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IN THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA—1ST DISTRICT

AUSTIN, CRAIG AND DEBBIE JOSHNIICK,

Appellants

CASE NO. 1DO4-2018

(Appeal fr. DOAH 03-0985N)

vs.

Florida Birth-Related Neurological
Injury Compensation Association (“NICA”)

Appellee

and

Michael Dawson, David O. Peterfreund, Patricia St. John, MDs;
Bay Area Women’s Care, Inc.; & Morton Plant Hospital Association, Inc.,

Intervenors

WJK
ADMINISTRATIVE
HEARINGS
AUG 24 PM 4:21

APPENDIX TO APPELLANTS’ INITIAL BRIEF

- A-1 Excerpt from Parties’ Pre-Hearing Stipulation, R804-5.
- A-2 Excerpts from Trial Testimony of
 - Kelly Chase T169, 173-7; and
 - Dr. Robert Nahouraii, T345-359, 361-363, 367, 405, 407-409.
- A-3 NICA’s Pamphlet, “*Peace of Mind for an Unexpected Problem*”, PE#3.
- A-4 Excerpts from Labor & Delivery Notes:
 - a. PE#2 /Bates 30 (Debbie Joshnick);
 - b. PE#2/Bates 64;
 - c. PE#24/Bates 356-358;
 - d. PE#25/Bates 50;
 - e. PE#2/Bates 2 (Austin Joshnick).
- A-5 Trial Statement by ALJ, describing Depositions as hearsay--“rumor”, T157-159.
- A-6 Excerpt from April 7, 2004 Final Order, Denying Claim, T942, 960-981.
- A-7 Excerpt from Trial Transcript of H. Kenney Shipley, NICA’s Executive Director, T208-218 & 222-226.
- A-8 Excerpt from Dr. St. John’s 6/27/03 Answers to Interrogatories, R110 & 119.
- A-9 Excerpt from Complaint in Hernandez v. St. John et al. , R1028-1029.
- A-10 Excerpt from 10/29/03 Deposition of Dr. St. John, RE#6/D1, 4-5, 10, 13-28, 30-33, 37, 40 & 42-45.
- A-11 Excerpts from Trial Testimony of:
 - a. Debbie Joshnick, T14, 18, 23-27, 32-35 & 87-89;
 - b. Craig Joshnick, T116-122; and
 - c. Lisa Weisickle, T129-136 & 139.
- A-12 Excerpt from Dr. St. John’s 2/10/04 Deposition in Joshnick v. St. John, et al. (6th Cir.), R1049-1055.

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Possible Rebuttal
Witness as to Times Before Dr.
Duchowny's IME, only
(attorney-client privilege not
waived)

John P. Fenner, Esq.
2840 NW Boca Raton Boulevard - Suite 107
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Legal Fees

2. Respondent:

(a) Michael S. Duchowny, M.D.
3200 S.W. 60 th Court, Suite 302
Miami, FL 33155

Expert Witness

(b) Dr. Patricia St. John
Bay Area Women's Care, Inc.
Fort Harrison Center
1055 S. Ft. Harrison Avenue
Clearwater FL 33756

3. Intervenor:

All witnesses listed by Petitioners.

Concise Statement of Admitted Facts

1. Craig and Debbie Joshnick are the parents and natural guardians of Austin Joshnick.
2. Austin was born a live infant on January 18, 2001, at Morton Plant Hospital, a hospital in Pinellas County. His birth weight was 2,823 grams--exceeding 2,500 grams.
3. None of the Doctors who were present at Austin's birth, were "participating physicians", because they had not paid their \$5,000 assessment to NICA, for 2001.
4. Morton Plant Hospital twice provided timely notice to Craig and Debbie Joshnick, by providing them with NICA's Pamphlet, "Peace of Mind for An Unexpected Problem".
5. Austin was delivered by forceps, facing posterior. Austin's Apgars were 8 at one minute--0 for color, and 9 at five minutes--1 for color.

6. Austin, more likely than not, suffered a subarachnoid hemorrhage during labor or delivery. (Whether the subarachnoid hemorrhage injured the brain at birth, or thereafter, is disputed.)
7. On January 24, 2001, Austin's (first) CT Scan revealed a Subarachnoid Hemorrhage, a Germinal Matrix Hemorrhage, and dilation of his ventricles.
8. Austin reveals evidence of developmental delay in the receptive and expressive language areas. His gross motor skills are intact.

Open Issues of Law

1. Promissory Estoppel.
 - A. Whether the Administrative Law Judge has jurisdiction to decide the question of promissory estoppel, under the Act?
 - B. Do the proved facts support a finding of promissory estoppel?
 - C. Can the Hospital's actions, bind NICA?
2. Birth-related Neurological Injury. What is meant by "**substantially and permanently mentally and physically impaired**", per Fla. Stat. 766.302(2), for this case?
3. What is meant by "**a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation,**" per Fla. Stat. 766.301(2)'s statement of Legislative Intent, and what is the effect of that description in this case? [Petitioners' Issue]
4. Does the fact that Petitioners actively seek NICA coverage, affect how the Act should be applied? [Petitioners' Issue]
5. Has NICA appropriately interpreted the Act? [Petitioners' Issue]

Issues of Fact which Remain to be Litigated

1. Did Petitioners rely on NICA's representations to them, that they would be covered? Was this reliance reasonable? Did they rely to their detriment? [Petitioners' Issue]
2. What is the extent of Austin's bleeds? What caused his bleeds? When did his Germinal Matrix bleed occur? When did the insult(s) leading to his bleeds occur?
3. How severe was the Germinal Matrix bleed? What damage did the bleeds do? [Petitioners' Issue]

1 THE COURT: I don't want to get into that, sir.
 2 MR. FENNER: Be that as it not, I withdraw the
 3 question. No more questions.
 4 THE COURT: Thank you. Miss Chase?
 5 MR. MARTIN: Your Honor, I have no objection to
 6 the witness going forward, and I was in the middle of
 7 some consultation here. I'm going to take a short
 8 break with your permission. He can go ahead and start.
 9 It's not --
 10 THE COURT: I can wait if --
 11 MR. MARTIN: No, that's fine.
 12 THE COURT: Okay. Let's go ahead with the next
 13 witness.
 14 MR. MARTIN: I've heard the witness.
 15 THEREUPON,
 16 KELLY CHASE
 17 was adduced as the deponent herein, and being first duly
 18 sworn upon oath, was questioned and testified as follows:
 19 THE COURT: Please state your name.
 20 THE WITNESS: Kelly Chase.
 21 THE COURT: Thank you. Mr. Fenner?
 22 DIRECT EXAMINATION
 23 BY MR. FENNER:
 24 Q. What's your occupation, Miss Chase?
 25 A. I'm a speech language pathologist.

Kelly Chase
 A-2 ~~WMA~~

1 THE COURT: Okay. Is that all right, Mr. Martin?

2 MR. MARTIN: Fine, Your Honor.

3 THE COURT: Okay.

4 BY MR. FENNER:

5 Q. How often do you see Austin?

6 A. I see him two times per week for half-an-hour
7 sessions.

8 Q. And this is since September?

9 A. Yes.

10 Q. So has Austin made progress?

11 A. He has, yes.

12 Q. What's the current size of his vocabulary?

13 A. I listed, just in my own jottings, about 50 words
14 that I know of just written from my notes and what I've
15 observed. So I would say anywhere from 50 to 75 words.

16 Q. Okay. What is the -- what is the current
17 inventory of words of a -- what is the typical average
18 inventory of words for a three-year-old?

19 A. Approximately, a three-year-old should have about
20 450 words in his vocabulary.

21 Q. So your professional opinion is that Austin has
22 approximately one-sixth of a normal vocabulary?

23 A. Yes.

24 Q. Okay. Is vocabulary an indication of
25 intelligence?

A-22

1 A. No.

2 Q. Can you describe, briefly, the process where
3 Austin acquires your --

4 A. Okay. Basically, what I do, I take toys that will
5 stimulate his vocabulary, such as animal toys, car toys,
6 train toys, anything to get him to -- to excite him and to
7 get him to talk. Basically, get on the floor with him and
8 have the toys and say, Austin, make the choo-choo go and
9 make the car crash. I kind of -- have the cow say moo,
10 pretty basic words that I use with him, just hoping that
11 it's going into his system and that he'll some day repeat
12 what I'm saying.

13 Q. Okay. Does he -- do you then work at him with
14 repeating the word, then?

15 A. Yes. It's constant repetition of words.

16 Q. Okay. And does he have some problems with his
17 hearing?

18 A. Not that I know of, no. He can hear what I'm
19 saying. He can hear sounds.

20 Q. Can he -- I guess the question's a little
21 different. He can hear sounds. Can he hear words,
22 typically?

23 A. Yes.

24 Q. Okay. Can he recognize them as words?

25 A. I don't know what he hears in his head.

A-2-3

1 Q. Can he make -- in other words, as far as you can
2 tell, does he easily make the connection between a word and
3 a concept?

4 A. No, not all the time.

5 Q. And are these concepts difficult for a
6 three-year-old -- an average three-year-old to comprehend?

7 A. No, concepts like colors and numbers, animal
8 sounds. They're not easy for Austin to understand.
9 However, a normal developing three-year-old easily gets
10 those concepts and uses them frequently and readily.

11 Q. So there's a question as to either the reception
12 of these sounds or their integration, to go from word to
13 idea? Is that a fair statement?

14 A. Yes. He has delayed receptive language skills for
15 a child his age.

16 Q. Does that kind of delay in receptive skills affect
17 his ability to talk?

18 A. Yes.

19 Q. In short, so a -- it's difficult to say it if he
20 can't hear it?

21 A. Right. If you don't understand what's coming in,
22 how can you say what you mean with those words?

23 Q. Have you worked much with Austin about the word
24 "cookie"?

25 A. I haven't used that word with Austin, no.

1 Q. Does Austin have any motor problems connected with
2 his mouth and tongue?

3 A. That is a difficult question for me to answer. I
4 talked about this during the deposition. Because in order
5 for me to know these things, he would have to follow
6 commands such as stick out your tongue, smile, make a fish
7 face, puff out your cheeks, things like that, that would
8 show me the strength of his articulators of his muscles. So
9 I'm not sure how Austin is with that because he doesn't
10 follow the commands that I have him try to follow.

11 Q. Okay. Can you tell from his speech that he may
12 be --

13 A. He does have a moderate articulation delay. And
14 the patterns that he shows are called fronting, which means
15 that his tongue is too far forward on some particular
16 sounds, such as for Kelly, for my name, he says Telly. So
17 he makes a T sound for the K sound, and for the G sound, he
18 makes a D sound. So his tongue is not in the appropriate
19 place to make these certain sounds.

20 And also, on sounds that are called blends, two
21 consonants together like F-L for "flower," he can only say
22 one of those sounds like "fower" or "lower," or instead of
23 "truck," he would say "ruck."

24 Q. Have you corrected him on this or --

25 A. That's not the issue that's most concerning right

1 now to work on. His receptive and expressive skills are
2 more important to work on than his articulation right now.

3 Q. Okay. But he does have some problems with
4 articulation that would suggest a motor deficit, a related
5 motor deficit?

6 A. Yes, yes.

7 Q. For example, does he mispronounce words
8 consistently?

9 A. Yes. My name is always Telly. He knows my name,
10 but he cannot say it properly.

11 Q. So that would always be a question, then, of the
12 tongue being in the wrong place or perhaps an inability to
13 put the tongue in the right place --

14 A. Correct.

15 Q. -- in connection with that. All right. When you
16 had your deposition, had you had a chance to see
17 Dr. Nahouraii's reports?

18 A. No, I had not.

19 Q. Okay. Have you had a chance to look at them since
20 then?

21 A. Yes. I read a deposition, I believe.

22 Q. Okay. Now, Dr. Nahouraii talks about agnosia,
23 which he describes briefly as being -- as word deafness.
24 Would the concept of word deafness be a good metaphor for
25 Austin's problems?

A-2-6

1 MR. WHITEMORE: Thank you.

2 THE COURT: Yes, sir.

3 BY MR. FENNER:

4 Q. In your professional opinion, what is causing that
5 density there?

6 A. This is resolving subarachnoid hemorrhage.

7 Q. That's blood, in other words?

8 A. Yes, sir.

9 Q. Okay. All right. We've heard testimony from
10 Dr. Duchowny that, although there was blood in contact with
11 the brain, that it had no effect. We've also heard
12 testimony from Dr. Gatewood that there were some hypoxic
13 incidents and a general hypoxia, lowered oxygen, not
14 catastrophic deprivation of oxygen, but lower oxygen that
15 weakened the cell walls of the newborn. Is that your
16 understanding, that hypoxia can weaken cell walls?

17 A. That starts the cascade. That's what I talked
18 about in the deposition before, but there are other
19 mechanisms after that.

20 Q. Okay. Well, can you describe what happens
21 between -- when that blood contacts the brain tissue.

22 A. Yes, sir. I would agree that there would be not
23 an issue that the blood itself is causing a problem if it's
24 not in the brain, but the best analogy that I can give is
25 that when you have a migraine headache, the brain itself

Dr. Duchowny

A-2-B

1 doesn't feel pain, but the brain lining is what's irritated
2 and inflamed.

3 And so that degree of blood itself, while it's not
4 in the brain, it's affecting the lining of the brain and
5 inflaming the lining of the brain. And I could draw a
6 picture if that would be all right with you, Your Honor,
7 because I figure that would probably be the easiest way.

8 What I testified in deposition was that as you
9 have inflammation -- and there is some length of hypoxia,
10 then death of the cell leads to release of these chemicals.
11 And I told the attorneys that there were better ways to
12 explain it than I could explain. Release of chemicals
13 called nitric oxide and superoxide mutase. These are
14 chemicals that are toxic to the cells.

15 What happens is that if we -- if this is the
16 brain, the blood itself is not in the brain, but it
17 interdigitates and coats the lining and causes inflammation
18 of the surface of the brain itself. The brain lining is
19 broken down into the categories. Dura, arachnoid, and pia.
20 So this blood, if we're talking about the blood in the left
21 temporal area, by definition it's below the arachnoid level.
22 So now it's irritating the surface of the brain, causing
23 inflammation. What happens is the cell itself has gates,
24 and these gates allow in sodium, salt and water.

25 When the cell lining gets inflamed, these gates

A-2-B-2

1 don't open and close as they should. These gates have a
2 mechanism where if enough salt and water comes in, then the
3 gate closes, inflammation prevents that gate from closing,
4 and then too much salt and water flow in, the cell starts to
5 swell, and that's what causes the cell to die. Somewhere in
6 this mechanism -- again, I said I wasn't a chemist.
7 Somewhere these -- when the cell dies, that's what releases
8 nitric oxide, superoxide mutase and other terms called free
9 radicals.

10 The key, I think, is that since it's not blood in
11 the brain, it's blood that's irritating the lining. In
12 migraine inflammation, we know the migraine can affect the
13 brain itself. So we know as the blood is irritating the
14 lining -- and it takes a while for that to happen; it takes
15 24 to 48 hours -- that this inflammation is what's causing
16 the gates to not work correctly, the cell to swell and
17 release of these free radicals. That's how I would explain
18 that.

19 Q. And this release of free radicals and nitric oxide
20 does further damage?

21 A. That's what's postulated by chemists and
22 biochemists. That's what's toxic to the brain. Perhaps the
23 hypoxia starts the trigger that's the beginning of the
24 cascade, but it's those chemicals that are harmful to the
25 cell.

A-2-B-3

1 Q. And you referred to this as a cascade of events,
2 one leading to the other?

3 A. Yes, sir.

4 Q. And so in your professional opinion that this
5 blood over time did damage to that area of the brain or
6 through its by-product and irritation -- through the
7 mechanism you described, did it do an injury to the brain?

8 A. It did. Again, as it started the beginning of a
9 cascade.

10 Q. What is the area of the brain that it did injury
11 to?

12 A. Predominantly if you look at the study, left
13 temple, a little of the frontal, also, but predominantly
14 left at the temporal lobe. Not exclusively, though.

15 Q. What are those areas known for?

16 A. Well, the vast majority of people are right-handed
17 and so the left temporal lobe is involved with speech and
18 language. Left temporal lobe has some aspect of memory,
19 too, although God gave us memory on the other side, also.
20 Excuse me. Left temporal lobe will have movement of the
21 opposite side of the body, and then the left temporal lobe
22 will bring sensation, have a strip where sensation from the
23 right side of the body will come up.

24 Q. Are those nerves -- are those -- that part of the
25 brain crucial to speech and language?

A-2-B-4

1 A. Yes.

2 Q. Okay. Are there some motor nerves that run
3 through that part of brain as well?

4 A. Yes, sir.

5 Q. Okay. What would those be?

6 A. The -- if we look at the scan, if we're looking at
7 the brain, the motor strip would be a very thin strip that
8 runs down the brain here, and the strip of sensation, we
9 call it a sensory strip, bringing information up from the
10 opposite side of the body, would be a little bit behind,
11 that right about here. I can't tell exactly because, as we
12 say, the brain is not a road map. We don't know exactly
13 where those are.

14 Q. Is it -- okay. Is speech a combination of mental
15 activity and motor activity?

16 A. Yes, sir. It --

17 Q. And the two have to more or less work together for
18 intelligibility?

19 A. We call that motor planning, the ability to think
20 out what you want to say and then plan the act of moving
21 your mouth and moving your lips to give a sentence.

22 Q. So some of the nerves that go to the mouth and the
23 tongue, for example, will run through this part of brain?

24 A. Yes, sir.

25 Q. Like a telephone line, that those are the

A-2-B-5

1 telephone lines to move the mouth?

2 A. In a rough sense, yes, sir.

3 Q. So if this part of the brain was injured, then it
4 would be a reasonable assumption to make that possibly some
5 of the motor -- some of the motor nerves that are associated
6 with speech and language would also be injured?

7 A. Would also be affected. I think, that's a
8 reasonable assumption.

9 Q. In your review of Austin Joshnick's speech and
10 language teacher's notes and -- have you discussed anything
11 with her?

12 A. I've reviewed her notes. I reviewed some of her
13 data, and I've also discussed the case with her. Yes, sir.

14 Q. Okay. Have you noticed that if Austin has any
15 motor deficiencies in connection with his speech?

16 A. Well, her observations, which are good ones, are
17 that he has difficulty, not only in moving his tongue, but
18 in trying to coordinate how he's thinking of planning his
19 sentences, which are not even two words yet, but trying to
20 plan the sentence and to get his tongue and his mouth to
21 form the correct words.

22 What -- I think that's one point. The other point
23 is that when we look at his testing data, his -- as we know,
24 kids generally learn and they are -- have the receptive
25 skills. They understand us before they talk. And so her

A-2-B-6

1 Q. Actually, since we're not talking about Austin,
2 we're talking something else --

3 A. It would help you to know what's going on with
4 Austin's brain.

5 MR. FENNER: For your entertainment, I will now
6 trip over the wires. I'm showing you another film.

7 This is Exhibit 15: And that's No. 10.

8 BY MR. FENNER:

9 Q. When you examine this film in somewhat smaller
10 form, did you see any blood in the ventricles?

11 A. I see -- in the frontal horn on the left, I see
12 blood around the basal ganglia extending into the left
13 frontal horn, which is part of the ventricular system, yes,
14 sir.

