

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2016-001551

Christy Byrd, as Next Friend of Julia B., a minor, ... Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning, ... Respondents.

**RECORD ON APPEAL
VOLUME 1 OF 3**

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JUN 15 2017

SC Court of Appeals

Volume 1 of 3

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STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Christy Byrd, as Next Friend of Julia B.
a minor,

Plaintiff,

Versus

McLeod Physician Associates II and Dr.
John B. Browning,

Defendants.

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 2013-CP-21-00690

) ORDER DENYING PLAINTIFF'S
) MOTION FOR NEW TRIAL
) ABSOLUTE AND/OR JUDGMENT
) NOTWITHSTANDING THE
) VERDICT

JUL 14 2016
BY: [Signature]

FILED
JUL 11 PM 4:10
CLERK OF COURT, C.P. & G.S.
FLORENCE COUNTY, S.C.

This matter is before the Court on a Motion for New Trial Absolute and/or Judgment notwithstanding the Verdict filed by Plaintiff Christy Byrd, as Next Friend of Julia B. a minor. This is a medical malpractice action arising out of the labor and delivery of Julia B. on October 8, 2009, in which Plaintiff alleges that Julia B. sustained permanent right brachial plexus nerve injuries as a result of alleged acts or omissions of the attending physician, Dr. John B. Browning of McLeod Physician Associates II. The first trial of this case was held from September 22-25, 2015, which resulted in a mistrial being declared on September 25, 2015, after improper testimony was offered in the presence of the jury during the direct examination by Plaintiff's expert rebuttal witness, Dr. Daniel Strickland. This case was tried again before the Court from May 16-20, 2016 resulting in a jury verdict in favor of Defendants McLeod Physician Associates II and Dr. John B. Browning. In utilizing the verdict form, the jury found the Defendants proved by a greater weight or preponderance of the evidence that the facts of this case arose of a genuine emergency situation where the patient was not medically stable and there was an immediate threat of death or serious bodily injury. The jury then found Dr. John B. Browning did not act in a manner that was grossly negligent.

On May 31, 2016, Plaintiff timely filed a Motion for New Trial Absolute and/or Judgment notwithstanding the Verdict. On June 10, 2016, Defendants timely submitted a Response in Opposition to Plaintiff's Motion for New Trial and/or Judgment notwithstanding the Verdict. After careful consideration of the parties' respective written submissions and applicable law and for the reasons stated herein, Plaintiff's Motion for New Trial Absolute and/or Judgment notwithstanding the Verdict is DENIED.

The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Krepps by Krepps v. Ausen, 324 S.C. 597, 608, 479 S.E.2d 290, 296 (Ct. App. 1996); Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). In reviewing a motion for judgment notwithstanding the verdict, the court views the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The trial court must deny a motion for judgment notwithstanding the verdict if the evidence yields more than one reasonable inference or its inference is in doubt. Id.; Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994).

Plaintiff moves for a New Trial Absolute and/or Judgment notwithstanding the Verdict on the basis that the Court erred in failing to find that the Obstetrical Medical Emergency Exception (S.C. Code Ann. § 15-32-230) did not apply as a matter of law and that the Court erred in failing to find that the proper Defendant or employer of Dr. Browning in this case was McLeod Physician Associates, Inc., a

for-profit entity, instead of McLeod Physician Associates II, a 501(c)(3) charitable institution.

As an initial matter, the Court finds there was sufficient evidence in the record that the Obstetrical Medical Emergency Exception applied to this case and that the Defendants presented sufficient evidence at trial as to each element of the Obstetrical Medical Emergency Exception in pleading the statute as an affirmative defense. Specifically, there was sufficient evidence in the record establishing that shoulder dystocia constitutes a genuine emergency situation, that the patient was not medically stable, and that there was an immediate threat of death or serious bodily injury. While there was a dispute between the expert witnesses for both Plaintiff and the Defendants as to implications of Julia B. medical condition at the time of delivery, there was sufficient evidence presented for the jury to decide, on proper instructions from the Court, whether the Obstetrical Medical Emergency Exception applied. Accordingly, the Court denied Plaintiff's request that the Obstetrical Medical Emergency Exception did not apply as a matter of law and instructed the jury on the applicable provisions of the Obstetrical Medical Emergency Exception in its charge and incorporated the applicable provisions into the verdict form.

The Court also finds that sufficient evidence was presented at trial that Dr. John B. Browning was employed by McLeod Physician Associates II, a 501(c)(3) charitable institution, at the time of the delivery of Julia B. The Court heard testimony from Saunders M. Bridges, Jr., personal counsel for McLeod Physician Associates II, who discussed the formation of the entity as a 501(c)(3) charitable institution and that it was the entity that employed Dr. Browning at the time of the

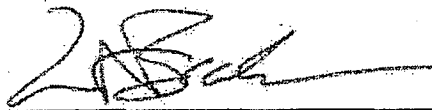
delivery of Julia B. on October 8, 2009. In addition to the testimony offered by Mr. Bridges, the Court also considered the documentation provided by the Defendants and Mr. Bridges in finding that sufficient evidence was presented that Dr. Browning was employed by McLeod Physician Associates II at the time of the delivery of Julia B.

CONCLUSION

Accordingly, for the reasons stated herein and after careful consideration of the parties' respective written submission and applicable law, it is HEREBY ORDERED that Plaintiff's Motion for New Trial Absolute and/or Judgment notwithstanding the Verdict is DENIED.

IT IS SO ORDERED.

6/26, 2016
Marion, South Carolina


Judge William H. Seals, Jr.
Presiding Judge, 12th Judicial Circuit

CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

2016 JUL 11 PM 4:12

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CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

Christy Byrd, as Next Friend of Julia B. , a
minor,

CASE NO.
2013-CP-21-00690

☐ Plaintiff(s),

MOTION INFORMATION FORM AND COVER
SHEET

Versus:

McLeod Physician Associates II,

☒ Defendant(s).

check box above indicating submitting party

Plaintiff's attorney:

Edward L. Graham, Esquire
Diane M. Rodriguez, Esquire
Graham Law Firm, P.A.

Post Office Box 550

Florence, SC 29503

P: 843-662-3281; F: 843-665-0254

Defendant's attorney:

Molly H. Craig (SC #6960)

Elloree A. Ganes (SC #70509)

HOOD LAW FIRM, LLC

172 Meeting Street/P.O. Box 1508

Charleston, SC 29402

P: 843-577-4435/F: 843-722-1630

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: YES ☐/ NO ☐

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order -

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the
attached order.

☐ Other:

JUDGE

CODE:

DATE:

CLERK'S VERIFICATION

Collected by: _____

(print name)

DATE FILED

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED-AMOUNT DUE: _____

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FLORENCE COUNTY, S.C.

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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-21-00690

Christy Byrd, as Next Friend of Julia B a
minor,

McLeod Physician Associates II and Dr.
John B. Browning,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Molly H. Craig (SC #6960)
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401

Attorney for: ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other.
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other.
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

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2016 JUL 11 PM 4:12

CLERK OF COURT
SOUTH CAROLINA
COUNTY OF FLORENCE

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Christy Byrd, as Next Friend of Julia B

CLERK OF COURT C.P. & G.S.
COUNTY OF FLORENCE, S.C.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2100690

Christy Byrd

Julia E

2016 MAY 20 PM 6:29

CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SCMcLeod Physicians
Associates Inc
McLeod Obgyn
Associates

John B Browning

MAY 25 2016

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Christy Byrd, as next friend of Julia E a minor	John B. Browning	

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

5/20/2016

2157
Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on May 20, 2016, and a copy mailed first class or placed in the appropriate attorney's box on May 23, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Edward L. Graham
PO Box 550 Florence, SC 29503

Mary Agnes Hood Craig
PO Box 1508 Charleston, SC 29402-1508

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Connie Reel-Shearin

Court Reporter

Connie Reel-Shearin - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Jury rendered a verdict in favor of the Defendant, John B. Browning. No money damages. Attorneys have ten (10) days to submit post trial motions.

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2016 MAY 20 PM 6:29
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

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Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2013-CP-21-0690

CHRISTY BYRD, AS NEXT FRIEND
OF JULIA B , A MINOR,

Plaintiff,

v.

MCLEOD PHYSICIAN ASSOCIATES, II,
AND DR. JOHN B. BROWNING,

Defendants.

VERDICT

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2013 MAY 20 PM 6:29
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

VERDICT FORM

1. Did the Defendants prove by a greater weight or preponderance of the evidence that the facts of this case did arise out of a genuine emergency situation where the patient is not medically stable and there is an immediate threat of death or serious bodily injury?

☒ YES.

☐ NO.

Please go to Question 2.

2. Did Defendant Dr. John B. Browning act in a manner that was grossly negligent?

☐ YES.

☒ NO.

If you answered YES to Question 1 AND NO to Question 2, you are finished. Please stop and notify the bailiff. If not, please go to Question 3.

CERTIFIED: A TRUE COPY
Clerk of Court
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

3. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants deviated from the standard of care?

_____ YES.

_____ NO.

If your answer to Question 3 is NO, you are finished. You have found for the Defendants. Please stop and notify the bailiff. If your answer is YES, please continue to Question 4.

4. Did the Plaintiffs prove by a greater weight or preponderance of the evidence that the Defendants' deviation from the standard of care was a proximate cause of the injuries to the Plaintiff?

_____ YES.

_____ NO.

If your answer to Question 4 is NO, you are finished. You have found for the Defendants. Please stop and notify the bailiff. If your answer is YES, please continue to Question 5.

5. State the amount of actual damages sustained by the Plaintiff.

\$ _____ Total Actual Damages.

You are finished. Please notify the bailiff.

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2016 MAY 20 PM 6:29
CONNIE REEL-SHEARIN
COP & GS
FLORENCE COUNTY, SC

I certify this decision was the unanimous decision of the jury.


Foreperson
May 20, 2016

CERTIFIED: A TRUE COPY
Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Christy Byrd, as Next Friend of
Julia B , a minor,

Plaintiff,

v.

McLeod Physician Associates, Inc., and
Dr. John B. Browning, individually and
d/b/a McLeod OB-GYN Associates,

Defendants.

) IN THE COURT OF COMMON PLEAS
) TWELFTH JUDICIAL CIRCUIT
) C/A No.:

COMPLAINT

(Jury Trial Requested)

COMES NOW the Plaintiffs complaining of Defendants above named and would show unto the Court as follows:

1. Plaintiff Christy Byrd (hereinafter, "Christy") is a citizen and resident of Cheraw County, South Carolina, and brings this action as Next Friend of her daughter, Julia B (hereinafter, "Julia")

2. Upon information and belief, McLeod Physicians Associates Inc. (hereinafter, "Physicians Associates") is a corporation existing under the laws of South Carolina or another state and has its primary place of business in Florence, South Carolina.

3. Defendant Dr. John B. Browning (hereinafter, "Dr. Browning") is, upon information and belief, a citizen and resident of Florence County, South Carolina, who was, upon information and belief, at all times relevant to this action, a physician duly licensed to practice medicine within the State of South Carolina.

4. Defendant Dr. Browning held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.

5. Defendant Dr. Browning maintained an office in Florence County, South Carolina, for the practice of obstetrics and gynecology.

6. Upon information and belief, Defendant Dr. Browning conducted business in the name of McLeod OB-GYN Associates (hereinafter, "OB-GYN").

7. Upon information and belief, Defendant Dr. Browning was at all relevant times an employee and agent of the Defendant Physicians Associates, acting within the course and scope of that employment and agency.

8. Prior to October 8, 2009, Christy, mother of Julia, became pregnant and submitted herself to the care and attention of Defendant Dr. Browning for pre-natal and obstetrical care.

9. On October 8, 2009, Defendant Dr. Browning attended the delivery of Julia, daughter of Christy at McLeod Regional Medical Center (hereinafter, "Hospital") in Florence County, S.C.

10. Julia was a healthy baby prior to October 8, 2009, when her mother, Christy, was admitted to the Hospital.

11. Defendant Dr. Browning took charge of the health care of Christy and her baby upon Christy's admittance to the Hospital.

12. The Defendant, Dr. Browning owed Christy and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

13. Defendant Dr. Browning breached his duties of care to Christy and her daughter Julia, and was negligent, reckless, willful, wanton, and/or otherwise wrongful in his care of them and attention to them, as a direct and proximate result of which Julia sustained severe bodily injuries, losses and damages.

14. Defendant Dr. Browning was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Julia;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Julia;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, traction and/or torsion;
- (h) in mismanagement of labor and delivery;
- (i) in mismanagement of shoulder dystocia;

- (j) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;
- (k) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (l) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
- (m) such other failures and refusals as may be identified during discovery and the trial of her case.

15. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Browning, Plaintiffs have sustained certain injuries, losses and damages, stated with particularity as follows:

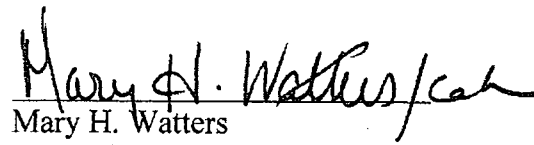
- (a) Direct violent and traumatic injuries to various bodily members of Julia, including, but not limited to, permanent traumatic injury to the nerves which innervate her right shoulder and arm, commonly known as Erb's palsy;
- (b) Adverse effects on various other bodily members and/or functions, such as gait, balance and skeletal and muscular symmetry;
- (c) Past and future medical expenses;
- (d) Life care management plan expense;
- (e) Permanent impairments and disabilities;
- (f) Disfigurement;

- (g) Physical pain and suffering;
 - (h) Mental, emotional and psychological harm;
 - (i) Adverse effect on the future career options, employability, earnings and earning capacity;
 - (j) Loss of enjoyment of life; and
 - (k) such further injuries, losses and damages as may be revealed through discovery and trial of this case.
16. Plaintiffs names Physicians Associates as a Defendant in this case because it has *respondeat superior* liability for Dr. Browning's torts as his employer.
17. Plaintiffs have previously complied with all statutory requirements for commencing this action. A copy of an Affidavit of Yvonne Gomez-Carrion is attached hereto in support of the liability allegations made herein.

WHEREFORE, Plaintiffs prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of this action; and for such other and further relief as this Court may deem just and proper.

~signature page to follow~

GRAHAM LAW FIRM, P.A.

Handwritten signature of Mary H. Watters in black ink, written over a horizontal line.

Mary H. Watters

J. Layton Ruffin

Post Office Box 550

Florence, S.C. 29503

Attorney for Plaintiff

March 7, 2013

AFFIDAVIT

1. McLeod OBGYN – Mother's Prenatal Records;
2. McLeod Regional Medical Center – Labor and Delivery Records;
3. McLeod Regional Medical Center – Electronic Fetal Heart Monitor Strips;
4. McLeod Regional Medical Center – Baby's Birth Records
5. MUSC Neurology records
6. Chesterfield Physical Therapy records

2. I am a physician, board certified in Obstetrics and Gynecology by the American College of Obstetrics and Gynecology. Details of my qualifications and background are set forth in my curriculum vitae attached hereto as Exhibit 1.

3. I have an active clinical practice in obstetrics and gynecology, at Beth Israel Deaconess Hospital, one of the Harvard Medical School teaching hospitals. As part of my practice I regularly manage labor and delivery of maternity patients. I am very familiar with the standards of care applicable to doctors, nurses and staff involved in managing labor and delivery in general and in particular with respect to the standards of care involved in the proper recognition, management and resolution of a complication known as shoulder dystocia.

4. In this case, based on my review of the medical records noted above, Dr. Browning committed at least two deviations from the generally accepted obstetrical standards of care during the delivery of Julia B on October 8, 2009. In my opinion, to a reasonable degree of medical certainty, Dr. Browning breached generally accepted standards of obstetrical practice in the following ways: (1) he chose not to take advantage of several safe and effective maneuvers available to him to assist in the management and resolution of shoulder dystocia without injury to Zari'yah; and (2) he applied excessive lateral traction or torsion to the head of Julia B

5. It is further my opinion, to a reasonable degree of medical certainty, that Julia B suffered severe and permanent injury to her brachial nerves as a direct and proximate result of these breaches of standard obstetrical practice by Dr. Browning.

6. There may be other deviations from the generally accepted standards of care by Dr. Browning and/or other health care providers which I may learn from additional records, information or depositions that may be provided to me in the future. Therefore, I reserve the right to change, modify, or supplement these opinions in the future, if new information and material is provided to me.

FURTHER AFFIANT SAYETH NAUGHT.

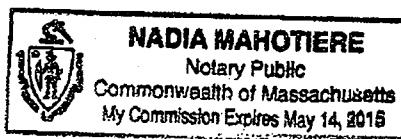
SWORN TO BEFORE ME THIS

19th Day of October, 2012

Nadia Mahotiere (L.S.)
NOTARY PUBLIC FOR MASSACHUSETTS

Yvonne Gomez-Carrion
YVONNE GOMEZ-CARRION

My Commission Expires: _____



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
Christy Byrd, as Next Friend of Julia	)	C/A No. 2013-CP-21-00690
E , a minor,	)	
	)	
Plaintiff,	)	
	)	DEFENDANTS' ANSWER TO
Versus	)	PLAINTIFF'S COMPLAINT
	)	(Jury Trial Requested)
McLeod Physician Associates, Inc., and	)	
Dr. John B. Browning, individually and	)	
d/b/a McLeod OB-Gyn Associates,	)	
	)	
Defendants.	)	

The Defendants, McLeod Physician Associates, Inc., and Dr. John B. Browning, individually and d/b/a McLeod OB-Gyn Associates, (hereinafter "the Defendants"), hereby answer the Plaintiff's Complaint subject to their affirmative defenses, motions and any other pleadings, as follows:

1. The Defendants deny each and every allegation of the Plaintiff's Complaint which is not specifically admitted without qualification in this Answer.
2. The Defendants are without sufficient knowledge at this time to form a belief as to the truth of the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore those allegations are denied.
3. The allegations contained in Paragraph 2 of the Plaintiff's Complaint state conclusions of law to which no response is required.
4. The Defendants admit the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. In response to the allegations contained in Paragraph 4 of the Plaintiff's Complaint, the Defendants admit only so much as alleges that Dr. Browning is board certified in obstetrics and gynecology. All remaining allegations contained in Paragraph 4 of the Plaintiff's Complaint are denied as written.

6. In response to the allegations contained in Paragraphs 5 and 6 of the Plaintiff's Complaint, the Defendants admit only so much as alleges that Dr. Browning provided medical care at his office in Florence County. Further responding, the allegations contained in Paragraphs 5 and 6 of the Plaintiff's Complaint state conclusions of law to which no response is required.

7. The allegations contained in Paragraph 7 of the Plaintiff's Complaint state conclusions of law to which no response is required.

8. In response to the allegations contained in Paragraphs 8, 9, 10 and 11 of the Plaintiff's Complaint, the Defendants admit only so much as alleges that Dr. Browning provided care to the Plaintiff during her pregnancy and delivery in 2009. Further responding, the Defendants crave reference to the Plaintiff's medical records for a more detailed description of all complaints, diagnosis and treatment. All remaining and inconsistent allegations contained in Paragraphs 8, 9, 10 and 11 of the Plaintiff's Complaint are denied.

9. The allegations contained in Paragraph 12 of the Plaintiff's Complaint state conclusions of law to which no response is required.

10. The Defendants deny the allegations contained in Paragraphs 13, 14 (including subparts a, b, c, d, e, f, g, h, I, j, k, l and m) and 15 (including subparts a, b, c, d, e, f, g, h, I, j and k) of the Plaintiff's Complaint.

11. The allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint state conclusions of law to which no response is required.

12. The Defendants deny the allegations contained in the WHEREFORE Paragraph, being the remaining allegations of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(No Deviation from Standard of Care)

13. That the care and treatment administered by the Defendants conformed to and was in full compliance with the standard of care. All care and treatment administered by the Defendants were within applicable medical standards and methods, and, at no time pertinent hereto, did the Defendants deviate from any medical standard while caring for or tending to the Plaintiff. Consequently, the Plaintiff is barred from recovery against the Defendants.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(No Proximate Cause)

14. That, even if the Defendants were negligent, as alleged in the Complaint, which is specifically denied, the negligence of the Defendants are not the direct or proximate cause of any injury alleged by the Plaintiff and therefore the Defendants are not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Failure to State a Claim)

15. The allegations contained in the Complaint fail in their entirety to state a claim upon which relief may be granted against the Defendants.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Superseding/Intervening Cause)

16. Whatever injuries and damages, if any, may have been sustained by the Plaintiff, were due to a superseding and/or intervening cause beyond the control of the Defendants.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Pre-Existing Medical Condition)

17. Whatever injuries the Plaintiff sustained, which are specifically denied herein, were the result of pre-existing medical conditions of the Plaintiff, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Predisposition of Medical Condition)

18. Whatever injuries the Plaintiff sustained, which are specifically denied herein, were the result of the Plaintiff's predisposition to medical conditions, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Natural Disease Process)

19. That the Defendants would allege, upon information and belief, that any injuries or damages sustained by Plaintiff were due to, caused and occasioned by the natural disease process over which the Defendants had no control and as such, the Defendants plead such a natural disease process as a complete bar to this action.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Comparative Negligence)

20. The Defendants allege that any injuries received by the Plaintiff, as alleged in the Complaint, if any, may have been due to and caused by and may be the direct and proximate result of acts of negligence on the part of the Plaintiff or a third party, over whom the Defendants had no control, so as to bar the claims of the Plaintiff against the Defendants.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Lack of Foreseeability)

21. That upon information and belief, even if the damages alleged in Plaintiff's Complaint, if any, were proximately caused by the acts and/or omissions of the Defendants, which is otherwise denied except for the purpose of this affirmative defense, the Defendants did not and could not have foreseen that Plaintiff's damages, if any, could have proximately resulted from the Defendants' acts or omissions.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Reasonableness and Good Faith)

22. The Defendants allege that they acted reasonably and in good faith at all times material herein, based on all relevant facts and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to the recovery of any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THE DEFENDANTS ALLEGE:
(Punitive Damages Unconstitutional)

23. That any award or assessment of punitive damages as prayed for by the Plaintiff would violate the Defendants' constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THE DEFENDANTS ALLEGE:
(Application of S.C. Code Ann. § 15-38-15)

24. That, upon information and belief, even if the Defendants were negligent as described in the Complaint, which is specifically denied, the Defendants was less than fifty percent liable for the total fault alleged. Accordingly, joint and several liability should not apply to this action as it relates to the Defendants and the Defendants should be held liable only for the percentage of fault, which is specifically denied, to be determined by the trier of fact. Additionally, the Defendants hereby reserve the right to seek all remedies, rights and privileges available to them pursuant to S.C. Code Ann. §15-38-15.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THE DEFENDANTS ALLEGE:
(Non-economic Damage Awards)

25. No award for non-economic damages shall exceed the statutory limits contained in the Non-economic Damages Awards Act of 2005, South Carolina Code Ann. §15-32-200, et. seq. The Defendants are health care providers as defined by S.C. Code Ann. § 15-32-210 and pursuant to §15-32-220 of the Non-economic Damage Awards Act of 2005, any potential recovery of non-economic damages is limited to the amounts stated therein.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Obstetrical Care Exception)

26. Pursuant to S.C. Code Ann. § 15-32-230, the Defendants were not grossly negligent in the care provided in this case and therefore, is not liable for any damages allegedly incurred by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Reservation and Non-Waiver)

27. The Defendants reserve any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as are consistent with the *South Carolina Rules of Civil Procedure*.

WHEREFORE, having fully answered the Plaintiff's Complaint, subject to any motions, qualifications, or other pleadings, and having asserted these Affirmative Defenses, the Defendants, McLeod Physician Associates, Inc., and Dr. John B. Browning, individually and d/b/a McLeod OB-Gyn Associates, pray that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded costs and attorney fees for defending this matter together or with such other relief which the Court deems proper.

HOOD LAW FIRM, LLC
172 Meeting Street
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Phone: (843) 577-4435
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Robert H. Hood (SC #2599)
Molly H. Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Justin T. Bamberg (SC #100337)

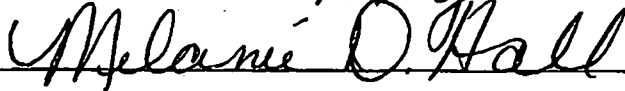
Attorneys for the Defendant
L. William Goldstein, M.D., individually and
d/b/a L. William Goldstein OB-GYN

5/7, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒ **X**
mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure.

This 8 day of May, 2013.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
Christy Byrd, as Next Friend of Julia	)	C/A No. 2013-CP-21-00690
B a minor,	)	
	)	
Plaintiff,	)	
	)	DEFENDANTS' AMENDED ANSWER
Versus	)	TO PLAINTIFF'S COMPLAINT
	)	(Jury Trial Requested)
McLeod Physician Associates, Inc., and	)	
Dr. John B. Browning, individually and	)	
d/b/a McLeod OB-Gyn Associates,	)	
	)	
Defendants.	)	

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12. The Defendants deny the allegations contained in the WHEREFORE Paragraph, being the remaining allegations of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THE DEFENDANTS ALLEGE:
(No Deviation from Standard of Care)

13. That the care and treatment administered by the Defendants conformed to and was in full compliance with the standard of care. All care and treatment administered by the Defendants were within applicable medical standards and methods, and, at no time pertinent hereto, did the Defendants deviate from any medical standard while caring for or tending to the Plaintiff. Consequently, the Plaintiff is barred from recovery against the Defendants.

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THE DEFENDANTS ALLEGE:
(No Proximate Cause)

14. That, even if the Defendants were negligent, as alleged in the Complaint, which is specifically denied, the negligence of the Defendants are not the direct or proximate cause of any injury alleged by the Plaintiff and therefore the Defendants are not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THE DEFENDANTS ALLEGE:
(Failure to State a Claim)

15. The allegations contained in the Complaint fail in their entirety to state a claim upon which relief may be granted against the Defendants.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THE DEFENDANTS ALLEGE:
(Superseding/Intervening Cause)

16. Whatever injuries and damages, if any, may have been sustained by the Plaintiff, were due to a superseding and/or intervening cause beyond the control of the Defendants.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Pre-Existing Medical Condition)

17. Whatever injuries the Plaintiff sustained, which are specifically denied herein, were the result of pre-existing medical conditions of the Plaintiff, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Predisposition of Medical Condition)

18. Whatever injuries the Plaintiff sustained, which are specifically denied herein, were the result of the Plaintiff's predisposition to medical conditions, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Natural Disease Process)

19. That the Defendants would allege, upon information and belief, that any injuries or damages sustained by Plaintiff were due to, caused and occasioned by the natural disease process over which the Defendants had no control and as such, the Defendants plead such a natural disease process as a complete bar to this action.

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THE DEFENDANTS ALLEGE:
(Comparative Negligence)

20. The Defendants allege that any injuries received by the Plaintiff, as alleged in the Complaint, if any, may have been due to and caused by and may be the direct and proximate result of acts of negligence on the part of the Plaintiff or a

third party, over whom the Defendants had no control, so as to bar the claims of the Plaintiff against the Defendants.

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THE DEFENDANTS ALLEGE:
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21. That upon information and belief, even if the damages alleged in Plaintiff's Complaint, if any, were proximately caused by the acts and/or omissions of the Defendants, which is otherwise denied except for the purpose of this affirmative defense, the Defendants did not and could not have foreseen that Plaintiff's damages, if any, could have proximately resulted from the Defendants' acts or omissions.

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THE DEFENDANTS ALLEGE:
(Reasonableness and Good Faith)

22. The Defendants allege that they acted reasonably and in good faith at all times material herein, based on all relevant facts and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to the recovery of any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Punitive Damages Unconstitutional)

23. That any award or assessment of punitive damages as prayed for by the Plaintiff would violate the Defendants' constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Application of S.C. Code Ann. § 15-38-15)

24. That, upon information and belief, even if the Defendants were negligent as described in the Complaint, which is specifically denied, the Defendants was less than fifty percent liable for the total fault alleged. Accordingly, joint and several liability should not apply to this action as it relates to the Defendants and the Defendants should be held liable only for the percentage of fault, which is specifically denied, to be determined by the trier of fact. Additionally, the Defendants hereby reserve the right to seek all remedies, rights and privileges available to them pursuant to S.C. Code Ann. §15-38-15.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Solicitation of Charitable Funds Act)

25. This action is governed by the terms, provisions and affirmative defenses set forth in the Solicitation of Charitable Funds Act which provides a limit on the amount of actual damages that can be recovered, a prohibition on the recovery of punitive damages and the Defendants plead these limitations as a requirement that Dr. Browning be dismissed from the suit, as a cap on actual damages and a bar to any punitive damages §§33-56-180 and 15-78-120.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE:
(Non-Economic Damage Awards)

26. No award for non-economic damages shall exceed the statutory limits contained in the Non-economic Damages Awards Act of 2005, South Carolina Code Ann. §15-32-200, et. seq. The Defendants are health care providers as defined by S.C. Code Ann. § 15-32-210 and pursuant to §15-32-220 of the Non-economic

Damage Awards Act of 2005, any potential recovery of non-economic damages is limited to the amounts stated therein.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THE DEFENDANTS ALLEGE:

(Obstetrical Care Exception)

27. Pursuant to S.C. Code Ann. § 15-32-230, the Defendants were not grossly negligent in the care provided in this case and therefore, is not liable for any damages allegedly incurred by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

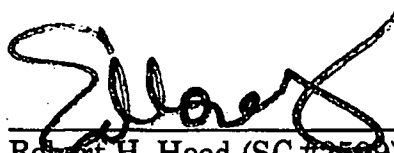
THE DEFENDANTS ALLEGE:

(Reservation and Non-Waiver)

28. The Defendants reserve any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as are consistent with the *South Carolina Rules of Civil Procedure*.

WHEREFORE, having fully answered the Plaintiff's Complaint, subject to any motions, qualifications, or other pleadings, and having asserted these Affirmative Defenses, the Defendants, McLeod Physician Associates, Inc., and Dr. John B. Browning, individually and d/b/a McLeod OB-Gyn Associates, pray that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded costs and attorney fees for defending this matter together or with such other relief which the Court deems proper.

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Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2559)
Molly H. Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Justin T. Bamberg (SC #100337)

Attorneys for the Defendants

4/14, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 14 day of April, 2014.

Melanie D. Hall

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Christy Byrd, as Next Friend of Julia E
Minor,

Plaintiff,

vs.

McLeod Physician Associates II,

Defendant.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-21-0690

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

FILED
JUN 31 PM 12:36
JANIE REEL-STEANIN
CCCP & SS
FLORENCE COUNTY, SC

Plaintiff's Attorney:

J. Layton Ruffin, Bar No. 78267

Address:

Graham Law Firm

P.O. Box 550

Florence, SC 29503

Phone: 843.662.3281 Fax 800.859.7028

E-mail: jlruffin@grahamlawfirm.net Other:

Defendant's Attorney:

Ellore A. Ganes, Bar No. 70509

Address:

Hood Law Firm

P.O. Box 1508

Charleston, SC 29402

Phone: 843.577.4435 Fax 843.722.1630

E-mail: ellore.ganes@hoodlaw.com Other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion For New Trial Absolute

Estimated Time Needed: 30 mins.

Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ Defendant

May 31, 2016

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: Ct Date Filed: _____

☒ MOTION FEE COLLECTED: \$ 25

☐ CONTESTED - AMOUNT DUE: \$ _____

CERTIFIED A TRUE COPY
Clerk of Court C.P. & G.S.
FLORENCE COUNTY, S.C.
Cristine Rod. Shearin

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Christy Byrd, As Next Friend of
Julia B a minor,

Plaintiff,

vs.

McLeod Physician Associates II,

Defendant.

C/A NO.: 2013-CP-21-0690

**PLAINTIFF'S MOTION FOR NEW
TRIAL ABSOLUTE AND/OR
JUDGMENT NOTWITHSTANDING
THE VERDICT**

FILED
2016 MAY 31 PM 12:36
CLERK OF COURT
COUNTY, S.C.

Plaintiff hereby moves before this court for an order granting Plaintiff a new trial absolute, and/or for a judgment notwithstanding the verdict, for the reasons stated herein.

FACTS

Plaintiff tried this case to verdict, which was rendered by the jury on May 20, 2016. Plaintiff presented in its case-in-chief evidence to support all elements of Plaintiff's cause of action. Additionally, Plaintiff's experts presented testimony and evidence from the medical records refuting the elements required under the obstetrical emergency affirmative defense found at S.C. Code Ann. § 15-32-230.

Defendant presented their case-in-chief. Defendant attempted to establish the elements of the obstetric emergency affirmative defense. However, Dr. Browning, the Defendant physician, took the stand and stated that it was his opinion and belief that during the delivery, neither mother nor the child were in immediate threat of death or serious bodily injury. Dr. Browning also noted that the evidence available after the infant's delivery proved that the child was medically stable throughout the delivery process. Thus, it was Dr. Browning's subjective belief during the course of his management of Christy Byrd's labor and delivery of Julia B that neither mother nor child were in immediate threat of death or serious bodily injury during the labor and delivery.

CERTIFIED: A TRUE COPY
Clerk of Court
Florence County, S.C.

Moreover, Dr. Browning confirmed that the evidence available after Julia's birth objectively established that both mother and child were in fact medically stable throughout the labor and delivery.

Expert testimony offered by the defense confirmed the same. Defendant expert witnesses all agreed that the evidence available after the infant's birth objectively proved that both mother and child were in fact medically stable throughout the labor and delivery process. This is true despite these experts' best efforts to offer testimony in direct contradiction to their sworn deposition testimony that both mother and child were medically stable and not in immediate threat of death or serious bodily injury. However, in the face of the Apgar scores and cord blood gases, the defense experts had to concede that these pieces of evidence objectively established that Julia, the infant, was medically stable throughout the labor and delivery. Moreover, the experts' discussion of their opinions of the child's stability and risk of immediate death or bodily harm is irrelevant in the face of direct testimony from Dr. Browning that he, when managing the labor and delivery, personally believed that mother and child were not in immediate threat of death or serious bodily injury. For these reasons, Plaintiff requested the court find as a matter of law that the elements of the obstetric emergency affirmative defense had not be met, and that the obstetric emergency statute did not apply to the facts of this case.

The court denied Plaintiff's request. Thus, despite Plaintiff's objections to the presentation of the obstetric emergency affirmative defense to the jury, the jury was presented with the question of whether the elements of the defense found at Section 15-32-230 had been satisfied. The jury was charged on the elements of the defense, and the first question on the verdict form asked the jury to determine whether the elements of the defense had been met. The jury found that the

obstetric emergency statute applied. Therefore, the jury judged the physician's conduct according to the gross negligence standard as charged. The jury found for the defendant.

STANDARD OF REVIEW

"The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Krepps by Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290, 296 (Ct. App. 1996). In reviewing a motion for judgment notwithstanding the verdict, the court views the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002).

ARGUMENT

Plaintiff respectfully submits to this court and argues that the verdict does not render justice, as it was the product of an unfair trial. The verdict was rendered after and affected by the following errors as listed and discussed *infra*.

I. The Court Erred in Failing to Find that the Obstetric Emergency Statute Did Not Apply as a Matter of Law

A. By its own terms, the obstetric emergency statute does not apply to charitable organizations.

As discussed *infra*, Plaintiff respectfully submits it was error to determine the defendant in this case was a charitable entity. However, determining that the defendant was a charitable entity precluded the defendant from the protections afforded by the obstetric emergency statute. By its express terms, S.C. Code Ann. § 15-32-230 does not affect prior tort liability of a charitable organization for damages caused by ordinary negligence of its physicians.

S.C. Code Ann. § 15-32-240 states in pertinent part, “The provisions of this article [the obstetrical emergency statute] do not affect any right, privilege or provision of . . . the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33.” Chapter 56 of Title 33 imposes tort liability on a charitable entity for damages caused by ordinary negligence of its employees, in an amount up to \$1.2 million when the tort was committed by a physician employee such as Dr. Browning. *See* SC Code of Laws 33-56-180(A). Thus, since the obstetrical emergency statute by its express terms does not affect the tort liability of McLeod Physician Associates, II in this case under Chapter 56, Title 33, it was error for the Court to deny the plaintiffs motions for directed verdict and JNOV on inapplicability of the obstetrical emergency statute as to the corporate defendant; and for similar reasons it was error to incorporate the provisions of the obstetrical emergency statute in the charge and verdict form.

B. The Emergency Exception Must Be Interpreted as a Statute in Derogation of the Common Law.

At common law, there is no “emergency medical and obstetrical care exceptions,” as set forth in S.C. Code Ann. § 15-32-230.¹ The common law states that the plaintiff in a medical malpractice lawsuit must:

- (1) Present evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, AND
- (2) Present evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the plaintiff.

Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985).

“[S]tatutes in derogation of the common law are to be strictly construed.” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696, 2012 (2012) citing *Epstein v. Coastal Timber*

¹ The specific requirements of this affirmative defense are discussed *infra*.

Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Additionally, "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Id.* citing *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Thus, Section 15-32-230 is to be strictly construed, in the least restrictive manner.

C. As an Affirmative Defense, the Defendant Has the Burden of Proving All Elements of the Obstetric Emergency Exception.

S.C. Code Ann. § 15-32-230 is an affirmative defense and must be pleaded or is waived. In *Howard v. South Carolina Dep't of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) our Courts noted, "Affirmative defenses are waived if not pled." In accordance with this requirement, Defendant pled the obstetrical care exception as an affirmative defense.

However, mere pleading of an affirmative defense without supporting evidence is insufficient. It is incumbent upon the defense to present evidence on each and every element of its affirmative defense. South Carolina Courts have noted, "It is well established that a party pleading an affirmative defense has the burden of proving it. *Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003), citing *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000). "When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence." *Id.* citing *Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 318, 150 S.E. 789, 792 (1929). Accordingly, a defendant cannot rest upon a factually unfounded, unsupported affirmative defense, nor should the same be presented to the jury for determination. See *Hoffman v. Greenville*, 242 S.C. 34, 40-41, 129 S.E.2d 757, 760-761 (1963) (holding that the trial judge properly refrained from charging an affirmative defense to the jury where there was no proof of such a defense).

In this case, Defendant asserted the affirmative defense based upon the statutorily created obstetric emergency care exception, but failed to present evidence of its necessary elements. S.C. Code Ann. § 15-32-230 (A) and (C) read:

(A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician² may be held liable unless it is proven that the physician was grossly negligent.

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

S.C. Code Ann. § 15-32-230 (A) and (C).³

In order for a physician to avoid liability by asserting this affirmative defense for negligent actions he would otherwise be liable for at common law, the physician must prove all the required elements of the statute. For a medical malpractice claim arising out of obstetrical care,⁴ a defendant physician is required to present evidence that: (1) the claim arises out of care rendered in a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient is in immediate threat of either death or serious bodily injury.⁵ If all these requirements have been met, then the physician is not responsible for his own negligent conduct unless it is proven that the physician was grossly negligent.

D. The defendant doctor by his own testimony established that neither the mother nor the infant were in immediate risk of death or serious bodily injury.

² In this case, this lawsuit went to trial on claims not only against a "physician," but also against a charitable corporation which is not entitled to the protection of the statute.

³ Section (B) involves a claim where there is "no previous doctor/patient relationship" between the physician and the patient or the patient did not receive prenatal care. This section is not applicable to the facts of this litigation.

⁴ Appellants concede that this case involves a claim for medical malpractice arising out of obstetrical care.

⁵ Additionally, the statute explains this limitation on liability only applies to care rendered prior to the patient's discharge from the emergency department or the obstetrical or surgical suite.

Dr. Browning, the Defendant physician, established by his own testimony that neither the mother nor the child were in immediate risk of death or serious bodily injury. Therefore, Defendant by his own admissions established that a required element of the affirmative defense was not met. Because one of the required elements of the defense was not met, this Court should have determined as a matter of law that the affirmative defense did not apply to the facts of this case.

To the extent any defense expert purported to opine that the patient was in immediate threat of death or injury, expert opinion does not change the defendant physician's statements regarding his own personal, subjective evaluation of his patients. There must be both the objective immediate threat *and* that the physician's subjective appreciation that such a threat existed. By Dr. Browning's own admissions, he never thought either patient was in immediate threat of death or serious injury. As such, the affirmative defense fails as a matter of law.

Even assuming the patient was in immediate threat of death or injury, a defendant physician who does not subjectively believe this to be the case when managing the complication does not receive the protection of the statutorily created affirmative defense. Said differently, what a reasonable physician might have believed in this particular situation is irrelevant because Dr. Browning made clear that he personally failed to appreciate and was not operating under the belief that there was any immediate threat of death or serious bodily injury. As such, the defendant physician was not acting under the type of situation and fact pattern the statute was drafted to cover. The statute was drafted to shield physicians from liability for their negligence when the physician was operating under the belief that the patient was in immediate threat of death or serious bodily injury. Dr. Browning admitted that this was not the case. Accordingly, the obstetric affirmative emergency defense does not apply to the facts of this case, as a matter of law.

E. Defendant's experts failed to establish that the infant or the mother was in immediate threat of death or serious bodily injury.

Even without the Defendant physician's own admissions, Defendant's failed to satisfy this required element by failing to offer competent expert testimony that either mother or child patient were in immediate risk of death or serious bodily injury. In sworn deposition testimony, Defendant's expert witnesses unequivocally stated it was their opinion that neither mother nor patient were in immediate risk of death or serious bodily injury. To the extent these experts purported to offer opinions that directly contradicted their previous sworn testimony, such opinions are not competent testimony. The Court is not required to accept dishonest testimony that directly contradicts previous sworn statements. The experts offered their sworn testimony, realized it was not in conformity with an affirmative defense that defense counsel wished to argue, and changed their testimony to accommodate trial strategy. As such, the testimony was incompetent and should not have been accepted by the court.⁶

F. The defendant doctor established by his own testimony that he believed both mother and infant patients were medically stable throughout the labor and up through the delivery

Similarly, Defendant physician Dr. Browning established by his own testimony that he believed both of his patients were medically stable throughout the labor and delivery. For the reasons previously stated concerning the element of "immediate threat," Dr. Browning's statements concerning his subjective belief that neither patient was not medically stable foreclosed

⁶ This assumes that such testimony was even offered by the expert witnesses. As the trial transcript is not currently available, the precise language used by Defense experts to try to modify their deposition testimony is not currently available.

his ability to argue the obstetric emergency affirmative defense. Therefore, the court should have determined as a matter of law that the obstetric emergency defense did not apply to the facts of this case, and the issue should not have been submitted to the jury.

Any attempt to argue he meant in hindsight the patient was medically stable is unavailing for two reasons. First, this argument directly contradicts his prior sworn testimony, whereby he made no distinction between what he believed during the delivery and what evidence showed after the delivery. Dr. Browning believed his patients were in fact medically stable throughout the labor and delivery. Second, as noted by Dr. Browning, the objective evidence available after delivery proved that the infant was medically stable at birth. Therefore, because the patient was in fact medically stable, the physician's beliefs to the contrary do not afford him protection under the statute. For these reasons, the obstetric emergency affirmative defense failed as a matter of law.

G. Defendant's experts failed to establish that the infant or the mother was not medically stable at any point throughout labor and delivery.

Even without the Defendant physician's own admissions, Defendant failed to satisfy this required element by failing to offer competent expert testimony that either mother or child patient were not medically stable. In sworn deposition testimony, Defendant's expert witnesses unequivocally stated it was their opinion that neither mother nor patient were not medically stable up through the delivery. To the extent these experts purported to offer opinions that directly contradicted their previous sworn testimony, such opinions are not competent testimony. The Court is not required to accept dishonest testimony that directly contradicts previous sworn statements. The experts offered their sworn testimony, realized it was not in conformity with an affirmative defense that defense counsel wished to argue, and changed their testimony to

accommodate trial strategy. As such, the testimony was incompetent and should not have been accepted by the court.⁷

II. The Court erred in failing to find that the proper Defendant in this case was McLeod Physician Associates, Inc., a for-profit entity.

Through the course of discovery, Defendant's disclosed certain documents and contracts in response to questions concerning who employed Dr. Browning at the time the time the alleged negligence occurred in this case. These documents revealed that Dr. Browning entered into an employment agreement dated October 1, 2005, with "McLeod Physician Associates, Inc.," a for-profit corporation. Julia B was born on October 8, 2009. Four days after Julia's birth, on October 12, 2009, Dr. Browning received a letter of correspondence from the corporation known as "McLeod Physician Associates II." In this letter, the vice president of "MPA, II" asked Dr. Browning to acknowledge by signature that the term of his "current Physician Employment Agreement, dated October 1, 2005," was to be extended by 90 days, through December 29, 2009. Dr. Browning signed the letter, thereby acknowledging that his employment agreement with McLeod Physician Associates, Inc., the for profit corporation, would be extended until December 29, 2009. Based upon the documents disclosed by defense counsel in the course of discovery, it is without question that Dr. Browning was employed by the for profit corporation McLeod Physician Associates, Inc., on the date the alleged acts of negligence occurred.

At trial, defense counsel came up with new corporation and employment documents that were never previously disclosed to plaintiff's counsel, despite plaintiff's counsel's requests for these very documents. As an initial matter, because defense counsel intentionally withheld these

⁷ Again, this assumes that such testimony was even offered at trial. As the trial transcript is not currently available, the precise language used by Defense experts to try to modify their deposition testimony is not currently available.

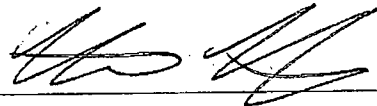
documents from the plaintiff despite plaintiff's discovery requests, the court should not have considered these documents. Nevertheless, the documents still failed to show that Defendant was employed by a non-profit corporation at the time the negligent acts occurred. According to the malpractice defense attorney who represented the nurses at their depositions, the for-profit corporation assigned its employment contracts to the non-profit corporation, McLeod Physician Associates, II. However, even if this were true, such an assignment of an employment contract does not change the fact that the employer of Dr. Browning was the for profit corporation known as McLeod Physician Associates, Inc., at the time of the negligent acts. Accordingly, the court should have held that Dr. Browning's employer and the proper defendant was the for profit corporation known as "McLeod Physician Associates, Inc."

CONCLUSION

For the reasons, stated, Plaintiff respectfully requests this Court grant Plaintiff's motion for a new trial absolute and/or grant Plaintiff's motion for judgment notwithstanding the verdict.

Respectfully submitted,

GRAHAM LAW FIRM, P.A.

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Attorneys for the Plaintiff

May 31, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
Christy Byrd, as Next Friend of Julia	)	C/A No. 2013-CP-21-00690
B , a minor,	)	
	)	
	)	DEFENDANTS' RESPONSE IN
	)	OPPOSITION TO PLAINTIFF'S
Versus	)	MOTION FOR NEW TRIAL
	)	ABSOLUTE AND/OR JUDGMENT
McLeod Physician Associates II and Dr.	)	NOTWITHSTANDING THE
John B. Browning,	)	VERDICT
	)	
<u>Defendants.</u>	)	

The Defendants, McLeod Physician Associates II and Dr. John B. Browning (hereinafter "the Defendants"), by and through their undersigned counsel, submits the following Response in Opposition to Plaintiff's Motion for New Trial Absolute and/or Judgment notwithstanding the Verdict.

STATEMENT OF FACTS

This is a medical malpractice action arising out of the labor and delivery of Julia B. (hereinafter referred to as "Julia") on October 8, 2009. During the delivery, the medical emergency of shoulder dystocia was encountered, and Dr. John Browning of McLeod Physician Associates II managed the emergency and delivered Julia. Julia's mother, Christy Byrd, brought this action on behalf of her minor child, against the Defendants seeking damages for alleged permanent right brachial plexus nerve injuries that Julia suffered during delivery. The first trial of this case was held from September 22-25, 2015, which resulted in a mistrial declaration on the afternoon of the last day of trial, September 25, 2015, after improper testimony was offered in the presence of the jury by Plaintiff's expert rebuttal witness, Dr. Daniel Strickland. This case was tried again before the

Honorable William H. Seals, Jr. from May 16-20, 2016 and resulted in a jury verdict in favor of Dr. Browning and McLeod Physician Associates II.

In utilizing the verdict form, the jury found the Defendants proved by a greater weight or preponderance of the evidence that the facts of this case arose out of a genuine emergency situation where the patient was not medically stable and there was an immediate threat of death or serious bodily injury. The jury then found Dr. John B. Browning did not act in a manner that was grossly negligent. Following publication of the verdict, and at the insistence of the Plaintiff's counsel, the Court polled the jury with each member affirmatively indicating his or her continued agreement with the verdict. The Plaintiff subsequently moves the court for an order granting her Motion for a New Trial Absolute and/or Judgment notwithstanding the Verdict asserting that the verdict did not render justice and was the product of an unfair trial. For the reasons stated herein, the Defendants respectfully submits that the Plaintiff's Motion should be denied and the verdict rendered by the jury in favor of the Defendants should be upheld.

STANDARD

The trial court must deny a motion for judgment notwithstanding the verdict if the evidence yields more than one reasonable inference or its inference is in doubt. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). A motion for judgment notwithstanding the verdict may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mutual Auto. Ins. Co., 307 S.C. 354, 357, 415 S.E.2d 393, 395 (1992). In deciding a motion for judgment notwithstanding the verdict, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving

party; if more than one inference can be drawn, the case must be submitted to the jury. Id.

The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). "However, where there is competent evidence to sustain the jury's verdict, the circuit court may not substitute its judgment for that of the jury." State v. Hill, 394 S.C. 312, 319, 714 S.E.2d 879, 883 (Ct.App. 2011) (citing State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993)).

ARGUMENT

I. The Court Properly Found that the Obstetrical Medical Emergency Exception (S.C. Code Ann. § 15-32-230) Applied to This Case and Properly Charged and Incorporated the Applicable Provisions of the Statute on the Verdict Form.

The South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-230, provides in pertinent part:

"Emergency medical and obstetrical care exceptions.

(A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.

...

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury. . ."

The limitation on liability is an affirmative defense and, as such, the defendant physician has the burden of proving that the limitation applied upon proof of which, the plaintiff patient bears the burden of proving gross negligence. Strange v. S.C. Dept. of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994) ("The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense."); Niver v. S.C. Dep't of Highways & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990) (limitations on liability under Tort Claims Act are affirmative defenses); James v. Lister, 331 S.C. 277, 283, 500 S.E.2d 198, 201 (Ct. App. 1998) (holding that the limitation on liability for charitable organizations, section 33-55-210(A) constitutes an affirmative defense); Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (governmental entity's burden to establish that the limitation on liability applied, and plaintiff's burden to establish gross negligence).

The Plaintiff asserts that McLeod Physician Associates II, as a charitable entity, is precluded from the protections afforded by the Obstetrical Medical Emergency Exception citing that S.C. Code Ann. § 15-32-240 provides that the provisions of the Obstetrical Emergency Statute "do not affect any right, privilege, or provision of . . . the South Carolina Solicitation of Charitable Funds Act" First, it should be noted that there was extensive argument from counsel during trial regarding the applicability of the Obstetrical Medical Emergency Exception to the Defendants and at no point did counsel for Plaintiff raise the issue that the statute does not apply to McLeod Physician Associates II, as a charitable institution and named Defendant, based on the argument Plaintiff now sets forth in her Motion

for New Trial and/or Judgment Notwithstanding the Verdict. Accordingly, Plaintiff's grounds for a new trial or judgment notwithstanding the verdict on this basis are expressly waived. Second, the allegations in the Plaintiff's Complaint and the Plaintiff's entire case in chief at trial was premised upon the alleged deviations from the standard of care of Dr. Browning during the delivery of Julia. Plaintiff did not set forth any evidence of alleged negligence or gross negligence on part of the practice and Dr. Browning's employer, McLeod Physician Associates II. No testimony was offered by any experts in the Plaintiff's case regarding any negligence or gross negligence on part of McLeod Physician Associates II. The Plaintiff's claims against McLeod Physician Associates II were based solely on the theory of vicarious liability for alleged acts and/or omissions or breaches of the standard of care of the agent, Dr. Browning. Imposing a separate and lesser ordinary negligence standard against McLeod Physician Associates II than the gross negligence standard against the agent and physician, Dr. Browning, solely on the status of McLeod Physician Associates II being an employer would lead to an unfair and absurd result.

The "goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000). As such, the Court properly charged the jury and incorporated on the verdict form the applicable provisions of the Obstetrical Medical Emergency Exception reflecting the proper standard of gross negligence should the jury find that the exception applied to the case.

The record of the trial of this case establishes that the Defendants submitted sufficient evidence that the Obstetrical Medical Emergency Exception applied; accordingly, it was proper for the Court to incorporate the applicable provisions of the Obstetrical Medical Emergency Exception in its charge to the jury and on the verdict form. "If there is any evidence to support a jury charge, the trial judge should grant the request." State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). There was abundant evidence in the record showing that shoulder dystocia constitutes a genuine emergency situation, that the patient was not medically stable, and that there was an immediate threat of death or serious bodily injury. Evidence was presented by both the Plaintiff and the Defendants that shoulder dystocia constituted a genuine emergency situation. In addition to Dr. Browning, obstetrical experts for both the Plaintiff and the Defendants testified that shoulder dystocia constituted a medical emergency. Further, in addition to the testimony offered by Dr. Browning regarding the management of the delivery of Julia, all of the medical expert opinion evidence offered by both Plaintiff and the Defendants establishes that time was of the essence in delivering Julia because it was only a matter of matter of minutes before Julia would have suffered brain damage or died.

The Plaintiff attempts to assert that the only evidence in the record proves that Christy Byrd and Julia were medically stable throughout the delivery and there was no immediate threat of death or serious bodily injury. As a threshold matter, it is notable that our statute does not define the term "medical stability," and the Plaintiff did not request any jury charge to define the term. The Plaintiff's argument is paradoxically premised on the notion that while Julia might have

become medically unstable if enough time had passed, the Obstetrical Medical Emergency Exception does not apply in this instance because the threat or risk did not materialize since she was delivered within one minute of Dr. Browning encountering the shoulder dystocia instead of pushing the limit to the five to eight minutes critical danger zone of brain damage or death.

While the Obstetrical Medical Emergency Exception speaks of “a genuine emergency situation,” “immediate threat” and “not medically stable” as seemingly separate elements, the medical evidence is not quite so distinct. And, while it is apparent from the trial testimony that there was a dispute between the different experts as to implications of Julia’s medical condition at the time of delivery, there was sufficient evidence presented for the jury to decide, on proper instructions from the Court, whether the Obstetrical Medical Emergency Exception applied. Accordingly, it was proper for the Court to instruct the jury on the applicable provisions of the Obstetrical Medical Emergency Exception in its charge and incorporate the applicable provisions into the verdict form.

II. The Court Properly Ruled that the Employer of Dr. Browning was McLeod Physician Associates II, a 501(c)(3) Charitable Institution.

Plaintiff initially sued McLeod Physician Associates, Inc. as a Defendant in this case; however, during the first trial of this case, it was established and agreed upon by counsel that McLeod Physician Associates II was the employer of Dr. Browning at the time of delivery of Julia and the proper entity to be named as a Defendant. See Exhibit 1, Trial Transcript, September 24, 2015, Pages 6-9. It is the understanding of the undersigned counsel that this was further stipulated to between counsel. Additionally, it is clear from a review of the first trial’s transcript that counsel for Plaintiff had no issue with the case proceeding against McLeod

Physician Associates II as no objection nor any argument was made by counsel for the Plaintiff that McLeod Physician Associates II was not the proper entity or employer of Dr. Browning during the delivery of Julia. See id.

In the Plaintiff's pre-trial brief submitted prior to the second trial, counsel for the Plaintiff then asserted there was controversy about the correct name of the entity that employed Dr. Browning stating that the Summons and Complaint were brought against McLeod Physician Associates, Inc. and Dr. Browning, and as far as the Plaintiff was concerned, those were the proper Defendants. In her pretrial brief, the Plaintiff further asserted that to the extent any discussions and statements were made about the name of the corporate Defendant and deleting the individual defendant, those were based upon the misrepresentation of fact and mistake of fact. The Plaintiff asserted its intention to again proceed against McLeod Physician Associates, Inc. and Dr. Browning until the Defendants produced reliable and authoritative evidence that Dr. Browning was employed by a different entity.

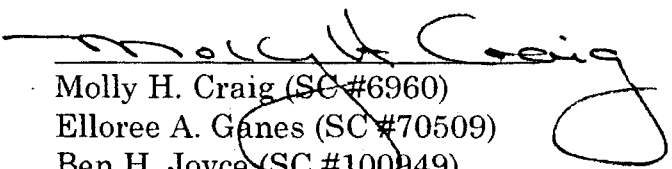
Like the first trial, at the second trial counsel for the Defendants again brought personal counsel for McLeod Physician Associates II, Saunders M. Bridges, Jr., to discuss the formation of McLeod Physician Associates II as a 501(c)(3) charitable institution and that it was the entity that employed Dr. Browning at the time of the delivery of Julia. Mr. Bridges was placed under oath and examined by counsel for the Defendants and the Plaintiff, and the Court found that based upon the documentation and testimony provided by Mr. Bridges that the proper entity or employer of Dr. Browning was McLeod Physician Associates II, a 501(c)(3) charitable institution. The Defendants produced reliable and authoritative evidence that Dr. Browning was employed by McLeod Physician Associates II.

Accordingly, the Court properly found that the entity that employed Dr. Browning at the time of Julia's delivery was McLeod Physician Associates II, a 501(c)(3) charitable institution.

