

CAUSE NO. GN-303407

COURTNEY (CRAWFORD) BONHAM,)	IN THE DISTRICT COURT OF
INDIVIDUALLY AND AS)	
PARENT AND NEXT FRIEND OF)	
RILEY CRAWFORD, A MINOR,)	
Plaintiffs,)	
v.)	TRAVIS COUNTY, TEXAS
)	
COLUMBIA/ST. DAVID'S HEALTH-)	
CARE SYSTEM, L.P. d/b/a ROUND)	
ROCK MEDICAL CENTER)	
COLUMBIA/HCA HEALTHCARE)	
CORP., ST. DAVID'S HEALTH CARE)	
SYSTEM, INC., ST. DAVID'S HEALTH-)	
CARE PARTNERSHIP, OAKWOOD)	
WOMEN'S CENTRE, P.A., GEORGE)	
SHASHOUA, M.D. and MARK)	
MAUNDER, M.D.,)	
)	
Defendants.)	250 th JUDICIAL DISTRICT

MOTION FOR ADMISSION PRO HAC VICE

COMES NOW, A. Scott Johnson and moves this Court pursuant to Rule XIX of the Texas Board of Law Examiners to admit him and the law firm he is associated with, Johnson and Hanan, to practice before this Court solely for the purpose of appearing in the above-captioned case as counsel for Defendants, Columbia/St. David's Healthcare System, L.P. d/b/a Round Rock Medical Center; St. David's Healthcare System, Inc.; and St. David's Healthcare Partnership. In support of this motion, A. Scott Johnson states:

1. I am a partner with the law firm of Johnson and Hanan, located at 100 North Broadway Avenue, Suite 2750, Oklahoma City, OK 73102, which has been retained to represent the above defendants in this action.

2. I am a member in good standing of the Oklahoma Bar Association and my Oklahoma

Supreme Court identification number is 04665.

3. I have been admitted to the below Courts, and the dates of admission are as follows:

a) State of Oklahoma – May, 1979

I have attached as Exhibit “A” my Certificate as an active member in good standing of the Oklahoma Bar Association dated August 31, 2004.

b) ***U.S. District Courts of Oklahoma:***

1) Eastern – August, 1980

2) Western – August, 1979

c) Tenth Circuit Court of Appeals – September, 1979

U.S. Court of Appeals – September, 1979

4. Missy Atwood, who is with the Germer, Gertz, Beaman & Brown, L.L.P. law firm, 400 West 15th Street, Suite 700, Austin, Texas, is an active member of the Texas Bar Association and a resident of Texas. Ms. Atwood is also associated as counsel for the Defendants and will be assisting me in the defense of this case.

5. I have not previously sought Admission Pro Hac Vice in Travis County, State of Texas.

6. I have not been the subject of disciplinary action by the Bar or Courts of any jurisdiction.

7. I have not been denied admission to any State or Federal Courts.

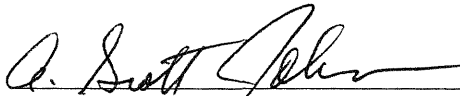
8. I am familiar with the Texas Disciplinary Rules of Professional Conduct and will at all times abide by and comply with same.

9. Attached hereto as Exhibit “B” is my Non-Resident Acknowledgment Letter from the Texas Board of Law Examiners dated September 1, 2004.

Based on the foregoing, I respectfully request that this Court grant this motion for Johnson and Hanan and myself to appear as counsel Pro Hac Vice in this proceeding.

DATED this 29th day of SEPTEMBER, 2004.

Respectfully submitted,



A. SCOTT JOHNSON

Oklahoma Bar No. 4665

JOHNSON and HANAN, P.C.

Bank One Center, Suite 2750

100 N. Broadway Avenue

Oklahoma City, OK 73102

Tel: (405) 232-6100

Fax: (405) 232-6105

*Attorneys for Defendants, Columbia/St. David's
Healthcare System, L.P. d/b/a Round Rock Medical
Center; St. David's Healthcare System, Inc.; and St.
David's Healthcare Partnership*

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing document was served on all counsel of record via United States Mail on this 29th day of September, 2004 to the offices of:

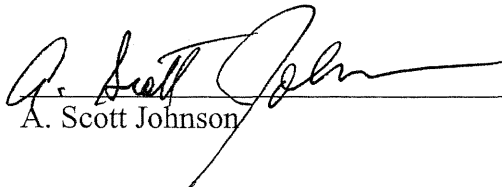
Max Freeman
MAX FREEMAN, P.C.
404 West 8th Street
Austin, TX 78701
Tel: (512) 495-6550
Fax: (512) 320-0504
Attorney for Plaintiffs

Mark R. Mueller, State Bar No. 14623500
Hunter Thomas Hillin
MUELLER LAW OFFICES
404 West 7th Street
Austin, TX 78701
Tel: (512) 478-1236
Fax:: (512) 478-1473
Attorney for Plaintiffs

David M. Davis
J. Mark Holbrook
DAVIS & WILKERSON, P.C.
P.O. Box 2283
Austin, TX 78768
Tel:
Fax:
*Attorneys for Defendants, Oakwood Women's
Centre, P.A, George Shashoua, M.D. and
Mark Maunder, M.D.*

Missy Atwood, State Bar No. 01428020
GERMER GERTZ BEAMAN & BROWN, LLP
400 West 15th Street, Suite 700
Austin, TX 78701
Tel: (512) 472-9250
Fax: (512) 472-9280
*Attorneys for Defendant Columbia/St. David's
Healthcare System, L.P. d/b/a Round Rock
Medical Center, St. David's Healthcare System, Inc.,
St. David's Healthcare Partnership*

George Shannon, State Bar No. 18106000
Scott J. Sherman, State Bar No. 24033058
SHANNON MARTIN FINKELSTEIN & SAYRE, P.C.
2400 Two Houston Center
909 Fannin Street
Houston, TX 77010
Tel: (713) 646-5500
Fax: (713) 752-0337
Attorneys for Defendant HCA, Inc.


A. Scott Johnson

VERIFICATION

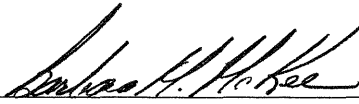
STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

BEFORE ME, on this day personally appeared A. SCOTT JOHNSON, a person who's identity is known to me, who, being by me duly sworn, testifies that, he has read the foregoing Motion for Admission Pro Hac Vice, and that the statements contained therein are within his personal knowledge and are true and correct.


A. SCOTT JOHNSON

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

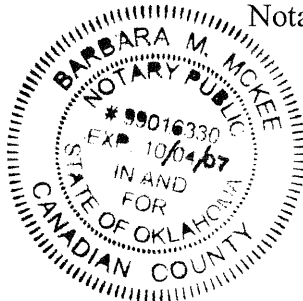
SUBSCRIBED AND SWORN before me, a Notary Public, this 9th day of September, 2004.



Notary Public

My commission expires:

10-4-2007
99016330





OKLAHOMA BAR ASSOCIATION

1901 North Lincoln Boulevard • P. O. Box 53036 • Oklahoma City, OK 73152 • (405) / 416-7007
Website: www.okbar.org FAX (405) / 416-7003

DAN MURDOCK
General Counsel

ALLEN J. WELCH
First Asst. General Counsel

MIKE SPEEGLE
Asst. General Counsel

LORAIN D. FARABOW
Asst. General Counsel

NATHAN A. LOCKHART
Asst. General Counsel

TONY R. BLASIER
Chief Investigator

ROBERT D. HANKS
Investigator

RAY PAGE
Investigator

JIM YANDELL
Investigator

CERTIFICATE

STATE OF OKLAHOMA)

)

COUNTY OF OKLAHOMA)

Dan Murdock, being duly sworn, deposes and says:

That he is the General Counsel of the Oklahoma Bar Association, under the Rules Creating and Controlling the Oklahoma Bar Association as adopted and promulgated by the Supreme Court of the State of Oklahoma, and as such has access to the records and files showing the date of admission and the standing of all attorneys admitted to practice by the Supreme Court.

That ALLEN SCOTT JOHNSON, OBA #4665, was admitted to the practice of law by the Supreme Court of Oklahoma on May 18, 1979, and is an active member in good standing of the Oklahoma Bar Association.

Dan Murdock, General Counsel

Subscribed and sworn to before me this 31st day of August, 2004.

NOTARY PUBLIC

My Commission Expires:

July 18, 2005

01012010

Commission Number



COMM. 01012010
EXP. 7-18-05

EXHIBIT

"A"

tabbies

Board of Law Examiners
Appointed by the Supreme Court of Texas

Non-Resident Acknowledgment Letter

September 01, 2004

ALLEN SCOTT JOHNSON
JOHNSON & HANAN
BANK ONE CTR STE 2750, 100 N BROADWAY AVE
OKLAHOMA CITY OK 73102-

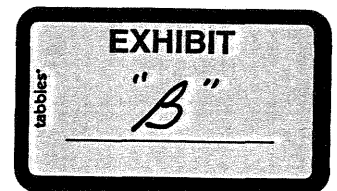
Application Received: 09/01/04

Cause/Style: GN-303-407; TRAVIS COUNTY 250TH JUDICIAL DISTRICT

FROM: Joyce Newton Ham, Assistant Director, Eligibility & Examination, 512-463-5414

This letter acknowledges receipt of your Application for Pro Hac Vice admission and serves as your Proof of Payment of Fee.

Filing the Application for Pro Hac Vice Admission and fee is the mandatory first step in your request for permission to participate in proceedings in a Texas Court. The next step is to file a sworn motion, in compliance with Rule XIX of the current *Rules Governing Admission to the Bar of Texas*, in the Texas Court in which you request to participate, which must be accompanied by this acknowledgment letter. The decision to grant or deny your application is ultimately made by the Texas Court in which you request to participate.



Mailing Address

Post Office Box 13486
Austin, Texas 78711-3486

Telephone: 512-463-1621

Facsimile: 512-463-5300

WebSite: www.ble.state.tx.us

Street Address

205 West 14th Street, 5th Floor
Austin, Texas 78701

CAUSE NO. GN-303407

COURTNEY (CRAWFORD) BONHAM,)	IN THE DISTRICT COURT OF
INDIVIDUALLY AND AS)	
PARENT AND NEXT FRIEND OF)	
RILEY CRAWFORD, A MINOR,)	
Plaintiffs,)	
)	
v.)	TRAVIS COUNTY, TEXAS
)	
COLUMBIA/ST. DAVID'S HEALTH-)	
CARE SYSTEM, L.P. d/b/a ROUND)	
ROCK MEDICAL CENTER)	
COLUMBIA/HCA HEALTHCARE)	
CORP., ST. DAVID'S HEALTH CARE)	
SYSTEM, INC., ST. DAVID'S HEALTH-)	
CARE PARTNERSHIP, OAKWOOD)	
WOMEN'S CENTRE, P.A., GEORGE)	
SHASHOUA, M.D. and MARK)	
MAUNDER, M.D.,)	
Defendants.)	250 th JUDICIAL DISTRICT

**RECOMMENDATION FOR COURT APPROVAL OF
THE ADMISSION OF JOHN B. HILL PRO HAC VICE**

TO THE HONORABLE JUDGE OF SAID COURT:

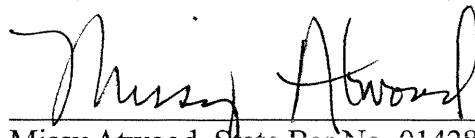
COMES NOW, Missy Atwood, as local counsel for the Defendants, Columbia/St. David's Healthcare System, L.P. d/b/a Round Rock Medical Center; St. David's Healthcare System, Inc.; and St. David's Healthcare Partnership and requests that this Court grant John B. Hill's Motion for Admission Pro Hac Vice. In support of this Recommendation, I state as follows:

1. That I am currently a licensed attorney in the State of Texas and a member of the law firm of Germer, Gertz, Beaman & Brown, L.L.P., 400 West 15th Street, Suite 700, Austin, Texas 78701.
2. That I am local counsel for the Defendants, Columbia/St. David's Healthcare System,

L.P. d/b/a Round Rock Medical Center; St. David's Healthcare System, Inc.; and St. David's Healthcare Partnership while this matter is pending and assisting Mr. Hill in the trial of this matter.

3. That it is my understanding and belief that Mr. Hill is a reputable attorney and I recommend that he be granted permission to participate as counsel in this cause of action.

Respectfully submitted,



Missy Atwood, State Bar No. 01428020
GERMER GERTZ BEAMAN & BROWN, LLP
400 West 15th Street, Suite 700
Austin, TX 78701

Telephone: (512) 472-9250

Facsimile: (512) 472-9280

*Attorneys for Defendant Columbia/St. David's
Healthcare System, L.P. d/b/a Round Rock Medical
Center, St. David's Healthcare System, Inc., St.
David's Healthcare Partnership*

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing document was served on all counsel of record via United States Mail on this 29th day of September, 2004 to the offices of:

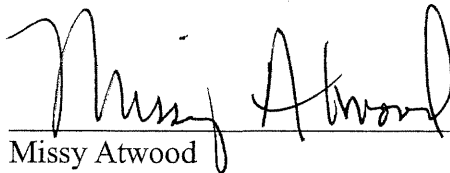
Max Freeman
MAX FREEMAN, P.C.
404 West 8th Street
Austin, TX 78701
Attorney for Plaintiffs

Mark R. Mueller
Hunter Thomas Hillin
MUELLER LAW OFFICES
404 West 7th Street
Austin, TX 78701
Attorney for Plaintiffs

David M. Davis
J. Mark Holbrook
DAVIS & WILKERSON, P.C.
P.O. Box 2283
Austin, TX 78768
*Attorneys for Defendants, Oakwood Women's
Centre, P.A, George Shashoua, M.D. and
Mark Maunder, M.D.*

George Shannon
Scott J. Sherman
SHANNON, MARTIN, FINKELSTEIN & SAYRE, P.C.
2400 Two Houston Center
909 Fannin Street
Houston, Texas 77010
Attorneys for Defendant HCA, Inc.

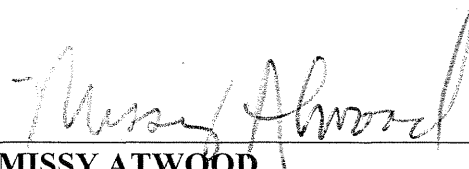
John B. Hill
JOHNSON AND HANAN
Bank One Center, Suite 2750
100 N. Broadway Ave.
Oklahoma City, OK 73102
*Attorneys for Defendant Columbia/St.
David's Healthcare System, L.P. d/b/a
Round Rock Medical Center, St. David's
Healthcare System, Inc., St. David's
Healthcare Partnership*


Missy Atwood

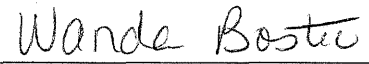
VERIFICATION

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

BEFORE ME, on this day personally appeared MISSY ATWOOD, a person who's identity is known to me, who, being by me duly sworn, testifies that, she has read the foregoing Motion in Support of John B. Hill's Motion for Admission Pro Hac Vice, and that the statements contained therein are within her personal knowledge and are true and correct.

