HOW TO LITIGATE A MEDICAL MALPRACTICE CASE

Co-sponsored by the D.C. Bar Litigation and Tort Law Sections

April 23, 2013

6:00 – 9:15 PM

FACULTY

Bruce J. Klores, Esq., Klores Mitchell, P.C. (Program Chair)

Honorable Melvin R. Wright, Presiding Judge of the Civil Division,
Superior Court of the District of Columbia

Steven A. Hamilton, Esq., Gleason, Flynn, Emig & Fogleman, Chartered

D.C. Bar Conference Center
1101 K Street NW
Washington, DC 20005

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TAB 1

THE HONORABLE MELVIN R. WRIGHT
ASSOCIATE JUDGE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Judge Melvin R. Wright was appointed to the Superior Court of the District of Columbia in 1998 by President William Jefferson Clinton. He has served in Juvenile and Criminal Division assignments. From January 2001 – December 2002 Judge Wright was the Presiding Judge for the Superior Court Drug Intervention Program (Drug Court), where he monitored and conducted review hearings in family court cases where drug addicted parents and their children were the issues. Judge Wright was assigned to a civil trial calendar from January 2003 to December 2007 where he decided numerous civil pleadings, conducted various hearings and pretrial conferences, and presided over jury and non-jury trials. He was appointed the Deputy Presiding Judge for the Civil Division in January 2008. Judge Wright is currently the Presiding Judge for the Civil Division.

Judge Wright was a member of the Task Force on Gender Bias in the District of Columbia Courts in 1991 and 1992, and he continues to serve as a Member of the Board of the Robert A. Shuker Scholarship Fund, an organization which raises money for District of Columbia students who wish to attend college and law school. Judge Wright is a member of the DCSC Rules Committee. He also serves on, and chairs the Amenities and Misfortune Committee, the Jury Committee and the Small Claims Advisory Rules Subcommittee.

Judge Wright was born in Baltimore, Maryland. He attended Calvin Coolidge High School in Washington, D.C. and graduated in 1968. He received his Bachelor of Arts degree in political science from the University of the District of Columbia in 1977 and his law degree in 1982 from the Georgetown University Law Center in Washington, D.C.

Judge Wright joined the Superior Court of the District of Columbia as a Landlord and Tenant/Small Claims Clerk in June 1972. He was promoted to Bailiff in 1973, to Civil Pretrial Clerk and then Civil Courtroom Clerk in 1974, and to Civil Motions Clerk in 1977.

In June 1981, Judge Wright obtained a judicial clerkship with the late Superior Court Associate Judge Robert A. Shuker, in which he worked in felony trials. From January 1983 through January 1986, Judge Wright was an Assistant U.S. Attorney for the District of Columbia, rotating through the misdemeanor, appellate, grand jury, and felony trial sections of the Office. In February 1986, Judge Wright joined the law firm of Montedonico, Hamilton & Altman as an Associate Attorney, where he worked on civil and criminal trials. He became a partner in September 1991, remaining with the firm until his appointment to the bench.

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STEVEN A. HAMILTON, ESQUIRE

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Admitted to the Maryland Bar	1974
Admitted to the District of Columbia Bar	1978
U.S. District Court for Maryland	1974
U.S. District Court for the District of Columbia	1978
United States Supreme Court	1979

EDUCATION

1969 South Carolina State University
Degree: Bachelor of Science, Business Administration with a concentration in Accounting

1974 American University, Washington College of Law
Degree: Juris Doctor

EMPLOYMENT

1979 to Present — Senior Member in the firm of **Hamilton Altman Canale & Dillon, LLC,** formerly known as **Montedonico, Hamilton & Altman, P.C.,** specializing in professional liability litigation, primarily medical negligence cases. Also involved in employment and academic discrimination cases.

Hamilton Altman Canale & Dillon, LLC, with 15 attorneys, is primarily composed of trial lawyers engaged in the defense of health care providers and institutions in malpractice cases. We are also involved in extensive litigation in personal injury, professional liability and products liability cases. Members of the firm also specialize in the areas of Corporate, Business, Employment and Estate Law.

I have also lectured quite extensively to local and national organizations on the subjects of professional liability (primarily medical) and risk management.

1978 Assistant Public Defender
Public Defender's Office for Montgomery County, Maryland

1975 Assistant State's Attorney (Prosecutor)
State's Attorneys Office for Montgomery County, Maryland

1974 Law Clerk
To Chief Judge Ralph G. Shure
Sixth Judicial Circuit Court
Rockville, Maryland

1972 Case Analyst
Equal Employment Opportunity Commission

1969 Accountant
Ernst & Ernst, Certified Public Accountants
Atlanta, Georgia

1967 Auditor
Internal Revenue Service
Orangeburg, South Carolina

AWARDS

Who's Who in American Universities and Colleges

Distinguished Military Graduate

Named by Washingtonian Magazine as one of the "The Best Lawyers" in Washington, D.C.

Listed continuously from 1995 to the present in all editions of "The Best Lawyers in America".

Outstanding Service Award, Maryland Legal Services Corporation

ASSOCIATIONS

Fellow, The American College of Trial Lawyers

Member, District of Columbia Bar Association

Member, District of Columbia Bar Association, Special Committee on Civility Implementation

Member, D.C. Defense Lawyers Association

Member, Maryland State Bar Association

Member and Past Treasurer, Montgomery County Bar Association

Former Member, Judicial Nominating Commission for the State of Maryland, Commission District II

Former Member, American Board of Trial Advocates

Former Member, Association of Trial Lawyers of America (ATLA)

Former Member, The Thurgood Marshall American Inn of Court No. 88

Former Member, Original Board of Directors, Maryland Legal Services Corporation

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PERSONAL DATA

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SHORT BIOGRAPHY

BRUCE J. KLORES is a Fellow of both the American College of Trial Lawyers and the International Academy of Trial Lawyers. He is the 1998-9 recipient of the Trial Lawyer of the Year award presented by the Trial Lawyers Association of Metropolitan Washington D.C. He has been listed in the Best Lawyers of America for the past fifteen years. Klores Mitchell P.C. prosecutes serious plaintiffs' medical malpractice actions in Maryland, Virginia, the District of Columbia and nationwide under the Federal Tort and Military Claims Acts. The Firm also concentrates on business tort litigation and has a growing education law practice. Mr. Klores has been an Adjunct Professor of Law at Catholic University. He is the past Chair of the Medical Malpractice Committee of the D.C. Bar. Mr. Klores is an invited member to the Judicial Conferences for both the Federal and State Courts. He served on the Committee on Arrangements for the Judicial Conference for the District of Columbia Courts. An extensive writer and lecturer in the field of trial techniques and malpractice law, Mr. Klores chaired the Bar Association's Jury Instructions for professional negligence and damages. Mr. Klores' seven month lecture series "Morning Rounds – Medicine for Lawyers," (I, II and III) sponsored by the D.C. Bar brings renowned physicians, judges and lawyers together over juice and bagels. Mr. Klores has been the Faculty Chair of "How to Litigate a Medical malpractice Case" since its inception in 1992. He created and chaired the D.C. Bar's first interactive trial skills program. He is a past President of "The Counselors" and The Trial Lawyers Association of Metropolitan Washington, D.C.

In 2001, the Firm was awarded the Martin Luther King, Jr. corporate Community Service Award by the United Planning Organization. Previous recipients include PEPCO and Giant Food. In 2002 the Firm was honored to receive the Constance Belfiore Award for Quality of Life presented by the Bar Association of the District of Columbia.

TAB 2

I. ASSESSING AND EVALUATING THE MALPRACTICE CASE: PLAINTIFF'S VIEW

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A. What Is or Isn't Malpractice

The standard medical malpractice case is a negligence action, and requires a showing of (1) the applicable standard of care; (2) deviation therefrom; and (3) a causal relationship between such deviation and the patient=s injury. See generally Morrison v. McNamara, 407 A.2d 555 (1979).

(I) Standard of Care

The particular medical conduct in your case is judged against the Astandard of care@ practiced by those in defendant=s profession acting in the same or similar circumstances. We employ a Anational standard of care@ in the District of Columbia. See Morrison, supra, see also Travers v. District of Columbia, 672 A.2d 566 (1996), Nwaneri v. Sandridge, 931 A.2d 466 (2007); Strickland v. Pinder, 899 A.2d 770 (2006); Snyder v. George Washington University, 890 A.2d 237 (2006).

In March, 2001, the District of Columbia Court of Appeals in Hawes v. Chua, 769 A.2d 797 (2001) set forth the legal principles to be used to establish national standard of care testimony. These include:

(1) The course of action that a reasonably prudent physician within the defendant=s specialty would have taken under same or similar circumstances;

(2) The course of action or treatment that is followed nationally;

(3) The fact the District of Columbia follows a national standard of care is insufficient in and of itself to establish the national standard of care;

(4) In demonstrating that a particular course of action or treatment is followed nationally, reference to a published standard is not required, but can be

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important;

(5) Discussion of the course of action or treatment with doctors outside the District of Columbia at seminars or conventions;

(6) An expert=s personal opinion does not constitute a statement on the national standard of care; and

(7) National standard of care testimony may not be based upon mere speculation or conjecture.

Failing to establish the Anational standard@ of care, your expert=s familiarity with it, and the factual basis for said familiarity can easily be fatal to your case. Read Hawes v. Chua. Send it to your experts. Write out the list of qualifying questions you will ask and make sure your experts are prepared for cross-examination. You can anticipate the cross by reading cases like Nwaneri and Snyder cited above.

(II) Deviation

Plaintiff must show that the defendant=s action or failure to act was not in accordance with the standard of care. In almost all cases, this deviation from the standard of care must be proven via expert testimony. See Martin v. Washington Hospital Center, 423 A.2d 913 (1980). An exception may be made in cases where the physician=s negligence is clearly recognizable as such by lay jurors. The typical example occurs where a surgeon leaves a foreign object (like metal scissors) within his patient. See e.g., Burke v. Washington Hospital Center, 475 F.2d 364 (D.C. 1983). Even in these cases, however, it is generally a simple matter, and advisable, to obtain the testimony of an expert, unless the anticipated value of the case makes it inappropriate. If that is the situation, you probably should think twice about taking the case in the first place.

(III) Proximate Cause

If the defendant=s deviation from applicable medical standards is shown, plaintiff must additionally show that the act or omission complained of was a proximate cause of the plaintiff=s injury. Causation generally requires expert testimony as well. See Martin and Burke, supra. AProximate Cause@ is defined generally by D.C. Standardized Civil Jury

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Instruction No. 5-12 as an act or failure to act which "played a substantial part in bringing about the injury or damage" and where the injury or damage was a "direct result or a reasonably probable consequence of the act or failure to act." The expert's opinion evidence on causation should be expressed to a reasonable degree of medical certainty or probability. The deviation can be "a," not necessarily "the," proximate cause. Stickley v. Chisholm, 765 A.2d 662 (2001).

B. Screening The Case C The Initial Evaluation

(I) Evaluating the case

Medical malpractice cases are expensive to prosecute, primarily because of the cost of medical expert review and testimony. It is not uncommon for a plaintiff to spend $100,000.00 before trial, and another $100,000.00 at trial in a serious case. Thus, before committing resources to the case, a practitioner will wish to scrupulously evaluate the merits and *especially* the potential damages associated with a prospective client's claim. Many of the potential medical malpractice clients who consult with an attorney are convinced that they have been victims of negligent treatment, simply because of a bad result, or because no one ever explained "what went wrong." As noted in D.C. Standardized Civil Jury Instructions § 9.06 however, a physician is not negligent simply because his efforts were unsuccessful. A successful plaintiff must show that their injury resulted from the defendant's departure from applicable standards. The most egregious or unfeeling act of negligence is not actionable unless it somehow costs the plaintiff. Likewise, the failure to explain a bad outcome may be bad medicine, but it's not malpractice in the legal sense.

Additionally, counsel will wish to determine whether the damages are recoverable (medical expenses, lost wages, etc.) warrant the exertion of resources necessary to prosecute the lawsuit. If, for example, the defendant emergency room physician negligently fails to diagnose appendicitis, and your client suffers through an unnecessary day of pain and suffering before the proper diagnosis is made, clearly you have a breach of standards proximately causing your client harm, but damages do not warrant the cost

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of bringing suit.

Potential limitations or bars to recover (contributory negligence, mitigation principles, sovereign immunity, statutes of limitations, etc.) must be considered as well. Perhaps most important in your evaluation are the intangible factors that experienced trial attorneys always evaluate:

1. Is the potential plaintiff sympathetic, likeable and believable?
2. Is there a cohesive, understandable an appealing theory of liability?
3. What about the defendant - is he or she likely to appeal to the jurors?
4. Is the venue favorable?
5. Are there caps in the jurisdiction?
6. Are there "skeletons" in anyone's closet (i.e., the plaintiff has a criminal record, or better yet, the defendant does!).
7. Have medical records been altered? See District of Columbia v. Perez, 694 A.2d 882 (1997) (jury entitled to resolve every factual issue against the defendant because defendant falsified medical records, n.8). (Attached)
8. What are the "trends" in malpractice cases?

(II) Retainer Agreement

If you are interested in the case, then the client must sign a retainer agreement which clearly sets forth the terms of your employment. Medical malpractice cases are often referred by other attorneys. Because of this, fees may often be shared. Each jurisdiction's ethical rules concerning fees and fee sharing should be checked. In Washington, D.C., the fee sharing must be disclosed to the client.

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C. The Need For And Benefits of Expert Consultations and Reviews

Upon deciding to consider a case, counsel will, of course, obtain the client's medical records for review. Keep a clean copy of the chart and segregate it. It is usually advisable to obtain the full record, rather than a chart abstract, despite the cost. Chart abstracts generally contain such documents as operative reports and discharge summaries,

which are composed after the fact and often times are defensively written. One never knows which section of the chart - medical records, progress notes, flow charts, etc., or bills, will contain evidence of malpractice, later explained away or ignored in typewritten summaries. Once the complete chart is obtained, counsel should become thoroughly familiar with the records in order to facilitate an intelligent consultation with an expert. There are various medical texts and medical-legal texts which counsel may consult in evaluating records. The Internet is very helpful for medical research. A list of valuable Internet sites is attached.

In the initial consultation with the medical expert, there are several factors to keep in mind, particularly if it is the first encounter with this expert. First, enhance your own credibility by knowing the record and the issues and emphasizing that you want an objective review. If your case is not meritorious, you want to know this. Get your important points out quickly. Be prepared to define the "reasonable and prudent physician." (See General Standard of Care of Professionals Standardized Civil Jury Instructions for DC § 9.02.)

You may have to overcome the expert's natural identification with a colleague. You should emphasize that your client is innocent and gravely injured. Be certain to reach a clearly understood agreement as to fees, review time, and the expert's availability for testimony. There are many experts who are willing to review records and render an opinion, but who are not willing to testify to that opinion in court. If such is the case, you will certainly want to know this before contracting with the expert. Find out if the witness has ever testified for a plaintiff, and how many times he or she has testified overall.

In your initial contact, identify all potential defendants to cover possible conflicts of interest an expert may have with respect to testifying. Tell the expert and have him agree that your discussions are privileged. This will help prevent the other side from calling him or her, if the expert is so inclined. Turner v. Thiel, 262 Va. 597 (2001). (Once the expert reviews a case for one side, he may be barred from testifying for the other.)

When forwarding medical records to your expert, keep in mind that whatever you send

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her may ultimately be discoverable and should thus be factual and preferably brief. Place the records in comprehensible and easily readable order to avoid the risk of the expert charging $500 an hour, or more, to perform this task for you. Keep an exact paginated copy of all records forwarded to an expert for yourself so you can easily discuss the records with your expert by telephone. Make sure the expert is apprised of any time constraints you have concerning filing dates, particularly your 26(B)(4) designation. A personal meeting with the expert or a videoconference before he or she is designated should be the rule, unless entirely impractical. Assess the witness's ability to communicate. Evaluate collateral and impeachment matters such as the amount of money the expert earns testifying, as this information may come out at trial.

D. Professional Ethics

Professional responsibility and common sense dictate that an attorney refrain from bringing a professional negligence action unless he or she has a good faith belief in the merits of the claim. The Rules provide that an attorney's signature on a pleading certifies his or her belief, formed after reasonable inquiry, that the pleading is well grounded in fact and supported by existing law, or at least by a good faith argument for modification of existing law. By signing a pleading, an attorney further certifies that it is not interposed for any improper purpose "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Attorneys who violate the Rules or case law are subject to sanctions, including reasonable expenses of the opposing party. Such expenses include reasonable attorney's fees.

What constitutes "reasonable inquiry?" In addition to consulting carefully with your client, reviewing medical records, consulting medical and legal literature, etc., District of Columbia law suggests your case should not be filed without first consulting with a knowledgeable medical expert to determine whether the complaint is well grounded in fact. See Apperson v. Greater Southeast Community Hospital Corporation, 118 WLR 1341 (1990) (Attached). In Maryland, a malpractice claim must be certified by a qualified expert within ninety days of the filing of a claim. See Md. Cts. & Jud. Proc.

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Code Ann. § 3-2A-04(b). This one section of the Maryland Code has spawned countless appeals and draconian results.

Notwithstanding the above, if your client comes to you on the verge of the statute of limitations and you do not have time for an expert review, but are interested in the case, you should preserve the Statute of Limitations.

E. Statutes of Limitations

In the District of Columbia, the statute of limitations for medical malpractice actions, including survival actions, but *excluding wrongful death*, is three years. D.C. Code § 12-301(8). Wrongful Death actions are governed by a one-year statute. D.C. Code § 16-2702.

The Discovery Rule is recognized in the District of Columbia and is set out in Bussineau v. Georgetown Hospital, 518 A.2d 423 (1986). When the Discovery Rule applies, the statute of limitations would begin to run when the plaintiff (1) knows or should have known after reasonable inquiry of an injury; (2) knows of the injury=s cause in fact; and (3) has some evidence of wrongdoing. See also Dawson v. Eli Lilly, 543 F. Supp. 1330 (1982).

The Continuing Treatment Rule is also recognized in the District of Columbia. See Page v. USA, 729 F.2d 818 (1984). Concealment also would extend the statute. See Weisberg v. Williams Connolly and Califano, 390 A.2d 992 (1978). Disability of the plaintiff, including minority and mental incapacity, is codified in the D.C. Code at § 12-301, et. seq. and when appropriate, extends the statute.

Laches is recognized as an equitable defense in the District of Columbia. See American University v. Burka, 400 A.2d 737 (1979).

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F. Who To Sue/Vicarious Liability/Agency

This is a tricky question. In some hospitals both the physicians and nurses who may be responsible for caring for your client are agents or employees of the hospital. In that instance, once you are satisfied of agency and have resolved questions of insurance

coverage, you may consider dismissing the individual defendants ***without prejudice***, the hospital agreeing it is responsible as a matter of law for their acts or omissions. In many cases, however, a client will have a Aprivate attending physician@ such as the AK@ Street obstetrician who delivers your client at George Washington University Hospital. In these cases, the institutional defendant may successfully argue there is no vicarious liability for the acts or omissions of an independent contractor.

Theories of hospital liability for Aprivate@ doctors or groups or in certain cases for everyone on staff at the institution are continually evolving. Federal Medicare Regulations seem to impose a non-delegable duty on hospitals which may make the institution liable for all health care providers acting within its walls. (42 CFR § 482). Many states have addressed Acorporate liability@ issues recognizing broad duties extending to acts or omissions in the institution. See e.g., Thompson v. Nason Hospital, 591 A.2d 703 (Pa. 1991).

Apparent and/or ostensible agency arguments are often made in malpractice cases. The resolution of these issues are fact and jurisdiction specific. In Maryland see Mehlman v. Powell 378 A.2d 1121 (1977); in D.C. see Street v. Washington Hospital Center, 558 A.2d 690 (1989). If, however, the private attending is assisted by residents who are employed by the hospital, you should establish what each of those residents did in order to make a determination as to whether the hospital can remain in the lawsuit on that theory. The hospital=s residents are generally held to the same standard as private physicians. Alden v. Providence Hospital, 283 F.2d 163 (1967).

G. Damages

There are no damages caps in the District of Columbia save the good common sense of the jury and the trial judge. Maryland caps pain and suffering (Md. Code Cts. & Jud. Proc. § 11-108 and § 3-2A-09) and Virginia caps medical malpractice actions entirely (Va. Code Ann. § 8.01-581.15). Each state cap has inflationary adjustments. A good way to initially determine the types of allowable damages in a malpractice case is to consult the jurisdiction=s jury instructions. Punitive damages are rare in malpractice

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cases.

Wrongful Death and Survival Action damages are sometimes confusing. A good discussion on wrongful death action damages appears in Runyon v. District of Columbia, 463 F.2d 1319 (1972), and Doe v. Binker, 492 A.2d 857 (1985). Survival Action damages inure to the decedent=s estate and consist of probable net future earnings, reduced to present value and then reduced further by taxes, the decedent=s own consumption for personal maintenance and the amount that those collecting under the Wrongful Death Act would receive for support. (See generally, Standardized Civil Jury Instructions for DC § 14.01 et seq.).

Wrongful Death Act damages, on the other hand, are specifically designated to the next of kin, typically the surviving spouse or children. Who qualifies as next of kin varies by jurisdiction. These include pecuniary losses (typically the shares of each in the decedent=s income for the joint life expectancy of the next of kin and the decedent); and loss of services, including guidance and advice. See Binker. Grief is not recoverable in the District of Columbia in death cases, but it is in Maryland and Virginia.

Loss of consortium is recognized in the District of Columbia as an independent claim. If your clients are common law married, they can bring a claim for loss of consortium, assuming they were married at the time of the incident. See Stager v. Schneider, 494 A.2d 1307 (1985). The Collateral Source Rule is followed in the District of Columbia. See Jacobs v. H.C. Rust Co., 355 A.2d 6 (1976). A jury therefore should not hear that your client=s medical bills have been paid by a third party insurance company. However, this does not mean that a private insurance company cannot assert a lien for these medical expenses. Moreover, if your client=s medical bills have been paid by the District of Columbia or Medicare, you are obliged to take certain affirmative action towards repayment or run the risk of personal liability or sanctions. Medical Care Recovery Act, D.C. Code § 3-501, et seq.

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H. Alternate Theories of Liability

Along with the straightforward medical negligence claim described above in Section A,

there are various alternative theories of medical liability, including but not limited to:

(i) Lack of Informed Consent. See Anderson v. Jones, 606 A.2d 185 (1992);

(ii) Abandonment of a patient. See Miller v. Greater Southeast Community Hospital, 508 A.2d 927 (1986); and

(iii) Breach of the physician/patient privilege. See Vassiliades v. Garfinckel=s Brooks Brothers, 492 A.2d 580 (1985).

(iv) Warranty of result. See Scarzella v. Saxon, 436 A.2d 358 (1981).

I. The District of Columbia Medical Malpractice Act

The Medical Malpractice Amendment Act of 2006, D.C. Code §16-2801 et seq. is based on a series of recommendations that a D.C. City Council Special Task Force on Medical Malpractice issued.

The Task Force concluded that fostering early settlements, and a more stringent policing of the medical profession were key elements of any legal reform needed in this area. Once the law was passed, the Judges of the Superior Court worked closely with the Bar to implement two main litigation related changes required by the Act:

1. That the plaintiff must send the proposed defendant(s) an intent to sue letter, and cannot file a lawsuit for ninety days thereafter;
2. That all malpractice cases are referred to Court ordered mediation immediately after filing.

At the time of this writing, the reviews are mixed as to whether the mandatory early mediation has been successful. However, the general sense is that certain cases have settled early and certain less meritorious cases have been weeded out by the process. With the passage of the Medical Malpractice Amendment Act of 2006, all local jurisdictions now have pre-suit filing requirements. In Virginia, see Va. Code Ann. § 8.01-581.2; Va. Med. Mal. R. Prac. R. 1 et seq.; in Maryland, see Md. Cts. & Jud. Proc. Code Ann. § 3-2A-01 et seq. Likewise an administrative claim (SF-95) must first be filed in any Federal Tort Claims Act case (28 U.S.C. § 2675).

NB: See TAB 9 for recent updates on the 90 day Notice Provision.

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J. **Tidbits/Updates**

A. Independent Medical Examinations: Superior Court Rule 35

(i) Party being examined has the right to have an attorney present, Moore v. Washington Hospital Center, 124 WLR 2015 (1996).

(ii) Taping held permissible, Langfeldt-Haaland v. Saupe Enterprises, 768 P.2d 1144 (1989).

B. Experts

(i) Ethical issues of physicians testifying Aagainst@ patient discussed in Butler-Tulio v. Scrogg Insurance. 774 A.2d 1209 (Md. Ct. Spec. App. 2001).

(ii) Experts= earnings admissible. Wrobleski v. deLara, 727 A.2d 930 (Md. 1999).

(iii) Experts= relationship to defendant=s insurer admissible. Lombard v. Rohrbaugh, 551 S.E.2d 349 (Va. 2001).

C. Videotapes

(i) May be admissible under the learned treatise exception to prove standard of care. Costantino v. Herzog, 203 F.3d 164 (2nd Cir. 2000)

D. Jury Instructions

(i) Pannu v. Jacobson, 909 A.2d 178 (2006). Trial judge in medical malpractice case must give a general negligence like instruction that the duty of care rises with the risk of harm.

E. Informed Consent

Whether patient was informed of risks of surgery not relevant to the standard of care determination in cases where informed consent not an issue. Hayes v. Camel, 977 A.2d 880 (Conn.) 2007.

F. Wrongful Death

Himes v. Medstar, U.S.D.C. 2010 CA 8-1804, adult children qualify as

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beneficiaries under D.C. Wrongful Death Act.

K. HIPAA

The old adage (correct or not) in malpractice litigation was that by filing a lawsuit against a doctor, the plaintiff puts his medical condition at issue, and therefore Awaives his medical privilege.@

Right or wrong, such a common law analysis has now given way to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

For purposes of malpractice litigation HIPPA has two important effects:

(i) The client=s authorization to release medical records must be HIPPA compliant (see e.g. attached); and

(ii) defense attorneys must now ask the Court for permission to speak to plaintiff=s treating physicians *ex parte*.

Because treating physicians can offer valuable assistance to either side at trial, but in many cases particularly for the defense, you must be prepared for the inevitable motion to allow defense counsel to have *ex parte* contacts with treaters. At the time of this writing, there is an almost even split amongst Superior Court judges on this issue. A sample motion and opposition are attached which lay out the arguments for and against *ex parte* communications.

As a plaintiff=s attorney, I oppose *ex parte* contacts for a number of reasons. First, notwithstanding a Court Order ostensibly restricting the scope of the discussion between defense counsel and the treater to "only the facts", private meetings can be an invitation to expand these discussions, particularly when the treater is insured by the same entity as the defendant or perhaps himself represented by the interviewing lawyer. Second, the thought that defense counsel is speaking to someone's physician over the patient's objection is abhorrent to most of our clients.

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L. Contribution Amongst Joint Tortfeasors

When two or more defendants are joined in an action, and a plaintiff settles with one, the

minefield of computing the credit the non-settling defendant may be entitled to receive is laid. Many states (i.e., Maryland and Virginia) have statutorily addressed credit issues, or adopted the AUniform Contribution Amongst Joint Tortfeasors Acts.@ Md. Cts. & Jud. Proc. Code Ann. § 3-1401 et seq.; Va. Code Ann. § 8.01-34.

The bottom line is that the plaintiff=s attorney must be acutely aware of the potential ramifications of a partial settlement, and make sure that his client is fully advised as well. Generally speaking, a non-settling defendant is entitled to a *pro-rata* reduction off the verdict if the settling defendant is determined to be a joint tortfeasor through either agreement or judicial finding. The non-settling defendant is entitled to a *pro-tanto* (dollar for dollar) credit if the settling defendant is not a joint tortfeasor. Good discussions on this issue can be found in Paul v. Bier, 758 A.2d 40 (2000), and Berg v. Footer, 673 A.2d 1244 (1996).

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Medical Malpractice Trial Verdicts (January 1, 2012 - June 30, 2012) (Compiled from trial completion forms submitted to Presiding Judge, Civil Division and from Courtview Statistics)

No.	Trial Month	Year Case Was Filed	Claim						Injury					Plaintiff's Last Known Demand	Defendant's Last Known Offer	Verdict	Verdict Amount
			Misdiagnosis	Informed Consent	Incompetent Surgery	Birth Complications	Other	Not Specified on Form	Fatality	Serious Permanency	Non-Serious Permanency	No Permanency	Not Specified on				
1	March	2010							X					$0	$0	Def.	$0
2	April	2010	X							X				$1,250,000	$415,000	Pl.	$500,114
3	June	2010		X	X						X			$0	$0	Def.	$0
4	June	2010	X							X				$5,000,000	$1,250,000	Pl.	$5,363,448.93
5	June	2011					X				X			$0	$0	Def.	$0
6	June	2009			X							X		$0	$0	Def.	$0

Total Jury Trials Resulting in Verdicts	6
Verdicts for Defendants	4
Verdicts for Plaintiffs	2
Highest Plaintiff's verdict	$5,363,449
Number of Plaintiff's verdicts $500,000 or less	0
Number of Plaintiff's verdicts above $500,000 but less than $1,000,000	1
Number of Plaintiff's verdicts above $1,000,000 but less than $5,000,000	0
Number of Plaintiff's verdicts $5,000,000 or more	1
Verdicts where judgment amount for Plaintiff exceeded the last known offer from Defendant	2
Verdicts where judgment amount for Plaintiff exceeded Plaintiff's last known demand	1
Verdicts where judgment amount for Plaintiff was less than Defendant's last known offer	0

Slip and Fall Jury Trial Verdicts (January 1, 2011-December 30, 2011) (Compiled from trial completion forms submitted to Presiding Judge, Civil Division and from Courtview Statistics)														
No.	**Trial Month**	**Year Case Was Filed**	**Injury**					**Permanency**			**Plaintiff's Last Known Demand**	**Defendant's Last Known Offer**	**Verdict**	**Verdict Amount**
			Soft Tissue	Broken Bones	Verifiable Back and Neck	Other	Not Specified on Form	No	Yes	Not Specified on Form				
1	February	2009			X				X		$1,500,000	$0	Def.	$0
2	April	2009	X			X			X		$80,000	$0	Def.	$0
3	September	2009	X						X		$20,000	$0	Def.	$0
4	September	2010	X		X				X		$50,000	$20,000	Pl.	$30,000
5	November	2009				X			X		$95,000	$10,000	Pl.	$65,000

Total Jury Trials Resulting in Verdicts	5
Verdicts for Defendants	3
Verdicts for Plaintiffs	2
Highest Plaintiff's verdict	$65,000
Lowest Plaintiff's verdict	$30,000
Number of Plaintiff's verdicts $10,000 or less	0
Number of Plaintiff's verdicts above $10,000 but less than $25,000	0
Number of Plaintiff's verdicts above $25,000 but less than $50,000	1
Number of Plaintiff's verdicts above $50,000 but less than $100,000	1
Number of Plaintiff's verdicts $100,000 or more	0
Verdicts where judgment amount for Plaintiff exceeded the last known offer from Defendant	2
Verdicts where judgment amount for Plaintiff exceeded Plaintiff's last known demand	0
Verdicts where judgment amount for Plaintiff was less than Defendant's last known offer	0

Auto Collision Jury Trial Verdicts (January, 1 2012-June 30, 2012) (Compiled from trial completion forms submitted to Presiding Judge, Civil Division and from Courtview Statistics)

No.	Trial Month	Year Case Was Filed	Injury					Permanency			Plaintiff's Last Known Demand	Defendant's Last Known Offer	Verdict	Verdict Amount
			Soft Tissue	Broken Bones	Verifiable Back and Neck	Other	Not Specified on Form	No	Yes	Not Specified on Form				
1	January	2004				X				X			Pl.	*
2	January	2009	X		X				X		$300,000	$125,000	Pl.	$9,366.00
3	January	2010				X		X			$500,000	$	Def.	$0.00
4	January	2010	X			X		X			$300,000	$0	Def.	$0.00
5	February	2010	X		X				X		$240,000	$30,000	Def.	$0.00
6	February	2010	X						X		$250,000		Pl.	$4,800.00
7	February	2010			X				X		$0	$0	Pl.	$0
8	February	2010	X		X			X			$31,000	$24,000	Pl.	**
9	February	2009			X					X	$399,959	$200,000	Pl.	$22,346.00
10	February	2009	X						X		$100,000	$0	Pl.	$2,478
11	February	2010						X			$35,000	$0	Def.	$0.00
12	February	2011			X						$30,000	$5,000	Pl.	$3,244.75
13	March	2010	X					X			$40,000	$0	Def.	$0.00
14	March	2010	X		X				X		$90,000	$20,000	Pl.	***
15	March	2010									$12,500	$0	Pl.	$5,920
16	March	2011	X					X			$15,000	$1,000	Def.	$0.00
17	March	2010					X	X			$250,000	$0	Def.	$0.00
18	March	2010					X	X			$25,000	$10,800	Pl.	$10,000
19	March	2010					X	X			$200	$0	Def.	$0.00
20	March	2010	X		X				X		$25,000	$7,500	Pl.	$25,000.00
21	April	2010		X					X		$100,000	$0	Def.	$0.00
22	April	2010	X					X			$8,000	$0	Def.	$0.00
23	April	2009			X				X		$100,000	$0	Pl.	$75,000.00
24	April	2010				X		X			$0	$3,000	Pl.	$5,000.00
25	April	2011	X					X			$25,000	$0	Def.	$0.00
26	April	2010	X					X			$36,500	$0	Def.	$0.00

27	April	2011	X		X			X			$7,000	$3,500	Pl.	$3,170.00
28	May	2010		X					X		$325,000	$5,000	Def.	$0.00
29	May	2010	X		X				X				Def.	$0.00
30	May	2010			X			X			$200,000	$90,000	Pl.	$203,500.00
31	May	2010	X					X			$1,000,000	$20,000	Pl.	$175,000.00
32	May	2008			x				x		$100,000	$25,000	Def.	$0.00
33	May	2011			X			X					Def.	$0.00
34	June	2011			X			X			$9,500	$6,600	Pl.	$6,200
35	June	2011			X			X			$10,000	$7,500	Pl.	$500.00
36	June	2010							X		$50,000	$0	Pl.	$10,641

Total Jury Trials Resulting in Verdicts	36
Verdicts for Defendants	16
Verdicts for Plaintiffs	20
Highest Plaintiff's verdict	$203,500
Lowest Plaintiff's verdict	$0.00
Number of Plaintiff's verdicts $10,000 or less	13
Number of Plaintiff's verdicts above $10,000 but less than $25,000	2
Number of Plaintiff's verdicts above $25,000 but less than $50,000	0
Number of Plaintiff's verdicts above $50,000 but less than $100,000	1
Number of Plaintiff's verdicts above $100,000 but less than $500,000	2
Number of Plaintiff's verdicts $500,000 or more	0
Verdicts where judgment amount for Plaintiff exceeded the last known offer from Defendant	9
Verdicts where judgment amount for Plaintiff exceeded Plaintiff's last known demand	2
Verdicts where judgment amount for Plaintiff was less than Defendant's last known offer	7

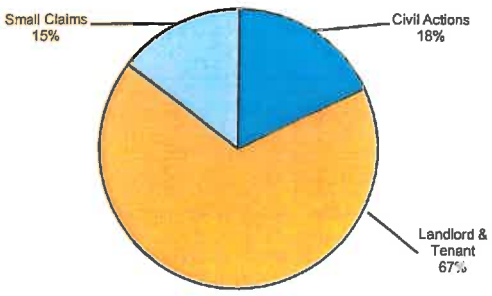
NOTES
*Tried on liability only
**Aggregate verdict of $13,400 - two plaintiffs
***Aggregate verdict of $30,000 - two plaintiffs

CIVIL DIVISION CASE ACTIVITY FOR CY 2012

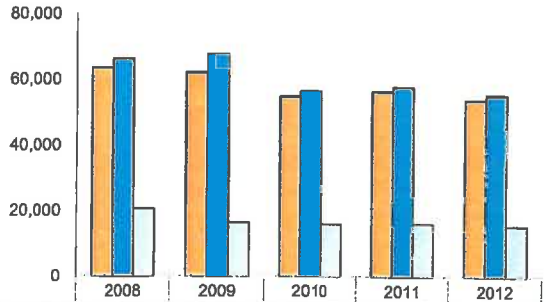
	Civil Actions	Landlord & Tenant	Small Claims	Total
Pending Jan 1	7,566	6,062	2,309	15,937
New Filings/Assignments	9,581	36,217	7,930	53,728
Reactivated/Reopened	431	324	271	1,026
Total Available for Disposition	17,578	42,603	10,510	70,691
Methods of Disposition				
Agency Review/Appeal	61	-	-	61
Default Judgment	545	4,486	1,121	6,152
Dismissed by Court	2,027	1,469	427	3,923
Dismissed by Plaintiff/Parties	-	3,998	-	3,998
Dismissed re: Bulk Filing by FAX/email	-	15,261	-	15,261
Dismissed Rule 4(m)/4(o)	994	-	2,318	3,312
Dismissed Rule 41/14i	404	3,257	192	3,853
Dispositive Motions	694	17	344	1,055
Ex parte Proof-Affidavit	205	-	383	588
Judgment for Possession	-	198	-	198
Judgment from Jury Trial	119	4	-	123
Judgment from Non-Jury Trial	81	113	179	373
Judicial Arbitration Awards	-	-	72	72
Judgments/Consents/Confession	228	6,210	359	6,797
Mediation Agreement Approved	-	434	-	434
Non-Redeemable Judg./Plntf for Poss.	-	114	-	114
Other	87	10	93	190
Plea of Title	-	2	-	2
Removed to Federal Court	162	-	5	167
Settled During Trial	8	3	34	45
Settled/Dismissed	3,840	993	2,794	7,627
Summary Proceedings	1,020	-	-	1,020
Total Dispositions	10,475	36,569	8,321	55,365
Pending Dec. 31	7,103	6,034	2,189	15,326
Percent Change in Pending	-6.1%	-0.5%	-5.2%	-3.8%
Clearance Rate[a]	105%	100%	101%	101%

[a]The Clearance Rate, a measure of court efficiency, is the total number of cases disposed divided by the total number of cases added to the caseload (i.e., new filings/cases reactivated/reopened) during a given time period. Rates of over 100% indicate that the court disposed of more cases than were added, thereby reducing the pending caseload

2012 New Case Filings (N=53,728)



Case Activity, CY 2008-2012



	2008	2009	2010	2011	2012
New Filings	63,374	62,032	54,718	56,272	53,728
Dispositions	66,197	67,530	56,373	57,695	55,365
Pending	20,484	16,435	16,003	15,937	15,326

TAB 3

HIPAA AUTHORIZATION AND CONSENT FOR THE RELEASE OF RECORDS AND INFORMATION

TO: _____
_____
_____
_____

Name: _____
Social Security No.:_____
Date of Birth: _____
Date: _____

1. This document represents my request, consent, and authorization for you to release my protected health information and other requested information/documents as set forth below to **Klores Mitchell, P.C. at 1735 20th Street, N.W., Washington, D.C. 20009, (202) 628-8100, fax (202) 628-1240**:

_____Any and all medical records, including but not limited to, ER records, history & physical records, discharge summary, outpatient records, office visits, operative reports, progress notes, nurses notes, physicians notes, physicians orders, flow sheets, anesthesia records, diagnostic reports, evaluations, consultations, correspondence, therapy, rehabilitation records, drugs or prescriptions, medications, laboratory reports, EKG tracings, fetal monitor tracings, electronic records, any treatment records or records or records related to treatment & care maintained on any computer, or any other documentation related to this individual. Note: This includes records you have received from other health care providers, unless redisclosure is prohibited by the other health care provider

_____ **X**-rays, films MRIs, CT-scans, and reports

_____ Pathology slides and reports

Date(s): _____

_____ Medical Bills

_____ School Records, including but not limited to, written evaluations, attendance and performance reports, report cards, notes, notices, correspondence, special school equipment requests and occupational, speech, language and physical therapy records and reports

_____ Employment/Personnel Records

_____ W-2 Forms and Tax Returns

_____ Workers Compensation Records

_____ UPDATED INFORMATION or OTHER

Type:_____

Date(s): _____

2. This document will also authorize you to speak to and disclose orally any information relating to my diagnosis, care, treatment, prognosis, injury and opinions to the above law firm or its employees and agents.

3. I understand that I may revoke this authorization by notifying Klores Mitchell, P.C. and said health care provider in writing of my desire to revoke this authorization. Revoking this authorization will not have any effect on actions that the health care provider took in reliance on the authorization before the health care provider received notice of the revocation. Information disclosed under this authorization may be redisclosed by the recipient and no longer protected by federal privacy regulations.

4. I understand that my ability to receive health care treatment from the health care provider will not be affected if I do not sign this form. However, without my signature, this request to release information described above will not be honored. The protected health information provided under this authorization may include diagnosis and treatment information, including information pertaining to chronic diseases, behavioral health conditions, alcohol or substance abuse, communicable diseases (including HIV/AIDS) and/or genetic marker information. These records will be included in the information we will make available to the individuals or organizations I have identified above.

5. **THIS INFORMATION IS REQUIRED FOR LEGAL REVIEW REGARDING POSSIBLE LITIGATION**

_____ _____
Signature / Date Printed Name

Note to Health Care Providers: This authorization is provided in compliance with HIPAA. Failure to forward the requested information may render a health care provider liable for damages.

* A COPY OF THIS AUTHORIZATION SHALL BE CONSIDERED AS VALID AS AN ORIGINAL.
** THIS AUTHORIZATION IS VALID FOR ONE YEAR FROM THE DATE OF SIGNATURE.

1 of 12 DOCUMENTS

*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
*** AND THROUGH D.C. ACTS 17-171 ***
*** STATE ANNOTATIONS CURRENT THROUGH AUGUST 10, 2007 ***

TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER I. GENERALLY

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2801 (2007)

§ 16-2801. Definitions

For the purposes of this chapter, the term:

(1) "Court" means the Superior Court of the District of Columbia.

(2) "Healthcare provider" means an individual or entity licensed or otherwise authorized under District law to provide healthcare service, including a hospital, nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, renal dialysis facility, ambulatory surgical center, pharmacy, physician or health care practitioner's office, long-term care facility, behavior health residential treatment facility, health clinic, birth center, clinical laboratory, health center, physician, physician assistant, nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, certified nurse midwife, psychologist, certified social worker, registered dietitian or nutrition professional, physical or occupational therapist, pharmacist, or other individual health care practitioner.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --Law 16-263, the "Medical Malpractice Amendment Act of 2006," was introduced in Council and assigned Bill No. 16-334. The Bill was adopted on first and second readings on Dec. 5, 2006, and Dec. 19, 2006, respectively. Signed by the Mayor on Dec. 28, 2006, it was assigned Act No. 16-619 and transmitted to Congress for its review. D.C. Law 16-263 became effective on Mar. 14, 2007.

EDITOR'S NOTES. --Section 301 of D.C. Law 16-263, provided that this chapter may be cited as the Medical Malpractice Proceedings Act of 2006.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007, ***
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GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2802 (2007)

§ 16-2802. Notice of intention to file suit

(a) Any person who intends to file an action in the court alleging medical malpractice against a healthcare provider shall notify the intended defendant of his or her action not less than 90 days prior to filing the action. Notice may be given by service on an intended defendant at his or her last known address registered with the appropriate licensing authority. Upon a showing of a good faith effort to give the required notice, the court may excuse the failure to give notice within the time prescribed.

