

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

2008-CP-21-2326

Marquette Johnson, as "Mother Natural"
Guardian of "D'Andre G.", an infant under the
age of 14 years,

Appellant / Respondent,

v.

Anu Chaudhry, M.D., McLeod Regional Medical
Center, and Florence Women's Health, Defendants,

Of whom Anu Chaudhry, M.D. and Florence
Women's Health are the,

Respondents / Appellants.

RECORD ON APPEAL

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Gordon Cooper, Esquire
P.O. Box 2424
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Telephone: (843) 377-1400

Deborah Harrison Sheffield, Special Counsel
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On Behalf of:
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McGowan, Hood & Felder, LLC
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(803) 327-7800

ATTORNEYS FOR APPELLANT

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STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother Natural
Guardian of D'Andre C. [REDACTED] an infant under
the age of 14 years,

Plaintiff,

Versus

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 08-CP-21-2326

CONSENT
SCHEDULING ORDER

FILED
2009 AUG 27 PM 3:25
FLORENCE COUNTY, SC

The Court finds that the below Scheduling Order is reasonable and that in the interests of all parties a date certain for trial is appropriate.

ACCORDINGLY, IT IS ORDERED AS FOLLOWS:

CERTIFIED A TRUE COPY

Carrie Red-Spearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

1. The Plaintiffs shall present for deposition by October 15, 2009.
2. Plaintiffs shall name expert witnesses by November 30, 2009.
3. The depositions of the parties and treating medical providers shall be completed by January 8, 2010.
4. The depositions of the Plaintiffs' experts shall be completed by February 26, 2010.
5. The Defendants shall identify expert witnesses by May 7, 2010.
6. Defendants' expert witnesses' depositions shall be completed by June 25, 2010.
7. Mediation shall be held prior to July 16, 2010.
8. The parties will attend the first date certain roster meeting setting this matter for a date certain trial after August 2, 2010.
9. Any dates within this Order not affecting the trial date can be changed by consent of the parties.

Thomas A. Russo

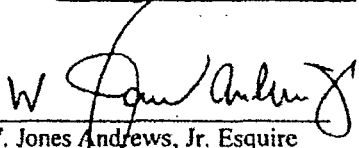
The Honorable Michael G. Nettles
Chief Administrative Judge for the Twelfth Judicial
Circuit

8/27, 2009
Florence, SC

Exhibit A

WE CONSENT:

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ksitnik@mcgowanhood.com


W. Jones Andrews, Jr. Esquire
Kevin H. Sitnik, Esquire

Attorneys for Plaintiff

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

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Mt. Pleasant, SC 29465-2424
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Email: hwb@buyckfirm.com



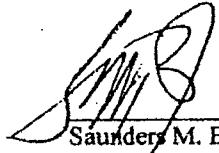
Hugh W. Buyck, Esquire

Attorney for the Defendants
Anu Chaudhry, M.D. and Florence Women's Health

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

WE CONSENT:

AIKEN BRIDGES NUNN ELLIOTT & TYLER, PA
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 7/14/09
Saunders M. Bridges, Jr., Esquire

Attorney for Defendant
McLeod Regional Medical Center

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

IN THE COURT OF COMMONS

) TWELFTH JUDICIAL CIR

) C/A No. 08-CP-21-2326

ORDER

CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

2011 MAR 25 PM 3:32

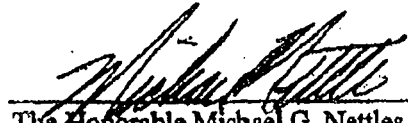
FD-36

Furthermore, the Plaintiff has previously been provided the opportunity to name additional experts, exclusively limited to damages witnesses, and must present all expert witnesses for deposition by May 15, 2010.

The Defendants are to then name their experts by June 15, 2011.

Finally, Kevin Sitnik, Esquire is hereby relieved as counsel on behalf of the Plaintiff with the law firm of McGowan Hood & Felder, LLC and Robert Phillips, Esquire continuing to represent the Plaintiff.

IT IS SO ORDERED!


The Honorable Michael G. Nettles
Twelfth Judicial Circuit

3-25-, 2011
Florence, SC

FILED
2011 MAR 23 PM 3:32
CONNIE REEL-SHEARIN
CLERK & US
FLORENCE COUNTY, SC

County of Florence County

2008 - CP-21-2326

Marquette Johnson,
et alAnu Chaudhry, M.D., et al

Plaintiff(s)

Defendant(s)

Defendant(s)

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 decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41 (a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

Dated at Florence, South Carolina, this _____ day of _____ 2010.

2010 MAY -7 PM 2:53
 CONNIE REEL-SHEARIN
 CLERK OF COURT
 FLORENCE COUNTY, S.C.

PRESIDING JUDGE

This judgment was entered on the 7 day of May 2010 and a copy mailed first class this 10 day of May 2010, to attorneys of record or to parties (when appearing pro-se) as follows.

K.H. Sitnik
1539 Health Care Drive
Rock Hill, S.C. 29732
 Attorney(s) for Plaintiff(s)

H.W. Buysch, M.D., Plaintiff, S.C. 29465-2424
P.O. Box 2424
S.M. Bridges Jr., Florence, S.C. 29503
P.O. Drawer 1931

Attorney(s) for Defendant(s)

Connie Reel-Shearin
 Florence County Clerk of Court

CERTIFIED A TRUE COPY
 CONNIE REEL-SHEARIN
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.
 7

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)
Marquette Johnson, as Mother Natural)
Guardian of D'Andre G■■■■, an infant under)
the age of 14 years,)
Plaintiff,)
Versus)
Anu Chaudhry, M.D., McLeod Regional)
Medical Center, and Florence Women's)
Health,)
Defendants.)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A No. 08-CP-21-2326

**ORDER
GRANTING
SUMMARY JUDGMENT
TO DEFENDANTS
ANU CHAUDRY, M.D.
&
FLORENCE WOMEN'S HEALTH**

FILED
2009 MAY -7 AM 11:50
CLERK OF COURT C.P. & S.
FLORENCE COUNTY, S.C.

This matter came before the Court on April 29, 2010 at 2:00 p.m., for Defendants, Anu Chaudhry, M.D. and Florence Women's Health, Motion for Summary Judgment pursuant to Rules 16 and 56 of the South Carolina Rules of Civil Procedure. Based upon the following, Summary Judgment is hereby granted to the Defendants, Anu Chaudhry, M.D. and Florence Women's Health.

LEGAL STANDARD

Summary judgment is appropriate when there is "no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). When a Motion for Summary Judgment is made and supported by proper affidavits, a Plaintiff cannot rest on allegations in his pleadings that are controverted by affidavits and/or depositions submitted by

Defendants. S.C.R. Civ. p. 56 (E); Manly v. Manly, 291 S.C. 325, 353 S.E.2d 312 (S.C. App. 1987); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (S.C. App. 1985). Therefore, where the Plaintiff relies solely upon the pleadings, files no counter affidavits, and makes no factual showing in opposition to a Motion for Summary Judgment, the court is required to grant summary judgment, if under the facts presented by the Defendant, he is entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974). Although the burden is on the party seeking summary judgment, the non-moving party must point to specific facts showing that there is a genuine issue for trial rather than resting on the assertions of its pleadings. See Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 407 S.E.2d 637 (1991); Laughrdige v. Parkinson, 304 S.C. 51, 403 S.E.2d 120 (1991). If the non-moving party fails to make a showing sufficient to establish the existence of an element of its case, and on which it will bear the ultimate burden of proof at trial, there can be no genuine issue of material fact because the failure of proof concerning an essential element of the case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Complaint in this matter was filed December 8, 2008. A Consent Scheduling Order was entered by the Court at the request of the parties on August 27th, 2009, including the following deadlines:

1. The Plaintiffs shall present for deposition by October 15, 2009.
2. Plaintiffs shall name expert witnesses by November 30, 2009.
3. The depositions of the parties and treating medical providers shall be completed by January 8, 2010.
4. The depositions of the Plaintiffs' experts shall be completed by February 26, 2010.

As of the date of the hearing on Defendant's Motion for Summary Judgment, Plaintiff failed to present for a deposition, name experts or depose any parties or treating medical providers in accordance with this Consent Order. As such, there has been a gross indifference to these Defendants rights to defend the case and failure to set forth the issues for a jury.

In a medical malpractice action, such as the case at bar involving the delivery of a child and allegations of a brachial plexus injury and Erb's palsy, the Plaintiff must establish the appropriate standard of care and a deviation thereof by expert medical testimony. The Plaintiff filed this suit on December 8, 2008, and despite the case pending for over 17 months, Plaintiff failed to name an expert to testify as to any deviation of the standard of care. The Plaintiff also failed to comply with a scheduling order entered by the Hon. Thomas A. Russo, Chief Administrative Judge for the Twelfth Judicial Circuit on August 22, 2009.

In a medical malpractice action the burden of proof is on the Plaintiff throughout. Bothelo v. Bycura, 282 S.C. 578, 320 S.E. 2d 59 (S.C. App. 1984). Further, the Plaintiff must:

1. Establish the required standard of care by presenting evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, and
2. Establish defendant's failure to conform to that standard by presenting evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the Plaintiff.

Pederson v. Gould, 288 S.C. 141, 341 S.E. 2d 633 (1986); Cox v. Lund, 286 S.C. 410, 334 S.E. 2d 116 (1985).

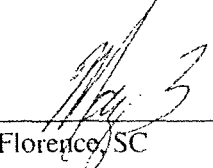
The Plaintiff is mandated to establish both the required standard of care and the Defendant's failure to conform to that standard through the use of expert testimony, unless the subject matter is one in which the common knowledge or experience of lay persons is comprehensive enough to permit the recognition or inference of negligence from the particular facts. Pederson, supra; Bothelo v. Bycura, 282 S.C. 578, 320 S.E. 2d 59 (S.C. App. 1984).

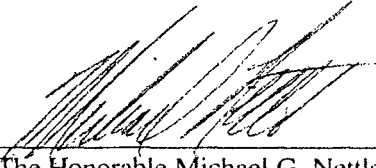
The case at bar concerns complicated issues surrounding the birthing process of a child. The type of testimony required and expected to be rendered at trial is not within the layperson's knowledge and experience. As Plaintiff has failed to produce any testimony as to the standard of care or breach thereof by expert testimony or otherwise, Plaintiff cannot overcome the Defendants' Motion for Summary Judgment.

Where the Plaintiff relies solely upon the pleadings, files no affidavits, and makes no factual showing in opposition to Motion for Summary Judgment, the court is required to grant summary judgment, if under the facts presented by the Defendant, he is entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974). Plaintiff has failed to make a showing sufficient to establish the essential elements of her case, specifically expert testimony establishing the standard of care and breach of that standard by Dr. Chaudry. Failure to name an expert in this regard is fatal to the pursuit of her claims. Therefore, under Rule 56(c) there is no genuine issue of material fact and these Defendants are entitled to judgment as a matter of law.

WHEREFORE, based upon the foregoing, Summary Judgment is hereby GRANTED on the merits as to the Defendants, Anu Chaudry, M.D. and Florence Women's Health.

IT IS SO ORDERED!


_____, 2010
Florence, SC



The Honorable Michael G. Nettles
Twelfth Judicial Circuit

FILED
JULY - 7 AM 11:50
CLERK REEL-OUT ARIN
COURT CLERK
FLORENCE COUNTY, SC

PROVIDE A TRUE COPY
Clerk of Court of S.C.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

) TWELFTH JUDICIAL CIRCUIT

Marquette Johnson, as Mother Natural of
D'Andre G. Johnson, an infant under the age of 14 years.

CASE NO. 08-CP-21-2326

☐ Plaintiff.

Versus

Anu Chaudhry, M.D., McLeod Regional Medical Center,
and Florence Women's Health☒ Defendants.

check box above indicating submitting party

**ORDER
GRANTING
SUMMARY JUDGMENT
TO DEFENDANTS
ANU CHAUDHRY, M.D.
&
FLORENCE WOMEN'S HEALTH**

Plaintiff's attorney:

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Fax: (803) 328-5656
E-mail: ksitnik@mcgowanhood.com

Defendant's attorney:

Hugh W. Buyck, Bar No. 66462
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P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Phone: (843) 377-1400; Fax: (843) 377-1403
e-mail: hwb@buyckfirm.com

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: YES ☐/ NO ☐**SECTION II: Motion/Order Type**☐ Written motion attached☒ Form Motion/Order -

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

Signature of Attorney for ☐ Plaintiff/ ☒ Defendants

Date submitted 5/5/10

SECTION III: Motion Fee☐ PAID - AMOUNT:☒ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION☐ Motion Fee to be paid upon filing of the attached order.☐ Other:

JUDGE

CODE:

DATE:

CLERK'S VERIFICATIONCollected by: _____
(print name)**DATE FILED**☐ MOTION FEE COLLECTED:☐ CONTESTED-AMOUNT DUE:

F:\21.35 Johnson v. Chaudhry\Pleadings & Discovery\Motions\Motion slip (Order).doc

CERTIFIED A TRUE COPY
 JUDGE: H. W. Buyck
 CLERK: J. A. G. S.
 FLORENCE COUNTY, S.C.

State of South Carolina

County of Florence County

Marquette Johnson,
et al.

Plaintiff(s)

CERTIFIED A TRUE COPY
Form 4
Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Judgment in a Civil Case

2008 - CP-21-2326

Anu Chaudhry, M.D., et al

Defendant(s)

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 decision rendered.
- () **ACTION DISMISSED (CHECK REASON):** () Rule 12(b), SCRPC; () Rule 41 (a), SCRPC (Vol. Nonsuit); () Rule 43(k), SCRPC (Settled); () Other _____
- () **ACTION STRICKEN (CHECK REASON):** () Rule 40(j) SCRPC; () Bankruptcy; () Binding arbitration, subject to right to restore to confirm, vacate modify arbitration award; () Other _____
- () **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
() Affirmed; () Reversed; () Remanded; () Other _____
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: () See attached order. (Formal order to follow) () Statement of Judgment by the court:

Dated at Florence, South Carolina, this _____ day of _____, 2009.

2009 JUN -3 PM 2:56
CLERK OF COURT
FLORENCE COUNTY, SC

FILED

PRESIDING JUDGE

This judgment was entered on the 3 day of June 2009, and a copy mailed first class this 4 day of June 2009, to attorneys of record or to parties (when appearing pro-se) as follows.

R.V. Phillips

1539 Health Care Dr.

Rock Hill, S.C. 29732

Attorney(s) for Plaintiff(s)

H.W. Buysch, Jr.
5111 Bridge, Jr. Florence, S.C. 29503
P.O. Box 2424
P.O. Drawer 1931

Attorney(s) for Defendant(s)

Connie Reel-Shearin
Florence County Clerk of Court

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 08-CP-21-2326

CONSENT ORDER

;

;

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ns

Siding Judge

Conine Reel - Spearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

2009 JUN -3 AM 11:01
COMMUNICATIONS SECTION
FLORENCE COUNTY, SC

7
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7
7

WE CONSENT:

MCGOWAN HOOD & FELDER, LLC
1539 Health Care Dr.
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Phone: (803) 327-7800
Fax: (803) 328-5656

By: _____
Kevin H. Sitnik, Esquire

Attorney for Plaintiff

WE CONSENT:

BUYCK & SANDERS LAW FIRM, LLC
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Phone: (843) 377-1400; Fax: (843) 377-1403
Email: hwb@buyckfirm.com

By: _____
Hugh W. Buyck, Esquire

Attorney for Defendants
Anu Chaudhry, M.D. and Florence Women's Health

WE CONSENT:

AIKEN BRIDGES NUNN ELLIOTT & TYLER, PA
P.O. Drawer 1931
Florence, SC 29503
Phone: (843) 669-8787 (ext. 353)
Fax: (843) 664-0097
Email: smbjr@aikenbridges.com

By: _____
Saunders M. Bridges, Jr., Esquire

Attorney for Defendant
McLeod Regional Medical Center

FILED
2009 JUN -3 AM 11:01
CLERK OF COURT - C.P. & G.S.
FLORENCE COUNTY, SC

CERTIFIED A TRUE COPY

Corrine Keel-Spearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

WE CONSENT:

MCGOWAN HOOD & FELDER, LLC
1539 Health Care Dr.
Rock Hill, SC 29732
Phone: (803) 327-7800
Fax: (803) 328-5656

By: 
Kevin H. Sitnik, Esquire

Attorney for Plaintiff

WE CONSENT:

BUYCK & SANDERS LAW FIRM, LLC
P.O. Box 2424
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Phone: (843) 377-1400; Fax: (843) 377-1403
Email: hwb@buyckfirm.com

By: 
Hugh W. Buyck, Esquire

Attorney for Defendants
Anu Chaudhry, M.D. and Florence Women's Health

WE CONSENT:

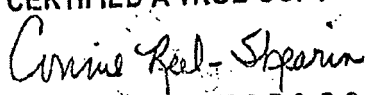
AIKEN BRIDGES NUNN ELLIOTT & TYLER, PA
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Fax: (843) 664-0097
Email: smbjr@aikenbridges.com

By: _____
Saunders M. Bridges, Jr., Esquire

Attorney for Defendant
McLeod Regional Medical Center

2009 JUN -3 AM 11:01
CORRECTOR-CLERK
C.C.P. & G.S.
FLORENCE COUNTY, SC

FILED

CERTIFIED A TRUE COPY

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

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

FORM 4

FILED

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-21-2326

Marquette Johnson, as Mother and Natural Guardian of D'Andree Gannon, and infant under the age of 14 years
and Shaudry, M.D., McLeod Regional Medical Center, and Florence Women's Health

2010 JUL -6 AM 11:28
CONNIE REEL-SHEARIN
CLERK OF COURT
FLORENCE COUNTY, SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

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(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐

ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED:

☐

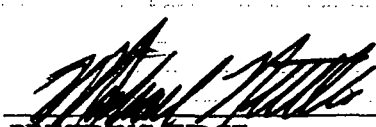
See attached order. (Formal order to follow)

☒

Statement of Judgment by the Court: Motion to reconsider

in the above captioned case is denied without the need for a hearing.

Dated at Florence, South Carolina, this 6th day of July, 2010.


PRESIDING JUDGE

This judgment was entered on the 6th day of July 2010, and a copy mailed first class this

7th day of July, 2010 to attorneys of record or to parties (when appearing pro se) as follows:

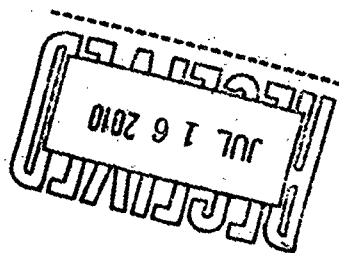
K.H. Strick
1517 Hampton Street
Columbia, SC 29201

ATTORNEY(S) FOR PLAINTIFF

J.H. Bridges, Jr. - PO Drawer 1931
Florence, SC 29502
H.W. Buysch PO Box 2424 Mount Pleasant
SC 29465

ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT



Marquette Johnson

Plaintiff(s)

FILED

2010 JUL 30 PM 3:46

ORDER

vs

Anne Chaudry, et al

Defendant(s)

Case No. 2008 -CP-21- 2326

FLORENCE COUNTY, SC

I. **IT IS ORDERED** that the below MOTION(S) be struck from the active Motion Calendar for the following reason:

✓ 1. Plaintiff(s) Motion for Reconsideration as to McLeish
heard on this 30 day of July, 2010.

2. Defendant(s) Motion _____
heard on this _____ day of _____, 2010.

✓ 3. Rulings of the above motion(s): Granted, a more formal order forthcoming.

✓ 4. Other: Summary judgment heard 7/26 held in absence

II. **IT IS ORDERED** that the within entitled CASE/MOTION(S)/RULE be:

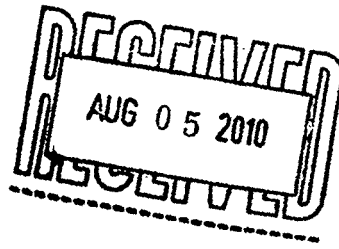
1. Transferred to the Jury/Non-jury Calendar.
2. Referred to Special Referee
3. Continued upon request of Plaintiff and/or Defendant beyond the _____ for Continuance: _____
4. Other: _____

CERTIFIED A TRUE COPY
Clerk of Court - Sharon
FLORENCE COUNTY, S.C.

Florence, South Carolina

July 30, 2010

Michael A. Hitt
Presiding Judge



STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE 2010 AUG 12 AM 10:59 TWELFTH JUDICIAL CIRCUIT

Marquette Johnson, as Mother Natural Guardian of D'Andre G., an infant, the age of 14 years,

Plaintiff,

Versus

Anu Chaudhry, M.D., McLeod Regional Medical Center, and Florence Women's Health,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO RECONSIDER

This matter came before the Court on July 30, 2010 at 2:00 p.m., for Plaintiff's Motion to Reconsider this Court's Order dated May 5, 2010, granting Defendant Anu Chaudhry, M.D. and McLeod's Motion for Summary Judgment. Present at the hearing were the following: Kevin Sitnik, Esq. appearing on behalf of the Plaintiff; G. Wade Cooper, Esq. appearing on behalf of Defendants Chaudhry and Florence Women's Health; and Saunders M. Bridges, Jr., Esq. appearing on behalf of Defendant McLeod Regional Medical Center. After review and consideration of the memorandum and affidavits submitted by Plaintiff in support of her Motion to Reconsider, and after hearing oral arguments both for and against, I hereby GRANT Plaintiff's Motion to Reconsider, hold Defendant McLeod's Motion for Summary Judgment in abeyance, and impose the following deadlines and sanctions as part of the Court's ruling in this matter:

1. Plaintiff is limited to use of testimony of Dr. Gary Oakes as expert as to all issues of liability;
2. On or before August 30, 2010 Plaintiff shall submit any affidavits or deposition testimony in opposition to the Defendant McLeod's Motion for Summary Judgment. Failure to

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CLERK OF COURT
FLORENCE COUNTY

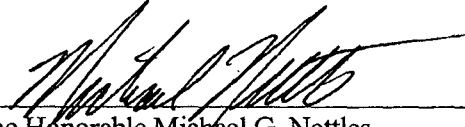
produce probative and admissible evidence in opposition to the Defendant McLeod's motion shall result in this Court granting McLeod's Motion for Summary Judgment.

3. The Court orders Kevin Sitnik, Esq. to remain as counsel for the Plaintiff;

4. Plaintiff shall be responsible for re-imbursement of Defendants' filing fee related to the Motion for Summary Judgment, and for attorneys fees and travel expenses related to the hearing on the Motion for Summary Judgment (4/29/10) and the hearing related to the Plaintiff's Motion to Reconsider (7/30/10). Additionally, Plaintiff shall be responsible for Defendants' attorneys fees related to the preparation of this Order. Counsel for Defendants are to provide an accounting of these costs, expenses, and related fees to Plaintiff's counsel.

5. Upon motion of the parties, the Court shall re-visit the Consent Scheduling Order entered in this case on August 27, 2009, by The Hon. Thomas A. Russo, Chief Administrative Judge for the Twelfth Judicial Circuit. As above, however, Plaintiff shall not be allowed to offer additional liability testimony other than that which may be offered by Dr. Gary Oakes.

IT IS SO ORDERED.



The Honorable Michael G. Nettles
Twelfth Judicial Circuit

8-11-, 2010
Florence, SC

2010 AUG 12 AM 10:59
CONNIE REEL-SHEARIN
CCJP & GS
FLORENCE COUNTY, SC

FILED

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother and Natural
Guardian of D'Andre G■■■■, an infant under
the age of 14 years,

Plaintiff,

vs.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

Defendant.

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 08-cp-21-2326

ORDER

CONNIE REEL-SHEARIN
C.C.P. & G.S.
FLORENCE COUNTY, SC

2010 OCT 12 PM 3:16

FILED

This is a medical malpractice action involving an alleged birth injury against the physician, her practice, and the hospital where the Plaintiff's minor child was born. By this Order the Court reaffirms its decision to grant Plaintiff's renewed motion for reconsideration, denies Defendants' Chaudhry and Florence Women's Health's Motion for Reconsideration of that Order, grants those Defendants' Motion to Compel, in part, and orders counsel for the parties to present a new scheduling order to the administrative judge.

PERTINENT FACTS

Plaintiff's complaint alleges that as a result of the negligence of the Defendant, the infant Plaintiff sustained severe and permanent injuries including a left Erbs Palsy and brachia

CERTIFIED: A TRUE COPY

Connie Reel-Shearin

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

plexus injury." Plaintiffs seek actual, special, and consequential damages, including medical expenses, disfigurement, pain and suffering, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages. Plaintiffs have also asserted a claim for punitive damages.

D'Andre G. [REDACTED] was born on February 3, 2004. The current action was instituted by Plaintiff Johnson, Plaintiff Green's mother and natural guardian, on or about December 8, 2008.^[1]

PROCEDURAL FACTS

This case has an extensive history. Originally, this case was taken by the Plaintiff to an attorney who practices law in New York. That attorney's name was not provided to this Court. The New York attorney contacted at least two law firms in the Carolinas, who were supposed to serve as local counsel. Based upon this information, a South Carolina attorney filed suit for the Plaintiff shortly after receiving notice of the potential claim, due to a possible issue with our state's statute of limitations. Thereafter, the New York attorney declined to serve as lead counsel on the case. Subsequently, local counsel for the Plaintiff became lead counsel.

Plaintiff's counsel then requested that the case be stricken from the docket, pursuant to Rule 40(j), SCRCF, in order for local counsel to properly prepare the case. While counsel for Defendant Hospital agreed, Defendant Chaudhry and Florence Women's Health did not. As a result, a scheduling Order was entered in August, 2009.

Thereafter, Plaintiff expressed her desire to her former counsel to seek a second opinion from new counsel.^[2]

^[1] Thereafter, an individual claim on behalf of the mother was dismissed by stipulation of the parties.

^[2] During this time period, an attorney for Plaintiff's firm also informed opposing counsel of his withdrawal from the case, although the reason for that withdrawal was not stated.

On or about May, 24, 2010, Defendants filed a motion for summary judgment, asserting that such judgment was proper due to the failure of Plaintiff to identify an expert witness by the date indicated in the first Scheduling Order, which was issued in August of 2009. Plaintiff's counsel presented evidence that from the time the first scheduling Order was issued, Defendants' counsel made no attempts to contact Plaintiff's counsel, prior to filing the motion for summary judgment. In addition, Plaintiff's counsel acknowledged that dates from the scheduling Order had been inadvertently removed from his calendar by a paralegal who misunderstood communications with the Plaintiff.^[5]

The Court conducted a hearing, and gave a bench ruling granting Defendants' motion for summary judgment, finding that the failure of Plaintiff's counsel to name an expert witness by the date set forth in the initial scheduling Order was fatal, regardless of the circumstances. Plaintiff's counsel presented an oral motion to extend the deadlines set forth in the original scheduling order. Plaintiff's motion to extend the deadlines was denied from the bench, and not included in the written Order drafted by opposing counsel, and ultimately adopted by the Court.

Thereafter, Plaintiff filed a motion for Reconsideration, arguing both as to the merits of the dismissal, as well as to the failure to address Plaintiff's motion to extend the original scheduling Order's deadlines. In addition, Plaintiff submitted the affidavit of Dr. Oakes, both to the Court and opposing counsel, as a supplement to her first motion for reconsideration, on or about June 23, 2010.

Plaintiff received written notice of the entry of this Order on July 16, 2010. Thereafter, a hearing was scheduled on co-defendant's motion for Summary Judgment on July 26, at which time Plaintiff renewed her motion for reconsideration as to all Defendants, and filed a written

^[5] The affidavit of Plaintiff's counsel has been submitted, outlining these issues.

motion to that effect. A hearing was subsequently held on July 30, 2010, where the Court granted Plaintiff's renewed motion for reconsideration, and instructed Defendants' counsel to prepare an order.

Thereafter, on or about August 6, 2010, Defendants filed the present motion, seeking reconsideration of this Court's ruling reversing the grant of summary judgment, and alternatively seeking to compel certain discovery responses. A hearing was held on this motion on Friday, September 17, 2010, at which time, all motions were heard.

Law / Analysis

Timeliness of Plaintiff's Renewed Motion for Reconsideration

Pursuant to Rule 59(e), SCRPC, a motion for reconsideration shall be served no later than 10 days after receipt of written notice of the entry of the order. Plaintiff received written notice of the entry of the Order on July 16, 2010. Plaintiff served Defendant with the written motion on July 26, 2010, and thus Plaintiff's renewed motion for reconsideration was timely.

The Court Correctly Granted Plaintiff's Second Motion for Reconsideration

The Court has carefully considered both the history and facts in this case, and is convinced that the original decision to dismiss the minor child's complex medical malpractice case under these circumstances was not proper. A lesser sanction must be employed for violation of a scheduling Order where the result would be dismissal of the case, unless there is intentional misconduct. Orlando v. Boyd, 320 S.C. 509, 466 S.E.2nd 353 (1995) (citations omitted).

Defendant made no showing of intentional misconduct, and even defense counsel for the defendant hospital has admitted as such. While the defendants argue that the plaintiff's failure to

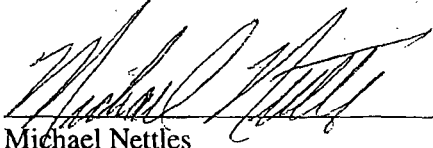
name an expert witness by the date set forth in the original scheduling order should be fatal, the Court finds that adjudication on the merits is more appropriate.

Motion to Compel

Defendants also moved to compel more certain responses to discovery. Many interrogatories were fully answered in open court. Plaintiff's counsel is directed to supplement her answers accordingly. In addition, Plaintiff's counsel is directed to fully respond to all interrogatories regarding 'maneuvers' which should have been employed by Defendant Chaudhry.

ORDER

Based on the forgoing, Plaintiff's renewed Motion for Reconsideration is hereby **GRANTED**, Defendants' Motion for Reconsideration is **DENIED**, and Defendants' Motion to Compel is **GRANTED**, in part. Counsel for the parties are to discuss a new scheduling order in which defendants are to be given special consideration. Additionally, this Court limits the Plaintiff's expert witnesses as to liability to Dr. Oaks. However, the Plaintiff's expert witnesses as to damages are not limited.



Michael Nettles
Circuit Court Judge
Twelfth Judicial Circuit

This 12 day of Oct., 2010

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, et al

Plaintiff(s)

vs.

Anu Chaudhry, MD, et al

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2008-CP - 21- 2324

(Please Print)

Submitted By: Robert V. Phillips

Address: 1539 Health Care Drive

Rock Hill, SC 29732

SC Bar #: 68458

Telephone #: 803-327-7800

Fax #: 803-328-5656

Other:

E-mail: rphillips@mcgowanhood.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)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (410)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (415)
☐ Employment (120)	☒ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/ File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (425)
☐ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Other (799)	☐ Other (899)	☐ Worker's Comp (960)
			☐ Zoning Board (970)
			☐ Administrative Law Judge (980)
			☐ Public Service Commission (990)
			☐ Employment Security Comm (991)
			☐ Other (999)
-
Special/Complex /Other	
☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of State Depositions (650)
☐ Other (699)	☐ Sexual Predator (510)

Submitting Party Signature:

Date: December 3, 2008

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

MARQUETTE JOHNSON, as Mother
Natural Guardian of D'ANDRE G-~~REDACTED~~,
an infant under the age of 14 years,

Plaintiff(s),

vs.

ANU CHAUDHRY, M.D., McLEOD
REGIONAL MEDICAL CENTER, and
FLORENCE WOMEN'S HEALTH,

Defendant(s)

IN THE COURT OF COMMON PLEAS

C. A. NO: 2008-CP-21- 2326

SUMMONS

2008 DEC -8 PM 12:11
CORRE REEL-SHEARIN
CCOP & GS
FLORENCE COUNTY, SC

FILED

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his Office at 1539 Health Care Drive, Rock Hill, South Carolina, 29732, within thirty (30) days from the service hereof, exclusive of the date 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 in the Complaint.

MCGOWAN HOOD & FELDER, LLC

Robert V. Phillips, Esq.
1539 Health Care Drive
Rock Hill, South Carolina 29732
(803) 327-7800 - Office
(803) 328-5656 - Facsimile
rphillips@mcgowanhood.com

Rock Hill, South Carolina
November 24, 2008

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

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

C.A. File No. 08-CP-21- 2326

MARQUETTE JOHNSON, as Mother &)
Natural Guardian of D'ANDRE G.)
an infant under the age of 14 years,)

Plaintiff,)

vs.)

ANU CHAUDHRY, M.D., McLEOD)
REGIONAL MEDICAL CENTER, and)
FLORENCE WOMEN'S HEALTH,)

Defendants.)

COMPLAINT

(Jury Trial Requested)

2008 DEC - 8 PM 12:11
COURT REEL-SHEARIN
CCOP & GS
FLORENCE COUNTY, SC

FILED

The Plaintiff, by and through her undersigned counsel, for a Complaint against the Defendants, does hereby allege as follows:

PARTIES

Plaintiff

1. The Plaintiff, Marquette Johnson, is the natural mother and GAL for her infant child D'Andre G. and is a citizen and resident of Florence County, South Carolina.

Defendants

2. Defendant, Anu Chaudhry, was a physician duly licensed to practice medicine in the State of South Carolina.

3. Upon information and belief, at all times hereinafter mentioned, the Defendant, McLeod Regional Medical Center was a corporation duly organized and existing under and by virtue of laws of the State of South Carolina.

CERTIFIED: A TRUE COPY

Christa R. Spivey

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

4. Upon information and belief, at all times hereinafter mentioned, the Defendant, Florence Women's Health was a corporation duly organized and existing under and by virtue of laws of the State of South Carolina.

5. That upon information and belief, at all times hereinafter mentioned, the Defendant, McLeod Regional Medical Center, maintained a medical facility located at 1001 Day Street, Florence, South Carolina, for the care and treatment of patients.

6. That upon information and belief, at all times hereinafter mentioned, the Defendant, Florence Women's Health, maintained a medical facility located at 901 E. Cheves Street, Florence, South Carolina, for the care and treatment of patients.

7. Upon information and belief, at all times hereinafter mentioned, the Defendant, McLeod Regional Medical Center, through its agents, servants, and/or employees, operated, maintained, managed and was in control of said facility and held itself out as a medical facility duly qualified and capable of rendering adequate medical care, treatment, and procedures to the public and for such purposes hired doctors, nurses and attendants and other personnel.

8. Upon information and belief, at all times hereinafter mentioned, the Defendant, Florence Women's Health, through its agents, servants, and/or employees, operated, maintained, managed and was in control of said facility and held itself out as a medical facility duly qualified and capable of rendering adequate medical care, treatment, and procedures to the public and for such purposes hired doctors, nurses and attendants and other personnel.

9. At all times relevant hereto, Defendant, Anu Chaudhry, M.D. was acting within the scope of employment or agency with Defendant McLeod Regional Medical Center.

10. At all times relevant hereto, Defendant, Anu Chaudhry, M.D. was acting within the scope of employment or agency with Defendant Florence Women's Health.

FACTUAL ALLEGATIONS

11. During a course of treatment beginning on or about June 17, 2003 through on or about February 3, 2004, the infant-plaintiff, D'Andre G■■■■, was delivered and came under the medical care and treatment of Anu Chaudhry, M.D., her agents, servants and/or employees.

12. During a course of treatment beginning on or about June 17, 2003 through on or about February 3, 2004, the infant-Plaintiff, D'Andre G■■■■, was delivered and came under the medical care and treatment of Defendant, McLeod Regional Medical Center, its agents, servants and/or employees.

13. During a course of treatment beginning on or about June 17, 2003 through on or about February 3, 2004, the infant-Plaintiff, D'Andre G■■■■, was delivered and came under the medical care and treatment of defendant, Florence Women's Health, its agents, servants and/or employees.

14. During a course of treatment beginning on or about June 17, 2003 through on or about February 3, 2004, the mother and natural guardian of the infant Plaintiff came under the medical care and treatment of Anu Chaudhry, M.D., her agents, servants and/or employees.

15. During a course of treatment beginning on or about June 17, 2003 through on or about February 3, 2004, the mother and natural guardian of the infant Plaintiff came under the medical care and treatment of McLeod Regional Medical Center, its agents, servants and/or employees.

16. That as a result of Defendants' negligence, the infant Plaintiff sustained severe

and permanent injuries including a left Erbs Palsy and brachial plexus injury. These deviations from the standard of care were the direct and proximate cause of infant-Plaintiff's damage.

17. That the medical and hospital care, treatment and procedures rendered by the Defendants, their agents, servants and/or employees, to the infant-Plaintiff, D'Andre G■■■■, were rendered in a negligent, careless and unprofessional manner; that the Defendants, their agents, servants, associates and/or employees failed to employ approved measures generally in use in the treatment of the infant-Plaintiff; departed from accepted standards of medical treatment; failed to use reasonable care and skill and failed to use their best judgment in the treatment of the infant-plaintiff, negligently managed the delivery and birth of the infant Plaintiff, D'Andre G■■■■, all of which resulted in severe, grievous and permanent personal injuries.

18. That the foregoing was not occasioned by any negligence on the part of the Plaintiffs contributing thereto.

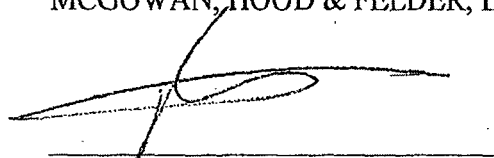
19. That by reason of the foregoing, the infant-Plaintiff has been severely and permanently damaged and accordingly, seeks appropriate recompense.

20. By reason of the foregoing, Plaintiffs have been damaged and is entitled to recover a sum to compensate Plaintiffs for actual, special, and consequential damages, including medical expenses, disfigurement, pain and suffering, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages. Plaintiffs are also entitled to recover a sum of punitive damages to punish and deter there Defendants and others like it from similar conduct in the future. All damages should be in an amount determined by a jury in this action.

WHEREFORE, Plaintiffs respectfully pray for a judgment against the Defendants, both jointly and severally, for actual damages, special damages, consequential damages, and punitive

damages in an amount to be determined by the jury at the trial of this action, for the costs and disbursements of this action and for such other and further relief as this Court deems just and proper.

MCGOWAN, HOOD & FELDER, LLC

A handwritten signature in black ink, appearing to read 'Robert V. Phillips', is written over a horizontal line.

Robert V. Phillips,
SC Bar # 68458
1539 Health Care Drive
Rock Hill, South Carolina 29732
803.327.7800

Rock Hill, South Carolina
November 24, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G., an infant under	)	
the age of 14 years,	)	
	)	
	)	
Plaintiff,	)	DEFENDANT ANU CHAUDRY, M.D.
	)	& FLORENCE WOMEN'S HEALTH
Versus	)	ANSWER TO PLAINTIFF'S COMPLAINT
	)	(Jury Trial Demanded)
Anu Chaudhry, M.D., McLeod Regional	)	
Medical Center, and Florence Women's	)	
Health,	)	
	)	
Defendants.	)	

COMES NOW, the Defendants, Anu Chaudry, M.D. and Florence Women's Health (hereinafter "these Defendants"), by and through their undersigned attorneys answering the Plaintiff's Complaint as follows, subject to the motion to dismiss filed herewith:

1. These Defendants deny each and every allegation of the Plaintiff's Complaint which is not hereinafter specifically admitted.

2. Answering Paragraph 1 of the Plaintiff's Complaint, these Defendants admit the Plaintiff is the mother of D'Andre G. These Defendants lack sufficient information to admit or deny all remaining allegations of this paragraph.

3. These Defendants admit Paragraph 2 of the Plaintiff's Complaint.

4. These Defendants admit, upon information and belief, the allegations of Paragraph 3 of the Plaintiff's Complaint.

5. These Defendants admit Paragraph 4, 5, 6, 7 and 8 of the Plaintiff's Complaint.

6. These Defendants deny Paragraph 9 of the Plaintiff's Complaint.

7. These Defendants admit, upon information and belief, Paragraph 10 of the Plaintiff's Complaint.

8. Answering Paragraphs 11 of the Plaintiff's Complaint, these Defendants admit Dr. Chaudry and members of her practice participated in the care and treatment of Ms. Johnson

and delivered D'Andre Green on or about February 3, 2004. Further reference is made to the medical records and testimony of all healthcare providers for a complete and accurate recitation of the care and treatment provided. All remaining and inconsistent allegations are denied.

9. The allegations of Paragraph 12 of the Plaintiff's Complaint do not apply to these Defendants, and therefore, no response is required. To the extent that a response is required, these Defendants refer to the Answer of the Defendant McLeod reference is made to the medical records and testimony of all healthcare providers for a complete and accurate recitation of the care and treatment provided. All remaining and inconsistent allegations are denied.

9. Answering Paragraphs 13 of the Plaintiff's Complaint, these Defendants admit Dr. Chaudry and members of her practice participated in the care and treatment of Ms. Johnson and delivered D'Andre G on or about February 3, 2004. Further reference is made to the medical records and testimony of all healthcare providers for a complete and accurate recitation of the care and treatment provided. All remaining and inconsistent allegations are denied.

10. Answering Paragraphs 14 of the Plaintiff's Complaint, these Defendants admit Dr. Chaudry and members of her practice participated in the care and treatment of Ms. Johnson and delivered D'Andre G on or about February 3, 2004. Further reference is made to the medical records and testimony of all healthcare providers for a complete and accurate recitation of the care and treatment provided. All remaining and inconsistent allegations are denied.

11. The allegations of Paragraph 15 of the Plaintiff's Complaint do not apply to these Defendants, and therefore, no response is required. To the extent that a response is required, these Defendants refer to the Answer of the Defendant McLeod reference is made to the medical records and testimony of all healthcare providers for a complete and accurate recitation of the care and treatment provided. All remaining and inconsistent allegations are denied.

12. These Defendants deny Paragraphs 16, 17, 18 19 and 20 of the Plaintiff's Complaint.

13. These Defendants deny the Plaintiff is entitled to the relief requested in her prayer for relief.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,

THESE DEFENDANTS ALLEGE:

(No Deviation from Standard of Care)

14. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 13 above as if fully repeated herein verbatim.

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

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,

THESE DEFENDANTS ALLEGE:

(No Proximate Cause)

16. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 15 above as if fully repeated herein verbatim.

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

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,

THESE DEFENDANTS ALLEGE:

(Failure to State a Claim)

18. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 17 above as if fully repeated herein verbatim.

19. The allegations contained in the Complaint fail in their entirety to state a claim upon which relief may be granted against these Defendants. As a result, this matter should be dismissed against some or all of these Defendants pursuant to Rule 12(b)(6), SCRPC.

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

20. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 19 above as if fully repeated herein verbatim.

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

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THESE DEFENDANTS ALLEGE:
(Statute of Limitations)

22. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 21 above as if fully repeated herein verbatim.

23. Based upon the pleadings, this matter was not commenced within the applicable statute of limitations. Accordingly, this Court lacks jurisdiction over the subject matter of this action and this matter should be dismissed pursuant to Rule 12(b)(1), SCRPC.

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

24. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 23 above as if fully repeated herein verbatim.

25. The minor's injuries are the result of a natural disease process.

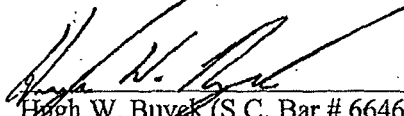
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE
THESE DEFENDANTS ALLEGE:
(Reservation and Non-Waiver)

26. These Defendants reallege and incorporate by reference all of their responses in Paragraphs 1 through 25 above as if fully repeated herein verbatim.

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

WHEREFORE having answered all of the allegations of the Plaintiff's Complaint and having asserted these affirmative defenses herein, these Defendants hereby move the Court for a dismissal of all claims, for costs and fees associated with the defense of this action, and for such other relief as the Court deems appropriate.

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Telephone: (843) 377-1400
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Email: hwb@buyckfirm.com

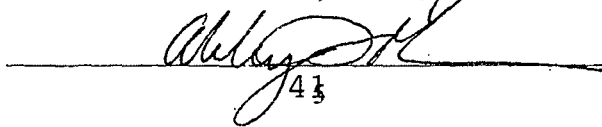

Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)
Attorneys for the Defendants
Anu Chaudhry, M.D. and Florence
Women's Health

Feb. 11, 2009
Mt. Pleasant, South Carolina
T:\21.35\Caption.doc

CERTIFICATE OF SERVICE

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

This 12 day of February, 2009.


4 1/2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G■■■■, an infant under	)	
the age of 14 years,	)	
	)	
	)	
	)	DEFENDANT'S FIRST SET OF
Plaintiff,	)	INTERROGATORIES TO
	)	THE PLAINTIFFS
Versus	)	
	)	
Anu Chaudhry, M.D., McLeod Regional	)	
Medical Center, and Florence Women's	)	
Health,	)	
	)	
	)	
Defendants.	)	

TO: ROBERT V. PHILLIPS, ATTORNEY FOR THE PLAINTIFF:

The Defendants, Anu Chaudhry, M.D. and Florence Women's Health (hereinafter "these Defendants"), propounds the following Interrogatories to the Plaintiff pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, to be answered separately and fully in writing under oath and signed by the person making them, within thirty (30) days after service hereof. These Interrogatories are deemed to be continuing, and if complete answers to any of them are not presently available, supplemental Answers are required at the time the information is available.

1. Give the names and addresses of persons known to the Plaintiff or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. For each person known to the Plaintiff or counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform this Defendant of the important facts known to or observed by such witness and provide a copy of any written or recorded statements taken from such witnesses if any written or recorded statements have been generated.

3. Set forth a list of photographs, plats, sketches or other prepared documents in the possession or control of the Plaintiff or her attorney that relate to the claims made in the Plaintiff's Complaint.

4. Set forth the names and addresses of all physicians who have treated the minor and the Plaintiff and all hospitals to which the minor and the Plaintiff have been committed in connection with the injuries alleged in the Complaint and also set forth a statement of all medical costs involved.

5. Please list the names and addresses of all insurance companies which have medical insurance coverage relating to the allegations in the Complaint and set forth the number or numbers of the policies involved and the amount of insurance paid to the Plaintiff or on behalf of the minor as a result of the injuries alleged in the Complaint.

6. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the Plaintiff and the minor.

7. Furnish the name, address, place of employment and qualifications of each and every expert witness the Plaintiff plans to call at the trial of this case. As to each person named in response to this Interrogatory, state:

- a. The subject matter on which the expert or experts are expected to testify;
- b. The substance of the facts and opinions to which each of the experts named is expected to testify;
- c. Furnish a summary of the grounds for each opinion expected to be elicited from each of the experts named in response to this Interrogatory;
- d. Provide a copy of any written report, memorandum or other written document prepared by each expert witness including a copy of all handwritten notes generated by the expert; and
- e. Whether said expert has conducted any investigation, inspection, examination and/or testing in connection with the issues involved with this suit, and, if so, the nature of each such investigation, inspection, examination and/or testing, the results of same and the dates on which such work was performed.

8. As to each expert listed in response to the previous Interrogatory, list the caption, jurisdiction and year of filing any suit in which he has given court or deposition testimony as an expert witness.

9. Please state the name, address, date of birth and place of birth of the Plaintiff and the minor.

10. Do you contend that any of the Defendants or any employees/agents of the Defendants made any admission or statement against interest to the Plaintiff or anyone else in connection with the matters alleged in the Complaint? If your answer is anything other than an unequivocal "no," please set forth the following: the substance of each such admission or statement; the person(s) who made each such admission or statement; the persons present when the admission or statement was made; the time, date and place each such admission or statement was made; and if you contend the admission or statement was made in writing, identify specifically each document you contend contains each such admission or statement.

11. Please give the names and addresses of all of the doctors, dentists, or other healthcare professionals that treated the Plaintiff and the minor for the last ten (10) years, including but not limited to all internists, chiropractors, rehabilitationists, hospitals or family practitioners.

