

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

AMY MANNING, AS CONSERVATOR OF JONATHAN §
BOTELLO, A MINOR, LORENZA BOTELLO AND ALVARO §
BOTELLO, INDIVIDUALLY AND AS PARENTS OF §
JONATHAN BOTELLO §

PLAINTIFFS, §

vs. § NO. D-101-CV-2016-00742

PECOS VALLEY OF NEW MEXICO, LLC §

DEFENDANT. §

SECOND AMENDED ORIGINAL COMPLAINT TO RECOVER DAMAGES
DUE TO PROFESSIONAL MALPRACTICE

Plaintiffs state their claim for relief against Defendant as follows:

1. Plaintiff Amy Manning, as Conservator of Jonathan Botello, A Minor, is a resident of Santa Fe, Santa Fe County, New Mexico. Plaintiffs Lorenza Botello and Alvaro Botello are residents of Lea County, New Mexico.
2. Defendant Pecos Valley of New Mexico, LLC (hereinafter "Pecos Valley") is a foreign limited liability corporation transacting business in the state of New Mexico at all times relevant hereto. No service is necessary as Defendant has filed an Answer herein. Defendant is subject to the jurisdiction of this Court by virtue of transacting business within this state.
3. Venue is proper in Santa Fe County pursuant to §38-3-1, NMSA 1978, as Plaintiff Amy Manning resides in Santa Fe County. This Court has jurisdiction over the subject matter and the parties hereto.

4. At all times material hereto, Defendant Pecos Valley was not a qualified health care provider in the State of New Mexico pursuant to N.M. Stat. Ann. §§ 41-5-1 et. seq. (1978). Therefore, the provisions of N.M. Stat. Ann. §§ 41-5-1, et. seq., do not apply to any of the causes of action alleged herein.
5. In performing the negligent acts set forth in this pleading, Jerry D. McLaughlin, II, M.D. (hereinafter "McLaughlin") was the employee of Defendant Pecos Valley.
6. McLaughlin was, at all times relevant hereto, within the course and scope of his employment with Defendant Pecos Valley.
7. In performing the negligent acts set forth in this pleading, Marva Johnston, RN, CNP, (hereinafter "Johnston") was the employee of Defendant Pecos Valley.
8. Johnston was, at all times relevant hereto, within the course and scope of her employment with Defendant Pecos Valley.
9. Defendant Pecos Valley is responsible for the actions and omissions of its employees by virtue of the doctrine of the doctrine of *respondeat superior*.
10. Plaintiffs' claims against Defendant arise out of the needless and tragic injuries sustained by the minor Jonathan Botello due to Defendant and its employees's acts of negligence.

COUNT I
NEGLIGENCE

11. In August 2012, McLaughlin and Johnston maintained an OB/GYN practice.
12. On August 6, 2012, Plaintiff Lorenza Botello, then 36-years-old, presented to McLaughlin and Johnston's OB/GYN medical practice for her initial prenatal examination.
13. She was seen and examined by Johnston, a nurse practitioner.

14. The medical record from that visit states that Lorenza is diabetic and taking medication for that condition.
15. Johnston's *Impression* from that initial visit states: "Pregnancy, other high-risk pregnancy. Diabetes Mellitus."
16. Lorenza continued to return to the clinic as instructed for all of her prenatal care.
17. McLaughlin examined Lorenza on one of her prenatal visits and noted that her case was "significant for the diabetes and advanced maternal age."
18. Both diabetes and advanced maternal age as noted by Johnston and McLaughlin increase the risk of Fetal Macrosomia.
19. Fetal Macrosomia is a condition in which babies are born unusually large for their gestational age, typically greater than 4,500 grams at birth.
20. Fetal Macrosomia greatly increases the risk of complications during a vaginal delivery, particularly Shoulder Dystocia.
21. Shoulder Dystocia is obstructed labor where a baby's head is delivered through the vagina, but its shoulders get stuck inside the mother's body.
22. This creates an extreme risk for both mother and baby.
23. In order to properly manage the pregnancy of a patient at risk of having a macrosomic baby, the standard of care requires that a *series* of ultrasound examinations be performed over the course of the *entire* pregnancy to measure fetal growth.

