

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No.: 2011-CP-32-2282

RECEIVED

MAY 14 2014

SC Court of Appeals

Tanya Bennett, as Next Friend of
Mykelvion T., a minor.....Appellants,

v.

Lexington County Health Services District, Inc.
d/b/a Lexington Medical Center.....Defendants,

RECORD ON APPEAL
VOLUME 1

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Attorneys for Respondents

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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

Docket No.: 2011-CP-32-2282

Plaintiff,

v.

ORDER

Scott Augustine, MD and Lexington
County Health Services District, Inc. d/b/a
Lexington Medical Center,

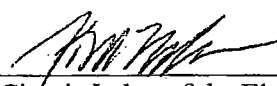
Defendants.

THIS MATTER COMES BEFORE ME on motion of the attorney for the Defendant for an Order striking the name of Scott Augustine, MD from the caption on the ground that he has not been served and is not a proper party defendant, as he was an employee of Lexington County Health Services District, Inc. d/b/a Lexington Medical Center during the times alleged in the Complaint filed in this action.

THEREFORE, it is

ORDERED, with consent of the attorney for the Plaintiff, that the name Scott Augustine, MD be and is stricken from the caption.

without prejudice.

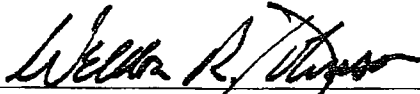

Circuit Judge of the Eleventh Judicial Circuit

22 JAN 12
KW/SK, SC

Columbia, South Carolina

Date: JANUARY 12, 2012

I SO MOVE.



Weldon R. Johnson, Esquire
Barnes, Alford, Stork & Johnson, LLP
Post Office Box 8448
Columbia, SC 29202-8448
Attorney for the Defendants

I CONSENT



Edward L. Graham, Esquire
Graham Law Firm, PA
Post Office Box 550
Florence, SC 29503
Attorney for the Plaintiff



ORIGINAL

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT

Tanya Bennett, as next friend of)
Mykelvion Thurmond, a minor,) Civil Action No: 2011-CP-32-2282

BEVERLY G. BIGG
Plaintiff)
LEXINGTON)

ORDER

v.)

Lexington County Health Services)
District, Inc. d/b/a Lexington Medical)
Center,)
Defendant.)

This matter came before the Court on March 11, 2013 upon the Motion for Summary Judgment filed by Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("Lexington Medical Center"). Present at the hearing were Edward Graham, Esquire, counsel for Plaintiff Tanya Bennett, as next friend of Mykelvion Thurmond, a minor ("Plaintiff"), and Weldon Johnson, Esquire, and Emily Brown, Esquire, counsel for Lexington Medical Center. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Lexington Medical Center's Motion for Summary Judgment is **GRANTED**.

FACTS

On July 23, 2001, Mykelvion Thurmond was born to Plaintiff Tanya Bennett at Lexington Medical Center, a governmental healthcare entity, and delivered by Dr. Scott Augustine, a physician employed by Lexington Medical Center. At delivery, Dr. Augustine stated to Plaintiff "[o]ops, I hurt his arm." Bennett Deposition, p. 41, lines 7-23. On August 21, 2001, Plaintiff called Lexington Medical Center in Swansea to obtain an orthopaedic referral for the injury to Mykelvion's arm. In October 2001, Dr. David Redmond, a physician at Midlands Orthopaedics, evaluated and tested Mykelvion's brachial plexus nerves. On December 5, 2001, a doctor at Midlands Orthopaedics advised Plaintiff that Mykelvion's "particular deficit was indicative of marginal recovery." On January 11, 2002, Plaintiff met with and authorized David Betts, an attorney in Columbia, South Carolina to receive Mykelvion's medical records. On January 25, 2006, McWhirter, Bellinger and Associates requested medical records from Dr. Augustine with Plaintiff's permission. On February 6, 2008, a doctor at Emory Orthopaedics

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Center noted “according to his mother at three months of age it sounds like [Mykelvion] had an EMG and the mother thought there would be no nerve regeneration at this time.” Plaintiff commenced this medical malpractice action on June 17, 2011. On September 13, 2011, the Summons and Complaint were served upon the Defendants.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP; *Pittman v. Grand Strand Entertainment, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). In determining whether any triable issue of fact exists, the evidence and inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998). “[I]n cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Carolina Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

DISCUSSION

The South Carolina Tort Claims Act (SCTCA), S.C. Code Ann. § 15-78-10 et seq., (Rev. 2005) is the exclusive remedy for any tort committed by an employee of a governmental entity. The SCTCA is applicable in this case because Lexington Medical Center is a governmental healthcare entity. Except as provided in S.C. Code Ann. § 15-3-40, a claim is barred under the SCTCA unless it is “commenced within two years after the date the loss was or should have been discovered.” S.C. Code Ann. § 15-78-110. S.C. Code Ann. § 15-3-40 provides a general exception to the two year statute of limitations for minors. If a person is under the age of eighteen at the time the cause of action accrued, then “the time of the disability is not a part of the time limited for the commencement of the action” S.C. Code Ann. § 15-3-40.

The tolling provision for minors in Section 15-3-40 is more specifically limited by S.C. Code Ann. § 15-3-545(D), which limits the period of tolling to seven years for medical malpractice actions involving minors. Section 15-3-545(D) “demonstrates that, while the legislature was concerned with increased exposure to claims created by the tolling statute, the legislature was not willing to completely abandon the protection given minors by the tolling statute.” *O’Tuel v. Villani*, 318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995), *overruled on other*

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grounds by I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). The statute provides in part:

[I]f a person entitled to bring an action against a licensed health care provider . . . is under the age of majority at the date of the treatment, omission, or operation giving rise to the cause of action, the time period or periods limiting filing of the action are not tolled for a period of more than seven years on account of minority.

S.C. Code Ann. § 15-3-545(D).

Here, the date of Mykelvion's birth injury was July 23, 2001. Under Section 15-3-545, any claim by Mykelvion would be tolled for seven years after July 23, 2001. The two year statute of limitations began to run on July 23, 2008. Therefore, Plaintiff was required to bring the action by July 23, 2010. Plaintiff's action, filed June 17, 2011, was not timely.

Plaintiff argues her Complaint was timely filed because she did not discover the full extent or permanency of Mykelvion's injuries until several years after his birth. Plaintiff relies on the affidavit of Dr. Redmond, in which he states he would not be able to tell if the injury was permanent until Mykelvion was eighteen to twenty-four months old.

Under the discovery rule, the statute of limitations begins to run when a cause of action was discovered or reasonably ought to have been discovered by exercise of reasonable diligence. *See Id.* "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Id.* (quoting *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 378 S.E.2d 333, 334 (1981)). "The date on which discovery should have been made is an objective, not subjective, question." *Id.* (quoting *Joubert v. South Carolina Dept. of Social Services*, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000)). Furthermore, "the fact that the injured party does not comprehend the full extent of his injuries is immaterial." *Knox v. Greenville Hospital System*, 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005).

Plaintiff's Complaint is barred by the application of S.C. Code Ann. § 15-3-40 and S.C. Code Ann. § 15-3-545(D); therefore, Plaintiff's claim need not be addressed under the discovery rule. However, even if the discovery rule were to apply, this Court finds that there is sufficient evidence to establish that Plaintiff was on notice Mykelvion suffered an injury at birth during the first six months of his life.

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FILED

ORDER

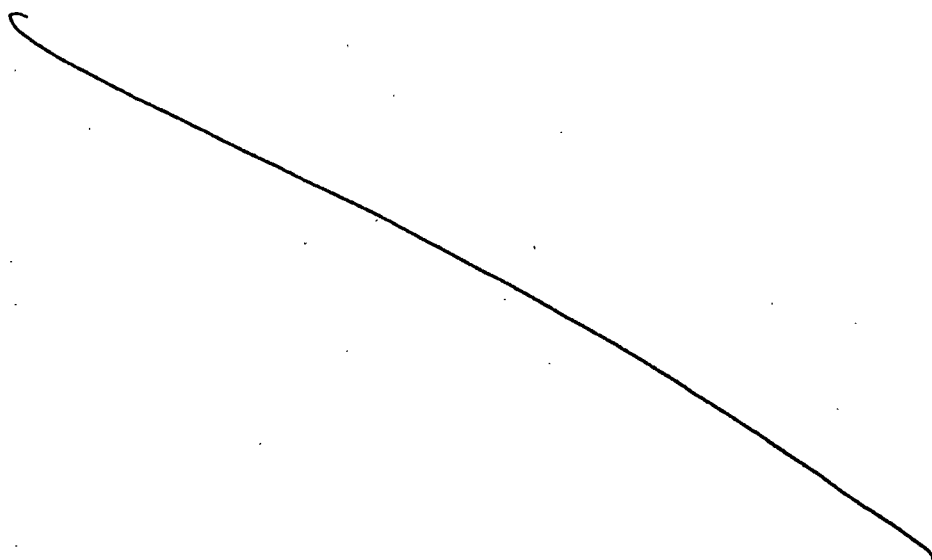
For the reasons stated above, it is therefore **ORDERED** that Lexington Medical Center's 40 Motion for Summary Judgment is **GRANTED**.

AND IT IS SO ORDERED.

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
May 13, 2013



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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE Lexington

COPY
IN THE COURT OF COMMON PLEAS

TANYA BENNETT, AS NEXT FRIEND OF MYKELVION THURMOND, A MINOR

FILED

CIVIL ACTION COVERSHEET

Plaintiff(s) JUL 17 3:46

vs.

RETHA CARRIGG
CLERK OF COURT

-CP-

DR. SCOTT AUGESTINE, M.D., AND LEXINGTON COUNTY HEALTH SERVICES DISTRICT, INC. D/B/A LEXINGTON MEDICAL CENTER

Defendant(s)

(Please Print)

Submitted By: Edward L. Graham
Address: GRAHAM LAW FIRM, P.A.
383 W. CHEVES ST.
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SC Bar #: 2483
Telephone #: 843-662-3281

2011 JCP 3202282
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E-mail: ZGLAW@AOL.COM

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
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| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (120) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (199) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input checked="" type="checkbox"/> Medical Malpractice (220) Previous Notice of Intent Case #
20 -CP- _____ <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Assault/Slander/Libel (300) <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Other (399) | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Other (799) | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Driver's License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Public Service Commission (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
| <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) | <ul style="list-style-type: none"> <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) <input type="checkbox"/> Sexual Predator (510) | | |

Submitting Party Signature:

Edward L. Graham/car

Date: 6/15/11

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A NO.:

2011 JUN 17 3:46

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

Plaintiff,

BETH A. CARRIGE
CLERK OF COURT
LEXINGTON SC

v.

SUMMONS

Dr. Scott Augustine, M.D., and Lexington
County Health Services District, Inc. d/b/a
Lexington Medical Center,

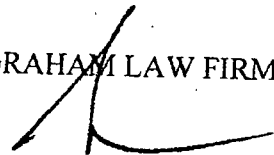
Defendants.

2011CP3202282

TO THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their office in Florence, S.C., within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded therein.

GRAHAM LAW FIRM, P.A.



BY:

Edward L. Graham
Mary H. Watters
383 W. Cheves Street
Post Office Box 550
Florence, S.C. 29503

Attorney for Plaintiff

June 8, 2011

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2011 JUN 17) 3:46 C/A NO.:

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

DETHA A. CARRIGG
CLERK OF COURT
LEXINGTON DISTRICT

Plaintiff,

v.

Dr. Scott Augustine, M.D., and Lexington
County Health Services District, Inc. d/b/a
Lexington Medical Center,

Defendants.

COMPLAINT
(Jury Trial Requested)

2011CP3202282

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

1. Plaintiff Tanya Bennett is a citizen and resident of Lexington County, South Carolina, and brings this action as Next Friend of her son, Mykelvion Thurmond, (hereinafter "Mykelvion").
2. Defendant Scott Augustine, M.D. (hereinafter, "Dr. Augustine") is, upon information and belief, now a citizen and resident of Sampson County North 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.
3. Defendant Dr. Augustine held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.
4. At relevant times Defendant Dr. Augustine maintained an office in Lexington, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Defendant Dr. Augustine was at all relevant times an employee of Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center (hereinafter, "Hospital").

6. Defendant Hospital is, upon information and belief, a hospital corporation which owns and operates hospital(s) in Lexington County, South Carolina, including Lexington Medical Center.

7. Defendant Hospital holds itself out to the public as having specialized facilities, equipment and staff to facilitate the provision of high quality obstetrical care. Said Defendant is named as a party to this action by virtue of the acts and/or omissions of its employee(s) and agent(s), within the course and scope of their respective employment and agency, for which it is liable to Plaintiff under the doctrine of respondent superior.

8. Prior to July 23, 2001, Tanya Bennett, mother of Mykelvion Thurmond, became pregnant and submitted herself to the care and attention of certain Defendants, primarily Dr. Augustine, for pre-natal and obstetrical care.

9. On July 23, 2001, Defendant Augustine attended the delivery of Mykelvion Thurmond, son of Tanya Bennett, at Lexington County Medical Center in Lexington County, S.C.

10. Mykelvion Thurmond was a healthy baby prior to July 23, 2001, when his mother, Tanya Bennett, was admitted to Defendant Hospital.

11. Dr. Augustine took charge of the health care of Tanya and her baby upon Tanya's admission to Defendant Hospital.

12. The Defendant Dr. Augustine owed Tanya Bennett and her son a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

13. Defendant Hospital owed Tanya Bennett and her son, Mykelvion, a duty of providing obstetrical nursing and support services, labor and delivery nursing and support services, and newborn care and support services consistent with generally accepted standards of hospitals, nurses and support staff acting under similar situations.

14. Defendants breached their duties of care to Tanya Bennett and her son Mykelvion, and were jointly and concurrently negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Mykelvion sustained severe bodily injuries, losses and damages.

15. Defendant Dr. Augustine 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 Mykelvion;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in this 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 Mykelvion;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, torsion and/or traction;
- (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (i) in mismanagement of labor and delivery;
- (j) in mismanagement of shoulder dystocia;
- (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;
- (l) 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;
- (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
- (n) such other failures and refusals as may be identified during discovery and/or trial of this case.

16. Defendant Hospital, its employee(s) and agent(s), were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all or, and including but not limited to, the following particulars:

- (a) in failing and refusing to require its employee(s) and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics, labor and delivery generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing of Mykelvion Thurmond;
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of recognition and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;
- (d) in failing to communicate with fellow healthcare team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (e) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (f) in failing and refusing to provide proper nursing care and support for management of shoulder dystocia;

- (g) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (h) in using fundal pressure in the presence of shoulder dystocia;
- (i) in failing and refusing to use independent nursing judgment to assure proper management of obstructed labor and shoulder dystocia;
- (j) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's condition;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;
- (n) such other failures and refusals as may be identified during discovery and the trial of this case.

17. As a direct and proximate result of the joint and concurrent negligence and other wrongful conduct on the part of Defendant Dr. Augustine; and the agent(s) and/or employee(s) of Defendant Hospital; Mykelvion Thurmond has sustained certain injuries, losses and damages, stated with particularity as follows:

- (a) Direct violent and traumatic injuries to various bodily members of Mykelvion Thurmond, including, but not limited to, permanent traumatic injury to the nerves which innervate his left shoulder and arm, commonly known as Erb's palsy.
- (b) Adverse effects on various other bodily members and/or functions, such as development, 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 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.

FILED

2011 JUN 17 3:46

BETH A. CARRIGE
CLERK OF COURT
LEXINGTON SC

WHEREFORE, Plaintiff 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; for pre-judgment interest; and for such other and further relief as this Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



BY:

Edward L. Graham
383 W. Cheves Street
Post Office Box 550
Florence, S.C. 29503

Attorney for Plaintiff

June 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

Plaintiff,

v.

Scott Augustine, MD and Lexington
County Health Services District, Inc. d/b/a
Lexington Medical Center,

Defendants.

Docket No.: 2011-CP-32-2282

**ANSWER ON BEHALF OF
DEFENDANT LEXINGTON
COUNTY HEALTH SERVICES
DISTRICT, INC.**

The Defendant, Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, answering the Complaint, would respectfully show unto the Court that it:

FOR A FIRST DEFENSE

1. Denies each allegation in the Complaint that is not specifically admitted in the following paragraphs.
2. As to the allegations of Paragraphs 2, 3, 4, and 5, admits Dr. Augustine was an employee of Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, resides in North Carolina, and maintained an office in Lexington County, South Carolina for the practice of obstetrics and gynecology.
3. As to the allegations of Paragraph 6, admits it is a governmental healthcare entity as that term is defined by the South Carolina Tort Claims Act and it owns and operates Lexington Medical Center in Lexington County, South Carolina.
4. As to the allegations of Paragraph 7, admits it held itself out to the public as a community hospital providing quality medical and hospital services. The remaining allegations state a legal conclusion and are denied.

5. Admits, upon information and belief, the allegations of Paragraphs 8 and 9.

6. As to the allegations of Paragraph 10, admits, upon information and belief, Mykelvion Thurmond was a viable fetus prior to July 23, 2001.

7. As to the allegations of Paragraph 11, admits, upon information and belief, Tanya Bennett was admitted to Lexington Medical Center to the services of Dr. Augustine.

8. Admits, upon information and belief, the allegations of Paragraphs 12 and 13.

9. Denies, upon information and belief, the allegations of Paragraphs 14, 15, 16, and 17.

FOR A SECOND DEFENSE

10. The allegations of the Complaint are governed and controlled by the terms and provisions of the South Carolina Tort Claims Act which, among others, limits the amount of actual damages that can be recovered and prohibits the recovery of punitive damages, both of which are pled as affirmative defenses.

FOR A THIRD DEFENSE

11. The Summons and Complaint were not filed and served within the applicable statute of limitations, by virtue of which this claim is barred.

FOR A FOURTH DEFENSE

12. The South Carolina Tort Claims Act waives sovereign immunity in limited fashion and specifically excepts from the waiver of liability for any loss resulting from:

- (a) The exercise of discretion or judgment by employees of a governmental entity or the failure to perform any act or service which is in the discretion of the governmental entity or its employees;
- (b) Any act or omission of a person other than an employee of the governmental healthcare entity;
- (c) Responsibility or duty to any patient of any governmental entity except when the responsibility is exercised in a grossly negligent manner. These limitations are pled as affirmative defenses and as a bar to the allegations of the Complaint.

WHEREFORE, having fully answered, the Defendant, Lexington County Health Services District, Inc. d/b/a Lexington Medical Center, demands the Complaint be dismissed.

Barnes, Alford, Stork & Johnson, LLP



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Date: October 12, 2011

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

Plaintiff,

v.

Lexington County Health Services
District, Inc. d/b/a Lexington Medical
Center,

Defendant.

Docket No.: 2011-CP-32-2282

**MOTION FOR SUMMARY
JUDGMENT**

TO: THE PLAINTIFF AND HER ATTORNEY, EDWARD L. GRAHAM,
ESQUIRE:

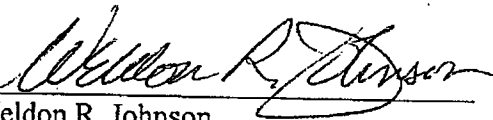
YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("Lexington Medical Center"), by and through the undersigned counsel, will move before the Presiding Judge of the Court of Common Pleas for Lexington County, on a date and at a time to be established by the court, for an Order dismissing the Complaint and granting summary judgment to Lexington Medical Center.

Lexington Medical Center is a governmental healthcare entity as that term is defined in the South Carolina Tort Claims Act. This motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the grounds that Plaintiff failed to file and serve the Summons and Complaint within the applicable statute of limitations. This motion is supported by the pleadings in this action, any affidavits or memoranda of law which may be subsequently submitted, all applicable statutes and case authority, all

completed discovery, the applicable Rules of Civil Procedure, and other evidence and authority as the court may find acceptable.

For the above reasons, the Defendant asks this Court to grant its motion for summary judgment.

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Date: December 17, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

Plaintiff,

v.

Lexington County Health Services
District, Inc. d/b/a Lexington Medical
Center,

Defendant.

Docket No.: 2011-CP-32-2282

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

The Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("Lexington Medical Center") submits the following Memorandum in Support of its Motion for Summary Judgment for failure to file and serve the Summons and Complaint within the applicable statutes of limitations and repose.

TIMELINE

- July 23, 2001 – Mykelvion Thurmond was born to Tanya Bennett at Lexington Medical Center, a governmental healthcare entity, and delivered by Dr. Scott Augustine, a Lexington Medical Center employed physician.
 - At delivery, Dr. Augustine told Ms. Bennett that he injured Mykelvion's arm during delivery.
- August 21, 2001 – Ms. Bennett called Dr. Augustine for an orthopedic referral because "his arm was injured during delivery."
- September 5, 2001 – Dr. Albert T. Gilpin "explained to the mother that the patient probably sustained a stretch injury to the nerves during the later stages of pregnancy." Mother testified that Dr. Gilpin told her the injury was permanent. (Bennett Dep. 104:2-9, Nov. 5, 2012).
- January 11, 2002 – Tanya Bennett authorized attorney, David E. Betts, to get Mykelvion's medical records.

- January 25, 2006 –McWhirter, Bellinger and Associates requested medical records from Dr. Augustine on behalf of Plaintiffs.
- June 17, 2011 – Summons and Complaint were filed.
- September 13, 2011 – Summons and Complaint were served.

FACTUAL BACKGROUND

Plaintiff Tanya Bennett, as next friend and mother of Mykelvion Thurmond, a minor, brought an action for medical malpractice against Lexington Medical Center arising out of the delivery of Mykelvion Thurmond on July 23, 2001 by Dr. Scott Augustine, an employed physician.

On July 23, 2001, at the time of delivery, Ms. Bennett, his mother, testified that Dr. Augustine stated “[o]ops, I hurt his arm.” (Bennett Dep. 41:7-23). Ms. Bennett testified that she did not expect for Mykelvion to be born with an injury to his arm. (Bennett Dep. 36:1-7). Additionally, Ms. Bennett did not expect Dr. Augustine to injure Mykelvion’s arm during delivery. (Bennett Dep. 41:7-42:1).

On August 21, 2001, Ms. Bennett called Lexington Medical Center in Swansea to obtain an orthopedic referral for Mykelvion’s arm (Exhibit “A”). When Mykelvion was three months old, he went to Midlands Orthopedics and his physician told Ms. Bennett that Mykelvion’s injury was due to delivery and the injury was permanent. (Bennett Dep. 101:23-104:9).

On January 11, 2002, Ms. Bennett met with and authorized David B. Betts, an attorney in Columbia, South Carolina to receive Mykelvion’s medical records (Exhibit “B”). On January 25, 2006, H. Patterson McWhirter with McWhirter, Bellinger and Associates requested medical records on behalf of Plaintiffs from Dr. Augustine (Exhibit “C”).

On July 23, 2010, the combined statute of repose (seven years) and the statute of limitations (two years) expired, assuming that the statute of limitations runs after the expiration of the statute of repose.

On November 18, 2010, the Plaintiffs' current attorney wrote letters requesting Mykelvion's medical records (Exhibit "D"). On September 13, 2011, Plaintiffs served the Summons and Complaint.

Currently, the minor claims permanent residual impairment of his left upper extremity.

STANDARD OF REVIEW

Summary judgment is proper where there is "no genuine issue of material fact" and "the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRC.P. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

"The date on which discovery [of a potential claim] should have been made is an objective, not subjective question." Knox v. Greenville Hospital System Id., 362 S.C. 570, 608 S.E.2d 459, 462 (Ct. App. 2005)(quoting Joubert v. South Carolina Dept. of Soc. Services, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). Because the calculation of the statute of limitations is an objective standard, there is not an issue of fact for a jury to evaluate.

"Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Gauld v.

O'Shaugnessy Realty Co., 380 S.C. 548, 559-60, 671 S.E.2d 79, 84 (Ct. App. 2008).
“The nonmoving party must present specific facts showing a genuine issue for trial.” Id.
at 560, 671 S.E.2d at 84. “[W]hen plain, palpable, and indisputable facts exist on which
reasonable minds cannot differ, summary judgment should be granted.” Miller v.
Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005).

ARGUMENT

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq., is the
“exclusive remedy for any tort committed by an employee of a governmental entity.
Additionally, the provisions of the South Carolina Tort Claims Act “must be liberally
construed in favor of limiting the liability of the State.” S.C. Code Ann. § 15-78-20(f).

Under the South Carolina Tort Claims Act, except as provided for in Section 15-
3-40, a claim is barred against Lexington Medical Center unless it was “commenced
within two years after the date the loss was or should have been discovered.” S.C. Code
Ann. § 15-78-110. Under the discovery rule, the statute of limitations begins to run when
a cause of action was discovered or reasonably ought to have been discovered “by the
exercise of reasonable diligence.” Knox v. Greenville Hospital System Id., 362 S.C. 570,
608 S.E.2d 459, 462 (Ct. App. 2005)(internal punctuation omitted). “The exercise of
reasonable diligence means simply that an injured party must act with some promptness
where the facts and circumstances of an injury would put a person of common knowledge
and experience on notice that some right of his has been invaded or that some claim
against another party may exist.” Id. (quoting Snell v. Columbia Gun Exch., Inc., 276
S.C. 301, 303, 278 S.E.2d 333, 334 (1981)).

S.C. Code Ann. § 15-3-40 makes a general exception for individuals under disability, which means “(1) within the age of eighteen years.” Further, Section 15-3-40 states that “the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended: more than five years by any such disability, except infancy . . .”

However, S.C. Code Ann. § 15-3-545(D) states “[n]otwithstanding the provisions of Section 15-3-40,” if the Plaintiff is a minor “at the date of the treatment, omission, or operation . . . the time period or periods limiting filing of the action *are not tolled for a period of more than seven years on account of minority.*” (emphasis added). Additionally, Section 15-3-545(A) provides *a six year statute of repose* applicable to medical malpractice actions “*from the date of occurrence, or as tolled by this section.*” (emphasis added). Therefore, medical malpractice causes of actions for minors are tolled for a maximum of seven years. If the statute of limitations is in addition to the tolled period for minors, the statute of limitations runs for two years starting when the Plaintiff knew or should have known by reasonable diligence that a claim may have existed.

In Knox, the plaintiff experienced pain in his wrist when a nurse administered an IV on May 2, 2000. Id. The plaintiff filed suit on May 8, 2002. Id. at 569, 608 S.E.2d at 461. The court held that the two-year statute of limitations applicable to state hospitals began to run on May 2, 2000 and had expired before the complaint was filed. Id. at 572, 608 S.E.2d at 463. The court found it material that the plaintiff previously received many I.V.s. Id. at 571, 608 S.E.2d at 462. “When [the plaintiff] left the emergency room, [he] knew he had experienced pain upon injection, that the pain was not a normal

consequence of an I.V. administration, that the nurse had hit a nerve, and that the nerve was the 'wrong thing' to hit." Id. Therefore, a person of common knowledge would have been on notice of a potential claim at the time it occurred.

At issue in this case is when did the Plaintiffs discover the existence of a claim or when should the Plaintiffs have discovered the existence of a claim by reasonable diligence. The statute of limitations begins to run when a person of common knowledge would be on notice that some right of his or hers has been invaded or a claim may exist. Similar to the facts of Knox, Ms. Bennett testified that she had previously delivered two other sons and neither of her first two sons had any kind of problems at birth. (Bennett Dep. 35:21-25). At the time of delivery, Ms. Bennett testified that Dr. Augustine said, "[o]ops, I hurt his arm." (Bennett Dep. 41:7-23). Applying the discovery rule objectively, a reasonable person of common knowledge would have been on notice at delivery that a right had been invaded or that they may have a claim against the doctor that said he injured Mykelvion's arm. Furthermore, on August 21, 2001, Ms. Bennett called Lexington Medical Center in Swansea to get an orthopedic referral for Mykelvion's arm (Exhibit "A"). However, even if the Plaintiffs did not have constructive knowledge of a potential claim at delivery, the Plaintiff had *actual* knowledge of a claim when Mykelvion was three months old. Ms. Bennett testified that Mykelvion went to Midlands Orthopedics when he was three months old, and a physician told Ms. Bennett that Mykelvion's injury was due to delivery and the injury was permanent. Bennett Dep. 101:23-104:9.

In Smith v. Smith, the plaintiffs sued a doctor for malpractice when their child was delivered stillborn. 291 S.C. 420, 423, 354 S.E.2d 36, 38 (1987). The delivery was

on September 12, 1979. Id. The plaintiffs consulted an attorney in 1979 and another attorney in 1980 to discuss whether they had a claim against the doctor. Id. at 426, 354 S.E.2d at 40. The plaintiffs filed suit on March 8, 1985. Id. at 422, 354 S.E.2d at 37. The court found that the plaintiffs' action was barred by the three-year statute of limitations. Id. at 426, 354 S.E.2d at 40. "The statute of limitation begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed." Id. at 426, 354 S.E.2d at 40. "The Smiths' consultation with an attorney . . . in 1979 and with counsel . . . in the spring of 1980 indicates the Smiths had discovered or reasonably ought to have discovered the potential medical malpractice action no later than 1980." Id.