12. If within the ten years prior to the time of this claim, the Plaintiff or minor suffered any type of physical or mental injury, illness, or other complaint, please state the following:

a) List fully all such prior injuries, illnesses, complaints and symptoms stating to which area or areas of the body they related, the dates and causes or cause of origin, and the date or dates when complaints and symptoms were no longer noticed.

b) State when, where, and the nature of medical treatment, if any, received for each such prior injury, illness, or complaint including the name of the medical practitioners providing such care.

c) Describe fully any accident or occurrence that gave rise to each of these injuries, complaints, or illnesses giving the date of each such accident or occurrence, where it occurred, and the nature of the event.

d) If a claim was made arising out of the injury, give the name of the person against whom the claim was made, the name of their insurer, the full caption and action number of any suit that was filed, and the disposition of the claim.

13. Please state whether or not the Plaintiff or minor have ever been a party to any other civil action, and if so, please give the names of all parties, the date of each such suit, and the Court in which each such suit was brought.

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.

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.

16. Set forth a list of all exhibits or other documents, which will be used in the trial of this case.

17. State with specificity each act wherein the Plaintiff submits that this Defendant failed to adhere to accepted medical practices or standards of care and in connection with each alleged deviation from the standard of care state the following:

- a. When did said deviation occur;
- b. What should have been done to comply with accepted medical practice;
- c. What supports your position that a violation of the standards of care occurred; and
- d. What damages did the Plaintiff and/or minor sustain as a result of said deviation of the standard of care.

18. Identify by date, author, location and citation, where appropriate, any code, regulation, statute, custom or standard which you contend this Defendant violated and state with particularity the facts upon which you rely to allege such violations.

19. Give the title, author, date, volume and page, where appropriate, of any periodical, journal, text, paper or other publication of any kind, to which the Plaintiff or her attorneys or her experts intend to refer, or about which the Plaintiff or her attorneys or her experts intend to ask any questions, during the examination or cross-examination of any witnesses at trial or during any deposition.

20. Has the Plaintiff been arrested or convicted of a crime? If so, please describe the nature of the alleged offense, the date of the offense, and the punishment received.

21. Do you contend that any of the minor's or Plaintiffs' treating physicians or healthcare providers were critical of the care and treatment rendered by this Defendant to the minor, mother of the minor, the Plaintiff or anyone else in connection with the matters alleged in the Complaint? If your answer is anything other than an unequivocal "no," please set forth the following: the substance of each such statement; the person(s) who made each such statement; the persons present when the statement was made; the time, date and place each such statement was made; and if you contend the statement was made in writing, identify specifically each document you contend contains each such statement.

22. What do you contend were all causes of the injury sustained by the minor?

23. Provide your complete factual and legal basis for every allegation of negligence alleged in the Plaintiff's Complaint against this Defendant and her practice.

24. At what time do you contend a c-section should have been performed to completely avoid injury to the Plaintiff and minor Plaintiff?

25. Describe in complete detail how the Plaintiff or her experts will contend that the pre-natal period, labor and delivery should have been managed in order to completely comply with the standard of care and to avoid injury to the minor.

26. Set forth all specific recollections of the Plaintiff and every family member of the minor present during labor or delivery regarding all conversations had with this Defendant before, during and after the hospitalization of the Plaintiff and minor that is at issue in this litigation. Describe completely the substance of all conversations, the date of the conversations, and the names of all persons present for each conversation.

27. Describe in complete detail every action, intervention or treatment that you contend should have been provided by the Defendant Dr. Chaudry in order to completely comply with the appropriate standard of care and avoid injury to the Plaintiff and the minor Plaintiff. Include the specific time at which each such action, intervention or treatment should have been provided.

28. If you contend the Defendant Dr. Chaudry should have performed some maneuver to resolve the shoulder dystocia that was not performed, please list all such maneuvers and set forth the time and sequence in which such maneuvers should have been performed.

29. Please set forth all authorities in the possession of the Plaintiff, her attorneys, or her experts which support any contention that an attempt at a vaginal delivery was inappropriate in this case.

30. If you contend that the fetal monitoring strips in anyway showed patterns consistent with fetal stress or uterine hyperstimulation, please list the specific panel number that shows such patterns and describe fully the pattern shown as well as the intervention that should have been taken to either resolve the pattern evidenced or to comply with the standard of care.

31. If you contend the fetal monitoring strips, the Plaintiff's presentation to McLeod Hospital, or anything else about the Plaintiff or minor Plaintiff's condition in anyway supports an allegation that a c-section should have been performed in this case, state your complete basis for that contention by describing the panel number, fetal heart rate pattern or contraction pattern and time at which there was evidence that a c-section should have been performed.

32. If you contend that there was an arrest of descent or that the labor curve in some way supports an allegation that a c-section should have been performed, list all medical records including fetal monitoring strips that support your contention and explain how each record supports your response.

33. If you contend there was evidence of fetal macrosomia or that fetal macrosomia should have been suspected, set forth your complete basis for that response including a referral to all medical records supporting your response. When referring to a specific medical record, set forth the provisions of the record that supports your response.

34. If you contend any action of any agent or employee of the co-Defendant caused injury to the minor, mother of the minor, or the Plaintiff, set forth your complete basis for that

response including a referral to all medical records supporting your response. When referring to a specific medical record, set forth the provisions of the record that supports your response.

35. If you contend an attempt at a vaginal delivery should not have been made or that an attempted vaginal delivery should have been abandoned at any point in time prior to the delivery of the minor, set forth your complete basis for your response including a referral to all medical records supporting your response. When referring to a specific medical record, set forth the provisions of the record that supports your response.

36. If you contend the minor Plaintiff suffered any brain injury or any injury related to a decreased oxygenation during the labor and delivery, list the diagnosis of the injury, the healthcare provider making such a diagnosis, and set forth all evidence that supports your answer.

37. If any of the Plaintiff's Responses to Requests for Admissions served by this Defendant during the course of this litigation is anything other than an unqualified admission, state the Plaintiff's complete legal and factual basis for each such response.

38. List the name and current addresses of all family members or friends of the Plaintiff or minor Plaintiff present at anytime during labor and delivery.

BUYCK & SANDERS, LLC
757 Johnnie Dodds Blvd., Suite 100
Mt. Pleasant, SC 29465
Telephone: (843) 377-1400
Facsimile: (843) 377-1403
Email: hwb@buyckfirm.com



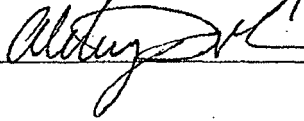
Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)
Attorneys for the Defendants
Anu Chaudhry, M.D. and Florence
Women's Health

February 11, 2009
Charleston, South Carolina
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CERTIFICATE OF SERVICE

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

This 12 day of February, 2009.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G., an infant under	)	
the age of 14 years,	)	
	)	
	)	
Plaintiff,	)	DEFENDANT'S FIRST SET OF
	)	REQUEST FOR PRODUCTION
Versus	)	TO THE PLAINTIFFS
	)	
Anu Chaudhry, M.D., McLeod Regional	)	
Medical Center, and Florence Women's	)	
Health,	)	
	)	
Defendants.	)	

TO: ROBERT V. PHILLIPS, ATTORNEY FOR THE PLAINTIFF:

Pursuant to South Carolina Rules of Civil Procedure Rule 34, the Defendants, Anu Chaudhry, M.D. and Florence Women's Health, (hereinafter "these Defendants") by and through its undersigned attorneys, hereby requests that you produce and permit the undersigned, or someone acting on their behalf, to inspect and/or copy the following documents, materials and/or product at issue within thirty (30) days from the date of this request. These requests shall be deemed continuing and to require supplemental responses if the Plaintiff obtains further documents or materials between the time of production and the time of trial.

1. Copies of all statements given by the Plaintiff which are in the possession of the Plaintiff or her attorney, whether written or recorded or on a tape recorder or otherwise, which relate to the matters complained of in the Complaint herein.

2. Copies of any and all statements given by either eye witnesses or other witnesses to the matters complained of in the Complaint herein which are in the possession of the Plaintiff or her attorney, whether written or recorded or on a tape recorder or otherwise.

3. Copies of any and all written reports by examining and/or treating physicians of the minor and of the Plaintiff by medical practitioners relating to the injuries complained of in the Complaint.

4. Copies of any and all statements, memoranda, bills or other materials which substantiate or relate to the claimed damages sustained by the Plaintiff and the minor.

5. All medical records, surgical records, mental health records, prescription drug records, financial records, bills, invoices, writings, notes or memoranda relating in any way to all of the Plaintiff's and all of the minor's physical, medical, or mental conditions, illnesses, or disabilities, including but not limited to those of doctors, nurses, practitioners, technicians, hospitals, clinics, institutions, laboratories, or other health care providers or third party private or governmental health or accident insurers, without regard to whether it is the Plaintiff's contention that such physical, medical or mental conditions, illnesses, or disabilities were caused in any way by this Defendant:

- a) For a period of five years before and up to the time of the occurrence alleged in the Plaintiff's Complaint;
- b) For a period of time commencing on the date of the occurrence alleged in the Plaintiff's Complaint up to and including the present date.

6. With regard to any medical or hospital records of the Plaintiff and of the minor referred to in Request Number 5 above which are in existence but are not physically in possession or custody of the Plaintiff or the Plaintiff's attorney, but which are in the Plaintiff's control or the control of the mother of the minor, this Defendant requests that the Plaintiff executes authorizations to each doctor or hospital where records exist, to allow this Defendant to obtain and examine copies of said records.

7. All photographs, sketches, medical records or diagrams relating in any way to the allegations of the Plaintiff's Complaint.

8. Any and all reports, correspondence or memoranda of any and all expert witnesses upon which the Plaintiff intends to rely in proving her claims.

9. The Plaintiff's state and federal income tax returns for the past five years.

10. Reports or projections of any accountants, economist or other financial consultants concerning past or prospective economic damages, to include loss of income, loss of

income producing capacity, cost of nursing or attendant care, cost of future medical care and/or treatment, etc.

11. Copies of all exhibits or other documents, which will be used or which may be used in the trial of this case.

12. Produce all evidence including but not limited to documents or tangible evidence that you contend constitutes an admission or statement against interest of this Defendant and/or any other Defendant.

13. Produce all evidence including but not limited to documents or tangible evidence that constitutes an admission against the interest of the Plaintiff and/or of the minor.

14. Produce copies of all periodicals, journals, texts, papers or other publications of any kind, to which the Plaintiff or her attorney or her experts intend to refer, or about which the Plaintiff or her attorneys or her experts intend to ask any questions, during the examination or cross-examination of any witnesses at trial or during any deposition.

15. Produce a copy of all documents that you contend evidence a criticism of the care and treatment rendered by this Defendant to the Plaintiff or minor by any of the Plaintiff's or minor's treating physicians or healthcare providers.

16. Produce copies of all documents referenced within Plaintiff's Answers to Interrogatories.

17. Produce copies of all documents received pursuant to subpoena or FOIA request in this matter.

18. Produce copies of all documents that support all specifications of negligence alleged against this Defendant in the Plaintiff's Complaint.

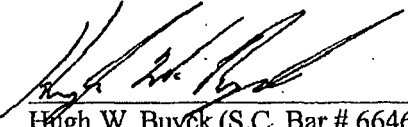
19. Produce copies of all "Day in the Life of" or similar videos generated that relate to this litigation.

20. Produce all documents from the medical literature that you contend support the Plaintiff's theories of liability against the Defendants in this case.

21. Produce copies of all demonstrative aides or devices including power point presentations that will be used during the trial of this matter.

22. If any of the Plaintiff's Responses to Requests for Admissions served by this Defendant during the course of this litigation is anything other than an unqualified admission, produce all documents that support the Plaintiff's response.

BUYCK & SANDERS, LLC
757 Johnnie Dodds Blvd., Suite 100
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Email: hwb@buyckfirm.com



Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)
Attorneys for the Defendants
Anu Chaudhry, M.D. and Florence
Women's Health

February 11, 2009
Charleston, South Carolina
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CERTIFICATE OF SERVICE

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

This 12 day of February, 2009.



STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother Natural Guardian of
D'Andre G., an infant under the age of 14 years,

☐ Plaintiff,

Versus

Anu Chaudhry, M.D., McLeod Regional Medical Center,
and Florence Women's Health,

☒ Defendants.

check box above indicating submitting party

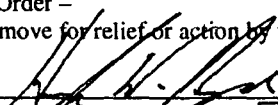
) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

CASE NO. 08-CP-21-2326

DEFENDANT ANU CHAUDRY, M.D.
& FLORENCE WOMEN'S HEALTH
NOTICE OF MOTION
AND

MOTION FOR SUMMARY JUDGMENT

Plaintiff's attorney: Kevin H. Sitnik, Esquire McGowan Hood & Felder, LLC 1539 Health Care Dr. Rock Hill, SC 29732 Phone: (803) 327-7800 Fax: (803) 328-5656 Email: ksitnik@mcgowanhood.com		Defendants' attorney: Hugh W. Buyck (S.C. Bar # 66462) BUYCK & SANDERS LAW FIRM, LLC 757 Johnnie Dodds Blvd., Suite 100 P.O. Box 2424 Mt. Pleasant, SC 29465-2424 Phone: (843) 377-1400; Fax: (843) 377-1403 Email: hwb@buyckfirm.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)			
SECTION I: Hearing Information			
Nature of Motion: Notice of Motion and Motion for Summary Judgment Estimated Time Needed: 30 minutes Court Reporter Needed: YES ☒ NO ☐			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order – I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff/☒ Defendants 3/24/10 Date submitted			
SECTION III: Motion Fee			
☒ PAID – AMOUNT: \$25 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: ☐ State Agency v. Indigent Party ☐ Post-Conviction Relief ☐ Motion for Execution (Rule 69, SCRPC)			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ DATE: _____	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		<u>DATE FILED</u>	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED-AMOUNT DUE: _____			

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G■■■■, an infant under	)	
the age of 14 years,	)	
	)	
	)	
Plaintiff,	)	DEFENDANT ANU CHAUDRY, M.D.
	)	& FLORENCE WOMEN'S HEALTH
Versus	)	NOTICE OF MOTION
	)	AND
Anu Chaudhry, M.D., McLeod Regional	)	MOTION FOR SUMMARY JUDGMENT
Medical Center, and Florence Women's	)	
Health,	)	
	)	
Defendants.	)	

TO: KEVIN H. SITNIK, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendants, Anu Chaudhry, M.D. and Florence Women's Health (hereinafter "these Defendants"), will move this Court in ten days or as soon as it may be heard thereafter for an Order granting these Defendants Summary Judgment pursuant to Rules 16 and 56 of the South Carolina Rules of Civil Procedure.

The grounds for these Defendants' motion include but are not limited to the following issues:

1) A Consent Scheduling Order dated August 27, 2009 was entered by the parties and the Plaintiffs have failed to present for deposition, name additional witnesses or name expert witnesses to support the claims for medical negligence within the mandatory timeframes therein. (Exhibit A)

2) Plaintiff has failed to respond to Interrogatories and Requests for Production originally propounded to the Plaintiff on or about February 12, 2009. (Interrogatories and Requests for Production attached as Exhibit B)

Counsel for these Defendants has previously provided letters to Plaintiff's counsel pursuant to Rule 11, SCRCR requesting responses to discovery and as of the date of this Motion, responses to discovery have not been received.

LEGAL STANDARD

Summary judgment is appropriate when there is "no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). A fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257.

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in the pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324. The existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. Anderson, 477 U.S. at 252. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must provide existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). When a Motion for Summary Judgment is made and supported by proper affidavits, a Plaintiff cannot rest on allegations in his pleadings that are controverted by affidavits and/or depositions submitted by Defendants. S.C.R. Civ. p. 56 (E); Manly v. Manly, 291 S.C. 325, 353 S.E.2d 312 (S.C. App. 1987); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (S.C. App. 1985). A party cannot escape summary judgment on the mere hope that something may develop at trial or by remaining silent and later claiming additional facts supporting the cause of action. Hammond, 232 S.E.2d 336. Therefore, where the Plaintiff relies solely upon the pleadings, files no counter affidavits, and makes no factual showing in opposition to a Motion for Summary Judgment, the court is required to grant summary judgment, if under the facts presented by the Defendant, he is entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974).

Although the burden is on the party seeking summary judgment, the non-moving party must point to specific facts showing that there is a genuine issue for trial rather than resting on the assertions of its pleadings. See Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 407 S.E.2d 637 (1991); Laughrdige v. Parkinson, 304 S.C. 51, 403 S.E.2d 120 (1991). If the non-moving party fails to make a showing sufficient to establish the existence of an element of its case, and on which it will bear the ultimate burden of proof at trial, there can be no genuine issue of material fact because the failure of proof concerning an essential element of the case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

LEGAL ARGUMENT

In a medical malpractice action, such as the case at bar involving the delivery of a child and allegations of a brachial plexus injury and Erb's palsy, the Plaintiff must establish the appropriate standard of care and a deviation thereof by expert medical testimony. The Plaintiff filed this suit on

December 8, 2008. Despite the case pending for over 16 months, Plaintiff has failed to name an expert to testify as to any deviation of the standard of care in this case. The Plaintiff has also failed to comply with a scheduling order entered by the Hon. Thomas A. Russo, Chief Administrative Judge for the Twelfth Judicial Circuit on August 22, 2009.

In a medical malpractice action the burden of proof is on the Plaintiff throughout. Bothelo v. Bycura, 282 S.C. 578, 320 S.E. 2d 59 (S.C. App. 1984).

In a medical malpractice action the Plaintiff must:

1. Establish the required standard of care by presenting evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, and
2. Establish defendant's failure to conform to that standard by presenting evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the Plaintiff.

Pederson v. Gould, 288 S.C. 141, 341 S.E. 2d 633 (1986); Cox v. Lund, 286 S.C. 410, 334 S.E. 2d 116 (1985).

Furthermore, the Plaintiff must establish both the required standard of care and the Defendant's failure to conform to that standard through the use of expert testimony, unless the subject matter is one in which the common knowledge or experience of lay persons is comprehensive enough to permit the recognition or inference of negligence from the particular facts. Pederson, supra; Bothelo v. Bycura, 282 S.C. 578, 320 S.E. 2d 59 (S.C. App. 1984).

The case at bar concerns the complicated issues surrounding the birthing process of a child, including alleged brachial plexus injuries and Erb's palsy. The type of testimony required and expected to be rendered at trial is not within the layperson's knowledge and experience. To date, the Plaintiff has failed to produce any testimony as to the standard of care or breach thereof by expert testimony or otherwise. Plaintiff, therefore, can not overcome the Defendants' Motion for Summary Judgment.

A party cannot escape summary judgment on the mere hope that something may develop at trial or by remaining silent and later claiming additional facts supporting the cause of action. Hammond, 232 S.E.2d 336. Therefore, where the Plaintiff relies solely upon the pleadings, files no counter affidavits, and makes no factual showing in opposition to Motion for Summary Judgment, the court is required to grant summary judgment, if under the facts presented by the Defendant, he is entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974).

Although the burden is on the party seeking summary judgment, the non-moving party must point to specific facts showing that there is a genuine issue for trial rather than resting on the assertions of its pleadings. See Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 407 S.E.2d 637 (1991); Laughrdige v. Parkinson, 304 S.C. 51, 403 S.E.2d 120 (1991). If the non-moving party fails to make a showing sufficient to establish the existence of an element of its case, and on which it will bear the ultimate burden of proof at trial, there can be no genuine issue of material fact because the failure of proof concerning an essential element of the case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In this case, the Plaintiff has failed to make a showing sufficient to establish the essential elements of her case, specifically expert testimony establishing the standard of care and breach of that standard by Dr. Chaudry. Failure to name an expert in this regard is fatal to the pursuit of her claims. Therefore, under Rule 56(c) there is no genuine issue of material fact and these Defendants are entitled to judgment as a matter of law.

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P.O. Box 2424
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Facsimile: (843) 377-1403
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Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)

Attorneys for the Defendants
Anu Chaudhry, M.D. and Florence
Women's Health

March 24, 2010

Mt. Pleasant, South Carolina

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CERTIFICATE OF SERVICE

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

This 24 day of March, 2010.



STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother Natural
Guardian of D'Andre G., an infant under
the age of 14 years,

Plaintiff,

Versus

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 08-CP-21-2326

CONSENT
SCHEDULING ORDER

FILED
2009 AUG 27 PM 3:25
FLORENCE COUNTY, SC

The Court finds that the below Scheduling Order is reasonable and that in the interests of all parties a date certain for trial is appropriate.

ACCORDINGLY, IT IS ORDERED AS FOLLOWS:

CERTIFIED A TRUE COPY

Corinne Reel-Spearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

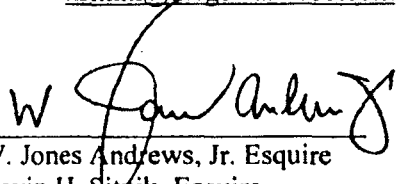
1. The Plaintiffs shall present for deposition by October 15, 2009.
2. Plaintiffs shall name expert witnesses by November 30, 2009.
3. The depositions of the parties and treating medical providers shall be completed by January 8, 2010.
4. The depositions of the Plaintiffs' experts shall be completed by February 26, 2010.
5. The Defendants shall identify expert witnesses by May 7, 2010.
6. Defendants' expert witnesses' depositions shall be completed by June 25, 2010.
7. Mediation shall be held prior to July 16, 2010.
8. The parties will attend the first date certain roster meeting setting this matter for a date certain trial after August 2, 2010.
9. Any dates within this Order not affecting the trial date can be changed by consent of the parties.

Thomas A. Russo
The Honorable ~~Michael G. Nettles~~ Thomas A. Russo
Chief Administrative Judge for the Twelfth Judicial
Circuit

8/27, 2009
Florence, SC

WE CONSENT:

MCGOWAN, HOOD & FELDER, LLC
1517 Hampton St.
Columbia, SC 29201
Phone: (803) 779-0100
Fax: (803) 787-0750
Email: jandrews@mcgowanhood.com
ksitnik@mcgowanhood.com

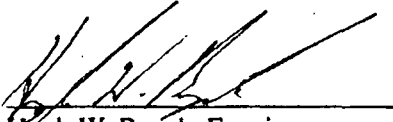

W. Jones Andrews, Jr. Esquire
Kevin H. Sitnik, Esquire

Attorneys for Plaintiff

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

WE CONSENT:

BUYCK & SANDERS LAW FIRM, LLC
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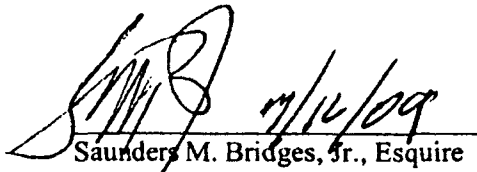
Hugh W. Buyck, Esquire

Attorney for the Defendants
Anu Chaudhry, M.D. and Florence Women's Health

FILED
2009 AUG 21 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

WE CONSENT:

AIKEN BRIDGES NUNN ELLIOTT & TYLER, PA
P.O. Drawer 1931
Florence, SC 29503
Phone: (843) 669-8787 (ext. 353)
Fax: (843) 664-0097
Email: smbjr@aikenbridges.com

 7/14/09
Saunders M. Bridges, Jr., Esquire

Attorney for Defendant
McLeod Regional Medical Center

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G****, an infant under	)	
the age of 14 years,	)	
	)	
	)	
	)	DEFENDANT'S FIRST SET OF
Plaintiff,	)	INTERROGATORIES TO
	)	THE PLAINTIFFS
Versus	)	
	)	
Anu Chaudhry, M.D., McLeod Regional	)	
Medical Center, and Florence Women's	)	
Health,	)	
	)	
	)	
Defendants.	)	

TO: ROBERT V. PHILLIPS, ATTORNEY FOR THE PLAINTIFF:

The Defendants, Anu Chaudhry, M.D. and Florence Women's Health (hereinafter "these Defendants"), propounds the following Interrogatories to the Plaintiff pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, to be answered separately and fully in writing under oath and signed by the person making them, within thirty (30) days after service hereof. These Interrogatories are deemed to be continuing, and if complete answers to any of them are not presently available, supplemental Answers are required at the time the information is available.

1. Give the names and addresses of persons known to the Plaintiff or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. For each person known to the Plaintiff or counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform this Defendant of the important facts known to or observed by such witness and provide a copy of any written or recorded statements taken from such witnesses if any written or recorded statements have been generated.

3. Set forth a list of photographs, plats, sketches or other prepared documents in the possession or control of the Plaintiff or her attorney that relate to the claims made in the Plaintiff's Complaint.

4. Set forth the names and addresses of all physicians who have treated the minor and the Plaintiff and all hospitals to which the minor and the Plaintiff have been committed in connection with the injuries alleged in the Complaint and also set forth a statement of all medical costs involved.

5. Please list the names and addresses of all insurance companies which have medical insurance coverage relating to the allegations in the Complaint and set forth the number or numbers of the policies involved and the amount of insurance paid to the Plaintiff or on behalf of the minor as a result of the injuries alleged in the Complaint.

6. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the Plaintiff and the minor.

7. Furnish the name, address, place of employment and qualifications of each and every expert witness the Plaintiff plans to call at the trial of this case. As to each person named in response to this Interrogatory, state:

- a. The subject matter on which the expert or experts are expected to testify;
- b. The substance of the facts and opinions to which each of the experts named is expected to testify;
- c. Furnish a summary of the grounds for each opinion expected to be elicited from each of the experts named in response to this Interrogatory;
- d. Provide a copy of any written report, memorandum or other written document prepared by each expert witness including a copy of all handwritten notes generated by the expert; and
- e. Whether said expert has conducted any investigation, inspection, examination and/or testing in connection with the issues involved with this suit, and, if so, the nature of each such investigation, inspection, examination and/or testing, the results of same and the dates on which such work was performed.

8. As to each expert listed in response to the previous Interrogatory, list the caption, jurisdiction and year of filing any suit in which he has given court or deposition testimony as an expert witness.

9. Please state the name, address, date of birth and place of birth of the Plaintiff and the minor.

10. Do you contend that any of the Defendants or any employees/agents of the Defendants made any admission or statement against interest to the Plaintiff or anyone else in connection with the matters alleged in the Complaint? If your answer is anything other than an unequivocal "no," please set forth the following: the substance of each such admission or statement; the person(s) who made each such admission or statement; the persons present when the admission or statement was made; the time, date and place each such admission or statement was made; and if you contend the admission or statement was made in writing, identify specifically each document you contend contains each such admission or statement.

11. Please give the names and addresses of all of the doctors, dentists, or other healthcare professionals that treated the Plaintiff and the minor for the last ten (10) years, including but not limited to all internists, chiropractors, rehabilitationists, hospitals or family practitioners.

12. If within the ten years prior to the time of this claim, the Plaintiff or minor suffered any type of physical or mental injury, illness, or other complaint, please state the following:

a) List fully all such prior injuries, illnesses, complaints and symptoms stating to which area or areas of the body they related, the dates and causes or cause of origin, and the date or dates when complaints and symptoms were no longer noticed.

b) State when, where, and the nature of medical treatment, if any, received for each such prior injury, illness, or complaint including the name of the medical practitioners providing such care.

c) Describe fully any accident or occurrence that gave rise to each of these injuries, complaints, or illnesses giving the date of each such accident or occurrence, where it occurred, and the nature of the event.

d) If a claim was made arising out of the injury, give the name of the person against whom the claim was made, the name of their insurer, the full caption and action number of any suit that was filed, and the disposition of the claim.

13. Please state whether or not the Plaintiff or minor have ever been a party to any other civil action, and if so, please give the names of all parties, the date of each such suit, and the Court in which each such suit was brought.

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.

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.

16. Set forth a list of all exhibits or other documents, which will be used in the trial of this case.

17. State with specificity each act wherein the Plaintiff submits that this Defendant failed to adhere to accepted medical practices or standards of care and in connection with each alleged deviation from the standard of care state the following:

- a. When did said deviation occur;
- b. What should have been done to comply with accepted medical practice;
- c. What supports your position that a violation of the standards of care occurred; and
- d. What damages did the Plaintiff and/or minor sustain as a result of said deviation of the standard of care.

18. Identify by date, author, location and citation, where appropriate, any code, regulation, statute, custom or standard which you contend this Defendant violated and state with particularity the facts upon which you rely to allege such violations.

19. Give the title, author, date, volume and page, where appropriate, of any periodical, journal, text, paper or other publication of any kind, to which the Plaintiff or her attorneys or her experts intend to refer, or about which the Plaintiff or her attorneys or her experts intend to ask any questions, during the examination or cross-examination of any witnesses at trial or during any deposition.

20. Has the Plaintiff been arrested or convicted of a crime? If so, please describe the nature of the alleged offense, the date of the offense, and the punishment received.

21. Do you contend that any of the minor's or Plaintiffs' treating physicians or healthcare providers were critical of the care and treatment rendered by this Defendant to the minor, mother of the minor, the Plaintiff or anyone else in connection with the matters alleged in the Complaint? If your answer is anything other than an unequivocal "no," please set forth the following: the substance of each such statement; the person(s) who made each such statement; the persons present when the statement was made; the time, date and place each such statement was made; and if you contend the statement was made in writing, identify specifically each document you contend contains each such statement.

22. What do you contend were all causes of the injury sustained by the minor?

23. Provide your complete factual and legal basis for every allegation of negligence alleged in the Plaintiff's Complaint against this Defendant and her practice.

24. At what time do you contend a c-section should have been performed to completely avoid injury to the Plaintiff and minor Plaintiff?

25. Describe in complete detail how the Plaintiff or her experts will contend that the prenatal period, labor and delivery should have been managed in order to completely comply with the standard of care and to avoid injury to the minor.

26. Set forth all specific recollections of the Plaintiff and every family member of the minor present during labor or delivery regarding all conversations had with this Defendant before, during and after the hospitalization of the Plaintiff and minor that is at issue in this litigation. Describe completely the substance of all conversations, the date of the conversations, and the names of all persons present for each conversation.

27. Describe in complete detail every action, intervention or treatment that you contend should have been provided by the Defendant Dr. Chaudry in order to completely comply with the appropriate standard of care and avoid injury to the Plaintiff and the minor Plaintiff. Include the specific time at which each such action, intervention or treatment should have been provided.

28. If you contend the Defendant Dr. Chaudry should have performed some maneuver to resolve the shoulder dystocia that was not performed, please list all such maneuvers and set forth the time and sequence in which such maneuvers should have been performed.

29. Please set forth all authorities in the possession of the Plaintiff, her attorneys, or her experts which support any contention that an attempt at a vaginal delivery was inappropriate in this case.

30. If you contend that the fetal monitoring strips in anyway showed patterns consistent with fetal stress or uterine hyperstimulation, please list the specific panel number that shows such patterns and describe fully the pattern shown as well as the intervention that should have been taken to either resolve the pattern evidenced or to comply with the standard of care.

31. If you contend the fetal monitoring strips, the Plaintiff's presentation to McLeod Hospital, or anything else about the Plaintiff or minor Plaintiff's condition in anyway supports an allegation that a c-section should have been performed in this case, state your complete basis for that contention by describing the panel number, fetal heart rate pattern or contraction pattern and time at which there was evidence that a c-section should have been performed.

32. If you contend that there was an arrest of descent or that the labor curve in some way supports an allegation that a c-section should have been performed, list all medical records including fetal monitoring strips that support your contention and explain how each record supports your response.

33. If you contend there was evidence of fetal macrosomia or that fetal macrosomia should have been suspected, set forth your complete basis for that response including a referral to all medical records supporting your response. When referring to a specific medical record, set forth the provisions of the record that supports your response.

34. If you contend any action of any agent or employee of the co-Defendant caused injury to the minor, mother of the minor, or the Plaintiff, set forth your complete basis for that

response including a referral to all medical records supporting your response. When referring to a specific medical record, set forth the provisions of the record that supports your response.

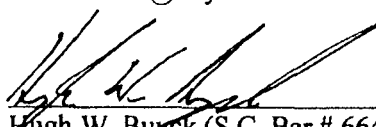
35. If you contend an attempt at a vaginal delivery should not have been made or that an attempted vaginal delivery should have been abandoned at any point in time prior to the delivery of the minor, set forth your complete basis for your response including a referral to all medical records supporting your response. When referring to a specific medical record, set forth the provisions of the record that supports your response.

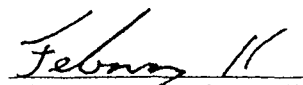
36. If you contend the minor Plaintiff suffered any brain injury or any injury related to a decreased oxygenation during the labor and delivery, list the diagnosis of the injury, the healthcare provider making such a diagnosis, and set forth all evidence that supports your answer.

37. If any of the Plaintiff's Responses to Requests for Admissions served by this Defendant during the course of this litigation is anything other than an unqualified admission, state the Plaintiff's complete legal and factual basis for each such response.

38. List the name and current addresses of all family members or friends of the Plaintiff or minor Plaintiff present at anytime during labor and delivery.

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Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)
Attorneys for the Defendants
Anu Chaudhry, M.D. and Florence
Women's Health


February 11, 2009
Charleston, South Carolina
Z:\121.35\Interrogatories.doc

CERTIFICATE OF SERVICE

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

This 12 day of February, 2009.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G. [REDACTED], an infant under	)	
the age of 14 years,	)	
	)	
	)	
	)	DEFENDANT'S FIRST SET OF
	)	REQUEST FOR PRODUCTION
	)	TO THE PLAINTIFFS
	)	
Plaintiff,	)	
	)	
Versus	)	
	)	
Anu Chaudhry, M.D., McLeod Regional	)	
Medical Center, and Florence Women's	)	
Health,	)	
	)	
	)	
Defendants.	)	

TO: ROBERT V. PHILLIPS, ATTORNEY FOR THE PLAINTIFF:

Pursuant to South Carolina Rules of Civil Procedure Rule 34, the Defendants, Anu Chaudhry, M.D. and Florence Women's Health, (hereinafter "these Defendants") by and through its undersigned attorneys, hereby requests that you produce and permit the undersigned, or someone acting on their behalf, to inspect and/or copy the following documents, materials and/or product at issue within thirty (30) days from the date of this request. These requests shall be deemed continuing and to require supplemental responses if the Plaintiff obtains further documents or materials between the time of production and the time of trial.

1. Copies of all statements given by the Plaintiff which are in the possession of the Plaintiff or her attorney, whether written or recorded or on a tape recorder or otherwise, which relate to the matters complained of in the Complaint herein.

2. Copies of any and all statements given by either eye witnesses or other witnesses to the matters complained of in the Complaint herein which are in the possession of the Plaintiff or her attorney, whether written or recorded or on a tape recorder or otherwise.

3. Copies of any and all written reports by examining and/or treating physicians of the minor and of the Plaintiff by medical practitioners relating to the injuries complained of in the Complaint.

4. Copies of any and all statements, memoranda, bills or other materials which substantiate or relate to the claimed damages sustained by the Plaintiff and the minor.

5. All medical records, surgical records, mental health records, prescription drug records, financial records, bills, invoices, writings, notes or memoranda relating in any way to all of the Plaintiff's and all of the minor's physical, medical, or mental conditions, illnesseses, or disabilities, including but not limited to those of doctors, nurses, practitioners, technicians, hospitals, clinics, institutions, laboratories, or other health care providers or third party private or governmental health or accident insurers, without regard to whether it is the Plaintiff's contention that such physical, medical or mental conditions, illnesses, or disabilities were caused in any way be this Defendant:

- a) For a period of five years before and up to the time of the occurrence alleged in the Plaintiff's Complaint;
- b) For a period of time commencing on the date of the occurrence alleged in the Plaintiff's Complaint up to and including the present date.

6. With regard to any medical or hospital records of the Plaintiff and of the minor referred to in Request Number 5 above which are in existence but are not physically in possession or custody of the Plaintiff or the Plaintiff's attorney, but which are in the Plaintiff's control or the control of the mother of the minor, this Defendant requests that the Plaintiff executes authorizations to each doctor or hospital where records exists, to allow this Defendant to obtain and examine copies of said records.

7. All photographs, sketches, medical records or diagrams relating in any way to the allegations of the Plaintiff's Complaint.

8. Any and all reports, correspondence or memoranda of any and all expert witnesses upon which the Plaintiff intends to rely in proving her claims.

9. The Plaintiff's state and federal income tax returns for the past five years.

10. Reports or projections of any accountants, economist or other financial consultants concerning past or prospective economic damages, to include loss of income, loss of

income producing capacity, cost of nursing or attendant care, cost of future medical care and/or treatment, etc.

11. Copies of all exhibits or other documents, which will be used or which may be used in the trial of this case.

12. Produce all evidence including but not limited to documents or tangible evidence that you contend constitutes an admission or statement against interest of this Defendant and/or any other Defendant.

13. Produce all evidence including but not limited to documents or tangible evidence that constitutes an admission against the interest of the Plaintiff and/or of the minor.

14. Produce copies of all periodicals, journals, texts, papers or other publications of any kind, to which the Plaintiff or her attorney or her experts intend to refer, or about which the Plaintiff or her attorneys or her experts intend to ask any questions, during the examination or cross-examination of any witnesses at trial or during any deposition.

15. Produce a copy of all documents that you contend evidence a criticism of the care and treatment rendered by this Defendant to the Plaintiff or minor by any of the Plaintiff's or minor's treating physicians or healthcare providers.

16. Produce copies of all documents referenced within Plaintiff's Answers to Interrogatories.

17. Produce copies of all documents received pursuant to subpoena or FOIA request in this matter.

18. Produce copies of all documents that support all specifications of negligence alleged against this Defendant in the Plaintiff's Complaint.

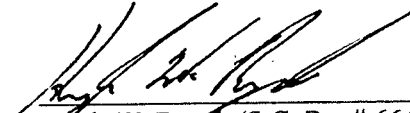
19. Produce copies of all "Day in the Life of" or similar videos generated that relate to this litigation.

20. Produce all documents from the medical literature that you contend support the Plaintiff's theories of liability against the Defendants in this case.

21. Produce copies of all demonstrative aides or devices including power point presentations that will be used during the trial of this matter.

22. If any of the Plaintiff's Responses to Requests for Admissions served by this Defendant during the course of this litigation is anything other than an unqualified admission, produce all documents that support the Plaintiff's response.

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Facsimile: (843) 377-1403
Email: hwb@buyckfirm.com



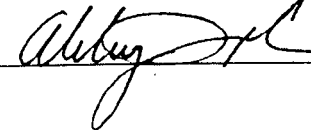
Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)
Attorneys for the Defendants
Anu Chaudhry, M.D. and Florence
Women's Health

February 11, 2009
Charleston, South Carolina
ZA21.35\RFP.doc

CERTIFICATE OF SERVICE

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

This 12 day of February, 2009.



STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS

Marquette Johnson, as Mother & Natural Guardian of
D'Andre G., an infant under the age of 14 years,
☒ Plaintiff

CASE NO.

08-CP-21-2326

v.

Anu Chaudhry, M.D., McLeod Regional Medical Center
and Florence Women's Health,
☐ Defendant

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: W. Jones Andrews, Jr., Bar No. 64294 Address: 1517 Hampton Street Columbia, South Carolina 29201 phone: (803) 779-0100 fax: (803) 256-0702 e-mail: jandrews@mcgowanhood.com other:		Defendant's Attorney: Saunders M. Bridges, Jr., Esquire, Bar No. Address: Post Office Drawer 1931 Florence, South Carolina 29503 phone: (843) 669-8787 fax: (843) 664-0097 e-mail: smbjr@aikenbridges.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Reconsideration Estimated Time Needed: 30mins Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff / ☐ Defendant		Date submitted 5/23/2010	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE: _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: <u>SD</u>		Date Filed: _____	
☒ MOTION FEE COLLECTED: <u>25.00</u> ☐ CONTESTED - AMOUNT DUE: _____			

CERTIFIED: A TRUE COPY

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

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother and Natural
Guardian of D'Andre Green, an infant under
the age of 14 years,

Plaintiff,

vs.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

C/A No. 08-cp-21-2326

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

FILED
FLORENCE COUNTY
MAY 12 2010
PM 2:13

TO: HUGH W. BUYCK, ATTORNEY FOR DEFENDANT CHAUDHRY AND
DEFENDANT FLORENCE WOMEN'S HEALTH, YOU WILL PLEASE TAKE NOTICE that
the Plaintiff D'Andre Green, an infant under the age of fourteen years, by and through his mother
and natural guardian, Marquette Johnson, and by and through undersigned counsel, hereby
moves for reconsideration of the order dated May 3, 2010, and entered on May 7, 2010, wherein
the Court granted summary judgment to these Defendants based upon Plaintiff's failure to
identify an expert witness and present that witness for deposition by dates established in a
Scheduling Order, which in turn was entered by consent on August 27, 2009. Written notice of
entry of this Order granting summary judgment and dismissing the case against these Defendants
was received by Plaintiff's counsel on May 12, 2010, making this motion timely, pursuant to
Rules 52(b) and 59(e), SCRCP. D'Andre Green's motion is based upon the facts and laws cited
herein, the record as previously exists, and upon the arguments of counsel. **Plaintiff's counsel
respectfully implores this Court to permit oral argument of this motion for reconsideration.**

VERIFIED: A TRUE COPY.

1

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

In addition, Plaintiff's counsel requests the Court reconsider its denial of Plaintiff's motion to extend the scheduling Order, which was made in open court on the date Defendants' motion for summary judgment was heard, and to state findings of fact and conclusions of law in support thereof, so as to preserve this issue for appellate review. Plaintiff's present motion is based upon the grounds that the Order is based upon a "first offense" failure to comply with a scheduling Order, which does not give rise to a judgment on the merits. In addition, a ruling of dismissal for failure to comply with an initial scheduling Order has been ruled improper, where the offending party was not given an opportunity to cure, and where there is no finding of intentional misconduct. Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996). Plaintiff would further implore the Court to reconsider whether some other less drastic sanction, targeted to the specific conduct, may be more appropriate under the circumstances described herein.

PERTINENT FACTS

This is a medical malpractice action, which by Defendant's own admission, "concerns complicated issues surrounding the birthing process of a child, including alleged brachial plexus injuries and Erb's Palsy." Defendants' Motion for Summary Judgment, p. 4. This child's complaint alleges that as a result of the negligence of the Defendants, "the infant Plaintiff sustained severe and permanent injuries including a left Erbs Palsy and brachial plexus injury." Complaint, ¶ 16. Plaintiff, as the motion and natural guardian on D'Andre, seeks "to recover a sum to compensate Plaintiffs for actual, special, and consequential damages, including medical expenses, disfigurement, pain and suffering, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages." Complaint ¶ 20. Plaintiff's Complaint also asserts a claim for punitive damages. *Id.*

Plaintiff D'Andre Green was born on or about February 3, 2004. The current action was instituted by Plaintiff Johnson, Plaintiff Green's mother and natural guardian, on or about December 8, 2008. This action was commenced via a referral from an attorney not licensed to practice in the state of South Carolina--Daniel Buttafuccho, from New York. That attorney first contacted Kent Brown, an attorney from Charlotte, who then contacted the office of McGowan Hood and Felder, LLC, to serve as local counsel. As a potential claim on behalf of the mother was possibly about to expire, due the statute of limitations, an attorney with McGowan, Hood and Felder filed suit on behalf of both the mother and the child. By previous consent Orders, the individual claim of the mother was subsequently dismissed, and Mr. Brown was relieved as counsel of record. A status conference was held, wherein Defendants Chaudry and Florence Women's Health's counsel objected to a request to stay this case, pursuant to Rule 40(j), SCRCP. Therefore, an initial, and only scheduling order was entered by consent on or about August 27, 2009. (Attached as Exhibit A).

Thereafter, Plaintiff's counsel conducted due diligence, and reported to the client. In addition, a member of Plaintiff's counsel informed all opposing counsel of his desire to withdraw from this case. From that point in time, Plaintiff's review of the file shows that absolutely no correspondence from Defendant Chaudhry's and Florence Women's Health's counsel has been received concerning requests of any kind for discovery, directly contrary to the assertion of Defendants' counsel in their motion for summary judgment. (Defendants' Motion for Summary Judgment, p. 2 ("Counsel for these Defendants has previously provided letters to Plaintiff's counsel pursuant to Rule 11, SCRCP requesting responses to discovery and as of the date of this Motion, responses to discovery have not been received.")). Plaintiff's counsel acknowledges that

such written discovery was not provided until the date of the hearing, but denies that the alleged correspondence of counsel was received. Furthermore, Plaintiff's counsel denies any communication by counsel for these Defendants since the issuance of the scheduling Order in August of 2009. The last correspondence received by Plaintiff's counsel prior to the filing of Defendants Motion for Summary Judgment was a courtesy copy of a letter sent to the Court concerning the proposed consent scheduling Order, dated August 14, 2009. See Exhibit B. Specifically, there have been no prior complaints by these Defendants of prejudice due to a lack of discovery.

As was stated at the hearing of this matter, Plaintiff's counsel has attempted to conduct a due diligence review of this matter, including review by a legal nurse consultant with familiarity with such injuries, and subsequent follow-up treatment by the child Plaintiff. The result of this review led to certain conclusions on the part of undersigned counsel, which were communicated both to the referring attorney, as well as to the minor Plaintiff's mother. Based on these discussions, Ms. Johnson requested that another firm review this case. As reported to the Court at the hearing on Defendants' Motion for Summary Judgment, the file had already been copied to Plaintiff's choice of a potential substitute attorney.

At the hearing of this motion, Plaintiff's counsel pointed out that notice of the hearing had not been received, until the Clerk of Court's office called to change the time of the hearing, one day before the hearing. Plaintiff never received written notice, and such notice appears to have been mailed by the clerk's office to an old address for one of the attorney's in Plaintiff's office--and address which has not been used since such counsel joined McGowan Hood and Felder, some six years prior. See Exhibit C (online case information from the Clerk's office, listing an

address for the lawfirm of "Phillips and Young"). With the consent of Defendants' counsel, the hearing was rescheduled two days later. This objection was raised at the hearing, but Plaintiff's counsel proceeded.¹

Also at the hearing, Plaintiff's counsel moved for an extension of the scheduling Order (suggesting ninety days), in Order for Plaintiff to be afforded an opportunity to name an expert witness, and substitute new counsel. This motion was denied by the Court from the bench, and is omitted from the Order. The Order also states that "Plaintiff has failed to present for deposition," when, in fact, no notice of deposition has been entered into the record, nor has one been cited by Defendants' counsel.

Additionally, Plaintiff notes that discovery in this case is not closed. While dates in that Order may have passed, Defendants' experts are not due until June 25, 2010. Mediation is not due until July, 16, 2010. And this case is not subject to be called to trial until August, at the earliest. (See Exhibit A). Again, each of these dates are from the initial Scheduling Order. The Scheduling Order also states that any dates not affecting the trial date can be changed by consent of the parties. Again, contrary to the assertions of Defendants' counsel, Plaintiff's counsel has not been able to locate any communications from Defendants' counsel concerning discovery requests of any type since the Scheduling Order was entered.

Plaintiff's counsel further submits the attached affidavit, certifying the statements of counsel made herein, and the veracity of the documents attached hereto. See Exhibit D (Affidavit of Kevin Hayne Sitnik).

¹ Plaintiff's counsel had little opportunity to consider options, but did voluntarily attend the hearing.

ARGUMENT / LAW

“Summary judgment is a “drastic remedy” which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002). “Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a “full and fair opportunity to complete discovery.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); Lanham, 349 S.C. at 363, 563 S.E.2d at 334; Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

The Court granted summary judgment, based upon the failure to name an expert witness by the time scheduled in the initial scheduling order, but well before the close of discovery. Specifically, the Order notes certain scheduling Order deadlines, and then concludes that the failure to comply with such deadlines is evidence of “gross indifference to these Defendants.” Order, p. 3. Where Defendants' counsel has not noticed the deposition of Plaintiff, nor communicated with Plaintiff's counsel concerning any issues with discovery, these Defendants have not, and cannot show, gross indifference, or prejudice as a matter of law.