24. For patients who have diabetes in pregnancy, the standard of care calls for repeat ultrasounds every four weeks after 20 weeks gestation to monitor fetal growth and to guard against potential fetal macrosomia.
25. Johnston ordered an ultrasound on Lorenza's initial visit solely to rule out an ectopic pregnancy (ectopic pregnancy occurs when the fertilized egg attaches itself in a place other than inside the uterus).
26. Johnston negligently failed to order any further ultrasound examinations to assess the growth of Lorenza's baby.
27. McLaughlin ordered what the record reflects as an "initial ultrasound" examination on October 24, 2012 which is read as "Normal."
28. Over the course of her pregnancy, Lorenza returns to McLaughlin and Johnston's OB/GYN practice for a total of 17 prenatal visits.
29. During those visits, measurements are taken of the fundal height.
30. Fundal height is a measure of the size of the uterus used to assess fetal growth and development during pregnancy.
31. Fundal height is measured from the top of the mother's uterus to the top of the mother's pubic symphysis.
32. Fundal height, when expressed in centimeters, roughly corresponds to gestational age of the baby in weeks.
33. A fundal height that measures longer than would be expected for the gestational age may be an indication of fetal macrosomia, particularly in a diabetic mother.

34. It was noted in Lorenza's medical record at 29 weeks, 33 weeks, 34 weeks, and 36 weeks that the fundal heights were significantly greater than expected.
35. This is a strong indication that Lorenza's baby is macrosomic.
36. For any patient who is pregnant with an excessive fundal height, ultrasound evaluation to rule out macrosomia is required by the standard of care.
37. McLaughlin and Johnston negligently fail to order *any* other ultrasound examinations to determine if Lorenza's baby is growing abnormally large.
38. Even though the standard of care dictated that an ultrasound examination should have been performed on Lorenza during her last month of pregnancy to check for fetal macrosomia, McLaughlin and Johnston negligently failed to do so.
39. On March 24, 2013, Lorenza is admitted into Lea Regional Medical Center under the orders of McLaughlin to give birth to her baby, Jonathan.
40. McLaughlin determined Jonathan's gestational age to be 38 weeks.
41. McLaughlin measured Lorenza's fundal height to be 42, a strong indication that Jonathan is a macrosomic baby.
42. The standard of care required that McLaughlin obtain an ultrasound to assess for macrosomia.
43. McLaughlin negligently failed to obtain this ultrasound.
44. McLaughlin examines Lorenza upon her arrival and estimates Jonathan's weight to be 8 pounds.

45. In truth, Jonathan actually weighs 11 pounds, 5 ounces (5150 grams), an extremely macrosomic baby.
46. In order to assure the safety of both Jonathan and Lorenza, McLaughlin should have advised Lorenza to undergo a C-section to avoid the risk of having Jonathan get stuck in the birth canal.
47. Instead, McLaughlin negligently advises Lorenza to proceed with a vaginal delivery.
48. During the delivery, a catastrophe occurred. Jonathan became tightly wedged in the birth canal, a condition known as "shoulder dystocia." This is a dire situation where the baby's shoulders are too large to pass through the birth canal.
49. McLaughlin reports that there was "severe shoulder dystocia."
50. Once Jonathan's head was delivered, his body remained trapped in the birth canal.
51. This is a critical time, as Jonathan could not breathe on his own while trapped.
52. Jonathan remained stuck in the birth canal for 10 minutes.
53. Jonathan was without oxygen for those 10 minutes.
54. When Jonathan was finally fully delivered, his condition was assessed by the use of APGAR scores.
55. An APGAR Score is a set of criteria used to evaluate the condition of a newborn and are measured at 1 minute and 5 minutes after birth for all infants, and at 5-minute intervals thereafter until 20 minutes for infants with a score less than 7.
56. Included in this APGAR score criteria are values such as pulse rate and respiratory effort.

57. When McLaughlin finally got Jonathan out of the birth canal, his APGAR scores were "0"... he had no pulse and he was not breathing.
58. Jonathan's APGAR scores were also "0" at the five minute mark...a dire finding indicating severe neurological injury.
59. When confronted with the shoulder dystocia, McLaughlin negligently applied a vacuum extraction device to Jonathan's head.
60. In the process of yanking Jonathan out of the birth canal, McLaughlin negligently ripped apart his brachial plexus, a network of nerves located near his right shoulder which innervate his right arm and hand. Additionally, McLaughlin's actions fractured the humerus bone in Jonathan's left arm.
61. These injuries to Jonathan are permanent. He basically has a limp right arm and hand, very similar to a victim of polio. He is left with severe neurologic injuries.
62. Jonathan has been diagnosed with hypoxic-ischemic brain injury and a brachial plexus palsy.
63. All of these injuries and Plaintiffs' damages would have been avoided had McLaughlin performed a C-section rather than proceeding with a vaginal birth.
64. McLaughlin and Johnston breached their duty to Lorenza and Jonathan, as described herein, and thereby performed their responsibilities in a negligent manner.
65. During the times that Lorenza and Jonathan were patients of McLaughlin and Johnston, McLaughlin and Johnston failed to possess and apply the knowledge and to use the skill