15 THE COURT: Okay. This is Petitioner's 15.

16 MR. FENNER: Petitioner's 15, right.

17 BY MR. FENNER:

18 Q. But that wasn't so evident on a much
19 smaller -- isn't it true that you didn't see any blood in
20 the ventricles the first time around when you had the
21 mini --

22 A. That's correct. There was also some concern about
23 blood in other areas, which I haven't seen. There's the
24 ventricular system. There's also blood in the subarachnoid
25 space, which is more evident on this image. The film we

A-2-B-7

1 just viewed is blood as it starts to consolidate. So that
2 hasn't changed; that's still subarachnoid blood.

3 Q. So this shows a greater infiltration of other
4 areas?

5 A. This shows the blood -- this shows that it's
6 interdigitating, as I drew the picture before, within the
7 subarachnoid spaces extending from the frontal area almost
8 to the end of the temporal lobe back here.

9 THE COURT: Talking between the membranes?

10 THE WITNESS: Yes, sir.

11 BY MR. FENNER:

12 Q. Is blood in the ventricles and enlarged ventricles
13 generally associated with developmental delay?

14 A. It can be, but again, it would be inconsistent
15 with my deposition. I still think the ventricles are large.
16 I don't think they're enlarged. I do appreciate that blood
17 in that aspect of the frontal horn, but I don't think that
18 particular ventricle system is enlarged.

19 Q. So you don't see this as being a clinical
20 significant finding?

21 A. I think that most of my focus has been on the
22 extensive subarachnoid blood, that's correct.

23 Q. Also, do you have any opinion on what happens to
24 one of these after six days? I guess, the germinal matrix
25 bleed that it might be affected by the passage of six days

A-2-B-8

1 since the birth?

2 A. It's possible that it was larger, and it's
3 something that became smaller, but I think we're probably
4 speculating there.

5 Q. In medical terminology is the word "substantial" a
6 generally recognized medical term?

7 A. In the context of impairment?

8 Q. In the context of impairment.

9 A. Yes.

10 Q. Okay. Then within a reasonable level of medical
11 certainty, do Austin's problems that were at least caused by
12 his bleeds, do they leave him substantially impaired?

13 A. Absolutely.

14 Q. All right. And does the impairment have both
15 physical and mental elements to it?

16 A. It does.

17 MR. FENNER: No more questions.

18 CROSS-EXAMINATION

19 BY MR. MARTIN:

20 Q. Doctor, my name is Jim Martin. We met briefly
21 telephonically. I didn't go to Charlotte. Let me see if I
22 understand your testimony. First, based upon your
23 education, background, training and experience and a review
24 of Austin's records, including the CT scans and the notes
25 from his speech pathologist or speech therapist, do you have

A-2-B-9

1 physical exam, for the most part, that was important in my
2 mind was a small degree of low muscle tone. But since we
3 know that the ability to coordinate speech and language
4 involves moving his lips and tongue, that, in my opinion, is
5 a physical component.

6 Q. And so there's both a physical and a mental
7 component which has resulted in a substantial injury to him?

8 A. Yes, sir.

9 Q. Based on your training and experience and your
10 examination of him, do you have an opinion within a
11 reasonable degree of medical probability based on what
12 evidence you have today as to whether or not, more likely
13 than not, that will be permanent?

14 A. He will -- he will improve, but he will never
15 close the gap as compared to other children. So it will be
16 permanent, sir.

17 MR. MARTIN: I have no other questions.

18 CROSS-EXAMINATION

19 BY MR. ROSIN:

20 Q. Good afternoon, Doctor.

21 A. How are you?

22 Q. On November 4th, you dictated a report in this
23 matter; is that correct? On November 4th, you issued this
24 report?

25 A. The preliminary part?

A-2-B-10

1 to -- you asked me if that was in Austin, and I said no. I
2 just wanted to hear a generalized. But for Austin, would
3 that be any different?

4 A. We don't know. Again, if we're concerned about
5 clumsiness, if he has something to where his tone is low.
6 For instance, we know that from exam, then it is possible
7 that the cerebellum lumbar is -- I guess I'm speculating
8 here, which you probably don't want me to do. It's possible
9 that the cerebellum is not the same in Austin as it would be
10 in us, and that could somehow be coordinated into speech.
11 So it's not too far off to make that connection, but I don't
12 know for sure.

13 Q. And is there any other lobes that were damaged in
14 reviewing those CT scans?

15 A. Well, actually -- which I didn't comment on, if
16 you look on the left side where the subarachnoid hemorrhage
17 was, this amount of black fluid here, which is a cleft, is
18 larger on this side. This cleft is larger here than it is
19 on the right. So that tells us that as the blood was
20 getting absorbed and as the cells broke down, brain tissue
21 got absorbed, too. And that is not because he is tilted in
22 the scan because every other fluid-filled sack is about the
23 same size. So this tells us here that where the blood was,
24 the hemorrhage was, brain tissue got absorbed and is gone
25 also.

A-2-B-11

1 it would be even more likely that he fits within the
2 autistic spectrum disorder?

3 A. Yes.

4 Q. Thank you, Doctor. I appreciate your time.

5 A. Yes, sir.

6 THE COURT: Redirect? Mr. Martin? Anything
7 further?

8 MR. MARTIN: Go ahead.

9 REDIRECT EXAMINATION

10 BY MR. FENNER:

11 Q. The brain tissue that was shown to be absorbed on
12 April 11th 2001, is that brain tissue ever coming back?

13 A. No, sir.

14 Q. And when is the time after birth when there's the
15 most activity in the growth of the brain?

16 A. First year of life or two. But first year or so.

17 Q. And that's particularly extreme in the first
18 couple of weeks of life?

19 A. Yeah, it's the -- it's the concept of brain
20 plasticity, which you've probably already heard where the
21 brain -- other areas that are damaged, good areas take over.
22 Very important that first year or so.

23 Q. Okay. Now, a generalized atrophy of the brain, is
24 that a -- is that usually associated with a major loss of
25 oxygen?

A-2-B-12

1 A. It can be. A generalized atrophy would be
2 something that was a diffuse or a global insult to the
3 brain.

4 Q. You're saying there's a focused area of atrophy
5 where the bleed was?

6 A. Absolutely.

7 Q. Okay. What is a co-morbid disorder?

8 A. A co-morbid disorder -- co-morbidity, two things
9 that run together, a higher likelihood of running together
10 than either one of them alone.

11 Q. And would a severe disruption of language -- is it
12 fair to say that Austin Joshnick has, as a result of the
13 subarachnoid bleed, a severe disruption of his language?

14 A. Of his expressive language, as I said.

15 Q. And his reception language as well?

16 A. Moderate, but altogether moderate to severe, yes.

17 Q. With treatment, you said, in your medical opinion,
18 he will probably never catch up?

19 A. My opinion was that we always want children to
20 close the gap. And I thought that he would never completely
21 close the gap but that he would get better, his language
22 skills and social skills, too.

23 Q. And without treatment?

24 A. He'll regress. He'll go backwards. That's been
25 documented in other children. He'll have language disorder.

A-2-B-13

1 Q. Without treatment, will he ever be able to go to a
2 mainstream school?

3 A. No.

4 Q. Will he ever be able to go to school at all?

5 A. Well, right now, as I see him, I think because of
6 the issues regarding his social skills and some of the
7 behavioral issues -- I know he's only three, but his ability
8 to sit makes that a little hard, makes that difficult.
9 Things could change in two or three years, but I think that
10 will be pretty hard right now.

11 Q. Would he be able to hold down a normal job?

12 A. Well, I'd have to predict, I guess, 15 years from
13 now --

14 Q. Without treatment?

15 A. -- but without treatment, no, that wouldn't be
16 possible. With treatment, I think it's reasonable he'd be
17 able to function and be happy.

18 Q. How much of your income comes from forensic work,
19 from testifying being an expert in trials?

20 A. Six percent.

21 Q. And approximately what's the proportion between
22 plaintiffs and defendants?

23 A. It's two-thirds. Two-thirds plaintiff, one-third
24 defense.

25 Q. So approximately six percent of your total income

A-2-B-14

Traveler Health Insurance Association, 52 South Florida
Avenue, Suite 100, Fort Lauderdale, FL 33301, Florida
Statute, Chapter 766, Florida Statutes, NICA
policyholders.



NICAN

Florida Birth-Related Neurological Injury
Compensation Act
The statute provides for
financial assistance for
children born with
neurological injuries who
are eligible for
compensation.

Section 766.301-766.316, Florida Statutes, ("NICA law") pro-
vides rights and remedies for certain birth-related neurological
injuries and is an exclusive remedy. This brochure is prepared in
accordance with the mandate of Section 766.316, Florida
Statutes. A copy of the complete statute is available free of
charge to completely inform patients of their rights and limita-
tions under the application provisions of Florida law. Since
1989, numerous court cases have interpreted the NICA law,
clarifying legislative intent.

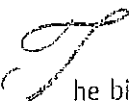
PEACE OF MIND For An Unexpected Problem



Florida Birth-Related Neurological Injury Compensation Act



NICAN



The birth of a baby is an exciting and happy time. You have every reason to expect that the birth will be normal and that both mother and child will go home healthy and happy.

Unfortunately, despite the skill and dedication of doctors and hospitals, complications during birth sometimes occur. Perhaps the worst complication is one which results in damage to the newborn's nervous system – called a “neurological injury”. Such an injury may be catastrophic, physically, financially and emotionally.

In an effort to deal with this serious problem, the Florida Legislature, in 1988, passed a law which created a Plan that offers an alternative to lengthy malpractice litigation processes brought about when a child suffers a qualifying neurological injury at birth. The law created the Florida Birth-Related Neurological Injury Compensation Association (NICA).

Exclusive Remedy

The law provides that awards under the Plan are exclusive. This means that if an injury is covered by the Plan, the child and its family are not entitled to compensation through malpractice lawsuits.

Criteria and Coverage

Birth-related neurological injuries have been defined as an injury to the spinal cord or brain of a live-born infant weighing at least 2500 grams at birth. In the case of multiple gestation, the live birth weight is 2000 grams for each infant. The injury must have been caused by oxygen deprivation or mechanical injury, which occurred in the course of labor, delivery or resuscitation in the immediate post delivery period in a hospital. Only hospital births are covered.

The injury must have rendered the infant permanently and substantially mentally and physically impaired. The legislation does not apply to genetic or congenital abnor-

malities. Only injuries to infants delivered by participating physicians, as defined in s. 766.302(7),

Florida Statutes, are covered by the Plan.



Compensation

Compensation may be provided for the following:

- Actual expenses for necessary and reasonable care, services, drugs, equipment, facilities and travel, excluding expenses that can be compensated by state or federal government or by private insurers;
- In addition, an award, not to exceed \$100,000 to the infant's parents or guardians.
- Funeral expenses are authorized up to \$1,500.
- Reasonable expenses for filing the claim, including attorney's fees.

NICA is one of only two (2) such programs in the nation, and is devoted to managing a fund that provides compensation to parents whose child may suffer a qualifying birth-related neurological injury. The Plan takes the “No-Fault” approach for all parties involved. This means that no costly litigation is required and the parents of a child qualifying under the law who file a claim with the Division of Administrative Hearings may have all actual expenses for medical and hospital care paid by the Plan.

You are eligible for this protection if your doctor is a participating physician in the NICA Plan. If your doctor is a participating physician, that means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law. If your health care provider has provided you with a copy of this informational form, your health care provider is placing you on notice that one or more physician(s) at your health care provider participates in the NICA Plan.

MORTON PLANT MEASE HEALTH CARE

NOTE PROGRESS OF CASE, COMPLICATIONS, CONSULTATIONS, CHANGE IN DIAGNOSIS, CONDITION ON DISCHARGE, INSTRUCTIONS TO PATIENT.

11/1/01
0208 D/w pt concern over possible stone - urology
to see - spoke to Dr. Klammer. He requested renal
panel & blood test today.
Hx - severe uterine irritability
Crx - Deprenol
FHT - 160 c. per LTV & duh

A/p urology to see

11/1/01
1200 Pt went to % abd pain midline - which is relieved
episodic intermittently - demigland pain
PE: abd mild perid. tenderness - & NOT of flange
tenderness. +/- sigmoidal tenderness
FHT - 160-170 c. per LTV & duh, occasional pulse
Crx - 1/60/1-3 cephalexin

A/ abd pain - ? etiology - doubt kidney stone or UTI @ present
Will repeat UA & send specimen -

▷ mid right of fetal tachycardia (although variability present)
and abdominal pain & severe irritability -
▷ must consider possible abruptions in chorionvilli
- WBC → Wnt -

▷ D/w pt alone differential & decision made to proceed
c. amnio to evaluate PM/infection.
BPP - 8/8 score pending AFI
2 for NRST

11/1/01
1830 Amnio performed - Dr. H. Pohl assisting under aseptic
technique & one single pass ~ 15cc of bloody fluid
removed through 22 gauge spinal needle under sonographic
visualization. (Dr) In light of large
blood content, will send fluid for
gram stain, Kleinsauer, Bacter. to evaluate
source of blood - Will await results

90383610 481311
JOSHNIK, DEBBIE A S 1A
07/29/65 F 35 01/17/01 OBS
PETERFREUND, DAVID

000030"

PROGRESS RECORD

MORTON PLANT MEASE HEALTH CARE

DATE	TIME	PATIENT FOCUS	NOTES
4/17/01	1015		Orders received for CS Q1h 4u Reg insulin SQ D5 1/2 NS IVPB @ 100cc/h
	1030		Mr. Dawson in. - reviewed chart - notified urologist and seen all lab work from 8940
1335	1110	▷	First attn informed of all lab results medicated for abd. & back discomfort 1340 US - needs to be held to trace correct fetus - consulted Dr. Dawson see notes. Resting until 1430 to US via Prehosp 1500 Returned from US. - to bath room - Upset. No pain - continues to be non- specific about site. Dr. Dawson notified of US results & pain, & contractions ▷ Pl. states they had it, they need to do ▷ C-section. Numerous times to Dr. Dawson ▷ stated She wants the baby out - when ▷ informed of problems of prematurity ▷ She looks away.
1515			Seen by urologist - Dr. Dawson notified of pain & temp of 100. No new orders
1716			US by Dr. Dawson
1800		▷	Mr. St. John here. Dr. Dawson performed Amnio
1850			Amniotic fluid sent for tests

FOCUS:

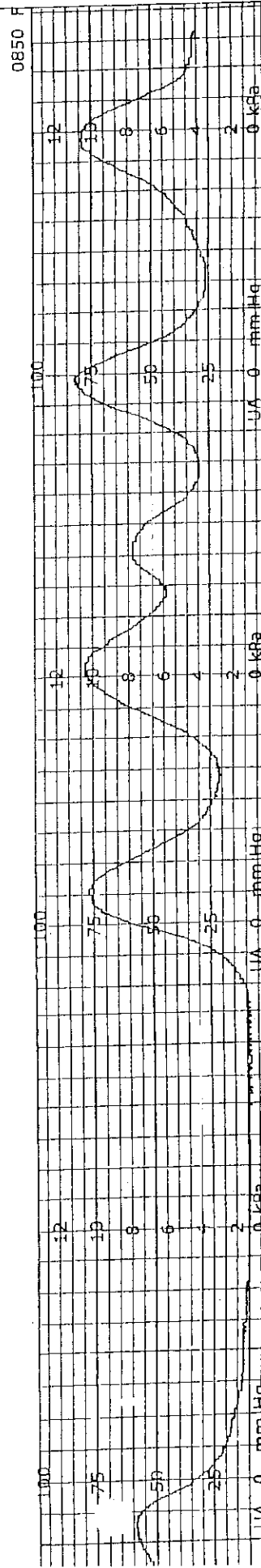
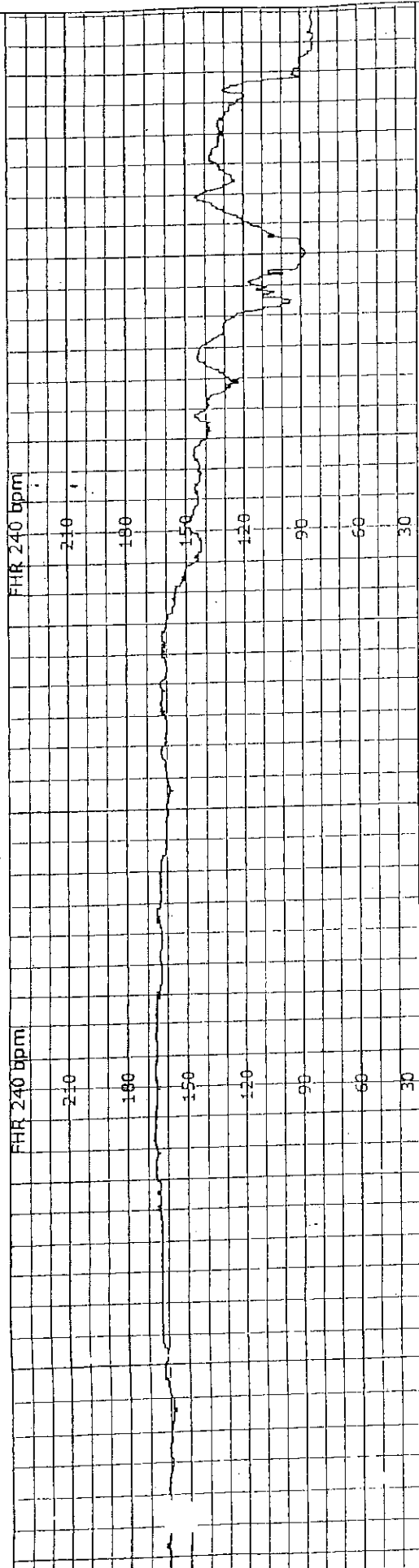
- A current patient concern or behavior
- A significant event in the patient's therapy
- A significant change in the patient status or behavior
- A transfer summary
- A problem number

PATIENT PROGRESS RECORD

A-4-6

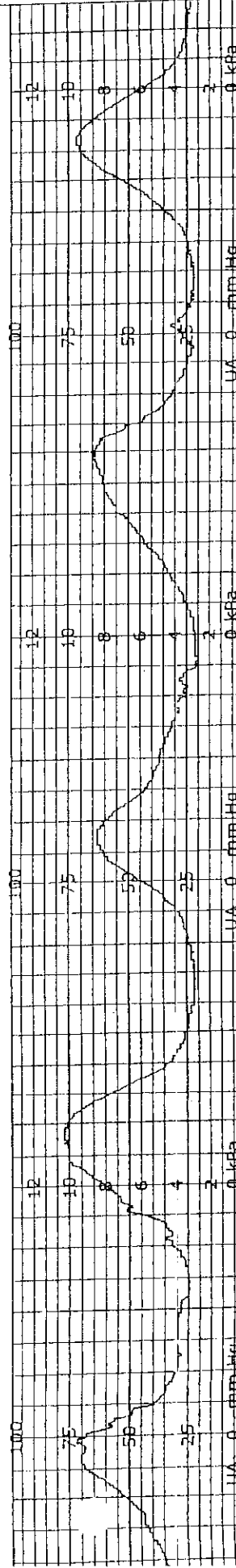
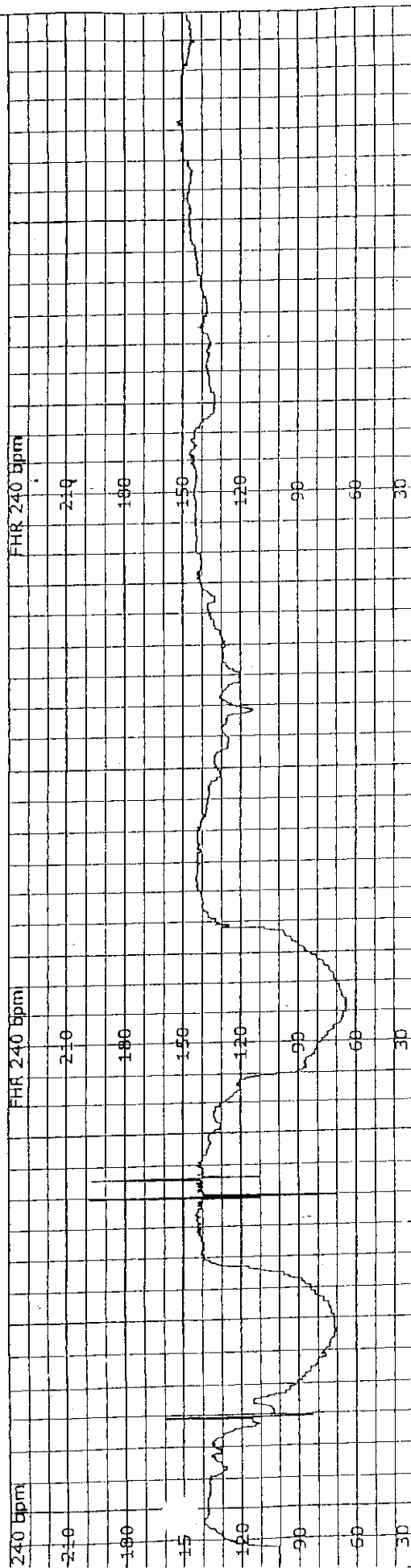
000064