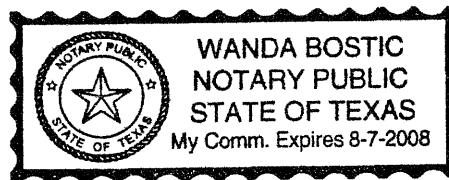

MISSY ATWOOD

SUBSCRIBED AND SWORN to on this 28th day of September, 2004 to certify which, witness my hand and official seal.


Notary Public, State of Texas

My Commission Expires:

8-7-08



CAUSE NO. GN3 03407

COURTNEY (CRAWFORD) BONHAM,)
INDIVIDUALLY AND AS)
PARENT AND NEXT FRIEND OF)
RILEY CRAWFORD, A MINOR,)
Plaintiffs,)

v.)

COLUMBIA/ST. DAVID'S HEALTH-)
CARE SYSTEM, L.P. d/b/a ROUND)
ROCK MEDICAL CENTER)
COLUMBIA/HCA HEALTHCARE)
CORP., ST. DAVID'S HEALTHCARE)
SYSTEM, INC., ST. DAVID'S HEALTH-)
CARE PARTNERSHIP, OAKWOOD)
WOMEN'S CENTRE, P.A., GEORGE)
SHASHOUA, M.D. and MARK)
MAUNDER, M.D.,)

Defendants.)

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

250th JUDICIAL DISTRICT

**ORDER GRANTING A. SCOTT JOHNSON'S
MOTION FOR ADMISSION PRO HAC VICE**

On this day, came to be heard, A. Scott Johnson's Motion for Admission Pro Hac Vice. The Court having considered the Motion and the Motion in Support of Mr. Johnson's Admission Pro Hac Vice, is of the opinion that A. Scott Johnson's Motion for Admission Pro Hac Vice in the above-entitled and numbered case should be in all things GRANTED.

IT THEREFORE IS ORDERED, ADJUDGED, AND DECREED that A. Scott Johnson's Motion for Admission Pro Hac Vice in the above-entitled and numbered cause is hereby **GRANTED**.

SIGNED this 15th day of November, 2004.

FILED

04 NOV -1 PM 1:39

Myra Rodriguez-Mendoza
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

A. Scott Johnson
JUDGE PRESIDING

WL6549PG137

FROM :

FAX NO. :5123200504

Oct. 14 2004 04:55PM P4

OCT. 13. 2004 4:21PM

GERMER GERTZ BEAMAN

NO. 112 P. 4

AGREED (Agreement to Pro Hac Vice Motion of A. Scott Johnson):

MAX FREEMAN, P.C.

404 West 8th Street

Austin, TX 78701

Telephone: (512) 495-6550

Facsimile: (512) 320-0504

MUELLER LAW OFFICES

404 West 7th Street

Austin, TX 78701

Telephone: (512) 478-1236

Facsimile: (512) 478-1473

By: 

Max Freeman

State Bar No. 07427000

Attorneys for Plaintiffs

WL6549PG138

SEP. 29. 2004 3:24PM

GERMER GERTZ BEAMAN

NO. 624

P. 30

DAVIS & WILKERSON, P.C.

P.O. Box 2283

Austin, TX 78768

Telephone: (512) 482-0614

Facsimile: (512) 482-0342

By: 

J. Mark Holbrook

State Bar No. 09819500

*Attorneys for Defendants, Oakwood Women's Centre, P.A.,
George Shashoua, M.D. and Mark Maunder, M.D.*

SHANNON, MARTIN, FINKELSTEIN & SAYRE, P.C.

2400 Two Houston Center

909 Farmin Street

Houston, Texas 77010

Telephone: (713) 646-5500

Facsimile: (713) 752-0337

By: _____

George Shannon

State Bar No. 18106000

Scott J. Sherman

State Bar No. 24033058

Attorneys for Defendant HCA, Inc.

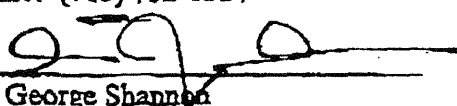
ML6549PG139

DAVIS & WILKERSON, P.C.
P.O. Box 2283
Austin, TX 78768
Telephone: (512) 482-0614
Facsimile: (512) 482-0342

By: _____
J. Mark Holbrook
State Bar No. 09819500

*Attorneys for Defendants, Oakwood Women's Centre, P.A.,
George Shashoua, M.D. and Mark Maender, M.D.*

SHANNON, MARTIN, FINKELSTEIN & SAYRE, P.C.
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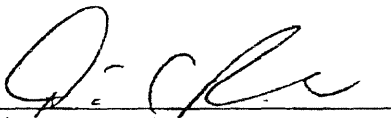
By:  _____
George Shannon
State Bar No. 18106000
Scott J. Sherman
State Bar No. 24033058

Attorneys for Defendant HCA, Inc.

W6549PG140

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400 West 15th Street, Suite 700
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Telephone: (512) 472-9250
Facsimile: (512) 472-9280

By: _____



Missy Atwood
State Bar No. 01428020
Diane C. Presti
State Bar No. 24002790

*Attorneys for Defendant Columbia/St. David's Healthcare System, L.P.
d/b/a Round Rock Medical Center, St. David's Healthcare System, Inc.,
St. David's Healthcare Partnership*

16549PG141


~~~~~

D SHERRI ADELSTEIN  
DISTRICT CLERK DENTON CO.,TX

**DENTON COUNTY, TEXAS**

~~~~~

393RD JUDICIAL DISTRICT

1. Any evidence or questions concerning whether it is necessary to deduct an amount out of Plaintiffs' income for income taxes, social security or other withholding items and particularly any questions regarding the amount of "take-home" pay or whether the Plaintiffs will have to pay income taxes out of any recovery obtained herein.

GRANTED: _____

DENIED: _____

2. Referring in any way to any aspect of any settlements, settlement negotiations or offers of settlement between Plaintiffs and any past or present Defendant.

GRANTED: _____

DENIED: _____

3. Any evidence, questions or comments referring to the contents of any prior pleadings that have been superseded by the current pleadings on file in this case. Ragsdale v. Lindsey, 254 S.W.2d 843 (Tex.Civ.App. -- Amarillo 1952, writ ref'd, n.r.e.); Zock v. Bank of Southwest National Association of Houston, 464 S.W.2d 375 (Tex.Civ.App. - Houston, [14th Dist.], 1976, no writ)

GRANTED: _____

DENIED: _____

4. Any evidence, statements, comments or questions concerning whether or not the Plaintiffs have ever been accused of, or in fact found guilty of, any misconduct or criminal activity. City of Houston v. Watson, 376 S.W.2d 23 (Tex.Civ.App. - Houston, 1964, writ ref'd n.r.e.); Landry v. Travelers Insurance Company, 458 S.W.2d 649 (Tex. 1970).

GRANTED: _____

DENIED: _____

5. Any evidence or reference that suggests that any person or entity other than Columbia Medical Center of Denton Subsidiary, L.P., d/b/a Denton Regional Medical Center, or the personnel of such persons and entities, were negligent or failed to act reasonably or appropriately or within the standard of care during any of their care of Lanette McClure and/or Jessica McClure.

GRANTED: _____

DENIED: _____

6. Any evidence or reference that suggests that the negligence of any person or entity other than Columbia Medical Center of Denton Subsidiary, L.P., d/b/a Denton Regional

Medical Center, or the personnel of such persons and entities, was a proximate cause of the injuries and damages to the Plaintiffs.

GRANTED: _____

DENIED: _____

7. Any reference to the circumstances surrounding payment or non-payment of any charges or items which the Plaintiffs are claiming as damages in this cause, including hospital, medical or other bills for health care and treatment of Plaintiffs because such matters are not an issue in this cause and are prejudicial to Plaintiffs and would violate the collateral source rule and the prohibition against mention of insurance.

GRANTED: _____

DENIED: _____

8. Any reference to any person receiving an invitation to the Mueller Law Offices annual party. Clients of the Mueller Law Offices in addition to expert witnesses, defense attorneys and insurance adjusters are invited to this party. There are approximately 1200 people invited. The party is irrelevant to any issue that will be presented in this case. Alternatively, any relevance will be far outweighed by the prejudicial value of such testimony in that it would introduce wealth of Mueller Law Offices into the trial of this matter.

GRANTED: _____

DENIED: _____

9. Any reference to any advertising by Mark Mueller or the Mueller Law Offices other than to ask the jurors if they have seen the advertising and to ask questions of the jurors separately to see if knowledge of the advertising and attitudes about said advertising will affect the juror's ability to be unbiased and fair.

GRANTED: _____

DENIED: _____

10. That the Defendants not mention or state to the jury the probable testimony of a witness who will not be called to testify at time of trial.

GRANTED: _____

DENIED: _____

11. Any statement that this case or any medical negligence case would have an adverse effect on the availability or cost of physicians, hospitals, or other health care providers in any locality. (*Levermann v. Cartall*, 393 S.W.2d 931, 937 [Tex. Civ. App. -San Antonio 1965, writ ref. n.r.e.]).

GRANTED: _____

DENIED: _____

12. Any reference or statements to the effect that "no other doctors but Plaintiffs' experts" have made certain findings or have expressed an opinion that any Defendant was negligent or that Plaintiffs' damages were caused by Defendants' negligence.

GRANTED: _____

DENIED: _____

13. Any reference to claims made or lawsuits filed against any of Plaintiffs' expert witnesses.

GRANTED: _____

DENIED: _____

14. Any reference to any report filed in compliance with the requirement of the Medical Malpractice Act, 4590i, Section 13.01. Section 13.01(k) provides that, "notwithstanding any other law", such report "is not admissible into evidence by a defendant; shall not be used in a deposition, trial or other proceeding; and shall not be referred to by a defendant during the course of the action for any purpose."

GRANTED: _____

DENIED: _____

15. That Plaintiffs have previously alleged a cause of action or made claims against or sent notice letters (including but not limited to Art. 4590i notice letters) to any person or entity not presently a party to this suit, based on the occurrences made the basis of this suit.

GRANTED: _____

DENIED: _____

16. Any comments made by counsel or witnesses to the Jury that Plaintiffs have "improperly edited" videotapes, have made a specific number o deposition edits, that Plaintiffs failed to play the whole story because they deleted portions of various depositions or did not

present them fairly. Defendants have the opportunity to play any portions of the videotapes and/or depositions to the Jury either by way of cross-examination during Plaintiffs' case in chief or by waiting until Defendants' case in chief and playing various portions of videotaped depositions to the Jury at that time.

This motion in limine is not intended to preclude counsel from reading or playing a deposition segment based on the rule of optional completeness in the appropriate circumstance, but this limine is intended to exclude prejudicial remarks concerning the way in which the depositions have been edited and/or played to the jury. Rules 401, 402, and 403, Texas Rules of Civil Procedure.

GRANTED: _____

DENIED: _____

17. Any questions concerning whether the healthcare providers were nice, kind or gracious people. Such is not relevant to any material issue in this case.

GRANTED: _____

DENIED: _____

18. That this Motion has been filed or any ruling by the Court in response to this Motion, suggesting or inferring to the jury that the Plaintiffs have moved to prohibit proof or that the Court has excluded proof of any particular matter. Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. - San Antonio 1963, writ ref'd n.r.e.).

GRANTED: _____

DENIED: _____

19. That Lanette McClure, James Russell McClure and/or Jessica Elise McClure have been entitled to receive, will receive, or will be entitled to receive, benefits of any kind or character from any collateral source.

GRANTED: _____

DENIED: _____

20. Any reference to or questions regarding any testimony concerning life expectancy from any expert that is not designated to testify on Jessica Elise McClure's life expectancy, nor from any expert not proven to be generally or specifically qualified to so testify. This limine

shall specifically apply to the testimony of expert witnesses not designated to testify on the subject of life expectancy, nor qualified to testify on the subject of Jessica Elise McClure's life expectancy.

GRANTED: _____

DENIED: _____

21. Any mention of, or questions concerning, Plaintiffs' having filed for bankruptcy at any time, as such is irrelevant and creates a danger of unfair prejudice.

GRANTED: _____

DENIED: _____

22. Any statement or evidence which states or purports to show that a finding of negligence in this case would ruin the reputation of the Defendants or make the Defendants unwilling to provide services. (*Stauf v. Holden*, 94 So. 2d 361, 362 [Fla. 1957]; *Torrez v. Raag*, 43 Ill. App. 3d, 779, 783-84, 357 N.E. 632, 634-35 [1976]; *Delaughter v. Womac*, 215 Miss. 190, 206-207, 164 So.2d 762, 768-69 [1964].)

GRANTED: _____

DENIED: _____

23. Any reference to the "lawsuit business."

GRANTED: _____

DENIED: _____

24. Any reference to experts being "hired to give an opinion."

GRANTED: _____

DENIED: _____

25. Any question or comment concerning experts not being from Texas or to the distance traveled to testify or to how many states the expert had to fly over.

GRANTED: _____

DENIED: _____

26. Any suggestion that Jessica Elise McClure's injuries are the result of a genetic dysfunction or genetic disorder unless and until the Defendants can support such a suggestion by laying the proper predicate through scientifically reliable testimony from a qualified expert witness.

GRANTED: _____

DENIED: _____

27. Any mention of decreased fetal movement experienced with Mrs. McClure's first pregnancy as such is irrelevant and creates a danger of unfair prejudice and confusion of the issues.

GRANTED: _____

DENIED: _____

28. Any question or reference that mentions that Lanette McClure smoked during her pregnancy with either Jessica Elise McClure or Jennifer McClure, or at any time, as it is not relevant given there is no reliable scientific testimony by a qualified expert that any alleged smoking caused the injuries to Jessica Elise McClure.

GRANTED: _____

DENIED: _____

29. Any question or reference that mentions either Lanette or James McClure having herpes, or having passed herpes to Jessica or Jennifer McClure at birth, or of any findings in the medical records of Jessica McClure that show an exposure to the herpes virus or a virus in the herpes family, as it is not relevant given there is no reliable scientific testimony by a qualified expert that any alleged smoking caused the injuries to Jessica Elise McClure.

GRANTED: _____

DENIED: _____

30. Any mention of, or question regarding, an exclusion of an opinion of Dr. Kenneth McCain by the 5th Circuit Court of Appeals since the matter pertained to an anti-trust case, was based on relevancy only, not qualifications or reliability, and as such is completely irrelevant to his opinions in this case. Mention of the matter would only serve to confuse the issues and create a danger of unfair prejudice and holds absolutely no probative value.

