care applicable to each under the same or similar circumstances.

39. Defendants Robert Atlas, M.D., Michelle Kush, M.D., Kristin Atkins, M.D., Jerome Kopelman, M.D., and Mercy Medical Center (directly and through their actual and/or apparent agents, servants, and employees), failed to act as reasonably competent like health care providers would have acted under the same or similar circumstances, breached their duties under the applicable standard of care, and were negligent in the following ways, among others:

- A. Failing to recognize the presence of abnormal fetal measurements on the prenatal sonogram(s);
- B. Failing to understand the significance abnormal fetal measurements on the prenatal sonogram(s);
- C. Failing to inform Ms. Kennedy and Nurse Midwife Hemphill regarding the presence of abnormal fetal measurements on the prenatal sonogram(s);
- D. Failing to inform Ms. Kennedy and Nurse Midwife Hemphill regarding the potential significance of the abnormal fetal measurements on the prenatal sonogram(s);
- E. Failing to recommend to Ms. Kennedy and Nurse Midwife Hemphill that appropriate follow up studies should be performed in light of the abnormal fetal measurements;
- F. Failing to order and/or perform appropriate follow up studies in light of the abnormal fetal measurements;
- G. Failing in other ways to address Ms. Kennedy's condition (and that of her fetus) at the time of the prenatal sonogram(s) in accordance with the applicable standard of care; and,
- H. Otherwise failing to adhere to the applicable standard of care.

40. Defendant Mercy Medical Center is vicariously liable for the acts and omissions of its actual and/or apparent agents, servants and employees, including Robert Atlas, M.D., Michelle Kush, M.D., Kristin Atkins, M.D., and Jerome Kopelman, M.D. who provided care to Ms. Kennedy and her fetus.

41. In addition, Defendant Mercy Medical Center (directly and through its actual and/or apparent agents, servants, and employees) failed to act as a reasonably competent like health care provider would have acted under the same or similar circumstances, breached its duties under the applicable standard of care and was negligent in the following ways, among others:

- A. Failing to adequately train, supervise, and instruct its agents, servants and employees in conducting prenatal sonograms;
- B. Failing to have and follow appropriate guidelines and policies to ensure proper interpretation of prenatal sonograms;
- C. Failing to have and follow appropriate guidelines and policies to ensure that important findings from prenatal sonograms, and the medical implications of those findings, are communicated promptly and correctly to the patient and her Nurse Midwife; and,
- D. Failing in other ways to manage Ms. Kennedy's condition and that of her fetus at the time of the prenatal sonogram(s) in accordance with the applicable standards of care.

42. Had Defendants, adhered to the applicable standards of care, then Ms. Kennedy, would have elected to terminate the pregnancy.

43. As a direct and proximate result of the negligence on the part of each Defendant, jointly and severally, as aforesaid, Payton Brown was born and suffered (and continues to suffer) from numerous serious medical conditions, including but not limited to:

- A. Cerebral Palsy, polymicrogyria, and other severe and permanent neurologic damage, including, but not limited to, severe developmental delay and impaired hearing;
- B. Microcephaly and other disfiguring facial injuries; and,
- C. Medical conditions, including, but not limited to, intractable seizures.

44. Payton Brown requires extraordinary care and will require such care for the rest of her life, all of which would have been avoided had Defendants met the applicable standard of care.

45. As a direct and proximate result of the negligence on the part of each Defendant, jointly and severally, Plaintiff, Brieyonna Kennedy, suffered and continues to suffer the following injuries:

- A. The cost of baby Payton's extraordinary care, past, present and future, including but not limited to, medical, nursing, hospital, pharmaceutical, rehabilitative, custodial and attendant care, as well as equipment and adaptive housing;
- B. The cost of ordinary care, support, maintenance, and welfare of baby Payton;
- C. Substantial pain, suffering, mental anguish, and inconvenience; and,
- D. Loss of income.

WHEREFORE, Plaintiff, Brieyonna Kennedy requests that she be compensated with a fair, adequate, and just award of damages against the Defendant Health Care Providers, jointly and severally, plus costs.