(b) The notice required in subsection (a) of this section shall include sufficient information to put the defendant on notice of the legal basis for the claim and the type and extent of the loss sustained, including information regarding the injuries suffered. Nothing herein shall preclude the person giving notice from adding additional theories of liability based upon information obtained in court-conducted discovery or adding injuries or loss which become known at a later time.

(c) A legal action alleging medical malpractice shall not be commenced in the court unless the requirements of this section have been satisfied.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
SECTION REFERENCES. --This section is referenced in *§ 16-2803* and *§ 16-2804*.

LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
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*** STATE ANNOTATIONS CURRENT THROUGH AUGUST 10, 2007 ***

TITLE 16. PARTICULAR ACTIONS. PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER I. GENERALLY

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2803 (2007)

§ 16-2803. Extension of statute of limitations

If the notice required under *§ 16-2802* is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the date of the service of the notice.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
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TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER I. GENERALLY

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2804 (2007)

§ 16-2804. Unknown defendant or unlicensed defendant

(a) *Section 16-2802* shall not apply to:

(1) Any intended defendant whose name is unknown or who was not licensed at the time of the alleged occurrence or is unlicensed at the time notice is given;

(2) Any claim that is unknown to the person at the time of filing his or her notice; or

(3) Any intended defendant who is identified in the notice by a misnomer.

(b) Nothing indicated herein shall prevent the court from waiving the requirements of *§ 16-2802* upon a showing of good faith effort to comply or if the interests of justice dictate.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
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TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER II. MEDIATION

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2821 (2007)

§ 16-2821. Requirement for mediation

After an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The mediation schedule shall be included in the scheduling conference order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007, ***
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TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
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GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2822 (2007)

§ 16-2822. Mediator costs

Unless otherwise agreed by the parties, the costs of mediation, if any, shall be equally shared by the parties.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007, ***
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TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
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SUBCHAPTER II. MEDIATION

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2823 (2007)

§ 16-2823. Mediators

(a) The court shall assign the parties to court-provided mediation and provide a roster of medical malpractice mediators from which the parties may hire an eligible medical malpractice mediator. In the alternative, all parties can agree to hire another individual outside the roster. To be eligible for inclusion in the roster of medical malpractice mediators, an individual shall be a judge or lawyer with at least 10 years of significant experience in medical malpractice litigation.

(b) If the parties cannot agree on the selection of a mediator, the court shall appoint one.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
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TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
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GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2824 (2007)

§ 16-2824. Attendance at mediation session

(a) For the purposes of this section, the term "a representative with settlement authority" means an individual with control of the financial settlement resources for the case and the authority to pledge those resources to settle the case on behalf of a party.

(b) All parties shall personally attend mediation sessions.

(c) If a party is not an individual, a representative with settlement authority for the party shall attend the mediation session.

(d) In cases involving an insurance company, a representative of the company with settlement authority shall attend the mediation session.

(e) Attorneys representing each party with primary responsibility for the case shall attend the mediation session.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

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*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
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TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER II. MEDICATION

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2825 (2007)

§ 16-2825. Mediation statements

(a) Each party shall submit a confidential mediation statement to the mediator no later than 10 days prior to the initial mediation session. The parties shall not send copies of the mediation statement to the clerk, the assigned judge, or the other parties.

(b) Unless not already stated in the complaint and answer, the mediation statement shall:

(1) Include a brief summary of facts;

(2) Identify the issues of law and fact in dispute and summarize the party's position on those issues;

(3) Discuss whether there are issues of law or fact the early resolution of which could facilitate early settlement or narrow the scope of the dispute;

(4) Identify the attorney who will represent the party at the mediation session and the person with settlement authority who will attend the mediation session;

(5) Include any documents or materials relevant to the case which may assist the mediator and advance the purposes of the mediation session; and

(6) Present any other matters that may assist the mediator and facilitate the mediation.

(c) Mediation statements are intended solely to facilitate the mediation and shall not be filed with the court.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

10 of 12 DOCUMENTS

*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007, ***
*** AND THROUGH D.C. ACTS 17-171 ***
*** STATE ANNOTATIONS CURRENT THROUGH AUGUST 10, 2007 ***

TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER II. MEDIATION

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2826 (2007)

§ 16-2826. Mediator's report

A mediator's report shall be filed with the court no later than 10 days after the mediation has terminated, informing the court regarding:

(1) Attendance;

(2) Whether a settlement was reached; or

(3) If a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

11 of 12 DOCUMENTS

*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
*** AND THROUGH D.C. ACTS 17-171 ***
*** STATE ANNOTATIONS CURRENT THROUGH AUGUST 10, 2007 ***

TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER II. MEDIATION

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2827 (2007)

§ 16-2827. Confidentiality

(a) The mediation session shall be confidential. All proceedings at the mediation, including any statement made by any party, attorney, or other participant, shall be privileged and shall not be construed as an admission against interest. Any statement at such proceedings shall not be used in court in connection with the case or any other litigation. A party shall not be bound by anything said or done at the mediation unless a settlement is reached.

(b) A mediator shall not be compelled to provide evidence of a mediation communication in any subsequent trial.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

12 of 12 DOCUMENTS

*** CURRENT THROUGH D.C. LAW 17-41, EFFECTIVE OCTOBER 18, 2007. ***
*** AND THROUGH D.C. ACTS 17-171 ***
*** STATE ANNOTATIONS CURRENT THROUGH AUGUST 10, 2007 ***

TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS
CHAPTER 28. MEDICAL MALPRACTICE
SUBCHAPTER III. EVIDENCE

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 16-2841 (2007)

§ 16-2841. Inadmissibility of benevolent gestures

For the purpose of any civil action or administrative proceeding alleging medical malpractice against a healthcare provider, an expression of sympathy or regret made in writing, orally, or by conduct made by or on behalf of the healthcare provider to a victim of the alleged medical malpractice, any member of the victim's family, or any individual who claims damages by or through that victim, is inadmissible as an admission of liability. Nothing herein shall preclude the court from permitting the introduction of an admission of liability into evidence.

HISTORY: Mar. 14, 2007, D.C. Law 16-263, § 302, 54 DCR 807.

NOTES:
LEGISLATIVE HISTORY OF LAW 16-263. --See note to *§ 16-2801*.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO.
1105-0008
EXPIRES 6-30-01

1. Submit To Appropriate Federal Agency:

Tort Claims and Litigation Division
Office of the Judge Advocate General
Code 15, 1322 Patterson Ave SE Suite 3000
Washington Navy Yard DC 20374-5066

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.)* *(Number, Street, City, State, and Zip Code)*

Mr. Andrew Cibula Individually
2511 Fowlers Lane
Reston, Virginia, 22091
*See Attached

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
☒ MILITARY ☐ CIVILIAN	05/07/01	Married	May 7, 2001	

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof.)* *(Use additional pages if necessary.)*

On or about 7 January - 7 May 2001, attending US Navy health care providers negligently managed Jennifer Cibula's prenatal care and labor & delivery resulting in the need for emergency surgery and delivery of her infant son, David Cibula. As a direct result of the negligence, David Cibula has suffered and continues to suffer great physical pain, profound brain damage, cerebral palsy, extreme mental anguish, loss of familial consortium, lost wages, and extraordinary medical care and expenses including the need for 24 hour skilled care. Andrew Cibula has suffered and continues to suffer the loss of familial consortium, extraordinary medical expenses, emotional distress, and other pecuniary losses caused by the negligence of the United States of America.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, Street, City, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE, AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See Block 8
See Attached

11. WITNESSES

NAME	ADDRESS *(Number, Street, City, State, and Zip Code)*
Attending Health Care Providers Andrew & Jennifer Cibula	Bethesda Naval Medical Center 8901 Wisconsin Avenue Bethesda, Maryland 20889-5600

12. AMOUNT OF CLAIM *(See instructions on reverse.)* *(In dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	$50,000,000.00	N/A	$50,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13 a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone Number of Signatory (703) 716-6069	14. DATE OF CLAIM

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of not less than and not more than $10,000, plus 3 times the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Imprisonment for not more than five years and shall be subject to a fine of not than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. *(See 18 U.S.C.A. 287.)*

95-109
Previous editions not usable

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items – Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim be furnished, upon request, by the office indicated in Item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in Item #12 of this form.

The amount claimed should be substantiated by competent evidence as

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or if payment has made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit means as to the original cost of the property, the date of purchase, and the value property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid." A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or other of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company *(Number, Street, City, State, and Zip Code)* and policy ☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deductible, state amount.

18. If claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? *(It is necessary that you ascertain these facts.)*

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier *(Number, Street, City, State, and Zip Code).* ☐ No

* U.S. GOVERNMENT PRINTING OFFICE: 1988–241-175

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CARMASIETTA BEAN, Individually and as Next Friend of MB and MLB, both minors, 7805 Putnam Lane Forestville, Maryland 20747	)
and	)
PAUL BROWN, Individually and as Next Friend of MB and MLB, both minors, 7805 Putnam Lane Forestville, Maryland 20747	)
Plaintiffs,	)
v.	) CA No: 2007 CA 0004996 M
KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC. 6104 Old Branch Avenue Camp Springs, Maryland 20748 SERVE: Prentice Hall Corporation System 1090 Vermont Avenue, N.W. Washington, D.C. 20005	) Calendar 14 - Judge Judith Retchin) Next court event: January 29, 2009)Pretrial Conference .) TRIAL BY JURY REQUESTED
and	)
MID-ATLANTIC PERMANENTE MEDICAL GROUP, P.C. f/k/a CAPITAL AREA PERMANENTE MEDICAL GROUP, P.C. 6104 Old Branch Avenue Camp Springs, Maryland 20748 SERVE: Prentice Hall Corporation System Maryland 11 E. Chase Street Baltimore, Maryland 21202	)
and	)
MEDLANTIC HEALTHCARE GROUP, INC. d/b/a WASHINGTON HOSPITAL CENTER	)

BRUCE J. KLORES
& ASSOCIATES
ATTORNEYS AT LAW
[illegible]

110 Irving Street, N.W.
Washington, D.C. 20010
SERVE: CT Corporation System
1025 Vermont Avenue, N.W.
Washington, D.C. 20005

and

ERNEST C. WYNNE, M.D.
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

and

DR. CHRISTINE CHANG,
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Defendants.

FIRST AMENDED COMPLAINT

Come now plaintiffs Carmasietta Bean and Paul Brown, Individually and as Parents and Next Friends of their minor twin son and daughter, MB (boy) and MLB (girl), by and through their attorneys Bruce J. Klores, Thomas W. Mitchell, and Bruce J. Klores & Associates, P.C., and sue defendants stating as follows:

COUNT I
(Minor Plaintiff MB's Claim - Negligence - Medical Malpractice)

1. Jurisdiction of this Court is invoked pursuant to D.C. Code §§ 11-921 and 13-423.

2. Plaintiffs, Carmasietta Bean and Paul Brown, are the natural parents of MB, who is a disabled minor. Plaintiffs reside in the State of Maryland. The events giving rise to this action occurred in the District of Columbia. The corporate and individual defendants

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conducted business and/or provided health care services in the District of Columbia on a regular basis at the time of the events giving rise to this action.

3. At all times of which the plaintiffs complain, the defendants themselves and through their agents, servants and employees, represented to the plaintiffs and the general public that they possessed the degree of knowledge, ability and skill possessed by reasonably competent medical, surgical and nursing practitioners, practicing under the same or similar circumstances as those involving care to Carmasietta Bean while pregnant with the minor plaintiff MB.

4. Upon information and belief and all times mentioned herein, the nursing, medical and surgical care provided to Carmasietta Bean and the minor plaintiff MB by defendants Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Mid-Atlantic Permanente Medical Group, P.C. f/k/a Capital Area Permanente Medical Group, P.C., and Medlantic Healthcare Group, Inc., d/b/a Washington Hospital Center, hereinafter collectively referred to as "Corporate Defendants," was provided by agents, employees, servants, and representatives of these defendants, on their behalf, or by others affiliated with and acting on behalf of these defendants.

5. At all times mentioned herein, the defendants Ernest Wynne, M.D. and Christine Chang, M.D., as well as another physician Paul Lewis, M.D., by themselves or as employees or agents of the Corporate Defendants acting within the scope of their employment, provided surgical, medical, radiologic, prenatal, obstetrical and labor/delivery care and treatment to Carmasietta Bean and the minor plaintiff MB.

6. A health care provider/patient relationship existed between the named defendants, their agents, employees, representatives, independent contractors, and/or servants,

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and Carmasietta Bean and the minor plaintiff MB at all times relevant herein. The defendants owed Carmasietta Bean and the minor plaintiff MB a duty to conform their care to the standards of reasonably prudent practitioners acting under same or similar circumstances.

7. The defendants (which hereinafter includes agents, employees, representatives, subsidiaries, and/or independent contractors of each defendant) owed a duty to Carmasietta Bean and the minor plaintiff MB, which included performing appropriate diagnostic tests and procedures, assessment, appropriately diagnosing the condition of the pregnancy, providing appropriate treatment, procedures, surgery and/or medications to correct the condition without injury upon Carmasietta Bean or the minor plaintiff MB, continuous evaluation of effects of treatment, and adjustment of the course of treatment in response to ongoing surveillance and evaluation.

8. The defendants were negligent in that they failed to employ appropriate diagnostic tests and procedures to evaluate and diagnose complications that occurred during the pregnancy, failed to employ appropriate treatment, procedures, surgeries and/or medications to correct such complications, failed to appropriately monitor and evaluate the condition of the mother and child, failed to adjust treatment in response to appropriate evaluation of the effect of treatment, and the defendants were otherwise negligent.

9. MB was born to Carmasietta Bean and Paul Brown on April 11, 1998, at Washington Hospital Center at approximately 28 weeks gestation. MB suffered permanent neurologic injury a result of a brain injury which occurred during the perinatal period in which Mrs. Bean was at The Washington Hospital Center. The defendants who provided pre-natal care to Carmasietta Bean during her pregnancy with the minor plaintiff MB failed to timely and appropriately diagnose and treat Carmasietta Bean to prevent pre-term labor and delivery, and

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then to timely, and more expeditiously and less traumatically, deliver MB when Mrs. Bean showed signs and symptoms of infection compromising the minor.

10. As a direct and proximate result of the negligence of the defendants, MB suffered permanent damage to his central nervous system, resulting in severe spastic diplegia and cerebral palsy, and other cognitive and developmental impairments. As a direct result of these injuries, MB will require special therapeutic, educational and medical care including physical, occupational, physiological, and vocational rehabilitation. He will also suffer lost work expectancy and lost income over his lifetime. He has suffered and will continue to endure pain, anguish, embarrassment, and humiliation.

WHEREFORE, Carmasietta Bean and Paul Brown, as Mother and Father and Next Friend of MB, pray for judgment against the defendants, jointly and severally, in the amount of Thirty Million Dollars ($30,000,000.00) and for other relief found just and proper by the jury and the Court.

COUNT II
(Minor Plaintiff MLB's Claim - Negligence - Medical Malpractice)

11. Plaintiffs Carmasietta Bean and Paul Brown individually hereby incorporate the above paragraphs 1-10.

12. Plaintiffs, Carmasietta Bean and Paul Brown, are the natural parents of MLB, who is a disabled minor. MLB is MB's twin sister.

13. At all times of which the plaintiffs complain, the defendants themselves and through their agents, servants and employees, represented to the plaintiffs and the general public that they possessed the degree of knowledge, ability and skill possessed by reasonably competent medical, surgical and nursing practitioners, practicing under the same or similar

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circumstances as those involving care to Carmasietta Bean while pregnant with the minor plaintiff MLB.

14. Upon information and belief and all times mentioned herein, the nursing, medical and surgical care provided to Carmasietta Bean and the minor plaintiff MLB by defendants Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Mid-Atlantic Permanente Medical Group, P.C. f/k/a Capital Area Permanente Medical Group, P.C., and Medlantic Healthcare Group, Inc., d/b/a Washington Hospital Center, hereinafter collectively referred to as "Corporate Defendants," was provided by agents, employees, servants, and representatives of these defendants, on their behalf, or by others affiliated with and acting on behalf of these defendants.

15. At all times mentioned herein, the defendants Ernest Wynne, M.D. and Christine Chang, M.D., as well as another physician Paul Lewis, M.D., by themselves or as employees or agents of the Corporate Defendants acting within the scope of their employment, provided surgical, medical, radiologic, prenatal, obstetrical and labor/delivery care and treatment to Carmasietta Bean and the minor plaintiff MLB.

16. A health care provider/patient relationship existed between the named defendants, their agents, employees, representatives, independent contractors, and/or servants, and Carmasietta Bean and the minor plaintiff MLB at all times relevant herein. The defendants owed Carmasietta Bean and the minor plaintiff MLB a duty to conform their care to the standards of reasonably prudent practitioners acting under same or similar circumstances.

17. The defendants (which hereinafter includes agents, employees, representatives, subsidiaries, and/or independent contractors of each defendant) owed a duty to Carmasietta Bean and the minor plaintiff MLB, which included performing appropriate diagnostic tests and

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procedures, assessment, appropriately diagnosing the condition of the pregnancy, providing appropriate treatment, procedures, surgery and/or medications to correct the condition without injury upon Carmasietta Bean or the minor plaintiff MLB, continuous evaluation of effects of treatment, and adjustment of the course of treatment in response to ongoing surveillance and evaluation.

18. The defendants were negligent in that they failed to employ appropriate diagnostic tests and procedures to evaluate and diagnose complications that occurred during the pregnancy, failed to employ appropriate treatment, procedures, surgeries and/or medications to correct such complications, failed to appropriately monitor and evaluate the condition of the mother and child, failed to adjust treatment in response to appropriate evaluation of the effect of treatment, and the defendants were otherwise negligent.

19. MLB was born to Carmasietta Bean and Paul Brown on April 11, 1998, at Washington Hospital Center at approximately 28 weeks gestation. MLB suffered permanent neurologic injury a result of a brain injury which occurred during the perinatal period in which Mrs. Bean was at The Washington Hospital Center. The defendants who provided pre-natal care to Carmasietta Bean during her pregnancy with the minor plaintiff MLB failed to timely and appropriately diagnose and treat Carmasietta Bean to prevent pre-term labor and delivery, and then to timely, and more expeditiously and less traumatically, deliver MLB when Mrs. Bean showed signs and symptoms of infection compromising the minor.

20. As a direct and proximate result of the negligence of the defendants, MLB suffered permanent damage to her central nervous system, resulting in severe cognitive and developmental impairments. As a direct result of these injuries, MLB will require special therapeutic, educational and medical care including physical, occupational, physiological, and

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vocational rehabilitation. She will also suffer lost work expectancy and lost income over her lifetime. She has suffered and will continue to endure pain, anguish, embarrassment, and humiliation.

WHEREFORE, Carmasietta Bean and Paul Brown, as Mother and Father and Next Friend of MLB, pray for judgment against the defendants, jointly and severally, in the amount of Thirty Million Dollars ($30,000,000.00) and for other relief found just and proper by the jury and the Court.

COUNT III
(Parents' Claim - Economic Losses)

21. Plaintiffs Carmasietta Bean and Paul Brown individually here incorporate the above paragraphs 1-20.

22. As a result of the above described injuries sustained by the minor plaintiffs, MB and MLB, Carmasietta Bean and Paul Brown have in the past incurred, and will in the future incur, significant medical, therapeutic and educational expenses on behalf of MB and MLB, as well as their own wage loss.

WHEREFORE, Carmasietta Bean and Paul Brown pray for judgment against the defendants, jointly and severally, in the amount of Twenty Million Dollars ($20,000,000.00) and for any other relief found just and proper by the jury and the Court.

COUNT V
(Mother's Claim – Negligence – Medical Malpractice)

23. Plaintiff Carmasietta Bean individually here incorporates the above paragraphs 1-22.

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24. As a direct and proximate result of the negligence of the defendants who provided obstetrical/gynecological care, Carmasietta Bean suffered physical injury. She has in the past and will in the future suffer great and permanent emotional distress.

WHEREFORE, Carmasietta Bean prays for judgment against the defendants, jointly and severally, in the amount of Five Million Dollars ($5,000,000.00) and for any other relief found just and proper by the jury and the Court.

Date: May 19, 2008

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By /s/
Bruce J. Klores - D.C. #358548
Thomas W. Mitychell – D.C. #425180
1735 20th Street, N. W.
Washington, D. C. 20009
(202) 628-8100
(202) 628-1240 (facsimile)
bjk@klores.com

Attorneys for Plaintiffs

Plaintiffs request a trial by jury on all issues.

/s/
Thomas W. Mitchell

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing First Amended Complaint was served by mail on the 19th day of May 2008, on the following counsel:

Robert W. Goodson, Esquire
Shadonna E. Hale, Esquire
David J. Finucane, Esquire
Wilson Elser Moskowitz Edelman & Dicker, LLP
1341 G Street, NW, Suite 500
Washington, DC 20005

Daniel C. Costello, Esquire
Paul M. D'Amore, Esquire
Wharton Levin Ehrmantraut & Klein, P.A.
104 West Street, P.O. Box 551
Annapolis, MD 21404-0551

/s/
Thomas W. Mitchell

1828\complaint.amended

BRUCE J. KLORES
& ASSOCIATES
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SHEILA MAHER, Personal Representative of the Estate and Next of Kin of THOMAS BUFFINGTON, JR., Deceased
2916 Rittenhouse Street, N. W.
Washington, DC 20015

Plaintiff,

v.

THE GEORGE WASHINGTON UNIVERSITY
2121 I Street, N.W.
Washington, D.C. 20052
SERVE: Vicki Hunt, Esquire
Office of General Counsel
2100 Pennsylvania Ave., NW
Suite 525
Washington, D.C. 20037

and

DISTRICT HOSPITAL PARTNERS, L.P.
t/a THE GEORGE WASHINGTON UNIVERSITY HOSPITAL
2121 I Street, N.W.
Washington, D.C. 20052
SERVE: CT Corporation
1025 Vermont Avenue, N.W.
Washington, D.C. 20005

and

UNIVERSAL HEALTH SERVICES, INC.
367 S. Gulph Road
Post Office Box 61558
King of Prussia, Pennsylvania
SERVE: CT Corporation
1025 Vermont Avenue, N.W.
Washington, D.C. 20005

and

SURGICAL ASSOCIATES, CHARTERED

03-0009429
C.A. No. _____
JURY TRIAL REQUESTED

estate and next of kin.

3. The defendants Stanley Knoll, M.D., and Allen Greenlee, M. D. are health care providers in the District of Columbia who provided care, services, and/or treatment to the decedent in the District of Columbia, and as such owed to the decedent a duty to conform their conduct to prevailing standards.

4. The defendants George Washington University Hospital, Surgical Associates Chtd. District Hospital Partners, L.P., Universal Health Services, Inc., and Drs. Stock, Kaufman & Greenlee, are corporate or partnership entities conducting business in the District of Columbia, by and through their agents, employees, servants, representatives, nurses, residents, and/or independent contractors, and provided medical, surgical, and nursing care to the decedent during the time frames complained of herein. That care created a healthcare provider/patient relationship between the decedent and the defendants.

5. All of the individually named defendants were acting with the scope of their employment, appointment, and responsibilities with their respective corporations.

6. The defendants, acting by themselves and/or as agents, employees, servants, representatives, apparent agents, and/or independent contractors of the other defendants, provided medical, surgical and nursing care to Thomas Buffington, Jr. in the Fall of 2002 and then in the Winter of 2002. Mr. Buffington was admitted to The George Washington University Hospital on December 12, 2002, for a routine hernia operation. Because Mr. Buffington had a history of deep vein thrombosis, the plan was to discharge him on blood thinners. This was not done. Mr. Buffington died on December 16, 2002 of pulmonary embolism, as a direct and proximate result of the defendants' failure to appropriately treat.

7. The defendants departed from the standard of care with respect to the decedent

paragraphs 1-9 above.

11. As a direct and proximate result of the aforesaid negligence of the defendants, the decedent's next of kin has been injured and damaged, including, but not limited to, the following particulars:

a. expenses of last illness;

b. expenses of hospitalization and for medical care after the negligence and until death;

c. pecuniary and non-pecuniary loss to the next of kin;

d. loss of society and comfort of the decedent;

e. all damages recoverable under the Wrongful Death Act and its common law interpretation;

f. loss of care and specific services provided by Thomas Buffington, Jr. to his wife, Sheila Maher; and

g. being otherwise injured and damaged.

RUCE J. KLORES
K ASSOCIATES
TTORNEYS AT LAW

Superior Court of the District of Columbia
CIVIL DIVISION — CIVIL ACTIONS BRANCH

INFORMATION SHEET

SHEILA MAHER, Personal Representative of the Estate and Next of Kin of THOMAS BUFFINGTON, JR.

vs.

THE GEORGE WASHINGTON UNIVERSITY, et al.

Case Number: _____

Date: _____

Name: (please print) BRUCE J. KLORES	Relationship to Lawsuit
Firm Name: BRUCE J. KLORES & ASSOCIATES, P.C.	☒ Attorney for Plaintiff
Telephone No.: 202-628-8100 Unified Bar No.: 358548	☐ Self (Pro Se)
	Other:

TYPE OF CASE: ☐ Non-Jury ☒ 6 Person Jury ☐ 12 Person Jury

Demand: $ 10,000,000.00 Other: _____

PENDING CASE(S) RELATED TO THE ACTION BEING FILED

Case No. _____ Judge _____ Calendar # _____

Case No. _____ Judge _____ Calendar # _____

NATURE OF SUIT: *(Check One Box Only)*

A. CONTRACTS

☐ 01 Breach of Contract
☐ 02 Breach of Warranty
☐ 06 Negotiable Instrument
☐ 15 Other: _____
☐ 07 Personal Property
☐ 09 Real Property-Real Estate
☐ 12 Specific Performance

COLLECTION CASES
☐ 14 Under $25,000 Pltf. Grants Consent
☐ 16 Under $25,000 Consent Denied
☐ 17 OVER $25,000

B. PROPERTY TORTS

☐ 01 Automobile
☐ 02 Conversion
☐ 07 Shoplifting, D.C. Code § 3-441
☐ 03 Destruction of Private Property
☐ 04 Property Damage
☐ 05 Trespass
☐ 06 Other: _____

C. PERSONAL TORTS

☐ 01 Abuse of Process
☐ 02 Alienation of Affection
☐ 03 Assault and Battery
☐ 04 Automobile
☐ 05 Deceit (Misrepresentation)
☐ 06 False Accusation
☐ 07 False Arrest
☐ 08 Fraud
☐ 09 Harassment
☐ 10 Invasion of Privacy
☐ 11 Libel and Slander
☐ 12 Malicious Interference
☐ 13 Malicious Prosecution
☐ 14 Malpractice Legal
☒ 15 Malpractice Medical
☐ 16 Negligence
☐ 17 Personal Injury
☐ 18 Wrongful Death
☐ 19 Wrongful Eviction
☐ 20 Other: _____
☐ 21 Asbestos
☐ 22 Toxic/Mass Torts

SEE REVERSE SIDE AND CHECK HERE ☐ IF USED

5. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 6. Furthermore, the allegations contained in Paragraph 6 do not relate to this defendant and do not therefore require a response.

6. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 7. Furthermore, the allegations contained in Paragraph 7 do not relate to this defendant and do not therefore require a response

7. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 8. Furthermore, the allegations contained in Paragraph 8 do not relate to this defendant and do not therefore require a response

8. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 9. Furthermore, the allegations contained in Paragraph 9 do not relate to this defendant and do not, therefore, require a response

9. The allegations contained in Paragraph 10 of the Complaint contain conclusions of law to which no response is necessary.

10. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 11 of the Plaintiff's Complaint. Further, the allegations contained in Paragraph 11 do no relate to this defendant and do not, therefore, require a response.

11. Defendant is without sufficient information to admit or deny the truth or falsity of the allegations contained in Paragraph 12 of the Plaintiff's Complaint.

12. Defendant is without sufficient information to admit or deny the truth or falsity of the allegations contained in Paragraph 13 of the Complaint. To the extent that a response is required the allegations are denied.

FIRST DEFENSE

This complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The cause of action, if any, is barred by the applicable statute of limitations and/or latches.

THIRD DEFENSE

The plaintiff's damages, if any, are the result of the plaintiff's contributory negligence and/or assumption of risk.

FOURTH DEFENSE

The plaintiff's damages, if any, are the result of actions, commissions, omissions or liabilities of others for whom this defendant is not legally responsible.

FIFTH DEFENSE

The defendant will rely upon all defenses lawfully available to it, including, but not limited to those already asserted herein.

SIXTH DEFENSE

The defendant and its employees complied with the applicable standards of care of reasonably competent practitioners and did not cause the injuries alleged.

WHEREFORE, the defendant respectfully requests that the Complaint filed herein be dismissed with prejudice, with cause of this action and such further and additional relief as the nature of this case may required and which this honorable court deems just and proper.

Superior Court of the District of Columbia

MULTI-DOOR MEDICAL MALPRACTICE
EARLY MEDIATION FORM

To be used in selecting a mediator from the Multi-Door Medical Malpractice Mediator Roster and scheduling a mediation date through the Multi-Door Dispute Resolution Division.

Case Number _____

Case Caption _____

Undersigned counsel, as well as individual parties, representatives of non-individual parties with settlement authority, and involved insurance companies with the required settlement authority, have agreed to be available for mediation on the three dates listed below, from 1:00 pm to 5:00 pm. All listed dates occur after the Initial Scheduling and Settlement Conference and within 30 days of that date, as required under D.C. Code §16-2821.

_____ _____ _____
Date Date Date

Parties have reviewed the Multi-Door Medical Malpractice Mediation Roster and have agreed on the following mediators, listed below in order of preference:

_____ _____
First Mediator Second Mediator

_____
Third Mediator

Submitted by:

_____ _____
Signature Date
Atty. for: _____ E-mail address:_____
(or telephone number, if no e-mail address)

_____ _____
Signature Date
Atty. for: _____ E-mail address:_____
(or telephone number, if no e-mail address)

_____ _____
Signature Date
Atty. for: _____ E-mail address:_____
(or telephone number, if no e-mail address)

The completed form must be filed with the court and e-mailed to: earlymedmal@dcsc.gov. Those unable to eFile may file the form with the Civil Clerk's Office and deliver a copy to the Multi-Door Dispute Resolution Division, 515 5th St. NW, Suite 105, Washington, DC 20001.

Multi-Door will notify counsel or *pro se* parties promptly, by e-mail, when the mediation date has been set.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
MULTI-DOOR DIVISION

MEDICAL MALPRACTICE
CONFIDENTIAL MEDIATION STATEMENT

Parties to medical malpractice litigation are required, under D.C. Code §16-2825, to file this Confidential Mediation Statement (CMS) with the Multi-Door Dispute Resolution Division (202-879-1557). The statement must be filed no later than ten days prior to the scheduled mediation session. *Parties and counsel are cautioned that sanctions may be imposed on those who do not file the statement by the due date.*

You may submit the form in one of three ways: by e-mail, regular mail, or hand-delivery. To submit the form by e-mail, send it to: CivilCSS@dcsc.gov. The form should be titled by the case number. Do not send any other information or inquiries to this e-mail address. It may only be used to receive completed CSS forms.

The form may be mailed or delivered to: Multi-Door Dispute Resolution Division, 515 5th St. NW, Suite 105, Washington, D.C. 20001. Hand-delivery must occur between the hours of 8:30 am and 5:00 pm. *There is no after-hours filing box for CMS forms.* Do not deliver CMS forms to the Civil Division or any after-hours filing box. Proper filing with the Multi-Door Division will ensure that the CMS remains confidential and is not filed in the Court's case jacket nor shown to anyone other than the mediator or case evaluator assigned to the case. **Do not send a copy of the statement to opposing counsel or attach a certificate of service.**

Please be candid in your responses; this information is important to the mediation or case evaluation process. Responses need not be confined within the spaces provided. You are encouraged to attach additional pages or expand as much as needed.

If the case has been settled, a settlement praecipe must be filed in the Civil Clerk's Office with a copy sent to the Multi-Door Dispute Resolution Division, in lieu of the statement.

Thank you.

MEDICAL MALPRACTICE

CONFIDENTIAL MEDIATION STATEMENT

Multi-Door Dispute Resolution Division

Judge _____ Calendar # _____

Case Number _____

Case Caption _____

This case is scheduled for mediation on _____ at 1:00 p.m.

Submitted by:

_____
Attorney or *Pro Se* Party (please print)

Check one

☐ Plaintiff ☐ Defendant
☐ 3rd party Plaintiff
☐ 3rd party Defendant

_____
Firm

_____
Address

_____
City State Zip

_____
Telephone

List below the names of all parties you represent. (Attach an additional page if necessary). The filing of one settlement statement will suffice for all of the parties that you represent in this matter, provided all of the parties are listed.

_____ _____
Name of party Name of party

_____ _____
Name of party Name of party

_____ _____
Name of party Name of party

_____ _____
Name of party Name of party

1. Please provide a brief summary of the facts of this case:

2. Please identify the issues of law and fact in disputes and summarize the position of the party/ies you represent on these issues:

3. Discuss any issues of law or fact the early resolution of which could facilitate early settlement or narrow the scope of this dispute:

4. Please provide your assessment of the value range of this case for settlement purposes.

minimum $_____ maximum $_____

5. Please outline any other matters that may assist the mediator and facilitate the mediation.

6. Identify the attorney who will represent the party/ies at the mediation session and the person with authority who will attend the mediation session:

_____ _____
name and title party/entity represented

_____ _____
name and title party/entity represented

7. Attach any documents or materials relevant to this case that may assist the mediator and advance the purposes of the mediation session.

Effective March 24, 2008

GENERAL ORDER

I. SCOPE AND PURPOSE

This General Order is uniform for the Civil I and Civil II calendars. A Supplemental Order is attached to this General Order specifying any additional requirement(s) by the judge assigned to the individual calendar. This General Order supplements the Superior Court Civil Rules, which apply to every Calendar and with which counsel and *pro se* parties should be familiar. In addition, a **Civil Actions Information Handbook** is available at the Scheduling Conference for *pro se* parties and counsel who wish to share it with their clients. All counsel and parties are expected to treat each other and those involved in the case resolution process with dignity, respect and civility, both in court and in out-of-court conferences and discovery proceedings.

II. MOTIONS, OTHER FILINGS and COURT RECORDS

All filings by represented parties subsequent to the complaint and affidavits of service must be electronically filed and served. This applies to pending and newly- filed cases.
See http://www.dccourts.gov/efiling.

All requests must be by written motion (Rule 7(b)(1), 12-I(d)). The Court will not act on informal correspondence, e-mails or telephone calls, but appreciates notice by phone that an emergency motion is being filed. *Ex parte* communications are inappropriate and will not be accepted. Fees must be paid before filing.

All motions requesting a continuance of any hearings, conferences, etc., should include proposed continuance dates that are mutually agreeable to all counsel and unrepresented parties.

The caption of all filings should include "Judge _____" beneath the case number and on the lines below that, the next court date, and the nature of the scheduled event. E.g.

Plaintiff(s),	)	2008 CA 00XXXX 'Extender'[1]
	)	Judge XXXXXX
v.	)	Next Court Date _____
	)	Event _____
Defendant(s).	)	

[1] Proper caption format, including explanation of Extenders, is explained at www.dccourts.gov/efiling under frequently asked questions.

II. DISCOVERY

Motions to compel discovery and motions relating to discovery must comply with Rules 5, 26(l) and 37(a) and must include the various certifications required by Rule 37(a). The meeting required under the circumstances set forth in Rule 37(a) must be face to face, for a reasonable period of time (usually at least 60 minutes) in an effort to resolve the matter before filing a motion. Motions lacking any certification required by Rule 37(a), including the date, time, and place at which a meeting was held, will be **summarily denied.** Motions lacking a Certificate Regarding Discovery will not be accepted for filing.

IV. SETTLEMENT

In order to reduce litigation expense and delay, to eliminate the anxiety of trial and the risk of an unsatisfactory outcome, it is desirable that settlements occur as early as possible in the litigation process. The Court and the Multi-Door Dispute Resolution Branch are available to assist the parties in pursuing settlement early in the case. However, the Court will not delay trial to participate in settlement discussions on the day of trial. Counsel must sign a **certificate that all discovery has been completed by the time of mediation.** Counsel unable to sign the certificate, and, if necessary, their clients, may be sanctioned or summoned to appear before the Court for consideration of **further sanctions.**

V. PRETRIAL/SETTLEMENT CONFERENCE

Violations of any provision of Rule 16 may result in sanctions. The attached form for **Joint** Pretrial Statements must be used and must include **joint** *voir dire* questions, jury instructions and verdict form – with objections, if any.

Non-party principals whose authority may be needed to settle a case must attend in person, unless excused by the Court for good cause shown. Civil Rule 16(j).

VI. TRIAL

The Court expects parties will provide the Court with an exhibit list and a copy of the exhibits.

If it is anticipated that **audio or video equipment** is needed, the proffering party must bring their own equipment. In order to bring any audio or video equipment into the courthouse, a party must submit a Request for Authorization Letter to the Executive Office (202) 879-1700 located in Suite 1500 in the Moultrie Building, which in turn gives authorization to Courthouse Security. The request must contain the name of the party/attorney making the request, their address, telephone number, fax number, the case number, date and time of the trial, the name of the judge hearing the trial and the courtroom where the trial will be heard. In addition the request must indicate what type of equipment is being brought in and the name of the individual bringing in the equipment. The request may be faxed to the Executive Office at (202) 879-1802 at least three business days before the start of the trial. If it is anticipated that an **interpreter** is needed, the proffering party may contact the Office of Court Interpreting Services (202) 879-4828 to obtain a list of qualified interpreters.

Form of Joint Pretrial Statement To Be Served, Filed and Provided To Assigned Judge Before Pretrial Conference Pursuant to Rule 16(e)

_____ Plaintiff,	2008 CA 00XXXX 'Extender'
v.	Judge_____
	Pretrial Date_____Time___
	Trial Date_____Time_____
_____ Defendant.	(Jury) (Nonjury)

JOINT PRETRIAL STATEMENT

A. Certification of Rule 16(c) Meeting: State date, time and place of the meeting required to be held before pretrial to prepare joint statement and persons who attended.

B. Parties and Counsel: Names, addresses, and telephone numbers of all parties and counsel on whose behalf this statement is filed.

C. Nature of the Case: A brief mutually agreed upon, non-argumentative, neutral statement of the case suitable for reading to a jury as part of voir dire.

D. Claims and Defenses: Each party to set forth a concise statement of all claims and defenses, separately numbered, which that party is submitting for trial.

E. Undisputed Issues/Stipulations: List all issues not in dispute or facts stipulated.

F. Disputed Issues: List each disputed issue with the parties' principal contentions.

G. Requested Stipulations: List all facts to which other parties are asked to stipulate.

H. Relief Sought: Specify nature and amount of each item of damage claimed or description of equitable relief sought by each party.

I. Citations: List any cases or statutes which need to be called to the court's attention. Attach copies of any not found in D.C. Code, A.2d, or U.S. App. D.C., and include copies of any DCMR relied upon.

J. Pending Motions: List title, movant, and filing date of all pending motions.

K. Witnesses: Name, address, and telephone number of each person who may be called to testify. As to experts, list briefly matters about which each expert will testify. **Per Rule 16(e), no party may call at trial any witness omitted from that party's pretrial statement, except for impeachment or rebuttal purposes.**

THE DAILY WASHINGTON
Law Reporter
Established 1874

U.S. Court of Appeals for the D.C. Circuit

IMMIGRATION

SUGAR CANE

U.S. Department of Agriculture acted properly in defining sugar cane as not being fruit or vegetable, thus eliminating sugar cane workers from eligibility for permanent residence in U.S.

WINT, ET AL. v. YEUTTER, ET AL., U.S App. D.C. No. 89-5123, May 4, 1990. *Affirmed per* Ruth B. Ginsburg, J. (Edwards and Buckley, JJ. concur). *Steven J. Routh with Kristine Poplawski for appellants. Wilma A. Lewis with Jay B. Stephens, John D. Bates, R. Craig Lawrence and Madelyn E. Johnson for appellees the Honorable Clayton K. Yeutter, et al. John M. Simpson and Robert A. Burgoyne for appellee United States Sugar Corporation.* Trial Court—Hogan, J.

GINSBURG, RUTH B., J.: Alien farmworkers appeal a decision by the district court upholding a U.S. Department of Agriculture (USDA or Department) rulemaking that effectively eliminates sugar cane cutters from the group of seasonal farmworkers eligible for permanent residence in the United States under the Immigration Reform and Control Act of 1986 (IRCA). Satisfied that the Department acted within its statutory authority and provided a reasoned basis for its actions, we affirm.

I. STATUTORY FRAMEWORK AND CASE HISTORY

IRCA was enacted to reform the nation's immigration laws, largely by controlling illegal immigration into the United States through, *inter alia*, penalizing employers of undocumented aliens. *See* 8 U.S.C. §1324a. As part of a congressional compromise between the interests of growers, primarily from the West, who sought assurance that a pool of legal labor would be available to perform temporary field work, and those of farmworkers' rights groups, Congress included in IRCA a new Seasonal Agricultural Worker (SAW) program. *See* H. REP. No. 99-682(I), 99th Cong., 2d Sess. 50-51 (1986) (hereafter House Report). That program confers on qualifying workers status as lawful immigrants, eligible for permanent residence.

To qualify for the SAW program, applicants must demonstrate that they resided in the United States and performed seasonal agricultural services for at least 90 days during the year ending May 1, 1986. *See* 8 U.S.C. §1160(a)(1). IRCA defines "seasonal agricultural services" as "the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture." 8 U.S.C. §1160(h).

IRCA also amended an existing foreign guest worker program, the H-2 program, known in its amended form as the H-2A program. Under the H-2A program an employer may petition the Secretary of Labor at least 60 days in advance of need, for a certification that

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor and services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and other working conditions of workers in the United States similarly employed.

8 U.S.C. §1188(a)(1). Foreign workers admitted under H-2A visas, in contrast to those eligible for the SAW program, are not entitled to

(Continued on p. 1344)

District of Columbia Bar

Election Results

Robertson Wins D.C. Bar President-Elect Post; Joins Determan at Head of New Leadership Team

James Robertson, a partner in the law firm of Wilmer Cutler and Pickering has been elected president-elect of the District of Columbia Bar in a mail ballot of the Bar's 42,600 active members.

As president-elect, Robertson will automatically succeed to the Bar's presidency after one year in office. He subsequently will serve a third year with the title of immediate past president.

As Robertson takes office, the current D.C. Bar President-Elect, Sara-Ann Determan will become Bar President. Determan is a partner in the law firm of Hogan & Hartson.

Also elected were Secretary Darryl W. Jackson, Executive Assistant United States Attorney; and Treasurer Alan I. Herman, project manager of the national pro bono program for the American Corporate Counsel Institute; both for one-year terms.

Elected to three-year terms on the Board of Governors were: Frederick D. Cooke, partner, Dow Lohnes & Albertson; Cornish Hitchcock, Public Citizen Litigation Group; Carolyn R. Lamm, White & Case; Michael J. Madigan, partner, Akin Gump, Strauss, Hauer & Feld and Linda E. Perle, Center for Law and Social Policy.