As the court in Smith explains, a plaintiff does not have to develop a "full blown theory of recovery" for the statute of limitations to begin to run. Rather, the question is whether the facts and circumstances of the injury would put a person of common knowledge on notice of a potential claim. Applying the objective standard, in the instant case, a person of common knowledge would be on notice of a potential claim on July 23, 2001, the date of Mykelvion's delivery. Nevertheless, the Plaintiffs had actual knowledge of a potential claim when Mykelvion was three months old and a doctor at Midlands Orthopedics told Ms. Bennett that Mykelvion's injury was due to delivery and was permanent. (Bennett Dep. 101:23-104:9). Additionally, Ms. Bennett consulted David Betts, an attorney, on January 11, 2002 (Exhibit "B").

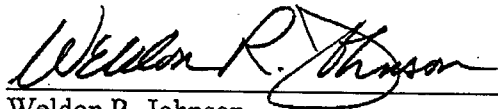
CONCLUSION

Medical malpractice causes of actions for minors are tolled for a maximum of seven years. In the instant case, Ms. Bennett was on constructive notice of a potential

claim on the date of delivery when she was told by Dr. Augustine that he injured Mykelvion's arm. Therefore, the two year statute of limitations began to run immediately after she learned of the injury. Even assuming the two year statute is in addition to the seven years of the statute of repose, on July 23, 2010, which is nine years after delivery, the statute of limitations and/or the statute of repose had expired for Plaintiff to file and serve the Summons and Complaint. Even assuming it did not begin to run on July 23, 2001 or August 21, 2001, it certainly began to run no later than January 11, 2002 when an attorney was consulted. Therefore, when the Summons and Complaint were filed on June 17, 2011 and served on September 13, 2011, the applicable statutes had already expired.

For the above-stated reasons, Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center respectfully requests that its motion for summary judgment be granted as to all causes of action.

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Date: March 6, 2013

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED
IN THE COURT OF COMMON PLEAS

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor,

2013 MAR 1

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Docket No.: 2011-CP-32-2282

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

v.

Lexington County Health Services
District, Inc. d/b/a Lexington Medical
Center,

Defendant.

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

The Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("Lexington Medical Center") submits the following Supplemental Memorandum in Support of its Motion for Summary Judgment for failure to file and serve the Summons and Complaint within the applicable statutes of limitations and repose.

TIMELINE

- July 23, 2001 – Mykelvion Thurmond was born to Tanya Bennett at Lexington Medical Center, a governmental healthcare entity, and delivered by Dr. Scott Augustine, a Lexington Medical Center employed physician.
 - At delivery, Dr. Augustine told Ms. Bennett that he injured Mykelvion's arm during delivery.
- August 21, 2001 – Ms. Bennett called Dr. Augustine for an orthopedic referral because "his arm was injured during delivery."
- September 5, 2001 – Dr. Albert T. Gilpin "explained to the mother that the patient probably sustained a stretch injury to the nerves during the later stages of pregnancy." Mother testified that Dr. Gilpin told her the injury was permanent. (Bennett Dep. 104:2-9, Nov. 5, 2012).
- January 11, 2002 – Tanya Bennett authorized attorney, David E. Betts, to get Mykelvion's medical records.

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- June 17, 2011 – Summons and Complaint were filed.
- September 13, 2011 – Summons and Complaint were served.

FACTUAL BACKGROUND

Plaintiff Tanya Bennett, as next friend and mother of Mykelvion Thurmond, a minor, brought an action for medical malpractice against Lexington Medical Center arising out of the delivery of Mykelvion Thurmond on July 23, 2001 by Dr. Scott Augustine, an employed physician.

On July 23, 2001, at the time of delivery, Ms. Bennett, his mother, testified that Dr. Augustine stated “[o]ops, I hurt his arm.” (Bennett Dep. 41:7-23). Ms. Bennett testified that she did not expect for Mykelvion to be born with an injury to his arm. (Bennett Dep. 36:1-7). Additionally, Ms. Bennett did not expect Dr. Augustine to injure Mykelvion’s arm during delivery. (Bennett Dep. 41:7-42:1).

On August 21, 2001, Ms. Bennett called Lexington Medical Center in Swansea to obtain an orthopedic referral for Mykelvion’s arm (Exhibit “A”). When Mykelvion was three months old, he went to Midlands Orthopedics and his physician told Ms. Bennett that Mykelvion’s injury was due to delivery and the injury was permanent. (Bennett Dep. 101:23-104:9).

On December 5, 2001, a doctor at Midlands Orthopedics advised Ms. Bennett that Mykelvion’s “particular deficit was indicative of marginal recovery.” (Exhibit “E”).

On January 11, 2002, Ms. Bennett met with and authorized David B. Betts, an attorney in Columbia, South Carolina to receive Mykelvion’s medical records (Exhibit

"B"). On January 25, 2006, H. Patterson McWhirter with McWhirter, Bellinger and Associates requested medical records on behalf of Plaintiffs from Dr. Augustine (Exhibit "C").

On February 6, 2008, a doctor at Emory charted "according to his mother at three months of age it sounds like he had an EMG and the mother thought there would be no nerve regeneration at this time." (Exhibit "F").

On July 23, 2008, the seven year statute of repose expired. On July 23, 2010, the combined statute of repose (seven years) and the statute of limitations (two years) expired, assuming that the statute of limitations runs after the expiration of the statute of repose.

On November 18, 2010, the Plaintiffs' current attorney wrote letters requesting Mykelvion's medical records (Exhibit "D"). On September 13, 2011, Plaintiffs served the Summons and Complaint.

Currently, the minor claims permanent residual impairment of his left upper extremity.

STANDARD OF REVIEW

Summary judgment is proper where there is "no genuine issue of material fact" and "the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

"The date on which discovery [of a potential claim] should have been made is an objective, not subjective question." Knox v. Greenville Hospital System Id., 362 S.C.

570, 608 S.E.2d 459, 462 (Ct. App. 2005)(quoting Joubert v. South Carolina Dept. of Soc. Services, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). Because the calculation of the statute of limitations is an objective standard, there is not an issue of fact for a jury to evaluate.

The statute of repose “constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered.” Hoffman v. Powell, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (1989). “Additionally, the statute of repose portion of Section 15-3-545(A) is substantive law . . . ” Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C.137, 142, 628 S.E.2d 38, 41 (2006). Therefore, the calculation of the starting date and the expiration date of the statute of repose is not an issue for a jury to decide.

“Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” Gauld v. O’Shaughnessy Realty Co., 380 S.C. 548, 559-60, 671 S.E.2d 79, 84 (Ct. App. 2008). “The nonmoving party must present specific facts showing a genuine issue for trial.” Id. at 560, 671 S.E.2d at 84. “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005).

ARGUMENT

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq., is the “exclusive remedy for any tort committed by an employee of a governmental entity.

Additionally, the provisions of the South Carolina Tort Claims Act “must be liberally construed in favor of limiting the liability of the State.” S.C. Code Ann. § 15-78-20(f).

Under the South Carolina Tort Claims Act, except as provided for in Section 15-3-40, a claim is barred against Lexington Medical Center unless it was “commenced within two years after the date the loss was or should have been discovered.” S.C. Code Ann. § 15-78-110.

S.C. Code Ann. § 15-3-40 makes a general exception for individuals under disability, which means “(1) within the age of eighteen years.” Further, Section 15-3-40 states that “the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended: more than five years by any such disability, except infancy . . .”

However, S.C. Code Ann. § 15-3-545(A) provides *a six year statute of repose*, which applies to causes of action under the South Carolina Tort Claims Act. Kerr v. Richland Memorial Hosp., 383 S.C. 146, 147, 678 S.E.2d 809, 810 (2009) (emphasis added). The statute of repose provision in Section 15-3-545 is “an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered.” Harrison v. Bevilacqua 354 S.C. 129, 137-38, 580 S.E.2d 109, 113 (2003). Furthermore, the statute of repose under Section 15-3-545(A) runs “*from the date of occurrence, or as tolled by this section.*” (emphasis added). S.C. Code Ann. § 15-3-545(D) states “[n]otwithstanding the provisions of Section 15-3-40,” if the Plaintiff is a minor “at the date of the treatment, omission, or operation . . . the time period or periods limiting filing of the action *are not tolled for a period of more than seven years on*

account of minority." (emphasis added). Therefore, medical malpractice causes of actions for minors are tolled for a maximum of seven years, and the statute of repose, at the most, runs for seven years from the date of the injury. If the statute of limitations is in addition to the tolled period for minors, then the statute of repose would no longer give effect to the intent of the legislature to "liberally construe[d] [the provisions of the Tort Claims Act] in favor of limiting liability of the State." S.C. Code Ann. § 15-78-20(f). Furthermore, the statute of repose would no longer provide a "substantive right" for individuals "to be free from liability after a legislatively determined period of time." Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993).

Under the discovery rule, the statute of limitations begins to run when a cause of action was discovered or reasonably ought to have been discovered "by the exercise of reasonable diligence." Knox v. Greenville Hospital System *Id.*, 362 S.C. 570, 608 S.E.2d 459, 462 (Ct. App. 2005)(internal punctuation omitted). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party may exist." *Id.* (quoting Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)).

At issue in this case is when did the Plaintiffs discover the existence of a claim or when should the Plaintiffs have discovered the existence of a claim at all by reasonable diligence, not when the injury was determined to be permanent. In Knox, the plaintiff experienced pain in his wrist when a nurse administered an IV on May 2, 2000. *Id.* The plaintiff filed suit on May 8, 2002. *Id.* at 569, 608 S.E.2d at 461. The court held that the

two-year statute of limitations applicable to state hospitals began to run on May 2, 2000 and had expired before the complaint was filed. *Id.* at 572, 608 S.E.2d at 463. The court found it material that the plaintiff previously received many I.V.s. *Id.* at 571, 608 S.E.2d at 462. Therefore, a person of common knowledge would have been on notice of a potential claim at the time it occurred.

Similar to the facts of Knox, Ms. Bennett testified that she had previously delivered two other sons and neither of her first two sons had any kind of problems at birth. (Bennett Dep. 35:21-25). At the time of delivery, Ms. Bennett testified that Dr. Augustine said, “[o]ops, I hurt his arm.” (Bennett Dep. 41:7-23). Applying the discovery rule objectively, a reasonable person of common knowledge would have been on notice at delivery that a right had been invaded or that they may have a claim against the doctor that said he injured Mykelvion’s arm. Furthermore, on August 21, 2001, Ms. Bennett called Lexington Medical Center in Swansca to get an orthopedic referral for Mykelvion’s arm (Exhibit “A”). A reasonable person of common knowledge would not have needed an orthopedic referral if the individual was not aware of an existing problem or injury. However, even if the Plaintiffs did not have constructive knowledge of a potential claim at delivery, the Plaintiff had *actual* knowledge of a claim when Mykelvion was three months old. Ms. Bennett testified that Mykelvion went to Midlands Orthopedics when he was three months old, and a physician told Ms. Bennett that Mykelvion’s injury was due to delivery and the injury was permanent. Bennett Dep. 101:23-104:9.

In Smith v. Smith, the plaintiffs sued a doctor for malpractice when their child was delivered stillborn on September 12, 1979. 291 S.C. 420, 423, 354 S.E.2d 36, 38 (1987). The plaintiffs consulted an attorney in 1979 and another attorney in 1980 to discuss whether they had a claim against the doctor. Id. at 426, 354 S.E.2d at 40. The plaintiffs filed suit on March 8, 1985. Id. at 422, 354 S.E.2d at 37. The court found that the plaintiffs' action was barred by the three-year statute of limitations, and "[t]he statute of limitation begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed." Id. at 426, 354 S.E.2d at 40. "The Smiths' consultation with an attorney . . . in 1979 and with counsel . . . in the spring of 1980 indicates the Smiths had discovered or reasonably ought to have discovered the potential medical malpractice action no later than 1980." Id.

As the court in Smith explains, a plaintiff does not have to develop a "full blown theory of recovery" for the statute of limitations to begin to run. Rather, the question is whether the facts and circumstances of the injury would put a person of common knowledge on notice of a potential claim. Applying the objective standard, in the instant case, a person of common knowledge would be on notice of a potential claim on July 23, 2001, the date of Mykelvion's delivery. Nevertheless, the Plaintiffs had actual knowledge of a potential claim when Mykelvion was three months old and a doctor at Midlands Orthopedics told Ms. Bennett that Mykelvion's injury was due to delivery and was permanent. (Bennett Dep. 101:23-104:9). Additionally, Ms. Bennett consulted David Betts, an attorney, on January 11, 2002 (Exhibit "B").

CONCLUSION

Medical malpractice causes of actions for minors are tolled for a maximum of seven years. In the instant case, the seven year statute of repose began to run from the date of delivery since the alleged injury occurred during delivery. Additionally, Ms. Bennett was on constructive notice of a potential claim on the date of delivery when she was told by Dr. Augustinc that he injured Mykelvion's arm. As a result, the two year statute of limitations began to run immediately after she learned of the injury. If it did not begin to run on July 23, 2001, it certainly began to run no later than January 11, 2002 when an attorney was consulted. Therefore, when the Summons and Complaint were filed on June 17, 2011 and served on September 13, 2011, the applicable statutes had already expired.

Even assuming the two year statute is in addition to the seven years of the statute of repose, on July 23, 2010, which is nine years after delivery, the statute of limitations and/or the statute of repose had expired for Plaintiff to file and serve the Summons and Complaint.

For the above-stated reasons, Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center respectfully requests that its motion for summary judgment be granted as to all causes of action.

Signature on following page.

Barnes, Alford, Stork & Johnson, LLP



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Date: March 11, 2013

FILED
2013 MAR 11 P 3:17
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT OF COMMON PLEAS

2011-CP-32-02282

TANYA BENNETT, as Next Friend)
of Mykelvion T., a Minor)
PLAINTIFF)

vs.)

TRANSCRIPT OF RECORD

LEXINGTON COUNTY HEALTH)
SERVICES DISTRICT, INC. d/b/a)
LEXINGTON MEDICAL CENTER)
DEFENDANT)

March 11, 2013

Lexington, South Carolina

B E F O R E:

THE HONORABLE ALISON RENEE LEE, JUDGE.

A P P E A R A N C E S:

EDWARD L. GRAHAM, ESQ.
Attorney for the Plaintiff

WELDON R. JOHNSON, ESQ.
Attorney for the Defendant

CAROL M. THUEME, RPR
Official Court Reporter

I N D E X

(There were no witnesses produced.)

EXHIBITS

(There were no exhibits marked.)

1 THE COURT: Good afternoon, everyone.

2 Our first case this afternoon is Tanya Bennett
3 versus Lexington County Health Services.

4 The plaintiff is represented by?

5 MR. GRAHAM: Ed Graham, if Your Honor please.

6 THE COURT: Ed Graham. Thank you.

7 And the defendant is represented by Weldon
8 Johnson.

9 MR. JOHNSON: And Emily Brown.

10 THE COURT: And, Emily, what's your last name
11 again?

12 MS. BROWN: Brown.

13 THE COURT: Brown. Thank you.

14 We're here on a motion that's been filed by the
15 defendant relating to the action that was brought by
16 Mr. Graham.

17 I've had the opportunity to read the motion and
18 the memorandum that was included in the file itself, and
19 there was a supplemental memorandum which I received today
20 and was just pointed out for me, so I haven't had a chance
21 to look at the supplemental one.

22 I understand that there are a couple of
23 additional exhibits that have been added to it, and
24 probably a little bit additional argument, but I'm
25 familiar with the general facts as they've been alleged

1 and the claim that's being made by the defendant.

2 Mr. Johnson.

3 MR. JOHNSON: Thank you, Your Honor.

4 This is a motion for summary judgment based on
5 both the statute of repose and the statute of -- and/or
6 the statute of limitations as applicable to the South
7 Carolina Tort Claims Act.

8 This case arises out of a birth injury to -- or
9 alleged birth injury, I should say, to Mykelvion Thurmond,
10 who was born July 23rd, 2001. Almost ten years later, the
11 summons and complaint were filed.

12 Our first position is that the statute of
13 repose, which is found in 15-3-545 subsection A as
14 modified by D, applies.

15 As Your Honor knows, the statute of repose is an
16 outer limit of six years. It runs from the date of the
17 occurrence regardless of when someone knew or should have
18 known, and six years later it expires. That is -- our
19 courts have said that right to be free of litigation after
20 the statute of repose is a substantive right as opposed to
21 a procedural limitation, which is the statute of
22 limitations. My interpretation of subsection D is that it
23 modifies the statute of repose to extend to seven years
24 when a minor is involved. Even in the event that the
25 seven-year statute is deemed to somehow toll the actual

1 statute, then the seven-year statute of repose plus the
2 two-year statute of limitations applicable to governmental
3 cases has also expired before this action was brought. So
4 whether you use the absolute standard of seven years or
5 the seven plus two under the statute, you get the same
6 result.

7 Now, the statute of limitations is a discovery
8 statute of limitations; it does not begin to run when the
9 person knew of a claim, but when exercising reasonable
10 diligence, a person of ordinary intelligence would know
11 that they had some right violated or they had a claim.

12 In this case, we believe that the statute of
13 limitations clearly start to run on the day of delivery
14 because the mother in her deposition stated that the
15 doctor said, "Oops, I hurt his arm."

16 The child was born with a condition called or
17 designated a brachial plexus injury, which is an injury to
18 the plexus of nerves in the neck area that governs the
19 ability or inability to move the arm. As a result, young
20 Mr. Thurmond at birth was unable to move his left arm.

21 This was the third birth to Mrs. Bennett. Her
22 first two were uneventful, and as she said, one, I didn't
23 expect any injury to him to have occurred at birth. She
24 had never had this happen to any person before, and the
25 doctor says, "Oops, I hurt his arm."

1 The following month -- and this is an exhibit
2 attached to the memo -- there's a call, a telephone
3 message to Dr. Augustine's office in which mother calls
4 and asks for a referral to an orthopedist to look at his
5 arm. It's Exhibit A to both memos, Your Honor. In it --
6 and it's indicative -- the mother is quoted as saying
7 orthopedic referral for her son, Mykelvion. His arm was
8 injured during delivery. This is followed by a visit at
9 age three months to Midlands Orthopedics after she was
10 referred there in response to her request, and in her
11 deposition she testified that the doctor told her on that
12 occasion that the injuries to the arm occurred during
13 birth and were permanent.

14 On December the 5th of 2001, she goes back to
15 Midlands and is told -- and this is one of the reasons for
16 the supplemental memo -- and is told there's likely to be
17 minimal regeneration of the nerves in that particular arm.

18 A month later, Ms. Bennett is in the office of
19 the first attorney she consulted, Mr. David Betts, in
20 January of 2002. And our position is that using, as the
21 Court must, an objective standard of when this statute
22 begins to run and not a subjective one, the statute of
23 limitations clearly began to run when the doctor told her
24 of the injuries, her testimony in three areas about she
25 has never had this happen before, was unexpected, and

1 followed by a request for an orthopedist to deal with the
2 injury that was suffered, followed by another visit to the
3 doctor who told her that it wasn't going to regenerate
4 very much, and then you go to her first attorney.

5 Following along, surely by January, giving her
6 the benefit of the doubt, when she seeks the services of
7 an attorney for herself and her son, which is Exhibit B to
8 the memo which she signed, authorized Mr. Betts to get her
9 records.

10 The next event in that chain is when she seeks
11 the advice of a second attorney, McWhirter and Bellinger,
12 in 2005 and 2006. Then there was an affidavit delivered
13 to our office, which was a reason for the supplemental
14 memo primarily, saying that mother was confused and she
15 was not told that it was a permanent injury. We put in
16 the medical record of a doctor at the Emory Clinic that
17 Mr. McWhirter sent her to, in which he quotes -- this is
18 in 2008, seven years later -- in which he quotes the
19 mother, according to his mother, at three months of age it
20 sounds like he had an EMG and the mother thought there
21 would be no nerve regeneration at that time.

22 Technically, I believe that the Court could not
23 consider the affidavit filed by Ms. Bennett, or at least
24 it was delivered to our office last week, but we're not
25 asking the Court to do that because it's an objective

1 standard, not a subjective standard. Furthermore, the law
2 on the topic is plain: The injured person doesn't need to
3 know the extent of the damage or injury that they had
4 sustained, merely the fact that an injury has occurred.
5 So the affidavit's when she knew it was permanent is not
6 really relevant to all of this.

7 The statutes -- and I will admit to the Court,
8 it took me a while to struggle with the order in which all
9 of these have been passed, enacted, and interpreted.

10 Fortunately, our Supreme Court ruled that the medical
11 malpractice statutes apply to the tort claims action
12 statutes. We also deal with the legislative requirement,
13 which is unusual in a summary judgment motion, that the
14 Court must construe the facts liberally in favor of
15 limiting the liability of the statement, which is Section
16 15-78-20 (f). The constitutionality of 545 has been
17 tested and upheld, which is the statute of repose. The
18 only thing that I cannot find a case on yet is the
19 statement that the minor has seven years under subsection
20 D as an outside limit or whether plaintiff can argue that
21 the statute begins to run, the two-year statute, after the
22 statute is tolled. But as I said at the very outset,
23 under either standard, whether it's the seven-year statute
24 of repose or a seven plus two, a year before the -- or a
25 year after the statute expires, in that sequence, it's too

1 late.

2 And thank you, Your Honor, for reading the
3 brief. I will not then go through the Knox case and the
4 Smith case, which are similar factually, rulings on
5 summary judgment motions dealing with malpractice remedies
6 or a person of ordinary knowledge would or should have
7 known that some right had been violated.

8 So for those reasons, Your Honor, we think that
9 utilizing the objective standard, construing it liberally
10 in favor of limiting liability, the statute of repose and
11 the combined statute of limitations and repose, if they
12 are to be combined, have both expired prior to the filing.

13 And also included as an exhibit is Mr. Graham's
14 letter in 2010 which is after both of these statutes ran
15 before he got involved as the third attorney that
16 Mrs. Bennett had consulted that we know of.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Mr. Graham.

20 MR. GRAHAM: Thank you, Your Honor. May it
21 please the Court.

22 THE COURT: Yes, sir.

23 MR. GRAHAM: My friend Weldon has done his usual
24 outstanding job of citing certain South Carolina law and
25 weaving together a presentation that makes it sound on the

1 surface like a very strong case.

2 Your Honor, I would like to submit two
3 affidavits and four cases for your consideration.

4 THE COURT: Thank you.

5 MR. GRAHAM: First of all, if Your Honor please,
6 under well-established law regarding summary judgment, the
7 movant has the burden of proof. The movant is charged
8 with the reality that inferences and factual disputes must
9 be construed in favor of the plaintiff, or the non-moving
10 party, and Weldon contends that in this case, because it's
11 a tort claims acts situation, that those rules don't
12 apply. I'd point out he hasn't cited any law to Your
13 Honor that I'm aware of that stands for that proposition,
14 that the normal rules as to summary judgment adjudication
15 would somehow be displaced merely because it's a tort
16 claims act situation.

17 My presentation is really very simple, if Your
18 Honor please. We submit to you that there is a genuine
19 dispute regarding material facts that preclude summary
20 judgment being granted in this case. We believe that the
21 facts support more than one inference about when the
22 client should or should have known that there was a cause
23 of action, and clearly we've got the discovery period plus
24 seven years plus two or three years, depending on whether
25 it's a tort claims act case or not, in this case it's a

1 tort claims act so we have two years, discovery plus seven
2 plus two.

3 There's absolutely no law being presented by
4 Weldon to suggest that you don't get the two years. Were
5 that the case, we would have an odd situation where the
6 General Assembly has declared that minor's claims are
7 tolled for seven years after discovery, but there is no
8 statute of limitations. I mean, what's being tolled?
9 What's being tolled is the statute of limitations. So for
10 him to suggest somehow that you don't get the two years is
11 just preposterous. And if he's serious about that,
12 where's the law?

13 If Your Honor please, I'd like to focus on the
14 affidavits that we just handed up.

15 The first affidavit is Dr. David Redmond. He's
16 a physiatrist; that is to say, a physical medicine and
17 rehabilitation doctor at Midlands Orthopedics. Weldon in
18 his factual suppositions theorizes from pronouns in the
19 plaintiff's -- in Tanya Bennett's deposition when she
20 refers to he, Weldon contends that that means there's no
21 factual dispute. He is Dr. Gilpin. Well, it wasn't. It
22 was Dr. Redmond. The context of the questioning dealt
23 with -- not with an orthopedic exam but with an EMG, an
24 electromyographic procedure whereby the nerves in the arm
25 are tested to see how well they function.

1 Dr. Redmond has submitted -- this first
2 affidavit I presented to Your Honor is from Dr. Redmond --
3 he too works at Midlands Orthopedics. He tested these
4 nerves when the child was three months old back in late
5 October of 2001. He states in paragraph number four, "I
6 can state with certainty that at the time I tested and
7 evaluated this child's brachial plexus nerves in October
8 of 2001 when the child was three months old, I would not
9 have been able to determine whether or not this child's
10 injury was permanent." A determination of permanency
11 would not have been possible until the child was at least
12 approximately 18 to 24 months old.

13 That is well known in terms of pediatric
14 neurology and in terms of pediatric orthopedics, pediatric
15 physiatry, nerves when damaged, when ruptured, even if
16 they're broken completely in two, they try to grow back
17 together. It takes time to grow back together. There's a
18 period of time over which it takes for them to grow back
19 together. The doctors always say, be confident, be
20 optimistic, this will probably grow back. We won't know
21 for sure if there's a permanent injury until 18 or 24
22 months of age. So that's the reality, and we have an
23 affidavit from Dr. Redmond to that effect. He states, "I
24 did not tell anyone in October of 2001 that the injury was
25 permanent as that determination would not have been

1 possible at that time."

2 Next is the affidavit from Tanya Bennett. She's
3 the son's mother. She is the -- acting as next friend of
4 her son as plaintiff in this case.

5 At her deposition, section four of her
6 deposition, recites the key words that were asked and
7 answered.

8 Question: At three months of age, according to
9 what we looked at earlier, he was in Midlands and had EMG
10 studies done?

11 Answer: Yes, sir.

12 Question: To test his nerve function, correct?

13 Answer: Yes, sir, that's correct.

14 Question: And that doctor after testing the
15 nerves told you that C5 and C6 area in the neck was what
16 was involved?

17 In other words, the cervical C5 and C6 area
18 which is the upper end of the brachial plexus nerves.
19 That signifies that the hand was fine. The damage was
20 limited to the shoulder and the elbow and the muscles in
21 between.

22 Answer: Yes, sir.

23 Question: Okay. And he told you that, in
24 essence, it was a permanent injury, that he would never
25 use the arm?

1 Answer: That's correct.

2 "He "-- "he told you," Weldon thought that she
3 was talking about Dr. Gilpin, who also works at Midlands,
4 but, in fact, the plaintiff was talking about Dr. Redmond
5 that we have the affidavit from as is quite reasonable
6 since the line of questioning was about the EMG. Dr.
7 Redmond is the one that does the EMG, not Dr. Gilpin. So
8 what Dr. Gilpin may have said or not said has no relevance
9 to the EMG studies and the question about permanency.

10 Now, if you read the actual words here, she
11 never says I was told at age three months that this was a
12 permanent injury. The question about permanency is, and
13 he told you that, in essence, it was a permanent injury,
14 that he would never use the arm?

15 Answer: That's correct.

16 From the context, I think an inference could be
17 made that she was describing a conversation about
18 permanency that did tie back to the prior questions about
19 three months, but it's not clear. But in section five of
20 her affidavit, she makes it clear that when she was
21 referring to the question about, quote, that doctor, end
22 quote, she was referring to Dr. Midland -- Dr. Redmond,
23 who is the one who met with him following the EMG study.

24 And in number six, I've substantially been made
25 aware of Dr. Redmond's statement that he would not have

1 been able to determine the permanency of Mykelvion's
2 injuries until about 18 to 24 months of age and that he
3 did not tell me Mykelvion's injuries were permanent in
4 October of 2001.

5 Continuing with paragraph seven, In light of Dr.
6 Redmond's statement, I am now uncertain about when I first
7 heard that Mykelvion's brachial plexus nerve damage was
8 permanent, but based on Dr. Redmond's statement, it must
9 not have been until my son was at least 18 to 24 months of
10 age.

11 And she goes on to say she didn't know or
12 suspect that her son had a legal right to bring a lawsuit
13 for his brachial plexus nerve damage until the son was
14 five or six years old.

15 I'd like to turn now to the first case that I
16 handed up. It's Garner versus Houck, a 1993 state Supreme
17 Court case authored by -- I think it was by Justice Toal
18 before she was Chief, but by Justice Toal, and on page
19 four, I've highlighted, The statute of limitations
20 requiring action to be commenced within the time period
21 after the person knew or by exercise of reasonable
22 diligence should have known that he had a cause of action
23 means that the injured person must act with some
24 promptness where facts and circumstances of the injury
25 would put a person of common knowledge and experience on

1 notice that some right of his had been invaded or that
2 some claim against another party might exist.

3 And then skipping a sentence, If there is
4 conflicting evidence as to whether a plaintiff knew or
5 should have known he or she had a cause of action, the
6 question is one for the jury.

7 Moving on to the Grillo case, second in your
8 cases there, Your Honor, this is a Court of Appeals case
9 from 2000. On page six I've highlighted certain
10 provisions here.

11 Grillo argues considering the facts in the light
12 most favorable to him, that the defendant was not entitled
13 to summary judgment as a matter of law where reasonable
14 minds could differ on when he knew or should have known he
15 had a cause of action against defendant. We agree. They
16 go on to define the elements of the cause of action.

