

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

I.P., A MINOR, BY AND THROUGH
HER GARDIAN AD LITEM, FACUNDO
PALACIO DIEZ; MICAELA
PALACIO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

No. 2:13-cv-01012-JAM-CKD

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff I.P., a minor, and her mother, Micaela Palacio (collectively, "Plaintiffs") originally sued the hospital where I.P. was born for negligently failing to perform a timely C-section, causing I.P. brain damage that rendered her severely and permanently disabled. That case proceeded in Lassen County Superior Court. Upon learning that the United States employed the two doctors involved in the delivery - Drs. Paul Davainis and

1 Paul Holmes - Plaintiffs brought this action against the United
2 States ("Defendant") under the Federal Tort Claims Act ("FTCA"),
3 28 U.S.C. § 2671 et seq. This Court is vested with jurisdiction
4 pursuant to 28 U.S.C. § 1346(b).

5 Plaintiffs' federal complaint alleged three causes of
6 action: negligence as to I.P., and negligence¹ as well as
7 negligent infliction of emotional distress as to Micaela Palacio.
8 Facundo Palacio Diaz, I.P.'s father, also asserted a claim
9 against the hospital in the Lassen County case, but appears in
10 this FTCA action only as I.P.'s guardian ad litem. In July 2015,
11 this Court confirmed a settlement between the hospital, I.P. and
12 her father. In the federal action, the parties proceeded to
13 trial.

14 This Court conducted a nine-day bench trial beginning
15 September 24, 2015. The parties offered testimony from
16 percipient witness including I.P.'s parents, both doctors, and a
17 nurse, as well as expert testimony on each doctors' negligence,
18 causation, and several damages issues. The Court also considered
19 the parties' stipulations reached prior to and during trial
20 (Docs. ##98, 131) as to certain causation and damages issues.

21 After the close of Plaintiffs' case, the government moved
22 for partial judgment as to the issue of Dr. Holmes's negligence.
23 The Court agreed with the findings of fact and conclusions of law
24 argued and submitted by the government (Doc. #153), and granted
25 the motion pursuant to Federal Rule of Civil Procedure 52(a)(1)

26
27 ¹ As confirmed at trial, Mrs. Palacio abandoned her negligence
28 claim and asserted only a claim for negligent infliction of
emotional distress.

1 and (c). Because the Court concluded that Dr. Holmes was not
2 negligent and his actions did not result in injury to Plaintiffs,
3 all issues involving Dr. Holmes are resolved and this Order does
4 not address them.

5 As to Dr. Davainis, the Court's findings of fact and
6 conclusions of law pursuant to Rule 52 follow.

7
8 II. FINDINGS OF FACT AS TO LIABILITY

9 1. Banner Health is a nonprofit corporation that owns
10 BLMC, a 25-bed hospital that provides medical care in Lassen
11 County, California.

12 2. Micaela Palacio presented to BLMC around 11:00 PM on
13 the evening of April 29, 2012, in active labor. She was at 39
14 weeks of gestation and had delivered two prior children vaginally
15 without complications.

16 3. Facundo Palacio Diaz is I.P.'s father and Mrs.
17 Palacio's husband.

18 4. Mrs. Palacio and her husband were both 34 years old as
19 of April 2012.

20 5. In April 2012, Dr. Paul Davainis and Dr. Paul Holmes
21 were Northeastern Rural Health Clinic employees.

22 6. Northeastern Rural Health Clinic is located in
23 Susanville, California and is a Federally Qualified Health
24 Center.

25 7. Dr. Davainis and Dr. Holmes are doctors with a
26 specialty in Family Medicine who were in April 2012 deemed
27 federal employees pursuant to the Federally Supported Health
28 Centers Assistance Act.

1 8. In April 2012, Kelly DelCarlo was a registered nurse
2 and a Banner employee.

3 9. Ms. DelCarlo and Ms. Ginger Leeth were working at BLMC
4 the evening of April 29, 2012 and provided nursing care to Mrs.
5 Palacio.

6 10. Dr. Davainis was on call for Obstetrics during the
7 evening of April 29, 2012. Dr. Davainis was at his home when he
8 was called to come in by the nursing staff around 2:00 AM on the
9 morning of April 30, 2012.

10 11. At that time, the nursing staff informed him that Mrs.
11 Palacio had dilated to 9 cm and that her membranes had
12 spontaneously ruptured. The nursing notes state that Mrs.
13 Palacio remained at 9 cm dilation from 2:00 AM until the C-
14 section.

15 12. Dr. Davainis had not provided Mrs. Palacio's prenatal
16 care, and the early morning of April 30 was the first time the
17 two had met. He examined her medical records that morning, but
18 he was not generally familiar with her or her medical history.

19 13. The nurses and Dr. Davainis monitored I.P.'s wellbeing
20 prior to birth by using an external electronic fetal heart rate
21 monitor. The heart rate was measured on a tracing strip between
22 approximately 11:06 PM and 5:07 AM. Dr. Davainis looked back at
23 the entire strip when he arrived, and continued to examine it
24 throughout Mrs. Palacio's labor.

25 14. The first stage of labor involves dilation of the
26 cervix. Once the cervix is fully dilated, labor moves to the
27 second stage, in which contractions push the baby down the birth
28 canal.

1 15. At 2:15 AM when Dr. Davainis arrived, it was expected
2 that Mrs. Palacio would fully dilate and deliver within the hour,
3 because she had dilated rapidly since arriving at the hospital,
4 she had a history of two prior vaginal deliveries without
5 complication, and in general, the last part of dilation is the
6 most rapid.