In the Order, the basis of the motion is a violation of Rule 37 (violation of a discovery Order), despite its reference to Rule 56. As pointed out during the hearing, a violation of Rule 37 (in this case, an initial scheduling order), results in a death knell for a child's claim. Respectfully, such a dismissal is unwarranted under the circumstances, and constitutes an abuse of discretion. As the Court presumably noted, the motion was based upon an initial objection to

timeliness of discovery responses. That objection would normally be made through a motion to compel, or other similar motion. Again, these would all require communication between counsel. But there is no record that defense counsel has objected, and thus no legal prejudice has been shown under our state's prior case law. If there is legal prejudice, the record before the Court is devoid of evidence to that effect. Plaintiff submits that mere delay, under the facts of this case, cannot constitute legal prejudice.² Instead, this motion, and the Order of the Court, contends without authority that summary judgment is the appropriate remedy for an initial failure to comply with an initial scheduling order. As noted at the hearing, Plaintiff's counsel had previously responded to requests for admission, and both parties had obtained medical records. In addition, on the date of the hearing, Plaintiff's counsel belatedly served responses to written discovery, after discovering that previously drafted responses had not been served.³

There are several similar cases referenced in appellate decisions in this state. In each one of those instances, the offending party was given an opportunity by the court to cure the discovery deficiencies; either by the appellate court on review of dismissal, or by the trial court prior to such a drastic sanction. In a case somewhat similar to the one before the court, Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1995), the trial court excluded plaintiff's expert witness for failure to comply with a scheduling order. In that case, Defendant moved to dismiss for failure to prosecute because the plaintiff had not identified an expert by the date stated in the scheduling Order. Approximately one month after the filing of that motion, plaintiff moved to

² Had Defendants' not first filed a motion for summary judgment, Plaintiff would have been entitled to a voluntary non-suit without prejudice, as a matter of law. See Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct.App.2004) ("Ordinarily, a plaintiff is entitled to a voluntary dismissal without prejudice as a matter of right, unless there is a showing of legal prejudice to the defendant.").

³ As stated at the hearing, Plaintiff's counsel discovered in preparation for the hearing on Defendants' Motion for Summary Judgment that these responses had not been served, and that the deadlines of the scheduling order had been removed from his calendar by his staff, due to a mistaken assumption by the staff that counsel had been relieved.

extend the scheduling Order. The trial court denied the motion to extend the scheduling order, and as a sanction for the failure to identify the expert pursuant to the scheduling order, excluded a late named expert, and then granted summary judgment. The Court of Appeals vacated the exclusion of the late named witness, and remanded for a determination of whether the failure to comply with the scheduling order was the result of 'willful disobedience or gross indifference.' On remand, the trial court found the plaintiffs were "willfully indifferent of the [scheduling] order and grossly indifferent to the [defendants'] rights." *Id.* at 511.

On subsequent appeal, the South Carolina Supreme Court reversed. Specifically, the Supreme Court noted, "[t]he exclusion of a witness is a sanction under rule 37, SCRCP, which should never be lightly invoked." *Id.* "Furthermore, "[w]here the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party." *Id.* (quoting Baughman, 306 S.C. At 108) (emphasis added). The Supreme Court then noted that "[w]hatever sanction is imposed would serve to protect the rights of discovery provided by the rules. A sanction of dismissal is too severe if there is no evidence of any intentional misconduct." *Id.* (citing Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989) and Kershaw Co. Bd. Of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990)).

Plaintiff respectfully submits that the order granting summary judgment and dismissal of this action for failure to comply with the initial scheduling Order in the present case does not evidence the intentional conduct required for such a severe sanction. Again, the appropriate sanction should "serve to protect the rights of discovery provided by the rules." *Id.* Where, as in the present case, Defendants have not even sought to compel discovery of any kind, such a

sanction does not serve to protect the rights afforded under the rules, but rather turns them into a tool for gamesmanship. Had these Defendants moved to compel, the required consultation under Rule 11 would have led to resolution of some of these discovery issues, such as the scheduling of Plaintiff's mother's deposition, and serving of the discovery responses. Again, there was no communication from opposing counsel prior to the filing of this motion concerning discovery. If any sanction is warranted, a less severe sanction is mandated by Orlando v. Boyd.

Other South Carolina authority is similar. In Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc., the plaintiff first filed a motion to compel discovery, and hearing on its motion was continued repeatedly at the request of the offending defendant. 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct.App.1999). The parties, nearly a year after the motion to compel was filed, entered into a consent order. Again, the defendant failed to comply, and a second motion to compel was filed. At the hearing on that motion, the court ordered compliance within 30 (thirty days). Even after that ruling, defendant did not comply, and the court (on a third motion to compel), ordered the defendant to produce a witness, and specifically noted that the failure to comply might result in striking the defendant's answer. Again, the defendant did not comply, and yet again, the court heard yet another motion to compel, and ordered compliance within a certain time. In short, by the time the court struck the answer, six motions to compel had been filed, and four orders compelling discovery had been entered. In the present case, there have been zero motions to compel, and consequently zero orders compelling discovery.

In Griffin, the Court of Appeals stated, "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." Griffin Grading & Clearing,

Inc., 334 S.C. at 199, 511 S.E.2d at 719. *See also*, McComas v. Ross, 626 S.E.2d 902 (Ct.App. 2006) (noting that “[i]n those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party....”). Where there have been no motions to compel, and no orders compelling discovery, such factors have not been met.

Finally, Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App. 1997), is instructive. In Karppi, the trial court struck the pleadings of a defendant for discovery violations. As in other cited cases, Karppi had filed two motions to compel, the court issued a order compelling the discovery, and then discussed compliance with the order during a status conference. Once again, the appellate court reversed, finding that dismissal was too harsh a sanction for violation of a discovery order, and commenting that “the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.” *Id.* at 543 (*citing* Balloon Plantation v. Head Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990)). Thus, even where the Court of Appeals found “willful disobedience and gross indifference,” the court nonetheless held “the harsh sanction that was imposed was not commensurate with [defendant’s] disobedience, and any number of lesser, more narrowly tailored sanctions would have sufficed to protect [plaintiff’s] rights while adequately punishing the wrongdoing....” *Id.*

In the present case, there has been no intentional wrongdoing. Nor, given the fact that no motions to compel have been filed, and no Orders compelling discovery (or warning of the possibility of dismissal for failure to comply with such an order) have issued, there has been no showing of gross indifference to the Defendants’ rights. While certain dates in the scheduling

order have passed without the identification of an expert by Plaintiff, discovery has not yet closed, and is not set to close for months.

As undersigned counsel mentioned during the hearing, my client has sought other counsel, and has since permitted me to speak with such counsel. Since that hearing, this other counsel has agreed to allow me to state that they are willing and able to assume representation in accordance with my client's wishes, provided they have a claim to pursue. This counsel has indicated that they have experience in this type of complex injury, and expect to have an expert affidavit shortly. Again, Plaintiff submits, through his mother, that he should have the right to pursue this case with choice of counsel.

In other words, a decision on the merits of D'Andre G. [REDACTED]'s claim that he was NOT injured when he was born is too severe a sanction under the circumstances of this case. Respectfully, the failure to name an expert before the close of discovery, given the admitted procedural posture of this case, is not a "decision on the merits." As this Court is well aware, "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 – 544 (1991) (citations omitted) (emphasis added).

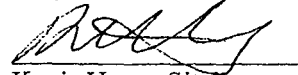
Plaintiff's counsel readily concedes that he did not meet certain deadlines contained in the scheduling Order, but has been in contact with the client and attempted contact with referring counsel on several occasions since the issuance of the scheduling order, concerning possible substitute counsel. In the present case, while there was a scheduling order, there was absolutely no correspondence or requests from opposing counsel to move discovery forward. In fact, the Order contains a fact unsupported by the record--that Plaintiff failed to present for deposition.

However, Defense counsel never noticed a deposition, nor requested such in any writing produced to the Court, or able to be located in Plaintiff's counsel's file. See Exhibit D. It is a fundamental precept that a plaintiff does not notice his own deposition. Yet, defense counsel in this case chose not to contact Plaintiff's counsel about discovery at all, until filing a dispositive motion for summary judgment. Respectfully, both Rule 1 and Rule 37, SCRPC, and Rule 402(k), SCACR, require other action first, as do the decisions of our appellate courts cited above. Regardless of the technical aspects of Defendants' motion for summary judgment, it is, at heart, a motion to dismiss for failure to comply with a scheduling order on a discovery issue. Respectfully, my client (a child), shouldn't be the victim of such gamesmanship. At a bare minimum, lesser sanctions more narrowly tailored to the present situation are available.

CONCLUSION

Based on the foregoing, Plaintiff respectfully implores this Court to reconsider its Order granting summary judgment to these Defendants, and denying Plaintiff's motion to extend the scheduling Order to provide ninety days in which to name an expert.

Respectfully submitted,



Kevin Hayne Sitnik
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
Office: (803) 779-0100
Fax: (803) 787-0750
ksitnik@mcgowanhood.com

May 24, 2010
Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother Natural
Guardian of D'Andre ~~Gordon~~, an infant under
the age of 14 years,

Plaintiff,

Versus

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 08-CP-21-2326

CONSENT
SCHEDULING ORDER

FILED
2009 AUG 21 PM 3:25
FLORENCE COUNTY, SC

The Court finds that the below Scheduling Order is reasonable and that in the interests of all parties a date certain for trial is appropriate.

ACCORDINGLY, IT IS ORDERED AS FOLLOWS:

CERTIFIED A TRUE COPY

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

1. The Plaintiffs shall present for deposition by October 15, 2009.
2. Plaintiffs shall name expert witnesses by November 30, 2009.
3. The depositions of the parties and treating medical providers shall be completed by January 8, 2010.
4. The depositions of the Plaintiffs' experts shall be completed by February 26, 2010.
5. The Defendants shall identify expert witnesses by May 7, 2010.
6. Defendants' expert witnesses' depositions shall be completed by June 25, 2010.
7. Mediation shall be held prior to July 16, 2010.
8. The parties will attend the first date certain roster meeting setting this matter for a date certain trial after August 2, 2010.
9. Any dates within this Order not affecting the trial date can be changed by consent of the parties.

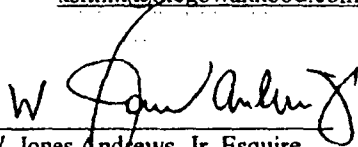
/s/ Thomas A. Russo
The Honorable ~~Michael G. Nottles~~ *THOMAS A. RUSSO*
Chief Administrative Judge for the Twelfth Judicial
Circuit

8/27, 2009
Florence, SC

Exhibit A

WE CONSENT:

MCGOWAN, HOOD & FELDER, LLC
1517 Hampton St.
Columbia, SC 29201
Phone: (803) 779-0100
Fax: (803) 787-0750
Email: jandrews@mcgowanhood.com
ksitnik@mcgowanhood.com

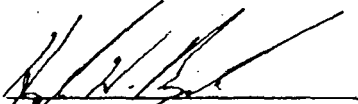

W. Jones Andrews, Jr. Esquire
Kevin H. Sitnik, Esquire

Attorneys for Plaintiff

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

WE CONSENT:

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Telephone: (843) 377-1400
Facsimile: (843) 377-1403
Email: hwb@buyckfirm.com



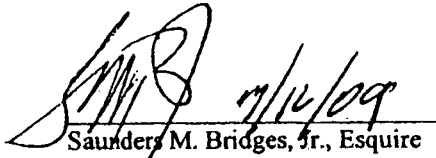
Hugh W. Buyck, Esquire

Attorney for the Defendants
Anu Chaudhry, M.D. and Florence Women's Health

FILED
2009 AUG 27 PM 3:25
CLERK OF COURT
FLORENCE COUNTY, SC

WE CONSENT:

AIKEN BRIDGES NUNN ELLIOTT & TYLER, PA
P.O. Drawer 1931
Florence, SC 29503
Phone: (843) 669-8787 (ext. 353)
Fax: (843) 664-0097
Email: smbjr@aikenbridges.com


Saunders M. Bridges, Jr., Esquire

Attorney for Defendant
McLeod Regional Medical Center

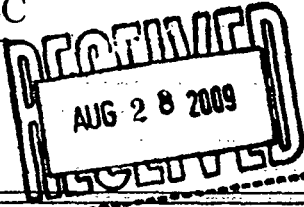
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2009 AUG 27 PM 3:25
CLERK OF COURT
COURT & CLERK
FLORENCE COUNTY, SC

EXHIBIT B

BUYCK & SANDERS, LLC

ATTORNEYS & COUNSELORS AT LAW

757 JOHNNIE DODDS BLVD., SUITE 100
P.O. BOX 2424
MT. PLEASANT, SC 29465-2424



TELEPHONE: (843) 377-1400
FAX (843) 377-1403
E-MAIL: HWB@BUYCKFIRM.COM

Hugh W. Buyck
Darren K. Sanders
G. Wade Cooper

August 14, 2009

The Honorable Michael G. Nettles
Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, SC 29501

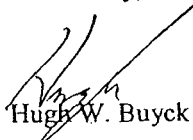
Re: Marquette Johnson, as Mother Natural Guardian of D'Andre G., an infant under the age of 14 years v. Anu Chaudhry, M.D., McLeod Regional Medical Center, and Florence Women's Health
C/A No. 08-CP-21-2326 (Florence Co.)
BSLF File No. 21.35

Dear Judge Nettles:

Attached please find a proposed consent Scheduling Order in the above-referenced matter. Plaintiff's counsel has indicated that they have a busy trial schedule for the balance of the year, and we all felt that it would be most prudent to propose the attached. If this meets with your approval, we would kindly request your execution of the Order. For convenience of filing, we have attached a motion slip and the requisite filing fee.

With kind regards,

Yours truly,

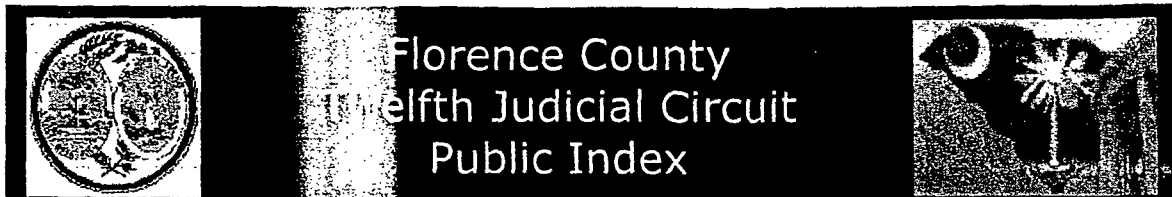


Hugh W. Buyck

HWB:adm
Enclosure

cc: Saunders M. Bridges, Jr., Esquire
Kevin H. Sitnik, Esquire

EXHIBIT C

[Back](#)[New Search](#)[County Home Page](#)**Marquette Johnson, Plaintiff, et al VS Anu Chaudry, defendant, et al**

Case Number: 2008CP210: 3	Court Agency: Common Pleas Court	Filed Date: 12/08/2008
Case Type: Common Pleas	Case Sub Type: Medical Malpractice 220	File Type: Mediator - Jury
Status: Pending/AD Deferred	Assigned Judge: Clerk Of Court C P, G S, And Family Court	
Disposition:	Disposition Date:	Disposition Judge:
Original Source Doc:	Original Case #:	
Judgment Number:		

Parties	Judgments	Actions	Associated Cases	Tax Map Information

Parties

Name	Address	Race	Sex	Date of Birth	Party Type Description	Status
Bridges, Saunders M. Jr.	Archie Bridges-Nunn Elliott & Tyler, PA P.O. Box 1931 Florence SC 29503				Defendant Attorney	Active
Buyck, Hugh Willcox	Brown Law Firm, LLC P.O. Box 2424 Florence SC 29465				Defendant Attorney	Active
Chaudry, Anu					Defendant	Active
Florence Womens Health					Defendant	Active
Fowler, Marion Stephenson III	Fowler Law Firm, PC P.O. Box 1719 Lake City SC 29560				Mediator	Active
Green, Dandre					Plaintiff	Active
Johnson, Marquette					Plaintiff	Active
McLeod Regional Medical Center					Defendant	Active
Phillips, Robert Verner	Young & Phillips, PC P.O. Box 14228 Florence SC 29505				Plaintiff Attorney	Active
R K Brown W					Other Party to Case	Active
Smith, V.M.	Kenneth Smith & Smith 71 Sams Point Rd. Florence SC 29907				Alternate Mediator	Active

CMS 5.5.07.02

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Florence County Twelfth Judicial Circuit - Roster Details
Motion Roster April 26th-April 29th, 2010, 10th Floor Courtroom

Court Agency	Common Pleas Court				Judge	Nettles		Roster Id	30		
Roster Type	Motion New				Roster Begin Date	04/26/2010		Roster End Date	04/29/2010		
Number of motions = 24											
Scheduled	#	Time	hr:mn	Description	Filing Party	Filed Date	Case	Case Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
04/27/2010	3	2:00 PM		Motion/Compel	Mattie Pinckney-PLT	03/25/2010	2009CP2101087 Mattie Pinckney VS Dustin Wade Renfroee , defendant, et al	Motor Veh Accid 320	Margie Bright Matthews (843) 549-6028	Louis David Nettles (843) 665-0100	
04/28/2010	1	9:30 AM		Motion to amend and/or vacate order	Fla Card Services PLT	02/08/2010	2009CP2102844 Fla Card Services VS Rafaela Vargas Myers	Deb Collections 7140	Richard Joseph Sreale (843) 250- 2207	Penny Hays Cauley (843) 393-5200	
04/28/2010	2	9:30 AM		Motion for Reconsideration	North Point Development Group -PLT	02/02/2010	2009CP2102961 North Point Development Group VS Department Of Transportation South Carolina	Judicial Review 810	Evander Whitehead (843) 669-6002	Department Of Transportation South Carolina	
04/28/2010	3	9:30 AM		Motion to Substitute Parties	Sharon S Sides PLT	03/02/2010	2008CP2101056 Sharon S Sides plaintiff, et al VS Christopher L Raley defendant, et al	Breach of Cont 140	Henniferia U Golding (843) 744- 1507	Jon Rene Josey (843) 662-9008 Brandon A Smith (843) 658-4438	
04/28/2010	4	2:00 PM		Motion to Compel Settlement	Town Of Timmons ville-DEF	01/28/2010	2008CP2102085 Jerome Mcelveen plaintiff, et al VS Town Of Timmons ville defendant, et al	Torts/Other 399	Jerome Mcelveen Tonya Mcelveen	Mark W. Buyck III (843) 662-3258	
04/28/2010	5	2:00 PM		Motion/Compel	Donna Dickerson PLT	01/25/2010	2009CP2101273 Jalan Dickerson plaintiff, et al VS Charles Marshall Webb defendant, et al	Medical Malpract 220	Alexander Blair Cash (843) 577- 6725	Saunders M Bridges Jr (843) 668-8787 Hugh Wilcox Buyck (843) 377-1400 Gordon Wade Cooper (843) 377- 1400 Donald Jay Davis Jr (843) 577-4000 William L Howard Sr (843) 577-4000	
04/28/2010	6	2:00 PM		WCC APPEAL	John Calhoun Land IV-PAT	09/02/2009	2009CP2101941 Michelle Jones VS DEPARTMENT OF HEALTH AND ENVIROMENT CONTROL	Worker's Comp 960	John Calhoun Land IV (803) 435-8894	Samuel Thompson Brunson (843) 669- 8111	
04/28/2010	7	2:00 PM		Motion/Motion For for Damages Hearing	Susan Van Epps PLT	04/12/2010	2009CP2100654 Susan Van Epps VS Peggy W Scott defendant, et al	Breach of Cont 140	Brown W Johnson (843) 669-2401		
04/29/2010	1	9:30 AM		CIVIL APPEAL	James Floyd III-PLT	07/13/2009	2009CP2101337 James Floyd III VS Jimmy Leris	Magistrate Civil 910	James Floyd III	Henry Morris Anderson Jr (843) 665-4300	Completed-04/29/2010

Florence County Twelfth Judicial Circuit - Roster Details
Motion Roster April 26th-April 29th, 2010, 10th Floor Courtroom

Court Agency	Common Pleas Court			Judge	Nettles			Roster Id	30		
Roster Type	Motion New			Roster Begin Date	04/26/2010			Roster End Date	04/29/2010		
Number of motions = 24											
Scheduled	#	Time	hr:mn	Description	Filing Party	Filed Date	Case	Case Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
04/29/2010	1	9:30 AM		CRIMINAL APPEAL	Joseph L Weston-DEF	11/09/2009	2009CP2102741 South Carolina State Of VS Joseph L Weston	Magistrate Crim 920	Susan Elaine Cooke (843) 665-3091	Joseph L Weston	Completed-04/29/2010
04/29/2010	2	9:30 AM		CRIMINAL APPEAL	State-PLT	11/18/2009	2009CP2102845 State VS Carla Lynn Riles	Magistrate Crim 920	Susan Elaine Cooke (843) 665-3091	Carla Lynn Riles	
04/29/2010	3	9:30 AM		CRIMINAL APPEAL	Florence City Of-PLT	11/23/2009	2009CP2102908 Florence City Of VS Janine	Municipal 930	Mark Vincent Desser (843) 676-8633	Jermaine Hunt	
04/29/2010	4	9:30 AM		Criminal Appeal	Zalandria L Brown-DEF	11/23/2009	2009CP2102910 State Of South Carolina VS Zalandria L Brown	Magistrate Crim 920	Susan Elaine Cooke (843) 665-3091	Zalandria L Brown	
04/29/2010	5	9:30 AM		MUNICIPAL APPEAL	Randy Phillip Leonard-PLT	01/20/2010	2010CP2100175 Randy Phillip Leonard VS Florence City Of	Municipal 930	Randy Phillip Leonard	Mark Vincent Desser (843) 676-8633	
04/29/2010	6	9:30 AM		CIVIL APPEAL	Williams Auto Sales-PLT	01/29/2010	2010CP2100257 Williams Auto Sales VS Brian Emmen	Magistrate Civil 910	Williams Auto Sales	Brian Emmen (843) 773-9297	
04/29/2010	7	2:00 PM		Motion/Summary Judgment	Anu Chaudry-DEF	03/26/2010	2008CP2102326 Marguerite Johnson plaintiff et al VS Anu Chaudry defendant et al	Medical Malpractice 220	Robert Verner Phillips (843) 292-8780	Saunders M Bridges Jr (843) 669-8787 Hugh Wilcox Buyck (843) 377-1400 Rick Brown W	
04/29/2010	8	2:00 PM		CRIMINAL APPEAL	Ronnie Bines Jr-DEF	10/30/2009	2009CP2102650 State Of South Carolina VS Ronnie Bines Jr	Magistrate Crim 920	Susan Elaine Cooke (843) 665-3091	Ronnie Bines Jr	
04/29/2010	9	2:00 PM		CRIMINAL APPEAL	Yolanda Timmons-DEF	10/30/2009	2009CP2102639 State Of South Carolina VS Yolanda Timmons defendant et al	Magistrate Crim 920	Susan Elaine Cooke (843) 665-3091	Yolanda Timmons	
04/29/2010	10	2:00 PM		CIVIL APPEAL	Motor Mart-PLT	12/01/2009	2009CP2102973 Motor Mart VS Regina Kirvin defendant et al	Magistrate Civil 910	Motor Mart	Regina Kirven Regina Kirvin	
04/29/2010	11	2:00 PM		Criminal Appeal	Roberta Hayward-DEF	10/26/2009	2009CP2102577 State Of South Carolina VS Roberta Hayward	Magistrate Crim 920	Susan Elaine Cooke (843) 665-3091	Roberta Hayward	
04/29/2010	12	2:00 PM		CIVIL APPEAL	Timothy Huntley-PLT	12/09/2009	2009CP2103045 Timothy Huntley VS Anthony James	Magistrate Civil 910	James Thomas Mcbratney (843) 662-8155	Anthony James	
04/29/2010	13	2:00 PM		CIVIL APPEAL	Shirley Jones-PLT	12/21/2009	2009CP2103164 Shirley Jones VS Rex A Matthews	Magistrate Civil 910	Shirley Jones	Carolina Cars Inc Rex A Matthews	
04/29/2010	13	2:00 PM		Structured Settlement	Joshua Dixon-TRE	03/09/2010	2010CP2100638 Application of Joshua	App/Trans/Rts (760)	Mark D. Bower (803) 779-2650		Completed-04/06/2010

100

Florence County Twelfth Judicial Circuit - Roster Details
Motion Roster April 26th-April 29th, 2010, 10th Floor Courtroom

Court Agency		Common Pleas Court			Judge	Nettles		Roster Id	30		
Roster Type		Motion New			Roster Begin Date	04/26/2010		Roster End Date	04/29/2010		
Number of motions = 24											
Scheduled	#	Time	hr:mn	Description	Filing Party	Filed Date	Case	Case Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
							Dixon and Symetra Assigned Benefits Service Co for Approval of Structured Settlement Payment Rights				
04/29/2010	13	2:00 PM		Structured Settlement	Application of Settlement Funding	03/26/2010	2010CB21008972 Application of Settlement Funding Plaintiff, et al and Defendant for Approval of Structured Settlement Payment Rights	App/Trans/R/s (760)	Theodore Von Keller (803) 779-2650		

EXHIBIT D

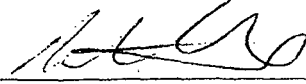
AFFIDAVIT

- 1) That the documents attached to Plaintiff's Motion for Reconsideration, submitted herewith, are true and accurate copies.
- 2) That no correspondence from Defendant Chaudhry and Defendant Florence Women's Health's counsel concerning discovery issues have been received by me or my office to my knowledge, since the Scheduling Order was entered on or about August 27, 2009.
- 3) That no such correspondence can be located in the file, after a diligent search.
- 4) That the client's mother and guardian, has previously indicated a desire to seek and obtain substitute counsel.
- 5) That such substitute counsel has been contacted, met with Ms. Johnson, reviewed the file, and indicates a willingness to be substituted as counsel of record.
- 6) That such substitute counsel has stated he believes the case to be viable, and believes he can produce an expert affidavit to that effect within a short period of time, perhaps as little as a week or two.
- 7) That there has been no intentional disregard for the rights of any Defendants in this action, nor willful disobedience of the scheduling Order entered in this action, on the part of Plaintiff's counsel.
- 8) That Plaintiff's counsel did not receive written notice of the hearing on Defendant Chaudhry's and Defendant Florence Women's Health's Motion for Summary Judgment.

Subscribed, sworn to and acknowledged before me by Kevin Hayne Sitnik, this
24 day of MAY, 2010.



Notary Public for South Carolina
My Commission Expires: 3/16/2017



Kevin Hayne Sitnik, Affiant

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother Natural
Guardian of D'Andre G., an infant under
the age of 14 years,

Plaintiff,

Vs.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

) IN THE COURT OF COMMON PLEAS

) TWELFTH JUDICIAL CIRCUIT

) C/A No. 08-CP-21-2326

CERTIFICATE OF SERVICE

I, Ann B. Brock, a paralegal at the law firm McGowan, Hood & Felder, LLC do hereby
certify that I served a copy of the foregoing PLAINTIFF'S MOTION FOR RECONSIDERATION
upon the Defendants in the above-referenced matter via U.S. MAIL and ELECTRONIC MAIL,
on the 24th day of May, 2010, addressed to the attorneys listed below:

Hugh W. Buyck, Esquire
Buyck & Sanders Firm
Post Office Box 2424
Mt. Pleasant, South Carolina 29465
Email: hwb@buyckfirm.com

Saunders M. Bridges, Jr., Esquire
Aiken Bridges Nunn Elliott & Tyler, PA
Post Office Drawer 1931
Florence, South Carolina 29503
Email: smbjr@aikenbridges.com



Ann B. Brock
Paralegal at McGowan, Hood & Felder, LLC

MCGOWAN HOOD & FELDER, LLC

W. JONES ANDREWS, JR.
JOHN G. FELDER, JR.
LARA PETTISS HARRILL
S. RANDALL HOOD
CHAD A. MCGOWAN (SC, GA, NC)
WILLIAM A. MCKINNON (SC, DC)
DANIEL "ERIE" PEAGLER
ROBERT V. PHILLIPS
KEVIN H. SITNIK
WILLIAM DIXON ROBERTSON, III*
J. STEPHEN WELCH*
JOSEPH G. WRIGHT, III*
*OF COUNSEL



ROCK HILL • COLUMBIA • ANDERSON
WWW.MCGOWANHOOD.COM

1517 HAMPTON STREET
COLUMBIA, SOUTH CAROLINA 29201

803.779.0100
TOLL FREE 877.644.6400
FAX 803.256.0702

WRITER'S E-MAIL:
KSITNIK@MCGOWANHOOD.COM

June 23, 2010

VIA U.S. MAIL & FACSIMILE: (843) 292-7436

The Honorable Michael G. Nettles
Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, South Carolina 29501

RE: Marquette Johnson, as Mother & Natural Guardian of D'Andre G., an infant
under the age of 14 years, v. Anu Chaudhry, M.D., McLeod Regional Medical
Center and Florence Women's Health
Civil Action No.: 2008-CP-21-2326

Dear Judge Nettles:

Enclosed, please find Plaintiff's Supplement to Motion for Reconsideration in the above-referenced matter.

Please feel free to contact our office with any questions or concerns.

Sincerely,

Kevin H. Sitnik

KHS/ab
enclosure

cc: Marquette Johnson Green
Hugh W. Buyck, Esquire (facsimile: 843-377-1403)
Saunders M. Bridges, Jr., Esquire (facsimile: 843-664-0097)
Edward L. Graham, Esquire (facsimile only: 843-665-0254)
Herbert Louthian, Jr., Esquire (facsimile only: 803-256-6033)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

TWELFTH JUDICIAL CIRCUIT

Marquette Johnson, as Mother and Natural Guardian of D'Andre G■■■■■, an infant under the age of 14 years,

C/A No. 08-cp-21-2326

Plaintiff,

PLAINTIFF'S SUPPLEMENT TO
MOTION FOR RECONSIDERATION

VS.

Anu Chaudhry, M.D., McLeod Regional Medical Center, and Florence Women's Health,

Defendants.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff D'Andre G [REDACTED], an infant under the age of fourteen years, by and through his mother and natural guardian, Marquette Johnson, and by and through undersigned counsel, respectfully seeks to supplement Plaintiff's Motion for Reconsideration with the Affidavit of Gary K. Oakes, M.D., an expert obtained by Edward L. Graham, Esquire.

Respectfully submitted,

[Handwritten signature]

Kevin H. Sitnik
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
ksitnik@mcgowanhood.com

Columbia, South Carolina.
June 23, 2010.

STATE OF GEORGIA
COUNTY OF CHATHAM

)
)
)

AFFIDAVIT

PERSONALLY APPEARED before me, GARY K. OAKES, who first being duly sworn, deposes and says:

1. I am Gary K. Oakes, of Savannah, GA. I make this Affidavit based on my professional background, education, training and experience as well as my review of certain medical records and other documents relating to the birth of D'Andre Green, including the following:

MEDICAL RECORDS

- A. Florence Women's Health – Marquette Green
- B. McLeod Regional Medical Center – Marquette Green;
- C. McLeod Regional Medical Center – D'Andre Green;
- D. Comprehensive Neurological Services – D'Andre Green;
- E. CareSouth Carolina – D'Andre Green;
- F. McLeod Rehabilitation – Florence – D'Andre Green;
- G. McLeod Rehabilitation – Darlington – D'Andre Green;
- H. Dr. John Keith – D'Andre Green;
- I. MUSC – D'Andre Green

AFFIDAVITS

- J. Affidavit of Brenda Johnson;
- K. Affidavit of Andre Green;
- L. Affidavit of Keyna Tedder

2. 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.

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

4. I have had the opportunity to review certain medical records and other documents set forth above regarding Marquette Green and her son D'Andre G_____ (hereinafter "D'Andre"), with respect to the birth of D'Andre at McLeod Regional Medical Center on February 3, 2004.

5. I have knowledge concerning the generally accepted standards, customs and practices applicable to obstetricians providing care and treatment of maternity patients with infants born under circumstances and conditions similar to those involved in D'Andre's birth.

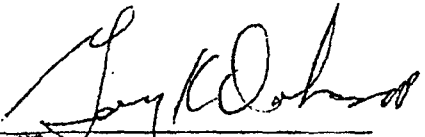
6. In this case, based on my review of the medical records noted above, Dr. Anu Chaudry committed at least three causally significant deviations from the generally accepted obstetrical standards of care during the delivery of D'Andre G_____ on 02/03/2004. In my opinion, to a reasonable degree of medical certainty, Dr. Chaudry breached generally accepted standards of obstetrical practice in the following ways: (1) she failed to recognize the complication commonly known as "shoulder dystocia;" (2) she chose not to take advantage of several safe and effective maneuvers available to her to assist in the management and resolution of shoulder dystocia without injury to D'Andre; and (3) she applied excessive lateral traction and/or torsion to the head of D'Andre G_____.

7. . It is further my opinion, to a reasonable degree of medical certainty, that D'Andre ~~Ge~~ suffered severe and permanent injury to his brachial nerves on the right side as a direct and proximate result of these breaches of standard obstetrical practice by Dr. Chaudry.

8. I have knowledge concerning the generally accepted standards, customs and practices applicable to labor and delivery nurses providing care and treatment of maternity patients with infants born under circumstances and conditions similar to those involved in D'Andre's birth. From my review of the medical records and other documents mentioned above, I am unable to form an opinion concerning whether the labor and delivery nurse(s) complied with or breached such standards in this case. To form such an opinion I would need more information about their specific acts with regard to this delivery than is reflected in the medical records and documents I have reviewed. It is my understanding and belief that such nurse(s) have not been deposed, and it would assist me in evaluating their actions in this case to read their deposition testimony.

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

FURTHER AFFIANT SAYETH NAUGHT.


GARY K. OAKES, M.D.

SWORN TO BEFORE ME THIS

4th day of June, 2010


_____(L.S.)
NOTARY PUBLIC FOR GEORGIA

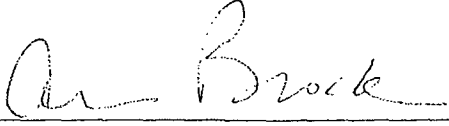
My Commission Expires August 17, 2013
My Commission Expires: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother Natural	)	C/A No. 08-CP-21-2326
Guardian of D'Andre G■■■■, an infant under	)	
the age of 14 years,	)	
	)	
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
	)	
Vs.	)	
	)	
Anu Chaudhry, M.D., McLeod Regional	)	
Medical Center, and Florence Women's	)	
Health,	)	
	)	
Defendants.	)	

I, Ann B. Brock, a paralegal at the law firm McGowan, Hood & Felder, LLC do hereby certify that I served a copy of the foregoing PLAINTIFF'S SUPPLEMENT TO MOTION FOR RECONSIDERATION upon the Defendants in the above-referenced matter via U.S. MAIL and ^{23rd}~~24th~~ day of June, 2010, addressed to the attorneys listed below:

Hugh W. Buyck, Esquire
Buyck & Sanders Firm
Post Office Box 2424
Mt. Pleasant, South Carolina 29465
Email: hwb@buyckfirm.com

Saunders M. Bridges, Jr., Esquire
Aiken Bridges Nunn Elliott & Tyler, PA
Post Office Drawer 1931
Florence, South Carolina 29503
Email: smbjr@aikenbridges.com



Ann B. Brock
Paralegal at McGowan, Hood & Felder, LLC

MULTI TRANSMISSION REPORT

TIME : 06-23-'10 11:36
FAX NO.1 :
NAME :

FILE NO. : 229
DATE : 06.23 11:15
DOCUMENT PAGES : 7
START TIME : 06.23 11:16
END TIME : 06.23 11:36
SUCCESSFUL
FAX NUMBER

818436650254

818436640097

818433771403

818432927436

UNSUCCESSFUL
FAX NUMBER

818032566033

PAGES SENT

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FILE NO. : 229

*** TX FAILURE NOTICE

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WILLIAM A. MCKINNON (SC, DC)
DANIEL "ERNIE" PEAGLER
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J. STEPHEN WELCH*
JOSEPH G. WRIGHT, III*
*OF COUNSEL



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1517 HAMPTON STREET
COLUMBIA, SOUTH CAROLINA 29201

803.779.0100
TOLL FREE 877.644.8400
FAX 803.256.0702

WRITER'S E-MAIL:
KSITNIK@MCGOWANHOOD.COM

June 23, 2010

VIA U.S. MAIL & FACSIMILE: (843) 292-7436

The Honorable Michael G. Nettles
Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, South Carolina 29501

RE: Marquette Johnson, as Mother & Natural Guardian of D'Andre Green, an infant
under the age of 14 years, v. Anu Chaudhry, M.D., McLeod Regional Medical
Center and Florence Women's Health
Civil Action No.: 2008-CP-21-2326

Dear Judge Nettles:

Enclosed, please find Plaintiff's Supplement to Motion for Reconsideration in the above-referenced matter.

Please feel free to contact our office with any questions or concerns.

Sincerely,

Kevin H. Sitnik

Kevin H. Sitnik

KHS:at
enclosure

cc: Marquette Johnson Green
Hugh W. Buyok, Esquire (facsimile: 843-377-1403)
Saunders M. Bridges, Jr., Esquire (facsimile: 843-664-0097)
Edward L. Graham, Esquire (facsimile only: 843-665-0254)
Herbert Louthian, Jr., Esquire (facsimile only: 803-256-6033)

MEMORY TRANSMISSION REPORT

TIME : 06-23-'10 11:46
FAX NO.1 :
NAME :

FILE NO. : 232
DATE : 06.23 11:42
TO : 82566033
DOCUMENT PAGES : 7
START TIME : 06.23 11:43
END TIME : 06.23 11:46
PAGES SENT : 7
STATUS : OK

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W. JONES ANDREWS, JR.
JOHN G. FELDER, JR.
LARA PETTUS HARRILL
S. RANDALL HOOD
CHAD A. MCGOWAN (SC, GA, NC)
WILLIAM A. MCKINNON (SC, DC)
DANIEL "ERNE" PEADLER
ROBERT V. PHILLIPS
KEVIN H. SITNIK
WILLIAM DIXON ROBERTSON, III*
J. STEPHEN WELCH*
JOSEPH G. WRIGHT, III*
*OF COUNSEL



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TOLL FREE 877.644.8400
FAX 803.256.0702

WRITER'S E-MAIL:
KSITNIK@MCGOWANHOO.COM

June 23, 2010

VIA U.S. MAIL & FACSIMILE: (843) 292-7436

The Honorable Michael G. Nettles
Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, South Carolina 29501

RE: Marquette Johnson, as Mother & Natural Guardian of D'Andre Green, an infant under the age of 14 years, v. Anu Chaudhry, M.D., McLeod Regional Medical Center and Florence Women's Health
Civil Action No.: 2008-CP-21-2326

Dear Judge Nettles:

Enclosed, please find Plaintiff's Supplement to Motion for Reconsideration in the above-referenced matter.

Please feel free to contact our office with any questions or concerns.

Sincerely,

Kevin H. Sitnik

Kevin H. Sitnik

KHS:ab
enclosure

cc: Marquette Johnson Green
Hugh W. Buyck, Esquire (facsimile: 843-377-1403)
Saunders M. Bridges, Jr., Esquire (facsimile: 843-664-0097)
Edward L. Graham, Esquire (facsimile only: 843-665-0254)
Herbert Louthian, Jr., Esquire (facsimile only: 803-256-6033)

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother and Natural
Guardian of D'Andre G., an infant under
the age of 14 years,

Plaintiff,

vs.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

C/A No. 08-cp-21-2326

NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
ORDER DENYING MOTION TO
RECONSIDER

Plaintiff, a minor under the age of fourteen, through undersigned counsel, hereby moves for reconsideration of the order dated July 6, and entered on July 7, 2010. Written notice of entry of this Order was received by Plaintiff's counsel on July 16, 2010, making this motion timely, pursuant to Rules 52(b) and 59(e), SCRPC.¹ This written motion supplements the oral motion of D'Andre made at the July 26, 2010, and is based upon the facts and laws cited herein, the record as previously exists, and upon the arguments of counsel. A copy of Plaintiff's previous motion for reconsideration is attached hereto as Exhibit B, and Plaintiff renews each of those arguments, including the lack of any Order denying Plaintiff's motion for an extension of the scheduling Order. Plaintiff further notes that an expert witness has been disclosed, and has issued an affidavit outlining negligence on the part of Defendant Chaudhry. This affidavit has been previously disclosed to

¹ A copy of the Form 4 Order denying Plaintiff's motion for reconsideration is attached hereto, with the intra-office file stamp, indicating the date received by Plaintiff's counsel, as the second page. Exhibit A. Office policy is to mark the reverse side of a document with the date received.

the Court, and all opposing counsel, and is attached hereto as Exhibit C.

Plaintiff's counsel respectfully implores this Court to entertain oral argument of this motion for reconsideration, and understands that such argument is to be held on Friday, July 30, 2010, at or about 11:30am, at the Florence County Courthouse.

Respectfully submitted,



Kevin H. Sitnik
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
ksitnik@mcgowanhood.com

Columbia, South Carolina.
July 26, 2010.

2010 JUL 26 PM 2:07
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother & Natural Guardian of
D'Andre G., an infant under the age of 14 years,
☒ Plaintiff

v.

Anu Chaudhry, M.D., McLeod Regional Medical Center
and Florence Women's Health,
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

08-CP-21-2326

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

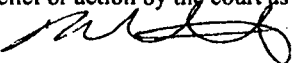
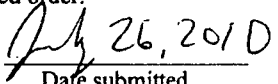
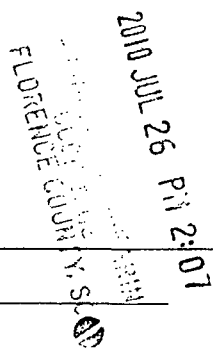
Plaintiff's Attorney: W. Jones Andrews, Jr., Bar No. 64294 Address: 1517 Hampton Street Columbia, South Carolina 29201 phone: (803) 779-0100 fax: (803) 256-0702 e-mail: jandrews@mcgowanhood.com other:		Defendant's Attorney: Saunders M. Bridges, Jr., Esquire, Bar No. Address: Post Office Drawer 1931 Florence, South Carolina 29503 phone: (843) 669-8787 fax: (843) 664-0097 e-mail: smbjr@aikenbridges.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Reconsideration Estimated Time Needed: 30mins Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:			
CLERK'S VERIFICATION		JUDGE	
Collected by: 		CODE: _____ Date: _____	
☒ MOTION FEE COLLECTED: 25.00 			
☐ CONTESTED - AMOUNT DUE: _____			

EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA **JUDGMENT IN A CIVIL CASE**
COUNTY OF Florence
IN THE COURT OF COMMON PLEAS **CASE NO. 2008-CP-21-2326**

FILED

Marquette Johnson, as Mother and Natural Guardian of D'Andree ~~Conner~~ and infant under the age of 14 years
and Marquanda M. D., McLeod Regional Medical Center, and Florence Women's Health

PLAINTIFF(S)

2010 JUL 6 AM 11:23
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SOUTH CAROLINA
DEFENDANT(S)

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(b), SCRCP; ☐ Rule 41(a), S.C. SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court: Motion to reconsider in the above captioned case is denied without the need for a hearing.

Dated at Florence, South Carolina, this 6th day of July, 2010.


PRESIDING JUDGE

This judgment was entered on the 6th day of July 2010, and a copy mailed first class this 7th day of July, 2010 to attorneys of record or to parties (when appearing pro se) as follows:

K.H. Strick
1517 Hampton Street
Columbia, SC 29201
ATTORNEY(S) FOR PLAINTIFF

Sgt. Bridge S. P. Podraun 1931
Florence, SC 29502
H.W. Buysck PO Box 2424 Mount Pleasant
SC 29465
ATTORNEY(S) FOR DEFENDANT

Connie Reel-Shearin
CLERK OF COURT

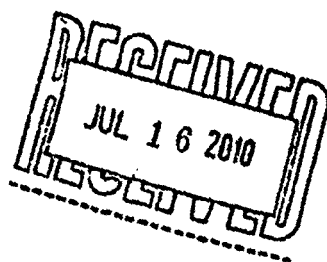


EXHIBIT B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FLORENCE) TWELFTH JUDICIAL CIRCUIT
)
Marquette Johnson, as Mother Natural) C/A No. 08-CP-21-2326
Guardian of D'Andre G., an infant under)
the age of 14 years,)
)
Plaintiff,)
)
Versus)
)
Anu Chaudhry, M.D., McLeod Regional)
Medical Center, and Florence Women's)
Health,)
)
Defendants.)

**DEFENDANT ANU CHAUDRY, M.D.
& FLORENCE WOMEN'S HEALTH
MOTION FOR RECONSIDERATION
OR IN THE ALTERNATIVE
MOTION TO COMPEL
&
MOTION FOR STATUS CONFERENCE**

The Defendants, Anu Chaudry, M.D. and Florence Women's Health (hereinafter "these Defendants"), by and through their undersigned attorneys hereby move before the Court as soon as counsel may be heard pursuant to Rules 52, 59 and 60 SCRPC for reconsideration of its Order dated August 3, 2010 granting Plaintiff relief through a second motion for reconsideration of the entry of Judgment in favor of these Defendants dated May 7, 2010. Further, due to the additional curtailment of the Defendants' rights, these Defendants alternatively request a Motion to Compel pursuant to Rule 37 and a Motion for a status conference to discuss, if necessary, future scheduling issues.

PROCEDURAL ISSUES

This matter was originally brought through issuance of a Summons and Complaint dated December 8, 2008. The claims concern the delivery of a child born in February of 2004. Following a lengthy period of the Defendants requesting dates to depose the Plaintiffs and their fact witnesses, the Plaintiff asserted that they had a busy trial schedule and a consent scheduling order was entered on or about August 27, 2009. Thereafter, Plaintiff failed to respond to written discovery, undertake depositions of witnesses or produce the names of any expert witnesses to prosecute the case pursuant to the scheduling order and the legal requirements of a medical negligence action. See Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633 (1986). Accordingly a

properly filed Motion for Summary Judgment was submitted on March 24, 2010 with a hearing held on April 29, 2010. An Order granting summary judgment to these Defendants was entered on May 7, 2010.

Plaintiff's counsel then filed a Motion for Reconsideration of the May 7th Order on or about May 24, 2010. This motion was denied by the Court on or about July 6, 2010 with notice provided to all counsel by e-mail from the Court's law clerk dated July 6, 2010. Thereafter, Plaintiff's counsel untimely filed a subsequent motion for reconsideration on or about July 26, 2010 with no new grounds for reversal of the Court's prior Order beyond those raised in their prior motion.

Thereafter, the Court held a hearing on the Plaintiff's second motion for reconsideration on July 30, 2010, issuing a form 4 Order from the bench. It is from this Order that these Defendants file the instant Motion for Reconsideration, Motion to Compel and Motion for a Status conference.

LEGAL ARGUMENTS

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). A party cannot escape summary judgment on the mere hope that something may develop at trial or by remaining silent and later claiming additional facts supporting the cause of action. Hammond, 232 S.E.2d 336. Therefore, where the Plaintiff relies solely upon the pleadings, files no counter affidavits, and makes no factual showing in opposition to a Motion for Summary Judgment, the court is required to grant

summary judgment, if under the facts presented by the Defendant, he is entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974).

"An issue may not be raised for the first time in a motion to reconsider." South Carolina Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 414-15, 669 S.E.2d 647, 652 (Ct.App. 2008) Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct.App. 1999). "The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion." State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). The trial court only abuses its discretion, though, when that decision is based upon an error of law or upon factual findings that are without evidentiary support. *Id.* at 206, 656 S.E.2d at 368.

I. ON APRIL 29, 2010, PLAINTIFF FAILED TO PRESENT ANY EVIDENCE MEETING THE BURDEN OF PROOF TO OVERCOME THESE DEFENDANTS' PROPERLY PRESENTED MOTION FOR SUMMARY JUDGMENT.