Elected to the American Bar Association House of Delegates were: Mortimer M. Caplin, Caplin & Drysdale; Paul L. Friedman, White & Case; David B. Isbell, Covington & Burling and Marna S. Tucker, Feldesman, Tucker, Leifer, Fidell & Bank.

All newly-elected officers, Board members, and delegates will take office during the Presidential Luncheon at the D.C. Bar's 1990 Convention, set for noon Thursday, June 28, at the Capital Hilton Hotel, 16th & K Streets, N.W., Washington, D.C. Luncheon tickets are available from the D.C. Bar for $25. There is no charge for attending the business session only, which is scheduled to begin at 1:30 p.m.

D.C. Superior Court

CIVIL PROCEDURE

RULE 11

Rule 11 sanction of $3,500 is imposed on attorney who filed medical malpractice case without consulting knowledgeable medical expert to determine whether there was breach of standard of care.

APPERSON, ET AL. v. GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, ET AL., Sup.Ct., D.C., C.A. No. 10194-88, May 9, 1990. *Opinion* per Salzman, J. *W. Ray Ford for plaintiffs. Nicholas S. McConnell for defendant Greater Southeast Community Hospital.*

SALZMAN, J.:

I

This matter came before the Court on defendant Greater Southeast Community Hospital's motion for sanctions under Civil Rule 11. Based upon the briefs and counsel's representations at a hearing on the motion, the Court found that plaintiffs' counsel had signed and filed a medical malpractice complaint against the Hospital without first making reasonable inquiry into whether the suit was well grounded in fact, and thereby violated the Rule. The Court ordered plaintiffs' counsel to pay the Hospital's costs and reasonable attorney's fees (stipulated to be $3,500.00) as a sanction.[1] This memorandum amplifies the findings and conclusions announced in open court on March 23, 1990.

II

W. Ray Ford, Esquire, was counsel for plaintiffs Cynthia and Donald Apperson in this litigation. He prepared, signed and filed a medical malpractice suit on their behalf against Greater Southeast Community Hospital and the late Dr. Jo Shibuya.[2] Mrs. Apperson was admitted to the Hospital for the birth of her child. Dr. Shibuya was the Hospital's anesthesiologist who gave Mrs. Apperson an epidural anesthesia to ease her pain and discomfort in childbirth. The administration of an epidural anesthetic involves the insertion of a needle into the outer covering of the spinal

(Continued on p. 1344 - Rule 11)

1 Defendant has withdrawn its request for sanctions against the individual plaintiffs.

2 Dr. Shibuya died on May 9, 1987, before this suit was filed. The Hospital filed a suggestion of death on December 11, 1987.

TABLE OF CASES

§ 11

(Cont'd. from p. 1341)

cord. Mrs. Apperson's complaint alleged that Dr Shibuya performed the procedure [illegible]gently and caused a "[illegible]arachnoid tap" [p]uncture of her spine. Mrs. Apperson [as]serted that as a result of the puncture she suffered low back pain and severe headaches for several weeks thereafter. The complaint additionally alleged that Mrs. Apperson was never informed that this risk was inherent in the administration of epidural anesthesia and that, had she been made aware of it, she would not have consented to the procedure. The complaint sought $250,000 in compensatory damages and $100,00 for loss of consortium.

2. Mr. Ford drafted and signed the Appersons' complaint and filed it in this court. He conceded, however, that before doing so neither he nor his clients consulted any medical expert about the case, much less an expert in the field of anesthesiology. Counsel asserted that he was not able to do so because his clients lacked the funds to pay expert consulting fees. Mr. Ford stated that he did inform plaintiffs they would not be able to pursue the lawsuit without retaining a medical expert.[3]

3. On May 3, 1989, Judge Sylvia Bacon of this court granted Mr. Ford's motion to withdraw from the case and ordered plaintiffs either to have new counsel appear for them or advise the Court that they intended to represent themselves. When plaintiffs did neither, on August 1, 1989, this Court granted the Hospital's motion to dismiss the suit.[4] It is not disputed that the Hospital incurred $3,500.00 dollars in attorneys fees and other costs defending the action.

III

To establish a medical malpractice claim a plaintiff must prove the applicable standard of care, that the defendant physician negligently deviated from that standard, and that the negligence was a proximate cause of the alleged injury. *Pasada v. Kilpatrick*, 547 A.2d 163 (D.C. 1988). The plaintiff ordinarily must establish the standard of care through the testimony of a qualified expert witness. *Sponaugle v. Pre-Term, Inc.*, 411 A.2d 366, 368 (D.C. 1980). The point need not be belabored. It is not disputed that in order to prove Dr. Shibuya failed to meet the requisite standard of care in administering the epidural anesthesia to Mrs. Apperson, plaintiffs required expert testimony.[5]

Before the epidural anesthesia could be undertaken, Mrs. Apperson's "informed consent" to the procedure was needed. To establish that her informed consent was lacking here, Mrs. Apperson would have had to show that there was a material risk associated with the proposed treatment, a risk that Dr Shibuya failed to disclose and one that would have caused a reasonable person to decline the course of treatment. *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982). This proof, too, required the testimony of a qualified medical expert to establish the nature and degree of the risks of the proposed and alternate treatments, the probability of success, and whether disclosure would be detrimental to the patient.[6] *Crain*, *supra*, at 563.

The malpractice alleged here concerns an invasive and delicate procedure involving inserting a needle into the outer covering of Mrs. Apperson's spinal cord. This required professional judgment and skill on Dr Shibuya's part. Whether he negligently administered the anesthesia is obviously beyond the common knowledge and experience of laymen. Expert medical testimony would therefore be necessary to establish the standard of care for the procedure and whether it was breached. Neither plaintiffs' counsel nor plaintiffs themselves are physicians or experts in anesthesiology; they make no claim to any formal medical education or other expertise in these fields. Consequently, as a layman, Mr Ford could not have decided of his own knowledge that Dr. Shibuya breached the standard of care expected of an anesthesiologist in administering an epidural anesthesia. Mr. Ford's investigation of the breach of standard of care was limited to his personal review of medical literature he deemed relevant. But without expert guidance, Mr Ford was in no position to decide on the basis of articles in professional journals whether suit in this case was warranted in fact. Counsel's lack of medical training precluded him making that judgment on his own.[7] As a minimum, Mr Ford was required to consult a knowledgeable medical expert to determine whether the Appersons' claim of breach of the standard of care was well founded on the facts presented.[8] There was ample time for Mr. Ford to make a proper inquiry; this is not a situation where the statute of limitations was about to run.[9]

In sum, Rule 11 imposed on Mr. Ford the responsibility to make a reasonable inquiry to determine whether the complaint was well grounded in fact. He failed to do so. As a result the defendant Hospital was forced to expend time and money defending an apparently baseless lawsuit. This is precisely the sort of litigation Rule 11 is designed to preclude

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3. [M]r. Ford also acknowledged to the Court that he never [consult]ed an expert even after filing the complaint. The [illegible] [illegible] is predicated on counsel's failure to investigate [illegible] before signing and filing the complaint. Whether [he sh]ould have withdrawn at later is a separate question that [is n]ot before the Court. See *Hilton Hotels Corporation v. [illegible]* No. 89-7045 (D.C. Cir., May 22, 1990).

4. The dismissal was based on the plaintiffs' failure to comply with Judge Bacon's May 3, 1989 order. No request for reconsideration was filed and no appeal was taken from that dismissal.

5. Expert testimony might not be required in a malpractice case if a lay person, relying on common knowledge and experience, can find that the harm would not have occurred in the absence of negligence. [illegible] v. [illegible], [illegible] A.2d [illegible] (D.C. [illegible]). [illegible]

6. Had Dr. Shibuya [illegible], it might have been possible for plaintiffs to establish this through his testimony. See *Abbey v. Jackson*, 483 A.2d 330 (D.C. 1984). But Dr. Shibuya [illegible] before suit was filed. Plaintiffs' counsel never spoke to him or any other physician about these risks before filing suit.

7. Counsel cites *Calabrese v. Trenton State College*, 82 N.J. 321, 413 A.2d 315 (1980), as authority for filing a medical malpractice suit without consulting expert sources other than medical literature. Reliance on *Calabrese* is misplaced. That case was not a [illegible] under Rule 11 and the court was not addressing the situation presented here. Moreover, the New Jersey opinion makes clear that, unlike what happened in this case, counsel in *Calabrese* had taken "defendant doctors' depositions in which they state that they gave plaintiff warnings as to possible hazards in the injections [of [illegible]]." 413 A.2d at 317. It was that expert evidence, coupled with articles in medical journals of which the trial court may take judicial notice, the New Jersey court held adequate to withstand a motion for summary judgment in an "informed consent" case. Compare *Abbey v. Jackson*, supra, 483 A.2d 330. In the case at bar, defendant Dr. Shibuya was not deposed. The comparative risks of epidural versus general anesthetic are not the kind of scientific facts "known as part of ordinary knowledge" or "capable of accurate and ready determination" by resort to unquestionably accurate sources, and therefore not subject to judicial notice. *St. [illegible] v. Fennimore*, 126 A.2d 317 (D.C. 1957); Rule 201(b), Federal Rules of Evidence.

8. The Court is not suggesting that a plaintiff must retain a medical expert ready, willing and able to testify at the [trial] before filing suit. The Court is aware of the expense entailed in such arrangements. Having an expert review the facts and give his opinion of the merits of the [illegible] [illegible] is all [the] Court believes necessary. That is hardly an unreasonable burden for plaintiffs to shoulder before filing suit for hundreds of thousands of dollars and causing defendants substantial [illegible] opposing unfounded litigation. While plaintiffs' counsel asserted that his clients were unable to afford the [illegible] expert consultant, at the hearing he proffered no information about the expenses involved or his clients' finances. A court places little weight on such self-serving, unsubstantiated assertions. In any event, the District of Columbia Bar Rules permit counsel to advance or guarantee the expenses of litigation, including the expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. DR 5-103(B). Counsel was apparently unwilling to do [illegible]

9. The statute of limitations for this action is three [years]. D.C. Code [illegible] [illegible] [illegible] A.2d 613 [illegible]

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Fed Supplement, Vols 1-724; Fed Reporter 2nd, Vols 1-890; West's Fed Practice Digest [illegible] [illegible] set); Supreme Court Reporter, Vols [illegible]; Moore's Fed Practice [illegible]. [illegible] [illegible] at [illegible] [illegible]

TAB 4

DISCOVERY - GOALS AND LIMITATIONS

Michele L. Smith, Esq.

I. GENERALLY

Discovery should be used, but not abused, to accomplish the following:

1. to identify the opponent's theories;

2. to limit the issues;

3. to identify all relevant persons and things (documents, exhibits, and tangible evidence); and

4. to lock in the testimony of potential witnesses.

Counsel should obtain all relevant medical records, which should be reviewed with that side's experts before the first fact witness is deposed. Discovery without a clear understanding of the medical issues to be addressed or the objectives to be achieved is expensive and often counterproductive. It is not useful to propound unnecessary or extensive discovery, which frequently forces the opposition to prepare explanations, and results in educating the opponent regarding the strengths and weakness in their own case.

Moreover, the medical record is useful in identifying relevant witnesses, documents and tangible evidence, and in eliminating unnecessary fact witnesses. Generally, depending upon illness and length of admission, a hospital chart should include the following:

1. an admission sheet, which may be an emergency room document if the patient first presented to the emergency room prior to being admitted to the hospital;

30-

2. an admitting history and physical examination by the attending physician;

3. the physician's progress notes;

4. the physician's order sheet;

5. nursing notes, which may be broken down into narrative, graphic, and flow sheets;

6. medication records, which may or may not include a medication Kardex;

7. consultations;

8. operative reports;

9. anesthesia records;

10. pathology reports;

11. laboratory reports;

12. radiology reports;

13. therapy records;

14. consent forms; and

15. discharge summaries.

Obviously from reviewing the consultations, treating physicians, generally with issue specific expertise, can be identified. Reviewing the physician's progress notes can identify any house officers, consultants who did not record a separate consultation sheet, or other health care providers that treated the patient during the hospitalization. From these two documents, separate requests should be made to the health care providers to obtain any office records they may have. Admitting histories may identify prior treating

physicians and pre-existing illnesses, and discharge summaries will identify referral institutions and receiving physicians.

Other documents to consider may include hospital incident reports, institutional policies and procedures, specialty board practice parameters, medical literature, Joint Commission on Accreditation of Hospitals, and managed care guidelines. Not all of these documents are relevant or necessary in every case.

A useful tool for effectively organizing and utilizing the information contained in voluminous medical records is a chronology of care. While too much information will defeat the purpose, a good chronology should include, by date of service:

the identity of the provider;

the chief complaint;

any case specific pertinent history or examination findings;

any diagnosis;

and the health care provider's plan.

This summary will assist in determining the need for further document or discovery requests and assist in prioritizing and taking depositions.

II. DEPOSITION

The greatest limitation that should be placed on any discovery deposition is to avoid taking that deposition without sufficient preparation to form a comprehensive strategy, which identifies the specific testimony one wishes to elicit, and identifying those issues one should avoid to "save for trial." Furthermore, not every health care provider who saw the plaintiff need be deposed. Non-party nurses, technicians or other

hospital employees often work closely with the defendants, and can have difficulty remembering specific facts two or three years after the occurrence. For this reason, depositions of these individuals should only be undertaken when necessary, and after a careful strategy devised to pin down reasonable testimony. By deposing every treating health care provider, opposing counsel is forced to meet with numerous witnesses who are potentially supportive of the defendant's case.

Prior to the deposition of an expert, a broad search of the medical literature is instructive, not only to understand the medical issues involved, but to establish beneficial "sound bites" from the expert that can be later utilized at trial. One frequently useful strategy is to begin with broad, general concepts of medicine with which the expert more likely than not will agree. The examiner can then begin to narrow the issues and tailor them more precisely to their particular case. The expert's own publications are frequently a good starting point. The trick is to know what, and when, to hold back.

Another effective strategy is to begin with a reasonable differential diagnosis for a given presentation, and then focus on what was done to "rule in" or "rule out" each condition.

While it is necessary to establish qualification of practice, it is not particularly instructive to ask the witness to read their *curriculum vitae* into the record. Obtaining a previous testimonial history is frequently a useful mechanism to obtain avenues for future impeachment at trial.

Finally, when deposing experts, testimony should be elicited which effectively limits their opinions to standard of care, causation, and/or damages. Obviously, once

the general areas of opinion are obtained, the basis for those opinions must be understood. Fair, credible witnesses can generally base their opinions within their training, experience, and/or the medical literature. Generally, if a witness has never seen it, read about it, or studied about it, but thinks it happened in this case, the opinion is subject to impeachment.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CARMASIETTA BEAN and PAUL BROWN Individually and as Parents and Next Friends of their minor son MEGUEL BROWN,	)
Plaintiffs,	) **CA No: 2007 CA 0004996 M**
v,	) **Calendar 14 - Judge Judith Retchin**) **Next court event: January 29, 2009**
KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., et al.	)
Defendants.	)

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC.

TO: Kaiser Foundation Health Plan
of the Mid-Atlantic States, Inc.
C/o Robert W. Goodson, Esquire
Shadonna E. Hale, Esquire
David J. Finucane, Esquire
Wilson Elser Moskowitz Edelman & Dicker, LLP
1341 G Street, NW, Suite 500
Washington, DC 20005

Plaintiffs, pursuant to S.C.R. Civ. P. 33, by and through counsel, request that defendant Dr. Christine Chang timely answer within thirty (30) days the following interrogatories, separately, fully, in writing, and under oath.

DEFINITIONS AND INSTRUCTIONS

A. These interrogatories shall be deemed continuing so as to require reasonable supplementary answers if you obtain further or different information between the time your answers are served and the time of trial.

B. The terms "you," "your," or "Kaiser", refer to Kaiser Foundation Health Plan, as well as their officers, directors, agents, employees, representatives, contractors, lawyers, and anyone acting for or on your behalf.

C. Where knowledge or information in the possession of you is requested, such request includes knowledge and information of your agents and representatives and, unless privileged, your attorneys.

D. Unless otherwise indicated, these interrogatories pertain to the occurrence complained of in the pleadings.

INTERROGATORIES

INTERROGATORY NO. 1: State the full name, present business and home addresses, occupation and/or job title, date of birth, and social security number of the person answering these interrogatories.

ANSWER:

INTERROGATORY NO. 2: State the full name, present address and professional capacity or job title, if any, of each doctor, nurse, medical assistant, midwife, or other individual who saw, evaluated, treated, consulted, monitored, or in any way assisted with the care and treatment of Carmasietta Bean and/or Meguel Brown during all or any portion of the prenatal and labor and delivery care, and the delivery and neonatal care of Carmasietta Bean and/or

Meguel Brown. As to each, please provide:

(a) his/her duties with regard to their care;

(b) the specific shift(s) and date(s) each person worked with regard to their care;

(c) the contractual or employment relationship each person had with any defendant in this action, identifying the employer/principal.

ANSWER:

INTERROGATORY NO. 3: State whether you intend to rely upon or use in direct examination any medical articles, treatises, textbooks, or other publications. If so, state the title of each such publication, journal, magazine or series wherein each was published, the name and address of the publisher, the date of publication, the name of the author, and the volume, page or section reference.

ANSWER:

INTERROGATORY NO. 4: State the names and addresses of all persons not named in answer to the foregoing interrogatories who are known to you to have personal knowledge or relevant facts pertaining to the occurrence complained of in this action, or any fact or

information relevant to the injuries or infirmities of the plaintiffs, or the damages claimed to have resulted from the occurrence, or any other issue in this case. Include in your answer a brief statement sufficient to identify the subject matter about which each person has knowledge.

ANSWER:

INTERROGATORY NO. 5: If plaintiffs made or gave to you, or to any agent or representative or person acting in your behalf, any statement, orally or written and/or reduced to writing or otherwise recorded, concerning the occurrence complained of in this action or concerning any fact or information relevant to the injuries or infirmities of the plaintiffs or their present condition or the damages claimed to have resulted from the occurrence or to any issue in this case, state when, where and the name and address of each person to whom they made or gave each such statement, and if any such statement is signed by them, attach a true copy of all such signed statements to the answers to these interrogatories.

ANSWER:

INTERROGATORY NO. 6: If any statement or report, written, reduced to writing or otherwise recorded has been obtained by you, or any agent or representative or person acting in

your behalf, from any person concerning the occurrence complained of in this action or any fact c information relevant to the injuries or infirmities of plaintiffs or their present condition or the damages claimed to have resulted from the occurrence or to any issue in this case, state the name and address of each person who made or gave each such statement or report, the date of each, and the name and address of the person who has the custody or possession of each or a true copy thereof.

ANSWER:

INTERROGATORY NO. 7: If you contend that any party, or their agent or employee, has made any admission, declaration or statement against interest concerning the occurrence complained of in this action, injuries or losses, please state by whom it was made, the substance of any such admission, to whom it was made and when, the name and address of each person who heard such admission, and whether it was oral or written, by conduct, silence or otherwise. If such admissions were made in writing, state the date of each such writing, to whom the writing was addressed, by whom it was signed and all persons having custody of each such writing.

ANSWER:

INTERROGATORY NO. 8: Describe in as much detail as possible all conversations between you and the plaintiffs regarding the health care provided in this case. State the nature and substance of each conversation, whether the conversation was in person or by telephone, the date and place of each conversation, who participated in the conversation, and identify all persons who were present.

ANSWER:

INTERROGATORY NO. 9: If you contend or have knowledge of facts or information tending to prove that the injuries or damages of the plaintiffs were caused or directly contributed to by any negligent act or omission on the part of any person, persons, or corporation, including the plaintiffs, not named as a party herein, state the name and address of each such person or corporation, setting forth concisely but fully the nature of each negligent act or omission and the manner in which it was committed and the names and addresses of all persons having personal knowledge of the facts or information relevant to all such negligent acts or omissions.

ANSWER:

INTERROGATORY NO. 10: State all the facts upon which you rely in support any affirmative defenses raised in your answer to the complaint.

ANSWER:

INTERROGATORY NO. 11: Identify all documents within your knowledge, custody or control which contain facts or opinions concerning the allegations asserted in the complaint or any fact or information relevant to the care and treatment or the injuries or infirmities of the plaintiffs or the damages claimed to have resulted from the occurrence or to any issue in this case (other than documents prepared in anticipation of litigation), and include in your answer the date of the documents and the name and address of the person(s) who made it, the title and a short description of the document sufficient to identify the contents or subject matters and the person who presently has custody or control of it.

ANSWER:

INTERROGATORY NO. 12: Identify all tangible items of any type or description which are relevant to the subject matter of this litigation, including but not limited to documents, medical records, reports, memoranda, notes, paper writings, plats, photographs, models,

appliances, pictures, x-rays, slides, scans, tracings, diagrams, computer printouts, tape recordings (audio, video, computer, etc.), demonstrative aid, visual aid or any other graphic, pictorial or tangible item, or any other item of any type or description, which are relevant to this matter, and the name of the custodian of each such document or item and the date each object was produced or obtained.

ANSWER:

INTERROGATORY NO. 13: If you contend that any of the plaintiffs' injuries, disabilities, or losses claimed are due to any sickness, disease or condition which existed before Carmasietta Bean arrived at the Washington Hospital Center on the date of her delivery or were caused by some process unrelated to labor and delivery, summarize any such contention and the facts upon which you base your contention, setting forth the names and addresses of all persons having personal knowledge thereof.

ANSWER:

INTERROGATORY NO. 14: Please identify each instance in which any of your agents, servants, or employees provided care to Carmasietta Bean and/or Meguel Brown, and also

identify for each of them, whether they have ever had their professional license or any hospit. privileges suspended, revoked, or terminated, and state for each license or privilege the authority which granted it, the date it was suspended, revoked, or terminated and the reason for each.

ANSWER:

INTERROGATORY NO. 15: Do you believe that any of your agents or employees departed from the standard of care in any way in the care and treatment of Carmasietta Bean and/or Meguel Brown? If so, state in detail each departure and the facts you believe tend to support the same.

ANSWER:

INTERROGATORY NO. 16: Identify each rule, regulation, guideline, instruction, protocol, recommendation, manual, handbook, collection of standard orders, memoranda, notices or other documents relating to the following topics in existence at Washington Hospital Center at

the time of delivery:

(a) Intrapartum electronic fetal monitoring;

(b) Documentation of labor; or

(c) Abnormal fetal presentation.

ANSWER:

INTERROGATORY NO. 17: With respect to each and every expert whom you may call at the hearing and/or trial hereof, state the name, professional address of each expert, specialty of each expert, the subject matter on which each witness will testify, the substance of the facts considered and opinions held by each expert, the grounds and/or basis for each opinion, and attach a curriculum vitae as well as a copy of all reports received from or sent to the expert

ANSWER:

Date: November 15, 2007

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____
Thomas W. Mitchell – D.C. #425180
Bruce J. Klores - D.C. #358548
1735 20th Street, N. W.
Washington, D. C. 20009
(202) 628-8100
(202) 628-1240 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by hand delivery on the 15th day of November, 2007, on the following counsel:

Robert W. Goodson, Esquire
Shadonna E. Hale, Esquire
David J. Finucane, Esquire
Wilson Elser Moskowitz Edelman & Dicker, LLP
1341 G Street, NW, Suite 500
Washington, DC 20005

Daniel C. Costello, Esquire
Paul M. D'Amore, Esquire
Wharton Levin Ehrmantraut & Klein, P.A.
104 West Street, P.O. Box 551
Annapolis, MD 21404-0551

Thomas W. Mitchell

k:/1828/interrogatories.first

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

LOUISE SPERRAZZA HAVLICEK, Individually and as Personal Representative of the Estate and Next of Kin of FRANKLIN JOSEPH HAVLICEK, Deceased,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 2007 CA 006925 M**
	:	**Calendar 9, Judge Anderson**
DAVID W. PATTERSON, M.D., *et al.*,	:	**Next Scheduled Event: Initial**
	:	**Conference on 1/18/08 @ 9:30 a.m.**
Defendants.	:	

DEFENDANTS DAVID W. PATTERSON, M.D. AND DRS. ARLING AND PATTERSON, P.C.'S REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFFS

COME NOW the **Defendants, David W. Patterson, M.D. and Drs. Arling and Patterson, P.C.,** by and through their attorneys, **Steven A. Hamilton, Esquire, Karen S. Karlin, Esquire and Hamilton Altman Canale & Dillon, LLC,** and pursuant to the Superior Court Rules of Civil Procedure, request that Plaintiff produce and permit Defendants to inspect, copy and photograph all documents and things in the Plaintiff's possession, custody or control which embody, refer to, or relate to in any way the following subject, other than written materials prepared in anticipation of litigation or for trial:

1. All medical records, surgical records, x-rays, mental records, financial records, bills, invoices, writings, notes, or memoranda relating in any way to all of the Plaintiff's decedent's physical, mental, or medical condition, illnesses, or disabilities,

including but not limited to those of doctors, psychologists, therapists, counselors, nurses, practitioners, hospitals, clinics, institutions, or other health care providers or third party private or governmental health or accident insurers, without regard to whether it is the Plaintiff's contention that such physical, mental, or medical conditions, illnesses, or disabilities were caused in any way by Defendants or any agent or employee of Defendants for a period of ten (10) years before and up to the time of the death of Plaintiff's decedent.

2. With regard to any medical or hospital records referred to in paragraph one (1) above which are in existence, Defendants request that Plaintiff execute the attached HIPAA-compliant authorization for each doctor, hospital or health care provider where records exist.

3. All employment records relating in any way to the Plaintiff's decedent, whether employed or self-employed, including the names and address of all employers, records of the dates absent from work for any reason whatsoever, the records relating to the fact and duration of unemployment, the records of Worker's Compensation, unemployment insurance, welfare, and applications for assistance from any governmental agency because of unemployment or ill health, and all income records for a period of ten (10) years prior to the time of the death of Plaintiff's decedent.

4. All tapes, recordings of any kind, DVDs, CDs, photographs, sketches, or diagrams relating in any way to the allegations of the Complaint.

5. All state and federal income tax returns, W-2 forms, and attached schedules for a period of five (5) years before the occurrence alleged in the Complaint up to and including the present date.

6. All documents received pursuant to any subpoena or notice of deposition duces tecum issued in this action.

7. Any and all notes and reports provided by any and all treating physicians and/or independent experts.

8. All statements of any person having knowledge of the facts of this case.

9. Any and all autopsy reports relating to Plaintiff's decedent.

10. Any and all documents referred to in your Answers to Interrogatories from this Defendant.

As used herein, documents and materials and items shall include all types of recorded information, including but not limited to, writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form.

Defendants request that the documents and things herein requested be produced at the offices of Defendants' attorneys, **Hamilton Altman Canale & Dillon, LLC**, 4600 East-West Highway, Suite 201, Bethesda, Maryland 20814, on the 30th day after service of this Request, except that compliance with this Request may be made by mailing copies of such documents to Defendants' attorneys, such mailings to be postmarked prior to the 30th day following service of said Request.

Respectfully submitted,

HAMILTON ALTMAN CANALE & DILLON, LLC

By: */s/ Steven A. Hamilton*

Steven A. Hamilton (D.C. Bar No. 953539)
steven.hamilton@hacdlaw.com
Karen S. Karlin (D.C. Bar No. 446660)
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Attorneys for Defendants

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LOUISE SPERRAZZA HAVLICEK Individually and as Personal Representative of the Estate and Next of Kin of FRANKLIN JOSPEH HAVLICEK, et al.	)	
Plaintiffs	)	
v.	)	C.A. No. 2007 CA 006925 M J. Jennifer M Anderson
DAVID W. PATTERSON, M.D., et al.	)	
Defendants	)	

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT DAVID W. PATTERSON, M.D.

COMES NOW the plaintiff, Mrs. Louise Sperrazza Havlicek, on behalf of the next of kin of Franklin Joseph Havlicek and as Personal Representatives of the Estate of Franklin Joseph Havlicek, by and through Bruce J. Klores & Associates, P.C., and pursuant to the Superior Court Rule of Civil Procedure 34, request the defendant to produce and permit the plaintiff to inspect, copy, and photograph all documents, things and compilations referred to below in defendant's possession, custody, or control which embody, refer or relate to in any way the subject matter of this litigation within thirty days of this request. These requests are considered to be continuing in character. You are, therefore, required to produce additional documents if you obtain or discover additional respective documents prior to trial.

INSTRUCTIONS

A. The term "document" refers to all writings and/or other tangible or electronic records including, but not limited to any written, printed, typed, recorded, filmed, punched, transcribed, taped or other graphic matter of any kind or nature held or produced or reproduced, whether sent or received, including the original, draft, copies and non-identical copies bearing notation or marks not found on the original, and includes, but is not limited to, all records, drawings, medical reports, charts, correspondence, minutes, inventory records, payroll records, corporate records, bank records, accounting records, logs, work reports, files, hearing or trial transcripts, depositions, calculations, memoranda, reports, financial statements, telegrams, cable, telex messages, tabulations, studies, analysis, evaluations, projections, work appointment books, diaries, lists, comparisons, questionnaires, survey, charts, graphs, books, pamphlets, booklets, articles, magazines, newspapers, microfilm, microfiche, photographs, tapes or other recordings, punched cards, magnetic tapes, discs, data sales, drums, printouts, computer generated reports and printouts, other data compilations from which information can be obtained, any other documents defined in the Superior Court Rules of Civil Procedure, which is in your custody, possession and/or control or to which you otherwise have access.

B. As used herein, the word "document" includes all copies unless such copies (including any notations and marks thereon) are exact duplicates of documents that are produced.

C. This request is directed to all documents within the possession, custody or control of the defendant, and also includes documents in the possession, custody or control of agents, persons or entities in privity with the defendant, including past or present attorneys.

D. As used herein, the term "relating to" means containing, recording, discussing, mentioning, noting, summarizing, referring to, commenting upon, describing, digesting, reporting, listing, analyzing, or studying the subject matter identified in the request.

E. To the extent a privilege is claimed with respect to any document covered by this request for production of documents, defendant is requested to state with respect to such document the following:

(1) the basis for the claim of privilege;

(2) the author of the document;

(3) to whom the document is addressed;

(4) the date upon which the document was prepared;

(5) the title or heading of the document;

(6) the type of document (e.g., handwritten note, memorandum, tape recording, journal, desk calendar, book of accounts, etc.)

(7) any other information which might be necessary to describe such document sufficiently for designation thereof; and

(8) its present location and custodian

F. These requests are considered to be continuing in nature. You are therefore required to produce additional documents if you obtain or discover additional responsive documents prior to trial.

G. When producing documents, you should organize and label them where appropriate to correspond with the numbered categories in this request.

DETAILS OF PRODUCTION

Please provide all documents requested herein at the law offices of Bruce J. Klores & Associates, P.C., 1735 20th Street, N. W., Washington, DC 20009 on March 20, 2008 at 10:00 a.m.

DOCUMENT REQUEST

1. Please produce your complete original office medical record including all pictures, films, reports, bills, correspondence, etc., whether electronically stored or stored in a hard copy relating to the treatment of Franklin Havlicek together with one true copy of the same.

2. Please produce copies of all correspondence between you and Franklin Havlicek and any members of his family.

3. Please produce your current curriculum vitae.

4. Please produce a copy of all applications for privileges for all hospitals at which you have ever had privileges, and all documents in your possession concerning the hospitals' responses to these applications.

5. Please produce a copy of the professional liability declaration sheet which insures you in this case.

6. Please produce all curriculum vitae for all experts you expect to call to testify at the trial of this case.

7. Please produce all reports of all experts you expect to call to testify at the trial of this case.

8. Please produce copies of all signed witness statements in your possession concerning this litigation, or in the alternative, provide a list of all witnesses from whom you have signed statements with their names and addresses.

9. Please produce copies of all exhibits you anticipate using at the trial of this case.

10. Please produce copies of all documents referred to in your Answers to Interrogatories.

11. Please produce copies of all employment/professional contracts between you and any hospital, corporation, organization or other entity.

12. Please produce copies of all licenses to practice medicine, from all jurisdictions in which you are, or have been licensed.

13. Please produce all documents of certification which you hold from any medical board or association.

14. Please produce copies of all depositions you have given.

15. Please produce copies of any guideline, recommendation or protocol used or consulted by you relating to the diagnosis, care, management and treatment of chest pain and cardiovascular disease from 2000 until Mr. Havlicek's death.

16. If you keep a medical literature file for chest pain or cardiovascular disease in the office or at home; please produce a copy of the contents.

17. If you have given any presentations, lectures, or rounds on management of chest pain, or the care and treatment of cardiovascular disease, please produce the data and notes, memoranda, pictures, slides and electronic tools (i.e. Powerpoint) for such presentations.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____
Bruce J. Klores - D.C. #358548
1735 20th Street, N. W.
Washington, D. C. 20009
(202) 628-8100 (phone)
(202) 628-1240 (facsimile)

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' First Request for Production of Documents to Defendant David W. Patterson, M.D. was mailed, postage prepaid, this _____ day of February, 2008 to Steven A. Hamilton, Esquire, 4600 East West Hwy Suite 201 Bethesda, MD 20814.

_____
Bruce J. Klores

1866\rpd.patterson

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

LOUISE SEPRRAZZA HAVLICEK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. 2007 CA 006925 M
	)	J. Jennifer M. Anderson
DAVID W. PATTERSON, M.D., et. al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' NOTICE OF DEPOSITION DUCES TECUM TO DAVID W. PATTERSON, M.D.

Please take notice that the plaintiffs, by and through counsel, Bruce J. Klores and Bruce J. Klores & Associates, P.C., will take the deposition of the below-listed defendant for the purpose of oral examination and for use as discovery and/or evidence in the above entitled matter through an officer authorized by law to administer oaths and according to the Rules of the Court.

Deponent	Date/Time	Location
David W. Patterson	3-18-08 10:00 a.m.	Bruce J. Klores & Associates, P.C. 1735 20th Street, N. W. Washington, D.C. 20009

Documents to Be Produced:

1. The complete and original medical records for the plaintiff Frank Havlicek.

2. A copy of your license to practice medicine in the District of Columbia and/or any other jurisdiction in which you have been or are currently licensed.

3. A copy of your most recent *curriculum vitae*.

4. Any and all literature you reviewed in connection with your care of the decedent

(either before or after the events of the complaint).

5. All correspondence concerning Frank Havlicek to anyone or from anyone, except your lawyers or malpractice insurance company, and pertaining to the facts as set forth in the Complaint.

6. If you are a member of a professional corporation, the Articles of Incorporation for that entity and all contracts or agreements between you and that entity, or that entity and the District of Columbia.

7. Any and all memoranda or documents of any type you have written or participated in the formation of concerning Frank Havlicek and/or any hospital or office incident report.

8. A list of all legal cases where you have offered medical testimony, whether formally or informally, and whether at deposition , trial, hearing, or other proceedings. The list should contain the parties, case names, dates of testimony, attorneys involved, and a brief description of your involvement.

9. All transcripts of any depositions or trial testimony you have ever given.

10. Any articles, writings, papers, slides, abstracts and/or presentation materials, or other information that you have in your office or at home, whether electronically stored or in writing, about chest pain, and care and treatment of cardiovascular diseases.

11. Any and all diagrams, charts, photographs, reports, publications and/or other documents to which you may refer during your deposition or direct testimony at trial in the above-captioned matter about Mr. Havlicek and his condition.

12. Any phone logs, pager, communication records, or documents of any kind that

document or in any way reflect all contact made between you or your office staff or partners and Mr. Havlicek or any member of the Havlicek family.

13. A copy of the insurance declaration page for the allegations set forth in the Complaint;

TO COUNSEL

IF YOU OR THE DEPONENT OBJECT TO ANY OF THE MATERIAL ABOVE, PLEASE IMMEDIATELY SO INFORM PLAINTIFFS' COUNSEL.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____
Bruce J. Klores - #358548
1735 20th Street, N. W.
Washington, D.C. 20009
(202) 628-8100
(202) 628-1240 (facsimile)
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Deposition *Duces Tecum* to David W. Patterson, M.D., was mailed, first class mail, postage prepaid, to Steven A. Hamilton, Esquire, and Karen S. Karlin, Esquire, Hamilton Altman Canale & Dillon, LLC, 4600 East-West Highway, Suite 201, Bethesda, MD 20814 this 8th day of February, 2008.

_____
Bruce J. Klores

1866\dep.patterson

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ARZINA B. GIBSON, Personal Representative of the Estate and Next of Kin of Emmaline Moorehead, deceased	)	
Plaintiff,	)	
v.	)	C. A. No. 05378-97
	)	Cal. 3, J. Graae (Civil I)
GEORGE WASHINGTON UNIVERSITY et al.,	)	
Defendants.	)	

PLAINTIFF'S REQUESTS FOR ADMISSIONS TO DEFENDANT LALIGAM SEKHAR, M.D.
(August 14, 1998)

Comes now the plaintiff, by and through counsel, Bruce J. Klores, Richard J. Fogelson and Klores & Cardaro, P.C., and, pursuant to Superior Court Rule 36, propounds the following Requests for Admissions of Fact to be answered by defendant Laligam Sekhar.

REQUESTS

Request 1. If Mrs. Moorehead had been referred to the neurosurgical department at George Washington University Hospital on August 22 or August 23, 1996 and an angiogram done and coiling unsuccessfully attempted before Dr. Sekhar left on his overseas trip, then Dr. Sekhar would have operated on Mrs. Moorehead prior to his going overseas.

Request 2. If Dr. Sekhar in fact operated on Mrs. Moorehead prior to going overseas, she would more likely than not be alive today.

Respectfully submitted,

KLORES & CARDARO, P.C.

By_____
Bruce J. Klores - #358548
915 15th Street, N. W. #300
Washington, D. C. 20005
(202) 628-8100
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Admissions to Defendant Laligam Sekhar, M. D. was mailed, postage prepaid to the following persons this 14th day of August, 1998:

Robert Goodson, Esquire
Suite 400, East Tower
1301 K Street, NW
Washington, DC 20005

Cynthia Santoni, Esquire
Miles & Stockbridge
1751 Pinnacle Drive, Suite 500
McLean, VA 22102

Charles Wilson, Jr., Esquire
McCarthy, Wilson & Ethridge
100 S. Washington Street
Rockville, MD 20850

Michael F. Flynn, Jr., Esquire
Gleason, Flynn & Emig
451 Hungerford Drive #600
Rockville MD 20850

_____
Bruce J. Klores

1394\reqadm-2.sekhar

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CARMASIETTA BEAN and PAUL BROWN Individually and as Parents and Next Friends of their minor son MEGUEL BROWN,	)
Plaintiffs,	) **CA No: 2007 CA 0004996 M**
v.	) **Calendar 14 - Judge Judith Retchin**) **Next court event: January 29, 2009**
KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., et al.	)
Defendants.	)

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC.

TO: Kaiser Foundation Health Plan
of the Mid-Atlantic States, Inc.
C/o Robert W. Goodson, Esquire
Shadonna E. Hale, Esquire
David J. Finucane, Esquire
Wilson Elser Moskowitz Edelman & Dicker; LLP
1341 G Street, NW, Suite 500
Washington, DC 20005

Plaintiffs, pursuant to S.C.R. Civ. P. 34, by and through counsel, request that Defendant Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc. respond in writing within thirty (30) days to the following requests, and that it produce and permit plaintiffs to inspect, copy and photograph all documents and things in its possession, custody or control as described below or, in the alternative, produce all documents and things requested at 1735 20th Street., N. W., Washington, D.C. 20009.

DEFINITIONS AND INSTRUCTIONS

A. The term "document," as used herein, has the meaning described in S.C.R. Civ. P. 34 and includes, but is not limited to, all writings and/or other tangible or electronic records, including but not limited to any written, printed, typed, recorded, filmed, punched, transcribed or taped records and other graphic matter of any kind or nature held or produced or reproduced, whether sent or received, including the original, draft, copies and non-identical copies bearing notation or marks not found on the original, which are in your custody, possession and/or control or to which you otherwise have access. Examples of these items include, but are not limited to, all emails or other electronic messages, records, drawings, medical reports, charts, correspondence, minutes, inventory records, payroll records, corporate records, bank records, accounting records, logs, work reports, files, hearing or trial transcripts, depositions, calculations, memoranda, reports, financial statements, telegrams, cable, telex messages, tabulations, studies, analyses, evaluations, projections, work appointment books, diaries, lists, comparisons, questionnaires, surveys, graphs, books, pamphlets, booklets, articles, magazines, newspapers, microfilm, microfiche, photographs, tapes or other recordings, punched cards, magnetic tapes, discs, data sales, drums, printouts, computer-generated reports and printouts, other data compilations from which information can be obtained and any other documents, as defined under the Superior Court Rules of Civil Procedure.

B. As used herein, the term "document" includes all copies unless such copies (including any notations and marks thereon) are exact duplicates of documents that are produced.

C. The terms "you," "your," and/or "Kaiser," as used herein, refer individually and collectively to Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., as well as your

officers, directors, agents, employees, representatives, contractors, lawyers, and anyone acting for or on your behalf.

D. The term "Plaintiffs," as used herein, refers to Miguel Brown, Carmasietta Bean, and Paul Brown, individually and/or collectively, and all persons acting or purporting to act on their behalf.

E. The term "Complaint," as used herein, refers to the complaint filed in this action by Plaintiffs.

F. This request is directed at all documents within your possession, custody or control, and also includes documents in the possession, custody or control of agents, persons or entities in privity with you, including past or present attorneys.

G. As used herein, the terms "referring or relating to" means containing, recording, discussing, mentioning, noting, summarizing, referring to, commenting upon, describing, digesting, reporting, listing, analyzing or studying the subject matter identified in the request.

H. To the extent a privilege is claimed with respect to any document covered by this request for production of documents, you are requested to state with respect to such document the following:

i. the basis for the claim of privilege;
ii. the author of the document;
iii. to whom the document is addressed;
iv. the date on which the document was prepared;
v. the title or heading of the document;
vi. the type of document (e.g., handwritten note, memorandum, tape recording, journal, desk calendar, book of accounts, etc.);
vii. any other information that might be necessary to describe such a document sufficiently for designation thereof; and
viii. the document's present location and custodian.

I. These requests shall be deemed to be continuing in nature. You are therefore required to produce additional documents if you obtain or discover additional responsive documents prior to trial.

J. When producing documents, you should organize and label them where appropriate to correspond to the numbered categories in this request.

K. The time period for these requests is January 1, 1997, to the present, unless otherwise specified.

DOCUMENT REQUESTS

You are hereby requested to produce the following documents:

REQUEST 1: All medical records, including hospital and physician records; computer data; laboratory reports; fetal monitor tracings; radiologic films and reports, including sonograms, echocardiograms, and biophysical profiles; correspondence; bills; notes; consent forms; instructions or any other documents relating in any way to the treatment or services rendered by you to Carmasietta Bean and/or Meguel Brown.

REQUEST 2: All documents referring or relating to communications between you and any expert witness whom you anticipate will be called to testify on your behalf at the hearing or subsequent trial of this matter, including but limited to any and all reports given to you by the expert.

REQUEST 3: All documents referring or relating to any written or recorded statements concerning the matters described in the Complaint or the subject matter of this action.