7 16. When Dr. Davainis examined Mrs. Palacio around 2:15 AM,
8 he determined that she had dilated to between 8 and 9 cm and that
9 the cervix "seemed loose."

10 17. Around 2:15 or 2:30 AM, Mrs. Palacio had an urge to
11 push, so Dr. Davainis turned down the epidural and directed her
12 to attempt pushing. They then abandoned the attempt because it
13 caused swelling of the cervix. Dr. Davainis turned the epidural
14 up and the swelling subsided.

15 18. Over the next hour to hour and a half, Dr. Davainis
16 observed that Mrs. Palacio went from "between 8 and 9 cm" to 9 cm
17 dilated. The nurses administered oxygen, IV fluids, and changed
18 her position.

19 19. At 4:00 AM, Mrs. Palacio had a "rim of cervix." The
20 cervix did not dilate any further. Mrs. Palacio never reached
21 the second stage of labor, because her cervix never fully
22 dilated.

23 20. Between 4:00 and 5:00 AM, Dr. Davainis had Mrs. Palacio
24 resume pushing as he attempted to reduce the cervix.

25 21. Dr. Davainis felt the baby's head slightly descending
26 at times between 4:00 and 5:00 AM. He considered that the baby
27 might be in occiput posterior position, which could slow labor,
28 or that there was cephalo-pelvic disproportion, which could

1 prevent vaginal delivery.

2 22. At 5:00 AM, Dr. Davainis called for a C-section. He
3 described his reasons in a preoperative note recorded at 5:01 AM,
4 indicating that the fetal heart rate tracing was worsening and he
5 felt that "a vaginal delivery [was] too far off for this baby and
6 that she will have a difficult time tolerating any prolonged
7 pushing." He also was "afraid [cephalo-pelvic disproportion
8 would] be proven."

9 23. Dr. Holmes was at his home when he was called at 5:00
10 AM on April 30, 2012, to assist with the delivery of I.P.

11 24. After Dr. Davainis called for a C-section, the nurses
12 prepared Mrs. Palacio for surgery.

13 25. In preparing her for surgery, they disconnected the
14 fetal heart rate monitor at approximately 5:07 AM.

15 26. I.P. experienced a hypoxic ischemic injury of the acute
16 profound pattern due to near-total cessation of oxygenated blood
17 through the umbilical cord sometime between approximately 5:08
18 and 5:13 AM.

19 27. This injury led to neonatal encephalopathy, which
20 ultimately resulted in spastic quadriplegic cerebral palsy,
21 cortical visual impairment, and severe global development delay.

22 28. The nurses reconnected Mrs. Palacio to the fetal heart
23 monitor once inside the operating room, around 5:13 AM. The
24 nurses were unable to find a fetal heart rate. Dr. Davainis
25 observed a heart rate, but a very slow one.

26 29. Dr. Davainis immediately thereafter performed a C-
27 section on Mrs. Palacio, assisted by Dr. Holmes.

28 30. I.P.'s time of birth was sometime between 5:24 and 5:28

1 AM. I.P. had APGAR scores of 0, 2, and 3 at 1, 5, and 10 minutes
2 of life, respectively.

3 31. After I.P. was delivered, Dr. Holmes resuscitated her
4 and was assisted by hospital staff in the resuscitation.

5 32. I.P. was later transferred to U.C. Davis Medical Center
6 NICU.

7 33. I.P. was cared for at U.C. Davis Medical Center from
8 April 30, 2012 to June 5, 2012.

9 Further findings of fact are described and explained below.

10
11 III. OPINION AS TO LIABILITY

12 A. Legal Standard

13 The FTCA makes the United States liable for the negligent
14 actions of its employees. 28 U.S.C. § 1346(b)(1). Because the
15 allegedly negligent medical care in this case was provided in
16 this state, California law applies. Id.; Hernandez ex rel.
17 Telles-Hernandez v. United States, 665 F. Supp. 2d 1064, 1076
18 (N.D. Cal. 2009) (citing Richards v. United States, 369 U.S. 1,
19 11-12 (1962)).

20 To prove negligence, Plaintiffs must demonstrate by a
21 preponderance of the evidence that (1) Dr. Davainis had a duty
22 to use such skill, prudence, and diligence as other members of
23 his profession commonly possess and exercise (the standard of
24 care);² (2) he breached that duty; and (3) the breach was the

25 ² The evidence in this case demonstrated agreement between the
26 parties that the standard of care applicable in this case was
27 that of an obstetrician (not a family practice physician) and
28 that this standard of care is the reasonable degree of skill,
knowledge and care ordinarily possessed and exercised by
obstetricians under similar circumstances.

1 proximate cause of (4) Plaintiffs' injuries. Hanson v. Grode,
2 76 Cal.App.4th 601, 606 (1999) (citing Budd v. Nixen, 6 Cal.3d
3 195, 200 (1971) & Gami v. Mullikin Med. Center, 18 Cal.App.4th
4 870, 877 (1993)); Mgmt. Activities, Inc. v. United States, 21 F.
5 Supp. 2d 1157, 1174 (C.D. Cal. 1998).

6 B. Analysis

7 1. Negligence of Dr. Davainis

8 a. Duty and Breach of Standard of Care

9 Dr. Davainis breached a duty owed to his patients if he
10 failed to "exercise that reasonable degree of skill, knowledge
11 and care ordinarily possessed and exercised by members of [his]
12 profession under similar circumstances." Alef v. Alta Bates
13 Hosp., 5 Cal.App.4th 208, 215 (1992); see Burgess v. Superior
14 Court, 2 Cal.4th 1064, 1069 (1992) (holding that negligence as to
15 delivery of a fetus also breaches a duty owed to the mother).
16 The central issue in dispute is whether Dr. Davainis complied
17 with the standard of care by calling for a C-section at 5:00 AM,
18 or whether that standard required him to call for a C-section
19 earlier.