GRANTED: _____

DENIED: _____

31. Any mention of family history of bipolar disorder, alcoholism, and/or attention disorder as plaintiffs do not allege that that Defendant is responsible for such problems in Jessica McClure. Additionally, it can not be shown that these things are indicative of a genetic or chromosomal disorder in Jessica McClure, and unless and until Defendants can show a

scientifically reliable basis for such an allegation, mention of such family histories is not probative and merely creates a danger of unfair prejudice and confusion of the issues.

GRANTED: _____ DENIED: _____

32. Any mention of Lanette McClure's history of hypothyroidism, as there is no expert testimony suggesting that such was a potential cause of any injury to Jessica McClure.

GRANTED: _____ DENIED: _____

Each of the above matters, set forth in individual paragraphs, are generally inadmissible, irrelevant and prejudicial to Plaintiffs' rights to a fair and impartial trial. Should any matter as set forth above become material, relevant or admissible, that Defendants can bring such matter to the Court's attention, receive a favorable ruling thereon, and thus preserve each and every one of their rights. The failure of the Court to grant this Motion in Limine will be to grant the Defendants a free hand to inject such inadmissible and prejudicial matters as listed above before the jury by asking questions or making of statements to the jury, and even though, upon objection, the Court sustains the same and instructs the jury to disregard the same, harm will have been accomplished.

Therefore, to prevent a miscarriage of justice, Plaintiffs pray that this Motion in Limine be granted in its entirety.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE and CERTIFICATE OF CONFERENCE

I certify by my signature above that on the 12th day of October, 2005, a true and correct copy of Plaintiffs' Motion in Limine was served on all counsel of record in this cause, via fax and via certified mail, return receipt requested. I further certify that attempts are being made to discuss this Motion with counsel for the Defense in order to agree to as much as possible prior to the Pre-Trial Conference in this case.

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME

TRIAL COURT CAUSE NO. 2003-60081-393
JAMES MCCLURE AND LANETTE) IN THE DISTRICT
COURT
MCCLURE AS PARENTS AND)
NEXT FRIENDS OF JESSICA)
MCCLURE, A MINOR,)
PLAINTIFFS)
vs.)
DENTON COUNTY, TEXAS)
DENTON REGIONAL MEDICAL)
CENTER, COLUMBIA MEDICAL)
CENTER OF DENTON)
SUBSIDIARY LP, F/K/A)
DENTON REGIONAL MEDICAL)
CENTER, INC., A/F/K/A)
DENTON REGIONAL MEDICAL)
CENTER, LAURA ANN DAVIDSON)
M.D., D/B/A WOMEN WHO CARE)
FOR WOMEN,)
DEFENDANTS.) 393RD JUDICIAL
DISTRICT

PRE-TRIAL MOTIONS

On the 14th day of October, 2005, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Vicki Isaacks, Judge Presiding, held in Denton, Denton County, Texas.

Proceedings reported by computerized stenotype machine.

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VOLUME 1 OF 1 VOLUME
PRE-TRIAL MOTIONS

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P R O C E E D I N G S

THE COURT: We're on the record in Cause Number 2003-60081-393. And today I think we have set the Plaintiffs' Motion to Exclude several motions; is that correct?

MR. LYONS: Yes, Your Honor. And we still have one remaining Motion to Exclude, the Defendants'. I'm fine if we start with that one.

THE COURT: Go ahead.

MR. JOHNSON: I believe that was the one on cumulative evidence, Your Honor.

THE COURT: All right.

MR. JOHNSON: It had to do with the fact that they have endorsed two nurse experts, Nurse Gayle Gross and Nurse Barbara True-Driver, both to speak to issues of obstetrical nursing and obstetrical nursing standards of care. And it's the Defendants' position that since they both are going to examine obstetrical nursing standards of care and not NICU or not any other types of nursing, that it's cumulative. That they are both going to express opinions about the fetal heart monitoring strips, about obstetrical nursing and checking patients that are in labor and delivery. Both of

them are going to say the same thing. They both say it's a breach of standard of care, of course. And we just don't see how having two obstetrical nurses, other than to make the trial of this case longer, is anything but cumulative evidence. And that they ought to elect one or the other of them so we are not wasting the Court's time and the jury's time.

THE COURT: A response?

MR. LYONS: There are a couple of reasons that both of them are necessary. But first of all, my objection would be that this motion is premature right now. No evidence has been presented. If after we put on -- and this isn't necessarily a Daubert hearing as the Court through its motion, through the scheduling order, had requested that we file these ahead of time so we can hear all of this stuff in advance. I don't see why we can't put on our first nurse and then as we begin to introduce our second nurse, have a short hearing on this matter and some indication of what we think this nurse will add, the Court can rule then. And I think that's the best way to take this matter up.

But in response to the motion as it is today,

Gayle Gross is one of the nurses and Barbara True-Driver is the other nurse. The chief difference that I think that they will -- that they have, there are two major differences. But the most important is probably the bulk of experience and the type of hospital that they each serve as a nurse.

And Gayle Gross is a nurse in labor and delivery unit -- at a labor and delivery unit in Sherman, Texas, a smaller place, smaller hospital. Her hospital has a total of 177 beds and only 272 employees. It's a little closer to, perhaps even smaller than the Denton Regional facility that we will be talking about here.

Barbara True-Driver is probably going to be our first witness. She has the greater bedside and clinical experience. Gayle Gross has a lot of supervision experience, and Barbara True-Driver will be testifying about a lot of bedside care. But her testimony, her experience chiefly at a large hospital, University of Texas in Tyler Methodist Medical Center which is a metropolitan hospital with approximately 351 beds and 1700 employees.

And one of the questions that came up during her deposition was, you know, have you ever practiced in Denton, have you ever practiced at a small rural hospital and have you ever practiced at a level 2 hospital, which her hospital is a level 3 hospital. And in order to buffer ourselves against those sorts of criticisms, our intention is to bring Gayle Gross who practices in Sherman and follow up with, yes, those are the same standards of care you would expect in a smaller hospital as well.

And in that sense, Your Honor, they do both bring something to the table. And it is something that we would be prejudiced -- the Plaintiffs would be prejudiced if Barbara True-Driver were subject to cross-examination on the subject and another nurse who could have covered that issue was somehow excluded at this point in the trial.

MR. JOHNSON: Just briefly, Your Honor. The standard of care is a national standard of care. The size of the hospital, if that's the distinction, it's a distinction without meaning here. They are cumulative. Because it's a national standard of care, and the standard of care

is going to apply across the board for labor and delivery on the levels that they are at. And Barbara True-Driver testified that she knew the standard of care for all these hospitals. So that's the distinction without meaning here.

THE COURT: All right. I think what I would prefer to do is wait until the trial. And I will reconsider ruling on it at that time if you will remind me.

MR. JOHNSON: Thank you, Judge.

THE COURT: Let's go on to the other motions that you have pending.

MS. GOOSEN: May I inquire, has the Court ruled on the matters we heard before?

THE COURT: Yes, I have. I have denied the Motion to Exclude both of those experts.

MS. GOOSEN: Okay, thank you, Judge.

MR. LYONS: And there was -- Your Honor, there is another Motion to Exclude that was filed by the Defendants regarding anything that happened up until 3:38 a.m. And I won't argue their points for them. I don't know if they are dropping it or still on the table today.

MS. GOOSEN: As I appreciate this coming from

Sean, that was filed in the form of a Motion for Summary Judgment and the Court has those.

THE COURT: I have those. And I have not looked at those yet but I will.

MS. GOOSEN: Let me give you some good news in that regard, Your Honor. We have reached an agreement on two of those motions that you need not consider them. We will submit a proposed order. Did you want to delineate which motions we agreed on?

MR. LYONS: Before we -- I just don't want to get confused. Here's what I'm talking about.

MS. GOOSEN: Go ahead and do that one.

MR. SCHOONVELD: Good morning, Your Honor. I'm Eric Schoonveld. I didn't meet you last week, but I'll be here for the trial too. With regard to the No Evidence Motion for Summary Judgment, Plaintiff had filed some Special Exceptions which led us to have a conversation and try to reach some agreements. And we can submit the proposed order to you. There is one motion, No Evidence Motion for Summary Judgment as to direct liability of the hospital. And we have not reached an agreement as to the rule -- or as to that motion itself, but we

have reached an agreement as to Plaintiffs' Special Exception. They were concerned about one sentence that maybe made that motion applicable to the entire case. And we have clarified that that motion only pertains to the issues of direct liability of the hospital set out in that motion. And we can submit that to Your Honor.

The second motion for No Evidence Motion for Summary Judgment was one as to the issue of vicarious liability. And we are agreeing to withdraw that order or that motion based on Plaintiffs' agreement to serve a new pleading identifying specifically who was negligent. And I don't know if you want me to put it on the record the substance of our agreement or if you want us to submit that to you.

THE COURT: I would prefer that you submit it.

MR. SCHOONVELD: That's fine, but you will not need to consider that motion.

THE COURT: All right.

MR. SCHOONVELD: We have reached agreement. And the third No Evidence Motion for Summary Judgment that we have been trying to reach agreement on is with regard to the resuscitation.

And that's the one where they have withdrawn their standard of care expert. But there is still one small little hiccup in that one, and I think we're going to need you to rule on that one even though we have agreed to some parts of that motion.

MR. LYONS: And perhaps to narrow the issues with regard to my Special Exception, if we could clarify to the Court what she would be ruling on, that it's just the issues of resuscitation, that will be fine.

MR. SCHOONVELD: Right. And I guess, again, Plaintiff in their Special Exception was concerned that our motion which was addressed just to the fact that they do not have any evidence that there was any negligence or any breach of the standard of care under resuscitation. They have agreed that there is no causal connection, nothing in the resuscitation caused an injury. But, again, that No Evidence Motion is just intended to address the issue of resuscitation. And I think in our prayer for relief it might have said whatever else the Court feels appropriate. We're not asking for you to grant summary judgment on the case as a whole. We're just asking for summary judgment as to the

issue of the resuscitation because there is no evidence of any deviation and no evidence of any causal injury to the child.

MR. LYONS: And the summary, Your Honor, you know, in case the Court's wondering and looking at these things under submission is that with those three Motions for Summary Judgment, I think we can take care of the issues through Special Exception in any rulings the Court gives and aren't particularly terrifying to the Plaintiffs, okay. So that's just what we wanted to clarify with the stipulations.

THE COURT: All right.

MS. GOOSEN: Okay. As to the -- are we done with that?

MR. LYONS: Yes. Thank you.

MS. GOOSEN: And thank you. As to the motion that he's referring to, Your Honor, there is a Motion to Exclude any testimony about any breaches of the standard of care before a certain time period. If I can just give you a very brief background of the relevant facts, I think you will need to consider it in the other Daubert hearings we have today too.

This case involves a lady who came into the hospital and she labored for several hours before the events that were really made the basis of this claim occurred.

The Plaintiffs contend -- well, we all agree that this baby had a cord prolapse and that the umbilical cord was coming out the end of her labor, ahead of the head, which can cause lack of oxygen to the baby and can theoretically cause brain damage, obviously, if it goes on long enough.

The Defense, on the other hand, contends that while that prolapse did occur, it didn't occur because of anyone's negligence. It just happens sometimes. And, also, there is an alternate theory that totally explains this child's problems. She has a genetic disorder, and we'll talk about that more when we get to the Daubert hearings.

But the Plaintiffs have produced two nurses in this case, Barbara True-Driver and Gayle Gross we just discussed. These nurses have opined that there were breaches of the standard of care. Like when she was admitted, that they didn't take this proper history; they didn't go get this record; there weren't vital signs recorded on the chart;

things of that nature. They say, well, that's a breach of the standard of care. And then they will say there is a breach of the standard of care because of something else that happened two hours later all the way before the vital time period.

The time period in issue here is at -- one of their experts has basically said at 3:38 the cord prolapse occurred, 3:38 a.m. And then there is some testimony that it occurred at 4:10 which is about the time that things started happening.

Our position is Plaintiff should not be allowed to put any evidence on about breaches of the standard of care before the time that their experts say this is what occurred. Their expert Dr. Gottesman has said that he thinks the care was fine up until about 3:38. That's their OB expert. Yet they have these two nurses coming in to testify about breaches of standard of care. Any opinions they may have about that just simply aren't relevant to any issue the jury will decide because in order for it to be a jury issue, you have to have a breach of the standard of care by this nurse that then proximately caused damages to the Plaintiff.

All the evidence from their experts is that, (a), Dr. Gottesman says there wasn't breach of standard of care before 3:38; and, (b), their expert Dr. du Plessis said that from a proximate cause standpoint this occurred at the cord prolapse which is either going to be 3:38 or 4:10.

So we move to exclude all of the testimony from Nurse True-Driver and/or Nurse Gross that were prior to that time period simply because it would be misleading and confusing to the jury, as there is no causal link between their alleged breaches and any damage or injury to this child. That's our position.

THE COURT: Okay. A response?

MR. LYONS: First of all, I want to clarify what this motion is. It's a Motion to Exclude, and it was filed under the Daubert deadlines. But really what this is, is a Texas Rule of Evidence 403 Motion to Exclude possibly otherwise relevant testimony and evidence because, as they say, the probative value is outweighed by a danger of unfair prejudice and confusing of the issues, okay.

And so in my response, Your Honor, I challenged them to show any evidence as their

burden -- as their burden requires. That they -- that they -- Texas Rule 403 requires that the person objecting to certain testimony or evidence identify first of all, which they haven't done, the testimony or the evidence that they are -- that they are objecting to and that they explain why that evidence or testimony is unfairly prejudicial or creates a confusion of the issues.

And what they are doing is basically saying -- and I can quote their motion -- Defendants therefore respectfully request that the Court exclude any opinions, all evidence, mention, allusion, reference or asking questions regarding anything that transpired up until 3:38 a.m.

So if the Court would just imagine for me for a moment what transpired up before 3:38 a.m. First of all, she was in a hospital already about eight hours, her water had broken, her -- she had had a previous cesarean section which was something that was important for the nurses to know because she was a high-risk pregnancy and high-risk delivery. She was being treated by -- rather than her normal obstetrician, she was being treated by a physician that was on call. I mean, there were all kinds of

facts that are going to be relevant for this jury to understand.

Now, if they are trying to narrow this to -- well, let's just talk about instances of negligence. And what incidents of negligence are they specifically talking about. They haven't identified those. And then they haven't gone further to support their burden, which is to identify how those instances of negligence would be unfairly prejudicial to Defendants. In other words, if we are saying that the nurses ambulated Lanette or let Lanette get up and walk around rather than being monitored, even though the doctor specifically ordered that every hour that she be monitored for 20 minutes of every hour and these nurses are letting her ambulate for over an hour, why is it unfairly prejudicial to point out to the jury that the nurses have already begun to violate the doctor's order, especially when the nurses later on will be testifying that they don't believe that there was any risk with spontaneous rupture of the membranes and the nonapplied head of the cervix, that there would be a cord prolapse.