The only issue properly before the Court during the hearing of April 29, 2010 was these Defendants' Motion for Summary Judgment that had been pending for greater than a month. The Plaintiff filed no counter affidavits, provided no evidence nor submitted any expert opinions to rebut the properly filed Motion for Summary Judgment. In fact, prior to the hearing and despite various requests, Plaintiffs failed to present for deposition and they did not respond to written discovery that had been outstanding since February 11, 2009.¹

It was not until immediately prior to the hearing on these Defendants' Motion for Summary Judgment that the Plaintiff finally hand delivered responses to written discovery. Even considering the content of these discovery responses outside the time limitations of Rule 6 SCRPC, it is apparent that there was no basis to defeat these Defendants' well-pled Motion. Further, there were no witnesses proffered or excluded. The Plaintiff failed to present any

¹ These Defendants did grant an extension of time to respond to the discovery on February 18, 2009 indicating that "[w]e have no objection as to the proposed extension as long as we receive 'meaningful' responses."

evidence of an expert witness, including those disclosures within the then presented Answers to Interrogatories and Request for Production. Plaintiff could not legally defeat the motion. Plaintiff had repeatedly, in complete derogation and in gross indifference to the Defendants' rights, disregarded prior deadlines for discovery, requests for depositions, the consent Scheduling Order, and the time requirements for presenting opposing motions. Therefore, these Defendants were not only unable to fully prepare and defend against the allegations of the Complaint, there was no evidence to support any claims asserted therein.

For example, the Plaintiff indicated within responses to various Interrogatories requesting specificity as to issues of standards of care and causation that responses could not be provided as expert opinions were required. (See Plaintiff's Answers to Defendants Florence Women's Health and Anu Chaudry's First Set of Interrogatories, Nos. 17, 18, 19, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36). Further, Plaintiff previously denied various specificities of causation and standards of care outlined within Requests for Admissions asserting that they had insufficient information to admit or deny the requests. (See Plaintiff's Responses to Florence Women's Health's First Request for Admissions Nos. 4, 5 and 6.) Without such responses, the Defendants were provided no basis to defend the allegations of medical negligence and provide opinions for their experts' rebuttal as to alleged deviations from the standard of care and causation. Defendants remained materially and adversely affected by the Plaintiff's complete failure to not only comply with the prior Scheduling Order but also by Plaintiff's failure to submit any evidence to defeat the properly noticed Motion for Summary Judgment. Without such evidence, the Defendants were not provided any explanation of material allegations of this medical negligence action.

This Court noted the Plaintiff's failure to present testimony and the continued failures of the Plaintiff's delays upon the Defendants' rights within its Order indicating:

"As of the date of the hearing on Defendants' Motion for Summary Judgment, Plaintiff failed to present for a deposition, name experts or depose any parties or treating medical

providers in accordance with this Consent Order. As such, there has been a gross indifference to these Defendants' rights to defend the case and failure to set forth the issues for a jury."

Thus, the Defendants did nothing to create the situation but were being adversely affected by the Plaintiff's failures to act and properly participate in the litigation process. Further, the Plaintiff failed to identify at the hearing on Defendants' Motion any potential witnesses, expert or otherwise, who would be excluded should this properly granted Judgment be entered.

II. THE INITIAL MOTION FOR RECONSIDERATION WAS PROPERLY DENIED ON JULY 6, 2010.

The Court summarily denied the Plaintiff's initial motion to reconsider on July 6, 2010. Contemporaneously therewith, the Court through its law clerk advised all parties by electronic mail that the Motion had been denied. Thereafter, a formal Order was filed on July 7, 2010.

Through the initial Motion to Reconsider, the Plaintiff argued that its discovery abuses failed to rise to the level of gross indifference to the Defendants' rights and that the previous Consent Scheduling Order should be extended. Nevertheless, the Plaintiff once again failed to provide any expert testimony to rebut the Court's properly entered Order granting Judgment to these Defendants due to the failure to provide any evidence in opposition to these Defendants' well founded Motion for Summary Judgment. The Plaintiff presented no expert to rebut the Order and relied on case law concerning the exclusion of a witness. The truth, however, is that no witness had been identified nor excluded. The Plaintiff once again failed to rebut the properly filed Order.

The issue concerning extension of the Consent Scheduling Order, however, was not the issue before the Court during the April hearing. The plain and simple issue was that the Plaintiff failed to present any evidence or expert testimony to support the case despite the passage of eighteen (18) months of litigation. Further, the Plaintiff had deliberately failed to properly respond to discovery requests seeking the expert opinions necessary to prove the requisite

standards for a medical negligence action and to provide the Defendants the courtesies and ability to defend this lawsuit.

III. THE PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION MUST BE CONSIDERED PURSUANT TO RULE 60(b), SCRPC.

Despite the prior Order granting summary judgment and the denial of a prior Motion for Reconsideration, the Plaintiff filed a second Motion to Reconsider on July 26, 2010 with a hearing then being mandated on the Motion for July 30, 2010. It was within this untimely motion that Plaintiff first presented any expert opinions to support the claims against these Defendants. There, however, were no new grounds raised beyond those raised in the prior Motion to Reconsider and the initial hearing on the Motion for Summary Judgment. As set forth previously, "[a]n issue may not be raised for the first time in a motion to reconsider." South Carolina Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 414-15, 669 S.E.2d 647, 652 (Ct.App. 2008) Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct.App. 1999).

More than ten (10) days had elapsed since the Plaintiff was notified that its Motion to Reconsider had been denied and the Motion was untimely as to these Defendants pursuant to Rule 59(e). The Plaintiff unquestionably had notice as of July 6, 2010 that its prior Motion had been denied and the instant motion was not filed until July 26th.

As such, the Plaintiff was required to move to reverse the judgment pursuant to Rule 60(b) under the grounds of "mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc." A party seeking to be relieved from a judgment must do so under Rule 60(b), SCRPC. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55. Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRPC. No such

showing has been made nor can be made by Plaintiff's counsel as their complete disregard of the Defendants' rights are inexcusable and led to the entry of the Judgment.

IV. ALTERNATIVELY, THESE DEFENDANTS MOVE TO COMPEL THE PLAINTIFF TO FULLY RESPOND TO ALL DISCOVERY AND REQUEST A STATUS CONFERENCE.

Alternatively, these Defendants move to compel complete responses to their Interrogatories, Request for Production and Request for Admission. Additionally, the Defendants request that the Plaintiff present for deposition pursuant to prior requests of these Defendants.

As set forth above, these Defendants filed Interrogatories, Request for Production and Request for Admission along with their Answer seeking specific delineations of the standards of care, deviations thereof and proximate cause. These requests were purposely directed towards the Defendants' trial and discovery preparation. Despite the ongoing delays and purported naming of an expert witness, Plaintiff's counsel continually has failed to completely respond to the discovery and now has issued a mandate to these Defendants to immediately produce Dr. Chaudry for a deposition.

Plaintiff's delays and irresponsible disregard of the Defendants' rights led to the current posture of the case. Through Plaintiff's intentional conduct, these Defendants are now being placed in an intolerable position of undertaking depositions without the benefit of proper discovery responses and the proper ability to prepare for deposition. Further, the Plaintiff now asserts an immediate right to have Defense counsel drop all current activities and insure that they are able to complete depositions post haste.

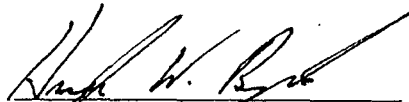
Dr. Chaudry has been under the impression since April 27, 2010 that this case was dismissed. This was confirmed through the denial of the motion for reconsideration of July 6th. She has experienced over 18 months of delays and is now expected to fully prepare immediately at the Plaintiff's insistence to her detriment and the detriment of counsel. This callous disregard

of the Defendants' rights continually places these Defendants in this unfavorable and prejudicial position. At the very least, Plaintiff's counsel should present complete disclosures of their position through accurate, complete and full responses to the previously served discovery requests. Further, the Court should mandate that the Plaintiffs first present for deposition at a mutually convenient time for all counsel as previously requested by the Defendants.

Finally, given that this case is now over 18 months old, it can be placed upon the trial roster pursuant to Rule 40. Without protection from the Court of its rights to defend the case, these Defendants are further prejudiced in their rights through Plaintiff's procedural posturing.

Respectfully submitted,

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Telephone: (843) 377-1400
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Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)

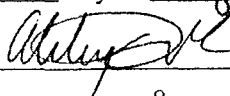
Attorneys for the Defendants
Anu Chaudry, M.D. and Florence Women's
Health

August 6, 2010
Mt. Pleasant, South Carolina
Z:\21.35 Chaudry Motion Reconsideration.doc

CERTIFICATE OF SERVICE

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

This 6 day of August, 2010.



130

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	
Marquette Johnson, as Mother and Natural	)	C/A No. 08-cp-21-2326
Guardian of D'Andre G****, an infant under	)	
the age of 14 years,	)	
	)	
Plaintiff,	)	<u>MEMORANDUM IN OPPOSITION</u>
	)	<u>TO DEFENDANT'S MOTION FOR</u>
vs.	)	<u>RECONSIDERATION OR IN THE</u>
	)	<u>ALTERNATIVE MOTION TO COMPEL</u>
Anu Chaudhry, M.D., McLeod Regional	)	<u>& FOR A STATUS CONFERENCE</u>
Medical Center, and Florence Women's	)	
Health,	)	
Defendants.		

Plaintiff Green and Plaintiff Johnson, by and through their undersigned counsel, submit the following memorandum in opposition to Defendant Chaudhry's and Defendant Florence Women's Health's (hereinafter, "Defendants") Motion for Reconsideration or in the Alternative, Motion to Compel and for a Status Conference. Based on the following arguments, Defendants' motion should be denied.

PERTINENT FACTS

This is a medical malpractice action. Plaintiff's complaint alleges that as a result of the negligence of the Defendants, "the infant Plaintiff sustained severe and permanent injuries including a left Erbs Palsy and brachial plexus injury." Complaint, ¶ 16. Plaintiffs seek "to recover a sum to compensate Plaintiffs for actual, special, and consequential damages, including medical expenses, disfigurement, pain and suffering, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages." Complaint ¶ 20. Plaintiffs have also asserted a claim for punitive damages. Id.

D'Andre Green was born on February 3, 2004. The current action was instituted by Plaintiff Johnson, Plaintiff Green's mother and natural guardian, on or about December 8, 2008.

On or about May, 24, 2010, Defendants filed a motion for summary judgment, asserting that such judgment was proper due to the failure of Plaintiff to identify an expert witness by the date indicated in the first Scheduling Order, which was issued in August of 2009. Plaintiff objected to the motion, and sought to enlarge the deadlines in the Scheduling Order. The Court initially granted Defendants' motion for summary judgment. Thereafter, Plaintiff filed a motion for Reconsideration. A hearing was scheduled on this motion, and then cancelled by the Court, and the motion for Reconsideration was denied by Form Order. Plaintiff received written notice of the entry of this Order on July 16, 2010. Thereafter, a hearing was scheduled on co-defendant's motion for Summary Judgment on July 26, at which time Plaintiff renewed her motion for reconsideration as to all Defendants, and filed a written motion to that effect. A hearing was subsequently held on July 30, 2010, where the Court granted Plaintiff's renewed motion for reconsideration, and instructed Defendants' counsel to prepare an order.

Thereafter, on or about August 6, 2010, Defendants filed the present motion, seeking reconsideration of this Court's ruling reversing the grant of summary judgment, and alternatively seeking to compel certain discovery responses. Defendants have been unwilling to provide dates for Dr. Chaudry's deposition during the interval. Plaintiffs' counsel has repeatedly attempted to contact Defendants counsel, with very limited success. Defendants' motion for reconsideration renews its arguments that summary judgment was proper, that the Plaintiff's renewed motion for reconsideration was untimely, and alternatively seeks to compel additional discovery responses, mostly concerning the expert witness previously identified by Plaintiff, and this expert's opinions, which again were previously submitted in the form of an expert affidavit.

Law / Analysis

Timeliness of Plaintiff's Renewed Motion for Reconsideration

Defendants argue, without reference to facts, that "Plaintiff unquestionably had notice as of July 6, 2010 that its prior Motion had been denied and the instant motion was not filed until July 26, 2010." Defendants' Motion, p. 6. This purported fact rests on a clear misunderstanding of the law. Pursuant to Rule 59(e), SCRCP, a motion for reconsideration "shall be served not later than 10 days after *receipt of written notice of the entry of the order.*" (emphasis added). Plaintiff received written notice of the entry of the Order on July 16, 2010. Plaintiff served Defendant with the written motion on July 26, 2010, and thus Plaintiff's renewed motion for reconsideration was timely. In fact, Plaintiff's counsel notified Defendant well in advance of the hearing on July 26, 2010 of the date written notice of entry the Order was received, and of his intention to seek reconsideration. See Exhibit A (e-mail dated July 23, 2010).¹

The Court Correctly Granted Plaintiff's Second Motion for Reconsideration

Defendant argues that Plaintiff did not present any expert opinion until her Second Motion for Reconsideration. This statement is false. Plaintiff submitted the affidavit of Dr. Oakes, both to the Court and opposing counsel, as a supplement to her first motion for reconsideration, on or about June 23, 2010, well prior to the Court's ruling on Plaintiff's motion for reconsideration. In fact, Defendants' counsel noted this date at the hearing on July 30, 2010.

¹ Plaintiff was notified of the Judge's decision, and cancellation of the hearing prior to this date. However, the e-mail from the Judge's clerk did not say that an Order had been filed with and entered by the clerk, only that a ruling had been issued. See Exhibit B (e-mail from Jonathan Waller, dated July 6, 2010 at 11:03am). Thus, this e-mail from the Judge's clerk did not constitute written notice that the Order had been *entered*, as required by Rule 59(e), SCRCP. See *Upchurch v. Upchurch*, 367 S.C. 16, 22-23, 624 S.E.2d 643, 646 (2006) ("An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case."); *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An order is not final until it is written and entered by the clerk of court. Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly."). Furthermore, the Order could not have been entered at the time of the e-mail, as the Order is file stamped by the Clerk's office at 11:43am, and the e-mail was sent at 11:03am. Thus, the e-mail could not have served as notice that the Order had actually been entered by the Clerk, as entry was not accomplished by that time.

Again, Defendant's factual assertions are incorrect, and even were they correct, they are not controlling.

As previously argued, both at the original hearing, and in Plaintiff's motion for reconsideration, our appellate court's have stated that a lesser sanction must be employed for violation of a scheduling Order, where the result would be dismissal of the case, unless the Defendant shows intentional misconduct. Orlando v. Boyd, 320 S.C. 509, 466 S.E.2nd 353 (1995) (citations omitted). Plaintiff relies upon the arguments raised in Plaintiff's Motion for Reconsideration, and incorporates them by reference. Defendant made no showing of intentional misconduct, and did not argue intentional misconduct at the hearing on Plaintiff's renewed motion for reconsideration. Nor did Defendants' counsel submit a response to Plaintiff's first Motion for Reconsideration.

Defendant also argues that the proper standard for considering Plaintiff's renewed motion is under Rule 60(b), SCRPC under the grounds of "mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc." Plaintiff's counsel, at the original hearing of this matter, and in Plaintiff's Motion for Reconsideration, argued extensively about how the case had been referred from an out of state attorney just prior to the potential running of a statute of limitations, his communication with both the client and referring counsel, and the fact that the deadlines of the scheduling Order had been removed from his calendar due to his paralegal's mistake. Plaintiff further noted for the Court that since the time the scheduling Order was entered, he had received no communication from Defendant's counsel concerning any discovery issues, prior to the filing of Defendant's motion for summary judgment. These Defendants are simply not entitled to a quick procedural victory under these facts. That is what the law states, and that is what justice requires.

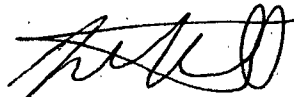
Motion to Compel

Defendants have included a motion to compel, in the alternative. Defendant did not consult with Plaintiff's counsel prior to filing this motion, pursuant to Rule 11, SCRPC. After this motion was filed, Plaintiff provided supplementary responses, and has enquired of Defendant's counsel of whether this motion is still outstanding. Defendants' counsel has not responded as to whether this motion to compel is going forward, and if so, on what issues. In addition, Plaintiff has made herself available for deposition. Plaintiff is thus unaware of any outstanding issues concerning this Defendant's discovery requests.

CONCLUSION

Based on the forgoing, Defendants' Motion for Reconsideration and Motion to Compel should be denied.

Respectfully submitted,



Kevin H. Sitnik
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
ksitnik@mcgowanhood.com

Columbia, South Carolina.
September 16, 2010

EXHIBIT A

Kevin Sitnik

From: Kevin Sitnik
Sent: Friday, July 23, 2010 11:34 AM
To: 'Saunders Bridges Jr', 'hwb@buyckfirm.com'
Subject: Emailing: Affidavit of Oakes, MD.pdf

Attachments: Affidavit of Oakes, MD.pdf



Affidavit of Oakes,
MD.pdf (14...

This has previously been sent to you, but I am sending again. FWIW, I received written notice of the filed order denying our motion for reconsideration on July 16. Actually, that is the date received by my office. I got it on Monday. I am going to appeal this issue, and raise a second motion for reconsideration at the hearing on Monday. However, this will not toll the time for appeal. While I realize I'm not in the best bargaining position, if either of you have any thoughts as to how we could avoid the appeal, and substitute counsel and resume with discovery, I'm all ears.

Kevin Hayne Sitnik
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1517 Hampton Street
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(803) 787-0750 Facsimile
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Confidentiality Note: This e-mail has been sent from a law firm. It may contain privileged and confidential information. You are hereby notified that any dissemination or duplication of this e-mail is prohibited and that there shall be no waiver of any privilege or confidence by your receipt of this transmission. If you have received this e-mail in error, please notify us by telephone at the number indicated above.

The message is ready to be sent with the following file or link attachments:

Affidavit of Oakes, MD.pdf

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

EXHIBIT B

Kevin Sitnik

From: Nettles, Michael G. Law Clerk (Jonathan Waller) [MNettlesLC@sccourts.org]
Sent: Tuesday, July 06, 2010 11:03 AM
To: Kevin Sitnik; Saunders Bridges Jr; hwb@buyckfirm.com
Subject: 08-CP-21-2326 Marquette v. Chaudry

Gentlemen:

Judge Nettles has issued a ruling denying the motion to reconsider in the above captioned case without the necessity of a hearing.

Jonathan Waller
Law Clerk to the Honorable Michael G. Nettles
Twelfth Judicial Circuit
180 N. Irby Street
MSC - XX
Florence, SC 29501
Office: 843-292-7433
Fax: 843-292-7436

9/16/2010

) IN THE COURT OF COMMON PLEAS
) OF THE TWELFTH JUDICIAL CIRCUIT

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if

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

FILED

IN THE COURT OF COMMON PLEAS

Marquette Johnson, as Mother & Natural Guardian of
D'Andre C. [REDACTED], an infant under the age of 14 years,

☒ Plaintiff

CASE NO.

08-CP-21-2326

2010 OCT 26 AM 10:28

CONNIE ROEL-SHEARIN

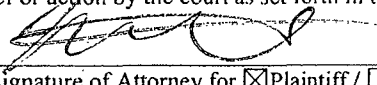
CLERK & GS

FLORENCE COUNTY, SC

MOTION AND ORDER INFORMATION

FORM AND COVER SHEET

Anu Chaudhry, M.D., McLeod Regional Medical Center)
and Florence Women's Health,)
☐ Defendant.)

Plaintiff's Attorney: Kevin Sitnik Bar No. 71682 Address: 1517 Hampton Street Columbia, South Carolina 29201 phone: (803) 779-0100 fax: (803) 787-0750 e-mail: ksitnik@mcgowanhood.com other:		Defendant's Attorney: Saunders M. Bridges, Jr., Esquire, Bar No. Address: Post Office Drawer 1931 Florence, South Carolina 29503 phone: (843) 669-8787 fax: (843) 664-0097 e-mail: smbjr@aikenbridges.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Reconsideration Estimated Time Needed: 30mins Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff / ☐ Defendant		Date submitted	
		10/25/2010	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE: _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: 		Date Filed: _____	
☒ MOTION FEE COLLECTED: 25.00 ☐ CONTESTED - AMOUNT DUE: _____			

FLORENCE COUNTY C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Marquette Johnson, as Mother and Natural
Guardian of D'Andre G■■■■, an infant under
the age of 14 years,

Plaintiff,

vs.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

C/A No. 08-cp-21-2326

PLAINTIFF'S MOTION FOR
RECONSIDERATION

FILED
2010 OCT 26 AM 10:28
CLERK OF COURT
FLORENCE COUNTY, SC

YOU WILL PLEASE TAKE NOTICE that the Plaintiff D'Andre G■■■■, an infant under the age of fourteen years, by and through his mother and natural guardian, Marquette Johnson, and by and through undersigned counsel, respectfully moves for Reconsideration of the Order filed on October 12, 2010, arguing that the sanction of exclusion of liability experts, other than Dr. Oaks, for violation of an initial scheduling Order, deprives D'Andre G■■■■ of a trial on the merits, and is thus an abuse of discretion.

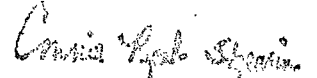
Respectfully submitted,



Kevin H. Sitnik
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
ksitnik@mcgowanhood.com

Columbia, South Carolina.
October 25, 2010.

CERTIFIED A TRUE COPY.



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

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
Marquette Johnson, as Mother and Natural
Guardian of D'Andre G [REDACTED], an infant under
the age of 14 years,

Plaintiff,

vs.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's
Health,

Defendants.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

C/A No. 08-cp-21-2326

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
RECONSIDERATION

FILED
2010 OCT 26 AM 10:28
CLERK OF COURT
FLORENCE COUNTY, SC

Plaintiff Green and Plaintiff Johnson, by and through their undersigned counsel, submit the following memorandum in support of Plaintiff's Motion for Reconsideration of the Order dated October 12, 2010 (**EXHIBIT A**), in which the court limits Plaintiff's liability experts to Dr. Oaks. Plaintiff, respectfully submits that the Court has acknowledged that Plaintiff has new counsel, Plaintiff's new counsel has procured expert testimony, and that the violation of an initial scheduling Order, where there was no demand made by Defendant Chaudhry to either compel discovery, nor to depose any witness, cannot support a bar to naming expert witnesses in a case that Defendant calls "complex."

PERTINENT FACTS

This is a medical malpractice action. Plaintiff's complaint alleges that as a result of the negligence of the Defendants, "the infant Plaintiff sustained severe and permanent injuries including a left Erbs Palsy and brachial plexus injury." Complaint, ¶ 16. Plaintiffs seek "to recover a sum to compensate Plaintiffs for actual, special, and consequential damages, including medical expenses, disfigurement, pain and suffering, mental anguish, loss of earnings capacity, and other damages." Complaint, ¶ 17.

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

loss of enjoyment of life, and other damages." Complaint ¶ 20. Plaintiffs have also asserted a claim for punitive damages. Id.

D'Andre G. [REDACTED] was born on February 3, 2004. The current action was instituted by Plaintiff Johnson, Plaintiff Green's mother and natural guardian, on or about December 8, 2008.

On or about May, 24, 2010, prior to the close of discovery, Defendants filed a motion for summary judgment, asserting that such judgment was proper due to the failure of Plaintiff to identify an expert witness by the date indicated in the first Scheduling Order, which was issued in August of 2009. Plaintiff objected to the motion, and sought to enlarge the deadlines in the original Scheduling Order. The Court initially granted Defendant's motion for summary judgment. Thereafter, Plaintiff filed a motion for Reconsideration. A hearing was scheduled on this motion, and then cancelled by the Court, and the motion for Reconsideration was denied by Form Order. Plaintiff received written notice of the entry of this Order on July 16, 2010. Thereafter, a hearing was scheduled on co-defendant's motion for Summary Judgment on July 26, at which time Plaintiff renewed her motion for reconsideration as to all Defendants, and filed a written motion to that effect. A hearing was subsequently held on July 30, 2010, where the Court granted Plaintiff's renewed motion for reconsideration, and instructed Defendants' counsel to prepare an order. Defendants Chaudhry and Florence Womens' Health failed to follow the Court's instructions and prepare an Order, despite multiple requests by Plaintiff's counsel.

Thereafter, on or about August 6, 2010, Defendant Chaudhry filed a motion, seeking reconsideration of this Court's oral ruling reversing the grant of summary judgment, and alternatively seeking to compel certain discovery responses. Defendant has been unwilling to provide dates for Dr. Chaudhry's deposition during the interval. Plaintiff's counsel has repeatedly attempted to contact Defendants counsel, with very limited success. Plaintiff's new

counsel has taken certain depositions, pursuant to the Court's prior instructions, during which undersigned counsel was present, as ordered by the court. The Plaintiff wishes to substitute attorneys.

Despite the uncontradicted statements of Plaintiff's counsel concerning the posture of the case, the Court at first granted summary judgment to Defendant Chaudhry and her practice, based solely upon the failure to follow the initial scheduling Order's deadline for naming expert witnesses. (A copy of the entire transcript of that hearing is attached as **EXHIBIT B**). As the Court explained more fully at the hearing on Defendant Chaudhry's Motion for Reconsideration, the Court was not fully aware of the all of the facts of this case.

At the hearing on that summary judgment motion, Plaintiff's counsel explained, in detail, how this case evolved from an out of state lawyer, and presented issues of the statute of limitations before it was filed. Plaintiff's counsel also summarized communications with both the client, and the out-of-state referring attorney. Plaintiff's counsel, at that time, also moved to extend the scheduling Order, and acknowledged discussions with defense counsel to that effect. Plaintiff's counsel also noted to the Court that Defendant Chaudhry refused to permit a Rule 40(j) docket entry, and that no communication regarding discovery had been pursued by defendant's counsel, prior to filing the motion for summary judgment (approximately seven months).

Plaintiff further incorporates the facts and analysis contained in Plaintiff's Motion for Reconsideration, filed May 24, 2010.

Law / Analysis

Our appellate courts have stated that a lesser sanction must be employed for violation of a scheduling Order, where the result would be dismissal of the case, unless the Defendant shows

intentional misconduct. Orlando v. Boyd, 320 S.C. 509, 466 S.E.2nd 353 (1995) (citations omitted). The Court definitively found that there was no intentional misconduct on the part of either the Plaintiff, or Plaintiff's counsel. Exhibit A, pg. 4. Rather, by Defendant's own admission--- this case, "concerns complicated issues surrounding the birthing process of a child." Defendant's Motion for Summary Judgment, p. 4.

At the hearing on Defendant Chaudhry's Motion for Reconsideration of the Order granting Plaintiff's motion to restore, the Court stated, unequivocally, that a resolution *of this case* on the merits is preferable to a procedural dismissal. However, the Court's ruling that no further liability experts may be named, other than Dr. Oaks, has the same practical effect—it precludes D'Andre, a child allegedly injured at birth, from presenting all of the truthful and factual medical evidence available in this case. Indeed, in complex medical malpractice cases, the necessity for multiple experts is not often known until all of the fact witnesses are deposed. Despite Defense counsel's multiple misrepresentations, both in court, and in filings, Defendant Chaudhry has never even requested dates for Plaintiff's deposition—and even after her availability was voluntarily disclosed, Defendant has not attempted to set a date.

In the present case, the Defendant laid in wait. They stood back, from the time the initial scheduling Order was entered, and did nothing. Not a phone call. Not an e-mail. And NOT, despite statements to the contrary, a request for dates for deposition of the Plaintiff. If anything, Plaintiff's counsel missed a deadline—but she has not misled the Court. This is a difficult case, with difficult facts, and a client who has an absolute right to choose her lawyer, and to have that lawyer be substituted.

"The sanction should be aimed at the specific *misconduct* of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast." Balloon Plantation v. Head

Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990) (emphasis added). “The sanction imposed should be *reasonable*, and the court should *not* go beyond the necessities of the situation to foreclose a decision on the merits of a case.” Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679 (S.C.App. 1997) (citations omitted) (emphasis added).

Where the Defendants admit that the case involves a complex medical malpractice issue, our law requires expert testimony on causation, new counsel with special knowledge in this area has been retained (and appeared at deposition), and a minor child’s future health is at issue, the Court’s exclusion of any other expert witnesses, as a sanction, goes beyond the necessities of the present situation, and effectively denies D’Andre G. of a decision on the merits of his claim.

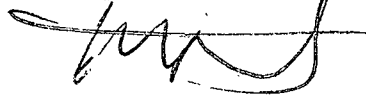
Furthermore, where there admittedly has been no intentional misconduct on the part of either the Plaintiff or her counsel, Plaintiff respectfully submits that “the necessities of the situation” demand nothing further than a revised scheduling order (as moved for by Plaintiff’s counsel previously), accompanied by the appropriate (and required) warning that further failures to adhere to subsequent scheduling orders might result in dismissal.

As undersigned counsel has previously argued, a failure to abide by an original scheduling Order has never, to counsel’s knowledge and after extensive research, resulted in a sanction so severe as this—such that it effectively precludes any decision on the actual merits, precludes the client from substituting her attorney, and results in an effective default judgment to the Defendant. A limitation on required expert testimony has the same effect.

CONCLUSION

Based on the forgoing, Plaintiff's Motion for Reconsideration should be granted, such that pursuant to the previous Order, the remaining parties should agree to a new scheduling Order that permits Plaintiff's new counsel to participate meaningfully and identify new witnesses, and that Plaintiff be permitted to substitute and relieve counsel, as she chooses.

Respectfully submitted,



Kevin H. Sitnik

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Columbia, South Carolina.
October 25, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2008-CP-21-2326

Marquette Johnson, as Mother
and Natural Guardian of
D'Andre G■■■■, an infant
under the age of 14 years,

Appellant,

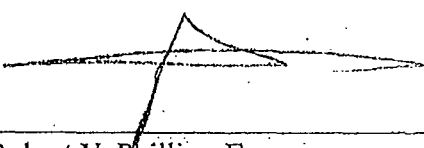
v.

Anu Chaudhry, M.D., and
Florence Women's Health,

Respondents.

NOTICE OF APPEAL

Marquette Johnson, as Mother and Natural Guardian of D'Andre G■■■■, an infant under the age of 14 years, appeal the Order and Judgment of the Honorable Michael G. Nettles filed on October 12, 2010, and of the Order denying reconsideration of the prior order, filed on March 25, 2011. Appellant received written notice of the entry of the March 25th Order on March 29, 2011.



Robert V. Phillips, Esq.
1539 Healthcare Drive
Rock Hill, South Carolina 29732
(803) 327-7800 - Office
(803) 328-5656 - Facsimile
rphillips@mcgowanhood.com
Attorneys for Plaintiff

April 14, 2011

Other Counsel of Record:

Hugh W. Buyck, Esquire
Buyck & Sanders Firm
Post Office Box 2424
Mt. Pleasant, South Carolina 29465
Attorneys for Respondents

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Florence County
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2008-CP-21-2326

Marquette Johnson, as Mother and Natural Guardian
of D'Andre G., an infant under the age of 14 years,

Appellant/Respondent,

v.

Anu Chaudhry, M.D., McLeod Regional Medical Center,
and Florence Women's Health,

Defendants,

Of Whom Anu Chaudhry, M.D.
and Florence Women's Health are

Respondents/Appellants.

**Notice of Cross Appeal on behalf of
Anu Chaudhry, M.D. and Florence Women's Health**

Anu Chaudhry, M.D. and Florence Women's Health cross appeal from the orders of the
Honorable Michael Nettles, filed August 12, 2010, and October 12, 2010. Respondents received
the notice of appeal on April 18, 2011.

April 25, 2011


Hugh W. Buyck, Esquire
BUYCK & SANDERS, LLC
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
(843) 377-1400; (843) 377-1403 (fax)
Email: hwb@buyckfirm.com

Deborah Harrison Sheffield, *Special Counsel*
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837; (803) 419-3519 (Fax)
dhsheffielddatty@aol.com

Counsel for the Respondents/Appellants

Other Counsel of Record:

Robert Verner Phillips, Esquire
McGowan, Hood & Felder, LLC
1539 Health Care Dr.
Rock Hill, SC 29732
Phone: (803) 327-7800
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2008-CP-21-2326

Marquette Johnson, as Mother and Natural Guardian
of D'Andre G. [REDACTED], an infant under the age of 14 years,

Appellant/Respondent,

v.

Anu Chaudhry, M.D., McLeod Regional Medical Center,
and Florence Women's Health,

Defendants,

Of Whom Anu Chaudhry, M.D.
and Florence Women's Health are

Respondents/Appellants.

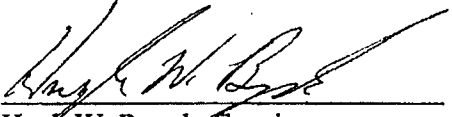
Certificate of Service

I, Hugh W. Buyck, attorney for the Respondents/Appellants, do hereby certify that on April 25, 2011, I served a copy of the Notice of Cross Appeal on Counsel for Appellants, via U.S. Mail, first class, postage prepaid to the following address:

Robert Verner Phillips, Esquire
McGowan, Hood & Felder, LLC
1539 Health Care Dr.
Rock Hill, SC 29732

I further certify that I mailed a copy of the Notice of Cross Appeal to the Clerk of the Court for Florence County for filing on this same date:

The Honorable Connie Reel-Shearin
Clerk of Court, Florence County Courthouse
180 N. Irby St., MSC-E, Rm. B11
Florence, SC 29501-3456



Hugh W. Buyck, Esquire
BUYCK & SANDERS, LLC
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
(843) 377-1400; (843) 377-1403 (Fax)
Email: hwb@buyckfirm.com

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF FLORENCE ___) 2008-CP-21-2326

MARQUETTE JOHNSON, AS MOTHER)
AND NATURAL GUARDIAN OF)
D'ANDRE G. [REDACTED], AN INFANT UNDER))
THE AGE OF 14 YEARS)
 PLAINTIFF)

vs.)

TRANSCRIPT OF RECORD

ANU CHAUDHRY, M.D., MCLEOD)
REGIONAL MEDICAL CENTER, AND)
FLORENCE WOMEN'S HEALTH)
 DEFENDANTS)

April 29, 2010
Florence, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

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

KEVIN H. SITNIK, ESQ.
Attorney for the Plaintiff

HUGH W. BUYCK, ESQ.
Attorney for the Defendant, Anu Chaudhry, M.D.

SAUNDERS M. BRIDGES, ESQ.
Attorney for the Defendant, McLeod Medical Center

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: Madam Court Reporter, the next
2 matter is Marquette Johnson, as Mother and Natural
3 Guardian for D'Andre G [REDACTED] versus Anu Chaudhry, M.D., and
4 McLeod Medical Center. It's Civil Action No.
5 2008-CP-21-2326.

6 This is a motion for summary judgment. I'll be
7 glad to hear from the moving party.

8 MR. BUYCK: Your Honor, Hugh Buyck here on
9 behalf of Dr. Chaudhry and her practice, Florence Women's
10 Health.

11 This is a medical malpractice action. It's a
12 2008 case, and we have filed a motion for summary judgment
13 for failure to name an expert witness. It's been about
14 16, 17 months now. We just got some discovery request
15 responses to our initial discovery today in which they've
16 yet to name an expert witness.

17 We previously had addressed the issue in regards
18 to their discovery. A consent scheduling order was
19 entered. It's attached to our motion. And within the
20 consent scheduling order, plaintiffs were to name their
21 expert witnesses by November 30th of 2009. No expert's
22 been named.

23 We filed the motion on March 24th, so over 30
24 days ago. No additional efforts have been made to name
25 experts since then.

1 Mr. Sitnik's here on behalf of plaintiff's
2 counsel.

3 Also, counsel of record, there was a motion pro
4 hoc vice of a lawyer in New York -- oh, excuse me -- a
5 lawyer in North Carolina, Mr. Brown, who has been admitted
6 in the case, and that's just where we are.

7 THE COURT: I assume that probably it's really a
8 motion to dismiss for failure to comply with the
9 scheduling order, or is it a motion for summary judgment?
10 You all have an affidavit or --

11 MR. BUYCK: There is no affidavit.

12 We filed -- let's see how I titled this. I
13 titled it a motion for summary judgment for failure to
14 name the expert and that's what my brief outline is, that
15 this is a malpractice action and they're mandated to have
16 an expert witness, and without such proof of the standard
17 of care and deviation from the standard of care, we're
18 entitled to summary judgment.

19 THE COURT: Was this filed before the rules
20 required you to have an expert before you filed a lawsuit?

21 MR. BUYCK: Yes, sir. This involves a minor
22 child. I think it goes back to the 2003 time frame.

23 THE COURT: I've got you.

24 MR. BUYCK: Of course, you know, when you're
25 faced with this, with cases hanging this long over my

1 client's head, you know, there's two sides to every case,
2 there's the plaintiff's side and there's the defense side,
3 and the defendants are entitled to know what the
4 allegations are against them.

5 And we served requests for admission. They did
6 answer those initially, but they've sent, you know, tell
7 us what the injuries are, admit that there's no brain
8 damage and things, and they're denied based upon at this
9 time we don't have sufficient evidence.

10 So we've got a case that's been going on for 16,
11 17 months in which my client wants to know, What's going
12 on, Mr. Buyck? Why can't you do anything? And my hands
13 are tied. And I think the Court's required to enter a
14 summary judgment for, one, for failure to follow the
15 scheduling order, and two, failure to name an expert
16 witness.

17 THE COURT: Very good. Yes, sir.

18 MR. SITNIK: Your Honor, Kevin Sitnik for the
19 plaintiff.

20 I believe Mr. Brown, who Mr. Buyck listed as
21 second counsel, has been relieved as the counsel of record
22 in this case. And I don't think that's in dispute, I
23 think he was just misspeaking.

24 And I've had some conversations in the very
25 recent days with Mr. Buyck. The plaintiff's position in

1 this is, first of all, this is just a recordkeeping thing,
2 Your Honor. We did not get notice of this hearing. The
3 Clerk's office has an incorrect address. It's not the
4 address that was on the complaint that was filed.

5 Apparently, according to the website, which I --
6 Mr. Robert Phillips with my firm filed this action. I've
7 spoken with him and his paralegal asking them why they
8 didn't let me know that this was on the docket. We did
9 some back-checking, and according to the Clerk's office
10 here, they just have an old address for him at Young and
11 Phillips. He hasn't practiced with that firm at that
12 address in six years or so. That's just a possible
13 explanation for the notice.

14 But, Your Honor, Mr. Buyck is correct, an expert
15 witness has not been named in this action.

16 In addition, I have handed them the discovery
17 responses. It is my responsibility, and I take that
18 fully.

19 This was a short-statute case. It was filed
20 originally on behalf of the mother of the minor child as
21 well as the child. The mother's claims had potential
22 statute issues. We received this case as a referral from
23 a New York attorney by the name of Mr. Buttafuoco. We
24 were to serve -- Mr. Phillips was to serve as local
25 counsel. He filed a complaint on a short statute. Their

1 discovery was served. Mr. Buttafuoco asked that he not be
2 lead counsel in this case. That's when I became involved.

3 We did enter into a scheduling order. We had
4 originally asked the case be 40(j)'d so that we can do our
5 due diligence background work. Instead a scheduling order
6 was entered because we did not reach a consent on
7 40(j)'ing the case.

8 We've done additional investigation of this
9 case. We've discussed those findings with both
10 Mr. Buttafuoco in New York as well as with the client.

11 The client has indicated to us that she would
12 like a second opinion of this. We've gotten her consent.
13 This file has been copied, this file has been sent.

14 We're still attorneys of record, Your Honor, I
15 understand that, but Mr. Buyck is correct, that as of
16 today, no expert witness has been named.

17 I respectfully, if necessary, move the Court for
18 90 days as a drop-dead date in which to have the plaintiff
19 identify an expert.

20 I've just also today received a copy of what has
21 been purported to me to be a nearly identical motion on
22 behalf Mr. Bridges and his client for the identical
23 reason. I've discussed that with Mr. Bridges and also
24 mentioned and proposed to Mr. Buyck and obviously we're
25 here on a motion date and he hasn't given consent but

1 would respectfully ask that plaintiff be given some time.

2 I will say again this is my responsibility, but
3 when we began contacting the client and contacting the
4 referring attorney about this, my paralegal inadvertently
5 removed this case from our calendar and placed it in the
6 closed file. That's not an excuse, Your Honor, that's
7 simply what actually happened. And the discovery was
8 prepared. She felt that given our communications with
9 co-counsel and with the client, she thought it was a
10 closed case and did not serve the discovery, but it was
11 concluded at that time.

12 Again, Mr. Buyck is correct that an expert has
13 not been named. The scheduling order has not been
14 amended. It is an initial scheduling order. The case was
15 filed in 2008; however, it was filed in December of 2008,
16 so roughly the time frame that Mr. Buyck is representing
17 this case has been pending for, I guess, 14, 15 months,
18 Your Honor, and the deadline was November 30th to name
19 the expert witness.

20 There's privileged communications in the file
21 that if the Court would care to review them, I can show
22 that these communications I'm discussing have been taking
23 place.

24 Again, I've talked to my client, she's aware of
25 the hearing today. I forwarded a copy of the notice to

1 the law firm to whom we sent the file and I've been
2 informed by my client, although I've had no direct contact
3 with the other law firm, that they would need a couple of
4 weeks.

5 Again, Your Honor, this is my responsibility but
6 would ask for the sake of my client that she be given 90
7 days to provide the expert witness affidavit.

8 The other discovery, I agree with Your Honor,
9 this appears to be a motion that's based upon a failure to
10 comply with discovery pursuant to the scheduling order.
11 Although that -- and, again, my responsibility. Discovery
12 was served, but I've had no communications from opposing
13 counsel alerting us that the discovery was not served.
14 Again, our responsibility, but have had no communications
15 saying where's the discovery responses.

16 Certainly there was no motion to compel filed in
17 this case with regards to this discovery. That would have
18 necessitated some communication between counsel that may
19 have alerted me to my error.

20 Again, it's my responsibility, but we're here on
21 a motion for summary judgment that was filed approximately
22 one month ago today. Based upon summary judgment, there
23 doesn't need to be collaboration between counsel on this.

24 I would respectfully submit that this is, in
25 fact, a discovery issue motion and that it would be a

1 drastic remedy to grant summary judgment under the present
2 circumstances against my client based upon the failure to
3 comply with a scheduling order.

4 THE COURT: Well, it's really a little bit more
5 than a discovery matter because it's an order of the Court
6 that you had to do it by a certain date, and based on
7 that, I'm going to dismiss the case for failure to comply
8 with discovery and the scheduling order. And I'll ask
9 Mr. Buyck if he could prepare an order to that effect.

10 Good luck to you.

11 MR. BRIDGES: Your Honor, I have a motion
12 pending on behalf of my client, McLeod, on the same
13 grounds that I've just filed but it is not ripe for
14 hearing yet because I've just served it.

15 THE COURT: All right. I'm not real sure
16 whether we can go forward with that now unless the
17 plaintiff is in a position to agree to do that.

18 MR. SITNIK: Clearly, Your Honor, I would not be
19 in a position to consent to, based upon the Court's
20 indication that they've dismissed the case against the
21 doctor, to agree to that.

22 THE COURT: Okay. That was my initial
23 inclination. We'll just let it take its course.

24 MR. BRIDGES: I just wanted to call that to Your
25 Honor's attention because we'll be back shortly for a

1 hearing on that one as well.

2 THE COURT: Very good. Thank you all.

3 MR. SITNIK: Your Honor, just a clarification.

4 I made an oral motion. Obviously I assume that
5 my motion to extend the scheduling order is denied;
6 however, I believe I still would need to submit a copy of
7 that motion to the Court for its consideration.

8 THE COURT: I've ruled on that. Very good.
9 Thank you.

10 (The proceedings were concluded.)

11 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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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 Florence County, South Carolina, on the 29th day of April, 2010.

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

September 17, 2010



CAROL M. THUEME, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA))
COUNTY OF FLORENCE)) COMMON PLEAS COURT

MARQUETTE JOHNSON, As Mother)
NATURAL GUARDIAN OF D'ANDRE)
G■■■■■, AN INFANT UNDER THE)
AGE OF 14 YEARS)

PLAINTIFF,)

v.

ANU CHAUDRY, M.D., MCLEOD)
REGIONAL MEDICAL CENTER, AND)
FLORENCE WOMEN'S HEALTH,)

DEFENDANTS.)

TRANSCRIPT OF RECORD
08-CP-21-02326
July 26, 2010
Florence, South Carolina

BEFORE:

THE HONORABLE MICHAEL G. NETTLES, JUDGE

APPEARANCES:

KEVIN H. SITNIK, ESQ.
Attorney for the Plaintiff

SAUNDERS M. BRIDGES, JR. ESQ.
Attorney for Defendant McLeod Hospital

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

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1 THE COURT: Madam Court Reporter, this is civil
2 action 2008-CP-21-2326.

3 MR. BRIDGES: Good morning, Your Honor. Sandy
4 Bridges for Defendant McLeod. We're here today on
5 McLeod's motion for summary judgment based upon the
6 plaintiff's failure to name an expert witness within the
7 time frame provided by the scheduling order. Your Honor,
8 you previously heard a motion on behalf of Doctor Chaudhry
9 who at that time was defendant in the case based upon the
10 same grounds in making the same arguments. At the time
11 Your Honor heard Doctor Chaudhry's motion from McLeod
12 motion which was filed shortly after the Chaudhry motion.
13 It was not yet ripe and so, really, on that motion -- our
14 motion was withheld until the time ran which occurred
15 sometime after that.

16 Your Honor, very briefly, this is a medical
17 malpractice case. It was filed in December of 2008. The
18 parties entered into a scheduling order in August of 2009
19 by agreement which provided deadlines for the disclosure
20 of expert witnesses, no discovery responses of any kind,
21 particularly expert designations were received. And we
22 filed this motion for summary judgment in April of 2010.
23 And that's the grounds for our motion, Your Honor.

24 THE COURT: All right. Could you set out the time
25 frame once again. This suit was filed when?

1 MR. BRIDGES: The suit was filed in December,
2 December 3rd, 2008.

3 THE COURT: All right. And the motion with regard
4 to Doctor Chaudhry was what day?

5 MR. BRIDGES: Was April 24th, 2010. I'm sorry,
6 March 24th, 2010.

7 THE COURT: All right. So essentially it was over a
8 year and not a thing had transpired; is that correct?

9 MR. BRIDGES: That's correct, Your Honor.

10 THE COURT: All right.

11 MR. BRIDGES: The scheduling order which the parties
12 had entered into by agreement was signed by Judge Russo on
13 August 27th, 2009. Item two of the scheduling order said
14 plaintiff shall name expert witnesses by November 30th,
15 2009, and it then had other deadlines for additional
16 discovery. So when that was not done, Your Honor, each
17 defendant filed a motion for summary judgment, as I said,
18 Doctor Chaudhry's on March 24th and McLeod's on
19 April 29th.

20 THE COURT: I'll be glad to hear from plaintiff's
21 counsel at this time.

22 MR. SITNIK: Kevin Sitnik for the plaintiff, Your
23 Honor. Your Honor, I think in general you're familiar
24 with this issue. Mr. Bridges is correct of the dates that
25 he recited. This case was filed in December of '08. As I

1 previously stated to the Court, this was a referral case
2 from an out-of-state attorney that we subsequently took
3 over. There were some requests to admit that were filed
4 by the defendant Doctor Chaudhry. Those -- there was --
5 and those were responded to. The remainder of discovery
6 was not responded to, however, there was no communication
7 or motion to compel. We did -- one of our attorneys in
8 our office did apprise both defense counsel that he would
9 personally be withdrawn from the case. And as Your Honor
10 may be aware, I don't want to go into everything that's
11 already put before the Court in a previous motion;
12 however, you know, we did not have any contact. There was
13 no motions to compel that was filed. There was never a
14 request for deposition dates of any party. The discovery
15 has been responded to with regards to both defendants, in
16 addition an expert witness has been identified.