20 In general, the evidence showed that the standard of care
21 indicates a C-section in the face of arrest of labor and fetal
22 intolerance to labor. Both Plaintiffs' and Defendant's experts
23 (Drs. Frank Manning and Maurice Druzin, respectively) opined that
24 there were medical indications for a C-section as early at 3:00
25 AM and that those indications persisted throughout Mrs. Palacio's
26 labor until delivery.

27 The government argues that at best the evidence shows that a
28 C-section before 5:00 AM was permissible, not required. The

1 government further contends that the standard of care did not
2 require a C-section before 5:00 AM, because labor had progressed
3 up to that point and the baby was tolerating labor sufficiently.

4 Contrary to the government's representations, labor in this
5 case was arrested much earlier than 5:00 AM, and under the
6 circumstances, the standard of care required Dr. Davainis to call
7 for a C-section around 4:00 AM. Only one witness, Dr. Druzin,
8 defined arrest of labor. Dr. Druzin testified that arrest of
9 labor occurs where the cervix dilates at less than 1.5 cm per
10 hour. According Dr. Davainis's own testimony, Mrs. Palacio's
11 cervix dilated (at most) 1.5 cm over two hours: between 2:00 and
12 4:00 AM. The Court therefore concludes, as Plaintiff's expert
13 Dr. Manning did, that the progress reported by Dr. Davainis was
14 not appreciable and the standard of care required Dr. Davainis to
15 recognize that labor was arrested by at least 4:00 AM.

16 Once labor was arrested, it was unreasonable for Dr.
17 Davainis to have Mrs. Palacio push for an hour in the presence of
18 worsening fetal wellbeing. The standard of care may have allowed
19 him to make one last attempt to vaginally deliver this fetus at
20 4:00 AM, but the evidence showed that he fell below the standard
21 of care by waiting until 5:00 AM to intervene.

22 The Court reaches this conclusion after a thorough and
23 careful consideration of the trial record, as well as an
24 assessment of and conclusions about the credibility and relative
25 persuasiveness of witnesses and exhibits.

26 The record here reveals numerous divergent and contradictory
27 opinions regarding interpretation of the fetal heart rate tracing
28 and what the standard of care required Dr. Davainis to do in

1 response. In fact, almost every individual who analyzed this
2 strip had a different interpretation - from the nurses present
3 during labor to Dr. Davainis to the testifying experts. The
4 experts even appeared to have had a difficult time interpreting
5 the strip consistently over time, evidenced by the divergence in
6 their descriptions of the strip during depositions and at trial.

7 The Court finds it unnecessary and impractical to choose a
8 particular interpretation from this mess of opinions. The range
9 of opinions appears to be a normal consequence of asking multiple
10 individuals to interpret a strip minute-by-minute; indeed, Dr.
11 Ivonne Wu testified that interpretation of fetal heart rate
12 tracings can be subjective, that interrater reliability is poor,
13 and that the same person may view a strip differently at
14 different times. These reliability issues appear to have been
15 borne out in this case.

16 But the fact that fetal heart rate tracings are subjective
17 and unreliable does not make them worthless. As each witness
18 testified, the standard of care required using and interpreting
19 this tool. And the witnesses generally agreed that a reasonable
20 interpretation of the strip included at least the following:

21 (1) the strip showed a Category I tracing from its inception
22 until about 1:30 AM; (2) the strip then depicted a Category II
23 tracing from 1:30 AM until at least 4:45 AM; (3) Category II
24 meant, among other things, that the tracing was no longer in
25 Category I; (4) Category I would have been a good indicator that
26 the baby was doing well, and by 1:30 AM, Dr. Davainis no longer
27 had that reassurance; (5) the fetus was increasingly stressed by
28 the labor (evidenced by some combination of the type, frequency,

1 and length of decelerations and the decrease in variability); and
2 (6) at some point - a point that no one could predict - this
3 increasingly stressed fetus would be unable to compensate and
4 would metaphorically "fall off the cliff."

5 So the situation faced by Dr. Davainis raises the following
6 questions: by 4:00 AM, why wait? Why wait when labor has been
7 arrested for over an hour without apparent explanation and no
8 appreciable progress? Why wait when the previous pushing attempt
9 produced swelling of the cervix? Why wait with a patient whose
10 medical history is unfamiliar and when a language barrier impedes
11 communication? Why wait for the fetus to get closer to the cliff
12 - especially when it is impossible to determine where the cliff
13 is? Why wait when at every time between 3:15 and 5:00 AM, there
14 were clear medical indications for a C-section?