and care ordinarily used by reasonably well-qualified physicians and nurse practitioners in the same field under similar circumstances.

66. By virtue of the relationship between Lorenza and Jonathan and the Defendant Pecos Valley, Defendant Pecos Valley owed an independent, non-delegable duty to exercise reasonable care in assuring that the health care personnel selected by Defendant were competent to perform the tasks assigned to them, and to otherwise refrain from subjecting patients to harm and injury by health care personnel.
67. Defendant Pecos Valley negligently breached this duty.
68. By reason of the facts set forth herein, Defendant and its employees, who were acting within the course and scope of their employment, were negligent in failing to properly carry out their medical and nursing responsibilities to Lorenza and Jonathan in accordance with accepted standards of medical and nursing practice, thereby proximately causing injuries and damages to Plaintiffs.
69. Defendant and its employees were negligent in one or more of the following particulars and such negligence was a proximate cause of the Plaintiffs' damages sued for herein:
 - (a) the failure to recognize the signs of fetal macrosomia;
 - (b) the failure to conduct timely ultrasound examinations to reveal the development of fetal macrosomia;
 - (c) the failure to properly interpret the diagnostic examination that was done to adequately assess Jonathan's growth;
 - (d) the failure to properly and adequately measure, monitor, and assess Lorenza and Jonathan's conditions;
 - (e) the failure to seek the assistance of other physicians;
 - (f) the failure to properly supervise the treatment and care given to Lorenza and Jonathan;
 - (g) the failure to take appropriate clinical measures to safely deliver Jonathan in light of the macrosomia;

- (h) the failure to recommend a C-section rather than a vaginal delivery;
- (i) inappropriate use of vacuum extraction device during the vaginal birth; and
- (j) the failure to appreciate the risk factors for fetal macrosomia.

70. By reason of the facts set forth herein, Defendant and its employees were negligent in failing to properly carry out their responsibilities to Lorenza and Jonathan in accordance with accepted standards of medical practice, thereby proximately causing the injuries and damages to Plaintiffs.

71. As a proximate result of the negligence of Defendant and its employees, Jonathan Botello sustained serious and permanent bodily and neurological injuries; has undergone and, in the future, will continue to undergo considerable physical pain and mental suffering which has and will impair his ability to function normally; in the future, Jonathan will incur reasonable and necessary medical expenses; his future earning capacity has been permanently impaired; he has suffered physical and neurological impairment as a result of his injuries in the past and such physical and neurological impairment is, in all reasonable probability, permanent; he has suffered physical disfigurement as a result of his injuries in the past and such physical disfigurement is, in all reasonable probability, permanent; Plaintiffs Lorenza Botello and Alvaro Botello have been caused to incur reasonable and substantial medical expense for necessary treatment of Jonathan's injuries in the past and will, in all reasonable medical probability, incur future medical expenses for treatment of his injuries; they have suffered other expenses and will continue to suffer such other expenses in the future as a result of Jonathan's injuries. Plaintiffs are entitled to

recover from Defendant compensatory damages in such amounts as may be determined by the fact finders in this case to be just, reasonable, and fair.

WHEREFORE, Plaintiffs demand judgment against and the following relief from Defendant:

- a. The amount of Plaintiffs' actual damages resulting from Defendant and its employees's act and/or omissions as stated in this Complaint;
- b. Costs of this action;
- c. Pre-judgment and post-judgment interest; and
- d. Such other relief as the Court deems appropriate.