17 And then in the next paragraph, they quote the
18 new discovery rule, must be commenced within three years
19 after the person knew or by the exercise of reasonable
20 diligence should have known that he had a cause of action.

21 And then on the last page, or page 9, and this
22 gets to the important part of the Grillo case, There is a
23 substantial difference between knowledge of injury and the
24 cause of that injury and mere suspicion. The evidence
25 shows that the plaintiff's suspicions about TBI were

1 either unconfirmed or denied at the time of their early
2 employment with Whirlpool. We do not believe -- well,
3 this is citing a Minnesota case, but it's citing it
4 favorably by the Court of Appeals: We do not believe
5 Minnesota's applicable statutes of limitation were
6 intended to provoke the premature commencement of claims
7 for temporary sickness or discomfort, rather the
8 plaintiffs are entitled to wait until the cause has been
9 rationally identified.

10 Consider, if you will, the context in which we,
11 as plaintiff's attorneys and plaintiffs, find ourselves in
12 2013. There are rigid rules about due diligence before we
13 have the right to pursue an action. We have to -- we are
14 at risk of being punished for violation of the frivolous
15 proceedings action if we jump to conclusions: An injury,
16 oh, there must be medical malpractice because there's an
17 injury. I guarantee you, when we get to trial, one of
18 Weldon's first charges asking the Judge to charge is you
19 can't infer malpractice from the mere fact of an injury,
20 and yet here he is today saying we're on notice of an
21 injury because the arm's hanging down, the arm's not
22 right, and somehow that means that we're on notice of a
23 cause of action.

24 We know that the arm's not right, we know that
25 the arm's not perfect, but this doctor never admitted

1 negligence. He said, oops, I must have hurt his arm, or
2 words to that effect, but he didn't say, I have breached
3 the generally accepted standards of care applicable to
4 obstetricians under these same or similar facts or
5 circumstances.

6 So we believe that there's a huge difference
7 between being on notice of an injury and being on notice
8 of a cause of action, especially in the medical
9 malpractice context where we're required to get expert
10 affidavits.

11 I mean, how can you say she should be charged
12 with knowledge that a doctor negligently caused her son's
13 brachial plexus nerve damage when, number one, there's no
14 reason to believe it's permanent until he's a year and a
15 half or two years old and, number two, she'll be laughed
16 out of court if she doesn't have expert testimony on
17 causation? She can't testify as to causation.

18 It's kind of ironic that Weldon would have the
19 Court look at this two ways. When we get to trial, she
20 can't testify about causation, only an expert witness can
21 who's properly qualified, but somehow she should be held
22 responsible for knowing what the cause of the injury is in
23 the face of the doctor's denial of negligence and
24 causation? If you look at his answer, he's denied
25 negligence, he's denied causation. "Oops, I must have

1 hurt his arm" doesn't get us very far on either prong, a
2 breach of the duty or cause of the injury.

3 But moving on with the next highlighted section
4 of the Grillo case, at the bottom of page 9, In reverse of
5 the trial court's grant of summary judgment on the statute
6 of limitations, the Oregon Supreme Court noted the statute
7 of limitations on claims involving negligent infliction of
8 an occupational disease does not begin to run until the
9 plaintiff knows or as a reasonably prudent person should
10 know that he has the condition for which his action is
11 brought and that the defendant caused it. This is an
12 Oregon case, but our Court of Appeals in South Carolina
13 has cited it favorably.

14 It goes on to say, We reject defendant's claim.
15 The statute of limitations begins to run when a reasonably
16 prudent person associates his symptoms with a serious or
17 permanent condition and at the same time perceives the
18 role which the defendant has played in inducing that
19 condition. That's still Oregon law or Oregon language,
20 but on the last page, number 10, this comes straight from
21 our Court of Appeals: Viewing the evidence in the light
22 most favorable to the plaintiff, we conclude the defendant
23 was not entitled to summary judgment as a matter of law on
24 the basis that the plaintiff should have known he had a
25 cause of action when the associated temporary symptoms

1 with the use of, being in May 1992. We find more than one
2 inference can be drawn as to when a reasonable person
3 would have been on notice that he might have a cause of
4 action against the defendant. Institution of an action
5 based upon those temporary symptoms would likely have been
6 premature and possibly frivolous; moreover, the permanent
7 injuries for which plaintiff now seeks recovery would not
8 have been compensable at that time. Accordingly, a jury
9 issue is presented as to the application of the statute of
10 limitations in this case.

11 Next I've handed up the Graniteville case, and
12 I'm going to move quickly through this because I think
13 I've made my main points, but on page three of this case
14 which is another -- it's a 1994 Court of Appeals case from
15 our state. On page three I've highlighted, Graniteville
16 knew it had experienced the loss from the fire. It was,
17 however, unable to determine the cause without the employ
18 of an expert. It would be paradoxical to hold that a
19 person suffering an injury is required to determine the
20 causation of the injury without benefit of expert opinion
21 and then require causation testimony at trial to be
22 limited to expert opinion, the point I was making earlier.

23 Finally, I've handed up Cothran versus Brown.
24 It's not really relevant to any argument that's been
25 expressed by Weldon today. I thought he might express the

1 opinion that -- that this was a sham affidavit from the
2 plaintiff we're handing up to clarify her prior deposition
3 testimony, but the Cothran case makes a clear distinction
4 between sham affidavits and clarifying affidavits. Hers
5 clearly falls in the clarifying category.

6 I'd like to go through a few of the points in
7 Weldon's first memorandum when he goes through his
8 timeline.

9 He claims that the delivering doctor told
10 Ms. Bennett that he injured Mykelvion's arm during
11 delivery. What the -- the record shows that he said,
12 "Oops, I've hurt his arm," or words to that effect. So
13 there's really no reference to the time that he hurt his
14 arm. Maybe you can infer that it was during delivery, but
15 I just wanted to clarify that point.

16 Next, if you look at the September 5, 2001 entry
17 that Weldon highlighted, Dr. Gilpin explained to the
18 mother that the patient probably sustained a stretch
19 injury to his nerves during the later stages of pregnancy.
20 So in the face of the OB who delivered her son saying
21 "Oops, I hurt his arm," the doctor who's treating the son
22 said, well, it's probably during the latter stages of
23 pregnancy, and it was probably just a stretch, that needs
24 to be taken into account when one is judging the timing
25 with which she sought legal attention.

1 Next, he highlights January 11 when Tanya signed
2 a medical authorization for David Betts. There's
3 absolutely nothing that I know of in the record about why
4 she went to Attorney Betts or why she signed that medical
5 authorization. Weldon has attached the authorization, and
6 the authorization itself says nothing about a birth injury
7 or even birth. It's Exhibit B to his first memorandum.
8 The key language is when they asked for medical
9 information including reports, et cetera, it then talks
10 about "regarding any treatments received by me and my
11 son," including treatments after the signing of this
12 authorization.

13 Now, the record is silent about why there was
14 that encounter with Attorney Betts. I've tried to reach
15 Attorney Betts by telephone to see if he could shed any
16 light on this. I don't know him personally, but from what
17 I've been able to learn about his practice leads me to
18 question whether he does any kind of medical malpractice.
19 I know the attorneys in this state who do, at least do of
20 any significance, I don't know him. I don't know if he
21 does Social Security law or problems with taxes and
22 government benefits or something like that. I'm not sure
23 what he does. But the mere fact that there's a medical
24 authorization saying "I authorize records to be produced
25 to this lawyer concerning treatment of me and my son" is a

1 far cry from saying this lady was on constructive notice
2 that she had a right to sue Dr. Augustine.

3 Next, she does request medical records through
4 the McWhirter firm in January of '06. Her affidavit
5 suggests that by the time her son was five or six years
6 old, she had begun to get suspicious about whether the
7 doctor might have been negligent, so that's consistent
8 with her affidavit.

9 Certainly my letter seeking medical records, the
10 information that I had from the client didn't involve any
11 medical records when she came to see me. We just sent a
12 letter, you know, after nine years asking for the medical
13 records so we could do our due diligence to try to figure
14 out if we had a case here. It took us a while, but we
15 determined that we did have a meritorious claim and we
16 proceeded as expeditiously as we could within the
17 discovery period plus seven years plus two years, at least
18 the way we inferred the discovery to be.

19 I know Weldon makes a different factual
20 inference, and he's entitled to argue his inference at
21 trial, but I don't see how this Court could rule that
22 there's no jury question here. There's a question of fact
23 as to when this lady knew or should have known that there
24 was a cause of action. And Weldon's first memorandum
25 really comes very close to conceding discovery plus seven

1 years plus two years. In his supplemental memorandum he
2 makes a much stronger argument about the statute of
3 repose. I assume that's because he realizes that the
4 first case he was trying to build was a house of cards in
5 light of the two affidavits we served his office on
6 Thursday of last week.

7 Finally, there are a couple of other points I
8 wanted to make in the new attachments to the supplemental
9 memorandum which Weldon handed me right before we came in
10 the courtroom.

11 If you look at Exhibit E, this is a report from
12 Dr. Gilpin, under physical examination, the first sentence
13 says, "Gross examination of the upper extremities shows no
14 obvious abnormalities." It seems to me what he is saying
15 is if one just looks at this child, you don't realize
16 there's anything wrong with his arm or his brachial plexus
17 nerves. I don't know what else that could mean. And I
18 think that -- that it needs to be taken into account when
19 judging when this woman should have known that she had a
20 cause of action that the doctors are telling her it may
21 not be permanent, there's some suggestion of improvement,
22 Dr. Gilpin says in -- in this -- I'm looking for the
23 date --

24 MR. JOHNSON: December 5th.

25 MR. GRAHAM: Okay. So perhaps five months of

1 age, four and a half months of age according to the first
2 sentence a gross examination shows no obvious abnormality.
3 It goes on a couple of lines later, non-tender to
4 palpation; in other words, it wasn't hurting. You could
5 punch him and prod him and poke him and he didn't show any
6 sign of pain. He had a reasonable range of motion.

7 Now, once you get down in disposition and
8 recommendations, he goes on and he talks about
9 questionable brachial plexus palsy, left arm. He's not
10 even saying this child definitely has a brachial plexus
11 birth injury. Questionable brachial plexus palsy. Then
12 he goes on and talks about some motor deficits. So it's
13 kind of hard for us as attorneys, and Your Honor, to try
14 to pars through the medical record and figure out exactly
15 what he means by the seeming apparent contradiction
16 between no obvious abnormalities, questionable brachial
17 plexus injury, and then he talks about some deficits. But
18 I just submit to you that an ordinary lay person listening
19 to the doctors talk about his arm got hurt, that these
20 things usually heal, that we have to wait one and a half
21 to two years to figure out if it's permanent, and we're
22 not even sure it's a brachial plexus birth injury, and
23 there's no obvious problem, there's no pain on palpation,
24 all of those factors argue in favor of a more relaxed
25 judgment about when this lady knew or should have known

1 that she had a cause of action.

2 And let's not forget, this is a minor that we're
3 talking about. So far we've been talking about whether
4 the mom knew or should have known that she had a cause of
5 action. But this is the child's case. There's been no
6 showing that the child knew or should have known that he
7 had a cause of action.

8 For all those reasons, if Your Honor please, we
9 believe there's a factual issue presented and that the
10 motion for summary judgment should be denied.

11 I'm happy to answer any questions. Otherwise,
12 that's all I have.

13 Thank you.

14 THE COURT: Thank you.

15 Any response, Mr. Johnson?

16 MR. JOHNSON: If it please, Your Honor, yes.

17 First of all, Mr. Graham applies the wrong
18 standard. It's not when this mother knew or should have
19 known, it is when in the exercise of reasonable diligence
20 a person of common knowledge would know.

21 The Knox, K-N-O-X, case and the Jouvart,
22 J-O-U-V-E-R-T, versus DSS cases both say that this is an
23 objective not a subjective standard for the Court to
24 determine when the statute under both circumstance begins
25 to run.

1 The affidavit that purportedly creates a
2 question of fact that he handed in last week has nothing
3 to do with your ruling today for the simple fact that all
4 it does is refute her own affidavit as to when she knew
5 the injury was permanent. Case law says that's
6 immaterial. It's irrelevant whether you knew the extent
7 of the injury. It's whether you knew there was an injury.
8 Clearly we do. Mr. Graham then cites only the first
9 sentence of the December 5 record of Dr. Gilpin that says
10 "~~Gross exam of the upper abnormality, no obvious~~
11 abnormality." If you read the rest of the page, you come
12 down to, "The mother was advised that this particular
13 deficit was indicative of marginal recovery."

14 The issue of when the statute begins to run,
15 assuming the two statute of limitations is the one we're
16 talking about, the Court in Smith and in Knox said that
17 the indication that the plaintiffs in those cases met with
18 an attorney and consulted an attorney are indicative that
19 they had discovered or reasonably ought to have discovered
20 that an injury or malpractice claim existed.

21 The Smith case stands for the proposition that
22 an injured party may not comprehend the full extent of
23 damage is immaterial. That's a quote. So the law as I
24 read it says it's an objective standard, which then means
25 the Court must look at the testimony of the mother in her

1 quoting the fault on the part of the doctor, "Oops, I hurt
2 his arm," until a month later when, as an exhibit from the
3 telephone record indicates, "I need to see an orthopedist
4 for his injury," followed by the visit in December to Dr.
5 Gilpin when he told her there was marginal recovery, and
6 within a month she's in the office of David Betts signing
7 an affidavit so he can get both her records and the
8 child's records.

9 Then in spite of this affidavit today -- and I
10 wasn't going to go to the sham affidavit, but it certainly
11 is a sham affidavit when you look at the very last -- in
12 Cothran versus Brown, it says, In distinguishing between a
13 sham affidavit and a correcting -- a clarifying affidavit,
14 the following considerations provide guidance, the very
15 last one being when in relation to summary judgment was
16 the second affidavit submitted. As Mr. Graham said, he
17 brought it to my office last Thursday.

18 You don't need a full blown theory of recovery.
19 You've got a mother who knew her child's arm was injured,
20 and you have a statute of repose that ends this case in
21 seven months. If it is a tolling-only statute, then the
22 two-year statute of limitations runs from the exercise of
23 reasonable diligence by this mother as to investigation.
24 She did that. She carried the child for treatment of the
25 condition, and she sought two lawyers.

1 Thank you, Judge.

2 THE COURT: Thank you.

3 MR. GRAHAM: Could I just respond very briefly,
4 Your Honor?

5 THE COURT: Very briefly because I believe I've
6 heard your argument. I suspect that you're going to
7 respond to the sham affidavit.

8 MR. GRAHAM: I also, to clarify the objective
9 versus not subjective --

10 THE COURT: Yes, sir.

11 MR. GRAHAM: Weldon is right that some of our
12 case law talks about an objective standard, not a
13 subjective standard. Other parts of our case law talk
14 about actual inferences, if different, make it a jury
15 question. So I think what the Court means by objective
16 standard is not -- is that you don't just go to Tanya
17 Bennett and say, Tanya, when should you have known? When
18 do you subjectively believe you should have known that you
19 had a cause of action for your son? But rather we look to
20 the facts, all the facts and circumstances, including the
21 fact that she has no medical training, she's listening to
22 a variety of different treaters give her little bits and
23 pieces about the injury, which is confusing, and nobody
24 says -- at that point, nobody says, your obstetrician was
25 negligent in the delivery, thereby causing injury to son.

1 So I just suggest that we put in context what "objective"
2 means.

3 You still have to look at the facts. If the
4 facts give rise to different inferences, it's for the
5 jury, not for the Court.

6 And I was going to respond to the sham
7 affidavit, but I think Your Honor can probably see through
8 that. Weldon just highlighted one of the points. All the
9 other points are clearly in our favor. It's not a sham
10 affidavit.

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. JOHNSON: Your Honor, if I may, I'll hand up
14 the original transcript.

15 THE COURT: Yes, sir. Thank you.

16 And the original has not been filed with the
17 Clerk's office?

18 MR. JOHNSON: No, that's correct. I.

19 THE COURT: Okay.

20 MR. JOHNSON: I'll be happy to take it down and
21 file it if you want.

22 THE COURT: I'll give it to the Clerk here.
23 She'll take care of it.

24 Thank you.

25 MR. GRAHAM: For that matter, Your Honor, our

1 affidavits, the originals have not been filed with the
2 Clerk.

3 THE COURT: I'll make sure all of it gets filed.

4 MR. GRAHAM: Thank you, Your Honor.

5 THE COURT: Thank you.

6 MR. JOHNSON: Thank you, Judge.

7 THE COURT: Thank you.

8 (The proceedings were concluded.)

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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CERTIFICATE OF REPORTER

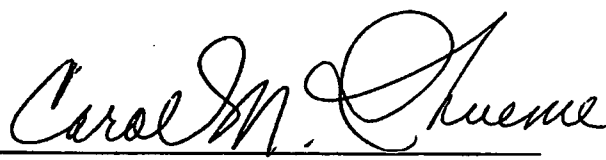
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STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

I, CAROL M. THUEME, RPR, Official Court Reporter for the 11th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Lexington County, South Carolina, on the 11th day of March, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 16, 2013



CAROL M. THUEME, RPR
Circuit Court Reporter

State of South Carolina) Court of Common Pleas
County of Lexington) No.: 2011-CP-32-2282

Tanya Bennett, as Next)
Friend of Mykelvion)
Thurmond, a minor,)
Plaintiff,)
vs.) Deposition of
TANYA BENNETT
Lexington County Health)
Services District, Inc.)
d/b/a Lexington Medical)
Center,)
Defendant.)
November 5, 2012

Deposition on oral examination of Tanya Bennett, reported by Jeffrey M. Thomas, Registered Professional Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to agreement and in accordance with the South Carolina Rules of Civil Procedure, at the Offices of Barnes, Alford, Stork & Johnson, LLP, 1613 Main Street, Columbia, South Carolina, on November 5, 2012, at the hour of 10:00 a.m.

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* * * * *

EXHIBIT INDEX

Exhibits: Marked at Page

(Copy of exhibits attached to each copy of transcript.)

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* * * * *

1 This deposition is taken in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 It is agreed and stipulated by the
5 Deponent and respective counsel that the reading and
6 signing of the deposition by the Deponent is
7 expressly waived.

8 WHEREUPON:

9 TANYA BENNETT, being duly sworn and
10 cautioned to speak the truth, the whole truth and
11 nothing but the truth, testifies as follows:

12 EXAMINATION

13 BY MR. JOHNSON:

14 Q. Give us your full name, please.

15 A. It's Tanya Juanita Bennett.

16 Q. And, Ms. Bennett, my name is Weldon
17 Johnson.

18 A. Nice to meet you.

19 Q. Good to see you. You've got a fine
20 lawyer. And I'm sure she has explained everything
21 to you, but the Rules require me to tell you a
22 couple of things --

23 A. Okay.

24 Q. -- before we get started. Okay?

25 A. Yes, sir.

1 Q. If at any time during the questioning
2 today, whether it is by me or by your attorney, if
3 you become confused, don't understand the question,
4 need clarification, you must ask the person asking
5 you the question for the clarification. Okay?

6 A. Got you. Okay, sir.

7 Q. The other thing, it's real easy to nod
8 your head or say uh-huh or uh-uh, but for this
9 record we need you to say -- answer out audibly yes
10 or no or whatever the answer may be.

11 A. Yes, sir.

12 Q. Okay. Now, today is -- may take awhile.
13 If at any time you feel the need to take a comfort
14 break for any reason, out this door to the left are
15 the restrooms.

16 A. Yes, sir.

17 Q. If you want something to drink, let us
18 know and we will be happy to accommodate you.

19 A. Feed the meter.

20 Q. Feed the meter. Okay. Well, the new
21 garage half a block down on Taylor now offers free
22 parking for two hours.

23 A. Oh, I didn't know that.

24 Q. Well, it's brand new. It's only been open
25 about two months.

1 MS. WATTERS: I didn't know it
2 either, but I did magically pull into it today by
3 accident.

4 BY MR. JOHNSON:

5 Q. The only other thing I need to tell you,
6 if we do take a break today you are not allowed to
7 discuss the subject matter of this deposition with
8 anyone, including your attorney.

9 A. Yes, sir.

10 Q. Okay. In other words, now that you have
11 been sworn, I'm the only one you can talk to until
12 it gets to be her turn unless she tells you not to
13 answer a question for some reason. Okay?

14 A. Yes, sir.

15 Q. Now, you were born where?

16 A. In Lexington County.

17 Q. And are your parents living?

18 A. Yes, sir, they are.

19 Q. Mother's name?

20 A. Joan Bennett.

21 Q. Okay. And your father?

22 A. Jacob Bennett.

23 Q. And do either work outside the home?

24 A. My mom does. My dad is disabled. My mom
25 works at Amazon.

1 Q. And before that?

2 A. She worked at Captain D's. She worked at
3 Wal-Mart. And Watson Manufacturing was her first
4 job.

5 Q. And have you always lived in Lexington
6 County?

7 A. The majority of my life, yes, sir. I did
8 move to Richland County for a little while. It's a
9 bit too fast-paced. So I ended up back in Lexington
10 County.

11 Q. Okay. And what area in Lexington do you
12 reside?

13 A. Swansea.

14 Q. Good group of folks there. And you
15 attended school where?

16 A. Swansea High School.

17 Q. And did you finish?

18 A. Yes, sir, I did.

19 Q. What year?

20 A. 1992.

21 Q. And after '92 did you go to school any
22 further?

23 A. After '92, no, sir. But in a little -- I
24 guess '96 I went to Midlands Tech for awhile and
25 then transferred to Orangeburg Technical College.

1 Q. To Orangeburg?

2 A. Uh-huh. Yes, sir.

3 Q. And what -- did you achieve a certificate
4 or degree?

5 A. No, sir. I ended up having a baby.

6 Q. What were you studying?

7 A. Health science.

8 Q. Okay. And that would have led to what
9 kind of job opportunities?

10 A. In the health field. Nursing is what I
11 really wanted to do, but life happens.

12 Q. I understand. And your first child was
13 born when?

14 A. He was born in 1994.

15 Q. Where?

16 A. At Lexington Hospital.

17 Q. And do you remember who the physician was
18 who delivered him?

19 A. Dr. Neal Bennett.

20 Q. Any complications with your pregnancy or
21 the delivery?

22 A. No, sir.

23 Q. And that child's name?

24 A. His name is Tyreek, T-y-r-e-e-k. Last
25 name Bennett.

- 1 Q. And who is his father?
- 2 A. Stanley Palling.
- 3 Q. Last name again?
- 4 A. Palling, P-a-l-l-i-n-g.
- 5 Q. And where does he reside?
- 6 A. Swansea.
- 7 Q. Is he married?
- 8 A. No.
- 9 Q. Okay. Did the two of you ever live
- 10 together?
- 11 A. No.
- 12 Q. Okay. And the second child?
- 13 A. Kwaymauren, K-w-a-y-m-a-u-r-e-n, Bennett.
- 14 Q. Who is his father?
- 15 A. His father is Timothy Addison.
- 16 Q. And does he still live in the Swansea
- 17 area?
- 18 A. No. He is in North Carolina.
- 19 Q. Did he ever live in the Swansea area?
- 20 A. No.
- 21 Q. How did you come to be acquainted with
- 22 him?
- 23 A. I met him through some friends.
- 24 Q. Okay. Does he have any relatives living
- 25 in Lexington County?

1 A. No.

2 Q. Okay. How about Stanley?

3 A. Yes.

4 Q. His dad's name is what?

5 A. Oh, I don't know. His dad was deceased,
6 so I don't know.

7 Q. Mother's name?

8 A. Eloise Palling.

9 Q. And your second son, was he born at
10 Lexington also?

11 A. He was.

12 Q. And who delivered him?

13 A. Dr. Bennett, if I'm not mistaken.

14 Q. Is Dr. Bennett still practicing?

15 A. No. He delivered me, so I hope not.

16 Q. He delivered you as well?

17 A. Yes.

18 Q. Who were the other doctors in the practice
19 when your first two children were born?

20 A. Just Dr. Bennett. That is all I remember
21 that was in there with him.

22 Q. Did he have an office in Swansea or in
23 Lexington?

24 A. In Lexington behind the hospital.

25 Q. And how did you come to start going to see

1 Dr. Augustine at the Lexington Swansea office?

2 A. That was the only place we had in Swansea.
3 Just the Medical Center there.

4 Q. I take it it was not there when your first
5 two children were born?

6 A. No.

7 Q. Is that correct?

8 A. No. I don't remember it being there.

9 Q. Okay.

10 A. We had one doctor after Dr. Grainer died.
11 And then someone else took over, and they put the
12 Swansea Medical Center there.

13 Q. And that is the Lexington Medical
14 Center-Swansea? Is that the way they call --

15 A. Yeah.

16 Q. And Dr. Augustine, I think, was the only
17 doctor in that office along with the nurse
18 practitioner?

19 A. Yes. Ms. Barber.

20 Q. And how did you find out you were or who
21 made the determination you were actually pregnant
22 with your third child?

23 A. I went to the Health Department in Swansea
24 and was referred.

25 Q. To Lexington?

1 A. Yes, sir.

2 Q. Do you remember your first visit with
3 Dr. Augustine?

4 A. Vaguely. It was just a regular woman's
5 checkup and normal, you know, urine test, blood
6 pressure check.

7 Q. Okay. Let me back up and ask it this way.
8 Did you ever see Dr. Augustine before you became
9 pregnant?

10 A. No, not before I became pregnant. No,
11 sir.

12 Q. Did you see an obstetrician between Dr.
13 Bennett and Dr. Augustine?

14 A. No, not as I can recall.

15 Q. Okay. Did you have a doctor that you saw
16 for any reason other than your obstetrician?

17 A. No, sir. I really didn't go to the doctor
18 too much.

19 Q. But if you had a cold, flu, anything like
20 that, you can't remember?

21 A. Just dealt with it at home.

22 Q. Okay. Up until you became pregnant with
23 your first child, who would your doctor have been to
24 go to for whatever kind of illness you might have?

25 A. Gosh. I guess Dr. Johnny Smith in Irmo,

1 Lexington Family Practice.

2 Q. The Lexington office in Irmo?

3 A. Yes, sir.

4 Q. Okay. And what sort of things did you see
5 Dr. Smith or his partners for?

6 A. Well, just I guess if there was anything
7 major from -- but my mom didn't take me to the
8 doctor too much. So just if there was -- if I
9 needed to go as far as not for colds or anything.
10 Just sickness. Just for general things.

11 Q. Okay. Let me ask it a different way.
12 What would you have seen Dr. Smith for?

13 A. If there was sickness such as flu or a
14 bad, bad cold that I had to go to the doctor for.

15 Q. Different question. Had you ever been in
16 a hospital before the delivery of your first child
17 as a patient?

18 A. No.

19 Q. In between the two -- first two children,
20 were you ever hospitalized for any reason?

21 A. No.

22 Q. And in between the second and third child?

23 A. No hospitalization.

24 Q. Okay. Now, after you were referred by the
25 Health Department to Lexington Medical Center in

1 Swansea; is that correct?

2 A. Yes.

3 Q. And Dr. -- if I've got it correct,
4 Dr. Augustine was the doctor inside the Lexington
5 Medical Center facility?

6 A. That's correct, yes, sir.

7 Q. Okay. Now, one of the things that we are
8 going to talk about today is the fact that you have
9 through your lawyers brought a lawsuit against
10 Lexington Medical Center. Do you understand that?

11 A. Yes, sir, I do.

12 Q. Okay. And the way a lawsuit starts out is
13 that your lawyers file what is called a Summons and
14 Complaint which sets forth who they are bringing the
15 suit against and what the case is all about.

16 A. Yes, sir.

17 Q. Do you understand that?

18 A. I do.

19 Q. And did you ever get a copy or read the
20 Summons and Complaint that Mr. Graham's office filed
21 on your behalf?

22 A. No, I haven't.

23 Q. You haven't? Okay. As is customary, it's
24 kind of lengthy, but I want to focus on a couple of
25 parts of it. Okay?

1 A. Okay. That's fine.

2 Q. For instance, if you need me to show you
3 the Complaint -- why don't we do it this way since I
4 have two copies of it. Let me hand you a copy of
5 the Summons and Complaint.

6 MS. WATTERS: Can I have a standing
7 objection, but you go ahead. And I won't interrupt
8 as you go forward, but --

9 MR. JOHNSON: Object to what?

10 MS. WATTERS: Well, objecting to the
11 form with regard to addressing the allegations in
12 the Complaint with the client or with the deponent
13 during their deposition, but I'm not going to
14 interrupt you going forward. Just going to object
15 to this line of questioning.

16 BY MR. JOHNSON:

17 Q. For instance, in Paragraph Number 2, did
18 you know that Dr. Augustine had moved to North
19 Carolina?

20 A. No.

21 Q. Okay. Why don't you just take a moment, I
22 don't want to --

23 A. Okay. No, you are fine.

24 Q. No, ma'am. I want you to read the
25 Complaint --

1 A. Okay.

2 Q. -- rather than me pick parts of it out and
3 you not having read the whole document. So take
4 whatever time you need and take a look.

5 A. Okay.

6 Q. Now, since you have not seen this document
7 before, I'd be happy to give you and your attorney
8 an opportunity to confer with her and ask her any
9 questions or she can counsel you about what the
10 Complaint is or anything if you all want to do that.