CONCLUSION

For the foregoing reasons, the Defendants, McLeod Physician Associates II and Dr. John B. Browning, respectfully request that the Court deny the Plaintiffs Motion for New Trial Absolute and/or Judgment notwithstanding the Verdict.

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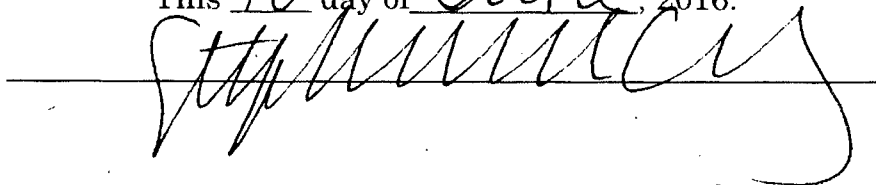
*Attorneys for the Defendants
McLeod Physician Associates II and Dr. John
B. Browning*

6110, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL ABSOLUTE AND/OR JUDGMENT NOTWITHSTANDING THE VERDICT** was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 10 day of June, 2016.



1 MR. GRAHAM: Yes, sir.

2 THE COURT: --- find those ---

3 MR. GRAHAM: Thank you.

4 THE COURT: --- cumulative and it'll come in.

5 (To the bailiff) All right. Bring them in, please.

6 MS. CRAIG: Your -- Your Honor, just that one thing
7 that we needed to clear up; it was a stipulation.

8 THE COURT: That's right. On the ---

9 MS. CRAIG: Is that all right?

10 THE COURT: On the 501(c)(3) -- whichever the proper
11 corporation was?

12 MS. CRAIG: Yes, sir. So the proper employer of Dr.
13 Browning is McLeod Physician Services, II ---

14 MR. BRIDGES: Associates.

15 MS. CRAIG: Would you state it, please, Sandy?

16 MR. BRIDGES: McLeod Physician Associates, II.

17 MS. CRAIG: Okay. And I have a copy ---

18 THE COURT: All right.

19 MS. CRAIG: --- Mr. ---

20 THE COURT: Hang on -- hang on one second.

21 MS. CRAIG: Yes, sir.

22 THE COURT: Mr. Bridges, I'm going to need your full
23 name for ---

24 MR. BRIDGES: All right.

25 THE COURT: --- for the record.

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EXHIBIT

1

1 MR. BRIDGES: Saunders Bridges, Jr. I'm just here
2 observing. But McLeod Physician Associates, II, is my
3 client. And the articles of incorporation, Mr. Graham, is
4 here. The employment contract is McLeod Physician
5 Associates, II.

6 THE COURT: All right. And so that'll be marked as
7 defense exhibit and admitted by stipulation that that is
8 the employer, correct?

9 MS. CRAIG: Yes, sir. And I have a copy from the
10 secretary of state's office, indicating that it's a
11 nonprofit corporation.

12 THE COURT: And this is consistent with the -- this
13 articles of amendment. And you've got the articles of
14 incorporation?

15 MS. CRAIG: Yes, sir. This came from Mr. Bridges.

16 THE COURT: So that'll be marked as the next defense
17 exhibit. And ---

18 MR. GRAHAM: Well ---

19 THE COURT: --- it'll be ---

20 MR. GRAHAM: I thought ---

21 THE COURT: --- in addition ---

22 MR. GRAHAM: --- it was ---

23 THE COURT: --- to the ---

24 MR. GRAHAM: --- entered yesterday ---

25 THE COURT: --- articles of amendment.

1 MR. GRAHAM: --- as Defendant's 3.

2 THE COURT: Well, that's the articles of amendment.

3 These are the articles of incorporation, as I ---

4 MR. GRAHAM: Oh, I see.

5 THE COURT: --- understand them. And they're ---

6 MR. GRAHAM: All right.

7 THE COURT: --- they're ---

8 MR. GRAHAM: Yes, sir.

9 THE COURT: --- they're distinguishable.

10 MR. GRAHAM: Yes, sir.

11 THE COURT: But they go together. Would y'all like to
12 mark them as -- as just -- no. I -- I want them marked
13 separately. So this will be a stipulation. But it's
14 defense -- whatever the next one is.

15 THE COURT REPORTER: Four.

16 THE COURT: Defense 4 and they go together.

17 MR. GRAHAM: May I just see it, Your Honor?

18 THE COURT: Sure. And 3 is right here.

19 MR. GRAHAM: Okay. I didn't know if there was a typed
20 stipulation or what. Okay. Oh, so this includes what came
21 in yesterday. I see. But other stuff as well.

22 MS. CRAIG: It's what Mr. Bridges gave me. I just
23 want to make sure ---

24 MR. GRAHAM: That's fine.

25 MS. CRAIG: --- I've got ---

1 THE COURT: All right.

2 MS. CRAIG: --- I mean ---

3 THE COURT: No -- no objection to Defense 4?

4 MR. GRAHAM: No, Your Honor.

5 THE COURT: All right.

6 (Whereupon, Defendant's Exhibit 4 was marked and
7 entered into evidence.)

8 THE COURT: All right. Now bring the jury, please.
9 All right. All right. And, Dr. Browning, you can retake
10 the stand, please, sir. And I remind you, you're still
11 under oath.

12 (Whereupon, the witness entered the witness stand.)

13 (Whereupon, the jury entered the courtroom at 8:53
14 a.m.)

15 THE COURT: All right. Ladies and gentlemen, we're
16 ready to continue. Ms. Craig, your witness.

17 MS. CRAIG: Please the Court?

18 THE COURT: Uh-huh.

19 DIRECT EXAMINATION

20 BY MS. CRAIG:

21 Q Good morning, Dr. Browning.

22 A Good morning.

23 THE WITNESS: Good morning, Your Honor.

24 Q All right. So late yesterday afternoon, when we went
25 through all of your -- your education, your training, and

State of South Carolina	)	Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2013-CP-21-00690
	)	
Christy Byrd, as Next Friend	)	
Of Julia B , a minor,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	(Volume I - Day 1 of 5)
	)	
McLeod Physician Associates II	)	
and Dr. John B. Browning,	)	
individually and d/b/a McLeod	)	
OB-GYN Associates,	)	
	)	
Defendants.	)	
	)	

May 16-20, 2016
Florence, South Carolina

B E F O R E:

The Honorable William Seals, Judge; and a jury

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1 (WHEREUPON, the jury entered the courtroom at 2:08 p.m.)

2 THE COURT: All right. Thank you very much. You may
3 continue.

4 MR. GRAHAM: Thank you, Your Honor. Good afternoon
5 again.

6 THE JURY: Good afternoon.

7 OPENING STATEMENT ON BEHALF OF THE PLAINTIFFS

8 MR. GRAHAM: Baby delivery doctors must deliver babies
9 with finesse, not force, to protect the baby that's being
10 born. If a doctor delivers a baby with force rather than
11 finesse and thereby causes injury to the baby, the doctor is
12 responsible for the harm.

13 When -- in a vaginal delivery situation where the baby is
14 coming out head first, if the doctor sees that the baby's top
15 shoulder is stuck behind the mother's pubic bone, the doctor
16 must get the mom to stop pushing. If the mom does -- if the
17 doctor does not get the mom to stop pushing and the baby is
18 injured as a result, the doctor is responsible for the harm.

19 When a baby's shoulder gets stuck behind the mom's pubic
20 bone during a head-first vaginal delivery, the doctor must
21 work through his checklist of safety maneuvers to get the
22 shoulder unstuck so the baby can be delivered safely. If the
23 doctor fails to work through his checklist and instead pulls
24 with increasing force on that baby's head, stretching the
25 baby's neck and bending the neck, if the baby is harmed as a

1 Well, in a shoulder dystocia situation, when the shoulder
2 gets stuck, it is considered an emergency, but it's not a
3 life-and-death emergency unless the doctor messes up. There's
4 five to seven minutes to get that shoulder unstuck. Doctors
5 are trained in how to do that, how to make that happen safely
6 and get the child out without any injury to these nerves.

7 So -- so doctors are trained. You know, do we want to
8 give a doctor a pass when he's asked to perform in an
9 emergency? It seems to me the evidence will show the reason
10 we need doctors is because there might be an emergency. You
11 know, if a baby is born without an emergency, a taxicab driver
12 can do the job. A stranger on the sidewalk can do the job.
13 Any of us, the evidence would show, can catch a baby that
14 comes out of the mother's birth canal without a problem. It's
15 when there is an emergency that we need a professional
16 obstetrician to manage it.

17 We also had to decide does it make a difference that this
18 stuck shoulder situation is not predictable. It's not
19 predictable. It's not preventable, but we found out it
20 doesn't make any difference because doctors are trained that
21 they must manage emergencies that occur. That's part of their
22 training. The rules require it. The standards of care
23 require that they be able to step in and manage that situation
24 with skill and with knowledge that they should have and apply.

25 What difference does it make that the cord was wrapped

1 MS. GANES: No. I have no objection, Your Honor. Our
2 only objection in the past has been where they would have a
3 PowerPoint up leading the witness through it.

4 MR. RUFFIN: Right. And I wouldn't do that. I'm not
5 doing that this time.

6 MS. GANES: Okay.

7 MR. RUFFIN: I've got pictures I'm going to put up to
8 discuss --

9 MS. GANES: I don't have any objection to the summary of
10 record.

11 MR. RUFFIN: The only words on the PowerPoint are the
12 date and maybe the holiday. It says, like, Halloween 2012,
13 and that's all it says on the slide.

14 MS. GANES: And that's just the pictures that you're
15 going to put up?

16 MR. RUFFIN: Correct. Nothing but pictures. I might put
17 this up for her as well right there just so the jury can know.

18 THE COURT: Everybody good?

19 MS. GANES: Yes. Thank you, Your Honor.

20 (WHEREUPON, the bench conference ended and the
21 proceedings resumed as follows.)

22 THE COURT: All right. Go ahead and call your first
23 witness.

24 MR. RUFFIN: Your Honor, the plaintiff calls Christy
25 Byrd.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 I've been married to my husband, David, 18 years in December.
2 We were high school sweethearts. He basically lived in my
3 backyard. I could look out my window and see him, make sure
4 he was home or not. And pretty much we've had a good life.
5 Q: And where did you say you -- where you went to school?
6 A: I went to school at Wallace High School. I was the last
7 class to graduate.
8 Q: Okay. And y'all -- and you and your husband were high
9 school sweethearts?
10 A: Yes.
11 Q: And what does he do now?
12 A: He's athletic director at Cheraw High School.
13 Q: And what about you? What do you -- what do you do for
14 work?
15 A: I'm a cosmetologist at Finishing Touches.
16 Q: Okay. And tell me how many -- how many children do you
17 and your husband have?
18 A: Three.
19 Q: And what are -- what are the ages?
20 A: Fifteen, 11, and 6.
21 Q: And Julia is the youngest?
22 A: She's the baby. She's 6.
23 Q: And what are the names of your other two children?
24 A: Mary Elizabeth, who goes by Liz, and Emily Grace, and we
25 call her Em or Emmie.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Q: And so as a family, what -- what types of things do y'all
2 do?

3 A: Well, of course, with David being an athletic director,
4 mostly everything we do is sports oriented; so ballgames. My
5 oldest daughter plays volleyball and softball. My middle
6 daughter is a gymnast. Like I said, David's the coach. He
7 just played for an upper state championship on Friday. So
8 we've been at the ballpark pretty much since January. So
9 everything we do is basically sports related or beach outings.
10 Family -- just we're very family oriented. We do everything
11 together.

12 Q: Does that extend beyond just the immediate family? Do
13 you have maybe -- maybe an aunt?

14 A: Yes.

15 Q: Tell us.

16 A: Usually, birthday parties are huge at our house, one
17 reason because everybody's birthday is in the same week, but
18 my family is big. David's family is big. So it's always a
19 big event when we're all together. Deliveries -- we've been
20 told to quiet down, you know, in the hospital.

21 Q: Tell me about -- who is Stacy?

22 A: She's my aunt.

23 Q: Okay. And what -- what relevance will she have in this
24 case as we sort of progress?

25 THE WITNESS: I feel like I'm echoing here. Is that

1 okay?

2 THE COURT: You can turn that off if you want to. That
3 would be fine. If the jury can hear, that's fine.

4 THE WITNESS: I still feel like I'm fussing. Is that
5 better?

6 MR. RUFFIN: We'll find out in a minute.

7 THE WITNESS: Okay.

8 BY MR. RUFFIN:

9 Q: I was asking who is Stacy and how is she related to
10 Julia's birth?

11 A: She's my aunt. I lived with her from the time I was
12 probably 10 or 11 until I moved out and got married, but she
13 videoed Julia's birth.

14 Q: How was she the lucky one?

15 A: I was just laying there and I was like, David, go get
16 Stacy. I think I want her to video the birth. We've never
17 had anyone video the other two girls' births and we knew it
18 was the last one. So we had planned on it being the last one.
19 It's been the last one and I wanted him to be able to enjoy it
20 as much as I did and not have to worry about all the videoing.

21 Q: And before we talk in more detail about Julia's birth, I
22 want to talk about sort of the process of how the pregnancies
23 went and deliveries with your first two. Would you mind
24 telling me a little bit about how your first pregnancy went?

25 A: My first pregnancy?

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Q: With your oldest.

2 A: With Mary Elizabeth, it was good. I gained a little bit
3 more weight than I should have, but it was my first pregnancy
4 and I took advantage of it. I could eat; so I ate. But she
5 was a normal-sized baby, normal delivery. No problems
6 whatsoever.

7 Q: Did you do the things that the doctor told you to do --

8 A: I did.

9 Q: -- with your first? Did you take care of yourself other
10 than you said --

11 A: I over ate a little bit. I did.

12 Q: And prenatal vitamins and all that?

13 A: I did.

14 Q: Let me ask you this. With your first child, did your
15 oldest have any sort of injury to her arm?

16 A: No, she does not.

17 Q: Any -- any limitation in movement of her arm?

18 A: No.

19 Q: And what doctor delivered your first?

20 A: Dr. Tatum.

21 Q: And tell me about baby number two. How did that
22 pregnancy go?

23 A: Emily -- I guess I got payback for all the eating the
24 first time because the second time I couldn't eat anything.
25 Whatever I ate, it came right back up. And I think I only

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 gained maybe 22 pounds -- 20 -- 22 pounds, not a lot. She was
2 seven five and a half, a good-sized baby, normal.

3 Q: Did you have any health issues with -- with your second
4 pregnancy?

5 A: No.

6 Q: And what about the delivery? How did the delivery go of
7 your second?

8 A: It was a breeze.

9 Q: Any sort of injury to your middle child's arm?

10 A: No.

11 Q: Any limitation in movements of her arm?

12 A: No.

13 Q: All right. Let's move on to Julia. And tell us, was
14 Julia here in the courtroom at any point today?

15 A: Yes. She's been here all day in the back. She just left
16 a little while ago. She was taking a little nap and sitting
17 in the back, but she's been here.

18 Q: Tell us about learning you had number three on the way?

19 A: I was totally shocked. I think I bought maybe 15
20 pregnancy tests waiting for that one to say no, when all the
21 rest had said yes because we -- we didn't plan on one at that
22 time. I went to Dr. Browning. He confirmed my pregnancy and
23 from there on everything was normal. I didn't gain a lot of
24 weight. I was active.

25 Q: Did you yourself have any health issues during your

1 pregnancy with Julia?

2 A: I failed my first sugar test, but the second one I
3 passed.

4 Q: Did you take care of yourself with Julia's pregnancy?

5 A: I did.

6 Q: Did you take prenatal vitamins?

7 A: I did.

8 Q: Did you do all the things the doctor tells you to do?

9 A: I did.

10 Q: Did you have any complications whatsoever other than the
11 one failure of a sugar test that you passed later?

12 A: No, I did not.

13 Q: Tell me about Julia's delivery. Was it a natural? Did
14 you just go into labor or did you -- were you induced?

15 A: No. We had -- we chose induction.

16 Q: Okay. And when you chose induction, sort of how did that
17 come about? How did you know what doctor would deliver when
18 you scheduled for induction? Tell me a little bit about that.

19 A: My last doctor visits were with Dr. Browning. He -- he
20 was my primary doctor before I ever got pregnant. He was my
21 primary doctor and then during pregnancies he always saw me up
22 until, like, I was four or five months pregnant and then you
23 go into a rotation.

24 But once I came back to him, he saw me the rest of the
25 time. And I was old; so I felt having a baby at 38 and tired

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 and I talked to him about induction and we both agreed that --
2 to set it up on October the 8th for her induction date.

3 Q: Okay. And when you went in for the induction, tell me
4 what it's like for the Byrd family when someone's having a
5 baby?

6 A: Like I said, we've been told quite a few times to keep it
7 down in the hospital. We knew it was probably our last.
8 David's family was there. My family was there. We had the --
9 the whole waiting room filled up. We started -- we went by
10 ourself to start with and slowly everybody started bringing in
11 the kids because I wanted them to be the first ones to meet
12 her. And by the end of the day when she finally arrived, I
13 think the -- the room was full.

14 Q: So you get to the hospital at some point. Tell me about
15 what's happening then?

16 A: When I come in, I was set up to have my tubes tied. I
17 signed the papers, but that didn't happen. I didn't have them
18 tied. And they took me to the room, get me prepped, did my
19 blood work, took blood work, blood pressure, and started me on
20 Pitocin. Dr. Browning come in and checked me and then they
21 started the Pitocin.

22 Q: And as you sit here today, do you have any memory of the
23 names or faces of any of the doctors and nurses that were in
24 and out of the delivery room?

25 A: Dr. Browning was in and out during the day. Misty

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Barrett was in there the whole day with me.

2 Q: And who is Misty Barrett?

3 A: She's the nurse. And the reason why I remember her, I
4 made a connection with her. We both had the same birthday and
5 Julia was born on October the 8th and our birthday was October
6 the 12th. So it was kind of a little joke that we were both
7 getting birthday presents on our birthday a little earlier.

8 Q: And we'll show the video later. So we'll obviously have
9 that to look at, but what I'd really like to know now is if
10 you could tell us a little bit about -- you know, if you could
11 just set the scene for what's going on right before you're
12 instructed to start pushing, sort of leading up to the point
13 where it's time to start pushing?

14 A: I was just laying in the bed this way. To the right of
15 me was Misty. To the left was my husband. There were a
16 couple CNAs in during the day. I'm not sure of their names.
17 I didn't really speak with them.

18 Misty watched me push a couple times. Well, she checked
19 me and then she watched me push a couple of times and, you
20 know, she said I think we're going to have a baby. Let's get
21 the doctor in. And they called Dr. Browning to come in.

22 Q: And prior to pushing, were there any issues with your
23 health or the baby's health at all?

24 A: No.

25 Q: Did anyone let you know of any issues whatsoever in terms

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 of any complications or heart rate issues or anything of that
2 nature?

3 A: No.

4 Q: And how were you progressing?

5 A: Not fast enough for me, but they said I was progressing
6 enough not to have a C-section. I had thought since it was my
7 third child that I would have her fairly quickly. My first
8 one, I was in a little while. The second one was born
9 quickly. So I was, like, oh, I'll have a baby by lunchtime.
10 And when that didn't happen, I felt like I just wasn't
11 progressing well, but according to Misty, I was progressing
12 enough that I didn't need a C-section and everything was okay.

13 Q: Thank you. Now what I'd like for you to do is tell us --
14 if you could, just set the scene for what's happening at the
15 time you're told to start pushing?

16 A: David was to my left and he held my left leg. Misty was
17 to my right and she -- she watched me push a couple of times.
18 I actually held my right leg while she watched a couple of
19 times. And she just told me to keep pushing. We did the 10
20 count. I pushed for 10 counts, stopped, pushed for 10 counts,
21 to get -- try to get three out of each contraction.

22 Dr. Browning came in and watched and watched me push a
23 couple of times and he told me I was a good pusher and that we
24 should have a baby before long. And he was to the right of me
25 and put on his scrubs and said that you're a good pusher,

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Christy, we're going to have a baby.

2 Q: Did Dr. Browning ever instruct you to stop pushing?

3 A: No.

4 Q: Did anyone ever get you to stop pushing?

5 A: No.

6 Q: Did any nurse or anyone else in the room ever say or
7 instruct you to stop pushing?

8 A: No.

9 Q: And now, tell us a little bit about, if you remember, a
10 nurse at any point putting pressure or pushing on your -- on
11 your abdomen area anywhere or your pubic area anywhere?

12 A: Misty.

13 Q: Okay.

14 A: She -- I had an epidural. So I couldn't feel exact, but
15 -- and she kind of leaned over me, which kind of blocked any
16 view I would have had, but I was more or less -- I didn't
17 think anything was wrong. So I was just concentrating on
18 having the baby and she began -- I could feel the pressure. I
19 can't tell you exact, but she just leaned over me and started
20 applying pressure.

21 Q: Okay. And is Julia finally delivered?

22 A: Yes.

23 Q: When did you -- what did you realize or when did you
24 realize maybe something hadn't gone quite right?

25 A: I can remember once during the -- when I was pushing that

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 David looked at me and he said you've got to push, you've got
2 to push now. So I just pushed. And after she was born, they
3 asked him did he want to cut the umbilical cord and he did,
4 but they never offered her to me. Normally, your baby lays on
5 your chest once you have -- give birth, and they took her.
6 They took her over to the little crib, and him and my aunt
7 went with her, and he come back and told me something was
8 wrong with her arm.

9 Q: Now, what does -- at the time right after Julia's
10 delivery, what does Dr. Browning tell you about Julia?

11 A: That she may have a stinger.

12 Q: And what did you understand that to mean?

13 A: That it was like an injury a football player would have.
14 That everything would be okay by the time we went home, and we
15 stayed an extra night just to make sure.

16 Q: When you finally left the hospital, did Julia have any
17 movement in her arm -- her right arm?

18 A: No.

19 Q: Ms. Byrd, tell me how things have been since?

20 A: We've traveled everywhere we know to go trying to find
21 help for her. We didn't even know what was wrong when we left
22 the hospital.

23 She can't do things that other kids to do. She can't
24 carry her tray correctly at -- at school. She has to have
25 help. She walked up to us just the other night in the bedroom

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 and said why is my arm broke, and when we asked her what she
2 meant by it, she said, my arm is broke, mama. And I said,
3 well, no, Julia, your arm is not broke. She said, look, it's
4 shorter than the other one. And we told her that God made her
5 special, that everybody was special in their own way and
6 that's how he made her special.

7 Q: Ms. Byrd, I want the jury to get to know a little bit
8 about how she's aged and grown and see some of sort of what
9 it's been like for her since this case is you for Julia, and I
10 think the best way might be to go through some photographs.
11 What I'd like to do is present you with what's marked as
12 Plaintiff's Exhibit Number 1 for identification. Tell me if
13 these are the photographs that you and I went through and
14 selected to best illustrate Julia?

15 A: Yes. It looks like the ones.

16 MR. RUFFIN: Your Honor, at this time, we'd move for the
17 photographs to be admitted into evidence.

18 THE COURT: Any objections?

19 MS. GANES: No objection, Your Honor.

20 THE COURT: All right. Plaintiff's Number 1 is into
21 evidence without objection.

22 (WHEREUPON, Plaintiff's Exhibit Number 1, photographs,
23 was admitted into evidence.)

24 BY MR. RUFFIN:

25 Q: And you can hang onto those because I'm going to -- we're

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 going to put them up so that the jury can see them. And I
2 just want -- as we put them up, if you wouldn't mind telling
3 me a little bit about what's going on in each photo and any
4 significance to why you chose the photo that we're looking at.
5 And I'm going to -- I'm going to move over here to get out of
6 the way.

7 A: This was immediately after she was born once they took
8 her over into the crib before I had a chance to see her.
9 David took the picture of her. And as you notice, her left
10 hand is up and her right arm is hanging.

11 Q: Okay. What about here?

12 A: This was right after they had done her Apgars I think and
13 they turned her on her side and her little left arm would
14 move, but her right arm wouldn't raise up.

15 Q: Do you remember what her Apgar scores were?

16 A: They were nines. They were high.

17 Q: Do you know if that -- I mean what was your understanding
18 of what that meant?

19 A: That she was healthy. All my babies had high Apgars.

20 MR. RUFFIN: Go to the next.

21 BY MR. RUFFIN:

22 Q: Okay. And what do we see here?

23 A: This is either the night after she was born or the next
24 day, and they had asked me to swaddle her and I --

25 Q: And you said they. I'm sorry. I don't mean to cut you

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 off, but who is they?

2 A: The nurse told me to swaddle -- to keep her swaddled and
3 not to let her arm move much.

4 Q: Okay. At any point, did you learn anything more about
5 swaddling a child?

6 A: That it was the worst thing I could have done.

7 MR. RUFFIN: Let's go to the next one.

8 BY MR. RUFFIN:

9 Q: I think that's a little -- well, if there's any --

10 A: No. We were just holding her and obviously her left hand
11 is visible and her right wasn't.

12 Q: Okay. What do we see here?

13 A: This is when we came home from the hospital. Her left
14 arm is up and her right arm is still down.

15 Q: Is she able to move her right arm at this point at all?

16 A: No. It's her first Halloween. That's my dad holding
17 her. It was taken at his house. And she was mad.

18 Q: And what do we have here?

19 A: This is first Christmas. The one in the -- by herself in
20 the polka dots, we just took and she -- her left arm is
21 forward and her right arm is tucked under. She -- she was
22 propped because she couldn't weight bear or bear weight on her
23 arms.

24 Q: And what do we see here?

25 A: This is January after she started therapy in December I

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 think and still no -- no movement, just barely lifting her
2 shoulder off the ground.

3 Q: Okay. And on this picture, I see -- it looks like tape
4 on the arm or -- can you tell me what that is?

5 A: It's kineseo taping, and her occupational therapist done
6 it. It helped if we propped her or could put her on a flat
7 surface or up against anything. The kineseo taping would pull
8 the ligaments and tendons back so that her shoulder wouldn't
9 slump and would help give her some movement. Her arm rotated
10 in; so the tape was diagonal to help rotate out.

11 Q: Okay.

12 MR. RUFFIN: Let's go to the next photo.

13 BY MR. RUFFIN:

14 Q: Okay. What do we see here?

15 A: This is one of the first times she was able to pick up
16 her arm. In one she's holding her baby and in the other she's
17 reaching for her little toy, but that was after 2 and 1/2
18 months therapy before she was able to do that.

19 MR. RUFFIN: Let's go to the next.

20 BY MR. RUFFIN:

21 Q: Okay. What do we have here?

22 A: That's her first daycare picture, probably her only
23 daycare picture.

24 Q: Did she not stay there very long?

25 A: No, she did not stay in daycare. And as you can tell,

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 her arm is bent and that's how she carries it.

2 MR. RUFFIN: Let's go to the next.

3 BY MR. RUFFIN:

4 Q: Okay. These three photos -- what are we seeing here?

5 A: Just playing with her sister, trying to get her on her
6 stomach to learn some weight-bearing so she could prop that
7 arm up, but it's under in all of the pictures. And the left
8 arm is up, right arm is down.

9 Q: Okay.

10 A: This was at a -- a little farm that we have near our
11 home, and my dad, since all the girls' birthdays are in
12 October, had taken them to the farm for the Halloween
13 festival. And as you can see, she holds her right arm. It
14 doesn't extend out.

15 Q: All right. Okay. So this says before surgery at Papa's
16 house, May 2012. What's the significance of this picture?

17 A: She's -- her right arm is still very little movement.
18 You could tell that her left arm was bending. She was posing
19 for us. But her right arm cannot do what her left arm does.

20 Q: Okay.

21 MR. RUFFIN: Let's go to the next one.

22 BY MR. RUFFIN:

23 Q: Is that the same place sort of?

24 A: Yeah. And just the bending. That's how she holds her
25 arm.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Q: Okay. All right. So where is this picture taken?

2 A: This is in Atlanta at the hospital before surgery.

3 Q: Okay. And we're going to talk a little bit about the
4 surgery in a minute, but let's see the --

5 MR. RUFFIN: What's the next one?

6 BY MR. RUFFIN:

7 Q: So where is this?

8 A: This is our first night home from Atlanta.

9 Q: Okay.

10 MR. RUFFIN: And that next?

11 BY MR. RUFFIN:

12 Q: Where are we here?

13 A: Back at Papa's house at the pool and everyone is swimming
14 but Julia because of her body cast. This was at Papa's.
15 Yeah, we had to make her clothes so that she could -- so that
16 she could -- they would fit over the whole entire cast.

17 Q: Okay.

18 A: This is playing dress-up with her sisters.

19 Q: Okay.

20 A: And you could tell that the left arm is bent and the
21 right arm is still -- and her shoulders -- they're rounded.

22 Her right shoulder is rounded and her left one is not.

23 Q: Okay.

24 A: This is just Christmas photos that --

25 Q: Okay.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 A: -- that they done. This was Halloween and once again the
2 right shoulder is rounded. She has trouble with her clothes
3 staying on her shoulder because --

4 Q: I'm sorry.

5 A: Regardless, it still slopes.

6 Q: And what do we have here?

7 A: This is in a homecoming parade. My friend Sonya is in
8 the car with me and our children were the mascots for the
9 homecoming night. And as you can tell, Julia has her right
10 hand up waving, but she can't wave like this. She has to turn
11 her whole body to wave. There's no moving out.

12 Q: All right.

13 A: This is at Papa's house again, baking cookies. Everybody
14 was -- they do it once a -- well, once a year at Christmas
15 time baking -- baking cookies, and Julia -- I think it's a
16 roller in her hand. She had to use a different roller than
17 everybody else because she couldn't apply the pressure with
18 the two hands.

19 Q: Okay. If we looked at Julia's shoulders today, how would
20 one look compared to the other if we looked at her back?

21 A: She's -- she's not even. Her midline is off. Her right
22 shoulder is sloped. This one is straight. Her scapula wings
23 --

24 Q: If we looked at her arms in front, what would we see?

25 A: That her right arm is shorter than her left arm.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Q: What about movement of left arm compared to right?

2 A: She has full range movement of her left arm, but not of
3 her right arm.

4 Q: Ms. Byrd, what treatment have you sought and received for
5 Julia over the course of her life?

6 A: We've been in occupational therapy since she was three
7 months old until her surgery. And after she was released,
8 then we've continued therapy at home.

9 Q: And when were you released?

10 A: From OT? From occupational therapy?

11 Q: Okay.

12 A: We were released probably 12 weeks after surgery maybe.

13 Q: And when you say at home therapy, what is that?

14 A: We do therapy with her at home. Since she's been in
15 therapy since she was three months old, each occupational
16 therapist that we visited with, each doctor gave us a list of
17 movements to do with her to help get more range of motion.

18 Q: How many -- how often do you do that a week?

19 A: We do it every day.

20 Q: After Julia was born, how did you come to learn that
21 Julia needed to see a specialist about her injury?

22 A: At her first pediatric visit.

23 Q: Who was that?

24 A: Dr. Mariana Ciobanu.

25 Q: And where does she work?

CHRISTY BYRD - DIRECT BY MR. RUFFIN

- 1 A: She worked at Carolina Pediatrics.
- 2 Q: Does she still see your kids?
- 3 A: No. She moved away.
- 4 Q: Well, at any point prior to Dr. Ciobanu, your
- 5 pediatrician, letting you know you should see a specialist,
- 6 did anyone else ever let you know that Julia had an injury
- 7 that was permanent or that required treatment of a specialist?
- 8 A: No.
- 9 Q: And at delivery, what did Dr. Browning lead you to
- 10 believe about Julia's injury?
- 11 A: That it was something that would heal.
- 12 Q: Now, did he call you at any point after Julia's birth?
- 13 A: He did.
- 14 Q: When he called you, did he tell you the injury was
- 15 permanent?
- 16 A: No.
- 17 Q: Did he let you know anything about seeing a specialist
- 18 before the pediatrician had already told you to see a
- 19 specialist?
- 20 A: No.
- 21 Q: What I'd like to do now is just briefly put up so we can
- 22 talk about a couple of the more significant treatment sessions
- 23 or visits over the course of Julia's life, but before we do
- 24 that I want to pass up a document and ask you to identify for
- 25 me what it is. And this is Plaintiff's Exhibit Number 2.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 A: This is a list of all the doctors we've visited since her
2 birth.

3 Q: Now, did you and I -- actually, let me ask you what
4 Plaintiff's Exhibit Number 3 is?

5 A: These are all of her -- her doctor notes, visits,
6 therapy.

7 Q: Now, did you and I go through these records and from
8 these records make the list that I handed you, which is
9 Plaintiff's Exhibit Number 2, to summarize your treatment
10 efforts or your family's efforts to help Julia so that we
11 could run through this as opposed to thumbing through that
12 stack?

13 A: Yes, we did.

14 MR. RUFFIN: Your Honor, at this time, we move
15 Plaintiff's Exhibits Number 2 and 3 into evidence.

16 THE COURT: Any objections?

17 MS. GANES: Your Honor, either the records or the
18 summary, not both.

19 THE COURT: I think he said Plaintiff's 2; isn't that
20 right?

21 MR. RUFFIN: I'm happy to do just 2, Your Honor.

22 THE COURT: Any objections?

23 MS. GANES: No objection other than if he's going to go
24 through it ad nauseum here. Then it would be cumulative.

25 THE COURT: Plaintiff's Number 2 into evidence without

1 objection.

2 MR. RUFFIN: Okay.

3 (WHEREUPON, Plaintiff's Exhibit Number 2, summary of
4 medical records, was admitted into evidence.)

5 BY MR. RUFFIN:

6 Q: So here's the first few visits. Tell me just briefly a
7 little bit about the very first one?

8 A: The first one was her well-baby visit with Dr. Ciobanu.

9 Q: Okay. Now, what about the MUSC visit?

10 A: That was our first visit with Dr. Steven Kinsman and Dr.
11 David Stickler.

12 Q: Okay.

13 A: That is where Dr. Ciobanu's sent us after telling me that
14 she had Erb's palsy.

15 Q: And when you were at MUSC, did they do a test called an
16 EMG?

17 A: They did.

18 Q: Why do you remember that?

19 A: Because I was the one who held her while they stuck her
20 with needles to evaluate her nerves.

21 Q: Okay.

22 MR. RUFFIN: I want to move to the next.

23 BY MR. RUFFIN:

24 Q: Okay. This says physical occupational therapy. What are
25 these visits?

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 A: And these are all our OT therapy, occupational therapy,
2 with Amber Hughes.

3 Q: Okay. Now, in these -- in this grouping, is there any
4 particular visit that stands out to you?

5 A: The March 12th visit when we were at a follow-up at MUSC.
6 We were lucky enough that God placed Dr. McGillicuddy there.
7 He -- he's the doctor who invented the nerve transfer surgery
8 and they were going to take a nerve from Julia's leg, a tendon
9 and nerve from her leg, and put it in her shoulder. And he
10 began to see her on that day. Luckily, she bypassed that with
11 therapy and we didn't have to have that visit -- I mean that
12 surgery.

13 Q: Okay. All right. I see the first visit to Atlanta.
14 What's the significance of the Atlanta visit?

15 A: We saw Dr. Ratner at the Children's Hospital. He is a
16 hand and upper extremity specialist, and he evaluated Julia's
17 brachial plexus injury.

18 Q: Now, how did you end up in Atlanta?

19 A: Our friends Derek and Sonya Gordon. Their child also has
20 an injury to his arm, not the same as Julia's. He was born
21 with a mass, and they saw doctors in Philadelphia and had
22 tried to connect us with them, and in return the doctors in
23 Philadelphia said that Dr. Ratner would be better for Julia's
24 injury.

25 MR. RUFFIN: Go to the next.

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 BY MR. RUFFIN:

2 Q: Okay. Is this just more MUSC visits --

3 A: Uh-huh.

4 Q: -- and therapy?

5 A: Yes. That's all. We did see an orthopedic on 8/17 at
6 MUSC, but being that it's not an injury, an orthopedic injury,
7 it was just pure evaluation.

8 Q: More of the same?

9 A: More of the same. Hands on Development, also known as
10 BabyNet, began coming out to our house, coming to our home to
11 do therapy with her as well.

12 Q: Okay.

13 A: Hands on Development there too. Those are all the same.

14 Q: Okay. All the same?

15 A: All the same.

16 Q: Okay. So I see Texas Nerve and Paralysis Institute. Can
17 you tell me about that?

18 A: After seeing Dr. Ratner and the doctors at MUSC, nobody
19 was telling us the same thing. We just wanted, like, the same
20 thing twice, a second opinion that matched the first opinion.
21 So we visited Dr. Nath. He -- he has a clinic in Texas, but
22 we visited him in West Palm Beach, Florida, and he examined
23 Julia and told us that she would need two surgeries.

24 Q: And what did you decide to do with Dr. Nath?

25 A: The two surgeries he had told us about were not two that

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 we had heard before. So we sought another opinion until we
2 could get the same thing.

3 Q: Okay. And so we have -- and I saw some Cincinnati
4 visits.

5 A: Uh-huh.

6 Q: Cincinnati. I'm going to discuss that with David, later;
7 so I'm going to keep moving through this page and this page.
8 I do want to turn back to the Children's Healthcare of
9 Atlanta. When did you go to Atlanta after your first visit?

10 A: I'm looking on here. That's Cincinnati. On mine, I
11 think we went back 6/28/2012. There may have been one or two
12 visits in between there with him.

13 Q: And what went on in Atlanta during this trip?

14 A: He actually told us the same thing that Cincinnati had
15 told us as far as surgery-wise, and we chose to use Dr. Ratner
16 because he was closer and, as I said before, I don't go
17 anywhere without my children and it was just much easier for
18 us to all go to Atlanta rather than Cincinnati.

19 Q: And tell me what doctor? Was it Dr. Ratner you said? Is
20 that the doctor that you saw in Atlanta?

21 A: Yes.

22 Q: Okay. At any point in time, did -- was a surgery
23 performed?

24 A: Yes. He performed her surgery.

25 Q: Okay. Let me ask you -- and I know Julia -- how old was

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 Julia at that time?

2 A: About two.

3 Q: Okay. Can you tell me -- do you know if she had any
4 recollection of that, either now or afterward?

5 A: She does.

6 Q: How do you know that?

7 A: Because when she -- when she plays sometimes or sometimes
8 we'll just be talking, she'll say, mama, do you remember the
9 men with the white hats and the blue suits, and I'll say,
10 Julia, where -- you know, I always try and say, well, who are
11 you talking about just to make -- and she'll say, you know,
12 the people that made you -- because I had to -- I was allowed
13 to carry her to the operating room. So I had to wear the
14 white hat and the gown and all as well, and she said the
15 people who put the white hat on you, mama, those people.

16 Q: And if you could, just walk us through. What's going on
17 there? Since we weren't there, I mean what -- what is the --
18 I mean what's happening? You said you have the gown on. I
19 mean --

20 A: They dressed -- they dressed me. In one of the pictures
21 you saw, they dressed me in a gown like hers and -- as we sat
22 there waiting, then we were taken to another room where they
23 started to give her -- they put a mask on her to kind of help
24 calm her down so we can get her to the operating room. And
25 they came -- I sat in a rocking chair and rocked her and she

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 sucked a pacie then; so we had to take her pacie away and I
2 sat down and rocked her. And they came around from behind and
3 put it over her face and she fought and screamed and yelled,
4 mommy, no, no, mommy, no, until she calmed down some and they
5 took it off and David kissed her and I carried her to the
6 operating room.

7 Q: And then what happened?

8 A: I handed her over to perfect strangers to do -- take her
9 to Dr. Ratner to have surgery.

10 Q: And then she wakes up and how are -- how is she after the
11 surgery?

12 A: Irritable a little. I mean she's in a cast like this.
13 So she was irritable. Some pain.

14 Q: Okay.

15 A: We spent the night in Atlanta that night.

16 Q: So if you wouldn't mind telling us, with Dr. Ratner -- I
17 mean was it one and done or have you --

18 A: We -- we have seen him some follow-up visits. We
19 conference call with him. He's done -- if we need to email or
20 send him videos, he accepts those, but we have a follow-up
21 visit or a visit with him in June.

22 Q: Thank you. I'm going to move away from just the medical
23 records and would like to just get a better understanding from
24 you, her mother, as to what you see when you watch her just --
25 just so we can have some understanding of how she -- how she

1 gets along.

2 A: Julia is six years old and she can't wipe herself. She
3 goes to school all day and does not use the bathroom because
4 she can't unbutton her pants and she can't wipe herself. She
5 can't do some of the same things that my other two girls done
6 at that age. She can't do gymnastics.

7 Here lately, she says I want to play softball, I want to
8 play softball. She may be able to hit the ball, but as far as
9 gloving, putting a glove on, catching, throwing, she's going
10 to have to learn a whole different way.

11 Q: Now, as her mother, what concerns do you have for Julia
12 as she gets older and tries new things as she gets by and she
13 ages?

14 A: I think about her when she's in high school or along
15 middle school, junior high, the bullying because she is
16 different. She does look different. I think about when she's
17 a mama. Will she be able to hold and care for her baby the
18 way I've cared for mine? Family events -- will she be able to
19 be the grandma that does the cooking and takes the turkey out
20 of the oven or bakes cakes and all because she can't equally
21 use both arms?

22 Q: Do you think she could be employed in your profession?

23 A: No.

24 Q: What about David's as a coach?

25 A: She may could coach. She can't participate. She

CHRISTY BYRD - DIRECT BY MR. RUFFIN

1 wouldn't be able to show or have the ability to do the things
2 that he does.

3 Q: I just have a few more questions, Ms. Byrd. Are you
4 aware of anything that you did or didn't do that would have
5 caused or contributed to Julia's injury?

6 A: No.

7 Q: Are you aware of anything that Julia did or didn't do
8 that would have caused or contributed?

9 A: No.

10 Q: Can you think of anything that either of you did or
11 didn't do that would warrant any assertion that y'all did
12 something to cause her injury?

13 A: No.

14 MR. RUFFIN: Thank you. I have no further questions.
15 Please answer any that the defense may have.

16 THE COURT: All right. Cross?

17 MS. CRAIG: Ms. Ganes will do cross.

18 MS. GANES: Thank you, Your Honor. May it please the
19 Court.

20 CROSS-EXAMINATION

21 BY MS. GANES:

22 Q: Good afternoon, Ms. Byrd.

23 A: Good afternoon.

24 Q: Are you okay to answer a few more questions or do you
25 need a break?

CHRISTY BYRD - CROSS BY MS. GANES

1 A: No. I want to answer.

2 Q: I only have a few. Ms. Byrd, you became a patient of Dr.
3 Browning around 1999 or 2000; is that correct?

4 A: Yes.

5 Q: And you never had any complaints about Dr. Browning's
6 treatment of you as a patient, did you?

7 A: No, I have not.

8 Q: There was never a time when you felt that Dr. Browning
9 was unkind or lacked compassion toward you as a patient, was
10 there?

11 A: No, I have not ever felt that.

12 Q: He was never rude to you in any way; isn't that true?

13 A: That's true.

14 Q: And he always took the time to listen to you when you had
15 office appointments --

16 A: He --

17 Q: Is that correct?

18 A: He did.

19 Q: There was never a time when Dr. Browning was taking care
20 of you that you felt you needed to have another obstetrician;
21 is that true?

22 A: That's true.

23 Q: And you had no complaints about his practice or anyone
24 who worked in the practice; correct?

25 A: Correct.

CHRISTY BYRD - CROSS BY MS. GANES

1 Q: No receptionist or office staff was ever rude or uncaring
2 toward you, were they?

3 A: No.

4 Q: Everyone -- did everyone treat you professionally and
5 courteously?

6 A: They did.

7 Q: And you were satisfied with all the prenatal care that
8 you were provided by Dr. Browning and his practice; is that
9 true?

10 A: That's true.

11 Q: You didn't have any complications with your pregnancy
12 with Julia, did you?

13 A: No, I did not.

14 Q: When Dr. Browning came to see you in the hospital on the
15 day that you delivered Julia, was he kind and compassionate to
16 you during the delivery?

17 A: He was.

18 Q: And isn't it true that you did not know that a
19 complication occurred during Julia's delivery until after the
20 delivery?

21 A: Exactly.

22 Q: There was never a time that Dr. Browning did anything to
23 you that was reckless or irresponsible, was there?

24 MR. RUFFIN: Objection, Your Honor. That calls for
25 standard of care.

CHRISTY BYRD - CROSS BY MS. GANES

1 THE COURT: Somewhat. Sustained. I think you can
2 rephrase that a different way.

3 MS. GANES: Okay.

4 BY MS. GANES:

5 Q: When Dr. Browning was with you at the hospital on the day
6 that Julia was born, did he do anything that you felt was
7 reckless or irresponsible toward you?

8 MR. RUFFIN: Again, objection, Your Honor. She's not a
9 physician. She's not a doctor.

10 THE COURT: Sustained.

11 MS. GANES: Okay. I'll move on, Your Honor.

12 BY MS. GANES:

13 Q: Did you understand that Dr. Browning was your doctor and
14 not Julia's doctor after she was delivered?

15 A: Yes.

16 Q: And you were dissatisfied with the pediatric care that
17 Julia received; is that true?

18 A: Yes, I was.

19 Q: Did you go back to see Dr. Browning at your six-week
20 appointment?

21 A: Yes, I did.

22 Q: Did you have any complaints about his care and treatment
23 of you at the six-week appointment?

24 A: No, I did not.

25 Q: When Dr. Browning came to speak with you after Julia was

CHRISTY BYRD - CROSS BY MS. GANES

1 born, did he take time to talk to you and answer your
2 questions in the hospital?

3 A: What questions I had, he answered, yes.

4 Q: Okay. And Julia has no problems with her brain or no
5 problems with being able to think, does she?

6 A: No, she doesn't.

7 Q: And you understand that in some cases where shoulder
8 dystocia occurs, the babies have brain damage; correct?

9 A: I do.

10 Q: And you're grateful that Julia does not have brain
11 damage, aren't you?

12 A: I am. But it doesn't lessen her other injury.

13 MS. GANES: Thank you, Ms. Byrd, I have no further
14 questions.

15 THE COURT: All right. Any redirect?

16 MR. RUFFIN: Just a couple follow-up, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. RUFFIN:

19 Q: For what reason were you dissatisfied with the pediatric
20 care?

21 A: No one told us anything. No one told us what my child
22 had.

23 Q: Okay. When -- when you were at the six-week checkup with
24 Dr. Browning, did he let you know that the injury was
25 permanent with Julia?

CHRISTY BYRD - REDIRECT BY MR. RUFFIN

1 A: No, he did not.

2 Q: You were asked about your thoughts on going back to Dr.
3 Browning for the six-week. Had you known today what you --
4 had you known then what you know today, would you have
5 returned for a six-week checkup?

6 A: No, I would not.

7 MR. RUFFIN: Thank you. No further questions.

8 THE COURT: All right. Any follow-up from the defense?

9 MS. GANES: Just one question, Your Honor..

10 RECROSS EXAMINATION

11 BY MS. GANES:

12 Q: Were you aware, Ms. Byrd, that a doctor cannot diagnose a
13 permanent injury in a child like Julia before 18 months old?

14 MR. RUFFIN: I'm going to have to object to that one,
15 Your Honor.

16 THE COURT: Sustained. All right.

17 MS. GANES: Nothing further, Your Honor.

18 THE COURT: You may step down. Thank you. All right.
19 Call your next witness.

20 MR. RUFFIN: Your Honor, our next witness is going to be
21 by video. It's a de bene esse.

22 We may need to discuss -- I think we're good on the
23 designations so we can play it, but just to be sure I'd like
24 to confer.

25 THE COURT: All right. Let's do that real quick.

1 (WHEREUPON, there was a pause in the proceedings, after,
2 which the proceedings resumed as follows.)
3 MS. GANES: Thank you, Your Honor.
4 THE COURT: Everything good?
5 MS. GANES: Yes, sir, Your Honor.
6 THE COURT: All right. Let's go ahead and play the
7 video.
8 THE COURT: All right. Can everybody on the jury see
9 that from where you are? Are you good? All right.
10 (WHEREUPON, the video deposition of Dr. John Grossman was
11 played in open court. Transcribed as follows.)
12 THE VIDEOGRAPHER: In the matter of the case of Christy
13 Byrd versus McLeod Physician Associates, Inc. Today is
14 Thursday, September 17th, 2015, and the time is 1:29 p.m.
15 Counsel, please introduce yourself on the record and, after
16 this, the court reporter will swear in the witness.
17 MR. RUFFIN: Layton Ruffin on behalf of the plaintiff.
18 MS. GANES: Ellore Ganes on behalf of the defendants.
19 THE COURT REPORTER: If you will, please raise your right
20 hand to be sworn? Do you swear or affirm the testimony you
21 are about to give is the truth, the whole truth, and nothing
22 but the truth?
23 THE WITNESS: Yes.
24 THE COURT REPORTER: Thank you, sir.
25 DR. JOHN GROSSMAN, being first duly

1 sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. RUFFIN:

4 Q: Good afternoon, Dr. Grossman.

5 A: Good afternoon.

6 Q: We are here to take your trial testimony by video for use
7 in the case of Christy Byrd, as next friend of Julia B ,
8 against Dr. Browning and his practice, McLeod Physicians
9 Associates.

10 Before we go into the conclusions you reached, I want to
11 first say that I believe that on the order of testimony in
12 which the jury is going to hear this case unfold, the first
13 witness they will hear from, at least before you, is Dr.
14 Resnick, who will likely go through at least some background
15 discussion of brachial plexus nerves, and so they'll have some
16 understanding of what the brachial plexus is. And so I'm
17 going to do my best not to be duplicative in that regard.

18 And before we go into what your conclusions are, I'd like
19 to get some -- allow us to have some understanding of who you
20 are, your training, experiences, and qualifications. And if
21 you'd start by just telling us where you currently live?

22 A: I live in Miami, Florida.

23 Q: And you're a medical doctor?

24 A: Yes.

25 Q: What's your specialty?

DR. JOHN GROSSMAN - DIRECT BY MR. RUFFIN

1 A: Hand surgery and peripheral nerve surgery.

2 Q: Okay. And tell us what a -- what a peripheral nerve is?

3 A: It's a nerve after it has come out of the spinal cord.

4 So the nerves that go down the arms and the -- and the legs
5 basically.

6 Q: Okay. And -- and with reference to the ones that come
7 out of the neck and go down the arm, what -- what do they do?

8 A: They completely control the arm from the shoulder down to
9 the fingertip, both feeling and also movement.

10 Q: With regard to your work as a surgeon, focusing on hand
11 and peripheral nerves, is there a certain group of peripheral
12 nerves that you have a special interest in operating on?

13 A: Yeah. My practice is now pretty much limited to surgery
14 on the brachial plexus in children.

15 Q: And for purposes of this case, you intend to discuss your
16 review of the medical records and evaluation as it pertains
17 specifically to the brachial plexus nerves of Julia B ;
18 correct?

19 A: Yeah. I'm going to discuss her brachial plexus injury
20 and her current condition.

21 Q: And where were you born?

22 A: In Norfolk, Virginia.

23 Q: I'd like to hand you what's been pre-marked as
24 Plaintiff's Exhibit 1 to your testimony. And if you could,
25 please identify what that document is?

DR. JOHN GROSSMAN - DIRECT BY MR. RUFFIN

1 A: It's a copy of my curriculum vitae.

2 Q: Is it -- does it appear to be an up-to-date true and
3 accurate copy or representation of your achievements,
4 education, accomplishments, and work history?

5 A: Yes.

6 Q: Starting with college, please tell us your educational
7 background. And you can refer to this if you have any -- if I
8 ask any questions and you need to.

9 A: Sure. I went to college at Dartmouth College. I went to
10 medical school at the University of Virginia. I did general
11 surgery training at George Washington University, the Clinton
12 Clinic in Cleveland, and arm surgery and hand surgery training
13 at the Massachusetts General Hospital.

14 I did a fellowship in hand surgery and neurosurgery at
15 the French Hand Institute in Paris, France. And then I did a
16 2 and a half year residency in reconstructive plastic surgery
17 at Eastern Virginia medical school. Following that, I went
18 into practice at Brown University, where I was on the faculty,
19 and I was also the chief of plastic surgery at the Veterans
20 Hospital in Providence. And I had a practice in primarily
21 reconstructive surgery and hand surgery.

22 Q: And when did you move or relocate here to Miami?

23 A: Well, from Providence, I actually joined the Institute of
24 Reconstructive Plastic Surgery at NYU Medical Center and
25 practiced there until 1996. I started the brachial plexus

1 program at NYU, which we then moved to Miami, Florida, to
2 Miami Children's Hospital in 1996. And I've been practicing
3 in Miami at Miami Children's Hospital since 1996.

4 Q: So is the reason that there is a brachial plexus surgery
5 center here in Miami in part due to your relo -- or your
6 efforts to establish it?

7 A: Correct.

8 Q: And even though you're here in Miami, what is the
9 geographical range of your patients?

10 A: They come from pretty much all over the world.

11 Q: Meaning other countries come and see you?

12 A: Yeah. I have patients from -- you know, from Europe,
13 from Israel, from Pakistan, from Asia.

14 Q: Do you have offices located anywhere outside of Miami?

15 A: I still see patients in New York, but for the past three
16 or four years have not continued to do surgical procedures in
17 New York.

18 Q: For how many years have you focused your practice on
19 matters relating to surgical problems of the hand and upper
20 extremity?

21 A: Oh, it's been almost my whole practice since 1985 other
22 than initially for the first four or five years I did general
23 reconstructive plastic surgery of the entire body. And then
24 when I moved to New York, I limited my practice to the upper
25 extremity primarily and it's slowly become more and more and

1 more focused. So now I basically just treat patients --
2 children with brachial plexus birth injuries.

3 Q: And how many times, in your best reasonable effort --
4 estimate, have you conducted or performed surgeries involving
5 brachial plexus nerves?

6 A: We've performed well over 400 primary repairs of brachial
7 plexus injuries in infants and then, you know, a very large
8 number of secondary procedures of the shoulder, elbow, wrist,
9 and hand.

10 Q: Okay. So have you performed approximately more or less
11 or the same number of secondary procedures involving muscles,
12 tendons, bones in relation to the brachial plexus and any
13 injuries sustained?

14 A: I have a colleague who works with me who does all the --
15 now he does all the shoulder and elbow surgeries. So, you
16 know, between the two of us, we've probably done a similar
17 number of secondary procedures or maybe even more.

18 Q: And so just to be clear, your practice today is primarily
19 or almost exclusively limited to direct nerve surgery or hand
20 and wrist surgery of infants?

21 A: (No verbal response.)

22 Q: What is your current focus and practice as it relates to
23 the performance of surgery?

24 A: Treating children with brachial plexus birth injuries.

25 Q: Is there anyone you're aware of in the country that has

1 more experience performing surgery on brachial plexus nerves
2 and the affected arms and hands and shoulders than you?

3 A: I think Dr. Clark in Toronto has probably done an equal
4 number of primary repairs. I'm not sure of anyone in the
5 United States now who is -- you know, does so many primary --
6 primary surgeries on these cases or has done so many.

7 Q: Well, what about outside of the United States?

8 A: Well, there are European surgeons who have a very large
9 series as well, European and Asian surgeons.

10 Q: Have you been published with respect to issues relating
11 to brachial plexus management and/or causation?

12 A: Yeah. I've published a number of papers in peer-
13 reviewed, you know, journals on the -- on the treatment of
14 brachial plexus birth injuries and the outcome of different
15 surgical procedures.

16 Q: And what about with reference to causation? Have you in
17 any way written on the topic of causation?

18 A: The other thing that we've done with that is we did write
19 a book chapter where we reviewed 100 patients' consecutive
20 surgical cases of infants with a brachial plexus injury and
21 looked at the MRI results, the findings during surgery, the
22 pathology findings from the surgery, and it basically
23 confirmed what other surgeons have reported that these are a
24 traction injury.

25 In the vast majority of cases, where not just the nerves

1 are injured, but the surrounding soft tissues, muscle are torn
2 and there's bleeding, scarring, and really these injuries are
3 in a sense stereotypical. They're very similar in that sense
4 from patient -- from patient to patient. There's a large
5 collagen neuroma and it's just the extent of the neuroma that
6 really is the variation.

7 Q: In terms of formulating your conclusion as to causation
8 of these injuries, what, if anything, do you evaluate in terms
9 of intrauterine causes to determine -- to rule out, say, in
10 your -- or are there other causes?

11 A: There also is a theory, you know, of trying -- trying to
12 -- trying -- trying to establish something else besides
13 traction during delivery as the causative factor in -- in
14 these -- in these cases, but as I've, you know, testified many
15 times, there -- there's -- there's nothing in terms of the
16 operative findings, the surgical findings or the overall -- or
17 the overall situation in these cases that would -- that would
18 suggest that something going on intrauterine or even during
19 the -- you know, as the baby goes down the birth canal that
20 would cause a traction injury, that would cause a disruption
21 of the nerves and the surrounding tissues because I -- because
22 -- because these injuries are traction. They're -- they're
23 not from -- from pushing.

24 Q: And -- and in -- when reviewing to determine the cause,
25 do you seek to exclude other potential causes, such as a

1 tumor, infection or anything of that nature?

2 A: Well, sure. It's just -- we're talking about, you know,
3 phases of a -- of a brachial plexus birth injury, not a case
4 of a child with a brachial palsy which is due to some other
5 cause, you know, like an intrauterine amniotic band or an
6 intrauterine infection or a tumor or even a congenital
7 anomaly.

8 There are certain cases where children actually have not
9 developed a portion of the brachial plexus and so at birth
10 have -- have paralysis of certain muscles, which is -- which
11 is due to the fact that they don't have nerves to supply those
12 muscles.