COUNT II

RESPONDEAT SUPERIOR AND VICARIOUS LIABILITY

72. The allegations contained in the preceding paragraphs are hereby incorporated by reference.
73. Defendant's employees, McLaughlin and Johnston, were at all times relevant hereto within the course and scope of their respective agency, servitude, and/or employment with Defendant Pecos Valley.
74. At all times material hereto, McLaughlin and Johnston were acting as employees of, and with the actual or apparent authority of, Defendant Pecos Valley, which is therefore liable for their actions, inactions, and negligence resulting in the injuries and damages to Plaintiffs, as described herein.
75. Defendant Pecos Valley ratified the conduct of McLaughlin and Johnston.
76. As a proximate result of the negligence of Defendant and its employees, Jonathan Botello sustained serious and permanent bodily and neurological injuries; has undergone and, in

the future, will continue to undergo considerable physical pain and mental suffering which has and will impair his ability to function normally; in the future, Jonathan will incur reasonable and necessary medical expenses; his future earning capacity has been permanently impaired; he has suffered physical and neurological impairment as a result of his injuries in the past and such physical and neurological impairment is, in all reasonable probability, permanent; he has suffered physical disfigurement as a result of his injuries in the past and such physical disfigurement is, in all reasonable probability, permanent; Plaintiffs Lorenza Botello and Alvaro Botello have been caused to incur reasonable and substantial medical expense for necessary treatment of Jonathan's injuries in the past and will, in all reasonable medical probability, incur future medical expenses for treatment of his injuries; they have suffered other expenses and will continue to suffer such other expenses in the future as a result of Jonathan's injuries. Plaintiffs are entitled to recover from Defendant compensatory damages in such amounts as may be determined by the fact finders in this case to be just, reasonable, and fair.

WHEREFORE, Plaintiffs demand judgment against and the following relief from Defendant:

- a. The amount of Plaintiffs' actual damages resulting from Defendant and its employees's acts and omissions as stated in this Complaint;
- b. Costs of this action;
- c. Pre-judgment and post-judgment interest; and
- d. Such other relief as the Court deems appropriate.

COUNT III
PUNITIVE DAMAGES DUE TO GROSS NEGLIGENCE,
WANTON, WILLFUL, AND/OR RECKLESS CONDUCT

77. Plaintiffs incorporate by reference the preceding allegations in paragraphs of this complaint.
78. Defendant and its employees were guilty of acts or omissions which involved an extreme degree of risk but, nevertheless Defendant and its employees proceeded with conscious indifference to the rights, safety and welfare of Lorenza and Jonathan Botello. Such recklessness, wanton, willful conduct, and/or gross negligence showed a conscious disregard for the safety of Lorenza and Jonathan Botello and was a proximate cause of the injuries and damages sued for herein.
79. As a proximate result of the recklessness and/or gross negligence and/or extreme wanton and willful conduct of Defendant and its employees as aforesaid, Plaintiffs sustained the injuries and damages set out above.
80. The acts and omissions for which Defendant and its employees are responsible constitute recklessness, gross negligence, willful and wanton conduct and were with wanton disregard of the rights and safety of Lorenza and Jonathan Botello, entitling Plaintiffs to punitive damages.
81. As a proximate result of the negligence of Defendant and its employees, Jonathan Botello sustained serious and permanent bodily and neurological injuries; has undergone and, in the future, will continue to undergo considerable physical pain and mental suffering which has and will impair his ability to function normally; in the future, Jonathan will incur reasonable and necessary medical expenses; his future earning capacity has been

permanently impaired; he has suffered physical and neurological impairment as a result of his injuries in the past and such physical and neurological impairment is, in all reasonable probability, permanent; he has suffered physical disfigurement as a result of his injuries in the past and such physical disfigurement is, in all reasonable probability, permanent; Plaintiffs Lorenza Botello and Alvaro Botello have been caused to incur reasonable and substantial medical expense for necessary treatment of Jonathan's injuries in the past and will, in all reasonable medical probability, incur future medical expenses for treatment of his injuries; they have suffered other expenses and will continue to suffer such other expenses in the future as a result of Jonathan's injuries.

WHEREFORE, Plaintiffs demand judgment against and the following relief from Defendant:

- a. the amount of Plaintiffs' actual damages resulting from Defendant and its employees's negligence as stated in this complaint;
- b. exemplary and punitive damages in an amount to be assessed against Defendant by the jury in order to deter Defendant and others from such wrongful conduct in the future and punish Defendant for its behavior resulting in the the injuries and damages set forth herein;
- c. pre-judgment and post-judgment interest;
- d. such other relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this pleading was sent to all counsel of record via email delivery this 2nd day of May, 2017.

By: /s/ B. Kent Buckingham
B. Kent Buckingham