15 Dr. Manning³ offered credible and reasoned answers to these

16 ³ The government attempts to cast Dr. Manning's trial testimony
17 as a devious scheme to manufacture causation and as evidence that
18 he is not qualified to offer a medical opinion. The Court
19 disagrees. The Court found his testimony at trial to be
20 credible, forthcoming, and professional. As a Professor of
21 Obstetrics with over forty years of experience, Dr. Manning is
22 qualified to opine on the issues in this case. Also, where the
23 government contends that Manning changed his answers between
24 deposition and trial, the Court finds no important discrepancies.
25 For example, the government pointed out that Manning testified at
26 his deposition that the strip became Category III at 4:50 AM,
27 whereas at trial he stated it was 4:45 AM. As discussed above,
28 the Court finds it unnecessary and impractical to decide what
exactly the strip showed at each minute or when exactly the strip
moved from Category II to Category III. The government also
contends that Dr. Manning changed his testimony at trial to
indicate that a C-section was required by 3:15 AM versus 4:50 AM
(which he supposedly testified to at deposition). This
characterization of his testimony and his statements at
deposition is inaccurate; the thrust of his opinion has always
remained the same: worsening fetal wellbeing required Dr.
Davainis to call for a C-section when it became clear that labor

1 questions. He opined that the standard of care required Dr.
2 Davainis to recognize the warning signs of a worsening fetal
3 condition and intervene in the face of minimal progress. Dr.
4 Davainis had many opportunities to intervene starting around 3:15
5 AM, and he took an unreasonable risk by waiting in the presence
6 of all the factors discussed above.

7 Dr. Manning testified that in certain circumstances, it
8 would in fact be reasonable to attempt a course of pushing even
9 in the presence of worsening fetal distress. Those circumstances
10 include where the patient is experiencing rapid progress in
11 labor, such that she is likely to deliver before a C-section
12 could be completed. But in this case, Mrs. Palacio's labor was
13 not progressing rapidly. To the contrary, there had been no
14 appreciable progress for over an hour - and the fetal heart rate
15 was worsening.

16 Dr. Druzin, in contrast, was unable to offer a reasoned
17 answer to the questions posed above. When pressed on the subject
18 of how long it was permissible to wait under the circumstances,
19 Dr. Druzin stated that there is no standard of care governing how
20 long Dr. Davainis should have waited. Simply put, "at some point
21 you've got to call it," and Davainis called it.

22 The Court cannot accept that no standard of care governed
23 Dr. Davainis's decision. "No standard" cannot possibly be the
24 standard applied in this legal context.

25 ///

26
27 was arrested. This reliable and credible opinion is what the
28 Court has considered herein in forming its findings and
conclusions.

1 ///

2 ///

3 ///

4 The Court is also skeptical of Dr. Druzin's testimony⁴ that
5 waiting for a vaginal delivery was reasonable because Dr.
6 Davainis was "hoping for" and "expecting" such a delivery.
7 Although the Court acknowledges a role for medical judgment in
8 these situations, Dr. Druzin's analysis would make the standard
9 of care entirely subjective. That is, under Dr. Druzin's theory,
10 a doctor would always meet the standard of care so long as he
11 recounted a hope of vaginal delivery or stated that he
12 subjectively believed that there was progress, no matter how
13 slight.

14 The Court also rejects this testimony even assuming that Dr.
15 Davainis's expectation of a successful vaginal delivery between
16 4:00 and 5:00 AM was most likely objectively accurate. The Court

17
18 ⁴ A further reason for the Court's partial skepticism toward Dr.
19 Druzin's testimony is that he did not appear unbiased. He
20 testified that he does 99.9% of his medical-legal work for
21 defendants, indicating that his opinion may be colored by the
22 financial benefit of providing defense-friendly testimony in
23 these kinds of cases. He also revealed himself to be more an
24 advocate for the defense than a neutral observer. For instance,
25 he became argumentative with Plaintiffs' attorney and the Court
26 when pressed about the divisive issues in this case, and made at
27 least one sarcastic comment impugning plaintiff-side work in
28 medical malpractice cases. The Court does not however wholly
disregard this expert's testimony (since he is very well
qualified in this area), and relies on it in part as discussed
throughout this opinion. The Court has discounted his opinion in
areas where he became argumentative and appeared to adapt his
answers to counter Plaintiffs' theories. For example, the Court
did not find credible his testimony that by "stalled" labor, he
meant "slowly progressing" labor in response to questioning about
whether arrest of labor justified a C-section in this case.

1 accepts the fact (agreed to by all witnesses) that it is possible
2 for a patient similar to Mrs. Palacio to push past a rim of
3 cervix and deliver vaginally. The Court also accepts the fact
4 that, in general, a fetus can withstand a significant amount of
5 stress and that it is possible - or even very likely - that a
6 stressed fetus showing a Category II tracing for long periods
7 will not develop cerebral palsy. But these objective
8 possibilities do not absolve the government of liability.
9 Indeed, an unlikely event is not always unforeseeable. And here,
10 the harm was foreseeable at least by 4:00 AM, because of the
11 worrying and worsening signs of fetal distress and the arrest of
12 labor for over an hour.

13 Dr. Davainis took an unreasonable risk by attempting pushing
14 for a full hour rather than calling for a C-section around 4:00
15 AM. The Court agrees with Dr. Manning that Dr. Davainis's choice
16 to take this risk under the circumstances fell below the required
17 standard of care. Dr. Davainis overlooked or discounted the
18 warning signs at 4:00 AM (i.e., unexplained arrest of labor for
19 over an hour and a progressively worsening fetal heart rate) that
20 the standard of care required him to consider and act upon. He
21 hoped and expected that these warning signs would not spell
22 disaster for I.P. But they did.

23 Dr. Druzin also testified that waiting for a vaginal
24 delivery during that hour was reasonable because Dr. Davainis
25 observed progress in the labor (i.e., the head moving down
26 slightly with pushing) and because the variability on the fetal
27 heart monitor tracing showed that the baby was tolerating labor.