01/18/01 08:50



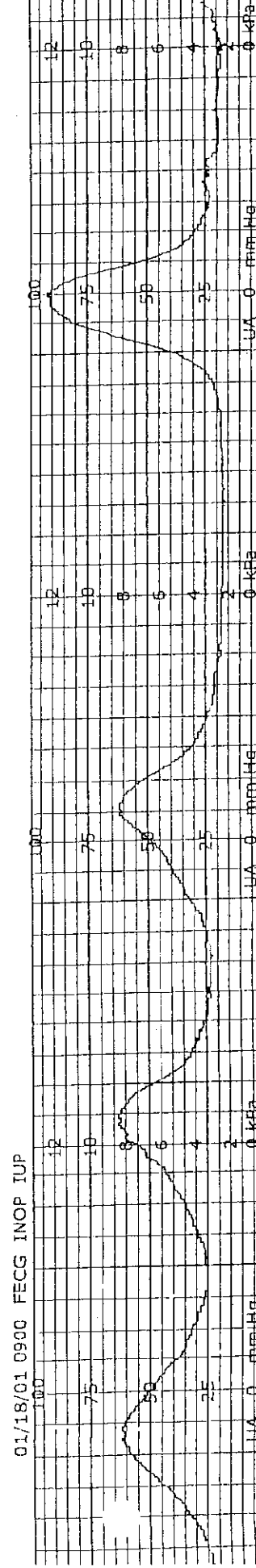
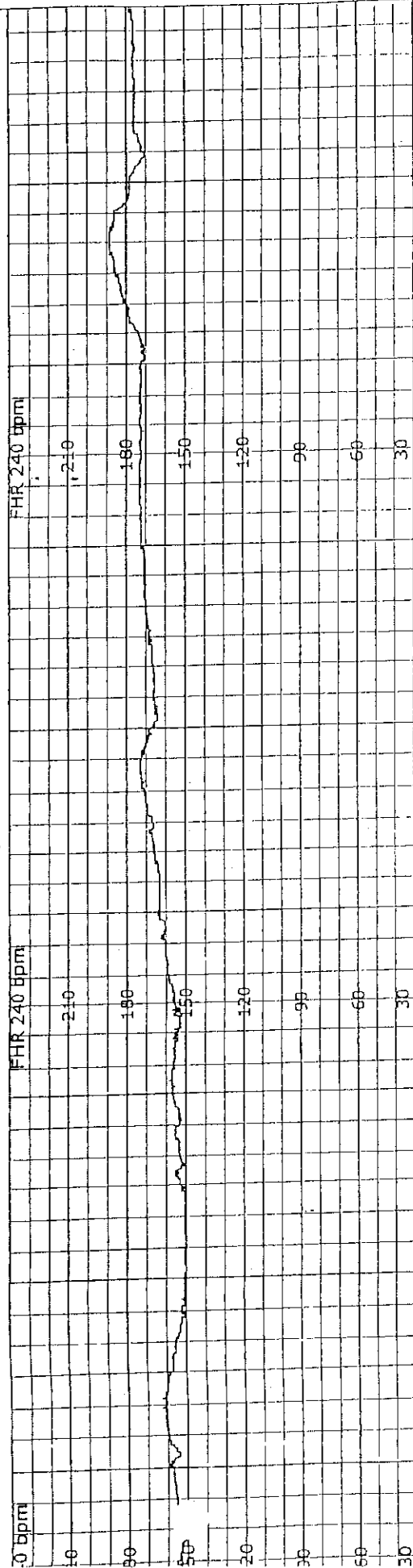
A-4-c
000356

01/18/01 08:59



000357
A-4-
C-2

01/18/01 09:07



000358-3
A-4-c

Date Time	Dil of cervix	Station	Efface- ment	Progress Notes
0718	2cm			AROM clear fluid & bloody particles. IUC placed per Dr Dawson. — Sy
0745				Pt do more pain, more in pelvic pressure anesthesia called for redose — Sy
0750				Shirley Holmquist RN redosed epidural. — Sy
0830	4			Dr St John @ bedside. SE. — Sy
0850			▷	Variables < 90's x 20 second, contractions less than 1 min P. turn off. Pt turned to left side. O2 sat/mad. Dr St John
0905	6-7			Dr St John @ bedside VE done Pt c/o pressure — Sy
0908	7-8cm			Pt c/o lot of pressure VE done per Dr St John — Sy
0915				Pharynx started per Dr St John @ 4 min — Sy
0935	9	+1	C	SE per Dr St John. — Sy
0950				anesthesia here for redose. — Sy
1010				Dr St John notified of blood sugar. Order for insulin drip received. — Sy
1040	ant exp	+1	C	Pt c/o more pressure. — Sy Had pt push; cervix not reduced. Pt turned to (R) lateral.
1110	C	+2	C	Dr St John informed of progress. — Sy Pushing started. — Sy

#25

A-4-d

000050



Morton Plant Mease Health Care
323 Jeffords Street
Clearwater Beach, FL



Patient Coding Summary

Patient Name JOSHNIK, BABY BOY		Sex MALE	Birthdate 01/18/01	Age 0	Medical Record Number 000977079	Account Number 0090384349
Admit Date 01/18/01 12:46 PM		Discharge Date 01/26/01 11:20 AM		LOS 8	Disposition SHORT TERM GENERAL HOSPITAL	
Financial Class Commercial HMO						
Attending Physician MCKAY, VICTOR				Coder ANGELA TAYLOR		
MDC Code 015		MDC Text NEWBORNS & OTHER NEONATES WITH CONDITION ORIGINATING IN PERINATAL PERIOD				
DRG Code 385		DRG Text NEONATES, DIED OR TRANSFERRED TO ANOTHER ACUTE CARE FACILITY				
HCFA Weight 1.3767		Average LOS 1.8000		Geometric Mean LOS 1.8000		Estimated Reimbursement 7169.23
Admit DX		Admit Diagnosis Text				
V3000		SINGLE LIVEBORN, BORN IN HOSPITAL				
Prin. DX		Principal Diagnosis Text				
7722		SUBARACHNOID HEMORRHAGE OF NEWBORN				
DX Code		Secondary Diagnosis Text				
7670 7742 7706 7750 76519 V290		SUBDURAL & CEREBRAL HEMORRHAGE DUE TO BIRTH TRAUMA OR INTRAPARTUM ANOXIA/HYPOXIA NEONATAL JAUNDICE ASSOCIATED WITH PRETERM DELIVERY TRANSITORY TACHYPNEA OF NEWBORN SYNDROME OF 'INFANT OF A DIABETIC MOTHER' OTHER PRETERM INFANTS, 2500 OR MORE GRAMS OBSERVATION AND EVALUATION OF NEWBORNS FOR SUSPECTED INFECTIOUS CONDITION NOT FOUND				
RX Code		Procedure Text		Date		Surgeon
9983 640		PHOTOTHERAPY CIRCUMCISION		01/24/01 - 01/24/01		MCKAY, VICTOR MCKAY, VICTOR

Austin
000002-4-4-0
379
Date Printed: 02/01/01

1 Mr. Joshnick.

2 MR. MARTIN: Same, Your Honor.

3 THE COURT: Overruled. 3 is received. 4,
4 deposition of Keith Decker.

5 MR. MARTIN: The same, Your Honor. He was here
6 live and testified, and his deposition testimony serves
7 no useful purpose. They were able to ask every
8 question, both petitioner and respondent. Even I got
9 to ask questions.

10 THE COURT: Indeed, you did. Okay. What have
11 NICA to say on Mr. Decker? He was present. He is
12 certainly within the jurisdiction to testify. That is
13 oh, bitter hearsay under the rules.

14 MR. ROSIN: Your Honor, the deposition transcripts
15 in any of the testimony does not have to abide by the
16 strict rules of evidence. In fact, Chapter 120.569,
17 section C talks about evidence that's commonly relied
18 upon by the reasonably prudent person.

19 THE COURT: It's hearsay.

20 MR. ROSIN: Which is the deposition transcripts?

21 THE COURT: Deposition transcripts are, by their
22 very nature, hearsay unless they're admissible under
23 one of the provisions of the Rules of Civil Procedure.

24 MR. ROSIN: Absolutely, Your Honor. However, they
25 don't support a finding of fact, as this Court's aware,

1 that they have previously testified. However, they do
2 shed light onto their testimony and whether it was
3 consistent with their deposition transcript, and the
4 Court can rely on their testimony.

5 They can't use the deposition transcripts to
6 support a finding of fact. However, they can rely on
7 it to show whether the testimony was truthful and
8 accurate.

9 THE COURT: No. You can use it to cross-examine
10 and question his credibility. It has absolutely no
11 value to me to support a finding of fact.

12 MR. FENNER: Your Honor, if I may, the citation
13 Mr. Rosin made is to agency ~~in~~ action, which my
14 understanding is, is not -- this is not what that is.
15 This is a judicial hearing. This is not for agency
16 action. That's what the -- that word does appear in
17 there, I think I mentioned in one of our many papers,
18 and I just don't think that's a relevant citation to
19 justify hearsay.

20 THE COURT: That's the rule -- or that's the
21 statute that governs the receipt of evidence in
22 administrative proceedings, which this happens to be
23 one of. But hearsay is not what people commonly rely
24 on to support facts or support their conduct. It's
25 considered, in other words, rumor. Mr. Decker was

A-5-2

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRAIG JOSHNICK AND DEBBIE	)	
JOSHNICK, as parents and	)	
natural guardians of AUSTIN K.	)	
JOSHNICK, a minor,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 03-0985N
	)	
FLORIDA BIRTH-RELATED	)	
NEUROLOGICAL INJURY	)	
COMPENSATION ASSOCIATION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
MICHAEL A. DAWSON, M.D.;	)	
DAVID O. PETERFREUND, M.D.;	)	
PATRICIA ST. JOHN, M.D.; BAY	)	
AREA WOMEN'S CARE, INC.; and	)	
MORTON PLANT HOSPITAL	)	
ASSOCIATION, INC.,	)	
	)	
Intervenors.	)	
	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings,
by Administrative Law Judge William J. Kendrick, held a hearing
in the above-styled case on January 20 and 21, 2004, in
St. Petersburg, Florida.

A-76

16. Contrasted with Petitioners' testimony, Respondent offered the deposition testimony of Nurse Collins. Not unexpectedly, Nurse Collins did not recall the incident, but offered the following testimony regarding her normal practice:

Q. . . . What was your normal business practice of saying to patients about the NICA pamphlet?

A. I would hand them the form that needed to be signed, and I would tell them there were two places that needed to be signed. The first one, I would usually hand them the pamphlet and say -- customarily say, "Here is this pamphlet. You are signing that you received this pamphlet; not that you've read it, just that you've received it. And you need to sign here, and then you need to sign down at the bottom here for consent for these procedures," and I would read over those procedures with them.

Q. Would you volunteer anything about the pamphlet?

A. If I volunteered anything at all, it would only have been that if it was the neurological information -- well, what is it? -- Neurological Injury Compensation Association, and that if somebody [sic] happened, you might have the possibility of being covered.

* * *

Q. In your normal practice, what is your understanding of the NICA pamphlet . . . [?]

A. I didn't really -- I never read the pamphlet. But I guess my understanding was that if during the course of the birth of a baby there was some neurological accident or impairment, there might possibly be some compensation available to them.

A-7-18

A-6-2

17. Finally, in the opinion of Dr. St. John, which stands uncontradicted, there was no medical justification to deliver Austin by cesarean section, and absent medical justification surgery would be contraindicated and against her ethical obligations. (Respondent's Exhibit 6, pages 21, 27 and 30).

18. Here, the testimony and other proof offered on the issue of estoppel, predicated on Nurse Collins' remarks, have been carefully considered, and found less than compelling on some key issues. First, the proof failed to demonstrate, with the requisite degree of certainty, that Nurse Collins made an affirmative assurance, without limitation, as opposed to a general comment as to the nature of the program. In so concluding, it is noted that, given the passage of time and anxieties of the moment, it is unlikely either Mr. or Mrs. Joshnick would recall any comment Nurse Collins made regarding the NICA program, much less recall her remarks with any degree of accuracy, and that the remarks they attribute to her are so general, as not to reasonably support an assurance of coverage, without limitation. Moreover, given Mrs. Joshnick's condition on presentation to the hospital, and the events that ensued, it is evident that it was Dr. St. John's opinion that vaginal delivery, not cesarean delivery was medically appropriate, that Petitioners accepted that opinion, and that

Petitioners did not rely in whole or in part on NICA coverage in deciding not to insist on a cesarean delivery.

19. Finally, apart from Nurse Collins' comments, Petitioners contend that NICA should be estopped to deny coverage based on the NICA brochure. Pertinent to this claim, the brochure provided:

Criteria and Coverage

Birth-related neurological injuries have been defined as an injury to the spinal cord or brain of a live-born infant weighing at least 2500 grams at birth. In the case of multiple gestation, the live birth weight is 2000 grams for each infant. The injury must have been caused by oxygen deprivation or mechanical injury, which occurred in the course of labor, delivery or resuscitation in the immediate post delivery period in a hospital. Only hospital births are covered.

The injury must have rendered the infant permanently and substantially mentally and physically impaired. The legislation does not apply to genetic or congenital abnormalities. Only injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan.

* * *

You are eligible for this protection if your doctor is a participating physician in the NICA Plan. If your doctor is a participating physician, that means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law. If your health care provider has provided you with a copy of this informational form, your health care provider

is placing you on notice that one or more physician(s) at your health care provider participates in the NICA Plan.

(Petitioners' Exhibit 3) According to Petitioners:

A reasonable person would have concluded, "If [Morton Plant] has provided [Petitioners] with a copy of [the Pamphlet], . . . one or more physician(s) at [Morton Plant] participates in the NICA Plan." A fair reading of the Pamphlet as a whole, is that this participation of a Morton Plant physician--regardless of particular obstetricians' participation--was enough to give Petitioners NICA coverage.

(Petitioners' Proposed Findings of Fact & Conclusions of Law, paragraph 20) However, a "fair reading" of the NICA pamphlet does not support Petitioners' interpretation. Rather, the brochure provides, unequivocally, that "[o]nly injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan." Moreover, Petitioners never read the pamphlet until well after Austin's birth and, therefore, could not have relied, detrimentally or otherwise, on its provisions.

CONCLUSIONS OF LAW

Jurisdiction

20.. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

Compensability

21. In resolving whether a claim is covered by the Plan, the administrative law judge must make the following determination based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth."

§ 766.31(1), Fla. Stat.

22. Here, even though admittedly obstetrical services were not delivered by a participating physician at Austin's birth and, consequently, the claim is not covered by the Plan, Petitioners

contend they are entitled to recover under a theory of coverage by estoppel. In response, NICA contends the Division of Administrative Hearings is without jurisdiction to address the issue of estoppel or, alternatively, that the facts do not support a claim of estoppel. For the reasons that follow, it is resolved that the Division of Administrative Hearings has jurisdiction to decide the issue of estoppel, but that the facts do not support such a claim.

Jurisdiction to resolve the issue of estoppel

23. Effective July 1, 1998, the Legislature adopted Chapter 98-113, Laws of Florida, which amended Sections 766.301 and 766.304, Florida Statutes. Pertinent to this case, the amendments (underlined) to Sections 766.301 and 766.304, Florida Statutes, were, as follows:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

* * *

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

* * *

766.304 Administrative law judge to determine claims.--The administrative law

judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303 An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered

Ch. 98-113, § 1, at 524, Laws of Fla.

24. By the amendments to Sections 766.301 and 766.304, Florida Statutes, the Legislature expressed its intention that the administrative law judge resolve all issues relative to coverage. Fundamentally, whether the "infant . . . sustained a birth-related neurological injury" and whether "obstetrical services were delivered by a participating physician at birth," are clearly questions related to coverage. § 766.31(1), Fla. Stat. Moreover, promissory estoppel may, under certain circumstances, also support a claim of coverage. See Crown Life Insurance Co. v. McBride, 517 So. 2d 660 (Fla. 1988) (The general rule is that the doctrine of estoppel based upon the conduct of an insurer or its agent does not operate to create coverage where coverage does not exist. There is, however, a narrow exception

to this general rule, as when to refuse to enforce a promise would sanction the perpetration of fraud or other injustice.)

Accord Wheeland v. State Farm Fire & Casualty Co., 668 So. 2d 337 (Fla. 3d DCA 1996). Consequently, given the language used by the Legislature in its amendment to the Plan, it is resolved that all questions of coverage, including those related to coverage by estoppel, are properly decided in the administrative forum. See, e.g., Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1989).

Petitioners' claim of estoppel

25. When, as here, a party claims coverage by estoppel, they must establish the facts necessary to support such claim by clear and convincing evidence. Jarrard v. Associates Discount Corp., 99 So. 2d 272, 277 (Fla. 1957). ("[T]he burden of proving all the facts essential to the working of an estoppel rests on the party asserting it or on whose behalf it is applied Before an estoppel can be raised, there must be certainty and the facts necessary to constitute it cannot be taken by argument or inference, nor supplied by intendment. They must be clearly and satisfactorily proved.") Accord Barber v. Hatch, 380 So. 2d 536 (Fla. 5th DCA 1980). That standard requires that "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in

confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, Petitioners failed to sustain their burden or proof.

26. As heretofore noted, Petitioners' claim of estoppel is two-fold. First, Petitioners contend that the comments made by Nurse Collins when she delivered the NICA pamphlet, together with Mrs. Joshnick's reliance on those statements in deciding not to insist on a cesarean section, support a finding of estoppel. Moreover, Petitioners contend, since NICA provided the pamphlet to the hospital for distribution to its patients, NICA cloaked Nurse Collins with apparent agency to act on its behalf and is bound by her representations. Petitioners' contentions are unpersuasive.