11 A. No, I'm fine. I understand the document.

12 Q. Okay. Is there anything in there that you
13 believe to be incorrect?

14 A. No, sir. Not going through it.
15 Everything that is here to me is accurate.

16 Q. Okay. And I want to work backwards from
17 here. Okay?

18 A. Okay.

19 Q. Tell me -- I don't want to pronounce his
20 name wrong. Pronounce his first name, please.

21 A. Mykelvion.

22 Q. Okay. And how old is he today?

23 A. He's 11 years old.

24 Q. And where does he go to school?

25 A. He goes to Francis Mack Intermediate

1 School.

2 Q. Francis Mack?

3 A. Yes, sir.

4 Q. And where is that?

5 A. In Gadsden, South Carolina.

6 Q. Grade?

7 A. He's in the sixth grade.

8 Q. Has he been promoted each year?

9 A. He has, yes, sir.

10 Q. And generally how has he done in school?

11 A. Grade-wise he's doing good. He's always
12 been on the honor roll.

13 Q. Now, is he currently under the care of any
14 doctor for any reason?

15 A. As of right now he's doing therapy. He
16 goes to physical therapy.

17 Q. Where?

18 A. Vital Energy Rehabilitation Center in
19 Lexington, South Carolina.

20 Q. Vital?

21 A. Vital.

22 Q. And where is that located?

23 A. It's in Lexington. I don't know the
24 address. It's off of Charter. Charter Road in
25 Lexington.

1 Q. In the city or in the county?

2 A. It's in Lexington County. It's further
3 out of the city limits.

4 Q. And is that private or government? Does
5 the hospital run it, do you know?

6 A. I think it's private.

7 Q. Okay. Do they take -- well, let me back
8 up. At one point your son was covered by Medicaid.
9 Is he still?

10 A. That's correct. Right now he has Blue
11 Cross/Blue Shield as his primary insurance. And he
12 has Medicaid as secondary.

13 Q. And how was he referred to Vital?

14 A. Vital Energy? I actually had him going to
15 a doctor from Emory, a private doctor where I
16 actually paid for in Atlanta, Georgia. And he
17 recommended him back in therapy. And so I found
18 Vital Energy by going online.

19 Q. And there were two doctors at Emory.
20 Which one are we talking about?

21 A. He actually saw Dr. Felton at Emory.

22 Q. Felton?

23 A. Yes.

24 Q. And when did he see Dr. Felton?

25 A. Dr. Felton? He saw him on October the 5th

1 of this year.

2 Q. And is he in the same office with Dr.
3 Bruce or is this a different office?

4 A. It's the same office, but I don't think
5 Dr. Bruce practices there anymore.

6 Q. And before October the 5th, when was the
7 last time you were in that doctor's office? Not
8 Dr. Felton himself, but the office where he and Dr.
9 Bruce --

10 A. That office? It had been awhile since I
11 took him back there. I would say maybe about four
12 years.

13 Q. And who made the appointment for you to go
14 back to see Dr. Felton?

15 A. I made my own appointment for him to be
16 seen.

17 Q. And why did you make the appointment?

18 A. Because my son was complaining of pain in
19 his shoulder and tingling in his arm.

20 Q. And that is a complaint he's had before,
21 isn't it?

22 A. Yes, it is. And then he also started
23 complaining his fingers were getting stuck, jammed.
24 I guess, I don't know, they call it trigger finger.
25 So he was actually having problems with that.

1 Q. One finger or all of them?

2 A. Mainly the thumb and the little pointer
3 finger.

4 Q. And this is on his left hand?

5 A. It is.

6 Q. Okay. And tell me what Dr. Felton told
7 you after his examination.

8 A. He recommended therapy. For me to put him
9 back into therapy. Mainly the therapy would help
10 him a whole lot. Something that he is going to have
11 to have. As far as the pain, he said it's just
12 something that they experience at times.

13 The jamming of the finger, a lot of
14 medical terms, so I don't know. He was concerned
15 about the popping and stuff in his wrist. Said
16 something about the ligaments having, I guess, knots
17 or something at the top of them. So he wanted me to
18 get him into therapy as soon as possible.

19 Q. And I take it he wrote a prescription for
20 the therapy?

21 A. He did. He did.

22 Q. And have you been to any of his therapy
23 sessions?

24 A. I haven't. My sister -- I have to make
25 arrangements for my sister to take him because I

1 can't take off of work. He's going three times a
2 week.

3 Q. And when did he start?

4 A. He actually started therapy -- his first
5 session -- he did three days last week. He did two
6 sessions the week before. I don't have the exact
7 dates, but he's been to all sessions since.

8 MS. WATTERS: I'm sorry. How many
9 sessions?

10 THE WITNESS: He took three sessions
11 last week. The week before last he did two
12 sessions. I don't know the exact date. I would
13 have to look at a calendar.

14 BY MR. JOHNSON:

15 Q. Can you tell me what kind of therapy it
16 is?

17 A. Right now he's doing aquatic therapy
18 there. Strengthening. He's doing that -- mainly
19 the aquatic therapy is the biggest thing that they
20 are working with him right now and just different
21 strengthening that he can do at home.

22 Q. What does he do at home?

23 A. Well, he has to where he has to do
24 push-ups beside the wall. He has to push up. He
25 was trying to hold weights, so we use a can to try

1 to strengthen muscle tone. And then just basic -- I
2 do massage on his arm because he does complain about
3 the pain.

4 Q. What did the doctor think the therapy
5 would do for him? What would that accomplish?

6 A. With the therapy, basically with that he
7 just felt that it may benefit him to try to use the
8 arm more to get more strength in it because it is
9 weak.

10 Q. What limitations do you see as his mother
11 in his use of the left arm?

12 A. Well, with him just simple things. He has
13 trouble as far as with the lifting of the shoulder.
14 He does have trouble with, you know, weightbearing,
15 with -- especially when he's trying to pick up
16 certain things. He can't really hold it in that
17 arm. He ends up dropping it. He's real clumsy. He
18 drops things.

19 Just simple stuff with -- as far as he
20 really doesn't tie his shoe on that left side. He
21 just kind of -- he stuffs his shoestrings down in
22 his shoe because he can't get the grip. He has
23 trouble -- stuff that we take advantage of like
24 letting the windows up or letting them down.

25 As simple as trying to put the water tray

1 for the ice into the top of the freezer. Stuff like
2 that because he can't lift the shoulder up to get it
3 at that height. So just simple stuff that I
4 wouldn't think I would have issues with, he has
5 trouble with.

6 Q. Now, is he right-handed?

7 A. He is. He's right-handed.

8 Q. And does he write and throw a ball with
9 his right hand?

10 A. He writes with his right hand and he
11 throws the ball with his right hand.

12 Q. If I'm standing here looking at your son,
13 is there any obvious sign with him not moving that
14 there is anything wrong with his left arm?

15 A. It is because he holds it mainly to his
16 side and his arm -- his hand is -- I don't know how
17 to explain it. It's mainly like this. And it's
18 just -- it kind of hangs there if he's standing
19 there because I've had people ask me did he have a
20 stroke. I'm like, no, he didn't.

21 Q. Okay. And before Dr. Felton and this
22 session of therapy, when was the last time that he
23 had seen a doctor? And I'm going to limit it to his
24 left arm for right now.

25 A. Okay.

1 Q. Because I know he's had colds, flu.

2 A. Yeah.

3 Q. Been to Richland a number of times for a
4 lot of things, but let's work backwards from
5 Dr. Felton. Who had seen him for his left arm
6 before then?

7 A. He's seen Dr. Gilpin at McLeod
8 Orthopaedics.

9 Q. Does he go to Florence or is Dr. Gilpin --
10 Dr. Gilpin moved his office from Columbia to
11 Florence?

12 A. He actually left Midlands and moved to
13 Florence, but he left when Jabo was small, just a
14 baby. So he's in Florence.

15 Q. So when you first started with him he was
16 with Midlands here in Columbia?

17 A. Yes.

18 Q. Okay. And what does he see Dr. Gilpin
19 for?

20 A. Just the arm. For the left arm.

21 Q. What has Dr. Gilpin done for him?

22 A. Mainly -- let's see. The last time he saw
23 Dr. Gilpin, he went in because of the finger. It
24 was getting stuck and him complaining of the actual
25 pain in the arm. Dr. Gilpin recommended that he

1 could do like a little release in the wrist, but
2 then that probably would end up causing him to lose
3 function.

4 So that is not an option because he's done
5 very well. I mean, he mentioned there was some
6 other type of surgical procedure that he could
7 actually do because he was having pains in the upper
8 arm, but then again he said it could leave him
9 losing some function.

10 So he recommended, you know, doing some
11 exercise with balls and maybe doing like with the
12 weights with the cans, the canned goods, trying to
13 get him to use it, have more strength in it, but
14 mainly that is about it.

15 Q. Okay. Dr. Gilpin hasn't done any kind of
16 surgery?

17 A. No.

18 Q. I know he said there are things he could
19 do, but has he actually recommended that your son
20 have any kind of surgery?

21 A. Well, after he mentioned that, with him
22 losing function, no.

23 Q. Okay.

24 A. I decided no.

25 Q. Does he -- has he followed anybody other

1 than Dr. Gilpin?

2 A. He saw Dr. Gilpin. Dr. Gilpin when -- I
3 was seeing him pretty regularly. He sent me to the
4 University of South Carolina to see Dr. Walsh. He
5 did at one point recommended, you know, there was
6 some surgery, but he wanted Dr. Walsh to do like a
7 recommendation and see if it was something that he
8 would be -- that would benefit him, but nothing came
9 about that. Dr. Walsh, he just basically said Jabo
10 would be okay.

11 Q. So Dr. Gilpin sent him to Dr. Walsh for a
12 second opinion about whether surgery would be of
13 benefit; is that correct?

14 A. Yes.

15 Q. And your understanding from Dr. Walsh is
16 that he didn't think that surgery would be of
17 benefit; is that right?

18 A. Yes. Yes, that's correct.

19 Q. I'm not trying to put words in your mouth.
20 I'm just trying to --

21 A. No, that's correct. Yeah.

22 Q. That is correct? Okay.

23 A. That is what he said, yeah.

24 Q. What -- do you remember what kind of
25 procedure Dr. Walsh and Dr. Gilpin were talking

1 about?

2 A. No. Dr. Gilpin just sent me to Dr. Walsh.
3 And when I went back to -- when I went to Dr. Walsh,
4 Dr. Walsh said he didn't think surgery would benefit
5 him at that time. And then he sent me back to Dr.
6 Gilpin. And Dr. Gilpin sent me back to Dr. Walsh.
7 So it was like a back and forth.

8 And so I just started -- and that is when
9 I ended up trying to find someone that would want to
10 help him. And that is when I started going to -- I
11 went to Emory that week and then took him back.

12 Q. And how did you find Emory or who referred
13 you to Emory?

14 A. Online just doing different research as
15 far as brachial plexus injuries go. That was closer
16 than trying to go to any of the other doctors that
17 specialized like in Texas and places that I knew I
18 could not drive. So I decided to take him to Emory.

19 Q. Did someone refer you there? Did you have
20 to have a referral to get into the Emory office?

21 A. No.

22 Q. Okay. Do you remember about when you
23 started at Emory?

24 A. His first visit at Emory I think was in
25 2003 maybe. I'm not exactly sure.

1 Q. Okay. And if you want to refer to
2 records, that is fine.

3 A. Okay. That might have been. I have to
4 think about whenever. I've been to so many doctors.

5 Q. It looked like to me the first time --

6 A. It may have around 2000 -- it may have
7 been later than that because -- I would say maybe --
8 that might be right, around 2008. At that time we
9 had Blue Cross/Blue Shield.

10 Q. Let me show you this to help your memory a
11 little bit. This is an Emory note from February of
12 '08, a Dr. McGillivray?

13 A. Yes. That is probably it. Pediatric.
14 Orthopedics. I think this may -- yeah, that
15 might -- yeah, this is the first visit. I'm sorry.
16 Because I do remember. Yes, that is the right time.
17 That was the actual first visit.

18 Q. Okay. And here is -- this is the one by
19 Dr. Bruce which was also February.

20 A. I think we saw two doctors that day; one
21 was a hand specialist and one was the shoulder.
22 Yeah. That is about right.

23 Q. Okay.

24 A. Yeah, that would have been the first.

25 Q. So we know what we are looking at later

1 on --

2 A. Okay.

3 Q. -- the two documents I've handed you were
4 given to us by your attorneys. And they are marked
5 Emory down in the lower left -- I mean lower right
6 corner. You see that?

7 A. Yes, I do.

8 Q. Pages 1 through 4?

9 A. Yeah.

10 Q. And it has your son's name right under
11 Emory?

12 A. Yes.

13 Q. 0004?

14 A. Yes. So that would have been right.

15 Q. Okay.

16 A. We've been to different doctors. I'm
17 sorry.

18 Q. That's fine. And I wanted to ask you one
19 question about -- in Emory Page 0001, this is Dr.
20 Bruce's report. I'm going to read you this.

21 A. Okay. That's fine.

22 Q. And then I'll hand you the document so you
23 can review it again.

24 A. Okay.

25 Q. It says, "He has a history of a left

1 brachial plexus injury at birth. According to his
2 mother, at three months of age it sounds like he had
3 an E.M.G. And the mother thought that there would
4 be no nerve regeneration at this time."

5 A. Yeah. That is because one of the doctors
6 at Midlands stated that he would not have -- he
7 wouldn't have any type of function in it again. So
8 I didn't agree with that.

9 Q. Okay. A couple of questions to put this
10 in sequence.

11 A. Okay.

12 Q. First of all, the sentence that I read to
13 you, that is something you told Dr. Bruce and he
14 wrote down in his record; is that correct?

15 A. Yes, that's correct.

16 Q. And the fact that there would be no
17 regeneration when they did the study when he was
18 three months old is something that you were told by
19 the doctors at Midlands?

20 A. Yes.

21 Q. Okay. And the bottom line, when you left
22 Emory after those couple of visits, did they have
23 any recommendation for you as to treatment or
24 therapy or any such?

25 A. As far as the doctor goes when I left

1 there he stated that he could do surgery, but
2 because we lived so far -- after the surgery he
3 would have to have therapy every single day. So
4 with me living in South Carolina and trying to come
5 back and forth to Atlanta, he didn't want to risk
6 doing any surgery on him.

7 Q. All right. And what was the surgery going
8 to accomplish?

9 A. Basically -- it's been such a long time.
10 He basically wanted to do, I guess, the transfer of
11 the --

12 Q. Tendon transfer?

13 A. Yes, of the muscle or whatever he called
14 it. I don't know what the medical term for it is.
15 He said that would help give him more function as
16 far as lifting the shoulder up. But, again, because
17 we lived so far and I wouldn't have been able to get
18 him back and forth to Atlanta for therapy every day,
19 he didn't want to risk that.

20 Q. Do I understand that surgery was going to
21 help him, but it wasn't going to cure all of his
22 problems?

23 MS. WATTERS: Object to the form. Go
24 ahead.

25 BY MR. JOHNSON:

1 Q. I'll restate the question.

2 A. Okay.

3 Q. What was your understanding of what the
4 outcome of the surgery Dr. Bruce talked about would
5 be?

6 A. The outcome? It would give him more
7 function. It wasn't going to make it 100 percent,
8 but it would help him have more function in the
9 shoulder.

10 Q. Okay. Did you ever talk to any other of
11 the doctors in Columbia about their doing the
12 surgery so that it could be done closer?

13 A. No.

14 Q. Now, before Emory you had been going to
15 Dr. Gilpin off and on for years?

16 A. Dr. Gilpin. We went to Midlands
17 Orthopaedics with Dr. Piehl.

18 Q. And there are two Peeles. Is it the
19 P-i-e-h-l or the P-e-e-l-e?

20 A. I don't know. It's the young Piehl, not
21 the old Peele.

22 Q. Then that is the P-i-e-h-l. I won't tell
23 Bob that you referred to him as old. And who did
24 you see first at Midlands?

25 A. Dr. Gilpin.

1 Q. And why did you see Dr. Piehl?

2 A. Because Dr. Gilpin left the practice.

3 Q. Left? Okay. And then at some point you
4 decided to follow him to Florence?

5 A. Yes. I found him in Florence.

6 Q. Well, let's just deal with Dr. Piehl for a
7 minute. What did he do or tell you or recommend?

8 A. Just therapy for him. Basically that was
9 mainly it.

10 Q. Did Dr. Piehl refer him to any particular
11 place for the therapy?

12 A. Not really because I was already going to
13 Richland Memorial, the pediatric part of that. So
14 just make sure that he kept going to therapy.

15 Q. Okay. And who has seen him -- who
16 referred him to Richland for the therapy?

17 A. Dr. Patricia Chisholm whenever we first --
18 when he first got out of the hospital we went to
19 her --

20 Q. She was your pediatrician?

21 A. -- at the hospital. Yeah. And then Dr.
22 Gilpin. They did -- we went back to Dr. Gilpin, and
23 then we ended up at the therapy place at Richland.

24 Q. And it may be easier to go this way since
25 you've mentioned Dr. Chisholm. She was the

1 pediatrician who saw him at the hospital at birth?

2 A. Yes.

3 Q. And where was her office?

4 A. It was off of Brookland-Cayce Pediatric
5 off of -- I guess going towards West Columbia or --
6 no, Cayce. Off of -- with the Zesto's. I don't
7 know the name of that street. I think it's
8 Monticello or --

9 Q. Did you pick her as the pediatrician?

10 A. No. She just came around from the
11 hospital. No.

12 Q. Did she work for the hospital?

13 A. I don't know. She just ended up being the
14 doctor that I saw whenever I was in the hospital for
15 him. And that is where they recommended me to go
16 after I brought him home.

17 Q. Okay. And did you take him to --

18 A. The first appointment I did.

19 Q. You followed up with Dr. Chisholm in her
20 office?

21 A. I did.

22 Q. And then that is when she suggested
23 therapy somewhere?

24 A. Yes. We went and did therapy for him.

25 Q. And how long did he go to therapy?

1 A. He went to physical therapy for --
2 continuously for a year. And then once he started
3 getting the feeling back, we did occupational
4 therapy.

5 Q. And where did you do O.T.?

6 A. At the same. Palmetto Richland.

7 Q. And what was different between the
8 physical therapy and the occupational therapy, if
9 you can remember?

10 A. Occupational therapy giving him just
11 different things, making him use the arm as far as,
12 I guess, daily activities. So just making him --
13 instead of just doing everything because he was at
14 the point where he was depending completely on the
15 right-hand side. He was not -- because he didn't
16 have the function or the -- in the left arm, he was
17 just mainly trying to do everything with the right
18 hand. And so they was just trying to basically
19 trying to make him understand that he did have a
20 left arm and that he could actually use it.

21 Q. And I take it neither of your first two
22 sons had any kind of problems at birth?

23 A. No.

24 Q. Is that correct?

25 A. That's correct.

1 Q. Okay. And we are going to come to the
2 events at birth, but I take it his being delivered
3 with problems with the left arm was not something
4 you expected him to have?

5 A. No.

6 Q. Is that correct?

7 A. That's correct.

8 Q. All right. You follow with Dr. Chisholm,
9 and she refers you to Richland. And what -- did he
10 start going there when he was a couple months of
11 age?

12 A. He did.

13 Q. Okay. And how long did he go there?

14 A. I would say from baby up until maybe three
15 we were going.

16 Q. Age three?

17 A. Yeah. Around there.

18 Q. How often would he go after, say, age one?

19 A. We went -- we were going every week. So
20 we had his appointments. He was going every week to
21 the therapy sessions. Yeah, I think every week when
22 I could get him there with work, trying to work and
23 transportation.

24 Q. And would you be always the one to take
25 him to therapy?

1 A. Yeah.

2 Q. Do you remember the names of any of his
3 therapists?

4 A. The one that I praise the most was Cindy.

5 Q. Cindy?

6 A. Yes.

7 Q. Do you know the last name?

8 A. No. Just knew Ms. Cindy.

9 Q. Okay. All right. And from what I've seen
10 in the records, at about age three is when he quit
11 going to physical therapy; is that correct?

12 A. Yeah, that's correct.

13 Q. Okay. And was there a reason you stopped?

14 A. Well, basically there really wasn't much
15 that they could do. And then me trying to work,
16 trying to get off, not wanting to lose my job. I
17 remember all the stuff that he did with therapy I
18 could mainly do at home. So --

19 Q. Did he ever get much improvement from the
20 time he was born?

21 A. He did because whenever he was born he
22 didn't have any feelings in it at all with the first
23 doctor telling me, you know, when they did that
24 E.E.G. he would have --

25 Q. E.M.G.?

1 A. E.M.G. that he wouldn't have any function.

2 Q. Okay. That was when he was about three
3 months of age?

4 A. Yeah. That kind of bothered me for
5 awhile. But, yes, he did end up getting the
6 function in it with us going to therapy, continuing
7 to work with it.

8 Q. Do you remember who did the E.M.G.?

9 A. Not right offhand I don't. No.

10 Q. Was it somebody at Midlands?

11 A. It was somebody at Midlands. It was an
12 older doctor.

13 Q. Dr. Redmond?

14 A. I don't know if that is his name or not.
15 I know it was an older doctor there. Brown hair. I
16 don't know his name right offhand. I'm sorry.

17 Q. That's okay. I can sort of piece it
18 together by you referring to Dr. Peele as the older
19 doctor because I know how old he is.

20 A. Yeah.

21 Q. And do you remember who sent you for
22 the -- to have the E.M.G. study done, which doctor
23 recommended it?

24 A. I'm not -- if it was just me having that
25 appointment at -- initially at Midlands, they wanted

1 to see what type of function he had in it. So I
2 don't know if it was one of their doctors that just
3 recommended me to go to the other doctor for the
4 E.M.G. I'm not sure.

5 Q. Dr. Chisholm is the one who sent you to
6 Midlands to see a doctor?

7 A. Well, initially Dr. Chisholm, yeah,
8 because she wanted me to follow up with the
9 orthopedic.

10 Q. So we start with Dr. Chisholm. She sends
11 you to Midlands and to Richland for therapy?

12 A. That's correct.

13 Q. Okay. And when do you see somebody
14 different other than Dr. Chisholm and doctors at
15 Midlands?

16 A. I guess around the time whenever -- it's
17 been awhile. Between Dr. Piehl. So I guess around
18 the 2008 when I was trying to see if there was
19 anything else we could do.

20 Q. Okay. I've got some records here, and
21 I'll show them to you or we'll talk about them.

22 A. Okay.

23 Q. But I guess the easier way to do it is
24 because it looks like to me that the McWhirter Law
25 Firm sent you to a doctor for some evaluations or to

1 some therapists?

2 A. Yes. Dr. Alan Winetraub.

3 Q. Let me do this. I'm going to hand you two
4 pages, Page 20 and 21, out of your lawyer's Answers
5 to Interrogatories. While you read it we are going
6 to mark this as Exhibit 1.

7 A. Okay.

8 (Deposition Exhibit 1 marked for
9 identification.)

10 BY MR. JOHNSON:

11 Q. Have you read Number 15?

12 A. I have. Okay.

13 Q. Beginning at Supplemental Response,
14 two-thirds of the way down?

15 A. Okay.

16 Q. That and the whole next page?

17 A. Okay.

18 Q. Have you had an opportunity to read that?

19 A. I have.

20 Q. Okay. Now, this says information that
21 your lawyer provided to us in the form of what we
22 call an interrogatory answer.

23 A. Okay.

24 Q. And I want you to make sure that what you
25 have obviously conveyed to them is accurate in the

1 answer or is there anything there that you need to
2 change to be correct?

3 A. No, this is -- no, nothing needs to be
4 changed.

5 Q. Is it accurate?

6 A. It is.

7 Q. All right. Dr. Augustine then stated,
8 "Oops, I hurt his arm."

9 A. Yes.

10 Q. That is a statement you are going to tell
11 us in a little bit that Dr. Augustine said that you
12 heard.

13 A. Yes, sir.

14 Q. Correct?

15 A. That's correct.

16 Q. Okay. And that is in response to the fact
17 that he was unable to move his left arm when he came
18 -- when he was born?

19 A. Whenever he was in the little incubator,
20 the little bed, he just -- because his arm -- his
21 right arm was flared up, but the left was just
22 there. So he picked up his arm and he just said,
23 "Oops, I hurt his arm."

24 Q. Okay. And that was not something you
25 expected to have had happen?

1 A. No.

2 Q. Is that correct?

3 A. That's correct.

4 Q. Okay. And then he tells you, according to
5 this, that, "Injuries like this one usually heal
6 fully in about two weeks"?

7 A. He did the next day when he came to check
8 on me he said he would.

9 Q. And did it heal in two weeks?

10 A. No.

11 Q. Has it ever healed?

12 A. No.

13 Q. So you knew in two or three weeks that his
14 statement that they usually heal, your son wasn't
15 going to be one of them that healed in two weeks,
16 correct?

17 A. Yes, sir, that's correct.

18 Q. Okay.

19 (Deposition Exhibit 2 marked for
20 identification.)

21 BY MR. JOHNSON:

22 Q. What we've marked as Exhibit 2 is a form
23 that is in the records your lawyer has furnished to
24 me.

25 A. Okay.

1 Q. And it indicates it's a call back sheet.
2 And it indicates Lexington Medical Center in Swansea
3 up at the top, correct?

4 A. Uh-huh. It does.

5 Q. And it says, "Reason for the call.
6 "Orthopedic referral for her son Mykelvion. His arm
7 was injured during delivery." Do you remember
8 making that call?

9 A. No, I don't remember. That's been such
10 awhile back.

11 Q. I understand. And then the note by the --
12 Dr. Augustine down below says, "Have patient check
13 with pediatrician to evaluate and do referral. To
14 call back if any problems with this." Does that
15 refresh your memory that you were told to get your
16 pediatrician to make the referral?

17 A. No, but it's here. So I just don't
18 remember making the call. I'm sorry.

19 Q. Okay. And I understand that. But, in
20 fact, is that what did happen, Dr. Chisholm made the
21 referral to an orthopedic?

22 A. Yeah.

23 Q. And that was to Midlands?

24 A. Yeah.

25 Q. Okay. So more likely than not that is an

1 accurate depiction of a phone call that took place
2 even though you don't remember making it?

3 A. Yeah. Yes, sir. That is true.

4 Q. Okay. Now I'm going to hand you another
5 document which we'll mark as Exhibit 3.

6 (Deposition Exhibit 3 marked for
7 identification.)

8 MS. WATTERS: I have an objection to
9 a question about this. Remind her of her rights to
10 her attorney/client privilege.

11 MR. JOHNSON: Okay.

12 BY MR. JOHNSON:

13 Q. All right. First of all, in Exhibit 3, is
14 that your signature?

15 A. It is.

16 Q. Okay. And it's dated January 11, 2002, on
17 the left side?

18 A. That's correct.

19 Q. Okay. Now, it came out of the records
20 from Dr. Augustine's office.

21 A. Uh-huh.

22 Q. And it's an authorization by you to
23 release information to David B. Betts, correct?

24 A. That's correct.

25 Q. Okay. Now, one caution. I am not

1 privileged to know anything you and Mr. Betts may
2 have talked about.

3 A. Okay.

4 Q. So in answering my questions don't tell me
5 anything your attorney may have told you. Okay?

6 A. Okay.

7 Q. Is that -- are the dates accurate that in
8 January the 11th would have been when you signed the
9 form in Mr. Betts' office to get -- for him to get
10 the medical records?

11 A. It's dated for 1/11/02, so yes.

12 Q. Do you remember if you signed
13 authorizations for Mr. Betts to get records from any
14 other facility?

15 A. Not as I can recall.

16 Q. I mean, from the hospital? This is
17 directed to Dr. Augustine's office. Did he also
18 give you one for him to obtain the hospital records?

19 A. I don't recall.

20 Q. How about one for Midlands' records?

21 A. I don't recall. I'm sorry.

22 Q. Okay. Since we are going to come to it in
23 Mr. McWhirter's, did you go see any -- take your son
24 to see any physician or therapist or anything at the
25 instruction of Mr. Betts?

1 A. No.

2 Q. Okay.

3 (Deposition Exhibit 4 marked for
4 identification.)

5 BY MR. JOHNSON:

6 Q. All right. We've marked this document as
7 Deposition Exhibit 4. First of all, in the lower
8 left side is that your signature?

9 A. It is.

10 Q. And it's dated January 11, 2005?

11 A. That's correct.

12 Q. Okay. In the upper left-hand corner it's
13 partially off, but it reads Lexington Medical Center
14 Swansea?

15 A. That's correct.

16 Q. Okay. And this document authorizes
17 Lexington Medical Center, Dr. Augustine's office, to
18 release a copy of your records to you?

19 A. That's correct.

20 Q. And what did you do with the copy of the
21 records that Dr. Augustine's office sent to you?

22 A. I actually kept the records for myself.

23 Q. Okay. Did you take them to anyone?

24 A. No.

25 Q. Do you still have them?

1 A. No, I don't.

2 Q. Do you remember why you obtained them?

3 A. Personally, because I'm entitled to my
4 records.

5 Q. Well, I understand that. I just am trying
6 to decide or figure out was there some reason for
7 you to obtain your records?

8 A. No.

9 Q. Okay.

10 A. Just personal. Just kept the records.
11 Just wanted a copy of the records. I didn't take
12 them anywhere.

13 (Deposition Exhibit 5 marked for
14 identification.)