13 Q: And one final question as to your qualifications. As --
14 as a surgeon who has operated on hundreds of children with
15 these particular type of injury, have you -- what do you view
16 firsthand as far as the surgeon who is opening up the arm and
17 looking at the nerves? What are you able to see?

18 A: Well, actually the surgery takes place in the --

19 Q: Oh, I'm sorry. I said arm. I meant --

20 A: -- you know, in the neck and, you know, above and below
21 the collarbone.

22 Q: Okay.

23 A: And we see the -- the damage to the tissue, the nerve
24 tissues and the other soft tissues, and then based on what the
25 -- what the damage is, try to perform some sort of repair or

DR. JOHN GROSSMAN - DIRECT BY MR. RUFFIN

1 reconstruction.

2 Q: Okay.

3 MR. RUFFIN: At this point, we'd offer Dr. Grossman as an
4 expert witness qualified to testify about matters related to
5 brachial plexus nerve injuries, surgical management thereof,
6 the cause of brachial plexus injuries, treatment of these
7 injuries, and these matters generally and as they specifically
8 relate to Julia B .

9 MS. GANES: We have no objection at this time in those
10 areas.

11 MR. RUFFIN: Okay.

12 BY MR. RUFFIN:

13 Q: At our request, have you had opportunity to conduct a
14 medical evaluation in your office of Julia B ?

15 A: Yeah, back -- back on October 23rd, 2013. She came to the
16 -- Miami and I had a chance to examine her at that time and to
17 review medical records.

18 Q: Okay. And you've also reviewed medical records in
19 connection with this?

20 A: Correct.

21 Q: Okay. What else, if anything, have you done to formulate
22 your opinions other than specifically your -- your evaluation
23 of Julia?

24 A: Well, my opinion is just based on the examination of the
25 records that I reviewed at that time and the clinical

1 findings, the examination of the -- of the -- of the child
2 and, you know, some of the general details surrounding the
3 delivery.

4 Q: And I'm handing you what's been marked as Plaintiff's
5 Exhibit Number 2. If you could, please identify what this
6 document is?

7 A: That's my report.

8 Q: And does it -- is it an accurate reflection of your
9 evaluation of Julia B ?

10 A: It's a summary of my -- my report and I've filled out
11 what's called a Mallet evaluation, which just shows -- it's a
12 system that was designed to show -- report shoulder function
13 in these children.

14 Q: Okay. What can you tell us based upon your personal
15 observation as to the current limitations of Julia B ?

16 A: Okay. Well, I mean her -- her -- her -- her limitations
17 are related to her right upper extremity. Basically, they
18 involve just limitations of -- primarily limitations -- when I
19 examined her, primarily limitations of -- of motion. It was
20 how high she could raise her arm, how far she can -- how
21 easily she can get it behind her -- behind her head or around
22 her back or how difficult it is for her to keep her elbow from
23 flying up in the air when she brings her hand to her face.
24 Some limitations in the ability to fully rotate her forearm.
25 So she has a variety of -- of limitations in range of motion

1 of her injury-involved extremity.

2 Q: Okay. I'm going to hand you another document, which is
3 labeled as Plaintiff's Exhibit Number 11. If you could,
4 please identify this documentation?

5 A: This is a medical report that was done on January 27th,
6 2015, this year by Dr. Trevor Resnick.

7 Q: Okay. And what I want to do now is simply, since that
8 report was done in February, is see what opinions, if any, you
9 have in relation to your evaluation of Julia and Dr. Resnick's
10 evaluation, especially with reference to the Mallet score. If
11 you could, just please tell us if there -- compare your report
12 to Dr. Resnick's and tell us if anything has changed from your
13 view.

14 A: I mean -- I mean the only -- I mean the -- sometimes it's
15 hard to compare two different -- two different examiners, but
16 general -- generally speaking, based on the Mallet score that
17 I filled out and based on the Mallet score that Dr. Resnick
18 filled out this year, there's been somewhat of a deterioration
19 of her overall shoulder function, not, you know, tremendous
20 but, you know, it looks like if you can compare his evaluation
21 and my evaluation, there probably is a deterioration.

22 And that's not really, you know, unexpected because if
23 you look at my -- if you look at the report I prepared in
24 2013, the last sentence of the report says it should be noted
25 that there is a possibility with growth there could be further

1 deterioration of shoulder function, you know, as well as
2 extremity form and function. So basically that's what Dr.
3 Resnick has demonstrated by -- by his more recent examination
4 of the child.

5 Q: Okay. And so has there been any change in your opinions
6 as they relate to causation or your review of the life care
7 plan or anything else concerning Dr. Resnick's -- your
8 evaluation of Dr. Resnick's more recent evaluation and what
9 you initially saw during the first visit?

10 A: No. It's -- it's -- nothing has changed in terms of
11 vetting my opinions. His -- his evaluation just simply
12 confirms one of the -- one of the possibilities that I raised
13 back in 2013.

14 Q: I'd like to hand you now what's been pre-marked as
15 Plaintiff's Exhibit Number 3. If you could, identify what
16 this document is?

17 A: Well, as I said in my report, she had a --

18 Q: Well, first, if you could, just tell us what the document
19 is?

20 A: It's an operative report for a procedure performed by Dr.
21 Joshua Ratner, who is a pediatric hand surgeon, orthopedic
22 surgeon, in Atlanta, and the procedure was performed on June
23 28th, 2012.

24 Q: Okay. Is this report the type of document that an expert
25 in your field would reasonably rely upon in formulating the

1 opinions you are offering to us today?

2 A: I mean I'm not sure you would necessarily draw any
3 opinions from this. It's a reconstructive procedure that --
4 to correct the typical shoulder deformity associated with an
5 upper brachial plexus birth injury.

6 Q: Does this document aid you in understanding the
7 historical presentation of Julia and what treatments have been
8 needed?

9 A: I mean it just -- it confirms that she had typical
10 treatment for a stereotypical brachial plexus birth injury.
11 So the whole -- you know, it fits the picture. There's
12 nothing --

13 Q: Sure.

14 A: It's what would be expected if, you know, she was
15 receiving good care.

16 Q: What's the significance of that report? What was sought
17 to correct and what were the limitations as indicated by that
18 surgeon?

19 A: Well, the most common deformity that we see in these
20 children is a limitation of shoulder elevation and also
21 external rotation of the shoulder. In other words, the arm is
22 internally rotated and that's because the area of primary
23 injury is on the upper trunk of the brachial plexus. A
24 structural nerve called the super scapular nerve takes off and
25 that's where the -- the major care is usually found in these

1 upper brachial plexus injuries.

2 And so the muscles that externally rotate the shoulder
3 and help to raise it up are weak or paralyzed; so you get
4 internal rotation deformity. And this operation, which takes
5 muscles that are working well and are actually contributing to
6 the deformity -- it relocates them so they actually correct
7 the deformity and improve the shoulder motion in the -- in the
8 child.

9 Q: Okay. And what is your expert opinion as to what
10 necessitated the need for this surgery to be performed? When
11 did -- what caused this injury?

12 A: It's clear in the record she went for -- for a pretty
13 extensive evaluation at Cincinnati Children's Hospital at
14 their brachial plexus program. I mean it's pretty clearly
15 documented that she had a typical shoulder deformity, both
16 skeletal and muscular, associated with these injuries. And so
17 the operation that Dr. Ratner performed is one that -- you
18 know, that we all deal with in one form or another to -- to
19 correct this typical deformity that we see with these upper
20 brachial plexus birth injuries.

21 Q: And tell us have you had an opportunity to review any of
22 the notes which indicated the time when this injury was first
23 observable as far as the child's age? For instance, at birth?
24 Later?

25 A: I mean I just -- I just recall seeing it noted in some

1 records that at birth she had a pretty extensive paralysis
2 that even involved the hand, which is typical, you know, of
3 the immediate birth period. Basically, the paralysis focused
4 primarily on the shoulder -- shoulder and elbow.

5 Q: Okay. So then what is your opinion as to what -- when
6 did the injury occur as far as, like, what point in time, that
7 necessitated the performance of the surgery?

8 A: Well, the original injury occurred during the delivery.
9 Traction was put on the nerves, the brachial plexus, when the
10 baby was being delivered by the -- you know, probably by
11 manipulation of the head and neck during -- during the
12 delivery with the shoulder being stuck. So forces were put
13 across the nerves in the neck and that's what causes the --
14 the tear. And so it's a well described, you know, mechanism.

15 Q: Okay. I'd like to now give you what's been pre-marked as
16 Plaintiff's Exhibit Number 4. If you could, please identify
17 this document.

18 A: This is the -- this is the MRI report from Cincinnati
19 Children's Hospital.

20 Q: And is an MRI report a typical type document which you
21 would review in assessing -- in addressing the questions or
22 addressing the opinions you are offering today?

23 A: Well, like I said before, the MRI showed the typical
24 changes of the shoulder joint, as well as the muscle atrophy,
25 which is all consistent with -- with this -- with this -- with

1 this injury.

2 Q: Now, I'm handing you what's been pre-marked as
3 Plaintiff's Exhibit Number 5. If you could, please identify
4 what this document is?

5 A: This is a report from electrical studies and EMG and
6 nerve conduction studies that were done as well. They were
7 done as well at Cincinnati Children's Hospital when she went
8 there for the evaluation in early 2012.

9 Q: What does that document, as well as the others that
10 you've provided, tell you about the location of damage to
11 Julia's nerves? Which nerves?

12 A: It's primarily an upper brachial plexus injury like the
13 -- the -- like the neurologist said in this study and in his
14 -- in his impression, he said there are innervation findings
15 in those muscle groups at C5 and C6, innervation or decreased
16 interference patterns seen in three muscle groups, being most
17 pronounced in the biceps and -- so all of it just, you know,
18 further tells you that it's a typical -- stereotypical
19 traction injury to the upper brachial plexus that occurred
20 during birth.

21 Q: I'd like to hand you what's been pre-marked as
22 Plaintiff's Exhibit Number 6. If you could, identify what
23 this is?

24 A: These are some forms for an evaluation that she had at
25 the brachial plexus clinic of Dr. Rahul Nath.

1 Q: And based upon that document, where has the evaluator
2 indicated that the nerves were damaged?

3 A: I mean he marked the type of location of, you know,
4 injury and checked off -- he checked off C5, C6, and C7.

5 Q: And is his review consistent with the presentation of
6 Julia and her injuries?

7 A: Yeah. The same sort of findings that would have led Dr.
8 Ratner to perform the procedure, you know, that he did.

9 Q: Was the surgery performed by Dr. Ratner, in your opinion,
10 reasonable and necessary to treat Julia's brachial plexus
11 birth injury?

12 A: Absolutely. No question.

13 Q: And briefly, again based upon your evaluation of Julia,
14 can you explain to us or characterize the severity of her
15 injury?

16 A: Well, I would -- I -- in terms of overall brachial plexus
17 injury, it's certainly moderate. It's not a global injury.
18 In other words, it doesn't really affect her -- her hand and
19 her -- and her wrist.

20 In terms of an upper brachial plexus injury, it's on the
21 severe side because she needed to have surgical reconstruction
22 of her shoulder and, you know, probably 75 percent of kids who
23 are born with this will have a reasonable spontaneous recovery
24 during the first, you know, six to eight months of life. And
25 so won't need to have a major shoulder surgical procedure. So

1 in that respect, it's obviously a severe-type injury.

2 Q: Okay. Next I'd like to present you with what's been pre-
3 marked as Plaintiff's Exhibit Number 10. If you could,
4 identify this document?

5 A: This is a questionnaire that I filled out that was sent
6 to me by Mr. Lawrence Forman, who prepares life care plans.

7 Q: Okay.

8 A: For children and adults who have, you know, injuries.

9 Q: And the handwriting that's on that page, is that your
10 answers to his questions?

11 A: It's my handwriting, my answers to his questions.

12 Q: Okay. And did you at Forman's -- Mr. Forman's request
13 review his life care plan, at least to the extent that you
14 could provide input based upon your expertise?

15 A: I probably reviewed the plan. This was actually done
16 before the plan so he could make the life care plan.

17 Q: Okay. So his plan was --

18 A: So basically, what I -- basically, I didn't really
19 recommend much of anything. So I suspect that was reflected
20 in what I recommended in the life care plan. Sure.

21 Q: Based upon your review of Julia and the medical records,
22 is it safe to categorize her injury as permanent?

23 A: Absolutely. She has a permanent impairment of her right
24 upper extremity related to the injury.

25 Q: And, Doctor, based on your review of the surgical record,

1 the EMG studies, the MRI, and your personal opportunity to
2 examine Julia, do you have an opinion to a reasonable degree
3 of medical certainty as to what caused Julia B 's permanent
4 brachial plexus injury?

5 A: It's a traction injury that was -- it was -- that
6 occurred during -- during the delivery, as I said before, when
7 traction was placed on the nerves of the brachial plexus by
8 manipulation of the -- of the head and the neck. We have a
9 typical scenario of these cases. We have, you know, a large
10 baby. The baby weighed over eight pounds.

11 You have a history of shoulder dystocia and we have the
12 typical findings both on MRI, nerve conduction studies, and
13 clinical of, you know, what's referred to often as an Erb's
14 palsy, an injury to the upper brachial plexus as a result of
15 traction during the delivery.

16 Q: And when you say manipulation of the head, obviously you
17 weren't there, but what does -- what does that mean as far as
18 manipulation of the head?

19 A: Well, they had to put traction on -- you know, the head
20 and neck had to be manipulated or, you know, the torso of the
21 body would not be moving forward. It would be stuck. There
22 had to be some manipulation that would -- that would put
23 traction across the -- the brachial plexus and the surrounding
24 soft tissues of the neck.

25 Q: What is your opinion as to the angle or direction that

1 traction is applied in order to cause these injuries?

2 A: I don't -- I don't have an opinion on that. That's
3 really a question for the obstetricians.

4 Q: Well, let me rephrase. Will these injuries result or be
5 more likely to occur if traction is applied where there is a
6 separation of the nerves in terms of pulling the head with the
7 head being pulled towards one shoulder? Does that make it --
8 does that in any way increase the likelihood of an injury?

9 A: That's what I was demonstrating before is obviously that
10 distance between, you know, the shoulder and the head and neck
11 is increased and force is applied. You know, that's how the
12 force and the direction of the forces that seem to be
13 associated with these -- with these injuries.

14 Q: And in this case, what was the result, any result, of the
15 fetal manipulation of the head for Julia?

16 A: That she had this -- she had this injury, this injury to
17 the nerves, and as a result of the injury to the nerves, there
18 was paralysis of muscles, and as a result of the paralysis of
19 muscles, imbalance is developed in the various joints,
20 particularly the shoulder joint, and those imbalances cause
21 deformity of the bones and also limitations of motion.

22 Q: And what's the significance of fibrosis?

23 A: Well, fibrosis is scarring.

24 Q: Okay. And what does the presence of scarring tell you
25 about the nature of an injury?

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1 A: Just that there was some -- something that happened that
2 caused, you know, scarring or some -- some trauma or some, you
3 know, some event or some inflammation or something. It
4 depends on -- you know, you have to look at all the other
5 factors.

6 Q: And in this particular case with regard to Julia B ,
7 have you considered and/or ruled out any other causes of a
8 permanent injury to her beyond traction applied to the nerves?

9 A: I mean I didn't see any evidence any -- anywhere in the
10 records that I reviewed that would suggest anything else but a
11 typical Erb's palsy. As I said before, all the other -- all
12 of -- all of -- you know, it has all the features that are
13 consistent with these injuries across -- across the board.

14 Q: Are you aware of any way in which it's possible for this
15 injury to occur before someone places their hands on the
16 baby's head?

17 A: You mean a traction injury?

18 Q: Correct.

19 A: I don't know how you'd apply traction before -- you have
20 to apply traction.

21 Q: Right.

22 A: Okay. So -- so obviously there's no way that, you know,
23 traction is going to take place in the birth canal or in the
24 uterus.

25 Q: Okay. I'd like to now present you with what's been

1 marked as Plaintiff's Exhibit Number 8.

2 A: It's a drawing of the brachial plexus nerves.

3 Q: Okay. And I'd like for you to hold it up so we can zoom
4 in on it. Okay.

5 Now, if someone were to talk about variation in a child,
6 their brachial plexus, what -- what do they mean as far as
7 variation of the brachial plexus from one child to the next?

8 A: I mean there are anatomical variations in the -- in the
9 layout of -- you know, of the different nerves. There's
10 what's called a prefix brachial plexus where the C4 actually
11 contributes significantly to the plexus. There's what's
12 called a postfix plexus where T2 contributes. And there are
13 all sorts of, you know, variations that we find during surgery
14 in terms of where a branch takes off from, where a division of
15 the trunk is, and so forth and so on, but I mean there are --
16 there are -- there are anatomical -- there are anatomical
17 curiosities that are important for a surgeon to recognize, but
18 otherwise they have no other significance.

19 Q: Okay. Are you aware of any study or from your personal
20 experience aware of any way in which anatomical variations
21 such as you've described would make a child more susceptible
22 to a permanent injury?

23 A: No.

24 Q: I want to --

25 A: That just doesn't make any sense. It's just a local

1 variation in the -- in the nerves and I mean they are very
2 subtle variations.

3 Q: Are you aware of any brachial plexus injury being caused
4 by compression?

5 A: Well, it would be possible, for example, to have
6 compression on the -- on the brachial plexus, you know, from a
7 tumor or from an amniotic band, but once the compression is
8 relieved, then everything should recover and it should start
9 to work well.

10 Now, interestingly, in these -- in these traction
11 injuries, in surgery we find that the actual traction injury,
12 the healing of the traction injury, the scarring actually
13 forms a local compression sometimes, which we have -- which we
14 have to deal with, but -- and -- and -- and I guess otherwise,
15 you know, local -- local compression externally on the
16 brachial plexus, you know, would resolve after delivery and
17 would not -- you know, would not be a permanent -- would
18 certainly not be a permanent injury.

19 Q: Is there any reason to believe that Julia B 's injury
20 was caused by some form of compression to the nerves?

21 A: No. I mean you can make any -- you can go with any
22 hypothesis, you know, you want to throw out there and, you
23 know, see if it -- see if it sticks, but the reality is -- is
24 that -- is that every detail of her case fits with the
25 stereotypical traction injury to the upper brachial plexus

1 known as Erb's palsy.

2 Q: And as far as a compression injury from forcible impact
3 as opposed to lateral moving away from the head, do you have
4 any understanding of how that would happen as far as a -- an
5 impact?

6 A: An impact with what? You mean the pubic bone or
7 something?

8 Q: I guess.

9 A: When it's coming out?

10 Q: Right.

11 A: Well, you know, as I was saying, that's total nonsense
12 because if you go stand up against the door and put your
13 shoulder against the door and push as hard as you want, you're
14 not going to get a brachial plexus injury. But if someone's
15 running down the hall and they hit you in the head while
16 you're pushing up against that door, then you are going to get
17 a brachial plexus injury.

18 And if pushing against, you know, something, repeatedly
19 pushing and banging and, you know, with your shoulder could
20 cause a brachial plexus injury, then why don't we see brachial
21 plexus injuries in football players who push these big heavy
22 sleds, you know, time and time and time and time again? The
23 only time they get a brachial plexus injury or a stinger
24 injury is -- is -- is when they're -- they sustain a hard
25 tackle and they fly through the air and their shoulder hits

1 the ground and their head and their neck keep moving and they
2 get a traction injury as well. So it's a -- it's the same
3 mechanism, but this pounding you're talking about would not --
4 would not -- could not cause a nerve injury.

5 Q: And, Dr. Grossman, finally, what is your level of
6 certainty with regards to your opinion that Julia B 's
7 injury was caused by force, I guess the lateral traction onto
8 the baby's head, by someone in this case?

9 A: I didn't -- we didn't operate or someone didn't operate
10 and actually see the actual damaged nerves. So I would say we
11 are 99 percent. You know, in the absence of actually having a
12 surgical exploration, it's -- it's -- I'm pretty certain, you
13 know.

14 Q: Just bear with me one moment. Are you aware of any
15 literature anywhere published by a neurosurgeon which says
16 that something other than traction applied by a clinician is
17 capable of causing a permanent brachial plexus birth injury?

18 A: By a neurosurgeon?

19 Q: Or a surgeon.

20 A: By a surgeon, I'm not. I don't know of any -- any
21 discussion of anything but traction in any of the -- you know,
22 the surgical meetings that I have attended on brachial plexus
23 injuries, birth injuries, around -- around the world. It's
24 only this -- this recent obstetrical literature that's popped
25 up that's tried to propose new hypotheses as to the etiology

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1 of these injuries and, you know, as I've said many times, it's
2 just junk science. It has no foundation at all.

3 MS. GANES: Thank you, Dr. Grossman. It's good to see
4 you this afternoon.

5 CROSS-EXAMINATION

6 BY MS. GANES:

7 Q: We've met before on -- we've met before on other cases;
8 is that correct?

9 A: Correct.

10 Q: Now, Dr. Grossman, you've reviewed other cases at the
11 request of the Graham Law Firm; isn't that true?

12 A: Yes.

13 Q: In fact, you've reviewed 10 or 12 or even more cases for
14 the Graham Law Firm as of my taking your deposition a few
15 months ago. Is that still true?

16 A: That's correct.

17 Q: And you characterize the examination that you performed
18 on Julia B as an independent medical examination?

19 A: It's a medical examination. I'm not sure what -- I'm not
20 a treating physician. So I guess that's what the independent
21 stands for.

22 Q: And that's right. You never gave any treatment --
23 provided any treatment to Julia B ?

24 A: No.

25 Q: Is that right?

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1 A: No. I just examined her for the basis of this
2 litigation.

3 Q: Okay. Now, this examination was in response to you being
4 contacted by Ms. Byrd's attorney, Mr. Graham; right?

5 A: Correct.

6 Q: And you've previously seen patients in the same fashion
7 after Mr. Graham contacted you and asked you to do those
8 evaluations?

9 A: Correct.

10 Q: Is that right? In fact, just this past May, you and I
11 met, just like we're doing here today, so we could videotape
12 your testimony for another jury in Florence County to review
13 it as an expert witness on behalf of the Graham Law Firm;
14 isn't that true?

15 A: Correct.

16 Q: Now, your medical examination was not requested by my law
17 firm, was it?

18 A: No.

19 Q: And it wasn't requested by the Court, was it?

20 A: No.

21 Q: You charged \$600 an hour to look at the records in this
22 case; right?

23 A: Yes.

24 Q: And you charge \$1,100 per hour to give testimony in a
25 deposition; is that right?

1 A: Correct.

2 Q: Is that how much you're charging for your videotaped
3 testimony for trial or is that a different rate?

4 A: Same rate.

5 Q: You've never been to South Carolina, have you?

6 A: I have not.

7 Q: You've never been to Florence, South Carolina; correct?

8 A: I don't see how I could be in Florence if I haven't been
9 to South Carolina.

10 Q: You've never been to Florence, South Carolina, have you?

11 A: No.

12 Q: You've never testified for a defendant in a lawsuit
13 involving a brachial plexus injury, have you?

14 A: No, I haven't.

15 Q: Do you agree, Doctor, that Julia B obtained
16 significant improvement after the surgery that she had with
17 Dr. Ratner?

18 A: Well, I never saw her before the surgery. I was here
19 after the surgery, but I would say that he had a pretty good
20 outcome from the surgery performed.

21 Q: Do you agree that she had significant improvement after
22 that surgery?

23 A: Well, I don't know what -- you know, what she was like.

24 As I said, I didn't examine her before, but I'm sure that, you
25 know, she had a significant deformity. Otherwise, he wouldn't

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1 have done the surgery. So I would say she -- you know, she
2 had a good result, good outcome from the surgery.

3 Q: All right. Doctor, you remember when I came down and
4 took your deposition in this case, don't you?

5 A: Not really.

6 Q: You don't remember that?

7 A: I mean I know your name.. You did a deposition on this
8 case.

9 Q: Okay. Well, I'm going to open that transcript from that
10 deposition and see if you gave an answer to this question for
11 the jury that I had previously asked in that deposition. All
12 right. Doctor, if you'll turn to page 38?

13 A: I have a copy.

14 Q: You have a copy? Okay. Great.

15 A: Page what?

16 Q: Page 38.

17 A: Yep.

18 Q: And if you'll look at line 6 where I asked you were you
19 able to glean from the records any opinions related to her
20 change in presentation or any improvement that she had from
21 her tendon transfer surgery. And that's the surgery she had
22 with Dr. Ratner; correct?

23 A: Right.

24 Q: She had a tendon transfer?

25 A: Right.

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1 Q: Okay. What was your answer to that on line 10?

2 A: I said I think she had significant improvement, but as I
3 said earlier, I never really saw her beforehand. So I must've
4 seen something in the records that state what her opinions
5 are. I mean if you want to -- if you want to tell me that she
6 had significant improvement, I have no -- no qualms with that
7 because she had a good result from the surgery. So if it was
8 a significant improvement or not a significant improvement, it
9 was still a good result from the surgery. So I'm not sure
10 what your point is.

11 Q: Doctor, I'm just trying to get truthful testimony for
12 this jury.

13 A: Well, did you think I was being untruthful when I said
14 that -- that I didn't know if she had a significant
15 improvement because I didn't recall? I haven't seen any
16 records prior to her having had the surgery. Is that what
17 you're accusing me of?

18 Q: I'm just asking you, Doctor. Is it true that Julia B
19 had significant improvement as a result of --

20 A: If that's --

21 Q: If you'll --

22 A: If that's what I said in my testimony, then I'll stand by
23 that.

24 Q: May I finish my question though?

25 A: Go ahead.

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1 Q: Okay. Thank you. I'm just trying to make sure that it
2 is still your opinion, as it was when I took your deposition
3 when you were under oath, that Julia B had significant
4 improvement after her tendon transfer surgery.

5 A: She did. I said that. I'll stand by that.

6 Q: Okay. Thank you, Doctor. Doctor, to go back to my
7 original question, it simply was that your response was you
8 would have to see what the Graham Law Firm had to say about
9 providing those documents. Is that true or untrue?

10 A: Where is it in the deposition? Whatever I said in the
11 deposition, I'll stand by it.

12 Q: Okay. And so let's make sure the jury knows what you
13 said. If you'll go to page 8 of that deposition on line 10?
14 I want to just read my question. It looks like we were having
15 some of the same trouble we're having here today.

16 A: Okay.

17 Q: I just need to finish. Do you have any objections to
18 providing the 1099s related to your work with the Graham Law
19 Firm? And, Doctor, what was your answer on line 10?

20 A: I'll have to see what the Graham Law Firm had to say
21 about it.

22 Q: Okay. That was -- that was my question. Now, Dr.
23 Grossman, you only saw Julia B one time; is that correct?

24 A: Correct.

25 Q: And you spent probably a half-hour with her?

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1 A: The exam probably took a half-hour.

2 Q: Okay. And your fee for that examination was \$2,500; is
3 that true?

4 A: That was to review the medical records before the
5 examination and write the report.

6 Q: All right. Doctor, when you reviewed the life care plan
7 in this case, you charged for that too; is that right?

8 A: Yeah. You know, I'm just like you. I charge for
9 everything I do. You know, I bill by the hour.

10 Q: All right, doctor. And you charged \$1,500 to review that
11 life care plan that Larry Forman sent you; is that true?

12 A: I don't know. If that's what the invoice is for.

13 Q: Okay. Well, I'll let you hold that invoice. And isn't
14 it true, Dr. Grossman, on the bottom of that invoice it says
15 that the life care plan won't be provided until the money is
16 paid?

17 A: That's right.

18 Q: Okay. And this document that I've handed you is your
19 invoice for reviewing that life care plan; is that right?

20 A: That's what it says.

21 Q: And that document is gotten in the ordinary course of
22 business?

23 A: Yes.

24 Q: Okay.

25 MS. GANES: I'd move that into evidence as Defendant's

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1 Exhibit 1 at this time.

2 BY MS. GANES:

3 Q: And, Dr. Grossman, you wanted to examine Julia again if
4 this case went to trial; is that true?

5 A: I thought that would be useful.

6 Q: Okay. But that didn't happen; correct?

7 A: No, it did not happen.

8 Q: How long did it take you to review that life care plan
9 that Larry Forman provided?

10 A: I have no idea. I would've had to answer the questions
11 and then, after he prepared the whole life care plan, review
12 the life care plan when it came back to me.

13 Q: Okay. Doctor, isn't it true that you would come to
14 Florence, South Carolina, and provide the testimony that
15 you're providing here by videotape in person and would charge
16 -- and it would cost \$20,000 plus travel expenses?

17 A: Yeah, if I could do it all, you know, in a one-day trip,
18 that's what it would probably cost.

19 Q: And if you couldn't do it in a one-day trip, it would
20 cost even more; correct?

21 A: Yeah.

22 Q: Dr. Grossman, you're not an OB/GYN like Dr. Browning;
23 correct?

24 A: That's correct.

25 Q: And you don't deliver babies as part of your medical

1 practice like Dr. Browning does, do you?

2 A: Correct.

3 Q: And you're not here today to tell the jury in this case
4 that Dr. Browning deviated from the standard of care during
5 the delivery of Julia B , are you?

6 A: That's not for me to say.

7 Q: Okay. And you cannot provide the jury with any
8 quantitative measurement for the amount of traction that
9 occurred during the delivery of Julia B , can you?

10 A: No. It was just enough to cause the injury. That's all
11 I know.

12 Q: Okay. And, Doctor, you haven't seen Julia in almost two
13 years; correct?

14 A: That's correct.

15 Q: And you cannot tell the jury what treatment she may or
16 may not need, including future surgeries, because you have not
17 examined her; is that right?

18 A: That's true. As of the time that I did examine her, I
19 said that she would not need any more surgical treatment.

20 Q: Okay. And just so I'm correct, I just want to make sure
21 that I was reading this questionnaire correctly. This is the
22 questionnaire that Mr. Forman provided to you related to the
23 life care plan. And is it still true that there will not be a
24 need for diagnostic tests such as magnetic resonance imaging
25 -- and those are MRIs or x-rays -- over Julia's lifetime?

DR. JOHN GROSSMAN - CROSS BY MS. GANES

1 A: With regard to this injury, no.

2 Q: Okay. Certainly, you can't tell what she may need for
3 other things that should come up? And what other types of
4 specialists -- is it -- on this document, it says what other
5 types of specialists should evaluate Julia? Orthopedists,
6 physiatrists, and you write no under that; is that correct?

7 A: Correct.

8 Q: Okay. Does that mean that -- that you didn't intend for
9 any of that or you didn't have an opinion that any of that
10 would be necessary for Julia?

11 A: Yeah, but she has to go back to Dr. Ratner for some
12 question, but I mean no -- no general follow-up I don't think
13 probably needed.

14 Q: Okay. And in response to the question would Julia
15 benefit from any splints, braces, et cetera, you have no as of
16 last exam. Is that still true?

17 A: Correct.

18 Q: And we talked about the surgery. And then will Botox
19 injections be needed in the future and how often? And you
20 write no as of last exam. Is that still true?

21 A: Yes.

22 Q: Okay.

23 MS. GANES: Thank you, Dr. Grossman. I have no further
24 questions.

25 REDIRECT EXAMINATION

1 BY MR. RUFFIN:

2 Q: Dr. Grossman, have we paid you money to review cases that
3 you turned down and did not support?

4 A: Well, it's not exactly turned down, but I've told you
5 that I don't believe that there is a -- a causation that I can
6 document.

7 Q: So every time we send a child to you, you don't support a
8 causation?

9 A: Correct.

10 Q: And you mentioned you would've liked to have reviewed or
11 seen Julia a second time. Let me ask you this. Was Dr.
12 Resnick's more recent evaluation of Julia helpful in
13 determining how she's progressing since you've seen her?

14 A: Well, the reason to see her again would simply be to make
15 the determination as to whether or not she's maintained the
16 correction from the surgery or whether maybe there's been some
17 deterioration, like I suggested in my report might occur. So,
18 you know, Dr. Resnick's report certainly supports the fact
19 that there has been some integral deterioration, which is,
20 unfortunately, you know, the problem with these children.

21 Q: And as far as income derived from depositions or
22 medicolegal work, where do you make more money? In surgery or
23 reviewing cases for litigation?

24 A: I make significantly more money seeing patients and doing
25 surgery.

1 Q: And there was reference to the amount of work and work
2 with others that has been done by you and the Graham Law Firm.
3 Let me ask you do you have patients that you share treatment
4 with that are also seeing Dr. Resnick or his neuro -- the
5 practice -- the neurological practice that he's a member of?

6 A: I get a lot of referrals from that -- from his -- from
7 his group, primarily from Dr. Alfonzo, who is a neurologist, a
8 child neurologist, who specializes in actually brachial plexus
9 problems in neonates and then I get, you know, a smattering of
10 referrals from the other members, not all of the members, but
11 some of the other people in his group. It's quite a large
12 group he has.

13 Q: There is also mention of the number of times we've sent
14 children with brachial plexus injuries to be evaluated by you.
15 And so my question to you is if one wanted to be sure that
16 their clients were evaluated by a physician who performs
17 surgeries on brachial plexus nerves and -- and who is the most
18 knowledgeable and experienced in this particular field, what
19 surgeons would I consider in sending these children?

20 A: Certainly, Dr., you know, Clark in Toronto, Dr. Waters in
21 Boston, Dr. Kozin in Philadelphia, one of the surgeons in
22 Cincinnati.

23 Q: Okay. And where do you fit in that list?

24 A: And myself as well. I mean I've probably done more of
25 the, you know, primary surgeries, but these are all people who

1 have, you know, established brachial plexus programs. So, you
2 know -- and again, I know they generally are also involved in
3 litigation as well.

4 (WHEREUPON, the video deposition ended, after which the
5 proceedings resumed as follows.)

6 THE COURT: All right. Is that it for this witness?

7 MR. RUFFIN: That is, Your Honor. We'd move to have the
8 exhibits admitted into evidence that were referenced in the
9 deposition.

10 THE COURT: All right. Any objections?

11 MS. GANES: Your Honor, we do have some objections. They
12 weren't moved in contemporaneously with the witness, number
13 one, but the reports and the things that he testified about
14 here greater than an hour would be cumulative and unnecessary
15 to put into evidence.

16 THE COURT: All right. What reports are you talking
17 about?

18 MR. RUFFIN: Your Honor, Dr. Grossman did an evaluation.
19 There were notes from Dr. Grossman to the life care planner
20 where Dr. Grossman was signing off saying these are treatments
21 that will be needed. There's his curriculum vitae. It's all
22 going to just be evidence that can be viewed or not viewed.
23 It's not like we're going to read it again to the jury. They
24 can have it. We would just like for them to have it.

25 THE COURT: All right. And that would be what number?

1 MR. RUFFIN: I believe -- as they were mentioned in the
2 deposition, I believe we -- well, will you say it? I don't
3 really know. You've got it. What are they?

4 MR. JOYCE: All right. His CV is 38. His report is 49
5 and then the deposition exhibits are 42-3 -- excuse me -- 42-
6 3, 42-4, 42-5, 42-6, 42-8, 42-10, and 42-11.

7 THE COURT: All right. Other than cumulative, any
8 objections?

9 MS. GANES: Yes, sir. Your Honor.

10 THE COURT: What are they?

11 MS. GANES: They -- those -- I don't think I caught
12 everything that he was saying as he was reading them out, but
13 those items were not moved into evidence during the witness's
14 testimony. They asked about them extensively. He testified.
15 The jury has received the evidence through the video. And
16 certainly as to the CV, it would be improper to submit the CV
17 when I think he probably testified about 20 or 30 minutes
18 about his qualifications and -- and how great he is.

19 THE COURT: All right.

20 MR. RUFFIN: Your Honor, I just moved it into evidence.

21 THE COURT: I understand.

22 MR. RUFFIN: And I think the jury should have it to look
23 at.

24 (WHEREUPON, there was a pause in the proceedings.)

25 THE COURT: All right. I'm going to deny the motion and

1 allow 38, 49, 42-3, -4, -5, -6, -8, -10, and -11 into
2 evidence.

3 (WHEREUPON, Plaintiff's Exhibit Number 38, curriculum
4 vitae of Dr. Grossman, and Plaintiff's Exhibit Number 49,
5 report of Dr. Grossman, and Plaintiff's Exhibit Number
6 42-3, 42-4, 42-5, 42-6, 42-8, 42-10, and 42-11,
7 deposition exhibits, were all admitted into evidence.)

8 THE COURT: All right. Any other witnesses for the day?

9 MR. RUFFIN: No, Your Honor.

10 THE COURT: All right. Members of the jury, let's break
11 until 9:30 in the morning. If you would, be back and be ready
12 to go at 9:30, and we'll resume with this trial.

13 (WHEREUPON, the jury exited the courtroom at 5:41 p.m.)

14 THE COURT: All right. What witnesses do we plan on
15 calling tomorrow?

16 MR. GRAHAM: Stacy Puette, Dr. Pliskow, Sonya Gordon, Dr.
17 -- or rather Mr. Forman --

18 MR. RUFFIN: By video.

19 MR. GRAHAM: -- by video, Oliver Wood, and Henry Cobb.

20 THE COURT: Henry Cobb?

21 MR. GRAHAM: Yes, sir. That's C-o-b-b.

22 THE COURT: All right. Sounds good. I'll see you all
23 then.

24 MR. GRAHAM: I mean that's our -- that's our intention,
25 depending on how things go.

1 impeachment is sought in a particular manner that it somehow
2 runs afoul of the rule, then I'm sure Your Honor would let us
3 know. But I mean by all means we intend to use the deposition
4 to impeach and if there are inconsistencies in his statement.

5 THE COURT: I understand. I'll take a look at it.

6 MS. CRAIG: It's brief.

7 THE COURT: It'll be fine.

8 MR. GRAHAM: Your Honor, may I address one housekeeping
9 matter?

10 THE COURT: Yes.

11 MR. GRAHAM: With respect to the curative charge that you
12 gave after I made the comment about holding doctors
13 accountable, you -- you told the jury that the only issues
14 were between these two parties. And as Your Honor will
15 remember, before some part of the jury qualification, we -- we
16 approached the bench to have a discussion about clarifying the
17 number of defendants.

18 Defense keeps sending up documents that have a caption
19 that we believe is improper. If their caption were used,
20 there would just be two parties. If our caption is used,
21 which we believe is proper, there are three parties. And the
22 defendants include not only Dr. Browning, but all the other
23 doctors in his group. It's -- it's Dr. Browning and that
24 other corporation, Physician Associates, Inc. -- McLeod
25 Physician Associates Inc.

1 So if -- if -- my intention when I mentioned doctors was
2 because there are implicitly more than one doctor on the
3 defense side of the pleadings. I wasn't trying to go to
4 hammer all the doctors in the community, and I just want to
5 make that clear because I don't want you to think I
6 intentionally ran afoul of any of your rulings.

7 THE COURT: All right. Thank you.

8 MR. GRAHAM: But may we get clarification? I thought you
9 said that we were going with our caption. So there are three
10 parties.

11 MS. CRAIG: Your Honor, this is going to -- this will be
12 cleared up when Mr. Aiken comes back and, like he explained to
13 you earlier, in the Secretary of State documents -- we have
14 those. We're happy to give them to the Court at any time. We
15 were going to put them in with Dr. Browning's testimony.

16 It's very clear that he was an employee of a 501(c)(3)
17 charitable organization and you have to sue the actual
18 organization. It's improper to have him as a named defendant.
19 That's why he was dismissed from the first trial of this case.
20 We -- but we just haven't presented that to you at this time
21 because it -- we just -- we haven't put up our case yet.

22 THE COURT: All right.

23 MS. CRAIG: Since it's not yet the defense case.

24 THE COURT: We'll do that at the appropriate time. All
25 right.

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 MAY 17, 2016

2 THE COURT: Everybody ready to go?

3 MR. GRAHAM: Yes, sir, Your Honor.

4 MS. CRAIG: Yes, sir.

5 THE COURT: Okay. Go ahead and bring them out.

6 (WHEREUPON, the jury entered the courtroom at 9:36 a.m.)

7 THE COURT: All right. If the plaintiff will call your
8 next witness?

9 MR. RUFFIN: Your Honor, the plaintiff calls Stacey
10 Puette.

11 THE CLERK: Place your hand on the Bible and raise your
12 right hand. Do you swear or affirm that the testimony you
13 give in this case will be the truth, the whole truth, and
14 nothing but the truth, so help you God?

15 THE WITNESS: I do.

16 THE CLERK: Please have a seat and state your name for
17 the record.

18 THE WITNESS: My name is Stacey Driggers Puette.

19 STACY PUETTE, being first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. RUFFIN:

23 Q: Good morning, Ms. Puette.

24 A: Good morning.

25 Q: Would you mind telling us a little bit about who you are

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 and where you live?

2 A: My name is Stacey Puette. I live in Wallace. I've been
3 married for 42 years. I've been working at the same place for
4 40 years. My husband was a schoolteacher. He's now retired.

5 Q: And where do y'all live now?

6 A: We live in Wallace.

7 Q: Okay.

8 A: Always lived there.

9 Q: Your whole life?

10 A: Whole life.

11 Q: Very good. Well, we're here obviously for the Byrd
12 family. Tell me what is your tie to the Byrd family, to
13 Christy and David?

14 A: Christy is my niece by law, my daughter by heart.

15 Q: And what do you mean by that? How is your relationship
16 with her maybe different than how most peoples' are with their
17 aunt?

18 A: When Christy was small, her mom and dad divorced and she
19 came to live with me. Her -- her mom worked and so she stayed
20 with me and my husband, and she stayed with me for over 20
21 years.

22 Q: Okay. So is it probably more appropriate from your
23 perspective to think of Christy and Julia as your daughter and
24 granddaughter?

25 A: I've always called her my daughter. If anybody asked me

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 who she is, Christy is my daughter and her children are my
2 grandchildren and David is my son-in-law.

3 Q: Thank you. Now, tell me a little bit about the Byrd
4 family?

5 A: They are a do everything together family. If David has
6 to go on a trip, the whole family goes. They take family
7 vacations. They go to church together. They do everything
8 together. The oldest girl plays sports and they're all there
9 at the games.

10 Q: Now, for the deliveries when Christy has gone into labor
11 or gone to the hospital for all her children, have you gone as
12 well?

13 A: Yes. I've been to every one of them.

14 Q: I'm going to hand you what's been pre-marked as
15 Plaintiff's Exhibit Number 5.

16 A: Okay.

17 Q: And I'd like to ask you what have I handed you a copy of?

18 A: The DVD of the birth of Julia.

19 Q: Okay. And did you film it with this camera?

20 A: Yes, I did.

21 Q: And did we take the video from that camera and put it on
22 that disk?

23 A: Yes.

24 Q: And tell me how did you get to be the lucky one to film
25 the birth?

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 A: I don't know. I was in the waiting room and it was just
2 Christy and David, like always, in the birth room, and David
3 comes out and says Christy wants to know if you'll do the
4 videoing. And I said, well, I guess I can. So proud mama
5 went back there.

6 Q: Let me ask you is there -- before we hit play, is there a
7 period of time where maybe the video cuts off and back on?

8 A: Yes.

9 Q: What happened in there?

10 A: My arm -- one time my arm got hit and the camera went up
11 and come down. Then someone stepped in front of me and I
12 couldn't see anything else. So I cut it off.

13 Q: And then cut it back on?

14 A: And I cut it back on.

15 Q: Okay. Let me ask you have we -- have we edited out some
16 filming of cheerleading that didn't -- what happened there?

17 A: Yes. I left the camera with Christy and them from when
18 we left the hospital and they had it at their house. One of
19 my other nieces was cheering; so I get the camera and go video
20 her cheering, not rewinding the tape. I just started taping.

21 Q: And the part that's taped over is after Julia has been
22 born I believe; is that true?

23 A: Yes.

24 Q: Okay.

25 MR. RUFFIN: All right. Your Honor, at this time, we'd

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 like to play the video for the jury.

2 THE COURT: Any objections?

3 MR. JOYCE: No objection, Your Honor.

4 THE COURT: All right.

5 MR. RUFFIN: Your Honor, may we dim the lights?

6 THE COURT: Sure.

7 (WHEREUPON, Plaintiff's Exhibit Number 5, video of the
8 birth of Julia B , was then played in open court, not
9 transcribed herein, and then stopped.)

10 MR. RUFFIN: I'm just trying to speed it up. We're
11 skipping a minute of it.

12 THE COURT: Sure.

13 (WHEREUPON, the video resumed playing.)

14 (WHEREUPON, the video ended and the proceedings resumed
15 as follows.)

16 BY MR. RUFFIN:

17 Q: Is that the entirety of your filming as you remember it?

18 A: Yes.

19 Q: Except for maybe a couple seconds at the very end that
20 just showed more of the same?

21 A: Yes.

22 Q: Okay. Aside from what we saw on the video, which is I
23 know more or less your point of view throughout, do you have
24 any memories that are significant as you sit here today about
25 the delivery?

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 A: Yeah. After she got in the warming bed, the nurse come
2 over and she picked her arm up and it just fell and she picked
3 it up again and it just fell. And me and David just looked at
4 each other and didn't say anything. We didn't -- I didn't say
5 anything to Christy. We just looked at each other and didn't
6 say anything.

7 Q: So we also heard from Christy a little bit about her
8 mom's -- that the family's trips for treatment and everything;
9 so we're not going to go into those, but just from your
10 observations, I mean do you see Julia do things or not do
11 things or can you tell us about that?

12 A: Yeah. Julia can do a lot of things that little girls can
13 do, but there's a lot of things she can't do. She's six and
14 she can't go to overnight stays and spend the night with
15 children because she can't dress herself. She can't brush her
16 own hair. She thinks her arm is broke because it's shorter
17 than the other one. Her days at school is not good days. She
18 has fun, but her arm hurts by the time she gets home.

19 Q: Let me ask you this --

20 A: She can't --

21 Q: I'm sorry. I didn't mean to interrupt.

22 A: -- tumble and play. She can't do cartwheels like other
23 children can, and she really doesn't understand why.

24 Q: As essentially her grandmother, do you have any concerns
25 for her as she ages?

STACEY PUETTE - DIRECT BY MR. RUFFIN

1 A: Yes. I'm concerned that her arm is not going to grow
2 with her body. And when she gets older, there will be things
3 that she can't do. She's going to struggle in school because
4 she's not going to be able to keep up.

5 MR. JOYCE: Objection, Your Honor. Calls for --

6 THE COURT: Sustained.

7 BY MR. RUFFIN:

8 Q: Have you had opportunity to watch David and Christy do
9 the at-home therapy with Julia?

10 A: Yes.

11 Q: In your mind, is there anything that David and Christy
12 should have done or could have done with Julia that they have
13 not?

14 A: No.

15 MR. RUFFIN: Your Honor, in case I forgot to do it, we'd
16 move the video into evidence.

17 THE COURT: Any objections?

18 MR. JOYCE: No objection, Your Honor.

19 THE COURT: That will be what number?

20 MR. RUFFIN: No further questions.

21 THE COURT REPORTER: Number 5.

22 THE COURT: Number 5 is into evidence without objection.

23 (WHEREUPON, Plaintiff's Exhibit Number 5, DVD video of
24 the birth of Julia B , was admitted into evidence.)

25 CROSS-EXAMINATION

STACEY PUETTE - CROSS BY MR. JOYCE

1 BY MR. JOYCE:

2 Q: Good morning, ma'am.

3 A: Good morning.

4 Q: You were standing at the foot of the bed during the

5 video; is that right?

6 A: Yes.

7 Q: And you're able to capture Julia's head come out; is that

8 right?

9 A: Yes.

10 Q: Okay. And then at some point the video spans to the

11 ceiling?

12 A: Yes.

13 Q: And then someone walks in front of you?

14 A: Yes.

15 Q: Okay. And then was your view obstructed then?

16 A: Yes.

17 Q: Okay. And then the video was cut off?

18 A: Correct.

19 Q: Okay. And then you cut the video back on and Julia was

20 already delivered?

21 A: Yes.

22 Q: Okay. So the video didn't capture Dr. Browning

23 successfully complete the delivery of Julia?

24 A: (No response.)

25 Q: Do you need me to repeat that?

STACEY PUETTE - CROSS BY MR. JOYCE

1 A: No. My idea of delivery may be different. So explain
2 what you mean by delivery.

3 Q: Well, the video didn't capture Julia -- Julia's -- the
4 completion of Julia's delivery, did it?

5 A: No. It just showed the head coming out.

6 Q: Okay. You were asked some questions about Julia and I
7 just had a few to follow up on. Julie is engaged and she
8 likes to talk a lot, doesn't she?

9 A: Yes, she does.

10 Q: She likes to tell stories?

11 A: Yes, she does.

12 Q: She's also an intelligent little girl?

13 A: She's very smart.

14 Q: Okay. She can write her own name?

15 A: I do not know.

16 Q: Okay. Ms. Puette, Julia is a happy child, isn't she?

17 A: The majority of the time, yes, she is.

18 MR. JOYCE: No further questions.

19 THE COURT: All right. Any redirect?

20 MR. RUFFIN: No redirect, Your Honor.

21 THE COURT: All right. You may step down. Thank you.

22 Call your next witness.

23 MR. GRAHAM: The plaintiff calls Dr. Steven Pliskow.

24 Please come forward. Wait a minute. It's tight quarters back
25 here. Let me -- hang on just a second. Watch your step.

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 THE CLERK: Sir, if you'll place your left hand on the
2 Bible and raise your right hand? Do you swear or affirm that
3 the testimony you give in this case will be the truth, the
4 whole truth, and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Please have a seat and state your name for
7 the record.

8 THE WITNESS: My name is Dr. Steven Pliskow.

9 MS. GANES: I beg the Court's indulgence, Your Honor.

10 THE COURT: Uh-huh.

11 (WHEREUPON, there was a pause in the proceedings.)

12 MS. GANES: Your Honor, if we could just -- we got some
13 things this morning. He just shared these. If there's
14 anything else, for the jury's sake, if we could just have
15 everything so that we could review it?

16 THE COURT: All right. Do you have anything else?

17 MR. GRAHAM: Not for this witness, if Your Honor please.
18 I mean none other than the exhibits we served and the
19 demonstratives, which we had previously served. And I'm just
20 showing them again before their use with this witness.

21 THE COURT: All right.

22 MS. GANES: Thank you, Your Honor.

23 THE COURT: All right.

24 DR. STEVEN PLISKOW, being first duly
25 sworn, testified as follows:

DIRECT EXAMINATION

2 BY MR. GRAHAM:

3 Q: Good morning.

4 A: Good morning, sir.

5 Q: Dr. Pliskow, let me start off just by having you
6 introduce yourself to the jury. Tell them who you are, where
7 you live, and something about your family situation?

8 A: Okay. My name is Steven Pliskow. I live in West Palm
9 Beach, Florida. I practice there in an OB/GYN practice. I've
10 been there for 26 years. I'm married with three children.
11 And I think that answers your question.

12 Q: Thank you. You're an obstetrician?

13 A: I am.

14 Q: And where do you practice?

15 A: I practice in West Palm Beach, Florida, in an area out
16 west called Wellington, Florida, and also in Loxahatchee,
17 Florida.

18 Q: Thank you.

19 MR. GRAHAM: If Your Honor please, I'm going to -- just
20 for the sake of time, I'm going to hand the witness all of the
21 exhibits we intend to use --

22 THE COURT: Any objections?

23 MR. GRAHAM: -- for his testimony.

24 MS. GANES: Your Honor, nothing has been moved into
25 evidence. If he wants to move it into evidence --

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 THE COURT: He's not moving it into evidence, but if you
2 want to look at it, now is the time.

3 MS. GANES: He did give me those this morning. Thank
4 you.

5 BY MR. GRAHAM:

6 Q: Doctor, you have in front of you Exhibit 41?

7 A: Yes, sir.

8 Q: What is that, please, sir?

9 A: That's my resume or curriculum vitae.

10 Q: Thank you. Is -- are its contents true and accurate?

11 A: The contents are true and accurate. There should be a
12 more updated version that has one more published article on
13 it.

14 Q: I see. As of the date that CV was created, was it true
15 and accurate and up-to-date in all respects as of that time?

16 A: Yes, sir.

17 Q: Okay. And what is the one publication that -- well, is
18 the one publication that needs to be added -- is that
19 pertinent to any of the issues in this case?

20 A: It is not. It is regarding a condition called Stevens-
21 Johnson syndrome.

22 Q: Thank you.

23 MR. GRAHAM: Your Honor, we would offer Exhibit 41 at
24 this time.

25 THE COURT: Any objections?

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 MS. GANES: No objection, Your Honor, consistent with the
2 Court's ruling yesterday.

3 THE COURT: All right, 41 is into evidence without
4 objection.

5 (Plaintiff's Exhibit Number 41, curriculum vitae of Dr.
6 Steven Pliskow, was admitted into evidence.)

7 BY MR. GRAHAM:

8 Q: Doctor, let me ask you a few questions from your CV.
9 Plus -- first of all, please just give us an idea about your
10 educational background, starting with college?

11 A: Sure. I was accepted out of high school for the six-year
12 medical program, which is where you do eight years of -- four
13 years of college and four years of medical school in six
14 years. You go continuously. And I did that at Rensselaer
15 Polytechnic Institute in Troy, New York, and that's where I
16 got my Bachelor of Science in biology and then received my
17 medical degree at Albany Medical College of Union University
18 in Albany, New York.

19 Q: Thank you. And tell us about your employment background
20 since then as your medical work?

21 A: Well, subsequent to that, I was accepted in the OB/GYN
22 residency at the University of Miami and was there for four
23 years, and that would be from 1986 to 1990. And then since
24 that time, I've been practicing obstetrics and gynecology in
25 the West Palm Beach area from 1990 to date.

1 Q: Okay. And West Palm is in the southern part of Florida?

2 A: It's the northernmost part of what's considered South
3 Florida.

4 Q: Gotcha. Have you ever done work in South Florida in the
5 service of women who were the victims of crimes?

6 A: Yes, sir.

7 Q: All right. Tell us about that?

8 A: From 1988 or '89 -- end of '88 to the beginning of '89
9 through 1990, I worked at the rape treatment center at the
10 University of Miami doing intake exams and actually did have
11 to testify in criminal trials telling my findings during those
12 exams.

13 Q: Thank you. In your -- you mentioned residency. In your
14 residency program, were you ever a chief resident?

15 A: Yes. In the fourth year of the residency program, if
16 you've made it to your fourth year, you become a chief
17 resident. There were ten of us. There are two administrative
18 chiefs. Those are the ones that make the schedule. I was not
19 an administrative chief, but I was a chief resident.

20 Q: Let's talk about being board-certified. What -- first of
21 all, what does it mean to be board-certified in a specialty
22 area of medicine?

23 A: Well, when you have a specialty of medicine, the top
24 acknowledgment that you can get, accreditation, would be board
25 certification. For obstetrics and gynecology, it includes two

1 parts. One is a written examination, which you sit down and
2 take a test and if you pass that, then you are board eligible
3 to sit for the oral part of the boards.

4 After approximately a year in private practice where you
5 accumulate a set of cases that you've performed, deliveries
6 that you've done, complications that you've handled, you sit
7 in front of a committee of professors where you're asked
8 questions, clinical questions, and if you can answer them
9 satisfactorily, then you pass the oral part of the boards and
10 then you're determined to be board-certified.

11 Q: Are you board-certified?

12 A: Yes, sir.

13 Q: In obstetrics and gynecology?

14 A: Yes, I am.

15 Q: As of what date?

16 A: That would be 1992.

17 Q: Is there a recertification program that you have to go
18 through afterwards?

19 A: There is. Every six years, you sit for another
20 examination, a written examination, and annually you do a set
21 of continuing medical education where you review articles and
22 answer questions. And if you answer -- I believe it's 70
23 percent of those questions correct, then you pass on each year
24 until you sit for that written test, and then you have to pass
25 that every six years.

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 Q: Have you ever had any problem getting board-certified or
2 recertified?

3 A: No, sir.

4 Q: Thank you. Now, are you -- are you board-certified in
5 any field other than obstetrics and gynecology and, if so,
6 what is that?

7 A: I'm board-certified also in forensic medicine.

8 Q: What is forensic medicine?

9 A: Well, forensics -- forensic medicine is the interaction
10 between law and medicine.

11 Q: Do you have any hospital privileges or appointments?

12 A: I do.

13 Q: All right. Where are they?

14 A: At Palms West Hospital in Loxahatchee, Florida, and
15 Wellington Regional Medical Center in Wellington, Florida.

16 Q: Have you taught obstetrics or delivery techniques, safe
17 -- safe ways of delivering babies?

18 A: Yes. I do currently teach.

19 Q: Have you ever served on any hospital committees that
20 investigate quality control of the physician performance at
21 the hospital?

22 A: Yes, sir. I've sat on a peer-review committee. I've sat
23 on the quality assurance committee. I've sat on the medical
24 executive committee of our hospital, and currently I'm on the
25 Board of Trustees, which makes the final determination if

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 there are any negligent acts being performed at the hospital.

2 Q: I don't want to take the time to ask you about all the
3 various organizations, professional organizations, you're a
4 member of, but those are set forth on your CV?

5 A: Yes, sir.

6 Q: Thank you. Have you been published?

7 A: Yes.

8 Q: In the field of obstetrics?

9 A: Yes, sir.

10 Q: Okay. What is obstetrics exactly?

11 A: Obstetrics is the study or the management of the pregnant
12 female.

13 Q: As an obstetrician and a forensic obstetrician, have you
14 investigated allegations of medical negligence on behalf of
15 obstetricians when a hospital has asked you to do so?