27. "Florida case law provides that an insurer may be held accountable for the actions of those it cloaks with 'apparent agency'." Almerico v. RLI Insurance Company, 716 So. 2d 774, 777 (Fla. 1998). "Further, a review of the case law on agency indicates that evidence of indicia of agency may be demonstrated if the insurer furnishes an insurance agent or agency with 'any blank forms, applications, stationery, or other supplies to be used in soliciting, negotiating, or effecting contracts of

insurance'." Id. Indicia of agency may likewise be demonstrated when the company holds a person out to the public as an agent by printing and delivering business cards designating him as such. Hughes v. Pierce, 141 So. 2d 280 (Fla. 1st DCA 1961).

28. In this case, Nurse Collins was not NICA's agent or employee, and the only evidence relied upon by Petitioners to establish apparent agency was the pamphlet NICA prepared and delivered to the hospital for distribution to its obstetrical patients; notably, the pamphlet developed by NICA and furnished to participating physicians and hospitals, such as Morton Plant Hospital, so they could furnish a copy of the brochure to their obstetrical patients, was required by law.¹⁰ § 766.316, Fla. Stat. Under such circumstances, the pamphlet did not cloak Nurse Collins, or any other employee of the hospital, with apparent authority to bind NICA, and it would be unreasonable to conclude otherwise. Consequently, there being no other evidence relied upon by Petitioners to establish apparent authority, their claim of apparent agency is rejected. Moreover, Petitioners' claim of estoppel, based on the substance of Nurse Collins' statement, must also fail.

29. To demonstrate estoppel, the following elements must be established: "1. A representation as to a material fact that is contrary to a later-asserted position; 2. A reasonable reliance on that representation; and 3. A change in position detrimental

to the party claiming estoppel caused by the representation and reliance thereon." Warren v. Department of Administration, 545 So. 2d at 570.

30. As noted in the Findings of Fact, the proof failed to demonstrate, with the requisite degree of certainty, that Nurse Collins made an affirmative assurance, without limitations, as opposed to a general comment on the nature of the program. Moreover, given the general nature of Nurse Collins' remarks, without further elaboration or inquiry, it would not have been reasonable to rely on her remarks as an affirmative assurance of coverage. Additionally, as noted in the Findings of Fact, Petitioners' testimony that Dr. St. John changed from a planned cesarean delivery, to a vaginal delivery, or that Petitioners relied in whole or in part on NICA coverage, not to insist on a vaginal delivery, is not compelling or credible. Consequently, the proof also failed to support a claim of estoppel based on Nurse Collins' remarks.

31. Finally, Petitioners' claim of estoppel, predicated on the NICA pamphlet, must also be rejected for two reasons. First, as previously noted, the wording of the pamphlet is not misleading, as Petitioners contend. Rather, the pamphlet is unequivocal that "[o]nly injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan." Second, the wording of the

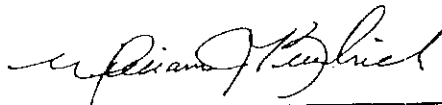
pamphlet would not under any circumstance support a claim of estoppel, since Petitioners did not read the pamphlet until well after Austin's birth and could not have detrimentally relied on its provisions. Consequently, the wording of the pamphlet does not and could not support a claim of estoppel.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Craig Joshnick and Debbie Joshnick, as parents and natural guardians of Austin K. Joshnick, a minor, is dismissed with prejudice.

DONE AND ORDERED this 7th day of April, 2004, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2004.

17 Dr. Duchowny?

18 A. Primarily, yes. - K. Shipley

19 Q. In fact, no other doctors are mentioned in the → Fenner
20 NICA claims manual; is that --

21 A. That may be true. That doesn't mean that we don't
22 refer. There are times when there's a conflict and we refer
23 to another doctor.

24 Q. Okay. Well, how do you define a conflict?

25 A. A petitioner raises a conflict. Either Duchowny
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1 has been involved in a diagnosis or care in some way, shape
2 or form, and they request a different physician to do the
3 examination --

4 Q. Okay. But the great majority of cases go to
5 either Dr. Willis or Dr. Duchowny or to both?

6 MR. ROSIN: Objection. Asked and answered.

7 THE COURT: Overruled.

8 A. The great majority go to either one or both.

9 BY MR. FENNER:

10 Q. Okay. And how they interpret -- basically, then,
11 so their interpretation of the plan and their interpretation
12 of the act is, therefore, fairly important; isn't that
13 correct?

14 A. I don't know whether that's the case or not. They
15 need to know what's substantially mental and physically
16 impaired, I would guess.

17 Q. Okay. Has there been any -- has counsel talked
18 to both of them as to the meanings of both of those words?

19 A. You know what? I don't know what specific
20 discussions with counsel have been, but I'm sure that there
21 have been discussions about their opinion of those words.

22 Q. Okay. Just trying to find out how the decisions
Page 8

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23 are -- tend to be made. Now, in the initial pleading in the
24 NICA file where you were asked to act as NICA's
25 representative, that pleading states that the only question
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1 to be resolved by the Court was participating physician; is
2 that correct?

3 A. That was the basis that we responded on in our
4 initial response.

5 Q. And that's not your standard form of response, is
6 it?

7 A. It depends on the issue. I mean, if there is a
8 threshold issue, for instance, child doesn't meet the birth
9 weight, there's no participating physician. Those are
10 threshold questions before we ever get to is there any
11 injury or impairment. So if there's -- if those thresholds
12 have not been met, we don't normally go the next step.

13 Q. So saying that this is the only issue before the
14 Court, that was a misnomer; that was --

15 A. At the time, that was what we assumed to be. We
16 didn't think there was any -- it's a threshold question.

17 Q. Exactly. And was there a -- what changed your
18 mind, or what changed NICA's position?

19 A. The ruling by the judge that the case could go
20 forward absent a participating physician.

21 Q. And was there concern by NICA that the promissory
22 estoppel argument, if successful, would damage the actuarial
23 soundness of the plan?

24 A. If we took more cases -- whenever the law changes
25 in any way that causes us to take more claims than are
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1 anticipated, it would impact us actuarially. So if this
2 theory were to become law in some way, shape or form, it

3 would increase the number of cases and would impact our
4 financials.

5 Q. Okay. And what would your -- assuming
6 the -- assuming that the -- I guess -- so the question is
7 the actuarial soundness of the plan enters into your claims
8 procedures?

9 A. No. Not in the day-to-day claims operation. In
10 the overall operation of the plan, if there is a decision
11 that is going to change the assumptions that are made in
12 terms of how many claims will be accepted or not accepted,
13 that impacts our overview in terms of how our financials are
14 developed, and on a claim-to-claim basis, that would be an
15 issue we look at as a claim comes in.

16 Q. So this claim, basically, is a threat to the
17 actuarial soundness of the plan?

18 A. I don't think so, because I don't think that
19 there's really a basis for that particular theory. But if
20 every time a brochure was given out we would be estopped
21 from denying the claim, certainly that would create a
22 tremendous problem. That's not at all what was intended by
23 the way the law as structured.

24 Q. Okay. Do you remember a conversation we had about
25 the -- in fact, the first conversation we ever had about the
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1 pamphlet?

2 A. You know what? You probably have a better memory
3 than I do on this, and we had a number of conversations.

4 Q. We did, indeed. Do you remember when I suggested
5 that perhaps it ought to be changed?

6 A. Yes, I do.

7 Q. Looking for a minute here at 766.314 Florida
8 statutes where it states the plan of operation for NICA

9 shall include provision for. We've got establishment of
10 facilities, management of the funds, processing of claims,
11 and then they talk about assessments, which assessments
12 shall be on an actuarially sound basis, and I'm also -- and
13 there was an earlier -- the early version of the Birnie case
14 in the 5th DCA where NICA raised the actuarial soundness
15 argument basically said that under the statute, you have
16 to -- if the plan becomes unsound, the first thing you do is
17 to adjust the assessments in the long term, at least, or
18 recommend to the legislature -- is that your awareness of
19 how it works or --

20 A. Yes, it does.

21 Q. Okay. So under the statute, then, there shouldn't
22 be any leakage from the actuarially sound concern here into
23 the processing of claims, specifically this claim?

24 A. No.

25 Q. But nonetheless, NICA decided that they were going
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1 to fight this claim because of a perceived danger to the --

2 A. No, that's not the reason that we fought the
3 claim. It had nothing to do with actuarial soundness. The
4 reason we caught the claim is because there's no
5 participating physician. There was never any intention for
6 coverage to be -- to exist without a participating physician
7 any more than there is coverage for an auto policy where
8 there's not an auto that it specifically covers.

9 Q. You are aware of the doctrine of promissory
10 estoppel?

11 A. Yes, I'm familiar with it.

12 Q. When the insurance company says you're covered,
13 essentially, they can't deny the fact that the fine print in
14 the policy takes it away; is that your understanding?

15 A. I don't understand what that has to do with the
16 instant case, but I'm familiar with the theory, the
17 doctrine.

18 Q. Are you also aware of the Googleman case which
19 states that if the hospital can be exempt from suit under
20 NICA but if the participating physician did not give the
21 required notice, then the participating physician could
22 still be sued civilly?

23 MR. ROSIN: Your Honor, objection. These are
24 calling for legal conclusions to be drawn by an
25 attorney.

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1 MR. FENNER: Your Honor, they've --

2 THE COURT: Ask her if she's familiar with it.

3 BY MR. FENNER:

4 Q. Are you familiar with the Googleman case?

5 A. I'm familiar with the Googleman case.

6 Q. So wouldn't it be in talking to obstetrician and
7 trying to get them to sign up for the plan that
8 you'd -- that even if promissory estoppel was established in
9 a number of claims, not only this one, wouldn't it be true
10 that you would still have the incentive for an obstetrician
11 to continue to be covered?

12 A. I don't understand the logic there. Sorry.

13 Q. That's fine. Also, what's your understanding in
14 this context of substantial impairment?

15 A. Substantial impairment is usually one that -- I'm
16 not an expert, but looking at the kids that are in our
17 program, most of them are or will be wheelchair bound at
18 some point. Most of them are severely restricted in any
19 kind of physical activity. They're severely restricted in
20 terms of their mental capabilities. Substantial, severe. I

21 don't know other words to use to describe it.

22 Q. So you mentioned the word severe about three or
23 four times. So do you generally feel that substantial means
24 severe?

25 A. I generally think it means something more serious
214

1 than mild or moderate.

2 Q. Which are medical terms?

3 A. Those are medical terms.

4 Q. Okay. Most of the cases that NICA takes, is there
5 any possibility that they're going to get better?

6 A. Some of them can get somewhat better is. Not a
7 whole lot better. We've got a lot of differences. It
8 depends on -- a lot of it depends on what age they were when
9 they came to the program, too. Generally, by the age of
10 four or five, those impairments are pretty easy to detect.

11 Q. And rather hard to improve on?

12 A. Rather hard to improve. When you have children
13 that don't walk by the time they're four or five, don't
14 talk, those are fairly easy to --

15 Q. And easy to quantify, but are you aware of the
16 literature that suggests that the earlier you get to a child
17 with, say, pervasive developmental delay or speech delay
18 that the better the outcome?

19 A. To a degree, I'm familiar with it.

20 Q. And is that your perception?

21 A. In some cases.

22 Q. Okay. You understand the act talks often in terms
23 of rehabilitation; is that correct?

24 A. I do.

25 Q. And that would be taken from the workers'

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1 compensation model?

2 A. I don't know that it was taken, but I would assume
3 it has some similar meaning, but I don't know that's where
4 it came from.

5 Q. So then it's possible that if with a lot of
6 therapy the child will actually get better and perhaps even
7 reach a normal level that that would be considered
8 rehabilitation?

9 A. When I look at permanent impairment, I generally
10 think that regardless of the level of rehabilitation that is
11 done, there is going to be -- continue to be a substantial
12 level of impairment. The child may improve. There may be
13 things that improve with the child, but there will always be
14 a substantial mental and physical disability there.

15 Q. Okay. So the possibility that the child could get
16 up to the norm means he's not -- he doesn't qualify for the
17 NICA plan?

18 A. I don't think that was the intent of the plan.

19 Q. Okay. So your understanding of the intent of the
20 plan is that, basically, if you're going to get better,
21 you're not badly off enough to qualify for the plan?

22 A. You don't have a substantial permanent physical
23 and mental impairment.

24 Q. Well, since the act talks about rehabilitation,
25 isn't the better concept of permanent meaning is that it's
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1 unless they get the rehabilitation, it will continue in its
2 present state?

3 A. I can't say that that's what the law is meant to
4 say.

5 Q. Okay. We subpoenaed some documents. Did you
6 bring them with you?

7 A. I did. I have a copy for you. Thank you very
Page 14

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8 much for that.

9 Q. Okay. Did anybody talk with Dr. Willis about this
10 case?

11 A. Nope, other than to set up the appointment that I
12 know of.

13 Q. Dr. Willis' report is substantially longer than
14 any of the others he gave in the last three years. Do you
15 know why that is?

16 A. No, I don't. Hadn't even made that observation.

17 Q. A look of the 76 cases, there was 16 cases where
18 you could, from his report, identify a death of the child?

19 A. I'm sorry. Ask the question again.

20 Q. In looking through Dr. Willis' reports, of the 76
21 reports we got, there were 16 children who died. I guess
22 the question is what's NICA's payout on a child who dies?

23 MR. ROSIN: Objection. Materiality and relevance
24 to the issues before this Court at this time as to
25 whether the child suffered any permanent substantial?
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1 THE COURT: Well, assuming that it was a
2 birth-related neurological injury or otherwise, the
3 result of substantial impairment what is NICA's
4 payout --

5 MR. FENNER: who does the statute provide --

6 THE COURT: The statute provides for an award of
7 past expenses and perhaps an award to the child,
8 depending on the date of the injury, the funeral
9 expenses --

10 BY MR. FENNER:

11 Q. Would it surprise you that in all 17 cases of
12 where there was a -- the child died, that Dr. Willis
13 recommended coverage by NICA?

14 A. The child had died at the time the petition was
15 filed? Is that what you --

16 Q. That's correct, yes.

17 A. No. That wouldn't surprise me.

18 Q. Certainly there's no question about the
19 substantiality of the injury, but isn't it a little unusual
20 that his other ratio was about three acceptances to two?

21 A. I don't really look at the doctors' ratios. All
22 I'm interested in is their opinion in each individual case.
23 So I've not made those observations. I haven't done that
24 analysis.

25 MR. FENNER: No more questions, Your Honor, and I
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1 would waive the rule.

2 THE COURT: The rule?

3 MR. FENNER: For this witness.

4 THE COURT: Oh, if she'd like to continue to sit.

5 Yes, sir. Okay. Any cross?

6 MR. MARTIN: She's a party. She can stay.

7 MR. ROSIN: Corporate representative.

8 THE COURT: Whatever.

9 (Discussion held off the record.)

10 CROSS-EXAMINATION

11 BY MR. ROSIN:

12 Q. When you -- Miss Shipley, when you first filed the
13 motion to act as a qualified representative, at that point
14 in time, no doctors had reviewed that evidence, the medical
15 records?

16 A. That's true.

17 Q. So when you make that final, you're basically
18 looking at threshold issues?

19 A. Actually, I make that filing in every case that
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6 program; is that correct?

7 [Dr. Duchowry] A. He's not part of the program. He's the expert
8 that we refer questions of neurological impairment to.

9 Q. In the normal sense. Are you aware of his
10 subspecialties within this profession?

11 A. Not in any great detail. I know he's a pediatric
12 neurologist, and I'm familiar with that part --

13 Q. And your understanding is, then, that he has kind
14 of a general practice; he sees all kinds of patients with
15 all kinds of problems?

16 A. No, he sees children with neurological disorders.

17 Q. I'm sorry. All sorts of children with all sorts
18 of neurological disorders?

19 A. Yes.

20 Q. Okay. That he sees children who have pervasive
21 developmental delay?

22 A. I don't know what all of his -- I don't know who
23 all of his patients are, what all of their conditions are,
24 but I assume whatever would fit under those general
25 headings.

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1 Q. Okay. So your assumption is that as a pediatric
2 neurologist, that he is a generalist, that he sees all types
3 of patients?

4 A. And I can't answer -- I don't know what more you
5 want me to say.

6 Q. Going back to the pamphlet and the last sentence
7 of -- I guess the last sentence of the text, which reads if
8 your health care provider has provided you with a copy of
9 this information form, your health care provider is placing
10 you on notice that one or more physicians at your health
11 care provider participates in the NICA plan.

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10

12 As a non-lawyer -- presumably this is intended to
13 be written by a non-lawyer -- what's your understanding of
14 that sentence?

15 MR. ROSIN: Your Honor, beyond the scope of cross.

16 THE COURT: Overruled.

17 A. That there may be a participating physician at the
18 facility that you are -- whatever -- whoever's handing out
19 the brochure may have a participating physician there.

20 BY MR. FENNER:

21 Q. And it's important for waiver purposes, right,
22 that since people are waiving their rights to sue the
23 obstetrician that it's important that they be placed on
24 notice of that; is that not one reason why that's in there?

25 A. Yes, sir.

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1 Q. Okay. And also it covers the situation, wouldn't
2 it, where someone arrives at the hospital, the baby is
3 head-down, hours away from delivery, but there's no
4 attending obstetrician, what I call the St. Mary's problem,
5 referring to St. Mary's Hospital, West Palm Beach, where
6 that's a fairly common occurrence? Is that one thing that
7 it's intended to cover?

8 A. It's intended to be general enough language for a
9 hospital or a doctor to hand out.

10 Q. Okay. So under the plan, if someone arrives at
11 the doorstep of a hospital and doesn't have an obstetrician,
12 has never seen an obstetrician and doesn't have any name,
13 then if there's a birth-related injury, that infant is
14 covered?

15 A. No, it's saying may be covered because you may
16 have a participating physician. It doesn't say you will
17 have a participating physician. It doesn't say everybody's

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18 covered in this facility. It says there are physicians in
19 this facility that participate. You may be covered.

20 Q. All right. And if you have a birth-related injury
21 that qualifies under the --

22 A. Right.

23 Q. Yeah. Okay. Right. So that -- so it was
24 intended with the best will in the world to cover a
25 situation which is fairly common in hospital practice where
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1 you've got a woman and her about-to-have child and there is
2 no obstetrician. So in that situation, then, the fact that
3 the hospital has a participating physician on staff, that
4 enables you to be covered by the NICA plan assuming you meet
5 the rest of the criteria?

6 A. The requirement is that the hospital hand out the
7 notice.

8 Q. Okay.

9 A. That doesn't mean that they are covered by the
10 plan. It just means they've been notified that there may be
11 a physician that is a participating physician.

12 Q. When you hand out -- when you give the notices to
13 the hospital, do you also, as a matter of policy, tell the
14 hospital which doctors are participating in NICA?

15 A. No.

16 Q. Wouldn't that be sort of helpful?

17 A. If I knew. I don't know which doctors are on
18 their staffs.

19 Q. Well, don't most hospitals have a risk management
20 department where you give them an entire list?

21 A. Some of them have a risk management unit, and I
22 don't have the doctors' names who are on their staff. If a
23 hospital contacts me and gives me a list of their staff.

24 physicians with their license number, we can let them know
25 which ones participate and which don't. Very few hospitals
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1 do that, and I don't have access to the information to tell
2 them -- I don't know which hospitals any of our participate
3 physicians are on staff at or have privileges at. So
4 there's no way for me to notify them.

5 Q. On the other hand, if you just ran the Xerox
6 machine and printed out an entire list of -- as you did for
7 me, you were very kind enough to help me, if you just ran
8 the Xerox machine and gave the hospital -- said these are
9 all the participating doctors, please check them off against
10 your attendings, would that be useful for the hospitals?