These facts are important for us to be able to

cross-examine the nurses about, test the nurses as far as when they say things like, well, I always follow the doctor's orders or when expert witnesses say I assume the nurses were doing the right thing. I assume even though they didn't document it, I assume they must have known what they were doing. Those kinds of statements make it relevant to talk about the fact that the nurses had been committing negligence all day long. And they haven't identified anything as far as what they are objecting to and how it would be unfairly prejudicial. So I'm asking the Court to deny this Motion to Exclude.

MS. GOOSEN: Just very briefly, Your Honor. We're not objecting to us talking about the facts of the case, who did what when and whether or not this is consistent with the doctor's orders or whatever. That's not the issue. The issue is if Barbara True-Driver or Gayle Gross get on that stand and say this is a breach of the standard of care on things that don't matter from a proximate cause stand point, that is just going to confuse the jury on issues they shouldn't be considering. If it's a breach of the standard of care and the

Plaintiffs are unable to link that breach with any harm or damage to the patient, it's just irrelevant to any issue they are going to decide and it will lead to confusion of the jury. That's the basis of our motion, but not factually.

MR. JOHNSON: Your Honor, can I add something here? For instance, what Mr. Lyons just said about starting and stopping this drip in this hour, neither one of these nurse experts had anything like that in their report. Neither one of them testified about anything like that. That's something that now they are going to try to race to pick at back when she first got there to somehow prove something that happened between 3:38 and 4:10 or 4:30 or 4:42 when this baby was delivered. They just want to go back and pick it apart.

And in addition to that, Barbara True-Driver herself -- and I'm quoting her -- says "Well, when the rubber meets the road it's 3:38." That's the important time frame. And they just want -- they just want to put these nurses up there and pick at their charting and pick at this and pick at that, and none of it is causally connected by any of their doctors. None of it is causally connected to

this case by any physician. To the contrary, their doctors, both of them, put the causation at 3:38 or beyond. So we're just going to sit here and pick at these nurses about something that didn't have anything to do with the injury in this case.

MR. LYONS: If I may just briefly, Your Honor. That's incorrect. Both of them put in their reports breaches of the standard of care prior to 3:38 a.m. And Mr. Johnson is new to the case, and I don't think he intended to mislead the Court.

But the motion -- this is a Motion to Exclude. This matter can be handled by a Motion in Limine at the most severe or certainly by relevancy objections during trial. And this is a Motion to Exclude an entire area because they are trying to tie our hands behind our back, and I think this can be handled in some other matter.

THE COURT: I am inclined to grant a Motion in Limine on this if you want to --

MR. JOHNSON: I move for that, Your Honor. And I also would ask the Court to recall these arguments when you are reviewing our Motion for Summary Judgment which is on a very closely-related topic, both an Affirmative Motion for Summary

Judgment and a No Evidence Motion for Summary Judgment. And, I mean, that's something you need to take into consideration.

THE COURT: Okay.

MS. GOOSEN: So you are saying we need to approach before we get into that?

THE COURT: Exactly. We need to approach and possibly have a hearing outside the presence of the jury before we go into that testimony.

MR. LYONS: And, Your Honor, as I stated, the motion does not clarify what specific subjects they are talking about. I mean, their prayer respectfully requests the Court to eliminate any discussion, period, of any discussion that happened before 3:38 p.m. So if we are going to have a Motion in Limine, I think we need something very clear.

THE COURT: I am going to ask you to put something in writing that we can look at and delineate if we need to.

MS. GOOSEN: So I will know which way to go, I'm moving on the standard of care. I'm certainly not moving factually.

THE COURT: That's what I'm concerned about.

MS. GOOSEN: Thank you, ma'am.

THE COURT: Ready to proceed?

MR. LYONS: I think from here, Your Honor, we can begin with Plaintiff's Motions to Exclude. If I may approach, I have a tabulated notebook that goes in the order of business. I think that would be most appropriate.

THE COURT: Well, good. Pretty soon I'm going to have to relocate my bench.

MR. LYONS: And if I am burdening the Court, you are always welcome to give these things back to us. Thank you.

THE COURT: Thank you.

MR. LYONS: I have both our motions and responses in that notebook.

THE COURT: All right.

MR. LYONS: Your Honor, I think it's going to be important to take these motions one at a time as we clarify the Court's rulings. But there is an overview that I can give that might be important for the Court. Would the Court like to entertain that or would you rather I just stick to one at a time?

THE COURT: Brief overview would be helpful.

MR. LYONS: Okay. The principal thing that we're focusing on in these Motions to Exclude is the overall opinion that Jessica McClure who is 11 years old, that the conditions that she suffered from are a result of some sort of genetic disorder or genetic abnormality or dysmorphic condition, as one expert put it.

As the Court has heard and as the Court will see in our response to the Motion for Summary Judgment, which a very large Motion for Summary Judgment was filed, there is labor and delivery testimony as to the cord prolapse occurring; as to fetal acidosis at the time of birth; as to very low Apgar scores; and as to an MRI that reflects injuries to the basal ganglia and putamina which are, according to our experts, consistent with hypoxic ischemic lack of oxygen event that occurred around the time of birth. And these things, according to Dr. du Plessis, according to Dr. Zimmerman are very clear to be clear evidence for these things.

And then if you look at the subsequent treatment records, there is discussion of a static encephalopathy brain injury that doesn't change,

doesn't rest. There is mentioned by her treating pediatric neurologist of a choreoathetoid movements which are consistent with the cerebral palsy, the kind that is caused by hypoxic ischemic encephalopathy.

They are also -- and this is what the Defendants' experts will be discussing, focusing on. There are also here and there are mentions of, and later, only later in her life, starting around when she turned 5, 6, 7, starts to get a little older, of a slightly elongated face, of mild facial dysmorphia, of a little bit of spacing between the lower teeth, a little bit of wide spacing between the lower teeth and then there is Attention Deficit Disorder and things like that. And we'll get into those more specifically, okay.

Early in the records when she was born, there was no mention throughout the neonatal period of any kind of -- this is one of the things that they focus on, a later finding of clinodactyly. Which if you look in the medical dictionary, you see a definition of clinodactyly which is deflection, okay.

You see no mention of that when they do the

examinations of the baby in the nicu period. You see no mention of dysmorphia or clinodactyly throughout her records for the first few years of her life. Not until she starts to grow up do they mention those things. And they specifically say for years prior to her 5th and 6th birthday that there was no dysmorphia noted.

So, nonetheless, the Defendants have hired Barbara Burton. And for Barbara Burton, there is a domino effect of three other experts. And Barbara Burton comes in and she says this child has some sort of genetic abnormality, okay. I took her deposition.

Now, I asked her to tell me what genetic abnormality are you referring to; and she couldn't name any specific genetic abnormality that she believed Jessica has. She named the things that I named to you in her report. She said things like facial dysmorphia, wide space teeth, clinodactyly. And, in any event, these things she did not -- she never saw a picture of Jessica that she could actually say she was going to show to the jury and say, see, here's the facial dysmorphia I'm talking about or here are the fingers overlapping that I'm

talking about. She never did an examination of the child, and the Defendants never requested an examination of Jessica. They never did any specific genetic testing. And the Defendants never suggested or asked or requested for blood samples of Jessica to do genetic testing on. In fact, some of the treating physicians of Jessica did do genetic testing and it all came back normal.

When I talked to Barbara -- and I'm getting to the first Motion to Exclude here, Your Honor, specifically. I'm done with the overview. When I talked to Barbara Burton, I asked her if she did those things. And then I said, well, finally what kind of genetic dysmorphia are we talking about here. And she refused to give me the name of one. I finally said, well, what are some possibilities. And she says, well, she hasn't been tested for this but it could be a 22q11 deletion syndrome, okay. She agreed that that was found in one out of every 3,000 children. And then I said, would you agree that those complications include cardiovascular disease, cleft palate, immune deficiencies, velopharyngeal incompetence, swallowing difficulties. She says those are -- she would

agree that those are common findings. I also said kidney abnormalities, et cetera. She said those are common findings, highly variable.

First of all, while I was taking her deposition I was looking on the web site from her hospital and looking under the subject 22q11 deletion, which she just threw out to me as an example of something Jessica might have.

Any testimony she would come in the Court with, all her credibility, with all her Ph.Ds and MDs and come and sit in the witness stand and say to the jury this little girl may have 22q11 deletion syndrome. Now, we're supposed to make the jury make sense out of whether or not that is a real possibility.

And I'm looking at the web site from her hospital, and I'm naming all the things her web site says a child will have when they have that. And I said, do you -- do any of those findings present themselves anywhere in Jessica McClure's medical records. And she says, no. And so I asked her, well, then what in Jessica McClure's medical records suggest that she might have 22q11. And she says, well, we also see in patients with 22q11

syndrome growth hormone deficiency, learning disabilities, psychiatric problems, overlapping at the toes and those are the findings that we do see in Jessica McClure.

And looking at the web site again I said, do you have any explanation as to why these things, overlapping toes, gross hormone deficiency, learning disabilities that you say are symptoms of it do not appear anywhere in the description on the web site of Children's Memorial Hospital where you work. And she says, no.

In other words, she's going to come into this courtroom -- she really plans to and has already done it in her deposition -- come to this courtroom and start matching syndromes with Jessica McClure's records even though those syndromes and Jessica McClure's symptoms are completely -- they don't match up at all by their -- by the literature from her own hospital. And that was just one example she threw out. And she later said, I never meant to suggest that that was actually what she had. I was just giving you an example.

When I finally pressed her for it -- well, give me something that she might actually have --

she started playing this game. And you can read in her deposition what she did. She says, well, she can have one deletion or one duplication; two deletions or two duplication. She started counting through the Chromosomes, P and Q I think they are, each side of the 26 Chromosomes and talking about the deletion or duplication, saying basically it could be anything that she has.

And when I said, well, if we did testing on Jessica and it all came back normal, even if we did all the testing you possibly require, would we then have ruled it out. And she said, no, because current testing can't ever find anything.

In other words, this woman is going to come in here and testify no matter what we do to close off the subject matter, she is going to come in here and try to testify that this little girl has a Chromosome abnormality. And she bases it on facial dysmorphia even though she admits that a child with dystonia, with improper tone of muscle over time will have problems with facial musculature becoming asymmetrical.

She admits that she changed widely -- the little bit of wide spacing in the lower teeth in

her report to wide spacing of the teeth. She admits that she's never seen Jessica's teeth. She admits that she has never ever -- she's not aware of any studies that quantify how much spacing between the teeth becomes statistically significant in the world of genetics.

I mean, I asked her these three things: Is there any particular study on high arched palates that you can point to so we can get some kind of measurement as to what would be a significantly -- statistically significant high arched palate.

Answer, no.

I'm on page -- Barbara Burton's depo at Page 100, starting at Line 13. Is there any kind of study with regard to widely spaced teeth that would give us some sort of reference to determine what kind of spacing between the teeth would become statistically significant. Answer, no.

Is there any group of studies or literature that you can point to with regard to clinodactyly what level of deflection or amount of deflection would become statistically significant for genetic disorder purposes. Answer, no.

Then I asked her later, did you see in the

neonatal period any description of facial dysmorphia, clinodactyly, high arched palate, small hands and feet. And she says, no. And then I asked her -- oh, and that's important, Your Honor. Because she testifies that if you are going to have this kind of genetic disorder, you are going to have it even before you are born. In the womb, the child is going to develop the overlapping of the fingers and the -- not the teeth but dysmorphia of the face. These are dysmorphic conditions. These are malformations rather than deformations if it's a genetic problem.

Now she says that then those had to be present at birth, and she admits that nowhere in the records up until the age of 5 or 6 do you start to see these things present. And she admits that these things can be caused by growth deficiencies or muscular dystonia and the things that we know can be caused by hypoxic ischemic encephalopathy, like would occur with the cord prolapse.

And contradictory to her testimony, Dr. Nelms, the other witness we're objecting to here, says that if the child -- I asked him, a child that suffers from dysmorphic conditions, would you

expect that dysmorphic to appear at birth. And he says, no. So these two experts are actually contradicting one another on the subject.

And, in any event, Your Honor, the impact of this testimony is to take -- is to give the jury some sort of an idea that this little girl was born this way, that she was going to be born this way no matter what. Dr. Burton in response to this Motion to Exclude does not include or give us any indication of what kind of literature, scientific support or studies will support her theories that Jessica has a genetic disorder.

She testifies at the end of her deposition that she had testified for the Plaintiffs in another lawsuit. That in that lawsuit, they actually knew of a genetic abnormality in the child that was being discussed. But because she was aware of a hypoxic ischemic encephalopathy, she felt comfortable coming in in that court and testifying. That even though they knew about a genetic condition, a specific genetic condition, that it was, nonetheless, not enough to explain what the problem with that child is.

And the reason I bring that up, Your Honor, is

because this is a period -- this is a case where Dr. Burton was brought in as an expert for the other side. And she basically said even when you have a specific identified genetic disorder, you still have to make the next analytical leap which is has that disorder caused this particular problem.

In this case, we have not done that first thing which is identify the genetic disorder. So we can't begin to say and has that particular genetic disorder caused this problem. The analytical gap that exist here makes it that Barbara -- Barbara Burton's testimony cannot come into this courtroom. It cannot pass the gatekeeper hearing. It does not satisfy the reliability standards that are required in order to overcome these sorts of hearings. And I'll leave it at that.

We can take the other experts -- I think once we've ruled upon or got an idea of where we are with Dr. Burton, the other ones will be much easier to talk about. And I'll allow response now.

MS. GOOSEN: Your Honor, with the Court's permission, I would like to speak to the Daubert

issues and whether or not this is even a Daubert issue. And as to some of the medical factual debate here, I'm going to defer that to my co-counsel Mr. Johnson because he was at all these depositions and I was not, if that's okay with you, Your Honor.

THE COURT: That's fine.

MS. GOOSEN: All right. First of all, let me just say just briefly up front that the Plaintiffs' own expert is a guy named Dr. du Plessis. And on Page 38 of his deposition, Mr. Schoonveld was deposing him, he said, And

again the cause for short stature, the cause of the need for growth hormones, that there are many potential causes for that, right. And the answer is, Correct. And then he asks, And there

certainly could be some fundamental formative issues such as other -- as well as some genetic issues or metabolic cause for that, right. And the answer is, Correct. That's their expert, Your Honor.

Also, there is medical records from Scottish Rite Hospital in 1997 that says no firm diagnosis is established although metabolic causes seem most

likely.