28 The Court finds Dr. Druzin's testimony less persuasive than

1 that of Dr. Manning. The statement that labor was still
2 progressing based on the baby's head moving slightly contradicts
3 Dr. Druzin's other testimony defining arrest of labor as dilation
4 of less than 1.5 cm per hour. No witness here could reasonably
5 dispute that the first stage of labor was arrested, since by all
6 accounts the cervix dilated much slower than 1.5 cm per hour. A
7 finding of arrest of labor is also bolstered by Dr. Davainis's
8 observation prior to 4:00 AM of swelling of the cervix upon
9 pushing. The Court agrees with Dr. Manning that labor was
10 arrested and the reported progress was not appreciable.

11 Moreover, the Court was not convinced by Dr. Druzin's
12 testimony on direct examination that the presence of at least
13 some variability meant that the baby was fine and there was no
14 need to imminently intervene. The weight of the evidence, as
15 well as Druzin's subsequent testimony on cross examination,
16 militate to the contrary. In particular, every witness - Dr.
17 Druzin included - opined that the fetal heart rate was worsening.
18 No one thought the tracing would improve; everyone thought it
19 would continue to deteriorate. Dr. Davainis himself noted the
20 increasingly worrisome signs in his notes that morning. The
21 warning signs were there and Dr. Davainis should have heeded
22 them, particularly when the danger of veering off course if the
23 signs are ignored or misread, is so significant.

24 The Court does not reach its conclusions herein lightly and
25 recognizes the possibility that its decision today could subject
26 physicians to criticism and possible liability in cases involving
27 the subjective interpretation of fetal heart rate tracings. The
28 standard of care indeed allows for a range of reasonable

1 interpretations and differences in close calls of judgment, and a
2 court should not venture to second guess a doctor whose decisions
3 fall within these bounds. But under the specific circumstances
4 of this case, the Court concludes that the evidence and testimony
5 presented at trial was sufficient to establish that Dr.
6 Davainis's decision to wait until 5:00 AM to call for a C-section
7 breached the standard of care. The weight of the evidence
8 favored Plaintiffs' persuasive explanation of this standard and
9 how it was breached.

10 For these reasons, the Court finds that the standard of care
11 required Dr. Davainis to be more conservative and to order a C-
12 section around 4:00 AM or shortly thereafter.

13 b. Causation

14 As to causation, the parties have stipulated that

15 1. Neuroradiologists analyzing the May 1, 2012
16 ultrasound and the May 7, 2012 MRI of I.P.'s brain
17 concluded that those images are consistent with I.P.
having experienced hypoxic ischemic injury of the
acute profound pattern.

18 2. A hypoxic ischemic injury of the acute profound
19 pattern results from a near-total cessation of
20 oxygenated blood reaching the fetus for a short amount
of time, typically 10 to 20 minutes.

21 3. These imaging results are consistent with I.P.
22 having experienced a sentinel event such as a cord
compression occurring within the last 15 to 20 minutes
prior to birth.

23 Despite this stipulation, the government offers two theories in
24 an attempt to defeat causation. Neither is persuasive.

25 First, the government argues that even if Dr. Davainis did
26 not meet the standard of care, Plaintiffs cannot show that
27 compliance with the standard would have prevented I.P.'s
28 injuries. The reasoning is that even if Dr. Davainis had called

1 for a C-section at 4:50 AM and properly performed it within
2 thirty minutes, I.P. still would have been injured. But as
3 discussed above, the Court finds that the standard of care
4 required Dr. Davainis to call for a C-section around 4:00 AM.
5 Had he done so, I.P. would have been delivered well before 5:08
6 AM, which is the earliest I.P.'s injuries are estimated to have
7 occurred. The Court therefore rejects this theory.

8 The government has also argued that the word "sentinel" in
9 the third stipulated fact above indicates that the injury was not
10 foreseeable, which would therefore defeat a showing of proximate
11 cause. The argument relies on Dr. Druzin's testimony that
12 "sentinel" means an "unanticipated" event that is "not related to
13 the natural history of the disease." The Court is not persuaded
14 by Dr. Druzin's testimony, because the evidence at trial
15 established that cord compression is in fact related to labor and
16 childbirth, and occurs to varying degrees in every labor.⁵
17 Moreover, the evidence showed that the standard of care required
18 Dr. Davainis to be alert to signs of fetal distress - such as the
19 possibility of cord compression - by using the electronic fetal
20 heart rate monitor. While the extent of the harm may not have
21 been fully predictable, it cannot be said that I.P.'s injuries
22 were unexpected given the risks that Dr. Davainis took between
23 3:15 and 5:00 AM.

24 As the parties' stipulation strongly implies, there is clear

25 ⁵ Dr. Druzin also admitted on cross examination that the Joint
26 Commission defined "sentinel event" by stating, "Such events are
27 called sentinel because they signal the need for immediate
28 investigation and response, and that each accredited organization
is strongly encouraged, but not required to report sentinel
events to the Joint Commission."

1 proof beyond a preponderance of the evidence that I.P.'s injuries
2 were proximately caused by Dr. Davainis's negligence.

3
4 IV. CONCLUSIONS OF LAW AS TO LIABILITY

5 For the reasons set forth above, the Court concludes as
6 follows:

7 1. Dr. Davainis owed a duty of care to I.P. and her
8 mother.

9 2. Dr. Davainis was negligent as to both Plaintiffs in
10 failing to call for a C-section until 5:00 AM.

11 3. That negligence caused the injuries to Plaintiffs.

12
13 V. FINDINGS OF FACT AS TO DAMAGES

14 1. Because of her injuries, I.P. will never be able to
15 conduct the activities of daily living or otherwise care for
16 herself.

17 2. She will never be able to speak.

18 3. She will never be able to walk.

19 4. She will never be able to work.