11 A. I don't know.

12 Q. Would it have possibly avoided the situation where
13 we have here?

14 A. Doubtful. Even the hospitals that know which
15 one's are participating and which one's not, the person in
16 the admitting office probably doesn't know or doesn't check
17 to see which doctor it is. They hand that notice out with
18 every case that comes in.

19 Q. Well, couldn't that be done by computer?

20 A. You're assuming that every hospital has the same
21 capability.

22 THE COURT: You're also assuming that whoever is
23 providing prenatal care is going to end up delivering
24 the baby in the hospital. That may not be the case.
25 They may not be participating; they may not be, 226

1 depending on the emergent nature of the situation.

2 MR. FENNER: Without question.

3 BY MR. FENNER:

4 Q. Assuming the average hospital doesn't have a huge
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5 in-house staff. So I guess wouldn't it be useful for at
6 least the larger hospitals that have a computer or two and
7 have managed to computerize some of their operations -- I'm
8 sure that billing -- wouldn't it be helpful to them at
9 least?

10 A. In my opinion, yes. would I encourage them to do
11 that? Yes. Do they do it? No. They're not really that
12 sophisticated in most cases. There are very few hospitals.
13 I --

14 Q. Final question. Has anyone suggested -- besides
15 myself of course, has anybody suggested that NICA reword
16 that last sentence --

17 A. No.

18 Q. -- to clarify it?

19 MR. FENNER: No more questions.

20 THE COURT: Anything further?

21 MR. ROSIN: No, Your Honor.

22 THE COURT: Thank you. As I understand it,
23 Miss Shipley is free to stay or go about her duties as
24 she chooses. Is that accurate, Mr. Fenner? Counsel?
25 As I understand it, we're about to shift gears and take
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D

1 one of the Respondent's witnesses, Dr. Duchowny.

2 THEREUPON,

3 MICHAEL DUCHOWNY, M.D.,
4 was adduced as the deponent herein, and being first duly
5 sworn upon oath, was questioned and testified as follows:

6 THE COURT: Please state your full name.

7 A. Michael Samuel Duchowny.

8 DIRECT EXAMINATION

9 BY MR. ROSIN:

10 Q. Good morning, Dr. Duchowny, could you give the
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRAIG JOSHNIK and DEBBIE JOSHNIK,
on behalf of and as the parents and natural
guardians for AUSTIN K. JOSHNIK, a minor

Petitioners,

v.

Case No. 03-0985N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION,

Respondent,

MICHAEL A. DAWSON, M.D.; DAVID O.
PETERFREUND, M.D.; PATRICIA ST. JOHN, M.D.
BAY AREA WOMEN'S CARE, INC.; and
MORTON PLANT HOSPITAL ASSOCIATION, INC.,

Intervenors.

**PATRICIA ST. JOHN, M.D.'S NOTICE OF SERVICE OF UNVERIFIED RESPONSE
TO PETITIONERS' INTERROGATORIES AND REQUEST TO PRODUCE**

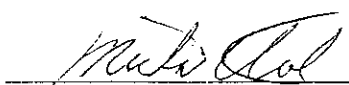
Intervenor, PATRICIA ST. JOHN, M.D., by and through her undersigned attorneys,
hereby gives notice of service of her Response to Petitioners' Interrogatories and Request to Produce
pursuant to Florida Administrative Code Rule 28-106.206 and Fla. R. Civ. P. 1.280 and 1.350.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S.
First Class Mail to **John P. Fenner**, 2840 NW Boca Raton Blvd., Suite 107, Boca Raton, Florida 33431;
Kenney Shipley, Executive Director, Florida Birth-Related Neurological Compensation Fund, 1435
Piedmont Drive East, Suite 101, Post Office Box 14567, Tallahassee, Florida 32312, and **Donald H.**
Whittemore, Phelps Dunbar, LLP, 100 South Ashley Drive, Suite 1900, Tampa, FL 33602 this 27 day
of June, 2003.

MACFARLANE FERGUSON & McMULLEN
Post Office Box 1669
Clearwater, Florida 33757
(727) 441-8966 - Telephone
(727) 442-8470 - Facsimile
Attorneys for Intervenor Patricia St. John, M.D.

By:


James A. Martin, Jr.

SPN 0170552 / FBN 0166508

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4/27/03

ANSWER: There are risks associated with every delivery. There are no medical procedures that are "risk-free." I do not believe there were any additional risk associated with the care and treatment I rendered to the Petitioners. I believe that the care and treatment I rendered to the Petitioners was appropriate.

e. Please identify, with sufficient particularity to formulate the basis of a request to produce, all medical records of any kind of which you are aware, which deal with the medical treatment or examinations furnished to Petitioners at any time, whether by you or another person or persons, if not already produced.

ANSWER: Morton Plant Hospital, Bay Area Women's Care, All Children's Hospital, Early Intervention Program, Jeffrey H. Wishoff, M.D., Chester Pediatrics, Dr. Celia DiMarco, Largo Medical Center, Dr. Milagros Oliveri-Lorenzo, and Dr. James N. Wapshire. Additional records may be discovered as discovery is just beginning.

f. Please state whether any claim for medical malpractice has ever been made against you alleging facts relating to the same or similar subject matter as this proceeding, and, if so, state as to each such claim: the names of the parties, the claim number, the date of the alleged incident, the ultimate disposition of the claim, and the name of your attorney, if any.

ANSWER: No claims for medical malpractice have ever been made against me.

DR. PATRICIA ST. JOHN

STATE OF FLORIDA
COUNTY OF PINELLAS

BEFORE ME, the undersigned authority, personally appeared DR. PATRICIA ST. JOHN, who is personally known to me, and who did not take an oath, and who, being first duly sworn, deposes and says that she has read the foregoing Response to Interrogatories and Request to Produce and that they are true and correct to the best of her knowledge and belief and has taken an oath to that effect.

Sworn to and subscribed before me this _____ day of June, 2003.

Notary Public

Print Name _____

My Commission Expires _____

and protection, medical and funeral expenses, and parental instruction and guidance.

WHEREFORE, the Plaintiff, ESTATE, demands judgment and damages against the Defendant, JENSEN, D.O., and a trial by jury on all issues so triable and attorney's fees.

CLAIMS AGAINST PATRICIA ST. JOHN, M.D.

25. The Plaintiff adopts and realleges all prior material paragraphs as if full set forth herein.

26. That at all times material and relevant hereto, the Defendant, ST. JOHN, M.D., was and is a medical doctor practicing the specialty of obstetrics and undertook to provide care and treatment to the patient, DEANNA ELAINE HERNANDEZ in a reasonable and acceptable manner.

27. Defendant, ST. JOHN, M.D., notwithstanding said duty was negligent and did breach said duty in one or more of the following ways, any, some or all of which are departures from the accepted standard of care for such medical physicians in the same or similar communities in the following particulars:

A. Negligent failure to treat and care for or assist in the treatment of caring for DEANNA ELAINE HERNANDEZ'S condition, labor and delivery in a safe and proper manner, or in a manner usually approved in the practice by other members of the medical profession in this community and in similar communities in the State of Florida possessing skill, learning, judgment and being presented with the same or similar procedure;

B. Failure to use or advise the proper recommended and accepted diagnostic procedures in anticipation of the delivery procedure particularly in consideration of the symptoms exhibited by patient;

C. Negligent failure to perform or advise a caesarean section;

D. Failure to make or advise to make timely and proper tests, although adequate sources were available for making such tests to determine the patient's true medical condition;

E. Failure to properly diagnose the early manifestation of the HELLP Syndrome which was indicated by eclampsia and elevated liver enzymes;

F. Failure to issue or recommend proper medical orders with respect to the care and treatment of the patient particularly in conjunction with the delivery performed;

G. Failure to properly monitor the patient's condition during the pre-labor, labor and delivery procedure referred to herein;

H. Being otherwise negligent in the care and treatment of the patient, DEANNA ELAINE HERNANDEZ.

28. As a direct and proximate result of the negligence and carelessness of the Defendant, ST. JOHN, M.D., or persons under her direction and control, the beneficiaries of the ESTATE and the ESTATE have suffered in the past and will suffer in the future mental anguish, mental pain and suffering, loss of support and services, future loss of support and services, loss of earnings and

DEPARTMENT OF ADMINISTRATIVE HEARINGS
STATE OF FLORIDA
CASE NO. 030985N

AUSTIN JOSHNIICK,

Petitioner,

vs.

FLORIDA BIRTH RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondents.

COPY

PLACE: BAY AREA WOMEN'S CARE
1055 S. Fort Harrison Avenue
Clearwater, Florida

DATE: October 29, 2003

TIME: 4 o'clock p.m.

REPORTED BY: P. ALECIA COX-WILKINS
Sixth Circuit
COURT REPORTER
Notary Public, State of Florida

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D E P O S I T I O N O F
P A T R I C I A S T. J O H N M. D.

ROBERT A. DEMPSTER & ASSOCIATES
P.O. Box 35
Clearwater, Florida 33757-0035
(727) 443-0992

A-10

P A T R I C I A S T. J O H N, after being first duly sworn by the Notary Public, testified as follows:

DIRECT EXAMINATION

BY MR. ROSIN:

Q. Good afternoon, Doctor. My name is Andrew Rosen. I represent Florida Birth Related Neurological Injury Compensation Association, otherwise known as NICA.

Please state, and spell your name for the record.

A. Patricia A. St. John.

MR. MARTIN: Before we get started with the deposition, I have a couple of things that I want to put on the record. Number one, this matter was noticed as part of the Division of Administrative Hearings, and is being heard on a NICA petition filed by the Joshnicks. As a result, there are only certain areas of inquiry which are relevant and material to a NICA petition.

So that all counsel are aware of this, I intend to object and instruct her not to answer any question dealing with the care and treatment that was rendered by Dr. St. John to Mrs. Joshnick, or the

A-10-2

1 baby, if she rendered any care and treatment to the
2 baby immediately after the baby's birth.

3 The issues here are whether or not she was a
4 participant in NICA at the time of this delivery;
5 whether she had given notice; whether the baby
6 weighed 2500 grams. And those are the issues that
7 Dr. St. John would be aware of during the course of
8 this.

9 NICA is a no-fault type of program, and
10 because there is a pending Notice of Intent, which
11 does not provide for sworn testimony prior to the
12 filing of a lawsuit, there's a Notice of Intent
13 addressed to Dr. St. John concerning Mrs. Joshnick's
14 cancer. And I've been told by Mr. Finner that there
15 may very well be a Notice of Intent filed on behalf
16 of the delivery of this baby if NICA does not pay,
17 and maybe even if NICA does pay.

18 Therefore, we're not going to use this
19 deposition as a discovery deposition in matters that
20 are not currently pending. If anybody has a problem
21 with that, you can continue the deposition, and we'll
22 reschedule it at another time after you get a ruling
23 from the Court.

24 MR. FENNER: Jim, we've got enough on our plate
25 without getting into that.

A-10-3

1 times, she never asked whether you were a NICA
2 participant?

3 A. No.

4 Q. Okay.

5 During any of those times, did she ever ask
6 whether she was going to have a Cesarean section?

7 A. Not that I recall. And I have no documentation
8 of that either.

9 Q. So you have no documentation demonstrating she
10 would have inquired about a Cesarean section?

11 A. No.

12 Q. Do you have any reason to believe that you would
13 have advised her that she was going to have a Cesarean
14 section?

15 A. I had no reason to tell her that.

16 Q. Did she have any complications during the
17 pregnancy of Austin prior to arriving at the hospital?

18 A. Yes.

19 Q. And what were those complications?

20 A. She was a gestational diabetic requiring
21 insulin; she had an advanced maternal age, and she was
22 markedly obese.

23 Q. Are there any others, or were there any others?

24 A. Not any problems that did not make it to the
25 alert column in our chart, like problems with urinary

A-10-4

1 1/18/01 at 9 a.m.: 6 centimeters, had rapid
2 descent to zero station with deep variable; tilted to
3 left with position change; oxygen pitocin off, fetal
4 heart rate variable resolved. However, fetal tachycardia
5 up to 180 beats per minute. Continue with close
6 observation and anticipate rapid delivery.

7 1/18/01 at 9:15: Now, 8 centimeters, zero 2
8 plus 1, that's station; will restart pitocin at 4
9 million -- that's per minute; blood sugar, 96; will hold
10 on insulin dosing.

11 1/18/01 at 9:20: Problem lists 1) AMA; 2)
12 gestational diabetes - on insulin; 3) preterm labor;
13 4) fetal tachycardia; 5) possible chorio. That's short
14 for chorioamnionitis; anticipate rapid delivery.

15 1/18/01 at 1:45 p.m.: Delivery note: pushed
16 close to two hours with very poor progress secondary to
17 difficulty pushing. Patient unable to hold her breath
18 long nor work up a good push. After no further progress
19 with patient's best attempts, she was delivered by low
20 forceps, open Simpson; occiput posterior presentation;
21 delivered over midline episiotomy with epidural
22 anesthesia.

23 Spontaneous intact placenta; no evidence of odor
24 nor of abruption; cord around the neck times one. Baby
25 boy, Apgar was 8/9; weight was 6 pounds zero ounces.

A-10-5

1 Sustained a midline episiotomy with right sulcus tear.
2 This repaired extensive retraction to expose area
3 secondary to obesity. Laceration and episiotomy repaired
4 with 30 Vicrol (ph.); estimated blood loss, 500 cc., baby
5 to NICU for evaluation and care.

6 Do you want me to read the post-partum notes?

7 Q. Yes, just the last one.

8 A. 1/19/02 at 9 a.m.: Post-partum day No. 1 without
9 complaint except neck pain. Occasional jitteriness,
10 headache gone. Vital signs: stable, afibrile; patient's
11 Accucheck, fasting; blood sugar, 120; abdomen,
12 non-tender, fundus under the umbilicus, normal lochia,
13 breathing easier. Post-partum, Day 1. Plan: Accucheck
14 AC., which means before meals, and no insulin for now.

15 Q. Thank you.

16 Going back to the 9/20 entry. No. 4 is -- I
17 can't read that second word, but it's fetal tachy -- can
18 you read that -- repeat that?

19 A. Fetal tachycardia.

20 Q. What is that?

21 A. A rapid fetal heart rate.

22 Q. Does that say how long that was sustained?

23 A. No, it does not.

24 Q. Do you recall whether it was a prolonged period
25 of time?

A-10-6

1 A. No, I do not.

2 Q. And then the next line?

3 A. Possible chorioamnionitis.

4 Q. What is that?

5 A. That's an infection in the placental and fetal
6 membranes.

7 Q. What does that indicate?

8 A. An infection.

9 Q. And is there any indication on when that would
10 have happened? Would that have happened prior to labor
11 and delivery?

12 A. There was no indication of it happening before
13 labor and delivery. I have no information that documents
14 that.

15 Q. Okay.

16 So that the rapid heart rate, would that be a
17 complication during labor and delivery? You gave me two
18 before, the premature contractions and the abdominal
19 pain.

20 A. Uh-huh.

21 Q. Would you also associate that with complications
22 during labor and delivery, or is that not --

23 A. It depends on duration.

24 Q. Okay.

25 So based on your notes, you don't believe it

A-10-7

1 rises to that level of complication?

2 A. I don't have that documented in this note.

3 Q. What other type of forcep deliveries are there
4 besides the low forcep?

5 A. Mid-forcep.

6 Q. Is there any other?

7 A. There's Keelan (ph.) forceps for rotation;
8 there's forceps for delivery of the after coming head and
9 breach delivery.

10 Q. In your opinion, how often are forceps used in
11 pregnancies?

12 A. Maybe --

13 MR. MARTIN: In her pregnancy, and the people
14 that she takes care of?

15 MR. ROSIN: Yes.

16 MR. MARTIN: Okay.

17 A. Fifteen percent.

18 Q. And how about when low forceps are used?

19 A. Are you saying out of those 15 percent, how many
20 are low forceps?

21 Q. Yes, yes.

22 A. Probably 90 to 95 percent.

23 Q. So that's the most common use?

24 A. Absolutely.

25 Q. And why is that?

A-108

1 A. Because it's the safest. I don't deliver
2 vaginal breaches, I don't do rotations requiring Keelan
3 (ph.) forceps in the mid-pelvis. And I do low
4 mid-forceps. That's the only other kind, and it's just
5 not as common; no need.

6 Q. You mentioned earlier that the baby was
7 premature?

8 A. Thirty-four weeks.

9 Q. Was that the reason -- could that have been a
10 reason why you needed to use the forceps, or what was the
11 reason? Strike that.

12 What was the reason you needed to use the
13 forceps?

14 A. Because she couldn't push.

15 Q. Was a Cesarean section ever discussed while you
16 were at the hospital?

17 A. Not that I know of.

18 Q. Was a Cesarean section ever discussed between
19 you and the Joshnicks, meaning both Craig or Debbie?

20 A. No.

21 Q. When you see Apgar scores of 8 or 9 at one
22 minute and five minutes respectively, are those
23 considered above average?

24 A. Those are pretty typical.

25 Q. Those are typical. What would be a -- Apgar

A-10-9

1 scores that would demonstrate oxygen deprivation,
2 generally, what would those be?

3 A. Well, they can be quite variable. If you have a
4 good resuscitation, you can have a low initial Apgar, and
5 a second one be pretty good. If you have a long lasting
6 fetal distress, hypoxia, then you're going to have the
7 first minute and the five-minute Apgar both be low.

8 Q. When you say low, would you say an average of a
9 $2/4$, an average of a $3/5$?

10 A. Well, anything under 7 indicates that some
11 resuscitation needs to be performed.

12 Q. That's because there's some type of oxygen
13 deprivation in the infant?

14 A. Well, there's lots of things that can cause low
15 Apgar besides oxygen deprivation.

16 Q. And what would those be?

17 A. Infection, abnormalities; those are probably the
18 major ones.

19 Q. What would be some examples of abnormalities?

20 A. Well, if you've got a child with a C and S
21 malformation, or a cardiac malformation, or a pulmonary
22 malformation.

23 Q. What are some other indications of oxygen
24 deprivation?

25 A. Blue, hypotonia, lack of cry.

A-10-10

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2 generally, what would those be?

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21 malformation, or a cardiac malformation, or a pulmonary
22 malformation.

23 Q. What are some other indications of oxygen
24 deprivation?

25 A. Blue, hypotonia, lack of cry.

A-10-10

1 believe.

2 Q. I think you're correct.

3 MR. FENNER: Excuse me, is that on the good
4 side, or bad side?

5 THE WITNESS: That's the good side.

6 MR. FENNER: Thank you.

7 BY MR. ROSIN:

8 Q. Is there any indication in your records, or in
9 your recollection that the baby was under any stress
10 during labor delivery or immediate resuscitation?

11 A. No.

12 Q. Is it common in forceps use because the baby's
13 skin is so delicate, that there would be some bruising?

14 A. That's possible.

15 Q. When you say possible, can you quantify that to
16 a number?

17 A. No.

18 Q. Would you say more than 50 percent?

19 MR. MARTIN: Asked and answered. She said she
20 couldn't quantify.

21 MR. ROSIN: She can answer.

22 A. I can't quantify.

23 Q. Okay. I don't want you to answer anything
24 you're not aware of.

25 What was the position of the baby?

A-10-11

1 Q. Is there anything in the records, or do you
2 recall whether the infant cried spontaneously after
3 birth?

4 A. Do you have the delivery sheet?

5 MR. MARTIN: Right here.

6 A. Baby's Apgar was 8/9, which means it had a
7 normal heart rate, normal respiration, normal muscle
8 tendon, normal irritative reflexes. The skin color
9 initially was not good, and the total was an "8."