17 THE COURT: Kind of hard to depose expert when you
18 you don't tell them who it is.

19 MR. SITNIK: And it has been subsequently
20 identified.

21 THE COURT: Right.

22 MR. SITNIK: And we have identified, you know,
23 identified that expert witness. That expert witness was
24 actually retained by would be substitute counsel who is
25 willing to step in at this juncture and has been willing

1 to step in provided there is a case against the doctor to
2 pursue at this point. You know, I do recognize, Your
3 Honor of course, there's a scheduling order in this case.
4 I would like to cite that -- in essence what's being asked
5 for is failure to comply with a scheduling order, that the
6 case be dismissed. It is a motion for summary judgment,
7 but it is for failure to comply with a deadline set forth
8 in a scheduling order. That is a Rule 37 violation. That
9 is a discovery motion; that is a discovery violation.
10 There has been no motion to compel. I would refer the
11 Court to the Orlando versus Boyd case. In that case, it's
12 a 1995 Supreme Court case, 320 South Carolina 09, the
13 trial Court had excluded plaintiff's expert witness for
14 failure to name that expert witness by the date in the
15 scheduling order. The Court of Appeals subsequently
16 reversed and said you have to go back and find that -- the
17 trial court needs to go back and find that the plaintiff
18 was willfully indifferent to the scheduling order or
19 grossly indifferent to the defendant's rights. They did
20 that. The trial court went back and said we're gonna find
21 they were grossly indifferent or willfully indifferent or
22 grossly indifferent to the rights. The case subsequently
23 went back up to the South Carolina Supreme Court which
24 said, and I quote Your Honor, the exclusion of a witness
25 is sanction Rule 37, South Carolina Rules of Civil

1 Procedure which should never be likely invoked.

2 Furthermore, where the effect will be the same as granting
3 judgment by default or dismissal and preclusion order may
4 only, may be made only if there is some showing of willful
5 disobedience or gross indifference to the rights of
6 adverse party. It then went on to say that, quote, Your
7 Honor, whatever sanction is imposed would serve to protect
8 the rights of the discovery provided by the rules. A
9 sanction of dismissal is too severe if there's no evidence
10 of any intentional misconduct.

11 THE COURT: All right. Mr. Bridges, that puts us to
12 the point about whether or not this is a willful
13 indifference to the rights of the defendant.

14 MR. BRIDGES: Well, Your Honor, with regard to
15 McLeod, I would point out that after all this came up,
16 after Your Honor had granted Doctor Chaudhry's motion for
17 summary judgment, after Your Honor had already issued your
18 order denying the motion to reconsideration on that, we
19 then received plaintiff's, on June 23rd, an affidavit
20 attempting to designate an expert witness Doctor Gary
21 Oates. This affidavit actually was filed by Doctor's
22 Oates, I'm sorry, signed by Doctor Oates on June 4th but
23 sent to us on June 23rd. Doctor Oates talks about Doctor
24 Chaudhry. He makes no allegations of negligence on the
25 part of the hospital still, and in fact, specifically

1 states that he doesn't have enough information to be able
2 to say that anybody at the hospital did anything wrong in
3 the birth of this child. So still we have no expert that
4 said anything about the hospital.

5 THE COURT: All right. The indicia of willfulness
6 would be the fact, the long period of time where they
7 haven't named an expert.

8 MR. BRIDGES: As to months.

9 THE COURT: Even in the posture that we're in right
10 now they have failed to provide an expert in that regard?

11 MR. BRIDGES: Yes, sir.

12 THE COURT: Yes, sir.

13 MR. SITNIK: Your Honor, just briefly. First, I
14 believe it says intentional misconduct, Your Honor, I
15 believe is the standard. That was what -- the court went
16 back and said a sanction's fine if there's, you know,
17 gross indifference, but if the sanction's dismissal it
18 requires intentional misconduct. With regards to the date
19 and time of the expert affidavit, as I stated to the
20 Court, the expert affidavit was actually attained by would
21 be substitute statute. That subsequent counsel was then
22 mailed to that subsequent counsel and then that counsel
23 then provided it to us at which time we then provided it
24 as a supplement to our motion to reconsider. It was
25 actually filed and sent prior to your ruling on, denying

1 the motion to reconsider. So if they were provided with
2 it before that ruling. In addition -- and I'm just gonna
3 represent to the Court that since the original Court's
4 ruling, besides determining to grant the motion for
5 summary judgment it's kind of put everybody in a box. If
6 we proceed with any form of discovery then and you granted
7 the motion to reconsider, then we would have to go back
8 and redo that discovery with counsel for Doctor Chaudhry,
9 and I believe that that was actually -- that we've
10 actually discussed that during the pendency of the motion
11 to reconsider that we needed to have that issue heard so
12 that we wouldn't have to go back and be duplicating
13 discovery at some point later in the case should the Court
14 decide to rehear that.

15 But, again, Your Honor, I do think and again,
16 reiterate sort of the arguments that I previously made, we
17 do have substitute counsel who is ready and willing to
18 step into this case. He has experience with shoulder
19 dystocia cases. There was never any intentional
20 misconduct with regard to this. There was never any alert
21 as to tardiness of the discovery responses. Once that
22 alert went up discovery responses were signed and they
23 were sent out. And again, we did try to get -- we have
24 been in communication with the client and had even prior
25 to the original hearing back in April on Doctor Chaudhry's

1 motion, had sent the file to another law firm. That's
2 over these last couple of months, Your Honor. I just
3 simply don't think that the plaintiffs should be penalized
4 for that period of time because we have been trying to
5 resolve these issues and have been bringing issues to the
6 Court and pursuing potentially duplicative discovery in
7 that posture.

8 THE COURT: Mr. Bridges, first of all, do you agree
9 with his interpretation of the case that requires
10 intentional misconduct?

11 MR. BRIDGES: Your Honor, I didn't bring the case
12 with me and I can't state the exact language, but let me
13 just say that my position basically is this. This is a
14 case in which they've alleged negligence in the delivery
15 of this child. Doctor Chaudhry was the delivery
16 physician. We filed our motion for summary judgment
17 immediately following Doctor Chaudhry's for the same
18 reasons. Hers was granted. Then they come along and file
19 an affidavit for an expert that still doesn't say anything
20 against us.

21 THE COURT: Right.

22 MR. BRIDGES: So I think that under those
23 circumstances, whatever the standard would be ---

24 THE COURT: All right.

25 MR. BRIDGES: ---it would rise to that.

1 THE COURT: If it indeed, if the standard is indeed
2 that the plaintiff in this circumstance needs to engage in
3 willful conduct, what elements of willfulness and
4 intentional conduct would you cite?

5 MR. BRIDGES: Well, I would cite the failure to --
6 after all this has come up, the failure to provide an
7 affidavit or designate an expert to testify against the
8 hospital. And we still don't have that, three months,
9 some three months after all this has first come up.

10 THE COURT: And it is clear that this wasn't an
11 arbitrary date that the Court thrust upon the parties; is
12 that correct?

13 MR. BRIDGES: You mean the scheduling order?

14 THE COURT: Right.

15 MR. BRIDGES: That was agreed to scheduling order by
16 the parties submitted to the Court for a conclusion.

17 THE COURT: Very good, all right. I am gonna grant
18 the motion for summary judgment. I understand that there
19 is a second motion for reconsideration. I'm gonna ask the
20 clerk if she would place it on the roster for Friday
21 afternoon. Is there any conflict with that?

22 MR. SITNIK: I'll make it work, Your Honor.

23 THE COURT: Very good.

24 MR. BRIDGES: I'll make it work.

25 MR. SITNIK: You Honor, I just ask one brief thing?

1 THE COURT: You may.

2 MR. SITNIK: I want to -- Mr. Bridges is correct
3 that there have not been any identifications of breaches
4 of the standard of care by Doctor Oats, but he has
5 indicated in his affidavit that he is an expert who has
6 qualifications to testify if there is other discovery with
7 regards to them. So I mean, he has been identified as a
8 potential expert. He just hadn't identified any breaches
9 based upon the limited records that he has. And just one
10 other thing, Your Honor, with regard to the nature of the
11 issue --

12 THE COURT: That's kind of what's incumbent upon you
13 as the plaintiff's counsel is to provide that in order to
14 survive a summary judgment motion. I think that's his
15 point.

16 MR. SITNIK: Yeah, well I think, Your Honor, the
17 medical records are provided in the affidavit. There's
18 extensive list of A through I. He has received and
19 reviewed all those. The actual statement of his testimony
20 is that he has knowledge concerning the general accepted
21 standards, customs and practices applicable to labor and
22 delivery nurses providing care and treatment of attendant
23 (ph) patients under these circumstances. And then he goes
24 on to state, from my review of the medical records of
25 documents mentioned above I'm unable to form an opinion, I

1 would, in order to form such opinion I would need more
2 information about their specific acts with regard to this
3 delivery. It is a -- he doesn't meet the standard of
4 surviving a motion for summary judgment. He has been
5 identified as an expert who is qualified in that area to
6 render opinions on that.

7 And just the last thing, Your Honor, with regard to
8 the issue of whether this was a consent motion or not, we
9 would certainly refer -- and this has been previously
10 cited of course, the Griffin Grain and Clearing,
11 Incorporated versus Tire Service Equipment Manufacturer
12 case. In that case there was, again, there was a -- it
13 was anyway a year after first motion to compel. There was
14 a consent motion to re-establish a scheduling order.
15 Several incarnations of motions to compel and hearings and
16 consent orders and delays went on. This is -- and it
17 cites also to the Marconis (ph) v. Ross cases that notes
18 that in those cases while the Supreme Court has affirmed
19 dismissal of actions based on failure to prosecute the
20 dismissals were imposed to maintain the orderly
21 disposition of cases in the face of repeated warnings to
22 the offended party. Again, the plaintiffs would simply
23 submit and graciously appreciate Mr. Bridges sort of
24 willingness to work with us on this issue, but we would
25 submit that we haven't been faced with the repeated

1 warnings. What we have done is since the motion to compel
2 was filed we've ramped up our efforts. We have substitute
3 counsel waiting. They have made certain -- they have used
4 their experts. We have not received those repeated
5 warnings, and therefore, would add that as additional
6 basis to state that summary, well, some lesser sanction
7 may be appropriate. Summary judgment at this juncture
8 would be improper. And we thank you, Your Honor.

9 THE COURT: All right, very good.

10 Mr. Bridges.

11 MR. BRIDGES: Your Honor, can I prepare a brief
12 order?

13 THE COURT: You can. And in granting the motion and
14 I anticipate there will be a motion to reconsider. We'll
15 take up this one and the one with regard to Doctor
16 Chaudhry.

17 MR. SITNIK: Thank you, Your Honor. If I could
18 just, I briefly make that motion on the record. We are
19 gonna move to reconsider the Court's July 7th order with
20 regards to Doctor Chaudhry and a written motion will be
21 filed with the Court today and a copy will be served upon
22 you and opposing counsel as well.

23 THE COURT: Very good.

24

25 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

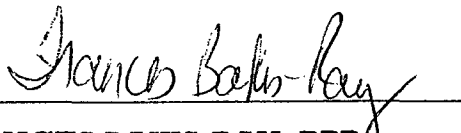
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina,
this 8th day of July, 2010.



FRANCES BAKIS-RAY, RPR
My Commission Expires: 9-13-2014

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

COURT OF COMMON PLEAS NONJURY

MARQUETTE JOHNSON, AS MOTHER)
 NATURAL GUARDIAN OF D'ANDRE)
 G■■■■, AN INFANT UNDER THE)
 AGE OF 14 YEARS,)

PLAINTIFF,)

vs.)

ANU CHAUDHRY, M.D. AND)
 FLORENCE WOMEN'S HEALTH)

DEFENDANT.)

TRANSCRIPT

OF

RECORD

08-CP-21-2326

July 30th, 2010
 Florence, South Carolina

B E F O R E :

THE HONORABLE MICHAEL G. NETTLES, Judge.

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

KEVIN H. SITNIK
 ESQ.
 Attorney for the Plaintiff

SAUNDERS M. BRIDGES, JR. and WADE COOPER
 ESQ.
 Attorneys for the Defendant

HATTIE GORDON
 Circuit Court Reporter

Transcribed by Pamela E. Green, Circuit Court Reporter

I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

THE COURT: Madam Court Reporter, this is Marquette Johnson as Mother and Natural Guardian of D'Andre G [REDACTED], an infant under the age of 14, versus Ann Chaudhry and McLeod Regional Hospital and others. The caption is -- I mean the Case Number's 2008-CP-21-2326.

Glad to hear from the moving party.

MR. BRIDGES: Your Honor, just before you get to the pending motion, you, you heard a motion earlier this week on the Defendant McLeod's motion for summary judgment.

THE COURT: Right.

MR. BRIDGES: I circulated the orders to -- Kevin Sitnik had a couple of request for changes, which I have made and I've brought---

THE COURT: Okay. Good.

MR. BRIDGES: ---the corrected order.

THE COURT: Well, I'll sign it.

MR. BRIDGES: I took one down there this morning.

MR. COOPER: Your Honor, then if, if, if that order has, in fact, been filed, then I would be moving for a reconsideration pursuant to your understanding on Monday with regards to both orders granting summary judgment.

THE COURT: Right. Very good.

MR. SITNIK: Your Honor, may it please the Court,

1 Kevin Sitnik---

2 THE COURT: Yes.

3 MR. SITNIK: ---on behalf of the plaintiff in this
4 action. Your Honor, this is a, this is a renewed motion
5 for reconsideration. We certainly appreciate the Court's
6 indulgence. I certainly appreciate the Court's indulgence
7 in scheduling this hearing on such short notice because
8 this is a second motion for reconsideration. Certainly
9 timing issues compel, compelled to go ahead and try to put
10 this one last time in front of the Court, and I appreciate
11 you being willing to hear that.

12 Your Honor, this is a, as you know, is a medical
13 malpractice action, which, by defendant's own admission in
14 Defendant Chaudhry and Florence Women's Healthcare
15 Center's own motion for summary judgment "concerns
16 complicated issues surround the birthing process of a
17 child including alleged brachial plexus injuries and
18 nerves causing" -- this is complex medical malpractice
19 action.

20 As Your Honor is already aware, this case came to us
21 from an attorney in New York who subsequently indicated he
22 did not wish to ride herd, herd over this case. It then
23 came to my partner and, and mine in our law firm. A
24 scheduling order was entered back in August. From that
25 date forward I did not have any contact whatsoever with

1 opposing counsel in this case. There was no calls or
2 requests for supplementation. There was no sense of
3 urgency with regard to this.

4 What we were doing during that time period was
5 actually conducting our own due diligence investigation of
6 the claim. We recognized that it was, as defense counsel
7 for the, Doctor Chaudhry has admitted, concerning
8 complicated issues. We did send the child back to a
9 neurologist for further evaluation.

10 At that point in time, and this is all stated, most
11 of this is stated in my affidavit that was previously
12 submitted to the Court with our motion for
13 reconsideration, and that including the fact there's been
14 no intentional disregard either from the rights of the
15 defendants in this case or intentional misconduct on our,
16 on our part. Quite simply, part of the reason for the
17 problem was we, we communicated with the client. She
18 expressed a desire to have another law firm look at this
19 case. That has taken place. It's taken place, continued
20 to take place around this process.

21 Back in April, without having a motion to compel
22 filed, both defendants, or excuse me, the defendant for
23 Doctor Chaudhry and Florence Women's Health Center filed a
24 motion for summary judgment citing the failure to comply
25 with the scheduling orders requirement of naming an expert

1 witness by November 30th.

2 On the date of the hearing of that motion, at that
3 point in time, McLeod Regional Health Center filed a
4 similar or nearly identical motion for summary judgment
5 based upon the same reason, that there was no expert
6 witness identified within the terms of the scheduling
7 order, and, and as of that date, still had not been.

8 Subsequent to that or after the original filing of
9 Doctor Chaudhry's motion, it came to light sort of what
10 had transpired with this file, that our letters to, to the
11 client in this case had caused somebody in my office, and
12 I'm responsible for them, to place this in the declined
13 files folder and she removed the dates from the scheduling
14 order off of my calendar.

15 After that point in time, when this motion, the first
16 motion was filed, since that time we diligently tried to
17 work through this issue. We've responded to all
18 outstanding discovery requests. Still have not seen a
19 motion to compel discovery.

20 Your Honor, it's our position that, under the Orlando
21 versus Boyd case, that there has to be -- that when an
22 expert is being excluded such -- and we have filed the
23 affidavit of Doctor Oaks, and Doctor Oaks is, is qualified
24 to render opinions. He, in this case, he's indicated that
25 he has opinions of negligence against Doctor Chaudhry and

1 against Florence Women Healthcare Center, indicates that
2 he's qualified to render opinions against the hospital,
3 but simply based on the records themselves, the medical
4 records, he's reviewed extensive medical records, I
5 believe all the medical records there are that have been
6 reviewed in this case, that he did not identify, from
7 those records, any breaches of the standard of care on
8 behalf of McLeod. He did state that that may change if
9 the deposition testimony of the McLeod employees who were
10 involved in the birth of D'Andre G [REDACTED] causes something to
11 change. But at this point in time, as I'm sure
12 Mr. Bridges will let you know, he does not have those
13 opinions.

14 Your Honor, the, the standard that we believe is
15 applicable to this case is the standard from Orlando
16 versus Boyd, which it said, in which case a late
17 identified physician was precluded from testifying and
18 then the Trial Court granted summary judgment. They said,
19 in essence, the Trial Court sanctioned the Orlando's and
20 dismissed the case for failure to follow a scheduling
21 order. The exclusion of a witness is a sanction under
22 Rule 37 SCRCB, which should never be lightly invoked.

23 Furthermore, where the effect will be the same as
24 granting judgment by default or dismissal, a preclusion
25 order may be made only if there is some showing of willful

1 disobedience or gross indifference to the rights of the
2 adverse party, and that latter portion was a direct quote
3 from the Balkin versus American Telegraph and Telephone
4 Company case, Your Honor, 306 S.C. 101. This -- that case
5 is referenced in our motion for reconsideration.

6 The Court then goes on to, and actually takes it one
7 step further, and says whatever sanction is imposed should
8 serve to protect the rights of discovery provided by the
9 rules. A sanction of dismissal is too severe if there is
10 no evidence of any intentional misconduct, and that cites
11 the Dunn versus Dunn case, Your Honor.

12 We do not believe that there is any, any shred of
13 evidence that there was any intentional misconduct towards
14 either one of the defendants in this case that would rise
15 to the level as an initial sanction issued by this Court
16 of, of dismissal. There, there may be lesser sanctions.
17 I'm sure Your Honor's aware of the, the general caveat.
18 Whatever sanction should be imposed should be a rifle shot
19 and not a shotgun blast, and, in this case, Your Honor, we
20 respectfully submit that the dismissal of the claims do --
21 summary judgment for failure to follow an initial
22 scheduling order in a complex medical malpractice case, as
23 conceded by the defendants, amounts to a shotgun blast if
24 not an atomic bomb.

25 For the last several months we've been dealing with

1 these issues now. We have provided a supplemental
2 affidavit as I mentioned to Your Honor. We've served
3 discovery responses to the defendants in this case. I've
4 actually spoken with Mr. Bridges during the interim
5 because, during that interim, because you ruled from the
6 bench granting summary judgment to the defendant, that
7 Doctor Chaudhry and Florence Women's Healthcare Center was
8 out, we haven't sought to conduct depositions that may
9 need to be reconvened or, or duplicated again should Your
10 Honor decide to, to allow the case to continue against
11 Doctor Chaudhry and Florence Women's Healthcare Center.

12 So, Your Honor, I would respectfully submit that
13 there hasn't been any dilatory action since that, since
14 the time that this came, came to light. Furthermore, Your
15 Honor, from the, the Balkin case, as I'm sure you, the
16 Court is aware, the summary judgment standard is a, is a
17 drastic remedy that should be cautiously invoked so that
18 no person will be improperly deprived at the trial on the
19 disputed factual issues.

20 We have a disputed factual issue now. With Doctor
21 Oaks affidavit, it certainly creates a disputed factual
22 issue, and, furthermore, Your Honor, in the Balkin case
23 they noted that it had been roughly three years since the
24 initial filing of the action before the disclosure of the
25 physician in that case. But the Court noted that there's,

1 that the, that the delay in locating a physician is
2 tempered by the complexity of these cases and the hardship
3 encountered in proving causation.

4 Certainly, by defendant's own admission in their
5 motion for summary judgment, this is a, this is a complex
6 medical malpractice case. It is a difficult issue of
7 causation. However, with Doctor Oaks' affidavit, we now
8 have an expert opinion who can provide that causation.
9 It, it is not as simple as amputating the wrong foot.
10 This is a case that requires not only an expert medical
11 opinion, but extensive and in depth research into the
12 causes in the medical literature that are out there on
13 this type of injury. Neither---

14 THE COURT: If it's so complex, generally you would
15 think that if you're gonna sue somebody over something's
16 that complicated, you'd get your expert before you mounted
17 up, wouldn't you think?

18 MR. SITNIK: Yes, Your Honor, and I think that's
19 exactly why the Legislature now has the requirement that
20 you, that you have that expert affidavit. Now, this is an
21 old statute.

22 THE COURT: I understand that.

23 MR. SITNIK: And you---

24 THE COURT: But I'm just saying---

25 MR. SITNIK: And---

1 THE COURT: ---as a general rule, if it's that
2 complex, you ought to investigate it before you file suit
3 I would think.

4 MR. SITNIK: And in addition -- I, I would agree,
5 Your Honor. In addition to that, there was a, a concern
6 that the statute may run, and even under our current
7 statutory scheme where the affidavit is required, there is
8 a built in mechanism for extending that Statute of
9 Limitations period where, due to the Statute of
10 Limitations concerns, the expert affidavit could not be
11 garnered ahead of time because initially this claim also
12 included the individual claims of Ms. White. There was a
13 decision made by another attorney that the claim needed to
14 get filed. It needed to get filed immediately because of
15 the issues concerning her Statute of Limitations.

16 AS I'm sure Your Honor is aware, there's a minor
17 tolling provision that may cover D'Andre G., but there
18 is not such a minor tolling provision with regards to the
19 mother's claim. So that -- because there were concerns
20 that the statute may be running, there was an immediate
21 urgency to try to file this case.

22 Your Honor, we would respectfully submit to the Court
23 that any, any delay that is transpired in this case, and
24 we certainly agree that, that there was, there were, there
25 was some delay, was, was inadvertent. It was certainly

1 not intentional. It was not designed to prejudice the
2 defendants in any way. And as further evidence of that,
3 Your Honor, we would suggest that had there been a concern
4 about the discovery responses, then normally what would
5 have to happen, under Rule 37 and Rule 11, is that there
6 would have to be some communication between counsel hey,
7 where's my stuff, why am I not getting my stuff. That did
8 not take place in any way, shape, or form in this case.

9 In other words, Your Honor, it, it, it is a -- I'm
10 not saying that there was impropriety in filing a summary
11 judgment motion, but respectfully, Your Honor, I submit
12 that the proper course of action under our rules is to
13 file a motion under Rule 37. It is a discovery issue when
14 discovery responses are not submitted and a discovery
15 order has not, a scheduling order is not complied with.
16 That's a, that's a Rule 37 motion. A Rule 37 motion,
17 under Rule ~~11~~, requires communication between opposing
18 counsel prior to filing that motion.

19 However, because this route was chosen, once those
20 summary judgment motions were filed, the plaintiff lost
21 the ability to voluntarily dismiss this action.
22 Furthermore, Your Honor -- and then refile on behalf of a
23 minor, who, because of the minor tolling provisions, would
24 still have a claim.

25 Your Honor, again, this is, at, at heart, this case

1 is fundamentally about a minor, D'Andre G■■■■, and this is
2 his one chance to determine and have the Court determine
3 and the judge and jury determine whether there is
4 sufficient evidence to prove negligence as a matter of
5 law. We have an affidavit from a physician who indicates
6 that there, that there, that, in his opinion, there is
7 evidence of negligence, and we're simply asking that the
8 Court allow us to pursue those, to pursue those claims.

9 If there is -- and, and, generally speaking, Your
10 Honor, I would split that under -- if a motion had been
11 filed -- first of all, if the consultation would have
12 occurred under a Rule 37 style motion, prior to filing
13 that motion, much of this would of come to light and
14 hopefully, if not resolve those issues right off the bat,
15 would of alerted us to some of the issues which could have
16 been resolved more quickly.

17 Second of all, Your Honor, if it was a motion under
18 Rule 37, generally speaking, the case law does not support
19 an initial sanction of dismissal. Rather -- and the cases
20 are cited again in our, in our brief. What the Courts
21 have said is that such a, such a dismissal may be
22 appropriate in light of repeated offenses of failure to,
23 to comply with the orders of the Court, and it's those
24 repeated offenses that would normally trigger or permit
25 the Court to allow dismissal of the action, and that is

1 the Griffin Grading and Clearing, Incorporated versus Tire
2 Services Equipment Manufacturing Company.

3 Your Honor, those, those were consent motions,
4 scheduling orders, consent orders compelling discovery,
5 multiple consent orders, roughly six in that case. Here
6 we haven't had a single one. We have not had a single
7 instance, prior to the issuance of summary judgment by
8 this Court---

9 THE COURT: Was it you or somebody in your firm who
10 entered, actually entered into the consent?

11 Did you sign it?

12 MR. SITNIK: No, sir, the, the signature on it is
13 actually Jones Andrews.

14 THE COURT: I got you.

15 MR. SITNIK: And, Your Honor, I -- it's with, it's
16 with my firm. I will say that, you know, I was, I was
17 aware that that was going on. Shortly -- there was a
18 point in time where both opposing counsel were served with
19 a letter from Mr. Andrews that indicated that he would not
20 be participating in this case and direct all
21 correspondents to me.

22 That letter went out prior to the running of any
23 deadlines in this case. I don't know what effect that
24 had, if any, on, on strategies that were going to be
25 employed in this, but Mr. Andrews did -- he, he, he was on

1 the consent order, but I did -- I was aware that the
2 consent order was being signed. But he did send a letter
3 out and just said, you know, he was be getting out of this
4 case.

5 That means if, if -- I mean I recognize that it falls
6 on me. I am aware that it was a consent order. I am
7 aware that it is an order of the Court.

8 What I would respectfully submit is, you know, as an
9 appropriate sanction, certainly tell the, tell me, tell
10 the plaintiff that their feet are gonna be held to the
11 fire and the dismissal may be an appropriate remedy if
12 there's inner, any, any further indication of any dilatory
13 delay tactics or missing deadlines or orders, and I
14 certainly don't think that that, you know, given what's
15 transpired, I don't think that that would be
16 inappropriate, and certainly, you know, for the, for the
17 cost of filing their motions, we certainly, you know, I
18 certainly would think that that would be a targeted motion
19 attempting to do this.

20 I will say that the client has found counsel of her
21 own choosing. She, she has -- and we've been in contact
22 with her since at least October 30th, Your Honor, before
23 the running of any deadline asking her to find us with
24 substitute counsel, asking her if she, you know, where she
25 would like the file sent. We repeated those issue. The

1 file was subsequently, prior to the, the first hearing on
2 the motion for summary judgment, was sent to the Louheed
3 Law Firm. It's my understanding, after speaking with both
4 Mr. Alton and Mr. Graham, that he associated Ed Graham in
5 this action, and Mr. Graham is actually the one who has
6 procured the physician, Doctor Oaks, to testify.

7 He has some experience. We don't use specialize in
8 South Carolina, but he has some experience with this type
9 of injury, this brachial plexus type injury, this erbs
10 palsy type injury that's alleged in the complaint. He is
11 indicated his readiness, willingness to stand in.
12 Unfortunately he's in trial all this week in, in
13 Charleston and expects to be down there, according to his
14 office, for the next couple of weeks. Otherwise I believe
15 he would, would actually be here with me.

16 But, Your Honor, I think the, the -- while I'm not
17 saying -- I don't want to go so far as to say that
18 there's, that there is no, that the violation of the
19 scheduling order does not merit some kind of caution from
20 the Court, some kind of direction from the Court, I'm not,
21 I'm not going that route. I do think that scheduling
22 orders are often changed, that we certainly have been the
23 victim of that with late named experts even during trial,
24 and have, and have seen than happen. I'm not saying that
25 there's not, that it's not an order and there there's not

1 some mechanism.

2 what I, what I do respectfully submit to the Court is
3 that the case law in this is, is pretty clear, and I don't
4 think that there's anything that's been presented to this
5 Court, and I certainly represent to this Court that
6 there's nothing that has transpired in this case that
7 amounts to intentional misconduct on behalf, on behalf of
8 the plaintiff's counsel. I certainly don't think that
9 there was any intent to cause harm or delay. I do think
10 that, you know, some procedures have -- and certainly
11 we've taken some remedial measures in light of this action
12 and certain people have, you know, have been counseled.

13 But, Your Honor, I respectfully submit that the
14 standard in this case is the potential misconduct
15 standard. I would respectfully submit also that, under
16 the Griffin Grading and Clearing case, or -- and the
17 McCummins and Ross cases, that the dismissal is, should
18 only be imposed in light of the face of repeated warnings
19 to the offending party, and I, I simply submit that -- I,
20 I -- while now may be a good time for us to give that
21 warning, Your Honor, I respectfully submit, given the
22 gravity of this case, given the fact that this is one
23 child, one case, this case could have been filed, were it
24 not for the concern about the mother's cases, could have
25 been filed even as late as today I believe based on the

1 date of the injury, if not later, because of the minor
2 tolling provisions.

3 However, Your Honor, we, we think it's -- it is a
4 drastic remedy. It amounts to a, it amounts to a
5 surprise, a surprise victory on a technical, on a
6 technicality. Granted summary judgment is not, strictly
7 speaking, a technicality. Summary judgment is a, is a
8 legitimate tool. But where the purpose, where the reason
9 for granting the summary judgment is the failure to comply
10 with a scheduling order, and at the time when this was
11 first raised, we were still months and months away from
12 the earliest possible trial date. We've been, we've been
13 spending the last two and a half, three months running
14 through these issues when we could be using that for
15 discovery purposes and get this case moving.

16 With regard to McLeod, Your Honor, I, I respectfully
17 submit the only -- they may be entitled to summary
18 judgment very shortly. I anticipate that there's only two
19 to three witnesses that would need to be deposed.
20 Doctor Oaks could then say either there's nothing
21 additional in their testimony which would give rise to
22 them, in which case McLeod would be free to refile their
23 motion and be granted summary judgment at that point. But
24 we do have an expert on board who's qualified.

25 The amount of discovery that would need to be, take

1 place, we're ready to jump in on that today. We're ready
2 to jump in and move this case forward.

3 So, as far as medical malpractice cases go, this one
4 was filed in December of '08. That doesn't make it a
5 young case by any stretch of the imagination. But it is
6 not the, it is not the oldest case particularly in light
7 of the fact that this ball on this summary judgment issue
8 got rolling in April. That makes it essentially about 13
9 or 14 months old at the time summary judgment issue was
10 raised and the, and the summary judgment was granted.

11 Respectfully, Your Honor, we also submit that, at the
12 original hearing, I did move for an extension of the, of
13 the scheduling order deadlines. Obviously that request,
14 you know, was denied in light of Your Honor's prior
15 ruling. But we do think that the Court is in a position
16 to impose a relatively short scheduling order deadline and
17 hold the plaintiff's feet to the fire at this point.

18 Certainly we'd, we'd, I think, as a matter of
19 fairness, would have to be amenable to the reasonable, to
20 any reasonable request on behalf of the defendants to get
21 their ducks in a row as well. But, but, Your Honor, based
22 on the case law that I've cited, based upon my affidavit
23 and our representations that there was no intentional
24 misconduct, we respectfully ask the Court to reconsider
25 its decision to grant summary judgment dismissals for

1 failure to comply with the scheduling order and reverse
2 those orders and allow us to proceed with this case as
3 quickly as possible.

4 THE COURT: Mr. Bridges, do you agree that that is
5 indeed the standard with regard to this particular case,
6 whether or not the burden is intentional misconduct?

7 MR. BRIDGES: Your Honor, I, I agree that that is the
8 language in the Orlando case when the relief sought is a
9 sanction. With regard to my client's motion, McLeod's
10 motion, our motion is not for a sanction. It was for
11 summary judgment. Not for sanctions. So, that's the
12 difference.

13 THE COURT: All right. Do you concede that there is
14 no intentional conduct in this case?

15 MR. BRIDGES: Yes, Your Honor.

16 THE COURT: All right. Yes, sir.

17 MR. COOPER: Your Honor, Wade Cooper appearing on
18 behalf of Doctor Chaudhry and her practice, and just to
19 let you know, I'm appearing for Mr. Blake who is on
20 vacation. But considering the timeliness of the nature of
21 this being heard, I'm happy to appear for him. I've
22 reviewed the file and believe that I'm up to speed.

23 Your Honor, what I believe that I just heard was a
24 motion to reconsider a dismissal of a case as a sanction
25 for failure to abide by a scheduling order. At least

1 that's the way I understand their written motion, and I
2 didn't really hear anything new in the oral argument as a
3 sanction, and indeed he's cited several cases where there
4 had been multiple violations of a scheduling order, which
5 resulted in an expert being excluded, which resulted in
6 summary judgment or dismissal being granted down the line
7 for failure to have an expert.

8 If you look at our motion for summary judgment, which
9 we filed in March of this year, the motion was based upon
10 the grounds that the plaintiffs had yet to produce an
11 expert, even identify an expert, that could testify as to
12 the standard of care, and that could testify that Doctor
13 Chaudhry deviated in some way from that standard of care.
14 That motion was filed I believe on March the 26th of 2010.
15 This motion was actually heard over a month later on
16 April the 29th of this year.

17 All right. So, we, we, you know have clearly more
18 than ten days the plaintiffs had, and clearly gave them a
19 month to put this case back on their radar.

20 If I can just, for a second, go back to correct some
21 things on the record with regard to our attempts to obtain
22 responses to our initial discovery requests. It's been
23 represented to the Court by a written motion, and today in
24 oral argument, that there were no attempts made by my
25 office to follow up with an attempt to get responses to

1 our discovery. I have here, if the Court wishes to see
2 it, I've got extra copies, a set of e-mails between my
3 office and Mr. Sitnik's, which I understand they have
4 multiple locations s, but it -- Mr. Rob Phillips of their
5 office initially, it looks to me like, he signed the
6 answers. So, initially our correspondents was between our
7 office and Mr. Phillips.

8 February 18th, 2009, Mr. Phillips office said Robert
9 also wanted me to request a 30 day extension to answer
10 these. Can you check with Hugh and let us know. This was
11 correspondents between the paralegals. Mr. Bike responded
12 to Mr. Phillips, we have no objection to the proposed
13 extension as long as we receive "meaningful responses."
14 Look forward to working with you on this matter.

15 All right. So, we've got an initial request hey, no
16 problem, give you extra time to answer it, but as long as
17 we receive meaningful responses, we'll move forward.

18 Well, we got no responses whatsoever. And, so,
19 again, on July the 13th of 2009, when, as I understand it,
20 dates were being passed back and forth for this proposed
21 consent scheduling order, Hugh said to, in an e-mail
22 directly to Jones Andrews with, which Mr. Sitnik was
23 copied on, July 13th of 2009, they're discussing the
24 scheduling order. No problem. I will send it over for
25 everyone's review.

1 we do note though that your discovery responses to
2 our initial interrogatories and request for production
3 remain outstanding, and would request legitimate responses
4 to these within 30 days.

5 Response from Mr. Andrews. Again, Mr. Sitnik's
6 copied, thanks, Hugh. We will do the best that we can to
7 answer your discovery to the fullest extent that we can.
8 July 13th, 2009.

9 Now, a month later, a consent scheduling order is
10 circulated, signed by all parties, including Mr. Sitnik's
11 office, setting forth a series of dates regarding
12 discovery, mediation, and ultimately a trial. In that
13 scheduling order there were dates for the plaintiffs to be
14 presented for deposition. There were dates for the
15 plaintiff to complete depositions of the physicians,
16 nursed, or anybody else they wanted to depose. There was
17 a provision or a deadline for the plaintiffs to name their
18 experts and produce them for deposition. That deadline
19 expired in November of 2009.

20 All right. So, we've got no discovery responses.
21 We've got them consenting to provide their parties and
22 their experts to us by November of 2009. Nothing happens.

23 Well, I can't speak for why he chose to do it when he
24 did it, but Mr. Bike filed a motion for summary judgment
25 in March as I've just told you. The basis for the motion

1 wasn't we think we should get summary judgment or think we
2 should be dismissed because the plaintiffs failed to abide
3 by the deadlines in the scheduling order. It was not that
4 at all. It was the plaintiffs have not provided, either
5 by testimony or an affidavit, of an expert who can testify
6 to the standard of care that Doctor Chaudhry deviated
7 therefrom.

8 A month goes by and this motion finally gets heard
9 and no affidavit appears at the, at the hearing. Now, I
10 wasn't here to know what was said, but I can tell you that
11 we finally got responses to our discovery the date of the
12 hearing, and delivered, and if I may also make the record
13 with these, the plaintiffs admit, at the day of the
14 hearing, not only in oral argument, but in writing, we
15 have no expert yet.

16 In their responses to Interrogatories 7, 8, 17, 18,
17 and 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, and 35, the
18 answers were, and this I believe is important cause they
19 understood the importance of it, is, is -- just a moment.
20 For instance, state with specificity each act wherein the
21 plaintiff submits that this defendant failed to adhere to
22 accepted medical practices or standards of care. Their
23 response, on the date that this motion for summary
24 judgment was heard, answer, this interrogatory requires
25 the opinion of medical experts, which have not yet been

1 identified by the plaintiff. Plaintiff reserves the right
2 to supplement this answer once responsive information
3 becomes available.

4 So, they show up at that hearing admitting, in oral
5 argument, in writing, we don't have an expert yet that can
6 testify that your doctor deviated from the standard of
7 care. That is the basis of your, Your Honor's ruling and
8 ultimately your written order was that the, in South
9 Carolina, it's well accepted that if you file a medical
10 malpractice case, you've got, and, and we've heard it
11 several times, this is a complicated matter outside of a
12 lay person's ability to understand. So, you've got to
13 bring an expert to the table and you got to do it when you
14 got that summary judgment, had, had that summary judgment
15 hearing, either already have a deposition where you can
16 point to certain pages and lines or the opinion sets forth
17 deviations from the standard of care or come to the table
18 with an affidavit. Neither of which they had done the
19 date that this motion was heard.

20 Careful reading of Your Honor's order granted summary
21 judgment based on the fact that there was no genuine issue
22 of material fact cause there was no expert testimony,
23 affidavit or otherwise, setting forth the standard of care
24 or that Doctor Chaudhry deviated from it. Therefore,
25 summary judgment, in South Carolina, is appropriate as a

1 matter of law.

2 Your Honor also found, and you've asked the question
3 of Mr. Bridges whether or not he was aware of any
4 intentional misconduct, well, that's one of the standards.
5 The other standard is that, whether there is a gross
6 indifference to the rights of the adverse party. In Your
7 Honor's order, it says as of the date of the hearing on
8 the motion, defendant's motion for summary judgment,
9 plaintiff failed to present her for deposition, name
10 experts, or depose any parties or treating medical
11 providers in accordance with the consent scheduling order.
12 As such, there has been a gross indifference to these
13 defendant's right to defend the case and a failure to set
14 forth the issues to a jury.

15 Now, there's two sides to every case. You hear every
16 time a defendant attorney stands up at trial and says all
17 right, now you're gonna hear my side of the story. Well,
18 Doctor Chaudhry got sued back in December of 2008. They
19 have to hire attorneys to represent Doctor Chaudhry who
20 have to go out and compile medical records, have to go out
21 and hire experts of our own, monies are spent. And, so,
22 clearly we've been adversely affected.

23 They filed a lawsuit admittedly without any expert's
24 advice from the beginning. Instead they showed up at a
25 motion for summary judgment resting on the allegations of

1 the complaint. No affidavits to support those
2 allegations. Certainly none from a doctor.

3 Now, Doctor Oaks. Doctor Oaks' affidavit is dated
4 June the 4th, 2010, a month and a week after you heard the
5 motion for summary judgment. So, you know, it, he -- it
6 may say what it may say, but it wasn't there when Your
7 Honor, Your Honor heard this motion on April the 29th,
8 2010.

9 Let me go over my notes to make sure I cover
10 everything here.

11 Three questions. Did the defendant's file a motion
12 for summary judgment?

13 Yes.

14 Basis for that was failure to provide an expert
15 testimony.

16 Did more than ten day elapse between filing of the
17 motion and the hearing?

18 Yes, more than a month.

19 Did the plaintiff present evidence of an expert to
20 overcome the defendant's motion at or before the hearing?

21 No.

22 Under South Carolina law, that's it, end of story. A
23 month and a half later -- I mean you think about the
24 precedent that's being asked for here. Okay. well, you
25 don't have to show up for a motion for summary judgment to

1 defeat. Instead you can come in a month later and say oh,
2 now we found somebody. In fact, we didn't find them.
3 Another attorney found them, and here's his affidavit, and
4 I'm not gonna get into the issues of, of Doctor Oaks'
5 credibility or the fact that he hasn't practiced medicine
6 in over a decade.

7 But that's the precedent that's being asked for, and
8 that's dangerous because, you know, I routinely have had
9 motions for summary judgment where I filed saying there's
10 no expert testimony, and I've come to the hearing, and I'm
11 handed a affidavit, and the judge looks it over and says
12 Mr. Cooper, he's got an affidavit. There's nothing I can
13 do. His affidavit sets forth the standard of care. It
14 says that your client deviated, and I can't grant your
15 motion relief.

16 But that wasn't done in this case. There was plenty
17 of notice for that. The initial notice was filing, taking
18 the case, and filing the complaint. Later on it was
19 filing a consent order saying we're gonna present our
20 expert. The third was our filing a motion for summary
21 judgment. A month goes by. No affidavit.

22 And, in conclusion, you know, the plaintiff was
23 required to present this expert testimony to establish the
24 standard of care and a deviation. They failed to do so,
25 and, therefore, under South Carolina law, summary judgment

1 was appropriate as a matter of law, and, therefore, we
2 would argue that the plaintiff's motion today be denied,
3 and as Your Honor's ruling is based soundly on South
4 Carolina law.

5 THE COURT: Yes, sir.

6 MR. SITNIK: Yes, Your Honor.

7 First of all, I just want to address a couple of
8 things to make sure the Court's clear. I do understand
9 that, opposing counsel. I appreciate his willingness to
10 be here today. I know that he's, he's not Mr. Bike who
11 was present at that first hearing on this.

12 But as Your Honor knows, and as is included in our
13 motion for reconsideration, it may not be the argument
14 that carries the day. But on the day of the initial
15 hearing of this matter, back in April, the notice from the
16 Court, the Court's own records indicate that notice was
17 sent to a P.O. Box here in Florence for Robert Phillips,
18 but it was not sent to anybody else in our firm. The only
19 notice of that hearing that we got that week was actually
20 when the Clerk's Office called to say can we change the
21 time from 10:00AM I think to 2:00PM in the afternoon, and
22 I said on what, and they said the summary judgment motion.

23 It doesn't mean we didn't get served with the motion,
24 Your Honor, but I did want to make that clear that it
25 wasn't that -- we showed up I think the, the next day or

1 two days later. I think it was Tuesday and we showed up
2 on Thursday there, but during that, that relatively short
3 timeframe. I did, I did just want to point than out.

4 With regards to the e-mail correspondents that
5 opposing counsel has alluded to, he is correct, and one of
6 them I am copied on. It was sent to Jones Andrews. That
7 was back July 13th. The other one was from February 18th
8 of 2009. Both of these were long prior to the entry of
9 the scheduling order in this case, and the affidavit, from
10 what I've, what I've sited in this Court, if I misspoke, I
11 will admit it, but I believe my affidavit speaks for
12 itself, is that, since the time of the filing of the
13 scheduling order, there was, there was no communication
14 between me or my office and either of the opposing
15 counsel.

16 These email correspondents, one which appears to be
17 from February, shortly after this action was filed, and
18 one from July 13th, well prior to the entry of the
19 scheduling order, but prior to the entry of the scheduling
20 order. It's actually consistent with my affidavit.

21 I'm not saying that there, that there weren't issues.
22 Of course, Your Honor, it was my responsibility to make
23 sure that that was, that, that the discovery got handled
24 once I took over sole responsibility for the case, but I
25 did want to make sure that there was clear. Between those

1 time frames that are listed in the scheduling order, and
2 the signed summary judgment motion was filed, there was no
3 communication.

4 Secondly, Your Honor, with regards to the scheduling
5 order in and of itself, the scheduling order says the
6 plaintiff shall present, for deposition, by October 15th,
7 2009. We never got a request for the plaintiff to appear.
8 Again, this was actually back, that I'm aware of, I
9 searched the file, I don't see any request. If, if that
10 is incorrect, it did not come through me or my office.

11 So, it was not -- I don't believe that this was a one
12 sided lack of discovery that was going on. In, in
13 essence, there was no discovery conducted from the time
14 the scheduling order was entered until the summary
15 judgment motion was filed. There were outstanding
16 discovery requests. I acknowledge that. I admit that.

17 But, Your Honor, I also -- I am I guess I'm moving on
18 to sort of the next point that was raised. It was
19 suggested that gross indifference is the standard, and
20 gross indifference is cited in the Orlando versus Boyd
21 case, but they go further, and the reason why they go
22 further is because the Trial Court, in Orlando versus
23 Boyd, this case went up on appeal, the Court of Appeals
24 originally said you have to show gross indifference or
25 willful disobedience. They sent it back down to the Trial

1 Court. The Trial Court said the lax efforts constitute a
2 gross indifference.

3 Then it went back up to the Supreme Court, and the
4 Supreme Court said, in the same case, no, that's not
5 enough. I don't think that there can be any argument that
6 the actual standard is, is too severe. There's no
7 evidence of any intentional misconduct. That's what
8 Orlando versus Boyd says. It's about two pages long, and
9 it's, while it's not a particularly long opinion, and it
10 makes its point very clearly.

11 Again, Your Honor, I do, while I respect the
12 forcefulness with which defense counsel has made his
13 arguments, this is a complex case. We have made certain
14 decisions in this case, and the client has, should
15 certainly have the right and the opportunity to seek
16 counsel of their own choosing. Once that opposing
17 counsel, once that sub, would be substitute counsel was
18 found, he was found shortly after the original hearing of
19 this, he agreed, spoke with their office on the phone
20 shortly after the original order was issued in this case,
21 he got an affidavit, he sent it, he mailed it to us, and
22 we got it, and we immediately turned around and mailed it
23 to opposing counsel.

24 There is a material issue of fact in this case as we
25 stand here today. This is the one opportunity for D'Andre

1 G~~ROSS~~ to get justice in this case. If, in fact, the
2 trial, at the trial, a jury finds that there was
3 actionable negligence on behalf of Doctor Chaudhry and her
4 practice or, and/or McLeod Regional Medical Center, Your
5 Honor, we're asking that we, that -- certainly hold our
6 feet to the fire. But let's get it done. Let's make sure
7 that justice is done, and not have a scheduling order take
8 precedent over the merits of litigation.

9 South Carolina case law is clear is that it's
10 preferable for cases to be decided on their merits rather
11 than on technicalities. Certainly failure to adhere to a
12 scheduling order is a, is a pretty big transgression of a
13 technicality. But it does not resolve this case on the
14 merits. It, it has the effect of resolving it on the
15 merits, but we've got Doctor Oaks affidavit, as we stand
16 here today, that identifies breaches of the standard of
17 care.