16 A: Yes, sir.

17 Q: When you go about doing a peer review or some other
18 evaluation of another doctor's performance, what do you do to
19 get yourself in the right frame of mind for that type of
20 undertaking?

21 MS. GANES: Objection, Your Honor. Relevance as to the
22 peer review.

23 THE COURT: And how is that relevant?

24 MR. GRAHAM: Because he uses that same approach when he's
25 evaluating a case like this. I'll tie it up in about three

1 questions.

2 THE COURT: All right. Overruled. Go ahead.

3 MR. GRAHAM: Thank you, Your Honor.

4 THE WITNESS: Could you repeat that, sir? I'm sorry.

5 MR. GRAHAM: Yes, sir.

6 BY MR. GRAHAM:

7 Q: When a hospital asks you to investigate a negligent --
8 when a hospital asks you to investigate a situation at a
9 hospital involving a potential claim of obstetrical
10 negligence, how do you get yourself in the right frame of mind
11 to conduct that professional activity?

12 A: Well, basically when I review any case or any treatment,
13 I look at the complete picture. I use my education, my
14 training, and my experience to review what has happened. I
15 review it from the standpoint of the physician reviewing -- of
16 the physician who was performing the care, from the patient,
17 from the baby, if there is a baby that is of concern if it's
18 an obstetric case.

19 I try to be fair to all parts, and also something that's
20 very important is to review the case prospectively, and what
21 that means is as if you were there in real time treating each
22 moment without knowing what's going to happen in the future
23 because you don't want to review a case with the hindsight of
24 already knowing what's happened. You may know that, but even
25 if you know the final result, you still have to put yourself

1 back to that moment of time when you are reviewing the case to
2 do it fairly.

3 Q: In your career, have you been requested to conduct an
4 evaluation in a lawsuit context on behalf of an obstetrician
5 who was being accused or where there's some allegation of
6 medical negligence?

7 A: Yes, I have.

8 Q: How do you put yourself in the right frame of mind to do
9 that kind of work?

10 A: Again, the same answer. You would review that without
11 bias to any party and in real time and using your education,
12 training, and experience.

13 Q: And in the lawsuit context, have you also been asked to
14 evaluate potential obstetrical negligence in a case where
15 you're contacted by the lawyers representing the injured baby?

16 A: Yes, I have.

17 Q: How do you go about putting yourself in the right frame
18 of mind for that undertaking?

19 A: It's really the same process. It doesn't really matter
20 who contacts you. When you're reviewing a case, you review it
21 the same way you would review it for any person that's sending
22 you the case.

23 Q: In South Florida, do you have any regular relationships
24 with defense law firms down there that -- that hire you fairly
25 regularly to help them figure out what they should do, how

1 they should handle a lawsuit against their obstetrician?

2 A: Yes, sir.

3 Q: And do you have experience working on legal cases in
4 other parts of the country outside of South Carolina --
5 outside of south Florida?

6 A: Well, as far as defense work, I have two attorney firms
7 that send me -- you know, as far as I know, exclusively their
8 OB/GYN work to review for them. Two defense firms, one in
9 Fort Lauderdale and one in West Palm.

10 I have experience in reviewing cases all over the country
11 pretty much, the northeast, the southeast, the central part of
12 the country. I don't believe I've reviewed anything on the
13 West Coast though. But mostly those have been sent to me by
14 plaintiff attorneys.

15 Q: What are some of the states that you've testified in?

16 A: Florida, New York, South Carolina, Georgia, Illinois,
17 Maryland, Texas, and those are the only ones I can think of
18 right now.

19 Q: Are you familiar with the standards of care by which
20 obstetricians should manage a pregnancy and a labor and a
21 delivery of a baby?

22 A: Yes, sir, I am familiar with that.

23 Q: Okay. When you've testified in court, have you ever been
24 found disqualified to serve as an expert witness?

25 A: No, sir, not to my knowledge.

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 MR. GRAHAM: Your Honor, at this time, we would proffer
2 Dr. Pliskow as an expert in the field of obstetrics and
3 forensic medicine, including standards of care, breaches, and
4 causation.

5 THE COURT: Any objections?

6 MS. GANES: I didn't hear the last area. I heard
7 standards of care.

8 MR. GRAHAM: Breaches and causation.

9 MS. GANES: Your Honor, no objection. I do have some
10 objection on the causation.

11 THE COURT: All right. Would you like for me to hear it
12 outside of the presence of the jury?

13 MS. GANES: Just briefly, Your Honor.

14 THE COURT: All right. Do you want to do it up here or
15 do you want to --

16 MS. GANES: I think we can do it up there.

17 THE COURT: All right.

18 (WHEREUPON, a bench conference was held in the presence
19 of the jury but out of the hearing of the jury as
20 follows.)

21 MS. GANES: Are you just going to stick with what you
22 asked him about last time?

23 MR. GRAHAM: Yes.

24 MS. GANES: He's not going to have anything new?

25 MR. GRAHAM: No. He's going to -- that came up last

1 time. He's --

2 MS: GANES: Please don't say last time where the jury can
3 hear you.

4 MR. GRAHAM: I don't think they can hear me, but what --
5 what -- what happened is he needs to know whether or not an
6 injury is permanent. It's part of his evaluation. He doesn't
7 make the determination. He relies on other professionals who
8 do. It's right under Rule 703.

9 MS. GANES: As long as he's not going to go into
10 neurology -- the neurology. As long he's not going into
11 neurology, I'm fine with that.

12 MR. GRAHAM: He's going to testify as an obstetrician.
13 You know, he's not going to testify as a neurologist.

14 MS. GANES: Thank you, Your Honor.

15 (WHEREUPON, the bench conference ended and the
16 proceedings resumed as follows.)

17 BY MR. GRAHAM:

18 Q: Doctor, in your career, how many babies have you
19 delivered?

20 A: In my career -- I have actually looked at this recently
21 to try to recalculate it. It's about 9,700. By the end of
22 this year, it should be close to 10,000.

23 Q: And that's over how many years?

24 A: That's over 30 years now. That's including my residency
25 program.

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 Q: What percentage of your deliveries have been vaginal as
2 opposed to a C-section?

3 A: Probably about 80 percent, eight zero.

4 Q: Are you familiar with the standards of care by which
5 obstetricians are supposed to manage a vaginal head-first
6 delivery where the shoulder gets stuck?

7 A: I am.

8 Q: What do you call that situation by the way?

9 A: I call it a shoulder dystocia.

10 Q: Okay. Have you taught medical students and residents how
11 to deal with that situation?

12 A: I have.

13 Q: How many times in your career have you been faced with a
14 stuck shoulder complication?

15 A: I would say probably 40 to 50 times.

16 Q: Of all those encounters, how would you characterize the
17 level of difficulty resolving them?

18 A: I would say the vast majority of them -- if we use the
19 round number of 50, I would say at least 40 to 45 of them were
20 resolved easily without having to go through the maneuvers
21 more than once.

22 Q: And I want to come back to that point about maneuvers in
23 a moment.

24 A: Okay.

25 Q: But right now, let me just talk some more about your

1 experience. Do you keep up with the professional literature
2 in your field about how to deliver babies safely when the top
3 shoulder gets stuck?

4 A: I do.

5 Q: Do you keep up with the professional literature in your
6 field about what causes temporary brachial plexus nerve
7 injuries and what causes permanent brachial plexus nerve
8 injuries?

9 A: I do.

10 Q: Have you at my request reviewed the medical records in
11 this case?

12 A: I have.

13 Q: Have you at my request reviewed the depositions in this
14 case of various witnesses?

15 A: Yes, sir.

16 Q: Have you at my request watched the birth video that the
17 jury saw a moment ago?

18 A: Yes, sir.

19 Q: Does prenatal care have anything to do with the issues in
20 this case?

21 A: This case has absolutely nothing to do with prenatal
22 care. It has to do with the management of a delivery.

23 Q: Do you criticize Dr. Browning in any way for anything
24 related to prenatal care?

25 A: No, sir.

1 Q: Is there any good reason for us to talk about any aspect
2 of prenatal care in this case?

3 A: Like I said, it has nothing to do with this case.

4 Q: What do you consider successful management of a stuck
5 shoulder situation, a shoulder dystocia as you put it?

6 A: The successful management of a shoulder dystocia is to --
7 the prompt and safe delivery of the baby without injury.

8 Q: Was the delivery of Julia B a successful management of
9 shoulder dystocia?

10 A: No. The delivery of Julia B with regard to the
11 treatment of the shoulder dystocia was a failure.

12 Q: What is a standard of care? We've used that phrase a
13 number of times, but let me get you to give us your definition
14 of what a standard of care is?

15 A: Well, the standard of care or a standard of care is what
16 a reasonably prudent physician would do under like or similar
17 circumstances to safely care for a patient or resolve a
18 situation.

19 Q: What is the purpose of standards of care for doctors,
20 especially obstetricians?

21 A: Well, the standards of care sort of gives you, like, a
22 checklist to go down and make sure that you are doing things
23 appropriately, what is the accepted methods. There are some
24 conditions or treatments that can be done one way or the other
25 and you can make choices, but there's others where there is a

1 set protocol to do. But basically a standard of care is when
2 faced with a situation what a prudent -- reasonably prudent
3 physician would do with that set of circumstances.

4 Q: And the -- and the -- what's the -- the overall purpose
5 in terms of the practice of medicine for having standards of
6 care?

7 A: Well, the overall purpose for standards of care is for
8 patient safety. There's a huge push in the medical field
9 through many of the governing bodies to manage things safely,
10 hospital care, patient care, and standards of care help manage
11 conditions in patients safely.

12 Q: In our country, are there different standards of care
13 from state to state, region to region?

14 A: I mean there might be for certain conditions, but not in
15 the field of obstetrics.

16 Q: And so for example, you practice in West Palm Beach?

17 A: Yes, sir.

18 Q: We are here today in a lawsuit dealing with what Dr.
19 Browning did in Florence, South Carolina. Could you give us
20 an idea about how your patient population should be described?
21 And I don't know want to know about business practices or how
22 people pay, but just in general socioeconomic characteristics
23 of your patient population compared to, say, other parts of
24 the country.

25 A: Well, patient wise, I mean we take care of all types of

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1 patients from -- I mean we have different areas of our
2 community. We have a rural area. We have an urban area. We
3 have Palm Beach, where many of the well-to-do live. My
4 practice takes care of everybody.

5 Q: Is there any difference between obstetrical standards of
6 care in West Palm Beach and obstetrical standards of care in
7 the Pee Dee section of South Carolina and particularly
8 Florence?

9 MS. GANES: Objection, Your Honor. Asked and answered.

10 THE COURT: Overruled. Go ahead.

11 BY MR. GRAHAM:

12 A: No. There's absolutely no difference in the management
13 of -- or obstetrical care and even further in the management
14 of shoulder dystocia.

15 Q: Tell me about ACOG. Are you -- first of all, what is
16 ACOG and are you a member?

17 A: ACOG is the American College of Obstetrics and
18 Gynecology. I am a member. It is the governing body by which
19 our board certification is issued, which is really the
20 American Board of OB/GYN, but ACOG is the governing body. It
21 releases updates, compendiums, literature for us on management
22 of different conditions and will also be the body by which an
23 OB/GYN would be chastised or -- or even removed from the
24 American College by doing things that are either unethical or
25 out of the norms for what physicians should do.

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1 Q: And is ACOG a national organization?

2 A: It is. It's American College.

3 Q: All right. Are there national conferences and meetings
4 and seminars that obstetricians such as yourself go to?

5 A: Yes, sir. There are.

6 MR. GRAHAM: Your Honor, at this point, I would like to
7 ask the doctor about how to safely manage a stuck shoulder
8 situation. I think that might be best if we had your
9 permission for him to step down.

10 THE COURT: You may.

11 THE WITNESS: Thank you, Your Honor.

12 MS. GANES: Excuse me, Your Honor. May I stand over by
13 the jury --

14 THE COURT: sure.

15 MS. GANES: -- so I can see?

16 THE COURT: Sure.

17 MR. GRAHAM: Let me grab these and make them easily
18 available to you.

19 BY MR. GRAHAM:

20 Q: First of all, Doctor, would one of these blow-ups assist
21 you in describing what shoulder dystocia looks like?

22 A: Well, I think we can certainly use this first
23 demonstrative.

24 Q: And, Doctor, let me get you -- if you don't mind, let me
25 get you to stand on this side to make it easier for the court

1 reporter to hear you.

2 A: Okay.

3 Q: Thank you.

4 A: And this demonstrative.

5 Q: So using this blowup, please explain to us, if you would,
6 exactly what is shoulder dystocia?

7 A: Well, shoulder dystocia is when the baby's head delivers,
8 it's outside the vagina, it's outside the mom's body, and the
9 shoulder here, what we call the anterior shoulder, which is
10 the shoulder that is toward the top -- this is posterior, this
11 is anterior. This would be superior. So those are terms I
12 may use.

13 Q: And I may stop you from using them if I'm quick enough.

14 A: Well, what happens is the head delivers easily or not
15 easily.

16 THE COURT: If you would, speak up a little bit. She has
17 to hear everything you say and she cannot hear you.

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: Thank you.

20 BY MR. GRAHAM:

21 A: So the head would deliver out of the vagina and the
22 anterior shoulder, this top shoulder, gets stuck behind the
23 pubic bone and the baby is unable to deliver the rest of the
24 body because of this stuck shoulder. So a shoulder dystocia
25 is basically a stuck shoulder.

1 Q: Now, you told us earlier about maneuvers. I said I would
2 circle back to that. First of all, before you tell us what
3 the various maneuvers are, what is the purpose of the
4 maneuvers that are available to an obstetrician to assist in
5 the safe resolution of shoulder dystocia? What's the basic
6 purpose of those maneuvers?

7 A: Well, they're basically safety measures, safety
8 maneuvers, that are performed to dislodge or get this shoulder
9 out from being stuck to allow the safe delivery of the baby
10 without injuring the nerves that run right in here in the
11 neck.

12 Q: Thank you. What are -- could you -- we'll take them
13 individually, but could you just run through the five most
14 frequently used maneuvers?

15 A: Sure.

16 Q: Either maternal or baby maneuvers?

17 A: Sure. The first maneuver that is normally used and
18 what's considered a standard maneuver is to do McRoberts
19 maneuver or place the mom in the McRoberts position.

20 Now, what McRoberts position is is where the knee is
21 bent, the hip is flexed or pulled back onto the body where the
22 knee is touching the abdomen. The legs are usually pointing
23 toward the shoulder, the maternal shoulder, and pulled back as
24 far as they can be pulled back without, obviously, injuring
25 the mom.

1 What that does is it moves this pubic bone or should move
2 that pubic bone superior or toward the top of mom, kind of
3 pushing it off of the shoulder. It straightens the curvature
4 of the lumbar spine and sometimes, probably about 40 percent
5 of time, in and of itself will resolve the shoulder dystocia
6 or the stuck shoulder.

7 Q: All right. So we know about McRoberts. What is the
8 second most frequently used safety maneuver for dealing with a
9 stuck shoulder?

10 A: The second maneuver usually used is the suprapubic
11 pressure, and what suprapubic pressure is is one of the
12 assistants -- because the person who is doing the delivery
13 can't really do suprapubic pressure; so one of the assistants
14 will place pressure to the maternal abdomen. It's never at
15 the top. It's always just above or suprapubic, above the
16 pubic bone, right where the shoulder is because that's where
17 the shoulder is stuck right above the pubic bone.

18 So you're actually pushing from the outside on the back
19 of that shoulder trying to push it or rotate it toward the
20 baby's chest and push it under the pubic bone. That's
21 suprapubic pressure. The combination of McRoberts maneuver
22 and suprapubic pressure will resolve about 70 percent of
23 shoulder dystocias by themselves.

24 Q: Thank you. Now, if the assistant, a nurse or some other
25 assistant, were to push right on -- not on the shoulder above

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1 the pubic bone, but to push down on the pubic bone itself,
2 what good does that do?

3 A: It doesn't do any good. In fact, it may very well do
4 harm because what's happening is, as you can see, with the
5 shoulder being stuck behind the pubic bone, if you push that
6 pubic bone down, you're making the obstruction worse. You're
7 pushing that bone down and trapping the shoulder behind the
8 bone even worse.

9 MS. GANES: Excuse me, Your Honor. I object to this.
10 This is in accordance with your ruling on captain of the ship
11 and I would ask for a Rule 105 charge.

12 THE COURT: Come on up.

13 (WHEREUPON, a bench conference was held in the presence
14 of the jury but out of the hearing of the jury as
15 follows.)

16 THE COURT: All right. Just from the other day, what did
17 you ask me to do?

18 MS. GANES: Your Honor --

19 MR. GRAHAM: We're -- I asked him what good it does to
20 push on the bone. He basically said no good. It may cause
21 harm.

22 MS. GANES: Yes. And they're not in this and there's no
23 captain of the ship and he is done with his answer and he is
24 answering these questions to impute that negligence to Dr.
25 Browning.

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1 MR. GRAHAM: No.

2 MS. GANES: And that is exactly what Rule 105 is designed
3 to prohibit.

4 MR. GRAHAM: No. We -- we are not blaming --

5 THE COURT: It's going to that extent. I think he's just
6 explaining what happens.

7 MS. GANES: No, Your Honor. He actually said that it
8 would do harm, that you are trapping the shoulder. The nurses
9 are not in this case. Dr. Browning doesn't train those
10 nurses. Dr. Browning doesn't employ those nurses. They are
11 to be trained and to do it appropriately when the doctor asks
12 for it.

13 THE COURT: I gotcha.

14 MR. GRAHAM: His deposition says I order them, I
15 supervise whether or not they carry out my order and, if they
16 don't, it's my job to tell them how to do it.

17 THE COURT: If he testifies, we're going to stand with
18 the prior ruling that I had.

19 MS. GANES: Can we have a Rule 105 charge? I would ask
20 for just what the rule says. That they are to disregard it
21 and that it is not --

22 MR. GRAHAM: We're not --

23 MS. GANES: -- to be used against Dr. Browning.

24 THE COURT: You need Rule 105? What is it?

25 MS. GANES: Rule 105 of the rules of --

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1 THE COURT: Captain of the ship?

2 MS. GANES: Yes.

3 MR. GRAHAM: And --

4 THE COURT: You want me to bring attention to it or --

5 MS. GANES: Yes.

6 THE COURT: You want me to bring it to the attention to
7 the jury in my charge or now?

8 MS. GANES: Now.

9 THE COURT: All right. Exactly what do you want me to
10 say?

11 MS. GANES: I'll grab my rulebook.

12 (WHEREUPON, there was a pause in the bench conference,
13 after which the bench conference resumed as follows.)

14 MS. GANES: I have some -- I'll wait for him to come
15 back.

16 (WHEREUPON, there was a pause in the bench conference,
17 after which the bench conference resumed as follows.)

18 MS. GANES: Do you see Rule 105? Okay.

19 THE COURT: Right. What is the curative instruction?

20 MS. GANES: Okay. The curative instruction would be that
21 any evidence offered as to the negligence of the nurses is not
22 to be considered.

23 THE COURT: Speak up again?

24 MS. GANES: Any evidence offered as to the negligence of
25 the nurses is not to be considered as to the negligence of Dr.

1 Browning.

2 MR. GRAHAM: But, Your Honor -- Your Honor --

3 MS. GANES: And, Your Honor, I -- I have made a list. I
4 have tried not to object to those and ask for numerous 105
5 charges.

6 MR. GRAHAM: This -- this is not relevant. If Your Honor
7 please, look at the first few words. When evidence which is
8 admissible as to one party or for one purpose is not
9 admissible for another party or another purpose. We are
10 admitting it for one purpose only, against both of these
11 defense parties, and that is that Dr. Browning was negligent
12 in not correcting the nurse's -- the nurse's error.

13 MS. GANES: And that is captain of the ship, Your Honor.
14 It is not recognized.

15 THE COURT: We're talking about Dr. Browning. The nurses
16 are not a party. He apparently does not employ the nurses.
17 The nurses do not work for him.

18 MS. GANES: That is correct. Nor the practice.

19 MR. GRAHAM: And the fact that they're not a party seems
20 to make this rule inapplicable.

21 MS. GANES: It does not, Your Honor. It does not. A
22 party does not have to be --

23 THE COURT: It's bringing attention to a wrong that goes
24 to Dr. Browning. We need to stick to what Dr. Browning did
25 wrong.

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1 MR. GRAHAM: Which is what we're doing. Well, I
2 understand.

3 MS. GANES: I waited for him to complete the answer.

4 THE COURT: So as to any evidence as to the negligence of
5 the nurses is not to be considered toward any negligence of
6 Dr. --

7 MS. GANES: Browning. Yes.

8 MR. GRAHAM: Although --

9 MS. GANES: Or the practice.

10 MR. GRAHAM: But you can consider his failure to correct.

11 THE COURT: I'll give an appropriate charge at the end of
12 the case, but at this point in time I don't see that. He
13 hasn't even testified. Nobody has testified as to what the
14 nurse's status in this case is.

15 MR. GRAHAM: And he will. This witness will in a few
16 minutes.

17 THE COURT: You're going to ask him right now?

18 MS. GANES: And he completed his answer.

19 THE COURT: How could he know what the nurses did, et
20 cetera, et cetera?

21 MR. GRAHAM: That's irrelevant to his opinion. He knows
22 that Dr. Browning and any obstetrician are responsible for
23 seeing that orders that take place a foot in front of their
24 face are carried out appropriately, and Dr. Browning admits
25 that in his deposition.

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1 MS. GANES: First of all --

2 MR. GRAHAM: Which he can rely on.

3 MS. GANES: He does not admit that in his deposition.

4 And second of all, that is captain of the ship.

5 THE COURT: I feel like this is an appropriate charge.

6 MR. GRAHAM: Okay.

7 THE COURT: If it changes, we'll go from there.

8 MR. GRAHAM: Okay.

9 MS. GANES: Thank you, Your Honor.

10 (WHEREUPON, the bench conference ended and the
11 proceedings resumed as follows.)

12 THE COURT: All right. Members of the jury, I want you
13 to understand that any evidence offered as to the negligence
14 of the nurses, if any, is not to be considered toward any
15 negligence of Dr. Browning.

16 All right. With that being said, you may continue.

17 MR. GRAHAM: Thank you, Your Honor.

18 BY MR. GRAHAM:

19 Q: I believe, before that objection, I had asked you what
20 good does it do to push on the bone instead of feeling for the
21 shoulder and pushing on the shoulder.

22 MS. GANES: Objection, Your Honor.

23 THE COURT: Sustained.

24 MR. GRAHAM: Okay.

25 BY MR. GRAHAM:

1 Q: Did -- Doctor, were you able to finish your last answer?

2 A: I believe we --

3 Q: Okay.

4 A: -- got through it.

5 Q: Fine. I couldn't remember if you finished it or not.

6 All right.

7 Let me ask you does -- does this diagram further assist
8 you in explaining to the jury about the importance of -- or in
9 explaining how suprapubic pressure should be properly
10 performed?

11 A: I guess it, again, just reiterates what we had said
12 before where there is a pushing from the side to try to push
13 this shoulder that is stuck here under the bone.

14 Q: Thank you. Now, are there any other maneuvers that an
15 assistant or nurse are supposed to carry out on the doctor's
16 order or are the rest of the maneuvers internal maneuvers that
17 the physician does himself?

18 A: Yeah. The rest of the maneuvers are internal maneuvers
19 that the physician does himself.

20 Q: All right. Does this blowup help you illustrate one of
21 those maneuvers?

22 A: It does.

23 Q: All right. Please, using this blowup, please explain the
24 Rubin's maneuver?

25 A: So the third maneuver that we're describing, which is the

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1 first of the fetal maneuvers, is called the Rubin's maneuver,
2 which involves actually going in and feeling that anterior
3 shoulder, that top shoulder, that stuck shoulder, putting two
4 fingers or three fingers behind that shoulder and pushing it
5 or maneuvering it forward so that this shoulder comes toward
6 the baby's chest and is pushed out of the way of the bone.

7 So then what will happen is the shoulders will now
8 instead of being up-and-down, north-south, they'll be
9 sideways, and the oblique or sideways angle of the pelvis is
10 larger; so the shoulders may fit through more easily through
11 that angle than as if they were up-and-down.

12 Q: Now, is there another maneuver, another rotational
13 maneuver, similar to Rubin's that involves a technical
14 difference?

15 A: The second maneuver, internal maneuver or maneuver of the
16 shoulders, is what's called Wood's maneuver. It's really a
17 180-degree turn of the baby's shoulders, but the Wood's
18 maneuver is not working on the anterior shoulder or the stuck
19 shoulder. It's working on the bottom shoulder, the posterior
20 shoulder, where you would go in vaginally, put your fingers in
21 front. The way Woods described it initially, it was the
22 fingers on the front part of the shoulder and spinning the
23 baby in the reverse -- reverse cycle to try to dislodge the
24 anterior shoulder, making the posterior shoulder, the bottom
25 shoulder, now the anterior shoulder.

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1 Q: Thank you. You told us about four of the safety
2 maneuvers so far. What is the -- of the -- of the top five
3 most frequent, what is the next?

4 A: The fifth maneuver that we would describe or the third
5 internal maneuver, physician maneuver, is called the delivery
6 of the posterior arm.

7 Q: Does this blowup assist you in explaining the posterior
8 arm delivery?

9 A: Yes, it does. So in this maneuver, the anterior
10 shoulder, the top shoulder, is still stuck right there behind
11 the bone and what's done here is the delivery attendant's hand
12 is placed in, the upper arm or the humerus, this part of the
13 arm, is felt for, grabbed. The elbow is flexed. The bottom
14 part of the arm, this part, is delivered across the shoulder
15 and out of the vagina. So you deliver the posterior or the
16 bottom shoulder first and once the bottom shoulder comes out,
17 there's more room for the anterior, the top shoulder that's
18 stuck, to come out, and that's called delivery of the
19 posterior or the bottom arm.

20 Q: I'm not going to ask you to go into any detail, but are
21 there other maneuvers available to a competent, well-trained
22 obstetrician to facilitate resolution of shoulder dystocia
23 safely if these top five maneuvers for any reason are
24 unsuccessful?

25 A: Well, the vast, vast majority of the shoulder dystocias,

1 the stuck shoulders, will resolve with these five maneuvers.

2 There are other maneuvers.

3 We can attempt to fracture the clavicle, break the
4 clavicle, which is this bone right here on the anterior side,
5 to collapse the shoulder. You can push the head back up and
6 do a cesarean section. That's called a Zavanelli maneuver.
7 Those are really last-ditch efforts.

8 There is one maneuver that you can do before doing those
9 potentially traumatic maneuvers and that's called a Gaskin
10 maneuver, which is where mom is switched from lying on her
11 back to being put on all fours and using the force of gravity
12 to be able to take that stuck shoulder, that top shoulder, off
13 of the pubic bone and deliver more easily toward the back.

14 Q: Thank you. Do you have an opinion to a reasonable degree
15 of medical certainty as to whether or not a competent, well-
16 trained obstetrician in this country should be able to perform
17 all of the various maneuvers that you have described or -- I
18 should rephrase -- be able to order and supervise the first
19 two maneuvers that other folks carry out and to personally
20 perform the three internal maneuvers?

21 MS. GANES: Objection, Your Honor.

22 THE COURT: Come on up here.

23 (WHEREUPON, a bench conference was held in the presence
24 of the jury but out of the hearing of the jury as
25 follows.)

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1 MR. GRAHAM: It was as bad -- it was an awkward question.
2 I'm happy to try again.

3 THE COURT: Yeah. Try again.

4 MS. GANES: Just so that we don't have to come back, I
5 don't know what the law is in all the other states where he's
6 testified, but we don't have captain of the ship and that's
7 what he's trying to do.

8 MR. GRAHAM: Captain --

9 MS. GANES: Supervise is my issue.

10 THE COURT: All right.

11 MR. GRAHAM: Okay.

12 (WHEREUPON, the bench conference ended and the
13 proceedings resumed as follows.)

14 BY MR. GRAHAM:

15 Q: Doctor, with respect to the internal maneuvers, the two
16 rotation maneuvers you talked about and the posterior arm
17 delivery method, do you have an opinion to a reasonable degree
18 of medical certainty as to whether or not an obstetrician in
19 Florence, South Carolina, or anywhere in the United States
20 should have command of all three of those maneuvers and be
21 able to use them to get a shoulder unstuck safely?

22 A: I do have an opinion, and I believe that they should have
23 that armamentarium, that expertise, in taking care of those
24 three maneuvers.

25 Q: Okay. And in terms -- let's take the first two maneuvers

1 individually. In terms of McRoberts maneuver, who orders
2 McRoberts?

3 A: The physician orders McRoberts.

4 Q: Who performs McRoberts?

5 A: Usually the physician can assist with the performance of
6 McRoberts, but it's usually two assistants, one on either
7 side. It can be a family member. Usually, two nurses.

8 Q: Okay.

9 A: Because when a shoulder dystocia occurs, what happens is
10 you stop everything, you have mom stop pushing because the
11 shoulder is stuck, and then you call for help. So there
12 should be ample help within the room, two nurses, to be able
13 to assist. If one hasn't arrived quick enough, then you can
14 use a family member to do the McRoberts.

15 Q: Thank you. What role, if any, does the physician have to
16 assure that his order for McRoberts positioning is carried out
17 appropriately?

18 MS. GANES: Objection, Your Honor. This calls for a
19 legal conclusion. Based on all my prior objections.

20 THE COURT: Sustained.

21 BY MR. GRAHAM:

22 Q: Doctor, what role, if any, does the obstetrician have for
23 seeing that his suprapubic pressure order is carried out
24 correctly?

25 MS. GANES: Same objection, Your Honor.

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1 THE COURT: Why don't you rephrase it?

2 BY MR. GRAHAM:

3 Q: Doctor, based on your knowledge, training, and experience
4 as a board-certified obstetrician and forensic medicine
5 specialist, does the doctor's job at -- at implementation of
6 suprapubic pressure stop with giving the order or are there
7 additional responsibilities in that regard?

8 A: No. As the doctor --

9 MS. GANES: Objection, Your Honor. This is a legal
10 conclusion based on captain of the ship.

11 THE COURT: Sustained.

12 MR. GRAHAM: Your Honor, may we approach?

13 (WHEREUPON, a bench conference was held in the presence
14 of the jury but out of the hearing of the jury as
15 follows.)

16 MR. GRAHAM: As I understand it, captain of the ship is
17 vicarious liability for negligence of a nurse. The doctor --
18 according to his own deposition testimony and according to my
19 experts, the doctor has the duty to see that his orders are
20 carried out properly. And I mean this is a key part of our
21 case. We are going to need to make a proffer or something if
22 -- if you won't let us go there. We could do it maybe during
23 a break or something, but --

24 THE COURT: In other words, he has the power to order
25 that certain things be done?

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1 MR. GRAHAM: Exactly. Exactly. Like if he -- if he
2 orders one gram of morphine and he sees a nurse doing 10 grams
3 of morphine, if he sees that, he's got a duty to stop it and
4 say no, one gram.

5 MS. GANES: But if she gives the 10 grams of morphine,
6 the hospital needs to be sued for her giving the 10 grams of
7 morphine. He didn't train her and the problem here, Your
8 Honor --

9 THE COURT: But what if he sees it? Then he needs to
10 stop it. He's got the power to stop it.

11 MS. GANES: Your Honor, he can't testify as to what Dr.
12 Browning saw or didn't see. He can't do that.

13 MR. GRAHAM: He can say what he should.

14 THE COURT: It's what I'm understanding based on --

15 MS. GANES: And so, Your Honor, my objections are that he
16 needs to give his expert opinions and --

17 THE COURT: I understand.

18 MS. GANES: My objections are that he needs to give his
19 expert opinions and move on and not give legal conclusions to
20 this jury. And, Your Honor, if he's done with the
21 demonstratives, can we take our seat instead of them standing
22 here?

23 MR. GRAHAM: I'm not --

24 MS. GANES: There's one sitting on the floor that he's
25 saving so he can stand here and be a professor to the jury.

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1 THE COURT: I'm fine with those exhibits back. I think
2 the expert does have a little bit of room to say in his
3 opinion what the doctor should or should not have done.

4 MR. GRAHAM: Thank you.

5 THE COURT: I think if we just totally cut that out of
6 the ballgame, I mean they would just have to assume. If Dr.
7 Browning doesn't say a word, everybody in here could do what
8 they want to. There's no way he can be liable. I know where
9 you're coming from and I'm stopping a lot of it, but I think
10 it's just explaining from this expert.

11 MS. GANES: Your Honor, could you ask Mr. Graham not to
12 continuously go back to the nurses and the harm caused because
13 if the nurses did something wrong and it caused harm, they
14 ought to be sitting at the defense table --

15 MR. GRAHAM: We --

16 MS. GANES: -- but they're not.

17 MR. GRAHAM: We can choose our defendants.

18 THE COURT: I think he's talking about the doctor.

19 MR. GRAHAM: We are not blaming the nurses.

20 THE COURT: All right. Go ahead and continue.

21 MR. GRAHAM: Thank you, Your Honor.

22 MS. GANES: Thank you, Your Honor.

23 (WHEREUPON, the bench conference ended and the
24 proceedings resumed as follows.)

25 BY MR. GRAHAM:

1 Q: Doctor, in your opinion to a reasonable degree of medical
2 certainty based on your knowledge, education, training, and
3 experience as an obstetrician and as a forensic medicine
4 specialist, what responsibility, if any, in the medical sense
5 does an obstetrician have to see that his orders being
6 performed inches or feet away from him are carried out
7 appropriately and in accordance with his order?

8 A: Well, when you give an order, especially in a delivery
9 setting, a shoulder dystocia, it's your job to make sure that
10 that order is performed correctly or you have to do it
11 yourself because the baby relies on you. So you are in a
12 sense the one that's responsible for doing the maneuver if
13 it's not being done correctly.

14 Q: Thank you. Now, one final blow up before you take your
15 witness seat again. Does this particular blow-up assist you
16 in explaining to the jury what an obstetrician should or
17 should not do when it comes to fixing a stuck shoulder?

18 A: Yes, it does.

19 Q: Please explain?

20 A: So basically in this picture we again see the anterior
21 top shoulder stuck behind the bone and we see the nerves that
22 we're concerned here about. Those are the brachial plexus
23 nerves, the nerves that run from the spinal cord into the
24 shoulder and into the arm that innervates the arm.

25 And we see where they run here and we see in the second

1 picture that excessive downward traction -- and traction is
2 pulling. So any pulling downward where we're moving the head
3 away from the axis of the spine so that it's not straight,
4 it's being torqued or turned toward the floor, or pulling too
5 hard against this obstruction will injure those nerves, and
6 that's what happened in this case. So that's why this
7 photograph is so important.

8 Q: Thank you. Doctor, at this point, please, take your seat
9 again.

10 (WHEREUPON, the witness complied.)

11 MS. GANES: Your Honor, may it please the Court?

12 THE COURT: Yes.

13 MS. GANES: Thank you.

14 (WHEREUPON, counsel returned to the defense table.)

15 BY MR. GRAHAM:

16 Q: Doctor, just a few follow-ups. You've talked about the
17 safety maneuvers. You've talked about pulling. Is it -- is
18 it ever appropriate for an obstetrician to pull on a baby's
19 head to any extent?

20 A: Not under normal circumstances or in the first five
21 minutes of a shoulder dystocia.

22 Q: Now, I've read in the literature something about gentle
23 traction, gentle guidance. Is -- is there some amount of
24 leeway given to try to help guide the head?

25 A: Well, there is just that, guidance. So basically in most

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1 deliveries once the head comes out, the shoulders will follow,
2 and one hand is on top of the head, one hand is on the bottom
3 of the head after it starts to look sideways, and you just
4 guide the baby out as the shoulders are delivering.

5 There are some times that -- maybe in an obese patient
6 there may be some friction with the vagina where it may take a
7 little bit more of what we call gentle traction. However,
8 there's never any pulling and there never should be any
9 stretches of -- stretching of the neck or stretching of the
10 nerves, which you can readily see with your eyes when you're
11 looking at the head and the vagina. So if you feel with your
12 hands or see with your eyes that the neck is being stretched,
13 you're pulling. It's too hard. You must stop.

14 Q: Thank you. Doctor, let me turn to a key question for
15 you, sir. Have you reached a conclusion as to whether or not
16 Dr. Browning complied with or violated applicable standards of
17 care involved in a shoulder dystocia situation?

18 A: I have.

19 Q: Okay. And what conclusions have you reached, sir?

20 A: That Dr. Browning breached the standard of care or
21 deviated from the standard of care in numerous -- numerous
22 ways with this shoulder dystocia delivery.

23 Q: Let's break them down. What -- in sequence of time, what
24 do you believe is the first applicable standard of care?

25 First of all, let's talk about what standards of care are

1 applicable and then we'll talk about whether or not he
2 complied.

3 A: Okay.

4 Q: So what -- what is the first -- in focusing on the ones
5 he violated, what is the first applicable standard of care?

6 A: Well, the first applicable standard of care, which Dr.
7 Browning mentions in his deposition testimony, is the stopping
8 of mom pushing once a shoulder dystocia is identified. Once
9 the shoulder is stuck, you don't have mom push anymore because
10 what that does -- it further impacts the shoulder against the
11 pubic bone.

12 Q: So the standard of care requires the doctor to get the
13 mom to stop pushing?

14 A: That is correct. Until the shoulder is dislodged. Once
15 the shoulder is unlodged or not stuck, then pushing can
16 resume.

17 Q: And do you believe Dr. Browning complied with that
18 standard of care or violated it in some way?

19 A: He clearly deviated from the standard of care in that
20 regard because you can hear on the videotape, throughout the
21 whole delivery process where there is a shoulder dystocia, the
22 urging of mom to continue to push and push harder.

23 Q: Thank you. In the sequence of time, what do you believe
24 is the second applicable standard of care that has
25 significance in this case?

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1 A: Well, the second standard of care that was deviated from
2 was the -- there was no suprapubic pressure given. As Dr.
3 Browning said in his deposition testimony, that he watches to
4 make sure that supra -- well, you should watch to make sure
5 that suprapubic pressure is being done, number one, and,
6 number two, being done appropriately, and it was not being
7 done appropriately in this case, as was his job to make sure
8 that it was.

9 Q: Okay.

10 MS. GANES: Objection, Your Honor.

11 THE COURT: On what grounds?

12 MS. GANES: Captain of the ship. He has just -- may we
13 approach?

14 THE COURT: You may.

15 (WHEREUPON, a bench conference was held in the presence
16 of the jury but out of the hearing of the jury as
17 follows.)

18 MS. GANES: Your Honor?

19 THE COURT: Uh-huh.

20 MS. GANES: He has now enumerated an opinion that Dr.
21 Browning is responsible for this maneuver. This is not an
22 order. This is not like morphine. This is a maneuver that
23 that nurse was to be trained to do.

24 THE COURT: Uh-huh.

25 MS. GANES: That is different than a physician's order

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1 and there is no captain of the ship doctrine and I move to
2 strike that testimony.

3 MR. GRAHAM: All right. We would invite your attention
4 to Dr. Browning's testimony starting at line 15 here.

5 MS. GANES: What is this? What is this, Ed?

6 MR. GRAHAM: Dr. Browning's deposition testimony.

7 MS. GANES: Okay. But this isn't --

8 THE COURT: All right. Have you read it?

9 MR. GRAHAM: Starting at 15.

10 MS. GANES: Your Honor, this is taken out of context. He
11 was asked numerous questions.

12 THE COURT: The objection is overruled.

13 MS. GANES: Thank you, Your Honor.

14 (WHEREUPON, the bench conference ended and the
15 proceedings resumed as follows.)

16 MR. GRAHAM: I'm trying to remember what my last question
17 was.

18 BY MR. GRAHAM:

19 Q: We were talking about -- I know we were talking about
20 suprapubic. Do you recall your last comments that elicited
21 the objection?

22 A: I do. Do you want me to --

23 Q: Just remind me, if you would.

24 A: Yeah. Basically --

25 Q: Repeat your complete answer in case we didn't get the

1 full answer.

2 A: I don't know that I can repeat it exactly the same, but I
3 will --

4 Q: Just the gist.

5 A: -- paraphrase that the second deviation was, as Dr.
6 Browning said in his deposition testimony, that when he orders
7 suprapubic pressure, he watches to make sure that it is done
8 correctly.

9 And in this particular case, suprapubic pressure was not
10 done correctly and he did nothing about it. The pressure, as
11 he said also in his depo, that you don't push on the bone
12 because as we said before when we were looking at the
13 pictures, pushing on the bone can make the dystocia and the
14 obstruction worse, but that's exactly what was done in this
15 case. The nurse was pushing on the bone and Dr. Browning did
16 nothing to fix that. So in essence, there was no suprapubic
17 pressure done in this case as a maneuver to help the
18 resolution of the shoulder dystocia. If anything, it made it
19 worse.

20 Q: Do you blame the nurse for that?

21 A: No, sir. That's the doctor's job to make sure that
22 that's -- well, that's what Dr. Browning said in his
23 deposition. It's his job to make sure it's done correctly.

24 Q: When a doctor is in-between the mom's legs at delivery
25 with his hands on a baby's head, how far away from his face is

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1 that nurse's inappropriate suprapubic pressure?

2 A: I mean as far as your hands are from your face. Very
3 close. Maybe a foot.

4 Q: Do you believe obstetricians have a duty to see what can
5 be seen a foot or so away from them in terms of whether or not
6 their order for suprapubic is being carried out properly?

7 A: Yes, sir, they do.

8 MS. GANES: Objection, Your Honor. Move to strike on the
9 duty. That's a legal conclusion.

10 THE COURT: I'm going to overrule that. Go ahead.

11 MR. GRAHAM: Thank you, Your Honor.

12 BY MR. GRAHAM:

13 Q: Doctor, moving through the sequence of time, what do you
14 believe is the third applicable standard of care in this case
15 that we should focus on?

16 A: Well, the third applicable standard of care in this case
17 is when McRoberts and suprapubic pressure fails, when the
18 shoulder dystocia, the anterior shoulder, the stuck shoulder
19 is not relieved or unstuck by those first two maneuvers, the
20 standard of care is, as Dr. Browning also said in his
21 deposition, to move to rotational maneuvers. And those are
22 the maneuvers we spoke about, Rubin's, Woods, or delivery of
23 the posterior arm.

24 The idea behind that is to use finesse in the delivery of
25 that stuck shoulder and not force, as was done in this case as

1 you saw in the video. The only thing that resolved this
2 shoulder dystocia in this case on that video was brute force.
3 There was no rotational maneuvers performed, no Rubin's, no
4 Woods, no posterior arm, no Gaskin, no anything, just
5 excessive force, and that is a breach of the standard of care,
6 even in Dr. Browning's own words.

7 Q: When you talk about breach of the standard of care, I
8 want to make sure -- I don't mean to play word games, but I
9 want to make sure what that means. Is a breach of the
10 standard of care the same as a deviation from the standard of
11 care?

12 A: Yes. A breach is a deviation.

13 Q: Is a breach of the standard of care the same as a
14 departure from the standard of care?

15 A: Yes. A breach is a deviation is a departure.

16 Q: Is a breach of the standard of care the same as a
17 violation of the standard of care?

18 A: Yes. That would be another term for it.

19 Q: Is a breach of the standard of care the same as medical
20 negligence?

21 A: It is medical negligence.

22 Q: Is a breach of the standard of care the same as medical
23 malpractice?

24 A: It is.

25 Q: Is a breach of the standard of care ever reasonable and

1 appropriate care?

2 A: It may be in a situation where there's no safe
3 alternative.

4 Q: In the facts of this particular case, were the three
5 breaches of the standard of care that you talked about
6 reasonable or appropriate in any way?

7 A: Not at all.

8 Q: Doctor, let me ask you this. Have you reached a
9 conclusion to a reasonable degree of medical certainty as to
10 whether or not there's a relationship between those three
11 breaches of care, breaches of standards of care, and the nerve
12 damage Julia suffered?

13 A: I have.

14 Q: What is your opinion?

15 A: That that is the direct cause of the nerve injury, the
16 C5, C6, and C7 nerve injury.

17 Q: I neglected to ask you one thing, sir. When you're
18 called upon to review issues in a case such as this, is it
19 reasonable for experts like you to rely upon sworn testimony
20 of the nurses?

21 A: When I review a case, I rely on everything, every piece
22 of forensic evidence there is, the medical record, the
23 deposition testimony, and, if we have demonstratives like a
24 video, of course.

25 Q: How do you know that the labor and delivery nurse applied

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1 pressure to the bone instead of doing it the right way?

2 A: Because she said that's how she normally does it in her
3 deliveries when she does suprapubic pressure, based on her
4 deposition testimony, and with my own eyes on the visual
5 evidence of the video.

6 Q: Do you have in front of you what's been pre-marked as
7 Plaintiff's Exhibit 6?

8 A: I do.

9 Q: Okay. What is that, please, sir?

10 A: That is a picture of the perineum, which is the vaginal
11 area, once the head has been delivered, and it's a snapshot in
12 time at 11:13 on the video of the nurse pushing on the pubic
13 bone.

14 Q: Thank you.

15 MR. GRAHAM: Your Honor, we'd offer that as evidence at
16 this time.

17 THE COURT: Any objections?

18 MS. GANES: Absolutely no objection, Your Honor.

19 THE COURT: All right. Number 6 is into evidence without
20 objection.

21 (WHEREUPON, Plaintiff's Exhibit Number 6, a photograph,
22 was admitted into evidence.)

23 MR. GRAHAM: May we publish that, Your Honor?

24 THE COURT: You may.

25 MR. GRAHAM: Thank you. Well, may we have the witness

1 step down and explain?

2 THE COURT: Yes.

3 MR. GRAHAM: Thank you. It's kind of small; so let me
4 get you to stand a bit closer this time. Why don't you just
5 -- if you would, just 7-

6 THE WITNESS: We can pass it around.

7 MR. GRAHAM: Oh, I'm sorry. We have it up here.

8 THE WITNESS: Oh. I'll use my pointer.

9 MR. GRAHAM: Yeah, use your pointer. Thank you, sir.

10 BY MR. GRAHAM:

11 A: So this is a snapshot from the video taken at 11:13 on
12 the video, which we have here. And what we see in this
13 picture -- this is the peroneal body, the perineum.

14 Q: What is a perineum?

15 A: That is the vaginal area, the delivery area. This is the
16 delivery attendant, who is Dr. Browning. His hand, one on
17 top, and the one on the bottom. This is the baby's head, the
18 top of the head here.

19 And then what we can see here is the hand reaching in
20 from the assistant, and that's the labor and delivery nurse
21 performing what she thinks is suprapubic pressure, pushing
22 right on top of the bone. So here is the clitoral area and
23 just above that right here, the mons pubis is where the pubic
24 bone is, and she's pressing right on the bone.

25 As we showed in those demonstratives before, suprapubic

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1 pressure is placed above, superior to the bone, cephalad, more
2 toward mom's head, away from this pubic bone here. It would
3 be performed more like up here, but the nurse's hand is down
4 here.

5 Q: Thank you. Doctor, I -- I could ask you a series of
6 questions about the video, but I think it may be a better use
7 of our time if I just ask you have you -- have you -- how many
8 times have you gone through this video to try to really absorb
9 everything there is to be seen?

10 A: I would say probably in the order of 15 -- 20 times.

11 Q: All right. Have you always looked at it in real time or
12 have you been able to break it down frame by frame?

13 A: I've done it both ways. You've had to because I wanted
14 to note on paper at what times on the video different things
15 were happening. So I did have to go through it frame by
16 frame.

17 Q: All right. And have you, in fact, made a record of those
18 -- the time entries where significant things happened on the
19 video?

20 A: Yes, sir.

21 Q: All right. Do you have that in front of you? Marked as
22 -- pre-marked as Plaintiff's Exhibit, 7?

23 A: I do.

24 Q: All right. And how, if at all, do you believe that those
25 time entries would help the jury understand the issues in this

1 case?

2 A: Well, I think the time entries help several ways. It
3 allows you, if you're going to use the video, to look at,
4 like, where I took that snapshot for Exhibit 6 of the
5 inappropriate or incorrect suprapubic pressure being performed
6 and we said that was at 11:13 on the video. You can -- I'm
7 sorry, 11:13. You can go to 11:13 on the video and just look
8 at that one instance if you wanted to.

9 The other thing that's important about the times is it
10 allows us to look at, from what we can see, the number of
11 seconds in total that the traction -- that this excessive
12 pulling was occurring on to the neck and the brachial plexus.
13 We can actually not only see what those times are and go and
14 look at it, but we can count the number of seconds that it's
15 occurring.

16 MR. GRAHAM: Your Honor, we offer that Exhibit 7 at this
17 time.

18 THE COURT: Any objections?

19 MS. GANES: Your Honor, may we approach?

20 THE COURT: Uh-huh.

21 (WHEREUPON, a bench conference was held in the presence
22 of the jury but out of the hearing of the jury as
23 follows.)

24 THE COURT: You'll cut that off?

25 MS. GANES: Yes. Your Honor, this is essentially the

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1 expert's notes. It would be inappropriate to send this to the
2 jury. It has his opinions on it with words like springing
3 back.

4 THE COURT: Are you talking about him?

5 MS. GANES: Yes.

6 THE COURT: I mean that's what he's here to do as an
7 expert witness is give opinions.

8 MS. GANES: But not for this to go into evidence. He can
9 testify to it. The video is in evidence. They can stop it
10 and replay it as many times as they want.

11 THE COURT: Did he make those notes?

12 MS. GANES: Yes, he created those. He can't send a note
13 to the jury any more than you or I can.

14 MR. GRAHAM: It makes the video more user-friendly. It's
15 37 -- 36 seconds of real fast movement. He breaks it down
16 frame by frame so you can grasp what it shows.

17 MS. GANES: And he's going to do that for them ad nauseam
18 in his testimony. It would be cumulative and it is an
19 inappropriate note to the jury.

20 THE COURT: I don't have a problem with the note going
21 back, but if we're going to send the note back and go through
22 that video frame by frame by frame by frame by frame -- why
23 don't you do one or the other?

24 MS. GANES: The video is already in. He did choose.

25 THE COURT: But he can show how it worked. He can put up

1 the video at 10:52 and show the head at 11:13 --

2 MR. GRAHAM: Your Honor --

3 MS. GANES: And then the jury has it. They heard it and
4 they can stop it and look at it if they're interested.

5 MR. GRAHAM: If I have to choose between those two, we'll
6 choose the frame by frame, but let me -- may I ask you a
7 question? I don't know if I was asleep on the job or what,
8 but did you tell the jury whether or not they could take
9 notes?

10 THE COURT: I didn't even mention it.

11 MR. GRAHAM: What do you -- what's your thought about
12 that?

13 THE COURT: I usually just never let them take notes.

14 MR. GRAHAM: Okay.

15 MS. GANES: And it's late in the game.

16 THE COURT: They'll get it right.

17 MR. GRAHAM: Okay. All right. I was thinking that might
18 be an option, but obviously I was wrong.

19 MS. GANES: If there's something they're interested in,
20 they'll remember it when he goes frame by frame. We don't
21 need to send the expert's notes in there.

22 (WHEREUPON, the bench conference ended and the
23 proceedings resumed as follows.)

24 MS. GANES: Your Honor, was it -- it was sustained?

25 THE COURT: That's correct. He's going to go frame by

1 frame.

2 MR. GRAHAM: All right.

3 BY MR. GRAHAM:

4 Q: Doctor, rather than put your time notes into evidence,
5 what we're going to do is have you go through the video frame
6 by frame, and what I'll ask you to do -- if you don't mind,
7 I'm just going to ask Dave to start playing. Is there a
8 certain part that is important to you to show frame by frame?
9 Or do we need to look at the entire video?

10 A: Well, I mean the important part of the video that we saw
11 this morning is really from 10:52 to 11:29. So it's about 35
12 seconds of video. If you want to run through that in real
13 time once and then we can go frame by frame, it won't take
14 much longer.

15 MR. GRAHAM: Is that acceptable, Your Honor?

16 THE COURT: That's fine.

17 MR. GRAHAM: Okay. All right. Dave, I'm going to ask
18 you if you would run through that the first time in real time
19 and then back it up and do it frame by frame.

20 And, Doctor, I'm going to ask you to please tell Dave
21 when to stop if you see something important you want to tell
22 us about.

23 THE WITNESS: Can I -- okay. Can I speak while the first
24 run-through is going?

25 THE COURT: Sure.

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1 THE WITNESS: Thank you, Your Honor.

2 (WHEREUPON, Plaintiff's Exhibit Number 5, DVD containing
3 the video of the birth of Julia B , was played in open
4 court, during which the testimony resumes as follows.)

5 BY MR. GRAHAM:

6 A: Okay. So there's the first attempt at traction. You can
7 keep going. He stops. He reduces the nuchal cord, which is
8 the cord around the neck, and here's the second attempt at
9 traction. Pulling, pulling, pulling, pulling. You see he's
10 pulling downward with his body. He's moving by pulling.

11 This is the third attempt. Pulling, pulling, pulling.
12 There is the inappropriate suprapubic pressure. Pulling,
13 pulling. No rotational maneuvers. No nothing. This isn't
14 working. The head just sprung back and he's pulling again.
15 This is the fourth attempt, pulling, pulling, pulling. He
16 stops. And then we go cut to delivery.

17 (WHEREUPON, the video stopped.)

18 Q: Thank you.

19 A: The baby is already out.

20 Q: Thank you.

21 MR. GRAHAM: Now, Dave, can we do it frame by frame,
22 please?

23 (WHEREUPON, Plaintiff's Exhibit Number 5, DVD containing
24 the video of the birth of Julia B , was played frame by
25 frame in open court, during which the testimony resumed

1 as follows.)

2 BY MR. GRAHAM:

3 A: Okay. There's the first attempt at traction. There's no
4 real stretch.

5 Q: Is there any violation of the standard of care on that
6 first attempt, sir?

7 A: On the first attempt, no. The fingers are released
8 because he sees the nuchal cord, which is the cord around the
9 neck, and he easily reduces that from around the neck.

10 Q: How unusual is it to have a cord around the neck?

11 A: Fifteen to 20 percent of deliveries. Not unusual at all.

12 Q: Is there any medical significance to a cord wrapped
13 around the neck like this one was?

14 A: No. It could be if it was tight, but this one was loose
15 and easily reduced without clamping and cutting it.

16 Stop.

17 (WHEREUPON, the video stopped.)

18 A: So hands were off, cord has been reduced, and now we're
19 going into the second attempt at traction. And this is from
20 about 10:59 to 11:06. So about seven seconds. You can see
21 the pulling and the torquing as we discussed before, the
22 pulling toward the floor.

23 (WHEREUPON, the video resumed.)

24 A: Stop.

25 (WHEREUPON, the video stopped.)

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1 A: There's a momentary release of traction to re-grip. That
2 occurs at 11:06 and then the third attempt at traction goes
3 from 11:08 to 11:20, which is 12 seconds.

4 Go ahead. Can we go a little faster?

5 (WHEREUPON, the video resumed.)

6 A: There's the release, re-grip, and pull again. There's
7 the visualization of the suprapubic pressure that's not
8 suprapubic pressure.

9 Could you go just full -- there's the spring back. See,
10 he lets his hands go and the head springs right back to the
11 vagina. So that just shows the pressure that was being put on
12 the neck and then right into again another pull, the fourth
13 attempt.

14 And -- stop.

15 (WHEREUPON, the video stopped.)

16 A: Oh. Can you go back a little bit?

17 See how much neck you're seeing here? That's -- this --
18 this pubic -- this shoulder is still stuck behind the pubic
19 bone up here. And this is all neck you're seeing being
20 stretched from the excessive traction and the angulation
21 downward.

22 Go ahead.

23 (WHEREUPON, the video resumed.)

24 A: And then the delivery. There's about nine seconds I
25 calculated, eight or nine seconds in there, that is not

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1 videotaped because the videographer was obstructed. First
2 hit. The camera went to the sky and then was obstructed by
3 Dr. Browning being in front of her field of vision and not
4 getting those nine seconds.

5 But we know not only from his deposition testimony, but
6 the medical records that nothing occurred in those nine
7 seconds rotationally, Rubin's, Woods, posterior arm delivery,
8 except the traction because the only thing in the note and the
9 medical record and in his deposition that effectuated delivery
10 in this case and relieved the shoulder was the suprapubic --
11 I'm sorry -- the McRoberts, the suprapubic which didn't occur,
12 and the traction, continuous traction.

13 The other thing that -- can you go ahead and play it in
14 real time with the sound? Because I want you to be able to
15 hear the urging of the pushing throughout too because we -- we
16 did say something about that.

17 (WHEREUPON, Plaintiff's Exhibit Number 5, DVD containing
18 video of the birth of Julia B , was played in open
19 court, during which the testimony continued as follows.)

20 A: Push, push, push, push. Push, push, push. Stop.

21 (WHEREUPON, the video stopped.)

22 A: So you hear push, push, push. They are urging her to
23 push and this shoulder is still stuck. Inappropriate. Keep
24 going.

25 (WHEREUPON, the video resumed.)

1 A: Stop.

2 (WHEREUPON, the video stopped.)

3 A: Okay. So again, multiple voices urging the patient to
4 continue to push without Dr. Browning stepping in and saying
5 stop pushing because you're making the shoulder dystocia worse
6 with pushing. The pushing has to stop.