So what we're faced with here is really not a junk science argument. All of Mr. Lyons' arguments really go to cross-examination and the weight of the evidence. In this case, Your Honor, there is no doubt about the fact, it's medically scientifically accepted, no one is going to contest it, that cerebral palsy can be caused by genetic and metabolic disorders. That would be the issue for the Court. Just because you can't name the specific metabolic or genetic disorder, absent the testing that's not been done on this child, doesn't make the testimony inherently unreliable.

There are thousands of genetic disorders that we are going to discover over the next 10, 20, 40 years in this ongoing area of medical science. There is agreement by this board certified geneticist, Dr. Burton, that it is medical certainty that this child has got a genetic disorder as the explanation for the constellation of problems that she has. So it's not even a Daubert challenge.

To go down the areas of Daubert, the first one would be can the theory be tested. Does CP cause

cerebral palsy -- I mean does genetic disorders or metabolic disorders cause cerebral palsy?

Absolutely. There is no evidence to the contrary.

Is it -- is that a subjective interpretation? No.

There are thousands of articles in the medical literature about genetic and metabolic problems leading to cerebral palsy. Is it peer review

literature? It is. What's the rate of error?

It's proven science. It's like cancer causes death. It's that medically accepted in the medical community that people know about. Is it generally accepted in the medical community? Absolutely.

Are there nonjudicial uses for the theory?

Absolutely. People use it, like Dr. Burton, to diagnose and treat children with genetic disorders every day that result in cerebral palsy.

So we do not believe this is even truly a Daubert issue. There may be this you can't name which disorder so it can't come into evidence at all. One of the issues for Daubert, though,

which make this very important and will pertain to the rest of this, the Plaintiffs are contending that there was a hypoxic hit, that this child sustained no oxygen for a while and caused

damage. In order for their experts to be able to take that position, they have got to be under Daubert able to rule out other possible causes. All of this disorder information, both from their own expert admitting that there may be genetic formation -- there may be some genetic issues or metabolic causes for some of her conditions, such as the need for growth hormones, all of that goes to the weight of the testimony that they are going to apply to the cause of this child's condition.

They are seeking with this series of motions to preclude the Defendant from offering any opinions of other possible causes, and it's their burden to rule out those opinions. We are required to put forth the possibilities under Daubert to test what they are saying. And so that was basically the basis of some of our Daubert issues, is that they do not have medical science to support their condition in their arguments while we do. And we just think the Court -- that all of this goes to the weight of the evidence on each of these motions.

There is no question that these doctors are qualified to opine about genetic metabolic

disorders causing problems in children, and we set forth everyone's qualifications in each of these issues. But they are not even complaining about Dr. Burton's qualifications.

And I'll let Mr. Johnson speak to the medical issues that you think are important to consider as far as evidence for the metabolic disorder.

MR. JOHNSON: If it please the Court, Dr. Burton took into consideration the maternal history leading up to and through pregnancy, to include the fact she had advanced maternal age; the fact that she had had a prior either a blighted ovum or spontaneous abortion; she was on fertility drugs to get pregnant with this pregnancy; that she had some early bleeding in this pregnancy; that she went through this pregnancy with no weight gain, about a pound and a half throughout the whole pregnancy; and that she was borderline diabetic, gestational diabetes; and that she exposed the fetus to herpes on three different occasions during this pregnancy; and that there was a history of ADD in the family with the sister, recorded history in these medical records; and that there is a history of hypothyroidism in the family, which is also a

known factor that can lead to DNA structure problems and/or metabolic problems.

And at the time of the birth, this patient had initially recorded a low Apgar score and initially recorded a cord gas, which will be in question, low but failed to exhibit any neurological sequela at all. Failed to meet any of the -- any of the neurological findings that indeed Dr. Burton said, as did all of the witnesses, to include theirs, that when you have a hypoxic ischemic event that is going to leave a child brain damage, you will have neurologic sequela apparent at birth. And they didn't have any.

In addition to that, that she went to Cooks. And by the time she got to Cooks, they judged her to be neurologically intact. She was there five days, off of the vent in one day and discharged. And the neonatologist discharging her said she was neurologically intact and that these genetic problems or metabolic problems arise slowly and over time and that she would expect them. They are there at birth in the genes or metabolically present, but they are going to evolve and they did here. Even I believe the mother and father's

testimony will be that it was 12 -- 9 to 12 months before they thought anything was wrong with this little girl. And the radiology, save and except for some that was done recently, all of the radiology has been negative. None of the radiologists at any of these treating hospitals have been able to find any neurologic damage.

So, to the contrary, the constellation of the problems Dr. Burton says that there are known risk factors, as does Dr. Nelms, all of those things I just talked to you about. And, in addition to that, those risk factors manifested themselves here. And they manifested themselves in a constellation of symptoms that you don't have with HIE. You don't have growth hormone problems. You don't have a high arched palate from hypoxic ischemic encephalopathy. You don't have clinodactyly from hypoxic ischemic encephalopathy. You may have cerebral palsy related to that, but that's not the constellation of symptoms that this young lady has demonstrated.

And that's what Barbara Burton did, she made a differential diagnosis based on the condition of this patient and based on the complete records

showing no neurological sequela. And even their own experts, their Volpe they refer to, says within the first few days of life. There is just nothing there. Judge, it didn't exist. They discharged her in good shape to go home, and that will be in the proof. And so that's what she's relying on. She's looking at the clinical symptoms, she's putting them together. If you have one of them, well, okay. But I've got four or five that are all the same. I have got a medical history here that supports that. They are saying she's got anxiety syndrome, family history of bi-polar disease. I mean, it just goes on, and on, and on. And it's cumulative and it's the constellation of all of those medical facts.

MS. GOOSEN: And just from the Daubert standpoint, under the Havner case which is a Supreme Court Decision which I think you have got before you, I know it's cited in all of our briefs. And under the Cruz decision which is a case that Mr. Mueller's law firm was involved in, it is quite clear that the Defendant is entitled to offer other possible explanations for the cause of the problem. And to exclude other possible causes would

clearly -- it would just be reversible error. And that's what, basically, they are trying to do, is exclude any mention of metabolic or genetic disorder as a cause for her CP.

MR. LYONS: These things that Mr. Johnson just went through -- advanced age, blighted ovum, spontaneous abortion --

(Reporter interrupted.)

MR. JOHNSON: Borderline diabetic, exposed fetus to herpes, history of ADD, hypothyroidism, none of those are mentioned by Dr. Burton in either her report or her deposition, except I guess the history of ADD was mentioned in deposition.

This is obviously a shotgun effect here, Your Honor, that we're calling things from the records to try to say they match up to equal genetic abnormality. And they are saying that they get to challenge us to rule out other possible causes.

What this is, is a gatekeeper hearing specifically focused upon expert testimony. And what we have here is an expert witness coming in to propose a theory of how this constellation of symptoms is proof of the existence of a genetic abnormality. What the expert doesn't do to support

that is restrict herself to reliable scientific bases for that.

And Ms. Goosen, always being a very good lawyer, went back and took me back to the actual reliability factors that the Court considers. And it is whether or not it can be -- the theory can be tested. But we have no theory here to test. Whether or not it is subjective interpretation. We don't know because she doesn't tell us where she gets her theory from, much less explain the theory. Whether it's peer view. She doesn't share a theory or publication that we can even see whether or not it's peer view or whether it's just an article. What the rate of error of the test is. Of course, there is nothing she's giving us that would possibly allow us to see what the rate of error is. Whether the theory is generally accepted. Since she hasn't enunciated any theory that connects these constellation of symptoms to genetic abnormality, we can't tell whether that theory is generally accepted. Nonjudicial uses. I can't imagine a judicial use for something like this. I don't think if you -- and I plead with the Court to review her testimony and review the response by the

Defendants in our motion. But you will see that a doctor would never take those things to a parent and say obviously your child has a genetic abnormality. The fact is none of the doctors, not a single one in the 11 years of Jessica McClure's life have gone to her parents and said this looks to me like a genetic abnormality. That's the basis of our motion, Your Honor.

MR. JOHNSON: Your Honor, I'm sure Mr. Lyons has forgotten that he asked the question of Dr. Burton about what she would take into consideration in arriving at her opinions. She begins her answer with prenatal course with any complications, exposure to medications, exposure to viruses, exposure to illnesses, exposure to tobacco, bleeding during pregnancy, prenatal testing, gestational age at delivery, complications in labor and delivery, details of labor and delivery, medical history of the family and of the mother, medical history prior to that in evaluating them, the medical history of the family with regard to bi-polar disease. I would like to know the histories and would look at the history of the siblings and the sibling disorders and whether or

not those were important. About four pages of her listing off to counsel at Page 29, 30 -- 28, 29, 30, 31, all of the things I just mentioned to the Court.

THE COURT: All right. Your other two motions are from MacGregor and Miller; is that correct?

MR. LYONS: I beg your pardon?

THE COURT: MacGregor and Miller, are those the other experts you are asking to exclude?

MR. LYONS: No MacGregor and Miller. I think the next in order would be Dr. Nelms, which --

THE COURT: I assume that I have all the deposition testimony and exhibits that you want me to consider in making this decision; is that correct?

MR. LYONS: Yes you do, Your Honor.

THE COURT: Is there anything that you want to add as a group here, or do you need to take them individually?

MR. LYONS: We can go through them individually, Your Honor. There is nothing more as a group.

THE COURT: All right. I'm trying to shorten the hearing, that's why. If there is something

else you want to add about any of these individual experts.

MR. LYONS: Oh, yes. Generally, Dr. MacGregor and Dr. Miller are both obstetric gynecologists. And we have an additional challenge to them on the subject of genetic testing because they are not qualified to testify.

THE COURT: All right. Why don't you go through that then.

MR. LYONS: Okay.

MS. GOOSEN: Your Honor, if I can make a suggestion that may shorten this. They are going to get to testify, these experts, about something. They just don't want them to testify about genetic counseling. My suggestion would be since they are going to be here anyway, that we allow them to testify on whatever it is we all agree they can cover by qualification. And that we take it up outside the presence of the jury as to whether or not you believe the qualifications are sufficient for them to do testimony on genetic testing, as opposed to having to go through all of this and make a pre-advanced determination of that.

THE COURT: That would be a very efficient way

to do it. I think that would give me a chance to read through all your material.

MR. LYONS: That sounds fine, Your Honor. And I think we can -- if the Court is of that disposition, we can probably do the same thing with Dr. Nelms. The difference with him is he is a neonatologist.

MS. GOOSEN: Board certified pediatrician and neonatologist and Chairman of the Department of Cook's Pediatrics.

MR. LYONS: So the qualification challenge is a little bit different, a little more specific. With each of them, we went through questions of how you are particularly qualified. So with each of them there are nuances and differences.

THE COURT: But you have set that out fairly clearly?

MR. LYONS: I think our motions speak for themselves. If you are willing to take these under submission, Your Honor, I would be fine with that.

THE COURT: And I assume your responses are complete?

MS. GOOSEN: I assume so, Judge. And if I find to the contrary, I will send the Court

whatever it is we think you need to consider. But, again, I think we ought to take it up during trial, quite frankly.

THE COURT: I prefer to do that then to the extent that we can.

MR. LYONS: Then that's fine with us, Your Honor.

THE COURT: What else do we need to do today?

MS. GOOSEN: Well, Your Honor, we have one matter that I don't think is officially before the Court but very significant. And I would like to take it up if they have got materials. We filed -- we have all exchanged witness lists and exhibit lists and Motions in Limine on the 13th. We need to confer with counsel so we can eliminate a lot of argument before you and keep it as concise as possible. I don't know when you want to take that up, given our trial starting on Tuesday.

THE COURT: Well, I did have a submission of a jury questionnaire. Has everybody seen the request?

MR. JOHNSON: It's been submitted to us. But we're -- at this point, we would have to take it and rework it. It's too late in the day. So we

would kind of like to not use the questionnaire and just do the brief voir dire that Your Honor suggested before, one hour to pick a jury and go forward. Because we would have to see if we could make some questions and put into theirs.

MS. GOOSEN: Plus, then you have to send them all out, fill them all out.

THE COURT: What I was getting to is while they are doing the questionnaire, if everybody was in agreement to do that, we could take up some other matters. But if you have a problem with

that --

MS. GOOSEN: We would just as soon not have a questionnaire.

MR. LYONS: We, of course, would like a questionnaire. There is plenty of time between now and Tuesday to work it out.

THE COURT: Back to the original problem. How about Monday afternoon? Can y'all be here for the preliminary matters?

MS. GOOSEN: Yes, ma'am, that would be fine, split time. What time would you like us?

THE COURT: How about 2:30?

MS. GOOSEN: Okay. There is one other issue,

this Dr. Hunter issue. I filed a motion, what I called it was a Supplemental Motion in Limine. But it's going to take a little bit of time. It's going to be -- we kind of have -- it would be better for us to have some indication from the Court about this.

I think you heard Mr. Johnson say that this child has had several ultrasounds, CT sounds, MRIs of her head. They have all been interpreted as normal, not showing any evidence of a hypoxic ischemic injury. That's been throughout her lifetime. She had one as recently as a year ago by Dr. Naugher here in Denton. Again, normal.

And I don't know if you have had any brain damage baby cases here, Judge. But there is going to be evidence that if a child suffers an anoxic hit, you see white matter and gray matter changes that are pretty apparent on these studies. And she's not demonstrated that.

They have hired an expert, a Dr. Zimmerman, who is a pediatric neuroradiologist. And he says all these guys are wrong. Actually, there is a subtle change here I think is consistent with hypoxic event. That's fine. We're going to deal

with that. We have deposed him on that issue. The problem is this. We have scheduling orders that we had to designate experts in 2004. We have agreed scheduling orders about that, about what their reports have to cover and exchange reports and they have all been deposed.

At the very 11th hour -- we just filed this recently so you have got that before you -- the Plaintiffs provided us on September 7th of 2005 a report by Dr. Jill Hunter. And it's an MRI taken of this patient on September the 2nd, as well as what they call a spectroscopy. I don't even really know what spectroscopy is, and all I do is defend malpractice cases. I haven't heard of it. But it's something new that was provided to us on the 7th, just the report.

So we got this report. Well, we're looking at it, going who is Jill Hunter. How did she get involved in this. She's not listed as a treating physician. She's not listed as a consultant. She's not listed as an expert. Where is she coming from.

I have filed a Motion to Exclude any reference to this late MRI spectroscopy, any reference to

Dr. Hunter. And now, as of yesterday, they have added Dr. Adar to their witness list.