REQUEST 4: All documents referring or relating to any and all statements made by the Plaintiffs or any of the Plaintiffs' family members concerning the subject matter of this lawsuit.

REQUEST 5: All documents referring or relating to communications between you and the Plaintiffs.

REQUEST 6: All documents referring or relating to any transcripts or recordings of testimony of any person or persons relating to the incident or facts alleged in the Complaint.

REQUEST 7: All documents referring or relating to any diagnostic studies, including but not limited to, laboratory studies, radiologic and sonographic still and real-time films, biophysical profiles, echocardiograms, reports and readings of any type in your possession, custody, and/or control concerning Carmasietta Bean and/or Miguel Brown.

REQUEST 8: All documents referring or relating to photographs, videotapes, or audiotapes, diagrams, surveys, or other graphic representations of information concerning the subject matter of this action.

REQUEST 9: All documents identified in, or reviewed or referred to by you when preparing, your Answers to Interrogatories.

REQUEST 10: Any and all other documents not otherwise requested which in any way relate to the subject matter of the Complaint, your Answer to the Complaint, or your Answers to Interrogatories.

REQUEST 11: All documents which you propose to introduce into evidence or rely upon at the hearing or trial of this case.

REQUEST 12: All documents evidencing a relationship in existence at the time of the events alleged in the Complaint, among or between some or all of the defendants in this case, including, but not limited to, all contracts, employment agreements, other agreements (written or otherwise), and/or any other documents which reflect formally or informally relationships of you and your agents, employees, servants, representatives, and/or independent contractors.

REQUEST 13: Any and all correspondence, notes, memoranda, telephone logs, or other written or recorded material concerning or relating to the care and treatment rendered to Plaintiffs.

REQUEST 14: All documents referring or relating to depositions given in any matter by anyone who provided care and treatment to Plaintiffs.

REQUEST 15: Copies of all diaries or journals kept by any health care providers who treated Plaintiffs which refer to the events described in the Complaint in any way.

REQUEST 16: All documents referring or relating to any and all notes, correspondence, diaries, memoranda or any other type of document kept by you or your agents and/or employees relating in any way to allegations contained in the Complaint.

REQUEST 17: The most recent resume or curriculum vitae of each expert whom you expect to call or rely upon as an expert witness at trial.

REQUEST 18: The curriculum vitae for each health care provider employed by you who treated Carmasietta Bean and Meguel Brown.

REQUEST 19: All pathology slides, including but not limited to the original slides as well as copies and/or recuts of all diagnostic material and/or other pathology materials, relating in any way to Plaintiffs. For any and all items requested in this request, if

you had custody and/or control at one time of such items and no longer do, please set forth all records demonstrating your efforts to store, retrieve, track, and/or account for said items.

REQUEST 20: All documents referring or relating to any and all manuals, written protocols, standards, or guidelines relating and applying to the care and treatment provided to Plaintiffs.

REQUEST 21: Any insurance policy providing coverage in this case.

Date: November 15, 2007

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____
Bruce J. Klores - D.C. #358548
Thomas W. Mitchell – D.C. #425180
1735 20th Street, N. W.
Washington, D. C. 20009
(202) 628-8100
(202) 628-1240 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by hand delivery on the 15th day of November, 2007, on the following counsel:

Robert W. Goodson, Esquire
Shadonna E. Hale, Esquire
David J. Finucane, Esquire
Wilson Elser Moskowitz Edelman & Dicker, LLP
1341 G Street, NW, Suite 500
Washington, DC 20005

Daniel C. Costello, Esquire
Paul M. D'Amore, Esquire
Wharton Levin Ehrmantraut & Klein, P.A.
104 West Street, P.O. Box 551
Annapolis, MD 21404-0551

_____
Thomas W. Mitchell

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Carmanietta Bean and Paul Brown, Individually and as Next Friend of M.B.	:	
Plaintiffs,	:	
v.	:	**CA No.: 2007 CA 0004996 M**
	:	**Calendar 14 – Judge Judith Retchin**
Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	:	**Next Court Event: November 19, 2008 Mediation**
Defendant.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NON-CONSENT MOTION FOR QUALIFIED PROTECTIVE ORDER PERMITTING DEFENSE COUNSEL TO SPEAK TO PLAINTIFFS' TREATING PHYSICIANS

Comes now Defendants Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Mid-Atlantic Permanente Medical Group, P.C. f/k/a Capital Area Permanente Medical Group, P.C., and Ernest C. Wynne, M.D. (hereinafter "these Defendants"), by and through counsel, Robert W. Goodson, Shadonna E. Hale, David J. Finucane and WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, and pursuant to the Superior Court Rules of Civil Procedure, including, but not limited to Rule 12(I-a), hereby requests an Order permitting defense counsel to speak to the minor female Plaintiff, , treating physicians[1].

I. Introduction

This is a medical malpractice case wherein the Plaintiffs allege that the Defendants provided substandard care to Plaintiff,

[1] This Court has already granted a Motion for Qualified Protective Order relating to the minor Plaintiff, Both minors have the same initials. Thus, Defendants added the qualifier "female" herein.

resulting in injuries and damages to them. Specifically, Plaintiffs allege that the health care providers in this case failed to appropriately deliver the minor female Plaintiff, , resulting in injuries and damages. Defendants deny any and all allegations of negligence or wrongdoing.

In an abundance of caution, while the Court has already granted a similar motion pertaining to her twin brother, Defendants file this Motion relating to the minor female Plaintiff to ensure compliance with the Health Insurance and Portability Accountability Act of 1996 (HIPAA). In her Complaint, Plaintiff , as mother and representative of her daughter, female , a minor, alleges that Defendants negligently delivered her preterm minor child, female causing injuries and damages. Clearly, Plaintiffs' Complaint places medical condition at issue, as well as the medical condition of the minor female Plaintiff, M.B. In order to understand the medical history, condition and treatment, both parties require open communication with their treating physicians and other providers. Attorneys for Plaintiffs have unfettered access to these non-party treating physicians, specialists, and providers, and Defendant's attorneys should be afforded the same opportunities.

II. Legal Argument

A. District of Columbia Law Permits *Ex Parte* Communication With Treating Physicians.

Plaintiffs waived the privilege against disclosure of relevant medical evidence by filing this lawsuit and placing the minor female Plaintiff, medical treatment at issue. *Street v. Hedgepath*, 607 A.2d 1238 (1992)(citing *Skiagen v. Greater Southeast Community Hospital*, 625 F.Supp. 991, 992 (D.D.C. 1984)). *See also Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 127 (D.D.C. 1983). In *Street*, the Plaintiff argued the court had a duty to prevent *ex parte* communication between treating physicians and attorneys, but the court disagreed. 607 A.2d at 1247. "We adopt the holding in *Doe*, and conclude that *ex parte* interviews with a treating physician are a permissible

means of informal discovery when the plaintiff has put the medical condition of that physician's patient at issue by filing a lawsuit." *Id.* In the instant case, Defendants' counsel should be permitted to speak with the minor Plaintiff, treating physicians since Plaintiffs put her medical treatment at issue by filing this lawsuit.

Judge Stephanie Duncan-Peters of the Superior Court of the District of Columbia granted a similar motion where defendants sought to interview plaintiff's treating physicians *ex parte* in Sherri Maybin v. George Washington University, et al., Case No. 03Ca68. (See, Order Granting, In Part, the Defendant's Motion for a Qualified Protective Order attached to the previous Non-Consent Motion for Order Permitting Defense Counsel to Speak to Plaintiffs' Treating Physicians as Exhibit 1 and incorporated by reference herein). Judge Duncan-Peters held "[p]laintiffs have not been restricted in their *ex parte* contacts with these physicians. Fairness to the Defendants requires that they should also be permitted to communicate informally with these physicians, so long as the Plaintiffs' privacy interests remain protected. Finally, the Court is mindful that 'the *ex parte* interview is an effective discovery procedure' which, unencumbered by the costs, time demands and adversarial nature of formal proceedings, often contributes to the fair and timely resolution of civil disputes." (Id. at 5.). The Court noted that a plaintiff "may not 'control and restrict the manner in which the [d]efendant[s] ... develop [their] case.'" (See, Id. at 5) (citing Sklagen v. Greater Southeast Community Hospital, 625 F.Supp. 991, 992 (D.D.C. 1984)). The Defendants herein submit that Judge Duncan-Peters' reasoning above, and Maryland cases below support their request to communicate with the minor female Plaintiff, health care providers and specialists.

Defendants incorporate by reference herein the numerous orders from the Superior Court of the District of Columbia, as well as some Maryland circuit courts (as persuasive authority), granting

similar motions (Exhibits 1-56 attached to the previous Non-Consent Motion for Order Permitting Defense Counsel to Speak to Plaintiffs' Treating Physicians[2]).

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[2] Exhibit 1, *Sherri Maybin v. George Washington University, et al.*, Case No. 03Ca68 (Superior Court of the District of Columbia); Exhibit 2, *Neary v. Washington Hospital Center*, 2006 CA 001503 M consolidated with 2006 CA 008799 M (2008) (Superior Court for the District of Columbia); Exhibit 3, *Finaliya v. Washington Hospital Center Corp.*, Case No. 05-0009102 (2006) (Superior Court for the District of Columbia); Exhibit 4, *Boyd, et al. v. Anwar Bafi, M.D., et al.*, Case No. 05-CA6153 (2006) (Superior Court for the District of Columbia); Exhibit 5, *Joseph v. Georgetown University Hospital, et al.*, Case No. 05-CA-009238M (2005) (Superior Court for the District of Columbia); Exhibit 6, *Garardi v. Washington Hospital Center Corp.*, Case No. 05-0001406 (2005) (Superior Court for the District of Columbia); Exhibit 7, *Sharps v. District Hospital Partners, et al.*, Case No. 04-0004878 (2005) (Superior Court for the District of Columbia); Exhibit 8, *White v. Kaiser Foundation Health Plan, et al.*, Case No. 04ca5807 (2005) (Superior Court for the District of Columbia); Exhibit 9, *Evans v. Washington Hospital Center, Inc., et al.*, Case No. 04 CA 8002 (2005) (Superior Court for the District of Columbia); Exhibit 10, *Johnson, et al. v. Medstar-Georgetown Medical Center, Inc., d/b/a Georgetown University Hospital*, Case No. 0006738-03 (2005) (Superior Court for the District of Columbia); Exhibit 11, *Hanan v. Medstar-Washington Hospital Center, Inc., d/b/a Washington Hospital Center*, Case No. 04ca003583 (2005) (Superior Court for the District of Columbia); Exhibit 12, *Palance v. Charles Tanen, DDS, et al.*, Case No. 02ca005767 (2005) (Superior Court for the District of Columbia); Exhibit 13, *Dineen, et al. v. Frederick Memorial Hospital, et al.*, Case No. 10-C-03-001153 MM (Frederick County); Exhibit 14, *Pouliott v. Dobbas, M.D.*, Case No. CAL04-07495 (Prince George's County); Exhibit 15, *Coates v. Franklin, M.D., et al.*, Case No. 03-C-04-002816 (Baltimore County); Exhibit 16, *Papineau, et al. v. Magat, M.D., et al.*, Case No. C-04-9084 (Baltimore County); Exhibit 17, *Clements v. Charles R. Cordasy, M.D.*, Civil Action No.: WGC-01-865 (United States District Court for the District of Maryland); Exhibit 18, *Sonja Deal v. John Carroll Barry, M.D., et al.*, Case No.: 02-c-04-100761 PM (Anne Arundel County); Exhibit 19, *Hammonds v. Dimensions Health Corp, et al.*, Case No. CAL 04-04988 (Prince George's County); Exhibit 20, *Connolly v. Westerhead, M.D., et al.*, Case No. 270061-V (Montgomery County); Exhibit 21, *Beck v. Lee-Lacar, M.D.*, Case No. CAL 05-13895 (2006); Exhibit 22, *Joyner v. Smith, et al.*, Case No. CAL 04-13206 (2005) (Prince George's County); Exhibit 23, *McGarty v. Gould*, Case No. CAL 04-01994 (2005) (Prince George's County); Exhibit 24, *Mateo v. Doctor's Hospital*, Case No. CAL 04-15236 (2004) (Prince George's County); Exhibit 25, *Jackson v. Isaacs, M.D.*, Case No. CAL 05-17735 (2006) (Prince George's County); Exhibit 26, *Brown, et al. v. Cytryn, M.D.*, et al., Case No. 252861-V (2006) (Montgomery County); Exhibit 27, *Lapiaff v. Adventist Healthcare, et al.*, Case No. 251513-V (2005) (Montgomery County); Exhibit 28, *Swisher v. Shar, M.D., et al.*, Case No. 253816-V (2005) (Montgomery County); Exhibit 29, *Young v. Panthankandath, M.D.*, Case No. 2709440V (2006) (Montgomery County); Exhibit 30, *Malloy v. Abend, M.D.*, Case No. 266456-V (2006) (Montgomery County); Exhibit 31, *Williams v. Lingelbach, M.D., et al.*, Case No. 260731-V (2006) (Montgomery County); Exhibit 32, *Ramey v. Washington Adventist Hospital, Inc., et al.*, Case No. 262553-V (2005) (Montgomery County); Exhibit 33, *Young v. Montgomery Village Health Care Center, et al.*, Case No. 259627-V (2005) (Montgomery County); Exhibit 34, *Morgan v. Adventist Healthcare, Inc.*, Case No. 249992-V (2005) (Montgomery County); Exhibit 35, *Pace v. Adventist Healthcare, et al.*, Case No. 255435-V (2005) (Montgomery County); Exhibit 36, *Wallace v. Upper Chesapeake Health*, Case No. 12-C-04-000942 (2005) (Harford County); Exhibit 37, *Marth v. Mallon, M.D.*, Case No. 20-C-05-005513 (2006) (Talbot County); Exhibit 38, *Anderson v. Johns Hopkins Health System, et al.*, Case No. 20-C-06-005631 (2006) (Talbot County); Exhibit 39, *Meredith v. Memorial Hospital of Easton, Maryland, et al.*, Case No. 20-C-03-004958 (Talbot County); Exhibit 40, *Travers v. Bowan, M.D., et al.*, Case No. 20-C-04-005172 (2005) (Talbot County); Exhibit 41, *Spillman v. Shore Health System, Inc., et al.*, case No. 20-C-04-005217 (2005) (Talbot County); Exhibit 42, *Briggs v. Bynske, M.D., et al.*, Case No. 20-C-04-0055094 MM (2005) (Talbot County); Exhibit 43, *Rapp v. Washington County Hospital Association, et al.*, Case No. 21-C-04-019417 (2004) (Washington County); Exhibit 44, *Thomas v. Sewell, D.P.M., et al.*, Case No. 09-C-04-012602 (2005) (Dorchester County); Exhibit 45, *Jones, et al. v. Callahan, M.D., et al.*, case No. 14-C-04-006165 (2005) (Kent County); Exhibit 46, *Watkins v. Lohr, P.A., et al.*, Case No. 14-C-04-005983 (2004) (Kent County); Exhibit 47, *Geary v. Arnaiz, M.D.*, Case No. C-05-1680 (December 2, 2005) (Frederick County); Exhibit 48, *Emerson v. Adventist Healthcare, Inc.*, Case No. C-04-101180 (2005) (Anne Arundel County); Exhibit 49, *Guy, et al. v. Glenn, M.D., et al.*, Case No. 18-C-04-001084 OC (2005) (St. Mary's County); Exhibit 50, *Price v. St. Mary's Hospital of St Mary's County, et al.*, Case No. 18-C-04-001014 (2004) (St. Mary's County); Exhibit 51, *Thomas Fields, et al. v. Lee A. Goodman, M.D., et al.*, Case No. 03-C-04-013478 (2005) (Baltimore County); Exhibit 52, *Doris A. Kelly, et al. v. Andrew Rosenstein, M.D., et al.*, Case No. C-05-1694 (2005) (Baltimore County); Exhibit 53, *James A. Manning, et al. v. Manor Care Health Services, Inc., et al.*, Case No. 03-C-05-9568 (2006) (Baltimore County); Exhibit 54, *Frances Chamish v. Risa M. Jampel, M.D., et al.*, Case No. 03-C-05-000716 OT (August 2005) (Baltimore County); Exhibit 55, *Steven G. Ochs, et al. v. Paul Armstrong, M.D., et al.*, Case No. CAL06-06849 (2007) (Prince George's County); Exhibit 56, *Joseph S. Bowman v. Bowie Center Limited Partnership, et al.*, Case No. CAL06-16690 (2007) (Prince George's County).

B. HIPAA Compliance Allows For *Ex Parte* Communication As Designated In An Order.

"Informal discovery of protected health information is now prohibited unless the patient consents." *Law v. Zuckerman*, 307 F.Supp.2d 705, 711 (D.Md. 2004). Although a Maryland District Court Judge is not controlling here, the Court in *Law* speaks to HIPAA in general and advises "[c]ounsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA's regulatory scheme." *Id.* Despite the District of Columbia's law permitting *ex parte* communication between an attorney and a treating physician, HIPAA compliance requires a Qualified Protective Order to outline what communication may take place. According to HIPAA, parties may have access to protected health information under certain circumstances as described in § 164.512:

> (e) Standard: Disclosures for judicial and administrative proceedings.
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
> (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

45 C.F.R. 164.512(e).

C. Defendants Request a Qualified Protective Order.

In order to alleviate Plaintiffs' privacy concerns as well as the treating physicians' and other specialists' undoubted concern for the same and compliance with HIPAA, Defendants request authorization for *ex parte* communication with the minor female Plaintiff, treating physicians via the attached Order. While HIPAA does not prohibit all *ex parte* communications between a Plaintiff's treating provider and defense counsel, it regulates the methods a physician may disclose a patient's medical information. *Law*, 307 F.Supp.2d at 709. An order specifically outlining the parameters of treating physicians' and/or provider's discussions with attorneys regarding a patient's protected health information would enable and preserve HIPAA's objective of maintaining a patient's privacy. *Id.* at 708.

Defendants would suffer immeasurable prejudice due to the inability to discuss this matter openly with the minor female Plaintiff, treating physicians and other specialists, as their ability to defend the case would be hindered without such open communication with the said Plaintiff's treating physicians and specialists. The attorneys for the Plaintiffs have unfettered access to these providers without the presence of defense counsel, and in fairness, Defendants should be accorded the same opportunity. By placing their medical treatment at issue in this lawsuit, Plaintiffs should recognize the critical importance of open communication with their treating physicians, specialists, and providers. "Fairness to the Defendants requires that they should also be permitted to communicate informally with these treaters, so long as the Plaintiffs' privacy interests remain protected." (*See* Order by the Honorable Stephanie Duncan-Peters dated September 14, 2004, Exhibit 1 attached to the previous Motion for Qualified Protective Order incorporated herein by reference).

The attached Order is the most efficient, appropriate and fair method of enabling this communication, while simultaneously appreciating the minor female Plaintiff, privacy concerns, and protecting her health information. Specifically, Defendants request that this Court issue the attached Order, which provides that any protected health information obtained by the parties in this matter may be used only in connection with this litigation, and that the parties to this matter, their counsel, the employees of their counsel and their respective agents, including both testifying and non-testifying experts and consultants, are prohibited from using or disclosing the protected health information for any purposes other than in connection with this litigation.

Multiple physicians and specialists from numerous specialties have evaluated and/or treated the minor female Plaintiff, . before, during and after her on April 11, 1998 at Washington Hospital Center, including but not limited to primary care physicians, radiologists, obstetricians, neonatologists, pediatric neurologists, pediatricians, physicians, hospital internists, special educators, psychologists, counselors and nurses.

Defendants seek this Honorable Court's permission to allow their attorneys to speak to the following health care providers of the minor female Plaintiff, *ex parte*, should they voluntarily choose to do so. The Qualified Protective Order sought would pertain only to the following of the minor female Plaintiff, providers:

Katharine Alter, M.D. (Physical Medicine/Rehabilitation)
Washington Hospital Center
110 Irving Street, NW
Washington, D.C. 20010

Carol L. Samuels-Botts, M.D. (Pediatrics)
Kaiser Permanente
1221 Mercantile Lane
Largo, Maryland 20774

Zacharia Cherian, M.D. (Neonatology)
Washington Hospital Center
Room 5B-17
110 Irving Street, NW
Washington, D.C. 20010

Lynne D. Diggs, M.D. (Internal Medicine)
Group Health Associates
6525 Belcrest Road
Hyattsville, Maryland 20782

or,

10400 Connecticut Avenue
Suite 206
Kensington, Maryland 20895

Michael Doom, Ed.D.
Prince George's County Public Schools

Jillian Whatley, Ed.S.
Prince George's County Public Schools

Terri Teague, Ph.D.
Prince George's County Public Schools

Providers/Specialists/Teachers
Early Childhood Intervention Program at Wheatley Learning Center

David C. Grant, M.D. (Radiology)
Washington Hospital Center
110 Irving Street, NW
Washington, D.C. 20010

Kim Kieu, M.D. (Radiology)
Diagnostic Radiology
Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

Jeffrey Seidman, M.D. (Pathology)
Washington Hospital Center
110 Irving Street, NW
Washington, D.C. 20010

Michael Smith, M.D. (Radiology)
Diagnostic Radiology
Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

Dana A. Twible, M.D. (Radiology)
Washington Hospital Center
110 Irving Street, NW
Washington, D.C. 20010

Nancy L. Williams-Horak, M.D. (Neonatology/Pediatrics)
Department of Neonatology/Pediatrics
Washington Hospital Center
110 Irving Street, N.W.
Washington, D.C. 20010

Colleen Wright, M.D. (Family Practice)
44055 Riverside Parkway
Suite 110
Leesburg, Virginia 20176

III. CONCLUSION

Pursuant to Superior Court Rules of Civil Procedure 12(I-h), a photocopy of the Scheduling Order is attached hereto.

WHEREFORE, for the reasons stated above, and in order to ensure HIPAA compliance, Defendants respectfully request the following relief:

A) That the Non-Consent Motion for Qualified Protective Order Permitting Defense Counsel to Speak to the Minor Female Plaintiff Treating Physicians be granted; and

B) The Court issue an Order permitting the defense counsel in this case to speak to the minor female Plaintiff, treating physicians and other specialists.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Robert W. Goodson*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Non-Consent Motion for Qualified Protective Order Permitting Defense Counsel to Speak to the Minor Female Plaintiff Treating Physicians, Memorandum of Points and Authorities and Proposed Order was served electronically and mailed, postage pre-paid, on this 22nd day of October 2008 to:

Bruce J. Klores, Esquire
Thomas W. Mitchell, Esquire
BRUCE J. KLORES & ASSOCIATES, P.C.
1735 20th Street, N.W.
Washington, D.C. 20009
Counsel for Plaintiffs

Daniel C. Costello, Esquire
Paul M. D'Amore, Esquire
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104 West Street, P.O. Box 551
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Counsel for Defendant Washington Hospital Center

/s/ David J. Finucane
David J. Finucane

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

[redacted]	)
	) CA No: 2007 CA 0004996 M
Plaintiffs,	)
	) Calendar 14 - Judge Judith Retchin
v.	) Next court event: January 29, 2009
	) Status hearing
KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., et al.	)
	)
	)
Defendants.	)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANTS' MOTION FOR QUALIFIED PROTECTIVE ORDER

Plaintiffs, by and through counsel, Bruce J. Klores, Thomas W. Mitchell and Bruce J. Klores & Associates, P.C., hereby oppose the Motion for Qualified Protective Order Permitting Defense Counsel to Speak to Plaintiffs' Treating Physicians (the "Motion") filed by Defendants Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Mid-Atlantic Permanente Medical Group, P.C., Ernest C. Wynne, M.D., and Barbara Turner, M.D. (collectively, "Defendants").

INTRODUCTION

This is a medical malpractice case involving birth injuries suffered by [redacted] and [redacted] on or about April 11, 1998. Plaintiffs allege that the Defendants, including Kaiser, breached the standard of care in their management of Plaintiff [redacted]'s twin pregnancy in 1998, and in the delivery of her children. As a result of Kaiser's negligence, [redacted] children, male [redacted] and female [redacted] suffered serious and permanent injuries. [redacted] injuries are catastrophic and undeniable. The crux of the present discovery dispute concerns female [redacted] and the extent of her injuries and damages. Defendants seek unlimited access to female [redacted]'s treating physicians.

Defendants have filed the in-vogue motion (with which this Court has dealt before) seeking to twist a federal law designed to *protect* patient privacy into one that allows unfettered access to patient information. Specifically, Defendants seek an order compelling the authorization of *ex parte* communications with minor [redacted] treating healthcare providers.

The Court should deny the Motion.

ARGUMENT

I. HIPAA MAKES PATIENT PRIVACY PARAMOUNT AND DEFENDANTS HAVE NOT OVERCOME THEIR HIGH BURDEN TO DEMONSTRATE NEED

A. Defendants' Motion Is Governed By HIPAA, Not District of Columbia Law

Congress enacted the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), in part, to protect the security and privacy of individual patient information. *See Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004); *see also United States v. Sutherland*, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001). HIPAA embodies a "strong federal policy in favor of protecting the privacy of patient medical records." *Law*, 307 F. Supp. 2d at 711. Thus, HIPAA requires a court order before *ex parte* contact by defense counsel can be permitted, and it gives this Court the discretion to deny a request for such an order. *See* 42 U.S.C. § 1320d, *et seq.*

The federal regulations implementing HIPAA provide the prerequisites to obtain health information by a party in a judicial proceeding. Specifically, 45 C.F.R. § 164.512(e) provides:

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order.

Thus, health information is protected information, and courts must determine the necessity for disclosing such information. HIPAA's stated purpose of protecting a patient's right to confidentiality of individual medical information is a compelling federal interest. *See Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1028 (S.D. Cal. 2004). As the court in *Law* recommended, "counsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA's regulatory scheme." *Law*, 307 F. Supp. at 711. Thus, the *Crenshaw* court determined that defense counsel's *ex parte* pretrial contacts with a physician who had examined Plaintiff violated HIPAA. *See Crenshaw*, 318 F. Supp. 2d at 1027.

In the present case, Defendants have provided inadequate justification to run roughshod over HIPAA, other than to allege they would like the sought-after information. This does not sustain their high burden, especially because, as explained within, existing discovery tools allow them to discover all of the information they seek.

B. **Because HIPAA Pre-Empts District Law, Reliance on *Street v. Hedgepath* Is Misplaced.**

No District of Columbia appellate case holds that a person waives his/her privacy rights under HIPAA by putting their medical condition at issue. Recognizing this, Defendants contend that the governing case is *Street v. Hedgepath*, 607 A.2d 1238 (D.C. 1992), wherein our Court of Appeals held that when a party puts their medical condition at issue, they waive certain statutory rights of medical confidentiality under D.C Code §14-307. Defendants are wrong.

Street waives only District law, not HIPAA, and, in fact, *Street* recognizes only a limited waiver to the extent related to the condition at issue – "relevant medical evidence." *See*

Street, 607 A.2d at 1246. HIPAA provides greater protection than District law, and HIPAA preempts District law on this issue.

C. Defendants' Request Puts The Treating Physicians In An Unnecessary Ethical Quandary That Can Be Easily Avoided.

Plaintiffs' privacy concern is not the only legal concern implicated by Defendants' request for *ex parte* communications. Under District law, physicians are subject to sanctions for violating their ethical duty to maintain the confidences of their patients. *See* D.C. Code § 3-1205.14(a)(16). This is echoed in the American Medical Association's ethical guidelines, which require physicians to protect patient confidences:

> E-5.05 Confidentiality
>
> The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.
>
> . . .
>
> When the disclosure of confidential information is required by law or court order, **physicians generally should notify the patient. Physicians should disclose the minimal information required by law, advocate for the protection of confidential information and, if appropriate, seek a change in the law.** (III, IV, VII, VIII) Issued December 1983; Updated June 1994 and June 2007.

(emphasis added).

> E-9.07 Medical Testimony
>
> In various legal and administrative proceedings, medical evidence is critical. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.
>
> **When a legal claim pertains to a patient the physician has treated, the physician must hold the patient's medical interests paramount,**

> including the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

(emphasis added).

An *ex parte* conversation with defense counsel puts the treating physician in a difficult ethical quandary by pitting his/her duty to the patient against the duty to comply with a Court Order. As one court has recognized, "[w]hen a treating physician is interviewed *ex parte* by defense counsel, there are no safeguards against the revelation of matters irrelevant to the lawsuit and personally damaging to the patient . . . ." *Horner v. Rowan Cos., Inc.*, 153 F.R.D. 597, 601 (S.D. Tex. 1994).

If defense counsel is allowed to speak *ex parte* with [redacted] treating physicians, Plaintiffs would have no way of guarding against, and would never know, if defense counsel gave the impression that the treating physician may be involved in the allegations of this lawsuit.[1] An *ex parte* interview could easily move into a discussion of the possible impact of testimony on the outcome of the case, the impact of a jury's award upon a physician's professional reputation, and other topics that could influence the treating physician's views. While it may not be presumed that this will happen, Plaintiffs have no protection against it if an *ex parte* discussion is allowed.

Perhaps if there were no alternative, it could be argued that the Court could err on the side of disclosure to defense counsel. But where existing discovery options (such as depositions or the presence of Plaintiffs' counsel during conversations) ameliorate the ethical quandary faced by the treating physician, while protecting Plaintiffs' interests, and allowing defense counsel to obtain the information they seek, these existing discovery options should be

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1 Plaintiffs cast no aspersions on learned defense counsel. But Plaintiffs are asking the Court to recognize the reality of the situation given defense counsel's duty to zealously represent their clients.

utilized. *See Alston v. Greater Southeast Comm. Hosp.*, 107 F.R.D. 35, 37 (D. D.C. 1985) ("When counsel for the Plaintiff is present at a formal deposition, the physician can rely upon that counsel to keep the questioning and his answers relevant to the matters properly at issue in the lawsuit.").

D. **The Myth Of Having The Same Access As Plaintiffs**

In these motions, defense counsel routinely appeal to the Court's sense of fairness by claiming that they seek only to have the same access that plaintiff's counsel has to the treating physicians. Kaiser has done exactly that here. The reality of the situation is quite different. The physician most likely to have the necessary information about the injury and its cause is the defendant. Of course, plaintiff's counsel is provided no *ex parte* opportunity to speak candidly with the defendants about the care provided. Instead, counsel is required to depose the defendant; the same discovery tool available to defense counsel for the treating physicians. Likewise, the notion that treating physicians -- who normally have a referral or even more close relationship with the defendant physician -- will readily sit down with plaintiff's counsel upon request belies reality.

The fact is that in any lawsuit, each side may have some tactical advantages unavailable to the other side. Defense counsel have many inherent advantages not available to plaintiff's counsel such as the case of procuring experts willing to defend another physician in the community and the ability to readily obtain institutional cooperation from hospitals and medical facilities in which their clients practice. Rules exist to limit these tactical advantages as best as possible, namely the Civil Rules of the Superior Court. Those Rules provide that the appropriate solution to the defense's request is to produce medical records (which defense counsel have) and allow depositions (which the defense may notice).

II. MANY COURTS, INCLUDING THIS ONE, HAVE DENIED SUCH REQUESTS

Undersigned Plaintiffs' counsel was before the Superior Court on this very issue in the 2005 case of *Maher v. Knoll*, C.A. No. 03-009429 (Exhibit A). In that case, the Court – having considered the same arguments -- denied the defendants' request for *ex parte* conversations.[2] The Court should rule the same here.

A. Many Courts Have Held That The Proper Compromise Is Struck By – If Not Outright Denying Such Requests – Greatly Restricting Access To Treating Physicians.

Defense counsel refer in footnote 2 of their memorandum to numerous orders from Judges of this Court, claiming that they are all qualified protective orders allowing contacts. In fact, many of the referenced orders greatly restrict such *ex parte* contacts and, require plaintiffs' counsel's presence, as Plaintiffs also request.

For example, in the lead order cited by Defendants in the body of their memorandum, Judge Duncan-Peters greatly restricted defense counsel in their contacts with treating physicians. *See Maybin v. George Wash. Univ. Hosp.*, CA-03-000583, Defense Exhibit 1. *See also, Emerson, et al. v. Adventist Healthcare, Inc.*, Case No. C-04-101180, Defense Exhibit 48 (joint discussions with attorneys for both parties and treating health care providers granted). In *Morgan v. Adventist Healthcare, Inc.*, defendant's motion for a protective order was denied, and defense counsel was limited to obtaining information from treating health care providers pursuant to otherwise valid subpoenas in compliance with HIPPA. *See Morgan v. Adventist Healthcare, Inc.*, Case No. 249992-V, Defense Exhibit 34.

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2 In the Court's Order, it wrote that "Defendants might consider an interview with plaintiff's treating physicians in the presence of his attorneys." This reasonable alternative would, of course, be acceptable to Plaintiffs in this case.

In an order that Kaiser failed to include, Judge Kravitz outright denied a defendant's motion to compel the plaintiff to execute authorizations, finding that:

> Particularly in light of the plaintiff's standing offer to arrange informal interviews of her treating physicians to occur in her lawyer's presence, the Court is not inclined to require anything further. If the defendant wishes to speak with the plaintiff's treating physicians he therefore must do so through formal discovery or some other means to which the plaintiff consents.

Mitchell v. Falk, Case No. 04-CA-261 (Exhibit B).

Judge Bush reached the same result in *Rupard v. Foxhall Surgical*, Case No. 02-CA-9741 (Exhibit C), and, as previously discussed, this Court reached the same result in *Maher*.

In September, 2008, Judge Hedge denied *ex parte* contact, permitting the defense counsel to engage in informal interviews only in the presence of plaintiff's counsel in *Smith v. Medical Facility Assoc.*, Case No. 07-CA-006855M (Exhibit D). Judge Motley issued a similar order in *Grealy v. Primary Care at Foxhall, PLLC*, Case No. 07-CA-001904M (Exhibit E), only allowing communications with healthcare providers when plaintiff and defense counsel are both present.

And as recently as October 2008, Judge Motley denied a motion seeking *ex parte* contact by defense counsel. *See Attias v. Washington Hosp. Center*, Case No. 07-CA-008056M (Exhibit F).

Plaintiffs attach at Exhibit G a list of 22 cases and orders in which courts faced with this motion outright denied the request (in cases 1-18), or allowed them only if plaintiff's counsel was present (cases 19-22).

B. **Defendants' Proposed Order Does Not Resolve The Problem.**

Defense counsel, no doubt aware of this Court's prior position on such motions, attempts to assuage the Court by claiming that their proposed order alleviates the Court's concerns. It does not.

First, and most fundamental, the proposed order allows *ex parte* conversations without the presence of Plaintiffs' counsel. Thus, the fundamental concern is not addresses in the order.

Second, the proposed order fails to limit sufficiently the conversations to "relevant medical evidence." In fact, it allows defense counsel to talk to the physicians about anything and everything that minor [redacted] has ever consulted her physicians for. And because plaintiffs' counsel would not be present, there would be no way to ensure that the conversations are appropriately tailored.

Third, the proposed order suggests that the treating physicians are free to choose not to talk to Defense counsel (paragraph 4), but does not clarify how the treating physicians will be informed of this right of refusal. This is very troublesome. There is nothing in the order that requires defense counsel to show the order to the physicians to allow them to make a reasoned decision whether to divulge information.

Fourth, the proposed order includes several individuals who are not treating physicians, namely members of the Prince George's County Public School system. The Order also lists generally "Providers/Specialists/Teachers" at the Early Childhood Intervention Program at Wheatley Learning Center. Not only are these requests vague, but irrelevant to this HIPPA motion. Defense counsel is attempting to gain a court order granting unfettered access to education professionals which the Court cannot grant in this motion.

C. **Defendants Will Suffer No Prejudice By Using Available Discovery Options.**

Defendants will suffer no prejudice if their motion is denied. They still will have full access to minor [redacted] treating physicians' opinions through depositions. Defendants have provided no reason to suggest that this is not a sufficient mechanism available to them. And in the high-stakes litigation that is medical malpractice, it cannot be reasonably argued that defendants save significant money by avoiding depositions.

In addition, as the Court and Defendants well know, most of the knowledge that the treating physicians possess is contained in their medical records, which have been produced to Defendants. The likelihood that the Defendants would gain some nugget of knowledge from *ex parte* conversations that they could not otherwise get from either the medical records or from depositions is so small that it cannot outweigh the Plaintiffs' paramount privacy interests under HIPAA.

CONCLUSION

HIPAA established the important privacy interests that patients have with their doctors. To overcome these privacy interests, defendants have a high hurdle to surmount by convincing the Court that the only way to obtain the information they seek is through private, off-the-record conversations. In this case, Defendants have provided the Court with no justification for such an intrusion, especially given that this information is readily available to Defendants either through deposition or, if the Court deems it necessary, through interviews conducted with Plaintiffs' counsel present.

Date: November 10, 2008

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

Motion for Ex Parte Communications – DENIED

1. *Maher v. Knoll*, 03-CA-009429, D.C. Superior Court, Judge Combs-Greene
2. *Mitchell, et al. v. Falk, et al.*, 04-CA-261, D.C. Superior Court, Judge Kravitz
3. *Rupard v. Fox Surgical Associates, P.C., et al.*, 02- CA-009741, D.C. Superior Court, Judge Bush
4. *Attias v. Washington Hosp. Center*, 07-CA-008056M, D.C. Superior Court, Judge Motley
5. *Adams v. Ampey*, 261197-V, Montgomery County Circuit Court, Judge Johnson
6. *Alperstein v. Adventist Healthcare, Inc. et al.*, 257254-V, Montgomery County Circuit Court, Judge Thompson
7. *Ambrose v. Pasha*, Case No. 21-C-05-21619-OT, Washington County Circuit Court, Judge Beachley
8. *Dale v. Davis et al.*, 22-C-03-001575, Wicomico County Circuit Court, Judge Davis
9. *Mardaga v. Franklin Square Hospital, et al.*, 03-C-04-004793, Baltimore County Circuit Court, Judge Levitz
10. *Milliner v. Glass*, CAL03-22268, Prince George's County Circuit Court, Judge Wallace
11. *Mills, et al. v. Garfinkel, et al.*, 24-C-03-008959, Baltimore City Circuit Court, Judge Hargadon
12. *Moore v. Adventist Healthcare, Inc.*, 251357-V, Montgomery County Circuit Court, Judge Mason
13. *Morgan v. Adventist Healthcare, Inc.*, 249992-V, Montgomery County Circuit Court, Judge Dugan
14. *Nunez, et al. v. Rockville Ambulatory Surgery, LP, et al.*, 267730-V, Montgomery County Circuit Court, Judge Thompson
15. *Perrone v. August*, 259738-V, Montgomery County Circuit Court, Judge Mason
16. *Probandt v. Potomac Ridge Behavioral Hopital, et al.*, 248757-V, Montgomery County Circuit Court, Judge Debelius
17. *South v. Washington County Hospital*, 21-C-05-21870-OT, Washington County Circuit Court, Judge Beachley
18. *Williams, et al., v. Grodin*, 245142, Montgomery County Circuit Court, Judge McAuliffe

Contact with Physician Only Allowed in Presence of Plaintiff's Counsel

19. *Smith, et al. v. Medical Faculty Associates, Ins. et al.*, 07-CA-006855M, D.C. Superior Court, Judge Hedge
20. *Grealy v. Primary Care at Foxhall, PLLC*, 07-CA-001904M, D.C. Superior Court, Judge Motley
21. *Emerson, et al. v. Adventist Healthcare, Inc.*, C-04-101180, Anne Arundel Circuit Court, Judge Caroom
22. *Weimer, et al. v. Anne Arundel Medical Center*, 02C04098406 Anne Arundel Circuit Court, Judge Caroom

TAB 5

EXPERT WITNESSES

by Cynthia Santoni, Esq.

INTRODUCTION

We are practicing in a very exciting time insofar as the use of expert witnesses in medical malpractice litigation. As for Plaintiffs, more and more physicians are willing to not only review, but to testify, on behalf of the Plaintiff. On the defense side, a greater variety of physicians are available from all academic and private levels. It is certainly clear that in today's Courtroom, the expert witness can make or break a case. Experts are frequently necessary to not only prove liability, but causation and damages as well. Cases such as Dauber and Kumho Tire have established more demanding standards that must be taken into consideration in federal cases, not only while the expert is on the stand, but during the selection phase as well. While medical malpractice litigators had eluded the demands of Dauber in the past, it is becoming a more and more frequent occurrence in medical malpractice cases tried in Federal Court.

PRELIMINARY GOALS

Other challenges include the selection of experts that are able to communicate to a jury difficult or complex issues in a way that the jury is able to comprehend and accept. The qualification of an expert is rarely the problems whereas his or her ability to express complex issues may be.

Initially, when working up a medical malpractice case, the litigator must identify the purpose of an expert. Research is fundamental on the elements of the claims and the defenses for both sides. Questions that frequently need to be asked are:

Do I need an expert to establish the standard of care?

Do I need an expert to establish causation or damages?

Is the purpose of my expert witness to communicate necessary information to the jury?

Frequently an expert may be necessary, not only to present your case, but to assist the jury in evaluating some portion of your case. Experts can also provide a framework for your case. A well chosen expert can be a vehicle to help you tell your client's story. This is especially true given the more complex nature of medical malpractice cases.

SELECTING AN EXPERT

Examinations under Dauber and Kumho Tire are necessary if you are in the Federal Court. The essence of these cases is that the expert must be qualified to give the testimony that you seek to introduce. The experts should have specific training, education, and experience in the field in which you are seeking his testimony to be introduced. This should be explored during the very first meeting with the expert. In 1993, the United States Supreme Court held that a Trial Judge has a gatekeeping function. Dauber v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Dauber established a two part test:

a. That the testimony must be relevant; and

b. The testimony must be reliable.

Further, the Court articulated four (4) non-exclusive factors:

a. Whether the theory or technique can be tested;

b. Whether the theory or technique has been subject to peer review;

c. The techniques known or potential error rate; and

d. Whether the technique is generally accepted in the relevant scientific community.

For fifty years, the test for admissibility of expert testimony in Federal Court, as well as the District of Columbia, was the "general acceptance" test the defendant in a murder case attempted to introduce expert witness testimony concerning the results of a "systolic blood pressure deception test." The trial court did not permit the expert to testify. The defendant was convicted of murder and appealed. And confirming the trial court's decision, the Court of Appeals stated "while Courts will go a long way in admitting expert testimony deduced from a well recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." The District of Columbia continues to follow this rule. However, fifty (50) years after Frye, Congress enacted the Federal Rules of Evidence. Rule 702 governs expert testimony. Once an enacted, Rule 702 superseded the Frye test in the Federal Court.

In Dauber, the case clarified the trial court's obligation in applying Rule 702. Because the expert testimony at issue in Dauber was scientific, the Court limited its discussion to the "scientific context." In 1999, the case of Kumho Tire Co., Ltd. v. Carmichael, 526, U.S. 137, 119 S.Ct 1167, 143 L.Ed 238 (1999) extended the Dauber Rule. "A Federal Judges gatekeeping obligation under the Federal Rules of Evidence - to ensure that an expert witnesses testimony rests on a reliable foundation, is relevant to the

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tasks at hand applies not only to testimony based on scientific knowledge, but rather to all expert testimony." The Court further noted that Dauber's factors were illustrative only and need not all be met.