10 Q. Doctor, what do you mean by not good in terms of
11 skin color?

12 A. Well, they look for them to be pink. If they're
13 pink all over, including their hands, they get two
14 points, and if they're pink throughout the body other
15 than the feet and the hands, then they get one point. So
16 at that one minute, the baby was not pink.

17 Q. Okay. And how about at five minutes?

18 A. Five minutes, the baby was pink.

19 Q. Would a low "ph" indicate oxygen deprivation?

20 A. It certainly can.

21 Q. And what would that sort of cutoff number be?
22 Is there a medical standard?

23 A. Well, at 7.1, you want to be delivering this
24 baby. And this child -- let me go to my delivery note.
25 There's somewhere that it's recorded it was 7.26, I

A-10-12

1 A. Occiput posterior.

2 Q. And when a child is delivered in that way, is
3 there any effect on the child in terms of generally in
4 the medical community? When a child is delivered, I
5 believe, that's face up; correct?

6 A. Right.

7 Q. When a child is delivered face up, is there any
8 studies -- have there been any indications that affects
9 the child's brain?

10 A. No.

11 Q. When was a vaginal delivery decided?

12 A. The route is generally a vaginal delivery unless
13 there is a reason to go otherwise. So the anticipation
14 is that it's going to be a vaginal delivery unless
15 there's a reason to do something different.

16 Q. And here there was no reason to do something
17 different based on the medical tests?

18 A. Exactly.

19 Q. And why was that?

20 A. Because she was progressing well, and she did
21 not meet criteria for doing a C-section. We have
22 indications for surgery; she did not meet those
23 indications.

24 Q. Could you briefly tell me what that criteria for
25 those indications --

A-10-13

1 MR. MARTIN: Well, wait a minute. No, we're not
2 going to do that. We're not going to do that because
3 that has nothing to do with the relevant issues that
4 are involved in the NICA petition. She's testified
5 that she didn't recommend a C-section; she
6 wasn't going to do a C-section, and we're not going
7 to go off on this track, so don't answer it.

8 THE WITNESS: Yes.

9 BY MR. ROSIN:

10 Q. Whose decision was it to perform a vaginal
11 delivery?

12 MR. MARTIN: Wait a minute. Don't answer that.
13 That doesn't have anything to do with this, with
14 the NICA petition.

15 MR. ROSIN: Well, they've asserted that they
16 wanted to insist on a C-section. I'm trying
17 to demonstrate on the record that it's not their
18 insistence, it's the doctor's recommendation. Let me
19 ask it this way.

20 BY MR. ROSIN:

21 Q. Did you recommend a vaginal delivery to
22 Debbie Joshnick?

23 MR. MARTIN: I'm just really having difficulty
24 understanding how any of that is relevant to a claim
25 that's pending before this administrative law judge.

A-10-14

1 MR. ROSIN: I understand. But here we have a
2 promissory estoppel argument.

3 MR. MARTIN: The promissory estoppel is that she
4 was told that she had insurance because she got a
5 pamphlet.

6 MR. ROSIN: Right.

7 MR. MARTIN: That's where the promissory
8 estoppel argument is. It has nothing to do with the
9 route of delivery. The facts are that she vaginally
10 delivers, period. And whether that's right or wrong
11 doesn't make any difference; that's what happened.

12 MR. ROSIN: It is relevant to the extent
13 that the Petitioners are saying, are alleging that
14 they based their decision on this pamphlet, which was
15 based on whether to have a vaginal delivery or
16 C-section. They have insisted throughout all their
17 pleadings that they talked about this C-section.

18 MR. FENNER: I would -- okay.

19 MR. ROSIN: Hold on, John. Let me finish,
20 please.

21 MR. MARTIN: Wait, John. Hang on a second,
22 John.

23 MR. ROSIN: I'm inquiring into the mindset, or
24 attempting to, of what was going on in this
25 promissory

A-10-15

1 estoppel allegation, on whether a vaginal delivery
2 was advised, and that she relied on this vaginal
3 delivery and not on a C-section. So I need to
4 establish just for the record, to the extent of that,
5 that there was no conversation about a C-section,
6 and it was just a vaginal delivery.

7 MR. MARTIN: Let me back up for a second.

8 MR. ROSIN: Okay.

9 MR. MARTIN: First off, I see nothing in the
10 petition or the argument of promissory estoppel that
11 deals with vaginal delivery versus C-sectional
12 delivery. What the petition talks about is that she
13 was provided a pamphlet, and the pamphlet says if you
14 get this pamphlet, then your health care providers
15 are participants. And that's what I understand the
16 reliance is on, not as to whether Dr. St. John said
17 we're going to have a C-section, or we're
18 going to have a vaginal delivery, or any other method
19 of delivery.

20 Did I misspeak, Mr. Fenner?

21 MR. FENNER: No, sir, you didn't, except there
22 has been some mention that in the Petitioner's eyes,
23 not necessarily Dr. St. John, there was a debate
24 going on, as there often is, i.e., get this baby out
25 now; I really need to have this baby, and that the

A-10-16

1 assurance of the insurance which was not given by Dr.
2 St. John, by any means, was a factor -- not the only
3 one, but a factor making that decision.

4 That was the reliance of -- and there was -- I
5 won't go into what the other testimony is, though.
6 But I'll ask some questions, and my questions are not
7 aimed at what was the best medical thing to do,
8 they're just aimed at what my people, high school
9 graduates almost knew, and what were they thinking.

10 It's really a subjective question of what they
11 thought rather than what was the best medical
12 treatment, and what was the, you know, what was the
13 right thing to do under the circumstances.

14 MR. MARTIN: I have been shown an affidavit
15 signed by Debbie Joshnick, which was attached to her
16 deposition the other day as Exhibit D, I believe.
17 And in paragraph 8, Mrs. Joshnick says, "Even with
18 the risk to me, it was a hard decision not to insist
19 on a Cesarean section. Knowing that I was covered
20 by NICA was an important reason why Craig and I did
21 not absolutely insist on a Cesarean section."

22 It sounds as though from the affidavit that Ms.
23 Joshnick filed, that she already was relying on some
24 representation under promissory estoppel theories
25 that she had NICA coverage. And so I still don't see

A-10-17

1 how a C-section representation is towards it or
2 not. I guess if the question was, did they ever
3 insist upon a C-section to you, I would allow you to
4 answer that.

5 MR. FENNER: Yeah, I think we're more looking to
6 their state of mind, and what they heard, and what
7 they knew. Obviously, it's two and a half years
8 afterwards, and people were busy.

9 MR. MARTIN: Well, certainly the doctor
10 testified that she didn't recommend a C-section; she
11 wasn't going to do a C-section, because the lady
12 didn't meet the criteria.

13 MR. FENNER: That is correct. And there are
14 some of the factual things, but it doesn't go near
15 whether the C-section was a good idea versus a bad
16 idea.

17 MR. ROSIN: All right, are we ready to proceed?

18 MR. MARTIN: Sure.

19 MR. FENNER: It's purely -- it's a subjective
20 thing.

21 MR. MARTIN: What's your next question?

22 MR. ROSIN: We're going to go ahead and proceed.

23 MR. MARTIN: What's the next question?

24 BY MR. ROSIN:

25 Q. Did Debbie Joshnick, or Craig Joshnick ever

A-10-18

1 insist on a Cesarean section?

2 A. Not that I'm aware of it. I have no
3 recollection of it, nor do I have that documented in my
4 notes. And, quite honestly, if somebody brought that up,
5 I would address that in my notes.

6 Q. Okay. That was my follow-up.

7 If Debbie Joshnick had insisted, or Craig
8 Joshnick had insisted that a C-section be performed,
9 would you have performed it?

10 A. I would have discussed with them the pro's and
11 con's, lack of indication. I'm bound by, "do not harm."

12 Q. So in your --

13 A. So to take a patient to surgery when it's not
14 indicated, it don't work that way.

15 Q. So that would be against your ethical duty?

16 A. Exactly.

17 Q. In your previous history and experience, has any
18 mother or family refused to follow the advise of whether
19 to do a vaginal delivery, or a C-section during labor
20 delivery where they needed resuscitation?

21 A. I don't know that that's happened.

22 Q. Has anybody ever insisted on a C-section against
23 your advice?

24 A. We have had patients that have come into the
25 practice, and at their initial prenatal care, asked for a

A-10-19

1 C-section because -- without any medical indication, and
2 we indicate to them that we don't practice that way, and
3 that they will need to seek care elsewhere.

4 Q. How about during labor, has that ever occurred
5 that anybody insisted on a C-section against your advice?

6 A. No.

7 Q. Is it your testimony that a C-section was not
8 advisable under Diane Joshnick's condition?

9 MR. MARTIN: Don't answer that.

10 MR. FENNER: Objection.

11 MR. MARTIN: Yes, don't answer that. That has
12 nothing to do with this. She has already said
13 she didn't meet the indicators. Let's move on.

14 BY MR. ROSIN:

15 Q. Were you in the room when Debbie Joshnick
16 received the NICA pamphlet?

17 A. I doubt it.

18 Q. Do you have patients during your practice, and
19 during your prenatal visits, sign any consent form
20 regarding your abilities of a C-section vaginal delivery,
21 any other type of procedure that may be necessary?

22 A. If they have a procedure done in the office,
23 they sign for a permit right then and there; i.e. an
24 amniocentesis, she signs a permit. We don't have a
25 permit for the care that's going to go on in the

A-10-20

C R O S S E X A M I N A T I O N

BY MR. FENNER:

Q. If Debbie had made a formal request for a C-section as opposed to "get the baby out of here, get the baby out," what would you have said were the con's in her particular situation?

A. Supposition?

Q. Pardon?

MR. MARTIN: Are you asking if she had made that statement, what would have been the doctor's advise?

MR. FENNER: Well, yeah. I mean -- I guess what -- let me rephrase.

MR. MARTIN: Thanks.

BY MR. FENNER:

Q. Were Debbie's weight and gestational diabetes reasons not to do a C-section?

A. Her gestational diabetes had nothing to do with that decision at all.

Q. Okay.

A. You've got to give me an indication to deliver her by C-section. I did not have one.

Q. Okay.

Did you discuss the possibility of a C-section with any of your colleagues?

A-10-21

1 Q. Did you have medical care during the pregnancy?

2 A. Yes.

3 Q. About how often did you see your obstetrician?

4 A. At the beginning, it wasn't more -- it was normal.

5 And I think like three months into it, I started having
6 problems, so I was going more frequently. Eventually, it
7 ended up being once a week.

8 Q. Okay. But before that, how often was it?

9 A. Often? I would say once a month or once every two
10 weeks.

11 Q. Okay. Now --

12 A. I saw her a lot.

13 Q. On one of your first examinations, did
14 Dr. -- excuse me. Who was your primary obstetrician?

15 A. Dr. St. John.

16 Q. Okay. She worked with a group or --

17 A. Yes.

18 Q. On one of your initial visits, did Dr. St. John
19 discuss anything with you?

20 A. Yeah. She discussed the fact that I had a small
21 pelvis and that they had to use smaller speculums, so most
22 likely I'd be having a C-section.

23 Q. Okay. Did she explain what the relationship of
24 the small pelvis is to a C-section?

25 A. I think she explained it a little bit. I don't

A-11-a-1

1 NICA pamphlet?

2 A. Yes.

3 Q. Okay. At that time, did you look at the NICA
4 pamphlet?

5 A. No.

6 Q. Did they give you any explanation about the NICA
7 pamphlet?

8 A. I was kind of leery of signing anything, so I had
9 to ask the nurse. I believe it was Nurse Collins. I said,
10 did Craig need to handle this? And I said, don't sign
11 anything. I was leery at that point.

12 Q. When you signed it in, this was maybe either at
13 night or later on about seven o'clock in the morning of the
14 17th, are you saying that somebody explained it to you then?

15 A. The nurse explained it to us. She said it was
16 like an insurance policy in case anything went wrong during
17 the delivery.

18 Q. Okay. All right. Now, labor went, or basically
19 pain, went throughout that day; you were in the hospital;
20 they didn't send you back, right?

21 A. Pardon?

22 Q. They did not send you back?

23 A. Send me back?

24 Q. Send you back home.

25 A. No.

A-11-a-2

1 BY MR. FENNER:

2 Q. Okay. Skipping over the words you can't read, if
3 you could just continue with it.

4 A. Okay. Stated she went to the -- she wants the
5 baby out. When informed of problems of prematurity, she
6 looks away.

7 Q. So you told the delivery nurse or the labor and
8 delivery nurse several times that you wanted the baby out?

9 A. Correct.

10 Q. Now, that's three o'clock in the afternoon. Did
11 you assume at that time that it was via Cesarean section?

12 A. Yes.

13 Q. All right. So you were asking for what was major
14 surgery then?

15 A. Yes.

16 Q. Okay. Do you remember what drugs they put you on
17 to stop your labor?

18 A. I don't remember the name of it. I know -- I know
19 it, but I don't remember the name of it right now.

20 Q. Okay.

21 MR. FENNER: For the record, Your Honor, it's
22 terbutaline.

23 A. Terbutaline. That's it. I'm sorry.

24 BY MR. FENNER:

25 Q. Later on in the afternoon, do you remember going

A-11-a-3

1 in for amniocentesis?

2 A. Yes.

3 Q. And do you remember who conducted that?

4 A. Dr. St. John and Dr. Dawson were there.

5 Q. Okay. Was Dr. St. John -- was Dr. St. John on
6 that day?

7 A. No. She came in because Dr. Dawson was qualified,
8 but yet she was kind of, like, watching over him.

9 Q. For the amniocentesis?

10 A. Right.

11 Q. Okay. And the notes say that they sent it off to
12 the lab at 6:50. Do you remember about -- do you remember
13 when the results of the amniocentesis were given to you?

14 A. Yes, I do. I mean, she told me there was blood in
15 the amniocentesis, and I was concerned immediately.

16 Q. Did she say where the blood could have come from?

17 A. She wasn't sure at the time. She mentioned a
18 possible rupture. They were inquiring what exactly had
19 happened to cause the premature labor at that point. She
20 said they were consulting with other doctors on it.

21 Q. Okay. And after the results of the amniocentesis
22 came back, did she again speak with you about what was to be
23 done?

24 A. She did. She had told me that they were doing it
25 to check the development of his lungs, I believe, if I'm

A-11-a-4

1 remembering correctly, and that it was okay to go ahead, and
2 that they were going to decide if they were going to do a
3 C-section or natural delivery.

4 Q. Okay. And what did she say was their decision?

5 A. She said after the consult with four doctors that
6 they were going to do vaginal delivery.

7 Q. Was this a surprise to you?

8 A. Yes.

9 Q. And let's back up a little bit.

10 A. Okay.

11 Q. Who was in the room with you in the evening of the
12 January 16 -- 17th, rather?

13 A. In the evening of the -- okay.

14 Q. In the afternoon and the evening.

15 A. Keith, my brother; my husband; Lisa had come in
16 there some time in the afternoon.

17 Q. Is that Lisa Weisickle?

18 A. Yes.

19 Q. And your brother, Keith, is Keith Decker?

20 A. Keith Decker, yes.

21 Q. So were these people in the room all at the same
22 time or --

23 A. They were on and off, Keith and Lisa. You know,
24 it kind of gets overwhelming with people, so they are in and
25 out.

A-11-a-5

1 Q. Okay. How long have you known Lisa?

2 A. Since, like, third or fourth grade. Six or seven.
3 Many years.

4 Q. Almost 30 years?

5 A. Yeah.

6 Q. And you're pretty close?

7 A. Yes. She's my best friend.

8 Q. And, in fact, would you consider her part of your
9 extended family?

10 A. Yes.

11 Q. When Dr. St. John said that the consensus decision
12 was to have a vaginal delivery, did you express any surprise
13 to Dr. St. John?

14 A. I questioned her, yes.

15 Q. Did anybody else question her?

16 A. I think everybody did, but I don't know if Keith
17 did. I had sent him to question her. I questioned him
18 getting me out of there.

19 Q. Getting you out of there? What do you mean by
20 getting you -- him --

21 A. I was starting to get concerned, like maybe I
22 should be going down here to St. Pete. I knew it was a
23 trauma hospital. So I was concerned about that.

24 Q. All right. So you were concerned about a vaginal
25 delivery?

A-11-a-6

1 A. Yes.

2 Q. Okay. Why were you concerned about a vaginal
3 delivery?

4 A. Well, from every -- well, they did a sonogram
5 every time I went in there just about, and they had told me
6 that his head was big, and I knew I was small; I knew I had
7 a small frame. So I figured it would be very difficult.
8 And I also was concerned that something was terribly wrong
9 with Austin.

10 Q. Okay. In addition to yourself discussing this
11 with Dr. St. John, do you remember anybody else discussing
12 it with Dr. St. John?

13 A. I know Lisa questioned thoroughly. Craig, I don't
14 know how much he questioned.

15 MR. ROSIN: Objection. Hearsay as to the
16 statements of Lisa Weisickle.

17 MR. FENNER: It's just for the fact that --

18 THE COURT: Overruled. She hasn't made any
19 statements to what she said.

20 MR. FENNER: Just in talking to her.

21 BY MR. FENNER:

22 Q. How did Dr. St. John react to Lisa's questioning?

23 A. She was defensive.

24 Q. Okay. Did she take any action?

25 A. I believe she told her to leave the room.

A-11-a-7

1 Q. Okay. At that time, did you read the entire NICA
2 pamphlet?

3 A. No.

4 Q. You didn't discuss -- let me back up a little bit.
5 Did you read at least the cover of the NICA pamphlet?

6 A. I glanced at it.

7 Q. Okay. What did Nurse Collins say about the NICA
8 pamphlet?

9 MR. ROSIN: Objection, Your Honor. To the extent
10 that the statement shall not be sufficient in and of
11 itself to support a finding, Nurse Collins' deposition
12 was put into evidence. She stated what she stated in
13 her deposition transcript.

14 MR. FENNER: Your Honor, this goes to my client's
15 state of mind. It goes to the reasonableness of her
16 reliance.

17 THE COURT: Go ahead. Overruled.

18 THE WITNESS: Repeat the question.

19 THE COURT: You may answer the question.

20 BY MR. FENNER:

21 Q. What did Nurse Collins say to you about the NICA
22 pamphlet?

23 A. She said it was like an insurance policy. We were
24 covered if anything went wrong with the baby at delivery.

25 Q. Okay. Had Dr. St. John mentioned any -- for

A-11-a-8

1 reasons to do a vaginal delivery in your discussions? Did
2 she mention any problems you might have?

3 A. She -- when I questioned her about the C-section,
4 she said that I was in grave condition and I had lost too
5 much blood. And I said, really, because I didn't realize I
6 had lost that much blood. So I was like, okay. I believed
7 that I was in grave condition and lost too much blood to
8 have a C-section.

9 Q. So in short, you understood that there were
10 dangers to you from a Cesarean section?

11 A. Yes.

12 Q. Okay. At the same time, you had testified you
13 were entertaining the possibility of leaving the hospital?

14 A. I had said to my brother, Keith, quite frankly,
15 get me some drugs or get me the hell out of here; there's a
16 problem. I felt we were going on too long without pain
17 medication, and the baby was in duress and all these other
18 things. I wanted some action taken.

19 Q. Okay. And in your capacity as a 911 supervisor,
20 did you get to know the local health care facilities?

21 A. Yes. I dealt with them every night.

22 Q. And so you had an idea of what your options were.

23 A. Yes.

24 Q. Getting back to working at 911, when you worked at
25 911, were there a lot of women working on your shift with

A-11-a
9

1 you?