20 5. I.P. will always require 24-hour/day care. She cannot
21 eat and must be fed through a gastronomy tube. She cannot
22 swallow and requires frequent suctioning, including during the
23 night. Her need for this care will continue for her entire life.

24 6. I.P. is at risk for complications, including pneumonia,
25 seizures, and joint dislocation and deformity.

26 7. I.P. turned three years old on April 30, 2015.

27 8. On or about November 20, 2012, I.P. and Mrs. Palacio
28 presented administrative tort claims to the Department of Health

1 and Human Services.

2 9. Mrs. Palacio's administrative claim sought \$500,000 for
3 severe emotional distress.

4 10. I.P.'s administrative claim sought \$25,000,000 for
5 personal injury.

6 11. Mr. Palacio Diaz did not present an administrative tort
7 claim to the Department of Health and Human Services.

8 12. Mr. Palacio Diaz brought a loss of consortium claim in
9 the Superior Court action against Banner Health.

10 13. Mr. Palacio Diaz and I.P. entered into a settlement
11 with Banner Health before trial in the amount of \$500,000.

12 14. At the time of trial, Medi-Cal had issued a lien for
13 payments made by the Medi-Cal program for medical services
14 related to I.P.'s injury of \$87,521.

15 Further findings of fact are described and explained below.

16

17 VI. OPINION AS TO DAMAGES

18 According to the proof at trial, Dr. Davainis's negligence
19 has caused and will cause I.P. economic and noneconomic damages.
20 As to the amounts of those damages, the parties initially offered
21 separate life care plans and costs for each specific item needed
22 for I.P.'s future medical care. They also argued about the
23 effect of future health insurance on damages.

24 After trial was underway, the parties reached a stipulation
25 (Doc. #131) that resolved most issues related to future medical
26 care. Plaintiffs accepted the items and costs in the
27 government's life care plan prepared by expert Tim Sells, except
28 for attendant care. Plaintiffs also agreed to the government's

1 method of taking insurance into account. The future-care costs
2 agreed upon by the parties therefore include expenses for future
3 insurance premiums and out-of-pocket costs, as well as a
4 corresponding offset for future insurance benefits. The parties
5 also agreed on four calculations of the present cash value of
6 these future care costs (except attendant care), contingent on
7 the Court's determination of I.P.'s life expectancy and the net
8 discount rate.

9 Pursuant to the parties' stipulation, the only remaining
10 issues as to future damages before the Court are:

- 11 1. I.P.'s life expectancy;
- 12 2. What type of attendant care I.P. needs;
- 13 3. The present cash value for this future attendant care;
- 14 4. The amount of I.P.'s projected lost earnings; and
- 15 5. The net discount rate(s) to apply.

16 The Court addresses each of these items below. Items 3 and 5 are
17 considered together as they involve similar issues. The Court
18 also determines the amount of past economic and noneconomic
19 damages, to which the parties have not stipulated.

20 A. Life Expectancy

21 The high end of Plaintiffs' life expectancy range for I.P.
22 and the low end of the government's range are only two years
23 apart (age 24 versus age 26), thus evidencing near agreement on
24 this issue between the parties. The evidence at trial
25 demonstrated that life expectancy is an epidemiological concept
26 based on probabilities. The Court therefore gives greater weight
27 to Dr. Steven Day's opinion, which was based on a comprehensive
28 statistical analysis of numerous population studies including

1 persons with characteristics and risk factors similar to I.P.
2 Dr. Ira Lott, in contrast, based his estimate on his "experience"
3 of treating patients with cerebral palsy. Although Dr. Lott also
4 considered "literature," he did not undertake any apparent
5 statistical analysis to arrive at his conclusion.

6 Plaintiffs argue that Dr. Lott's opinion is more accurate
7 because he personally examined I.P. and Dr. Day did not. But Dr.
8 Day reviewed extensive medical records for I.P. as well as the
9 recorded observations of her examining doctors, treating
10 physicians, and her parents in reaching his conclusion. On cross
11 examination, Dr. Lott conceded that he could not identify any
12 particular risk factor or characteristic of I.P. that Dr. Day had
13 overlooked in his analysis.

14 For these reasons, the Court is persuaded by Dr. Day's
15 analysis and determines I.P.'s life expectancy to be
16 approximately 20 additional years (to 23 years of age).

17 B. Type of Attendant Care

18 As to attendant care, Plaintiffs offered a plan providing
19 I.P. with 24-hour/day Licensed Vocational Nurse ("LVN") care
20 provided by an agency plus 24 hours/year of case manager time,
21 while the government offered two proposals: (a) 24-hour/day
22 private-hire Home Health Attendant ("HHA") care, plus two weeks
23 of 24-hour LVN agency care, 48 hours of case manager time,
24 payroll services, and 100 hours of conservator-fiduciary time for
25 the first year (and 60 hours/year thereafter), or (b) 18-hour/day
26 private-hire LVN care plus 6 hours/day HHA care, two weeks of 24-
27 hour agency LVN care, 48 hours/year of case manager time, payroll
28 services, and 100 hours of conservator-fiduciary time for the

1 first year (and 60 hours/year thereafter). As discussed above,
2 the type of attendant care is the only issue before the Court.

3 The Court finds that I.P. requires 24-hour/day care from an
4 LVN. Plaintiffs' evidence on this issue was far more persuasive
5 than that introduced by the government. An LVN, rather than an
6 HHA as the government proposes, will provide the appropriate
7 level of care, because LVNs are trained in medical decision-
8 making, are supervised, and can be responsive to I.P.'s
9 particular and developing medical needs and risk factors.