In Kumho Tire, in 1993, after a tire on the minivan blew-out, and the minivan overturned, one passenger died in and the others were injured. The plaintiff's relied on the testimony of a mechanical engineer, an expert in tire failure analysis, who intended to testify that a defect in the manufacturer design caused the blow-out. The opinion was based on the visual and textile inspection of the tire, and the theory that in the absence of at least two or four specific physical symptoms indicating abuse, the tire failure of the sort that occurred in the case at hand was caused by a defect. The District Court excluded the expert's testimony as failing to comply with Dauber. Plaintiff's argued, unsuccessfully, that Dauber applied only to scientific experts and would not apply to their cases. The Supreme Court disagreed, holding that Dauber applied to all experts. This includes physicians testifying as expert witnesses in medical malpractice actions

The District of Columbia continues to follow Frye. See Taylor v. United States, 661 A.2d 636 (D.C.1995).

Once you have determined the qualifications of your expert, you must look to the experts ability to communicate to a jury. The expert witness that you are considering must be a true professional. He or she should have a certain level of advocacy, but not to the point that he or she would be rude or dishonest. Further, you must assess your experts ability to withstand cross examination. One must look to an expert to be assertive but not combative. In this writers opinion, it is always best to retain the services of a local expert along with an expert witness who is a leader in his or her particular field of

medicine, and outside of the jurisdiction in which you are trying your case. It brings a sense to the jury that the local medical community is behind your client, as well as of sophistication and reliability.

WHERE TO FIND AN EXPERT

The medical malpractice litigator has many options in determining where to find an expert witness. If you are a defense attorney, the first place to go would be to your client. A client may frequently either know someone who may be willing to review a medical chart or at least know who the top people in their field are. Similarly, for defense counsel, insurance companies often keep files on expert witnesses in various fields. Both Plaintiff and Defense counsel who regularly try medical malpractice cases frequently maintain their own files on various experts who they have used in the past, or whom they have deposed or whom they have seen be deposed.

Probably the most effective way of choosing an expert witness is by doing medical research, finding that research that best presents the theory of your case, and contacting directly the authors of that literature. More and more physicians, renowned in their field and well published, are willing to review cases from "cold calls" if they find the medicine to be intriguing in their area of research or expertise. Similarly, one may find an expert witness by questioning the opposing party's experts on who they find to be authoritative in the field of medicine in which they are being deposed. This is also a very effective way of testing the credibility of your case over your opposing counsel's. Clearly, if your expert has testified that Dr. Smith is the best physician, in his or her field, and then Dr. Smith testifies on your client's behalf, your case would become more credible.

The internet offers a variety of ways in which to choose an expert witness, not only through medical research, but through various physician's web sites as well. Expert witness internet resources are attached to this program.

CONSULTING PHASE

Make sure that you discuss fee arrangements with your expert witness up front. Discuss record keeping and reporting to be performed to your desires regarding discovery. Discuss with the experts whether or not he should be highlighting, how he takes notes and whether he or she should prepare memos or other documents. Make your expert aware of discoverability of all communications whether in writing or otherwise. It is best to agree on the scope of work to be performed by the expert in advance. For example, who will be doing the research? Do you want to pay an expert witness $500 per hour to do medical research which you have already been doing for the last month? You will further need to determine whether the expert will make him or herself available for your education and preparation when the time comes to take the depositions of opposing experts as well as prior to trial.

Keep a detailed list of everything that is sent to the expert for his or her review. It is also a good idea to make sure that all of the documents which an expert may return to you are kept in a file specific to that particular expert. Similarly, you want to make sure that the expert can back his opinions with documents or research (avoid Dauber problems).

CONCLUSION

Expert witnesses are frequently the most exciting part of litigating a medical malpractice case. The more complex the medicine the intriguing the experts will frequently be. Take advantage of these experts in helping to educate you, formulate theories for your case, and to bond with the jury and allow them to assist you in telling the story which you want the jury to accept.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FREDERICK C. WILSON, et al.,	)
	)
Plaintiffs,	)
	)
v.	) C.A. No. 03-CA-004014
	) Cal. 12, J. Campbell
JOHN W. BARRETT, M.D., et al.,	) Next Event: Defendants 26(b)(4)
	) Statement 7-10-04
Defendants.	)

PLAINTIFFS' 26(B)(4) STATEMENT

Come now the plaintiffs, by and through counsel, Bruce J. Klores and Bruce J. Klores & Associates, P.C., and hereby identify the expert witnesses that may be called at the trial of this case:

1. **Michael Williams, M. D.**
Co-Director - Johns Hopkins Adult Hydrocephalus Program
Johns Hopkins Hospital
600 North Wolfe Street
Meyer 5-181
Baltimore, MD 21287
(Neurology)

Dr. Williams is Mr. Wilson's treating neurologist and a specialist in hydrocephalus shunts and shunt complications. He will testify that the neurosurgical management by the defendants in this case was beneath the standard of care and that this negligence was the proximate cause of Mr. Wilson's devastating neurologic impairment. He will address Mr. Wilson's needs and prognosis as well. Dr. Williams has reviewed the medical records, Dr. Convit's pictures and will review additional materials as provided to him.

2. **John Robbins, M. D.**
245 Saw Mill Road

Hawthorne, NY 10532
(Neurosurgery)

Dr. Robbins is a neurosurgeon. He will testify that the surgical and neurosurgical management by the defendants in this case was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. Dr. Robbins has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

3. **Clayton Moravec, M.D.**
34218 Caves Road
Owings Mills, MD 21117
(Infectious Diseases)

Dr. Moravec is a specialist in infectious diseases. He will testify that the care of the wound and exposed shunt in this case by the defendants was beneath the standard of care and that this negligence caused Mr. Wilson's devastating neurologic impairment. Dr. Moravec has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

4. **Sydney Peerless, M. D.**
Neurosurgeon
2721 Hibiscus Ct.
Punta Gorda, Fl 33950

Dr. Peerless is a neurosurgeon. He will testify that the neurosurgical management by the defendants was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. Dr. Peerless has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

5. **Craig A. Vander Kolk, M. D.**
Professor of Surgery
Johns Hopkins Medical Institution
Director, Cleft & Craniofacial Center

601 N. Caroline Street
Baltimore, MD 21287
(Plastic Surgery)

Dr. Vander Kolk is a plastic surgeon. He will testify that the plastic surgical and wound management in this case by the defendants was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. Dr. Vander Kolk has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

6. **Arnold S. Breitbart, M. D.**
Associate Chief, Division of Plastic and Reconstructive Surgery
New York Presbyterian Hospital
Columbia Presbyterian Center
161 Fort Washington Avenue, Suite 601
New York, NY 10032

Dr. Breitbart is a plastic surgeon. He will testify that the plastic surgical and wound management in this case by the defendants was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. Dr. Breitbart has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

7. **Paul Jeffrey Lewis, M.D.**
Buffalo Neurosurgical Group
550 Orchard Park Road, Suite 105A
West Seneca, NY 14224

Dr. Lewis is a neurosurgeon. He will testify that the surgical management by the defendants was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. Dr. Lewis has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

8. **Gary Lustgarten, M. D.**
1000 N.W. 170th Street #302
N. Miami Beach, FL 33169

Dr. Lustgarten is a neurosurgeon. He will testify that the surgical and neurosurgical ca of the defendants was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. He will address Mr. Wilson's needs and prognosis as well. Dr. Lustgarten has reviewed the medical records, Dr. Convit's pictures and will review additional

9. **Nicholas Economides, M.D.**
3106 Camba Road
Jackson, OH 45640
(Plastic Surgeon)

Dr. Economides is a plastic surgeon. He will testify that the surgical and wound management in this case by the defendants was beneath the standard of care and caused Mr. Wilson's devastating neurologic impairment. Dr. Economides has reviewed the medical records, Dr. Convit's pictures and will review additional material as provided to him.

10. **Richard Bonfiglio, M. D.**
P. O. Box 551
Murrysville, PA 15668
(Rehabilitation)

Dr. Bonfiglio is a specialist in physical medicine and rehabilitation. He will address needs, life expectancy, the cost of care, and the general damages suffered by Mr. and Mrs. Wilson. He will issue a report which will be provided to the defendants.

11. **Phillip Bussey, Ph.D., CRC/ or Estelle Davis, Ph.D.**
Bussey, Davis & Associates, Inc.
9500 Annapolis Road #B-6
Lanham, MD 20706-2060
(Vocational Rehabilitation)

Drs. Bussey and Davis are damages witnesses who will address needs, the cost of care, and the overall effect of the negligence in this case on Mr. and Mrs. Wilson, their family and

marriage. They may also prepare a life care plan.

12. **Raphael Minsky, Ed.D.**
4808 Moorland Lane
Bethesda, MD 20814
(Rehabilitation and Rehabilitation Psychology)

Dr. Minsky is a damages witness who will address the plaintiff's needs and the costs thereof, including new housing, and the profound effect the malpractice has had on both plaintiffs and their marriage.

13. **Richard Lurito, Ph.D.**
1491 Chain Bridge Road #300
McLean, VA 22101
(Economist)

Dr. Lurito is an economist. Dr. Lurito's opinion in this case will be provided in a report projecting the present value of all plaintiff's future economic losses, which will include future medical expenses, attendant care, loss of family services and the cost of replacement services, and future benefits. At the defendants' option, a report will be forwarded and/or Dr. Lurito will be made available for deposition.

14. Plaintiffs reserve the right to identify additional medical experts with additional specialities once discovery is complete.

15. The defendants and their agents and employees.

16. The defense experts.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____
Bruce J. Klores - #358548

915 15th Street, N. W. #300
Washington, D. C. 20005
(202) 628-8100
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' 26(b)(4) Statement was mailed, postage prepaid to the following persons this 4th day of June, 2004:

Brian J. Nash, Esquire
809 Gleneagles Court #201
Towson, MD 21286

Steven A. Hamilton, Esquire
4600 East-West Highway #201
Bethesda, MD 20814

Heather J. Kelly, Esquire
101 South Washington Street
Rockville, MD 20850

David Levin, Esquire
104 West Street
P. O. Box 551
Annapolis, MD 21404-0551

Bruce J. Klores

1776\26b4.2

MASSACHUSETTS GENERAL HOSPITAL

HARVARD MEDICAL SCHOOL

Department of Anesthesia and Critical Care
55 Fruit Street
Boston, Massachusetts 02114-2696

e-mail: khaspel@partners.o
Tel: 617-726-8904, Fax: 61 726-1044

Kenneth L. Haspel, MD

Instructor in Anesthesia
Harvard Medical School

Attending Anesthesiologist
Massachusetts General Hospital

July 29, 2004

Bruce J. Klores & Associates, P.C.
915 15th Street, NW
Washington, DC 20005

Dear Mr. Klores:

I have been asked to comment on the events surrounding the case of Tracy A Anzalone. My opinions are based on a careful and thorough review of the medical record as well as the written statements of Fanancy L. Anzalone.

I am particularly qualified to comment on this case because of my work as Medical Director of the Post Anesthesia Care Unit of the Massachusetts General Hospital since 1993. Additionally, I have special qualifications in critical care and I am recognized as an expert in emergency airway management as well as acute resuscitation. In addition to these specific areas of concentrated interest, I teach young trainees in the field of Anesthesiology basic, as well as advanced, concepts necessary to perform in this specialty. As such, I am very well aware of the standards of care associated with the routine practice of standard general anesthesia. My curriculum vitae is attached.

A summary of the case involves a previously healthy 20-year-old woman who suffered several leg bone fractures after being struck by a motor vehicle on January 15, 2003. Additionally, she had a laceration of her left leg.

The patient was taken to the operating room on January 17, 2003 and underwent surgery. Postoperatively she suffered a respiratory arrest followed by cardiac arrest, which led to anoxic brain injury. Tracy Anzalone is presently in a persistent vegetative state.

The details that are known as compiled from the medical record are as follows:

1) Asystolic arrest was recorded at 12:07
2) CPR was initiated at 12:07
3) Patient was intubated at 12:13
4) CPR terminated at 12:16[1]

[1] I very much question the validity of the O_2 at 100% saturation at 12:09 and respirations as "+" upon admission to the PACU. Even so, pulse oximetry is not a monitor of ventilation and O_2 saturation may be elevated for some time period in apneic patients.

The initial arterial blood gas obtained at 12:19 (7.179/48/265) indicates a metabolic acidosis which is consistent with hypoperfusion which would be associated with the asystolic arrest. This is completely expected at this point. The quick resolution of this metabolic acidosis, as evidenced by the follow up ABG at 13:10 (7.32/42/159) indicates that the metabolic acidosis was a result of the arrest not the cause of the arrest.

Primary pulmonary dysfunction is eliminated as a cause of the arrest by the fact that Tracy's PaO_2 was 265 and then 159 with the two blood gases.

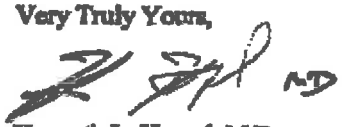
The explanation that best fits the events given the information available is a primary respiratory arrest with secondary cardiac arrest resulting in anoxic brain injury. This is my opinion to a reasonable degree of medical certainty.[2]

The only remaining question is why would Tracy suffer a primary respiratory arrest? That is answered once we note the dose of narcotic, benzodiazepine and local anesthesia used. Further concern is noted in regards to the description of Tracy's head position in transport to the PACU. This indicates that her head was in a position that would likely lead to upper airway obstruction.

I have enclosed the American Society of Anesthesiologist standards for Post Anesthesia Care. The most egregious violation is of Standard II. The evidence for this is found in Dr. Anzalone's statement which indicates that his daughter was transported from the operating room to the PACU by two nurses but no anesthetist. This is a clear violation of Standard II. Had an anesthetist or trained member of the anesthesia team been present, as required, that person would have recognized an apneic Tracy Anzalone and would have treated her prior to the respiratory arrest and subsequent anoxic brain injury, thusly avoiding any injury.

This adverse event would have been averted if simple due diligence was performed by the anesthetist, Dr. Avila. Unfortunately, this did not occur and this catastrophic event followed. In my opinion, the anesthesia management in this case fell markedly below accepted standards of care, and this deviation was the cause of Tracy Anzalone's permanent neurological deficit.

Very Truly Yours,



Kenneth L. Haspel, M.D.

KLH:lep

---

[2] Alternative potential diagnoses include: 1) pulmonary embolus: this is not possible given the lack of right ventricular dysfunction as well as the excellent PaO2 after intubation; 2) cardiac dysfunction: this is not possible given the results of the echocardiogram; 3) cardiac dysrhythmias: this is not possible given the presence of normal electrolyte findings, as well as the lack of rhythm abnormalities post event while in the ICU setting.

TAB 6

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LOUISE SFERRAZZA HAVLICEK, Individually and as Personal Representative of the Estate and Next of Kin of FRANKLIN JOSEPH HAVLICEK, Deceased,	)
Plaintiff,	) **Civil Action No. 2007 CA 006925 M**
v.	) **Calendar 9 – Judge Anderson**
DAVID W. PATTERSON, M.D., *et al.*,	) **Next Scheduled Event:**) **Plaintiff's Experts**) **June 2, 2008**
Defendants	)

PLAINTIFF'S CONSENT MOTION
<u>FOR MODIFICATION OF SCHEDULING ORDER</u>

Plaintiff, by and through counsel, Bruce J. Klores, Thomas W. Mitchell and Bruce J. Klores & Associates, P.C., hereby move the Court for an order modifying the original Track MS Scheduling Order in this case. Counsel for the Defendants has consented to the requested relief. In further support of this motion, Plaintiff states as follows:

1. Plaintiff has asserted medical malpractice claims against Defendants. Defendants have answered the complaint, denying liability and causation.

2. On January 18, 2008, the Court issued a Track MS Scheduling Order attached as Exhibit A. The trial is scheduled for August 10, 2009. The pretrial conference is on June 18, 2009.

3. The parties have had two mediation conferences to date and have agreed to continue their discussions at a later date.

4. The parties have already completed a round of extensive written discovery, and several fact witness depositions have been taken.

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& ASSOCIATES
ATTORNEYS AT LAW
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www.klores.com

5. The current "Discovery Closed" deadline is September 19, 2008. Plaintiff's counsel has a trial scheduled for September 8, 2008, and two other cases with deadlines for the completion of discovery by September 1, 2008.

6. In light of the fact that the pretrial and trial dates in this case are in June and August 2009, respectively, the parties have conferred and agreed that they will be able to complete discovery in this case in an orderly and less-burdensome manner by extending the remaining discovery dates by 90 days. Such an extension will not delay the work of the court, nor disturb the existing pretrial and trial dates.

7. For the reasons set forth above, Plaintiff requests, with Defendants' consent, that the Court modify the existing schedule order as follows:

	Current	Proposed
Plaintiff's Rule 26(b)(4)	June 2, 2008	September 5, 2008
Defendants' Rule 26(b)(4)	July 7, 2008	October 10, 2008
Discovery Closed & Status Conference	September 19, 2008	December 19, 2008
Motions Deadline	October 14, 2008	January 16, 2009
Motions Decided	December 15, 2008	March 16, 2009
Pretrial Conference	June 18, 2009	Same
Trial	August 10, 2009	Same

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www.klores.com

For the foregoing reasons, Plaintiff requests that the Court grant her Consent Motion for Modification of Scheduling Order. A proposed order is attached.

Date: May 23, 2008

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By /s/
Thomas W. Mitchell – D.C. #425180
Bruce J. Klores - D.C. #358548
1735 20th Street, N. W.
Washington, D. C. 20009
(202) 628-8100
(202) 628-1240 (facsimile)

Attorneys for Plaintiffs

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& ASSOCIATES
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TOLL FREE (877) 628-8100
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PLAINTIFF'S CONSENT MOTION FOR MODIFICATION OF SCHEDULING ORDER was served electronically on the 23[RD] day of May, 2008, on the following counsel:

Steven A. Hamilton, Esq.
Karen S. Karlin, Esq.
HAMILTON ALTMAN CANALE & DILLON, LLC
4600 East-West Highway
Suite 201
Bethesda, Maryland 20814

/s/
Thomas W. Mitchell

Motion.schedule.1

BRUCE J. KLORES
& ASSOCIATES
ATTORNEYS AT LAW
[illegible]
[illegible]
WASHINGTON, D.C. [illegible]
[illegible]
TELECOPIER [illegible]
TOLL FREE [illegible]
[illegible]

Superior Court of the District of Columbia

Civil Division – Washington, D.C. 20001

Medical Malpractice (Track MS) SCHEDULING ORDER

Case Number: 2007 CA 006925 M

LOUISE SPERRAZZA HAVLICEK Vs. DAVID W. PATTERSON MD et al

This ORDER may not be modified except by leave of Court upon a showing of good cause; stipulations between counsel shall not be effective to change any deadlines in the order absent Court approval. Failure to comply with all terms may result in dismissal, default judgment, refusal to let witnesses testify, refusal to admit exhibits, the assessment of costs and expenses, including attorney fees, or other sanctions.

January 18, 2008
Date:

JUDGE JENNIFER M ANDERSON

ADR Selected: Mediation ☒

Track MS

EARLY MEDIATION DATE	
DEADLINE FOR DISCOVERY REQUESTS	05/19/2008
EXCHANGE WITNESS LISTS	05/19/2008
PROPONENT'S RULE 26(B) (4) STATEMENT	06/02/2008
OPPONENT'S RULE 26(B) (4) STATEMENT	07/07/2008
DISCOVERY CLOSED AND STATUS CONFERENCE	09/19/2008 at 10:30 am
DEADLINE FOR FILING MOTIONS	10/14/2008
DISPOSITIVE MOTIONS DECIDED	12/15/2008
PRETRIAL DATE	6/18/09 at 9:00am
TRIAL DATE	8/10/2009 at 9:30am

Discovery has been stayed for 30 days. Unless already set at the initial scheduling conference **PRETRIAL and TRIAL DATES** will be set at the status conference. However, if discovery/motions deadlines are extended at the status conference, then another status date may be set. **A joint Pretrial Statement is required.**

Please check names of parties for accuracy and verify your own name, address and telephone number; write any correction and initial it. Each attorney and pro se party MUST INITIAL to acknowledge receipt of this Order.

PARTY	NAME / ADDRESS / BAR NUMBER
PLAINTIFF	LOUISE SPERRAZZA HAVLICEK 6024 Western Ave CHEVY CHASE MD 20815 Mr BRUCE J KLORES WASHINGTON DC 20000 358548

Print Form

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LOUISE SFERRAZZA HAVLICEK, Individually and as Personal Representative of the Estate and Next of Kin of FRANKLIN JOSEPH HAVLICEK, Deceased,	)
Plaintiff,	) **Civil Action No. 2007 CA 006925 M**
v.	) **Calendar 9 – Judge Anderson**
DAVID W. PATTERSON, M.D., *et al.*,	) **Next Scheduled Event:**) **Plaintiff's Experts**) **June 2, 2008**
Defendants	)

ORDER MODIFYING SCHEDULING ORDER

This matter having come before the Court on Plaintiff's Consent Motion for Modification of Scheduling Order, and the Defendants having consented to the requested relief, and for good cause shown, it is this _____ day of May 2008,

ORDERED, that the motion be and hereby is GRANTED, and it is further

ORDERED, that the Scheduling Order in this case be and hereby is modified as follows:

Plaintiff's Rule 26(b)(4)	September 5, 2008
Defendants' Rule 26(b)(4)	October 10, 2008
Discovery Closed & Status Conference	December 19, 2008
Motions Deadline	January 16, 2009
Motions Decided	March 16, 2009
Pretrial Conference	June 18, 2009
Trial	August 10, 2009

Date: May ____, 2008

_____
Judge Jennifer Anderson

Copies to:
Bruce J. Klores, Esq.
Steven A. Hamilton, Esq.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL ALEXANDER PURBAUGH, a minor, by HEATHER PURBAUGH, et al.	)	
Plaintiffs,	)	
v.	)	C.A. No. 04-1381 (Judge David S. Cercone)
THE UNITED STATES OF AMERICA	)	
Defendant	)	Electronically Filed

PLAINTIFFS' PRETRIAL STATEMENT

Come now the plaintiffs, by and through counsel, pursuant to the local Rules and this Court's Scheduling Order, and file their Pretrial Submission.

I. BRIEF NARRATIVE STATEMENT OF MATERIAL FACTS

This is a medical malpractice case brought pursuant to the Federal Tort Claims Act. (28 U.S.C. §1346(b) et. seq.) The case involves the labor and delivery care provided by the United States, through its agents and employees, to Heather Purbaugh and her infant, Michael, on December 19, 1998 at the 1st Fighter Wing, 1st Medical Group at Langley Air Force Base, Langley, Virginia.

The plaintiffs in the case are Michael Purbaugh, a seven year old boy; his mother, Heather Purbaugh; and his father, David Purbaugh.

Plaintiffs will prove that when Mrs. Purbaugh arrived at the hospital for induction of labor on December 19, 1998, her term infant, Michael, was neurologically and otherwise intact and that but for the acts or omissions of Capt. Darlene Walkenhorst, Michael Purbaugh would be normal today. Instead, through the defendant's negligence, an emergency was created causing the fetus to suffer unnecessary stress and distress resulting in an emergency traumatic

delivery in order to save the child's life. Plaintiffs will show that Darlene Walkenhorst, a Nurse Midwife, precipitously rushed the labor along on a Saturday through the injudicious use of Pitocin, which hyperstimulated Mrs. Purbaugh's uterus and its contractions, resulting in a traumatic delivery which caused her young son to develop a bleed in his brain. That bleed went on to cause significant brain damage, leaving Michael Purbaugh totally neurologically devastated. He will never walk, talk, eat, see, work or live independently.

II. DAMAGES AND CALCULATIONS IN SUPPORT

There are three plaintiffs in this case.

1. Michael Purbaugh sues for economic and non-economic damages. The economic damages he makes claim for are his future lost earnings and care costs. According to the economic reports in this case, Michael Purbaugh's wage loss claim (he is undeniably unable to ever work) ranges between $1,744,575.00 to $2,975,964.00, depending upon the level of education the Court finds he would complete. His future care costs have been calculated by an economist based on an extensive life care plan. If Michael Purbaugh lives to a normal life expectancy the costs of future care, reduced to present value, are $20,638,829.00.

2. In addition to the economic damages, all three plaintiffs sue for non-economic damages. Michael Purbaugh sues for his own physical and emotional pain and suffering. Mrs. Purbaugh sues for her own physical injuries occasioned by the traumatic delivery as well as the emotional distress of raising a disabled child. Mr. Purbaugh sues for his own emotional distress occasioned by raising a disabled child.

3. Past medical bills are substantial and are presently being complied.

III. WITNESSES

Plaintiffs expect to call the following witnesses live at trial:

1. Dr. John Holets
   447 Main Street
   Monongahela, PA
   724-258-2070
   Damages

2. Michael Purbaugh
   62 Jones Lane
   Monongahela, PA 15063
   Damages - will not testify

3. Heather Purbaugh
   62 Jones Lane
   Monongahela, PA 15063
   724-986-6171

4. David Purbaugh
   62 Jones Lane
   Monongahela, PA 15063
   724-986-6171

5. Darlene Walkenhorst
   1804 Baycliff Court
   Newport News, VA
   9757-989-0332
   Liability

6. Kelly D. Bouche
   210 N. Belletrend Avenue
   Pittsburgh, PA
   412-621-0100
   Damages

7. J. P. Douglas, R.N.
   Executive Director
   Dept. Of Health Professions
   Commonwealth of Virginia
   6603 West Broad Street
   Richmond, VA
   804-662-9900

Liability

8. Richard J. Lurito, Ph.D. - Economist
RL Inc.
1491 Chain Bridge Road, #300
McLean, VA 22101
703-442-4528
Economic Damages Expert

9. Richard L. Stokes, M. D. - OB/GYN
1830 Town Center Pkwy # 207
Reston, VA 20190
703-437-0001
Liability and Damages Expert

10. Cassandra Garcia, CNM, RN - Midwife
571 North West Broken Oak Trail
Jensen Beach, FL 34957
772-692-5786
Liability and Damages Expert

11. Mary Elizbaeth Latimer, M. D. - Pediatric Neurologist
6420 Rockledge Drive #2500
Bethesda, MD 20817
301-530-9200
Liability and Damages Expert

12. Richard Latchaw, M. D. - Pediatric Neuroradiology
3930 Pomo Place
Davis, CA 95616
916-734-5720
Liability and Damages Expert

13. Guy Young, M. D. - Pediatric Hematology
Division of Pediatric Hematology
455 S. Main Street
Orange, CA 92868
714-532-8459
Liability and Damages Expert

14. Stephen I. Goodman, M. D. - Pediatric Genetics
Department of Pediatrics, Box C-233
University of Colorado Health Sciences Center
4200 East Ninth Street

Denver, CO 80262
Liability and Damages Expert

15. Al Condeluci, Ph.D. - Life Care Planner
CLASS of Pittsburgh
4638 Centre Avenue
Pittsburgh, PA 15213
412-683-7100
Life Care Planner and Cerebral Palsy Expert

The plaintiffs may call the following witnesses:

1. Paula Chavis, R.N.
c/o United States of America
U. S. Attorneys Office for the Western District of Pennsylvania
Pittsburgh, PA
Liability

2. David Adelson, M. D.
Pediatric Neurosurgeon
University of Pittsburgh Medical Center
Pittsburgh, PA
Liability and Damages

Plaintiffs reserve the right to call any witness designated by the defense, expert or fact.

IV. TESTIMONY OF WITNESSES VIA DEPOSITION AND DESIGNATION

1. Plaintiffs reserve the right to use any deposition not designated herein if the witness becomes unavailable or for impeachment purposes. Plaintiffs also reserve the right to utilize all of the deposition of Darlene Walkenhorst as if she were a party defendant and the complete videotaped testimony of Dr. Hamilton.

2. Captain Paula Chavis:

P. 41, L. 3 - P. 44, L. 20

P. 49, l. 6- P. 51, L.19

P. 61, L. 10 - P. 62, L. 21

P. 92, L. 14 - P. 95, L. 18

_____3. Elizabeth McPherson, M. D. - gave a deposition on May 3, 2005

Plaintiffs objected to Dr. McPherson offering expert opinions at her fact deposition. More specifically plaintiffs objected to her offering opinion testimony in this case based on records she reviewed after her treatment of Michael Purbaugh ended, and for which she was not designated as an expert under the Federal Rules. Without waiving these objections, plaintiffs may read the following:

P. 90, L. 5 - L. 19

P. 115, L. 20 - P. 116, L. 1

P. 121, L. 17 - L. 24

P. 126, L. 9 - P. 128, l. 10

P. 132, L. 11 - P. 134, L. 7

P. 135, L. 22 - P. 136, L. 17

P. 138, L. 9 - L. 12

P. 145, L. 3 - P. 148, L. 15

_____4. Michael J. Painter, M.D.:

P. 17, L. 18 - L. 25

P. 29, L. 3 - P. 30, L. 4

P. 33, L. 23 - P. 34, L.9

P. 38, L. 1 - P. 38, L. 20

P. 55, L. 23 - P. 57, L. 18

P. 62, L. 12 - P. 62, L. 9

V. DOCUMENTS AND EXHIBITS

See attached Exhibit List for Plaintiffs, revised August 21, 2006.

VI. LEGAL ISSUES THAT SHOULD BE ADDRESSED AT FINAL PRETRIAL CONFERENCE

The only pure legal issue in this case at this time is the question of whether the Virginia cap on medical malpractice applies in this case. A motion has been filed by the plaintiffs on this issue. The parties have agreed to stay its disposition.

VII. COPIES OF ALL EXPERT DISCLOSURES

Plaintiffs' experts' disclosures are attached.

VIII. COPIES OF ALL RECORDS OF PHYSICIANS WHO MAY TESTIFY

The child's medical records constitute thousands of pages and all are identified in the attached Exhibit List. Plaintiffs will stipulate to the authenticity of all medical records except the records from Michael's original treating pediatrician due to inconsistencies. Plaintiffs will prepare an abbreviated abstract of the important medical records for the Court, defense and witnesses to streamline the trial.

IX. MATERIAL FACTS TO BE PROVED AT TRIAL BY PLAINTIFF

See plaintiffs' Proposed Findings of Fact and Conclusions of Law

X. PLAINTIFFS' EXHIBITS TO BE INTRODUCED IN THEIR CASE IN CHIEF

See plaintiffs' Exhibit List attached hereto. Exhibits marked with an asterisk will likely not be introduced in our case in chief.

XI. PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH CITATION TO THE RECORD

See plaintiffs' Proposed findings of fact and Conclusions of Law.

XII. PLAINTIFFS' TRIAL BRIEF

See Plaintiffs' Trial Brief.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By: s/ Bruce J. Klores
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Counsel for Plaintiffs (Pro Hac Vice)

and

JOHNSON & EDDY

By s/ J. Alan Johnson
J. Alan Johnson - PA Bar No. 10504
1720 Gulf Tower
Pittsburgh, PA 15219
Co-Counsel for Plaintiffs

1794\pretrial.statement.pm

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL ALEXANDER PURBAUGH, a minor, by HEATHER PURBAUGH, et al.	)	
Plaintiffs,	)	
v.	)	C.A. No. 04-1381 (Judge David S. Cercone)
THE UNITED STATES OF AMERICA	)	
Defendants	)	

PLAINTIFFS' PROPOSED PRETRIAL STIPULATION

I. **Plaintiffs seek the following forms of relief in this action:**

Plaintiffs in this case, Michael Purbaugh, a minor, by his mother, Heather Purbaugh, and Heather Purbaugh and David Purbaugh, Sr., seek monetary damages in this medical malpractice case against the United States of America.

There are three counts to plaintiffs' Complaint. Count I seeks damages for the minor plaintiff for his permanent injury, pain and suffering, non-economic damages, and the costs of full-time attendant care for the remainder of his life along with a variety of rehabilitative care and therapies as set forth in our evidence. Moreover, since the minor will never work a wage loss claim is brought on his behalf.

In Count II of the plaintiffs' complaint Mrs. Purbaugh sues for economic and non-economic damages. The economic damages would be those associated with her loss of income as a result of caring for her child, and for the medical and therapeutic expenses that her son will incur. The non-economic damages for Mrs. Purbaugh are those damages associated with her

physical injuries from delivery, and emotional distress, including the distress of raising a child with extensive disabilities.

In Count III of plaintiffs' complaint the plaintiff David Purbaugh, Sr. brings a claim for his own mental anguish, loss of income, loss of enjoyment of life, and substantial loss of familial consortium, in addition to the extensive medical and other related expenses associated with his son's disability.

II. **Subject matter jurisdiction:**

This Court has subject matter jurisdiction pursuant to 28 USC §2675(a), commonly known as the "Federal Tort Claims Act." Venue is proper before this Court pursuant to 28 USC §1402(b).

III. **Stipulations:**

Plaintiffs request defendant stipulate to the following:

1. That both the administrative claim and the lawsuit in this case were timely filed on behalf of all plaintiffs.

2. That all the care provided to Mrs. Purbaugh and Michael Purbaugh was provided by agents or employees of the United States acting within the scope of their employment.

3. That up until the day before Michael was delivered he was a neurologically and otherwise intact child.

4. That Michael Purbaugh will never be commercially or gainfully employed and will never earn a wage.

5. That Michael Purbaugh will need twenty-four hour a day, seven day a week skilled nursing care for the remainder of his life.

6. That an event or process occurred during the labor and delivery of Heather and Michael Purbaugh which caused Michael Purbaugh's brain damage, more likely than not.

7. Captain Darlene Walkenhorst was acting as a nurse midwife at the time of Michael Purbaugh's delivery on December 19, 1998.

8. On 19 December, 1998 Captain Darlene Walkenhorst's only health care license was a Registered Nurse license issued by the State of Pennsylvania.

9. Captain Darlene Walkenhorst performed an unsupervised outlet vacuum-assisted vaginal delivery at the time of Michael Purbaugh's birth on 19 December 1998.

10. Elective induction of labor of an at-term fetus and independent management of that labor including artificial rupture of membranes and pitocin administration is not within the scope of routine labor and delivery management for a Certified Nurse Midwife in accordance with Air Force Instruction 44-119, 6.3.3, Scope of Practice, Certified Nurse Midwives.

11. No documentation in Heather Purbaugh's medical record indicates that Captain Darlene Walkenhorst consulted or collaborated with an OB GYN physician in counseling, planning, or preparing Heather Purbaugh for elective induction of labor and the use of antepartum oxytocics.

12. It was not within the Air Force Medical Service's policy and operating instructions on or about 19 Dec 1998 to permit elective induction of labor for an at-term infant for the convenience of a patient or provider in the absence of any threat to fetal or maternal well being.

13. It was not within the 1st Medical Group's policy, protocols and operating instructions on or about 19 Dec 1998 to permit elective induction of labor for an at-term infant for the convenience of a patient or provider in the absence of any threat to fetal or maternal well

being.

14. It was not within the 1st Medical Group's policy, protocols, and operating instructions on or about 19 Dec 1998 to perform elective induction on a weekend.

15. It was mandated by the 1st Medical Group's policy, protocols, and operating instructions on 19 Dec 1998 to have an Obstetric physician present in the Medical Treatment Facility (MTF) during pitocin augmentation of labor.

16. An Obstetric physician was not present in the Medical Treatment Facility (MTF) on 19 December 1998 from at least 1300 hours until delivery of Michael Purbaugh.

17. Darlene Walkenhorst did not have a license issued by any state as a Nurse Practitioner or Nurse Midwife when she delivered Michael Purbaugh.

18. The vacuum had to be reapplied after popping off in order to ultimately deliver Michael's head.

19. Michael's porencephalic cyst is more likely the result of a hemorrhage than a thrombotic event.

20. Thrombotic strokes do not usually result in the loss of brain tissue as a porencephalic cyst, but rather result in area of abnormal signal in the brain seen on MRI reflecting infarcted tissue.

21. The overwhelming majority of patients with factor V Leiden do not suffer from neonatal stroke.

22. Michael had one protein C activity level done which was low at 46% however a repeat test on 10/17/00 was normal at 80%.

Plaintiffs agree that the following facts set forth by defendant in its Pretrial Stipulation

are accurate:

1, 2, 3, 4, 7, 14, 23, and 47

IV. **Factual Disputes:**

1. Defendant apparently disputes all allegations of negligence as set forth in plaintiffs' Complaint. Plaintiffs expect defendant will dispute life expectancy as well.

2. Whether Darlene Walkenhorst acted without legal authority.

V. **Legal Issues In Dispute:**

1. Standard of care

2. Causation

3. Whether the Virginia Malpractice Cap applies

VI. **Depositions**

Plaintiffs agree with the defendant's list of depositions to be utilized at trial, except for Elizabeth MacPherson.

VII. **Plaintiffs' Experts:** (All *curricula vitae* have been provided to defense counsel)

1. M. Elizabeth Latimer, M. D. (Pediatric neurology)

2. Richard Stokes, M. D. (Obstetrics/Gynecology)

3. Stephen I. Goodman, M. D. (Pediatric/Genetics)

4. Richard Lurito, Ph.D. (Economist)

5. Al Condeluci, Ph.D. (Life Care Planner)

6. Guy Young, M. D. (Pediatric Hematology)

7. Richard E. Latchaw, M. D. (Pediatric Neuroradiology)

8. Cassandra Garcia, CNM (Midwife)

VIII. Trial Time:

Plaintiffs' case in chief: 4 - 5 days.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By:_____
Bruce J. Klores (Pro Hac Vice)
1735 20th Street, N.W.
Washington, D.C. 20009
(202) 628-8100
Counsel for Plaintiffs (Pro Hac Vice)

and

JOHNSON & EDDY

By_____
J. Alan Johnson - PA Bar No. 10504
1720 Gulf Tower
Pittsburgh, PA 15219
Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Pretrial Stipulation was electronically served on Paul D. Kovac, Esquire, Assistant U.S. Attorney, Western District of Pennsylvania, U.S. Post Office & Courthouse, 700 Grant Street, Suite 400, Pittsburgh, PA 15219-2401 this 23rd day of June, 2006.

_____
Bruce J. Klores

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL ALEXANDER PURBAUGH, a minor, by HEATHER PURBAUGH, et al.	)	
Plaintiffs,	)	
v.	)	C.A. No. 04-1381 (Judge David S. Cercone)
THE UNITED STATES OF AMERICA	)	
Defendant	)	Electronically Filed

PLAINTIFFS' PRETRIAL BRIEF

Come now the plaintiffs, by and through counsel, and file this Memorandum concerning issues at trial.

I. INTRODUCTION

This is a medical negligence case brought pursuant to the Federal Tort Claims Act. The case involves the obstetrical care and treatment provided to Heather Purbaugh and her infant, Michael Purbaugh, by employees of the United States of America at the Langley Air Force Base in Virginia on December 19, 1998.[1] On that day Michael Purbaugh was delivered by Captain Darlene Walkenhorst, a nurse midwife. By all indications Michael Purbaugh was a normal baby as of the day before he delivered, December 18, 1998. In fact, all of the evidence in this case suggests that this was a healthy term pregnancy with a healthy baby, even on the morning that Mrs. Purbaugh presented to Capt. Walkenhorst for induction of labor. There was no reason to suspect this child would be any less healthy than the Purbaughs older son.

[1] Mr. and Mrs. Purbaugh were born and raised in Pittsburgh. Mr. Purbaugh is a truck driver and Army veteran. Mrs. Purbaugh is attempting to get her associate's degree in Architectural Drafting. They have an older child, David Purbaugh, Jr., who is now thirteen. He is neurologically normal. David Purbaugh, Sr. was in the Army when his son Michael was delivered.

Mrs. Purbaugh was not in full labor when she presented to the Labor and Delivery Unit at the Langley Air Force Base. To the contrary, this was a scheduled induction for convenience sake. This means that Capt. Walkenhorst, on this Saturday morning, was going to induce labor and delivery by taking affirmative action. Soon after admission on the 19th Mrs. Purbaugh was actually progressing well in her labor, without help. Then, Capt. Walkenhorst augmented labor by artificially rupturing Mrs. Purbaugh's membranes and by administering Pitocin, a potent drug which causes the uterus to contract. On the Pitocin, the baby started to show signs of distress in response to the contractions, but Capt. Walkenhorst continued with it, causing more and more fetal distress to the baby until ultimately an emergency delivery was needed to save Michael. This was an emergency created by Capt. Walkenhorst. In order to save Michael from the fetal distress Walkenhorst caused she had to deliver Michael with a suction device, called a vacuum, that she placed on his head. Prior to the vacuum even being placed the heavy contractions were causing disruptions in the blood supply to the infant. When the shearing forces of the vacuum were attached on this already weakened infant it caused a rupture of already weakened blood vessels in Michael's head. This is why at birth Michael was not moving, not crying, and he looked ashen and gray. According to David Purbaugh it looked like Michael had a "head on top of his head" from the vacuum. David Purbaugh, who was present throughout the delivery, describes extensive bruising on Michael's head with blood under the scalp.

Six months prior to Michael's birth the U.S. Food and Drug Administration issued a "PUBLIC HEALTH ADVISORY" to all obstetricians and nurse midwives about the dangers of vacuum deliveries. The most significant danger listed was bleeding in the brain.

During the first few months of his life Michael Purbaugh remained lethargic and did not have much appetite. According to his mother he was highly sensitive to light and sound. By about four months it was clear he was not able to fix his gaze and he seemed to be constantly turning his head to the right. This prompted repeated doctor visits. Finally, at eight months of age, Michael was seen by a pediatric ophthalmologist because of his vision problems. She referred him to the University of Pittsburgh where the first MRI of the brain was performed. That MRI, on September 16, 1999, years prior to litigation ever being considered, was read by a neuroradiologist, a specialist in studies involving the central nervous system, as showing massive brain damage. The neuroradiologist concluded that "the most likely cause for the finding is that of previous hemorrhage at birth or prenatally."

Michael Purbaugh is unable to walk, talk, see or breathe on his own. He never will do any of these things. He will wear diapers for the rest of his life. He will never work, will never live alone, will never enjoy the sights and sounds of life. He recognizes his parents and seems to smile when they are near. He has severe Cerebral Palsy which all of the health care providers who have seen him agree comes from a stroke in his brain. The defendant agrees there was a stroke. It takes issue with its cause and relationship to any of its employees' actions.

The plaintiffs' proof at trial, through the use of qualified experts, will show that the obstetrical care deviated from acceptable standards and that these deviations were a proximate cause of the injury to Michael's brain, which will cause him to suffer severe and permanent neurologic disabilities for the remainder of his life. In that regard his parents also bring claims for the costs of taking care of Michael as well as their own emotional distress.

The defendant United States of America denies that its conduct departed from the standard of care and also denies that anything that its agents or employees did caused Michael Purbaugh's brain damage. It is not expected that the defendant will dispute the nature and extent of Michael's disabilities. It may however dispute Michael's life expectancy.

II. LAW

The Federal Tort Claims Act, 28 U.S.C.§1346(b) imposes liability for personal injury or wrongful death caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." In this case there is no dispute that Capt. Walkenhorst was acting within the scope of her employment with the United States.

Since the acts or omissions complained of took place in Virginia, Virginia State substantive law applies to some of the plaintiffs' claims. See generally, Hall v. United States, 971 F.2d 1499 (10th Cir. 1992). Under Virginia law, to prevail in an action for medical malpractice the plaintiff must (1) establish the standard of care; (2) demonstrate that the defendant's actions breached the standard of care; and (3) prove that the defendant's breach was the proximate cause of the plaintiff's injuries. See Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986). Determining the "standard of care" in this case also requires reference to the Virginia Ann. Code, §8.01:-581 which reads as follows:

Virginia Code §8.01:-581-20(A).