2 A. When I started, or when I was a supervisor?

3 Q. When you started.

4 A. When I started, there was times I was the only
5 woman, and it was a man's world back then. There wasn't a
6 lot of females on night shift. I was the only one, as a
7 matter of fact.

8 Q. And you rose to be supervisor?

9 A. Yes.

10 Q. Is it fair to say that you weren't pushed around
11 easy?

12 A. No. I handled men mostly older than me and, you
13 know, firemen. They can be tough. Especially when they're
14 out there under stress.

15 Q. And what's your brother, Keith's, occupation?

16 A. He works for Danko. Salesman.

17 Q. What did he do before that?

18 A. He worked for CNN.

19 Q. Okay. And before that?

20 A. I don't remember what he did before that,
21 honestly.

22 Q. I guess I'm leading up to the question. Did you
23 feel even at that stage that you had options?

24 A. Yes.

25 Q. And what did those options include?

BA-11-a
10

1 A. Leaving -- you mean leaving the hospital? My
2 options were to, you know, seek other medical advice or get
3 a second opinion or do something, because I felt it was
4 lagging. I felt that this was going terribly wrong.

5 Q. Okay. Okay. Did the NICA pamphlet and the
6 nurse's explanation give you some comfort?

7 A. Yes.

8 Q. Okay. Did it give you full piece of mind?

9 A. No.

10 Q. Okay. Was that a factor in your not pushing for
11 other options?

12 A. I believe it was a factor, yes. She said -- she
13 calmed us down and explained it to us to a degree, you know.
14 I think eased me up a little bit.

15 Q. All right. Now, you still continued to discuss
16 the Cesarean section with Dr. St. John?

17 A. Not really. Not till the next morning. I think I
18 was -- you know, a couple times maybe during the night, I
19 mention it to the nurse. I don't think I saw St. John that
20 night until the next morning. I discussed it with, I think,
21 Dr. Dawson. He was in favor of the C-section.

22 Q. Okay. So possibly that if you insisted on
23 C-section, you could have gone to Dr. Dawson or asked him to
24 do it?

25 MR. MARTIN: Form.

A-11-a
11

1 A. At that time, I was doing the signing, I believe.
2 And he wasn't questioning at that time, because I assumed it
3 was all just sign-in paperwork. When this started coming
4 up, I started questioning.

5 Q. What's this?

6 A. Well, when the other paperwork came into play. I
7 had already been admitted. I was questioning what we were
8 signing.

9 Q. Okay. And at that point, you had seen
10 Dr. St. John during that amnio, correct?

11 A. I think I saw her before the amnio. I don't know
12 if she's the one that did the amnio.

13 Q. Who interpreted those results to you, or who spoke
14 to you about those results?

15 A. Oh, wait. Repeat that question. I want to make
16 sure I tell you right.

17 Q. Which question?

18 A. The last one -- when I saw Dr. St. John.

19 Q. Okay. When did you see Dr. St. John on Wednesday?

20 A. During the amnio.

21 Q. During the amnio. So she was present at the
22 amnio?

23 A. Correct. She came in to assist Dr. Dawson.

24 Q. Assist Dr. Dawson. After that, Dr. Dawson
25 explained the results to you; isn't that correct?

A-11-a
12

1 A. No, Dr. St. John did, I think.

2 Q. Dr. St. John explained the results to you?

3 A. Yeah.

4 Q. Did Dr. Dawson interpret those -- was Dr. Dawson
5 also there?

6 A. I can't be sure if he was there at the time or
7 not. I don't think he was at the time she explained it to
8 me. He was in later after that.

9 Q. Okay. Do you recall at what time the -- well, let
10 me rephrase it this way. The amniocentesis was done around
11 6:30; is that correct?

12 A. I think it was around -- yeah, dinnertime.

13 Q. Do you recall how long it took for you to get the
14 results back?

15 A. I don't think it was long. I think they were
16 doing it -- I -- at the beginning, I kind of felt that they
17 were doing it so they could get the C-section rolling. You
18 know, that's what I'm thinking.

19 Q. Nobody ever told you that you were having a
20 C-section; isn't that correct?

21 A. No. During the hospital stay?

22 Q. Yeah.

23 A. Okay. During the hospital stay, they did not say
24 I was having a C-section. Dr. Dawson originally wanted one,
25 from my recollection, but he was kind of overrun by

A-11-a
L3

1 Dr. St. John saying, no, we're holding off, was my
2 impression.

3 Q. So the answer was, no, that nobody ever told you
4 you were having a C-section?

5 A. Nobody told me during those three days that I was
6 having a C-section.

7 Q. Okay. Further, you testified that Dr. St. John
8 consulted with four other doctors --

9 A. Correct.

10 Q. -- isn't that correct? Do you remember what that
11 consultation was about?

12 A. About natural delivery versus the C-section.

13 Q. And it was those four doctors that agreed that you
14 were to have a vaginal delivery; isn't that correct?

15 A. That was my interpretation, yes.

16 Q. Did you receive any other papers -- hold on. Did
17 you receive any other papers at that same time when the
18 nurse came in around ten o'clock on Wednesday evening to
19 sign? Do you recall that?

20 A. I don't recall that, no.

21 Q. So nurse came in with this pamphlet, spoke to you
22 about it briefly, and then Craig ended up signing for it?

23 A. Correct.

24 Q. Is that your testimony? And there was no other
25 documents that you recall or your husband signed for?

A-11-a
14

1 (Discussion held off the record.)

2 THEREUPON,

3 CRAIG JOSHNIICK

4 was adduced as the deponent herein, and being first duly
5 sworn upon oath, was questioned and testified as follows:

6 THE COURT: Please state your name.

7 THE WITNESS: Craig Joshnick.

8 THE COURT: what happened to your hand?

9 THE WITNESS: I did it with a nail gun the other
10 day.

11 THE COURT: what is a nail gun?

12 THE WITNESS: 12-penny nail gun.

13 THE COURT: Moving too fast?

14 (Discussion held off the record.)

15 DIRECT EXAMINATION

16 BY MR. FENNER:

17 Q. All right. what is your occupation?

18 A. Carpenter.

19 Q. Okay. Moving backwards a little bit, going back
20 to your wife Debbie's pregnancy, did you ever accompany
21 Debbie to visit her obstetrician when she was pregnant?

22 A. Yes, on a couple of occasions.

23 Q. Okay. Did you -- were you present while she and
24 the doctor discussed things?

25 A. Yes.

A-11-6

1 Q. Okay. During those visits, do you recall their
2 ever discussing possibilities of a Cesarean section?

3 A. Yes, I do.

4 Q. Okay. Do you remember what they said or --

5 A. To the best of my recollection, I was under the
6 impression if my son was to be above a certain weight, it
7 was a guaranteed C-section.

8 Q. Do you remember what that weight was?

9 A. I believe it was somewhere around six-and-a-half
10 pounds or something around there.

11 Q. Do you remember which doctor that was -- okay.
12 You said it was your understanding. Did you get that from
13 Debbie after a visit, or did you get that directly from the
14 doctor?

15 A. I got that from the doctor.

16 Q. Okay. Do you remember which doctor that was.

17 A. I don't remember.

18 Q. I'm moving onto January 16th, the evening Debbie
19 went to the hospital. Did you go with her or --

20 A. I went -- I didn't go with her in the ambulance,
21 but I followed up, yes.

22 Q. And did you stay there pretty much the rest of the
23 time till Austin was delivered?

24 A. Yeah.

25 Q. Were you in the room every minute or --

A-11-6
2

1 A. Not every minute, no. I made a few phone calls,
2 tell people what was going on and stuff.

3 Q. Had you discussed with Debbie previously the
4 possibilities of having a Cesarean section?

5 A. Yes.

6 Q. Did you think it was likely; did you think it was
7 possible, or did you think it was remote?

8 A. I thought it was possible. I wasn't expecting
9 anything. I wasn't expecting much else than a C-section,
10 but I was told there was the possibility of a vaginal birth.

11 Q. Okay. Did you go with Debbie to get the
12 amniocentesis examination on the 17th?

13 A. I believe I was in the area. I don't remember
14 much about what happened, though.

15 Q. After the amniocentesis was done, do you remember
16 any conversations between either Dr. Dawson or Dr. St. John
17 and you and Debbie about what the results of the amnio were
18 and what they meant?

19 A. I don't recall.

20 Q. Do you recall either Dr. St. John or Dr. Dawson
21 talking about bringing on labor?

22 A. They -- at one point, they had stopped labor, and
23 then they decided to try to let it go again, yes.

24 Q. Okay. And did they discuss -- or rather was
25 Cesarean section discussed between the doctors and yourself

A-11-6
3

1 and Debbie?

2 A. Yes, and possibly Lisa.

3 Q. And do you remember what was discussed, what they
4 said?

5 A. I don't remember exactly what was discussed, no,
6 but it was being discussed that there was still a
7 possibility -- more of a possibility of getting a C-section
8 and a remote possibility of a natural birth.

9 Q. Okay. Do you remember when, I guess, Nurse
10 Collins, came in with a set of papers after the
11 amniocentesis, after the discussion? Do you remember when
12 she came in with a bunch of papers to sign?

13 A. A few papers, yes.

14 Q. Okay.

15 MR. FENNER: Your Honor, I'm going to refer to one
16 of your other exhibits, which there's a copy of one
17 here. I can't recall which number it is.

18 THE COURT: It's part of Austin's record, I
19 believe.

20 MR. FENNER: It's page three.

21 THE COURT: Yeah, it's Petitioner's Exhibit 2, tab
22 three at page three.

23 BY MR. FENNER:

24 Q. This is the consent to -- there's a consent, and
25 also there's a receipt for the NICA form. Is that your

A-11-6
4

1 signature?

2 A. Yes, it is.

3 Q. Okay. Why did you sign this document?

4 A. Well, the nurse handed me the pamphlet of the NICA
5 and gave a brief explanation of what it was, and I figured,
6 well, I guess I should sign.

7 Q. Okay. Is this a somewhat blown up copy of what
8 you remember?

9 A. Slightly enlarged, yes.

10 Q. For the record, referring to the blown up copy of
11 the NICA pamphlet. Did you read -- did you read the -- did
12 you read the entire pamphlet?

13 A. At the time, no, I did not.

14 THE COURT: Did you read any of it?

15 THE WITNESS: I read the very front part of it.

16 THE COURT: That's all?

17 THE WITNESS: That's all.

18 THE COURT: Okay.

19 BY MR. FENNER:

20 Q. What do you remember the nurse saying about the
21 pamphlet?

22 MR. ROSIN: Objection, Your Honor. That's
23 hearsay.

24 THE COURT: I'm going to overrule. When did you
25 ultimately read the pamphlet?

A-11-6
5

1 THE WITNESS: Actually, I really didn't read the
2 pamphlet until quite a while later when I -- when we
3 were realizing that things had gone wrong.

4 THE COURT: You're talking about months later?

5 THE WITNESS: I really don't even know how long it
6 was.

7 THE COURT: After Austin's discharge from the
8 hospital?

9 THE WITNESS: Yes.

10 THE COURT: Okay. I'm sorry to interrupt. Go
11 ahead with your line of questioning. That objection's
12 overruled.

13 BY MR. FENNER:

14 Q. What do you recall the nurse -- Nurse Collins
15 saying about the pamphlet, the NICA?

16 A. Just saying that it was somewhat like an insurance
17 policy. If things went wrong with delivery and all, that
18 we'd be covered to a certain degree.

19 Q. Who else was in and out at that time? Who else
20 was present?

21 A. Obviously, myself and my wife and a couple of the
22 doctors were in and out. Nurses. My brother-in-law was in
23 and out, and Lisa was there. And that's about all I can
24 think of.

25 Q. Okay. The brother-in-law is Keith Decker?

A-11-b
6

1 A. Yes, Keith Decker.

2 Q. Got his name right for the first time. And Lisa
3 Weisickle?

4 A. Yes.

5 Q. Do you remember any -- do you remember the
6 discussions that you and Debbie and Lisa had among
7 yourselves about a Cesarean section or a ---versus a vaginal
8 birth at about that time?

9 A. I don't remember anything specific, but I do
10 remember talking about both of the options, yes.

11 Q. Okay. And were you informed about what the risks
12 of both of the options were? I mean, did somebody tell you
13 why they were going for a vaginal delivery?

14 A. I don't really recall for sure. The only
15 thing -- the only thing I can think is that they were
16 recommending it for one reason or another.

17 Q. Okay. Did the pamphlet and Nurse Collins'
18 explanation of the pamphlet, did it give you some piece of
19 mind? Did it ease your mind about having a vaginal
20 delivery?

21 A. Yeah. I suppose it did.

22 Q. Flashing forward. You were also present when
23 Austin was born; is that correct?

24 A. Yes.

25 Q. Since you were not directly involved, do you

A-11-b
7

1 Q. Okay. In fact, I've described you as extended
2 family. Is that a fair --

3 A. Yes. Actually closer than family.

4 Q. I don't want to pry on that one. When Debbie
5 became pregnant, were you involved?

6 A. Yes.

7 Q. Did you ever accompany her to the obstetricians?

8 A. Yes.

9 Q. About how many times?

10 A. I would say three or four times.

11 Q. Okay. And when you went to the obstetrician with
12 Debbie, do you ever remember -- do you ever remember the
13 doctor and Debbie discussing a -- having a Cesarean section
14 versus a vaginal delivery?

15 A. Yes.

16 Q. Okay. Do you remember which doctor this was?

17 A. Dr. St. John.

18 Q. Okay. And you were present when this happened?

19 A. Yes.

20 Q. And do you recall what Dr. St. John said?

21 A. That Debbie has a small bone frame even though
22 she's a bigger girl, and she didn't think that she would be
23 able to deliver a baby vaginally.

24 Q. And did you and Debbie discuss this afterwards
25 or --

A-11-C
1

1 A. Yeah. We would usually go out to lunch, or if I
2 didn't go with her to the doctor, she -- we would meet
3 after, and we would talk about her appointment.

4 Q. Okay. But you would -- you were there -- you were
5 physically present when she described --

6 A. Yes.

7 Q. -- her small bone structure? Do you remember
8 about when that was -- how far along Debbie was?

9 A. I'm sorry. I don't --

10 Q. Do you remember how far along in the pregnancy was
11 Debbie?

12 A. Six months, maybe.

13 Q. All right. At the time of -- Debbie went to the
14 hospital on the 16th and 17th. What time did you get to the
15 hospital?

16 A. It was the afternoon of the second day that she
17 had been in the hospital.

18 Q. And that would be the 17th?

19 A. Yes.

20 Q. A Wednesday? And why did it take you so long?

21 A. Well, I'm kind of a hard person to get ahold of.
22 I have family. We own a business. I have two kids. They
23 both dance. They dance six days a week. So sometimes it's
24 hard for me to get -- for people to get ahold of me, and I
25 didn't know that she was in the hospital until the second

A-11-C
2

1 day. And as soon as I found out she was there, that's when
2 I went.

3 Q. And you said you have two children. What are
4 their names and ages?

5 A. Amy is 15, and Sarah is 11.

6 Q. Okay. And Amy baby-sits for Austin?

7 A. Yes.

8 Q. Okay. Going back to the 17th in the hospital, did
9 you see Dr. St. John when you got there?

10 A. I don't know if it was right exactly when I got
11 there, but it was shortly after I had gotten there. She
12 came in checking on Debbie.

13 Q. Okay. And how would you categorize your
14 relationship with Dr. St. John?

15 A. Not very well. I don't think she likes me very
16 well.

17 Q. Some time after Debbie had her amniocentesis, do
18 you remember either Dr. Dawson or Dr. St. John coming in and
19 discussing the results with Debbie?

20 A. I don't recall that.

21 Q. Okay. Do you recall -- at some point in the
22 proceedings, do you recall Dr. St. John telling Debbie that
23 they were going to induce labor?

24 A. I believe so.

25 Q. Okay. Your two children, were they both born

A-11-c
3

1 vaginally or by Cesarean section?

2 MR. MARTIN: Objection. Relevancy and
3 immateriality.

4 THE COURT: Overruled.

5 BY MR. FENNER:

6 Q. Were you own children born vaginally?

7 A. My first child was an emergency C-section. My
8 second child was vaginal. I have the experience of both.

9 Q. All right. Okay. Do you remember ever discussing
10 a Cesarean section with Dr. St. John when Debbie was in the
11 hospital?

12 A. Oh, yes.

13 Q. And-and about how many times?

14 A. I know one time for sure. I believe it was a few
15 times that it was brought up.

16 Q. All right. And what was Dr. St. John's reaction
17 to that?

18 A. Dr. St. John did not like me asking her questions.
19 That would, you know -- she just didn't like me asking her
20 questions about anything. She always made me feel like, who
21 did I think I was that I should be questioning anything that
22 she was doing? When I got to the hospital and Debbie was in
23 pretty bad shape, I asked her why? -- you know, I thought you
24 were having a C-section; what's going on? and --

25 MR. MARTIN: Excuse me. Your Honor, this isn't

A-11-C
4

1 responsive to any question that's been outstanding.

2 THE COURT: Sustained.

3 MR. FENNER: Pardon? Sustained? Okay.

4 THE COURT: Try again.

5 BY MR. FENNER:

6 Q. Okay. When you did talk with Dr. St. John, did
7 Dr. St. John ask you to do anything?

8 A. She asked me to leave the room.

9 Q. Okay. About how many times did she ask you to
10 leave the room?

11 A. A few times. Every time I would ask her a
12 question that she didn't like, she would ask me to leave the
13 room.

14 Q. So more than twice, she asked you to leave the
15 room?

16 A. I believe so. And then I finally -- I just
17 concentrated on Debbie and didn't get into it with her
18 anymore.

19 Q. Okay. And some of these conversations were about
20 Cesarean?

21 A. Yes.

22 THE COURT: What did you say to her and what did
23 she say to you?

24 THE WITNESS: I'm sorry.

25 THE COURT: You had a conversation with

A-11-c
5

1 Dr. St. John about Cesarean section?

2 THE WITNESS: Yes.

3 BY MR. FENNER:

4 Q. And when was this? When was the first time?

5 A. The first time was when I got to the hospital.

6 Q. And what did you say to her; what did she say to
7 you?

8 A. I asked why Debbie wasn't having a C-section,
9 because from the beginning of her pregnancy, it was
10 discussed that she would have a C-section? She told
11 me -- or responded by saying that she could not give Debbie
12 a C-section because Debbie had lost too much blood, okay?

13 So I said, well, I'm not a doctor or anything, but
14 I've had a C-section, and when I had my C-section, they were
15 in and out and had the baby out in, you know, no time. And
16 if it's because she's lost too much blood, it would make
17 more sense to me, would you rather not get the baby out
18 right away, or would you have somebody try for hours to push
19 a child out. That's when she asked me to leave the room.

20 THE COURT: Did you have a further discussion with
21 her about a C-section?

22 THE WITNESS: I recall bringing it up again and
23 again being asked to leave the room.

24 THE COURT: Okay.

25

A-11-c
6

1 BY MR. FENNER:

2 Q. So that was her response to you, to ask you to
3 leave?

4 A. Yes.

5 Q. So she did not go and, essentially, justify that?

6 A. I'm sorry.

7 Q. She didn't go and justify -- she didn't
8 go -- rather explain. She did not go and explain her
9 recommendation to go with a vaginal delivery to you --

10 A. No.

11 Q. -- beyond the initial explanation?

12 A. No.

13 Q. And you're sure of that wording?

14 A. Yes.

15 Q. She said Debbie had lost too much blood?

16 A. Yes.

17 Q. If Debbie had said to you, I have to leave this
18 hospital, would you have helped her?

19 MR. ROSIN: Object to form, Your Honor.

20 MR. MARTIN: Now we're talking about pure
21 speculation.

22 MR. ROSIN: Speculation, Your Honor.

23 THE COURT: I'll sustain it as phrased.

24 BY MR. FENNER:

25 Q. In your mind, was the option of insisting on a

A-11-C
7

1 Cesarean section to Debbie a live option?

2 MR. MARTIN: Objection, Your Honor, at this time.

3 Again, speculation, relevancy, immateriality as to what
4 this witness was thinking about the claimant's state of
5 mind.