In our request for disclosure, Your Honor, on September the 16th, 2005, after they had this information, after they had the MRI and the spectroscopy, they supplemented their discovery and their disclosures. And nowhere in there do they mention Dr. Hunter or any opinions Dr. Zimmerman, the treater, might have about this new report. They say something to the effect of Dr. Zimmerman may have opinions that he may discuss about this report.

Standing here the day before trial, I don't know what those opinions are. His report hasn't been supplemented, their disclosure hasn't been supplemented. And, as of yesterday, for the first time we find out Dr. Hunter and Dr. Adar, along with a handful of other witnesses who we have never seen on persons with knowledge of relevant facts or as experts, are disclosed on their witness list that they intend to bring them to trial.

And I have cited the rule, I think it is 193.6, the penalty for failure to supplement timely. Which is absolutely, no question about it

in this case, they have not supplemented to this day. I don't know what Dr. Zimmerman has to say about this. I certainly don't have any information about Dr. Hunter or Dr. Adar or even how they got involved, other than they have worked closely with this law firm in the past. And we're moving to exclude at the time of trial any reference to the fact that this MRI is out there, any reference to the spectroscopy and its results, any reference or testimony from or about Dr. Hunter or Dr. Adar for failure to comply with the rules of procedure.

It is unfair surprise, Your Honor, to be here today, you know, not knowing what these opinions might be. It is unduly prejudicial to us to now have what they are calling a MRI, quote, "consistent with a brain injury" presented to us even though those people were not disclosed as treaters, consultants, experts, nothing until we get their witness list yesterday.

And they can't show good cause for failure to supplement, Your Honor. They did supplement their discovery after they had all this stuff and didn't put these people on their supplementation on the 16th of 2005. So we're moving to exclude any

reference to this, any testimony about it because it's extremely prejudicial, unfair and there is no good cause.

That's all set forth in the motion we have got before the Court, but that's going to be a pretty critical issue from our standpoint because we are so surprised by that.

The other thing I think the Court needs to consider is as soon as we get this report from Dr. Hunter, we start trying to subpoena the medical records to see how the heck did she get involved in this, what's she doing, what history does she have and what's going on. We also subpoenaed records from Dr. Adar. You know, there is a 20-day delay. If you subpoena records, the court service has to wait 20 days before they can collect the records. That 20 days fell October the 12th, I think yesterday. Was that yesterday, day before yesterday. During that whole 20 days, we made repeated attempts to contact the Plaintiffs' attorney and say will you waive the 20 days so we can at least investigate who this woman is, you know, how she got involved in this child's care. She's in Houston, and we have never heard of her.

And they would not agree to waive the 20 days.

So standing here before you today, despite a subpoena issued three weeks ago, I still don't have the records and they haven't sent them to me. We can't even investigate it. And they have blocked attempts to do that. And they should not be rewarded for not supplementing their discovery, hiding behind the 8-ball with not letting us get the records and putting these people on their witness list four days before trial and getting to use this testimony that we have not had a chance to explore with our experts at all.

THE COURT: A response?

MR. LYONS: There is a lot there, Your Honor. And this is an important MRI. The last MRI taken was in 2004. There is a mention by the person reading it that it's difficult to read it because of the motion artifact. Well, we have got a little girl that's got cerebral palsy. And being in those things for 15, 20 minutes it takes, there is movement artifacts sometimes and you don't get a clean MRI.

So she's had several scans taken throughout her life. And the last one in 2004 was read as

normal. But the person reading it said that the reading was limited by the movement. So we went through pains to get an another MRI taken. The MRI itself, it's a photograph of the brain. It's the best kind of evidence of whether or not there is -- whether or not there is evidence of an injury in there. And we succeeded. You know, the treating doctors if they don't have the medical need for an MRI to be taken won't necessarily do that.

So we asked Dr. Adar who we know because he's an expert witness, to be frank with the Court, to give us a prescription for MRI, which he did. And he did it. He asked the closest person to him which was Jill Hunter in Houston, Texas Children's, to do the MRI. So she did the MRI. And she, every time she does an MRI, issues a report.

As soon as we got the report -- the MRI was September 3rd, 2005, which was a month and a half before trial. As soon as she got the report, she sent it to us. As soon as we got the report, we sent it to the Defendants. As soon as we got the report, we also sent it to our expert witnesses Dr. Zimmerman and Dr. du Plessis, the ones that can test with regard to findings on MRI.

As soon as we did that, we sent a letter to the Defendants saying Dr. du Plessis and Dr. Zimmerman will be reviewing the MRI and received the MRI report. And if you want to depose them, take a brief deposition, follow-up deposition, you are welcome to do that. We will arrange it for you. And to this date, they haven't requested that.

So they are asking that the Court exclude two things here. One, is any mention of the existence of that MRI. In other words, even though that MRI clearly shows -- more clearly shows than any previous test where the exact injury can be seen on the brain, for any expert to come into this court and testify about it, they want -- they want there to be no mention of that. And they want this jury to be left with the impression the best evidence anybody ever has going on in this girls brain is an MRI taken in 2004 when she was moving. That's not fair.

We have done everything we can to get a better piece of evidence. And we have done everything we can, Your Honor, to try to get some indication to the Defendants that we have it and they have an

opportunity to review it. If they want to ask for their own neuroradiologist to come in here and testify as an expert, we can allow them to do that. There is a month for them to find somebody to come in here and do that. Or if they want to -- they are also asking that Dr. Hunter not be made a witness or Dr. Adar not be made a witness. And, frankly, Your Honor, that's fine with us. We would like to have Dr. Hunter up here to justify and explain why she finds that. But if it's too late for another person to be used as an expert witness, I understand that. But that shouldn't exclude Dr. Zimmerman from talking about the latest medical finding that she has.

To analogize this to something else, Your Honor, Jessica is still going through all kinds of medical care. And we're all getting updated medical records to this day of that medical care. And those medical records are going to be entered into evidence, and those medical records are going to be discussed because her condition is constantly unfolding. And we should bring the evidence, the best evidence. Up-to-date, this MRI is the best medical evidence up-to-date.

Their restriction is based upon surprise, but they can't show how they have been prejudiced when we're offering them an opportunity to discuss the MRI with Dr. Zimmerman and with Dr. du Plessis at any time prior to their testimony.

So it's a very important piece of evidence, Your Honor. It's crucial to the case that the Plaintiffs have. And we would ask that the Court allow us to discuss the MRI and allow our experts Dr. du Plessis and Dr. Zimmerman to discuss the findings of the MRI.

MS. GOOSEN: In response, Your Honor, nowhere in this rule for failure to supplement does it say if it's important it can come in, you can disregard the rule. The rule is they have got to get up and show you good cause why they should allow it right now. And they to this moment in time have not told us what Dr. du Plessis or Dr. Zimmerman are going to say about these reports. We don't even have the films, Your Honor, to look at. They have not been made available to us. We have got the report in September. And this offer to go depose somebody, that was last week they made that offer. So it's a little disconcerting to hear that offered as an

excuse for why they should go forward. Unless they have shown good cause for the failure to supplement, and they haven't supplemented these opinions until today, the Court must exclude the evidence under Texas Rules of Procedure. And we're moving for it to be entirely excluded.

If it was that important to their case, Your Honor, you would think maybe they would have done it more than six weeks before trial. They just admitted that they went fishing for an expert, that they could get somebody to come in here and say this. They want to backdoor Dr. Hunter's opinions even though she is not designated as an expert, hasn't provided a report that we can go cross-examine her on. They want to backdoor her opinions by having Zimmerman say, oh, yeah, well, it's not just me, I'm not the only radiologist in the world who disagrees with everything done before it. We have got Dr. Hunter, one of Mr. Mueller's other kind of in his barn of experts that he goes to and fishes from that well all the time. Hunter and Adar will help me on this one. They will find somebody who will say it's consistent with. It just can't be included in the trial, Your Honor.

It's late date and no good cause.

MR. LYONS: May I clarify? First of all, we're just asking that these films be allowed to be discussed with our experts. We're not asking to backdoor any experts and not asking to bring Dr. Hunter or Dr. Adar in to testify. And, Your Honor, we did supplement. I mean, they are saying that we failed to supplement. Their notice is based on failure to supplement. Dr. Jill Hunter and Dr. Stuart Adar are both listed in our most recent supplementation that was before 30 days out. And good cause does exist, Your Honor. Good cause exist. And I have explained to the Court as to why it took so long to get the MRI and why the MRI is important and how we got it to them as quickly as we could. And they do have the films. We sent them the films.

MS. GOOSEN: We don't have the films.

MR. JOHNSON: You sent us a CD that's on some software that takes \$3,000.00 to open. We don't --

THE COURT: You need to address the Court, please.

MR. JOHNSON: I'm sorry.

THE COURT: Did you have something else to add

new?

MS. GOOSEN: They sent us that software two days ago?

MR. JOHNSON: Yeah, two days ago.

MS. GOOSEN: We can't open it because we don't have the software to open it. We still don't have the films. The issue is, if Dr. Zimmerman has an opinion about it, how come it's not in writing somewhere and been provided to us. In answers to disclosures, it says I may opine about it. What does that tell the defense. Nothing.

THE COURT: I am inclined to grant the Motion to Exclude. What else?

MS. GOOSEN: I think, Your Honor, the rest of this -- I think the rest of it is Motions for Summary Judgment, if I'm not mistaken.

THE COURT: How many Motions for Summary Judgment do I have to consider?

MS. GOOSEN: There were six. Let me -- let me find out the answer to that question, Your Honor. There were six, one is gone. Are you clear on which one is gone, Your Honor, so you don't have to worry about it?

THE COURT: I think so. If I'm not, I'll set

up a conference call.

MR. SCHOONVELD: We will -- we'll submit a written agreement order or something shortly after this hearing.

MR. LYONS: Your Honor, we have filed objections to the submission of these Motions for Summary Judgment because of failure to give us proper notice. And that objection, I guess the only time to hear that would be today before you take these under submission.

THE COURT: All right.

MS. GOOSEN: And we filed a response to that, Your Honor.

MR. LYONS: I have not seen a response to that objection.

THE COURT: I'm sorry?

MR. LYONS: I have not seen a response to that objection, Your Honor.

MS. GOOSEN: I've got it here. It was filed on the 13th. So if he needs a chance to consider that before the Court rules, that's fine.

MR. LYONS: Let's hear what it says, I mean, in oral argument. I would rather come up with the matter and get it addressed before the Court.

THE COURT: Okay.

MR. LYONS: May I explain to the Court the reason for my objection?

THE COURT: Yes.

MR. LYONS: Essentially, Your Honor -- and I'm not sure how much of this you are aware of when it happened. But when we had a hearing -- well, I guess the long and short of it is the rules regarding notifying a party of the date of either submission or hearing are very clear, very strict because the remedy that's being sought by a movant for summary judgment is so drastic. And the only way that the Respondent can know when their response is due, is by the date of submission or date of hearing being clearly told to them. And the courts have held that the nonmovant is entitled to 21 days' of notice for the date set for hearing for submission. But the notice requirements are strictly construed because summary judgment is so harsh. And the courts have held that notice provisions of the rule are intended to prevent the rendition of judgment without allowing the opposing party a full opportunity to respond.

The confusion that was caused because I didn't

know if this was going to be by hearing on Friday or by submission at some point was that while we were discussing these things, I noticed that -- I actually called the Court and asked, you know, do we have these set for hearing on Friday. And I was looking at a scheduling order that I had signed and that I thought we had all agreed to and I thought had been given to the Court that said there was going to be a hearing on Motion for Summary Judgment on Friday, the 14th, today.

And I was told by the Court Reporter that there was no such hearing on the document. And when I became aware of that, I looked through all my records and found that there was no signed fiat. All I had was a letter from Ms. Goosen saying that the Court generally takes these by submission, which turned out to be true and the rescheduling order turned out to be wrong. But what I realized then was I had nothing that gave me any notice of date of hearing or submission. So I filed these objections. And that's essentially it, Your Honor. When we realized that, we actually stopped working on our responses to Motion for Summary Judgment. And then they came up with a waiver argument that

frankly sent enough jolt to my spine to give me the belt and suspenders attitude. And so I decided to go ahead and file responses anyway. But I do believe that because they failed to give proper notice that the Motions for Summary Judgment can be dispensed with. I think they are dead under the rules.

MS. GOOSEN: Your Honor, the Motions for Summary Judgment, we filed them timely pursuant to the -- to the scheduling order. We asked for a hearing date on it. We were informed by the Court that they would be by submission. We immediately informed the other side that these were going to be by submission only by a letter dated September the 20th, 2005. And if they were confused about what date they needed to be filed on, what I would do as a prudent attorney is go ahead and file it on the date that we set forth in the scheduling order.

They have now filed responses to these Motions for Summary Judgment. And I don't have any problem with the Court considering those responses and ruling on them. But just to make the trial unnecessarily long by considering information that should be out as a matter of law before we start

it, that just doesn't satisfy judicial economy or anything else.

Mr. Lyons agreed to that date. If he was confused, he could have got the three of us on the phone and gotten unconfused and filed his response. I think the Court needs to decide these. I think it will streamline the trial in the event we're successful in any of them. There is no basis that I'm aware of in the law for filing a Special Exceptions to a hearing on Motion for Summary Judgment. I have never heard of that. May I hand the Court a copy of our response?

THE COURT: Yes.

MS. GOOSEN: It just kind of lays all that out factually what occurred, Your Honor.

THE COURT: All right. I'll take a look at everything and I'll let you know Monday afternoon when you come back in at 2:30.

MS. GOOSEN: Yes, ma'am. Thank you, Judge.

MR. LYONS: Your Honor, just on the questionnaire issue, what should we do further? Should we talk with the other side about how to work out the questionnaire, or what's the Court's inclination?

THE COURT: I'm really of the opinion that the questionnaire might speed things up and make it a little easier to get through this. Do you think that you can get one worked out between now and then?

MR. JOHNSON: We'll look it over if that's Your Honor's ruling. We'll be glad to do that.

THE COURT: Why don't you do that.

MS. GOOSEN: Thank you, Judge.

(End of hearing.)

STATE OF TEXAS

COUNTY OF DENTON

I, Pamela J. Duncan, Official Court
Reporter

in and for the 393rd District Court of Denton,
State of Texas, do hereby certify that the
above and foregoing contains a true and correct
transcription

of all portions of evidence and other
proceedings

requested in writing by counsel for the
parties

to be included in this volume of the
Reporter's

record in the above-styled and numbered cause,
all of which occurred in open court or in
chambers and were reported by me.

I further certify that this Reporter's
Record

of the proceedings truly and correctly
reflects the

exhibits, if any, offered by the respective
parties.