15 BY MR. JOHNSON:

16 Q. Have you had an opportunity to look at
17 Exhibit 5?

18 A. I have.

19 Q. Okay. Is that your signature?

20 A. It is.

21 Q. And it is an authorization for
22 Dr. Augustine to release his records to you dated
23 January 25, 2006, by the McWhirter or to the
24 McWhirter Law Firm?

25 A. That's correct.

1 Q. Okay.

2 (Deposition Exhibit 6 marked for
3 identification.)

4 BY MR. JOHNSON:

5 Q. And Exhibit 6 is dated the same date as
6 Exhibit 5. And it's on the McWhirter Law Firm
7 stationery sent to Lexington OB/GYN which -- in
8 Swansea that was where Lexington Medical Center,
9 Dr. Augustine's office, correct?

10 A. That's correct.

11 Q. Okay. And this letter asked them to send
12 a complete copy of those records to you -- to
13 Mr. McWhirter, correct?

14 A. That's correct.

15 Q. Now, I take it -- let's go back to Mr.
16 Betts. Did he send your son to any provider, any
17 medical person, any therapist for an evaluation?

18 A. No, he didn't because this is the only
19 date that I saw him. That was it. I didn't go back
20 to him.

21 Q. Okay. And I won't ask you why or
22 anything, but the purpose in your going to see him
23 was to obtain assistance for your son?

24 A. Well, actually just to inquire about the
25 brachial plexus injuries to see if there was

1 anything that I could actually do, but I didn't go
2 back to him.

3 Q. Now, I know based on the material that
4 your lawyer has furnished to me that Mr. McWhirter
5 did send you somewhere for an evaluation of your
6 son?

7 A. He did.

8 Q. Do you recall that?

9 A. I do.

10 Q. Tell me of your visit with that person.

11 A. We went to Dr. Alan Winetraub or --
12 Winetraub in Georgia. Spent just about all morning
13 him doing different evaluations as far as
14 educational-wise and physical evaluations.

15 Q. Do you think that would have been shortly
16 after Mr. McWhirter getting your records?

17 A. It would have been. It may be a little
18 further out.

19 Q. Your lawyer has furnished me with a copy
20 of Dr. Winetraub's records. And I just want you to
21 look at that to get the date fixed in your mind as
22 to when you would have seen Dr. Winetraub.

23 A. Yes.

24 Q. And what is that date?

25 A. It was in 2007.

1 Q. Okay. And he's in Norcross, Georgia,
2 which is outside Atlanta?

3 A. Yeah.

4 Q. Okay.

5 A. I know it's in Norcross. I don't -- how
6 far it's from Atlanta, I don't know.

7 Q. And it lists your general pediatrician is
8 Dr. Kara, K-a-r-a, O'Neil?

9 A. At Carolina Pediatrics. It's a practice
10 with different pediatricians there. So he kind of
11 saw whoever could see him.

12 Q. That is what I was going to ask you. Is
13 Dr. Chisholm in the same group with Dr. O'Neil?

14 A. No.

15 Q. Okay. Did you leave Dr. Chisholm for some
16 reason?

17 A. I saw Dr. Chisholm only because she was
18 the pediatrician at the hospital, but she wouldn't
19 have been my first recommendation. My other kids
20 went to Carolina Pediatrics so --

21 Q. And I understand that. So you simply
22 transferred your care to the pediatricians that took
23 care of your other two sons?

24 A. Yeah. That's correct.

25 Q. Okay. And you've indicated that in a busy

1 office they would see whoever is the doctor of the
2 day?

3 A. Was available.

4 Q. Do you remember when Dr. O'Neil's group,
5 Carolina Pediatrics, would have first seen
6 Mykelvion?

7 A. Not right offhand.

8 Q. Would it -- let me back up and ask you
9 this way. How many times did he see Dr. Chisholm?

10 A. Dr. Chisholm? Maybe twice. I think
11 about -- maybe twice.

12 Q. And then for follow-up you transferred his
13 care to --

14 A. Carolina Pediatrics.

15 Q. And where were they located?

16 A. Columbia off of Adams Grove.

17 Q. Does he still go there?

18 A. He does.

19 Q. Okay. And on Page Winetraub 0003 is a
20 recitation continuing of the history that Dr.
21 Winetraub took. Just read to yourself the first
22 sentence at the top of the page.

23 A. Okay.

24 Q. Is that a history that you gave to Dr.
25 Winetraub?

1 A. No. No.

2 Q. And that may be unfair to you to take it
3 out of context. Let me give the page that precedes
4 that because it begins a paragraph that starts on
5 Page 2 as Developmental History.

6 A. Okay.

7 Q. And as you read that all I'm going to ask
8 you is, is what you are reading accurate or does it
9 need to be changed?

10 A. Okay. Yeah we were concerned about his
11 arm at the birth because he wasn't able to use it.

12 Q. Okay. And you may have already answered
13 this. Under his Impressions on Page 7, read the
14 last paragraph, please.

15 A. Okay.

16 Q. His question seems to be that -- unclear
17 how much can be regained particularly in light of
18 the fact that therapy was suspended at age three?

19 A. Uh-huh.

20 Q. And if I understood you correctly, you
21 thought he had reached a plateau and you could do at
22 home what he was getting in therapy?

23 A. Basically, yeah. And then really I just
24 felt like there was -- I know he could have probably
25 gotten more, but, like I said, with work and -- it

1 just -- a lot of stuff I could do at home.

2 Q. I told you when we started if at any time
3 you needed to take a break, get up and stretch your
4 legs, you could.

5 A. Yes, sir. I'm fine.

6 Q. Okay. I just wanted to remind you.

7 A. Yes, sir. Thank you.

8 Q. Now, after seeing Dr. Winetraub, did you
9 go to -- did he send you anywhere or did you go
10 anywhere as a result of his evaluation?

11 A. No, sir, not as I can recall. I didn't go
12 anywhere else.

13 Q. What do you remember the bottom line of
14 the evaluation by Dr. Winetraub, what did he or his
15 staff tell you after he was finished?

16 A. I don't recall right offhand. I don't
17 know. Basically we went through developmental
18 recommendations. I know he sent information back to
19 his pediatrician as far as hyperactivity. Just
20 different -- I do remember them putting him -- based
21 on his recommendations, they ended up putting
22 Mykelvion on medication for hyperactivity. And
23 which I didn't agree with, but -- and later on found
24 out he didn't have. So --

25 Q. And that is a good point to ask this. Is

1 he taking any kind of medication today?

2 A. No.

3 Q. I mean not right this minute, but does he
4 have a prescription for any kind of regular
5 medicine?

6 A. No prescription for anything regular other
7 than he does get allergy shots weekly, but not as
8 far as anything else.

9 Q. Now, we go to -- we go to Midlands where
10 he's treated by Dr. Gilpin. And then Dr. Gilpin
11 moves to Florence and you go to Dr. -- the younger
12 Dr. Piehl for awhile?

13 A. Yes.

14 Q. And then you go back to Florence to follow
15 Dr. Gilpin; is that correct?

16 A. That's correct.

17 Q. Okay. Up until the time you start seeing
18 the doctors that were recommended by the Graham Law
19 Firm, I want to start from birth to the Graham Law
20 Firm, does he see anyone else that we haven't talked
21 about --

22 A. No, sir.

23 Q. -- for evaluation or treatment?

24 A. No.

25 Q. Okay.

1 MS. WATTERS: I'm sorry to interrupt,
2 but did you need to feed the meter?

3 THE WITNESS: Yes, before I get a
4 ticket. I'm sorry.

5 MR. JOHNSON: Go ahead.

6 (Discussion off the record.)

7 BY MR. JOHNSON:

8 Q. Go back. Who is -- and you call your son
9 Jabo?

10 A. Yes, sir.

11 Q. Okay. That is easier than Mykelvion. And
12 who is Jabo's father?

13 A. Mikel Thurmond, M-i-k-e-l.

14 Q. And where does Mr. Thurmond reside?

15 A. Address exactly?

16 Q. Yes, ma'am.

17 A. I don't know. He's in Gadsden, South
18 Carolina off of Fallaw Road. I don't know the exact
19 address. I'm sorry.

20 Q. And who lives with you in the place where
21 you reside?

22 A. It's my oldest son Tyreek. And that is
23 T-y-r-e-e-k. And my son Kway, K-w-a-y. And then my
24 sister Krystle with her two daughters. And then
25 Jabo's grandmother, Joan.

1 Q. Whose grandmother?

2 A. I'm sorry. My mom.

3 Q. Your mother? Okay.

4 A. I'm sorry. I'm so used to calling him
5 Jabo. I'm sorry.

6 Q. And how long have you been at this
7 particular location?

8 A. We actually moved back to Swansea in --
9 not long. July.

10 Q. Okay. Now, are you employed outside the
11 home?

12 A. I am.

13 Q. Whereabouts?

14 A. At Blue Cross/Blue Shield.

15 Q. And what is your job there?

16 A. Member Service Advocate.

17 Q. And tell me what a Member Service Advocate
18 does.

19 A. Telephone all day. Excuse me. Customer
20 Service Advocate because they just changed the
21 title.

22 Q. So when people call in with, "Why did I
23 get this" or "How do I do that," you are the one who
24 helps them through the problem?

25 A. Yes, sir. "Why am I getting billed?"

1 "Why are you all not paying?"

2 Q. And how long have you worked there?

3 A. I've worked there for three years.

4 Q. And what location?

5 A. Farrow Road. The Government complex.

6 Q. And before that?

7 A. Before that I worked at Providence

8 Hospital.

9 Q. In what capacity?

10 A. I worked as patient access. Worked, I
11 guess, up front registration, collections for the
12 hospital.

13 Q. Downtown?

14 A. No. Farrow Road.

15 Q. Northeast?

16 A. Yes, the northeast.

17 Q. And what were the approximate dates you
18 worked there?

19 A. From 2007 to 2009. And then I started
20 at -- back at Blue Cross/Blue Shield.

21 Q. When you say "back" had you been there
22 before?

23 A. Yes. On a Medicare contract.

24 Q. Did they lose the contract and you lost
25 your job?

1 A. They did. They lost the contract. Was
2 letting people off every day, and I got a job at
3 Providence.

4 Q. And how long had you worked for Blue Cross
5 before that?

6 A. On that contract I worked there two years.

7 Q. Roughly '05 to '07?

8 A. Yeah.

9 Q. And before that?

10 A. Before that I was doing home healthcare
11 with Care Pro Medical One.

12 Q. Care Pro?

13 A. Yes, sir.

14 Q. And what kind of home health did you do?

15 A. In the house. Anything that they needed
16 done as far as bathing, shopping.

17 Q. Did you attain a CNA designation?

18 A. I was certified -- certified nursing
19 assistant from 1994 up until 2002. Yeah, '02.

20 Q. Okay. And what were your dates with home
21 health, Care Pro?

22 A. Care Pro I would say 2003 up until 2005
23 when gas got very expensive. When gas got very
24 expensive. So from 2003 up until 2005 for Care Pro.

25 Q. And for them you would go to individual

1 people's homes to assist with whatever kind of home
2 health they --

3 A. Yeah. Yes, sir.

4 Q. And before '03?

5 A. '03 was still doing home healthcare, but I
6 was doing it with Winya. And I think I did that
7 from -- let's see. Got to go back. 2000 -- I'm not
8 quite clear on the dates because I was working at
9 the nursing home as well.

10 Q. Why don't we do this. On the day of
11 Jabo's birth where were you working or were you?

12 A. At that time I was actually with Care --
13 no, I was with Winya doing home health for a little
14 while.

15 Q. Okay. His date of birth was July 23rd,
16 2000?

17 A. Yeah. I was with Winya doing home health.
18 And I worked there I would say -- I'm trying to
19 think. I didn't work with them very long because
20 when I got pregnant I stopped. The dates I'm not
21 sure.

22 I think maybe from -- no, from 2000 up
23 until 2000 -- I can't remember the actual dates when
24 I started with them. I think it was back in 2000 up
25 until Jabo's birth I did -- yeah, because I had one

1 client, yeah. Up until Jabo was born I worked with
2 Winya.

3 Q. And he was born on July 23rd?

4 A. And I stopped working for them I think a
5 month before. So that would have been in June.

6 Q. And did you go back after Jabo was born?

7 A. I stayed out for awhile, and then I
8 started at Care Pro. So I stayed home with Jabo
9 because of his therapies.

10 Q. Okay. And who takes care of him when you
11 are at work? Or let me back up. He's in school
12 part of the time now?

13 A. Yeah.

14 Q. From birth until kindergarten or school,
15 who provided his daily care?

16 A. Well, I didn't work the first year or so
17 with him. So I was home. Then --

18 Q. Was that because of his left arm situation
19 and his therapy?

20 A. The therapy. I didn't have anybody to
21 take him. So I had to stay home and take him, but
22 then my sister would help me as far as babysitting
23 goes.

24 Q. That is the one that lives with you and
25 has two daughters?

1 A. Yeah.

2 Q. What are their ages?

3 A. Three and eight. Three and eight.

4 Q. I'm sorry. You might have told me her
5 name, but I've forgotten.

6 A. Krystle, K-r-y-s-t-l-e.

7 Q. And last name?

8 A. Bennett.

9 Q. Bennett? Okay. I'm going to run through
10 a list of names --

11 A. Okay.

12 Q. -- that your lawyer has given to me that
13 are people who have treated Jabo.

14 A. Uh-huh.

15 Q. One of them is the older Dr. Robert Peele.
16 He -- did Jabo ever see him?

17 A. No, I don't -- I don't know. I might have
18 gotten the names -- the different ones mixed up, but
19 I don't recall him seeing the older one. The
20 younger.

21 Q. We've got Dr. Robert M. Peele, Junior,
22 listed. Dr. Peele is about six-foot five, big man?

23 A. He may have come in. I don't know. I
24 know it was Dr. Piehl. I can for sure know it was
25 the younger Dr. Piehl.

1 Q. Okay.

2 A. But I remember the big, big, huge Dr.
3 Peele.

4 Q. Okay. Then we've got Dr. Albert Gilpin.
5 And then we've got Dr. Walsh. We've talked about
6 him. We've got Cindy Morgan. Is that the physical
7 therapist you liked at Richland?

8 A. Yes.

9 Q. Then we've got Dr. Mubarak at Carolina
10 Pediatrics?

11 A. Uh-huh.

12 Q. That is just one of the doctors?

13 A. One of the doctors.

14 Q. Then there is Dr. McGillivary at Emory?

15 A. Uh-huh.

16 Q. And then we've gone to Dr. Maureen Nelson
17 who is a doctor in Charlotte. And I'm going to
18 guess that based on past experience Mr. Graham's law
19 office set that up for you?

20 A. Yeah.

21 Q. Okay. Do you remember going to see her?

22 A. I do.

23 Q. And do you remember about when that was?

24 A. The exact date, no, sir. I'm sorry.

25 Q. The year I mean?

1 A. I guess maybe 2011 or maybe the end of
2 '10.

3 Q. Okay. And what do you remember about that
4 evaluation and what is the bottom line? What did
5 she tell you after she was through?

6 A. He needed to be back in therapy. And he
7 had some arthritis in his shoulder. I remember that
8 appointment because Jabo was not happy with the
9 therapist after they got finished.

10 Q. He didn't like the therapist that worked
11 for Dr. Nelson? Is that what you are telling me?

12 A. Yeah. Because they were making him --
13 trying to work his arm to stretch it and stuff. He
14 was in a lot of pain that day. He didn't want to go
15 back.

16 Q. As a result of what Dr. Nelson found and
17 recommended, did you take him anywhere?

18 A. As far as any other doctors, no, sir.

19 Q. Or therapists?

20 A. Not right away, uh-uh. Couldn't get the
21 time off from work or anybody to take him.

22 Q. Okay. Have you been to Miami?

23 A. I have.

24 Q. And who did you take him to see down
25 there?

1 A. The doctor's name? I'm sorry. I don't
2 know their names.

3 Q. Okay. This was somebody arranged by
4 Mr. Graham?

5 A. Yes, sir.

6 Q. Okay. And did you see two doctors while
7 you were there?

8 A. We did, yes, sir.

9 Q. Okay. Do you remember anything either one
10 of them told you?

11 A. One of the doctors that we did see I think
12 on the last day, he did recommend that he could do
13 some surgery but it would give him like 10 percent
14 more function in his arm.

15 Q. Have you decided to have that or not?

16 A. I'm debating because it's going to require
17 me to have to go to Massachusetts because the
18 distance. I don't think I could get the time.

19 Q. Go to Massachusetts did you say?

20 A. Yes. One of their practice -- yes or
21 either somewhere in New York. And I don't have
22 time. I'm debating. I'm still doing some research
23 on different things.

24 Q. What was his surgery going to do, if you
25 remember?

1 A. Just give him -- as far as the shoulder,
2 give him more, I guess, range as far as getting the
3 arm up. And, again, the 10 percent, it's not much,
4 but --

5 Q. Did he tell you what any of the risks of
6 the surgery would be?

7 A. No.

8 Q. Has he had any surgery on his shoulder or
9 arm at all?

10 A. No.

11 Q. Okay. So we've got a surgeon that tells
12 you he might could do a procedure that would maybe
13 give him 10 percent better use of his shoulder. Is
14 that a fair summary?

15 A. Yeah.

16 Q. Do you remember what the other doctor told
17 you?

18 A. Not right offhand. I'm sorry.

19 Q. Okay. Have you seen any other folks that
20 the Graham Law Firm has sent you to?

21 A. I have. I have seen an occupational
22 doctor. I don't know his name right offhand. It
23 was a doctor closer to Mt. Pleasant, I think.

24 Q. Do you remember what that doctor told you?

25 A. He recommended therapy. And then he also

1 recommended perhaps a surgery that could release the
2 muscles to give him more function, but then again
3 this doctor is in Massachusetts as well. So I don't
4 know about that one.

5 Q. Would that be the same doctor the one in
6 Miami talked about or is it a different one?

7 A. I don't know if it's the same doctors or
8 not. I don't know. He just felt as if it would
9 benefit Jabo to try to get that done to release the
10 muscles.

11 Q. And what would that supposedly help him
12 do?

13 A. It would give him more range of motion,
14 help him not to be so tight because instead of him
15 actually using the shoulder, he kind of leans in
16 with the body more. So it would just kind of
17 basically give him some relief instead of the muscle
18 being so tight.

19 Q. Some of the therapy records I have read
20 seem to indicate that he has good use of his hand
21 and his forearm.

22 A. Uh-huh.

23 Q. Would you agree with that assessment?

24 A. His hands, he does have a good use with
25 his hands. Like I say, his fingers, they do get

1 stuck. Some things he can't really grasp with the
2 fingers, but as far as the forearm, he can use the
3 forearm, but it doesn't straighten completely out.

4 So it's at the elbow. And he can only
5 extend it at a certain degree. So he -- his hands
6 -- yes, he does use the hand, but, like I said, his
7 fingers and stuff are getting stuck, so I'm just
8 concerned about him losing any function that he has
9 gained in it.

10 Q. I haven't seen a picture other than the
11 one shortly after birth with him sitting in Santa
12 Claus' lap.

13 A. Oh, yeah. We got some.

14 Q. Looking at him, does he have any obvious
15 difference in the length of his arms?

16 A. With his shoulder -- if you are looking at
17 him from the back, his left shoulder does hang lower
18 than the right. With the arm, he's -- mainly when
19 he stands you can tell the difference with the
20 right-hand side because he does hold it into his
21 body. And his wrist is more like this whenever he
22 is holding his arm.

23 You can tell the difference in his clothes
24 because on the left side his shirts and stuff are
25 always kind of hanging down. So I have to kind of,

1 you know, do the mommy thing with the needle and
2 thread to kind of stitch that up.

3 Q. All right. You indicated from the back
4 his left shoulder appears to be a little bit lower
5 than the other?

6 A. Yeah, it's lower than the right.

7 Q. How about from the front?

8 A. From the front you can tell -- when he's
9 standing straight up from the front you can tell
10 based on the fact that the way he holds his arm that
11 something, you know, different than the right
12 because I've had -- like I said earlier, I've had
13 people ask me if he's had a stroke. And I have
14 to -- which is kind of strange, but I just tell
15 them, no, he hasn't had a stroke. It's just some
16 damage from birth.

17 Q. Do you have any present appointments to
18 see any physician or provider or therapist on behalf
19 of your son?

20 A. Just him going to therapy right now. She
21 has him on a kind of tight schedule coming three
22 times a week to see her. Once the -- that is done
23 the doctor in Atlanta, he wanted me to go to Moore
24 Orthopaedic to maybe follow up with a doctor there
25 instead of me having to come back and forth so far.

1 Q. And how long is the physical therapy at
2 Vital to take? Let me withdraw it and ask you this
3 way. The doctor in Atlanta recommended the therapy.
4 You found Vital?

5 A. Yes.

6 Q. And you are to go back after some period
7 of therapy. I'm just trying to find out how long.

8 A. Maybe -- I'm thinking maybe -- she has him
9 coming so often. I think it's maybe six weeks worth
10 of therapy and then I'm to make an appointment.

11 Q. And that appointment is to go back to
12 Atlanta or is that to see somebody at Moore Clinic?

13 A. I can go back to Atlanta or either go to
14 someone at Moore to do a follow-up to see how the
15 therapy is going. I mean, Moore probably is going
16 to be closer with Moore than where I end up going.

17 Q. Did they give you a doctor's name at Moore
18 that will be the one that you will see?

19 A. You know what, let me see if I wrote the
20 name down. I don't have it on me. I took the card
21 out because it was on his order. It might have been
22 a Dr. Chad, but -- yeah, I took the paper out. I'm
23 sorry.

24 Q. Okay. Does Dr. Grossman sound like the
25 name of the surgeon that you saw in Miami?

1 A. Yes.

2 Q. And Dr. Resnick would have been the other
3 doctor?

4 A. I remember Dr. Grossman. Dr. Resnick?

5 Q. Trevor Resnick, R-e-s-n-i-c-k?

6 A. That may have been, yes, sir.

7 Q. May have been? At Miami Children's
8 Hospital?

9 A. Yeah. Yes, sir.

10 Q. Dr. Barry Weissglass, does that --
11 Carolina Center for Occupational Health in North
12 Charleston?

13 A. Uh-huh.

14 Q. Have you seen him or is that --

15 A. Is that occupational? Yeah.

16 Q. Now, let's go back to when you got
17 pregnant with Jabo you go to Lexington Medical
18 Center Swansea and see Dr. Augustine in that office,
19 correct?

20 A. Yes, sir.

21 Q. Okay. Do you remember about how often you
22 would see Dr. Augustine?

23 A. Every -- I guess every two weeks or so.
24 Just the normal pregnancy visits. And then as I got
25 closer I was going every week or every other week.

1 Q. Did you have any problems during your
2 pregnancy?

3 A. No, nothing that I can recall. No major
4 concerns.

5 Q. All right. There is an indication in the
6 record that you had a fall getting out of the tub?

7 A. Yeah.

8 Q. And went to the hospital?

9 A. Yeah.

10 Q. Tell me what happened.

11 A. Trying to get out of the tub, and ended up
12 sliding, hitting my butt, so -- excuse me. Hit my
13 bottom. I'm sorry.

14 Q. That is okay. Why did you go to the
15 doctor if you landed on your bottom?

16 A. Well, I just wanted to make sure that I
17 was okay because it was a pretty hard fall on the
18 bottom.

19 Q. Did you hit your abdomen or the area where
20 the infant was?

21 A. No. Just hard fall on the bottom. I
22 figured, you know, safe than sorry.

23 Q. Did you go to Swansea or did you go to the
24 emergency room?

25 A. I ended up -- because it was late that

1 evening. So they were already closed. So I went to
2 the emergency room.

3 Q. Do you remember who you saw?

4 A. In the emergency room?

5 Q. Well, they would have sent you to an -- up
6 to Labor and Delivery?

7 A. I just went to the Labor and Delivery
8 floor for a couple hours. Everything checked out
9 fine, so I was sent home.

10 Q. Okay. Now, both of your first two sons
11 weighed something over eight pounds?

12 A. Yeah. The oldest was 8.4 and the second
13 was 8.8.

14 Q. And somewhere I've noted that you were in
15 labor a long time with both of them?

16 A. I was.

17 Q. Any complications with either of those?

18 A. No. With my second one, no, sir. No
19 complications. The only thing that Tyreek, he ended
20 up swallowing some of the fecal matter. So he ended
21 up having to stay in the NICU, the little nursery,
22 a day longer, but other than that, no complications.

23 Q. Okay. And as far as you know you didn't
24 have any complications -- let me back up. The first
25 two children, do you remember how many weeks you

1 were when -- let's do it this way. The first child,
2 did you start into labor or was that an induction?

3 A. That was an induction because I was over
4 due two weeks.

5 Q. You were what?

6 A. Over due by two weeks.

7 Q. Over due would be 41 weeks?

8 A. Yeah.

9 Q. Okay.

10 A. And then the second one I went into labor.
11 That wasn't an induction.

12 Q. Do you remember how far along you were
13 when your labor started, how many weeks?

14 A. I guess 40, 40 weeks.

15 Q. And then how was the decision made that
16 you needed to be induced with Jabo?

17 A. I went to the doctor for my last
18 appointment. Well, it wasn't to be my last
19 appointment, but I went for a checkup. And I was
20 telling Dr. Augustine that I was having trouble
21 laying flat. I just felt kind of funny. I was
22 having to sit up. I was experiencing, you know,
23 some cramping and pain.

24 And he said I would be okay. Scheduled me
25 an appointment, but he said that if I decided that I

1 wanted to have him early then just to give him a
2 call because he would be there that Monday.

3 And so I went home. After I got home I
4 thought about it. And I said, well, I don't feel
5 right because he was moving in places that I knew he
6 wasn't -- I could feel him in places that he wasn't
7 supposed to be to me.

8 But I ended up calling him back. And he
9 scheduled me to come in that Monday.

10 Q. And that would be the hospital in West
11 Columbia?

12 A. Yeah. Yes, sir.

13 Q. Okay. Up until that point did you get
14 along with Dr. Augustine okay?

15 A. I did, yes, sir.

16 Q. Did you like him?

17 A. I did.

18 Q. He treat you well?

19 A. He did.

20 Q. And would you sometimes see the physician
21 assistant or the nurse practitioner?

22 A. I would. I saw Ms. --

23 MS. WATTERS: Let him finish his
24 whole question.

25 THE WITNESS: Oh, okay. I'm sorry.

1 MS. WATTERS: He's going to have
2 trouble typing it out.

3 THE WITNESS: Oh, I'm sorry.

4 MS. WATTERS: Thank you.

5 BY MR. JOHNSON:

6 Q. I'll start over. Did you see his nurse
7 practitioner some of the time?

8 A. Not the nurse practitioner, but the
9 midwife. I saw Ms. Barbara Moore.

10 Q. Okay. And did you get along well with
11 her?

12 A. Yes, sir, I did.

13 Q. Did you ever have any complaints about
14 your care up until the delivery?

15 A. No complaints.

16 Q. Who goes to the hospital on Monday with
17 you?

18 A. Mikel, he goes. My mom, she meets me
19 there. Joan. And that is it that actually went. I
20 had visitors throughout the day, but just that
21 morning, my mom, Joan, and then Mikel, of course.

22 Q. And when do you first see Dr. Augustine on
23 Monday?

24 A. When I got there at the hospital, got
25 settled in, he came in that morning.

1 Q. Before today have you kept any kind of
2 diary or notebook or notes as to any of the events
3 or care surrounding your son Jabo?

4 A. No. I haven't kept any diary or notes or
5 anything.

6 Q. Have you ever written up a summary of any
7 kind?

8 A. No, sir, I haven't.

9 Q. Made any notes in a computer anywhere?

10 A. No.

11 Q. So when I ask you questions about the
12 delivery, it's going to be from your memory?

13 A. Yes, sir, it is.

14 Q. Okay. Have you reviewed your hospital
15 records from the birth of Jabo?

16 A. Recently? No, not recently, but just
17 whenever I initially requested them back in, I
18 guess, 2005 or 2006. That is the last time I
19 reviewed them.

20 Q. Okay. Do you know what happened to the
21 copy of the records that went to Mr. Betts?

22 A. I don't know. I'm not sure because, as I
23 stated, I only saw him that once and I didn't go
24 back.

25 Q. Did he send you your records, Mr. Betts?

1 A. No.

2 Q. Okay. You get there. Dr. Augustine comes
3 in. Tell me what you can remember of that
4 interaction.

5 A. As far as him coming in that morning?
6 Like I say, they just got me prepared. Got my
7 dosage of, I guess, the Pitocin. I was already
8 having contractions that morning when I got there.
9 So he ended up breaking -- if I'm not mistaken,
10 breaking my water.