7 Continue.

8 (WHEREUPON, the video resumed and then stopped.)

9 BY MR. GRAHAM:

10 A: Okay. Yeah, that's it. I think that covers everything.
11 It covers the suprapubic pressure, inappropriate, the pushing,
12 and then the excessive traction.

13 Q: Thank you, Doctor. Doctor, you told us about the cause
14 of this injury being those three breaches, but what I want to
15 do now is go back and ask you about the basis of those
16 opinions and, first of all, I want to ask you some questions
17 about the respective roles of an obstetrician and a pediatric
18 neurologist or other -- other healthcare providers that
19 actually treat brachial plexus birth injuries.

20 A: Sure.

21 Q: Is it part of an obstetrician's job to determine whether
22 or not an injury is permanent?

23 A: It is not.

24 Q: Is it reasonable for an obstetrician to rely upon the
25 opinions of those qualified medical specialists who treat

1 brachial plexus birth injuries about whether the injury is
2 temporary or permanent?

3 A: Of course, it is.

4 Q: Okay. Tell us, please, the bases, all the reasons, for
5 your opinion to a reasonable degree of medical certainty that
6 what caused this nerve damage was those three breaches in the
7 standards of care?

8 A: Well, the only thing that effectuated the delivery of
9 this child was the excessive traction that we see on the video
10 and the lateral traction. Lateral because it's being pulled
11 down and excessive is because he's using too much force.

12 The basis is that there's not been a report in the
13 literature that doesn't have a brachial plexus injury that is
14 permanent, that persists greater than 18 months, where the
15 injury was caused by anything other than excessive traction,
16 and that's assuming that there's no other conditions going on,
17 like infections or tumors or abnormal position in -- in utero,
18 cervical rib, any external signs on the baby, which you can
19 see easily in the video there was nothing external that you
20 can see on the baby and all the medical records bear this out
21 that there was no other cause of the brachial plexus injury
22 that is permanent other than the excessive traction.

23 Q: Thank you. And do you consider excessive forceful
24 traction that stretches a baby's neck and causes those
25 injuries to always be a breach of the standard of care, even

1 if -- even if six -- seven -- eight minutes have passed?

2 A: Well, six -- seven -- eight minutes pass, the standard of
3 care at that point is to do anything you can to get the baby
4 out. It may wind up being excessive force, but as we
5 discussed before there's fracturing the clavicle. There is
6 other maneuvers. There is the Zavanelli maneuver.

7 Really at that point, if we're faced with -- and you can
8 feel the baby. If there's no more suck reflex, if the baby is
9 going limp under you, then you really need to move quickly.
10 And that -- yeah, five -- six -- seven minutes, that's about
11 the time in a normal healthy baby that that would be
12 occurring.

13 Q: If a baby had a permanent brachial plexus injury and if
14 the obstetrician had done everything right for the first six
15 -- seven -- eight minutes, but at that point decided to pull
16 down with whatever force it took to pry that shoulder out,
17 thereby causing the injury, would you blame the doctor for
18 causing the injury under those facts and circumstances?

19 A: I mean I would have to look at each case individually,
20 but I -- you know, just in general would have less of a --
21 less of an instinct or inkling to blame a doctor when we're at
22 six -- seven -- eight minutes from doing everything he can to
23 get that baby out.

24 Q: What I want to ask you about now, Doctor, is choices. On
25 the video, you showed us four distinct pulls and, of course,

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1 we don't know what happened during the eight or nine seconds
2 when the video was blocked and turned off, but based on your
3 knowledge, education, training, and experience and what you've
4 read in the medical records and seen on the video, is there
5 anything that could've happened off-camera that would justify
6 excusing Dr. Browning for causing this injury?

7 MS. GANES: Objection, Your Honor. It calls for
8 speculation.

9 THE COURT: Rephrase your question.

10 MR. GRAHAM: Thank you, Your Honor.

11 BY MR. GRAHAM:

12 Q: Based on your knowledge, training, and experience, do you
13 have an opinion to a reasonable degree of medical certainty
14 whether there's anything that Dr. Browning might possibly
15 theoretically have done during the off-camera time that would
16 have made his treatment of this baby, his fixing of -- I mean
17 his delivery of this baby reasonable and appropriate and in
18 accordance with the standards of care?

19 A: Nothing that I saw from my review of the medical record.
20 There's nothing in there that's an extenuating circumstance or
21 factor that would allow for or make it okay to use excessive
22 traction three times.

23 Q: Now, you said that after the first pull where Dr.
24 Browning lifted the loose cord over -- over Julia's head --

25 A: Yes, sir.

1 Q: You said there was nothing about that first pull or that
2 first manipulation, if you will, that was a standard of care
3 breach. After that first -- after the cord was lifted over
4 the baby's head, was there any justification for Dr. Browning
5 to increase his pulling force?

6 A: Absolutely not.

7 Q: After removing the cord over the baby's head, was that an
8 opportunity to make a decision for what to do next, which
9 could have either been safe or dangerous?

10 A: Absolutely. That's the decision-making process that
11 occurs. First, we say stop pushing and call -- we identify
12 the shoulder dystocia. You make the diagnosis that the
13 shoulder is stuck. We stop the pushing and we call for help.

14 Then the next thing is to try the McRoberts and the
15 suprapubic pressure. If those fail, the next step is to go
16 into the rotational maneuvers that we discussed.

17 It was obvious here that the suprapubic pressure, which
18 wasn't being done correctly, and the McRoberts didn't work.
19 And instead of going into rotational maneuvers, the force was
20 just continued and became stronger with each pull and it was
21 done 3+ times, which was the only thing that wound up
22 delivering the baby, and that's inappropriate.

23 Q: So how many opportunities did Dr. Browning have, shown on
24 the video camera, to make a decision? Do I switch to an
25 internal maneuver or do I pull harder?

1 A: Well, there's certainly at the point of the nuchal cord
2 being reduced, the suprapubic pressure and the McRoberts being
3 done and failing. That's one point in time right there where
4 the decision-making process, the choice, is made to go forward
5 with more traction as opposed to the internal maneuvers.
6 However, at that point, which was the second attempt, there's
7 also a third and fourth attempt that are made which are even
8 stronger.

9 So there's -- I mean the choices that were made, the
10 decision, the conscious decision to continue to pull on the
11 baby and not go to maneuvers, really continued from 10:59 all
12 the way to the delivery of the baby. So I don't know how you
13 could break it down and say he had -- I mean he had at least
14 three opportunities to choose to go to maneuvers that he
15 didn't, but really anytime during those 30 seconds he could
16 have chosen appropriately to go to internal maneuvers. It
17 doesn't limit you to three times. It's really more than that.

18 Q: As you evaluate alleged wrongdoing on the part of an
19 obstetrician, what consideration, if any, do you give to
20 whether the doctor just committed ordinary negligence or
21 actually made a conscious choice to act in a danger that
22 exposed the baby to unnecessary risk of harm?

23 A: Well, I mean if you -- you -- anytime you review a case,
24 that's something you look at. And if you look at this case in
25 specific -- specifically, you'll see that -- and look at Dr.

1 Browning's testimony, he knew that pulling too hard on the
2 head and using excessive traction and lateral traction can
3 injure the brachial plexus, yet he did it anyway.

4 So he made a conscious choice to put the baby at risk
5 when the baby really didn't need to be at risk, and that's
6 really a -- it's not ordinary negligence. You knew that you
7 were putting the baby at risk of injury and you did it anyway
8 when there are other better alternatives that were the
9 standard of care.

10 Q: Speaking of causation, can -- let's talk about the forces
11 of labor. Can the forces of labor -- in other words, the
12 uterus contracting to push the baby through the birth canal
13 and the mother's pushing efforts to push the baby out. Can
14 those forces of labor cause a temporary injury?

15 A: It's possible.

16 Q: Can those forces of labor cause a permanent injury?

17 A: No.

18 Q: Are you aware of any reliable report of a baby being
19 delivered ever in the history of the world in which a
20 permanent injury was caused by forces of labor, natural forces
21 of labor?

22 A: No.

23 Q: What significance is it to you, if any, that Julia's
24 injury was on the nerves on the -- near the top shoulder as
25 opposed to the nerves on the bottom shoulder?

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1 A: The injury to the anterior shoulder or the stuck shoulder
2 is more evidence that that is the shoulder or the brachial
3 plexus that was being stretched during the delivery. There
4 have been some reports that even where there is no shoulder
5 dystocia, even a normal delivery, there's some more stretch
6 that's placed on those posterior nerves, but this was not
7 that. This was an anterior nerve stretching.

8 Q: Again, posterior is bottom side?

9 A: Posterior is on the bottom towards the buttocks and
10 anterior is towards the ceiling or where it is being stuck
11 behind the pubic bone.

12 Q: So when you have a baby who has a right shoulder stuck
13 and the doctor pulls out and down, which nerves are put on
14 risk of potential permanent injury?

15 A: It would be the right brachial plexus, which feeds the
16 right arm and right upper arm and lower arm.

17 Q: How long have obstetricians in your field known that
18 using force, not finesse, injures or can injure a baby's
19 brachial plexus nerves?

20 A: Sixty -- 70 years.

21 Q: You mentioned earlier then there are some -- I think you
22 said rare or unusual causes other than traction. You
23 mentioned infection, tumor --

24 A: Cervical rib.

25 Q: Some other things. Is there any evidence in this case,

1 any evidence, any smidgen of evidence to suggest that this
2 child had nerve problems based on an infection before birth?

3 A: No, sir.

4 Q: Is there any smidgen of evidence to suggest that this
5 baby had a tumor that hurt her nerves before birth?

6 A: No evidence.

7 Q: Is there any evidence that this child had some kind of
8 long-term malpositioning chronic compression that caused nerve
9 damage over time?

10 A: Not at all.

11 Q: Is there any smidgen of evidence that this child was
12 injured by an abnormal uterus, uterine bands or fibroids or
13 anything unusual about the uterus?

14 A: No evidence of that.

15 Q: Is there anything to suggest that -- that Julia was
16 injured by any of these rare causes other than forceful
17 traction by Dr. Browning?

18 A: No other evidence.

19 Q: By the way, if you put all these rare causes together,
20 what percentage of permanent brachial plexus injuries do those
21 explain?

22 A: Four or five percent.

23 Q: And the rest?

24 A: Excessive -- permanent brachial plexus injuries?

25 Q: Yes, sir.

1 A: Excessive traction.

2 Q: Doctor, I want to ask you some questions about -- is
3 there medical literature that you consider to be reliable that
4 serves as an additional basis for your opinions in this case?

5 A: Yes, there is.

6 Q: All right. Among a variety of options, have you chosen
7 three to use in the courtroom here today?

8 A: Yes, sir.

9 Q: Okay.

10 MR. GRAHAM: Dave, can you please call up the first one
11 of those? Could you blow up the title, please?

12 MS. GANES: Excuse me, Your Honor. This is not a proper
13 use of a learned treatise under Rule 803. So I would ask that
14 he not publish it to the jury.

15 THE COURT: All right. Come on up here.

16 MS. GANES: In addition, I haven't been provided copies
17 of these articles.

18 THE COURT: All right.

19 (WHEREUPON, a bench conference was held in the presence
20 of the jury but out of the hearing of the jury as
21 follows.)

22 THE COURT: What do you want to do? Do you want to see
23 them first?

24 MS. GANES: I would love to see them first.

25 THE COURT: Okay.

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1 MR. GRAHAM: She's seen them. She's seen them. They're
2 in our trial brief.

3 MS. GANES: He said three articles. Three. He narrowed
4 it to three. So I would like to see the three that you're
5 going to use.

6 MR. GRAHAM: That's fine. That's fine.

7 THE COURT: Go ahead and show them to her.

8 MR. GRAHAM: Okay.

9 (WHEREUPON, the bench conference ended and there was a
10 pause in the proceedings, after which the proceedings
11 resumed as follows.)

12 A JUROR: Your Honor?

13 THE COURT: Do you need a break? All right. Ladies and
14 gentlemen, if you would, step into the jury room. Take a
15 quick break. And if the foreman would let the bailiff know
16 when you're ready to come back, we'll resume. Do not discuss
17 the case.

18 (WHEREUPON, the jury exited the courtroom at 11:58 a.m.)

19 THE COURT: All right. Doctor, you can take a break if
20 you need to. You can use the restroom if you need to, but you
21 cannot talk to anybody.

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: After you use the restroom or after you take
24 a break, step back and have a seat.

25 THE WITNESS: Yes, sir.

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1 THE COURT: All right.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: Let's take a short break.

4 (WHEREUPON, there was a break in the proceedings from
5 11:58 a.m. until 12:14 p.m., after which the proceedings
6 resumed as follows.)

7 THE COURT: Before we begin, you know we have one juror
8 that wants to be out of here by -- she said 5:15 at the
9 latest. I would think 5:00. And the clerk has questioned her
10 and she says that she has absolutely nobody to help pick up
11 one or two children from Kings Academy. I know you've got all
12 these experts lined up, but how do y'all suggest we handle
13 that?

14 MS. CRAIG: We are perfectly fine with accommodating
15 jurors.

16 THE COURT: Do you think you can be done by 5:00?

17 MR. RUFFIN: We can switch the order up. We might have
18 to bump one to tomorrow, but we just -- we need to do a video
19 of the life care plan before we can do Dr. Wood. It just
20 wouldn't make sense to have the, you know, economist come
21 before the video. So I think if we do those two and then
22 we'll just have to figure out how much time we have left.

23 MR. GRAHAM: We -- our very last witness today was going
24 to be a very short one, like 15 minutes. Maybe I should have
25 him come tomorrow instead if he can.

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1 THE COURT: Whatever suits you. I'm just -- if you can
2 make it work, let's just make it work.

3 MR. RUFFIN: Yeah.

4 THE COURT: If you can't, let me know. Okay.

5 MR. RUFFIN: We'll have the time filled until we have to
6 stop.

7 THE COURT: All right. Tell them to come on out, if you
8 would.

9 (WHEREUPON, the jury entered the courtroom at 12:15 p.m.)

10 THE COURT: All right. You may continue.

11 MR. GRAHAM: Thank you, Your Honor.

12 BY MR. GRAHAM:

13 Q: Doctor, before that break, we were just going to
14 highlight the title of an article and then I was going to ask
15 you some questions about it before we got past the title.

16 MR. GRAHAM: If you --

17 THE COURT: Any objections?

18 MS. GANES: Well, yes, sir, Your Honor. I would just ask
19 that he follow Rule 803 with using a learned treatise.

20 THE COURT: I agree. Let's let him testify and not
21 publish it to the jury. He can testify and he can read it.

22 MR. GRAHAM: Yes, sir.

23 BY MR. GRAHAM:

24 Q: Did you see the article that we published?

25 A: Yes.

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1 Q: I mean that we -- okay. Is that article one that experts
2 in your field reasonably rely upon?

3 A: It is.

4 Q: Okay. And is there a portion of that article that you'd
5 like to read to the jury?

6 A: Yes, sir.

7 MS. GANES: Your Honor, I thought we were reading, not
8 publishing.

9 THE COURT: Not publish. He can read it. Let's not
10 publish it at this time.

11 MR. GRAHAM: Oh, you mean not on the --

12 THE COURT: He can read it. Right.

13 MR. GRAHAM: Oh, I misunderstood, Your Honor. Got it.
14 Okay.

15 BY MR. GRAHAM:

16 Q: Could you -- first of all, for the record, would you
17 please identify that article by title and author and citation?

18 A: Yes. It's *The Comparison in Obstetric Management on*
19 *Infants with Transient and Persistent Obstetric Brachial*
20 *Plexus Palsy*. Lead author is Margaretta Mollberg and the
21 Journal was *The Journal of Child Neurology*, Volume 23, Number
22 12, December 2008.

23 Q: Now, Dr. Mollberg lives in which country?

24 A: Dr. Mollberg is from Sweden.

25 Q: And that article in which -- I mean the journal in which

1 the article was published was what again?

2 A: *The Journal of Child Neurology.*

3 Q: Okay. And is that a publication in this country?

4 A: It is.

5 Q: And is that a publication that despite being published in
6 a neurology journal is well known to and accepted by
7 obstetricians as being reliable science?

8 A: Yes, sir.

9 Q: Thank you. Please read whichever portion of that you
10 would like to publish to the jury.

11 A: The outcome of obstetric brachial plexus palsy depends on
12 the severity of the lesion of the nerve fibers. The aim of
13 the prospective study is to evaluate if differences in force
14 used in downward traction on the head correlate to the number
15 of nerve roots affected. At final neurologic examination at
16 18 months, complete neurologic recovery occurred in 80 out of
17 98 children, 82 percent.

18 Downward traction of the fetal head was applied more
19 often and with greater force in the group with persistent
20 damage. There was a significant correlation between the force
21 used to the number of nerve roots affected. The risk of
22 persistent obstetric brachial plexus palsy at age 18 months
23 depended on obstetric management and increased significantly
24 with increasing force used in downward traction on the fetal
25 head.

1 Q: Thank you.

2 MR. GRAHAM: Your Honor, we would offer this as a Court's
3 exhibit, Number 14.

4 THE COURT: All right.

5 (WHEREUPON, the referenced article was marked as
6 Plaintiff's Exhibit Number 14 for identification.)

7 BY MR. GRAHAM:

8 Q: And, Doctor, I now hand you an article that's been pre-
9 marked as Plaintiff's Exhibit 25. Would you please read the
10 title and the author and the citation for the record?

11 A: This is *The Prevention of Brachial Plexus Injury, Twelve*
12 *Years of Shoulder Dystocia Training: an Interrupted Time-*
13 *Series Study.* It's written by JF Crofts as the lead author
14 and Dr. Timothy Draycott as the main -- as the final author.
15 It is from the University of Bristol in Bristol, United
16 Kingdom. It is from the Royal College of OB/GYN, *The British*
17 *Journal of Obstetrics and Gynecology*, and that was published
18 the 17th of February, 2015.

19 Q: Doctor, is that article one that is considered reliable
20 by members of your profession in this country?

21 A: It is.

22 Q: Is there a portion of that article that you would like to
23 read to the jury and, if so, please read it?

24 A: Yes. I'll read the conclusion of the whole article,
25 which is:

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1 There are significant benefits to long-term embedded
2 training programs with improvements in both management and
3 outcomes. A decade after the introduction of training, there
4 were no cases of brachial plexus injury lasting over 12 months
5 in -- in 562 cases of shoulder dystocia.

6 Q: Thank you.

7 MR. GRAHAM: Your Honor, we'd offer that as Court's
8 Exhibit 25.

9 THE COURT: Yes, sir.

10 (WHEREUPON, the referenced article was marked as
11 Plaintiff's Exhibit Number 25 for identification, as the
12 attached sticker stated Plaintiff's Exhibit.)

13 BY MR. GRAHAM:

14 Q: Finally, Doctor, I hand you a third article. Could you
15 please give us the title, author, and citation?

16 A: This is the -- the title is *Comparing Mechanical Fetal*
17 *Response during Descent, Crowning, and Restitution among*
18 *Deliveries with and without Shoulder Dystocia*. It's from Dr.
19 Robert Allen and Edith Gurewitsch, and it was published in *The*
20 *American Journal of OB/GYN* in June 2007.

21 Q: Can you tell us with -- with which university Dr.
22 Gurewitsch and Dr. Allen are affiliated?

23 A: They're at Johns Hopkins.

24 Q: Thank you. Is that article one that obstetricians in
25 this country reasonably rely upon as accepted science?

1 A: Yes, sir.

2 Q: Please read any portions of that article that you would
3 like the jury to hear?

4 A: In the conclusion section, it says:

5 By itself, shoulder dystocia does not pose additional
6 risk of brachial plexus stretch over routine deliveries.

7 And then on page 539(e)(4), it says:

8 Albeit in a laboratory model, this is the first study to
9 quantify the degree to which the brachial plexus elongates
10 during the second stage and before traction is applied in
11 either normal or shoulder dystocia deliveries. The amount of
12 stretch, approximately 15 to 20 percent, is similar in routine
13 and shoulder dystocia deliveries.

14 In and of itself, shoulder dystocia does not pose an
15 additional risk of naturally occurring brachial plexus stretch
16 compared with deliveries unaffected by shoulder dystocia.
17 Because of space constraints in the model, the mechanically
18 simulated brachial plexus stretch values we obtained are
19 actually greater than what would occur during in vivo birth
20 and exceed those that have been reported previously in
21 computer simulated shoulder dystocia deliveries.

22 However, even the degree of brachial plexus stretch
23 reported here would be unlikely to cause injury independent of
24 additional externally applied force. Mechanically, fetal
25 nerves are far more elastic than pediatric or adult nerves.

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1 Fifty percent elongation is required before rupture occurs,
2 compared with 15 to 20 percent elongation required to produce
3 mechanical failure in adult nerves.

4 Q: Thank you, sir.

5 MR. GRAHAM: Your Honor, we would offer this as Court's
6 Exhibit Number 19.

7 (WHEREUPON, the article was marked as Court's Exhibit
8 Number 19.)

9 MR. GRAHAM: Your Honor, we have a few blowups of medical
10 records that we would like to go through and I'd like to have
11 the witness stand down again.

12 THE COURT: All right. You may step down. Have you seen
13 that?

14 MS. GANES: Yes, Your Honor. May I stand over there?

15 THE COURT: Sure.

16 BY MR. GRAHAM:

17 Q: Before you leave the stand, sir, do you -- I believe you
18 have at the stand the Plaintiff's Exhibits Number 8, 10, 11,
19 and 12?

20 A: Yes, sir.

21 Q: Okay. Could you just briefly mention what those are?
22 What is Exhibit 8?

23 A: Number 8 is the delivery report.

24 Q: By Dr. Browning?

25 A: That's correct.

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1 Q: What is Number 10?

2 A: Number 10 is the newborn nursery physician record.

3 Q: What is Number 11?

4 A: Number 11 is the newborn admission assessment.

5 Q: And what is Number 12?

6 A: It is the cord gases at delivery.

7 MR. GRAHAM: Your Honor, we would offer those at this
8 time.

9 THE COURT: Any objections?

10 MS. GANES: Well, Your Honor, we would like to offer the
11 jury the entire medical record.

12 THE COURT: That's fine with me. Any objections to that?

13 MR. GRAHAM: Well, I think it's premature to do that,
14 Your Honor.

15 THE COURT: All right.

16 MR. GRAHAM: I mean this is our case and we want to focus
17 --

18 THE COURT: Let's go ahead and put 8, 10, 11, and 12 in
19 evidence.

20 (WHEREUPON, Plaintiff's Exhibit Number 8, delivery
21 report, Plaintiff's Exhibit Number 10, newborn nursery
22 report, Plaintiff's Exhibit Number 11, newborn admission
23 assessment, and Plaintiff's Exhibit Number 12, cord gases
24 report, were admitted into evidence.)

25 MR. GRAHAM: And, Your Honor, we have blowups of those

1 exhibits for the witness to use.

2 Come and step down, please, Dr. Pliskow. Again, why
3 don't you stand on the other side here to make it easier for
4 the court reporter to hear?

5 (WHEREUPON, Plaintiff's Exhibit Number 8, delivery
6 report, was displayed on a large screen in the
7 courtroom.)

8 BY MR. GRAHAM:

9 Q: Is this the two-page delivery record, Plaintiff's Exhibit
10 Number 8, blown up?

11 A: Yes, sir.

12 Q: Thank you. Okay. What do you rely on in this exhibit,
13 sir?

14 A: Well, this exhibit tells us that this is the -- there was
15 two previous vaginal deliveries, so this was the third
16 delivery, fourth pregnancy. It tells us that Dr. Browning is
17 the delivering doctor and that the patient was 39 weeks.

18 Q: Is that considered full-term or not?

19 A: That's full-term. Also, the delivery weight was --
20 that's given a range there, but the birth weight was eight
21 three. I think that's on the next page.

22 Q: All right, sir. Is there anything that you rely on on
23 page 2 of Exhibit 8?

24 A: Yes. That the -- that this indeed was a moderate
25 shoulder dystocia. That the time between the head delivery to

1 complete delivery was 45 seconds. That controlled traction
2 was applied. And that the sequence of maneuvers, the safety
3 maneuvers we talked about before done to alleviate the
4 dystocia, were suprapubic pressure, McRoberts, no episiotomy,
5 and that was it. Apgar scores were 9 and 9. And no fundal
6 pressure was applied. That's pushing at the top of the
7 abdomen and we had said before you don't want to do that.
8 That's it.

9 Q: All right, sir. So let's take those -- well, first of
10 all, there's reference to moderate shoulder dystocia. Do you
11 distinguish between different levels of moderate -- of
12 shoulder dystocia and, if so, please explain that?

13 A: I don't know that there's any real benefit to
14 distinguishing whether it's mild or moderate. Anything that
15 requires maneuvers to be performed, whether they are maternal
16 or fetal maneuvers, is a shoulder dystocia. Usually the mild
17 ones will respond with McRoberts alone.

18 If you need to do internal maneuvers, some people call
19 that moderate shoulder dystocia. This was diagnosed as
20 moderate, but no internal maneuvers were ever done. So I
21 guess it means different things to different people.

22 Q: All right, sir. And you mentioned the maneuvers listed
23 were --

24 A: Suprapubic and McRoberts.

25 Q: Okay. And then you mentioned, quote, "controlled

1 traction", end quote. What does "controlled traction" mean to
2 you?

3 A: It's not a term that I use. From the deposition
4 testimony, it was equated with mild -- mild traction.
5 Obviously, from the videotape, this was not mild traction. So
6 it's really not an accepted obstetric term, controlled
7 traction.

8 Q: And I believe in the deposition Dr. Browning said gentle
9 axial traction or words to that effect. Was there axial
10 traction on the video?

11 A: No. There was lateral traction. There was pulling
12 downward, not along the spine.

13 Q: And you mentioned Apgars. What is the significance of.
14 Apgars? What is that system all about?

15 A: Well, the Apgar scores give scores to the baby when it
16 comes out related to its color, its breathing, its tone, its
17 movement, and respiratory rate, heart rate. And a 9 score is
18 about as good as you can get because most babies come out with
19 blue feet for the first minute and the distal hands and feet
20 are usually blue because the blood flow doesn't get there. So
21 a 9 is a great score.

22 THE COURT: Mr. Graham, will you have him speak up?
23 She's having a hard time.

24 MR. GRAHAM: Yes. Could you? And I'll stand over here.

25 THE COURT: If you'll just speak up.

1 BY MR. GRAHAM:

2 A: Nine is a great score. It's what you would see, as you
3 saw in the video, with the baby actively crying and breathing
4 and screaming.

5 Q: And there's a reference to cord blood being sent. What
6 -- tell us about cord blood. Why would an obstetrician
7 collect cord blood to be sent?

8 A: You can look at the cord blood and determine the oxygen
9 content in the cord. You can also look at the pH, which is
10 the acid-base level, and it can basically tell you some things
11 about fetal well-being and fetal -- whether there was fetal
12 distress or whether the baby was in trouble, for lack of a
13 better term.

14 Q: Okay. And there's a reference to cord wrapped around
15 neck one time loosely. Is that consistent with what you saw
16 on the video?

17 A: Yes.

18 Q: Does it have any medical significance?

19 A: No.

20 Q: Thank you, sir. Let's turn now to the newborn admission
21 assessment.

22 (WHEREUPON, Plaintiff's Exhibit Number 10, newborn
23 nursery report, was displayed on a large screen in the
24 courtroom.)

25 BY MR. GRAHAM:

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1 Q: What, if anything, is significant to you on this exhibit?

2 A: The fact that it reiterates that there was a shoulder
3 dystocia. That the baby was eight pounds, three ounces, which
4 here was appropriate for gestational age, not large but
5 gestational age. And that there was decreased movement of the
6 right arm.

7 (WHEREUPON, Plaintiff's Exhibit Number 11, newborn
8 admission assessment, was displayed on a large screen in
9 the courtroom.)

10 BY MR. GRAHAM:

11 Q: I now present the newborn nursery physician record. What
12 is of significance to you, if anything, on this document?

13 A: Again, telling us that this was a shoulder dystocia. The
14 Apgars were 9/9. The weight was eight, three. That the baby
15 did have decreased movement on that right side. It's hard to
16 read the exact words, but basically there was minimal movement
17 on that right side.

18 Q: No right arm recoil?

19 A: Right. No right arm recoil means that when you stimulate
20 the right arm, it doesn't pull back in a reflex. Crepitus is
21 something where we feel around the clavicle to see if it's
22 fractured and there was no crepitus. I believe that says good
23 hand tone.

24 Q: Thank you.

25 A: It also said -- can you put that back up for a second?

1 Q: Sure.

2 A: I think the doctor's impression here was that this was
3 consistent with shoulder dystocia.

4 (WHEREUPON, Plaintiff's Exhibit Number 17, cord gas
5 report, was displayed on a large screen in the
6 courtroom.)

7 BY MR. GRAHAM:

8 Q: Finally, a document from the laboratory at McLeod?

9 A: Right.

10 Q: What, if anything, do you find significant on this
11 exhibit?

12 A: So these are the cord gases that we were talking about,
13 and you see the pH, which is the acid-base level, 7.377.
14 That's within normal limits. So the baby is not acidotic.
15 It's not suffering from a lack of oxygen. Even though we do
16 see that PO₂, the oxygen, is a little low, that's normal in
17 these cord gases. It does not affect the overall pH, which is
18 the acid-base level, which tells us that the baby is okay.

19 Q: Thank you. Doctor, you may now return to your seat. I
20 appreciate it.

21 MS. GANES: May it please the Court, Your Honor?

22 THE COURT: Yes. Thank you.

23 (WHEREUPON, the witness returned to the witness stand and
24 defense counsel returned to defense table.)

25 BY MR. GRAHAM:

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 Q: Now, let me -- sir, do you have there in front of you
2 what's been pre-marked as Plaintiff's Exhibit 26?

3 A: I do.

4 Q: Okay. What are those documents, please?

5 A: Those are the fetal monitoring strips..

6 Q: Okay.

7 MR. GRAHAM: Your Honor, we offer those at this time.

8 THE COURT: Any objections?

9 MS. GANES: No objection, Your Honor.

10 THE COURT: All right. And what number would that be?

11 MR. GRAHAM: Number 26.

12 THE COURT: All right. Number 26 into evidence without
13 objection.

14 (WHEREUPON, Plaintiff's Exhibit Number 26, fetal
15 monitoring strips, were admitted into evidence.)

16 BY MR. GRAHAM:

17 Q: Doctor, what significance to you -- well, first of all,
18 explain what these -- what this fetal heart monitor strips is
19 all about. Just explain what's going on. Why do doctors use
20 equipment to generate these documents?

21 A: So basically, what we look on -- what we look at on a
22 fetal monitoring strip is the contractions. How frequent they
23 are is basically all you can tell from an external fetal
24 monitor. And then a measurement of the fetal heart rate and
25 the variability, the change in rate, over time. That's sort

1 of like taking the baby's vital signs during the whole labor,
2 looking at the pulse rate.

3 Q: And what do the fetal heart monitor strips in this case
4 tell us about how Julia was doing during the labor and
5 delivery in terms of her overall health, not the brachial
6 plexus injury, but her overall well-being?

7 A: It tells us that Julia was basically medically stable
8 throughout her whole labor and delivery -- throughout the
9 whole labor. Because you -- when you see the delivery, part
10 of the delivery on the monitor as well. So for that part, she
11 was medically stable as well.

12 Q: Was there ever a time throughout this entire pregnancy,
13 labor, and delivery when either the mama or the baby were not
14 medically stable?

15 A: No, sir.

16 Q: Was there ever a time when the mom or the baby were at
17 immediate threat of death or serious bodily injury?

18 A: Not at all.

19 Q: If the delivery -- if the stuck shoulder had gone unfixed
20 for six -- seven -- eight minutes, then at that point, would
21 the child be at immediate threat of death or serious bodily
22 injury?

23 A: Yes. That would be a life-threatening emergency at that
24 point.

25 Q: During the 45 seconds that it took to get this shoulder

1 unstuck, was the child ever at risk of any harm if the doctor
2 acted within the standard of care?

3 A: No. The baby was not.

4 Q: Was the mother at risk of any harm if the doctor acted
5 within the standard of care?

6 A: No. The mother was not.

7 Q: Yesterday, we heard Ms. Ganes state in opening something
8 about if -- when a shoulder dystocia occurs, nobody knows in
9 advance how long it's going to take to resolve the shoulder
10 dystocia. Is that true?

11 A: In essence, it is. The reality of the fact is that the
12 vast majority of shoulder dystocias are resolved or taken care
13 of within 1 to 2 minutes. So you know going into the shoulder
14 dystocia that if you maintain your calm and you do your
15 maneuvers appropriately, more likely than not you're going to
16 have a good outcome. So you do know that going in.

17 Certainly, you also know that there are a few percentage
18 of time, a small percentage of time, that shoulder dystocias
19 are not able to be resolved and they do require extra
20 maneuvers or life-threatening procedures.

21 Q: Well, what does that have to do with the delivery of
22 Julia B , if anything?

23 A: Nothing. It was not at that point. It was resolved
24 within 45 seconds, and both mom and baby were medically
25 stable.

1 Q: In the absence of medical malpractice, would Julia's
2 nerves be damaged?

3 A: In the absence of medical malpractice, absolutely not.

4 Q: Was this injury to Julia's nerves preventable?

5 A: Completely.

6 Q: How would they have been prevented?

7 A: By using finesse and not force, by following the standard
8 of care and going to maneuvers as opposed to using excessive
9 lateral traction.

10 Q: Is there anything about the uncertainty of knowing
11 exactly how long it will take to resolve a stuck shoulder that
12 makes it reasonable and appropriate to violate the standards
13 of care?

14 A: No, not at all. You still have to go down your checklist
15 and usually, if you follow protocol, it will resolve
16 appropriately.

17 Q: Is there anything about the uncertainty of how much time
18 it might take to resolve shoulder dystocia that justifies
19 pulling forcibly on a baby's neck multiple times with a bend
20 in the neck toward the floor?

21 A: Absolutely not. Not in the first 45 seconds of a
22 shoulder dystocia.

23 Q: Have you answered all of my questions to at least a
24 reasonable degree of medical certainty?

25 A: Yes, sir.

DR. STEVEN PLISKOW - DIRECT BY MR. GRAHAM

1 Q: By the way, do you charge for the work you do on legal
2 cases?

3 A: Yes, sir, I do.

4 Q: Okay. Is it expensive to get you to work on these cases
5 and come here for trial?

6 A: To come for trial, yes, because I have to leave my
7 practice. And leaving my practice, a day's work does cost a
8 lot of money, but I like doing this. I feel it's a service
9 and it's very important to be here.

10 MR. GRAHAM: Please answer any questions Ms. Ganes may
11 have.

12 THE COURT: Yes, ma'am.

13 MS. GANES: Thank you, Your Honor. May it please the
14 Court.

15 THE COURT: Sure.

16 CROSS-EXAMINATION

17 BY MS. GANES:

18 Q: Good afternoon, Dr. Pliskow.

19 A: Good afternoon.

20 Q: It's good to see you again.

21 A: Likewise.

22 Q: Dr. Pliskow, you and Mr. Graham had what you called some
23 mutual friends who recommended that he call you about
24 reviewing this case; is that right?

25 A: My understanding was that we both had mutual

DR. STEVEN PLISKOW - CROSS BY MS. GANES

1 acquaintances or friends. I consider most of the attorneys
2 that I do work for friends. So yes, there was somebody that
3 he knew that I knew as well that recommended me to him.

4 Q: And you have a website where you advertise for your
5 services as an expert witness; is that right?

6 A: Yes, ma'am, I do.

7 Q: And right now, you have as many as 20 or 25 cases that
8 you're reviewing; is that correct?

9 A: I would say as an estimate that is correct.

10 Q: You've been doing this work as an expert witness since
11 about 1997?

12 A: I have been doing medical-legal work in the malpractice
13 arena since '97 and, as we said earlier, from '89 -- '90 in
14 criminal cases with a rape treatment center.

15 Q: This isn't a criminal case though, is it?

16 A: This is not a criminal case.

17 Q: Okay. Now, during that time, you've testified just one
18 time on behalf of a defendant in a lawsuit; is that correct?

19 A: At trial and deposition testimony, yes, that is correct.

20 Q: One time in 18 years?

21 A: One time in 18 years. That's correct.

22 Q: Now, you agree with me that Julia B 's shoulder
23 dystocia was not preventable; correct?

24 A: That I agree with you.

25 Q: And you agree that her shoulder dystocia was not

1 predictable; is that correct?

2 A: I agree with you.

3 Q: And you agree that there's nothing in the medical records
4 to have indicated to anyone involved in this case that Julia
5 Byrd would present in her delivery with the unpredictable,
6 unpreventable medical emergency of shoulder dystocia; correct?

7 A: I do agree with that.

8 Q: You agree that Julia was not macrosomic; correct?

9 A: Yes, ma'am.

10 Q: And what does that mean? Will you tell the jury what
11 macrosomic means?

12 A: Macrosomia is a term that is used for when a baby is
13 greater than the 90th percentile at weight. So usually at
14 nine months, at 40 weeks, that would be the equivalent of
15 4,000 grams, which is around nine pounds.

16 Q: And so that means she wasn't unexpectedly large; correct?

17 A: That's correct.

18 Q: Was she a lighter birth weight?

19 A: She wasn't a lighter birth weight. I mean this was the
20 largest of Ms. Byrd's three children, but it wasn't
21 excessively large. As we saw on the medical record, it said
22 AGA, which is appropriate for gestational age, not LGA, which
23 is large for gestational age.

24 Q: Okay. Now, McRoberts is a safe maneuver for a physician
25 to use during a shoulder dystocia; correct?

DR. STEVEN PLISKOW - CROSS BY MS. GANES

1 A: Agreed. Yes.

2 Q: And that's what doctors are trained to do?

3 A: That is a first-line maneuver. That is what doctors are
4 trained to do.

5 Q: Okay. Suprapubic pressure is a safe maneuver during the
6 presentation of a shoulder dystocia delivery; correct?

7 A: Yes, ma'am.

8 Q: And the use of McRoberts and suprapubic pressure are
9 reasonable and within the standard of care in the face of a
10 shoulder dystocia; correct?

11 A: They are.

12 Q: You reviewed Dr. Browning's deposition testimony; is that
13 right?

14 A: Yes, ma'am.

15 Q: Are you aware that Dr. Browning testified in his
16 deposition that he corrected the nurse's suprapubic pressure?

17 A: I don't recall that. I would have to see that again.

18 Q: Okay. But you recalled everything that you answered to
19 Mr. Graham about what Dr. Browning didn't do related to that
20 nurse; right? You didn't have any trouble recalling those
21 things?

22 A: No, not at all.

23 Q: Okay. Would it be reasonable and appropriate for Dr.
24 Browning to have repositioned the nurse's hands and that
25 suprapubic pressure that she was using? Would that be

1 reasonable and appropriate?

2 A: It would be reasonable and appropriate.

3 Q: All right. And necessary?

4 A: And --

5 Q: As you testified?

6 A: Yes, ma'am.

7 Q: It needed to be done; correct?

8 A: Correct.

9 Q: Okay. Now, you agree with me that brachial plexus
10 injuries can be caused by things other than excess lateral
11 traction during delivery, don't you?

12 A: Yes, ma'am.

13 Q: You also agree with me that there's no way to measure the
14 amount of traction that a doctor uses during a delivery;
15 correct?

16 A: Yeah. You can't get a numeric measurement. That's
17 correct.

18 Q: There's no way to have a quantitative measurement of what
19 kind of gentle downward traction is being used during a
20 delivery; correct?

21 A: No. That's why we use the stretch and looking at the
22 neck to see if you're stretching the neck as opposed to
23 getting a quantifiable number.

24 Q: Okay. And I'm glad you mentioned that. I'll go back to
25 that in just a second. You agree with me that gentle downward

1 guidance of the maternal labor forces is appropriate during
2 delivery; correct?

3 A: I do.

4 Q: So babies don't just usually come out without some gentle
5 downward traction being used by the physician during delivery;
6 correct?

7 A: Well, there can be precipitous deliveries and some babies
8 to just come right out, but some do require some degree of
9 gentle guidance or gentle traction.

10 Q: When you had your little green pointer up here on the
11 video you were helping the jury with, you used that little
12 green pointer at the beginning when Dr. Browning was using
13 that guidance and you told the jury that that was not
14 inappropriate; correct?

15 A: That's correct.

16 Q: Okay. And so that delivery method is what you see in a
17 normal delivery, a gentle guide -- gentle guidance by the
18 physician for the baby to be born?

19 A: Yes, ma'am.

20 Q: Okay. You agree with me that if shoulder dystocia is not
21 relieved, it can cause death of the infant; correct?

22 A: Absolutely.

23 Q: And you agree that if shoulder dystocia is not relieved,
24 it can cause great bodily injury to the mother; correct?

25 A: I agree with you.

DR. STEVEN PLISKOW - CROSS BY MS. GANES

1 Q: And in your opinion, there is less than 10 minutes -- and
2 I think you said here today six -- seven -- eight minutes that
3 a delivering attendant physician, like Dr. Browning in this
4 case, knows they have to try and relieve that shoulder
5 dystocia before they're faced with that brain damage or great
6 bodily injury; correct?

7 A: Yes, ma'am.

8 Q: You have criticisms of the nurses in this case, didn't
9 you?

10 A: I did.

11 Q: You've never examined Julia B , have you?

12 A: No, ma'am.

13 Q: Now, you talked to the jury about the complete picture
14 when you review cases. You remember? It's been a couple of
15 hours, but when you first started your testimony, you told the
16 jury you like to look at the complete picture when you review
17 these cases; correct?

18 A: That's correct.

19 Q: Do you agree with me that when Dr. Browning realized that
20 Julia B was going to be a shoulder dystocia delivery, he
21 didn't yet have the complete picture of that delivery, did he?

22 A: Are you talking about knowing what would happen?

23 Q: That's right. When he realized -- when he saw that
24 turtling sign and he knew that this was a shoulder dystocia
25 like he had been trained to deliver in, he did not know then

DR. STEVEN PLISKOW - CROSS BY MS. GANES

1 what the outcome would be; correct?

2 A: No. No one could foresee the future. You know what
3 normally happens and how to handle problems, but you don't
4 know what's going to happen, no.

5 Q: And so he didn't have his complete picture of Julia
6 Byrd's delivery yet; correct?

7 A: Correct.

8 Q: Do you still have those articles that you and Mr. Graham
9 went over?

10 A: I believe they are around here somewhere.

11 Q: I'll help you find them.

12 A: Thank you.

13 Q: Thank you. I believe it was this one that I'm going to
14 hand to you.

15 A: Okay.

16 Q: The "Comparing Mechanical Fetal Response during Dissent,
17 Crowning, and Restitution Among Deliveries with and without
18 Shoulder Dystocia."

19 MR. GRAHAM: Could we get the exhibit number, please?

20 MS. GANES: It was the third one.

21 THE WITNESS: It says 19 on the bottom here.

22 MS. GANES: It's 19.

23 MR. GRAHAM: Thank you.

24 BY MS. GANES:

25 Q: All right. Will you go back and read to the jury what

1 you read to them about the elasticity and the 50 percent of
2 stretching?

3 A: Okay.

4 Q: Would you read that again, please?

5 A: Just that one line?

6 Q: Yep.

7 A: Okay. It says:

8 Mechanically, fetal nerves are far more elastic than
9 pediatric or adult nerves. Fifty percent elongation is
10 required before rupture occurs compared with 15 to 20 percent
11 elongation required to produce mechanical failure in adult
12 nerves.

13 Q: Okay. And if you'll also turn to page 539.e3? It's the
14 third page of the article.

15 A: Yes, ma'am.

16 Q: Do you see the beginning of the first full paragraph?

17 A: Where it says left vertical axis?

18 Q: No. It says in all types.

19 A: Oh. Second paragraph. Okay. Yes.

20 Q: That's the first full paragraph?

21 A: First full paragraph.

22 Q: All right. It says:

23 In all types of second stage labors, there is brachial
24 plexus stretch and neck stretch rotation during descent,
25 crowning, and restitution.

DR. STEVEN PLISKOW - CROSS BY MS. GANES

1 Did I read that correctly?

2 A: You did.

3 Q: Okay. And this article is still reliable like you told
4 Mr. Graham it was; correct?

5 A: Oh, absolutely. There's definitely stretch in every one
6 of the -- the parts of delivery, just not significant enough
7 to cause injury without external traction.

8 Q: Okay. I'll take that one back.

9 A: Yes, ma'am.

10 Q: I'm going to hand you what was marked as the Court's
11 Exhibit 25.

12 (WHEREUPON, Plaintiff's Exhibit Number 25 for
13 identification only was produced for the witness.)

14 A: Okay.

15 Q: And that's another article that you and Mr. Graham went
16 over. Let me ask you this.

17 A: Yes.

18 Q: Mr. Graham asked you to go find these articles before I
19 came down to take your deposition in Miami; right?

20 A: He asked me to bring articles that I had, whatever I had,
21 to deposition, yes.

22 Q: All right.

23 A: You are correct.

24 Q: Okay. So on Exhibit 25, under introduction, shoulder
25 dystocia remains a largely unpredictable event.

DR. STEVEN PLISKOW - CROSS BY MS. GANES

1 Did I read that correctly, the first line?

2 A: Yes, ma'am.

3 Q: Do you agree with that portion of that article?

4 A: I do.

5 Q: And then if you'll go under the conclusion, which is on
6 page 7?

7 A: Yes, ma'am.

8 Q: The second sentence there:

9 This paper provides further evidence that effective
10 training of staff is key to more effective management of
11 shoulder dystocia.

12 Did I read that correctly?

13 A: Yes, ma'am.

14 Q: Do you agree with that?

15 A: I do. I -- it's the training of staff and the attending
16 physician.

17 Q: Do you agree with me that if a physician during a
18 shoulder dystocia presentation instructs a nurse on where to
19 place her hands to do proper and appropriate suprapubic
20 pressure, would that be helping to train that nurse?

21 A: It would be, sure.

22 Q: All right. Doctor, you agree with me that a bad outcome
23 during a delivery does not equal medical malpractice; correct?

24 A: I agree with that.

25 MS. GANES: Nothing further. Thank you, Your Honor.

DR. STEVEN PLISKOW - REDIRECT BY MR. GRAHAM

1 THE COURT: All right. Any redirect?

2 MR. GRAHAM: Yes, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. GRAHAM:

5 Q: Doctor, you were asked if suprapubic was a safe maneuver.
6 Is suprapubic a safe maneuver if it's done incorrectly?

7 A: No, sir.

8 Q: And you were asked questions about -- we weren't shown
9 the deposition of Dr. Browning, but there was a statement made
10 that Dr. Browning in his deposition corrected the nurse's
11 position of the hands on -- about suprapubic. Was there any
12 such thing in the video that you saw earlier that you went
13 through with us?

14 A: I mean not only was there no such thing in the video, but
15 my memory of Dr. Browning's testimony was that he had no
16 visual memory of that delivery. So I don't know how he could
17 remember repositioning the hand when he said that the only
18 thing he remembered was walking in, greeting the family, going
19 over and seeing the baby after. He didn't say -- I don't
20 remember anything about repositioning a hand that he had
21 visual memory of.

22 Q: All right. Let me just ask you a hypothetical question.
23 Assume -- Doctor, assume that during -- assume that during the
24 eight or nine seconds that weren't on the video -- assume that
25 at that point Dr. Browning told the nurse stop pushing on the

1 bone and do it the right way and showed her how to do that,
2 assuming those theoretical assumed facts to be true, what good
3 does it do to fix the positioning of the hand that late in the
4 proceeding?

5 A: It wouldn't make a difference at that point. You've
6 already had mom continue to push. You haven't stopped it and
7 you also put excessive traction three times on the baby's neck
8 with lateral traction.

9 Q: Now, you said it was -- it would be reasonable and
10 appropriate and even required for a doctor to fix the hand
11 position if the nurse is pushing on the bone instead of the
12 shoulder. My question is did you see any evidence, any
13 smidgen of evidence, that Dr. Browning ever corrected the
14 nurse's improper hand positioning at any time?

15 A: Not at all. I believe there's two -- and we can look
16 back at the video, but I believe there's two instances at
17 different times where you see that hand and they are in the
18 same position. It was never shown on the video to have been
19 corrected, nor when you listen -- and I listened to this video
20 numerous times. You never hear amidst all of the urging to
21 push, anybody say move your hand, put it over here, push over
22 here, nothing like that.

23 Q: Now, you indicated in response to Ms. Ganes's question
24 that you did express some criticism of the nurses, but who do
25 you hold responsible for the failure to correct the nurse's

1 mistake?

2 A: That would be Dr. Browning.

3 Q: You were asked a question about whether you had ever
4 examined Julia B. As an obstetrician, is it part of your
5 job description to examine seven-year-old girls with brachial
6 plexus nerve injuries?

7 A: No, sir.

8 Q: You were asked questions about whether the baby might
9 eventually be at risk of brain damage. How long would have to
10 -- how long would this shoulder have needed to be stuck for
11 there to have been any concern about immediate threat of brain
12 damage or death?

13 A: Well, as long as everything is fine going into the
14 dystocia, meaning the fetal monitoring strip was fine and the
15 baby was fine, with normal fetal reserve you have at least 5
16 minutes to resolve that dystocia before you get into any
17 problem. So that 5- to 10-minute range that we speak of where
18 there could be permanent injury that can occur, it really
19 depends on the fetus.

20 Q: Thank you. Was Julia or her mom ever at risk, ever at
21 immediate threat of death or serious bodily injury if the
22 doctor had acted within accordance with the standard of care?

23 A: No.

24 Q: You were -- you were asked some questions about a
25 complete picture. Is it fair for you to look at the complete

DR. STEVEN PLISKOW - REDIRECT BY MR. GRAHAM

1 picture when Dr. Browning was going through it in real time?
2 When you -- when you said you wanted to look at the complete
3 picture, were you doing that as a way of being unfair to Dr.
4 Browning or something different?

5 MS. GANES: Your Honor, I just object to the leading.

6 THE COURT: Sustained.

7 BY MR. GRAHAM:

8 Q: What did you mean when you said that you -- you put your
9 mind in a position of wanting to see the complete picture
10 before you went about evaluating Dr. Browning?

11 A: Well, what I -- what I was referring to when I said
12 complete picture, I meant without bias, looking at it from the
13 perspective of all of the delivery attendants. So not only
14 the deliverer, Dr. Browning, but the nurses and the parents
15 and the baby, and looking at the complete picture.

16 But I also said that I look at it in real time, look at
17 it prospectively, look at it as the physician is at that time,
18 what he's faced -- he or she is faced with at that time.

19 So you have a shoulder dystocia. What do you do next?
20 What's the next maneuver? What's the next maneuver? What is
21 the standard of care?

22 So we look at it in real time. We don't look at it
23 knowing there's an injury, something must've happened. I mean
24 some people may do that. That's not how I do it. I look at
25 it prospectively in real time.

1 Q: And recognizing that any obstetrician in any delivery
2 complicated by a stuck shoulder is not going to have a crystal
3 ball about exactly what maneuvers -- what safety maneuvers are
4 going to work and how many need to be used, does that give any
5 obstetrician a pass to not work through his checklist of
6 safety maneuvers?

7 MS. GANES: Objection. Leading, Your Honor.

8 THE COURT: Sustained.

9 MR. GRAHAM: All right.

10 BY MR. GRAHAM:

11 Q: What -- what significance -- what significance is it, if
12 any, to a doctor's obligation to conform with the standard of
13 care that he or she does not know early on which safety
14 maneuvers will be required and which ones will be successful
15 and how long it takes to get the shoulder unstuck?

16 A: I mean it has absolutely nothing to do with the standard
17 of care and following your checklist. You're always going to
18 want to go through your safety maneuvers and your safety
19 procedures and make sure that you are following your checklist
20 to get the baby delivered safely.

21 We never know which maneuver is going to work. Maybe the
22 McRoberts will work. Well, maybe the Rubin will work. Maybe
23 you need to do an internal maneuver. Maybe you don't. You
24 don't know going in. You have to take it step-by-step and
25 resolve the problem.

1 MR. GRAHAM: Thank you. Please answer any questions, if
2 there are anymore.

3 MS. GANES: Nothing further, Your Honor.

4 THE COURT: All right. You may step down. Thank you.

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: Have a good day.

7 THE WITNESS: Thank you.

8 THE COURT: All right. Ladies and gentleman of the jury,
9 let's take a lunch break until about 2:15 and then we'll come
10 back and resume. All right. Do not discuss the case. Do not
11 research the case.

12 (WHEREUPON, the jury exited the courtroom at 1:07 p.m.)

13 THE COURT: Have you got them all or does she have them?
14 Have you got everything you need?

15 THE COURT REPORTER: Number 25 is missing.

16 THE COURT: You've got 25 over there?

17 MS. GANES: And she looks right at me. No, you're right.
18 It's got to be me. I just didn't want to walk back up there
19 after I was finished.

20 THE WITNESS: I believe I have it. I have it. I believe
21 I have it.

22 MS. GANES: Do you have it? I know I left some of my
23 notes up here too. So you have everything you need? Thank
24 you.

25 THE COURT: Okay. We'll see you back at 2:15.

DR. OLIVER WOOD JR. - DIRECT BY MR. RUFFIN

1 minutes at most.

2 THE COURT: All right.

3 MR. RUFFIN: And it's Dr. Oliver Wood. Those are the
4 exhibits.

5 THE COURT: All right. And those numbers were?

6 THE COURT REPORTER: 42-13, 42-14, and 47.

7 (WHEREUPON, Plaintiff's Exhibit Number 42-13, curriculum
8 vitae of Mr. Forman, Plaintiff's Exhibit Number 42-14,
9 continuum of care, and Plaintiff's Exhibit Number 47,
10 life care plan, were admitted into evidence.)

11 THE CLERK: Sir, if you would, place your left hand on
12 the Bible and raise your right hand. Do you swear or affirm
13 that the testimony you give in this case will be the truth,
14 the whole truth, and nothing but the truth, so help you God?

15 THE WITNESS: I do.

16 THE CLERK: Please have a seat and state your name for
17 the record.

18 THE WITNESS: Oliver G. Wood Jr.

19 DR. OLIVER WOOD JR., being first
20 duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. RUFFIN:

23 Q: Good afternoon, Dr. Wood.

24 A: Good afternoon.

25 Q: Would you mind stating your full name and your address?

DR. OLIVER WOOD JR. - DIRECT BY MR. RUFFIN

1 A: Oliver G. Wood Jr., Columbia, South Carolina.

2 Q: And where are you from originally?

3 A: I grew up in Greer.

4 Q: How long did you live there?

5 A: Eighteen years.

6 Q: Please describe your educational background?

7 A: I have a Bachelor of Science degree in Business
8 Administration from the University of South Carolina, a
9 Master's degree in Economics from the University of South
10 Carolina, and a Doctorate in Economics from the University of
11 Florida.

12 Q: Please describe your professional background?

13 A: I was hired by the University of South Carolina in 1965
14 to teach economics and banking and finance courses. I taught
15 at the university for 29 years. I'm now a distinguished
16 professor emeritus. Translated, that means I'm retired from
17 teaching.

18 Q: Did you serve in the military?

19 A: Yes. I served on active duty with the United States Navy
20 from 1959 to 1961.

21 Q: Did you serve in the reserves?

22 A: Yes. I served in the Naval reserve from 1961 until 1987
23 when I retired.

24 Q: What practical experience have you had in the business
25 world?

1 So what we have here is a plan, because it's line by
2 line, is one you can look at individually. If you don't need
3 it, take it out. If you need more, add to it.

4 These three pages are the costs of her future medical
5 care.

6 Chart 9. This is the present value of the total
7 financial loss. That first chart shows you her earning
8 capacity and the present value is 813,194. However, Mr.
9 Forman said that she can offset a good part of her earning
10 capacity by mitigating it. Mitigating means offsetting. She
11 can offset 557,709, leaving a loss in her earning capacity of
12 255,485. So if you take this number right here as a
13 percentage of that, she's lost -- eh -- 25 -- 30 percent.

14 Then the cost of the medical items, 713,723 makes her
15 total financial loss 969,208, and that's the sum of her net
16 loss in earning capacity minus the cost of funding the life
17 care plan, and that's my estimate of her total financial loss
18 of now through age 80.84, which is her life expectancy per
19 South Carolina Code 19-1-150.

20 Q: Are you finished with the numbers, Doctor?

21 A: Yes.

22 Q: All right. If you wouldn't mind, take a seat again.

23 (WHEREUPON, the witness complied.)

24 MR. RUFFIN: I'm just going to move this so I don't have
25 to look through it. Actually, I'm going to move it over here.

1 MAY 18, 2016

2 THE COURT: All right. Go ahead and bring out the jury.

3 (WHEREUPON, the jury entered the courtroom at 9:51 a.m.)

4 THE COURT: All right. If the plaintiff will call your
5 next witness?

6 MR. GRAHAM: Thank you, Your Honor. The plaintiff calls
7 Dr. Trevor Resnick. Please come forward and watch your step,
8 sir.

9 THE CLERK: Sir, if you'd place your left hand on the
10 Bible and raise your right hand? Do you swear or affirm that
11 the testimony you're about to give in this case will be the
12 truth, the whole truth, and nothing but the truth, so help you
13 God?