I further certify that the total cost for
the

preparation of this Reporter's record is

\$_____

and was paid/will be paid by

_____.

CSR-RPR

Reporter

(940) 349-2362

Pamela J. Duncan,

Texas CSR 3084
Official Court

393rd District Court
Denton County, Texas
Telephone:

Expiration: 12-31-06

Progress Notes

Date	Comments
9-10-93	Doyle Pharmacy: yeast infection: Wants Diflucan + Mytrex cream - sinus problems Diflucan 100po tAm - tpm #2 / Doyle Pharmacy (ML) Mytrex cream apply prn
9/22/93	Bladder inf pt states - freq. painful voiding Macrodid 100mg po BID x 7 days will leave UA (ML) Claritin 100mg po q day prn #60. UA C+S 327102
2/22/94	herpes outbreak - very painful - using Zovirax cream Wants Zovirax 400 tid x 10d. - needs more cream - Doyle Pharmacy - Darvocet N 100 t q 3-4° prn pain #20 (ML)

PROGRESS NOTES

DATE

NAME Lanette McClure

5/6/94	pregnant - 40 yeast infection - has been using OTC yeast med externally. Terazol 7 apply externally X 7 nights. Winn Dixie marketplace (MC)
3/6/94	40 pain on left side, annoying pain occurring off and on at times. Informed take tylenol, if pain gets worse go to ER (HE)
12/20/94	herpes outbreak Zovirax 5% 15gm tube apply prn Zithromax 3 pak for husband - Doyle Pharm. (MC)
1-9-95	40 sinus infection - Zithromax 3-pak - Duratuss i po BID prn #60 Duck N Dave (MC)
1-13-95	40 coughing Robitussin DAC + tsp q 4° prn Celegin #120cc Walmart 627-3038-
1-17-95	Postpartum - RCS- prolapsed cord BP 110/80 WT 181 (↓ 203) UMP? Bottlefeeding LPS 4-94 Meds used Duratuss today Human Resources NT 1-20-95 - disability letter Zantac * 300 (h) 150cc Depo Lot# 284MF exp. 7/96 (Dhip) 4-94

DICTATED

POSTPARTUM VISIT

PATIENT: MCCLURE, LANETTE
DATE OF VISIT: 01/17/95
DATE OF BIRTH:
AGE:

Blood pressure 110/80. She is bottle feeding. We talked about a tubal ligation in about six months. In the meantime, she would like the Depo-Provera. She has not had a period yet, but she has also not had intercourse. I have refilled her Zantac 300 mg q h.s., written a disability letter and given her 150 mg of Depo. Her vertical incision is healing very well. She may resume activities.

CM:AMT#86
DD:01/19/95
DT:01/19/95

CINDI MARSDEN, M.D.

2.21.95 C/o herpes outbreak - Zovirax 400 mg po tid x 10 days
Then 400 mg po BID daily # 75, refill x 1 (ML)
Eckerd's Univ.

3/3/95 - C/o sinus infection - request Cipro 500 mg po BID x 7d.
Eckerd's Univ. (ML)

**MC CLURE V DENTON REGIONAL DEPOSITION OF SCOTT N. MACGREGOR,
D.O. 9-165**

CENTRAL REPORTERS ASSOCIATED, LTD.

Page 1 to Page 117

**CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY:**

CENTRAL REPORTERS ASSOCIATED, LTD.

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Page 1

(1) IN THE DISTRICT COURT OF DENTON COUNTY, TEXAS
393rd JUDICIAL DISTRICT

(2) JAMES MC CLURE and LANETTE)
(3) MC CLURE, as parents and next)
friends of JESSICA ELISE)
(4) MC CLURE, a minor.)
Plaintiffs.)

(5))
-vs-) No. 2003-60081-393

(6))
DENTON REGIONAL MEDICAL CENTER.)
(7) COLUMBIA MEDICAL CENTER OF DENTON)
SUBSIDIARY, LP, f/k/a DENTON)
(8) REGIONAL MEDICAL CENTER, INC.,)
a/f/k/a DENTON REGIONAL MEDICAL)
(9) CENTER, and LAURA ANN DAVIDSON.)
M.D., d/b/a WOMEN WHO CARE FOR)
(10) WOMEN.)
Defendants.)

(11))
(12))
(13) The deposition of DR. SCOTT NELSON
(14) MAC GREGOR, called by the plaintiffs for examination,
(15) pursuant to notice, taken before Judy A. Landauer, CSR,
(16) a Certified Shorthand Reporter and Notary Public within
(17) and for the County of Cook and State of Illinois, at
(18) Evanston Hospital, 2650 Ridge Avenue, Suite 520A,
(19) Evanston, Illinois, on September 16, 2005, at the hour
(20) of 2:00 o'clock P.M.
(21)
(22)
(23)
(24)

Page 2

(1) P R E S E N T :

(2) MS. DIANA MARTINEZ
(3) (of the Mueller Law Offices, 404 West
Seventh Street, Austin, Texas 78701)

(4) appeared on behalf of the plaintiffs
(5) via telephone:
(6)

(7) MR. ERIC P. SCHOONVELD
(8) (of the firm of Messrs. Hall, Prangle &
Schoonveld, LLC, 225 West Washington
Street, Suite 2700, Chicago, Illinois
60606)

(9) appeared on behalf of the defendants;
(10)

(11) MR. A. SCOTT JOHNSON
(12) (of the firm of Messrs. Johnson & Hanan,
PC, Chase Tower, 100 North Broadway
Avenue, Suite 2750, Oklahoma City,
Oklahoma 73102)
(13) appeared on behalf of the defendants
(14) via telephone.
(15)

(16) A L S O P R E S E N T :

(17) MR. DONALD PETERSON
(18) Trialvision/Deposition.
(19)
(20)
(21)
(22)
(23)
(24)

Page 3

(1) I N D E X

(2)
(3) WITNESS

(4) Dr. Scott Nelson MacGregor
(5) Direct examination by Ms. Martinez Page 4
Cross-examination by Mr. Schoonveld. Page 96
(6) Redirect examination by Ms. Martinez Page 112
(7) EXHIBITS

(8) Deposition Exhibit No. 1 Page 9
(9) Deposition Exhibit No. 2 Page 10
Deposition Exhibit No. 3 Page 10
(10) Deposition Exhibit No. 4 Page 16
Deposition Exhibit No. 5 Page 68
(11)
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(1) MR. PETERSON: Okay. We're on the
(2) video record. The time is 2:26 P.M.
(3) DR. SCOTT NELSON MAC GREGOR
(4) having been first duly sworn, was examined and
(5) testified as follows:
(6) DIRECT EXAMINATION
(7) BY MS. MARTINEZ

(8) Q. Dr. MacGregor, my name is Diana
(9) Martinez, and I work with the Mark Mueller law
(10) office, and I represent the plaintiffs in this
(11) cause of action.
(12) It's my understanding that you have
(13) been retained by the defense in this case to be an
(14) expert witness, is that correct?
(15) A. Yes.
(16) Q. Can you give us your full name?
(17) A. Scott Nelson MacGregor, M-A-C,
(18) G-R-E-G-O-R.
(19) Q. And can -- I realize that some of the
(20) people are attending by telephone today. Can you
(21) tell me where you are physically located at?
(22) A. I am at Evanston Hospital in
(23) Evanston, Illinois.
(24) Q. And are you in your office?

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- (1) A. Well, she had – I would say her –
 (2) the main issue, she did smoke. She admitted to
 (3) use of tobacco, about a half pack per day, which
 (4) can be associated with a greater risk of preterm
 (5) labor, premature rupture of membranes, and smaller
 (6) infants.
 (7) The amount – the likelihood of those
 (8) problems are related to how – what the amount of
 (9) tobacco use is, so somebody who has used two packs
 (10) is greater than a pack and so on, but that would
 (11) be a risk factor.
 (12) Q. Okay. Is a herpes infection a risk
 (13) factor as well?
 (14) A. It can be. Active herpes during
 (15) pregnancy can be associated with a greater risk of
 (16) a preterm delivery, but this was not a preterm
 (17) delivery.
 (18) Q. In kind of conclusion here – a
 (19) couple more things before I conclude. In terms of
 (20) a community hospital like Denton Regional, in 1994
 (21) they did not have an in-house anesthesia there all
 (22) night to be able to immediately start anesthesia,
 (23) is that your understanding?
 (24) A. Yes.

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- (1) Q. Is that – where does that fall on
 (2) the usual or unusual scale of hospitals back at
 (3) that time period?
 (4) A. Actually, that would be more – it
 (5) would be more common that that would be the case.
 (6) If you – even if you look at hospitals that had a
 (7) larger number of deliveries, greater than 1,500
 (8) deliveries, there was a national survey of
 (9) anesthesia in-house, and only 27 percent of
 (10) hospitals performing more than 15,000 – 1,500
 (11) deliveries a year actually had in-house
 (12) anesthesia, so clearly the majority of hospitals
 (13) back in '96 – and I'm sure '94 was at least the
 (14) same – did not have in-house anesthesia.
 (15) Q. And I think you said for larger
 (16) hospitals over 1,500 deliveries it was 27 percent.
 (17) What about smaller hospitals like Denton Regional?
 (18) A. In the smaller hospitals, the 1,000
 (19) to 1,500 deliveries, I think that the percentage
 (20) was 7 percent, and less than 500 it was 2 percent,
 (21) so in centers – it would not be common that a
 (22) center such as Denton in 1994 would have in-house
 (23) anesthesia coverage.
 (24) Q. And despite not having in-house

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- (1) anesthesia coverage, the systems that were set up
 (2) to provide on-call coverage, were those sufficient
 (3) in this case to provide anesthesia and perform the
 (4) Cesarean section as necessary within the standard
 (5) of care?
 (6) A. Yes.
 (7) Q. Is there anything that Nurse Bayer
 (8) could have done to prevent this cord prolapse?
 (9) A. No.
 (10) Q. Did she do anything that she should
 (11) not have done?
 (12) A. No.
 (13) Q. Did the hospital fail to provide any
 (14) resource needed to respond to this obstetrical
 (15) emergency?
 (16) A. No.
 (17) Q. Could this prolapse have been
 (18) predicted or prevented in any way?
 (19) A. No.
 (20) MR. SCHOONVELD: All right. Doctor,
 (21) that's all the questions I have. Thank you
 (22) very much.
 (23) Diana, do you have anything to
 (24) follow up?

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- (1) MS. MARTINEZ: Yes, I do. I have a
 (2) few.
 (3) REDIRECT EXAMINATION
 (4) BY MS. MARTINEZ
 (5) Q. Doctor, earlier you were referencing
 (6) some articles that established the criteria you
 (7) were talking about, the ACOG guidelines?
 (8) A. Correct.
 (9) Q. Have you read all those articles you
 (10) referenced?
 (11) A. You mean all the reference – all the
 (12) ones that are referenced in the ACOG sup?
 (13) Q. Yes.
 (14) A. I haven't read every article that was
 (15) listed in the references there.
 (16) Q. Okay. Is there any evidence in this
 (17) case that Lanette McClure's smoking caused the
 (18) cord prolapse?
 (19) A. No.
 (20) Q. Is there any evidence that Lanette
 (21) McClure's smoking caused the injury to the infant?
 (22) A. No.
 (23) Q. Is there any evidence that the herpes
 (24) that Miss McClure has caused a cord prolapse?

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- (1) **A. No, there's no association between**
 (2) **herpes and cord prolapse.**
 (3) **Q. Is there any evidence that the herpes**
 (4) **caused injury to this infant?**
 (5) **A. Not that I'm aware of.**
 (6) **Q. Was Lanette McClure considered a**
 (7) **high-risk patient?**
 (8) **A. No. I mean, that's poorly – high**
 (9) **risk is kind of poorly defined. She has risk**
 (10) **factors.**
 (11) **Her risk factors would include the**
 (12) **borderline glucose screening and her tobacco use,**
 (13) **but that would not generally constitute a**
 (14) **situation in which a patient should be seeing a**
 (15) **high-risk specialist or a maternal/fetal medicine**
 (16) **specialist.**
 (17) **Q. Just so I'm clear on your testimony,**
 (18) **it is your opinion that the cord prolapse in this**
 (19) **case occurred sometime around the time it was**
 (20) **diagnosed?**
 (21) **A. Yes.**
 (22) **MS. MARTINEZ: That's all my**
 (23) **questions for today. Thank you very much,**
 (24) **doctor.**

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- (1) **MR. SCHOONVELD: Scott, do we need –**
 (2) **hello.**
 (3) **MR. JOHNSON: I'm there.**
 (4) **MR. SCHOONVELD: Are you there?**
 (5) **Anything further from your end?**
 (6) **MR. JOHNSON: No.**
 (7) **MR. SCHOONVELD: All right.**
 (8) **MS. MARTINEZ: That's it.**
 (9) **MR. SCHOONVELD: Doctor, we'll**
 (10) **conclude for today and finalize this**
 (11) **transcript.**
 (12) **MS. MARTINEZ: Thank you very much.**
 (13) **MR. SCHOONVELD: Off the record.**
 (14) **MR. PETERSON: This is the end of the**
 (15) **deposition of Dr. Scott MacGregor, and the**
 (16) **time is 5:14 P.M.**
 (17) **MR. SCHOONVELD: Signature is**
 (18) **reserved.**
 (19) **(Witness excused.)**
 (20)
 (21)
 (22)
 (23)
 (24)

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- (1) **IN THE DISTRICT COURT OF DENTON COUNTY, TEXAS**
 (2) **393rd JUDICIAL DISTRICT**
 (3) **JAMES MC CLURE and LANETTE)**
 (4) **MC CLURE, as parents and next)**
 (5) **friends of JESSICA ELISE)**
 (6) **MC CLURE, a minor,)**
 (7) **Plaintiffs,)**
 (8) **)**
 (9) **-vs-) No. 2003-60081-393**
 (10) **)**
 (11) **DENTON REGIONAL MEDICAL CENTER,)**
 (12) **et al,)**
 (13) **Defendants.)**
 (14) **)**
 (15) **I, DR. SCOTT NELSON MAC GREGOR,**
 (16) **being first duly sworn, on oath say that I am the**
 (17) **deponent in the aforesaid deposition taken on September**
 (18) **16, 2005, and that I have read the foregoing transcript**
 (19) **of my deposition, consisting of Pages 4 through 114**
 (20) **inclusive, taken at the aforesaid time and place, and**
 (21) **that the foregoing is a true and correct transcript of**
 (22) **my testimony so given.**
 (23)
 (24)

Page 116

- (1) **STATE OF ILLINOIS)**
 (2) **) SS:**
 (3) **SUBSCRIBED AND SWORN TO**
 (4) **before me this day**
 (5) **of JUDY A. LANDAUER, a**
 (6) **Certified Shorthand Reporter and Notary Public within**
 (7) **and for the County of Cook and State of Illinois, do**
 (8) **hereby certify that heretofore, to-wit, on the 16th day**
 (9) **of September, A.D. 2005, personally appeared before me**
 (10) **at Suite 520A, Evanston Hospital, 2650 Ridge Avenue,**
 (11) **Evanston, Illinois, DR. SCOTT NELSON MAC GREGOR, a**
 (12) **witness called by the plaintiffs in a certain cause now**
 (13) **pending and undetermined in the District Court of**
 (14) **Denton County, Texas, 393rd Judicial District, wherein**
 (15) **JAMES MC CLURE and LANETTE MC CLURE, as parents**
 (16) **and**
 (17) **next friends of JESSICA ELISE MC CLURE, a minor, are**
 (18) **the plaintiffs and DENTON REGIONAL MEDICAL CENTER**
 (19) **and**
 (20) **LAURA ANN DAVIDSON, M.D. are the defendants.**
 (21) **I further certify that the said**
 (22) **witness, DR. SCOTT NELSON MAC GREGOR, was by me**
 (23) **first**
 (24) **duly sworn to testify the truth, the whole truth, and**
 (25) **nothing but the truth in the cause aforesaid; that the**
 (26) **testimony then given by him was by me reduced to**
 (27) **writing by means of machine shorthand in the presence**

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- (1) computer, and the foregoing is a true and correct
- (2) transcript of the testimony so given by him as
- (3) aforesaid.
- (4) I further certify that after said
- (5) testimony had been so transcribed it was made available
- (6) to the witness for examination.
- (7) I further certify that the taking of
- (8) this deposition was pursuant to notice and that
- (9) there were present at the taking of the deposition
- (10) counsel as hereinbefore set forth.
- (11) I further certify that I am not
- (12) counsel for nor in any way related to any of the
- (13) parties to this suit, nor am I in any way interested in
- (14) the outcome thereof.
- (15) In testimony whereof I have hereunto
- (16) set my hand and affixed my notarial seal this 19th day
- (17) of September, A.D. 2005.
- (18)
- (19)
- (20)
- (21) JUDY A. LANDAUER, CSR
CSR License No. 084-000153
- (22) Notary Public, Cook County, IL
- (23)
- (24)

CONDENSED TRANSCRIPT

ORAL AND VIDEOTAPED DEPOSITION OF

DONALD K. NELMS, M.D.