11 Q. Do you remember how dilated you were the
12 first exam?

13 A. Not very. I wasn't dilated very much at
14 all.

15 Q. But you had already started having
16 contractions --

17 A. Yes, sir.

18 Q. -- that morning before you got there?

19 A. Yes.

20 Q. Okay. Do you think you were in labor?

21 A. I was in pain, so, yes. Yes, sir.

22 Q. Well, that is one experience I can't
23 relate to. So I have to depend on you to tell me
24 that.

25 A. Yes, sir.

1 Q. Okay. So he comes in. Does he do an
2 examination?

3 A. He does, yes, sir.

4 Q. Okay. And then at some point orders the
5 Pitocin to be started?

6 A. Yes, sir.

7 Q. And then at some point during the morning
8 he ruptures your membranes or afternoon?

9 A. He does. And I get the love drug, the
10 epidural.

11 Q. You what?

12 A. I get the love drug, the epidural.

13 Q. Did you request the epidural?

14 A. Yes, sir.

15 Q. You had had that before?

16 A. Yes, sir.

17 Q. It takes the pain away?

18 A. It does.

19 Q. Okay. So I take it then if you had an
20 epidural you were reasonably comfortable throughout
21 the labor?

22 A. I was, yes, sir.

23 Q. Take me through the day, if you will, or
24 night -- let me back up. What time did you get to
25 the hospital?

1 A. I got to the hospital at 6:00, if I'm not
2 mistaken. 6:30.

3 Q. Okay.

4 A. 6:00 or 6:30.

5 Q. Now, you told me that the baby was moving
6 in places you didn't expect it to move. What did
7 you mean by that?

8 A. I was at the point where I couldn't lay
9 flat because I was feeling like I was suffocating.
10 So I would have to sit up straight. And then just
11 whenever he would kick, I would -- oh, gosh, I
12 don't -- whenever he would move I would feel him in
13 just the private areas. I just knew he was just, I
14 guess, big. I just didn't -- I don't know. I don't
15 know how to else to put it.

16 Q. Let me ask it this way then. Was the day
17 you go into labor with Jabo, was that different than
18 the way you felt with the other two?

19 A. Yeah. The other ones I didn't have the
20 same type of problems as far as sleeping. Not
21 feeling when I lay down feel like I'm going to
22 suffocate because it just felt like Jabo was higher.
23 And then when he would move, I would get feelings.
24 I mean, just pain in my, you know, private area. It
25 didn't -- it was different.

1 Q. Weight gain? How much did you gain with
2 Jabo?

3 A. With Jabo? Maybe I would say -- I was
4 big. So maybe about 30. 30 pounds, maybe.

5 Q. How about with the first two, about the
6 same or more or less?

7 A. My first one I gained more because I
8 started maybe at 120 and by the time I was done I
9 was -- no, 130. By the time I had my first son I
10 was like 175, 180. I was too big with that one.

11 Q. Okay. And Number 2?

12 A. I didn't gain much weight with him at all.

13 Q. Let me ask an ineloquent question. Did
14 you lose much of the 180 pounds after the first one?

15 A. I did, yes, sir. I actually went back --
16 not to 130, 140-ish, but I did go back down.

17 Q. And do you know about what you would have
18 weighed when the second child was born?

19 A. When he was born I think I was about 150
20 because I didn't gain much weight with him at all.

21 Q. So maybe 10 pounds?

22 A. Yeah. Maybe.

23 Q. And with Jabo you got up to what?

24 A. With Jabo I think I was at 190.

25 Q. Okay. Had you had any problems with

1 diabetes with any of them?

2 A. No. No, sir.

3 Q. Did you have to take any kind of
4 medication because of the pregnancy with Jabo?

5 A. No. Just the normal -- the prenatal
6 vitamins, but nothing else.

7 Q. Let's go back to they give you the
8 epidural. And were you pretty much in labor from
9 the time Dr. Augustine leaves you whenever you got
10 settled, 7:00 or so in the morning?

11 A. Yes, sir, I was.

12 Q. Do you remember how long it was before you
13 got the epidural?

14 A. Not right offhand. I'm sorry. Because I
15 know I started with the Pitocin first, but I don't
16 know exactly the time I got the epidural. I'm
17 sorry.

18 Q. Do you know if the Pitocin continued the
19 whole time you were in labor or did they stop it at
20 some point?

21 A. I don't recall.

22 Q. Do you remember the names of any of the
23 nurses that took care of you in the afternoon?

24 A. Honestly, no, sir, I don't.

25 Q. Can you describe any of the nurses that

1 were present when you delivered?

2 A. No, sir. Because in the afternoon I
3 really didn't see any nurses too much.

4 Q. Can you describe any nurse at delivery?

5 A. No.

6 Q. Okay. Let me ask it this way. Was there
7 a nurse present at the time of delivery?

8 A. At the time of delivery, yes, there were.

9 Q. Do you remember how many?

10 A. Let's see. One -- the one that moved
11 Mikel. I do know there was one that assisted with
12 holding my leg up. One -- maybe three in the room.

13 Q. Okay. Was there a nurse on each leg?

14 A. No. Just my mom was on one leg. My mom
15 was on the left and there was a nurse on the other
16 side.

17 Q. How about the nursery nurses? Do you
18 remember the team that was there to take care of the
19 baby when he was born?

20 A. No. Because all with that whenever he did
21 come he wasn't breathing. I just remember like the
22 respiratory team. I don't know any of the nurses.

23 Q. Do you know what an Apgar score is?

24 A. Not right offhand.

25 Q. Okay. When your first child was born was

1 there any difficulty? That was a long labor as you
2 told me. Was there -- how was the infant at birth?

3 A. Other than him swallowing the fecal
4 matter, he was okay once they got him suctioned out.

5 Q. And the second child?

6 A. No problems at all.

7 Q. And with Jabo, as I understand, who all is
8 in the room at the moment of delivery?

9 A. At delivery my mom, Joan, she was in the
10 room. Mikel, he was in the room. And, of course,
11 Dr. Augustine. And then the nurse that I do
12 remember because she moved Mikel out of the way.
13 She pushed him out of the way to hold my legs back.
14 And then maybe two other nurses. I don't know total
15 of how many were in the room at that time.

16 Q. Okay. How did it come about that -- let
17 me back up. When Dr. Augustine walks in for the
18 delivery, where are your legs?

19 A. When he walks in for delivery actually I
20 was still laying on my back. My legs weren't in the
21 air when he got there.

22 Q. Okay. Were you flat in bed or was the
23 head elevated?

24 A. I was elevated in bed.

25 Q. Okay. And how do you -- who put your legs

1 back to start with?

2 A. Well, whenever he came in the room because
3 Jabo was -- head was already out. When he came in,
4 they just immediately had me to lift up because they
5 moved, I guess, the little bottom portion of the
6 table out of the way.

7 And then I immediately -- they had me to
8 put my legs up because my mom was on one side.
9 Mikel was on the other side. And they had me to put
10 in that -- I don't know what that position is. They
11 had me lift my legs up and just try to push.

12 Q. Okay. Now back up. When -- you said when
13 Dr. Augustine came in the head was already out. How
14 much of the head could you see?

15 A. Well --

16 Q. Or could you see or is this what somebody
17 is telling you?

18 A. I couldn't see the head. My mom actually
19 ended up looking. I asked her because I started
20 just not feeling -- I felt funny. So I asked her to
21 please check underneath the cover.

22 And at that time she lifted up the sheet.
23 And his head -- she said he was out. And so she
24 immediately called a nurse, and then they came. One
25 of the nurses came, and then she immediately had

1 them page Dr. Augustine.

2 Q. How many times do you remember seeing
3 Dr. Augustine from the time that he greets you after
4 you are set up until you see him at delivery, total
5 number of times?

6 A. That morning, of course. Then he came
7 back to check on me to see if I had dilated any
8 more. And I hadn't dilated, not to where I could
9 deliver. And then at the time of delivery. Maybe
10 three that I can recall.

11 Q. Could have been more? Could have been
12 less? That is the best of your memory?

13 A. Well, whenever I came in, and then he came
14 and checked on me later on that day because I
15 remember getting -- he ordered a second dose of
16 epidural. And at delivery. So it would have been
17 three.

18 Q. Do you remember him sticking his head in
19 the door and asking how you are doing?

20 A. No.

21 Q. And how often would the nursing staff
22 check on you?

23 A. The nursing staff? I remember, of course,
24 when I checked in that morning they were in there.
25 Throughout the day as far as when Dr. Augustine

1 would come in. When he came in that second time
2 they came with him, but when it got closer to the
3 delivery and I had that second dose of epidural I
4 didn't see anyone until my mom came. And she
5 actually had to call them because Jabo was
6 already -- head was already out.

7 Q. Were you able to nap at all during the
8 day?

9 A. No, no napping.

10 Q. Okay. Tell me what you remember from your
11 mom goes out and gets a nurse who got Dr. Augustine.
12 According to the chart, the nurse's notes, it was
13 about three minutes. Do you remember how long it
14 was between the nurse calling for him?

15 A. Whenever -- yeah, it wasn't very long
16 because he came. Once my mom called him, and she
17 looked and she noticed that he was out, his head was
18 out, she immediately called a nurse. And then the
19 nurse came in. And then she had Dr. Augustine paged
20 and then he came in. So it wasn't long before he
21 came in.

22 Q. And do you remember him saying or doing
23 anything?

24 A. Yeah. When he came in he said, "It's
25 about time" because he was getting ready to take a

1 nap.

2 Q. What time of the day is this?

3 A. This was about 6:00, maybe about 6:30 or
4 so.

5 Q. In the afternoon?

6 A. Yes, sir.

7 Q. So you had been there about 12 hours?

8 A. I had.

9 Q. So he came in and said what?

10 A. He came in and he said, "It's about time.
11 I was getting ready to take a nap."

12 Q. And what does he do or say after that?

13 A. After that he started with trying -- with
14 the delivery trying to get Jabo out.

15 Q. Do you remember any conversation between
16 Dr. Augustine and any of the nursing staff?

17 A. Not really as far as conversations between
18 them, no, sir. Not as I can recall.

19 Q. Can you describe any of the -- the nurse
20 that was holding your leg back?

21 A. The one -- the only one that I can, I
22 guess, from -- not right offhand. She was a more --
23 the one that pushed Mikel out of the way, she was
24 sort of aggressive. I think she had short hair.

25 Q. Short, gray hair?

1 A. Brown hair, if I'm not mistaken. But just
2 right offhand, no, sir.

3 Q. How about age-wise?

4 A. She was, I would say, an older nurse.
5 Maybe in her 40s or so. Late 40s.

6 Q. Was she white or African-American?

7 A. She was a white nurse.

8 Q. Okay. Tall, short, fat, thin?

9 A. Not -- I don't know as far as weight-wise.

10 I mean, she wasn't short. She was -- she wasn't
11 short at all. Gosh. I just remember her moving,
12 just pushing him out of the way, but she was not
13 heavy, but she wasn't thin either, but I don't want
14 to -- because I can't really describe her. So I
15 don't --

16 Q. Let's do this then. What is Mikel doing
17 or where is he standing that she moves him out of
18 the way?

19 A. He wasn't holding my leg back as far as
20 they needed to be held back. He was holding it,
21 but, I guess, not farther enough.

22 Q. Okay. Do you remember Dr. Augustine
23 telling the nurses to do anything?

24 A. No, sir.

25 Q. Do you know how it was that your mother

1 came to be holding one leg?

2 A. Because she was at the foot of the --

3 Q. And let me withdraw.

4 A. Okay.

5 Q. Did anybody ask her, that you remember, to
6 do that?

7 A. I don't recall. The only thing I knew,
8 she was on one side holding. Mikel was on the other
9 side. She was initially was sort of -- whenever she
10 was in the room with me, she was kind of sitting at
11 the foot of the bed. And she had to move out of the
12 way. So she ended up on the left side.

13 So I don't know who asked her to. I don't
14 know, but the only thing I know she was on one side
15 and he was on the other. And then the nurse pushed
16 Mikel out of the way. And they were telling me to
17 push. I'm pushing, but nothing.

18 Q. Do you remember who was telling you to
19 push?

20 A. The nurse.

21 Q. Had you attempted pushing before your mom
22 went out and got the nurse?

23 A. No.

24 Q. Do you remember the nurses turning you in
25 any position or asking you to lay on your side or

1 get on your knees or anything before the delivery?

2 A. No. No, sir.

3 Q. Do you remember the fetal monitor being
4 hooked up?

5 A. I remember -- what is the little thing
6 that goes across your stomach? I do remember that,
7 but that is about it. No repositioning or anything.

8 Q. So the best you can recall, you were in a
9 reclining, but not flat. You were in a sitting up
10 position?

11 A. Yes, sir.

12 Q. And then they come in and they take the
13 end of the table away?

14 A. Yes.

15 Q. And that would be what you are sitting on?

16 A. Yeah. I guess with the -- oh, goodness.
17 What is that -- with the little bed that -- the type
18 of bed that I was in, I know they had to remove the
19 portion of the bed, the end of the whatever, however
20 they do that. But other than that --

21 Q. That would be the end of the bed under
22 your legs so that they could get to the delivery
23 area?

24 A. Yeah. Uh-huh.

25 Q. Is that a yes?

1 A. Yes, sir. I'm sorry.

2 Q. That's all right. And then Dr. Augustine
3 stands up, sits down, what --

4 A. He was standing while delivering.

5 Q. Do you remember him saying anything at all
6 from the time he comes into the room and tells you
7 he was about to take a nap?

8 A. As far as the delivery goes, he was mainly
9 trying to get Jabo out. I can't recall any detailed
10 conversations that he had as far as with the nurses
11 or anything. The only thing I -- other than him
12 saying he couldn't get him out. So he was trying to
13 pull to get him out of my womb. I do recall him
14 asking for, I guess, the little needle to numb me so
15 he could do the cut.

16 Q. Episiotomy?

17 A. Yeah. So he did get a chance to get that,
18 but, of course, I felt that, so -- the little cut.
19 So I didn't get numb all the way. But other than --
20 detailed conversations, I don't recall any detailed
21 conversations that he had with the nursing staff.

22 Q. Okay. Did you have an episiotomy with
23 either of the other two?

24 A. With my first one I don't think I did, no,
25 sir. And then with the second one -- maybe with my

1 second one I think I did, but I'm not --

2 Q. In other words, when he asked for the
3 needle you knew what was about to happen?

4 A. Yeah.

5 Q. Okay. Now, as I gather from what you've
6 told me, you cannot see the baby's head while he is
7 attempting the delivery; is that correct?

8 A. That's correct.

9 Q. Okay. And where -- you say your mother is
10 on one side holding your leg back?

11 A. Yes, sir.

12 Q. Okay. Do you remember the nurses doing
13 anything other than holding your leg back?

14 A. The one nurse is holding my leg. Any
15 other nurses, no.

16 Q. If they did something, you don't remember
17 it; is that fair?

18 A. If they did something, it was something to
19 assist Dr. Augustine, but as far as anything related
20 to me, no.

21 Q. Okay. From the time Dr. Augustine gets in
22 the room and the table is disassembled, how long
23 before delivery takes place?

24 A. From the time he gets in I would say
25 maybe -- maybe about 10 or 15 minutes, if that long.

1 Q. That is just an estimate on your part?

2 A. Yes, sir.

3 Q. Do you remember your mother saying

4 anything during the delivery process after

5 Dr. Augustine got in the room?

6 A. After? No.

7 Q. How about your significant other; Mikel?

8 A. No, not really.

9 Q. Since the delivery I would assume you and
10 Mikel and your mother have talked about the delivery

11 itself. Have they told you anything that happened
12 that is different than what you remember?

13 A. No, because Mikel really doesn't -- once
14 that happened with Jabo, he really didn't talk too
15 much about it. And my mom, her main focus at that
16 time was she was glad she actually was there, but as
17 far as us sitting down together talking about it,
18 no.

19 Q. One of the things they do when they put
20 you in bed is give you a call device. Did you have
21 that in the labor room?

22 A. I did, yes, sir.

23 Q. Did you ever use it?

24 A. No. Not as I -- well, maybe earlier that
25 day, but I don't -- nothing related. So maybe

1 getting some ice.

2 Q. All right. Tell me everything that you
3 can remember seeing Dr. Augustine do.

4 A. As far as?

5 Q. When he came into the room. You told me
6 of the conversation. They break the table down.
7 And what, if anything, do you remember?

8 A. As far as the actual what I could see with
9 the height that I was at, I saw him pulling, trying
10 to get Jabo out. Just -- he was just having trouble
11 getting him out. He couldn't get him out. So once
12 he ended up asking for the -- I guess, the needle to
13 numb me and he did the -- what is the -- the
14 episiotomy.

15 Q. Just call it the cut.

16 A. The cut. I'm sorry. Once he did the cut,
17 I do remember him just as far as pushing his arm or
18 just kind of going in and snatching him out. I do
19 remember that. And then from that point they took
20 the baby. The respiratory team came in and got him
21 to breathing. And once they got him to breathing,
22 he did -- also made a comment that as far as him
23 being so big.

24 He didn't realize he was going to be so
25 big. He said I must have went to Ryan's and ate all

1 the food that weekend. And I guess it was just kind
2 of making jokes because he was so big. He didn't
3 realize he was going to be so big.

4 Q. He being Jabo?

5 A. Yeah.

6 Q. Okay. And how big was Jabo?

7 A. He was 10.4.

8 Q. Had you had a lot of weight gain in the
9 last week before delivery?

10 A. No. So as far as that comment, and then
11 whenever -- like I said, once they got him to
12 breathing, and he lifted up his arm and was just
13 like, "Oops, I hurt his arm." But my main concern
14 at that time was him being okay. And then the
15 nurses brought him to me and put him on my chest for
16 feeding.

17 Q. Did he feed okay?

18 A. Uh-huh.

19 Q. Is that a yes?

20 A. Yes, sir. I'm sorry.

21 Q. Okay. Now, when do you see Dr. Augustine
22 next?

23 A. The next time that I saw Dr. Augustine was
24 when I went to the room the next morning when he
25 came to check on me because he came down and he had

1 to do -- we signed a consent for Jabo to have the
2 circumcision. And he also came in to discuss the
3 x-ray for the shoulder.

4 And from that point he said usually -- it
5 does happen, but it would -- this type would, it
6 would heal up in two weeks. He would have full
7 function within two weeks.

8 Q. Did you have any questions of him?

9 A. With him saying that he was going to --
10 Jabo was going to be okay within two weeks? I
11 basically left it at that. After the x-ray, he said
12 it wasn't dislocated or anything. So with the two
13 weeks, that is just kind of what I based it on
14 because he said it did happen.

15 Q. Did you understand what had happened?

16 A. In depth, no, sir.

17 Q. I mean, did Dr. Augustine explain to you,
18 for instance, why he can't move his arm?

19 A. He didn't go into detail. He just said it
20 was just, you know, something that happens with big
21 babies and the shoulder wasn't dislocated or
22 anything, but it does happen.

23 Q. You had ultrasounds during your pregnancy
24 that would -- do you remember any of the folks who
25 performed them or the doctor or the midwife telling

1 you what size Jabo might be?

2 A. No. Because she wasn't allowed to do the
3 ultrasounds. Anytime I got a ultrasound,
4 Dr. Augustine did the ultrasound.

5 Q. Did he ever discuss with you what the
6 ultrasounds showed?

7 A. His ultrasound, he stated that he wasn't
8 going to be big. He said he was only going to weigh
9 about five pounds.

10 Q. Do you remember how long before delivery
11 that was?

12 A. I would say maybe about a month or two
13 before the delivery.

14 Q. Did you have another ultrasound between
15 then and the delivery that you remember?

16 A. Not as I can recall, no, sir.

17 Q. Okay. Dr. Augustine comes in and signs a
18 consent for the circumcision and the x-ray?

19 A. Yes, sir.

20 Q. And then at some point he discusses the
21 results of the x-ray with you?

22 A. Yes, sir.

23 Q. Is that the same time or the second visit?

24 A. Yes, sir. I was -- that would have been
25 before he did the actual x-ray. He came in because

1 he did the circumcision. He got the -- me to sign
2 off for the circumcision. And then he also was
3 going to do the x-ray for the shoulder.

4 And at that time he just stated that with
5 him being so big that it happens, and it would only
6 take two weeks for it to get back to normal.

7 Q. Okay. Do you remember talking to the
8 pediatrician in the hospital about his arm?

9 A. Dr. Chisholm, she just basically came
10 through and just basically confirmed, if I'm not
11 mistaken, that the x-ray was okay. The shoulder
12 wasn't dislocated. And basically she just gave the
13 information as far as me following up in her office.

14 Q. And who is the next doctor you see
15 after -- well, before we do that. Do you have any
16 more discussions with Dr. Augustine before you leave
17 the hospital?

18 A. No, sir, not as I can recall.

19 Q. Did you see any other doctors other than
20 Chisholm and Augustine during your stay in
21 Lexington?

22 A. No, sir.

23 Q. Okay. Then the pediatrician says follow
24 up with her, and you generally have a six-week
25 follow-up with Dr. Augustine?

1 A. Yes, sir.

2 Q. Did you see Dr. Augustine again?

3 A. I saw Dr. Augustine during the six -- my
4 checkup, I saw him then.

5 Q. And did you talk about his -- Jabo's arm
6 at that visit?

7 A. We mainly focused on me basically getting
8 released.

9 Q. I mean, do you have any questions of him
10 about Jabo's arm since it wasn't well yet?

11 A. Not as I can recall. We didn't really go
12 into any detail about Jabo because it was my
13 appointment. So, no, not as I can recall. I'm
14 sorry.

15 Q. Did you take Jabo with you to the six-week
16 checkup?

17 A. Did I take him? I think I did. Yes, sir.
18 I did, but he didn't really ask about Jabo. I think
19 he looked at him and he said he looked fine, but he
20 just saw him in the little car seat, but not just
21 taking him out or anything.

22 Q. Just looked at him sitting in the seat?

23 A. Yes, sir.

24 Q. And how would he -- was he swaddled?

25 A. He was.

1 Q. Do you remember any discussion with him
2 about how is the arm doing or how is he getting
3 along or anything like that at that visit?

4 A. No, sir.

5 Q. Do you see Dr. Augustine again after six
6 weeks?

7 A. After six weeks I had seen him because he
8 actually inserted an I.U.D., yes.

9 Q. Any other times?

10 A. Not as I can recall.

11 Q. I mean, the records indicate that you, you
12 know, kept your regular OB visits with the office.

13 A. Yeah. Mainly he wasn't really -- I saw
14 Ms. Barbara, the midwife, more than Dr. Augustine.

15 Q. After you went to see Mr. Betts, did you
16 ever discuss your concerns with Dr. Augustine?

17 A. No.

18 Q. Did you ever ask him any questions about
19 why the arm was the way it was at birth?

20 A. No.

21 Q. How about Ms. Barbara?

22 A. No. We never discussed anything as far as
23 Jabo was concerned. It was just my appointment.

24 Q. And we know you wound up at Midlands
25 somewhere around the three months of age timeframe?

1 A. Yes, sir.

2 Q. Do you remember what use Jabo had of his
3 arm at three months?

4 A. He didn't have any. It would just hang
5 there.

6 Q. Up to that point or at the end of that
7 visit has anybody given you an explanation of why
8 his arm was just hanging there as opposed to being
9 able to move it normally?

10 A. Well, I guess the only -- as far as just
11 going back and forth to the doctor, they explained
12 to me with a C5 and a C6, the vertebrae being
13 damaged. And which, you know, that is basically it.
14 But as far as that being, I guess, stretched because
15 he was so big, but just to go into detail, no.

16 Q. Okay. All right. The C5 and the C6 part
17 of the neck, would that have been at the time he had
18 the E.M.G. studies by the doctor at Midlands?

19 A. Yes, sir.

20 Q. Okay. He would have been the one that
21 told you what nerve levels were involved?

22 A. Yes, sir.

23 Q. Okay. Did he tell you it was a result of
24 being stretched or is that something somebody else
25 had told you?

1 A. No, he actually told me because he was so
2 big and with the stretching. And he would -- I
3 guess, mainly his main concern was because he was so
4 big. He couldn't believe that he was so big and
5 that I actually had him being that big, but he said
6 basically as far as the damage that he had, it was
7 due to the delivery.

8 Q. Now, this is the doctor at Midlands?

9 A. Yeah.

10 Q. So when he's three months old you go have
11 the E.M.G. studies done at Midlands?

12 A. Yes. Yes, sir.

13 Q. And whoever that doctor is tells you that
14 C5 and C6 is the area in the neck that was involved,
15 correct?

16 A. Yes, sir.

17 Q. And then he told you that -- something to
18 the effect he couldn't believe the infant was so
19 big?

20 A. Yeah, that he was big because he asked me
21 how I had him. I do remember him asking me how I
22 had him. And I told him I pushed him.

23 Q. You pushed him?

24 A. Yeah. That he came out. I didn't have --
25 because he asked me if I had a C-section, just

1 general conversation. And I told him, "No, I didn't
2 have a C-section." That he came out vaginally.

3 Q. And do I understand that that doctor told
4 you that the problems with C5 and C6 were due to
5 stretching at the time of birth?

6 A. Yes, sir. And that was also the same
7 doctor that said he wouldn't have any use of the arm
8 at all.

9 Q. So when you walk out of Midlands and he's
10 three months old, you have a grim prognosis that he
11 will never use the arm and he has damage to his neck
12 that occurred during the delivery. Is that a fair
13 summary?

14 A. I was basically in shock for him to say he
15 wouldn't have any function at all, but I didn't -- a
16 hundred percent -- I have faith. So, you know, I
17 prayed on that. So --

18 Q. Okay. But let me try the question one
19 more time.

20 A. Okay.

21 Q. At three months of age, according to what
22 we looked at earlier, he was in Midlands and had
23 E.M.G. studies done --

24 A. Yes, sir.

25 Q. -- to test his nerve function, correct?

1 A. Yes, sir. That's correct.

2 Q. And that doctor, after testing the nerves,
3 told you that C5 and C6 area in the neck was what
4 was involved?

5 A. Yes, sir.

6 Q. Okay. And he told you that, in essence,
7 it was a permanent injury, that he would never use
8 the arm?

9 A. That's correct.

10 Q. Okay. We are almost done.

11 A. Okay.

12 Q. During your treatment by or during your
13 pregnancy as I understand it the bills were covered
14 by Medicaid?

15 A. Yes, sir.

16 Q. Okay. Did you ever actually get a bill
17 yourself from going to Dr. Augustine for his care?

18 A. No, sir.

19 Q. And every one of his visits was at
20 Lexington Medical Center Swansea?

21 A. My visits, yes, sir.

22 Q. Okay. Until the time of delivery and then
23 you went to Lexington Medical Center downtown or
24 West Columbia?

25 A. Well, Swansea. I always did the Medical

1 Center in Swansea for my care as far as that goes.

2 The one in West Columbia --

3 Q. The main hospital?

4 A. Main hospital, yeah. The main hospital.

5 I only went there if there was some issue.

6 Q. Okay. And Dr. Augustine's office was in
7 the Swansea Lexington Medical Center?

8 A. Swansea, yes, sir.

9 Q. There was a note in Dr. Augustine's
10 records that they referred you to Southern Surgical
11 for an evaluation, but the appointment was not kept.
12 Do you remember that?

13 A. Uh-uh. Not right offhand. I don't know
14 why he would -- I don't recall.

15 Q. Do you remember any conversations with
16 Dr. Augustine that we haven't already talked about
17 that took place from the day of delivery until
18 today?

19 A. No, sir.

20 Q. Same question about the nursing staff at
21 delivery or any other hospital person?

22 A. No, sir.

23 Q. What has your mother told you that she
24 remembers about the delivery?

25 A. About the delivery? She -- the only thing

1 she -- my mom, she is strange.

2 Q. I'm sorry. She is what?

3 A. She's sweet, but she is just more of -- if
4 it wasn't for me being there, she don't know because
5 she was -- at that time she was so concerned about
6 him not making it and with her looking underneath
7 the covers and he was already blue. She was scared
8 that he maybe wouldn't -- that he wasn't going to
9 make it or she was afraid that he wasn't going to
10 make it.

11 Q. Do you remember her saying anything to the
12 nurses or Dr. Augustine?

13 A. No, I don't. She was more -- I can't
14 speak for her, but I don't know whether she was more
15 in shock whenever she did look underneath the cover
16 and saw him that he was already -- she said, "Oh, my
17 Gosh. He's out. And he's blue." And she just, I
18 guess, started panicking, but she was able to get
19 the nurse. So as far as I think that she -- I do
20 appreciate her every day that she was there.

21 Q. Okay. But my question was --

22 A. But as far as her conversation-wise or
23 saying anything, no, I don't.

24 Q. From the time of delivery to today has
25 your mother told you anything that she saw or

1 witnessed --

2 A. Other than him being --

3 MS. WATTERS: Let him finish his
4 question.

5 THE WITNESS: Okay.

6 BY MR. JOHNSON:

7 Q. You -- she was answering fine. My
8 question is, from the time of delivery until today
9 do you remember anything that your mother told you
10 about what she saw or heard that you haven't already
11 told me about?

12 A. No, there is nothing else other than him
13 being blue and her getting the nurse. She just kind
14 of relived that moment as far as him already, you
15 know, being out.

16 Q. How about Mikel, has he told you anything
17 that he saw or witnessed or heard?

18 A. No.

19 Q. Have you had any discussion with him at
20 all about your son's arm?

21 A. Mikel, being a dad, he's upset that his
22 arm is the way that it is because he can't really do
23 what he wants to do as far as playing like
24 basketball, football, but he really doesn't go into
25 details about that day. So as far as us sitting

1 down and having conversations about it, no.

2 Q. Did he ever ask any physician that was
3 treating you or treating Jabo any questions about
4 how did his arm come to be like this?

5 A. No. Because the appointments that I
6 mainly had for Jabo, I mainly took him.

7 Q. How involved is Mikel with Jabo today?

8 A. As of right now, Jabo will go to his house
9 like every maybe -- every other weekend or so. Two
10 weekends out of the month, but he's pretty -- Jabo
11 talks to him over the phone. He's in Jabo's life.