18 We have a local attorney who is ready, willing, and
19 able to step in and assume the defense of this action.
20 This was an initial scheduling order that had never been
21 modified. Opposing counsel, as I'm sure Your Honor is
22 aware, for Doctor Chaudhry and Florence Women's Healthcare
23 Center, would not consent to a Rule 41 in the case prior
24 to the issuance of the scheduling order in order to enable
25 us to sort of have more time to do all of these things.

1 And while it may be a consent scheduling order, it is
2 not given with unbridled, you know, unbridled agreement
3 on, on, on issues of time, and certainly we could of gone,
4 I guess, and said we can't agree on a consent scheduling
5 order but due to the, due to the timing issues. But, Your
6 Honor, I don't think that there's any evidence that's been
7 cited here today again that would rise to the level of an
8 intentional misconduct that Orlando versus Boyd says must
9 be present particularly in light of any prior warnings by
10 the Court that the, that the failure to abide by the
11 scheduling orders or any other orders in this Court will
12 result in the possibility of dismissal of the action.

13 THE COURT: Okay. Mr. Bridges, anything further from
14 you?

15 MR. BRIDGES: Just this, Your Honor. The, the one
16 which you entered granting summary judgment to McLeod, as
17 I alluded to before, is based on the failure of, of any
18 evidence of malpractice on the part of McLeod even
19 accepting Doctor Oaks' affidavit. So, as far as McLeod is
20 concerned, your order doesn't even address whether there
21 was an intentional failure, the scheduling order, or
22 anywhere anything else.

23 It's, it's granted McLeod's summary judgment even
24 after considering Doctor Oaks' testimony or his affidavit,
25 which is -- basically I don't see anything that I can

1 point to about McLeod, and the best I can do is hope
2 something might come up, and, and if, if that's all he has
3 to do, then we'll never get any defendant out of a case.
4 So --.

5 MR. SITNIK: Your Honor, just, just very briefly to
6 that point. I -- just particularly to that argument, I
7 would again reference the Balkin case, Your Honor, which
8 says that, given the complexity of the case, and the, and
9 the burdens encountered in proving causation, what we're
10 essentially asking for here, and I know that we're, I know
11 that I'm in the position to be imploring this Court to ask
12 for this, even with regards to, to McLeod, is that we been
13 given, hold our feet to the fire, a short time in which to
14 conduct and complete the, the fact discovery. That is
15 certainly up to the, you know, the Court's discretion I
16 guess as to the time.

17 We would, we would ask for a minimum of 90 days,
18 which would be three months. But basically the time we
19 spent arguing over these summary judgment issues to
20 complete fact discovery, and if, if, at that time or even
21 prior to that time, we don't undercover evidence using
22 Doctor Oaks as the expert that would indicate that
23 McLeod, then, then certainly I think they would be
24 entitled to summary judgment at that point, if they're not
25 voluntarily, if they're not actually just dismissed,

1 stipulated to be dismissed at that point.

2 But what we are asking of the Court is really, not
3 only to overturn the summary judgment portion, but to
4 address one of the things that has not been addressed in,
5 in the orders that have issued forth in this Court
6 previously, which is our motion for an extension of the
7 scheduling order.

8 We do realize that we, that we are asking for that.
9 We do not believe that that is out of bounds with, with
10 practice here in South Carolina. But late disclosures can
11 still be accepted, and this case can move forward. There
12 is a person, an attorney who's ready to step in. That's
13 who my client wants---

14 THE COURT: That's another problem. You, you're
15 wanting to get the thing reopened and they you're gonna
16 cut and run.

17 MR. SITNIK: Your Honor, I will not cut and run if,
18 if Your Honor would like me to stay on this case. I can
19 certainly hold my feet to the fire and I will do
20 everything in my power. I will appear at hearings. I
21 will appear at depositions. You know, I, I don't -- and
22 I'd be glad to tell, you know, Mr. Graham to use me as,
23 use me as he sees fit. But I've talked with him and he's
24 said, he's -- he's assured me that he can complete
25 discovery in short order, but if, if that's an issue in

1 this case---

2 THE COURT: Yeah, well, it sounds like he's in trial
3 for two weeks.

4 MR. SITNIK: Well, he, he's in trial, he's in trial
5 for right now. This -- he's been in trial all this week,
6 Your Honor, and I do -- I mean, from what I understand, I
7 do expect, and I did talk with his office, and they said
8 they expect him to, to be down there at least another
9 week.

10 So, I mean I do understand that he's gonna be gone
11 for, for a week. But when we're talking about scheduling
12 depositions of, with McLeod, I believe it is, it is
13 limited to two or three actual employees that were in that
14 delivery room when this infant was born. Those two or
15 three employees, we can set up those depositions and we
16 can move forward, and Doctor Oaks can either say that
17 changes my mind or it doesn't. But right now, he, he's
18 got an affidavit saying, based on the medical records, I
19 don't, I don't see anything here.

20 The only thing he says can change his mind is if, you
21 know, the, the fact witnesses say something different than
22 what's in the medical records, and, you know, and that's
23 always the case. But we can get that discovery done in
24 short order. I certainly -- I, I am at your whim. I'm,
25 I'm on this case until you let me go, and I understand

1 that, Your Honor. I certainly -- you can hold my feet to
2 the fire.

3 THE COURT: All right. With regard to McLeod, I'm
4 gonna grant the motion to reconsider. I'm gonna lift the
5 summary judgment and I'm gonna give 30 days from today's
6 date to submit affidavits or depositions of witnesses to
7 establish liability on the part of the McLeod. Plaintiff
8 is to, is to make themselves available, during this period
9 of time, for the defense to take depositions of these fact
10 witnesses during this 30 day period.

11 Mr. Sitnik is personally responsible for the
12 conducting of this discovery, and with regard to any
13 expert witnesses to the liability of McLeod, it's limited
14 to the testimony of that of Oak, Doctor Oak. Plaintiff's
15 counsel is to be responsible for the payment of the filing
16 fee, travel cost, and attorney fees for counsel for McLeod
17 for both hearings. The summary judgment's gonna be held
18 in abeyance until after this discovery has been conducted.

19 So, you understand the parameters of that?

20 MR. SITNIK: Yes, Your Honor.

21 THE COURT: Now, is that -- I'm -- I've outlined
22 these provisions.

23 Does that pose -- I know that you probably don't
24 agree with, with the ruling, but does, does that, that
25 pose any kind of difficulty for, for you with regard to

1 him conducting this -- clearly he can comply with it by
2 producing affidavits. But clearly you can participate
3 and, you know, take their depositions during the next 30
4 day period.

5 Is that gonna be too onerous on you?

6 MR. BRIDGES: I don't think so, Your Honor. The only
7 possibility would be if any, any witness that we need to
8 depose during that period of time---

9 THE COURT: Okay.

10 MR. BRIDGES: ---would be, had moved away or, or
11 something like that.

12 THE COURT: All right. But my point to you is that
13 for when you revisit -- after this 30 day period is up,
14 you can, you feel -- you can feel free to move for summary
15 judgment after you've had an opportunity to do that
16 investigation, and you can take their depositions beyond
17 that. But he's got to comply. He has got to produce
18 affidavits of somebody to establish liability, and, and,
19 and if you want to take depositions during that 30 day
20 period you can, but you can take it beyond that.

21 Do you understand what I'm saying?

22 MR. BRIDGES: I understand that.

23 THE COURT: All right.

24 MR. BRIDGES: And you're limiting his expert against
25 McLeod to Doctor Oaks?

1 THE COURT: Doctor Oak and---

2 MR. BRIDGES: I understand. I don't think that
3 should be a problem.

4 THE COURT: All right. And I'm gonna hold the
5 summary judgment motion on behalf of McLeod in abeyance.

6 With regard to Chaudhry and Florence Women's Health,
7 I haven't reviewed the -- that is one in the same, isn't
8 it, Florence Women's---

9 MR. SITNIK: You're correct.

10 THE COURT: Okay. All right. The testimony's gonna
11 be limited to the testimony of Oak with regard to
12 liability. The deposition is gonna be scheduled within
13 ten working days of today's date. The depositions will be
14 scheduled within 30 days of today's date, and under no
15 circumstances should it be longer than 60 days. I'm
16 gonna -- you have ten days to schedule it, and the
17 preference and the preparatory request of the Court is it
18 be within the next 30 days. Under no circumstances can it
19 be beyond 60 days.

20 Is that gonna pose a problem for counsel for
21 Chaudhry?

22 MR. COOPER: I don't know that I can speak on
23 behalf -- there's just three of us in our office. So,
24 I'd, I'd have to check with Hugh on that, but I do know
25 that we have several day certain trials scheduled between

1 now and the end of the year. I don't know how soon they
2 are.

3 THE COURT: All right.

4 MR. COOPER: We may have---

5 THE COURT: Well, we're gonna do it that way in order
6 for us to move forward. Chaudhry and Florence Women's
7 Health need to move forward on this. If it poses a
8 problem with defense counsel, I'll invite you to, to file
9 a motion and perhaps it can be handled by a conference
10 call. If you'll note that.

11 MR. SITNIK: Your Honor, just to make sure I'm clear,
12 that's, that's thirty to sixty days longer?

13 THE COURT: You just - you are to, you are have a
14 date within ten days.

15 MR. SITNIK: Yes, sir.

16 THE COURT: And that it -- the prefatory wish that it
17 be within the next 30 days. But under no circumstances
18 beyond 60 days unless defense counsel can't have a lawyer,
19 there to take it.

20 MR. SITNIK: In order to conduct Doctor Chaudhry's
21 deposition, Your Honor?

22 Is that what you're saying?

23 THE COURT: No, no, Doctor Oaks' deposition.

24 And you haven't taken Chaudhry's deposition either?

25 MR. SITNIK: No, Your Honor, there's been, there's

1 been no discovery in this case.

2 THE COURT: Okay. Well, does defense counsel have an
3 objection to doing it in that fashion?

4 MR. COOPER: Deposing Doctor Oaks before Doctor
5 Chaudhry?

6 THE COURT: Right. I tell you, under these
7 circumstances---

8 MR. COOPER: Yeah, I ask---

9 THE COURT: Under -- does the plaintiff have an
10 objection, under these circumstances, to allow the taking
11 of the deposition with leave for them to reopen it since
12 you put them in this box?

13 MR. SITNIK: Yes, Your Honor. That, that---

14 THE COURT: All right.

15 MR. SITNIK: We have no objection to that.

16 THE COURT: All right.

17 MR. SITNIK: We certainly think that that, that would
18 be fair. If we can -- and, and I will leave that to
19 defense counsel's discretion. I will certainly contact
20 them about setting up Doctor Chaudhry's deposition as soon
21 as possible, and then they can make that call as to
22 whether they wish to---

23 THE COURT: All right. Do y'all want to take
24 Chaudhry's deposition before?

25 well, well---

1 MR. COOPER: I'm not sure what -- I mean as far as
2 Doctor Oaks, if he can render an opinion without knowing
3 what Doctor Chaudhry would say.

4 THE COURT: I mean clearly the medical records are
5 now---

6 MR. COOPER: Yeah, that's all, that's all he's based
7 it on so far. You know, it's gonna take us time to, you
8 know, contact Doctor Chaudhry, explain to her that the
9 letter we sent to her granting motion for summary
10 judgment, explain the legal process of that, meet with her
11 and prepare her. If, if, if we can contact you by
12 wednesday of next week, maybe by way of a status
13 conference, and get Mr. Bike, who's gonna be handling this
14 case, I'd feel better about what I promise here in open
15 court. But, but it will be top priority for him once he
16 gets back, which is Tuesday night.

17 THE COURT: All right. Of course, we're gonna be --
18 everybody's gonna sort of be out of pocket for the trial
19 lawyers and so --.

20 MR. COOPER: All right. Well, I'm sure he'll be in
21 touch with Mr. Sitnik as soon as he gets back.

22 THE COURT: All right.

23 MR. COOPER: But I know that we would like to get
24 depositions scheduled as soon as possible.

25 THE COURT: I think that, given the---

1 MR. SITNIK: Your Honor --.

2 THE COURT: I'm sorry. Go ahead.

3 MR. SITNIK: Just -- if I could just make a
4 suggestion, I mean I certainly would stipulate to the,
5 that the, that we will go ahead and notice the depositions
6 of all the fact witnesses within the next ten days that
7 we, that we need to notice or that we can, the next ten
8 business days, and then certainly I will leave it to
9 opposing counsel's discretion and certainly with my
10 understanding that they have issues concerning the timing
11 or sequencing of that, then, you know, I would, I would, I
12 would just---

13 THE COURT: Well, you can notice depositions all day,
14 but after ten days, if you don't have affidavits
15 establishing some kind of liability, you're gonna, you're
16 gonna be in a jam.

17 MR. SITNIK: And, and I guess that goes back to -- I
18 guess I totally didn't understand the issue with, with the
19 McLeod, with regard to McLeod because it's a little bit
20 different, and once we started talking about Doctor
21 Chaudhry, do I have or will the Court grant me 30 days
22 within which to get the depositions of the two or three
23 employees of McLeod in order for, to see if there's any---

24 THE COURT: Yes.

25 MR. SITNIK: Okay.

1 THE COURT: But you get -- essentially what I'm doing
2 is I'm giving you 30, with regard to McLeod, I'm giving
3 you 30 days to produce some sort of affidavit saying that
4 there's factual grounds for, for liability, and you can
5 take depositions if you want to, and defense is given an
6 opportunity to take depositions during that time and prior
7 to any motion for summary judgment in the event they elect
8 to do so. So, you've got 30 days to do that, and if, for
9 whatever reason, the witnesses aren't available or defense
10 counsel isn't available, you need to get an affidavit.

11 MR. SITNIK: I guess I'm just -- so, if the, if the
12 witnesses state that they're not available -- if the
13 McLeod employees, the nurses that state that they're not
14 available, how would I get, go about getting an affidavit
15 from them if they don't present for the deposition?

16 MR. BRIDGES: If they're still McLeod employees,
17 they'll be available.

18 THE COURT: All right. Very good. All right. We
19 will cross that road when we get there. But give them 30
20 days to do that.

21 With regard to Chaudhry filing fee, attorneys fees,
22 and the summary judgment is to be held in abeyance, and
23 I'm gonna ask the lawyers to get together their, their
24 bill for services rendered with regard to these two and
25 submit it to me within the next ten days.

1 MR. BRIDGES: All right. I mean various lawyers will
2 see my rate and set it accordingly.

3 THE COURT: Do you want me to set the rate so you can
4 do that?

5 MR. BRIDGES: No, I'm joking.

6 THE COURT: All right. Very good.

7 And as additional sanction with regard to these, this
8 preliminary round of depositions of, of Oaks, I'm gonna
9 require that the plaintiff bear the expert fee cost that
10 might be charged with regard to his testimony in that
11 regard, and once all this preliminary, this round of
12 discovery is concluded, I'm gonna ask that y'all revisit
13 the scheduling order with Judge Russo with the stipulation
14 that I've already ruled that there is gonna be no other
15 expert witness with regard to liability.

16 Is there anything that I have neglected to address?

17 MR. SITNIK: I don't think so, Your Honor, with
18 regards to the, to the attorney's fee and filing fees and
19 travel expenses, am I then to, once I'm provided with
20 those, then submit those to you for order or just -- I'm
21 not accustomed to, to that obviously, but I understand the
22 invoices, you directed that they provide those to me?

23 THE COURT: That's correct. And you're, you're
24 ordered to pay them within a reasonable period of time.
25 If not, they can file a motion to enforce them.

1 MR. SITNIK: Yes, sir.

2 MR. BRIDGES: The only other thing, Your Honor, would
3 be, I assume if Mr. Sitnik wants to depose these
4 employees, he's willing to do it without waiting for
5 Mr. Graham since Mr. Graham---

6 MR. SITNIK: I plan on---

7 THE COURT: Oh, he is -- and, and that's exactly what
8 I'm saying. He's personally responsible for conducting
9 this discovery. Ed Graham's invited to come if he wants
10 to. But Sitnik's gonna be the one that's held responsible
11 pursuant to this order.

12 MR. BRIDGES: All right. I just know what a
13 difficult time I have sometimes, not saying it's a
14 critical issue, just as a practical matter, scheduling
15 things with Mr. Graham---

16 THE COURT: All right.

17 MR. BRIDGES: ---cause he's got cases all over the
18 State.

19 THE COURT: All right. Well, Mr. Sitnik probably has
20 an individual interest in seeing that this gets done.

21 Are you gonna attend to it?

22 MR. SITNIK: Yes, sir, Your Honor. I am going to
23 take care of it.

24 THE COURT: Very good.

25 All right. All right. Can you, can you think of

1 anything else, Mr. Sitnik?

2 who---

3 MR. SITNIK: The only other -- I mean I guess the
4 only other issue, Your Honor, is I assume that, I don't
5 know, I assume that this order's gonna be entered today,
6 and I, I, in other words, I just need to make sure that
7 it's entered before my appellate time runs. So---

8 THE COURT: Okay. Well, it is entered today, and I'm
9 gonna ask that Mr. Cooper and Mr. Bridges prepare an order
10 consistent with my ruling.

11 MR. BRIDGES: All right. Well, for his purposes,
12 Your Honor, I think your oral order---

13 THE COURT: Is, is good.

14 MR. BRIDGES: ---is good.

15 THE COURT: And that tolls the time, and I'll --
16 we'll be waiting on a form order, but for purposes of your
17 appellate time, that's been tolled.

18 MR. SITNIK: Your Honor, I, if I can just see when
19 they may have that available cause my understanding, under
20 the Bass case is, the Richland Memorial v. Bass case is
21 that an order is not final until it is signed by the judge
22 and filed with the clerk and that---

23 THE COURT: I'll tell you what we're gonna do is
24 we're gonna get you to sit down and, and draft an order
25 and you can use the back of this sheet to -- I want you to

1 work it out with them, and I'll be waiting right here, and
2 I'll sign it, and then you can send a more formal pretty
3 one when we get done.

4 All right.

5
6 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 General Sessions for Florence County, South Carolina, on the 30th day of July, 2010, as reported by Hattie Gordon, and prepared by myself to the best of my ability.

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

September 23rd, 2011

A handwritten signature in cursive script, reading "Pamela E. Green", written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2008-CP-21-2326
	)	
	)	
Marquette Johnson, et. al.	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Anu Chaudry, M.D. and Florence)	)	
Women's Health	)	
DEFENDANT	)	September 17, 2010
		Florence, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

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

SAUNDERS BRIDGES, ESQ.
ED GRAHAM, ESQ.
KEVIN SIDNICK
Attorneys for the Plaintiff

MARK BUYCK, ESQ.
Attorney for the Defendant

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, no witnesses were called.)

1 THE COURT: Madam Court Reporter, this is
2 Marquette Johnson, his mother and natural guardian of
3 D'Andre G. [REDACTED], an infant under the age of 14 years versus
4 Dr. Chaudhry, McLeod Regional Medical Center in Florence
5 Women's Health, 2008-CP-21-2326.

6 Mr. Bridges, I'm going to ask if you could to
7 kind of give a summary of what brings us here today for
8 the record.

9 MR. BRIDGES: Your Honor, I will do my best.

10 THE COURT: All right.

11 MR. BRIDGES: You last heard --

12 THE COURT: Well, let's start from the beginning
13 about the issue with regard to the motion for a summary
14 judgment. Just start from the beginning.

15 MR. BRIDGES: This is a medical malpractice
16 action in which a scheduling order was issued by Judge
17 Russo. After the expiration of the scheduling order,
18 particularly the time for naming of experts, the
19 Defendant, Dr. Chaudhry, moved for summary judgment on the
20 grounds of no expert had been identified by the Plaintiff.
21 The Defendant, McLeod, also filed a motion for summary
22 judgment on the same grounds.

23 You heard those motions in order. You granted
24 Dr. Chaudhry's motion for summary judgment. The Plaintiff
25 filed a motion for reconsideration. Subsequently, you

1 heard on the same day Plaintiff's motion for
2 reconsideration and the McLeod motion for summary
3 judgment. You held -- you granted, but held in abeyance
4 the ruling on the McLeod motion for summary judgment until
5 the Plaintiff could depose the nurses who were in the
6 delivery room at the time of the delivery of the child.

7 THE COURT: And I think we put some time limits
8 on that as well.

9 MR. BRIDGES: You did, Your Honor. I told you
10 and Mr. Sidnick that I could provide those nurses for
11 deposition within 30 days.

12 THE COURT: All right. Let me interrupt you
13 right there. Keep your thought right here. One of the
14 problems -- you know, of course, I heard this and it has
15 sort of been a convoluted procedural history, but the last
16 thing that we did was we dealt with McLeod Regional
17 Medical Center, the particular problems that they had --
18 Plaintiff had with the fact they hadn't done any discovery
19 in that regard. And we were going to set it -- we set it
20 up to put them sort of on the fast track to get that
21 resolved. And sort of in an effort to be accommodating to
22 the defense because of the fact that the plaintiff sort of
23 drug their feet, we were going to go ahead and get that
24 done on the fast track. And when we granted the motion to
25 reconsider with regard to Dr. Chaudhry, I granted that

1 motion and gave instructions to -- for an order to be
2 drafted, which was never drafted. And my question to
3 y'all is did that hold up the discovery between
4 Mr. Sidnick and McLeod and y'all's discovery?

5 MR. BRIDGES: No, Your Honor, what held that up
6 very simple, the nurses in question turned out, unknown to
7 me at the time, to have been sequentially on vacation --

8 THE COURT: Right.

9 MR. BRIDGES: -- and I was unable to produce
10 them to Mr. Sidnick for deposition. They are, in fact,
11 scheduled to be deposed on Monday.

12 THE COURT: But that wasn't the problem then?

13 MR. BRIDGES: The order was not the problem.

14 THE COURT: All right. Of course, that's
15 really -- I was really sort of doing that to accommodate
16 the Defendants because the predicament, to some extent,
17 the Plaintiff has caused. But y'all are on schedule to do
18 that?

19 MR. BRIDGES: On Monday, yes, sir.

20 THE COURT: Now, I didn't mean to interrupt you,
21 but go ahead.

22 MR. BRIDGES: That's all right. Then -- and I
23 may be a little off here, Mr. Buyck, on behalf of
24 Dr. Chaudhry, has filed a motion for reconsideration of
25 your order as it relates to Dr. Chaudhry. And that is the

1 order which I -- I believe you referred to that has not
2 been reduced to writing at this point. And that's where
3 we are.

4 THE COURT: All right. Very good.

5 Let me ask -- I want to ask all the lawyers
6 about this because I never really have had this come up as
7 a lawyer or as a judge where you give a direction for an
8 order to be drafted -- and I don't even think we did a
9 Form 4, but, generally, in order for everything to get
10 moving, you've got to have an order drafted for the times
11 run with regard to appeal and everything else. And, of
12 course, the --

13 What's your feeling about that, Mr. Buyck?

14 MR. BUYCK: First of all, I want to correct a
15 couple of things that Mr. Bridges has set forth. We filed
16 the motion for summary judgment. The motion was granted.
17 Then Mr. Sidnick filed a motion for reconsideration, which
18 was denied --

19 THE COURT: Summarily denied?

20 MR. BUYCK: Summarily denied with an e-mail
21 dated July 6th. And then on July 26th, he files a motion
22 to reconsider. In the interim, you considered McLeod's
23 motion on a Tuesday. On Friday, you said I want everybody
24 over here on a Friday to hear the second motion to
25 reconsider. I was on vacation. I sent my associate over

1 here to handle that and he handled it. You ruled that an
2 order should be drafted.

3 I talked to him about it. I said we've got this
4 Form 4 order, which I referenced in my motion. I say we
5 need to reconsider this because the judge has asked us to
6 reduce into writing an order against our interest and
7 we're not sure exactly under what rule he has reversed
8 this decision. Whether it was Rule 60 under excusable
9 neglect or whether it was under Rule 50 for alteration of
10 a judgment. So we were in that predicament.

11 In the meantime, I get back Monday and I get a
12 letter from Mr. Sidnick, who for 18 months hasn't done
13 anything on this case, and it says, Please provide us with
14 dates to depose your client, Dr. Chaudhry, by the close of
15 business Friday. And I've got a busy schedule and I am
16 trying my hardest to move things forward.

17 But on top of that, with our initial motion for
18 summary judgment, we had a motion to compel. And those
19 discovery responses remained outstanding and that goes to
20 some of the integral issues of this case. Also, we had
21 been asking for months to depose the Plaintiffs. We
22 haven't had an opportunity to provide the Plaintiffs or
23 provide the Plaintiffs for a deposition. So when I get a
24 letter that says if you don't provide something by Friday,
25 I'm going to file a motion or whatever, I take exception

1 to it. And so we did file a motion to reconsider. We've
2 styled it a motion to reconsider, in the alternative, a
3 motion to compel relative to the discovery responses that
4 remain outstanding and a motion for a status conference so
5 that we can get this case on a schedule if that's really
6 what we're going to do. It was limited to 30 days and --

7 THE COURT: I'm not real sure, was your
8 discovery limited to 30 days?

9 MR. BUYCK: That's what my understanding of the
10 order was. We had to get everything done within 30 days.
11 And the prejudice to the Defendants in that regard is
12 significant.

13 THE COURT: Well, one of the --

14 Mr. Bridges, I thought that the 30 days applied
15 to the nurses and it was something y'all pretty much had
16 agreed to.

17 MR. BRIDGES: Your order, Your Honor, which
18 applied to McLeod --

19 THE COURT: Is reduced to writing and in the
20 file?

21 MR. BRIDGES: Yes, Your Honor, we did submit a
22 written order. That order did say that we would produce
23 the nurses within 30 days.

24 THE COURT: Right, but it didn't -- there was
25 no -- as I recall, there was never any limitation on the

1 discovery with regard to Dr. Chaudhry or the Plaintiff or
2 anything within 30 days. I don't understand -- if it was,
3 it wasn't intended to be. And the only reason why I did
4 that was because I wanted to assist the Defendants because
5 the Plaintiffs had been dilatory. Do you follow me?

6 MR. BUYCK: I understand, Your Honor, but I
7 certainly think that we do deserve clarification of the
8 order --

9 THE COURT: Well, I don't have the order, you
10 didn't draft it.

11 MR. BUYCK: Well, I don't know the basis to
12 draft it. The legal basis to draft the order.

13 THE COURT: Let's go ahead and hear the motion
14 for reconsideration.

15 MR. BUYCK: All right, Your Honor, we had filed
16 a motion to reconsider the reversal of the judgment that
17 was entered previously on our motion for summary judgment.
18 If you'll give me just one moment, please, I'm going to
19 find the dates. It was in the spring. April 27th is when
20 the summary judgment was denied -- I mean, was granted.
21 The Plaintiffs did file a timely motion to reconsider at
22 that time.

23 Thereafter, on July 6th, you sent an e-mail to
24 all parties and said no reason for a hearing, your motion
25 has been denied. On July 26th, some 20 days thereafter,

1 we get a second motion to reconsider. We contend that
2 motion to reconsider is untimely. Two, we contend that
3 there is no basis in the record to reverse the prior
4 judgment. There is no evidence in the record as of the
5 entry of the judgment of a deviation from the standard of
6 care and proximate cause set forth by an expert witness.
7 It didn't exist then and it don't exist in the record of
8 this case and the entry of the judgment in this case.

9 So the grounds for the reversal, whether it be
10 Rule 50, 52, or 60 are unknown to us. We contend that if
11 it's Rule 60, that they had not provided the appropriate
12 standards for a reversal of the judgment and that there
13 has been no provision of a mistaken inadvertence,
14 excusable negligent, newly discovered evidence or fraud.
15 Because it's nothing that the Defendants did that led to
16 this predicament. What's happened now is we're being
17 extremely prejudiced in the prosecution of this case and
18 defense of this case and moving forth in this case because
19 of their actions. And it's been going on a long time.

20 It was appropriate to grant summary judgment
21 when the summary judgment was granted. There two sides to
22 every lawsuit. Each side deserves the attention of the
23 Court and the following of the orders of the Court. And
24 if there's an issue in regards to what order we are
25 appealing from or asking to reconsider, then there is a

1 miscommunication because as I set forth in the motion on
2 page two -- on July 30, a Form 4 order was issued from the
3 bench and it's from that Form 40 -- Form 4 order that
4 we're appealing, that we're asking that there be
5 reconsideration. Because we ask for the reconsideration
6 as quickly as we could. Essentially, I got back from
7 vacation. I talked to Wade Cooper. It was filed on
8 August 6th. I talked to Mr. Cooper and ask him what are
9 our alternatives here. And that, we felt, was the best
10 legal alternative, to make the Court rule specifically the
11 grounds for the reversal of the prior judgment.

12 THE COURT: Mr. Bridges, you have anything in
13 that regard?

14 MR. BRIDGES: No, Your Honor.

15 THE COURT: All right.

16 Mr. Sidnick, Mr. Graham?

17 MR. SIDNICK: Afternoon, Your Honor. Just to
18 let you know, Your Honor, after the original hearing of
19 this matter, we have requested a copy of the transcript of
20 the original hearing of this. The court reporter has
21 gotten apparently two extensions today from Court
22 Administration, the latest saying that upon good cause
23 shown she is to prepare it by September 20th, 2010.
24 That's just to let you know. Mr. Buyck made arguments
25 that certain issues may not have been raised during the

1 initial hearing, such as mistaken inadvertence or
2 excusable neglect. We don't believe that's the proper
3 standard. That's not the standard that we approached our
4 motion with. We filed a Rule 59(e) motion to alter or
5 amend.

6 Mr. Buyck has contended that that motion was
7 untimely. In our memorandum, I think you will see, and I
8 think Your Honor has touched on this issue beforehand,
9 there hasn't been an order, you know, a specific order to
10 that effect. But what he references is an e-mail that was
11 sent by your former law clerk saying that you had ruled on
12 the issue and denied the motion to reconsider and granted
13 the hearing. But what the case law is very clear about
14 saying is that a ruling, even if it's an oral ruling heard
15 in open court with the parties standing there, it's not
16 effective until that order is actually file.

17 I actually informed both Mr. Buyck and Mr.
18 Bridges on the 23rd of the date that I received the first
19 written notice, which was my copy of the order, which I
20 received it on the 16th. That makes Rule 59(e) timely.
21 It had to be filed the day of that hearing. The
22 hearing -- just to clarify, we did have a hearing on that
23 Monday, I believe, with Mr. Bridges. That hearing was
24 regarding his motion for summary judgment. At that time,
25 I made both an oral motion for reconsideration with regard

1 Mr. Buyck's client. And, subsequently, that same day
2 filed, and, more importantly, served pursuant to the rule
3 that second motion for reconsideration. It was timely.
4 The proper standard was used. There was never a response
5 to my initial motion for reconsideration and there's
6 really not one here today.

7 The Orlando vs. Boyd case, which is what Your
8 Honor heard at the last hearing, what we argued about, the
9 substitute counsel for Defendant Chaudhry, was very clear.
10 And it indicates that for a first violation of a
11 scheduling order, some lesser sanction must be imposed
12 other than exclusion of a witness where the result of the
13 sanction results in the dismissal of the case.

14 Now, Mr. Buyck has also put in his motion to
15 reconsider that he was not provided with a copy of that --
16 with a copy -- that Dr. Oaks' affidavit was not provided
17 until the second motion for reconsideration, which is -- I
18 think if the Court checks his file, you will see that it
19 was actually filed as a supplement to our first motion to
20 reconsider. Shortly after Mr. Graham's office obtained
21 that, they did have that on hand. It was present within
22 the record within our motion to reconsider.

23 And, Your Honor, I think we have been through a
24 lot of these issues before as to what may or may not have
25 caused the delay. What happened with -- in my office what.

1 happened -- there was a complete lack of communication
2 between the time the scheduling order was signed and
3 Plaintiff's and Defense counsel on both sides. Mr. Buyck
4 said he has repeatedly asked for dates for our clients to
5 be deposed. I don't know where that mail was going. I
6 don't know where that direction is going. It's not
7 existent in our file. I did subsequent to your ruling
8 provide Mr. Buyck with dates on which my client is
9 available, particularly the mother. The letter that he
10 got that he takes umbrage with is a direct result to what
11 you actually ruled at the last hearing, which, perhaps, it
12 wasn't your intent, but you did tell us that counsel had
13 to meet and set a deposition date within 10 days.

14 THE COURT: You're talking about with regard
15 to --

16 MR. SIDNICK: On both sides, Your Honor. So
17 that was the reason why I sent out a letter saying if I
18 haven't heard by Friday, I'm going to have to do something
19 to protect myself. That was the reason. And ever since
20 then, I've repeatedly asked for dates for Dr. Chaudhry,
21 weekly. I mean, I have copied Mr. Bridges on those. I
22 have examples of those here. I have repeatedly tried to
23 push this case forward. I can understand why -- I guess
24 why Mr. Buyck, in light of this order, hasn't wanted to
25 respond to those, but I've gotten crickets, Your Honor, in

1 response to my numerous e-mails. I'm not getting the yes,
2 no, I'm not getting dates, I'm just sending e-mails
3 repeatedly and not getting responses.

4 I've tried to push this case forward. If
5 there's prejudice that's resulting at this point, it's
6 certainly not due to the Plaintiffs' fault. I've talked
7 to Mr. Bridges. We have been diligently trying to set up
8 these nurses' depositions. We had a prior date that we
9 were trying to have them done. We weren't able to give
10 Mr. Buyck 10 days notice. That was as a result of
11 actually trying to schedule the depositions on short
12 notice. But we have really tried to push this case
13 forward, you know, since your last order. We believe the
14 basis for the motion to reconsider is Rule 59(e), that's
15 what we argued, that's what you granted.

16 But even if you did look at Rule 60(b), the
17 explanations are contained within the transcript. And,
18 Your Honor, we've -- I've been over those ad nauseam.
19 They're contained in our motion to reconsider. My
20 paralegal inadvertently removed those dates from my
21 calendar. And there's an affidavit to that effect in
22 my -- submitted with our motion to reconsider. This is
23 not a case of any kind of intentional misconduct. That's
24 what Orlando V. Boyd says there has to be. I think we
25 addressed that at the last hearing, Your Honor.

1 And with regards to the motion to compel, the
2 responses to which were supposedly deficient, to the best
3 of my knowledge, were answered by Dr. Oaks' affidavit.
4 Nonetheless, I still submitted supplemental discovery
5 responses, not only to the interrogatories, but to the
6 request to admit which address some of the concerns that
7 Mr. Buyck. He's got those -- he has those in hand. And,
8 Your Honor, I respectfully submit that this is becoming a
9 convoluted procedural history. What we've got right here
10 is -- I mean, we've got a ruling from the Court. And I do
11 think that there is an issue with potential prejudice
12 because we've got a ruling from the Court. Defense
13 counsel repeatedly contacted him asking him not only for
14 deposition dates for Dr. Chaudhry, but the status of the
15 order on a weekly basis as being so blunt as to say do you
16 plan to draft the order or not. Again, I did not get a
17 response.

18 THE COURT: One of the things, in a nonjury term
19 of court, you hear so many of them, to be quite honest
20 with you, it took me a little while to recall exactly what
21 happened. But as I recall, Mr. Buyck filed his motion for
22 summary judgment and I granted that. And the reason was,
23 at first blush, it appeared as if the Plaintiffs had just
24 disregarded the order. It was a scheduling order. It was
25 an order of the Court. Not only did you not produce any

1 evidence to establish your case, you showed up at the
2 hearing without even an affidavit. And I granted it, and
3 based on what transpired in that first hearing, you made a
4 motion for reconsideration. I summarily dismissed it and
5 said there was not a need for a hearing. Of course, at
6 that time, Mr. Bridges files his motion for summary
7 judgment. And it became imminently clear to me that there
8 was a little bit more to it than just denying the order.
9 It became apparent to me that this somehow involved a New
10 York law firm --

11 MR. SIDNICK: Yes, Your Honor.

12 THE COURT: -- a Plaintiff's law firm and they
13 associate with you. There seem to be confusion about
14 who's actually responsible for doing what. And as I
15 recall -- and I'm just going from memory, that they sort
16 of pulled out shortly before the expiration of the statute
17 of limitations. Is that right?

18 MR. SIDNICK: That is roughly correct, Your
19 Honor. What we got was we had a lawyer from New York who
20 hired our firm to serve as local counsel. Our local
21 counsel said we've got statute problems, we've got to
22 file. You know, a potential statute with the mom's claim,
23 not D'Andre's claim, but with her personal claim, so we
24 got it filed. At that point was when the New York lawyer
25 said I -- he really wasn't interested in actually having

1 local counsel.

2 THE COURT: So there was some confusion in that
3 regard. And, of course, there was a problem with the miss
4 calendaring. In retrospect, after I heard that at Mr.
5 Bridges' motion for summary judgment and a discussion
6 about the law which would seem to indicate that before you
7 could dismiss a case there has to be some sort of
8 intentional misconduct. That's kind of what they gave me
9 the -- some pause and in retrospect, it was not just a
10 blatant disregard of the order, that it was a combination
11 of a whole bunch of different things. And nobody really
12 filed a motion to compel. It was just the scheduling
13 order was there, the deadline ran and then there was a
14 motion for summary judgment. That was the reason why I
15 did that.

16 I think what Mr. Buyck says and what he says
17 might have some merit to it. I want to hear what
18 everybody thinks about this particular point. Because
19 there was an order granting the motion for summary
20 judgment. There was a motion to reconsider, which was
21 summarily denied. And then at some point in time, Mr.
22 Bridges files his motion for summary judgment which
23 required we look at it a little bit differently. In
24 retrospect, I've reevaluated the whole and just -- and I
25 think you filed a motion to reconsider my reconsideration,

1 I think, perhaps.

2 MR. SIDNICK: Your Honor, I can set forth the
3 time line a little bit better. On the day of Mr. Buyck's
4 hearing, the actual hearing on his motion for summary
5 judgment, Mr. Bridges filed his motion for summary
6 judgment. You asked me from the bench whether I wished to
7 waive the notice requirement for having you hear that
8 motion. In light of your ruling with regard to Mr.
9 Buyck's client, I could not waive. You know, I could not
10 waive at that time. Therefore, a subsequent hearing was
11 scheduled on the 26th. That hearing was supposed to be
12 both on my motion to reconsider and on Mr. Bridges' motion
13 for summary judgment. Those were due to be heard on the
14 same day. In the interval is when I got an e-mail from
15 your law clerk saying that you were issuing a ruling and
16 going to deny my motion for reconsideration and that there
17 would, therefore, be no reason for a hearing on that issue
18 on the 26th.

19 If the issue is with regards to what -- you
20 know, the purport of that e-mail, the Rule 59 was very
21 clear. We lay it out in our motion. It says receipt of
22 written notice of entry of the order. The e-mail was sent
23 even prior to the entry of the order with the clerk of
24 court. The e-mail was sent prior to the actual entry.
25 And we've cited the numerous case laws. Both Upchurch vs.

1 Upchurch, Bowman vs. Richland Memorial, Your Honor, they
2 are very clear when they say an order is not final until
3 it is entered by the clerk of court. And until the order
4 of judgment is entered by the clerk of court, the judge
5 retains control of the case. So it's receipt of written
6 notice of the entry of the order, not the fact that he had
7 received notice that you intended to deny my ruling. At
8 that point, I didn't know whether or not to expect --

9 THE COURT: So to that extent, you don't feel as
10 though -- the fact there had been an e-mail communication
11 with regard to my intentions to summarily dismiss it is a
12 problem procedurally?

13 MR. SIDNICK: It's not a procedural problem,
14 Your Honor.

15 THE COURT: All right.

16 MR. SIDNICK: And the case law is respectfully
17 directly on point. I've taken that issue up with the
18 Court of Appeals before where a form order specifically
19 says that a more extensive order was to be filed. And
20 that was dismissed on procedural grounds because it is the
21 entry of that more formal order which starts the times for
22 appeal. That was certainly an issue. And, Your Honor, I
23 have been somewhat diligent in trying to contact the Court
24 on that issue to find out where the order from Mr. Buyck's
25 office was.

1 THE COURT: All right.

2 Mr. Buyck, with regard to my granting of the
3 motion to reconsider, you weren't here at the previous
4 hearing. Do you feel as though what Mr. Sidnick did was
5 intentional disregard for an order?

6 MR. BUYCK: I do, Your Honor. Obviously, the
7 motion had been filed for 20 or 30 days prior to the
8 hearing. When we get to the hearing, we still don't have
9 an affidavit and we still -- we're hand delivered some
10 discovery responses that lack any substance.

11 Now, I also would like to address this
12 timeliness issue because I've got a certified copy of your
13 July 6th -- filed July 6th Form 4 order. And what I'm
14 hearing Plaintiff's counsel say is they didn't receive it
15 until 17 days after it was filed, and, thereafter, filed
16 the second motion to reconsider.

17 THE COURT: Let's hear with regard to that. Mr.
18 Sidnick seems to be indicating that isn't what he's
19 saying.

20 MR. SIDNICK: No, Your Honor, the order speaks
21 for itself. It was signed on July 6th. It was mailed on
22 July 7th and we received it on the 16th. I don't know
23 where 17 days is coming from. I mean, there's no way from
24 it being mailed on the 7th, or even signed on the 6th to
25 the 16th is 17 days. I mean, that's a just a gross over

1 estimation of fact.

2 MR. BUYCK: My apologies, I thought he said the
3 23rd. It's 11 days or 10 days after placement in the mail
4 in the State of South Carolina. I find that a little bit
5 strange. And plus, he had notice that it was being
6 entered. He had notice and it was entered. All he had to
7 do -- he had notice it was entered, the clerk's office had
8 it, everybody had it. And more than 10 days elapsed. So
9 that puts us back over to Rule 60. And that's why I think
10 Rule 60 applies. And the burden is upon them pursuant to
11 Rule 60 in overturning this with new evidence, fraud,
12 excusable neglect and that standard has not been met. And
13 I'm sorry we're in this position. I really am. And
14 that's why I have couched my motion the way I have couched
15 because I don't think I have much of an alternative in
16 order to seek relief from this Court. And I'm asking to
17 do what was right in April, in July, it was still right.
18 And even later, July 30th, it was the right thing to do.
19 Because there was no evidence. There's no evidence. And
20 there's two sides to this coin. There's two sides to that
21 V.

22 MR. SIDNICK: Your Honor, may I briefly address
23 this?

24 THE COURT: Yes.

25 MR. SIDNICK: First of all, he left out

1 inadvertent. As of July 30th, there certainly was an
2 affidavit. Part of our motion to reconsideration is mail
3 hasn't consistently, with respect to the clerk, gone from
4 the clerk's office not to my address. That is actually
5 listed as part of our motion to reconsider. When he says
6 we showed up at the hearing without the affidavit, we
7 received two days notice for that hearing. We actually
8 received a call from the clerk. When asked where it was
9 mailed to, it was mailed to a P. O. Box here in Florence
10 for Robert Phillips that he hasn't maintained in five
11 years. Even now, Brian Ramey, who checks that mailbox,
12 has called my office and said he's gotten mail there. So
13 if there's -- I mean, I know our procedures for getting an
14 order. We date stamp it. I submitted it as an attachment
15 to our motion for reconsideration. I have the original in
16 my file. But, I mean, to the extent that Mr. Buyck, I
17 guess, is just saying that I find it hard to believe that
18 it would take 11 days for it to happen. Your Honor, there
19 is a potential explanation for that, but I can't say --

20 THE COURT: Once again, start off with all of
21 the reasons why it happened the way it did. Start with
22 the New York firm, the fact that there was some confusion
23 with your own firm and let's go through all of the list of
24 reasons once again.

25 MR. SIDNICK: Your Honor, respectfully, I don't

1 think the confusion was on the part of our firm. We were
2 contacted by a New York law firm, Mr. Daniel Butafuco
3 to serve as the local counsel. Mr. Robert Phillips in our
4 office was contacted to serve as local counsel.
5 Mr. Phillips determined that there was a potential statute
6 of limitations issue, so he quickly filed a lawsuit -- he
7 went ahead and quickly filed a lawsuit.

8 Subsequent to that, it became clear that Mr.
9 Butafuco did not wish to serve as lead counsel in the case
10 and was really just hoping to refer it off to a local
11 attorney who would handle the case. And that's when we
12 became involved. And I say we, me and another associate
13 with my firm became involved in the case. At that point,
14 we had not had the opportunity to conduct due diligence.
15 We did begin our due diligence review of this case. We
16 had done a couple of things, including sending young
17 D'Andre back to a neurologist to have it reviewed. We've
18 consulted with our legal nurse consultant.

19 At that point in August, a scheduling order was
20 entered. We asked that the case be 40-J'd so that we
21 could have time to complete our due diligence. Mr.
22 Buyck's office, as is his right, refused to consent to the
23 40-J. Mr. Bridges consented to the 40-J, but Mr. Buyck's
24 office wouldn't consent to the 40-J. From the time that
25 August scheduling order was entered, we continued to

1 explore this case by sending D'Andre back to the
2 neurologist, consulting with our legal nurse consultants
3 and we came to certain theories about the case or ideas
4 about the case and we began communicating those to the
5 client. That process -- and Mr. Butafuco. Those were
6 back in early September, Your Honor. We were told that
7 the file was going to be reviewed by another attorney.

8 From the time of August 9th -- in addition, Your
9 Honor, an associate from my firm sent letters to opposing
10 counsel saying that he was no longer going to be involved
11 in the case, which left me, Your Honor. From that point
12 in time, I did not receive a single request for deposition
13 dates for my client. I didn't receive a single request
14 saying where's the discovery responses, what are you doing
15 on this. I received absolutely no communication from that
16 point in time. My paralegal inadvertently removed those
17 dates from my calendar based upon my discussion with her
18 and the letters that she was sending out -- you know,
19 printing out for me to sign to send out to the client.

20 THE COURT: So there was some confusion at one
21 point in time whether you or the associate was -- the
22 associate left your office and is somewhere else now?

23 MR. SIDNICK: No, Your Honor. It went from Mr.
24 Butafuco to Mr. Robert Phillips. Robert Phillips lives in
25 Rock Hill. He wanted to get Columbia -- our office has a

1 Columbia -- our firm has a Columbia office, to get us
2 involved. There were two lawyers at the Columbia office
3 who were going to work on this case. They both made
4 appearances. They both appeared -- or were on the
5 telephone call discussing the scheduling order with Judge
6 Russo. Subsequent to that, about a month later, I
7 believe, he sent out letters saying that he was -- you
8 know, direct all correspondence to me, he was not going to
9 work on this.

10 THE COURT: Okay. All right.

11 MR. SIDNICK: And, Your Honor, just with regard
12 to -- there's never been an allegation up until today that
13 there was any kind of intentional misconduct. It's not
14 intentional disregard of the scheduling order. It's
15 intentional misconduct. And there's never been a showing,
16 any kind of showing -- if there had been, it could be a
17 letter from opposing counsel saying the judge said you had
18 to do something by this date, where is it? That would be
19 intentional disregard. I never had any communication or
20 insistance of almost demands that there be that kind of
21 communication, Your Honor. There should have been a
22 motion to compel filed before a motion for summary
23 judgment. That's what the rules require. Under Rule 37,
24 the violation of a scheduling order should result in a
25 motion to compel. And that never happened in this case.

1 It was an ambush approach or jump the gun summary judgment
2 motion.

3 And, respectfully, Your Honor, the merits of
4 this case deserve to be heard. And we have associate
5 counsel, the client's choice of counsel ready, willing to
6 step into this case. I've tried to push this case as much
7 as I could since these problems have come up. I've been
8 diligent in communicating both with Mr. Buyck's office and
9 with Mr. Bridges' office. I think Mr. Bridges will agree
10 to that. At this point, we just want to enforce the
11 ruling that you had from the last hearing. We'd like to
12 get this case moved forward with the client's choice of
13 counsel.