September 19, 2005

JULIE A. JORDAN & COMPANY

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CAUSE NO. 2003-60081-393

JAMES MCCLURE AND LANETTE) IN THE DISTRICT COURT OF
MCCLURE AS PARENTS AND NEXT)
FRIENDS OF JESSICA ELISE)
MCCLURE, A MINOR,)
Plaintiff,)
VS.) DENTON COUNTY, T E X A S
DENTON REGIONAL MEDICAL)
CENTER; COLUMBIA MEDICAL)
CENTER OF DENTON SUBSIDIARY)
LP f/k/a DENTON REGIONAL)
MEDICAL CENTER, INC.,)
a/f/k/a DENTON REGIONAL)
MEDICAL CENTER; LAURA ANN)
DAVIDSON, M.D., d/b/a WOMEN)
WHO CARE FOR WOMEN,)
Defendants.) 393RD JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
DONALD K. NELMS, M.D.
SEPTEMBER 19, 2005

ORAL AND VIDEOTAPED DEPOSITION OF DONALD K. NELMS,
M.D., produced as a witness at the instance of the
Plaintiffs, and duly sworn, was taken in the
above-styled and -numbered cause on the 19th day of
September, 2005, from 11:13 a.m. to 2:26 p.m., before
Tami L. Slater, CSR in and for the State of Texas,
reported by machine shorthand, at the offices of Cantey
and Hanger, LLP, 801 Cherry Street, Burnett Plaza, Suite
2200, Fort Worth, Texas, pursuant to the Texas Rules of
Civil Procedure and the provisions stated on the record
or attached hereto.

Page 2

APPEARANCES

FOR THE PLAINTIFFS:

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ALSO PRESENT:

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PROCEEDINGS

THE VIDEOGRAPHER: We're on the record to begin the videotaped deposition of Donald Nelms, M.D., in the matter of McClure versus Denton Regional Medical Center, et al. Today's date is September the 19th, year 2005. The time is 12:14 [sic].

If the court reporter could please swear in the witness.

DONALD K. NELMS, M.D.,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. LYONS:

Q. Could you tell us your name, please?

A. Donald Kenneth Nelms.

Q. You are a medical doctor?

A. Yes, sir.

Q. What's your area of specialty, please?

A. I'm a pediatrician with subspecialty certification in neonatal, perinatal medicine, which is neonatology.

Q. Dr. Nelms, my name is Sean Lyons. You and I didn't get a chance to meet, but we've seen each other before there at the Crisp trial there in Denton. I work for Mark Mueller, as you know, and -- and I represent the McClure family and Jessica McClure specifically in

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EXHIBITS

NO.	DESCRIPTION	PAGE
1	Eleven page fax inclusive of fax cover page and various medical records for Lanette and Jessica McClure	7

VIDEOTAPE(S)

1	4
2	89

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this case. You understand that, right?

A. Yes, sir.

Q. And you've been hired as an expert for the defense in this case?

A. I have.

Q. And could you tell me what you've reviewed in preparation for writing your report?

A. Yes, sir. Let me turn to that on my list.

Q. Let me broaden the question. Go ahead and, if you could, please, tell me what medical records you've reviewed in preparation for your report and also in preparation for this deposition here today.

A. Just reading the material going down, I've had medical records on Lanette McClure, prenatal records from 12/16/94 to 12/19/94 and 12/16/94 to 12/19/94 [sic]. I've had records on Jessica McClure from Denton, 12/16 to 12/17/94, and then Cook Children's Hospital records from the 12/17/94 to the 12/22/94. And then I have various other records in the -- that's in that notebook up to July of 2004.

Then I had all of the radiology films from May 2003 to the present from Wise Regional Health System. Cook Children's had 15 films; Texas Scottish Rite Hospital, 4 films; Estes Park Medical Center, 3 films.

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1 Then I had a Plaintiffs' First Amended
2 Petition and Jury Demand. Depositions, I had James
3 McClure, Lanette McClure, Christine Rabenau, Elizabeth
4 Brim, Sarah Gibbons, and Jose Cal -- Calvo deposition.

5 Then I had expert reports and their
6 resumes from Camille DiCost -- Costanzo -- Costanzo;
7 Andre du Plu -- Plessis; Mark Gottesman; Gayle Gross;
8 Cheryl Silver; Barbara True-Driver; Cheryl Sill --
9 Siler; Dan Bagwell; Alex Willingham; the life care plan
10 and cost analysis for Jesse McClure, which was August
11 20th, 2004; Kenneth McCoin medical report; Robert
12 Zimmerman's medical report from August 23rd, 2004.

13 And I have deposition transcriptions from
14 Mark Gottesman, Gayle Gross, Andre du Ple -- Plessis,
15 Barbara True-Driver, Robert Zimmerman; expert report,
16 Ginny Stugart [sic], Kathryn Zidek, Joan Mayfield; and
17 depositions from Barbara Burton, which was September
18 12th, 2005.

19 Then I have ten miscellaneous pages of
20 medical records that I referenced, and that's the
21 material I've reviewed.

22 Q. When you say, "ten miscellaneous pages of
23 medical records," what -- what are you referring to
24 there?

25 A. These were some medical records that were

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1 furnished to me that were loose. They really are
2 records that I've already had, I believe, in all the
3 other above records, but they were sent by separate fax.

4 Q. Have you got those ten miscellaneous pages
5 with you there?

6 A. Yes, I do today.

7 Q. Could you put those together for the court
8 reporter? And we're going to make those Exhibit No. 1
9 to this deposition.

10 A. Okay. I may -- do you want me to pause now or
11 give it to her in a few minutes?

12 Q. Go ahead and pause now and take them out
13 because I want to ask you a couple of questions so you
14 can describe them to me.

15 A. (Witness reviews documents.) We found them.
16 (Deposition Exhibit No. 1 marked.)

17 Q. (BY MR. LYONS) Okay. You have them in front
18 of you there.

19 A. Yes.

20 Q. What -- generally, what do those pages
21 describe?

22 A. They are a -- one describes a -- a -- some
23 laboratory tests, EBV titers on the child. Another one
24 is a Texas Scottish Rite Hospital visit on July 14th,
25 '97. Some other ones are maternal histories. And

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1 that's pretty much it.

2 Q. Okay. And is there anything in particular
3 those ten page haves in common?

4 A. No. They're -- they're just different time
5 periods in the maternal and the child's course since
6 birth.

7 Q. And who provided those to you?

8 A. They were provided by Mr. Johnson, Scott
9 Johnson.

10 Q. And when was that?

11 A. That was on the 16th of September, '05.

12 Q. And did Mr. Johnson explain to you why he was
13 providing those ten pages that you already had in other
14 medical records?

15 A. The one in particular was on the EB virus
16 titer, just to help locate location. That was the
17 purpose there.

18 Q. What's the significance of that?

19 A. It -- the significance of EB titer is that
20 they -- it shows that the child has a proven titer to an
21 EB virus, which is a -- a DNA type of virus, at that
22 particular time.

23 Q. In 1997? When you say, "that particular
24 time," are you saying in July of 1997?

25 A. No. This titer was collected on the 24th of

Page 9

1 October, 2001.

2 Q. Okay. So that was something that was
3 available and in the medical records when you did your
4 report, correct?

5 A. It was, yes.

6 Q. Something that you didn't make specific note
7 of anywhere in your report, correct?

8 A. I did not notice it in my report, that is
9 correct.

10 Q. And Mr. Johnson, defend -- defendant's
11 counsel, has sent this page to you to consider
12 specifically, right?

13 A. I don't know the word "consider." It was just
14 to help me see the titer and its location within the
15 bulk -- the multiple pages of charts that we had.

16 Q. Does this -- does your review of this page
17 specifically alter or modify your opinions in any way?

18 A. It affects the report -- or affects my opinion
19 in the sense that it indicates the child -- this is a
20 type of virus that is in the same class as herpes, and
21 we knew that the child had had intrauterine exposure to
22 herpes. So in that sense, it just documents that the
23 child has shown a conversion to one of -- of a viral
24 illness either from prenatal, natal, or postnatal
25 exposure.

3 (Pages 6 to 9)

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CHANGES AND SIGNATURE

WITNESS NAME: DONALD K. NELMS, M.D. DATE: 9-19-05

PAGE LINE CHANGE REASON

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CAUSE NO. 2003-60081-393
JAMES MCCLURE AND LANETTE) IN THE DISTRICT COURT OF
MCCLURE AS PARENTS AND NEXT)
FRIENDS OF JESSICA ELISE)
MCCLURE, A MINOR,)
Plaintiff,)
VS.) DENTON COUNTY, TEXAS
DENTON REGIONAL MEDICAL)
CENTER; COLUMBIA MEDICAL)
CENTER OF DENTON SUBSIDIARY)
LP f/k/a DENTON REGIONAL)
MEDICAL CENTER, INC.,)
a/f/k/a DENTON REGIONAL)
MEDICAL CENTER; LAURA ANN)
DAVIDSON, M.D., d/b/a WOMEN)
WHO CARE FOR WOMEN,)
Defendants.) 393RD JUDICIAL DISTRICT

REPORTER'S CERTIFICATION
DEPOSITION OF DONALD K. NELMS, M.D.
SEPTEMBER 19, 2005

I, Tami L. Slater, Certified Shorthand Reporter in
and for the State of Texas, hereby certify to the
following:
That the witness, DONALD K. NELMS, M.D., was duly
sworn by the officer and that the transcript of the oral
deposition is a true record of the testimony given by
the witness;
That the deposition transcript was submitted on the
22nd day of September, 2005, to the witness or the
attorney for the witness for examination, signature, and
return to me by the 12th day of OCT, 2005;

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I, DONALD K. NELMS, M.D., have read the foregoing
deposition and hereby affix my signature that same is
true and correct, except as noted above.

DONALD K. NELMS, M.D.

THE STATE OF)
COUNTY OF)

Before me, , on this
day personally appeared DONALD K. NELMS, M.D., known to
me (or proved to me under oath or through
(description of identity card or other document)) to be
the person whose name is subscribed to the foregoing
instrument and acknowledged to me that they executed the
same for the purposes and consideration therein
expressed.

Given under my hand and seal of office this
day of , 2005.

NOTARY PUBLIC IN AND FOR
THE STATE OF

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That the amount of time used by each party at the
deposition is as follows:
Mr. Sean Lyons -- 2:30
Mr. A. Scott Johnson -- 00:27
Mr. Eric P. Schoonveld -- 00:00
That pursuant to information given to the
deposition officer at the time said testimony was taken,
the following includes counsel for all parties of
record:

FOR THE PLAINTIFFS:
Mr. Sean Lyons (Via Telephone)
MUELLER LAW OFFICES
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FOR THE DEFENDANT, DENTON REGIONAL MEDICAL CENTER:
Mr. A. Scott Johnson
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100 North Broadway Avenue, Suite 2750
Oklahoma City, Oklahoma 73102
- and -
Mr. Eric P. Schoonveld
HALL PRANGLE & SCHOONVELD, LLC
225 West Washington Street, Suite 2700
Chicago, Illinois 60606

I further certify that I am neither counsel for,
related to, nor employed by any of the parties in the
action in which this proceeding was taken, and further
that I am not financially or otherwise interested in the
outcome of the action.
Further certification requirements pursuant to Rule
203 of TRCP will be certified to after they have
occurred.

36 (Pages 138 to 141)

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1 Certified to by me this ^{22nd} day of September,
2 2005.

3 
4
5 Tami L. Slater, Texas CSR 7383
6 Expiration Date: 12/31/05
7 JULIE A. JORDAN & COMPANY
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9 4420 Marathon Boulevard
10 Austin, Texas 78756
11 (512) 451-8243 phone
12 (512) 451-7583 fax
13 (877) 851-8243 toll free
14 E-mail: info@jordanreporting.com
15 www.jordanreporting.com

16 FURTHER CERTIFICATION UNDER RULE 203 TRCP
17 The original deposition was/was not returned to the
18 deposition officer on , 2005;
19 If returned, the attached Changes and Signature
20 page contains any changes and the reasons therefor;
21 If returned, the original deposition was delivered
22 to MR. SEAN LYONS, Custodial Attorney;
23 That \$ is the deposition officer's
24 charges to the PLAINTIFFS for preparing the original
25 deposition transcript and any copies of exhibits;
That the deposition was delivered in accordance
with Rule 203.3, and that a copy of this certificate was
served on all parties shown herein on and filed with the
Clerk.

Page 143

1 Certified to by me this day of
2 , 2005.

3
4
5 Tami L. Slater, Texas CSR 7383
6 Expiration Date: 12/31/05
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37 (Pages 142 to 143)