> The standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified as to such standard of care, shall be admitted: provided however

> that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard. Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified.

See also, Bulala v. Boyd, 239 Va., 218, 389 SE 2d 670, (1990).

In this case, in light of the level of expertise expected of military physicians and midwives, as shown by their required adherence to national guidelines and protocols, plaintiffs submit the appropriate standard of care is a national standard of care. That is, each expert on the standard of care should be able to establish their familiarity with the national standard of care under the same or similar circumstances.

Va. Code. Ann. §8.01-581.20(A) goes on to say that:

> A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendants' specialty and of what conduct conform or rails to conform to those standards and if he has active clinical practice in either the defendants' specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

This section has been interpreted to permit testimony by an expert in a related field to the defendants. (Neonatologist allowed to testify against an obstetrician on an issue of how to prevent pre-term labor). Daniel v. Jones, 39 F.Supp. 2d 635 (E.D Va. 1999).

III. EVIDENCE

A. Liability

Plaintiffs' standard of care experts are Dr. Richard Stokes, a board certified obstetrician/gynecologist practicing in Virginia for the past thirty years, and Cassandra Garcia, R.N., CNM, a certified nurse midwife. They are both expected to testify to the departures from

the standard of care by Capt. Walkenhorst in the management of Mrs. Purbaugh's labor and delivery.

On the question of causation plaintiffs' experts include Dr. Elizabeth Latimer, board certified in the field of pediatric neurology and the former Chief of Pediatric Neurology at Georgetown University Hospital. Dr. Latimer has examined Michael Purbaugh and will offer opinions as to the cause of his brain damage, his needs, employability and life expectancy. Dr. Latimer will testify, more likely that not, that Michael's brain damage comes from trauma unnecessarily inflicted during the labor and delivery.

Because the United States of America has raised the defense that Michael's stroke was caused by an underlying blood disorder, not the events of labor and delivery, the plaintiffs have retained experts in the fields of pediatric hematology and pediatric medical genetics to highlight why this analysis is faulty. These experts are Guy Young, M.D. and Stephen Goodman, M. D., respectively.

In addition, on causation the plaintiffs will reply upon several neuroradiological studies (CT Scans and MRI's) that were performed on Michael. These studies are very helpful in determining the cause of the brain damage and the timing of the insult. To that end the plaintiffs have retained Dr. Richard Latchaw, one of the world's leading authorities on pediatric neuroradiology. Dr. Latchaw will testify in this case that Michael's head and brain were normal *in utero* and that the appearance and characteristics of his brain injury are entirely consistent with the use of a vacuum. In other words, Dr. Latchaw will opine that the traumatic delivery followed by a vacuum extraction was a proximate cause of Michael Purbaugh's brain damage as reflected in the MRI's and CT Scans.

B. Damages

As noted earlier, plaintiffs do not anticipate a significant dispute as to the nature and extent of Michael's injuries. He has severe Cerebral Palsy and severe brain damage. He sits in a wheelchair, cannot move his limbs voluntarily, cannot feed himself, toilet himself, speak, see, walk, or talk. He will never do any of these things. He needs at least one nurse twenty four hours a day, seven days a week to care for him and he will need more as he gets bigger. Al Condelucci, Ph.D., who is the Chief Executive Officer of United Cerebral Palsy of Greater Pittsburgh, has performed an extensive evaluation of Michael at our request. His "life care plan" sets forth in meticulous detail all of the care that Michael will need for the rest of his life.

The costs of Michael's care, reduced to present value, exceeds $20 million for a normal life expectancy. The wage loss claim runs between $1.7 million and $2.9 million, depending upon his projected educational attainment.

There may be a dispute at trial concerning Michael's life expectancy. Given his level of disability, Michael may not live until the age eighty, his statistical life expectancy. Dr. Latimer takes care of many children and adults like Michael and has extensive knowledge of the medical literature on the issue of life expectancy of the disabled. She will testify that while Michael may, with the best of care, have a normal life expectancy, it may also be reduced.

Finally, Plaintiffs will offer economic projections from Richard J. Lurito, Ph.D.

V. RELIEF

For the reasons that are more fully set out in the plaintiffs' Proposed Findings of Fact and Conclusions of Law, which are incorporated by reference herein, the plaintiffs will ask this Court to enter judgment against the defendant, without regard to the Virginia Medical

Malpractice Cap, in the full sums necessary to care for Michael Purbaugh for the rest of his life, to award him his complete loss wage claim, to reimburse for all prior medical bills, and to enter judgment on non-economic damages for all three plaintiffs in accordance with the evidence.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

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JOHNSON & EDDY

By s/ J. Alan Johnson
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Co-Counsel for Plaintiffs

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EILEEN WILSON AS GUARDIAN *Ad Litem* FOR FREDERICK C. WILSON, and EILEEN WILSON, INDIVIDUALLY	)
Plaintiffs,	)
v.	) C.A. No. 03-CA-4014
	) CIVIL I
JOHN W. BARRETT, M.D., *et al.*,	) Calendar 4—Judge Weisberg
Defendants.	)

JOINT PRETRIAL STATEMENT

A. CERTIFICATION OF RULE 16(c) MEETING

Undersigned counsel for Plaintiffs and for Defendants met via telephone conference, on January 31, 2006 and reviewed all matters set forth in Rule 16(c) in preparation for the filing of this Joint Pretrial Statement.

B. PARTIES AND COUNSEL

Parties	Counsel
Plaintiffs:	
Eileen Wilson Frederick Wilson	Bruce J. Klores, Esquire #35848 Thomas W. Mitchell #425180 Scott M. Perry #459841 Bruce J. Klores & Associates, P.C. 915 15th Street, N.W., #300 Washington, DC 20005 (202) 628-8100
Defendants:	
John W. Barrett, M. D.	Albert D. Brault, Esquire #16949 Heather J. Kelly, Esquire #453154 Brault, Graham, LLC 101 S. Washington Street Rockville, MD 20850

Washington Brain and Spine Institute	Brian J. Nash, Esquire # 230771 Marian L. Hogan, Esquire #445466 809 Gleneagles Court #201 Towson, MD 21286
Rafael Jacinto Convit, M. D.	Steven A. Hamilton, Esquire # 953539 Matthew D. Banks, Esquire #434987 4600 East West Highway #201 Bethesda, MD 20814

C. **NATURE OF THE CASE**.

Plaintiffs' Proposed Statement of the Case:

This is a medical malpractice action against defendants John W. Barrett, M. D., and his neurosurgical group and defendant Rafael Jacinto Convit, M. D. The plaintiffs are Fred Wilson, a retired plumber, and his wife and guardian, Eileen Wilson. The Wilsons claim that the care these doctors provided Fred Wilson was negligent and that their negligence caused Mr. Wilson to become neurologically devastated and permanently bedridden. They are seeking economic and non-economic damages for Mr. and Mrs. Wilson. The defendants deny that they committed malpractice or that they caused any of the Wilson's injuries.

Defendant Dr. Convit's Proposed Statement of the Case:

Defendant objects to Plaintiffs' proposed statement and are providing herein an alternative proposed statement.

This is a medical malpractice action against defendants John W. Barrett, M. D., his neurosurgical group Washington Brain & Spine Institute, and Rafael J. Convit, M.D. The plaintiffs are Fred Wilson, a retired plumber, and his wife and guardian, Eileen Wilson. The Wilsons claim that the care these doctors provided Fred Wilson was negligent and that their

negligence caused Mr. Wilson to suffer permanent neurologic injury. The defendants deny that they committed malpractice or that they caused any of Mr. Wilson's injuries.

D. CLAIMS AND/OR DEFENSES

For Plaintiffs: Plaintiffs claim that the defendants Dr. Barrett and his employers Washington Brain and Spine were negligent by failing to appropriately treat Mr. Wilson's ventriculo-peritoneal shunt, causing infection which resulted in devastating and permanent injuries to Mr. Wilson and his wife. Likewise, Plaintiffs claim that the defendant Convit, who treated Mr. Wilson after defendants Dr. Barrett and Washington Brain and Spine first began treating him, was also negligent by failing to appropriately treat Mr. Wilson's ventriculo-peritoneal shunt, causing infection which resulted in devastating and permanent injuries to Mr. Wilson and derivatively to his wife.

Defendant, Washington Brain & Spine Institute, P.C., objects to any inference that it was negligent.

Defendant John W. Barrett, M.D.:

Defendant, John Barrett, M.D. asserts as defenses to the Plaintiff's claims that he complied with all applicable standards of care in the consultation, assessment, care and treatment of the Plaintiff. Defendant further asserts that nothing he did or failed to do caused or contributed to Plaintiff's alleged injuries. Defendant asserts the defenses of contributory negligence and/or assumption of the risk. Defendant expressly preserves any and all defenses available at fact and law, and all defenses raised in his Answer to the Complaint, and Rule 26(b)(4) statement, and the testimony of the experts identified therein. Dr. Barrett further adopts by reference and incorporates all defense made by Washington Brain and Spine.

Defendant Washington Brain & Spine Institute, P.C.:

1. Defendant adopts by reference and incorporates herein all defenses made by Co-Defendant, Dr. Barrett.

2. Defendant denies each and every one of Plaintiffs' allegations of negligence, carelessness, malfeasance, nonfeasance and every other act of misconduct, whether alleged expressly or impliedly.

3. Defendant denies that any of the alleged breaches of the standard of care (assuming *arguendo*, without conceding, that those breaches occurred) bore any causal relationship to Mr. Wilson's current condition.

4. Defendant contends that the care of Mr. Wilson met the standard of care.

5. Defendant contends that Dr. Barrett's care and treatment of Mr. Wilson complied with the standard of care.

6. Defendant contends that there was no evidence of infection or exposure of the VP shunt on April 18, 2000.

7. Defendant contends that is was appropriate for Dr. Barrett to suggest a plastic surgery consultation to Mr. Wilson in April 2000.

8. Defendant contends that neither infection nor meningitis caused Mr. Wilson's complications on May 19, 2000.

9. Defendant contends that Mr. Wilson's condition was caused by intervening and/or superceding acts of commission and/or omission on the part of third persons of entities all over whom Defendant did not exercise dominion or control.

10. Defendant contends that Plaintiffs failed to reasonably mitigate their damages as a matter of law.

11. Defendant challenges the existence and extent of the damages asserted by Plaintiffs, supra, and also objects to Plaintiffs' listed claims as unsupported by the evidence.

12. Defendant adopts and incorporate by reference its Answer, Rule 26(b)(4) Statement, and the opinions set forth by its expert(s), and reserves the right to rely upon the pleadings and discovery responses of any party, as well as the deposition and/or trial testimony of any expert or party.

13. Defendant asserts that Mr. Wilson's condition was the result of natural-occurring and/or pre-existing disease processes and/or recognized risks and complications of surgery over which they had no control.

14. Defendant reserves the right to make additional objections at the time of Pretrial and/or Trial.

15. Defendant objects to Plaintiff's claims as stated as inconsistent with, and unsupported by, the evidence.

16. Defendant contends that Mr. Wilson's condition was a recognized complication that can occur even in the best of hands and even when Defendants exercise completely appropriate care.

17. There are no independent acts of negligence against this Defendant.

Defendant Raphael J. Convit, M.D.:

1. Defendant objects to Plaintiffs' statement of their claims on the grounds that it is not sufficiently detailed and does not provide Defendant with notice of the actual, specific claims Plaintiffs are pursing at trial.

2. Defendant generally denies that the medical care and treatment rendered to Plaintiff fell below the standard of care.

3. Defendant maintains that, at all times relevant hereto, he acted in accordance with the applicable standards of medical care and specifically denies that he was negligent in the treatment of Plaintiff.

4. Defendant specifically denies that any of Plaintiff's alleged injuries were a result of any negligence of Defendant.

5. Defendant generally denies that any negligent act and/or omission allegedly attributable to him caused or substantially contributed to Plaintiff's claimed injuries and disputes the nature, extent, cause and duration of Plaintiff's alleged injuries and damages.

6. Defendant asserts the defenses of contributory negligence and/or assumption of the risk.

7. Defendant adopts and incorporates his Rule 26(b)(4) Statement, any supplements thereto, deposition testimony and the testimony and/or reports of Defendant's expert witnesses as to liability, causation and damages.

E. **UNDISPUTED ISSUES/STIPULATIONS**

1. Mr. and Mrs. Wilson were at all times husband and wife.

2. A health care provider/ patient relationship existed between all defendants and Mr. Wilson.

Defendant, Washington Brain & Spine Institute, P.C., objects to No. 2 as it is a business entity and not a health care provider.

F. **DISPUTED ISSUES**

Defendants dispute all allegations of negligence and causation of injuries, and damages.

G. **REQUESTED STIPULATIONS**

Joint:

1. The parties will attempt to agree on pagination of medical records for use at trial.

2. With the Court's permission, the parties agree to exchange all exhibits and designation of deposition extracts of the parties to be used ten days before trial, and file any objections thereto within five days before trial.

By Plaintiffs:

1. The action is timely.

2. Mr and Mrs Wilson were at all times husband and wife.

3. A health care provider/patient relationship existed between all Defendants and Mr. Wilson.

Defendant, Washington Brain & Spine Institute, objects to No. 3.

Defendants:

1. Defendants stipulate only to the authenticity of the medical records, bills, radiological films, pathology slides, and laboratory results exchanged in discovery. Defendants do not stipulate that the action is timely. All other objections are preserved.

2. There are no independent allegations of negligence against Defendant, Washington Brain & Spine Institute, P.C.

H. **RELIEF SOUGHT**

By Plaintiffs:

Plaintiffs seek the following damages:

A. Economic losses: Future Care Needs—$5,000,000
B. Non-economic losses: Mr. Wilson--$15,000,000
C. Mrs. Wilson—loss of consortium—$10,000,000
D. Past Medicals—Approximately $450,000

Defendants:

1. Defendants seek dismissal of this case with prejudice or an entry of judgment in their favor. Defendants also seek an award of costs and expenses. Defendants object to the excessive nature of Plaintiffs' requested relief, and their claimed economic and non-economic damage valuations.

I. CITATIONS

By Plaintiffs: Doe v. Binker, 492 A.2d 857 (1985)

Defendant Dr. Convit:

Defendant will, at the time of trial, submit to the Court a general trial brief. Defendants also may submit other trial briefs concerning any appropriate subject matter as the issues raised at the time of trial may dictate.

Defendants John Barrett, M.D. and Washington Brain & Spine Institute, P.C.:

1. Defendant reserves the right to brief any and all issues that arise at trial.

2. Defendant refers this Court to any article or publication referenced by any of Defendants' expert witnesses in a report, during deposition, or at trial.

3. Defendant refers this Court to cases cited in its proposed non-standard jury instructions, if any.

4. Defendant reserves the right to request and/or draw the Court's attention to additional citations at the Pretrial or Trial of this matter, should it become necessary due to the facts, evidence, or circumstances.

5. Defendant notifies the Court of its intention to rely on Maryland law with regard to non-economic losses.

6. Defendant objects to Plaintiffs' use of Doe v. Butler under the facts of this case.

J. **PENDING MOTIONS**

There is one pending motion. Plaintiffs have moved for an Order excusing lead counsel Bruce J. Klores from attending the pretrial conference on February 15, 2006, at 9:15 a.m., because he will be in trial in Montgomery County, Maryland that day, and allowing Thomas W. Mitchell to attend in Mr. Klores' absence.

The parties reserve the right to file motions *in limine* up to ten days before trial. Defendants further reserve the right to file motions *in limine* at trial based upon facts, evidence, and/or testimony to be presented.

K. **WITNESSES**

Plaintiffs' Lay Witnesses:

1. Eileen Wilson
2. Theresa Wilson
3. Tammy Wilson
4. Mr. and Mrs. Kenneth Ward
5. Diane Wildman
6. Danielle Adkins

7. Glen Kreitzler

8. Valerie Mills

9. Shannon Wilson

10. John Barrett, M.D.

11. Rafael Convit, M.D.

12. Muhammad Moussavian, M.D.

13. Catherine Brophy, M.D.

14. Dr. Massini

15. Edward F. Aulisi, M.D.

16. Alexandros Powers, M.D.

17. Philip Berryhill, M.D.

18. All witnesses identified by the defendants, and all doctors and nurses who have treated Mr. Wilson.

Plaintiffs' Expert Witnesses:

1. Michael Williams, M.D. – neurologist and hydrocephalus expert
2. Sydney Peerless, M.D.—neurosurgeon
3. John Robbins, M.D. –neurosurgeon
4. Clayton Moravec, M.D.—infectious disease
5. Gary Lustgarten, M.D.—neurosurgeon
6. Richard Bonfiglio, M.D. -- physical medicine and rehabilitation
7. Terri Patterson, R.N.—life care planner

8. Richard Lurito, Ph.D -- economist

9. Frank Anderson, M.D.---defendants neurologist

10. Donlin Long, M.D.—defendants neurosurgeon

11. Arnold Breitbart, M.D. -- plastic surgeon

12. Kenneth Murray, M.D.---defendant neurosurgeon

13. Andrew Mayrer, M.D.—defendant infectious disease expert

14. Plaintiffs reserve the right to call any defense expert witness.

Defendant Dr. Barrett's Witnesses:

1. John Barrett, MD

2. Rafael Convit, MD

3. Zachary Levine, MD

4. Catherine Brophy, MD

5. Mohammad Moussavian, MD

6. Michael Williams, MD

7. Edward F. Aulisi, M.D.

8. Matthew Brackman, M.D.

9. Rakesh Jaitly, M.D.

10. Jimmy A. Light, M.D.

Defendant may also call the following treating physicians:

11. Russell Buchanan, M.D.

12. Michael Ayad, M.D.

13. Lee H. Monsein, M.D.

14. Alan Ost, M.D.

15. David R. Buck, M.D.

16. Richard Pratt, M.D.

17. James S. Jelinek, M.D.

18. Arnold Raizon, M.D.

19. Dana A. Twible, M.D.

20. Ann Archer, M.D.

21. Anna H. Choi, M.D.

22. Alexander S. Mark, M.D.

23. Robert Laureno, M.D.

24. Joseph Liberman, M.D.

25. Marc Schlosberg, M.D.

26. Mohammed Yaseen, M.D.

27. Victor Dean, M.D.

28. F. Niechniedowicz, M.D.

29. Phillip Berryhill, M.D.

30. E.L. Best, M.D.

31. K. Ashunadu, M.D.

32. Dan Lucey, M.D.

33. S. Andre, M.D.

34. M.R. Jeopeize, M.D.

35. Regina Hampton, M.D.

36. T. Right, M.D.

37. Richard Pratt, M.D.

38. Anna H. Choi, M.D.

39. Maria Jin, M.D.

40. Evan Pickus, M.D.

Defendant Dr. Barrett's Expert Witnesses:

1. Donlin Long, MD (expert, neurosurgery)

2. Allan Morrison, MD (expert, infectious disease)

3. Roger Gisolfi, MD (expert physical medicine and rehabilitation medicine)

4. Martha Bernad, ScD, CRC (expert, rehabilitation/life care planner)

5. Lise Van Susteren, MD (expert, psychiatry)

6. Thomas Grogan (expert, economist)

7. Defendant further reserves the right to call, elicit and/or rely on expert testimony from any expert witnesses identified by any other party, not otherwise objected to.

Defendant Dr. Barrett's Other Witnesses:

1. Defendant reserves the right to call as witness any witness identified above in Plaintiff's witness list, or in any other party's witness list.

2. Defendant reserves the right to call any health care provider who evaluated, diagnosed or provided care or consultation to Mr. Wilson.

3. Defendant reserves the right to call any witness whose identity was disclosed or revealed in the ordinary course of discovery, including through deposition testimony and/or

through documents produced by the parties or otherwise obtained through subpoena or release.

Washington Brain & Spine Institute, P.C.'s Witnesses:

* denotes those most likely to be called.

1. Frederick C. Wilson
2. Clara Eileen Wilson*
3. Tammy Wilson
4. Teresa Wilson
5. Carl Wilson
6. John W. Barrett, M.D.*
7. Rafael J. Convit, M.D.*
8. Mohammed Moussavian, M.D.*
9. Rakesh Jaitly, M.D.
10. Jimmy A. Light, M.D.
11. Russell Buchanan, M.D.
12. Michael Ayad, M.D.
13. Zachary Levine, M.D.*
14. Edward F. Aulisi, M.D.*
15. A. St. Andre, M.D.*
16. Anna H. Choi, M.D.*
17. Andrea R. Giacometti, M.D.*
18. Alan Ost, M.D.
19. David R. Buck, M.D.

20. Richard Pratt, M.D.

21. James S. Jelinek, M.D.

22. Arnold Raizon, M.D.

23. Dana A. Twible, M.D.

24. Ann Archer, M.D.

25. Alexander S. Mark, M.D.

26. Robert Laureno, M.D.

27. Joseph Liberman, M.D.

28. Marc Schlosberg, M.D.

29. Mohammed Yaseen, M.D.

30. Victor Dean

31. F. Niechniedowicz, M.D.

32. Phillip Berryhill, M.D.

33. E. L. Best, M.D.

34. Mario Golocovsky, M.D.

35. Matthew R. Brackman, M.D.

36. Alex Powers, M.D.

37. Dan Lucey, M.D.

38. M.R. Jeopeize, M.D.

39. Regina Hampton, M.D.

40. T. Right, M.D.

41. Richard Patt, M.D.

42. Maria Jin, M.D.

43. Evan Pickus, M.D.

44. Dr. Berhael

45. Dr. Jurao

46. Dr. Owings

47. Dr. Levine

48. Dr. Gupta

49. Dr. Messina

50. Dr. Stasigwicz

51. Dr. Premuzic

52. Dr. Kim

53. Dr. Rak

54. Dr. Herr

55. Dr. Jesperson

56. Dr. Lee

57. Dr. Morkos

58. Dr. Hockstein

59. Dr. Zuberi

60. Dr. Papanicali

61. Dr. McCormack

62. Dr. Levy

63. Dr. Asmedu

64. Dr. Jison

65. Dr. Paul

66. F. Simmons, LIC

67. J.M. Wisu, PA-C

68. D. Blasiole, PA-C

69. N. Adams, CRNA

70. R. Marlatt, CRNA

71. E. Begin, CRNA

72. S. Sutton, SRNA

73. A. Milburn, SRNA

74. C. Nassau, RD, LD, CNSP

75. M. Lewis, P.T.

76. Christine Watt, MPT

77. Daisy Moore

78. Danielle Smith, R.T.

79. C. Garcia, R.N.

80. E.A. Marshall, R.N.

81. S. Haywood, R.N.

82. K. Flater, R.N.

83. N. Feely, R.N.

84. Vanessa Isaac, R.N.

85. B. Welsh, R.N.

86. N. Thompson, R.N.

87. J. Claxton, R.N.

88. C. Potts, R.N.

89. K. Lacey, R.N.

90. S. Eaton, R.N.

91. S. Cho, R.N.

92. M. Llave, R.N.

93. H. Locksley, R.N.

94. Jeanne Slollee, R.N.

95. C. Braswell, R.N.

96. Lisa Smith, R.N.

97. L. Nembhard, R.N.

98. Lucy Nivachuker, R.N.

99. D. Elluse, R.N.

100. C. Carter, R.N.

101. Dwayne Connor, R.N.

102. N. Adam, R.N.

103. Mary W. Montgomery, R.N.

104. Greg Buchhester, R.N.

105. Debra Mickens, R.N.

106. G. Sellman, R.N.

107. Jennifer Chase, R.N.

108. Lonnie P. Herring, R.N.

109. T. Nome, R.N.

110. S. Rolle, R.N.

111. David Whitfield, R.N.

112. C. Curry, R.N.

113. Robert Banko, R.N.

114. John Fulcher, R.N.

115. Andrew Edwards, R.N.

116. Megan Manning, R.N.

117. Donald K. Miller, II, R.N.

118. Michael Pasierb, R.N.

119. Q. Williams, R.N.

120. Joe Stine, R.N.

121. Lisa Jones, R.N.

122. Glenn E. Watkins, R.N.

123. L. Conley, R.N.

124. C. Smith, R.N.

125. D. Miller, R.N.

126. Patrice Franklin, R.N.

127. Nicole Thevenot, R.N.

128. Lisa Tikelabury, R.N.

129. M. Deloskey, R.N.

130. Lisa Lundregan, R.N.

131. Carmina Concepcion, R.N.

132. Andrea Mendola, R.N.

133. Mary Benitez, R.N.

134. Kam Carletti, R.N.

135. J. Breakey, R.N.

136. K. Manuster, R.N.

137. K. Wallace, R.N.

138. Steve Youngstrom, R.N.

139. Edward James, R.N.

140. S. Samuel, PAS REP I

141. Evelyn Brooks

142. Calvin Beidleman

143. Timothy McWilliams

144. Elmina Ross

145. Edward Boxwell

146. James Sugent

147. Alfred Daley

148. Leslie Reynolds

149. Alisa Seaward

150. Solomon Hinsta

151. Gary Kensey

152. Jacqueline Sander

153. Delshawn Rollins

154. Nina Lewis

155. Megan Kriner

156. Theresa Lewis

157. Beverly Galloway

158. Tamarra Baker

159. Kudjo Aglagoh

160. Lori Mathis

161. Mary Claiborne

162. Eric Kriner

163. Jennifer Chandler

164. Tracy Cunningham

165. Ram Gupta

166. Camilla Eatmon

167. Catherine E. Hyler

168. Emmanuel Fokkoun-Ngassa

169. April Hampton

170. Morton R. Simon

171. Lula Berhane

172. Sepia Hicklin

173. Joel Boyer

174. Walter Glaser

175. Manette Reckson

176. Gemma Serquina

177. Fulton J. Lukban, M.D.

178. Benita F. Banks, M.D.

179. Dr. Stewart

180. Mary M. McCullough, R.N.

181. Christopher Curcio, M.D.

182. Gina Pervall-Phillips, M.D.

183. Dan Kramer, M.D.

184. George Ghuz, M.D.

185. Briggs Bralliar, M.D.

186. Shailesh K. Sheth, M.D.

187. William K. Brems, M.D.

188. P. Elliott, M.D.

189. Judith Gadol, M.D.

190. J. Kevin Belville, M.D.

191. Brenda Cley, M.D.

192. Gerald P. Sterner, M.D.

193. Ari M. Lieman, M.D.

194. Karl Hellinger, M.D.

195. Charles Lewis, M.D.

196. Dr. Leggett-Johnson

197. Dr. Waters

198. Dr. Ron

199. Dr. Phillips

200. Patricia S. Vondran, R.N.

201. B. Kunshu, R.N.

202. C. Marks, R.N.

203. Ramses X. Chavarria, VSA

204. Sarah P. Lloyd, CCAD, FNP

205. C. Jenkins, COA

206. Sandra Thomas, CA

207. L. Hodges, VCA

208. Verbina Reed

209. Michael A. Williams, M.D.

210. Jon Weingart, M.D.

211. David N. Irani, M.D.

212. Raymon A. Noble, M.D.

213. Any and all staff of Defendant, The Washington Brain & Spine Institute, P.C., who may have assisted in the treatment, examinations, or had contact with Frederick Wilson.

214. Any and all health care providers who may have treated, examined, or had contact with Frederick Wilson at Calvert Memorial Hospital or the Washington Hospital Center for any of his examinations, treatments, and/or admissions.

215. Any and all health care providers who may have treated, examined, or had contact with Frederick Wilson at any health care facility for any of his examinations, treatments, and/or admissions.

216. Defendant reserves the right to designate as a fact witness any and all witnesses listed in Plaintiffs' Fact Witness List, or any Co-Defendant's Fact Witness List, as well as any and all witnesses listed in any medical and/or court record pertaining to this action and the facts which underlie it.

217. Defendant reserves the right to designate as a fact witness any and all persons identified by Plaintiffs and/or any Co-Defendant in their Answers to Interrogatories and/or deposition testimony.

Defendant Washington Brain & Spine Institute, P.C.'s Expert Witnesses:

1. Donlin Long, M.D.
   Johns Hopkins Hospital
   600 North Wolfe Street
   Carnegie 466
   Baltimore, Maryland 21287

In addition to the information provided in the preliminary identification of Dr. Long's expected testimony, it is also anticipated that Dr. Long will testify consistent with his deposition testimony.

2. Kenneth J. Murray, M.D.
   2328 West Joppa Road, Suite 103
   Lutherville, Maryland 21093

In addition to the information provided in the preliminary identification of Dr. Murray's expected testimony, it is also anticipated that Dr. Murray will testify consistent with his deposition

testimony.

3. Allan Morrison, M.D.
3289 Woodburn Road, Suite 200
Annandale, Virginia 22003

In addition to the information provided in the preliminary identification of Dr. Morrison's expected testimony, it is also anticipated that Dr. Morrison will testify consistent with his deposition testimony.

4. Martha M. Bernad, Sc.D., C.R.C.
1250 Pine Hill Road
McLean, Virginia 22101

In addition to the information provided in the preliminary identification of Ms. Bernad's expected testimony, it is also anticipated that Ms. Bernad will testify consistent with her report.

5. Thomas Grogan
TFG Consulting
Victoria Business Center
1489 Baltimore Pike, Suite 211
Springfield, Pennsylvania 19064

In addition to the information provided in the preliminary identification of Mr. Grogan's expected testimony, it is also anticipated that Mr. Grogan will testify consistent with his report.

Defendant Dr. Convit's Expert Witnesses:

1. Ronald Silverman, M.D. (plastic surgery)
University of Maryland Medical Center
Division of Plastic and Reconstructive Surgery
22 S. Green Street
Room S8-D12
Baltimore, Maryland 21201

2. Michael J. Olding, M.D. (plastic surgery)
George Washington University Hospital
2150 Pennsylvania Avenue, NW

Department of Surgery
Washington, DC 20037-2396

3. Andrew Mayrer, M.D. (infectious diseases)
Sinai Hospital
Division of Infectious Disease
Hoffberger Professional Building
2435 W. Belvedere Avenue, Suite 56
Baltimore, Maryland 21215

4. Frank Anderson, M.D. (neurology)
5233 Partridge Lane, NW
Washington, DC 20016-5338

5. Martha M. Bernad, Sc.D., C.R.C. (vocational rehabilitation, life care planning)
1250 Pine Hill Road
McLean, Virginia 22101

6. Roger Gisolfi, M.D. (physical medicine and rehabilitation)
Physical Medicine and Rehabilitation Department
Mount Vernon Hospital
2501 Parker's Lane
Alexandria, Virginia 22306

7. Thomas F. Grogan (economics)
Victoria Business Center
1489 Baltimore Pike
Suite 211
Springfield, Pennsylvania 19064

Defendant Dr. Convit's Primary Witnesses:

1. Raphael J. Convit, M.D.

2. John W. Barrett, M.D.

3. Eileen Wilson

4. Mohammed Moussavian, M.D. (Kaiser Permanente)

5. Zachary Levine, M.D.

6. Edward F. Aulisi, M.D.

7. A. St. Andre, M.D.

8. Anna H. Choi, M.D.

9. Andrea R. Giacometti, M.D.

10. Christopher Curcio, M.D.

11. Raymond Noble, M.D.

12. George Gluz, M.D.

13. Wayne Roznan, M.D.

14. Michael Williams, M.D.

15. Catherine L. Brophy, M.D.

16. Jimmy A. Light, M.D.

17. Dan Lucey, M.D.

18. Dr. Kogulan

Defendant Dr. Convit's Secondary Witnesses (if necessary):

1. Custodians of records for all of Mr. Wilson's health care providers if there is any dispute concerning authenticity.

2. Defendant reserves the right to call any witnesses listed by Plaintiffs and all co-defendants.

3. Defendant adopts and incorporates by as if fully set out herein the witness lists of all other parties.

L. **EXHIBITS**

For Plaintiffs:

1. See attached list.

2. Plaintiffs reserve the right to use and all exhibits listed by the Defendants.

3. Plaintiffs object to some or all of Defendants' exhibits and reserves the right to state the grounds therefore once they have an opportunity to review the actual exhibits. At this point, Plaintiffs specifically object to the following: Dr. Barrett's exhibits: Nos. 3, 5, 7, and 8. Washington Brain and Spine's exhibits: Nos. 16, 18-20. Dr. Convit's exhibits: Nos. 3-4.

Defendant Dr. Barrett:

1. Plaintiff's records related to care, treatment and evaluation of Plaintiff from the following health care providers and facilities:

(a) Washington Hospital Center

(b) Calvert Memorial Hospital

(c) Washington Brain and Spine office chart

(d) Rafael Convit, M.D. office chart

(e) Johns Hopkins Hospital

(f) Kaiser Permanente chart

(g) Hopkins Adult Hydrocephalus Program chart (Dr.Wiliams)

(h) Raymond Noble, M.D. office chart

(i) Adventist Home Health Services

(j) Christopher Curcio, M.D. chart

2. Articles and Medical Literature reviewed by expert witnesses

3. Medical Models, Illustrations, and Exemplars

4. Enlargements/Blow-ups of medical records

5. Enlargements/Blow-ups of texts

6. Exhibits produced by Plaintiff's experts at or related to deposition testimony

7. Curriculum Vitae of Dr. Barrett

8. Curriculum Vitae of Defendants' expert witnesses

9. Medical bills from providers identified above

10. Defendant reserves the right to use any exhibit identified by Plaintiff or any other party herein.

11. Defendant reserves the right to object to any exhibit on any evidentiary basis available. Defendant further reserves the right to object to Plaintiff's exhibits which are not identified as of the time of this filing. At this point, Defendant objects to the following specific exhibits of Plaintiffs: Nos. 20-32, 36-38, 43-44, 51-60. Defendant specifically reserves his objections as to the following: 45-50.

Defendant Washington Brain & Spine Institute, P.C.

1. See attached Exhibit Summary Forms.

2. Defendant reserves the right to use and all exhibits listed by Plaintiffs and/or Co-Defendants.

3. Defendant objects to Plaintiffs' Exhibits Nos. 20-32, 36-38, and 43-60 listed above, and reserves the right to state the grounds therefore once it has an opportunity to review the actual exhibits.

Defendant Dr. Convit:

1. Relevant and admissible portions of Mr. Wilson's medical records from all health care providers including, without limitation, the following:

(a) Washington Brain & Spine Institute, P.C.

(b) John W. Barrett, M.D.

(c) Kaiser Permanente

(d) Washington Hospital Center

(e) Christopher Curcio, M.D.

(f) Calvert Memorial Hospital

(g) Raymond Noble, M.D.

(h) Johns Hopkins Medical Center

(i) George Gluz, M.D.

(j) Wayne Roznan, M.D.

(k) Michael Williams, M.D.

(l) Catherine L. Brophy, M.D.

(m) Adventist Home Health Services, Inc.

4. Enlargements of relevant exhibits.

5. Photographs taken by Dr. Convit on May 18, 2000

6. Anatomical diagrams.

7. Defendant objects to Plaintiffs' proposed exhibits 20-32, 36-38, 43-44, and 51-60

M. **DEPOSITION TESTIMONY**

The parties agree to exchange designations of deposition testimony ten days before trial, and all objections filed five days before trial. The parties reserve the right to use deposition testimony to the extent permitted by the rules of evidence.

Plaintiffs:

1. Plaintiffs reserve the right to submit as substantive evidence the deposition of any witness unavailable for trial, and reserves the right to submit any deposition testimony for purposes of rebuttal or impeachment, in accordance with the Rules of this Court.

2. In the event that any witness is "unavailable," in accordance with the Rules of this Court, Plaintiffs reserve the right to present any unavailable witness' testimony through *de benne esse* deposition testimony.

3. Plaintiffs reserve the right to use deposition testimony taken in this action for impeachment purposes.

Washington Brain & Spine Institute, P.C.:

1. Defendant reserves the right to submit as substantive evidence the deposition of any witness unavailable for trial, and reserves the right to submit any deposition testimony for purposes of rebuttal or impeachment, in accordance with the Rules of this Court. Defendant will supplement these designations at least one (1) week before trial.

2. In the event that an witness is "unavailable," in accordance with the Rules of this Court, Defendant reserves the right to present any unavailable witness' testimony through *de benne esse* deposition testimony.

3. Defendant reserves the right to use deposition testimony taken in this action for impeachment purposes.

N. **PLEADING AND DISCOVERY RESPONSES**

The parties agree to exchange designations of pleadings and discovery responses ten days before trial, and all objections filed five days before trial. The parties reserve the right to use discovery responses to the extent permitted by the rules of civil procedure and the rules of evidence.

Plaintiffs:

1. Plaintiffs reserve the right to offer the discovery responses of the Defendants, and any medical records that may have been produced in this matter as a response to a Request for Production of Documents, whether or not specifically listed on the parties' exhibit lists.

2. Plaintiffs reserve the right to use Defendants' depositions, as well as any pleading or discovery response, for impeachment, or in any matter consistent with the Rules of this Court.

Washington Brain & Spine Institute, P.C.:

1. Defendant reserves the right to offer as substantive evidence any discovery response of Plaintiffs, and any medical records that may have been produced in this matter as a response to a Request for Production of Documents, whether or not specifically listed on Plaintiffs' or Defendants' Exhibit Lists.

2. Defendant reserves the right to use Plaintiff's deposition, as well as any pleading or discovery response submitted by any party, for impeachment, or in any matter consistent with the Rules of this Court.

O. **DEMONSTRATIVE OR PHYSICAL EVIDENCE**

The parties reserve the right to use and agree to exchange demonstrative or physical evidence, including medical models, illustrations, summaries, time lines and exemplars, as well

as enlargements and blow-ups of medical records, ten days before trial, and all objections filed five days before trial.

Plaintiffs:

1. Plaintiffs reserve the right to introduce, utilize, or rely upon any demonstrative or other physical evidence identified by Defendants.

2. As indicated in Plaintiffs' exhibit list, Plaintiffs reserve the right to use demonstrative exhibits consisting of blow-ups of medical records, medical-anatomical diagrams, medical films or slides, and photographs, and other such demonstrative exhibits that will be exchanged pursuant to the above agreement.

Washington Brain & Spine Institute, P.C.:

1. Defendant reserves the right to use a blow-up or enlargement of any medical record or exhibit.

2. Medical illustrations, artists' sketches, drawings, and/or models.

3. Radiographic and/or pathologic slides.

4. Photographs, photomicrographs, and/or slides.

5. Exhibits to depositions.

6. Power Point demonstrations.

7. Defendant reserves the right to introduce, utilize, or rely upon any demonstrative or other physical evidence identified by Plaintiff or Co-Defendants.

8. Defendant reserves the right to object to demonstrative evidence that is to be identified/exchanged pursuant to the above agreement.

P. **VIDEOTAPES**

By Plaintiffs:

Plaintiffs have provided two videos to the defense of Mr. and Mr. Wilson and may use all or parts of them at trial.

Defendants:

1. Defendants object to the use of videotape presentation of Plaintiff and his family, and reserve the right to object to introduction of any videotape testimony on any available evidentiary grounds. Defendants intend to file a motion concerning the admissibility of Plaintiffs' videotapes.

2. If a witness becomes unavailable for trial within the Superior Court Rules, Defendants reserve the right to take and use at trial a videotape deposition. Ample notice will be given to all counsel. Defendants request that the Court enter as a part of the pretrial order that they be permitted to to bring videotape equipment into the courtroom.

Q. **REQUESTED-VOIR DIRE**

By Plaintiffs: See attached.

Defendant Dr. Convit: See attached. Defendant objects to Plaintiffs' proposed voir die #2, #3, and #6.

Defendant Dr. Barrett: See attached.

R. **LIST OF STANDARD JURY INSTRUCTIONS REQUESTED**

By Plaintiffs:

1-1 Function of the Court
1-2 Function of the Jury
1-3 Significance of Party Designations
1-4 Juror's Duty to Deliberate
1-5 Attitude and Conduct of Jurors
1-6 Instructions to be Considered as Whole

1-7 Court's Comments on Evidence
1-8 Court's Questions to Witnesses
1-9 Jury Not to Take Cue from Judge
1-10 Rulings on Objections
1-11 Equality of Litigants – Individuals
1-11 Equality of Litigants – Individuals

2-1 Evidence in the Case
2-2 Evidence in the Case – Judicial Notice
2-3 Inferences
2-4 Inadmissible and Stricken Evidence (if appropriate)
2-5 Statements of Counsel
2-6 Jury's Recollection Controls
2-8 Burden of Proof
2-9 Evidence Produced by Adversary
2-10 Direct and Circumstantial Evidence

3-1 Jury to Determine Credibility of Witnesses
3-2 Number of Witnesses
3-3 Expert Opinion
3-5 Depositions as Evidence (if needed)
3-8 Impeachment by Prior Inconsistent Statements (if appropriate)
3-9 Adopting Prior Inconsistent Statements (if appropriate)

5-1 Elements of a Negligence Cause of Action
5-2 Negligence Defined (Objection by Defendants)
5-3 Relative Concept
5-12 Proximate Cause Defined

6-1 Employer/employee liability/stipulated
6-2 Vicarious Liability – Basis
6-3 Agency or Scope of Employment Conceded
6-5 Employer and employee sued

9-1 Nature of the Medical Malpractice Claim
9-2 General Standard of Care of Professionals
9-3 Professional Liability – Elements of Claim
9-4 Professional Liability – Proximate Cause – Substantial Factor (Objection by Defendants)
9-7 General Standard of Care – Nationally Certified Specialist
9-8 Standard of Care Determined by Expert Testimony

12-1 Damages – Jury to Award
12-4 Multiple Defendants – Size of Verdict

12-5 Damage Verdict – Multiple Defendants

13-1 Damages – Elements
13-3 Medical Treatment – Past and Present
13-4 Lost Earnings – Past and Present
13-5 Lost Earnings – Future
13-6 Loss of Consortium (Objection by Defendants)
13-8 Special susceptibility
13-9 Recovery for emotional distress
13-10 Life Expectancy

14-2 Plaintiff's Role in Survival Action and Wrongful Death Action
14-3 Survival Action (Where Accompanied by Wrongful Death Action)
14-4 Wrongful Death – Real Parties
14-5 Wrongful Death Act Damages

Plaintiff objects to any requested instructions by defendants not on the above list.