14 THE COURT: First of all, Mr. Sidnick, I do
15 sympathize and I understood the difficulties with regard
16 to how you ended up with the responsibility of this case.
17 But at the same time, it's kind of hard for you to get on
18 your high horse and sanctimonious about them filing a
19 motion to compel when the obligation is on you to provide
20 the proof. You know, I understand and that's the reason
21 why I granted the motion for reconsideration, but I'm not
22 real sure that I follow you all the way throughout with
23 regard to that reasoning.

24 One of the things that probably -- it's just an
25 observation on my part in practicing law, it seems as

1 though plaintiff's lawyers, in my observation, quite often
2 take home more work than they can handle a lot of times
3 for whatever reason. I imagine they're in a position
4 where they eat what they kill and they take home a lot of
5 stuff, probably more stuff than they can handle. And I
6 think defense lawyers -- and because of that, I think
7 plaintiffs, generally, because it's a fee-generating
8 situation, generally, the less work they do on a case, the
9 more return they get for their effort. And I think that
10 on the -- as far as missing deadlines, problems with that,
11 they crop up more on the plaintiff's side than they do on
12 the defense side. Just my observation.

13 On the other hand, defense counsel, generally,
14 they get paid by the more work they do. And as a result
15 of the structure of that, quite often, defense lawyers are
16 more structurally sound, more disciplined. They have a
17 very active motion practice. And just by the very nature
18 of the beast, they're a little bit more organized than the
19 plaintiffs are.

20 But there is and will be an occasion, Mr. Buyck
21 -- I don't know if you've had a problem with it before or
22 -- but if you practice law long enough, there's going to
23 be a time when defense lawyers even can -- and I know you
24 run a very good organization. You are a very good lawyer
25 and you handle nothing but the very -- most demanding

1 defense-type cases. But there can be an occasion where a
2 defense lawyer can be in a position where they've missed a
3 deadline, too.

4 I say that just to say, you know, upon further
5 reflection, once we heard Mr. Bridges' motion for summary
6 judgment, all of these things dawned on me and all of the
7 difficulties that Mr. Sidnick had encountered.

8 I am going to grant the motion on the 59(e) and
9 ask that you draft -- Mr. Sidnick, I'm going to ask that
10 you draft the order in that regard, specifically
11 addressing the issue and the problems, the procedural
12 problems about the summary denial of the motion for
13 reconsideration and how that transpired and how the
14 reconsideration actually took place when we heard McLeod's
15 motion for summary judgment. And it is from the defense's
16 standpoint, that's the way I'm ruling, ruling on 59(e).

17 In addition to that, I'm doing it on the
18 inherent powers of the Court. I don't think that the
19 Court needs to be governed by the letter of the rules.
20 The way this thing transpired, it gave me an opportunity
21 to reevaluate the situation. And I think that it's
22 probably better for the case to be resolved on its merits.
23 And I did fashion an order which I thought, to some
24 extent, was punitive to the Plaintiff because of their
25 neglect in some ways. And I take it at Mr. Buyck, who was

1 not at that hearing, kind of felt put upon because of the
2 strictures of the limitations in the discovery.

3 Certainly, given the fact that the Plaintiffs have us in
4 this spot, we're going to give the Defense as long as they
5 want to get prepared, if you follow what I'm saying. That
6 was the intent of the previous order. Of course, you
7 weren't here and I did not anticipate there would be a
8 problem with getting something as important as this for a
9 doctor to sit down with a deposition and for the Plaintiff
10 to take their deposition and to go forward. I thought the
11 Defense was chomping and ready to go and wanting to get it
12 resolved.

13 But, of course, if you feel we need to talk
14 about that -- and we're sort of in a bad spot because I'm
15 not chief administrative judge. These things probably
16 ought to be taken up with Judge Russo. What is your
17 position on that, Mr. Bridges? If y'all want to work out
18 the details by scheduling an order right here, I'm willing
19 to do it and I'm willing to sign it. Or if y'all feel as
20 though we need to work out the details and propose it to
21 Judge Russo for his approval, or if you want to take it up
22 with Judge Russo, you can do that as well. But my intent
23 was to move forward, to move forward in an expeditious
24 fashion because of the position we find ourselves in.

25 What is your position with regard to whether or

1 not we work out the details of a scheduling order here
2 today, Mr. Sidnick?

3 MR. SIDNICK: Your Honor, I recall having some
4 discussions with Mr. Buyck -- or an e-mail discussion with
5 Mr. Buyck that they could not -- I think part of his
6 concern was that he could not complete discovery within 30
7 days, which I don't think was the intent of what your
8 original order was. It was to move things along, get
9 certain things done by certain days. Certainly, you know,
10 I think the Defendants -- I agree the Defendants have --
11 need to be consulted to make sure their trial schedules --
12 I know Mr. Buyck just finished with an extensive trial
13 schedule. So, basically, from my position, I would say
14 that the Plaintiffs would like to work with the Defendants
15 and just come to a mutually agreeable scheduling order and
16 we can present that to the chief administrative judge.

17 THE COURT: What's your position on that, Mr.
18 Buyck?

19 MR. BUYCK: Your Honor, if I may address a
20 couple of things?

21 THE COURT: All right.

22 MR. BUYCK: One, this issue regarding the
23 deadline situation. I give people consideration on
24 deadlines all the time when I'm called and they ask for
25 extensions. And that's not what this is about. And I

1 hope the Court doesn't see me in that light because that's
2 not what this is about. And the other thing --

3 THE COURT: What were you saying --

4 MR. BUYCK: The other thing, Your Honor, in
5 regards to moving the case forward and doing what's right,
6 that was the other intent behind my motion. Because I
7 don't deserve to come back and say give me a date by
8 Friday or tell me about the order --

9 THE COURT: I agree with you.

10 MR. BUYCK: So I filed a motion to reconsider.

11 THE COURT: I agree with you.

12 MR. BUYCK: And so I take exceptions to some
13 things that have been said.

14 THE COURT: Well, tell me about them.

15 MR. BUYCK: Because I really -- I ain't done
16 anything underhanded here. I have not. This is not my
17 making. What did we just hear? The Plaintiffs have been
18 sending this child all over the country preparing their
19 case to our detriment. We'd asked for discovery to be
20 undertaken. But with that, I would greatly appreciate the
21 Court's consideration to -- essentially, we're starting
22 from scratch. (Usually, a case takes a couple years to get
23 to trial. We're going to have a cause of action number
24 dating back to '08. I'd ask the Court's consideration of
25 a current cause of action number so that we can move this

1 case along as it should have been moved along.

2 The other thing is, there's some discovery
3 requests that are subject to a motion to compel that I
4 think we need to hear today as part of this motion. I'd
5 like the Court's consideration of those discovery requests
6 that mandate complete answers to these. This is not a
7 shoulder dystocia case, it's a common medical malpractice
8 case and we've got some specific discovery requests that
9 we think are being avoided and need to be -- we need
10 replies to.

11 THE COURT: All right.

12 MR. BUYCK: I'd like for those to be resolved
13 prior to --

14 THE COURT: We're going to do that before we
15 leave here today. I think that if -- and I do agree with
16 you that this predicament is not of your making. My
17 comments to you with regard to the discovery aspect of it
18 was all along that the Defense ought to be given plenty
19 enough time to defend it. You understand that?

20 MR. BUYCK: I understand.

21 THE COURT: All right. The other thing that I
22 think is going to expedite the thing, which I think works
23 to your advantage is that we've limited the Plaintiff's
24 experts, which -- I mean, quite often, there are doctors
25 upon doctors upon doctors that are getting named on up

1 until trial. But because of the predicament that the
2 Plaintiff has put us in, we've restricted the number of
3 experts. I don't think you need two years to prepare it.

4 MR. BUYCK: That's fine, Your Honor, I --

5 THE COURT: But if you want two years, I think I
6 will be in a position to agree to that.

7 MR. BUYCK: No. If that's the case, I mean, if
8 we know who the experts are -- and I think that's what the
9 law, the current law requires in an effort to expedite
10 these matters to some extent. If that's what we're living
11 by and I know it's Dr. Oaks I've got to depose, I'll go
12 depose Dr. Oaks.

13 THE COURT: I think that was the ruling.

14 Mr. Sidnick?

15 MR. SIDNICK: The ruling was, Your Honor, is
16 that his motion for summary judgment would be held in
17 abeyance while he got to go try to depose Dr. Oaks if he
18 chose to do so, and the summary judgment motion would rest
19 upon the testimony of Dr. Oaks. And that was the same for
20 both McLeod and -- I mean, Dr. Oaks said he could
21 potentially offer opinions against the hospital, but,
22 based upon his review of the records, he didn't see any
23 nurse issues, which is why the nurses were to be made
24 available. But it wasn't a blanket -- if that's the only
25 expert you used -- I mean, if Defense counsel names an

1 expert that requires a rebuttal witness, where would that
2 put the Plaintiffs, Your Honor?

3 Your ruling was just that you were going to hold
4 the summary judgment motion in abeyance pending his
5 deposition of Dr. Oaks.

6 THE COURT: To Mr. Bridges, what's your
7 understanding?

8 MR. BRIDGES: Your Honor, I hate to disagree
9 with Mr. Sidnick, but my understanding -- my recollection
10 of Your Honor's ruling as to -- well, as to McLeod, it was
11 clear that he was going to get to take the depositions of
12 the nurses and then if Dr. Oaks, based on that, could
13 revise his opinion, then that would be considered.

14 My recollection as to Dr. Chaudhry was Your
15 Honor did say no additional experts on liability issues
16 would be allowed beyond Dr. Oaks. That was my
17 recollection.

18 THE COURT: And that was my recollection as
19 well. And, of course, you, at the time, were in the
20 agreement with that. That was your expert. And you had
21 mentioned that any sanction other than granting of the
22 summary judgment would be appropriate. You don't recall
23 that?

24 MR. SIDNICK: Your Honor, I recall saying that
25 some lesser sanction other than dismissal of the action

1 can be an appropriate remedy. But when we were talking
2 specifically about the limitation on Dr. Oaks, my
3 recollection is that you were going to hold the summary
4 judgment motion in abeyance and that the only expert we
5 could use when you reheard that summary judgment motion
6 was Dr. Oaks, but not that there would be a blanket
7 limitation throughout the case on hiring other experts.

8 THE COURT: Okay.

9 MR. SIDNICK: I mean, Your Honor, respectfully,
10 I mean, I -- we -- I have told you that we have substitute
11 counsel who is ready to step in. He has actually procured
12 the affidavit of Dr. Oaks at the request of the Plaintiff.
13 And I can't speak for him regarding how -- I agree that
14 the case needs to develop further, but I don't recall --
15 if that's what you had said, I think I must have very
16 clearly misunderstood that because we were discussing you
17 held the summary judgment motions in abeyance and said
18 that the only -- now, that's my recollection, Your Honor.

19 MR. GRAHAM: Your Honor, may I be heard on that
20 point?

21 THE COURT: Yes.

22 MR. GRAHAM: If Your Honor please, Ed Graham,
23 also, for the Plaintiff. We filed a notice of appearance
24 in this case on September 8th of this year. I'd like to
25 say at the outset that Marquette Johnson, who is the one

1 who approached me, the mother of this minor, has some
2 concerns with the way the case was handled by the New York
3 attorney. That was her initial contact and that's --
4 disappointments with the New York attorney were no fault
5 of her own and, certainly, through no fault of her child
6 are what led to her disappointment in the way her case was
7 proceeding as well as some procedural problems here.

8 I have personally the utmost respect for the
9 attorneys at the McGowan and Hood Law Firm. So it was a
10 bit awkward when I was approached by Ms. Johnson and asked
11 to get involved in a case in which the McGowan and Hood
12 Firm was representing the Plaintiff. But once we talked
13 with Kevin, I realized that this was an awkward situation
14 for him, too, and that the real thrust of the problem
15 generated from the New York attorney.

16 But when I was deciding whether or not we could
17 step in and try to assist Ms. Johnson, I did my own due
18 diligence. We didn't have a transcript of the order in
19 which you made whatever ruling you made about limitation
20 of experts. There was no written order because Mr. Buyck,
21 for whatever reason, did not prepare it in accordance with
22 your instructions. Mr. Sidnick told me that his
23 understanding in good faith was what he just told the
24 Court in open court here today. It was in reliance on
25 that that I agreed to become involved in the case.

1 THE COURT: How many experts do you propose?

2 MR. GRAHAM: Well, ordinarily in these cases,
3 Your Honor, I like to have two or three OB experts, a
4 pediatric neurology expert, perhaps, a surgery expert and
5 then a whole host of damages experts. But we've got to
6 prove standard of care, breach, causation and damages.
7 And if we're limited to just Dr. Oaks, it makes it a very
8 different case than the one I anticipated getting involved
9 with. I would have to revisit that, if Your Honor please.

10 And it just seems to me there's some
11 misunderstanding about what the ruling was and since we
12 don't have a transcript of the hearing, if, in fact, the
13 transcript supports a ruling that the Plaintiff be limited
14 on the number of experts, then we're going to -- if I'm
15 still in the case, we're going to have to get involved in
16 another 59(e) motion to try to get reconsideration of
17 that. Because, frankly, limiting experts has its own set
18 of case law about that can only be done if there's
19 intentional misconduct and so forth.. I'm not prepared to
20 cite those cases right now because I had no idea that
21 issue would come up today.

22 But if this case is going to be heard on the
23 merits, for the benefit of all parties, including a
24 perfectly innocent young minor child whose brachial plexus
25 has a permanent severe injury, then I don't think -- I

1 think it's premature to be limiting experts. Of course,
2 it's Your Honor's domain and I mean absolutely no
3 disrespect in that regard, but when I agreed to get
4 involved in the case to try to help push past all this, it
5 was with the understanding that we would be able to go
6 forward on the merits. And I had no idea --

7 THE COURT: Certainly, if, indeed, that is going
8 to be the rule that we operate under, it would certainly
9 mean that we would certainly need to get a new number and
10 start from square one if we're going to do all that.

11 What's the position of you, Mr. Bridges?

12 MR. BRIDGES: Well, Your Honor, I think Your
13 Honor's ruling with regard to my client clearly was that
14 after he took these depositions of the nurses any
15 additional opinions with regard to liability of the
16 hospital was going to be limited to whatever Dr. Oaks
17 wanted to say. And I think the written order will bear
18 that out.

19 My clear recollection, Your Honor, is that your
20 oral ruling with regard to Dr. Chaudhry also was that
21 Dr. Oaks would be the only expert witness allowed on
22 liability issues. Not damages, liability. I'm sorry, but
23 I have a very clear recollection of that.

24 MR. GRAHAM: If I may, Your Honor. Mr. Sidnick
25 did tell me that there was a limit to Dr. Oaks with

1 respect to the hospital. My understanding was that he
2 would be the only standard of care expert against the
3 hospital and would not address causation issues or damages
4 issues.

5 MR. BUYCK: Your Honor, I've got a concern if
6 we're going to start opening up all these new experts,
7 where were they in April? This case has been going since
8 '08 in April. And so now, we're just putting -- start all
9 over guys.

10 THE COURT: All right. The ruling as it stands
11 today -- and, of course, anybody can file whatever motion
12 they want to file, but the ruling is with regard to
13 liability, Dr. Oaks is the only one -- that doesn't deal
14 with damages or anything else. And, certainly, the issue
15 with regard to reply, perhaps, might be dealt with at a
16 later date and time. Of course, it was two years to get
17 all this stuff together. And it was really at the
18 insistence of the Plaintiff something other -- or short of
19 a summary judgment was the appropriate remedy.

20 And, of course, the Defendants have been sued
21 and you're the one that sued them. And at some point in
22 time, they need to be in a position where they can defend
23 the case. And after the scheduling order was signed,
24 there was no expert showed up at the summary judgment
25 motion and there was no expert. Then at some point in

1 time, we end up with Dr. Oaks and -- and -- you know, I
2 just think the Defendant needs to have an opportunity to
3 at some point in time know what they're looking at and go
4 forward.

5 My ruling at this time is with regard to
6 liability experts, it will be limited to Dr. Oaks. And
7 either side can do what they wish in that regard.

8 MR. GRAHAM: Your Honor, could I get you to
9 clarify that, when you say liability, does that encompass
10 standard of care only or standard of case and causation?

11 THE COURT: My initial feeling was standard of
12 care and causation.

13 I'll be glad to hear discovery motions at this
14 time.

15 MR. BUYCK: Thank you, Your Honor. We had filed
16 a motion to compel were complete discovery responses in
17 regards to various discovery that we served initially with
18 the case being filed with our answer. And, specifically,
19 as this is a Erb's palsy, we asked when the deviation from
20 standard of care occurred. What these cases boil down to
21 is it's a medical emergency when the shoulder gets hung up
22 in the cervix and whether or not to -- how to deliver the
23 child.

24 Now, sometimes there's allegations that you
25 never should have attempted a vaginal delivery. So if

1 they claim that there's a deviation from attempting a
2 vaginal delivery or there's a deviation during the
3 delivery process, I think that's something that we should
4 be told. I don't think we ought to have to walk into the
5 deposition of Dr. Oaks and then be told that issue.

6 THE COURT: I think that's fair.

7 What do you say about that, Mr. Sidnick?

8 MR. SIDNICK: Your Honor, I'm curious right now
9 whether he's addressing our supplemental -- deficiencies
10 in our supplemental discovery responses or not.

11 MR. BUYCK: I am.

12 MR. SIDNICK: Well, which -- I mean, can we have
13 a number?

14 MR. BUYCK: Number 17. The answer that they
15 provide, be it the Plaintiff or Plaintiff's counsel is a
16 medical expert qualified to respond to this interrogatory.
17 And then it says subject to this objection, Plaintiff
18 refers to the affidavit of Dr. Oaks. Well, Dr. Oaks
19 doesn't say anything about that in his affidavit. His
20 affidavit is a vanilla affidavit. And I think we're
21 entitled to this discovery for specifics of what their
22 allegations are as to the standards of care and the
23 deviation from the standards of care. And that's what --

24 THE COURT: And when they took place?

25 MR. BUYCK: And when they took place.

1 And then, secondly -- these are all along the
2 same lines. Number 18 identify by --

3 THE COURT: Let's address 17 first. We'll do it
4 one at a time. And I'm going to ask if you could to keep
5 very detailed notes in this regard.

6 I think he's entitled to know that, so he can be
7 prepare to do the appropriate examination of Dr. Oaks.
8 How long do you think it will be before you can get this
9 information to him?

10 MR. GRAHAM: I'll give it to him right now.

11 THE COURT: Very good.

12 MR. GRAHAM: If you'll read Dr. Oaks' affidavit,
13 fairly, it's clear to me that he's not making any
14 contention that a trial of labor was inappropriate. He's
15 making a contention that the management of shoulder
16 dystocia was negligent for two reasons. The appropriate
17 maneuvers were not used and excessive lateral traction to
18 the baby's head was used.

19 THE COURT: Very good. Now, we're moving
20 forward. What I want you to do is produce that in writing
21 in the form of an answer to interrogatories so you can be
22 bound by it, not necessarily by the affidavit. If that's
23 the position the Plaintiff is taking, I think it's fair to
24 set that out.

25 MR. GRAHAM: And in terms of the timing, it's

1 after delivery of the head, but before delivery of the
2 baby's complete body.

3 THE COURT: Okay. We know now what their
4 position is going to be and we're going to ask that you
5 supplement number 17 to reflect what Mr. Graham's response
6 was. Does that seem fair enough to everybody?

7 MR. BUYCK: That's exactly what I was seeking,
8 Your Honor.

9 THE COURT: Very good. Let's move on to 18.

10 MR. SIDNICK: Eighteen is whether there are any
11 regulations, statutes, customs or standards which you
12 contend this Defendant violated. State in particularity
13 the facts upon which you rely to allege such violations.
14 And what I'm asking for is whether they're going to say
15 that ACOG or -- American College of Gynecologist or some
16 other organization has a regulation or statute to which
17 they're going to reference as being violated and be a
18 violation from the standard of care and support their
19 causation -- standard of care opinions that they have in
20 this case.

21 THE COURT: Mr. Sidnick, what have you got to
22 say about that?

23 MR. SIDNICK: Again, Your Honor, I mean, after
24 we submitted our supplemental response, I have not heard
25 from Mr. Buyck, even though I asked him specifically if he

1 still had these questions. So this is the first time
2 hearing of the specifics. We did submit a supplemental
3 affidavit. But, you know, if he wants to know whether
4 there's going to be -- I mean, we can -- if he wants to
5 provide me a list of more detailed --

6 THE COURT: I think that's what these questions
7 are, I think that's what he's asking right now.

8 MR. SIDNICK: Well, we gave a fairly detail
9 response, Your Honor. We gave reference to the affidavit
10 of Dr. Oaks as the specific deviations to the standard of
11 care which say Dr. Chaudhry's failure to recognize
12 shoulder dystocia or failure to employ safe and effective
13 maneuvers to resolve the shoulder dystocia without
14 injuring their application of excessive lateral traction
15 and or torsion to D'Andre G■■■■'s head during delivery.

16 I mean, if he wants to know whether ACOG is
17 going to be used, then that wasn't asked in the question.

18 THE COURT: Okay. Well, he's asking it now.

19 MR. BUYCK: I think it was, Your Honor. This
20 isn't my first dance in a shoulder dystocia case with
21 Mr. Graham. And I know that he sometimes pulls out these
22 bulletins. If he's going to pull out a bulletin and start
23 questioning the doctor about it, we contend that that sets
24 forth --

25 THE COURT: We need to know which bulletins he's

1 talking about.

2 MR. BUYCK: We need to know which bulletins he's
3 going to reference. And I think when we ask for any
4 regulation, statute, custom or standard which you contend
5 this Defendant violated, that that's what we're asking for
6 and that's specifically --

7 THE COURT: Mr. Graham, you know what he's
8 talking about, don't you?

9 MR. GRAHAM: He's confused me, Your Honor. He
10 talks about statutes. ACOG has nothing to do with
11 statutes --

12 THE COURT: I'm not real sure statutes are
13 really an appropriate interrogatory, which statutes you
14 rely on. I'm not real sure if that is or not. But these
15 bulletins seem to be something that would be appropriate.

16 MR. GRAHAM: Everybody who's ever done this kind
17 of litigation knows that there's an ACOG technical
18 bulletin on how to do shoulder dystocia. It's been
19 updated several times. Their experts know it. Our
20 experts know it. Now, we're not contending that that is
21 the end all and be all of the standard of care. The ACOG
22 itself says it's guidelines, not standard of care --

23 THE COURT: Mr. Graham, I don't mean to
24 interrupt you, but what I'm saying is you know the
25 regulations that you're going to be holding up in court.

1 He wants to know them now.

2 MR. GRAHAM: I presently don't intend to hold up
3 any regulations in court.

4 THE COURT: I mean any of these bulletins, I'm
5 talking about.

6 MR. GRAHAM: All I can say, Your Honor, is if
7 the expert tells me as trial approaches that he would like
8 to use the technical bulletin to support his opinions in
9 some way, then that's --

10 THE COURT: Well, that's what we want you to do
11 now, to talk with your expert, find out which bulletins
12 he's going to use and let him look at it. I think that's
13 fair game.

14 MR. GRAHAM: Well, all we can say now is we may.
15 So much depends on how the discovery develops, what the
16 Defense experts say about it --

17 THE COURT: Well, certainly, it can be
18 supplemented, but what you need to do from this point
19 right now is you need to talk to Dr. Oaks. You need to
20 tell him to look at those bulletins, find out which ones
21 are appropriate and which ones he's going to be relying
22 on. And if he needs to supplement it in replying to
23 anything that they might maintain or might assert in their
24 defenses, then you can supplement it in that regard. But
25 I think that he's entitled to know which bulletins y'all

1 are going to be talking about in court. Is that fair
2 enough to you?

3 MR. GRAHAM: Well, I don't mean to be difficult,
4 Your Honor, but every once in a while, I'll hear a word
5 that just throws me off my stride. When I hear something
6 that he relies upon, I think the answer to that is he
7 doesn't especially rely on anything, but he knows those
8 technical bulletins are out --

9 THE COURT: Well, if he's not going to rely on
10 any of them -- you need to ask him if he's going to rely
11 on any of them. If he's not going to rely on any of them,
12 you aren't going to be able to talk about them. You
13 follow me?

14 MR. GRAHAM: Well --

15 THE COURT: If you're not going to disclose
16 them.

17 MR. GRAHAM: Well, if the Defense experts rely
18 on them, it's our position he should be able to explain
19 why he does not rely on them.

20 THE COURT: I don't think that's what he's
21 asking, what the defense lawyers. He's asking what you're
22 going to rely on to prove your case. I think.

23 Is that right, Mr. Buyck?

24 MR. BUYCK: That's correct, Your Honor. And,
25 also, in qualification of an expert, I think that under

1 the gate keeping function of the Court, they have to have
2 some basis of their opinions and has to be some peer
3 reviews and different things that they have used to
4 establish that their an expert in the field. And so if
5 he's using those to address issues in the field -- because
6 19 ask for, essentially, the same thing, title, author,
7 date, volume, page --

8 THE COURT: We're going to finish with 18 first.
9 And we're talking about this particular bulletin, ACOG?

10 MR. BUYCK: That's correct, Your Honor. And, I
11 mean, that's just for an example. And that's why I want
12 to know --

13 THE COURT: You know the type material we're
14 talking about, don't you?

15 MR. GRAHAM: I know -- I assume I know the ACOG
16 technical bulletin that Mr. Wilcox brought up for the
17 first time today. I had no idea that was covered within
18 the scope of interrogatory 18.

19 THE COURT: All right. Well, to the extent that
20 it might bit a little bit general, we know that that's
21 what it means now and we're going to ask that you provide
22 any ACOG documents that he's going to be -- that your
23 expert is going to be relying upon.

24 And any other particular documents you --

25 MR. BUYCK: Just whatever on 18. If it's ACOG

1 or something additional. I'm not limiting myself to ACOG,
2 I'm saying I want to know everything.

3 MR. GRAHAM: Your Honor, his key words are code,
4 regulation, statute, custom or standard. It doesn't say
5 anything about ACOG technical bulletins. I mean, it
6 sounds like code and statute would be an inappropriate
7 interrogatory --

8 THE COURT: It seems to me that, too. But we do
9 know that he intended ACOG and like documents. You've
10 tried more of these than anybody I know of. Apparently,
11 this is one of your specialities, right? What other type
12 documents that are similar to ACOG do you know of?

13 MR. GRAHAM: Well, there's a number of
14 publications out there, whether by ACOG or individual
15 authors.

16 THE COURT: All right.

17 MR. GRAHAM: But there's another question that
18 ask about publications. This one ask about code,
19 regulation, statute, custom or standard. We gave him the
20 custom or standard in the affidavit. I'm not aware of any
21 code or statute. I'm not aware at this time of
22 regulation, although, you know, there may be some
23 regulation that's indirectly --

24 THE COURT: If you get a regulation, you need to
25 inform him of that.

1 MR. GRAHAM: Yes, sir.

2 THE COURT: All right. Well, he might be right
3 in that regard that this isn't the one that deals with --

4 MR. BUYCK: We'll move on to number 19.

5 THE COURT: Nineteen might be what we're talking
6 about. Go ahead.

7 MR. BUYCK: Title, author, date, volume, and
8 page, where appropriate, meaning periodical journals,
9 text, paper, or other publication of any kind to which the
10 Plaintiff or her attorneys or her experts intend to refer
11 or about which Plaintiff or her attorneys or her experts
12 intend to ask any questions during the examination or
13 cross-examination of any witness at trial or during any
14 depositions.

15 THE COURT: All right. ACOG would fall in that
16 category, wouldn't you think?

17 MR. BUYCK: Correct, Your Honor.

18 THE COURT: And also New England Journal of
19 Medicine, would that --

20 MR. BUYCK: Whatever it may be. I don't want to
21 come to Dr. Chaudhry's deposition and they throw a bunch
22 of publications in front of her that she's never seen
23 before. I think that this addresses that. And if they're
24 going to ask her do you think this is authoritative or
25 this is authoritative, let me know beforehand.

1 THE COURT: Well, I think that's fair game,
2 don't you think, Mr. Graham?

3 MR. GRAHAM: No, sir, actually, I don't. One of
4 the issues that we contend is that this Defendant lacks
5 the knowledge she should have about how to manage shoulder
6 dystocia. She wants us to educate her before her
7 deposition. We're entitled to find out what her level of
8 knowledge is now because of her lack of knowledge is a
9 huge reason why this child has a permanent brachial plexus
10 injury and doesn't have a normal arm. Work product
11 objection was made. When the motion was made, Mr. Sidnick
12 followed up to say please tell us specifically what's
13 wrong with our objections, what's wrong with our
14 supplemental responses and he hasn't heard a peep. So we
15 think it's a proper work product objection.

16 THE COURT: I do not. And if you intend on
17 using any periodical or ACOG, whether it be New England
18 Journal of Medicine or anything that they intend to
19 support their opinion, I think you need to tell them about
20 that before the deposition.

21 MR. GRAHAM: Just so Your Honor knows, and,
22 please, understand, I'm not arguing. I just want Your
23 Honor to know this is not the kind of thing where there's
24 one or two articles out there. There's hundreds of
25 articles.

1 THE COURT: Well, he's, certainly, not going to
2 share 100 articles with the jury, is he? I mean, your
3 expert, he's not going to share a hundred of them with
4 them, is he? His general expertise can explain what the
5 principles are and how they deviated from the standard of
6 care and all of that. But if he's going to start delving
7 into relying on the New England Journal of Medicine or
8 this ACOG or anything like that, and he intends on using
9 that, I think that they're entitled to know what it is.

10 MR. GRAHAM: The problem is if we try to
11 reasonably limit it to say two or three and then they
12 attack that as being just a tiny bit of the literature out
13 there, we can easily say these same points are in
14 thousands, at least, hundreds of other publications --

15 THE COURT: Certainly, you could do that. I
16 mean, certainly, you can ask him the general question is
17 there a lot of literature in this respect, and you can ask
18 him that general question, certainly.

19 MR. GRAHAM: Thank you.

20 THE COURT: But those are the ones he chose to
21 share with the jury. And whatever he intends to share
22 with the jury, they need to know before trial and before
23 the deposition.

24 MR. BUYCK: And including before the deposition
25 of Dr. Chaudhry.

1 THE COURT: Yes.

2 MR. BUYCK: All right, Your Honor. The next one
3 is, What do you contend were all causes of the injury
4 sustained by the minor? And this just say negligence of
5 the Defendant. And I just heard Mr. Graham state
6 excessive lateral traction. If it's excessive lateral
7 traction, I want to know. Is it due to something that
8 occurred in utero, I want to know. I'm asking him to set
9 forth the causation, what they contend was the cause of
10 the injuries.

11 THE COURT: Okay.

12 MR. BUYCK: This is to avoid having experts come
13 in here and offer different opinions by the Plaintiff's
14 counsel. If they have more than one, I want to know each
15 and every one of those opinions as to the cause.

16 THE COURT: Very good. All right.

17 What about providing that information, Mr.
18 Graham?

19 MR. GRAHAM: It's in the affidavit of
20 Dr. Roberson. We certainly don't contend anything
21 happened that had any causal significance to this child's
22 brachial plexus injury until after his head was delivered.
23 There was no in utero injury. The cause was application
24 of the doctor's hands to the head of this child, whether
25 it's excessive pulling, excessive lateral traction,

1 twisting.

2 THE COURT: Very good. That makes sense to me.
3 If you could reduce just what you said to writing,
4 everybody will know -- we'll be singing from the same
5 sheet of music. And it's not inappropriate to refer to
6 the affidavit of the doctor as well, but I think that
7 they're entitled to know what your position is based on
8 your interpretation of the affidavit. Does that sound
9 fair enough to you, Mr. Graham?

10 MR. GRAHAM: It does, Your Honor, very good.

11 Mr. Buyck?

12 MR. BUYCK: Your Honor, next, 24, At what time
13 do you contend a C-section should have been performed to
14 completely avoid injury to the Plaintiff and minor
15 Plaintiff? They may say a C-section was not indicated,
16 but what I hear is this what was responsible as this
17 interrogatory requires a medical expertise not possessed
18 by either the Plaintiff or her counsel. Plaintiff craves
19 reference to the affidavit Dr. Oaks who can be made
20 available for deposition. Dr. Oaks doesn't mention a
21 C-section. I want to know whether they contend that the
22 head should have never been delivered. I want to know --
23 and if so, when they contend the C-section should have
24 been performed.

25 THE COURT: I think that's a fair question, Mr.

1 Graham.

2 MR. GRAHAM: Would you like me to answer it,
3 Your Honor?

4 THE COURT: If you could answer here today and
5 you can reduce it to writing and then make reference to
6 the affidavit to support your position. But I think it's
7 a fair question for him to ask. And if you can answer it
8 here today, that would be good.

9 MR. GRAHAM: Again, Dr. Oaks' affidavit says
10 what his opinions are about negligence and causation that
11 are relevant to this case, but, Your Honor, we do not
12 contend, based on currently available information, that a
13 C-section should have been done.

14 THE COURT: Very good. That sounds clear.
15 Sounds like we're moving forward.

16 MR. BUYCK: If they would produce that in
17 writing.

18 THE COURT: And he's going to reduce that to
19 writing so they could be held to it. And, of course, Dr.
20 Oaks can explain it any way he wants to.

21 MR. BUYCK: Next, Your Honor, is number 25 and
22 this involves describe in complete detail how the
23 Plaintiff or her experts will contend that the prenatal
24 period, labor and delivery should have been managed in
25 order to completely comply with the standard of care and

1 to avoid injury to the minor. And that focuses on whether
2 or not they're going to say that it Dr. Chaudhry did
3 something prior to the delivery that was a deviation from
4 the standard of care. Whether or not -- again, whether or
5 not we should have had a trial of labor. I think what
6 I've heard here today is that the trial of labor was
7 appropriate.

8 So if there is nothing within the prenatal
9 period -- say, for instance, she was a diabetic and the
10 baby was too big, or something along those lines. I want
11 to know it beforehand so that we have an understanding.

12 THE COURT: Mr. Graham? Mr. Sidnick?

13 MR. SIDNICK: Your Honor, can I briefly address
14 that? This issue about whether a vaginal delivery was
15 original contraindicated is in our supplemental responses
16 and response to their request to admit number 6.

17 THE COURT: For clarification purposes here
18 today, he's asked for clarification with regard to that
19 particular question. Mr. Graham has provided that to us.
20 And we're going to ask that they be supplemented according
21 to what Mr. Graham has said here today.

22 MR. SIDNICK: Yes, sir.

23 THE COURT: Very good. And how about this
24 prelabor, prenatal care, Mr. Graham.

25 MR. GRAHAM: Your Honor, based on information

1 currently available to me and based on information that I
2 furnished to Dr. Oaks, I don't believe, as an officer of
3 the court, that there is any issue about prenatal care in
4 this case, but I'm not certain. Mr. Buyck just referred
5 to diabetes. If diabetes is an issue in this case, then
6 prenatal care may well be relevant. I don't believe
7 diabetes is an issue in this case, but my notice of
8 appearance was just, like, 10 -- less than 10 days ago, so
9 I'm not --

10 THE COURT: Well, you're going to be given about
11 10 days to prepare these answers to interrogatories and in
12 that time, you can make that determination, can't you?

13 MR. GRAHAM: I can make inquiry and get the best
14 information that's currently available and then supplement
15 it later if it turns out to be wrong.

16 THE COURT: Very good. All right. Mr. Buyck.

17 MR. BUYCK: Your Honor, number 26 ask for
18 specific recollections of the Plaintiff and every family
19 member of the minor present during labor and delivery
20 regarding all conversations had with Dr. Chaudhry before,
21 during and after the hospitalization of the plaintiff and
22 minor that is at issue in this litigation. I put to
23 describe the substance of all conversations, the date of
24 the conversations and names of all persons present for
25 each conversation. All they've done is crave reference to

1 our responses to interrogatories and request for
2 production. If it's in the medical records that they're
3 referencing, let me know that. If there's something else
4 that they contend was said, a statement against interest
5 or there was some conversation that they contend that is
6 at issue here, I want to know it beforehand.

7 THE COURT: Okay. All right.

8 Mr. Graham?

9 MR. GRAHAM: I'm still looking for that
10 interrogatory, Judge. That wasn't part of his motion to
11 compel, so we weren't --

12 THE COURT: Yeah, but we all -- we're trying to
13 move forward here. We're going to --

14 MR. BUYCK: It is attached to it.

15 MR. GRAHAM: Here it is.

16 Your Honor, I think it's an inappropriate
17 interrogatory because it violates work product. It also
18 violates attorney-client privilege with respect to the
19 Plaintiff. And in terms of every other family member
20 present, they're not my client. I mean, they're welcome
21 to take their depositions. We have the right to take
22 their depositions. They have the right to take their
23 depositions, but I don't think an interrogatory requires
24 me at their behest to go out and interview family members
25 that aren't my client to try to answer their questions.

1 Based on information currently available to me, I'm not
2 aware of any conversations involving anyone other than my
3 client. And as to my client, it would be attorney-client
4 privilege.

5 MR. BUYCK: Your Honor, I don't know a
6 conversation between the Plaintiff and Dr. Chaudhry is
7 attorney-client privilege.

8 THE COURT: I don't believe so either.

9 MR. GRAHAM: The conversation between me and the
10 client about that conversation would be.

11 THE COURT: No. No. If your client spoke to
12 the doctor about it and you intend on -- or there was a
13 conversation where the doctor said something that was
14 against his interest, then -- and you intend on using it
15 in your case, they're entitled to know about that well in
16 advance. And that's, certainly, not attorney-client
17 privilege.

18 MR. GRAHAM: And that relates to Marquette
19 Johnson only, correct? Just the client?

20 THE COURT: Right.

21 MR. BUYCK: Or, Your Honor, if they have
22 knowledge of additional conversations. I think I'm
23 entitled to what they have knowledge of.

24 THE COURT: All right. I will -- I think what
25 Mr. Graham said about going out and interviewing

1 independent witnesses makes a lot of sense, but if you
2 know that one of the witnesses -- if you know when you
3 answer the interrogatories that one of the witnesses is
4 going to say that the doctor said oh, I messed up when I
5 did this, you need to disclose that.

6 MR. BRIDGES: Your Honor, there are written
7 statements that were produced to the Defendant from some
8 of the family members. Those have already been produced.

9 THE COURT: Okay. Well, with regard to this
10 specific question, we're going to ask that you reiterate
11 then with regards to this question and, specifically, any
12 statements made by the doctor to Marquette Johnson.

13 MR. BRIDGES: Yes, sir, I understand. Thank
14 you.

15 MR. BUYCK: Your Honor, I'm waiving 26.
16 Twenty-seven, it says describe in complete detail every
17 action, intervention or treatment that you contend should
18 have been provided by Dr. Chaudhry in order to completely
19 comply with the appropriate standard of care and avoid
20 injury to the Plaintiff and minor Plaintiff?

21 THE COURT: Say that again now.

22 MR. BUYCK: What should have been done to meet
23 the standard of care, essentially, in order to comply and
24 avoid injury. Include the specific time at which each
25 such action, intervention, and treatment should have been

1 provided. Now, again, Mr. Graham tries a lot of these
2 case. If his contention is excessive traction was applied
3 to the head, tell me specifically what you contend should
4 have been done. How was it done safely other than --

5 THE COURT: How could it have been done safely.

6 MR. BUYCK: How could it have been done safely.

7 THE COURT: All right. That might be a --

8 What do you have to say about that, Mr. Graham?

9 MR. GRAHAM: Well, if I may, I'd like to respond
10 first to Mr. Buyck's first comment. Before he addressed
11 27, he said he was waiving 26.

12 MR. BUYCK: Excuse me, that was --

13 MR. GRAHAM: We had already gone over 26, I
14 didn't know if I should --

15 MR. BUYCK: It was 25. It was 25. I was
16 looking at the wrong thing. It was 25. Twenty-seven is
17 the one I'm talking about.

18 MR. GRAHAM: Well, we talked about 25, too,
19 that's the one about the prenatal period. This is the
20 problem, when Mr. Buyck gets upset about one thing and
21 makes a big deal out of it, then says he waives it, what
22 are we supposed to do? He's just taking up all of our
23 time with 26, he said he waived it. Then he says no, I
24 really waived 25. Well, he took up our time with 25, too.
25 Does he truly waive it?

1 THE COURT: What does 25 say?

2 MR. BUYCK: Your Honor, my apologies. What I'm
3 doing is I'm looking at this one that was previously filed
4 and the one that was received last week when I was in
5 court. So I felt that we were addressing this. I thought
6 we were on 26. I was wrong. I was looking at --

7 THE COURT: He's not waived anything that we've
8 talked about here today.

9 MR. BUYCK: I'm not waiving anything is what I'm
10 saying. And 27 is the one I want answers to, what should
11 have been done.

12 THE COURT: Okay. Very good.

13 MR. GRAHAM: Do you want me to answer now?

14 THE COURT: Well, yeah, if you could, that would
15 be real good.

16 MR. GRAHAM: Well, I mean, she should have
17 recognized that there was shoulder dystocia if she didn't.
18 If she did truly recognize it, she should have documented
19 it. She should have refrained from using excessive
20 traction, torsion or pulling on the baby's head. She
21 should have, instead, resorted to the use of various
22 maneuvers that are available to well-trained, competent
23 obstetricians and used each one of those maneuvers with
24 gentle traction until the baby delivered safely. If that
25 maneuver number one, plus gentle traction is insufficient

1 to get the baby out safely, then move to the next maneuver
2 with gentle traction and try to get the baby out safely.
3 If plan B fails with gentle traction, move to plan C. And
4 there's a series of about seven or eight commonly used
5 maneuvers. And that's about as well as I can address it.
6 She apparently didn't use any maneuvers --

7 THE COURT: I think if you can reduce that in
8 writing, it sounds like it's pretty comprehensive if you
9 reduce that to writing. That clarifies it for everybody.

10
11 MR. BUYCK: And, Your Honor, that would clarify
12 number 28 because we asked specifically if he contended
13 Defendant Chaudhry should have performed some maneuver to
14 resolve the shoulder dystocia that was not performed,
15 please list all such maneuvers and set forth the time and
16 sequence in which such maneuvers should have been
17 performed. Essentially, it's going to come down to
18 minutes here that they're talking about and I want to know
19 what -- when they contend that they should have been done.

20 THE COURT: All right. Do you have a problem
21 with providing a time line?

22 MR. GRAHAM: Well, I can give you part of the
23 answer.

24 THE COURT: I don't know anything about it,
25 never tried one, but it seems to me sometime after the

1 head was out and sometime before it was delivered, seems
2 like to me.

3 MR. GRAHAM: Well, that's right. And we don't
4 contend that there's one absolutely sacrosanct sequence of
5 events that has to be followed. That depends on the facts
6 and circumstance of the presentation as well as the
7 doctor's own preferences. But she's not allowed to just
8 pull apart and endanger the baby's nerves.

9 THE COURT: All right. Very good. Now, with
10 regards to the time sequence, you're saying --

11 MR. GRAHAM: Well, the sequence we're saying
12 is --

13 THE COURT: Not really the sequence, but as to
14 the time frame.

15 MR. GRAHAM: As to the time, I mean, the clock
16 is ticking. There's a period of time, doctors may differ
17 whether it's eight minutes or ten minutes, but there's a
18 limited period of time to get the baby out safely. And
19 they should -- the maneuvers should be used in whatever
20 sequence is chosen, usually, from less invasive to more
21 invasive, one after the other. If they're not being
22 perfected, then they should go back and perfect the move,
23 but continue with efforts to get the baby out safely --

24 THE COURT: I think the question is on the
25 medical records, there probably is going to be a time to

1 which all this becomes important. And can you, from
2 looking at the medical reports and confirm with your
3 doctor ascertain what time is critical? I think that's
4 what he's asking for is the time.

5 MR. BUYCK: I'm asking for that and the
6 maneuvers, because he just said there's seven or eight
7 maneuvers in response to the prior one. I want to know
8 specifically what maneuvers he contends should have been
9 performed.

10 THE COURT: I think you're going to list the
11 maneuvers, aren't you?

12 MR. GRAHAM: I thought we had already addressed
13 that.

14 THE COURT: Well, in this particular response to
15 this particular interrogatory, we want you to list the
16 maneuvers that Plaintiff maintains is relevant and the
17 time sequence -- the time frame to which they ought to be
18 applied as closely as you can.

19 MR. GRAHAM: From delivery of the head until the
20 baby comes out safely?

21 THE COURT: I think that pretty much covers
22 that.

23 MR. BUYCK: Your Honor, the next, I think we
24 previously discussed, but 29 ask, please set forth all
25 authorities in possession of the Plaintiff, her attorneys

1 or her experts which support any contention that an
2 attempt at a vaginal delivery was inappropriate in this
3 case. From what I've heard Mr. Graham say now, there
4 wasn't a deviation from the standard of care. There's
5 nothing to say that an attempt at vaginal delivery was
6 contraindicated.

7 THE COURT: That's what I understood him to say.

8 MR. BUYCK: But that's not what their answer is
9 and I'd like for that to be clarified in writing.

10 THE COURT: What is the answer and how is
11 different from that?

12 MR. GRAHAM: The answer says, Your Honor, this
13 interrogatory requires expert medical knowledge not
14 possessed by either the Plaintiff nor her counsel and
15 neither Plaintiff nor her counsel are in possession of
16 responsive authorities. Plaintiff has identified Dr. Gary
17 K. Oaks who has provided an affidavit responsive to this
18 request which has been submitted to the Defendants. To
19 the extent greater detail is sought, Dr. Oaks can be made
20 available for deposition upon request.

21 I would simply add to that answer, Your Honor,
22 that it is my understanding based on the facts within my
23 knowledge and the material I've produced to Dr. Oaks and
24 his responses to me that --

25 THE COURT: C-section is not an issue?

1 MR. GRAHAM: C-section isn't part of this case.

2 THE COURT: Very good. Well, if you could
3 supplement that response with that one sentence, that
4 C-section is not a part of this case, that would be good.

5 MR. BUYCK: Or an attempted -- this actually is
6 attempted vaginal delivery was inappropriate.

7 THE COURT: Okay. Is there a difference?

8 MR. BUYCK: Well, I don't know there really is.

9 THE COURT: There's only two different ways you
10 can do it, isn't it?

11 MR. BUYCK: I think you're right.

12 MR. SIDNICK: I think the only difference, Your
13 Honor, would be whether at some point during the attempted
14 vaginal delivery, a C-section then became appropriate.

15 THE COURT: And what he's saying is that is
16 never an issue.

17 MR. SIDNICK: That's correct, because of the
18 head coming out.

19 THE COURT: Very good.

20 MR. BUYCK: Your Honor, also, during the
21 delivery of a baby in today's technical medicine, they
22 come up with fetal monitor strips and they have times of
23 what all is happening. And number 30 ask, If you contend
24 that the fetal monitor strips in any way showed patterns
25 consistent with fetal stress or uterine hyperstimulation,

1 please list the specific panel number that shows each
2 pattern and describe fully the pattern as well as the
3 intervention that should have been taken either to resolve
4 the pattern evidence or to comply with the standard of
5 care.

6 THE COURT: That sounds like a fair question.

7 MR. GRAHAM: Well, Your Honor, if the strip
8 shows a non-reassuring pattern or ominous pattern, that
9 triggers a need to do a C-section. We've already
10 addressed all these issues on C-section based on
11 information currently available to me and based on my
12 understanding of what Dr. Oaks' anticipated testimony is.

13 THE COURT: Well, that sounds -- that clears
14 that up.

15 MR. BUYCK: So he's going to supplement that
16 answer?

17 THE COURT: Answer and say that the fetal
18 monitor strips are really not an issue because fetal
19 monitor strips is indicia of the need for a C-section and
20 there was none -- no indication, nor was there a need for
21 it. I think that's what he's going to say.