6 MR. ROSIN: Join.

7 THE COURT: What was the question again?

8 BY MR. FENNER:

9 Q. The question was, in your mind, was the
10 possibility of changing hospitals or changing doctors in
11 order to have a Cesarean section a live option?

12 THE COURT: She's not in the position to comment
13 on that. I'll sustain the objection. Did you have the
14 ability to transport Debbie to another facility if she
15 had asked you to do so?

16 THE WITNESS: I would have put her in my car and
17 taken her if I -- if it was something that -- I mean,
18 at that time, she had been in the hospital for a night
19 and a day already.

20 THE COURT: May well be a medical question of
21 whether she was moved.

22 MR. FENNER: Pardon?

23 THE COURT: Nothing. Go ahead.

24 BY MR. FENNER:

25 Q. Okay. At some point, did Austin and Keith -- I'm

A-11-c
8

1 the room once, twice, three times?

2 A. The first time I saw her was when I first got
3 there. She was in the room. Can I elaborate on the answer
4 there? Because that was the first time she asked me to
5 leave the room, which was about pain medicine for Debbie,
6 and I was asked to leave the room.

7 Then, again, I went in on and off. You know, time
8 frame-wise. You know, there's a lot of excitement going on
9 when someone's having a baby. Then there was the C-section
10 question.

11 Q. Now let me stop you. That C-section question, was
12 that Wednesday evening or -- I'm sorry. Yes. Was that
13 Wednesday evening on the 17th, or was that Thursday morning?

14 A. Wednesday.

15 Q. I'm sorry. Continue. How many other times after
16 that did you see her?

17 A. She would be in and out of the room. I would be
18 in and out of the room. I can't give you an exact amount of
19 times.

20 Q. Okay. So would you say more than three or four
21 times she was in and out of the room on Wednesday evening?

22 A. Yeah.

23 Q. Would it surprise you that Dr. Dawson was the
24 physician on call for Wednesday?

25 A. I have no idea.

A-11-C
9

0001

1 IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
2 IN AND FOR PINELLAS COUNTY, FLORIDA
3 CASE NO. 03-9216-CI-21

4 DEBBIE A. JOSHNICK and
5 CRAIG JOSHNICK,
6 Plaintiffs,

7 -VS-

8 PATRICIA A. ST. JOHN, M.D.,
9 ST. JOHN OB/GYN, INC., BAY AREA
10 WOMEN'S CARE, INC., ALLAN H. HAYDON,
M.D., and SURGICAL ASSOCIATES OF
WEST FLORIDA, P.A.,
Defendants.

11

12

13

VIDEOTAPED DEPOSITION OF PATRICIA ANN ST. JOHN
(Pages 1 - 151)

14

15

Tuesday, February 10, 2004
2:56 p.m. - 6:54 p.m.

16

17

Bay Area Women's Care
1055 South Fort Harrison Avenue
Clearwater, Florida

18

19

20

21

22

Reported By:
Jennifer Figueroa, RPR
Notary Public, State of Florida
Esquire Deposition Services
Tampa Office
Phone - 813.221.2535
Esquire Job No. N605127

0002

1

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2

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On Behalf of the Defendants:
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Clearwater, Florida 33756
727.441.8966

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15

ALSO PRESENT:
ANDRE ZAVALA, VIDEOGRAPHER

16

17

18

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20

A-12-1
1749

13 herself as being your patient were to come into the
14 office because of a particular obstetrical or
15 gynecologic need and was given an appointment to come
16 into this office, but you happened to be at a different
17 office at the time the patient presented, would it be
18 typical that someone else in the group, one of the other
19 physicians, might see the patient in your stead?

20 A. The gynecology patients were mainly an
21 individual's patients and seen in emergency situations
22 by another physician. The obstetrical patients were
23 shared patients.

24 Q. All right. Let me talk to you a little bit
25 about other legal matters that you've been involved in

0013

1 outside of this one. Can you tell me how many times
2 you've been a defendant in a medical negligence case?

3 A. 1985 I had a patient that had a neonatal
4 death, and I was sued for that. That case was won by
5 me. We had a case --

6 Q. Tell me -- I'm sorry to interrupt you. Tell
7 me the name of that plaintiff, please.

8 A. I think it was Ramona Martinez, but I'm not
9 sure.

10 Q. All right.

11 A. 20 years ago, you know.

12 Q. Sure.

13 A. I think it was 1991, patient's name was Deanna
14 Hernandez, it was a maternal death. It involved
15 Dr. Jensen, Dr. Peterfreund and myself, and that was
16 settled.

17 Q. All right. And tell me any others, please.

18 A. We shared a patient, but the suit was against
19 Dr. Weibel and the other physicians in the group for a
20 pregnancy loss at 20 weeks. I do not remember that
21 patient's name.

22 Q. Were you deposed in the Deanna Hernandez
23 case?

24 A. I think so.

25 Q. Do you remember the name of the attorney who

0014

1 sued you or who took your deposition?

2 A. I'm not even sure I was deposed. I can't
3 remember. I think I was deposed.

4 Q. Okay. Regardless of whether you were deposed
5 or not, do you remember the name of the attorney who
6 brought that case?

7 A. No.

8 Q. The pregnancy loss at 20 weeks, were you a
9 named defendant in that case?

10 A. The corporation was, which included me.

11 Q. Did you provide care to the patient? Let me
12 make my question clearer. Was one of the allegations in
13 the complaint that you were negligent or provided
14 substandard care, even though you may have been one
15 among others who were sued?

16 A. The actual claim was made against her care in
17 labor and delivery, which was Dr. Weibel's care.

18 Q. Okay. So the specific acts of negligence that
19 were alleged --

20 A. were not against me individually.

21 Q. All right. And what was the outcome of that
22 case, if you recall?

23 A. We lost that case.

24 Q. And were you deposed in that case?
25 A. I don't think so.

0015
1 Q. All right. Please continue.
2 THE WITNESS: Is there anything else?
3 MR. MARTIN: Whatever you remember.
4 A. That's what I remember.

5 BY MR. LeCLAINCHE:
6 Q. Okay. Let me ask you if you recall a case
7 involving a patient by the name of Lisa Young?
8 A. That was resolved. It was not settled. They
9 withdrew the suit.
10 Q. Okay. But you were sued. Correct?
11 A. Oh, yes.
12 Q. Just so that we're clear --
13 A. Yes. I beg your pardon.
14 Q. It sounds to me from your last response that
15 perhaps I didn't make myself clear. I want you to
16 identify for me all of the matters in which you have
17 been sued or have been put on notice of an intent to sue
18 you?
19 A. Oh, okay. I'm sorry. A patient at The
20 Diagnostic Clinic, probably '86, whose name I can't
21 remember, sued a suit for failure to diagnose breast
22 cancer, and that was a suit where she sued both myself
23 and The Diagnostic Clinic, and The Diagnostic Clinic
24 settled that. They paid the settlement on that.
25 Q. Would that be Chapman?

0016
1 A. Yes.
2 Q. Okay. Do you recall if you were deposed in
3 that case?
4 A. I think I was.
5 Q. Any other cases that you can recall,
6 Dr. St. John?
7 A. No; but obviously you have a list, so you can
8 remind me. 
9 Q. How about Marino versus Bay Area Women's
10 Center? You were sued along with it looks like a number
11 of your partners.
12 A. I don't recall that.
13 Q. It was in 2000, the year 2000?
14 A. I still don't recall it. If you can give me
15 a -- give me a heads-up on it?
16 Q. Candidly, other than seeing the petition for
17 another extension of the statute of limitations, I don't
18 know anything else about it. That's why I was asking
19 you.
20 A. (Witness moves head from side to side.) It
21 could potentially be something where the group was sued.
22 I don't know.
23 Q. I don't know if it could potentially be the
24 case against Dr. Weibel. When was that case tried? Do
25 you recall?

0017
1 A. No, I don't.
2 Q. Okay. Are there any current malpractice
3 claims pending against you, and I'm including not just
4 cases that have actually made their way into suit, but
5 also in the presuit phase, other than this one?
6 A. I think just this one.
7 Q. Would you tell me, please, Dr. St. John, what
8 materials you have reviewed in preparation for giving

10 A. Klavans.
11 Q. -- "Klavans. He requested renal sonogram and
12 we'll see today." And the assessment plan, A/P, is
13 urology to see. And then skipping -- that was a note
14 that looks like 10:20 in the morning. At 1700 it says,
15 "Patient continued to complain of abdominal pain midline
16 which is relieved with stadol intermittently. Denies
17 flank pain. Physical examination: Abdomen mild fundal
18 tenderness. Assessment: Abdominal pain questionable
19 etiology, doubt kidney stone or urinary tract infection
20 at present. Must consider possible abruption." There's
21 a squiggle and it says, "Chorioamnionitis."

22 A. Chorioamnionitis.

23 Q. Amnionitis. Thank you. And then the last
24 note is 1830, it appears to me to say, "amnio performed
25 with Dr. St. John" something "under" it looks like

0064
1 "aseptic technique with one single pair, approximately
2 15 cc's of bloody fluid" --

3 A. I think that was the 17th of January.

4 MR. MARTIN: That's the 17th.

5 A. Because she did not have an amnio prior --

6 BY MR. LeCLAINCHE:

7 Q. To the 17th?

8 A. -- to her hospitalization for delivery.

9 Q. I concede I was confused by that, but it sort
10 of looks like the 11th. If you look at the bottom,
11 doesn't it look like the 11th, the last note?

12 A. Well, this is on the admission of 1/17 as per
13 this, and your date is punched out up here. Here it
14 looks like 1/11, and here it certainly looks like 1/11,
15 but the chart stamp for the date of admission was 1/17.

16 Q. All right. Well, let's operate under the
17 assumption since you don't remember her being admitted
18 on January 11th.

19 A. I'm shocked that there's that question because
20 no, I don't remember that, and I would.

21 Q. Then let's assume for purposes of discussion
22 that notwithstanding the fact that the handwritten notes
23 look like the 11th, that this probably refers to the
24 17th?

25 A. I think so.

0065
1 Q. Okay. Do you recall that she was admitted on
2 the 17th with a complaint of severe abdominal pain and
3 there being a concern that she may have a kidney stone?

4 A. She was being evaluated for kidney problems.
5 she was being evaluated for chorioamnionitis. There was
6 a concern about whether she had an abruption.

7 Q. All right. Tell us what chorioamnionitis is
8 and what a placental abruption is?

9 A. Chorioamnionitis is an infection of the
10 membranes that surround the baby.

11 Q. All right. And --

12 A. Abruption is --

13 Q. Wait, wait. I'm sorry. Before you go to
14 abruption. She did not have chorioamnionitis, did
15 she?

16 A. Subsequently it was found that she did not.

17 Q. Okay. Were you about to tell me what --

18 A. Abruption is a placental separation.

19 Q. All right. And you found that she did not
20 have placental abruption?



21 A. There was a very small separation of the
22 placenta found at pathology.
23 Q. Okay. Did you feel that that was the cause of
24 her severe abdominal pain?

25 A. Suspected so, yes. He indicated in his note
0066

1 that she had fundal tenderness, that's uterine pain.

2 Q. Did you order a renal ultrasound?

3 A. She was evaluated by the urologist on that
4 admission.

5 Q. Do you recall whether a renal ultrasound was
6 performed?

7 A. I need to access the hospital chart.

8 MR. MARTIN: (Moves head from side to side.)

9 THE WITNESS: You don't have it?

10 MR. MARTIN: Huh-uh. At that point in time
11 you were not caring for her.

12 THE WITNESS: No, I was not caring for her at
13 this point. She was under the care of Dr. Dawson,
14 I believe.

15 BY MR. LeCLAINCHE:

16 Q. Let me just hand you a --

17 A. And Dr. Klavans.

18 BY MR. LeCLAINCHE:

19 Q. Let me hand you a radiology report by Barry
20 Krauss dated 1/17/01, which appears to be a renal
21 ultrasound?

22 A. And that says, "sonographically normal
23 kidneys."

24 Q. Would you have been aware of the results of
25 this renal ultrasound back on the 17th?

0067
1 A. I wasn't managing her until the 18th, until I
2 helped Dr. Dawson at the end of the day with the
3 amniocentesis.

4 Q. The amniocentesis was performed on what day,
5 the 17th?

6 A. You have the note there, I think it was the
7 17th.

8 Q. So earlier when you said you weren't involved
9 with her care until the 18th, you misspoke?

10 A. Yes.

11 Q. You actually were involved on the 17th. Is
12 that correct?

13 A. In the late afternoon, Dr. Dawson asked me to
14 come over and help him with the amniocentesis.

15 Q. And who is Dr. Dawson?

16 A. He was one of our associates at the time.

17 Q. And can you explain for me the circumstances
18 that would have led to him managing Debbie Joshnick's
19 care on the 17th?

20 A. He was on call.

21 Q. Okay. Do you know if the 17th was a weekend?

22 A. I have no recollection of that.

23 Q. Okay. I'm just trying to understand how the
24 on-call system worked. If it was a weekday --

25 A. If it's a weekday we each --

0068

1 Q. Hold on. Let me get to the end of my
2 question. If it's a weekday and it's one of your
3 patients for whom you have been solely responsible for
4 her obstetrical care during the course of her pregnancy,
5 and she comes into the hospital, would the way it

A-12-5

AKA

6 typically worked be that you would see the patient
7 during normal hours?

8 A. Number one, your statement that whoever was
9 taking care of the patient was the only one that was
10 taking care of her, we discussed earlier on that the
11 obstetrical patients are shared patients. There were
12 visits in the chart by other physicians as well. When
13 the patient is hospitalized with an acute problem, she's
14 managed by the doctor or doctors that are on call, as
15 each of us then have other responsibilities.

16 At that time I was probably in the office and
17 came over to assist him with the amniocentesis. So he
18 was taking care of her at that time; and we were
19 discussing her care, I'm sure, I don't have that written
20 down, but usually with a difficult patient like Debbie
21 we would all be discussing her to come up with her plan
22 of care.

23 Q. I want to make sure that I understand the way
24 things work according to how you earlier described it.
25 while the obstetrical patient -- while you cross cover

0069

1 for one another in terms of the obstetrical patients,
2 from the outset Debbie was established as being your
3 patient when she first presented to have someone in this
4 group manage her pregnancy. Is that correct?

5 A. I was the person that was sort of in charge of
6 her care, but her care was handled by all of the
7 physicians. It's a team approach.

8 Q. I understand. But we saw -- if you'll
9 remember back, we saw that there were the initials of
10 the various physicians right on that initial sheet --

11 A. That's right.

12 Q. -- and yours were the initials that were
13 circled?

14 A. Right. So I was the main or in charge
15 particularly of her care.

16 Q. All right. Did you hand me back that --

17 A. Yes, I did. I don't have it.

18 Q. Okay. Following the delivery of her child on
19 the 18th, did Debbie continue to experience severe
20 abdominal pain?

21 A. In the hospital?

22 Q. Yes, ma'am.

23 A. I don't have the hospital record to read off
24 of.

25 Q. Do you remember from your review of the

0070

1 record -- I believe you told me that was one of the
2 records that you reviewed. Do you --

3 A. And, no, I don't recall.

4 Q. -- recall whether she did, in fact, continue
5 to develop severe abdominal pain?

6 A. No, I don't recall.

7 Q. If the records reflect that, do you have any
8 reason to take issue with that?

9 A. I'd like to review them again. I don't like
10 to speak off the top of my head.

11 Q. I'm just looking for your discharge note.
12 Just bear with me one second.

13 A. Uh-huh.

14 Q. Let me hand you what I'm assuming -- please
15 correct me if I'm wrong -- is your progress note from
16 January 20th, 2001, which would be the day that Debbie

2 Q. All right. Tell us what Debbie's hematocrit
3 and hemoglobin were on the day of discharge, January
4 20th?

5 A. 8.5 and 27.3.

6 Q. And were those low values?

7 A. Yes.

8 Q. And to what did you attribute those values, if
9 anything?

10 A. Her postpartum bleed.

11 Q. Was it your intent to continue to check those
12 lab parameters over time to determine to what extent she
13 had improvement of her hematocrit and hemoglobin?

14 A. She was seen in the office for follow-up
15 visits.

16 Q. I understand she was seen in the office for
17 follow-up visits. Was one of your goals to follow the H
18 and H over time to make sure that she improved and her
19 values went from low to normal?

20 A. Typically someone who has a low blood count
21 that is attributed to a cause, which in her case it was
22 because she had a significant bleed, we do not
23 necessarily repeat blood work on those individuals.
24 Because of her complaints when she came in for her
25 visits, that did prompt lab evaluation.

0074

1 Q. Okay. Now, you said that the low H and H was
2 due to her postpartum bleed, and I want you to try to be
3 a little more specific for me, if you can.

4 A. I'd need the hospital chart from her delivery.

5 Q. Let me just represent to you -- and I'll be
6 happy to try to find you the reference, but I recall
7 from looking at the records that your estimated blood
8 loss associated with the delivery was 500 cc's?

9 A. That's correct.

10 Q. Is that what you would be referring to or --

11 A. Yes.

12 Q. So that amount of blood provided you with the
13 explanation for these values?

14 A. Yes.

15 Q. Okay. And I've just found the record, if you
16 want to confirm that?

17 A. Actually, there is a different record, but,
18 yes, estimated blood loss. I have a handwritten note,
19 delivery note in the chart under the progress notes.

20 Q. Here we go.

21 A. Blood loss 500 cc's.

22 Q. Do you make any comment in that note regarding
23 placental abruption?

24 A. In this note I did not see any evidence on
25 clinical evaluation of abruption.

0075

1 Q. So the only evidence that you know of
2 regarding placental abruption would be pathological
3 evidence?

4 A. Yes.

5 Q. And what's -- I don't have the delivery
6 records with me; otherwise, I'd try to find the path
7 report, but --

8 A. There was evidence of a retroplacental clot.

9 Q. Okay. And what does that suggest to you?

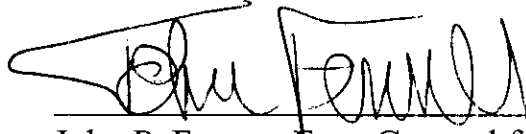
10 A. That there was a bleed behind the placenta.

11 Q. Can that occur in the absence of abruption?

12 A. Typically, no.

CERTIFICATE OF SERVICE (for Appendix)

I hereby certify that a true copy of the above Appendix was furnished by US mail, this 23rd day of August, 2004, to Wilbur E. Brewton, Esq., Appellee's Counsel, Roetzel & Andress, L.P.A., 225 South Adams Street, Suite 250, Tallahassee FL 32301; and James A. Martin, Jr., Esq., Intervenors' Counsel, MacFarlane Ferguson & McMullin, 625 Court Street, Suite 200, Clearwater, Florida 33756-5505.

A handwritten signature in black ink, appearing to read "John P. Fenner", written over a horizontal line.

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