Defendant Dr. Barrett:

Pattern Instructions: Defendant John Barrett, M.D. requests the following instructions:

1.01 Function of the Court
1.02 Function of the Jury
1.03 Significance of Party Designations
1.04 Jury's Duty to Deliberate
1.05 Attitude and Conduct of Jurors
1.06 Instructions to be Considered as a Whole
1.07 Court's Commenting on the Evidence
1.08 Court's Questions to Witnesses
1.09 Jury Not to Take Cue from Judge
1.10 Rulings on the Objections
1.11 Equality of Litigants – Corporations
1.12 Equality of Litigants – Individuals

2.01 Evidence in the Case
2.04 Inadmissible and Stricken Evidence
2.05 Statements of Counsel
2.06 Jury's Recollections Controls
2.07 Evidence Admitted Against One Party Only
2.08 Burden of Proof
2.10 Direct and Circumstantial Evidence

3.01 Jury to Determine Credibility of Witnesses

3.02 Number of Witnesses
3.03 Expert Opinion
3.04 Failure to Produce Stronger Evidence
3.05 Depositions as Evidence
3.08 Impeaching by Prior Inconsistent Testimony
3.10 Charts and Summaries

4.01 Multiple Plaintiffs
4.03 Multiple Defendants

5.04 Extreme Caution Not Required
5.05 Right to Assume Proper Conduct
5.06 No Comparative Negligence
5.13 Concurrent Causes
5.14 Intervening causes
5.15 Contributory Negligence Defined
5.17 Assumption of Risk
5.19 Fact of [Complication] Alone

9.01 Nature of Medical Malpractice Claim
9.02 General Standard of Care of Professionals
9.03 Professional Liability – Elements of Claim
9.04 Professional Liability – Proximate Cause
9.06 Bad result
9.08 Standard of Care Determined by Expert Testimony

12.01 Damages
12.02 Extent of Damages
12.03 Burden of Proof Speculative Damages
12.04 Multiple Defendants – Size of verdict
12.05 Damage Verdict – Multiple defendants
12.06 Duty to Mitigate Damages
13.01.1Damages Elements
13.03.1Medical Treatment
13.06.1Loss of Consortium
13.06.2Aggravation of Preexisting Condition
13.12 No Punitive Damages

Defendant will provide non-pattern jury instructions according to the evidence adduced at trial, including an instruction on spoliation of evidence.

Defendant Dr. Barrett's Objections to Plaintiffs' Standard Jury Instructions:1.

Defendant objects to Instructions 5-1, 5-2, 5-3, 5-12, 9-7, 13-4, 13-5, 13-8, and 13-9.

Washington Brain & Spine Institute, P.C.'s Objections to Plaintiffs' Instructions:

Defendant, Washington Brain & Spine Institute, P.C., objects to Plaintiffs' requested jury instructions, including any reference to Doe v. Binker, and reserving the right to amend any and all jury instructions at the time of trial.

Defendant requests the following:

1-3 Significance of Party Designations
1-11 Equality of Litigants – Individuals
1-12 Equality of Litigants – Individuals

2-7 Evidence Admitted Against One Party Only

3-8 Impeachment by Prior Inconsistent Statements (if appropriate)
3-9 Adopting Prior Inconsistent Statements (if appropriate)

4-3 Multiple Defendants

5-4 Extreme Caution or Exceptional Skill Not Required
5-13 Concurring Causes
5-14 Intervening Cause
5-15 Contributory Negligence Defined
5-17 Assumption of Risk

6-2 Vicarious Liability - Basis
6-3 Agency or Scope of Employment Conceded

9-6 Bad Result

12-2 Extent of Damages – Proximate Cause
12-3 Burden of Proof – Speculative Damages
12-7 Duty to Mitigate Damages

13-12 Punitive Damages Not Authorized Where Only Ordinary Negligence Is Shown

Defendant Dr. Convit:

In addition to Plaintiffs' standard jury instructions to which Defendant does not object, the following are also identified:

3-8 Impeachment by Prior Inconsistent Statements
3-9 Adopting Prior Inconsistent Statements

9-6 Bad Result (first paragraph only)

12-2 Extent of Damages – Proximate Cause
12-3 Burden of Proof – Speculative Damages

Defendant Dr. Convit's Objections to Plaintiffs' Standard Jury Instructions:

5-1 Defendant objects on the ground that the negligence instructions applicable to medical malpractice cases are included in the 9 series instructions. The parties have already designated the appropriate 9 series instructions, and therefore the 5 series instructions are duplicative.

5-2 See comments concerning 5-1 above.

5-3 See comments concerning 5-1 above.

5-12 See comments concerning 5-1 above.

9-9 Defendant objects because there is no claim concerning informed consent with respect to Defendant Dr. Convit.

13-4 Defendant objects on the ground that there has been no claim for lost earnings, especially by Mrs. Wilson.

13-5 Defendant objects on the ground that there has been no claim for lost earnings, especially by Mrs. Wilson.

13-8 Defendant objects because the requested instruction is not applicable to this case.

S. NON-STANDARD JURY INSTRUCTIONS REQUESTED

Plaintiffs reserve the right to submit non-standard jury instructions prior to trial and/or based upon the evidence at trial. Plaintiffs object to the defendants' proposed non-standard instructions.

Defendant Washington Brain & Spine Institute, P.C.:

See attached.

Defendant Dr. Convit:

See attached.

Defendants reserve the right to submit requests for non-standard jury instructions at the close of all the evidence at trial.

T. **VERDICT FORM**

By Plaintiffs:

See attached. Plaintiffs reserve the right to withdraw or modify their proposed form and/or submit special interrogatories based on the evidence admitted and rulings of the Court at trial. Plaintiff may object to Defendants' proposed verdict form.

Defendants John Barrett, M.D. and Washington Brain & Spine Institute, P.C.:

1. See Defendant's proposed Verdict forms.

2. Defendant reserves the right to withdraw or modify its proposed form and/or submit special interrogatories based on the evidence admitted and ruling of the Court at trial.

3. Defendant objects to Plaintiffs' proposed Verdict form.

Defendant Dr. Convit:

See attached.

U. **SETTLEMENT**

No serious discussions have taken place.

V. **ESTIMATED LENGTH OF TRIAL**

Ten to eleven days.

W. **OTHER MATTERS**

Plaintiffs:

Plaintiffs' lead trial counsel will be in trial during the scheduled pre trial conference.

Thomas Mitchell, Esq. in his office is aware of this case and ready to attend in his stead.

Defense counsel have no objection to this.

Defendants:

None.

Date: February 10th, 2006

RESPECTFULLY SUBMITTED:

By: /s/ Bruce J. Klores
Bruce J. Klores, Esquire
Scott M. Perry, Esquire
Thomas W. Mitchell, Esquire
Bruce J. Klores & Associates
915 15th Street, N.W.
Suite 300
Washington, D.C. 20005
Attorneys for Plaintiffs

By: /s/ Albert D. Brault, Esquire
Albert D. Brault, Esquire
Heather J. Kelly, Esquire
Brault, Graham, Scott & Brault
101 S. Washington Street
Rockville, Maryland 20850
Attorneys for Dr. Barrett

By: /s/ Brian J. Nash, Esquire
Brian J. Nash, Esquire #230771

Marian L. Hogan, Esquire #445466
Nash & Associates, LLC
Cromwell Center, Suite 201
809 Gleneagles Court
Towson, Maryland 21286
Attorneys for Washington Brain & Spine Institute

By: /s/ Steven A. Hamilton, Esquire
Steven A. Hamilton, Esquire
Matthew D. Banks, Esquire
Hamilton Altman Canale & Dillon, LLC
4600 East-West Highway
Suite 201
Bethesda, Maryland 20814
Attorneys for Dr. Convit

DEFENDANT DR. CONVIT'S PROPOSED VOIR DIRE

1. The name of this case is Frederick Wilson and Eileen Wilson v. John W. Barrett, M.D., Washington Brain and Spine Institute, and Raphael Jacinto Convit, M.D. Does any member of the jury panel believe he or she has any prior knowledge of this case?

2. Is any member of the jury panel related to, or has any member of the jury panel maintained a business or personal relationship, either past or present, with Plaintiffs Frederick Wilson or Eileen Wilson?

3. Is any member of the jury panel related to, or has any member of the jury panel maintained a business or personal relationship with Dr. John W. Barrett, Washington Brain & Spine Institute, or Dr. Raphael J. Convit? Having had that experience, either positive or negative, do you feel you can fairly judge the conduct of any person who is determined to be associated with either of these defendants in this case?

4. Has any member of the jury panel or member of his or her immediate family ever been a patient or employee or otherwise affiliated with defendants Dr. John W. Barrett, Washington Brain & Spine Institute, or Dr. Raphael J. Convit?

5. Has any member of the jury panel or member of his or her immediate family been represented, opposed by or had business dealings with any of the following attorneys:

(a) Bruce J. Klores, Esquire
Scott M. Perry, Esquire
Thomas W. Mitchell, Esquire
Bruce J. Klores & Associates
915 15th Street, N.W.
Suite 300
Washington, D.C. 20005

(b) Brian J. Nash, Esquire
Marian L. Hogan, Esquire
Nash & Associates
Cromwell Center, Suite 201
809 Gleneagles Court
Towson, Maryland 21286

(c) Albert D. Brault, Esquire
Heather J. Kelly, Esquire
Brault, Graham, Scott & Brault
101 S. Washington Street
Rockville, Maryland 20850

(d) Steven A. Hamilton, Esquire
Matthew D. Banks, Esquire
Hamilton Altman Canale & Dillon, LLC
4600 East-West Highway
Suite 201
Bethesda, Maryland 20814

6. Has any member of the jury panel ever filed a lawsuit for any reason, or presently contemplating filing a lawsuit? If so, please provide the details, including the allegations, the outcome and whether the matter was resolved to your satisfaction.

7. Has any member of the jury panel or member of his or her immediate family ever testified in court as a witness? Do you believe that experience would affect your ability to render a fair and impartial verdict in this case?

8. Does any member of the panel or any close relative of any member of the panel have any legal or paralegal training of any nature? If so, state the relationship and nature of training.

9. Is any member of the panel or any close relative of any member of the panel employed or trained as a health care provider of any kind, including but not limited to a doctor, nurse, nursing assistant, or physical therapist?

10. Is any member of the panel or a close relative of any member of the panel employed by an attorney or health care provider or in a health care setting?

11. Has any member of the jury panel or close relative ever experienced or cared for someone who had meningitis or other infection involving the brain?

12. Has any member of the jury panel or close relative ever experienced or cared for someone who has had hydrocephalus?

13. 12. Has any member of the jury panel or close relative ever experienced or cared for someone who has had seizures?

14. Has any member of the jury panel or close relative ever experienced or cared for someone who has had a shunt placed in the brain?

15. Has any member of the jury panel or close relative ever experienced or cared for someone who has had plastic surgery on the head?

16. Has any member of the jury panel or close relative ever experienced or cared for someone who is bedridden?

17. As a result of treatment rendered to you, a family member or friend, do any of you have any feelings in favor of or against health care providers or the medical profession in general that would affect your ability to render fair and impartial decisions?

18. Does any member of the jury panel feel that you cannot fairly evaluate a case in which claims are made for damages received as a result of medical treatment?

19. Is there any member of the jury panel who feels, for any reason, that you cannot sit as a juror in this case and render a fair and impartial verdict based solely on the facts received in evidence and the instructions of law provided by the judge?

SPECIAL JURY INSTRUCTIONS OF DEFENDANT WASHINGTON BRAIN & SPINE INSTITUTE, P.C.

SPECIAL JURY INSTRUCTIONS NO 1.

You are instructed that no inference of negligence arises from the mere happening of a complication following accepted medical procedures. You may not infer that the physician was negligent from the fact that after his treatment, the Plaintiff experienced further medical problems. On the contrary, the legal presumption is that reasonable care was exercised by the physician. The burden of proof is on the party charging negligence to overcome the presumption of due care by a preponderance of the evidence. Quick v. Thurston, 110 U.S. App. 169, 290 F.2d 369 (1961).

Defendant reserves the right to request additional Special Jury Instructions upon the evidence introduced at trial.

DEFENDANT DR. CONVIT'S PROPOSED SPECIAL JURY INSTRUCTIONS

SPECIAL JURY INSTRUCTION NO. 1

You are instructed that a witness who has special training or experience in a given field is termed an "expert" witness. A witness cannot be regarded as an expert merely because he considers himself as such. In weighing the qualifications of such witnesses, the jurors should carefully consider the training of a witness, his experience in the field and his intelligence as observed by you. It would be proper for you to consider the means of knowledge of such a witness. You should consider the evidence showing the opportunity that such witness had to observe and learn the facts upon which his opinion is based. The personal opinions of experts as to how they would have treated Mr. Wilson are not sufficient to prove the standard of care or a breach of any standard of care. **Moreover, experts are not allowed to speculate on their opinions or the basis thereof.** Thus, you cannot rely on personal opinions or speculative opinions in determining the appropriate standards of care, or whether Defendants breached any such standards of care.

Washington v. Washington Hosp. Ctr., 579 A.2d 177, 181 (D.C. 1990).
Meek v. Shephard, 484 A.2d 579, 581 (D.C. 1984).
Toy v. District of Columbia, 549 A.2d 1, 8-9 (D.C. 1988).
Capitol Hill v. Herring, 532 A.2d 89, 93-94 & n.18 (D.C. 1987).
Sponaugle v. Pre-Term, Inc., 411 A.2d 366, 368 (D.C. 1980).

SPECIAL JURY INSTRUCTION NO. 2

Plaintiffs have the burden of proving that the alleged damages were in fact the direct result of injuries caused by Defendants and, in addition, to establish with reasonable certainty the amount of damages suffered as a result of Defendants' conduct. If you find that any of the claimed damages in this action were not a result of Defendants' conduct, but rather were due to an existing physical or emotional condition of Mr. Wilson that was unrelated to Defendants' conduct, you should not award any damages to compensate Plaintiffs for such alleged injuries or conditions.

Manes v. Dowling, 375 A.2d 221 (D.C. App. 1977).
Central Dispensary and Emergency Hosp. v. Harbaugh, Inc., 84 App. D.C. 371, 174 F.2d 507 (1949).
Avrutick v. U.S., 164 F. Supp. 585 (D.C. 1958).

SPECIAL JURY INSTRUCTION NO. 3

You are not to infer from the fact that instructions on the measure of damages are given to you that the Court is instructing you to award damages. The Court is obliged to instruct you on all the issues that might be part of your deliberations. Whether or not damages are to be awarded is a question for the jury's consideration only if you first determine that Defendants are

liable to Plaintiffs in some amount. The order in which these instructions are given on the issues of liability and damages should not be considered by you to indicate that any instructions are more important than the others.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EILEEN WILSON AS GUARDIAN *Ad Litem* FOR FREDERICK C. WILSON, and EILEEN WILSON, INDIVIDUALLY	)
Plaintiffs,	)
vi.	) C.A. No. 03-CA-4014
	) CIVIL I
JOHN W. BARRETT, M.D., *et al.*,	) Calendar 4—Judge Weisberg
Defendants.	)

DEFENDANT DR. CONVIT'S PROPOSED VERDICT FORM[1]

1. Have Plaintiffs proven by a preponderance of evidence that Defendant John W. Barrett, M.D. breached the standard of care in his treatment of plaintiff Frederick C. Wilson?

YES _____ NO _____

Note: If you answered **YES** to Question 1, go to Question 2. If you answered **NO** to Question 1, skip Questions 1, 2, 3 and 4 and go to Question 5.

2. Have Plaintiffs proven by a preponderance of evidence that the negligence of Defendant John W. Barrett, M.D. proximately caused injury to Plaintiff Frederick C. Wilson?

YES _____ NO _____

Note: If you answered **YES** to Question 2, go to Question 3. If you answered **NO** to Question 1, skip Questions 1, 2 and 3 and go to Question 4.

[1] This form may need to be revised to conform to the actual evidence and issues presented at trial.

3. Have Plaintiffs proven by a preponderance of evidence that the negligence of Defendant John W. Barrett, M.D. proximately caused injury to Plaintiff Eileen Wilson?

YES _____ NO _____

Note: Go to Question 4.

4. Have Plaintiffs proven by a preponderance of evidence that Defendant Raphael J. Convit, M.D. breached the standard of care in his treatment of plaintiff Frederick C. Wilson?

YES _____ NO _____

Note: If you answered **YES** to Question 4, go to Question 5. If you answered **NO** to Question 4, skip Questions 5 and 6 and go to Question7 **ONLY IF** you answered YES to Question 1 and YES to either Question 2 or 3. Otherwise, go to Question 5.

5. Have Plaintiffs proven by a preponderance of evidence that the negligence of Defendant Raphael J. Convit, M.D. proximately caused injury to Plaintiff Frederick C. Wilson?

YES _____ NO _____

Note: Go to Question 6.

6. Have Plaintiffs proven by a preponderance of evidence that the negligence of Defendant Raphael J. Convit, M.D. proximately caused injury to Plaintiff Eileen Wilson?

YES _____ NO _____

Note: If you answered **YES** to Question 6, go to Question 7 **ONLY IF** you answered YES to Question 1 and YES to either Question 2 or 3 or YES to Question 4 and YES to either Question 5 or 6. Otherwise, skip Question 7 and return your verdict.

7 What amount do you award to Plaintiff Frederick C. Wilson?

$_____

Note: Go to Question 8 ONLY IF you answered YES to either Question 3 or Question 5.

8. What amount do you award to Plaintiff Eileen Wilson?

$ _____

PLEASE RETURN YOUR VERDICT AT THIS TIME.

_____ _____

Date Foreperson's Juror Number

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

EILEEN WILSON, as Guardian *Ad Litem* for FREDERICK WILSON, and EILEEN WILSON, Individually,	*	Civil Action No. 03-CA-4014
Plaintiffs,	*	Calendar #4 Judge Herbert B. Dixon, Jr.
v.	*	
JOHN W. BARRETT, M.D., et al.,	*	Next Scheduled Event: Pre-Trial Conference, 02/15/06, 4:00 p.m.
Defendants.	*	

* * * * * * *

VERDICT FORM OF DEFENDANT,

WASHINGTON BRAIN & SPINE INSTITUTE, P.C.[1]

1. In the case of Eileen Wilson, as Guardian *Ad Litem* for Frederick Wilson, and Eileen Wilson, Individually, against Defendant, **John W. Barrett, M.D., only**, how do you find?

_____ For the Plaintiffs, Eileen Wilson, as Guardian *Ad Litem* for Frederick Wilson, and Eileen Wilson, Individually.

_____ For the Defendant, John W. Barrett, M.D.

SHOULD YOUR ANSWER TO QUESTION 1 BE "FOR THE PLAINTIFFS," THEN PROCEED TO QUESTION NUMBER 2. IF YOUR ANSWER TO QUESTION 1 IS "FOR THE DEFENDANT," YOU SHOULD PROCEED TO QUESTION NO. 3.

2. Was the negligence of the Defendant, **John W. Barrett, M.D., only**, a proximate cause of the injuries sustained by Plaintiffs?

[1] To be submitted in conjunction with verdict form for Co-Defendants.

_____ Yes

or

_____ No

3. In the case of Eileen Wilson, as Guardian *Ad Litem* for Frederick Wilson, and Eileen Wilson, Individually, against Defendant, **Rafael J. Convit, M.D., only**, how do you find?

_____ For the Plaintiffs, Eileen Wilson, as Guardian *Ad Litem* for Frederick Wilson, and Eileen Wilson, Individually.

_____ For the Defendant, Rafael J. Convit, M.D.

SHOULD YOUR ANSWER TO QUESTION 3 BE "FOR THE PLAINTIFFS," THEN PROCEED TO QUESTION NUMBER 4. IF YOUR ANSWER TO QUESTION 3 IS "FOR THE DEFENDANTS," YOU SHOULD PROCEED TO QUESTION NO. 5.

4. Was the negligence of the Defendant, **Rafael J. Convit, M.D., only**, a proximate cause of the injuries sustained by Plaintiffs?

_____ Yes

or

_____ No

IF YOUR ANSWER TO QUESTION NUMBER 2 AND/OR 4 WAS "YES," THEN PROCEED TO THE FOLLOWING QUESTION (NO. 5). IF YOUR ANSWERS TO BOTH QUESTION NUMBERS 2 AND 4 WERE "NO," THEN YOU ARE TO GO NO FURTHER.

5. In what dollar amount is your verdict for Plaintiffs?

$ _____.

_____

Foreperson

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

EILEEN WILSON, as Guardian *Ad Litem* for FREDERICK WILSON, and EILEEN WILSON, Individually,	*	Civil Action No. 03-CA-4014
Plaintiffs,	*	Calendar #4 Judge Frederick J. Weisberg
v.	*	
JOHN W. BARRETT, M.D., et al.,	*	Next Scheduled Event: Pre-Trial Conference, 02/15/06, 4:00 p.m.
Defendants.	*	

* * * * * * *

EXHIBIT SUMMARY FORM OF DEFENDANT, WASHINGTON BRAIN & SPINE INSTITUTE, P.C.

Govt/Pltf. Atty: Bruce J. Klores, Esquire

"E" No. _____

Deft/Resp. Atty: Brian J. Nash, Esquire
Marian L. Hogan, Esquire

Judge: Frederick J. Weisberg

Case No.: 03-CA-4014

Clerk: _____

Date: _____

Court Exhibit No.	Defendant Exhibit No.	Plaintiff Exhibit No.	Item Description	Qt.	ID	Adm	Over Obj.	No. Obj.
	1		Office Records of Washington Brain & Spine Institute, P.C. 12/2/99-3/28/01					
	2		Office Records of Raymond Noble, M.D. 9/5/00-6/29/01					
	3		Records of Washington Hospital Center 12/8/99-12/13/99					
	4		Records of Calvert Memorial Hospital 5/19/00					

	5		Office Records of Christopher Curcio, M.D. 11/21/99-3/8/00					
	6		Records of Washington Hospital Center 5/19/00-6/26/00					
	7		Records of the Kaiser Permanente – Largo Medical Center 1989-2000					
	8		Office Records of Rafael Convit, M.D. 5/12/00-5/18/00					
	9		Records of Johns Hopkins Medical Center 6/26/00					
	10		Records of Johns Hopkins Medical Center 9/8/00-6/7/04					
	11		Office Records of Michael Williams, M.D. 1995-2005					
	12		Office Records of George Gluz, M.D. 1989-2000					
	13		Office Records of Wayne Rozran, M.D. 1/6/04					
	14		Office Records of Catherine I. Brophy, M.D.					
	15		Records of Adventist Home Health Services 8/2/00-9/19/00					
	16		Demonstrative pathology evidence, including photomicrographs and pictorial representations thereof from tissues of Frederick Wilson					
	17		Blow-ups of various pages of medical records					
	18		Medical drawings, renderings, models of anatomical areas of the body					
	19		Illustrative and demonstrative evidence					
	20		Radiographic studies					

(Use this Section only when exhibits are returned in open Court)

I hereby acknowledge Receipt of Govt./Pltf.

Exhibits No. _____ through _____.

_____

Person Receiving Exhibits

_____

Office Date

I hereby acknowledge Receipt of Deft./Resp.

Exhibits No. _____ through _____.

_____

Person Receiving Exhibits

_____

Office Date

Defendant John Barrett, M.D.'s Requested Voir Dire:

1. This is a civil action in which the Plaintiff, Eileen Wilson and Frederick Wilson are seeking damages that they allege were incurred as a result of the medical care provided to Frederick Wilson by Defendants. The Court has read a summary of the claims in this case. Is there any member of the jury panel who knows anything about the care which is the subject of this case?

2. Does any member of the jury panel know any of the parties to this case?

3. The Plaintiff is represented by Bruce Klores. The Defendant, John Barrett, M.D. is represented by Albert D. Brault and Heather Kelly of the law firm Brault Graham. Does any member of the jury panel know any of these persons or are you acquainted with the law firms?

4. The following persons are expected to testify as witnesses during this trial. (The Court is asked to read the parties' witness lists.) Do any of you know any of the witnesses identified by the parties?

5. Have you or has any member of your immediate family ever received medical care from neurosurgeon, John Barrett, M.D. or the physicians in his medical practice, Washington Brain and Spine?

6. Some of the treatment and care in this matter occurred at the Washington Hospital Center, located in Washington D.C. Have you or any member of your family or close friend ever been a patient at, employed by, or had any affiliation with this hospital?

7. Some of the treatment and care in this matter occurred at the Johns Hopkins Hospital, located in Baltimore, Maryland. Have you or any member of your family or close

friend ever been a patient at, employed by, or had any affiliation with this hospital?

8. Have any of you, members of your family, or close friends, had any nursing or medical education, training or experience, including experience or training as an emergency medical technician or paramedic, or worked for an ambulance company, doctor or hospital?

9. If any member of the Jury Panel is a medical doctor, psychologist, social worker, nurse, physical therapist, life care planner, or occupational therapist, please identify yourself by name and Juror number and state the nature of your profession.

10. Have any of you, members of your family, or close friends, had any legal training or experience, or worked as a lawyer, or for a lawyer or a law firm?

11. If any member of the jury panel or to your knowledge any member of your immediate family has ever worked for a doctor or hospital, or has had a business relationship with the medical profession or a hospital, please identify yourself by name and juror number. Was there anything about this experience which would cause you to have a prejudice against or bias for either side in this case?

12. Have any of you, members of your immediate family, or close friends ever undergone treatment for any neurological or neurosurgical condition (that is, a condition related to the brain or spine), or other testing for possible neurological condition? If there are any affirmative responses, Defendants request that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease and the aforementioned procedures, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

13. Have any of you, members of your immediate family, or close friends ever provided

care for an ill or disabled spouse, parent, child or other person, in either your or the ill person's home? If there are any affirmative responses, Defendants request that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease and the aforementioned procedures, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

14. Have any of you, members of your immediate family, or close friends ever undergone surgery of the brain or spine? If there are any affirmative responses, Defendants request that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease for which such treatment was performed, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

15. Have any of you, members of your immediate family, or close friends ever undergone neurosurgical or neurological treatment? If there are any affirmative responses, Defendants request that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease for which such treatment was performed, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

16. Have any of you, members of your immediate family, or close friends ever been evaluated or diagnosed with any injury or disease of the brain? If there are any affirmative responses, Defendants requests that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease

which required surgical intervention, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

17. Have any of you, members of your immediate family, or close friends ever had any illness or condition resulting in lengthy convalescence or period of time of confinement to bed? If there are any affirmative responses, Defendants requests that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease which required surgical intervention, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

18. If any member of the jury panel has ever filed a claim or a lawsuit in court, or had a claim or a lawsuit filed against them in court, please stand. Defendants request that the following information be obtained at the bench: Would you please identify yourself by name and juror number and state whether you filed the claim or one was filed against you, the nature of the claim, and the eventual outcome?

19. If any member of the jury panel or to your knowledge any member of your immediate family or a close personal friend has ever had an injury as a result of having received medical treatment, please stand. Defendants request that the following information be obtained at the bench: Would you please identify yourself by name and juror number and state the nature of the injury and treatment and the date(s) thereof?

20. If any member of the Jury Panel, or to your knowledge, any member of your immediate family, has ever filed a claim or initiated a lawsuit against a physician, hospital or other health care provider alleging malpractice? Defendants request that the following inquiry take place at the bench: Please identify yourself by name and juror number and state the details

of each such claim or lawsuit?

21. Has any member of the jury panel or to your knowledge any member of your immediate family, or a close personal friend ever been admitted to a hospital or treated by a physician where the appropriateness of the treatment being rendered to the patient was questioned? If there are any affirmative responses, Defendants request that any further inquiries regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the event, when and where the event occurred, and whether in a case where a such an occurrence may be an issue, such juror can be fair and impartial.

22. Has any member of the Jury Panel had either directly or through a family member a close personal friend any type of experience with either a doctor, nurse, or hospital, which has left you with a prejudice against or a bias for the medical profession or hospitals, so as to make it difficult for you to render a fair and impartial verdict in this case? If there are any affirmative responses, Defendants request that they be permitted to inquire further at the Bench as to the details regarding this experience or experiences and what effect, if any, this might have upon the perspective Juror's ability to render a fair and impartial verdict in this case.

23. If any member of the jury panel or to your knowledge any member of your immediate family is currently under the active care of a physician for an illness or injury which would impair your ability to sit for this trial, would you please stand. Defendants request that the following inquiry be performed at the bench: Would you please identify yourself by name and juror number and state the nature of that illness or injury and the frequency of the medical care you are receiving?

24. Have any of you, members of your family, or close friends, ever sued anyone or

been sued for money damages?

25. If there is any member of the jury panel who knows of any reason why they believe they could not render a fair and impartial verdict in this case based solely upon the evidence which they hear in court and the instructions of the Court as to the applicable law, please stand. Defendants request that any further inquiry take place at the bench with respect to any such affirmative responses: Would you please identify yourself by name and juror number and state the reason for your affirmative response.

26. Does any member of the Jury Panel feel that every time that someone is injured someone has to be at fault? If the answer is in the affirmative, please identify yourself by name and Juror number. (Plaintiffs object).

27. This case is expected to take approximately 10-12 days to try. Is there anyone among you who cannot sit as a juror in this case because of the amount of time it is expected to take?

28. Does any member of the jury panel have any personal knowledge regarding any of the following medical conditions: hydrocephalus, meningitis, cerebritis, seizures. If there are any affirmative responses, Defendants request that any further inquiry regarding this matter be conducted at the Bench and that inquiry be made by the Court as to the nature of the illness and/or disease and the aforementioned procedures, when and where same occurred, and whether or not in a case involving such diagnoses, such juror could be fair and impartial.

Defendant Washington Brain & Spine Institute, P.C.'s Requested Voir Dire:

In addition to any standard voir dire questions the Court proposes, the parties request the following questions:

1. This trial may last for over two weeks. Does anyone believe that they will be unable to sit on the jury for this length of time? Are there any of you who, for any reason, would prefer not to serve on this case?

2. Does anyone know anything about the incident that is the subject of this lawsuit (As read from the Nature of the Case above)?

3. Does anyone know the Plaintiff in this action? She is Eileen Wilson, Guardian *Ad Litem* for Frederick Wilson.

4. The lawyers representing Ms. Wilson are Bruce J. Klores, Esquire, and Thomas W. Mitchell, Esquire, of the law firm of Bruce J. Klores & Associates, P.C., whose offices are in Washington, D.C. Does anyone know these lawyers or any lawyer in their firm?

5. John W. Barrett, M.D., is a Defendant in this case. The lawyers representing him are Albert D. Brault, Esquire, and Heather J. Kelly, Esquire, of the law firm Brault Graham P.L.L.C., whose offices are located in Rockville, Maryland. Does anyone know any of these lawyers or any of the lawyers in their firm?

6. The Washington Brain & Spine Institute, P.C., is a Defendant in this case. The lawyers representing it are Brian J. Nash, Esquire, and Marian L. Hogan, Esquire, of the law firm of Nash & Associates, LLC, whose offices are in Towson, Maryland.

7. Rafael Jacinto Convit, M.D., is a Defendant in this case. The lawyers representing him are Steven A. Hamilton, Esquire, and Matthew D. Banks, Esquire, of the law firm of Hamilton,

Altman, Canale & Dillon, LLC, whose offices are located in Bethesda, Maryland. Does anyone know any of these lawyers or any of the lawyers in their firm?

8. Have any of you, your family, or close friends, ever had business dealings with, or been employed by or been patients of John W. Barrett, M.D., the Washington Brain & Spine Institute, P.C., and Rafael Jacinto Convit, M.D.?

9. The following persons may be called as witnesses at trial by the parties. (Please see respective Witness Lists, supra, for identities of prospective witnesses.) Do you, your spouse, or any member of your immediate family or close relatives know any of these people?

10. Do you now or have you heard anything about any of the witnesses whose names have been mentioned which would cause you to accord more or less weight to the testimony of those witnesses than to the testimony of some other witness or witnesses?

11. Have any of you, members of your family or close friends, had any nursing, medical, or dental education, training or experience, or worked for or been employed in a hospital or as a doctor, dentist, therapist, physician's assistant, paramedic, laboratory technicians, health care provider, or any medical related occupation?

12. Have you or any members of your families ever engaged in volunteer work at any hospital or medical clinic?

13. Do any of you possess any special knowledge with respect to the medical field of neurosurgery? Have any of you acquired some general knowledge regarding this field of specialty either from your own physician or through reading articles in newspapers and magazines or from television news shows? If selected as a juror in this case, would you be able to set aside any information regarding this field of specialty you may have obtained from these

sources, or any other sources, and decide the medical issues in this case based solely on the evidence you will hear during trial?

14. Have any of you, members of your family or close friends, had any experience in evaluating claims or in passing upon or approving claims?

15. Have any of you, members of your family or close friends, had any experience as investigators or private detectives?

16. Have any of you, members of your family or close friends, had training or work experience in the field of economics?

17. Have any of you, members of your family or close friends, had legal training or experience or worked for a lawyer or law firm?

IT IS SUGGESTED THAT THE RESPONDENTS TO THE FOLLOWING QUESTIONS BE INVITED TO APPROACH THE BENCH IN ANSWERING BECAUSE THE RESPONSES MAY BE SENSITIVE TO THE INDIVIDUAL MEMBERS OF THE JURY PANEL AND MAY ELICIT INFORMATION THAT WOULD BE IMPROPER FOR THE ENTIRE PANEL TO HEAR.

18. Defendants request that the Court question the jurors at side bar who are listed on the juror information sheet as either "retired" from employment or as currently unemployed.

19. Have any of you, members of your family or close friends, ever sued anyone or been sued for money damages, or made a claim or had a claim made against you for personal injuries? Have any of you, your relatives or close friends sued or been sued by a hospital, doctor or nurse? Have any of you or members of your family filed workers' compensation claims?

20. Have any of you ever testified as a witness in any trial? Was it a civil or criminal case? Which side called you as a witness? Did the case involve matters relating to health care? Does that experience influence or affect in any way your ability to render a fair and impartial verdict in this case?

21. Have any of you ever been a juror in a civil or criminal trial? If so, what kind of case? Is there anyone among you who has sat as a juror in a case involving allegations of medical malpractice? Was the verdict for the Plaintiff or the Defendant? Did that experience influence or affect in any way your ability to render a fair and impartial verdict in this case?

22. Do you have bumper stickers on your vehicle(s)? If yes, what do they say? (Plaintiffs object).

23. This case involves the alleged negligence of two physicians. Is there anyone who has strong feelings, one way or the other, about suits against physicians or hospitals because of anything you have seen, heard, read or experienced? Would anyone tend to consider this case any differently than you would because it involves a doctor/medical practice?

24. This case involves neurological impairment of a married gentleman. Do any of you, your relatives or close personal friends know of anyone who has suffered neurological complications due to hydrocephalus? [If yes, was there any allegation of mismanagement of a VP shunt or hydrocephalus?]

25. A. Have any of you, members of your family or close personal friends ever had experience with hydrocephalus?

B. Have any of you, members of your family or close personal friends ever had experience with complications after treatment for hydrocephalus, particularly regarding VP

shunts?

26. Has any member of the jury panel ever felt that he/she or a member of their family or a close friend was treated in a particularly good or bad manner by a doctor, health maintenance organization or hospital? After having had that experience, do you feel that you can fairly and impartially judge the issues in this case?

27. Do any of you have any moral or religious convictions that would affect your ability to render judgment in this case?

28. Is there any juror who does not believe that he/she can fairly hear the evidence and return a verdict pursuant to the instructions of the Court?

29. Are there any of you who have any problems with vision or hearing, or any other conditions such as a need to take medications that may cause drowsiness, which would affect your ability to sit as a juror in this case?

30. Does any one believe it would be especially difficult for him/her to hear and determine a case that involves hydrocephalus? Would hearing evidence in such a case cause you to feel sympathetic to the wife so that you might not be able to be completely impartial?

31. Have any of you, members of your immediate family, or close friends ever sustained any complication or problem as the result of medical care? (State particulars at bench)

32. Have any of you, members of your immediate family or close friends ever been treated by a physician or hospital, where you believe the explanation of the treatment and care was not properly or fully explained?

33. If any member of the Jury Panel, or to your knowledge any member of your

immediate family, has ever filed a claim or initiated a lawsuit against a physician or hospital alleging malpractice, would you please stand? (If any rise). Defendants request that the following information be obtained at the bench. Please identify the details of each such claim or lawsuit. (Plaintiffs object).

34. Does any member of the jury panel feel that every time someone is injured, someone has to be at fault? If any answer in the affirmative, please identify yourself by name and juror number. (Plaintiffs object).

35. Are any of you taking medication or have some condition that might cause drowsiness or in any way affect your ability to render judgment in this case?

36. Has any member of the jury panel or a member of the family been diagnosed with hydrocephalus?

37. Have you or any members of your immediate family ever brought either a claim or a lawsuit against another person or a business entity for money damages? If so, please describe the nature of that claim and/or lawsuit. (Plaintiffs object).

38. Have you or any members of your immediate family ever brought either a claim or a lawsuit against you or a business entity for money damages? If so, please describe the nature of that claim and/or lawsuit. (Plaintiffs object).

39. Have any of you, members of your immediate family, or close friends ever sustained any complication or problem as the result of medical care? (State particulars at bench)

40. Does any member of the jury panel have trouble understanding English? *In Spanish: Hay alguien presente que tiene problema comprendiendo Ingles?*

TAB 7

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SHERRI MAYBIN, as Mother and Representative of ALANTE MAYBIN, a minor,	*	Case No. 03ca583
	*	Calendar 16
	*	Judge Duncan-Peters
Plaintiffs,	*	Courtroom 516
v.	*	
GEORGE WASHINGTON UNIVERSITY, et al.,	*	
Defendants.	*	

ORDER DENYING DEFENDANT DR. SCHOONOVER'S MOTION *IN LIMINE* FOR APPLICATION OF VIRGINIA LAW

This matter comes before the Court upon consideration of Defendant Dr. Schoonover's Motion *in Limine* for Application of Virginia Law. The Plaintiffs filed an Opposition and Defendant Dr. Schoonover filed a Reply.

Background

When the events at issue occurred, the Plaintiff, Sherri Maybin, and her son, Alante Maybin, were residents of the District of Columbia and members of the George Washington University (GWU) Health Plan.[1] Ms. Maybin received this insurance through her employment at the Smithsonian Institute, located in Washington, D.C. Alante Maybin always received his health care through the GWU Health Plan. See deposition of Sherri Maybin at 18.

Defendant Dr. Schoonover is a resident of Virginia. At the time of the alleged negligence, she was licensed to practice in Virginia and employed by Community Medical Associates (CMA), which is located in Alexandria, Virginia.

[1] According to the Plaintiffs' Amended Complaint, The George Washington University was a healthcare provider doing business in and licensed to do business in the District of Columbia. See Amended Complaint at ¶ 5.

CMA had purchased the practice from the Defendant's former employer, GWU. See deposition of Angel K. Nicholson at 22-23. Dr. Schoonover no longer practices in Virginia, but is licensed and practicing in the District of Columbia.

Pursuant to a contract Dr. Schoonover entered into with GWU prior to her employment with CMA, she answered calls to GWU's after-hours advice line, which included calls to GWU's Pediatric Division.[2] She continued to answer these calls even after she commenced her employment with CMA. Dr. Schoonover understood that she would be receiving calls from GWU Pediatric Clinic patients. See deposition of Dr. Schoonover at 70.

On the evening of January 17, 2000, Ms. Maybin, who was concerned about her son's health, called GWU's Pediatric Division's after-hours advice line and sought medical advice. The telephone number she called was 994-2222. See deposition of Sherri Maybin at 63.[3] She apparently received a telephone call back from Ms. Bernadette Deely (see deposition of Dr. Schoonover at 3), a registered nurse practitioner who was taking after-hours calls in conjunction with GWU Health Plan pediatrician Judith Ratner, M.D., until 8:00 p.m. that night. See Defendant Dr. Schoonover's Trial Brief on Inadmissible Evidence of Recitation of Symptoms to Persons Other than Dr. Schoonover at 1. Ms. Deely did not tell Ms. Maybin to call a physician or seek hospitalization for her son. See id. at 2.

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[2] It is unclear to the Court whether the correct name is Division or Department as Plaintiffs use both in their Motion. See Opp. at 2.

[3] Apparently, this number is a District of Columbia number. See GWU Pediatrics On-Call Schedule: January 2000, which lists another number with a 994 prefix as the "Patient Line After Hours" with a 202 area code. In addition, Ms. Maybin, who lives in the District of Columbia, did not indicate that she dialed an area code.

On January 18, 2000, at approximately 7:20 a.m., Ms. Maybin again called the advice line. See id. She reported her son's symptoms to the representative answering the call, who advised that an on-call physician would call her back. Dr. Schoonover, the on-call physician who responded to the call, believes that she called the answering service and received information about Alante's symptoms at approximately 7:52 a.m.[4] See 2004 deposition of Dr. Schoonover at 65 and Defendant Dr. Schoonover's Trial Brief on Inadmissible Evidence of Recitation of Symptoms to Persons Other than Dr. Schoonover at 3. It appears that, at around that same time, Dr. Schoonover telephoned Ms. Maybin. See deposition of Sherri Maybin at 101. During that conversation, Dr. Schoonover allegedly told Ms. Maybin that she should not have her son taken to Children's Hospital but should instead call the GWU Pediatric Clinic, which was getting ready to open and have her son see the first available doctor.[5] See deposition of Sherri Maybin at 103. Ms. Maybin was to tell the Clinic that she had just spoken with Dr. Schoonover and what Dr. Schoonover had told her. See deposition of Sherri Maybin at 103.

Ms. Maybin did call the GWU Pediatric Clinic and, after listening to a series of prompts, sometime between 8:22 a.m. and 8:34 a.m., she spoke with Ms. Emily Campbell, a registered nurse. See Defendant Dr. Schoonover's Trial Brief on Inadmissible Evidence of Recitation of Symptoms to Persons Other than Dr. Schoonover at 4. Ms. Campbell told Ms. Maybin to bring Alante to the clinic right away. See id.

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[4] Dr. Schoonover testified that her shift ran from 8:00 p.m. to 8:00 a.m. See deposition of Dr. Schoonover at 61.

[5] It appears that the Clinic opened at 8:00 a.m. See deposition of Dr Schoonover at 65.

Plaintiffs contend that, after Ms. Maybin hung up with the Clinic, she dressed both her children, arranged for a neighbor to drive her to the Clinic and walked around the corner with Alante to her mother's house so that her mother could baby-sit her other child. See Joint Pretrial Statement at 4. At her mother's house, Alante began to foam at the mouth. See Joint Pretrial Statement at 4. At 9:13 a.m., Ms. Maybin called 911. See Joint Pretrial Statement at 4. As a result of her call, at approximately 9:30 a.m., Alante was taken by ambulance to Children's Hospital in the District of Columbia where he was diagnosed as suffering from toxic shock caused by strep sepsis that later resulted in multi-system organ failure, blisters, rashes and lesions on his extremities. See Joint Pretrial Statement at 4-5. To eradicate his infection, the physicians at Children's Hospital amputated both his legs below the knees. See Joint Pretrial Statement at 5.

Analysis

The Plaintiffs have sued Dr. Schoonover for medical negligence. Dr. Schoonover contends that the Court should apply Virginia law with respect to the claims against her, because Virginia's interest in this litigation is substantial and not applying Virginia law would frustrate the state's public policy of limiting the liability of its health care providers. In support of her argument, the Defendant points out that: (1) her then employer, Community Medical Associates (CMA), is located and incorporated in Virginia; (2) she was, at the time, licensed to practice only in Virginia, and (3) she lived in Virginia. The Plaintiffs counter that District of Columbia law applies.

Under choice of law principles, the District of Columbia Courts apply "another state's law when (1) its interest in the litigation is substantial, and (2) 'application of District of Columbia law would frustrate the clearly articulated public policy of that state.'" Herbert v. District of Columbia, 808 A.2d 776, 779 (D.C. 2002) (quoting Kaiser-Georgetown Community Health Plan Inc. v. Stutsman, 491 A.2d 502, 509 (D.C. 1985)). In tort cases, to resolve choice of law issues, the District of Columbia requires a governmental interests analysis. Herbert, supra, 808 A.2d at 779. Under this analysis, when both states have an interest in applying their own laws a true conflict arises. There, the forum state's law 'will be applied unless the foreign state has a greater interest in the controversy." Herbert, supra, 808 A.2d at 779 (quoting Kaiser-Georgetown Community Health Plan Inc., 491 A.2d at 509 (D.C. 1985)). '[W]hen the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the law of the interested state prevails." Herbert, supra, 808 A.2d at 779 (quoting Kaiser-Georgetown Community Health Plan Inc., supra, 491 A.2d at 509 (D.C. 1985)).