22 MR. BUYCK: Or whether there was uterine
23 hyperstimulation, we want to know about that, too. That's
24 an issue that Mr. Graham likes to bring into these cases
25 and I want to know whether he's going to bring in --

1 THE COURT: Uterine hyperstimulation, I have no
2 idea what it is, but does that call for a C-section or
3 not?

4 MR. BUYCK: They're going to say whether or not
5 it calls for a C-section or whether or not they may have
6 given Pitocin or some medication to push forth this
7 delivery faster than it should have been. And I want to
8 know whether they content that that's an issue.

9 THE COURT: Well, how about this uterine
10 hyperstimulation, is there going to be an issue with
11 regard to that, Mr. Graham?

12 MR. GRAHAM: The only time I've seen that in my
13 cases, Your Honor, is if the baby is brain damaged. I'm
14 not aware of this baby being brain damaged.

15 THE COURT: So that's not an issue in the case?

16 MR. GRAHAM: Based on my current understanding.

17 THE COURT: Well, you can put that based on your
18 current understanding, that's not an issue in the case.

19 MR. BUYCK: Number 31 is a continuation of that.
20 I'd ask specifically whether they indicate -- the strips
21 indicate a C-section should have been performed.

22 THE COURT: He's already said that.

23 MR. BUYCK: And I understand he's going to
24 supplement it. And then 32 ask for whether you contend
25 there was an arrest of dissent or that the labor occurring

1 in some way supports an allegation that a C-section should
2 have been performed. And what I've heard today, that's
3 not his contention. And I'd like him to reduce that to
4 writing.

5 THE COURT: It will be so amended, Mr. Graham;
6 is that right?

7 MR. GRAHAM: Yes, sir.

8 THE COURT: Very good.

9 MR. BUYCK: 33, if there was evidence of fetal
10 microsomia or fetal microsomia should have been suspected.
11 Fetal microsomia is related to diabetes in the prenatal
12 period and those issues. If he reduces to writing that he
13 doesn't contend that that was an issue, I'd like to know
14 about it. And it's also just basically the size of the
15 baby. It's not necessarily directly diabetes only, but
16 it's the size of the baby.

17 THE COURT: How big was the baby?

18 MR. GRAHAM: I just posed that question to
19 co-counsel, I'm not certain.

20 THE COURT: Mr. Graham, we're going to ask that
21 you review the medical records and talk with your experts,
22 do whatever you need to do, but find out what position the
23 Plaintiff is going to take with regard to whether or not
24 the fetal -- or the baby's size affected your theory of
25 recovery in any way?

1 MR. GRAHAM: With respect to fetal microsomia?

2 THE COURT: There you go.

3 MR. GRAHAM: Thank you, Your Honor. We'll do
4 that.

5 MR. BUYCK: And supplement it.

6 THE COURT: He will do that. He said he would.

7 MR. BUYCK: Your Honor, the next is any action
8 of any agent or employee -- excuse me, any agent or
9 employee of co-defendant. I will leave that issues that
10 are pending as to the hospital. But I would -- if they do
11 content that actions of the hospital and they reach those
12 conclusions, I'd ask that this interrogatory be
13 supplemented because I understand right now they're still
14 waiting to undertake the depositions of the employees for
15 Dr. Oaks to finalize his opinion.

16 THE COURT: Okay. We just -- so what are you
17 asking us to do?

18 MR. BUYCK: They reach the conclusion that there
19 is a deviation by anyone associated with the hospital that
20 they put that in writing, reduce that to writing to us.

21 THE COURT: What do you say about it, Mr.
22 Graham?

23 I think probably you will find out about that
24 about the same time Mr. Graham will, I think.

25 MR. GRAHAM: I think it will be painfully

1 obvious to everybody once the depositions are taken.

2 THE COURT: Okay. It depends on whether or not
3 Mr. Bridges is sitting beside you or not.

4 MR. BUYCK: The next one, again, is 35, if you
5 contend that an attempted vaginal delivery should not have
6 been made or that should have been abandoned at any point,
7 let us know. From what I've heard here today, he's saying
8 it was okay to deliver the head. So if that's their
9 position, I just ask he reduce it to writing.

10 THE COURT: I think he said that three or four
11 different ways, but we'll ask that he address that. I
12 imagine you can say refer to the previous response in that
13 regard.

14 MR. GRAHAM: Will do, Your Honor.

15 MR. BUYCK: Number 36, they've said Plaintiff --
16 it ask whether there was any brain injury or any injury
17 related to decreased oxygenation during the labor and
18 delivery and list the diagnosis of the injury, the health
19 care provider making such a diagnosis and set forth all
20 evidence to support your answer. This goes to damages.
21 And they said Plaintiff was unaware of any brain injury or
22 hypoxic injury to D'Andre Green at this time. If they've
23 talk about sending the child all over the country now, if
24 they do have any evidence of that, I'd ask that they
25 supplement it. But I think that's sufficient.

1 THE COURT: Okay. Very good. So that response
2 will stand and you're satisfied with that response?

3 MR. BUYCK: That's correct.

4 Here you go, Your Honor, this is a request for
5 admission. This is number six, admit there was no medical
6 contraindication to a vaginal delivery of the minor
7 plaintiff. And the request for admission is denied.

8 THE COURT: That was probably well before Mr.
9 Graham got involved with it, before their theory of
10 recovery was refined appropriately.

11 And I'm going to ask Mr. Graham if he's had an
12 opportunity to refine their theory of recovery?

13 MR. GRAHAM: Your Honor, I'd just like to point
14 out to the Court that Mr. Buyck omitted the third sentence
15 of that answer, which states, However, Plaintiff does
16 admit that a vaginal delivery was not contraindicated at
17 the outset of the delivery.

18 MR. BUYCK: I don't think you're entitled to
19 qualify your answer in a request for admission, deny it
20 and then okay, yes, on the backside. I think you've got
21 to set forth specifically in regards to the request to
22 admit. Because that's what request to admit are for, is
23 to establish facts so that we don't have to go through the
24 discovery --

25 MR. GRAHAM: Both the rules of civil procedure

1 and the code of professional conduct require us if we can
2 only admit part of it, we should explain that. That's
3 exactly what we did. And I think it's proper. But I
4 wasn't in the case at the time and I'm happy to revisit
5 that as Your Honor suggested.

6 THE COURT: All right. I will ask that you
7 revisit that. I want you to talk with your expert and
8 contemplate your theory of recovery. And if it requires
9 change in the answer, I'm going to ask that you do that.

10 MR. BUYCK: Your Honor, I'm going back to my
11 request for admission that were attached to my initial
12 motion. Number four, admit the minor Plaintiff did not
13 suffer a brain injury of any type during the labor and
14 delivery. Denied. Plaintiff is without sufficient
15 information to admit at this time. That's not what we've
16 been told in open court here today.

17 THE COURT: That might have been prior to the
18 affidavit or supplemental affidavit.

19 MR. GRAHAM: The supplemental answer to
20 interrogatory, Your Honor, says response admitted.

21 THE COURT: Okay. We're doing good there.

22 MR. BUYCK: Admitted, okay. We've got that
23 admitted. Then we've got number five.

24 THE COURT: You've got to read the
25 supplementals, Mr. Buyck.

1 MR. BUYCK: Okay. I'm trying to make sure I've
2 covered everything.

3 THE COURT: I'm just picking at you.

4 MR. BUYCK: I know. I think that's it, Your
5 Honor.

6 THE COURT: All right.

7 Mr. Sidnick, I'm going to ask --

8 MR. GRAHAM: Your Honor, just as an officer of
9 the court, because of all the procedural entanglements
10 that have taken place thus far, I would like to let Your
11 Honor know and let defense counsel know that it is our
12 intention to -- once there's an order that says we're
13 limited on experts, liability expert or standard of care
14 experts, it will be our intention to file a 59(e) motion
15 on that point and to cite the law about under what
16 circumstances that's an appropriate ruling and so forth.

17 THE COURT: Very good.

18 MR. GRAHAM: I'm afraid that might lead us to
19 more delay on this case, and I didn't want to spring that
20 at a later date.

21 THE COURT: All right. I'll tell what we're
22 going to do is -- I fully anticipate that and I'm going to
23 ask that y'all draft the order granting -- or deny their
24 motion to reconsider my previous order and specifically
25 set forth that that relief was granted on Rule 59(e).

1 And I want you to set forth in that order -- I know there
2 have been previous orders, but set forth all of the
3 problems that the Plaintiff incurred and why it posed some
4 difficulties, starting from the New York lawyer, the fact
5 that your associate -- there were problems with your
6 associate and mailing address and all the other problems,
7 set that forth. And set forth that I have limited the
8 expert testimony to Dr. Oaks and the reason why. And
9 before we leave here today, I want to talk to you about
10 the scheduling in this matter. And I'm going to give
11 deference to the Defense with regard to the time they need
12 to properly prepare the case.

13 And I understood y'all to say that you're going
14 to talk about it amongst yourselves and that you're going
15 to submit the matter to Judge Russo. And when it is
16 submitted to Judge Russo, I want it to be explained that
17 there's going to be deference granted to the Defendant.
18 If they want to move forward more quickly, within reason,
19 that will be fine. If they need more time, that's fine,
20 because of the predicament that the Plaintiff has put us
21 in. We have 10 days from today's date to have this order
22 prepared. And I anticipate it's going to be accompanied
23 with a 59(e) motion. And probably what we need to do --
24 I'd like to go ahead and set up a time to hear that and I
25 would like to hear that within short order.

1 Anything further from the Plaintiff?

2 MR. SIDNICK: Nothing.

3 THE COURT: Anything further from the Defense?

4 MR. BUYCK: No, sir, Your Honor. I'd just -- in
5 scheduling that hearing, I'd ask your consideration. I've
6 got another, at least, week long medical malpractice case
7 starting October 4th, and for the next two weeks, I've got
8 something everyday.

9 THE COURT: I don't anticipate it being -- we've
10 got 10 days for them to do the order and I'm not -- once
11 again, I say we're going to give deference to Defense's
12 position in that regard. But we will all talk on the
13 phone once we get the order drafted and the 59(e) motion
14 is filed. I'm going to ask that y'all get me on the
15 phone, we'll set up a time and we'll figure out what
16 everybody's schedule is and we'll get it done. But we
17 aren't going to dilly-dally around with it. We need to go
18 ahead and get this thing jump started so we'll know which
19 way we're headed.

20 MR. BUYCK: We'll try to --

21 THE COURT: It will probably be better to do all
22 that before we talk with Judge Russo about scheduling.
23 Because if I do, indeed, limit it to one expert, I imagine
24 you're going to need less time to prepare.

25 What do you think, Mr. Bridges?

1 MR. BRIDGES: Well, Your Honor, I just wanted to
2 clarify that your previous order as to McLeod about
3 depositions of nurses, from which neither party has filed
4 a motion to reconsider, remains in effect as far as McLeod
5 is concerned and we'll go forward as planned under that
6 order with those depositions on Monday.

7 THE COURT: Okay. And are we within the time
8 frame of that order or are we a little bit out of it?

9 MR. BRIDGES: We're a little bit out of it, Your
10 Honor, due to no fault of Mr. Sidnick. It was the
11 unavailability of the nurses because of their vacations.

12 THE COURT: Okay. And if you'll put that in
13 order that those depositions are going to proceed forward
14 as scheduled.

15 MR. SIDNICK: They will have already occurred at
16 that point, Your Honor.

17 THE COURT: Well, I think you probably just need
18 to make a note of it that that's going to happen and will
19 have transpired so we will be able to keep track of what's
20 going on.

21 Mr. Graham, anything you would like to add?

22 MR. GRAHAM: In an abundance of caution, Your
23 Honor, I'd just like to make sure I've got on the record
24 that when I agreed to get into this case, it was with the
25 understanding that there was no ruling about limiting

1 Plaintiff's experts, except to the limited extent of one
2 issue with the hospital on the standard of care for
3 nurses. And just as a matter of professional
4 responsibility, I'm going to have to revisit my agreement
5 to become involved in this case if that factor or
6 predicate turns out to be incorrect.

7 THE COURT: Well, very good. I don't really
8 have a dog in that right, that's between you and Mr.
9 Sidnick and your client. And I imagine it's premature for
10 us to even talk about that until such time as we've heard
11 the motion, but it probably needs to be preliminary
12 discussed. I don't really have anything -- I think what
13 you're doing is informing me that you might or might not
14 be here. Is that what you're saying?

15 MR. GRAHAM: Well, with all the procedural
16 problems, I don't want Your Honor to draw the conclusion
17 that I have gotten myself on the hook for the duration if,
18 in fact, we are handicapped in terms of going forward with
19 the case on the merits by the ruling on experts. That's
20 all I'm saying.

21 THE COURT: Okay. We'll let the chips fall
22 where they may in that regard.

23 Anything further, Mr. Buyck?

24 MR. BUYCK: Just hope everybody in the courtroom
25 has a good weekend.

END OF REQUESTED TRANSCRIPT

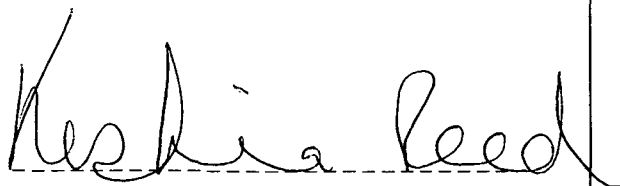
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 82, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Florence
County, South Carolina, on the 17th day of September,
2011.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 22nd
day of July 2011.

A handwritten signature in cursive script that reads "Keshia Reed". The signature is written in dark ink and is positioned above a horizontal dashed line.

Keshia Reed, Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2008-CP-21-2326
	)	
	)	
	)	
Marquette Johnson, et. al.	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Anu Chaudry, et. al.	)	)
<u>DEFENDANT</u>	)	January 5, 2011
		Florence, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

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

ROBERT PHILLIPS, ESQ.
KEVIN SITNIK, ESQ.
MARY WATERS, ESQ.
Attorney for the Plaintiffs

SAUNDERS M. BRIDGES, JR., ESQ.
HUGH W. BUYCK, ESQ.
Attorney for the Defendants

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, there were no witnesses called.)

1 THE COURT: Be glad to hear from the moving
2 party.

3 MR. SITNIK: Your Honor, before we get started
4 real quick. I just like to draw the Court's attention to
5 something I spoken to Mr. Buyck about. My name is Kevin
6 Sitnik. I'm no longer with the McGowan and Felder firm.
7 However, based on our prior conversations, I did come down
8 here today. I just wanted to inform you that I'm no
9 longer with that firm. I guess to also see if you support
10 me move this individual attorney from this case. Mr.
11 Phillips is here on behalf of the client ---

12 COURT REPORTER: He got to speak up so I can
13 hear him.

14 THE COURT: We got some real problems with
15 acoustics.

16 MR. SITNIK: I'll be glad to do so, I was just
17 trying to put all your attention to that ahead of time.

18 THE COURT: Who is going to be representing the
19 plaintiff in this case?

20 MR. PHILLIPS: Good morning, Your Honor. My
21 name is Robert Phillips. I had the pleasure of being in
22 front of you a few times before. I'm from Rock Hill. I'm
23 with McGowan, Hood and Felder and I'm going to argue the
24 motion this morning.

25 THE COURT: Okay. All right. Is your firm

1 going to be in a position to handle this matter through to
2 its conclusion?

3 MR. PHILLIPS: Well, Your Honor, that is part of
4 the -- our motion today. Mr. Graham has made an
5 appearance and is intending to take over the case, but as
6 I will address in our motion today part of that is, I
7 guess, dependent on your ruling today. But Mr. Graham has
8 every intention -- if we are successful today with the
9 motion to continue on the case.

10 THE COURT: Let's hear the motion.

11 MR. PHILLIPS: Your Honor, I'm new on this case
12 -- I'm originally on this case many years ago and an out
13 state attorney from New York ask me to file the toll
14 statute. Then Mr. Sitnik and another one of attorney in
15 our firm handled it. And then I'm not going to go into
16 all the details because I think you had a number of
17 hearings and are probably familiar with this case. The
18 crux of the case, Your Honor, was after numerous hearings
19 that were the result of a deadline in the scheduling order
20 naming an expert witness for the plaintiff, the defense
21 for at least for Dr. Chaudry and filed a motion summary
22 judgment. And I believe your original order you granted
23 summary judgment, there was a motion to reconsider. A
24 couple of motions or a couple hearings in there and
25 basically the final order that -- where we stand now is

1 basically you did not dismiss the case, but you said that
2 the plaintiff can only use Dr. Oaks for a liability
3 expert. And what I want to talk today about was in some
4 of the cases I'm sure you've read these cases, Your Honor,
5 I've kind of taken liberty on them. I know you seen them,
6 but I just want to go over them briefly and this is
7 probably as much for my -- I took liberty to outline the
8 case just kind of hit the highlights and what I did was I
9 cut and past right from the case, Your Honor, those are
10 not really my words.

11 Your Honor, this is the Orlando vs. Board case.
12 And, Your Honor, this was a medical malpractice case as
13 well. The trial -- in this case, the trial judge granted
14 the summary judgment motion because without Dr. Piester or
15 another medical expert the Orlando could not
16 establish deviation from the standard of care. I've
17 spoken with Mr. Graham in this case and he said with just
18 one liability expert or one expert other than your damage
19 expert, he says he can't prosecute this case. So it's
20 effectively going to end this case if we only have
21 Dr. Oaks in there.

22 Your Honor, as you know with medical
23 malpractices practice, it's not quite like it's a car
24 wreck case where you just have, you know, one liability
25 and then your expert on damages. Sometimes just, you

1 know, addition from damages you may have one or two. You
2 may have an anesthesia component, you may have a surgical
3 component and then you may have some type of pathological
4 component with the causal connections between the two.
5 And I think from speaking with Mr. Graham with Dr. Oak's
6 even though he's good at what he's going to do, he cannot
7 cover all that this is needed to get to the damages point.
8 He said if he's restricted to Dr. Oak's, then he can't
9 prosecute the case. I'm not familiar with the facts of
10 medicine in this case, but I do a good bit of med mal and
11 I've got cases three, four experts sometime. In fact, I
12 have a case with Mr. Buyck, two of them, we had four or
13 five experts. We had surgical. We had anesthesia. We
14 had neuro-ophthalmologist and that was just before we even
15 got to damages. So I'm very familiar with having one
16 expert. Sometimes it has the affect of a dismissal when
17 you only have one expert. And that's basically what
18 happened in Orlando vs. Boyd. Of course, they said that,
19 you know, exclusion of a witness should never be lacking
20 in both. This is where it's very similar to this case.
21 It says where the effect will be the same as granting
22 summary judgment by default or dismissal, a preclusion
23 order may be made only if there's some showing of willful
24 disobedience or gross indifference to the rights of the
25 adverse party. And it goes on and says, A sanction of

1 dismissal is too severe if there's no evidence of any
2 intentional misconduct and reading through the orders,
3 Your Honor, there was two orders. And on page four of
4 your order, the first order in this it says you stated
5 defendant made no showing of intentional misconduct and
6 even defense counsel for the defendant hospital has
7 admitted as such. And in the second order where on the
8 motion to reconsider, there was no finding of any type of
9 intentional conduct or gross negligence or gross
10 indifference. This was -- Mr. Sitnik and he can correct
11 me if I'm wrong. He had the case, did not want to pursue
12 it and spoken with the client. He was under the
13 impression that the client had already contacted Bert
14 Lappier, an attorney in Columbia, who had then contacted
15 Mr. Graham. His paralegal, mistakenly and I think he
16 accepts responsibility for that, had it taken off the
17 calendar and it was simply a misdate because it was no
18 longer on the calendar. I don't think that there was any
19 intentional nor gross indifference to caring about this
20 claim. And to compare, I'm going to do the same thing
21 here, this is Barnette vs. Adams and again, I just kind of
22 highlighted it there for you. And there's a copy of the
23 full case. This right out the case. This is what your
24 court said about this case. It says plaintiffs
25 imagination and invidious manipulations of discovery

1 process had by the time the undersigned became the
2 administrative judge for the circuit created an extremely
3 hostile environment, consumed inordinate amount of the
4 court's time to the detriment of other litigants in your
5 county and made what should have been a simple wreck case
6 into an administrative nightmare.

7 They had motions to compel on May 18th,
8 June 4th, June 11th, all with orders being issued to
9 compel discovery and the plaintiff in that case refuse to
10 compel. And it said that before you exclude a witness you
11 need to go through these three things. And again, in this
12 court, the Supreme Court said the court made no specific
13 finding of prejudice other than late disclosure that would
14 necessitate further discovery. And all the claims --
15 there was a car accident case and there was about five
16 claims. The mother eventually had her's later dismissed.
17 She wouldn't turn over her social security number, but the
18 four or five other claims the Court said even with this
19 mess the motions to compel that was just too severe of a
20 sanction. And I got one more case, Your Honor.

21 THE COURT: Well, while we're talking about this
22 Adam's case, what is the evidence that -- of these
23 potential experts? I mean, what evidence do you proffer?

24 MR. PHILLIPS: I'm sorry, I didn't understand.

25 THE COURT: I mean, we've got one expert that we

1 allowed that y'all declared after the motion for summary
2 judgment.

3 MR. PHILLIPS: Right.

4 THE COURT: And after the scheduling deadline
5 and you disclose one expert and I say in view of the fact
6 it wasn't a showing of willfulness, I allowed that witness
7 to testify. And one of the things that I have to evaluate
8 in determining whether or not I can exclude a witness is
9 what is the substance of the testimony that you're going
10 to be offering from these potential witnesses?

11 MR. PHILLIPS: I don't know -- Your Honor, this
12 is Mr. Graham's counsel and I'll let her address that, but
13 while we're on that topic, I thought we address one other
14 thing, then I'll let her do that. This was -- again, I
15 assume here. I'm looking at your order, this is the last
16 order where we're talking about that only Dr. Oaks can be
17 allowed. And I understand that I think you are doing the
18 right thing and you are on the right track in saying that,
19 you know, okay, I'll give you this -- I'm not going to
20 disagree with these cases, I don't cite any intentional
21 conduct, but I'm only going to let you have this one
22 witness. And I think Orlando talks about that when it's
23 the same as -- where the affect will be the same as
24 granting summary judgment then just excluding that one
25 witness.

1 THE COURT: But you understand that we had a --
2 first of all we had a scheduling order that set a
3 deadline, you didn't meet that. Then there was a motion
4 for summary judgment and there was not a disclosure at
5 that time. Then at the late, very late hour you named an
6 expert and I allowed you to use that one.

7 MR. PHILLIPS: I understand.

8 THE COURT: And then now you coming with other
9 experts and that's kind of what we're trying to avoid
10 because the defendants ought to have an opportunity to
11 find out what evidence they have against them and move
12 forward. You understand what I'm saying.

13 MR. PHILLIPS: I agree one hundred percent, Your
14 Honor. By having just one in a medical malpractice case,
15 by having just Dr. Oaks ---

16 THE COURT: I understand this a medical
17 malpractice, but how long did y'all have it before you --
18 I'm saying that there is some problems with the fact that
19 there was a scheduling order and you didn't -- you know,
20 you keep saying this a medical malpractice, we need a lot
21 of experts. This is kind of late to be deciding what the
22 case needs and adding experts and unlimited number of
23 experts, don't you agree.

24 MR. PHILLIPS: I agree, Your Honor, but I don't
25 think he wants to -- Mr. Graham wants to use an unlimited

1 number of experts. As you know with medical malpractice
2 case, experts are very expensive. Again, I'm making an
3 assumption here. I believe, the reason you allowed one
4 expert is because, you know, there has been delay. And
5 you didn't want the plaintiff coming in here and saying we
6 got these ten experts now and we're have 18 months of
7 depositions. I don't think that's what the plaintiffs
8 have in mind and I let Mr. Graham's associate speak to
9 that, but I think they just need one other expert. And I
10 think your goal here was ---

11 THE COURT: Let's hear what the expert's going
12 to say.

13 MS. WATERS: Thank you, Your Honor, Mary Waters
14 of the Graham Law Firm. We do handle a number of brachial
15 plexus injury cases, these are very complex matters. Dr.
16 Oaks is an obstetrician. He is there and he is able to
17 address the standard of care for Dr. Chaudry who delivered
18 this child. However, with a brachial plexus injury, there
19 are a number of issues that arise related to causation and
20 those issues have to be address by individuals not
21 necessarily obstetricians or maternal fetal specialist. I
22 can tell you from experience and from the cases that we
23 manage the experts that we -- the types of experts that we
24 are usually required to engage in order to prosecute this
25 type of case include obstetrician, a maternal fetal

1 specialist, specialists in the areas of causation, who
2 could address that the type of injury that this individual
3 suffered is the direct result of an excessive traction --
4 use of excessive traction during delivery. Your Honor,
5 may have presided over brachial plexus injury cases
6 before, I'm not certain. But typically this injury occurs
7 as a result of a shoulder becoming lodged behind the
8 mother's pubic bone during delivery. And there are a
9 number of maneuvers that are available to an obstetrician
10 in order to facilitate a safe delivery of the child. On
11 occasion, an obstetrician will not implement those
12 maneuvers that are available, but will instead apply
13 excessive traction to the child's head, excessive lateral
14 traction, which causes damage to the brachial plexus nerve
15 which results in underdeveloped and inability to use an
16 arm because of that nerve damage.

17 So in addition to the specialist, the
18 obstetrician, causation expert, we have surgeons who will
19 address the causation issue or who could potentially
20 address the causation issue. And then you have to have
21 your damages experts, life care planner, vocational
22 expert, and an economist to also address what those
23 damages mean for this child for this type of injury. Now,
24 we're not talking about an unlimited number of experts,
25 but there's certainly more than one and most definitely

1 more than two, that would be required in order to
2 effectively prosecute this case. And we were not involved
3 early on, but we do have experience in dealing with this
4 type of case and are fully prepared to expeditiously
5 submit these records to appropriate experts in order to be
6 able ---

7 THE COURT: So y'all haven't even identified the
8 experts and what they would say?

9 MS. WATERS: Well, to date, Your Honor, we've
10 been limited to Dr. Oaks and we have identified him and
11 have told -- I guess, my affidavit would express what he
12 would have to say. As Mr. Phillips pointed out, experts
13 are very expensive. It's not something -- we're waiting
14 for Your Honor's order. We spent thousands and thousands
15 of dollars trying to find out what everybody else might
16 say, if we get to prosecute this case appropriately.

17 THE COURT: So we don't have an affidavit about
18 what the substance of a proffer witnesses would be?

19 MS. WATERS: Not all of them, no, sir, but we do
20 have the affidavit of Dr. Oaks, which I believe was ---

21 THE COURT: We already passed on that issue.
22 But as far as any other witnesses, we don't have any
23 affidavits as to what the substance of their testimony
24 would be.

25 MS. WATERS: At this point, Your Honor, no.

1 MR. PHILLIPS: I think the reason behind it,
2 Your Honor, as if the Court ruled today that they can only
3 use Dr. Oaks and then Mr. Graham paid \$5,000 for two more
4 experts without knowing they would even be using -- they
5 allowed to use them, I think he was waiting for the
6 outcome of this hearing.

7 MS. WATERS: Yes, sir.

8 MR. PHILLIPS: Your Honor, I totally understand
9 the Court's concern with the delay and that's what
10 scheduling orders are for. But going back to Barnett vs.
11 Adams, they said right here said, The Court made no
12 specific finding of prejudice other than late disclosure
13 would necessitate further discovery. And they say, Yeah,
14 there issues with that, but it's not -- it doesn't rise to
15 the point of willfulness, it doesn't rise to the point of
16 where you're effectively tossing the case. And looking at
17 the order, you know, paragraph four of your order
18 plaintiffs responsible for reimbursement of defendant's
19 filing fee for the motion for summary judgment, attorney
20 fees, travel expenses. Plaintiff responsible for
21 defendant's attorney fees regarding preparation of the
22 order.

23 Your Honor, I think there's good bit punishment
24 to the attorney for missing that deadline. This is
25 punishing this child who has this injury, who's not going

1 to get their chance to see, you know, to have his case
2 evaluated on the merits rather than a summary judgment,
3 which the child had obviously no play in this. And it is
4 the responsibility of the attorney to meet those
5 deadlines. We feel that the Court has issued severe and
6 appropriate sanctions to where this want happen again.
7 And the only prejudice is a simple delay. And the Court
8 in Barnette said, that's not the type of prejudice that
9 should be considered to dismiss the case.

10 THE COURT: All right. Mr. Buyck.

11 MR. BUYCK: Thank you, Your Honor. I think you
12 hit the nail on the head in regards to whether or not to
13 allow additional witness. And it seems to me that you are
14 considering the Jumper vs. Hawkins factors, which were
15 enumerated in a case from Lexington County and I'll hand
16 it to you. It's actually set forth in one of the cases
17 that Mr. Phillips has submitted to you. And that is what
18 the Court must consider in regards to whether or not to
19 allow an additional witness outside the bounds of prior
20 court orders and orders that were issued in accordance
21 with the rules of civil procedure. And certainly those
22 factors are the type of witness involve, the content of
23 the evidence emanating from the proffered witness, the
24 nature and failure of neglect or refusal to furnish
25 witness name, degree of surprise, prior knowledge of the

1 name and the prejudice to the opposing party. Without
2 them identifying an expert here today, without them having
3 presented an affidavit or any testimony whatsoever, this
4 is premature. This is a motion to reconsider, a motion to
5 reconsider, a motion to reconsider is where we are. And
6 what I've heard today is that they don't have the
7 requisite causation testimony for this case to go forth.
8 And therefore, summary judgment was appropriate when it
9 was entered back in May of last year.

10 This motion for summary judgment was filed in
11 March of 2010, almost a year ago. And at that time, the
12 summary judgment was appropriately granted because the
13 plaintiff presented no affidavits, no testimony whatsoever
14 as to a standard of care, a deviation from the standard of
15 care, but most importantly proximate cause resulting from
16 that deviation. So what did they do, they filed a motion
17 to reconsider. And they presented the testimony of
18 Dr. Oaks, which they now admit is insufficient to
19 establish causation. It goes back to heart of a motion
20 for summary judgment. The plaintiff provides that they
21 required to provide that testimony. They're required to
22 do that. You are not throwing out a case as in Orlando
23 vs. Boyd if they now take the position that Dr. Oaks does
24 give them causation. It's not that harsh of a sanction.
25 It's, okay, guys I'm giving you one more bite at the

1 apple. You can have Dr. Oaks and that's what my
2 scheduling order said originally. You to name experts by
3 November 30th 2009. Here we are 14 months later and
4 they're trying to name additional witnesses not one, but
5 they're trying to send me all around the country spending
6 money and to prejudice to my client of not knowing what
7 this case has been about since it was filed in December of
8 2008. This case has been around long enough. It's been
9 given tremendous consideration by this court. And the
10 Court's been bent over backwards to help the plaintiffs in
11 regards to what occurred in concerning the motion for
12 summary judgment and their failure to name expert. You
13 given them the opportunity to prosecute the case with
14 Dr. Oaks and that's all they need.

15 If they stand by Dr. Oaks as establishing both
16 the standard of care and causation, then this isn't an
17 Orlando vs. Boyd case. And what they're asking the Court
18 to do is to speculate as to what these witnesses will come
19 forth and do. We'll come forth and offer. And Jumper vs.
20 Hawkins says that's not within the province of this court
21 to do. They have to present these factors to the Court
22 and they haven't done that. They haven't presented
23 sufficient evidence to this court just at the summary
24 judgment stage and they didn't present sufficient evidence
25 to overcome summary judgment. There's not any witness who

1 they have presented that meets the Jumper vs. Hawkins
2 factors. And I think the Court was very clear in your
3 questioning of them what is the testimony. I don't know
4 what the testimony is. I haven't been provided a
5 supplemental discovery response. So that's kind of where
6 we are.

7 THE COURT: If I understand and refresh my
8 memory, I don't have the order before me right now, but I
9 believe that the order did not limit damages experts.

10 MR. PHILLIPS: That's correct, Your Honor.

11 THE COURT: Okay. Well, I stand by the previous
12 order that that's the only liability expert that you are
13 going to be able to name. You didn't name prior to the
14 scheduling order. You didn't name it at the motion for
15 summary judgment. It was only the second motion for
16 reconsideration that an affidavit was submitted. And I am
17 going to allow that liability expert and I'm going to
18 allow damages experts, but we are going to be limited in
19 that regard and that's my ruling.

20 MR. PHILLIPS: Your Honor, just for
21 clarification purposes, I think one of our contentions was
22 you have liability, you also have causation. And I mean,
23 is that something that ---

24 THE COURT: Well, that's something that should
25 have been addressed prior to the scheduling order and at

1 the motion for summary judgment when you submitted that
2 affidavit.

3 MR. PHILLIPS: I understand, but your order
4 states -- here again this is just for your clarification
5 is your order states that, you know, you could have other
6 damage experts and no other liability experts, but
7 causation is one of the elements is that...

8 THE COURT: Well, causation actually goes toward
9 liability. But that was the tenor of my order was that
10 that was the expert that you were going to submit to say
11 that they breached the standard of care and with regard to
12 causation. Although, the letter of the order does not say
13 that. The only exception I was given was for damages
14 experts.

15 MR. PHILLIPS: Excuse me one second.

16 (WHEREUPON, a pause in the proceedings.)

17 MR. PHILLIPS: Thank you, Your Honor. One
18 second, Your Honor.

19 (WHEREUPON, a pause in the proceedings.)

20 MR. PHILLIPS: Your Honor, just for
21 clarification purposes, it's my understanding that the
22 affidavit from Dr. Oaks actually does address causation so
23 contrary to what Mr. Buyck said it wasn't that just had
24 the expert he issued this one little opinion. I mean, I
25 think the affidavit was sufficient to cover as far as

1 putting them on notice as to the liability and the
2 causation.

3 THE COURT: Okay.

4 MS. WATERS: And just for further clarification,
5 I think it was a statement about what I had stated for
6 purposes of the record, I like to point out that we're not
7 indicating or stating that Dr. Oaks does not address
8 causation which Mr. Buyck said. He clearly states in the
9 affidavit. However, being limited at this level will
10 effective make this case prejudicial, Your Honor.

11 THE COURT: Well, it might be prejudicial, but
12 if you got some evidence with regard to liability and
13 causation, which I assume that affidavit was what the
14 plaintiffs needed to get over summary judgment, then I
15 don't think that's the equivalent of granting summary
16 judgment.

17 MS. WATERS: Well, Your Honor, if we're limited
18 to Dr. Oaks for causation or for standard of care and
19 causation and then defendants show up with four
20 obstetricians or other experts who are able to address
21 issues that may venture beyond Dr. Oaks expertise, but
22 they may fall within the expertise of the other experts
23 when you propose to identify, then it is summary judgment.
24 I mean, there's no way that ---

25 THE COURT: I don't think it would be summary

1 judgment, would it?

2 MS. WATERS: Before a jury with awaited experts
3 on the other side, I think effectively that is exactly
4 what happened because we got one expert. We've been
5 limited to one expert. The appearance and Your Honor
6 knows how juries see these things. The appearance is, Oh,
7 they were only able to scramble and get this one expert
8 who has this limited expertise, but the defendants show up
9 with who knows who to say or to contradict the testimony
10 of Dr. Oaks.

11 THE COURT: The terms of the order allowed you
12 what amount of time to name your experts?

13 MR. BUYCK: Your Honor, it did not put a
14 limitation on me because the agreement was it wasn't going
15 to the prejudice the defendant. We just had the
16 depositions of plaintiffs last -- right before Christmas,
17 the week before Christmas. I mean, we're trying to get
18 the case moving along and it's taking this long to get the
19 plaintiffs depose. And Dr. Chaudry was deposed the
20 following day, so that's where we are. We're still trying
21 to figure out where we are in this case. If Dr. Oaks who
22 they're going to stand by, that's what it is. And that's
23 what the scheduling order allowed if they were to name
24 their experts by November 30th the parties were to be
25 deposed by January 8th. And that plaintiffs experts were

1 to be complete by February 26 and the defendants were to
2 name experts by May 7. This isn't anything unusual. They
3 need to come forth with their burden of proof, meet their
4 burden of proof and then we get to rebut that. What
5 they're asking this court to do is speculate as to what a
6 jury will do. And I think that's very inappropriate.
7 They come forth with this evidence, they overcome summary
8 judgment. They say that's sufficient, then I think they
9 ought to live by that and proceed under that witness
10 because you did give them a second bite at the apple.

11 MR. PHILLIPS: Your Honor, what Mr. Buyck is
12 saying goes -- just proving that I don't see what
13 prejudice he has. He's just now getting around to
14 deposing the plaintiff. Usually, when you have the case,
15 you depose the plaintiff and then you depose the doctor
16 after that's what the plaintiff said. If you just depose
17 the plaintiff couple of weeks ago nothing prevented him
18 from deposing this plaintiff for two years. I don't see
19 how -- if he just took the plaintiff a couple of weeks
20 ago, if the plaintiff had 30 days ---

21 THE COURT: Well, first of all, you probably
22 would not take the deposition of the plaintiff until you
23 find out what the allegations of negligence are, would
24 you?

25 MR. BUYCK: I'm going to address that if I can,

1 Your Honor, because we have been asking ---

2 MR. PHILLIPS: Your Honor, I've had a number of
3 cases with Mr. Buyck. If that plaintiff has not been
4 deposed, the first thing he's going to ask that plaintiff
5 expert you mean to tell me you going to testify against my
6 doctor and you don't even know what the victim said. I
7 had him ask that question before. You have to have the
8 plaintiff's deposition, so your expert can say, Yeah, I
9 know what the plaintiff said. I know what the plaintiff
10 said he went through because if he doesn't, Mr. Buyck is
11 going to tear them up if that expert is basing his opinion
12 and doesn't know the plaintiff's version of the story.
13 Again, you have different trial strategies, but deposing
14 the plaintiff is quite naturally one of the first things.
15 Then the expert's have the doctors.

16 THE COURT: Well, typically now under the new
17 rules you have an affidavit that sort of have an idea what
18 the allegations and negligence are.

19 MR. PHILLIPS: And that affidavit just requires
20 one act of negligence doesn't require causation or
21 damages. I just don't see what the prejudice has been.
22 These other cases there were four and five orders
23 specifically compel and they intentionally refuse to do
24 that. This was one mistaken or overlooking of a date to
25 name that expert. I just don't see what prejudice that

1 Mr. Buyck has suffered.

2 MS. WATERS: Your Honor, if I may point out, you
3 can't present the testimony of an expert for the plaintiff
4 without deposition of the defendant. These were just
5 taken a couple of weeks ago. It would have been an
6 incomplete affidavit at best if we were to try to provide
7 these additional materials without the defendant's
8 deposition. It certainly prevented sufficient basis for
9 the claim based on Dr. Oaks affidavit based on the review
10 of the medical records. But he will review these other
11 depositions and be able to rely and develop his opinions,
12 but that's the information that's necessary in order to
13 send these materials to other experts for a review on
14 causation issues.

15 MR. BUYCK: Your Honor, thank you. We overcame
16 the motion for summary judgment back in May. We'd been
17 asking for dates to depose the plaintiff. We been asking
18 for discovery responses if it's a motion to compel or in
19 the alternative motion for summary judgment because we
20 didn't have any discovery responses. And they handed us
21 discovery responses that morning without naming an expert
22 at the time of the hearing handed us the first discovery
23 responses that were overdue that were asked for back in
24 March when we filed a motion. I mean, at the very least
25 in March when we filed our motion. And I think that's

1 what the problem arises when you get new lawyers come in
2 they aren't very familiar with the factual basis of what's
3 happened up to this point. It's been a lot that's gone
4 on. There's been a lot that's gone on. There's been a
5 lot that this court has allowed despite having
6 appropriately granted summary judgment. And that's -- I
7 think you're rulings clear. It's back where we were, back
8 where we're going. I mean, I'm prepared to -- you know,
9 they know the answer -- we had that during the last
10 hearing. We went forth with a motion to compel, so that
11 they would have to elaborate on their discovery responses
12 and tell me when they thought that the allege deviations
13 occurred and was it after the delivery of the head or was
14 it for even attempting a vaginal delivery or when did
15 these alleged deviations occur. And we had to flesh all
16 that out through motions to compel and to get those
17 responses. And within those, they rely again on Dr. Oaks
18 and that's where we are.

19 THE COURT: How much time do you need to name
20 your experts?

21 MR. BUYCK: I probably need -- well, there's
22 some family members who we need to depose. I think there
23 two or three family members that they say who were in the
24 room. I think two additional because the husband was one.
25 And then it depends whether you have any additional

1 factors. I like to depose Dr. Oaks first as previously by
2 your scheduling order. And then I probably be prepared
3 to present experts after I get Dr. Oaks testimony, so I
4 can present it to my consulting experts and see whether
5 they are ready to move forth, I think in the next six
6 months we can get that done.

7 THE COURT: Okay. All right.

8 MR. PHILLIPS: Addressing, obviously, I wasn't
9 involved in this case last year, but going through the
10 file, there were no -- Mr. Buyck is telling me he couldn't
11 get answers to discovery. He couldn't get witnesses
12 deposed. There were no motions to compel that were filed
13 until after this whole summary judgment issue happen this
14 summer. So the whole argument that he was hamstrung and
15 couldn't get his case moving, that's just not true.
16 There's not been a single motion to compel filed until
17 after the summary judgment. Your Honor, I don't see how
18 if he hasn't even named his experts how it could be
19 prejudicial for the plaintiff to name another expert.

20 THE COURT: Well, I'll stand by the ruling and
21 I'm going to allow -- I'm going to put a deadline on the
22 defense naming their experts June 15th of this year.

23 MR. BUYCK: Would you like for me to draft an
24 order?

25 THE COURT: If you would.

1 Mr. Bridges.

2 MR. BRIDGES: Your Honor, first I apologize to
3 the Court for being tardy for this hearing. I represent
4 the defendant McLeod in this case. Your Honor, first
5 heard this matter back in may of last year. You granted
6 McLeod's motion for summary judgment. At that point,
7 Dr. Oaks had been named by the plaintiff in an affidavit
8 submitted by Dr. Oaks. It did nothing to address any
9 liability on the part of McLeod. We agreed with Mr.
10 Sitnik at that time at his request that we wouldn't allow
11 the deposition of two nurses from McLeod that he wanted to
12 depose to see if Dr. Oaks could add anything based on the
13 testimony of those two nurses. We agreed that, Your
14 Honor, would withhold filing that order until we could
15 provide those two nurses to Mr. Sitnik. We were not able
16 to do it within I think, Your Honor, gave 30 days. We
17 were not able to produce the nurses within 30 days because
18 one of them were on vacation. Those depositions were
19 taken -- I don't know the dates, but many many months ago
20 now. We never received any further motions, affidavits,
21 discovery responses anything addressed to the liability of
22 McLeod. We never received a motion for reconsideration of
23 that original order granting summary judgment to McLeod.
24 September 20th is when the nurses were deposed, Your
25 Honor. We would ask the Court to go ahead and enter that

1 order granting summary judgment.

2 THE COURT: If you would provide me a copy --
3 send me another order in that regard.

4 MR. BRIDGES: We presented one at that time,
5 Your Honor, and I will dig it out and get a clean copy of
6 it to you.

7 THE COURT: Any response from the plaintiff?

8 MR. PHILLIPS: Your Honor, my understanding.
9 Your Honor, one second please.

10 (WHEREUPON, a pause in the proceedings.)

11 MR. PHILLIPS: Your Honor, I apologize I was not
12 -- as you know I was not involved in those depositions. I
13 don't know what testimony had gone on in that deposition.
14 It may be Mr. Graham's intention to release those, I don't
15 know. If there's anyway defense counsel would consent to
16 hold that issue in abeyance until -- Mr. Graham is on
17 vacation this week. And I hate to speak for him when he
18 may have different...

19 THE COURT: I understood that Mr. Graham wasn't
20 going to be involved in it unless he got more experts.
21 Who's running the plaintiffs...

22 MR. PHILLIPS: I think Mr. Graham is the one
23 taking the depositions right now at this point.

24 THE COURT: Mr. Bridges, be glad to hear from
25 you.

1 MR. BRIDGES: Your Honor, these depositions --
2 these were the only depositions that we were ask to allow
3 plaintiff to take, these two nurses. They were taken in
4 September and I've asked Mr. Graham to look at the file
5 and get back to me on this case on several occasions. And
6 now, we're almost coming up on a year after those two
7 depositions were allowed to be taken. They didn't have
8 any testimony that would create any liability on the part
9 of McLeod. And if they did since September, they should
10 have been given to Dr. Oaks and he should have
11 supplemented his opinions at the very least. Then we be
12 arguing about whether he be allowed to do that, but he
13 hadn't even done that.

14 THE COURT: All right. Given all of the facts
15 and circumstances in the time frame involved, I'm going to
16 go ahead and sign the motion for summary judgment. You're
17 protected on the record in that regard.

18 MR. PHILLIPS: Thank you, Your Honor.

19 THE COURT: With regard to the -- since, it's
20 sort of influx as to whether or not Mr. Graham is going to
21 be involved in it. Your motion to be relieved Mr.
22 Sitnik is denied at this time.

23 MR. SITNIK: Your Honor, just briefly, I have
24 no -- I'm no longer an employee. I have no access to the
25 file. I don't have an agreement with the client. And

1 just put that out there on the record, I don't have
2 malpractice insurance. I've not attempted to talk with my
3 old firm. I'm completely on my own. I understand that
4 and that's why I'm here today, Your Honor, is to make sure
5 that something doesn't fall through the gaps. But
6 respectfully, Your Honor, requiring me to continue to be
7 attorney of record on this case when I'm not the client's
8 choice of attorney and not -- it puts my house at risk,
9 Your Honor, I'm at a loss as to what it is that I'm cable
10 of doing without access to file, without access to client
11 without contract.

12 MR. BUYCK: Your Honor, we have no objection
13 with Mr. Sitnik being relieve as counsel. Mr. Phillip's
14 signed the complaint.

15 THE COURT: All right, very good. I will indeed
16 as long as Mr. Phillips is here is going to see through
17 with the case to its conclusion, that will be fine. I
18 will indeed grant your motion to be relieved in view of
19 all of that. And if will put that in the order and send a
20 copy of that to Mr. Buyck and I will indeed sign it.

21 MR. SITNIK: Thank you, Your Honor. Again, I
22 will render whatever assistance I can to the parties. I
23 just for my own protection.

24 THE COURT: Very good. All right. Anything
25 further?

1 MR. PHILLIPS: Thank you, Your Honor.

2 THE COURT: Very good.

3 END OF REQUESTED TRANSCRIPT

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 32, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Florence
County, South Carolina, on the 5th day of January, 2011.

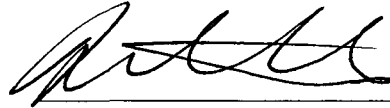
I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 5th day
of April 2011.

A handwritten signature in cursive script that reads "Keshia Reed". The signature is written in dark ink and is positioned above a horizontal dashed line.

Keshia Reed, Court Reporter

CERTIFICATE OF COUNSEL

The undersigned, as Counsel for the Appellant, certifies the the Record on Appeal contains all material proposed to be included by the parties and not any other material.



7/10/12

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

2011-190146

Marquette Johnson, as Mother Natural Guardian
of D'Andre G., an infant under the age of 14
years,

Appellant,

v.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's Health,

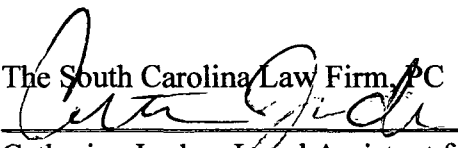
Of whom Anu Chaudhry, M.D. and Florence
Women's Health are the,

Respondents.

CERTIFICATE OF SERVICE

I, Catherine Jordan, legal assistant at The South Carolina Law Firm, P.C., attorney for the Appellant in the above mentioned case, 2011-190146, hereby certify that I have served Appellant's Motion to Permit Out of Time Filing of Final Briefs and Record on Appeal, along with the Briefs and Record on Appeal, by mailing a copy of the same, with prepaid postage, by US Mail, on 10/01/12, to the person's addressed below:

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