12 Q. Did he go with you to any of the
13 evaluations in Atlanta or Charleston or Miami?

14 A. The appointment in -- any of the recent
15 appointments, no. The only one that he went to was
16 one where we did Dr. Gilpin. He did go to that
17 appointment, but as far as the one in Atlanta, he
18 didn't go. And then there was one other that he did
19 go as far as Mykelvion goes when we went to
20 Charleston for evaluation, but that was the
21 education evaluation. But for everything else, no,
22 sir.

23 Q. Does he have any health problems other
24 than the limited use you've told us about?

25 A. He has allergies really bad in which he

1 does weekly allergy shots for those.

2 Q. Do you know what he's allergic to?

3 A. Oh, gosh. It's a list.

4 Q. He's been tested, in other words?

5 A. Yes, sir. He's allergic to corn products,
6 wheat products, chocolate which he loves, apples,
7 oranges. So it's a list of stuff that he's allergic
8 to.

9 Q. Okay. Has he been hospitalized for any
10 reason?

11 A. No, sir, not to where he actually had to
12 stay overnight, no.

13 Q. I understand some of his evaluations took
14 place in a hospital, but, I mean, has he had to be
15 admitted for any kind of healthcare reason?

16 A. No, sir.

17 Q. Okay. Anything else about him that you
18 would like to tell me about that I haven't asked you
19 about?

20 A. No, sir.

21 Q. All right. Is there anything that we've
22 talked about that you think you might need to go
23 back and change or modify your answer?

24 A. No, sir.

25 Q. Okay. As far as you know, you have told

1 me the truth today?

2 A. Yes, sir.

3 Q. Okay. Thank you for answering my
4 questions.

5 A. You are welcome.

6 MS. WATTERS: Just give me one
7 second. There were a few things I was confused
8 about.

9 EXAMINATION

10 BY MS. WATTERS:

11 Q. Mr. Johnson asked you a few questions
12 about any limitations that Jabo has. And I have a
13 couple of things here about being clumsy and
14 something about raising and lowering windows. Can
15 you just elaborate for me more on the things that
16 you've observed that are limitations that he has at
17 this point?

18 A. Okay. As far as the clumsiness, he's not
19 able to hold, you know, like grocery-wise. You
20 know, he will try to help me as far as toting heavy
21 objects, but, of course, with that he's most likely
22 dropping a lot of stuff.

23 As far as school-wise, I had to finally
24 tell the school what was happening with him because
25 he didn't want anybody to know that he was weaker on

1 that side. So we had a conversation -- I just had a
2 meeting with the school. She wanted to know why was
3 he so disorganized and why couldn't he do a lot of
4 stuff on the left side as far as toting the papers,
5 closing the books, and trying to shuffle everything.

6 And I had to explain. And then she
7 finally got it. Okay. So this is what it is with
8 the arm being weaker than the right. So that is why
9 it does take him a little longer to try to get his
10 stuff together.

11 The window-wise, he doesn't have the
12 strength to lift up windows, especially on the bus.
13 You know, he's a little boy. He would rather ride
14 in the cold than let his little cousin lift the
15 window up for him. So they freeze.

16 Last year we had an issue with that. So I
17 had to have my sister go on the bus and explain to
18 please let his window up. Because he didn't want my
19 little niece to do it because she is a girl. And he
20 didn't want to be tolerated with her.

21 So -- but he does have limitations. He
22 can't lift heavy objects. He wants to play ball,
23 football and basketball, but because he can't get
24 the shoulder up and do like the push-ups and
25 different things he -- they won't let him play. So

1 he's just different.

2 Q. How does he do with his self care on a
3 daily basis, like bathing and dressing and things
4 like that?

5 A. Self care he will go in the shower. But
6 as far as, you know, with him being a little boy, I
7 asked him if he wants me to wash him. Of course,
8 you know, how that goes. "Mama, get out." But as
9 far as him trying to -- he has complications
10 sometimes with buttoning of his shirts.

11 He does have issues as far as fastening
12 the pants with the little buttons. So instead of
13 him fastening the pants, he will just take a belt
14 and just pull it that way. Scratching of his back,
15 a lot of times I have to do that because he can't
16 reach around to do that.

17 Q. Do you think that he's able to wash his
18 back and his body well?

19 A. No. No. But he doesn't want me to do it
20 because, you know, pride. Like I haven't seen all
21 of that stuff before, but it's just he doesn't
22 really want me to do any of that stuff. He tries to
23 be independent as much as he can, but, no, I don't
24 think he gets it clean enough.

25 Q. Does he ever talk with you about his

1 limitations?

2 A. The comments that he's made is that his
3 arm is broke. That he can't do what other people
4 does. He has made a comment that he said, "well,
5 why don't they just cut it off?" And I had to
6 explain to him, you know, "They can't because you
7 are able to use it. They can't just go and cut
8 anything off."

9 So he does complain that he can't use it
10 to do certain things as far as playing ball. He
11 wants to know why he can't play ball and why his arm
12 doesn't work like everybody else's. So it's just
13 something that I guess I'm going to have to work
14 with him on to try to get him help.

15 Q. Does that seem to bother him?

16 A. At times it does because he did come home
17 from school one day crying because he -- one little
18 boy was picking on him about how he holds his arm
19 and why he holds his arm that way. So he came home
20 crying that day. And I had to explain to him, "Kids
21 are mean. And it's just something you are going to
22 have to deal with."

23 Q. Has he made any or is he currently
24 complaining of any pain in the arm?

25 A. He does. He complains about the

1 sensations like the tingling sensation in his arm.
2 He does complain about the pain in the upper -- the
3 shoulder. He complains about it aches a lot. And
4 then the fingers, of course, how they get stuck.

5 Q. When Mr. Johnson was asking you about at
6 the time of delivery I believe you said that there
7 were three nurses in the room. One nurse had pushed
8 Mikel out of the way and was holding your leg?

9 A. Yes.

10 Q. What were the other two nurses doing?

11 A. The other two nurses, if there was that
12 many, I can't recall exactly if there was two, but I
13 do remember the one nurse pushing Mikel out of the
14 way. And then I do remember a nurse handing -- I
15 guess, assisting Dr. Augustine as far as handing him
16 the, I guess, the needle because he -- of course, he
17 couldn't do it, but they were just, I guess,
18 monitoring, just watching.

19 It may not have been three right offhand,
20 but I do remember the one nurse because she just
21 pushed Mikel completely out of the way, for him just
22 to move.

23 Q. Was anyone providing any care, support, or
24 in any way having hands on you during the delivery
25 besides the nurse holding your leg back?

1 A. No. No. Not as I can recall any nurses.

2 Q. The nurse holding your leg back, was she
3 the one who had been in the room at some time before
4 the delivery, too, or was that a different nurse?

5 A. That was -- I hadn't seen her earlier.
6 But I really didn't see too many nurses that day. I
7 was mainly, -- most of my day I was in the room by
8 myself until my mom came, of course, but other
9 than -- knowing the nurses' names, the faces, I
10 really didn't see that many nurses throughout the
11 day.

12 Q. Was there a nurse in the room at any time
13 before -- was there a nurse in the room at the time
14 that Jabo's head came out of the birth canal?

15 A. Not as I can recall. If there was
16 someone, I can't recall, Ms. Mary. I'm sorry. I
17 just remember my mom being there. My mom got in.
18 And she was like, "Well, you are here by yourself?"
19 And I'm like, "Yes, ma'am."

20 And then she just kind of talked me to
21 death that whole time. I'm like, gosh, will she
22 just go away, but, of course, you know, I just kind
23 of -- during that time -- she was there that two
24 hours she wasn't -- there was nobody else that I can
25 recall that was in there. It was just me and her.

1 Q. About two hours that you don't recall
2 seeing a nurse at all?

3 A. Uh-uh.

4 Q. When did you next see a nurse?

5 A. When my mom called a nurse because Jabo's
6 head was already out.

7 Q. Okay. And at the time that your mom saw
8 that Jabo's head was out, were you still covered by
9 a sheet or --

10 A. I was. I was still covered because what
11 she ended up doing -- she was sitting at the foot of
12 the bed. And I asked her, I said, "Mama, I just
13 don't feel right. There is something not feeling
14 right." I said, "Can you please look?" And at that
15 time she lifted up the sheet. She lifted it up and
16 she just, "Oh, my gosh. His head is out and he's
17 blue." And she just dropped the sheet and she got
18 the nurse.

19 Q. How did she get the nurse?

20 A. She -- I don't know whether she ran out to
21 the nurse whenever she went out. I don't know if
22 she went out or if she used that call button. I'm
23 not exactly sure, but I know she's the one that got
24 the nurse because I was just kind of frantic myself
25 trying to figure out what in the world.

1 Q. Was your head still elevated in the bed at
2 this point?

3 A. Uh-huh. Yes. I was elevated.

4 Q. Okay. What about when Dr. Augustine came
5 in, did they lay the head of your bed down?

6 A. Uh-uh. No, I was still elevated. They
7 may have let it back just a little bit, but I was
8 mainly sitting up. I was elevated the whole time
9 just about.

10 Q. So from where you were sitting in the bed,
11 were you able to see Dr. Augustine when he was
12 delivering Jabo?

13 A. I was. I was able to see him trying to
14 pull Jabo out. And he couldn't pull Jabo out. And
15 I just remember with the needle, the cut, because I
16 did feel it. And him just pushing his arm. And he
17 just yanked Jabo out. And then he immediately
18 handed him over because he was blue.

19 Q. Okay. Now, based on your position in the
20 bed you couldn't see Dr. Augustine's hands, could
21 you?

22 A. No.

23 Q. How could you tell he was pulling?

24 A. Well, just the way that he was -- not
25 physically his hands, but just the way his body

1 position was. And he was just kind of pulling and
2 maneuvering around. And he -- you could tell he was
3 having problems trying to get Jabo out.

4 And my main thing was, I guess, my focus
5 was on him because he was just steady pulling him.
6 And I'm like, you know, just thinking earlier my mom
7 said, okay, he's not breathing. So just trying to
8 pull him out.

9 So I did see -- was mainly kind of
10 focusing on him just trying to figure out what was
11 going on as far as Jabo was concerned and him
12 getting him out. And, like I said, as I remember as
13 far as him just shoving, just the motion of his arm,
14 and just yanking Jabo out and then just immediately
15 handing him over. So that is just the viewpoint
16 that I had.

17 Q. What made you believe he was struggling
18 with trying to pull him out?

19 A. Because -- gosh, how can I say? He was --
20 I don't know whether -- he was -- the way that he
21 was just kind of turning and just going back and
22 forth with him just -- I don't know. It was
23 different. I didn't experience that with any of the
24 other doctors with my other two deliveries.

25 I didn't see them have all of that

1 struggle in trying to get him out. Get them out.

2 So this was just kind of different.

3 Q. When you are talking about struggling, I
4 mean are you talking about a certain measure of
5 force he's using to --

6 MR. JOHNSON: Object to leading.

7 BY MS. WATTERS:

8 Q. -- pull or some other movements that he's
9 making?

10 A. As far as with the movement of his body
11 because it seemed as if he was sliding a little, but
12 just with him just pulling and then all of a sudden
13 just with the cut and then the yanking out.

14 I guess the way that he was maneuvering
15 his -- just going back and forth trying to get him
16 out. He just couldn't get him out. And then just
17 with the final, the injection -- the cut and then
18 his arm going in and him yanking and him handing him
19 over immediately.

20 Q. Do you recall anyone applying any pressure
21 with their hands or by any other method to your
22 pubic bone area?

23 A. No, ma'am. I don't recall anyone touching
24 me at all other than my mom holding my leg, that one
25 nurse, but anyone else, no.

1 Q. You said the day after Jabo was born
2 Dr. Augustine came in to talk with you -- first talk
3 with you about, I guess, the circumcision?

4 A. Yes.

5 Q. But then at some point talked with you
6 about the injury or, you know, his arm not moving.
7 And did he ever use the term "shoulder dystocia"
8 when talking with you?

9 A. He did go into with the dystocia. His
10 main concern, I guess, was making sure that he
11 wanted to do the x-ray to make sure it wasn't
12 dislocated, but as far as -- and he did say the
13 shoulder dystocia, it happens when they are big, but
14 he just basically said within two weeks he would be
15 fine.

16 Q. Did he explain to you what shoulder
17 dystocia is?

18 A. No, he didn't go into detail.

19 Q. When you went back for follow-up and you
20 saw Dr. Augustine when you were six weeks after
21 having the baby, did he examine Jabo at all?

22 A. No, ma'am.

23 Q. Did he ask you how he was doing or
24 anything like that?

25 A. No, not as I can recall, other than

1 looking at him and just saying he looked okay.

2 Q. Did he ask you if his arm was working
3 okay?

4 A. We didn't have a conversation about his
5 arm, as I can recall at all. It was just pretty
6 much to release me and that was it.

7 Q. Did he seem to be concerned about Jabo?

8 A. Honestly, no, ma'am.

9 MS. WATTERS: I think those are all
10 the questions I have.

11 FURTHER EXAMINATION

12 BY MR. JOHNSON:

13 Q. Is Dr. Augustine the one who did the
14 circumcision?

15 A. He did. I guess in the hospital I would
16 assume. He had me sign the form. So I assume that
17 he did the circumcision.

18 Q. The day of birth or the next day?

19 A. The next day.

20 Q. So that is the visit we are talking about
21 that he comes in?

22 A. Yes, sir.

23 Q. Okay. And although you didn't think he
24 seemed concerned, he did come in to talk to you
25 about getting an x-ray to see what might be or might

1 not be wrong?

2 A. Well, I guess with the day after birth,
3 but as far as what she was relating to as far as the
4 six weeks, he didn't ask me any questions as far as
5 his actual injury went.

6 Q. When you went back for six weeks did you
7 tell him that he was still unable to move his arm?

8 A. No. He didn't ask and I didn't -- he
9 didn't ask me any questions as far as Jabo.

10 Q. That wasn't my question. I asked if you
11 told Dr. Augustine at the six-week visit, "Doctor,
12 you told -- something to the effect, you told me he
13 would be fine at two weeks, but he's not fine"?

14 A. No. I didn't have a -- don't recall
15 having a conversation as far as the six-week checkup
16 goes.

17 MR.. JOHNSON: Okay. Thank you,
18 ma'am.

19 THE WITNESS: You are welcome.
20 Further Deponent sayeth not.

21 (Whereupon, the taking of the
22 deposition was concluded at 1:10 p.m.)

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Certificate of Reporter

I, Jeffrey M. Thomas, RPR and Notary Public in and for the State of South Carolina, do hereby certify that I reported the deposition of Tanya Bennett on the 5th day of November, 2012: that the witness was first duly sworn by me, and that the foregoing 122 pages constitute a true and correct transcription of the said deposition.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter sealed and delivered to WELDON R. JOHNSON, Barnes, Alford, Stork & Johnson, LLP, 1613 Main Street, P.O. Box 8448, Columbia, South Carolina 29202. This sealed original transcript shall be retained by the above party, who shall be responsible for filing same with Court prior to trial or any hearing which might result in a final order on any issue.

In witness whereof I set my hand and seal this 27th day of November, 2012.

My Commission expires 12/14/17

Jeffrey M. Thomas, RPR
and Notary Public for the
State of South Carolina

As to Mykelvion Thurmond: None

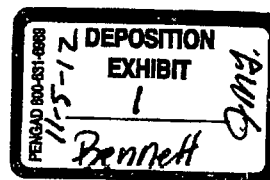
INTERROGATORY NO. 14: Please state specifically the dates from which the Plaintiff lost time from work and for which the Plaintiff will claim lost wages as a result of this incident as well as the exact amount of income which it will be asserted has been lost.

ANSWER: Plaintiff objects to this request on grounds that Plaintiff is not making a claim for lost wages.

INTERROGATORY NO. 15: Please state in comprehensive narrative detail the Plaintiff's version of exactly what happened before, during and after the occurrence alleged in the Complaint. Do not simply refer to the allegations contained within the Complaint or to the medical records.

ANSWER: Plaintiff objects to this Interrogatory on grounds that it is overly broad, unduly burdensome and an inquiry for deposition testimony. Subject to these objections, Plaintiff craves reference to the Complaint and medical records. Plaintiff and Plaintiff's witnesses will be made available for deposition at mutually convenient times, upon request. Plaintiff reserves the right to supplement this response.

SUPPLEMENTAL RESPONSE: Plaintiff restates her objections as set forth hereinabove. Subject to these objections, without waiving same, counsel summarizes, in brief, portions of Tanya Bennett's recollection of events as follows: Tanya recalls presenting at Lexington Medical Center on July 23, 2001 for induction. She began induction and labor. She was administered an epidural. Mid to late afternoon, Tanya complained that she was having pain. At that time, she was administered an additional half dose into the epidural. After the



anesthesiologist left, the labor and delivery nurse told Tanya that she would return soon and left the room.

Tanya does not recall the nurse returning to the room to provide nursing care for an extended period of time which she estimates to be approximately two hours. At some point around or after approximately 6:30 pm, during the nurse's continuing absence, Tanya felt that something was not right. She asked her mother, Joan Bennett, who was present in the room with her throughout most of her labor to lift the sheet which was covering her pelvic area and look to see if everything looked ok. Joan lifted the sheet and gasped, stating that Mykelvion's head was out and his face was blue. She immediately called for a nurse. The nurse came into the room, then called Dr. Augustine.

Dr. Augustine came into the room and began efforts to deliver Mykelvion. Joan Bennett and Mikel Thurmond were instructed to hold Tanya's legs back. Tanya could see Dr. Augustine pulling and struggling to deliver Mykelvion. A nurse pushed Mikel out of the way and continued pushing Tanya's legs back. After pulling forcefully, though unsuccessfully, Tanya recalls that Dr. Augustine made a cut at the bottom of her vagina, thrust his hand into the vagina and yanked Mykelvion out.

Mykelvion was limp and had to be resuscitated. Once Mykelvion was breathing, Dr. Augustine lifted Mykelvion's left arm and dropped it. Dr. Augustine then stated: "Oops, I hurt his arm."

At some point later, Dr. Augustine spoke with Tanya and explained to her that injuries like the one to her baby usually heal fully in about two weeks.

Plaintiff reserves the right to supplement this response and intends to do so through deposition testimony.

Authorization for Release of Protected Health Information

Patient's full name at the time of treatment: Tanya Tuarita Bennett
 Date of birth: 10-5-74 Social Security Number: 248-47-2823
 Date(s) of treatment: 10-29-2002 All
 Purpose of release: pt. copy
 I authorize the above named provider to release my health information to: PO Box 824
Swansea

Recipient's Address _____ City _____ State _____ Zip _____

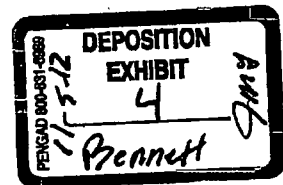
Mail record I will pick up FAX (to health provider or health plan only)

Information to be released: (Please check all that apply)

- | | |
|----------------------------------------------------------------------|--------------------------------------------------------------------|
| <input type="checkbox"/> Diagnoses list/Patient identification | <input checked="" type="checkbox"/> Laboratory Report (type) _____ |
| <input checked="" type="checkbox"/> Physician Dictation (type) _____ | <input type="checkbox"/> EKG/Cardiovascular |
| <input checked="" type="checkbox"/> Office Notes (type) _____ | <input type="checkbox"/> Pulmonary Function Test |
| <input checked="" type="checkbox"/> Pathology Reports | <input type="checkbox"/> Radiology Film Type _____ |
| <input type="checkbox"/> Cytology Reports | <input type="checkbox"/> Radiology Reports |
| <input type="checkbox"/> Physical Therapy Records | <input type="checkbox"/> Mammography Films |
| <input type="checkbox"/> Occupational Therapy Records | <input type="checkbox"/> Bill |
| <input type="checkbox"/> Speech Therapy Records | <input checked="" type="checkbox"/> Other <u>ultrasound record</u> |

- I understand that if my records contain documentation of alcohol abuse, psychiatric condition, drug abuse, or communicable diseases, this information will be released as part of my record.
- I understand that if the person or entity receiving this information is not covered by federal privacy regulations, this information will no longer be protected and may be re-disclosed.
- I understand that I may revoke this authorization at any time, but revocation will not apply to information that has already been released. Revocations should be sent to the address noted at the top of the form.
- I understand that I may refuse to sign this authorization and that my refusal to sign will not affect my ability to obtain treatment.
- I understand that there may be a charge for obtaining the requested information. Information on the charge can be obtained by contacting the medical records department noted at the top of this form.
- I understand that this authorization will expire 90 days after signed unless an earlier date is specified here _____.

Signature of patient or authorized person: Tanya Bennett Date: 2-11-05



Relationship /Reason patient is unable to sign _____

PROVIDER USE ONLY

Original to Medical Records _____ Copy to Mailed Dept.
 (Date) _____ (Date) _____

Verification Completed By _____
2-18-05
Spencer

Certain deposition exhibits have been omitted from this deposition transcript to prevent duplicative copies. They are as follows:

- **Deposition Exhibit 2 is duplicative of Defense Exhibit A set forth on pages 198-199 of this Record on Appeal.**
- **Deposition Exhibit 3 is duplicative of Defense Exhibit B set forth on page 200-201 of this Record on Appeal.**
- **Deposition Exhibits 5 and 6 is duplicative of Defense Exhibit C set forth on page 202-204 of this Record on Appeal.**

Exhibit "A"



LEXINGTON
MEDICAL CENTER
IN SWANSEA

935 West Second St.
Swansea, SC 29160
(803) 568-2000

CALL BACK SHEET

DATE: 8/21

TIME: 1:38

NAME OF PATIENT: Tanya Bennett

DOB:

PRESENT PHONE #: 868 8844

HOME PHONE #:

LAST VISIT DATE:

REASON FOR CALL:



orthopedic referral for her
son Mykelvia. His arm was
injured during delivery.

NAME OF PHARMACY IF APPLICABLE:

Baby's Rd Dr Chisholm

PHYSICIAN/NURSE PRACTITIONER REPLY:

Have pt check @ Paed to
evaluate & do referral - To call
back if any problem & this
8/22/01 1:38 PM
Augustine

CALL BACK RESPONSE AND SIGNATURE:
(TIME:

8/22/01 2:50

Augustine 0166

pt answer in

Exhibit "B"

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) AUTHORIZATION AND CONSENT TO
RELEASE MEDICAL INFORMATION

TO WHOM IT MAY CONCERN:

I hereby authorize David B. Betts, Attorney at Law, 2016 Gadsden Street, Columbia, S.C. 29201 to receive medical information including reports, charts, x-rays, bills, statements and all other information in the possession of any physician, hospital, health care provider, or other firms, corporations or individuals regarding any treatments received by me and my son including treatments after the signing of this authorization. I further direct that you are not to release any such information to any other person without my express consent or that of David B. Betts.

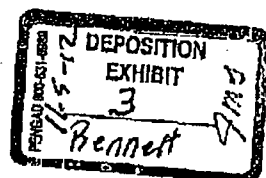
A photostat of this authorization and consent shall be treated as the original. It shall continue in force for three years from the date of signing unless withdrawn in writing.

Tanya Bennett
Tanya Bennett
P.O. Box 624
Swansea, SC 29160

248-47-2823
Social Security Number

1-803 744-3037

1/14/02
Date



Augustine 0146

TAKE OR ASSESSMENT STREET ON 1-14-02. *JMB*

Exhibit "C"

LAW OFFICES
MCWHIRTER, BELLINGER, & ASSOCIATES, P.A.

119 EAST MAIN STREET
LEXINGTON, SOUTH CAROLINA 29072
(803) 359-8823
FAX (803) 359-1248
mail@mcwhirterlaw.com

JN McWHIRTER
P. BELLINGER
JND P. McWHIRTER
CEY TARTE MEYER
JOSEPH R. DASTA

January 25, 2006

STEPHEN B. SAMUELS
ANGELA J. JOHNSON
BRADFORD W. CRANSHAW
JENNIFER N. WILLIAMS
MAX C. SPANWASSER

Lexington OB/GYN
935 West Second Street
Swansea, SC 29160
ATTENTION: MEDICAL RECORDS

PATIENT: Tanya J. Bennett ✓
DATE OF BIRTH: 10-05-74 ✓
SOCIAL SECURITY #: 248-47-2823 ✓
OUR CLIENT FILE #: 05-L-079

Dear Sir or Madam:

We represent the above named person. We are advised that this person received treatment in your facility.

Please send us a complete certified copy of your records per the attached authorization as soon as possible.

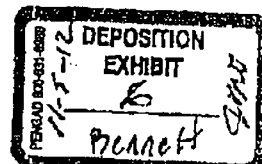
Yours very truly,

H. Patterson McWhirter

HPM:dkh
Enclosures:
Authorization

cc: Tanya J. Bennett

Carolina
2-6-06
7-1-00
present
113



McWhirter, Bellinger & Associates, P. A.
119 East Main Street
Lexington, SC 29072

Phone: (803) 359-5522
Fax: (803) 359-1248

HIPAA Authorization for Release of Protected Health Information
and
Revocation of All Prior Authorizations

Patient's full name at the time of treatment: Tanya Juanita Bennett
Date of birth: 10-9-74 Social Security number: 248-47-2823
Date(s) of treatment: 7-1-2000 to present
Purpose of release: legal representation

I authorize the following provider to release my health information to:
McWhirter, Bellinger & Associates, P. A., 119 East Main Street, Lexington, SC 29072

Provider name: Scott Augustine, M.D.
Provider's address: 935 West Second Street Swansea, SC 29160
City State Zip

Mail record Will pick up Fax

Information to be released: (Please check all that apply)

- | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|
| <input checked="" type="checkbox"/> All medical records, studies, reports, films and any other health information of any type or nature in your possession | <input type="checkbox"/> Laboratory Notes |
| <input checked="" type="checkbox"/> Diagnosis List/Patient Identification | <input type="checkbox"/> EKG/Cardiovascular Records or Studies |
| <input checked="" type="checkbox"/> Physician Dictation | <input type="checkbox"/> Pulmonary Function Test |
| <input checked="" type="checkbox"/> Physician Progress Notes | <input type="checkbox"/> Radiology Films |
| <input type="checkbox"/> Office Notes | <input type="checkbox"/> Radiology Reports |
| <input type="checkbox"/> Pathology Reports | <input type="checkbox"/> Mammography Films |
| <input type="checkbox"/> Cytology Reports | <input type="checkbox"/> Operative Reports |
| <input type="checkbox"/> Physical and/or Occupational Therapy Records | <input type="checkbox"/> Admission and Discharge Summary |
| <input type="checkbox"/> Speech Therapy Reports | <input type="checkbox"/> Medical Bills |
| <input type="checkbox"/> History and Physical | <input type="checkbox"/> Other <u>itemized bills</u> |
| <input checked="" type="checkbox"/> All Medical Records Since <u>7-1-2000</u> | |

- I understand that if my records contain documentation of alcohol abuse, psychiatric condition, drug abuse, or communicable diseases, this information will be released as part of my record.
- I understand that if the person or entity receiving this information is not covered by federal privacy regulations, this information will no longer be protected and may be re-disclosed.
- I understand that I may revoke this authorization at any time, but revocation will not apply to information that has already been released. Revocations in writing should be sent to the address of the provider noted at the top of this form.
- I understand that there may be a charge for obtaining the requested information.
- I understand that this authorization will expire three (3) years after signed unless an earlier date is specified here:
- I revoke all previous authorizations given by me for the release of medical information for any reason or purpose whatsoever, and do specifically request that no medical information of any nature be given out at any time to any insurance company, their attorney, or anyone else other than a treating doctor, the law offices of McWhirter, Bellinger & Associates, P. A., my attorney, someone designated in writing by my attorneys, except to the extent that the authorization was given to release records to my health insurance company in order to obtain health insurance coverage.
- I, and any person representing me, release and hold harmless from any liability any individual or entity for releasing my records or discussing my file with my attorneys, the Law Offices of McWhirter, Bellinger & Associates, P. A., or anyone designated by them.
- The provider may not condition treatment, payment, enrollment or eligibility for benefits when signing this authorization.

Signature of patient or authorized person Tanya Juanita Bennett

Date 1/25/06

Relationship/Reason patient is unable to sign

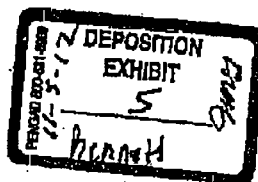


Exhibit “D”



Graham
Law Firm, P.A.

Edward L. Graham
Mary H. Watters

Mail Bill

383 W. Cheves Street (29501)
P. O. Box 550
Florence, SC 29503

Telephone (843)662-3281
Facsimile (843) 665-0254

November 18, 2010

Richland Memorial
ATTENTION: RECORDS CUSTODIAN
5 Richland Medical Park
Columbia, SC 29203

Re: (Mykelvion Thurmond) PT
DOB: 7/23/05

Dear Sir/Madam:

Please be advised that we represent the legal interests of Tanya Bennett and her son, Mykelvion Thurmond. This is to request that you kindly forward to us a copy of any/all records regarding treatment rendered to Mykelvion Thurmond. I have enclosed a Medical Authorization form which has been signed by Ms. Bennett for this purpose. Kindly submit your bill for the requested information and payment will be promptly remitted.