10 Defendant's expert, Dr. Joseph Capell, conceded that it would be
11 "entirely appropriate" for I.P. to have care from an LVN, and
12 that certain tasks essential to I.P.'s daily care (such as
13 gastronomy tube feeding) require an LVN. Contrary to the
14 government's position, I.P. needs LVN care around the clock,
15 because her medical needs and complications will arise around the
16 clock and cannot be scheduled in an 18-hour/day window.

17 With respect to the issue of whether I.P. needs an agency or
18 private LVN, the Court finds that an agency will more likely
19 ensure that I.P. experiences no gaps in coverage due to
20 unavailability of individual staff members. Moreover, an agency
21 would offer employee screening, bonding, insurance, and medical
22 record compliance. If not for an agency, this burden, as well as
23 the risks of gaps in care or low quality care, would fall on
24 I.P., her family, and the few hours of case manager time offered
25 by the government's plan. That is neither fair or reasonable to
26 IP or her family.

27 For these reasons, the Court concludes that I.P. requires
28 and is entitled to 24-hour/day LVN agency care.

1 C. Present Cash Value

2 Determination of present cash value depends on the net
3 discount rate. The Court finds, based on the expert testimony,
4 that the best estimate of the net discount rate is 1%. In
5 reaching this conclusion, the Court was more persuaded by Dr.
6 Peter Formuzis's analysis than that of Dr. Erik Volk. Dr.
7 Formuzis considered a more compressive dataset over a longer time
8 period, and his opinion better aligned with current projections
9 of the Congressional Budget Office. The Court declines to apply
10 a different discount rate for growth in attendant care wages,
11 because the dataset that Dr. Volk relied on was even more
12 temporally limited and was also not commensurate with official
13 projections.

14 D. Conclusion as to Present Cash Value of Future Care
15 Costs

16 The Court calculates future costs assuming a 1% discount
17 rate and a life expectancy to 23 years of age, as determined
18 above. Relying on Dr. Formuzis's analysis,⁶ the present value of
19 LVN agency care using those assumptions is \$7,753,349. Using
20 those same assumptions and pursuant to the parties' stipulated
21 calculations, the present cash value of I.P.'s future medical
22 expenses other than LVN agency care is \$544,139. Total future
23 medical costs therefore amount to \$8,297,488 in present cash
24 value.

25 E. Projected Lost Earnings

26 The Court is persuaded that I.P.'s projected lost earnings

27 _____
28 ⁶ The government did not offer a calculation for agency LVN care based on the above parameters.

1 should be based on an assumption that, absent the injury, she
2 would have achieved an education of 13.5 years. As Plaintiffs'
3 expert Dr. Formuzis testified, this number represents the average
4 educational attainment in the United States. The government's
5 expert, Mr. Sells, provided no basis for estimating her education
6 to be lower, except that her parents did not obtain college
7 degrees and she is Hispanic. Mr. Sells did not cite any
8 methodology that would justify lowering the estimate of I.P.'s
9 capacity for educational attainment based on these or other
10 factors. The Court therefore uses the national average.

11 Both parties' experts - Mr. Sells and Dr. Formuzis - agreed
12 that whatever education she obtained, I.P. would have been likely
13 to work full time.

14 Based on these assumptions, and applying a net discount rate
15 of 1%, I.P.'s lost earnings were proven at trial to have a
16 present cash value of \$967,796.

17 F. Past Medical Expenses

18 Plaintiffs proved I.P.'s past medical expenses at the time
19 of trial to be \$87,521 pursuant to the Medi-Cal lien. The
20 government has not disputed this figure. Other past medical
21 expenses have been covered by health insurance, and are subject
22 to the parties' stipulation about insurance issues, discussed
23 above.

24 G. Noneconomic Damages

25 In addition to economic damages, I.P. is also entitled to
26 noneconomic damages. These damages are "subjective, non-monetary
27 losses including, but not limited to, pain, suffering,
28 inconvenience, mental suffering, emotional distress, loss of

1 society and companionship, loss of consortium, injury to
2 reputation and humiliation." Cal. Civ. Code § 1431.2. In
3 medical malpractice actions such as this, damages are capped at
4 \$250,000. Cal. Civ. Code § 3333.2(b).

5 The evidence here showed that I.P.'s medical condition has
6 caused and will forever cause severe impairment preventing her
7 from fully enjoying life, forming relationships, and expressing
8 her thoughts. Her injuries will subject her always to the
9 indignity, inconvenience, and humiliation of being unable to
10 conduct even the most basic of tasks or to control bodily
11 functions. This evidence overwhelmingly establishes that she has
12 incurred noneconomic damages of \$250,000.

13 H. Negligent Infliction of Emotional Distress as to
14 Micaela Palacio

15 A physician whose negligence caused harm to a baby during
16 delivery is liable for damages not only to the child, but also to
17 the mother for negligent infliction of emotional distress.
18 Burgess, 2 Cal.4th at 1073 ("Any negligence during delivery which
19 causes injury to the fetus and resultant emotional anguish to the
20 mother . . . breaches a duty owed directly to the mother.").
21 These damages are limited to "emotional distress arising from the
22 'abnormal event' of participating in a negligent delivery and
23 reacting to the tragic outcome with fright, nervousness, grief,
24 anxiety, worry, mortification, shock, humiliation and indignity,
25 physical pain, or other similar distress." Id. at 1085. Damages
26 are also limited by California Civil Code section 3333.2(b) to a
27 maximum of \$250,000.

28 The evidence here was more than sufficient to establish

1 noneconomic damages. Mrs. Palacio's testimony demonstrated her
2 anguish and helplessness at realizing the severe and permanent
3 injury to her child. The profound effect on her well-being was
4 painfully apparent. The Court therefore awards the maximum
5 damages of \$250,000.