14 THE WITNESS: I do.

15 THE CLERK: Please have a seat and state your name for
16 the record.

17 THE WITNESS: Trevor Jesse Resnick.

18 DR. TREVOR RESNICK, being first duly
19 sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. GRAHAM:

22 Q: Good morning, Dr. Resnick.

23 A: Good morning.

24 Q: Please introduce yourself to the jury by giving us some
25 information about where you grew up, where you are now, your

1 family situation, et cetera?

2 A: My name is Trevor Resnick. As you can hear from my
3 accent, I'm not from -- I'm not local. I am originally from
4 South Africa, from Cape Town. I went to medical school in
5 Cape Town and did my training in the United States as a
6 pediatrician in Connecticut and as a neurologist and a
7 pediatric neurologist in New York.

8 I moved to Miami in 1985 and have been there since then.
9 I am a member of the Department of Neurology at Miami
10 Children's Hospital. I have been chief of the department for
11 the last 13 years and this year stepped down. We have a
12 mandatory step down at a certain age. I have three kids, two
13 of them are attorneys, and some grandkids as well.

14 Q: Thank you. Doctor, do you have in front of you a
15 document pre-marked Exhibit 53?

16 A: No.

17 Q: Well, let me fix that. Now do you, sir?

18 A: I do.

19 Q: What is Exhibit 53?

20 A: It's my CV, my curriculum vitae.

21 Q: Okay. Does that -- is -- are the contents of that true
22 and accurate as of the time this was created?

23 A: Yes.

24 Q: Is there anything that would need to be changed to make
25 it true and accurate as of this moment in time?

1 A: Yes.

2 Q: What is that?

3 A: There are some additional articles that have been
4 published, none of which are pertinent to this case, and I am
5 not chief of the department anymore.

6 Q: Okay. You stepped down earlier this year?

7 A: I stepped down this year, yeah.

8 Q: Thank you.

9 MR. GRAHAM: Your Honor, we would offer that as Exhibit
10 53.

11 THE COURT: Any objections?

12 MS. CRAIG: Yes, sir, Your Honor, just based on what's
13 been said previously.

14 THE COURT: 53 is into evidence.

15 (WHEREUPON, Plaintiff's Exhibit Number 53, curriculum
16 vitae of Dr. Trevor Resnick, was admitted into evidence.)

17 MR. GRAHAM: Thank you, Your Honor.

18 BY MR. GRAHAM:

19 Q: Now, let's turn to pediatric neurology. First of all,
20 what is pediatric neurology?

21 A: So neurology is the study of the nervous system, which
22 includes the brain, the spinal cord, and the peripheral
23 nerves.

24 Q: What are peripheral nerves?

25 A: The nerves that come out of the spinal cord. Once they

1 exit from the spinal cord, they are then called peripheral
2 nerves. And they go to supply the skin, to provide sensation,
3 and to the muscles to enable movement.

4 Q: Thank you. And I asked you about pediatric neurology. I
5 think you told us about neurology. And the pediatric part is
6 --

7 A: Is all those -- all those items, but those items
8 pertinent to pediatrics. In other words, specific diseases of
9 the nervous system that we see in kids.

10 Q: And are you board-certified and, if so, in what fields?

11 A: I'm board-certified in neurology, with special confidence
12 -- competence in child neurology, and I'm also board-certified
13 in pediatrics.

14 Q: In your practice, do you from time to time see children
15 with brachial plexus nerve injuries?

16 A: Yes.

17 Q: Have you -- and have you from time to time seen children
18 with brachial plexus birth injuries?

19 A: Yes.

20 Q: Have you ever dealt with a child who has a brachial
21 plexus injury after birth?

22 A: Yes.

23 Q: All right. What would account for a child having a
24 brachial plexus injury after birth?

25 A: There are multiple potential causes, but anything that

1 can damage or injure the brachial plexus can cause a brachial
2 plexus injury. So things like trauma, infection, infarction,
3 compression, anything that can damage the brachial plexus can
4 cause an injury. So for example, in motorcycle injuries where
5 the head is deviated away from the shoulder or football
6 injuries or certain kinds of viruses or infections can affect
7 the brachial plexus, cause damage, and result in either
8 weakness or pain.

9 Q: Have you ever had a child client or child patient who had
10 received a brachial plexus injury prior to being delivered?

11 A: Yes.

12 Q: All right. And how does that happen?

13 A: The cases that I've seen have been a few of them due to
14 congenital abnormalities of the brachial plexus, which means
15 that when the baby is born, the formation of the nerves that
16 are involved in the brachial plexus doesn't occur normally and
17 they're often born with deformities around the chest and the
18 arm and they have weakness in their arm. That's one form of
19 brachial plexus abnormality that can cause weakness.

20 The others are related to injuries in utero. In other
21 words, while the baby is in utero before delivery where there
22 is some damage that occurs, again, due to infection or
23 compression or various other causes to the brachial plexus.
24 And under those cases, the babies are usually born with
25 shrinkage of the arm, shrinkage of the muscles, and weakness.

1 Q: Thank you. Tell us, please, sir, do you have any special
2 training in terms of testing nerves, testing the electrical
3 impulses in nerves?

4 A: No. It's part of the general training that we get in
5 neurology. It's not -- I don't have specific training in
6 that.

7 Q: Okay. Well, based on the training that you do have, can
8 you tell us about what tests exist to distinguish healthy
9 nerves from injured nerves?

10 A: Well, the most important test is the clinical examination
11 because the clinical examination will show you which muscles
12 are weak. And based upon the muscles that are weak, you can
13 infer or work out which nerve is involved or which nerve is
14 damaged.

15 In addition to that, you can also do tests where you can
16 check the electrical impulses that move along the nerve and
17 see where the blockage or the slowing of the nerve conduction
18 occurs. And you can also insert needles into the muscles and
19 it will show abnormal firing of those muscles, indicating
20 which amount of the muscles are damaged.

21 Q: Thank you, sir. Would you -- as I look through your CV,
22 I don't want to go through 29 pages with you, but could you
23 just give us an idea? Have you had an opportunity to do
24 teaching relating to pediatric neurology?

25 A: Yes.

DR. TREVOR RESNICK - DIRECT BY MR. GRAHAM

1 Q: All right. And have you had an opportunity to publish
2 articles and books in your field?

3 A: Yes.

4 Q: Do you have -- have you had an opportunity to examine
5 Julia B ?

6 A: Yes.

7 Q: Do you have special knowledge, training, education, and
8 experience that would enable you to give us information about
9 the anatomy of nerves, the difference between healthy and
10 injury -- and injured nerves, the location and severity of
11 nerve damage in Julia, and related matters?

12 A: Yes.

13 MR. GRAHAM: Your Honor, at this time, we'd proffer Dr.
14 Resnick as an expert in pediatric neurology with specific
15 reference to causation and damages.

16 THE COURT: Any objections?

17 MS. CRAIG: No questions, Your Honor.

18 THE COURT: All right. Thank you.

19 BY MR. GRAHAM:

20 Q: Sir, look, if you would, at Exhibit 28, pre-marked there
21 before you?

22 A: Yes.

23 Q: What is that, sir?

24 A: That's the examination that I performed on Julia in
25 January of 2015.

DR. TREVOR RESNICK - DIRECT BY MR. GRAHAM

1 Q: Thank you. Could you tell us, please --

2 MR. GRAHAM: And, Your Honor --

3 BY MR. GRAHAM:

4 Q: Is this a true and accurate copy of your report?

5 A: Yes.

6 Q: And I see the first three pages are mainly words and
7 numbers, and then the last page has some pictures. Tell us
8 about the last page?

9 A: The last page is a -- a quantitative evaluation to work
10 out the grading of Julia's injury, specifically as it relates
11 to shoulder weakness. And it is a way to classify the degree
12 of injury and it goes through -- the diagrams show what she
13 can do in terms of movement of her shoulder and gives us an
14 idea of the extent of the weakness.

15 Q: Thank you.

16 MR. GRAHAM: Your Honor, we offer Exhibit 28 at this
17 time.

18 THE COURT: Any objections?

19 MS. CRAIG: We do object based on the reasons previously
20 stated, Your Honor.

21 THE COURT: Number 28 is into evidence.

22 (WHEREUPON, Plaintiff's Exhibit Number 28, evaluation
23 report of Dr. Resnick, was admitted into evidence.)

24 BY MR. GRAHAM:

25 Q: Before we go further, Doctor, I'm going to ask -- if His

DR. TREVOR RESNICK - DIRECT BY MR. GRAHAM

1 Honor would permit, I'm going to ask you to step down and, if
2 you would, see if any -- would you prefer to -- to use this
3 blowup or the one we have on the screen to illustrate with?

4 A: I think the screen is preferable.

5 Q: Okay. I'm sorry. Take your -- you may take a seat
6 again.

7 A: Oh, okay. Do you have a pointer?

8 Q: Yes, we do.

9 A: Okay.

10 Q: Could you --

11 A: Could I get a little closer so I can see?

12 Q: Sure.

13 A: Thank you.

14 Q: Please. Please feel free to get wherever you need to be.
15 Try to keep your voice up for the court reporter, please.

16 (WHEREUPON, the witness exited the witness stand.)

17 BY MR. GRAHAM:

18 A: Does this work? Can you hear me? So I'm going to
19 attempt to make -- good morning. I'm going to attempt to make
20 you all experts on the anatomy of the brachial plexus.

21 And this is a picture that shows looking front on at the
22 chest, at the nerves that come out from the arm. This is the
23 arm and the head is going to be up over there. And these
24 yellow lines over here are the nerve bundles or the nerve
25 fibers that make up the brachial plexus.

1 So what happens is the nerve fibers come down from the
2 brain into the spinal cord and they exit little holes or
3 foramina in the neck and then they form a network of nerves
4 called the brachial plexus, and then they move further down
5 the arm. And when they move further down the arm, they then
6 go to the relevant muscles to make the arms and the shoulder
7 and the elbow and the wrist move.

8 Now, these little holes that they come out of the spinal
9 cord -- of the spinal cord have names, and they have names
10 based upon where they are. So the neck is called the cervical
11 region and the numbers refer to which hole in the cervical
12 region these nerve roots come out. So for example, this would
13 be C5, C4, C3. That means that the nerve that comes out or
14 the fibers that come out come out of the third hole in the
15 cervical region out of the neck. And all of these nerve
16 fibers then go to join together and then separate and
17 ultimately become the nerves that supply the muscles and the
18 skin of the arm.

19 Now, when you get damage to the brachial plexus -- and
20 Mr. Graham had asked me questions about the various different
21 kinds of damage that can occur in the brachial plexus. There
22 are injuries that will occur to the nerves in this region that
23 will result in weakness and/or sensory abnormalities of the
24 arm.

25 Now, what I'd like to do is I'm now going to do you a

1 drawing of what these middle nerves look like and how the
2 injuries occur and what the injuries look like.

3 Q: Okay.

4 (WHEREUPON, there was a pause in the proceedings as an
5 easel with a blank pad of paper was set up in the
6 courtroom in front of the jury, after which the
7 proceedings resumed as follows.)

8 MS. CRAIG: May I stand so I can see the drawing?

9 THE COURT: Sure.

10 MS. CRAIG: Thank you.

11 THE WITNESS: Thank you.

12 BY MR. GRAHAM:

13 A: So what I'm going to do is I'm going to take -- I'm going
14 to do a drawing of one of these individual nerve bundles and
15 magnify it and then explain to you what happens when you have
16 certain kinds of injuries.

17 So if I had to say that this was one of those yellow
18 nerve fibers, what you see is inside the nerve compartment are
19 multiple nerve fibers. It's not one nerve. It's multiple,
20 multiple nerve fibers. And these nerve fibers are encased or
21 surrounded by a membrane or a sheath that keeps it together.
22 And each one of these nerve fibers will ultimately join with a
23 muscle or skin to enable that area to function normally.

24 Now, under circumstances -- and this is not the only kind
25 of injury, but under an injury where you get stretching or

1 tearing of this complex, in other words these bundles of
2 different nerve fibers encased in a membrane, what happens is
3 one of three things.

4 One, it is stretched. The nerve fibers are still there
5 and it is stretched and it causes a transient injury. It's
6 the kind of thing that happens to you when you're driving in
7 your car and you put your elbow on the side and then you get
8 that numbness afterwards for a few minutes. That's because
9 what you're doing is you're compressing the nerve and causing
10 transient damage or swelling to those nerve fibers, but it
11 recovers pretty quickly after a few minutes when you shake
12 your arm.

13 Now, the second scenario would be a scenario, again,
14 where you have that nerve -- nerve bundle and the nerves are
15 in there, but what happens is instead of them just getting
16 transiently damaged, they actually get torn and separated, but
17 they're still within the nerve bundle. Under those
18 circumstances, you get a transient injury, but it doesn't take
19 a few seconds or a few minutes to go away because now those
20 nerves have to reconnect. And because they've been damaged,
21 it takes sometimes weeks or even months before they get better
22 and before they return to normal function.

23 And then finally, in the most severe form of injury, you
24 get the nerve bundle or the membrane, but now the membrane
25 itself is torn and the nerve fibers that are within that

1 sheath are now separated completely. So what would normally
2 happen is because these are so close together, they join
3 together and they regrow to work normally, but now because
4 they separated in space, they look for their opposing partner,
5 they try to grow, but they can't find themselves. Under those
6 circumstances where you have a complete tear or rupture of a
7 nerve, that injury is permanent.

8 Now, sometimes what happens, it may be part of the nerve
9 but not the whole nerve, which would mean that it's either a
10 significant injury or a total injury, and there are variations
11 of the two.

12 Q: So of those three -- is that -- I have a glare from my
13 angle. Okay.

14 A: One, two, three.

15 Q: Of those -- of those four drawings, which one represents
16 the most severe nerve damage?

17 A: So the most severe nerve damage would be this one because
18 it's a permanent injury where the nerves cannot join together
19 and recover.

20 Q: Okay. Now, as you drew that bottom picture, the fourth
21 from the top, is that a partial rupture or a complete rupture?

22 A: Well, this would be a partial -- a complete rupture
23 because the entire nerve is separated. Sometimes you can have
24 a situation where the nerve is ruptured, but it's ruptured on
25 one end and there may be a couple of fibers that are still

1 intact, but these fibers aren't. So that could be a partial
2 rupture, not a complete rupture.

3 Q: And how -- how does a partial rupture like what you've
4 just drawn compare in terms of severity to the other types of
5 injury you depicted?

6 A: So in -- in the mild one, which is the elbow on the car,
7 and the more severe but transient injury, the recovery is
8 complete. In the complete rupture, all the nerve fibers are
9 separated and the injury is complete from the outset with no
10 recovery. In the partial rupture, the nerves that are close
11 to each other will recover and the nerves that are further
12 apart will not recover and the injury will be permanent.

13 So the typical scenario that you see with a partial but
14 significant rupture is there may be complete weakness after
15 the injury and, over a period of months, there will be
16 recovery of some function but not all function. So those
17 functions that do not recover completely indicate those nerves
18 that are completely ruptured and will never join together
19 again.

20 Q: Thank you, sir. Now, let me ask you, if you would, to
21 grab your pointer and return to the screen?

22 A: Can I put that away?

23 Q: Thank you, Doctor. Please tell us which are the nerve
24 roots associated with the brachial plexus and, if you would,
25 give them by number?

1 A: So as you can see in this diagram, it's typical to see
2 that that's at C5, C6, C7, C8, and T1. The letter C stands
3 for cervical, which means neck, and T means thoracic, which is
4 part of your chest. Those five roots or those five holes
5 where the nerve fibers come out make up the brachial plexus
6 and are part of the nerves that go down to supply the arm.

7 Q: Now, it just got --

8 A: Oh, there they are. Thank you.

9 Q: So those are the nerves you were just talking about?

10 A: Yes.

11 Q: Thank you. Which nerves -- I'm jumping ahead a bit, but
12 based on your clinical examination of Julia sometime after she
13 was born with a limp arm and with just slight finger movement,
14 can you tell us which nerves were able to heal and which
15 nerves had not healed as of the time you first saw her?

16 A: So if -- the examination shortly after birth showed that
17 she had no movement at all in the right arm other than flicker
18 movements from her fingers. The flicker movements in her
19 fingers come from the bottom roots, C8 and T1, mostly T1. The
20 fact that she was unable to move anything at the time means
21 that there was dysfunction of C5, C6, C7, and predominantly
22 C8. That was the picture when she was born.

23 Then over a period of time, as I showed you in the last
24 diagram, she had recovery of her finger moments, her wrist
25 movements, some of her flexion and extension of the elbow, and

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1 what she was left with was predominantly weakness of shoulder
2 and some other muscles, and those muscles are supplied
3 predominantly by the upper part of the brachial plexus, which
4 is C5 and C6 and, to a lesser extent, C7. So that shows you
5 that some of those nerve fibers did recover or rejoin, but
6 there were others that were permanently injured and they
7 involved specifically those roots.

8 Q: And based on your review of the medical records and your
9 clinical examination of this child -- on how many occasions?

10 A: Twice.

11 Q: Does she have -- what type of injury does Julia have to
12 C5?

13 A: So she has a significant -- a total injury to C5, a
14 significant injury to C6, although it's not total, and a minor
15 injury to C7.

16 Q: Okay. And when you talk about injury, could you compare
17 that to the pictures you drew in terms of -- are we talking
18 about --

19 A: So she --

20 Q: -- stretch? Are we talking about rupture?

21 A: No.

22 Q: Partial rupture?

23 A: It has to be a rupture because the injury is permanent.
24 Those nerves can't find the other side. If you look at C5 and
25 what her examination shows now, she has a near complete

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1 rupture of C5, a significant rupture but with some residual
2 function in C6, and a minor rupture or a minor tearing within
3 C7.

4 Q: Thank you.

5 MR. GRAHAM: Dave, could you go -- please go back to the
6 original drawing? Thank you.

7 BY MR. GRAHAM:

8 Q: Doctor, may I -- may I borrow your pointer just a second?
9 The nerves are in here; right?

10 A: Yes.

11 Q: What is this part of the body?

12 A: That's the shoulder.

13 Q: Okay. I thought so. All right. If someone puts a force
14 on the shoulder -- you know, you talked about stretch and you
15 talked about compression. If somebody puts a compression
16 force, an impact force, on the shoulder, what does that do to
17 the nerves?

18 A: There may be a minor -- if you depress the shoulder, as
19 you can see from this diagram, you can put some stretch, but
20 it's a minor stretch on the brachial plexus. A major stretch
21 on the brachial plexus is if the shoulder stays here, but the
22 head is deviated in that direction. In other words, the angle
23 between the head and the shoulder is widened.

24 And when you -- when you widen the angle between the head
25 and the shoulder, that's when you cause maximum stretch on the

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1 brachial plexus. And if you look at the diagram, you can see
2 that most likely the -- the nerves that have the most stretch
3 are going to be the nerves in the top part of the brachial
4 plexus because stretching it this way is going to affect those
5 nerves much more than those nerves.

6 Q: So if someone were to injure a baby's nerves on the right
7 side by pulling --

8 A: That's the next diagram. It's all right, sir.

9 Q: If someone were to injure the nerves in the right side of
10 a baby's neck by pulling out and bending the head down toward
11 the baby's left shoulder, if that were to happen, which nerve
12 is most vulnerable to injury?

13 A: So again, if you stretch the head or turn the head away
14 from that shoulder toward the other shoulder, the nerve that
15 would be most vulnerable or the root that would be most
16 vulnerable would be C5 because it is the one that is most
17 vulnerable to stretch. It's the one that's going to be
18 stretched the most. The next one would be C6 and then, to a
19 lesser extent, C7, C8, and T1. And each one of them would be
20 less and less and less.

21 Q: So how unusual would it be in your experience for a baby
22 to start off with a -- with a limp arm with some finger
23 movement and have recovery to C8 and decent recovery to C7,
24 but very little recovery, if any, to C6 and C5?

25 A: Well, that's pretty typical. What happens is the -- the

1 body has a way to regenerate itself. And typically when you
2 get damage and dysfunction to the entire arm, over a period of
3 months there is healing to those nerves that have been less
4 severely damaged, which is why C8 and C7 recover either
5 completely or some -- to some extent partially, but the nerves
6 that are more severely torn, like C5 and C6, are the ones that
7 remain permanently damaged.

8 Q: Okay. And I know you've touched on permanency before,
9 but just to be clear, let me ask you, sir, do you have an
10 opinion to a reasonable degree of medical certainty as to
11 whether or not Julia's injuries, near-total ruptures to C5 and
12 C6 and a mild rupture -- mild partial rupture to C7, are
13 temporary or permanent injuries?

14 A: They are now temp -- permanent injuries.

15 Q: Okay. At what point in time were you able to determine
16 that these injuries are permanent?

17 A: So what -- what we do is -- a lot of babies who are born
18 with brachial plexus injuries recover completely. About two
19 thirds of them to three quarters of them recover completely.
20 But some of them, if the injury is more severe, will have
21 permanent injuries and it takes time to evaluate whether they
22 are going to heal completely.

23 What happened with Julia is she continued to improve
24 within that first year. She regained function of her hands,
25 her fingers, her more distal muscles.

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1 Q: Wait a minute. What do you mean by distal?

2 A: So the muscles that are involved below the elbow, and
3 what she was left with was weakness around the shoulder and to
4 some extent the elbow. That only became evident by around 2
5 to 3 years of age because at that point she had plateaued in
6 terms of her improvement. She improved, she improved, she
7 improved, and by the time she got to 2 to 3 years of age,
8 there was no further improvement and there has been no further
9 improvement since then, indicating that those remaining
10 deficits, those remaining weaknesses, are permanent.

11 Q: Thank you, sir. You may take your seat.

12 (WHEREUPON, The witness complied.)

13 BY MR. GRAHAM:

14 Q: You previously -- we previously put into evidence Exhibit
15 28. Do you still have it there handy?

16 A: Yes.

17 Q: All right. Tell the jury, please, what you learned about
18 Julia's condition when you examined her on -- was it January
19 27 of 2015?

20 A: Yes.

21 Q: All right.. Tell the jury, please, what you learned?

22 A: What I learned from her examination was that she had
23 shrinkage or atrophy of her arm because the nerves not only
24 allow you to move the muscles, they also have, like, a growth
25 hormone that they secrete that allows the muscles to grow in

1 the way they should. And also if you don't use your muscles,
2 they don't grow in the way they should.

3 So she had atrophy or shrinkage of the arm and she held
4 her arm in an unusual position as compared to her other arm
5 and she had weakness in specific muscle groups that involve C5
6 and C6 the way I showed you on the diagram. And those
7 specific muscle groups are the muscles around her shoulder,
8 which is her ability to elevate the shoulder, her ability to
9 rotate her arm in an outwards direction, and the ability to
10 turn her forearm anticlockwise. Like you're using a
11 screwdriver and, when you use a screwdriver, you rotate it in
12 a clockwise direction. She had weakness of that action. She
13 also had some mild weakness of the biceps muscle.

14 Q: Thank you. And you said you saw her a second time?

15 A: Yes.

16 Q: When was that?

17 A: A few months ago.

18 Q: And was there any change in her condition then?

19 A: No.

20 Q: All right. I believe as part of your examination you
21 were able to actually measure or -- tell us were you able to
22 measure whether she could move her arm through the normal
23 range of motions and were you able to quantify that
24 shortcoming, if any?

25 A: Yes. Well, that was part of what you asked me earlier

1 about the quantitative examination of her shoulder that tells
2 me the degrees to which she can do certain actions. And those
3 muscles that I described of the shoulder joint and the forearm
4 are the ones that were mostly affected because of the damage
5 to the C5/C6 roots.

6 Q: What is the difference between active range of motion and
7 passive range of motion?

8 A: Passive range of motion is when I take the arm and I move
9 it in the direction that it should move. And the reason I do
10 that is because I want to make sure that there's no
11 contracture. For example, if you don't use a muscle for a
12 long time, that muscle shrinks and contracts, and then even if
13 you try and move it yourself, you can't move it.

14 So if you've seen people who have had a weakness on one
15 side of their body and they hold their arm in a certain
16 position, you actually can't straighten out the arm because
17 the muscles and the tendons have contracted to the point that
18 they're in a fixed position. So we use passive range of
19 motion to see if there are any contractures where the muscles
20 and the ligaments are stuck and they cannot be moved.

21 Q: Based on your examination, did Julia have any
22 contractions?

23 A: Yes.

24 Q: Or contractures?

25 A: Yes.

1 Q: Where were they?

2 A: So she had a contracture of a muscle that allows her to
3 externally rotate her shoulder and her arm. I think it's
4 probably easier if I demonstrate that.

5 Q: Okay. Please step down, sir, if you would, and
6 demonstrate? Why don't you demonstrate all of the significant
7 limitations that you found or contractures and range of
8 motion?

9 (WHEREUPON, the witness complied.)

10 BY MR. GRAHAM:

11 A: So the first question was asked was about the
12 contractures and there were two contractures. The major one
13 is the contracture of external rotation. So if I'm standing
14 with my arms bent at the elbow and I want to reach for
15 something on one side, I rotate my shoulder out and reach for
16 it.

17 Well, she has a contracture and she has an inability to
18 move that arm out. So she has no ability to move it out and,
19 in addition to that, when I try and do it myself -- and you
20 should get it out to about 90 degrees, she can move it out
21 about that much. I can get it out about that much. She has
22 no movement.

23 Q: All right. Let me get this straight. Which one is
24 passive movement?

25 A: Passive movement is me moving it in an outwards

1 direction.

2 Q: All right.

3 A: So when I try and move her arm out or externally rotate
4 her arm out, I can move it about that much. When I ask her to
5 do it, she can't do it at all.

6 Q: And were there any other contractures you were concerned
7 about?

8 A: Yes. She also has an extension contracture. So if you
9 try and -- if you straighten your arm out, you should be able
10 to straighten your arm out so it's at that line. And when I
11 straighten her arm out, she can get it out to about that
12 amount. I think it was about 130 -- 140 degrees, because of
13 contracture of the biceps muscle.

14 Q: All right. Now, are you talking about what she can do or
15 what you can do?

16 A: That's what I can do. That's passive range of motion.

17 Q: Okay. And what can she do?

18 A: She can actually move it, but because there has been
19 weakness for a period of time, the weakness is now a mild
20 weakness, but it has resulted in a contracture of that biceps
21 tendon.

22 Q: So in terms of biceps, active and passive are about the
23 same?

24 A: Yeah. When you -- what -- when you're talking about
25 passive, you can't get it past that point. In other words,

1 you're going to hurt her because you're pulling on fibrosis.

2 So she can get it out to that point, not fully, and when you
3 try and get her to flex it, she can't flex it. She has
4 minimum movement.

5 Q: All right. Before we go on, I want to -- I want to
6 follow up on something you just said. You talked about
7 fibrosis. Fibrosis is what?

8 A: Well, when you have tearing of the nerves, the
9 surrounding structures are also torn sometimes, and it could
10 be muscles or tendons or the membrane that covers the muscles
11 in the same region. So when there is healing, you get healing
12 with a scar and that healing can also cause a contracture.

13 Q: I see. So fibrosis of muscles and tendons?

14 A: Muscle, tendons, and the nerves and the nerve sheath,
15 which is that membrane that covers the nerve fibers.

16 Q: And what does the word fibrosis mean exactly?

17 A: Fibrosis means that there is scarring, and it's called
18 fibrosis because of the tissue that accumulates in the area
19 where there's a scar. So for example, if you cut your skin,
20 you can sometimes have a scar and that's due to fibrous tissue
21 in the skin. Now, you can have the same thing in the muscles
22 or the nerves, in the heart, and various different places. In
23 the brain, too.

24 Q: What is a neuroma?

25 A: So a neuroma is -- can I use the diagrams? It's probably

1 an easier way to show it.

2 Q: Sure. The one you drew?

3 A: The one I drew.

4 Q: Okay. Let me grab it for you.

5 A: Okay. In this diagram that I showed you where there was
6 a rupture and the nerves and the nerve sheath are separating,
7 I also -- I also explained that these nerves are now trying to
8 find their opposite partner. So what they do is they grow out
9 in this direction and, if they can't find their opposite
10 partner, they form this bundle of nerve fibers. So what you
11 end up seeing is this bundle of nerve fibers, and that bundle
12 of nerve fibers is called a neuroma.

13 Q: Do you have an opinion, sir, to a reasonable degree of
14 medical certainty as to whether or not Julia has fibrosis of
15 her muscles, tendons, and sheath?

16 A: Well, we know that she has it as it relates to the
17 external rotator and we know that she has it as it relates to
18 the biceps. By inference, because of the fact that she has
19 the weakness that she has, we know that those nerves that
20 supply the muscles of C5 and C6 are completely torn.
21 Therefore, she has a neuroma in those areas.

22 Q: Okay. And I was going to ask you about neuromas. To a
23 reasonable degree of medical certainty, Julia does have
24 neuromas?

25 A: Yes.

1 Q: And if so, and which areas?

2 A: C5 and C6. I don't know about C7 because it was a milder
3 injury and there may well not be a neuroma in that area.

4 Q: All right. Let me take this away for now. You were in
5 the process -- before I jumped in, you were in the process of
6 describing some of the limitations that Julia has. Have you
7 covered all of her contractures?

8 A: I've covered all of her contractures.

9 Q: Okay.

10 A: I've shown one of the areas of weakness. There are a
11 couple of others.

12 Q: Okay. Show us, please, the other areas of what you said
13 -- what you called weakness?

14 A: So there are two ways we evaluate weakness. One is we
15 get the patient to move the muscle in a specific direction to
16 evaluate the function of that muscle, and the other way is we
17 get them to do an activity that they would normally do in
18 their daily lives and see how they function doing that
19 activity.

20 So if you look at the individual muscles around the
21 shoulder, the one action was an external rotation, which I
22 already showed you. The other is the ability to lift the arm
23 up and get it up right up here above the head. So if you
24 think about bringing it up from the side all the way up to the
25 top of your head, that is 180 degrees. You can see when I'm

1 doing it, my head stays just where it is and my arm just goes
2 straight up.

3 Now, what happened with Julia is she initially had no
4 movement and as her muscles and nerves improved, she started
5 to get some movement of what's called abduction, which is
6 moving your arm away from your side, and she's now able to get
7 it above 90 degrees, but she doesn't do it in this way. She
8 does this. (Gesturing.) So she uses what are called
9 ancillary techniques to help her get her arm above the level
10 of her shoulder.

11 The other action that she can't do is if you hold your
12 arms like this and you're doing a screwdriver and you're doing
13 it that way and that way. When you go clockwise, that's
14 called supination and when you go anti-clockwise, it's called
15 pronation. Her ability -- she doesn't have the ability to
16 supinate other than the small amount of movement.

17 Q: All right. Let me ask you about the -- you said
18 ancillary maneuvers like bending to the left to get her arm
19 above 90 degrees. How does the -- how good is -- is doing
20 like this as good as doing like this? (Gesturing.)

21 A: No. I --

22 Q: Is it as efficient as it is mechanically sound to the
23 body to do the bending to try to make your arm move?

24 A: Well, that's the only way she can get her arm up there.

25 So she's doing -- she's learned compensatory techniques to

1 allow her to get her arm up there. She can't do it in the
2 usual fashion.

3 Q: Okay. And is it as efficient to do it that way as to do
4 it the normal way with a healthy arm?

5 A: No.

6 Q: Have you covered -- well, you used the word weakness and
7 I want to -- I want to get an understanding of what you mean
8 by weakness. When I think of weakness as -- I mean obviously
9 I'm not a doctor. When I think of weakness, I think about how
10 strong your arm muscles are. Is that what you mean by
11 weakness or do you mean something else?

12 A: That's one of the things I mean by weakness, and we grade
13 weakness in a certain way so that when physicians talk, they
14 all talk the same language and we mean the same thing.

15 So there are five grades of weakness. Zero means
16 absolutely no movement, complete paralysis.

17 One means that there is a flicker of movement, but really
18 no real function of movement.

19 Two means there is movement. You can move the arm, but
20 you cannot move it against gravity. So obviously if the arm
21 is down and I ask you to move the arm, you can move it, but if
22 I say can you lift it up, there's no ability to do the action
23 against gravity.

24 Three is the ability to do it, even if it's against
25 gravity.

1 And then the last two are the most important because four
2 -- and there's 4- and 4+. Four is weak where you can move it,
3 but if you compare your ability to flex your left arm or your
4 right arm, I can overcome one and I can't overcome the other.

5 And five is normal function.

6 Q: Okay. What do you mean by overcome one but not overcome
7 the other?

8 A: You're weaker. In other words, the way I test the
9 function is I would ask the patient to flex their arms and
10 keep their arms like that and I would try to pull it out.
11 Now, if I can't pull it out at all, that would mean they had
12 normal function. At least they were much stronger than me, in
13 which case it doesn't make a difference. Or if I find I can
14 overcome that flexion much more easily than the other side, it
15 means that there's an element of weakness.

16 Q: All right. So when -- help me understand this. When
17 Julia was first born with a limp arm with a little bit of
18 finger movement, how did that original injury fit on that
19 scale?

20 A: She would have been a zero other than her finger
21 movements, which would have been a one.

22 Q: And after -- after her surgery, which we've heard about,
23 and her years of therapy, how much has she improved to?

24 A: Well, she's improved significantly, but she has
25 significant residual weaknesses, and the significant

1 weaknesses are in those muscles that I described. So she's
2 still a zero in her ability to externally rotate her arm.

3 Q: So in terms of -- I think you used the word severe.

4 Which, if any, of Julia's limitations do you consider to be
5 severe at this point?

6 A: Well, the -- the most severe is the ability to externally
7 rotate. The next in severity is her ability to get her arm
8 above her shoulder, and the next in severity -- well, that
9 would be equal, would be the ability to supinate.

10 And in order to use your hands, you have to put your hand
11 in the position that you need in order to use your fingers.

12 (Gesturing.) Now, if you want to do something with your hand
13 in this position with your fingers in this position, but you
14 can't get your fingers to that position, it doesn't matter how
15 strong your fingers are. If you can't get your hand turned in
16 an upwards direction, you can't use it properly.

17 Q: So those are -- you consider those limitations to be
18 severe?

19 A: Yes.

20 Q: And are there other limitations that you consider to be
21 less severe, maybe moderate or mild?

22 A: Yes.

23 Q: All right.

24 A: Her ability to flex and extend at the elbow --

25 Q: Right.

1 object that is above shoulder level. Essentially, her one arm
2 is weak. She can't get that arm up. So that she would have
3 great difficulty with.

4 Q: Are those going to get better?

5 A: No.

6 Q: In a child with a permanent injury whose -- whose --
7 whose permanent problems are not going to get better, is there
8 any benefit to therapy and, if so, what is it?

9 A: The therapy does not change the nerve injury. The nerve
10 injury is permanent and nothing can do anything about the
11 nerve injury. Therapy is important because it prevents
12 progression of the contractures. So if you continuously
13 stretch the muscles and also use the muscles as much as you
14 can, you will prevent further shrinkage of the muscles and you
15 will prevent the formation of contractures.

16 Q: All right. You mentioned shrinkage of the muscles. Has
17 -- tell us whether or not Julia's right arm has shrunk
18 compared to her left arm?

19 A: It has. It's about four centimeters shorter than her
20 left arm and, if you look at the muscles in her arm, you can
21 see that they're smaller than the muscles in the other arm.

22 Q: How much is -- what did you say? Four centimeters
23 shorter? How much is that?

24 A: (Gesturing.) About that much. Four. Yeah, about that
25 much.

1 Q: And they're also smaller in girth --

2 A: Right.

3 Q: -- going around the muscles?

4 A: Yes.

5 Q: Thank you. You may return your seat, please.

6 (WHEREUPON, the witness complied.)

7 BY MR. GRAHAM:

8 Q: Doctor, I believe you have there nearby what's been pre-
9 marked as Plaintiff's Exhibits 74 and 75. Do you have those?

10 A: Yes.

11 Q: All right. What is 74?

12 A: Number 74 is a dictation of the operative report from
13 2012 when she had her transfer surgery.

14 Q: That was which one again?

15 A: Her -- she had an operation.

16 Q: No. I mean -- I'm sorry. Which exhibit number?

17 A: Oh, 75.

18 Q: Number 75. Thank you.

19 A: I'm sorry.

20 Q: Please go ahead.

21 A: Okay. This -- this exhibit is the dictation report from
22 the surgery that was done in June of 2012.

23 Q: Thank you. In terms of your evaluation of this child,
24 what significance, if any, does the operative report have?

25 A: It is significant just in that with the kinds of weakness

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1 that Julia has, there is a muscle imbalance due to her
2 weakness. And what they do with the surgery is they move the
3 tendon to a different position to allow her to have more
4 effective movement.

5 Q: And was that surgery performed before or after your first
6 visit with Julia?

7 A: Before.

8 Q: So when you were describing Julia's deficits, those
9 reflected any improvements that she had from the surgery?

10 A: Yes.

11 MR. GRAHAM: Your Honor, we'd offer Plaintiff's Exhibit
12 75.

13 THE COURT: Any objections?

14 MS. CRAIG: No objection, Your Honor.

15 THE COURT: All right. 75 is in evidence.

16 (WHEREUPON, Plaintiff's Exhibit Number 75, operative
17 notes, was admitted into evidence.)

18 BY MR. GRAHAM:

19 Q: Now, please turn to Exhibit 74.

20 A: Okay.

21 Q: What is that document?

22 A: This is the electrodiagnostic report that was done in
23 February of 2012.

24 Q: What significance, if any, is this study to your
25 evaluation?

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1 A: It's a confirmatory study. It shows that the nerve
2 potentials and the muscle function are abnormal in the same
3 roots that I found on my clinical examination of Julia.

4 Q: Were there any other tests performed, diag --
5 radiographic tests, MRI, anything like that that you had a
6 chance to review?

7 A: Yes.

8 Q: All right. What effect, if any, did those have on your
9 evaluation?

10 A: None.

11 Q: Let me turn now, sir, to your causation opinions. Do you
12 have an opinion to a reasonable degree of medical certainty as
13 to the most probable cause of Julia's brachial plexus birth
14 injury?

15 A: Yes.

16 Q: What is that?

17 A: That it is a stretch injury to her brachial plexus, and
18 that stretch injury or traction injury caused tension and
19 rupture of the nerves within her brachial plexus, most
20 specifically to roots C5 and C6 and to a lesser extent C7.

21 Q: Thank you. What is the basis of that opinion?

22 A: The basis of that opinion is the history of the
23 circumstances of her birth, the nature of the injury, the
24 localization of her injury.

25 Q: Are you -- tell us whether or not you're able to rule out

1 the timing of injury being before delivery?

2 A: When you say -- well, if the injury would've occurred
3 before delivery, there are two kinds of injuries. The one is
4 remotely before delivery, which means sometimes during
5 pregnancy, and there are multiple different causes of damage
6 to the brachial plexus during pregnancy, but when those
7 injuries occur or when those abnormalities occur, you can see
8 it at birth because the arm is shrunken and abnormal at birth.
9 She didn't have that.

10 So because of that, her injury to her brachial plexus did
11 not occur before birth. It occurred during the delivery due
12 to a stretch on the brachial plexus.

13 Q: And are you able to rule out the timing of the injury
14 being after delivery?

15 A: Well, there was no event after delivery that would have
16 resulted in her having damage to the brachial plexus. It was
17 during the delivery and specifically the delivery of the head.

18 Q: So at birth, can you tell us whether or not her arm and
19 nerve damage was observable to the healthcare providers taking
20 care of her?

21 A: Yes, it was. They noted that she had no movement in her
22 right arm.

23 Q: Did the injury to Julia's nerves occur before or after
24 her head delivered?

25 A: After her head delivered.

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1 Q: And did the injury to Julia's nerves occur before or
2 after Dr. Browning put his hands on Julia's head?

3 A: It would have to be during the time that traction was
4 exerted on the head, and the only way you can get traction
5 exerted on the head by -- is by a person, which would have to
6 be the physician.

7 Q: What is the difference between axial traction and lateral
8 traction?

9 A: Axial traction is traction or pulling of the head in the
10 same plane. In other words, the head is pulled away from the
11 shoulders without deviating or moving away from the plane.
12 It's in the same direction, whereas lateral direction is
13 pulling and deviating the head away from the shoulder. And
14 it's that increase in angle that results in the stretch to the
15 brachial plexus.

16 Q: Have you seen the birth video?

17 A: Yes.

18 Q: Tell us whether or not there was -- well, tell us whether
19 or not there was traction visible on the video and, if so,
20 what type?

21 MS. CRAIG: Your Honor, we'd object, as this is a new
22 opinion that wasn't disclosed previously.

23 THE COURT: Any reply?

24 MR. GRAHAM: Your Honor, may we approach?

25 THE COURT: You may.

1 (WHEREUPON, a bench conference was held in the presence
2 of the jury but out of the hearing of the jury as
3 follows.)

4 THE COURT: Let's start here. What was the question?

5 MR. GRAHAM: The question was when you watch the video --

6 THE COURT: Uh-huh.

7 MR. GRAHAM: -- can you tell us whether there was
8 traction depicted and, if so, what type. Meaning axial or
9 lateral.

10 THE COURT: Okay.

11 MS. CRAIG: In his deposition testimony, page 67, line 7,
12 he was asked other than the report that we have marked, have
13 you given them any other opinions via email or mail that
14 indicates your opinions. His answer was no. His opinions in
15 this case are limited to his report, which is now in evidence.
16 In his report, he does not mention the video at all.

17 MR. GRAHAM: He --

18 MS. CRAIG: So this is a new opinion that was not
19 previously disclosed to us.

20 MR. GRAHAM: It -- it -- he had not seen the video at the
21 time of the deposition.

22 THE COURT: Then we don't need to go there.

23 MR. GRAHAM: Okay. I'm just going to ask Your Honor to
24 make that a consistent ruling as to their -- the defendant
25 didn't see the video at the time of his deposition.

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1 THE COURT: We're dealing with this right now.

2 MR. GRAHAM: Yes, sir. All right.

3 MS. CRAIG: Thank you, Your Honor.

4 THE COURT: Sustained.

5 (WHEREUPON, the bench conference ended and the
6 proceedings resumed as follows.)

7 BY MR. GRAHAM:

8 Q: Hypothetically, sir, if there were videographic evidence
9 of a baby being delivered with the top shoulder stuck behind
10 the mother's pubic bone, being the right shoulder, and with
11 the head being pulled out and down, would that be axial
12 traction or lateral traction?

13 A: Both.

14 Q: And please explain your answer?

15 A: Well, if you're pulling it out, that's axial traction.

16 And if you're deviating it laterally, that's lateral traction.

17 Q: Which one -- well, which one or more of those put stretch
18 on the brachial plexus nerves?

19 A: Well, the one that's --

20 MS. CRAIG: Objection, Your Honor.

21 THE COURT: Sustained.

22 MS. CRAIG: This is another -- thank you.

23 THE COURT: Sustained. Rephrase.

24 MR. GRAHAM: Okay.

25 BY MR. GRAHAM:

1 Q: When a baby is being born, if the doctor applies axial
2 traction, can you tell us whether or not that puts stretch on
3 the brachial plexus nerves?

4 MS. CRAIG: Objection, Your Honor. This is outside of
5 his report.

6 THE COURT: Come up here. You can come up here.

7 (WHEREUPON, a bench conference was held in the presence
8 of the jury but out of the hearing of the jury as
9 follows.)

10 THE COURT: You got it right the first time when you said
11 hypothetically. Ask your hypothetical questions and so forth.

12 MR. GRAHAM: Okay.

13 THE COURT: Don't go into new opinions --

14 MR. GRAHAM: Thank you.

15 THE COURT: -- outside of the report.

16 MS. CRAIG: Thank you.

17 (WHEREUPON, the bench conference ended and the
18 proceedings resumed as follows.)

19 BY MR. GRAHAM:

20 Q: Hypothetically, sir, assuming that an obstetrician were
21 to apply axial traction on a baby's head during the course of
22 a headfirst vaginal delivery, does that -- tell us whether or
23 not that would put stretch on the brachial plexus nerves?

24 A: Yes. It would put some stretch on the brachial plexus.

25 Q: Hypothetically, sir, if an obstetrician in the course of

1 managing a headfirst vaginal delivery applies lateral traction
2 to a baby's head, tell us whether or not that would put
3 stretch on the brachial plexus nerves?

4 A: Yes, it would.

5 Q: And if the top -- hypothetically, if the top shoulder
6 were the right shoulder stuck behind the mother's pubic bone
7 and if the -- if one component of the traction being applied
8 by the doctor was downward traction, which nerves would be
9 subject to the stretch, the ones on the left side or the ones
10 on the right side?

11 A: The ones on the right side.

12 Q: Hypothetically, if a doctor applies both axial traction
13 and lateral traction to a baby's head, which is the more
14 injurious force, the axial component or the lateral component?

15 A: The lateral component.

16 Q: Sir, I want to ask you a question about what the word
17 excessive means to those in your field as opposed to those in
18 another field. What does excessive traction mean to you as a
19 pediatric neurologist?

20 A: Sufficient enough to cause an injury.

21 Q: And we've heard reference earlier in the trial to
22 excessive traction in another sense, meaning more than is
23 allowed by the obstetrical standards of care.

24 A: I wouldn't have an opinion about that.

25 Q: Okay. Putting aside any concept of excessive traction in

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1 obstetrics, let me ask you this, sir, as a pediatric
2 neurologist, tell us whether or not the traction applied to
3 baby Julia by Dr. Browning was or was not excessive traction?

4 MS. CRAIG: Your Honor, again, this is outside of his
5 report and his previous deposition testimony. It's a new
6 opinion.

7 THE COURT: Sustained.

8 MR. GRAHAM: Your Honor, may I ask a hypothetical
9 question?

10 THE COURT: You may.

11 MR. GRAHAM: Thank you.

12 BY MR. GRAHAM:

13 Q: Sir, hypothetically, if a baby were born in a headfirst
14 vaginal delivery with the right shoulder stuck behind the
15 mama's pubic bone and the obstetrician applied both axial
16 traction and downward traction or lateral traction, as you
17 said, to the baby's head and if the baby were born with an arm
18 that hung limp except for finger movement and after a couple
19 of years the baby had permanent significant partial ruptures
20 of C5 and C6 with a less severe rupture of C7, can you tell
21 us, sir, assuming those hypothetical facts, did the doctor
22 apply excessive traction?

23 MS. CRAIG: Your Honor, I would again object. This
24 doctor has said he has no opinion in that regard. Clearly,
25 this is an obstetrical opinion and, of course, that was a very

1 leading question.

2 MR. GRAHAM: He has no opinion as to excessive in the
3 obstetrical sense, but he has it in the pediatric neurological
4 sense.

5 MS. CRAIG: Your Honor, I believe that is not what his
6 testimony was. He said -- I think he said he didn't have an
7 opinion and that's consistent with his deposition.

8 THE COURT: All right. Come on up.

9 (WHEREUPON, a bench conference was held in the presence
10 of the jury but out of the hearing of the jury as
11 follows.)

12 THE COURT: We'll get to the objection in a second.

13 MS. CRAIG: Yes, sir.

14 THE COURT: The jury gets it. They've heard enough to
15 where they know, I know, everybody knows --

16 MR. GRAHAM: Okay.

17 THE COURT: -- what you're trying to say. So -- all
18 right. What was your question? If you're going ask it again.

19 MR. GRAHAM: It was, you know, based on the hypothetical
20 facts --

21 THE COURT: Uh-huh.

22 MR. GRAHAM: -- tell us whether or not the traction was
23 excessive.

24 THE COURT: Under what circumstances?

25 MR. GRAHAM: In a pediatric neurology sense.

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1 THE COURT: In this case?

2 MR. GRAHAM: Well, it was a hypothetical question that
3 matched the facts of this case.

4 THE COURT: Let me hear from you.

5 MS. CRAIG: So that is a new opinion that was not
6 included in --

7 THE COURT: I think so too.

8 MS. CRAIG: -- his deposition.

9 THE COURT: You can rephrase it or go ahead and move on.
10 The jury knows what's going on.

11 MR. GRAHAM: All right.

12 THE COURT: I promise you.

13 (WHEREUPON, the bench conference ended and the
14 proceedings resumed as follows.)

15 BY MR. GRAHAM:

16 Q: Doctor, I'm going to -- I'm going to skip over some other
17 questions in the interest of time and just ask you, sir, to
18 tell us have you reached a conclusion to a reasonable degree
19 of medical certainty as to the cause of Julia B 's brachial
20 plexus nerve damage?

21 A: Yes.

22 Q: What is it?

23 A: It is a stretch injury or a traction injury to Julia's
24 brachial plexus that was caused by stretching or traction on
25 the nerves due to lateral traction of the head away from the

1 shoulder.

2 Q: Have you answered all of my questions to at least a
3 reasonable degree of medical certainty?

4 A: Yes.

5 Q: Do I have to pay you for your work?

6 A: Yes.

7 Q: Are you expensive?

8 A: Yes.

9 MR. GRAHAM: Please answer any questions Ms. Craig may
10 have.

11 THE COURT: All right. Cross?

12 MS. CRAIG: Thank you, Your Honor. May it please the
13 Court.

14 THE COURT: Sure.

15 CROSS-EXAMINATION

16 BY MS. CRAIG:

17 Q: Just give me one second?

18 A: Okay.

19 Q: All right. Dr. Resnick, we have seen each other before,
20 have we not?

21 A: We have.

22 Q: Actually, here in Florence you testified at another trial
23 for Mr. Graham; correct?

24 A: Yes.

25 Q: And in that case, you had the same opinions that you have

1 in this case; is that correct?

2 A: Correct.

3 Q: You were -- we were defending a doctor and it was your
4 opinion that the doctor used excessive traction in that case.
5 Do you recall that?

6 A: I recall that the traction was sufficient to cause damage
7 to the brachial plexus.

8 Q: Right. It was the same opinion; correct?

9 A: Well, you asked the question differently. I am answering
10 it in a way accurately.

11 Q: Okay. I'm sorry. Did you have the same opinion in the
12 other trial that you represented-- or you were an expert for
13 Mr. Graham here in Florence --

14 A: Yes.

15 Q: -- South Carolina?

16 A: Yes, I did.

17 Q: And actually, you've had the same opinion in another case
18 for Mr. Graham, but that one was in Greenville, South
19 Carolina, where you were suing another doctor; correct?

20 A: Yes.

21 Q: Same opinions; right?

22 A: Yes.

23 Q: Okay. And in both of those cases, you did a
24 demonstration with a child during the -- the actual trial;
25 correct?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 A: Yes.

2 Q: And so in those other cases, you did a demonstration
3 where the child came down in front of the jury and you
4 actually showed the -- how the child's arm could move and you
5 did a demonstration; right?

6 A: Correct.

7 Q: But in this case, you did that demonstration; correct?

8 A: Correct.

9 Q: Now, I believe you testified that Julia must use her
10 axillary muscles to get her arm up; is that correct?

11 A: Correct.

12 Q: Okay. I'd like to show you a picture from December of
13 2015, a cute picture of the Byrd family and, if you could,
14 tell me where Julia's arm is in that picture?

15 A: It's up.

16 Q: Okay.

17 MS. CRAIG: Your Honor, we would offer this into evidence
18 as the next defense exhibit.

19 THE COURT: Any objections?

20 MR. GRAHAM: Let me see it. Are there any other
21 pictures?

22 MS. CRAIG: No, I think that's it.

23 MR. GRAHAM: Okay. No objection.

24 MS. CRAIG: Thank you.

25 THE COURT: All right. What number would that be?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 THE COURT REPORTER: Number 1.

2 THE COURT: Number 1.

3 MS. CRAIG: Number 1. Thank you.

4 THE COURT: All right. Defense Number 1 into evidence
5 without objection.

6 (WHEREUPON, Defendant's Exhibit Number 1, a photograph,
7 was admitted into evidence.)

8 MS. CRAIG: Your Honor, may I publish this to the jury?

9 THE COURT: You may.

10 MS. CRAIG: Thank you.

11 BY MS. CRAIG:

12 Q: Let's follow up on those questions, the last questions
13 that Mr. Graham was asking you. And you were asked a series
14 of questions about traction; correct?

15 A: Yes.

16 Q: Now, sir, you're not representing you deliver babies;
17 correct?

18 A: Correct.

19 Q: And you can't say how much traction is used to deliver a
20 baby; correct?

21 A: Correct.

22 Q: And that's not a hypothetical question. You can't say,
23 as a pediatric neurologist, the appropriate amount of traction
24 that should be used to deliver a baby; true?

25 A: True.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 Q: And you can't quantify the amount of traction that can
2 cause an injury; is that right?

3 A: Correct.

4 Q: That area would be outside of your area of expertise?

5 A: Correct.

6 Q: You would defer to an obstetrician; correct?

7 A: Correct.

8 Q: So you're not providing any testimony here in this
9 courtroom regarding the manner in which Dr. Browning delivered
10 Julia?

11 A: Correct.

12 Q: All right. And so just to be clear, you're not here to
13 testify that Dr. Browning breached the standard of care in any
14 way; is that true?

15 A: True.

16 Q: And you have no criticisms of Dr. Browning?

17 A: Correct.

18 Q: Despite all of those hypothetical questions that you were
19 just asked, you have no criticisms of Dr. Browning; is that
20 right?

21 A: Correct.

22 Q: Now, sir, you have been supplementing your income as a
23 paid expert in cases like this for quite a while; is that
24 right?

25 A: Yes.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

- 1 Q: And I think -- what? You told me last time you've done
2 medical-legal cases for about what? Twenty years?
- 3 A: Yes.
- 4 Q: And 15 percent of your income comes from testifying in
5 cases like this; true?
- 6 A: True.
- 7 Q: And you've done a number of cases for Mr. Graham, not
8 just the one here in Florence and the one in Greenville we
9 previously talked about; correct?
- 10 A: Correct.
- 11 Q: Now, let's see. You've testified in Florida; correct?
- 12 A: In connection with any cases?
- 13 Q: Yes, sir.
- 14 A: Yes.
- 15 Q: We're just talking about --
- 16 A: Yes.
- 17 Q: -- your litigation experience.
- 18 A: I just want to be clear.
- 19 Q: Thank you.
- 20 A: Yes.
- 21 Q: Your litigation experience, sir.
- 22 A: Yes.
- 23 Q: All right. So your litigation experience includes
24 testifying in Florida?
- 25 A: Yes.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

- 1 Q: Okay. And let's see. Georgia?
- 2 A: Yes.
- 3 Q: New York?
- 4 A: Yes.
- 5 Q: Massachusetts?
- 6 A: Yes.
- 7 Q: Alaska?
- 8 A: Yes.
- 9 Q: Illinois?
- 10 A: Yes.
- 11 Q: Indiana?
- 12 A: Yes.
- 13 Q: And what other states?
- 14 A: I cannot think offhand now.
- 15 Q: Sir?
- 16 A: I cannot think offhand.
- 17 Q: There are more, aren't there?
- 18 A: There may be.
- 19 Q: Okay. I believe you've testified previously that it's
- 20 been over ten different states?
- 21 A: Yes.
- 22 Q: Is that fair?
- 23 A: That's fair.
- 24 Q: Now, let's talk about your relationship with Mr. Graham.
- 25 A: Yes.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 Q: We know that you've done 10 to 15 examinations for Mr. --
2 Mr. Graham's clients down in Miami; is that right?

3 A: Correct.

4 Q: And I think about right now you have eight active cases
5 going for Mr. Graham?

6 A: I don't recall if that's the number, but that sounds
7 somewhere about right.

8 Q: Okay. All of those are shoulder dystocia cases where
9 you're saying that there was excessive traction by the doctor;
10 correct?

11 A: Correct.

12 Q: Now, in the trial in Greenville, of course, you were
13 hired by Mr. Graham; correct?

14 A: Correct.

15 Q: And the child there -- the injury you alleged was -- or
16 you stated it was excessive traction during the delivery;
17 true?

18 A: I don't remember, but that would be consistent.

19 Q: That's what you're saying in this case; right, sir?

20 A: Again, the way I answered it was traction sufficient to
21 cause damage to the brachial plexus.

22 Q: Okay. And right here in Florence, I think it was
23 actually a year ago this month, May 2015, that Florence doctor
24 -- you said that he used excessive traction in a delivery;
25 correct?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

- 1 A: Same answer as I just gave.
- 2 Q: Is that correct, sir?
- 3 A: Same answer as I just gave.
- 4 Q: Okay. I'm sorry. What was that?
- 5 A: I said traction sufficient to cause a brachial plexus
- 6 injury.
- 7 Q: Okay. And that's your opinion in this case; true?
- 8 A: Correct.
- 9 Q: Now, all of these cases where you've testified for Mr.
- 10 Graham, all of those involved the medical emergency of
- 11 shoulder dystocia; correct?
- 12 A: Correct.
- 13 Q: Now, in fact, you've never testified in one of Mr.
- 14 Graham's cases that something other than traction caused the
- 15 brachial plexus injury; is that right?
- 16 A: That's correct.
- 17 Q: All of those cases, it's always traction that caused the
- 18 brachial plexus injury; true?
- 19 A: Correct.
- 20 Q: But, sir, don't you agree that there can be other causes
- 21 for brachial plexus injury other than traction during the
- 22 birthing process?
- 23 A: True. And I've testified in those cases.
- 24 Q: Okay. And in fact, I believe you just testified in
- 25 response to Mr. Graham's questions that compression can cause

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 a brachial plexus injury. Did I state that correctly?

2 A: Yes.

3 Q: And a compression injury is different from an injury from
4 excessive traction? Those are two different things?

5 A: Correct. Two different mechanisms.

6 Q: Okay. Thank you. And even in your own practice, you
7 have seen a child where a brachial plexus injury occurred due
8 to a compression injury?