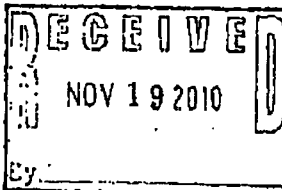
Should you have any questions, please do not hesitate to contact me.

With kindest personal regards, I am

Yours very truly,

Carolyn A. Harrison
Paralegal to Edward L. Graham

/cah
Enc.



RECEIVED

NOV 19 2010

44212019
6/10/10/10/10

1/22/10
PKC/HP

Exhibit "E"

N. E: MYKELVION THURMOND
DOB: 07/23/01

ACCOUNT #: 902597
SEN: 657 10 5077

bowing @
flexes @ elbow
tries to reach to knee
with right arm
when left arm is restrained

- fat folds symmetrical
Abd. 60°
IR. 20°
XR. 60°
- ankles turn in 20°

del

CLINICAL STATUS: The patient is a 4 1/2-MO African-American male followed for brachial plexus palsy left arm who returns today for follow-up. On return, the mother states the child is doing well. Unfortunately, he cannot bend his elbow. Currently, the patient continues to receive therapy on a regular basis.

PHYSICAL EXAMINATION: Cute male. Slightly fussy. No dysmorphic features. Gross examination of the spine shows no obvious abnormalities. No cutaneus stigmata.

Gross examination of the upper extremities shows no obvious abnormalities. Close evaluation of the left arm shows it to be held in a splinter position. Nontender to palpation. Reasonable range of motion. Further observation reveals marginal shoulder flexion and abduction. Absent elbow flexion. Reasonable finger flexion and extension.

Gross examination of the lower extremities shows no obvious abnormalities. Close evaluation of the hips reveals symmetrical anterior and posterior fat folds. Range of motion shows 130 degrees of flexion, 70 degrees of abduction, 20 degrees internal rotation, and 80 degrees of external rotation. During passive range of motion, no click nor pop noted. Ortolani and Barlow tests negative. Close evaluation of the knee shows no obvious abnormalities. Excellent range of motion with equivocal popping left knee. Close evaluation of the feet is plantigrade. Excellent range of motion. Neuromotor exam intact.

DISPOSITION AND RECOMMENDATIONS: On evaluation, the patient returns regarding questionable brachial plexus palsy left arm. As with the previous evaluation, the patient continues to exhibit obvious motor deficit in the left arm primarily involving shoulder and elbow muscle groups. As with the previous evaluation, the findings remain consistent with an Erb's palsy. By clinical exam as well as electric diagnostic studies, I am extremely concerned regarding the lack of biceps function. The mother was advised that this particular deficit was indicative of marginal recovery. With that in mind, I feel the patient would potentially benefit from referral to Dr. John Walsh at USC Department of Orthopedics to consider the possibilities of a brachial plexus reconstruction. The mother seemed to be reasonably understanding regarding this problem as well as our future plans for management. A return appointment

MIDLANDS ORTHOPAEDICS, PA
1910 BLANDING STREET
COLUMBIA, SC 29201

Page 2

NAME: MYKELVION THURMOND
DOB: 07/23/01

ACCOUNT #: 902597
SSN: 657 10 5077

will be made in 3 months for repeat clinical assessment. Should she have further concerns, the mother was advised to contact the office immediately regarding further evaluation.

RETURN APPOINTMENT: f/u 3/months

Albert T. Gilpin, Jr., M.D.
ATG/rb

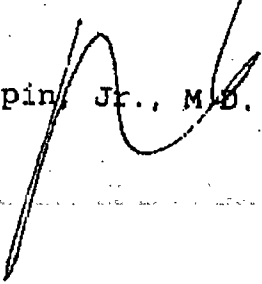


Exhibit "F"

Ver. 24 2008 10:45AM

Ver. 2459 10:45AM

Emory Healthcare-Confidential Document

This information is subject to all Federal and State laws regarding confidentiality and privacy and to the policies and procedures of Emory Healthcare regarding patient information. Any unauthorized use, disclosure, or reproduction of this information is strictly prohibited.

ORTHO NTE

THURMOND, MYKELVION - TEC_00025209430

* Final Report *

Document Type: ORTHO NTE
 Document Date: 08 February 2008 00:00
 Document Status: Auth (Verified)
 Document Title: Orthopaedics Patient Note
 Performed By: BRUCE JR. ROBERT WALLACE on 11 February 2008 20:48
 Encounter Info: 14875780, TEC, TEC Visit, 2/8/2008 - 2/6/2008

* Final Report *

Orthopaedics Patient Note

ELECTRONICALLY SIGNED BY Robert W. Bruce, M.D. on 02/11/2008 at 08:32 AM
 THE EMORY ORTHOPAEDICS CENTER
 59 Executive Park, South
 Atlanta, GA 30329

PATIENT NAME: THURMOND, MYKELVION
 MRN: 25209430
 ENCOUNTER NO: 14875780
 DATE OF SERVICE: 02/06/2008
 DOB: 07/23/2001
 DOCUMENT TYPE: NTE
 PHYSICIAN NO: 81373
 ATTENDING NO:
 REFERRING PHYSICIAN: Denise Coultes, NP

HISTORY: Mykelvion is here today for followup of his left brachial plexus injury that occurred at birth. He is 6-1/2 years of age and initially presented to our office in October. We had recommended occupational therapy. The family lives in South Carolina and unfortunately there is not an occupational therapist that has openings in order to evaluate him. He is on a waiting list. Mykelvion's mother's friend is a massage therapist and he does receive massage therapy weekly.

Mykelvion has a history of a left brachial plexus injury at birth. According to his mother at 3 months of age it sounds like he had an EMG and the mother thought that there would be no nerve regeneration at this time. He did receive

Printed by: Easter, Sherida T
 Printed on: 3/24/2008-10:25

Page 1 of 2
 (Continued)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-32-02282

Tanya Bennett, as Next Friend of
Mykelvion Thurmond, a minor

Appellant,

v.

Lexington County Health Services
District, Inc. d/b/a Lexington
Medical Center

RECEIVED

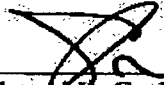
JUN 20 2013

SC Court of Appeals

Respondent.

NOTICE OF APPEAL

Tanya Bennett, as Next Friend of Mykelvion Thurmond, a minor, appeals the Order Granting Defendant's Motion for Summary Judgment of the Honorable Alison Renee Lee dated May 13, 2013 and entered of record on June 7, 2013. Appellant received written notice of the Order on June 11, 2013.


Edward E. Graham
Mary H. Watters
GRAHAM LAW FIRM, P.A.
Post Office Box 550
Florence, SC 29501
(843) 662-3281

Attorneys for Appellant

June 12, 2013.

Other Counsel of Record:

**Weldon R. Johnson
BARNES ALFORD STORK & JOHNSON, LLP
Post Office Box 8448
Columbia, SC 29202**

Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

PERSONALLY APPEARED before me, M. DAVID REDMOND, who first being duly sworn, deposes and says:

1. I am M. David Redmond, of Columbia, SC. I make this Affidavit based on my professional background, education, training and experience as well as my review of the EMG study of Mykeltion Thurmond performed by me on or about October 29, 2001, documented in the attached report.

The statements contained herein are true and correct as to my own knowledge, except as to those based upon information and belief, and as to those I believe them to be true. I am over the age of 18 and legally competent to make this Affidavit.

2. I am a physician, board certified in Physical Medicine and Rehabilitation and Electrodiagnostic Medicine. I am in practice at Midlands Orthopaedics, 1910 Blanding Street Columbia SC 29201.

3. Although I do not have a specific recollection of this patient, I evaluated and tested his brachial plexus nerves in October, 2001, and made a contemporaneous record of my findings, as set forth in the attached report.

4. Based on my review of my medical record noted above, I can state with certainty that at the time I tested and evaluated this child's brachial plexus nerves in October 2001, when the child was three months old, I would not have been able to determine whether or not this child's injury was permanent. A determination of permanency would not have been possible until the child was at least approximately 18 to 24 months old.

5. At the time I met with this child and any parent or other adult who was present with him on or about October 29, 2001, I did not tell anyone that the injury was permanent, as that determination would not have been possible at that time.

FURTHER AFFIANT SAYETH NAUGHT.


M. DAVID REDMOND, MD

SWORN TO BEFORE ME THIS

7 Day of March, 2012

Sara Kay Jones
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 1-13-2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

PERSONALLY APPEARED before me, TANYA BENNETT, who first being duly sworn, deposes and says:

1. I am Tanya Bennett, of Columbia, SC.

The statements contained herein are true and correct as to my own knowledge, except as to those based upon information and belief, and as to those I believe them to be true. I am over the age of 18 and legally competent to make this Affidavit.

2. I am the mother and legal guardian of Mykelvion Thurmond.

3. My deposition was taken on November 5, 2012.

4. In my deposition, I was asked certain questions about Mykelvion's birth injury. Specifically, I was questioned as follows, as reflected in my deposition transcript on pages 103, line 21-104, line 9:

Q. At three months of age, according to what we looked at earlier, he was in Midlands and had E.M.G. studies done --

A. Yes, sir.

Q. -- to test his nerve function, correct?

A. Yes, sir. That's correct.

Q. And that doctor, after testing the nerves, told you that C5 and C6 area in the neck was what was involved?

A. Yes, sir.

Q. Okay. And he told you that, in essence, it was a permanent injury, that he would never use the arm?

A. That's correct.

5. When I responded to the question about "that doctor," I was referring to Dr. David Redmond of Midlands Orthopaedics, who met with Mykelvion and me following the EMG study that was done on October 29, 2001.

6. I have subsequently been made aware of Dr. Redmond's statement that he would not have been able to determine the permanency of Mykelvion's injuries until about 18-24 months of age, and that he did not tell me Mykelvion's injuries were permanent in October, 2001.

7. In light of Dr. Redmond's statement, I am now uncertain about when I first heard that Mykelvion's brachial plexus nerve damage was permanent, but based on Dr. Redmond's statement, it must not have been until Mykelvion was at least 18-24 months of age.


8. I did not know or suspect that my son had the legal right to bring a lawsuit for his brachial plexus nerve damage until much later than that, when Mykelvion was around five or six years old.

FURTHER AFFIANT SAYETH NAUGHT.


TANYA BENNETT

SWORN TO BEFORE ME THIS

7th Day of March, 2012


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 2/11/2021

WELDON R. JOHNSON*
DAVID G. WOLFE
KAY GAFFNEY CROWE*
RICHARD C. THOMAS
ROBERT T. STRICKLAND
CURTIS W. DOWLING
MATTHEW G. GERRALD
BRIAN E. SOPP
EMILY COLLINS BROWN
CATHERINE AVA KOPIEC

*CERTIFIED CIVIL
COURT MEDIATOR



BARNES ALFORD

Barnes Alford Stork & Johnson L.L.P.

ATTORNEYS AT LAW

OF COUNSEL
WILLIAM C. STORK
ALAN J. REYNERT
ROGER A. WAY, JR.†

† CERTIFIED SPECIALIST
IN TAXATION & MEMBER
OF SEPARATE L.L.C.

RUDOLPH C. BARNES
(1917-1995)
JAMES W. ALFORD
(1930-2008)

March 13, 2013

The Honorable Alison Renee Lee
Post Office Box 192
Columbia, SC 29202-0192

Re: Mykelvion Thurmond, a minor, by his Next Friend, Tanya Bennett v. Lexington
County Health Services District, Inc. d/b/a Lexington Medical Center
Case No. 2011-CP-32-2282
BASJ File No. 7:19169
Client File No. CKE0496

Dear Judge Lee:

Since we were not previously furnished with the cases that Mr. Graham handed to you during the motion hearing on March 11, 2013, we would like to submit this letter in response. Mr. Graham stated that the discovery date for the running of the statute of limitations is a subjective standard, and not objective standard; therefore, the running of the statute of limitations is a question of fact for the jury. Additionally, he cited a Supreme Court case from 1993, Garner v. Houck, for this proposition. Mr. Graham read to the Court and Garner states "if there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury." Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989).

Santee Portland Cement Co. is a Supreme Court opinion involving the application of the discovery rule to a contract action, and the quote cited by Mr. Graham addressed a directed verdict motion. Santee Portland Cement Co. is case in which the owner of a cement company sued the contractor in tort and contract, following the rupture of a cement bin. The court reversed the trial court's granting of the directed verdict motion. In its analysis of the facts, the court pointed out that previously, one of the bins had cracked, but an expert testified that cracks were common. Additionally, the other bins were inspected, including the one that ruptured, and found to be in good condition. Later, one of these bins ruptured, and the owner brought this lawsuit. The court looked at these facts as reasonable for waiting to file the lawsuit.

The following South Carolina Supreme Court decisions directly address summary judgment and the running of the statute of limitations and hold the following:

"The statute of limitations on a negligence claim accrues at the time of the negligence, or when the facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule). Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (quoting Strong v. University of South Carolina, 316 S.C. 189, 447

POST OFFICE BOX 8448
OFFICE: 803.799.1111

WELDON R. JOHNSON
1613 MAIN STREET (29201)
FAX: 803.254.1335
WWW.BARNESALFORD.COM

COLUMBIA, SC 29202
WELDON@BASJLAW.COM

BARNES ALFORD STORK & JOHNSON L.L.P.

March 12, 2013

Page 2

S.E.2d 850 (1994)). Furthermore, Kreutner stated "the date on which discovery should have been made is an objective, not subjective, question." Id. (emphasis added) (quoting Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 196 (1994)).

In Strong, the Plaintiff became blind after a surgery performed on May 11, 1989. On June 23, 1989, Plaintiff's doctor noted in his medical records that his blindness was due to poor follow-up care. The Plaintiff continued follow up care until June 1989. The Plaintiff's attorney did not receive his medical records until February 1991. In response to a summary judgment motion, the Plaintiff argued that his claim did not begin to run until February 1991 when his attorney reviewed the medical records and he discovered that he had an injury caused by the negligence of a third party. In the opinion, Chief Justice Toal applied the objective standard and held that the "cause of action accrued, at latest, when physician noted in patient's medical records that his blindness was due to poor follow-up care." 316 S.C. 189, 447 S.E.2d 850 (1994).

The Wiggins case also states that the Plaintiff "erroneously applies a subjective test to establish the time of discovery of her injury. This does not accord with well settled law." (emphasis added) 314 S.C. 126, 128-9, 442 S.E.2d 169 (1994).

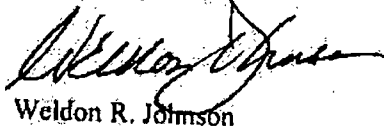
Based on the above mentioned case law from the South Carolina Supreme Court regarding summary judgment and the statute of limitations, the standard is an objective standard and not a subjective standard for the jury to analyze. Similar to the Plaintiff in Strong that knew he was blind after the surgery, Ms. Burnett knew of her son's injury immediately after his birth since Ms. Bennett testified that Dr. Augustine stated "oops, I hurt his arm." Furthermore, this is not a common injury like the cracking in Santee Portland Cement Co. On August 21, 2001, Ms. Bennett called Dr. Augustine for an orthopedic referral because "his arm was injured during delivery." Therefore, a person of common knowledge would have been on notice at the minor's birth (the time of the alleged negligence).

Additionally, enclosed please find a copy of a recent Order prepared by Judge Keesley in which he cites the objective standard.

We appreciate your time and consideration on this matter.

With kindest regards, I remain

Very truly yours,



Weldon R. Johnson

WRJ/ecb

Enclosures

cc: Edward L. Graham, Esquire

ORIGINAL

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP: 32-00833

ROBERT R. JACKSON SR.

LEXINGTON COUNTY

ET AL

HEALTH SERVICES DISTRICT INC,
ET AL

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: JUDGE

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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(h), 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 (attach order in follow) Statement of Judgment by the Court;

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: #4 on 09/04/12 CPNS ROSTER

MR. JOHNSON TO SUBMIT PROPOSED MODEL

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)
<u>N/A</u>	<u>N/A</u>	\$ <u>N/A</u>
		\$
		\$

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

N/A

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.

William P. Keesley
Circuit Court Judge WILLIAM P. KEESLEY

2050
Judge Code

09/06/12
Date

SCRPC Form 4C (12/2011)

Page 1

For Clerk of Court Office Use Only

This judgment was entered on the N/A day of N/A, 20— and a copy mailed first class or placed in the appropriate attorney's box on this 13th day of SEP, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

JAMES W. BOYD, ESQ.
DAVID BRADLEY JORDAN, ESQ.

ATTORNEY(S) FOR THE PLAINTIFF(S)

WELDON R. JOHNSON, ESQ.

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigan
CLERK OF COURT

Court Reporter: S. SHEPPARD

2012 SEP -7 PM 4:16
CLERK OF COURT
DISTRICT COURT
DISTRICT 50

FILED

ORIGINAL

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

ROBERT R. JACKSON, SR.,)
ET AL.,)

Plaintiffs,)

vs.)

LEXINGTON COUNTY HEALTH)
SERVICES DISTRICT, ET AL.,)

Defendants.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C/A No. 2010-CP-32-00833

ORDER

CLERK OF COURT
LEXINGTON COUNTY
SOUTH CAROLINA

2012 SEP -7 9:14:16

FILED

Lexington County Health Services District (Lexington Medical), a governmental entity, seeks to dismiss this medical malpractice claim based on the failure of the plaintiffs to comply with the statute of limitations. The motion is granted. Mr. Johnson is to submit a more detailed proposed order within 20 days.

*WJC
H1*

The plaintiffs knew or through the exercise of reasonable diligence were on notice of a claim against Lexington Medical more than 2 years before this action was filed. The surgery in question was performed in December 2006. The action was filed in February 2010. Complications from the surgery were known almost immediately. Follow up surgery was performed at Lexington Medical, and then the patient was treated and surgery performed at the Mayo Clinic.

In June 2007, the plaintiffs retained a prominent law firm to explore the possibility of filing a malpractice action for the surgeries and treatment at Lexington Medical. In June 2008, the attorney hired by the plaintiffs sent a letter to the plaintiffs indicating that the expert retained on their behalf had been unable to find any actionable

negligence on the part of Lexington Medical. The letter also stated that the plaintiffs were entitled to seek a second opinion on the legal issues, but cautioned about the impending statute of limitations.

An earlier motion for summary judgment was denied by this court. It was ordered that discovery should be allowed to proceed. Depositions have been taken, and both sides have submitted sworn testimony in support of their respective positions on this renewed motion for summary judgment.

The plaintiffs' contention is that the notice of having a claim was not known to the plaintiffs and should not reasonably have been known prior to June 1, 2009. They allege that the date of discovery did not arise until a doctor with the Mayo Clinic drew a diagram and explained to them what had transpired. Mrs. Jackson, specifically, has stated that she had lots of questions that never got answered, and that the plaintiffs' hiring of the previous attorney and expert did not reveal anything that put them on notice of a claim. Plaintiffs' counsel argues that there are issues of fact that are appropriate for a jury to evaluate to determine whether or not the statute of limitations ran out.

Under the precedent in this state, the court must conclude to the contrary. Calculation of the statute of limitations is based on an objective standard. The only evidence in this case is that the plaintiffs were put on notice or knew the requisite information to put them on notice for a period greater than 2 years before the lawsuit was filed.

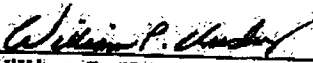
THEREFORE, IT IS ORDERED that the motion to dismiss is granted.

IT IS ORDERED that Mr. Johnson is to submit a proposed order to the court in electronic format within 20 days, via email, to wkeesleyj@sccourts.org and

wkeesley1c@sccourts.org , and a copy is to be sent to opposing counsel when the proposed order is sent to the court. The format used must be one that allows the court to make changes, such as Microsoft Word.

AND IT IS SO ORDERED.

September 6, 2012



William P. Keesley
Circuit Judge

This case is listed as an add-on to the September 6, 2012 Roster.
#4 on 9/4/12 ROSTER

#3

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2012 SEP -7 PM 4:16

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March 13, 2013

VIA EMAIL AND U.S. MAIL

Honorable Alison Renee Lee
Post Office Box 192
Columbia, SC 29202-0192

**RE: Tanya Bennett, as Next Friend of Mykelvion Thurmond, a
minor v. Lexington County Health Services District, Inc. d/b/a
Lexington Medical Center
C/A No.: 11-CP-32-2282**

Dear Judge Lee,

I just received Weldon Johnson's letter to you dated today, March 13. I write to respond briefly.

First, Weldon keeps saying that I want you to apply a subjective standard rather than an objective standard. That is not true. The case law does speak of an objective standard, and I agree with that. That means the determination of when a person "should have known he or she had a cause of action" must be made from the objective viewpoint of a "person of common knowledge" rather than the subjective viewpoint of the plaintiff.

What I disagree with are Weldon's erroneous contentions that an objective standard means (1) that specific facts are unimportant; and (2) that the date of when a "person of common knowledge" "should have known he or she had a cause of action" is an issue for the judge alone, and not for a jury. Every case cited by both sides reflects the court's consideration of the specific facts in issue, judged from the objective viewpoint of a "person of common knowledge." Only if those facts give rise to only one inference is the issue for the court. If you believe the facts give rise to only one inference about when a "person of common knowledge" "should have known he or she had a cause of action" (in other words, if there is no genuine dispute of material fact), the issue is one for you and you alone. If you believe the facts give rise to more than one such inference, you should allow the jury to resolve that factual dispute.

There are ample reasons why I respectfully submit the facts give rise to more than one inference:

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Edward L. Graham
Mary H. Watters
J. Layton Ruffin

(1) Recognition of an injury is quite different from recognition of actionable negligence, which is required to trigger the awareness of a cause of action. A mother of common knowledge would have recognized the former, but not the latter, in the days, weeks and months following birth. The obstetrician never admitted any potential breach by him of the standard of care, nor did he admit his negligence had caused the injury, so his mere acknowledgement of the presence of an injury does not put a person of common knowledge on notice of a medical negligence cause of action, especially when the doctor reassures the patient that the injury is likely temporary, like a bad "stinger" in contact sports, that knocks an athlete out of commission for weeks or months. Only after several years would a reasonable mother have recognized the reasonable likelihood of actionable negligence, after learning the injury had become permanent, and having first become aware that medical negligence had potentially been committed, and that medical negligence had potentially caused the injury. In this case that did not occur until the child was several years old, and that is true of any mother of common knowledge, signifying that this action was timely commenced.

(2) Different inferences can arise from the doctor's comment: "Oops, I hurt his arm," especially in the context of the doctor explaining that the shoulder had gotten stuck during delivery, and predicting the injury would be only temporary. Such a statement is a far cry from a doctor saying, "Oops, I caused brachial plexus nerve damage to your son by choosing to apply excessive lateral traction to his head and neck to try to pry his anterior shoulder out from behind the mother's pubic bone, and choosing not to resolve the shoulder dystocia complication by using proper safety maneuvers to rotate the anterior shoulder from where it was stuck behind the mother's pubic bone; and in doing so I ruptured the nerves, breaking them in two, rather than merely stretching them, so this is going to be a permanent injury; and by the way, what I did was a violation of generally accepted standards of care for obstetricians under these facts and circumstances." The former does not put a mother of common knowledge on notice that her son has a cause of action for obstetrical negligence, as the latter would. Most every delivery, sick visit or treatment visit includes some hurt to a child. Vaccinations hurt, but they are necessary to obtain immunization. Hurt from a needle stick to a child would hardly put the parent on notice that the nurse had caused nerve damage by injecting too deeply, even if the nurse said in warning, "This is gonna hurt." Most every child delivered vaginally experiences some degree of hurt from going through the tight, bony birth canal. Such injuries may involve swelling, bruising, changes in muscle tone, problems breathing, etc., either from trauma or reduced oxygenation or both. If every parent had to file suit when their child experienced a hurt, to avoid the statute of limitations, our courts would become quickly overrun by frivolous lawsuits. No one can equitably be required to file suit before there is an objective basis upon which to discover both that a serious injury has occurred, and that it occurred

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because of a breach of duty. Indeed, it would be unethical for that person's lawyer to do so. Yet that is precisely what Weldon is arguing should be required in this case.

(3) Weldon argues that the mom was told by Dr. Gilpin that her son's injury would be permanent at three months of age. The mother testified at her deposition in a way that can be so construed, but that testimony can be construed other ways as well. There is factual support from the affidavits submitted at the hearing that the conversation referred to was in fact between the child's mother and Dr. Redmond, not Dr. Gilpin. Moreover, those affidavits create compelling evidence that the conversation took place not at age 3 months, but at no earlier than age 18-24 months.

(4) Weldon argues there is significance to the fact that the mother signed a medical authorization during the child's first year of life. Yet there is no evidence of the purpose of that visit. Even assuming, as Weldon argues without factual support, that the purpose was to explore whether there was a basis for a cause of action, there is no factual evidence that signing the medical authorization provided any notice to the mother that there was even a long shot possibility of having a cause of action. In his brief, Weldon cited a case, *Smith v. Smith*, for the proposition that going to see attorneys could represent notice to the plaintiff of a potential cause of action for statute of limitation purposes. Yet that case presented factual evidence that the purpose of the lawyer visits was to try to see about suing the defendant, evidence sorely lacking in the case at bar. Moreover, even in the presence of such evidence, the court looked to the date of the second lawyer visit, not the first, as being the significant date for "notice" purposes. If the date of the second lawyer visit has any significance in this case, it is to prove that the mother had notice of a potential cause of action at the time of the second lawyer visit, at age 4 1/2 years, meaning that the subject case was timely commenced using the date of that second lawyer visit for statute of limitation purposes.

(5) There are so many facts that argue in favor of a delayed notice of a potential cause of action for obstetrical negligence: explanation that the injury occurred because the shoulder got stuck, therefore not caused by medical negligence; statement by Dr. Gilpin that there was a "questionable" nerve injury; statement by Dr. Gilpin that the injury occurred during the later stages of pregnancy, implying prior to delivery; no knowledge of permanency was even possible until age 18-24 months; the arm had improved during those months, leading a mother of common knowledge to hope of continued improvement; statement by Dr. Gilpin that there was no obvious impairment upon gross examination; statement by Dr. Gilpin of no pain; and many others I mentioned in court. Weldon argues that other facts exist which weigh in favor of an inference that a mother of common knowledge should have been put on notice during the first few months that a

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potential cause of action exists. That is fine, many inferences are possible. That is why it is a jury question, and not for summary adjudication.

(6) In his letter, Weldon attacks the Santee Portland Cement case, which I did not even argue. Yet the case supports my position. Just as notice of an injury to a cement bin does not provide notice of significant permanent damage or causation, sufficient to give rise to notice of a cause of action, so too notice of an injury to a baby's arm does not provide notice of significant permanent damage or causation, sufficient to give rise to notice of a medical negligence cause of action. Weldon tries to distinguish the "common" injury in Santee Portland to an "uncommon" injury in this case at bar, but that argument does not hold up to scrutiny. Birth injuries are, sadly, way more common than they should be. But that is not the point. The point is that just as cement bins can many times be injured mildly, or severely but without negligence, many times babies can be injured at birth mildly, temporarily or without negligence. What matters is not the frequency of injury in and of itself, but whether the facts put a person of common knowledge on notice of negligence, causation and sufficiently significant injury sufficient to give rise to notice of a potential cause of action.

(7) In his letter Weldon also cites the Strong case, which also helps my position. Weldon argues the court held the patient to have had notice of a cause of action when he became aware he was blind after surgery, but that is untrue. The court held that notice of a cause of action had accrued as of the date when a doctor informed the plaintiff his blindness "was due to poor follow-up care." Unlike the plaintiff in Strong, the mother in this case was not informed by any health care provider that poor care by her obstetrician had anything to do with her son's arm impairment or nerve damage. She had no notice of any potentially negligent medical care at delivery, nor any sense of medical negligence as causation, nor any significant or permanent injury. She had no clue there was a potential for a medical negligence cause of action until the child was several years old.

(8) Finally, Weldon argues about when the mother was put on notice of the cause of action. He has said nothing about the child being put on notice at all, but this is after all the child's cause of action being pursued.

Outcome of the motion depends on whether you believe this child should have been on notice of a medical negligence cause of action within his first eleven months of life. Eleven months plus seven years tolling plus two years of the statute of limitations represents a date after the date this action was commenced. Thus, this case was timely filed unless the court rules plaintiff should have been on notice of the cause of action as a matter



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of law before the child was approximately 11 months of age. Surely that is not the only fair inference from these facts. We ask that you deny the motion.

Thank you for your consideration.

With kindest personal regards, I am

Sincerely yours,

EDWARD L. GRAHAM

ELG

cc: Weldon R. Johnson, Esq.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material

May12, 2014



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Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

C/A No. 2011-CP-32-02282

Tanya Bennett, as Next Friend of
Mykelvion T., a minor

Appellant,

v.

Lexington County Health Services
District, Inc. d/b/a Lexington Medical Center,
Medical Center,

Respondent.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 13th day of May, 2014 served a copy of the Record on Appeal upon counsel for the Respondent by depositing them in the United States Mail, first-class postage prepaid, addressed to:

Weldon R. Johnson, Esq.
Matthew G. Gerrald, Esq.
Emily Collins, Esq.
Barnes, Alford, Stork & Johnson, LLP
P.O. Box 8448
Columbia, SC 29202



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SC Court of Appeals

CERTIFICATE OF COUNSEL

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May12, 2014



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