6 I. Offset of Damages Due to Settlement with Banner Health

7 California Code of Civil Procedure section 877 "requires a
8 setoff for preverdict settlement amounts paid by any tortfeasors
9 claimed to be liable for the same tort." Hellam v. Crane Co.,
10 239 Cal.App.4th 851, 863 (2015) (quoting Poire v. C.L. Peck/Jones
11 Bros. Construction Corp., 39 Cal.App.4th 1832, 1837 (1995))
12 (quotation marks and alterations omitted). To determine how much
13 to offset damages, the Court first looks to the settlement to see
14 if it "differentiate[s] between economic and noneconomic
15 losses[.]" Id. at 862 (quoting Rashidi v. Moser, 60 Cal.4th 718,
16 722 (2014)). If it does not differentiate, the Court must
17 determine "the amount of the settlement attributable to each type
18 of loss," id., by applying the methodology described in Espinoza
19 v. Machonga, 9 Cal.App.4th 268, 276-77 (1992).

20 First, the Court determines the percentage of the award at
21 trial attributed to economic damages. Rashidi, 60 Cal.4th at
22 722-23 (describing and applying Espinoza). The Court then
23 applies that percentage to the plaintiff's settlement recovery to
24 determine the amount of settlement dollars attributable to
25 economic loss. Id. The resulting amount of settlement dollars
26 is then deducted from the economic damages proved at trial. Id.

27 I.P. and her father previously entered into a settlement
28 with Banner Health for \$500,000. Petition to Approve Compromise

1 (Doc. #102) ¶ 11.c, Attachment 11. That settlement apportioned
2 \$250,000 to I.P.'s father and \$250,000 to I.P. Id. ¶ 11.c; Fagel
3 Decl. at 2. The settlement does not specify how much of I.P.'s
4 \$250,000 is for economic versus noneconomic losses. It only
5 states that this money was held by Plaintiffs' counsel's law firm
6 to satisfy attorneys' fees and costs pending resolution of the
7 federal action. Fagel Decl. at 2. The Court therefore must
8 apply Espinoza to determine how much of I.P.'s settlement is
9 attributable to economic loss.

10 I.P.'s damages determined herein are 97.4% economic and 2.6%
11 noneconomic. Applying these same percentages to her settlement
12 recovery, \$243,500 of that recovery is attributable to economic
13 loss and \$6,500 to noneconomic loss. The government is therefore
14 entitled to an offset of the economic damages in this case by
15 \$243,500.

16 For noneconomic damages, the calculation is different.
17 Under California Civil Code section 1431.2, liability for
18 noneconomic damages is several, not joint. Cal. Civ. Code
19 § 1431.2(a) ("Each defendant shall be liable only for the amount
20 of non-economic damages allocated to that defendant in direct
21 proportion to that defendant's percentage of fault . . ."). In
22 order to be entitled to an offset of noneconomic damages, the
23 defendant at trial must demonstrate the comparative fault of the
24 settling defendants. Rashidi, 60 Cal.4th at 727; Scott v. C.R.
25 Bard, Inc., 231 Cal.App.4th 763, 785 (2014).

26 Defendant here put on no evidence of Banner Health's degree
27 of fault in causing Plaintiffs' noneconomic injuries. So the
28 government is not entitled an offset of these damages.

1 ///
 2 ///
 3 ///

4 J. Summary of Total Damages Awarded By the Court

Type of Damages	Amount Proved by a Preponderance of the Evidence
24-hour/day LVN agency care	\$7,753,349 (in present cash value)
All other future medical expenses	\$544,139 (in present cash value)
Projected lost earnings	\$967,796 (in present cash value)
Past medical expenses	\$87,521
I.P.'s noneconomic damages	\$250,000
Micaela Palacio's noneconomic damages	\$250,000
	TOTAL: \$9,852,805

16 VII. CONCLUSIONS OF LAW AS TO DAMAGES

17 For the reasons set forth above, the Court concludes as
 18 follows:

19 Because of Dr. Davainis's negligence, the United States is
 20 liable to I.P. in the amount of \$9,602,805.

21 The United States is entitled to an offset of I.P.'s
 22 economic damages by \$243,500 pursuant to her prior settlement
 23 with Banner Health.

24 1. Because of Dr. Davainis's negligence, the United States
 25 is liable to Micaela Palacio in the amount of \$250,000.

27 VIII. ORDER

1 Given the above conclusions of law:

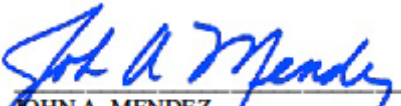
2 1. Defendant is ordered to pay I.P. (through her guardian
3 ad litem, Facundo Palacio Diaz) \$9,359,305 in economic and
4 noneconomic damages.

5 2. Defendant is ordered to pay Micaela Palacio \$250,000 in
6 noneconomic damages.

7 The government has stated its intent to invoke California's
8 periodic payment statute, California Code of Civil Procedure
9 section 667.7. The Court grants the government's request for
10 further briefing on this subject in order to advise the Court
11 about the propriety of applying section 667.7 and how periodic
12 payments would affect final judgment. Both parties are to
13 prepare briefs to be filed within ten (10) days from the date of
14 this Order. The Court may set this matter for a further hearing
15 if it so requires.

16 IT IS SO ORDERED.

17 Dated: October 28, 2015

18 
19 JOHN A. MENDEZ,
20 UNITED STATES DISTRICT JUDGE
21
22
23
24
25
26
27
28