9 A: Yes.

10 Q: That happens?

11 A: Yes.

12 Q: So I believe we've gone through a little bit of your
13 report and we're going to get into a little bit more detail in
14 that. Your report that you created in this case -- Mr. Graham
15 asked you to create that report; is that true?

16 A: True.

17 Q: So the examination that you just talked about, that was
18 not for purposes of providing treatment to Julia; is that
19 correct?

20 A: Correct.

21 Q: It was for purposes of this litigation; right?

22 A: Correct.

23 Q: And you know there are a lot of South Carolina doctors
24 that have seen and provided treatment to Julia? Do you know
25 about that?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

- 1 A: I do.
- 2 Q: And you've probably looked at their records?
- 3 A: I have.
- 4 Q: So in this case, you are aware that Dr. Grossman, who was
- 5 actually up on the -- on the video screen, that he is also an
- 6 expert witness in this case; is that correct?
- 7 A: Yes.
- 8 Q: And you know Dr. Grossman?
- 9 A: I do.
- 10 Q: I believe you refer patients to Dr. Grossman?
- 11 A: I have.
- 12 Q: And you've actually worked on many cases with Dr.
- 13 Grossman where he's an expert and you're an expert for Mr.
- 14 Graham; is that correct?
- 15 A: Correct.
- 16 Q: Same thing for Mr. Forman? You, Mr. Forman, and Dr.
- 17 Grossman have all served as experts together on multiple
- 18 shoulder dystocia cases for Mr. Graham where the allegation is
- 19 that the doctor used excessive traction; is that true?
- 20 A: No.
- 21 Q: That is not true?
- 22 A: That is not true.
- 23 Q: You don't understand that Dr. Grossman in this case said
- 24 that there was too much traction?
- 25 A: No. That's not the question you asked.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 Q: Well --

2 A: But can I answer the question you asked?

3 Q: You may, but tell me did Dr. Grossman --

4 MR. GRAHAM: Your Honor, excuse me. May he answer the
5 question she asked?

6 THE COURT: That's fine.

7 BY MS. CRAIG:

8 A: Okay. The question you asked me, the last question --

9 Q: Yes, sir.

10 A: Was that I have served on multiple cases with Mr. Forman
11 and I only recall one case or two cases that I have ever seen
12 Dr. Forman.

13 Q: Oh, thank you for the clarification. Okay.

14 A: Well, that was the question you asked me and I'm just
15 answering the question you asked me.

16 Q: Okay. Well, let's -- let's go -- let's go back a little
17 bit.

18 A: Yes.

19 Q: So the one here in Florence in May of 2015, you, Mr.
20 Forman, and Dr. Grossman all were experts in that case;
21 correct?

22 A: Correct.

23 Q: Okay. And then the Greenville case, the other one here
24 in South Carolina where you testified, you know that Dr.
25 Grossman and Mr. Forman were also experts in that case?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 MR. GRAHAM: Objection, Your Honor.

2 THE COURT: Overruled.

3 MR. GRAHAM: May we approach?

4 THE COURT: You may.

5 (WHEREUPON, a bench conference was held in the presence
6 of the jury but out of the hearing of the jury as
7 follows.)

8 MR. GRAHAM: I will state to Your Honor as an officer of
9 the Court that that is not true. She's --

10 THE COURT: It's a question. He can answer it and
11 explain it.

12 MR. GRAHAM: He doesn't -- well, I don't know how he
13 knows.

14 THE COURT: Okay. That's fine.

15 (WHEREUPON, the bench conference ended and the
16 proceedings resumed as follows.)

17 BY MS. CRAIG:

18 Q: So, Dr. Resnick, we've already established the one here
19 in Florence, the one in Greenville?

20 A: Yes.

21 Q: Were you aware that Dr. Grossman and Mr. Forman were also
22 experts for Mr. Graham in that case?

23 A: Yes.

24 Q: Okay. So you and Dr. Grossman and Mr. Forman have all
25 served together as experts on at least two cases?

- 1 A: Yes.
- 2 Q: Other than this one?
- 3 A: Correct.
- 4 Q: For Mr. Graham?
- 5 A: Oh, yes.
- 6 Q: Okay. But you and Dr. Grossman have served on many more
7 together?
- 8 A: Correct.
- 9 Q: Okay. All right. You just only remember or you can only
10 recall the other two and this one with Mr. Forman?
- 11 A: That's correct.
- 12 Q: Okay. Thank you. So Mr. Graham paid you I think \$10,000
13 for testifying in that trial in Greenville; is that right?
- 14 A: I think it was seven and a half for testifying.
- 15 Q: Okay. And then the one in Florence was actually about
16 \$10,000; right?
- 17 A: Again, seven and a half for testifying. There may have
18 been additional charges.
- 19 Q: Okay. Yes, sir. The one in Greenville or the one in
20 Florence in May of 2015?
- 21 A: I don't -- I don't remember.
- 22 Q: Okay. So somewhere between 7,500 and \$10,000?
- 23 A: Correct.
- 24 Q: Okay. And in this case, you've charged or you will
25 charge Mr. Graham more than \$10,000; is that right?

- 1 A: No.
- 2 Q: How much money are you going to charge Mr. Graham for
3 this case?
- 4 A: Seven and a half thousand.
- 5 Q: You have a flat rate with him and a flat fee agreement
6 with him?
- 7 A: No. It's seven and a half for testimony at trial and any
8 other review or whatever the case may be will be a separate
9 charge.
- 10 Q: Okay. And so it's your testimony that your total bill
11 for Mr. Graham for your work in this case is going to be about
12 \$7,500?
- 13 A: No. I didn't say that.
- 14 Q: Okay. Tell me -- tell me -- tell me what --
- 15 A: I said 7,500 for testimony at trial.
- 16 Q: Yes, sir.
- 17 A: And any other additional charges for review or meetings
18 will be charged separately.
- 19 Q: Okay.
- 20 A: I don't know what that number is going to be yet.
- 21 Q: Okay. So you -- you don't know how much you are going to
22 charge Mr. Graham? I'm just trying to get a total amount for
23 this case.
- 24 A: Well, I'm trying to explain it to you. I'm saying to you
25 it's 7,500 for testimony at trial.

1 Q: Right.

2 A: And any other additional charges for review will be added
3 to that. Now, that could end up being eight -- eight and a
4 half -- nine. I don't know yet.

5 Q: Okay. And so have you already billed Mr. Graham \$7,500
6 in this case?

7 A: No, I have not.

8 Q: Okay. But you plan to after --

9 A: Yes, I do.

10 Q: Now, I believe you charge \$450 an hour when you are
11 reviewing the medical records?

12 A: Correct.

13 Q: That's on top of the 7,500?

14 A: That's correct.

15 Q: Did you also charge for that evaluation of Julia that you
16 did for Mr. Graham?

17 A: Yes, I did.

18 Q: And I think that was what? About \$800?

19 A: Correct.

20 Q: And are you aware that Dr. Grossman charges \$20,000 a day
21 --

22 MR. GRAHAM: Objection, Your Honor.

23 Q: -- when he comes --

24 THE COURT: Overruled. Go ahead.

25 BY MS. CRAIG:

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

- 1 Q: Are you aware that Dr. Grossman -- when he comes to
2 testify at trial like you're doing today, he charges Mr.
3 Graham \$20,000 a day?
- 4 A: No, I'm not aware of that.
- 5 Q: All right. Let's go through your report. Do you still
6 have it close to you there?
- 7 A: Give me one second.
- 8 Q: Sure.
- 9 A: I've got it.
- 10 Q: All right. Again, this report that you have you -- you
11 did this examination at Mr. Graham's request; true?
- 12 A: Correct.
- 13 Q: The Court didn't ask you to do this examination?
- 14 A: Correct.
- 15 Q: Because you've labeled it an independent medical
16 examination; is that right?
- 17 A: Correct.
- 18 Q: But we didn't ask you to do it?
- 19 A: No.
- 20 Q: Okay. And Mr. and Mrs. Byrd didn't call you and ask you
21 to conduct this examination?
- 22 A: No, they did not.
- 23 Q: I believe Mr. Graham's office made all of the
24 arrangements for you to see this child down in Miami; right?
- 25 A: He did.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 Q: And he paid you for it?

2 A: Correct.

3 Q: Now, when you finished this report, you sent it to Mr.
4 Graham; right?

5 A: I did.

6 Q: You haven't sent this report to any of the doctors who
7 are actually providing care and treatment to Julia;

8 A: Correct.

9 Q: And I believe -- before you did the report, did you speak
10 with any of Julia's treating doctors?

11 A: No.

12 Q: So after this examination -- the date was January 27,
13 2015 -- did you schedule any follow-up visits?

14 A: No.

15 Q: And did you provide a treatment plan for Julia?

16 A: No.

17 Q: Did you provide any prescriptions for therapy?

18 A: No.

19 Q: How about any medications? Did you prescribe
20 medications?

21 A: No.

22 Q: So your sole purpose in creating this report was for
23 purposes of this lawsuit; true?

24 A: Correct.

25 Q: And I believe that it took about an hour?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 A: To do the examination, yes.

2 Q: Okay. In looking at your report, let's start under the
3 medical history.

4 A: Yes.

5 Q: Okay. And under the medical history, you've documented
6 that Ms. Byrd recalls that her legs were held up in a flexed
7 position and the nurse exerted pressure on her abdomen. Is
8 that what your report says?

9 A: Correct.

10 Q: And you understand that having your legs up in the flexed
11 position, that's called McRoberts; true?

12 A: Yes.

13 Q: And you also understand that having the nurse exert
14 pressure on the abdomen is describing suprapubic pressure?

15 A: Yes.

16 Q: So this was reported to you by Mrs. Byrd?

17 A: Correct.

18 Q: And so it's not in dispute that McRoberts and suprapubic
19 pressure were performed in this case based upon your
20 understanding?

21 MR. GRAHAM: Objection, Your Honor.

22 THE COURT: Overruled.

23 BY MS. CRAIG:

24 A: Correct.

25 Q: I'm sorry. Correct?

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 A: Correct.

2 Q: Okay. Thank you. So you understand that McRoberts and
3 suprapubic pressure -- that those are appropriate maneuvers
4 that a doctor should do when a baby's shoulder is stuck under
5 the mama's pubic bone?

6 MR. GRAHAM: Objection, Your Honor. May we approach?

7 THE COURT: Sure.

8 (WHEREUPON, a bench conference was held in the presence
9 of the jury but out of the hearing of the jury as
10 follows.)

11 MR. GRAHAM: She established he's not an OB expert and
12 now she's asking him all these OB questions..

13 MS. CRAIG: It's in his report and so his expert
14 testified that there was no suprapubic pressure and so in his
15 report he documents there was suprapubic pressure.

16 MR. GRAHAM: No.

17 MS. CRAIG: And so that's why --

18 MR. GRAHAM: Abdominal pressure.

19 THE COURT: I see where you're going.

20 MS. CRAIG: Yes, sir.

21 THE COURT: Can I see the report?

22 MS. CRAIG: Yes, sir.

23 (WHEREUPON, there was a pause in the bench conference,
24 after which the bench conference continued as follows.)

25 MS. CRAIG: He says Ms. Byrd recalls that her legs were

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 held up in a flexed position and the nurse exerted pressure on
2 her abdomen. That's why I asked him if that was suprapubic
3 pressure. He said yes.

4 MR. GRAHAM: He's not an obstetrician.

5 MS. CRAIG: And because Dr. Pliskow said there was no
6 suprapubic pressure.

7 THE COURT: I tend to agree with the plaintiff in this
8 regard. He is not an obstetrician. He didn't say what you
9 said he said. He said what the plaintiff said he said.

10 MS. CRAIG: I believe he testified that it was
11 suprapubic. That's what was described. Can I ask that again?

12 THE COURT: What's in your report?

13 MS. CRAIG: Sir?

14 THE COURT: What's in your report? Just that they had
15 pressed on the abdomen?

16 MS. CRAIG: He did not -- yes, sir. He didn't use the
17 word suprapubic in the report, but that's -- I asked him
18 before the question he objected to and he said yes.

19 MR. GRAHAM: I objected because it's an obstetrical
20 question and you overruled me, but I'm not sure you understood
21 what we --

22 THE COURT: I'll go with it in reference to the report
23 itself. Ask him to look at his report and go from there.

24 MS. CRAIG: Okay. Thank you.

25 (WHEREUPON, the bench conference ended and the

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 proceedings resumed as follows.)

2 BY MR. CRAIG:

3 Q: So, Doctor?

4 A: Yes.

5 Q: If you will look at your report, I was asking you about
6 McRoberts and suprapubic pressure.

7 A: Yes.

8 Q: Let's just read exactly what the medical -- what you've
9 documented in the medical history. It said Mrs. Byrd recalls
10 that her legs were held up in a flexed position and a nurse
11 exerted pressure on her abdomen; is that correct?

12 A: Correct.

13 Q: And I believe you told us that you understand that that
14 is McRoberts and suprapubic pressure; is that true?

15 A: Correct.

16 Q: Okay. Thank you. So now let's move into the
17 developmental history. That's the second section of your
18 report.

19 A: Okay.

20 Q: And I believe under the developmental history you state
21 that Julia's language is appropriate; true?

22 A: Correct.

23 Q: And her gross motor development outside of her right arm
24 was appropriate?

25 A: Yes.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 Q: And she's medically healthy; correct?

2 A: Correct.

3 Q: And then moving on to your neurologic examination -- and
4 that's on the second page of your report -- you have
5 documented that Julia was alert and interactive?

6 A: Yes.

7 Q: And that her expressive language was normal?

8 A: Yes.

9 Q: And it also says that the social interaction and
10 comprehension were age-appropriate?

11 A: Correct.

12 Q: Okay. And I also believe that you have documented that
13 Julia was not in any pain?

14 A: Yes.

15 Q: Okay. Thank you. We're finished with your report, sir.

16 A: All right. Okay.

17 Q: Let's talk about therapy a little bit. Would you agree
18 that it's important for a child with Julia's injury to receive
19 therapy as early as possible?

20 A: Yes.

21 Q: So is it -- was it appropriate for Dr. Browning to call
22 Mrs. Byrd shortly after the delivery and encourage her to take
23 her child for physical therapy?

24 A: Yes.

25 Q: And I believe you're not giving any opinions today on

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 what type of future care that Julia will need; is that right?

2 A: That's right.

3 Q: Now, is it true that a brachial plexus injury can occur
4 in the absence of medical negligence?

5 A: Yes.

6 Q: And so what I mean when I say that the injury can occur
7 in the absence of medical negligence is that a brachial plexus
8 injury can occur and it doesn't always mean that a doctor was
9 negligent; is that true?

10 A: Correct.

11 Q: And just because a brachial plexus injury occurred does
12 not always mean that somebody is at fault?

13 A: Correct.

14 Q: And I believe we already talked about this; so I won't go
15 into it, but there are other causes of brachial plexus injury
16 other than traction?

17 A: Correct.

18 Q: And I believe a palsy can develop prior to birth and not
19 be due to traction; true?

20 A: Correct.

21 Q: Now, in this case, you have testified that -- with Mr.
22 Graham that the injury occurred after the head was delivered;
23 is that true?

24 A: Correct.

25 Q: Now, sir, I just want to make sure that you understand

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 I'm not asking a hypothetical question. Okay?

2 A: Yes.

3 Q: And so my question is based upon your understanding and
4 description of the causes of these types of injuries, are you
5 able to tell us whether it would be more likely to occur or
6 less likely to occur before or after the head delivers? Is
7 that --

8 MR. GRAHAM: Your Honor, objection. May we inquire
9 whether the question is addressed to brachial plexus birth
10 injuries generally or this case in particular?

11 THE COURT: Why don't you just make your question a
12 little more specific?

13 MS. CRAIG: Yes, sir.

14 THE COURT: We'll see where it goes.

15 BY MS. CRAIG:

16 Q: Do you remember when Mr. Graham was asking you questions
17 about whether or not the brachial plexus injury -- whether
18 these types of injuries happen -- are more likely or less
19 likely to occur before or after the head delivers? Do you
20 recall that question?

21 A: Not specifically. When you say these types of injuries,
22 it requires more than one potential answer. If you say a
23 specific circumstance, then it may result in one specific
24 answer.

25 Q: Okay.

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1 A: So if you are specific with your question, I can try and
2 give you a specific answer.

3 Q: Okay. Let me -- let me give it a shot, Doctor. All
4 right. So my question is that, in these types of injuries,
5 are you able to tell us whether it would be more likely to
6 occur or less likely to occur before or after the head
7 delivers?

8 MR. GRAHAM: Objection, Your Honor. She's still
9 ambiguous about these injuries. What are --

10 MS. CRAIG: Your Honor, this is straight out of a
11 transcript.

12 MR. GRAHAM: But it's not responsive to the doctor's
13 request for clarification.

14 THE COURT: He can answer it when -- if it's not clear to
15 him, he can answer it.

16 THE WITNESS: Okay.

17 MS. CRAIG: Yes, sir.

18 BY MS. CRAIG:

19 A: So if -- if I had to take out the first part of your
20 question, which would be these kinds of injuries, just because
21 I'm not exactly sure without elaboration what that means, if
22 you mean specifically the circumstance where you have shoulder
23 dystocia and traction on the head, then the answer would be
24 that it's due to traction on the head resulting in -- in
25 stretching and tearing of the nerves.

DR. TREVOR RESNICK - CROSS BY MS. CRAIG

1 Q: Okay.

2 MS. CRAIG: Your Honor, may I provide Dr. Resnick with a
3 copy of his testimony?

4 THE COURT: You may.

5 MS. CRAIG: Thank you.

6 BY MS. CRAIG:

7 Q: So, Dr. Resnick, I'm going to --

8 MR. GRAHAM: Your Honor, may we approach?

9 (WHEREUPON, a bench conference was held in the presence
10 of the jury but out of the hearing of the jury as
11 follows.)

12 MR. GRAHAM: Your Honor, I'm not worried about where this
13 is going, but I am worried about opening the door to the prior
14 trial. I don't think this is deposition testimony. I think
15 it's prior trial testimony.

16 THE COURT: I'll tell you what. We can take a little
17 break and you can explain that to your witness. Do you have a
18 problem with that?

19 MS. CRAIG: No, sir.

20 MR. GRAHAM: I mean -- I mean if you -- if you say that
21 you can be impeached with prior trial testimony --

22 THE COURT: Deposition testimony is where you're going?

23 MS. CRAIG: This is trial testimony.

24 THE COURT: Trial testimony?

25 MS. CRAIG: Yes, sir.

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1 MR. GRAHAM: So --

2 MS. CRAIG: I was going to rephrase it very carefully.

3 THE COURT: Why don't we give the jury a break and let's
4 explain to him that he's not to mention the prior trial?

5 MR. GRAHAM: He's not -- I'm not worried about that. I'm
6 just worried about whether Your Honor considers it proper to
7 impeach with prior trial testimony since you said it's all
8 erased. If it is, that's fine. I just need to know going
9 forward.

10 THE COURT: How do you feel about that? Obviously, you
11 don't have any problem with it?

12 MS. CRAIG: Yeah. I mean he's got -- he was under oath
13 and he's just said one thing now and then a different thing
14 then.

15 MR. GRAHAM: Just as long as it's consistent because I
16 want to do the same.

17 THE COURT: Okay.

18 (WHEREUPON, Mr. Graham exited the bench conference and
19 the bench conference continued as follows.)

20 MS. CRAIG: You know, I can -- if I could just finish
21 this answer, I'm not going to do it so that it elicits any
22 other question.

23 THE COURT: Why don't you call him up and we'll talk
24 about it?

25 MS. CRAIG: Sir?

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1 asked in this -- in this trial but just not say it was in this
2 trial? I mean not in -- it's not trial testimony.

3 THE COURT: Then you cannot mention what the prior trial
4 --

5 MS. CRAIG: I'm not going to impeach him.

6 MR. GRAHAM: All right. That's fine.

7 MS. CRAIG: I'm going to see if he's truthful.

8 THE COURT: Okay. That's fine.

9 MS. CRAIG: All right. Thank you.

10 THE COURT: All right.

11 (WHEREUPON, the bench conference ended and the
12 proceedings resumed as follows.)

13 BY MS. CRAIG:

14 Q: All right. So, Dr. Resnick, is it a true or untrue
15 statement that you don't know that in these types of injuries
16 that you can tell whether or not it is more likely to occur or
17 less likely to occur before or after the head delivers? Is it
18 a true statement that you don't know? That's my question.

19 A: Yes. If you use the statement these kinds of injuries,
20 which is more general, I don't know.

21 Q: Thank you, sir. That's all --

22 A: That's fine.

23 Q: -- I wanted to know.

24 A: That's fine.

25 MS. CRAIG: Your Honor, that was my question. Would you

1 like me to continue?

2 THE COURT: Yes. Continue.

3 MS. CRAIG: All right.

4 BY MS. CRAIG:

5 Q: Okay. So in this case, I believe you would defer to an
6 obstetrician as to the actual mechanism of Julia's injury; is
7 that right?

8 A: No.

9 Q: You would not agree to that?

10 A: No. The mechanism of injury, which is the stretch
11 injury, is within my area of expertise. So if you're asking
12 about mechanism in that way, then I wouldn't defer.

13 Q: Okay. Is it a true statement or not a true statement
14 that you would defer to an obstetrician as to the actual
15 mechanism of the injury? Is that a true statement?

16 A: I don't know. It depends what you mean by mechanism. If
17 by mechanism you're talking about the degree of traction, then
18 I would defer. If you're talking about the fact that it is
19 traction, I wouldn't defer.

20 Q: Okay. Thank you. So with that qualification, there are
21 certain circumstances where you were -- would defer to an
22 obstetrician and perhaps other circumstances where you would
23 not; is that right?

24 A: I think I answered it. I could say it again. I'm not
25 sure if your clarification of what I said is an accurate

1 clarification. So I'd be happy to say it again, but it's in
2 the record.

3 Q: Okay. Well, let me just ask the question again so that
4 we're clear what the answer is --

5 A: Yes.

6 Q: -- too. Is it a true statement that you would defer to
7 obstetricians as to the actual mechanism of the injury?

8 A: And I said no.

9 Q: Is that -- is that your -- is it your testimony today?

10 A: I said -- again, I said it depends on what you mean. If
11 you mean mechanism meaning stretching, I would not defer
12 because the stretching injury is a neurological injury, which
13 I'm able to opine -- I'm able to give an opinion about. If
14 you're talking about the fact that that injury was incurred
15 due to excessive lateral traction, I can't give an opinion as
16 to how much is excessive or not.

17 Q: Thank you, sir. That's exactly what I was asking.

18 A: Okay.

19 Q: You don't have an opinion and you won't be giving an
20 opinion about excessive lateral traction and how that occurs?

21 A: Other than the fact that it can cause a traction injury,
22 then the obstetrical definition of excessive I do not have an
23 opinion about.

24 Q: Thank you. All right. So you also agree with us I
25 believe that the -- when the shoulder becomes stuck under the

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1 mom's pubic bone and you aren't able to get the baby
2 delivered, that that's a medical emergency; true?

3 A: Yes.

4 Q: And in that type of medical emergency, you would agree
5 that the patient is not medically stable?

6 MR. GRAHAM: Objection, Your Honor. Is this a
7 hypothetical or are we talking about this case?

8 THE COURT: Ask your question again.

9 MS. CRAIG: Sure.

10 BY MS. CRAIG:

11 Q: You've just said that you agree that a shoulder dystocia
12 is a medical emergency; correct?

13 A: Yes.

14 Q: So when you're confronted or you have a medical
15 emergency, it -- it's reasonable that the patient isn't
16 medically stable? Is that a true statement?

17 MR. GRAHAM: Object -- objection, Your Honor.

18 THE COURT: Overruled.

19 BY MS. CRAIG:

20 A: Yes.

21 Q: Thank you. So you know because if the shoulder is not
22 dislodged, that the baby could unfortunately suffer brain
23 damage or even death; right?

24 A: Yes.

25 Q: Now, in addition to the shoulder dystocia, are you aware

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1 that the umbilical cord was wrapped around the baby's neck?

2 A: Yes.

3 Q: And are you aware that Dr. Browning recognized that the
4 umbilical cord or the nuchal cord was wrapped around the
5 baby's neck; so he took it and he released it?

6 A: Yes.

7 Q: And that was the right thing to do; correct?

8 A: Well, you are asking me an obstetric opinion, but I know
9 that's the right thing to do.

10 Q: Thank you. Now, in order to give your opinions in this
11 case, I believe probably all of the information about this
12 case came to you from Mr. Graham; is that right?

13 A: Correct.

14 Q: So he provided to you the selected medical records to
15 review; correct?

16 A: Correct.

17 Q: And anything else that you reviewed came from Mr.
18 Graham's office; is that right?

19 A: Correct.

20 Q: You did not review Dr. Browning's deposition testimony,
21 did you?

22 A: Correct.

23 Q: And I know you've given many depositions, but a
24 deposition is sworn testimony taken outside of the presence of
25 the jury where both sides can ask questions of whoever is

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1 being deposed; is that right?

2 A: Yes.

3 Q: And you are aware that in this case that Dr. Browning was
4 deposed and answered hours of questions from Mr. Graham's
5 office; correct?

6 A: Yes.

7 Q: And he explained exactly what he did in this delivery and
8 why he did it in that deposition; true?

9 A: Yes.

10 Q: So in this case, you've never reviewed Dr. Browning's
11 sworn testimony to hear his side of the story prior to giving
12 your opinions in this case?

13 A: Correct.

14 Q: But, sir, if you had been sued or if you are sued for
15 medical malpractice, you would want that the experts on the
16 other side of the case review all available information prior
17 to testifying against you in a court of law like you're doing
18 today; is that a true statement?

19 A: I think in general that would be a true statement, but
20 specifically it would depend upon the role of the expert in
21 the case. So there are many times that there are other
22 experts or treating physicians who are outside of my specialty
23 and the -- and my opinion is not -- and my opinion on the case
24 because of my role in the case is not germane or dependent
25 upon the deposition. I'm not an obstetrician. Therefore,

1 obstetric issues are not part of -- necessarily not part of my
2 role in the case.

3 Q: Okay. But, sir, if you were being sued, is it true that
4 you would want the other lawyers to look -- or the other
5 doctors, the experts, to look at the -- all of the
6 information, including what you said about the case, prior to
7 testifying against you? Would you or not -- or would you not?

8 MR. GRAHAM: Objection, Your Honor. I believe it's been
9 asked and answered.

10 THE COURT: Overruled. You can answer and explain
11 yourself and we'll move on.

12 BY MS. CRAIG:

13 A: Yeah. I think I just did. I answered the question
14 fully. I said in general, yes, but it would depend on the
15 case and the expert's role in the case.

16 Q: Okay. Well, let me give you a copy of your deposition in
17 this case. Actually, I've got it right here.

18 MS. CRAIG: Your Honor, may I approach?

19 THE COURT: You may.

20 BY MS. CRAIG:

21 Q: And we can just look at it together. Your deposition was
22 taken in this case on April the 9th, 2015; correct?

23 A: Yes.

24 Q: And as we stated, there was -- you were given an oath to
25 tell the truth; correct?

1 A: Yes.

2 Q: And there's a court reporter there that's taking down all
3 of the questions and all of the answers; right?

4 A: Yes.

5 Q: Okay. And you've done this many times?

6 A: Yes.

7 Q: A lot of depositions. If we look at page 8 of your
8 deposition -- and if you want to look on it together? At line
9 14, it says --

10 A: Where is it?

11 Q: At line --

12 A: Yes, yes.

13 Q: Actually, why don't we go a little bit ahead and put it
14 in context? It says at line 5:

15 Have you ever had a lawsuit filed against you?

16 Your answer was yes?

17 A: Yes.

18 Q: The question was were there experts retained by the
19 plaintiffs in that case? The answer was yes.

20 Next question: And those would have been doctors I
21 presume? The answer was yes.

22 And then at line 14 the question is asked would you have
23 wanted the doctors who were offering testimony against you to
24 have reviewed all available information before doing so? And
25 your answer at line 18 was?

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1 A: Yes.

2 Q: Yes? Did I read that correctly?

3 A: You did.

4 Q: Thank you, sir. And you did not do that in this case?

5 You did not review Dr. Browning's deposition?

6 A: Correct.

7 Q: But regardless, sir, you are here without any criticisms
8 whatsoever about our client, Dr. Browning; true?

9 A: Correct.

10 MS. CRAIG: Those are all the questions I have, Your
11 Honor. Thank you very much.

12 THE COURT: All right. Redirect?

13 MR. GRAHAM: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. GRAHAM:

16 Q: Dr. Resnick, you were asked a lot of questions and it
17 sounded to me like obstetrical questions, but let me start
18 with that last sequence of events. Ms. Craig walked up to you
19 and showed you some deposition testimony where it -- where it
20 had you answering the question about if another doctor were to
21 testify against you, would you want them to read your
22 deposition first. Then she asked you if you had any criticism
23 of Dr. Browning.

24 Are you testifying as a -- as a pediatric neurologist in
25 a case against an obstetrician, are you truly testifying

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1 Q: Tell us, please, sir, if you were ever -- hypothetically,
2 if you were called upon to testify against another physician
3 to the effect that they had breached the applicable standards
4 of care of their specialty practice, would you read their
5 deposition?

6 A: Yes.

7 Q: In this case, are you giving any opinions about
8 obstetrical standards of care?

9 A: No.

10 Q: Are you giving any opinions about breaches of standard of
11 care by Dr. Browning?

12 MS. CRAIG: Objection to the continued leading. He can
13 just ask him what his opinions are.

14 THE COURT: Sustained.

15 BY MR. GRAHAM:

16 Q: Tell us whether or not, sir, you -- well, I'll move on.
17 If someone were to testify against you as a pediatric
18 neurologist claiming that you had violated the standards of
19 care for pediatric neurologists, would you or would you not
20 want that doctor to read your deposition first?

21 A: Yes.

22 Q: If that expert witness were testifying against you not as
23 to standard of care questions but only as to damages and
24 causation matters, would it matter to you so much whether the
25 doctor read your deposition?

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1 A: No.

2 MS. CRAIG: Same objection.

3 BY MR. GRAHAM:

4 Q: Assume for the moment, Doctor -- hypothetically, assume
5 for the moment that Dr. Browning in his deposition swears on a
6 stack of Bibles that he did nothing wrong to pull on this
7 baby's case -- he never pulled on the head, he never pulled it
8 laterally, he never caused any injury, assuming that to be
9 true, sir, what effect, if any, would that have on your
10 opinions in this case?

11 A: It wouldn't have an opinion -- an effect on my opinion.

12 Q: Why not?

13 A: Because I'm reviewing the case from the standpoint of the
14 neurological examination and the mechanism of the injury.

15 Q: Has anything about the questions put to you by Ms. Craig
16 altered in any way your opinions about what caused Julia's
17 nerve damage?

18 A: No.

19 Q: Now, I want to go back through a few specific points.
20 There was a question put to you about in another trial you had
21 -- you had brought the child in front of the jury and done a
22 demonstration. The point was made that you didn't do that
23 today; you just showed using your own body?

24 A: Yes.

25 Q: Why did you do it that way?

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 A: Because Julia was scared and anxious and she was reticent
2 about coming to do it. And I spoke to the parents about
3 whether --

4 MS. CRAIG: Objection, Your Honor, to any hearsay
5 statements.

6 MR. GRAHAM: It's not for the truth of the matter
7 asserted. It's to answer why he did what she accused him of
8 doing improperly.

9 THE COURT: All right. Overruled.

10 MS. CRAIG: Your Honor, I didn't accuse anyone of doing
11 anything.

12 THE COURT: What was the question again?

13 MR. GRAHAM: The question is why. And I'll be happy to
14 provide the context.

15 THE COURT: Go ahead.

16 MR. GRAHAM: Why did he demonstrate Julia's limitations
17 and weaknesses instead of bringing Julia into the courtroom to
18 demonstrate using her own body.

19 THE COURT: Why don't you just answer it without saying
20 what somebody else said?

21 MS. CRAIG: Your Honor, may I move to strike the
22 editorial comment, please?

23 THE COURT: Yes. Go ahead.

24 BY MR. GRAHAM:

25 A: Because she would've been too distressed to do the

1 examination in front of everybody.

2 Q: Okay. In your practice as a pediatric neurologist, what
3 have you learned about the relative emotional vulnerability
4 about different child patients? Is there a spectrum?

5 A: Yes.

6 Q: All right. How does Julia fit on that spectrum?

7 A: She is shy and anxious.

8 Q: What does it mean to be emotionally distraught?

9 MS. CRAIG: Your Honor, these are new opinions here.

10 THE COURT: Sustained.

11 MS. CRAIG: They're not in his report --

12 THE COURT: Everybody knows what's going on.

13 MS. CRAIG: -- and I've never heard it before.

14 THE COURT: Go ahead and move on.

15 BY MR. GRAHAM:

16 Q: What fault, if any, do you attribute to the parents for
17 not wanting their child to be brought into the courtroom given
18 her emotional state?

19 A: I think it's entirely appropriate.

20 MR. GRAHAM: Your Honor, last time I was up here, I
21 neglected to offer Exhibit 74 into evidence, which I do at
22 this time.

23 THE COURT: And that is what?

24 MR. GRAHAM: It was the -- I think it was the EMG report.

25 THE COURT: All right. Any objections?

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1 MS. CRAIG: No, sir, Your Honor.

2 THE COURT: Number 74 is into evidence without objection.

3 (WHEREUPON, Plaintiff's Exhibit Number 74,

4 electrodiagnostic report, was admitted into evidence.)

5 MR. GRAHAM: I'm sorry, sir. Was that -- was that in
6 without objection?

7 THE COURT: Correct.

8 MR. GRAHAM: Thank you, Your Honor.

9 BY MR. GRAHAM:

10 Q: Doctor, you were talking earlier about ancillary
11 movements. I think your specific reference was to try to get
12 her arm as high as she could, Julia would bend over?

13 A: Yes.

14 Q: Let me ask you, sir, are there other ancillary mechanisms
15 -- ancillary mechanisms that children can use to try to cover
16 up their limitations?

17 A: Yes.

18 Q: All right. Can you tell us whether or not one of those
19 involves a sling-type movement?

20 MS. CRAIG: Objection. Leading.

21 THE COURT: Sustained.

22 BY MR. GRAHAM:

23 Q: Can you tell --

24 THE COURT: Hold on one second. The bailiff is trying to
25 say something to me. What's that?

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 THE BAILIFF: They're saying that they're ready for a
2 break.

3 THE COURT: They need a break? All right. Do you have
4 any problems with the jury taking a break --

5 MS. CRAIG: Of course, not.

6 THE COURT: -- at this time and then we'll come back and
7 pick right up?

8 MR. GRAHAM: Sure.

9 THE COURT: All right. Members of the jury, step into
10 the jury room for about 15 minutes and then we'll come back.
11 Do not discuss the case.

12 (WHEREUPON, the jury exited the courtroom at 11:49 a.m.)

13 THE COURT: All right. If you need to use the restroom,
14 you can.

15 THE WITNESS: I'm sorry?

16 THE COURT: If you need to use the restroom, you may. If
17 you want something to drink, you can get it.

18 THE WITNESS: Thank you.

19 THE COURT: But you cannot talk to anybody.

20 THE WITNESS: I'm sorry?

21 THE COURT: You cannot talk to anybody.

22 THE WITNESS: All right.

23 THE COURT: All right. You can go use the restroom and
24 come right back and have a seat.

25 THE WITNESS: Will do.

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 MS. CRAIG: Your Honor, I would just ask very similar to
2 like the depo -- I mean the trial testimony I gave you about
3 the improper references to Dr. Browning's deposition trying to
4 imply that he said one thing in the trial and said something
5 differently in his deposition and that wasn't the case,
6 similar to that trial testimony, I'm having to stand up and
7 object almost every question on his redirect and I don't think
8 that that's fair to me or to my client because I shouldn't
9 have to continually object to leading questions and I don't
10 want this jury to hold it against us that we are continually
11 objecting.

12 THE COURT: He's not going to ask anymore leading
13 questions --

14 MS. CRAIG: Okay. Thank you.

15 THE COURT: -- I'm sure. All right. Let's go take a
16 short break.

17 (WHEREUPON, there was a break in the proceedings from
18 11:50 a.m. until 12:08 p.m., after which the proceedings
19 resumed as follows.)

20 THE COURT: Everybody have a seat. Go ahead and bring
21 out the jury.

22 (WHEREUPON, the jury entered the courtroom at 12:08 p.m.)

23 THE COURT: All right. You may continue.

24 MR. GRAHAM: Thank you, Your Honor.

25 BY MR. GRAHAM:

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

- 1 Q: Dr. Resnick, I believe at the break I had asked you a
2 question about what types of ancillary motions or actions a
3 child may take to try to create an appearance that the
4 limitations are not as bad as they really are. Could you
5 please tell us what some of those ancillary movements are?
- 6 A: Yes. Because of the weakness in the shoulder, they have
7 something called the trumpet sign. So if I -- if you asked
8 them to touch their chin or bring food to their mouth or take
9 a sticky from their forehead, under normal circumstances what
10 we would do is we would just flex our arm and touch it or
11 touch your face or your neck. What she would have to do is
12 she would have a trumpet sign where she would bring her arm up
13 in order to be able to do it.
- 14 Q: Bring her elbow up?
- 15 A: Yeah. Her elbow up in order to get that -- that
16 movement.
- 17 Q: Okay.
- 18 A: The other thing is in order to get her hand behind her
19 back, instead of just putting it behind her back, she would
20 have to have an additional motion of her arm, like a swinging
21 motion, to get it behind her back.
- 22 Q: What kind of motion?
- 23 A: Swinging.
- 24 Q: Okay.
- 25 A: She'd have to swing her arm to get it behind her back.

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 Q: Could you -- could you stand up and demonstrate what you
2 mean by a swinging motion?

3 A: If -- if I asked you to --

4 Q: Could you turn around so we can see?

5 A: Yes.

6 Q: Would that help us see better?

7 A: I don't know. I'll try. You would just do that.

8 (Gesturing.) What she would do is have it swing out in order
9 to get it behind her back.

10 Q: Okay. What other motions can children swing or sling
11 their arms in to try to cover up their limitations?

12 MS. CRAIG: Objection. Beyond the scope of cross.

13 BY MR. GRAHAM:

14 Q: If any?

15 MR. GRAHAM: I'll be happy to --

16 THE COURT: Why don't you just wrap it on up. Go ahead
17 and ask the question and wrap it up.

18 MR. GRAHAM: Okay.

19 THE COURT: Go ahead. You can answer it.

20 THE WITNESS: Okay.

21 BY MR. GRAHAM:

22 A: The same thing would apply to getting her hand behind her
23 head.

24 Q: Okay.

25 A: Just also a difficult action and then you would have to

1 do the shoulder elevation and then the same action to fling it
2 behind the head.

3 Q: Okay. And what about just up in the air? Would -- tell
4 us whether or not a child with a -- with a restricted arm
5 movement might be able to make it look less severe by slinging
6 it up?

7 A: Well, if -- the same thing would apply for any of those
8 motions in order to get the arm to where you wanted to get it.

9 Q: Okay. And which -- which is better at showing a child's
10 true limitations, a moving picture or a still photograph?

11 A: A video.

12 Q: And why is that?

13 A: Because you can see how they get to the point where they
14 are.

15 Q: Okay. I'm going to hand you what's been marked
16 Defendant's Exhibit 1 and represent to you that that's Julia
17 --

18 A: Yes.

19 Q: -- on the left. To understand the significance of that
20 photo, what -- what would you want to know, if anything, about
21 what was going on a few seconds before the photo was taken?

22 A: Well, you'd want to know how she got to that position.
23 And whether it was a moment in time or whether there was an
24 action that allowed her to get her arm to that position and in
25 what manner it occurred.

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 Q: Thank you. And, of course, do you have any knowledge as
2 to what was going on before that photo was taken?

3 A: No.

4 Q: Thank you. There were a number of questions about work
5 for me, work for my law office?

6 A: Yes.

7 Q: Oh, you may sit down, Doctor.

8 A: Thank you.

9 (WHEREUPON, the witness complied.)

10 BY MR. GRAHAM:

11 Q: Let me ask you this, sir, until recently you were chief
12 of pediatric neurology at Miami Children's Hospital for how
13 many years?

14 A: Thirteen.

15 MS. CRAIG: Your Honor, beyond the scope of cross-
16 examination.

17 THE COURT: I think I know where he's going. Go ahead.

18 MR. GRAHAM: Thank you, Your Honor.

19 THE COURT: Overruled.

20 BY MR. GRAHAM:

21 Q: And tell us whether or not Miami Children's Hospital has
22 a brachial plexus program that provides specialty care to
23 children with brachial plexus injuries?

24 A: Yes, we do.

25 Q: And who is the chief of surgery at that brachial plexus

1 center?

2 A: Dr. Grossman.

3 Q: Which hospitals in the southeastern part of the United
4 States are larger and greater -- have greater recognition for
5 brachial plexus work in the southeastern part of the country
6 other than -- if any, other than the Miami Children's
7 Hospital?

8 A: Texas does. I don't know if that's called the southeast,
9 but Texas Children's does other than Miami. Miami is one of
10 the larger centers.

11 Q: And given that, if a lawyer wanted to use due diligence
12 to try to get his brachial plexus child injury clients
13 evaluated by the best and the brightest in the southeast,
14 would you criticize them for going to the Miami Children's
15 Hospital?

16 MS. CRAIG: Objection. Leading.

17 THE COURT: Sustained.

18 BY MR. GRAHAM:

19 Q: All right. If -- hypothetically, sir, if you were -- if
20 you were a lawyer who wanted to get your child clients with
21 brachial plexus birth injuries evaluated by the most
22 knowledgeable, experienced doctors about treatment and cause
23 of brachial plexus birth injuries and if you were located in
24 the southeastern part of the United States, where would be the
25 closest place you would be inclined to send your patients?

1 A: Miami.

2 Q: You were asked a number of questions about how many cases
3 you've worked on for my office, how many cases you had
4 pending, all that sort of thing. Let me ask you, sir, how
5 does your work as a professional expert witness in pediatric
6 neurology break down in terms of percentages between the work
7 you do for plaintiff's lawyers, like me, and the work you do
8 for defense lawyers, like the Hood Law Firm?

9 A: About 60 percent of my work is done for defense law firms
10 and about 40 percent for plaintiff.

11 Q: Have you, sir, ever testified against the Graham Law
12 Firm's client?

13 A: Yes.

14 Q: What is your mode of operation when you get an inquiry
15 from my law firm to evaluate -- to conduct an independent
16 medical evaluation of a child client?

17 A: My inquiry about the patient and the circumstances of the
18 patient?

19 Q: Yeah. Or just what is your modus of operation just in
20 terms of evaluating the case, examining the child, that sort
21 of thing? Do you -- do you -- do you work any differently
22 than if you had been asked to do that by a defense attorney?

23 A: No.

24 Q: There were questions put to you about whether compression
25 can sometimes be the culprit for causing a brachial plexus

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 birth injury, and I want to ask you about Julia B 's injury.
2 Do you have an opinion, sir, to a reasonable degree of medical
3 certainty as to whether or not compression caused Julia's
4 injury?

5 A: Yes, I do.

6 Q: And what's your opinion?

7 A: That compression did not cause her injury.

8 Q: Okay. What's the basis of that?

9 A: The basis of that is that she had a stretch injury that
10 was caused by lateral traction on the head and the injuries
11 are consistent with a lateral traction injury, and there's no
12 evidence that compression was the cause in her case.

13 Q: Which fits better with the clinical examination that you
14 performed and with the -- the ruptures and the muscle fibrosis
15 and the nerve sheath fibrosis and the tendon fibrosis that you
16 referred to, injury --

17 MS. CRAIG: Objection.

18 Q: -- by compression or injury by stretch?

19 MS. CRAIG: Objection, Your Honor. Asked and answered.
20 Cumulative.

21 THE COURT: Go ahead and answer that one question. Then
22 move on.

23 BY MR. GRAHAM:

24 A: Yes. Well, once you get rupture and stretching, that
25 would be caused by a stretching injury and not by a

1 compression injury.

2 Q: Thank you, sir. They were asking you a question that
3 seemed critical about calling your report an independent
4 medical examination. Were you a treater of Julia?

5 A: No.

6 Q: Okay. Given that, what is the significance of an
7 independent medical examination?

8 A: I don't know whether I used the term correctly or not.
9 It's just a term that I've used. It means because I'm not a
10 treatment -- a treater. I'm just providing what we're doing,
11 a medical examination, to evaluate her neurological status.

12 Q: Okay. Without having any stake in how good your
13 treatment has been or not been?

14 A: Correct.

15 Q: There were questions put to you about whether the
16 mother's description of a hand on -- on her abdomen -- a
17 nurse's hand on her abdomen was suprapubic pressure, and you
18 said something to the effect of, yes, sounds like suprapubic
19 pressure. Do you have any way of knowing -- do you have any
20 information, one way or another, whether the nurse in this
21 case did suprapubic pressure correctly or not?

22 A: No.

23 Q: Questions were put to you about whether a brachial plexus
24 birth injury can occur without medical negligence. As a
25 pediatric neurologist in a case against an obstetrician, is it

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 your job to determine whether the excessive traction
2 represents medical negligence?

3 MS. CRAIG: Objection, Your Honor. Leading.

4 THE COURT: Sustained.

5 BY MR. GRAHAM:

6 Q: Is it your job, sir -- and or tell us whether or not it's
7 your job in such a case to form an opinion about whether or
8 not the doctor was negligent?

9 MS. CRAIG: Same objection.

10 THE COURT: Sustained. You can rephrase it.

11 BY MR. GRAHAM:

12 Q: As an -- as a pediatric -- as a pediatric neurologist
13 hired to give opinions about causation and damages, what role
14 do you play, if any, with regard to helping the jury
15 understand whether what the doctor did was proper or improper
16 for obstetricians?

17 A: That's not my role. My role is evaluating the mechanism
18 of the injury and my role is evaluating the degree of
19 neurological deficit or damage that the child has.

20 Q: You were asked questions and your deposition testimony
21 was used I believe about -- or I don't -- there was some
22 specific question. I don't know what the source was, but
23 there was some specific question about you don't know in these
24 types of injuries whether the damage was caused before or
25 after the head delivered. Did you ever get clarification when

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 you asked what counsel meant by these types of injuries?

2 A: No.

3 Q: Assuming hypothetically a case in which a child is born
4 in a headfirst vaginal delivery with the right shoulder on top
5 stuck behind the mother's pubic bone with traction applied in
6 the course of delivering the child and with some component at
7 least of lateral traction toward the left shoulder and with
8 the child born with a limp arm with some minor finger movement
9 and with a recovery of the -- of the lower part, the forearm
10 and hand/wrist area, but with a significant partial permanent
11 rupture of C5 and C6 and a lesser rupture of C7 with neuroma
12 formation and with fibrosis of muscles, tendons, and nerve
13 sheath -- assuming those facts to be true, sir, do you have an
14 opinion to a reasonable degree of medical certainty as to
15 whether that injury was caused before or after the head
16 delivered?

17 MS. CRAIG: Objection, Your Honor.

18 THE COURT: What grounds?

19 MS. CRAIG: Mr. Graham is trying to testify. If he would
20 just ask the question, what is his opinion, I think the doctor
21 is capable of telling us.

22 THE COURT: It's a very, very, very long question. Why
23 don't you simplify it a little bit and ask a question and let
24 him answer it?

25 MR. GRAHAM: All right, sir. Yes, sir.

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 BY MR. GRAHAM:

2 Q: Given the facts, Doctor, of -- as you've recited them,
3 given the facts of Julia B 's delivery and injury, do you
4 have an opinion to a reasonable degree of medical certainty as
5 to whether that injury occurred before or after Julia's head
6 delivered?

7 A: After Julia's head delivered.

8 Q: And do you have an opinion, sir, to a -- using those same
9 facts in this case, do you have an opinion to a reasonable
10 degree of medical certainty as to whose hands were on the
11 baby's head at the time of the injury being caused?

12 A: Well, it would be whoever the delivering physician was
13 and whoever it was applying the lateral traction.

14 Q: In explaining what you mean by lateral traction, is this
15 blowup helpful --

16 A: Yes.

17 Q: -- to explain to the jury? Would you mind --

18 MR. GRAHAM: If Your Honor please, letting him step down
19 and just explain?

20 THE COURT: Any objections?

21 MS. CRAIG: Your Honor, this is cumulative, beyond the
22 scope. I think he's testified to this numerous times.

23 THE COURT: I think we're going a little bit too far as
24 well.

25 MR. GRAHAM: Okay.

1 THE COURT: Thank you.

2 MR. GRAHAM: I'll move right along now.

3 THE COURT: We've heard tons.

4 BY MR. GRAHAM:

5 Q: Questions were put to you about children in a shoulder
6 dystocia situation and whether or not they were medically
7 stable or unstable. And you were specifically asked a
8 question, I believe, may it be reasonable to infer medical
9 instability in the face of an emergency or something to that
10 general effect, not word for word, but something kind of like
11 that.

12 My question to you, sir, is are you able to talk in
13 general about whether babies are medically stable in a
14 shoulder dystocia situation or would it be more meaningful to
15 talk about particular cases?

16 MS. CRAIG: Your Honor, I'm sorry. I'm going to have to
17 keep objecting to leading questions.

18 THE COURT: Sustained.

19 BY MR. GRAHAM:

20 Q: Doctor, as a pediatric neurologist, can you -- can you
21 tell us whether or not you are able to determine a patient's
22 medical stability or not without knowing the specifics of the
23 shoulder dystocia at hand?

24 MS. CRAIG: Objection, Your Honor.

25 THE COURT: Same objection?

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 MS. CRAIG: Yes, sir, same objection. Leading.

2 THE COURT: Sustained.

3 BY MR. GRAHAM:

4 Q: Doctor, this -- this is a little tricky I know because
5 you were asked so many obstetrical questions, but do you know
6 what Apgars are?

7 A: Yes.

8 Q: All right. Do Apgars of nine and nine suggest medical
9 stability or instability?

10 A: Stability.

11 Q: All right. Are you familiar with fetal heart monitor
12 strips or would you need to defer to Dr. Pliskow, an
13 obstetrician, about that?

14 MS. CRAIG: Objection, Your Honor. I think you sustained
15 his objection on the obstetrical inference.

16 THE COURT: Y'all come on up here and let me just talk to
17 you.

18 (WHEREUPON, a bench conference was held in the presence
19 of the jury but out of the hearing of the jury as
20 follows.)

21 THE COURT: The jury is falling asleep.

22 MR. GRAHAM: Okay.

23 THE COURT: We've got one who has fallen out. I mean I'm
24 not going to stop you from --

25 MR. GRAHAM: Okay. I'm -- I'm -- I'm almost finished.

1 This is my last line.

2 THE COURT: I think everybody just kind of needs to be --

3 MR. GRAHAM: I'm almost done, but I mean she went to OB
4 so --

5 THE COURT: Oh, I agree. I'm going to let you reply to
6 her cross.

7 MR. GRAHAM: Thank you. Thank you.

8 MS. CRAIG: Thank you.

9 (WHEREUPON, the bench conference ended and the
10 proceedings resumed as follows.)

11 BY MR. GRAHAM:

12 Q: Are you knowledgeable about fetal heart monitor strips?

13 A: I do know them, but I'm not an expert in fetal heart
14 monitor strips.

15 Q: So if I asked you questions about whether the strips
16 showed Julia was medically stable or instable -- unstable,
17 would you defer to an obstetrician like Dr. Pliskow?

18 A: Yes, I would.

19 MS. CRAIG: Objection. But he's answered the question.

20 THE COURT: Sustained.

21 MR. GRAHAM: All right.

22 BY MR. GRAHAM:

23 Q: In terms of -- as a pediatric neurologist, do you use
24 cord blood gases to assess the well-being of the neurological
25 status of a baby right after birth?

1 A: Yes, if necessary.

2 Q: Okay. And --

3 MR. GRAHAM: Excuse me. Your Honor, may I approach?

4 BY MR. GRAHAM:

5 Q: Dr. Resnick, I hand you Plaintiff's Exhibit Number 12.

6 Take a moment -- have you ever seen that document before?

7 A: I don't recall.

8 Q: All right. Take a moment and --

9 MS. CRAIG: Your Honor, I do object. This is beyond the
10 scope of cross. I don't think I asked about cord blood gases.

11 MR. GRAHAM: It goes to medical stability and
12 instability.

13 THE COURT: I thought you said you had one or two more
14 questions?

15 MR. GRAHAM: Well, one line of questions. It's about
16 medical stability or instability and the threats of death and
17 brain damage.

18 THE COURT: Can you wrap it up in under five minutes?

19 MR. GRAHAM: Yes, sir.

20 THE COURT: All right.

21 MR. GRAHAM: All right.

22 BY MR. GRAHAM:

23 Q: It's also up on the screen.

24 A: Yeah.

25 Q: If you -- I know it's tiny words. So --

1 A: I can read it.

2 Q: -- if -- if -- if there's part that you want Dave to
3 magnify --

4 A: No. I can say it because it's normal. I mean what you
5 -- this section over here is the cord blood gas.

6 Q: Right.

7 A: Which is blood that is taken from the umbilical cord.

8 MR. GRAHAM: Could you blow up that part, Dave, please?

9 BY MR. GRAHAM:

10 A: Okay. So this is the venous blood gas and this is
11 arterial blood gas, both of them from the umbilical cord, and
12 that looks at the -- the general status of the baby. In other
13 words, if there's any hypoxia or stress or asphyxia.

14 And the most important value to look at over here is the
15 pH, and more importantly the base excess over here. And
16 basically, these are fine. These are what you would see in a
17 normal baby.

18 Q: Okay. This is what you would want to see?

19 A: Correct.

20 Q: So based on that and forgetting about babies generally in
21 shoulder dystocia situations across the board, in terms of
22 Julia B in this delivery, do you have an opinion, sir, as
23 to whether or not she was medically stable or unstable?

24 A: Stable.

25 Q: Questions were put to you about threats of death and

DR. TREVOR RESNICK - REDIRECT BY MR. GRAHAM

1 serious injury. Over what time period after a head delivers
2 in a medically stable patient does the risk arise about nerve
3 -- about possible problems with insufficient oxygen to the
4 brain? What's the time period before --

5 MS. CRAIG: Objection, Your Honor. Beyond the scope.

6 MR. GRAHAM: It deals with her questions about threats.

7 THE COURT: Go ahead. You've got three and half minutes
8 left.

9 MR. GRAHAM: Yes, sir. Thank you.

10 BY MR. GRAHAM:

11 A: About 10 to 15 minutes.

12 Q: Okay. And at any time in the 45 seconds that it took
13 between delivery of Julia's head and Julia's body, during that
14 45 seconds was there any immediate threat to the patients of
15 death or serious bodily injury if the doctors act the way they
16 should?

17 A: No.

18 MR. GRAHAM: Thank you, Your Honor. May Dr. Resnick be
19 excused?

20 THE COURT: Any recross?

21 MS. CRAIG: Thank you, Your Honor. I do have just a
22 very, very brief recross.

23 RECROSS-EXAMINATION

24 BY MS. CRAIG:

25 Q: Dr. Resnick, so Mr. Graham asked you some questions about

1 the Apgars; correct?

2 A: Yes.

3 Q: And of course, those are taken after the baby is born;
4 right?

5 A: Correct.

6 Q: And when I asked you whether or not when you are
7 confronted with a medical emergency of shoulder dystocia,
8 whether or not the patient is stable or unstable, is it still
9 your answer that the patient is unstable in light of the
10 medical emergency of shoulder dystocia?

11 A: The patient is potentially unstable.

12 Q: So you're changing it now to say --

13 A: No, no. You asked me whether it's a medical emergency;
14 the answer is yes. It's a medical emergency because if you
15 don't do anything about it, something bad can happen.

16 Q: Exactly. It's --

17 A: So it's -- can I finish?

18 Q: Of course.

19 A: Okay. So the implication is medically -- medical
20 stability is -- you're talking about a potential for medical
21 instability, and there absolutely is a potential for medical
22 instability if you don't do something about it.

23 Q: And what --

24 A: The baby --

25 Q: Go ahead.

DR. TREVOR RESNICK - RECROSS BY MS. CRAIG

1 A: The baby is medically stable at the time there's an
2 obstetric emergency and if the baby isn't delivered, the baby
3 could become medically unstable.

4 Q: Yes, sir. And what I'm trying to establish is that
5 without the benefit of hindsight and without knowing the
6 outcome of the delivery, when a doctor is confronted with the
7 medical emergency of shoulder dystocia, that patient is
8 medically unstable?

9 A: Now, you're talking --

10 Q: That's common sense.

11 A: You're talking about the baby or the mother?

12 Q: I'm talking about everybody.

13 A: Well, you said patient. You didn't say patients.

14 Q: Yes, sir. The baby and the mama. It is medically
15 unstable when you are confronted with the medical emergency of
16 shoulder dystocia, yes or no?

17 MR. GRAHAM: Objection, Your Honor. It's been asked and
18 answered.

19 THE COURT: Overruled. Go ahead.

20 THE WITNESS: Okay.

21 BY MS. CRAIG:

22 A: So the mother I would defer to the obstetrician. As far
23 as the baby is concerned, it's medical instability based upon
24 potential.