COUNT II
NEGLIGENCE/INFORMED CONSENT

46. Plaintiff incorporates by reference herein all of the facts and allegations contained in paragraphs one through forty-five (45) as if fully set forth herein, and further alleges as follows:

47. After each sonogram, the Defendant who interpreted the sonogram (Dr. Atlas, Dr. Kush, Dr. Atkins, Dr. Kopelman), had a duty to inform Ms. Kennedy of all significant information that would be material to the intelligent decision of a reasonably prudent patient in Ms. Kennedy's position in making an informed choice about further testing that could lead to a diagnosis and/or treatment, and an informed choice whether to continue or discontinue the pregnancy.

48. Such material information included that various head measurements were significantly below the curve and abnormal, the potential diagnosis of microcephaly, the serious possibility that the child would be born with brain damage/mental retardation, and the advisability of further testing.

49. Defendants, and each of them, breached their duty to Ms. Kennedy by failing to provide such material information to Ms. Kennedy.

50. Defendants failed to obtain informed consent from Ms. Kennedy.

51. Had a reasonable person in Ms. Kennedy's position been informed by any or all of the Defendants about the abnormal head measurements, the potential diagnosis of microcephaly and the serious possibility that her child would be born with brain damage/mental

retardation, she would have chosen to terminate the pregnancy, the same as Ms. Kennedy would have done.

52. In the alternative, had a reasonable person in Ms. Kennedy's position been properly informed by any or all of the Defendants about the abnormal head measurements, the potential diagnosis of microcephaly and the serious possibility that her child would be born with brain damage/mental retardation, she would have undergone further testing that would have led to the diagnosis of microcephaly, genetic issue(s), and/or polymicrogyria, and she would have elected to terminate the pregnancy, the same as Ms. Kennedy would have done.

53. In the alternative, had a reasonable person in Ms. Kennedy's position been properly informed by any or all of the Defendants of the abnormal head measurements referenced hereinabove, the potential diagnosis of microcephaly and the serious possibility that her child would be born with brain damage/mental retardation, she would have undergone further testing that would have been inconclusive and she would have elected to terminate the pregnancy, the same as Ms. Kennedy would have done.

54. As a direct and proximate result of the Defendants' aforesaid breach of duty, Ms. Kennedy was deprived of the opportunity to make an informed decision whether to undergo further testing and whether to continue or terminate her pregnancy; she was precluded from giving an informed consent regarding further testing and continuing her pregnancy to term.

55. As a further direct and proximate result of the Defendants' aforesaid breach of duty precluding Ms. Kennedy from giving an informed consent regarding further testing and continuing her pregnancy to term, Payton Brown was born and suffered (and continues to suffer) from numerous serious medical conditions, including but not limited to:

- A. Cerebral Palsy, polymicrogyria, and other severe and permanent neurologic damage, including, but not limited to, severe developmental delay and impaired hearing;
- B. Microcephaly and other disfiguring facial injuries; and,
- C. Medical conditions, including, but not limited to, intractable seizures.

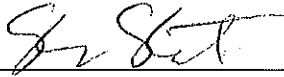
56. Payton Brown requires extraordinary care and will require such care for the rest of her life, all of which would have been avoided had Defendants met their duty.

57. As another direct and proximate result of the Defendants' aforesaid breach of duty precluding Ms. Kennedy from giving an informed consent regarding further testing and continuing her pregnancy to term, Plaintiff, Brieyonna Kennedy, suffered and continues to suffer the following injuries:

- A. The cost of baby Payton's extraordinary care, past, present and future, including but not limited to medical, nursing, hospital, pharmaceutical, rehabilitative, custodial and attendant care, as well as equipment and adaptive housing;
- B. The cost of ordinary care, support, maintenance, and welfare of baby Payton;
- C. Substantial pain, suffering, mental anguish, and inconvenience; and,
- D. Loss of income.

WHEREFORE, Plaintiff, Brieyonna Kennedy requests that she be compensated with a fair, adequate, and just award of damages against the Defendant Health Care Providers, jointly and severally, plus costs.

Respectfully submitted,



Zev T. Gershon, M.D., J.D.

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