25 Q: Yes, sir. I know you want to state --

DR. TREVOR RESNICK - RECROSS BY MS. CRAIG

1 A: I'm trying to -- I'm trying to clarify the question that
2 you asked. Is the baby medically unstable at the time? No.
3 Is the baby potentially medically unstable? Yes.

4 Q: Okay. So at the time that the shoulder dystocia is
5 recognized -- and we agree it's a medical emergency?

6 A: Correct.

7 Q: That is a medically unstable situation --

8 A: Correct.

9 Q: -- for the baby? Thank you.

10 MR. GRAHAM: Object.

11 THE COURT: Overruled. Go ahead.

12 BY MS. CRAIG:

13 Q: Okay. And then I wanted to ask you just real quickly --
14 you were asked some questions about where you work in Miami;
15 correct?

16 A: Yes.

17 Q: And Dr. Grossman works there; correct?

18 A: Yes.

19 Q: So the facility in Miami --

20 A: Yes.

21 Q: -- where Julia went to where Mr. Graham sent her to see
22 you and Dr. Grossman, that was not for treatment; correct?

23 A: Agree.

24 Q: It was for litigation purposes?

25 A: Agree.

DR. TREVOR RESNICK - RECROSS BY MS. CRAIG

1 Q: But Julia did go to Atlanta. Do you want me to just --
2 the name of that facility is Children's Healthcare of Atlanta,
3 and she had surgery by a very qualified surgeon at that
4 institution; correct?

5 A: Correct.

6 Q: And that's also a very good institution for treatment of
7 injuries; correct?

8 A: Yes.

9 MS. CRAIG: Thank you, sir. Those are all the questions
10 I have.

11 THE COURT: All right. You have more?

12 MR. GRAHAM: Just so briefly, Your Honor.

13 SECOND REDIRECT EXAMINATION

14 BY MR. GRAHAM:

15 Q: Doctor, I was confused a little bit because you kept
16 getting asked the same essential question over and over about
17 medical stability. In Julia's case, during the 45 seconds
18 between when her head delivered and when her body delivered,
19 was she at any time medically unstable?

20 MS. CRAIG: Your Honor, I object. This has been asked --

21 THE COURT: Sustained.

22 MS. CRAIG: -- repeatedly.

23 THE COURT: I agree.

24 BY MR. GRAHAM:

25 Q: At what point -- you indicated -- in response to

DR. TREVOR RESNICK - SECOND REDIRECT BY MR. GRAHAM

1 questioning from counsel, you indicated that the child could
2 get -- the child was at risk of being potentially medically
3 unstable. How much time would've had to pass for Julia to be
4 medically unstable?

5 MS. CRAIG: Objection.

6 THE COURT: Same grounds?

7 MS. CRAIG: Yes, sir.

8 MR. GRAHAM: One last question, Your Honor.

9 THE COURT: Why don't you just go ahead and answer that
10 one question and let's call it -- call it a day with them.

11 BY MR. GRAHAM:

12 A: Yeah. I said about 10 minutes.

13 MR. GRAHAM: Thank you.

14 THE COURT: All right. Have a good day. Unless you have
15 one question?

16 SECOND RECROSS-EXAMINATION

17 BY MS. CRAIG:

18 Q: And then, of course, you don't know at the time of the
19 medical emergency whether it's going to be 10 minutes, 5
20 minutes, 2 minutes or 45 seconds?

21 A: Well, you asked me a question. I'm answering from the
22 best way I can.

23 Q: Yes, sir. You don't know how long that is going to take
24 to dislodge that -- that shoulder when you're confronted with
25 that medical emergency; true?

DR. TREVOR RESNICK - SECOND RECROSS BY MS. CRAIG

1 MR. GRAHAM: Objection.

2 BY MS. CRAIG:

3 A: Well, that's it --

4 MR. GRAHAM: Your Honor, that's an obstetrical question.

5 THE COURT: Overruled. Go ahead.

6 BY MS. CRAIG:

7 A: That wasn't the question you asked me. You said how long
8 if something isn't done does it take before -- before the baby
9 would be in harm. Didn't you ask that question?

10 Q: No.

11 A: I just want to make sure I'm understanding.

12 Q: I think Mr. Graham asked you that question.

13 A: Okay. So tell me yours.

14 Q: My question is just simply when you're confronted with
15 the medical emergency of shoulder dystocia, you don't know how
16 long it's going to take?

17 A: Agree.

18 Q: Thank you, sir.

19 A: Okay.

20 THE COURT: Have a good day. Thank you. I'm cutting it
21 off there. Everybody knows everything there is to know about
22 that issue.

23 MR. GRAHAM: Well, Your Honor, I'm worried about the last
24 phrase she added. She said how long will it take --

25 THE COURT: And if you ask a question, then she'll be

DR. TREVOR RESNICK - SECOND RECROSS BY MS. CRAIG

1 worried about the last thing you said.

2 MR. GRAHAM: Well -- but, Your Honor, may I clarify
3 whether -- whether when he said it depends on how long it
4 would take, he's taking about how long to resolve the shoulder
5 dystocia, not how long to become medically unstable?

6 THE COURT: All right.

7 MS. CRAIG: Your Honor, he's testifying. I think that we
8 have --

9 THE COURT: I think enough has been done.

10 MS. CRAIG: -- sufficiently answered the question.

11 THE COURT: I can't imagine anything else needing to be
12 asked of this witness. But if you want to ask that one
13 question --

14 MR. GRAHAM: Yes, sir.

15 THE COURT: That's it. And then I'm going to let him go.

16 THIRD REDIRECT EXAMINATION

17 BY MR. GRAHAM:

18 Q: When you said you don't know how long it will take --

19 A: Uh-huh.

20 Q: -- in response to the question, did you mean how long it
21 would take to resolve the shoulder dystocia?

22 THE COURT: That's leading.

23 BY MR. GRAHAM:

24 A: Yes.

25 Q: I mean tell us what you mean --

DR. TREVOR RESNICK - THIRD REDIRECT BY MR. GRAHAM

1 THE COURT: You can ask that another way.

2 BY MR. GRAHAM:

3 A: Yes. I meant how long it would take to resolve --

4 MS. CRAIG: Objection.

5 THE COURT: Sustained.

6 BY MR. GRAHAM:

7 A: -- the shoulder dystocia.

8 THE COURT: Hold on. You don't need to answer. All
9 right.

10 MR. GRAHAM: Well, let me rephrase it.

11 BY MR. GRAHAM:

12 Q: When you said I don't know how long it would take, what
13 were you talking about when you said it would take? What is
14 it?

15 A: Resolving the shoulder dystocia.

16 THE COURT: All right. That's good. You got one
17 question, if you want it.

18 MS. CRAIG: I do not have any further questions. Thank
19 you.

20 THE COURT: All right. Nice to see you. Have a good
21 day.

22 THE WITNESS: Thank you.

23 THE COURT: All right. Call your next witness.

24 MR. RUFFIN: Your Honor, the next witness is David Byrd.

25 MR. GRAHAM: Watch your step.

DAVID BYRD - DIRECT BY MR. RUFFIN

1 THE CLERK: Raise your right hand. Do you swear or
2 affirm that the testimony you give in this case will be the
3 truth, the whole truth, and nothing but the truth, so help you
4 God?

5 THE WITNESS: I do.

6 THE CLERK: Please have a seat and state your name for
7 the record.

8 THE WITNESS: David Byrd.

9 DAVID BYRD, being first duly
10 sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. RUFFIN:

13 Q: Good afternoon.

14 A: Good afternoon.

15 Q: I want to present you with a photograph that the defense
16 counsel showed the jury and Dr. Resnick. When was that photo
17 taken?

18 A: December of 2015.

19 Q: Tell us about that photo?

20 A: We had -- I had a conference for athletics in Orlando,
21 Florida, and as we said, with everything that we do, our kids
22 go with us. And, you know, they went with us on this trip and
23 we were down at the pool and we took a picture.

24 Q: And when you took that picture, how many times did you
25 take it before you got that one to click?

DAVID BYRD - DIRECT BY MR. RUFFIN

1 A: Numerous times.

2 Q: And why did you have to take it numerous times?

3 A: Well, as you notice in the picture, my other two girls
4 don't have their arms up.

5 Q: Why is that?

6 A: Because Julia has trouble doing that and she specifically
7 asked me to do that.

8 Q: Why?

9 A: And I --

10 MR. JOYCE: Objection to hearsay.

11 THE COURT: Sustained.

12 MR. JOYCE: Move to strike as well.

13 MR. RUFFIN: It's not for the truth of the matter --

14 THE COURT: He hasn't answered it anyway. Don't say what
15 somebody else said.

16 THE WITNESS: Yes, sir.

17 BY MR. RUFFIN:

18 Q: Just tell me the reason why -- what was going on and the
19 reason for that picture?

20 A: Well, we were just down at the pool and, you know, we
21 took the picture. She asked us to take the picture and, you
22 know, she wanted to pose in that direction to show that she
23 could do some -- she could potentially do some things that she
24 has not tried to do by maneuvering herself to get into a
25 position that it was taken.

DAVID BYRD - DIRECT BY MR. RUFFIN

1 Q: So how did she finally get her arm to the position it's
2 in in that photo?

3 A: After swinging it like she does with a lot of other
4 things that she does, trying to get her arm behind her back,
5 swinging it, swinging it, swinging it.

6 Q: Did she just raise her arms up like that?

7 A: Absolutely not.

8 Q: So where did that picture come from?

9 A: That picture come from my Twitter account, which has very
10 few posts on it.

11 Q: So then why did you put that picture?

12 A: I posted it because I was proud that she was able to do
13 something even though she maneuvered it, but what the picture
14 doesn't show is -- it shows a snapshot. It doesn't show the
15 numerous times. Just as she does everything every day of her
16 life, to do it over and over and over and over and over and
17 over again to get it done.

18 Q: So let me ask you if someone were to point to that
19 picture and say, look, she can get her arm over her head,
20 would that be an accurate representation of Julia B 's range
21 of motion and movement?

22 A: Absolutely not.

23 Q: Tell us about your trip to Miami to meet with Dr. Resnick
24 and Dr. Grossman. Did you appreciate the input that they gave
25 you on Julia's condition?

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1 A: We did, just as we did with all the doctors we've
2 visited.

3 Q: Have you found that the facilities in South Carolina are
4 sufficient to meet the medical needs of your daughter?

5 A: Did I find them sufficient?

6 A: Correct. Or have you left the state to seek --

7 A: We -- we took numerous opinions. We did not take one
8 doctor's opinion. As you can tell, we've been from Cincinnati
9 to West Palm Beach, Florida, to Atlanta to Miami to Duke. You
10 name it. It consumed us. We wanted to get the best treatment
11 for our daughter. We want to take all those opinions and put
12 them together to see what the best treatment would be.

13 Q: And why did you ultimately select Atlanta over, say,
14 Cincinnati or some of the other facilities that you visited?

15 A: Really because they had agreed on the same thing and
16 because of the location and our kids, you know, wanting to go
17 with us and us to be a family and do things, you know,
18 together. We felt comfortable with Dr. Ratner and, you know,
19 we just felt like that that was a place that we could go to
20 within reason that wouldn't cause us as much stress as far as
21 traveling and traveling with Julia, you know, before and after
22 the surgery.

23 Q: Have Dr. Grossman and Dr. Resnick, who have testified in
24 this case, offered to be of any assistance needed for Julia in
25 the future?

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1 A: Absolutely. Just as all doctors have.

2 Q: Do you have future treatments planned at any facility for
3 follow-up?

4 A: We do. We have an upcoming appointment back at Dr.
5 Ratner's office in the coming month.

6 Q: And are you going back to Dr. Ratner primarily because of
7 location?

8 A: Absolutely. That and the care that we received from him.

9 Q: How are you holding up?

10 A: I mean it's tough.

11 Q: Well, I wanted to get some initial issues out of the way,
12 but I still think it's important for the jury to get to know
13 you, Julia's father. So tell us a little bit about yourself?

14 A: Well, as Christy stated earlier, I was -- I started out
15 at high school at Wallace High School, which is a small --
16 small 1A school in Wallace, and we consolidated into Marlboro
17 County High School in 1990. So I was the first class to
18 graduate from there.

19 I went on to college at Spartanburg Methodist, where I
20 played baseball. I moved there to Coker College and graduated
21 from Coker and then received a Master's degree from the Sports
22 Academy in Daphne, Alabama. I think it was around 2000.

23 I started work in 1996 at Cheraw High School. I was
24 fortunate to get a coaching job there. I was fortunate to
25 move through the ranks and come up as a young coach, very

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1 blessed to have won some state championships both in baseball
2 and football.

3 I guess with a little bit of that success, common sense,
4 and knowing how to treat people, I was moved into the position
5 of athletic director not long after I was hired originally in
6 '96. I think it was 2000, you know, the year 2000, I was
7 hired as athletic director of our schools and I've just been
8 extremely blessed to have a great job and work for great
9 people in a small town that's, you know, about people and
10 family and, you know, getting a good education.

11 Q: And are you a member of a church in Cheraw?

12 A: I am. We go to Cheraw Family Worship Center.

13 Q: Have you got a role in that church?

14 A: I'm a board member on that church.

15 Q: Did you play baseball for college as well?

16 A: I did. I played at Spartanburg Methodist.

17 Q: Do you coach -- that was my fault. I interrupted you.

18 A: Okay.

19 Q: Did you -- do you coach baseball?

20 A: I do at Cheraw High School. I have been the head coach
21 since 1998.

22 Q: You just finished the season I hear?

23 A: We did. We just finished on Friday. It was unfortunate.
24 We played in the upper state championship game and the team
25 had to beat us twice and I guess the coach failed a little bit

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1 because we got beat twice, but very proud of our guys and our
2 year. We won 22 games and lost nine and, you know, just
3 extremely proud of our -- our kids. We had a great crowd at
4 our place and, you know, I like the enjoyment of bringing
5 something to the community, the small town of Cheraw. We
6 don't get a lot of things there, but seeing seven -- 800+
7 people there from the community, it was really exciting.

8 Q: Thank you. And I'd like to move away to a new topic and
9 talk a little bit about Christy and her pregnancies, but since
10 we've heard so much about them, I'm going to be brief and just
11 ask quickly how did Christy's first two pregnancies go?

12 A: It went very well.

13 Q: Okay. And did she do all the things that -- did Christy
14 do all the things she was supposed to do with those
15 pregnancies?

16 A: Absolutely.

17 Q: Were your first two daughters -- do they have any
18 injuries to their arms or any limitations?

19 A: No, sir. No, sir.

20 Q: Okay. Now, tell us about learning you had number three
21 on the way?

22 A: Well, we were excited. You know, all our guys always kid
23 us or my friends, like you're waiting on a boy, waiting on a
24 boy, waiting on a boy, and you know, that was always kind of
25 the running joke there, but just extremely glad to be bringing

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1 another child into this world, and to have them all with
2 October birthdays was kind of unique as well.

3 Q: Did she -- did Christy have any complications prior to
4 going into labor?

5 A: No, sir.

6 Q: Now, if you could, tell us a little bit about heading to
7 the hospital for Julia's birth?

8 A: Well, it was normal. She was set up for an induction
9 and, you know, we went through the normal process of getting
10 there early, going through the process of getting signed and
11 in and all of that and getting to her room and just -- just
12 your normal procedures that you would normally go through with
13 -- or what I experienced with the other two.

14 Well, I take that back. Our second one -- she went on
15 her own. So that was a little bit different waking up 3 or 4
16 o'clock in the morning and going, but this one was a little
17 bit different from that standpoint.

18 Q: So we've seen the video, but let me ask you do you as you
19 sit here today have memories of Julia's delivery?

20 A: I do.

21 Q: Okay. Can you please tell us -- share with us what you
22 remember and what's going on up to right before it's time to
23 start pushing?

24 A: Well, I just remember the nurses coming in and out and
25 checking her and saying everything looked good and she was

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1 progressing and, you know, we did think that she would
2 probably go a little sooner than what she had, but, you know,
3 progressing regular I guess and, you know, everything seemed
4 to be normal from the standpoint of what I would -- of what
5 I've seen in the past.

6 Q: Okay. Now, if you could, please tell us about what you
7 see and what's going on at the time when Christy starts
8 pushing?

9 A: Well, she starts pushing. At some point, Dr. Browning
10 comes in and we moved to the area of where, you know, we start
11 to I guess see if we want to start to where the head has
12 progressed out, and everything seemed to be normal from that
13 standpoint. You know, there was the pushing, encouraging to
14 push. Dr. Browning had his hands like any other doctor would
15 have in guiding that baby out at that point in time. Nothing
16 seemed to be any different from that standpoint.

17 I guess as time went on and she was asked to push again,
18 Dr. Browning continued to do as before, but it seemed to be
19 each time there was a little bit more force applied to pulling
20 the baby out or delivering it.

21 Q: And what do you see in those last few seconds? Perhaps
22 part of the time is covered by the video, but then the video
23 cuts off. Tell us what's going on there?

24 A: Well, as you've seen in the video, the same thing. There
25 continued to be another pull or two. The thing that I noticed

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1 was the shaking of the hands and the downward pull. And --
2 and when the baby was not delivered on those couple of pulls,
3 the baby seemed to go back. Okay? More than what I
4 experienced seeing in the past.

5 And that continued on. When the video stopped, there
6 seemed to be one or two more pulls of shaking of the hands and
7 pulling more in a downward direction, and then the baby was
8 delivered.

9 Q: Did you ever -- did anyone ever instruct Christy to stop
10 pushing at any point?

11 A: Absolutely not. From no one.

12 Q: Not the doctor?

13 A: No. It was encouraged.

14 Q: Not the nurses?

15 A: It was encouraged to push, to continue to push.

16 Q: Do we hear you encouraging to push?

17 A: Absolutely.

18 Q: Did anyone tell you to stop encouraging her?

19 A: Absolutely not.

20 Q: Did you ever witness in the course of Julia's delivery
21 Dr. Browning do anything other than pull on Julia's head?

22 A: We did not see nothing but that.

23 Q: So after Julia was born, when did you realize that maybe
24 something wasn't quite right with Julia?

25 A: Well, you know, when she was actually delivered, they

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1 kind of cut the umbilical cord and she moved straight over to
2 the baby warmer or whatever that's called. If I recall
3 correctly, I think I just checked to make sure Christy was
4 okay and went straight to Julia, and I just noticed that her
5 arm was -- was limp and the other one was, you know, moving
6 around or whatever.

7 And I just noticed that something did not look right with
8 that and at that time I think Stacy was beside me and we just
9 kind of looked at each other, you know, just looked like --
10 you know, nobody said anything, but it was like, you know,
11 what's -- what's going on? And at that point was the first
12 that I knew that something was -- was not right.

13 Q: Let me ask you this. Did you ever go to any of the
14 ultrasound appointments with Christy?

15 A: Yes, I did.

16 Q: Did you ever go in the room and watch the video and
17 listen?

18 A: Yes, sir.

19 Q: Did you ever see on the ultrasound anything that looked
20 like or were told or there was concern about one of the arms
21 not moving?

22 A: No, sir.

23 Q: So after learning or realizing that maybe one of Julia's
24 arms aren't moving at birth, what -- what happens next? What
25 have you been doing since?

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1 A: Well, we just -- we're sitting watching her. They're --
2 they're checking her. You know, I guess it's the reflex test
3 or whatever they call it in moving the arms and they're
4 picking her arm up and it's falling straight down. The other
5 arm has a little reaction from the standpoint of just moving
6 and crying and that type of stuff and basically, you know, at
7 that point, you know -- you know what's going on? I mean what
8 is this? I think there was some conversation with a nurse,
9 but I can't say to what extent that was. I cannot remember
10 that -- that part.

11 Q: So when did you start seeking treatment for -- well, let
12 me rephrase. What have you done to try to help Julia get
13 better?

14 A: We've done everything in our power. When this took
15 place, I felt like we were left in the dark. There -- there
16 wasn't any help. There -- there wasn't anybody to go to.
17 There wasn't anything at all. We basically, you know, went to
18 her well-baby checkup and got some information there from that
19 doctor that led us to MUSC, but I relentlessly done studying
20 on my own in trying to grasp everything that we could possibly
21 do to get my child to a position to say, hey, I got to get
22 this fixed. I've got to. I'm her dad. I've got to get this
23 fixed. I've got to get her arm fixed.

24 I was consumed by that. I was completely consumed by it.
25 We went to Charleston. We went to MUSC numerous times. We

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1 went to Cincinnati. We went to Atlanta. We went to Duke.
2 These visits were numerous visits, as you've seen depicted on
3 the screen earlier, but you'll do anything for your daughter.

4 Any parent would do anything for their daughter to know
5 that it's not right. Her arm is not functioning correctly,
6 and we just went through the process of saying, hey, we're
7 going to do whatever it takes until somebody can give us
8 something. What is the best plan in action for us to do to
9 get our daughter in the best position so that she can -- she
10 can be complete?

11 Q: And let me ask you this. David, you mentioned
12 Cincinnati. Tell me a little bit about your experience when
13 you went to Cincinnati?

14 A: We went to Cincinnati twice. On the first time was a
15 consultation. Cincinnati has a great children's facility
16 there with a brachial plexus and that was some research we had
17 done on our own with that. And, you know, we -- the first one
18 was a consultation and they basically went through and really
19 told us what they would do to get more evaluation on her, an
20 EMG test where they test the nerves.

21 Q: What is -- what is a -- tell me. I don't know what an
22 EMG test is.

23 A: EMG --

24 Q: What was it from your point of view?

25 A: And I'm not a doctor, but to test the nerves and the

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1 muscles and how they're firing and working.

2 Q: What were they doing? I mean I don't know.

3 A: Okay. In the EMG test, she had one in Charleston when
4 she was very young, you know, whatever months old she was, and
5 then she had it again in Cincinnati. And if you're not
6 familiar with that test, they take needles and poke them into
7 her skin into her muscles and move them around over and over
8 and over and over and over again to test the nerve and the
9 muscles and see if they're firing.

10 And to be able to go through that and know that as Julia
11 moved when she was three or four or five months old when she
12 had the first one, you know, it was awful, but for her to be
13 older now and try to handle that, I felt helpless, you know,
14 for her to have to be able to go through that. I cannot
15 describe to you what position we as parents were in and, not
16 only us, but what Julia had to go through with that.

17 Q: And did you ever attend or go with Julia to therapy, to
18 physical or occupational therapy?

19 A: We did. Almost all the time, Christy went back with her.

20 Q: Where did you stay?

21 A: I stayed outside.

22 Q: So what's going on? I mean how was that for you?

23 A: I mean just the thing of her, you know, crying because of
24 the movements that they were doing or just, you know, as she
25 continued to move on with this just tired of the process of,

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1 you know, felt like she was being singled out to continue to
2 be worked on and worked on and worked on and worked on, but,
3 you know, to be outside and know that you can't help your
4 child make it right or make it better, that's -- you feel
5 helpless as a -- as a parent.

6 Q: And when you ceased going to the professional therapists,
7 did you continue therapy at home?

8 A: Absolutely. We -- we did.

9 Q: Tell us about that. What is it?

10 A: Therapy every day. From the standpoint of whether we put
11 towels in her hand -- as we move forward with this therapy
12 with her, she did not like you doing it because she doesn't
13 like to be singled out about it. She just doesn't like you to
14 talk about it or do anything with it.

15 As time moved on, we were able to develop stuff with her
16 like we were playing around with her and putting towels in her
17 hand and moving the range of motion and doing different things
18 such as that to help increase that flexibility and mobility in
19 her arm.

20 So, you know, that's something that we do literally, you
21 know, every day with her to progress, but it's gotten better
22 with the therapy from the standpoint of getting her to do it
23 because we try to make it -- make it fun for her, so to speak.

24 Q: Has -- has it been recommended to you that additional
25 professional therapy from an occupational therapist, one

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1 trained in occupational therapy, would -- would -- would be
2 good for Julia?

3 A: Yes, sir.

4 Q: Do you believe that it would be of greater benefit to
5 Julia to receive therapy from a professional compared to at-
6 home therapy?

7 A: Yes, sir.

8 Q: Is there -- for what reason have you not taken her back?

9 A: Just haven't been able to do it at this time or been in a
10 position to do it.

11 Q: Mr. Byrd, as Julia's father, what concerns do you
12 currently have for your daughter?

13 A: I have a lot of concerns. I have concerns about what
14 she's able to do now. I have concerns with -- with how she's
15 treated at school. I'm going to have concerns of when she
16 wants to start playing sports. Can she play certain sports?
17 You know, she can't pitch in softball. I know there's certain
18 things as being a coach that she can't do. She just can't do
19 them.

20 And how that progresses, not only from her being a
21 youngster to a teenager to an adult. We're talking about her
22 cranking a car. We're talking about as she gets older. You
23 know, mom and dad is here every single minute of the day right
24 now for her pretty much. How does that happen as she
25 progresses and moves as she gets older and moves to go to

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1 college and all of that and has a family of her own? I mean
2 there's various concerns, not just now, but -- but throughout
3 the rest of her life.

4 Q: Is there anything else that we need to know about Julia
5 or anything leading up to where we are today and how it
6 affected her and her family?

7 A: Well, I just -- I want you to know that it's been a
8 struggle. It's been a struggle for us and our family. We
9 didn't know anything. We didn't know what to do.

10 And I have to look at my daughter, who is starting to
11 become more talkative and who has questions now, and she sees
12 her other two sisters that don't have that, and it's just
13 hard. It's hard from knowing that we went to a point that I'm
14 going to make this right for my daughter to hearing that you
15 can't make it right for her. I can't fix it. A doctor can't
16 fix it. It's permanent. And to hear that these times in this
17 court --

18 Q: It's all right.

19 A: In this courtroom to hear that, it hurts. To know that
20 she's going to have to do things differently and she's going
21 to have to adapt differently just to do some of your basic
22 things. I say that to say this. We are going to push our
23 daughter. We're going to push her to be the best that she can
24 be. That's how I was brought up. That's how I'm going to
25 bring my child up.

1 MR. RUFFIN: Thank you. Please answer any questions that
2 the defense might have.

3 THE COURT: All right. Cross?

4 MR. JOYCE: Thank you, Your Honor. We have no questions.
5 Thank you.

6 THE COURT: All right. Thank you. You may step down.
7 All right. Ladies and gentleman of the jury, let's take a
8 lunch break until about 2:15, and then we'll come back and go
9 from there.

10 (WHEREUPON, the jury exited the courtroom at 1:02 p.m.)

11 THE COURT: Let me know when that door is closed. Good?
12 All right. Is that your last witness for the day?

13 MR. GRAHAM: It's our last witness, Your Honor. We do
14 have the other matter about the employment.

15 THE COURT: Yeah. We're going to do that. I just wanted
16 to know. I'm going to let you rest when they come back from
17 lunch and then do you want to go ahead and do motions now?

18 MR. RUFFIN: It seems like we could just --

19 THE COURT: In other words --

20 MR. GRAHAM: I mean I don't want to rest until we've
21 dealt with the employment issue just so we --

22 THE COURT: Okay.

23 MR. GRAHAM: -- can't get --

24 THE COURT: I'm ready.

25 MR. GRAHAM: -- dismissed against the corporate

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1 THE CLERK: Please have a seat and state your name for
2 the record.

3 THE WITNESS: I'm Saunders Bridges Jr.

4 THE COURT: All right. Why don't you go ahead and ask
5 him questions? And then we'll let them cross if he'd like.

6 MS. CRAIG: Okay. Sure.

7 SAUNDERS M. BRIDGES JR., being
8 first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MS. CRAIG:

11 Q: Hello, Mr. Bridges.

12 A: Good afternoon.

13 Q: Just two questions, if I may. Could you please tell us
14 in 2009 at the time of this delivery who was Dr. Browning's
15 employer?

16 A: Dr. Browning's employer -- I understand the date here is
17 October 8th, 2009.

18 Q: Yes, sir.

19 A: And Dr. Browning's employer was McLeod Physician
20 Associates II -- Roman numeral II.

21 Q: And is McLeod Physicians Associates II a 501(c)(3)
22 charitable organization pursuant to Section 33-56-180 of the
23 South Carolina Code?

24 A: Yes.

25 MS. CRAIG: Those are all the questions I have. Thank

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1 you very much.

2 THE COURT: All right. Mr. Graham?

3 MR. GRAHAM: Excuse me, Your Honor.

4 (WHEREUPON, there was a pause in the proceedings.)

5 THE COURT: Mr. Bridges, why don't we go one step further
6 just for the record. Tell them who you are and what you do
7 and how you would know this information.

8 THE WITNESS: I am a partner in the law firm of Aiken,
9 Bridges, Elliott, Tyler, and Saleeby in Florence. We serve as
10 general counsel to McLeod Health and related healthcare
11 entities.

12 THE COURT: Thank you. All right. Mr. Graham?

13 MS. CRAIG: Your Honor, while Mr. Graham is looking for
14 the documents, I do believe Mr. Bridges brought some documents
15 that we should put into the records to show the 501(c)(3)
16 status of Dr. Browning's employer. May I approach, Your
17 Honor?

18 THE COURT: You may.

19 CONTINUED DIRECT EXAMINATION

20 BY MS. CRAIG:

21 Q: Mr. Bridges, is this the copy from the Secretary of
22 State's Office?

23 A: Yes. This is a copy of the Certificate of Existence of
24 McLeod Physician Associates II as a non-profit corporation
25 issued by the South Carolina Secretary of State.

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1 Q: And does this help you and help this Court determine
2 whether or not Dr. Browning's employer in the time of this
3 delivery was a 501(c)(3) corporation?

4 A: Yes. That's the document we get from the Secretary of
5 State whenever we need to demonstrate the non-profit nature
6 and the 501(c)(3) status corporation.

7 MS. CRAIG: Thank you, Mr. Bridges. We'd just mark this
8 as a Court exhibit, please.

9 (WHEREUPON, the 501(c)(3) document was marked as Court's
10 Exhibit Number 2.)

11 MS. CRAIG: Thank you.

12 BY MS. CRAIG:

13 Q: Mr. Bridges, did you bring any other documents with you
14 that we should mark as Court's exhibits too as evidence that
15 Dr. Browning was employed with a charitable organization at
16 the time of this delivery?

17 A: I did. I tried to grab a series of documents to show
18 through time Dr. Browning's employment status leading up to
19 October 9th, 2009. I brought a copy of Dr. Browning's
20 employment agreement with an entity that was known as McLeod
21 Physician Associates, Inc. That entity was originally owned,
22 I believe, by stockholders, mostly physicians I believe, and
23 it was a for-profit corporation.

24 Dr. Browning's contract with McLeod Physician Associates,
25 Inc., was effective the 1st day of October of 2005. It had a

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1 three-year term with a one-year extension option. That
2 contract was assigned by McLeod Physician Associates, Inc. --

3 MR. GRAHAM: Excuse me, Your Honor.

4 A: -- to a new entity --

5 MR. GRAHAM: I'm going to object, but -- but the best
6 evidence of that purported assignment would be the document.
7 Do you have that, sir?

8 THE WITNESS: If you'll let me get to it, Mr. Graham --

9 MR. GRAHAM: Sure.

10 THE WITNESS: -- I will.

11 MR. GRAHAM: Go ahead.

12 BY MS. CRAIG:

13 A: In 2006, McLeod Physician Associates II was established
14 as a completely new non-profit, non-stock corporation. And
15 the next document I brought is August 7, 2006, which is from
16 Charles Jordan, who was vice president of McLeod Physician
17 Associates, Inc., and later of MPA II.

18 This is a letter from Dr. Jordan to Dr. Browning
19 confirming that as of October 1, 2006, McLeod Physician
20 Associates, Inc., was assigning certain contracts, including
21 Dr. Browning's, to this new entity, MPA II, the non-profit.
22 Dr. Browning was asked to consent to and confirm that by
23 signing and returning that letter, which he did.

24 And, Your Honor, do you want these?

25 THE COURT: Make them Court exhibits would be a good

1 idea.

2 MS. CRAIG: Yes, sir. So we'll make this the next Court
3 exhibit.

4 (WHEREUPON, the 8/7/2006 letter was marked as Court's
5 Exhibit Number 3.)

6 MR. GRAHAM: Your Honor, we asked for all these documents
7 in discovery. None of this has ever been produced. We would
8 ask for a copy and we would also ask Your Honor to apply the
9 same rule to these documents as you did to the expert opinions
10 that anything not disclosed in discovery not be produced now
11 because discovery in this case was closed by the defense
12 motion.

13 THE COURT: I'm just trying to figure out who the doctor
14 works for. That's it. This doesn't have anything to do with
15 the jury's process.

16 THE WITNESS: Then, Your Honor, as you'll see from that
17 August letter, as of October 1 of 2006, Dr. Browning was
18 employed by MPA II.

19 The next document I was able to put my hands on and bring
20 is an amendment to the original physician agreement signed by
21 Dr. Jordan and by Dr. Browning, and this just recites that the
22 new employer is going to be MPA II and that, because it is now
23 a non-profit, the employment agreement is amended to put a cap
24 on what the employees can be paid.

25 MS. CRAIG: We'll make that a Court exhibit, please.

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1 (WHEREUPON, the amendment letter was marked as Court's
2 Exhibit Number 4.)

3 BY MS. CRAIG:

4 A: So then on July 29, 2008, by this next letter from Dr.
5 Jordan, senior vice president of MPA II, confirming the
6 renewal of the original and now assigned contract for an
7 additional year through October 1, 2009. And that was signed
8 and returned by Dr. Browning.

9 MS. CRAIG: We'll mark that as the next Court exhibit.

10 (WHEREUPON, the renewal letter was marked as Court's
11 Exhibit Number 5.)

12 BY MS. CRAIG:

13 A: And then the next is October 12, 2009, another letter
14 between now Dane Ficco, F-i-c-c-o, who is by now senior vice
15 president of MPA II, and signed by Dr. Browning, extending the
16 employment agreement from October 1, 2009, through the end of
17 2009. And again, that's the contract between Dr. Browning and
18 MPA II.

19 MS. CRAIG: We'll mark that as a Court exhibit, please.

20 (WHEREUPON, the renewal letter was marked as Court's
21 Exhibit Number 6.)

22 MS. CRAIG: Thank you.

23 BY MS. CRAIG:

24 A: Then I brought Dr. Browning's new contract, which I don't
25 know if you want or not. This was the new one that took over

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1 on January 1, 2010, between Dr. Browning and MPA II.

2 And I think we've already marked the certificate of non-
3 profit status. And that's what I was able to bring. Yes,
4 that certificate of non-profit status is Court Exhibit 2.

5 Q: Thank you, Mr. Bridges. Any other documents that you
6 would like to identify for the Court to show Dr. Browning's
7 employment status with the 501(c)(3) corporation?

8 A: Let's see. I think as an attachment to Exhibit 2 is
9 maybe parts of the Articles of Incorporation referring to MPA
10 II as a non-profit, non-status -- I'm sorry -- non-profit,
11 non-stock public benefit corporation. And also the printout
12 of the website of the Secretary of State showing MPA II as
13 non-profit.

14 MS. CRAIG: Thank you very much. Those are all the
15 questions I have. Thank you.

16 THE COURT: All right. Mr. Graham?

17 MR. GRAHAM: Thank you, Your Honor. Could you please
18 mark these as 80 and 81?

19 (WHEREUPON, Plaintiff's Exhibit Number 80, contract, and
20 Plaintiff's Exhibit Number 81, letter, were marked for
21 identification purposes only.)

22 MR. GRAHAM: Thank you.

23 THE WITNESS: Your Honor, the -- the contracts of
24 employment -- if you're going to make them part of the file,
25 we would prefer that the financial information be redacted.

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1 MR. GRAHAM: I think it already has been.

2 THE WITNESS: It's not on the copies I brought, but I
3 know y'all exchanged them.

4 MR. GRAHAM: Yeah. This is marked confidential and it's
5 got some redactions.

6 THE WITNESS: Okay. Thank you.

7 CROSS-EXAMINATION

8 BY MR. GRAHAM:

9 Q: Sandy, I -- before we finish, of course, I need to see
10 the documents you referred to, but when we asked for
11 employment documents, we were furnished only two, those being
12 -- thank you -- those being marked as Plaintiff's Exhibit 80
13 and Exhibit 81.

14 A: Okay.

15 Q: Could you identify Plaintiff's Exhibit 80?

16 A: Plaintiff's Exhibit 80 is the original contract that we
17 referred to earlier effective October 1, 2005, between McLeod
18 Physician Associates, Inc., and Dr. Browning.

19 Q: All right. And McLeod Physician Associates, Inc., is a
20 for-profit entity; correct?

21 A: It was.

22 Q: Okay. And --

23 A: It no longer -- it actually shows on the website as still
24 existing, but it does not exist in terms of doing anything or
25 conducting any business or holding any assets.

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1 Q: Well, it still exists in terms of the Secretary of
2 State's Office; true?

3 A: Correct.

4 Q: And it still exists in terms of having \$1.2 million
5 dollars' worth of liability coverage for Dr. Browning in this
6 case; true?

7 A: No.

8 Q: Well, that -- that was represented to us.

9 MR. GRAHAM: Could you pull that answer to
10 interrogatories, please?

11 BY MR. GRAHAM:

12 Q: Now I hand you Exhibit 81. I couldn't tell if you had
13 referred to this in your documents.

14 A: Yes, sir.

15 Q: But this is the letter from Mr. --

16 A: Ficco.

17 Q: -- Ficco. All right. And this letter --

18 MR. GRAHAM: Excuse me, Your Honor.

19 BY MR. GRAHAM:

20 Q: This letter states:

21 Dear Dr. Browning. To allow you and MPA II sufficient
22 time to reach agreement on a new employment agreement, please
23 acknowledge your approval by signing where indicated below to
24 the 90-day extension of the term of your current physician
25 employment agreement dated October 1, 2005; correct?

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1 A: Correct.

2 Q: Did I read that accurately?

3 A: Correct.

4 Q: And is the employment agreement referred to in Exhibit 81
5 the same as we introduced as Exhibit 80?

6 A: It is.

7 Q: And so that is the physician employment agreement that
8 has McLeod Physician Associates, Inc., the for-profit entity,
9 as the employer; correct?

10 A: Correct. But this also -- Exhibit 80 does not include
11 the amendments.

12 Q: All right, sir. Well, let's -- let's read the next
13 sentence.

14 Quote, other than the extension of the term of the
15 agreement as such is set forth in 7.1 of the agreement, there
16 are no and there will be no other changes to your agreement
17 for the extension period, end quote.

18 Did I read that accurately?

19 A: You did.

20 Q: All right. So this letter dated October 12, 2009,
21 ratifies and continues in effect the contract marked Exhibit
22 80 in all respects except the duration of the contract without
23 further change; true?

24 A: That letter does.

25 MR. GRAHAM: And that's the letter, Your Honor, that was

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1 produced to us when we asked for employment documents, these
2 two documents, Exhibit 80 and Exhibit 81. Now, I haven't seen
3 these other documents. Your Honor, may I take a moment just
4 --

5 THE COURT: You may.

6 MR. GRAHAM: -- to peruse them?

7 (WHEREUPON, there was a pause in the proceedings.)

8 BY MR. GRAHAM:

9 Q: Sandy, were these your only copies?

10 a: No, I've got -- I've got copies.

11 Q: This is for me?

12 A: Yeah.

13 Q: Thank you.

14 (WHEREUPON, there was a pause in the proceedings.)

15 BY MR. GRAHAM:

16 Q: Sandy, have you carefully reviewed all these documents?

17 A: As carefully as I could while I was driving over here.

18 Q: Now, you know, sir, no distracted driving. My question
19 though is, Sandy, are -- as you sit here right now, are you
20 aware of any legal document that purports to change the name
21 of the employer of Dr. Browning? I realize there's some
22 assignment of employment contracts from one existing
23 corporation to another, but do you have access to any document
24 that changes the name of the employer?

25 A: Well, the assignment of the contract in my opinion would

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1 change the name of his employer. If you look at the October
2 -- I'm sorry -- the August 7th, 2006, letter from Dr. Jordan,
3 it says that MPA II will assume all the obligations and
4 certain agreements of MPA, and MPA II will commence operating
5 as a medical practice. And then it goes on and says in
6 connection with this assignment, MPA is notifying you via this
7 correspondence that your current physician employment
8 agreement with MPA dated October 1, 2005, will be assigned by
9 MPA to MPA II effective October 1, 2006.

10 Then the next real action on this I guess that I brought
11 was the July 29, 2008, letter from Dr. Jordan to Dr. Browning
12 saying your MPA II contract will be renewed effective October
13 1, 2008.

14 So I don't know exactly what you mean other than the fact
15 that they assigned the contract -- Dr. Browning's employment
16 contract to MPA II and he was practicing since that time as
17 MPA II. That's all I know of.

18 Q: Yes, sir. But I understand there are these assignment
19 documents. I understand there are letters referring to the
20 assignment documents and giving Dr. Browning notice of a
21 purported assignment. My question though is do any of those
22 documents by their terms expressly change the employer from
23 McLeod Physician Associates, Inc.?

24 A: Yeah. I think they do, yes.

25 Q: Expressly by their terms? Please show me where.

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1 A: Well, by assigning that contract.

2 Q: Okay. I understand your argument that that implicitly
3 changes. That's why I used the word express in my question.
4 Are you aware of any express language that says word for word
5 we hereby amend the name of the employer from McLeod Physician
6 Associates, Inc., to McLeod Physician Associates II?

7 A: No.

8 Q: Okay. Let me now --

9 MR. GRAHAM: Could you mark this as Exhibit 82?

10 (WHEREUPON, Plaintiff's Exhibit Number 82, amendment to
11 Contract Number 1338, was marked for identification
12 purposes only.)

13 BY MR. GRAHAM:

14 Q: Now, this -- this is my only copy. Do you have another
15 copy of this? This is the amendment to Contract Number 1338.

16 A: I do.

17 Q: Okay. Thank you. Okay. Now, just to set the sequence
18 of events, this amendment is dated August 21, 2006; correct?

19 A: Yes.

20 Q: Which puts it after the August 7, 2006, letter you
21 referred to and before the July 29, 2008, letter you referred
22 to, both being from Dr. Jordan?

23 A: Yes.

24 Q: And in Exhibit 82, the amendment -- the only amendment is
25 set forth in Roman numeral III; correct? I mean there's some

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1 boilerplate, but the only actual amendment is in Roman numeral
2 III?

3 A: As far as I can tell. I mean I haven't compared this to
4 the original, but that's the purpose of the amendment.

5 Q: Well, there's some whereas clauses and then now,
6 therefore -- and then there are four Roman numeral paragraphs.
7 Number I is Recitals. That's just purely boilerplate; true?

8 A: Yeah.

9 Q: Roman numeral II, Capitalized Terms. That's pure
10 boilerplate; true?

11 A: True.

12 Q: Roman numeral III reads -- title is Amendment to Article
13 IV, Section 4.8. Article IV of Section 4.8 will be added to
14 the agreement and shall read as follows.

15 Section 4.8. Total Annual Compensation Cap. The parties
16 agree that, notwithstanding any provision to the contrary
17 herein, as of October 1, 2006, in no event shall MPA pay to
18 physician annual total base compensation as set forth in
19 Section 4.1 in excess of -- and there's a dollar figure which
20 I will not read into the record.

21 And that's the entirety of Section III; true?

22 A: True.

23 Q: Then if we go on to Section IV, the title is No Other
24 Changes or Modifications. The parties agree that no other
25 changes or modifications will be made to the agreement other

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1 than as set forth above and that all other provisions in the
2 agreement remain intact and enforceable. The parties hereto
3 agree that this amendment shall not constitute a novation,
4 satisfaction or cancellation of the agreement and, except as
5 modified herein, all other terms of the agreement shall remain
6 in full force and effect.

7 Did I read that accurately?

8 A: You did.

9 Q: All right. So again, sir, can you point me to any
10 document that by its express terms changes the name of Dr.
11 Browning's employer from McLeod Physician Associates, Inc., a
12 for-profit entity, to McLeod Physician Associates II, a non-
13 profit entity?

14 A: The amendment took place specifically for reasons having
15 to do with federal law and regulations before the assignment.
16 Okay? As of the time of the assignment, the amendment was
17 part of the contract. The assignment of the contract to MPA
18 II changed Dr. Browning's employer to MPA II. It's just like
19 --

20 Q: I --

21 A: I mean it's just like selling your car. If you sell
22 somebody your car --

23 Q: Okay. If I sell --

24 A: -- you don't --

25 Q: -- somebody my car, how does that change my employer?

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1 A: It doesn't. It changes the ownership of the car.

2 Q: Okay. Exactly. Do you remember my question, Sandy? The
3 question is do you have any document to show His Honor that by
4 its express language expressly changes the name of the
5 employer from McLeod Physician Associates, Inc.?

6 A: Not here, no.

7 Q: As you sit here today, are you aware of any?

8 A: I cannot imagine that any such document would ever exist.

9 MR. GRAHAM: Thank you.

10 THE COURT: All right. Any follow-up to that?

11 MR. GRAHAM: Excuse me?

12 THE COURT: I'm asking her does she have any follow-up.

13 MS. CRAIG: I think that Mr. Bridges was very clear; so I
14 have no follow-up to Mr. Bridges, but I just -- I want Your
15 Honor to understand McLeod Physicians Associates, Inc., is an
16 uncovered entity. There's no insurance coverage. The
17 insurance coverage is with McLeod Insurance II [sic].

18 THE COURT: All right. For the record, based on the
19 evidence presented to me, I'm going to find that Dr.
20 Browning's employer at the time of the incident which is the
21 subject matter of this action was McLeod Physician Associates
22 II.

23 All right. Do we want to take up motions now or do we
24 want to do that later?

25 MS. CRAIG: Either way, Your Honor. I'm happy to do

1 whatever you wish.

2 THE COURT: Do you mind doing the motions now and then we
3 come back and let you rest on the record and then move forward
4 with the defendant's case? Are you okay with that?

5 MR. GRAHAM: I'm sorry, Your Honor.

6 MR. RUFFIN: We were conferring. Sorry.

7 THE COURT: Are you okay with letting me go ahead and
8 hear the pre-trial motions at this time and then come back and
9 rest and then --

10 MR. GRAHAM: Yes, sir.

11 THE COURT: -- just move right into it?

12 MR. GRAHAM: Absolutely.

13 THE COURT: All right. Any motions from the defense?

14 MS. CRAIG: Thank you, Your Honor.

15 THE WITNESS: May I be excused?

16 MS. CRAIG: Thank you, Sandy. Thank you, Mr. Bridges.
17 Your Honor, at this time, the defendants would move for a
18 directed verdict as to both defendants and all causes of
19 action.

20 First of all, we would ask that Your Honor dismiss Dr.
21 Browning as an individual defendant pursuant to Section 33-56-
22 180. Your Honor may know that when we tried this case the
23 first time, Dr. Browning was dismissed by the plaintiff prior
24 to the start of the case.

25 So this exercise is -- I don't understand the purpose of

1 this exercise, but I think clearly based on the documents that
2 Mr. Bridges was kind enough to put into evidence, there is no
3 doubt that Dr. Browning is an employee of a charitable
4 organization and that the proper defendant in this case should
5 only be McLeod Physicians Associates II. So we would ask that
6 Dr. Browning be dismissed in his individual capacity for that
7 reason.

8 Your Honor, we would also ask that you grant our motion
9 for summary judgment pursuant to the Emergency Medical and
10 Obstetrical Care Statute. As Your Honor knows, that's Section
11 15-32-230, which requires the plaintiff to prove not only that
12 there was a deviation from the standard of care that
13 proximately caused damage in this case, but there was gross
14 negligence in this case, and the plaintiff has not proved --
15 met their burden of proof to show any type of reckless conduct
16 or gross negligence on behalf of either of the defendants.

17 Your Honor, we would also move for a directed verdict as
18 to liability, causation, and damages. The only reasonable
19 inference from the plaintiff's testimony -- the plaintiff's
20 case and all of the testimony that they have elicited is that
21 they have not been able to meet their burden of proof or to
22 prove the case against the defendants.

23 And finally, Your Honor, we would ask -- we have filed a
24 motion to strike and limit liability. The motion to strike
25 damages, Your Honor, if I could hand that up to you? Thank

1 you.

2 The plaintiff is seeking punitive damages in this case
3 and we would contend that the plaintiff has not proved the
4 defendant's conduct is so shocking and offensive that
5 punishment should be -- such that punishment should be
6 justified. That's the *McGee v. Bruce Hospital System* case in
7 which the plaintiff must prove reckless, willful, and wanton
8 conduct on behalf of the defendant. And for that basis, we
9 would ask that you strike punitive damages.

10 And there's also no punitives available to the plaintiff
11 under the charitable immunity statute, as it only allows
12 actual damages. Also for that basis, we'd ask that you strike
13 punitive damages as well.

14 THE COURT: All right. Let me hear from you.

15 MS. CRAIG: Thank you, Your Honor.

16 MR. RUFFIN: Your Honor, may it please the Court.

17 THE COURT: Sure.

18 MR. RUFFIN: The first point would be that they have
19 asked for a directed verdict based upon an affirmative defense
20 that they've asserted, which is the Emergency Exception
21 Statute, which is indeed an affirmative defense. So it's
22 obviously premature to make a ruling when they haven't even
23 put up their case yet on an affirmative defense. Until we've
24 heard them put up the evidence, to do so -- since they have
25 the burden of establishing that.

1 Secondly, in terms of Dr. Browning, there's certainly
2 been sufficient evidence not only of negligence but of gross
3 negligence, reckless, and willful conduct through the
4 testimony of Dr. Pliskow. Dr. Pliskow described the negligent
5 acts of Dr. Browning in such a way that they meet the
6 definition of gross negligence as defined by this state's case
7 law. He described how it was a conscious indifference and I'm
8 using words to that effect. I don't have his transcript in
9 front of me, but he certainly described the conduct as going
10 well beyond ordinary negligence.

11 So therefore the testimony of Dr. Pliskow establishes
12 that he -- that Dr. Browning was not only negligent, but also
13 reckless, willful, wanton, and grossly negligent.

14 Secondly, we've obviously -- and I mean causation
15 shouldn't even be a question. We've gotten expert testimony
16 from Dr. Grossman and Dr. Resnick, as well as Dr. Pliskow, on
17 causation. Damages are self-evident. I'm not sure to what
18 extent Your Honor would like me to continue to go into this.

19 The punitive damages -- pursuant to Your Honor's
20 determination of McLeod Physician Associates II being the
21 employer, if the statute for nonprofits says that there's no
22 punitive damages to be awarded, then we're bound by Your
23 Honor's decision on that issue.

24 In terms of keeping Dr. Browning on the verdict form, I
25 believe he does remain on the verdict form because we have put

1 forth sufficient evidence of reckless, willful, wanton, and
2 gross negligence in his conduct. Therefore, certain
3 exceptions may apply in terms of economic and noneconomic
4 damages. Therefore, it's necessary for Dr. -- for Dr.
5 Browning to stay on the verdict form.

6 THE COURT: All right. I'll think about it over lunch
7 and I'll let you know my ruling when we get back.

8 MS. CRAIG: Thank you, Your Honor. And what time would
9 you like us back?

10 THE COURT: What?

11 MS. CRAIG: What time would you like us back?

12 THE COURT: How about 2:10?

13 MS. CRAIG: Yes, sir.

14 MR. BRIDGES: Your Honor, I walked off with one of the
15 Court's exhibits.

16 THE COURT: Don't do that.

17 MR. GRAHAM: Your Honor, can we just clarify one more
18 thing?

19 THE COURT: Yeah.

20 MR. GRAHAM: Of course, we'd like to reserve our rights
21 under the ruling about who was the employer, but in light of
22 Your Honor's ruling, will this case be going to the jury as
23 McLeod Physician Associates II? In other words, we'll amend
24 the name for the purposes of this trial while preserving our
25 right to go after the --

1 THE COURT: That's the way I see it. Right.

2 MR. RUFFIN: Thank you.

3 THE COURT: All right.

4 (WHEREUPON, there was a break in the proceedings from
5 1:38 p.m. until 2:19 p.m., after which the proceedings
6 resumed as follows.)

7 THE COURT: All right. For the record, I am going to
8 grant the directed verdict motion to limit liability and
9 strike punitive damages as it applies to McLeod Physicians
10 Associates II only. I'm going to deny all other motions.

11 All right. What we're going to -- y'all come up here
12 real quick. Let me talk to you.

13 (WHEREUPON, a bench conference was held as follows.)

14 THE COURT: And who -- are you going to do Dr. Browning?

15 MS. CRAIG: Yes, sir.

16 THE COURT: All right. I had the distinct pleasure of
17 reading what Judge Griffith had to go through in the last
18 trial.

19 MR. GRAHAM: Yes, sir.

20 THE COURT: And we -- hopefully, we're not going to do
21 that in this trial. In other words, there were people talking
22 -- it was almost hard to read the transcript. Somebody would
23 talk, you would try to talk, somebody else would talk, and
24 somebody else. It was out of this world. We're not going to
25 have that. So if I open my mouth to say something, everybody

1 else better shut up.

2 MR. GRAHAM: Okay.

3 THE COURT: We're going to keep it in order. And I know
4 you've got to do your job and you've got to take a pound of
5 flesh for your client. I understand all that and I'm cool
6 with that, but there's a point when it gets out of hand. I
7 understand that. And let's try to use depositions properly.
8 They were not used properly.

9 MR. GRAHAM: I know.

10 THE COURT: And I know you know that. And that prior
11 trial transcript -- I didn't let her use it; so let's don't
12 use it.

13 MR. GRAHAM: Okay.

14 THE COURT: No prior lawsuits. Just make sure that no
15 prior lawsuits --

16 MR. GRAHAM: I'm not going to.

17 THE COURT: -- are coming in.

18 MR. GRAHAM: Not unless he opens the door somehow.

19 MR. RUFFIN: But we would, of course, mention it to you
20 beforehand.

21 THE COURT: All right.

22 MS. CRAIG: You've got to come up here more often.

23 THE COURT: You're going to rest on the record and then
24 we're going to just jump right in?

25 MS. CRAIG: Yes, sir. We're ready to go. Well, he is --

1 we're setting up some speakers.

2 THE COURT: Who is going to cross him?

3 MR. RUFFIN: No.

4 MR. GRAHAM: Me.

5 THE COURT: You don't want to let him do it? He might
6 actually get us out of here quicker.

7 MR. GRAHAM: Some parts of me would like to let him do
8 it, but --

9 THE COURT: So I think that's got it. Let me know when
10 all your stuff is set up and we'll roll.

11 (WHEREUPON, the bench conference ended and there was a
12 pause in the proceedings, after which the proceedings
13 resumed as follows.)

14 MR. GRAHAM: Your Honor?

15 THE COURT: Yes, sir?

16 MR. GRAHAM: May we approach for a second?

17 THE COURT: Sure.

18 (WHEREUPON, a bench conference was held as follows.)

19 MR. GRAHAM: There's one more thing I'd like to do before
20 we rest. One more thing before we rest and that is just to
21 put in the record as a Court's exhibit or whatever their
22 answers to interrogatories on behalf of McLeod Physician
23 Associates Inc., where they say they have 1.2 million in
24 liability coverage for that entity.

25 THE COURT: Do you want to just make that a Court

1 exhibit?

2 MS. CRAIG: We can. I'd like to put on the record an
3 explanation too.

4 THE COURT: I don't think there's anything that they have
5 to prove.

6 MR. GRAHAM: No.

7 MS. CRAIG: No.

8 THE COURT: And we're on the record as we're talking.

9 MS. CRAIG: Oh, we are? Okay. Sure.

10 THE COURT: So we can do it right here if you would like
11 to.

12 MS. CRAIG: So I think those answers to interrogatories
13 were in 2013. There were numerous conversations with counsel,
14 both orally and in writing, about the fact that this was a
15 501(c)(3). I don't know why we're fighting this. The entity
16 that he wants to keep in the suit does not have insurance
17 coverage. We have identified the one who has the insurance
18 coverage, which is McLeod Physicians Associates II.

19 So the 2013 interrogatories -- after that, there were
20 multiple conversations with plaintiff's counsel and, as I told
21 you, in the first trial they agreed to dismiss Dr. Browning.
22 So all of this was a surprise. I don't think there's any
23 prejudice. We've actually now identified the party that has
24 coverage as opposed to a defunct entity.

25 THE COURT: Go ahead.

1 MR. GRAHAM: First of all, with respect to different
2 tactics and different trials, the old trial is erased, as Your
3 Honor knows. We are motivated by different tactics each time.

4 As far as -- as far as the representations are concerned,
5 they answer a formal interrogatory telling us certain facts.
6 They never amend it. We asked them about employment. They
7 say they did a -- that McLeod Physician Associates II was the
8 employer, but when we asked for proof, they sent us proof to
9 the contrary.

10 And so all this business about we don't know why Mr.
11 Graham is going after McLeod Physician Associates Inc., that's
12 who they told us was the employer. That's who they told us
13 had the insurance, and the Secretary of State says they still
14 exist and they are a for-profit company. It makes a big
15 difference. If we get -- if we potentially get a big verdict,
16 it makes all the difference in the world about collecting it.

17 So that's why we do what we do. We have the
18 interrogatory answer, but I need to go get it.

19 (WHEREUPON, there was a pause in the bench conference,
20 after which the bench conference resumed as follows.)

21 MR. GRAHAM: Your Honor, the critical answer is number
22 three.

23 THE COURT: All right. Let me see the picture.

24 (WHEREUPON, the answers to interrogatories were marked as
25 Court's Exhibit Number 7.)