A. Governmental Interests Analysis

The Court begins its inquiry into the respective interests of Virginia and the District of Columbia by considering the policies underlying each jurisdiction's applicable laws. In tort claims, states have a general governmental interest in "compensation of the victim [as well as] admonition of the wrongdoer." See W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 4, p.25 (5th ed.

1984). Additionally, the Court considers Virginia's policy of limiting recovery for certain malpractice claims. See Va. Code Ann. § 8.01-581.15 (2004).

1. The District of Columbia's Policy Interest

The Court first addresses the District of Columbia's general governmental interest in tort cases. Since the Plaintiffs live in the District of Columbia, the District of Columbia has a strong general tort interest in seeing that they are adequately compensated. The District of Columbia also retains a general governmental interest in admonishing the alleged wrongdoer. Although, at the time of the alleged negligence, Defendant Dr. Schoonover was licensed and practicing exclusively in Virginia, she is presently licensed and practicing in the District of Columbia. Thus, the District of Columbia has an interest in admonishing the alleged torts of Dr. Schoonover as a means of regulating and deterring her future behavior while practicing within its jurisdiction.

2. Virginia's Policy Interests

Since Dr. Schoonover practiced in Virginia at the time of the alleged negligence, the state has a general governmental interest in admonishing her negligence is she is found liable. In contrast, the state's general interest in protecting the Plaintiffs, who throughout this case have resided in the District of Columbia, is much weaker.

Virginia has also expressed a policy interest in limiting damage awards in medical malpractice cases. Va. Code Ann. § 8.01-581.15 (2005) states:

> In any verdict returned against a heath care provider in an action for malpractice where the act or acts of malpractice occurred on or after August 1, 1999, which is tried by a jury or in any judgment entered against a health care provider in such an action which is

> tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed $1.5 million. The maximum recovery limit of $1.5 million shall increase on July 1, 2000, and each July 1 thereafter by $50,000 per year; however, the annual increase on July 1, 2007 and the annual increase on July 1, 2008, shall be $75,000 per year. Each annual increase shall apply to the act or acts of malpractice occurring on or after the effective date of the increase. The July 1, 2008, increase shall be the final annual increase.

The policy considerations underlying this law are two-fold: 1) to lower the high cost of medical malpractice insurance which the legislature believed was responsible for driving health care providers from the profession, and 2) to ensure that the residents of Virginia benefit from adequate health care that is both available and affordable. See Rallo v. United States, 157 F. Supp. 2d 1, 5-6 (D.D C. 2001); Etheridge v. Medical Center Hospitals, 376 S.E.2d 525, 527-28 (Va. 1989) (commenting that escalating costs of medical malpractice insurance and availability of such insurance adversely affect the health, safety, and welfare of Virginia citizens.)

Looking to Virginia's underlying policy interests, it is apparent that the state's interest in limiting medical malpractice damages is minimal in the instant case. Dr. Schoonover asserts her contact with the District of Columbia was limited, stating that she "lived and worked exclusively in Virginia and her employer was incorporated and did business exclusively in the Commonwealth." See Defendant's Motion at 4. For a period of five years, however, the Defendant participated in GWU's after-hours advice line, which served mostly District of Columbia residents. She entered the contractual agreement to participate in the advice line with GWU while she was a GWU

employee, prior to her employment with CMA. As previously stated, the Defendant no longer practices in Virginia, but is now licensed and practicing in the District of Columbia. Thus, applying Virginia law will not help effectuate the state's policy goal of lowering medical malpractice insurance costs, because, as in Kaiser-Georgetown Community Health Plan, Inc., "the financial impact ... of a finding of liability in excess of the statutory cap will not fall most heavily within Virginia." Kaiser-Georgetown Community Health Plan, Inc., supra 491 A.2d at 511. Given that the impact will not fall upon Virginia, application of that state's law will not serve to ensure available and affordable health care to Virginia citizens. Accordingly, the application of District of Columbia law, instead of Virginia law, would not frustrate Virginia's interest in protecting its native health care providers from excessive liability.

3. True Conflict Analysis

After applying the governmental interests analysis, the Court finds that both jurisdictions maintain a general tort interest in the instant case. As previously stated, a true conflict is presented when both states have an interest in applying their own laws to the underlying facts, and when this occurs, the forum law will be applied unless the foreign state has a greater interest in the controversy. Because Virginia does not have a greater interest in the instant case, the Court finds at this point in the inquiry that the law of the District of Columbia should apply.

Most Significant Relationship Analysis

Although the Court has determined that the governmental interests test favors application of District of Columbia law, the Court must still consider the strengths of the states' competing interests. Accordingly, the Court considers the four factors elaborated in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) to identify the jurisdiction with the "most significant relationship" to the dispute See In re Air Crash Disaster, 559 F. Supp. 333, 342 (D.D.C. 1983); see also Herbert, 808 A.2d at 779. The factors considered are:

1) the place where the injury occurred;
2) the place where the conduct causing the injury occurred;
3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
4) the place where the relationship is centered.

The place of the injury in the instant case was the District of Columbia. Ms. Maybin spoke to Dr. Schoonover over the phone from her home in the District of Columbia. She alleges that Dr. Schoonover instructed her to make an appointment with GWU's Pediatric Clinic when it opened, instead of instructing her to seek immediate medical attention for her son. On January 18, 2004, at approximately 9:30 that morning, Alante Maybin was transported to Children's Hospital in the District of Columbia where he experienced multi-system organ failure. The only aspect of this transaction that involved Virginia was the location of Dr. Schoonover, which, at all pertinent times, was completely unknown to the Plaintiffs.

Further, assuming, *arguendo*, that the place of the injury is Virginia, that location was a mere fortuity and is entitled to little weight. See Kaiser-

Georgetown Community Health Plan, Inc., supra, 491 A.2d at 508 (finding diminished importance in the location of injury where it is mere happenstance that the party was injured there – that the location was a mere fortuity). Accord Hitchcock v. United States, 214 U.S. App. D.C. 198, 665 F.2d 354, 360 (1981); Williams v. Rawlings Truck Line, Inc., 123 U.S. App. D.C. 121, 357 F.2d 581, 585 (1965). In Kaiser-Georgetown Community Health Plan, Inc. the plaintiff's health provider permitted the plaintiff to seek treatment at either its Virginia or District of Columbia clinic. The District of Columbia Court of Appeals found it was a mere fortuity that the plaintiff was injured at a Virginia clinic. In the instant case, that Dr. Schoonover responded to Ms. Maybin's call from Virginia is even more fortuitous, because the Plaintiffs did not know, much less have any say in, where Dr. Schoonover was located or where that call was coming from. In fact, Ms. Maybin was specifically asked if she had caller I.D. and, when she said she did, was told to switch it off in anticipation of the return call she eventually received from Dr. Schoonover. See deposition of Sherri Maybin at 101.

The conduct allegedly causing the injury occurred in Virginia, which is the location Dr. Schoonover was in when she advised and instructed Ms. Maybin regarding Alante's condition. Dr. Schoonover cites Bledsoe v. Crowley, 270 U.S. App. D.C. 308, 849 F.2d 639, 643 (1988), for the proposition that "the state where the defendant's conduct occurs has the dominant interest in regulating it . . .." Immediately following this statement, however, the Bledsoe court went on to say, "[t]his is particularly so where, as here, it is impossible meaningfully to separate the injury from the tortious conduct, and where other factors--such as

the residence or place of business of the parties--do not point in the opposite direction. In Bledsoe, the plaintiff regularly sought treatment from the defendant's Maryland practice over a twelve-year period. Because it was over this period of time that the plaintiff's injury, a slow-growth brain tumor, occurred, it was impossible to meaningfully separate the place where the conduct occurred from the place of injury. Additionally, because the plaintiff in Bledsoe lived and worked in Maryland at the time he began treatment with the defendants, only later moving to the District of Columbia, there were no strong factors pointing against the application of Maryland law. In the instant case, Ms. Maybin, a District of Columbia resident, never left the jurisdiction to receive medical assistance for Alante, also a District of Columbia resident. Alante's injury, therefore, clearly occurred in the District of Columbia and is easily separable from the place of Dr. Schoonover's conduct. The Plaintiff's only contact with the state occurred via telephone, when her call to GWU's District of Columbia advice line was responded to, without the Plaintiff's knowledge, by Defendant Dr. Schoonover in Virginia. Given these facts, the place where Dr. Schoonover's conduct occurred cannot be given controlling weight.

Ms. Maybin's residence and place of employment are located in the District of Columbia. Virginia is Dr. Schoonover's place of residence and was her place of employment at the time of the alleged negligence. She now, however, practices in the District of Columbia.

The facts indicate that the place where the relationship was centered was the District of Columbia. The Plaintiff called GWU's after-hours advice line

using a District of Columbia phone number and did not know or have reason to know the call would be referred to a doctor in Virginia. The Plaintiff believed that GWU's Pediatrics' Clinic or one of its employees or affiliates would respond to the call. Dr. Schoonover, on the other hand, was aware that the advice line was managed by the GWU Pediatrics Division located in the District of Columbia, and accordingly knew or should have known that that most of the patients using the advice line were District of Columbia residents. Pursuant to Dr. Schoonover's contractual agreement with GWU, she regularly advised and instructed GWU's District of Columbia patients regarding actions they were to take entirely within the District of Columbia, *i.e.*, how soon Ms. Maybin should bring her son to the hospital. Further, Dr. Schoonover had been participating in the after-hours hotline for a period of five years. Accordingly, since Dr. Schoonover had regular and continuous contact with District of Columbia patients, she cannot claim surprise that she could be subject to the laws of the District of Columbia, were one of these patients to allege negligence in the performance of her advice line duties. See Bucci v. Kaiser Permanente Foundation Health plan of the Mid-Atlantic States, Inc., 278 F. Supp. 2d 34, 36 (D.D.C. 2003); see also Rafio v. United States, 157 F. Supp. 2d 1, 7 (D.C.C. 2001) (both applying District of Columbia law where the defendant conducted significant business in the District). The only aspect of the "relationship" between the parties that involved Virginia was that, unbeknownst to the Plaintiffs, Dr. Schoonover returned the Plaintiff's call from Virginia. Viewing

these four factors together, it is clear that they weigh more strongly in favor of the District of Columbia.

Therefore, it is this 13th day of October 2005,

ORDERED that the Defendant Dr. Schoonover's Motion *in Limine* for Application of Virginia Law is **DENIED**.

Stephanie Duncan-Peters
Stephanie Duncan-Peters
Associate Judge
(Signed in chambers)

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SARDUL SINGH PANNU, et al.
Plaintiffs

v.

JEFF JACOBSON, M.D., et al.
Defendants

[redacted]

Case No. 01CA7485
Calendar 13
Judge Melvin R. Wright

ORDER DENYING DEFENDANTS' MOTION TO APPLY MARYLAND SUBSTANTIVE LAW

This matter is before the Court on Defendants' Motion to Apply Maryland Substantive Law. Plaintiffs have filed an Opposition, and Defendants have filed a Reply thereto. Upon consideration of the combined pleadings, the Court concludes that the Motion must be denied for the following reasons:

Procedural and Factual Background

Plaintiff began suffering from intense lower back pain and radiating pains in his legs, which led to his consultation with Defendant Jeff Jacobson, M.D. at the latter's principal place of business in Washington, D.C. The doctor recommended a diagnostic MRI, which was performed at the doctor's office in Bethesda, Maryland. The doctor then performed back surgery on Plaintiff at Suburban Hospital in Maryland. After that surgery, the doctor referred Plaintiff to post-operative rehabilitation in Washington, D.C.

Plaintiffs filed the instant action on November 9, 2001, alleging that the doctor negligently severed four nerves during the surgery and that this negligence caused permanent incontinence of bowel and bladder. In response, Defendants filed a motion to dismiss based on *forum non conveniens*. Judge Susan R. Winfield, the judge then assigned to this calendar, denied Defendants' motion on December 27, 2001. Judge

Mary Ellen Abrecht, the judge next assigned to this calendar, denied Defendants' motion for reconsideration of Judge Winfield's order. Defendants then noted an interlocutory appeal, and the Court of Appeals affirmed the trial court's decision in *Jacobson v. Pannu*, 822 A.2d 1080 (D.C. 2003).

Because the Court of Appeals has reviewed this case in the above-noted context, this Court relies on the factual characterization and certain conclusions of the Court of Appeals' decision throughout this Order.

Legal Standard

In the District of Columbia, another state's law will be applied "when (1) its interest in the litigation is substantial, and (2) 'application of District of Columbia law would frustrate the clearly articulated public policy of that state.'" *Herbert v. District of Columbia*, 808 A.2d 776, 779 (D.C. 2002) (quoting *Kaiser-Georgetown Community Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985)). In tort actions, the courts use a "governmental interests" analysis to determine whether to apply District of Columbia law. *Id.* (citation omitted). This analysis "requires first a court evaluation of the governmental policies underlying the applicable conflicting laws and then a determination as to which jurisdiction's policy would be most advanced by having its law applied to the facts of the case." *Valentine v. Elliott (In re Estate of Delaney)*, 819 A.2d 968, 988 (D.C. 2003) (citations omitted).

In evaluating the policy issues, "when the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the law of the interested state prevails." *Kaiser-Georgetown*, 491 A.2d at 509 (quoting *Biscoe v. Arlington County*, 738 F.2d 1352, 1360

(D.C. Cir. 1984). "A true conflict is presumed when both states have an interest in applying their own laws to the underlying facts; in that event, the forum law will be applied unless the foreign state has a greater interest in the controversy." *Id.* (citations omitted). Accordingly, in analyzing the governmental interests, four factors must be considered: 1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered. *Herbert*, 808 A.2d at 779.

Analysis

Applying the "governmental interests" analysis to the facts of this case, the Court concludes that District of Columbia law should apply.

In reaching this conclusion, the Court finds the case of *Kaiser-Georgetown*, *supra*, particularly instructive. In *Kaiser-Georgetown*, another medical malpractice suit, the plaintiff-appellee was a Virginia resident but was employed in the District of Columbia. The patient had secured the services of the defendants-appellants, both District of Columbia corporations, and virtually all of the treatment rendered to the patient was at the defendants' Virginia facilities. The plaintiff brought suit in the District of Columbia, but the defendants argued that Virginia law should apply, especially in light of Virginia's statutory cap on punitive damages. The Court of Appeals held that District of Columbia law should apply, concluding that the District had a significant interest "in holding its corporations liable for the full extent of the negligence attributable to them." *Kaiser-Georgetown*, 491 A.2d 509-10.

Turning to application of the four factors in the case *sub judice*, that much, if not all, of the alleged negligence complained of occurred in Maryland is not dispositive of the choice of law issue. Our Court of Appeals has rejected strict application of the *lex loci* doctrine, concluding instead "[a] tort 'need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence.'" *Id.* at 507 (quoting *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 314 n.19, 101 S. Ct. 633, 640 & n.19 (1981) (plurality decision). Consequently, "[w]here the location of the injury may be described as 'fortuitous,' the court is not bound by the law of the place of the tort." *Id.* Defendant Jacobson enjoyed privileges at five area hospitals, the Maryland hospital at which Plaintiff Sardul Pannu had surgery being the only hospital outside of the District of Columbia. Hence, it appears that the place of the actual injury was merely fortuitous and does not require application of Maryland substantive law on this basis.

Moreover, the relationship that caused the injury between Plaintiff Sardul Pannu and Defendants took place in both the District of Columbia and Maryland, and the relationship was centered in both the District of Columbia and Maryland. For these reasons, neither the second nor the fourth factor requires the application of Maryland law.

The third factor is equally unsupportive of Defendants' contention that Maryland law should be applied. Defendants are two Washington, D.C. corporations. The individual Defendant's principal place of business is in Washington, D.C. Plaintiff Sardul Pannu is a Maryland resident but was employed in the District of Columbia at the time of the alleged negligence. Under a choice of law analysis, "'[e]mployment status is not a sufficiently less important status than residence,' when combined with other

contacts, to prohibit [application] of District of Columbia law." *Id.* at 507 (quoting *Allstate*, 449 U.S. at 317, 101 S.Ct. at 642).

Finally, the Court is not persuaded that Maryland's policy would be advanced by application of its law to this case. "Section 11-108 was enacted in response to a legislatively perceived crisis concerning the availability and cost of liability insurance in *this* State." *Murphy v. Edmonds*, 601 A.2d 102, 114 (Md. 1992) (emphasis added). Maryland's clear policy objectives were to expand the availability and to limit the cost of liability insurance for its *own* citizens and entities, objectives that would not be served here. On the other hand, the District of Columbia has a significant interest in holding its own corporations and an individual with his primary place of business in this jurisdiction fully liable for any negligence attributable to them.

Conclusion

Based on the foregoing, it is this 7th day of November 2003,

ORDERED that Defendants' Motion to Apply Maryland Substantive Law be and is hereby DENIED.

Melvin R. Wright
Associate Judge

MAILED NOV 10 2003

DOCKETED NOV 10 2003

Copies to:

Brian J. Nash, Esq.
Leopard W. Doerer, Esq.
NASH & ASSOCIATES, LLC
Cromwell Center
809 Glenmagin Court
Suite 201
Towson, MD 21286

Bruce J. Klores, Esq.
Patricia C. Kappi, Esq.
BRUCE J. KLORES & ASSOCIATES, PC
915 – 15th St., NW
Suite 300
Washington, DC 20005

SAMPLE CASE EVALUATION

JOHN DOE V. AMERICA'S HEALTH PLAN, INC
SUPRIOR COURT OF THE DISTRICT OF COLUMBIA - COURT FILE NO;

Recommendations: State your recommendations (i.e. settlement or trial). Please outline the rationale for your recommendations.

Options: Please outline the options available in the case (i.e. settlement, admitting liability, trial, etc.). The pros and cons of each option should be discussed.

Chances of Prevailing at trial: Please provide a percentage.

Damages:

Past and future medical
Past and future wage loss
Other damages

Value:

Potential Jury Verdict
Demand
Settlement Value

Settlement Status: Describe the status of settlement negotiations.

Upcoming Events: Identify trial dates, pretrials, depositions, etc.

Statement of the Case/Facts: Provide the pertinent facts of the case. If it is a complex case requiring a lengthy explanation of the facts, please provide it.

Liability Analysis:

Negligence
Proximate Cause
Damages

Issues: Itemize the specific issues against each defendant and co-defendant.

Plaintiff's Expert Witnesses: Provide name, specialty, affiliation and an overview of opinions.

Defense Expert Witnesses: Provide name, specialty, affiliation and an overview of opinions.

Co-Defendant's Expert Witnesses: Provide name, specialty, affiliation and an overview of opinions.

Lay Witnesses/Treating Physicians: Provide an overview of treatment and testimony.

Other: Provide an assessment of the ability of plaintiff's counsel, co-defendant's counsel, the ability of the assigned judge and likelihood of the assigned judge conducting the trial; comment on the trial venue/jurisdiction.

10306 EATON PLACE, SUITE 500
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OFFICES IN
WASHINGTON, D. C. FREDERICK, MARYLAND
RICHMOND, VIRGINIA ROCKVILLE, MARYLAND

October 3, 1994

BY TELECOPY & MAIL -

Mr. Mark Inman
Multi Systems Agency, Ltd.
540 Lake Cook Road
Deerfield, Illinois 60015

Re: Insured :
Patient :
File No. :

Dear Mark:

Please accept this letter as my Pre-Trial Report in the case, coming up for trial in the near future. Because this is now a case by the District of Columbia against under the Third Party Complaint, many of the questions in the report are inapplicable. If upon receipt of this Pre-Trial Report you have any questions, please do not hesitate to contact me.

I. Trial Date

This matter is scheduled to begin trial on in the Superior Court for the District of Columbia before a jury. The case will start that day.

II. Key Elements of District Cases with Key Witnesses

The District's case against is fairly simple. As part of their case in chief, they will be introducing records to show that he made no notation on October 5, 1990 that should stop the INH. They will also point to the fact that the first mention by in his records occurred on October 18, one day following visit with Dr. The Plaintiffs will also be calling Dr. who will testify that Mrs. was still taking the INH when he saw her on October 17. Dr. cannot state whether or not told

VII. Damages Provable

The District only needs to submit evidence that the settlement was in the amount of $262,500.

VIII. Economist Needed

No economist is needed.

IX. Defense Economist

No economist needed.

X. Damages

Since this is now a suit just for contribution, there are really no damages except the District claiming that we owe them 1/2 of the settlement.

XI. Settlement Value

The case probably does have settlement value and I think the District would be willing to take something significantly less than 1/2 of the settlement. However, since our exposure is limited, it is probably a good case for trial.

XII. Maximum We Should Pay in Settlement

It is my recommendation that this case go to trial.

XIII. Intentions of our Co-Defendants

N/A.

XIV. Further Recommendations

The matter should be tried on [redacted].

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D.C., MD.
PATRICIA C. KARPPI
D.C., VA.
PATRICIA A. BALLARD, RN., MSN
NURSE CONSULTANTS
CORINNE J. MACHADO, R.N., BSN
NURSE CONSULTANTS

SETTLEMENT OF MINOR'S CASES IN DISTRICT OF COLUMBIA - MARYLAND - VIRGINIA

OCTOBER 2, 2001

A. DISTRICT OF COLUMBIA

D.C. Code §21-120 requires court approval of minors' settlements. If the net settlement is more than $3,000.00, then a "guardian" is supposed to be appointed.

A friendly suit is typically filed when there is no action pending.

B. MARYLAND

Maryland law does not specifically require court approval of minors' cases, but we always obtain the same.

Md. Code Estates & Trusts §13-403 "Recovery By Minor In Tort" establishes a statutory mechanism for receiving, holding, investing and spending settlement funds.

C. VIRGINIA

Virginia Code §8:01-424 et. seq. (Approval of Compromises On Behalf Of Persons Under A Disability In Suits Or Actions To Which They Are Parties) requires court approval.

The Code also mandates investment restrictions and fiduciary obligations.

Every judge I have appeared before in Virginia has required a *Guardian Ad Litem* to be appointed. The *Guardian Ad Litem* reviews the case and the settlement and files a report with the Judge.

TAU

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

JANE DOE . Individually, and as Mother and Next Friend of KEVIN DOE, a Minor, et al.	)	
Plaintiffs,	)	
v.	)	CASE No. _____
FRANK SMITH, M.D., P.A., et al.	)	
Defendants.	)	

CONSENT MOTION FOR APPROVAL OF MINOR'S COMPROMISE SETTLEMENT, DISTRIBUTION OF FUNDS, AND CREATION OF SPECIAL NI TRUST

Come now the plaintiffs, by and through counsel, Bruce J. Klores, Lesley S. Zork : Bruce J. Klores & Associates, P.C., and seek an Order of this Court approving a minor's compromise settlement, authorizing distribution of all settlement funds, and creating a "Sp Needs Trust." As grounds, plaintiffs state as follows:

1. Defendants do not oppose the relief sought in this Motion.

2. This is a medical negligence action brought by Jane and John Doe, individually on behalf of their minor son, Kevin Doe, now four years old. Plaintiffs allege that defenda Frank Smith, M.D., and Frank Smith, M.D., P.C. (through Dr. Frank), were negligent in th care and treatment of Jane Doe while pregnant with her son in 1997, and that this negligen caused Kevin Doe to suffer neurologic injuries and Cerebral Palsy. During the Circuit Cou litigation plaintiffs joined co-defendant ABC Health Network, alleging that its inclusion in

2. Payment to Jane Doe and John Doe, Individually $_____

3. Payment to Bruce J. Klores & Associates, P.C., as attorneys' fees, pursuant to written agreement[1] $_____

4. Payment to Bruce J. Klores & Associates, P.C., as reimbursement of litigation expenses, including expert witness fees, transcripts, medical records expense, costs and fees of trust counsel, and court costs $_____

5. Payment of Maryland Medicaid Lien $_____

Total Distribution: $_____

6. The Annotated Code of Maryland, Estates & Trusts, Subtitle 4, Sections 13-40 seq., allows for the establishment of a Guardianship of the Property of the minor for the purposes of managing a minor's settlement funds. Because Kevin is not only a minor, but permanently disabled person, plaintiffs request instead that the Court approve the establis of the Kevin Doe Special Needs Trust and order that $_____ of the settlement proce be transferred to this Special Needs Trust pursuant to Estates & Trusts, Subtitle 4, Section 105 et. seq.[3]

7. Due to the nature of Kevin's injuries, his disability will continue during his life

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[1] The legal fee contracted for was one-third of any recovery. Plaintiffs' counsel has reduced this fee to twenty-seven percent (27%) in order to maximize recovery for the family.

[2] The total Medicaid lien was $_____. The Maryland Department of Health and Mental Hygiene has reduced its subrogation interest to $_____ and further negotiations are in progress. Any further reduction realized will be paid to the Kevin Doe Special Needs Trust.

[3] The settlement proceeds will be deposited in trust account of Bruce J. Klores & Associates, P.C., for the benefit of the plaintiffs. Upon approval of the Kevin Doe Special Needs Trust by this Court and the State of Maryland, the amount to be distributed to the Trust will be forwarded to the investment advisor designated by the Trustee.

provide for the beneficiary without disqualifying him for state aid that he may need durin life. Placing these assets in a Guardianship Estate would cause the beneficiary to be disqualified from aid under the State of Maryland Medical Assistance Program. Under th terms of the trust and the COMAR regulations, an annual report of the trust must be provi the State of Maryland at the Division of Medical Assistance Recoveries.

11. Attached as Exhibit 2 is a copy of a trust, The Kevin Doe Special Needs Trust is proposed to hold the settlement proceeds. This trust is drafted to comply with the provi of 42 U.S.C. 1396p(d)(4)(A) and COMAR 10.09.24.08-2. If approved by the Court, Tom Jones, Esquire, will sign this trust as trustee. The purpose of this trust is to enable the nam Trustee, Tom Jones, Esquire, of the Bar of this Court, to hold and administer Kevin Doe's settlement proceeds for his sole benefit, with the assistance of his parents. This trust agreem has been drafted by Tom Jones, Esquire, who concentrates his practice in trusts and estates approved, a copy of the trust will be submitted to the appropriate state agency for review a any changes required by the state agency to qualify the trust as a payback trust will be mad

12. John Doe and Jane Doe have expended considerable time and money caring fo Kevin. Their extreme devotion to Kevin has helped him maintain his health. Mrs. Doe is trained as a school teacher and has not been able to return to work so that she can care for Kevin. The Does' request for $_____ of the settlement is therefore fair and equitable.

13. The Does entered into a contingency fee agreement with their attorneys, agreein pay 33-1/3 percent of any recovery as attorneys' fees, and the costs of the litigation. As not

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Mr. Jones is a member of the bars of D.C., Maryland, New Jersey and New York, and a member of the law firm of Jones & Jones. He is the former chairman of the Steering Committee for the Estates, Trusts and Probate Section of the D.C. Bar and is a member of the Estate Planning Council of Washington, D.C.

John Doe, Individually and as Parent
and Next Friend of his Minor Son, Kevin Doe

Tom Jones, Esquire

Trust Counsel

WE HAVE READ THE FOREGOING MOTION AND CONSENT TO THE RELIEF REQUESTED THEREIN.

By_____

Attorneys for Defendants Frank Smith, M.D. and Frank Smith, M.D., P.C.

By_____

Attorney for Defendant ABC Health

John Doe, Individually and as Parent
and Next Friend of his Minor Son, Kevin Doe

Tom Jones, Esquire

Trust Counsel

WE HAVE READ THE FOREGOING MOTION AND CONSENT TO THE RELIEF REQUESTED THEREIN.

By_____

Attorneys for Defendants Frank Smith, M.D. and Frank Smith, M.D., P.C.

By_____

Attorney for Defendant ABC Health

John Doe, Individually and as Parent
and Next Friend of his Minor Son, Kevin Doe

Tom Jones, Esquire

Trust Counsel

WE HAVE READ THE FOREGOING MOTION AND CONSENT TO THE RELIEF REQUESTED THEREIN.

By_____

Attorneys for Defendants Frank Smith, M.D.
and Frank Smith, M.D., P.C.

By_____

Attorney for Defendant ABC Health

FURTHER ORDERED, that the settlement proceeds in this action be distributed as follows:

1.	Payment to Tom Jones, Esquire, as Trustee of the Kevin Doe Special Needs Trust	$_____
2.	Payment to John Doe and Jane Doe	$_____
3.	Payment to Bruce J. Klores & Associates, P.C., as attorneys' fees	$_____
4.	Payment to Bruce J. Klores & Associates, P.C., of litigation expenses, including expert witness fees, transcripts, medical records expense, costs of the first trial, costs and fees of trust counsel, and court costs	$_____
5.	Payment of Maryland Medicaid Lien	$_____ [5]
Total Distribution:		$_____

and it is,

FURTHER ORDERED, that the proceeds to be paid to the Kevin Doe Special Nee Trust shall be held by Bruce J. Klores in trust pending the posting of a bond by the Trustee the sum of $_____, at which time the sum of $_____ shall be transferred to Trustee of the Special Needs Trust, and it is

FURTHER ORDERED, that this Court shall not maintain continuing jurisdiction o the Kevin Doe Special Needs Trust, but it shall be supervised by the State of Maryland with filing of an annual report in the form required by the Maryland State Division of Medical Assistance Recoveries or other appropriate office.

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[5] The total Medicaid lien was $_____. The Maryland Department of Health and Mental Hygiene has reduced its subrogation interest to $_____ and further negotiations are in progress. Any further reduction realized will be paid to the Kevin Doe Special Needs Trust.

benefits are based in whole or in part on the income and/or resources of program beneficiaries, without diminution of these government benefits by reason of the existence of this Trust.

WHEREAS, the Trustee is willing to administer the Trust, and has agreed to hold, manage, invest and reinvest the Trust assets, to collect the income thereof, and after paying all expenses properly attributed thereto, to distribute the Trust assets in accordance with its terms and conditions;

NOW, THEREFORE, in consideration of this settlement between the named parties and the obligations assumed by the Trustee, and the Order of the Superior Court directing distribution to the Trustee of a portion of the amount of settlement in accordance with the terms of settlement, to have and to hold the same by the Trustee and successors, IN TRUST NEVERTHELESS, for the uses and purposes set forth in this Trust, under the following terms and conditions, such that there shall be, and there is hereby, created the DE'SHAWN MECCO BROWN SPECIAL NEEDS TRUST, with terms and conditions as may be required and approved by the Probate Division of the Superior Court of the District of Columbia and any controlling governmental authority in the jurisdiction in which De'Shawn Mecco Brown resides, incorporated by this reference.

NOW, THEREFORE, the following declaration and agreement is made with respect thereto. The property described above is transferred to the Trustee, IN TRUST, subject to the terms and conditions set forth in this agreement. The Trustee accepts the property transferred to him, IN TRUST, and agrees to hold, administer and distribute the Trust estate according to the terms of this agreement, and the Order of the Civil Division,

ARTICLE ONE
Beneficiary

This Trust is established for the benefit of De'Shawn Mecco Brown, a disabled person as defined in the Social Security Act Sec. 1614 (a)(3), 42 U.S.C. 1382c(a)(3). This Trust is created pursuant to 42 U.S.C. 1396p (d) (4) (A).

ARTICLE TWO
Irrevocability

This Trust and all interests in it are irrevocable, and there is no power to alter, amend, revoke, or terminate any Trust provision or interest, whether under this Trust or any statute or rule of law, except as provided herein. If ever necessary in the Trustee's opinion, due to judicial decisions or interpretations or the changes in any laws or rules, to conform the Trust provisions to operate and to fully comply with the expressly stated intentions, purposes, and goals in establishing this Trust, the Trustee of this Trust may amend and/or reform this instrument so that it conforms with any regulations that are approved by any governing body or agency relating to 42 U.S.C. 1396p or related statutes, including state statutes that are consistent with the provisions and purposes of the Omnibus Budget Reconciliation Act of 1993 and amendments to such Act.

1. In exercising discretion to expend income or principal under this Article, the Trustee shall give such consideration, as the Trustee deems appropriate, to all other income and resources which the Trustee knows to be then readily available to the Beneficiary for use for such Trust purposes. Further, the Trustee shall be guided by the determinations of the Special Advisor(s) named herein as to the needs of the Beneficiary and the eligibility of the Beneficiary for public benefits assistance.

2. The Trustee may make payments under this paragraph to the guardian or conservator of the Beneficiary's person or estate, or to such other person or persons as the Trustee deems proper for Beneficiary's use, within the limitations set forth above.

3. All decisions of the Trustee as to the person or persons to whom, and the purposes for which, such payments are to be made, and the amount or amounts, if any, to be paid out under this paragraph, are within the Trustee's discretion subject of course to periodic review and supervision of the Probate Division.

D. The Trustee may apply the Trust estate for the "special needs" of the Beneficiary. As used in this Trust, "special needs" includes the requisites for maintaining the health, safety and welfare of the Beneficiary when, in the discretion of the Trustee, such requisites are not available from a public agency, office or department of the state where he resides or from the federal government. In particular, but not by way of limitation, "special needs" may include the following:

1. Subject to the restrictions specified in Article Six, the purchase of an appropriate house or apartment for the Beneficiary to use as his residence and, if appropriate, the residence of his family.

2. The construction or removal of any structures or improvements to an existing structure that will improve the residence for the Beneficiary, whether or not such residence is solely owned by the Beneficiary. Such construction or removal may provide accessible bath and kitchen facilities, access and egress from the Beneficiary's room, widened doorways, or other architectural adaptations necessary to make the dwelling safe and barrier-free or to enhance the residence to provide therapeutic treatment such as a hydrotherapy pool.

3. Subject to the restriction of Article Six, Section B. 3., medical expenses to provide the Beneficiary with the full range of medical goods, services, therapies, treatments, surgeries, as well as medicines, food supplements, hearing aids, corrective lenses and other health aids if such goods and services are not provided to the Beneficiary by any public benefits program or other governmental agency or the Beneficiary is not eligible to receive such goods and services from any public benefits program or other governmental agency. Medical expenses shall include the purchase of health and dental insurance. Therapeutic services may include physical therapy, hydrotherapy, occupational therapy, psychological counseling, and speech therapy. Further, services may include

organization or governmental agency seeking to reduce or eliminate the Beneficiary's eligibility for government financial and other assistance, or seeking payment or reimbursement for benefits extended to or for the benefit of the Beneficiary or any other proceeding for the same or any similar purpose. The Trustee shall have discretion with regard to the defense of any such claim, including the management of all litigation that may result. The Trustee shall also be authorized, in its complete discretion, to settle, in whole or in part or otherwise compromise any such claim or litigation with the consent of the Special Advisor. The Special Advisor shall be responsible for advising the Trustee in writing to contest or defend or to settle such action.

G. The trustee shall file an account and report in compliance with Rule 305 (a) of the Civil Procedure Rules of the District of Columbia, subject to audit and examination by the Auditor Master or Register of Wills in compliance with Rule 305(b), as determined by the Court, together with the payment of fees for review of fiduciary accounts in compliance with Rule 305 (d). The trustee may make expenditures only as stated in this trust agreement without prior authorization of the Court. The trustee shall seek Court authority for expenditures other than those provided in this trust agreement and by statute in accordance with Rule 305 (c). The trustee shall be governed by Rules 305 (e),(f), (g), (h), (i), and (j). The trustee shall obtain an appraisal of property in accordance with Rule 305 (k) and file an inventory within 90 days from the date of appointment.

ARTICLE FOUR
Special Advisor

A. Appointment of Special Advisor. La Toyia Brown shall serve as Special Advisor for the purpose of advising the Trustee as to the needs of the Beneficiary and determining if the Beneficiary shall apply for and receive public assistance benefits.

B. The Special Advisor shall have the following responsibilities:

1. to determine whether or not it is in the best interests of the Beneficiary to qualify for government benefits.

2. to identify those particular benefits and the resource and income limitations of the identified programs.

3. to advise the Trustee of available resources and application of resources and income limitation of any public assistance programs for which the Beneficiary may be eligible.

C. The Trustee may rely upon the instructions or information provided by the Special Advisor in making decisions to distribute income or principal under this paragraph. If the Special Advisor shall fail to advise the Trustee, in writing, of available resources and the applicable resources and income limitation, the Trustee shall not be responsible for failure to consider such factors in exercising discretion over distributions. Upon receipt of notice of such resources and income limitations, the Trustee shall not make distributions that would disqualify the Beneficiary for those benefits identified in writing by the Special Advisor. The Trustee may, upon consultation with the Special Advisor, make payments that may reduce or eliminate benefits from one or more programs. The Trustee may determine that it is in the best interest of

of benefits for maintenance and support or medical care to which De'Shawn Mecco Brown would otherwise be entitled under a benefits program.

C. Pursuant to 42 U.S.C. 1396p (d)(4)(A), assets remaining in the Trust at the time of the death of DE'SHAWN MECCO BROWN, or termination of the Trust for any other reason, shall be paid to the appropriate governmental agency of the District of Columbia or such other state or states as reimbursement to such state or states having a lien for claims arising by virtue of the fact that benefits were provided through a government benefits plan or program to or for the benefit of DE'SHAWN MECCO BROWN during his lifetime to the extent that such benefits were paid to or for her. The Trustee may first pay any outstanding, reasonable expenses for maintaining the existence of the Trust, any final bills, debts, expenses, fees, and/or such other items which may be paid, prior to reimbursement to the state, following statutes or regulations now in existence or hereafter enacted or issued. The Trustee should obtain a receipt demonstrating release from the governmental authority that receives reimbursement for medical assistance benefits and other related benefits. Upon termination of this Trust by reason other than the death of DE'SHAWN MECCO BROWN, the remainder of the Trust, if any, shall be distributed for the sole benefit of DE'SHAWN MECCO BROWN, to a Trust to be created pursuant to a further Order of the Court, or to a guardian or conservator appointed through appropriate proceedings initiated by the Trustee.

D. Should any assets remain in the Trust after the satisfaction of claims as set forth in Section C, above, they shall be paid to LaToyia Rasheik Brown, or if not then living, to the estate of DE'SHAWN MECCO BROWN to be distributed in accordance with the laws of intestacy of the District of Columbia or any other jurisdiction as may be appropriate.

E. The Trustee, may terminate any Trust created under this agreement in advance of the time when the Trust would otherwise terminate, if the Trustee determine that the size of the Trust is so small as to make its continued operation uneconomical, which may be subject to the approval of a relevant state government agency or the Court of the controlling jurisdiction after obtaining court approval. The Trustee shall not be liable for the exercise or non-exercise of the discretion granted under this paragraph.

ARTICLE SIX
Administrative Provisions

A. Trustee's Powers. In addition to the powers, authority and discretion conferred upon the Trustee by the provisions of this agreement or by law, including (but not limited by) the provisions of the law of the Trust situs, the Trustee is authorized and empowered in the Trustee's discretion, to act without order of any Court, as follows:

1. to retain as an investment for the Trust and in the same form as received by the Trustee, all or any of the property hereby or hereafter given to the Trustee or which may be distributed to the Trustee; and

2. to prudently manage, invest and reinvest the Trust and each and every part thereof, with power, in the Trustee's discretion with an appropriate mix of investments

pertaining to the Trust and to pay the reasonable fees and compensation of such persons for their services as an expense of administration of the Trust; and

9. to determine, in the exercise of reasonable discretion and in accordance with generally accepted accounting principles, whether all or any part of any payment or property received, or charge or expense (including taxes) incurred, shall be credited to or charged against income or principal, or both; and

10. to lend money to any person or entity for such consideration and upon such terms as to interest, security or otherwise as the Trustee deems proper and the Trustee shall not be liable for loss to the Trust or to any Beneficiary for any default or failure of any borrower to repay any such loan or loans, and to lend Trust funds to such persons and on such terms, including (but not limited to) interest rates, security, and loan duration, as the Trustee deems advisable; provided, however, that the Trustee may neither lend money without receiving adequate security and an adequate rate of interest nor loan Trust funds to themselves; and

11. to make any payment, division, or distribution required by this agreement in money, in kind, or partly in money and partly in kind; and

12. to pay and advance money for the Trust's protection and for all expenses, losses and liabilities sustained in its administration; and

13. to prosecute or defend any action for the protection of the Trust, the Trustee in the performance of the Trustee's duties, or both, and to pay, contest or settle any claim by or against the Trust or the Trustees.

14. The Trustee may, pay reasonable costs incurred in the creation and administration of this Trust and any administrative costs associated with any conservatorship or guardianship or other protective order which may be advisable for the Beneficiary, from the Trust estate.

B. Limitations on Trust Assets.

1. All property valued at more than $500 must be titled in the name of the Trust.

2. Trust assets may not be used to purchase an annuity on the life of the Beneficiary unless the annuity provides that:

(a) The final payment to the trust shall be made before the Beneficiary is 65 years old; and

(b) If the Beneficiary dies before the final payments have been made, the remaining payments shall be paid directly to the State until the total Medical Assistance benefits paid on behalf of the Beneficiary have been reimbursed

with the Beneficiary to occupy said residential property or properties without obligation to pay rent. In addition, the Trustee is authorized to pay all real property taxes, expenses of insurance, maintenance, and repair from the net income or principal of the Trusts created hereunder in proportion to the Beneficiary's interest in each such residence.

F. Applicable Law. The Trust shall be construed, regulated and governed by and in accordance with the laws of the residence of the beneficiary, which is the District of Columbia at the date of the execution of this trust but may be the State of Maryland or another jurisdiction in the event that the Beneficiary is then living in another jurisdiction or the situs of this Trust or any portion of the Trust is moved to another jurisdiction, such that the Trust must be construed, regulated and governed by and in accordance with the laws of that place in order for the Beneficiary to receive public assistance benefits. The Trustee may change the situs of the Trust if the Trustee determines that such action would be in the best interests of the Beneficiary.

ARTICLE SEVEN
Trustee Provisions

A. Trustee's Accounts. The Trustee shall render an annual accounting of the trust, including a listing of current assets, income and itemized distributions during the previous year, which shall be filed with the Probate Division of the Superior Court of the District of Columbia and audited therein pursuant to relevant rules and procedures of that Court and such other governmental authorities as may be indicated or required to preserve public assistance benefits.

B. Compensation of Trustee. A Trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder, consistent with industry standards, which may be expressed as a percentage of Trust assets. All trustee compensation is subject to review by the Superior Court, to be approved if reasonable and modified if unreasonable. In considering the reasonableness of fees reported in the accounting by the Trustee, the Court may consider the industry practice and any other factors.

C. Trustee's Bond. When any individual or individuals are serving as Trustee, then the Trustee shall be bonded in an amount set by the Probate Division of the Superior Court pursuant to Rule 303 of the Civil Rules of Procedure of the Superior Court. The bond may be increased in accordance with any increase in assets of the Trust.

D. Successor Trustee. Evan J. Krame, guardian of De'Shawn Brown is the proposed initial Trustee of the Trust, subject to final appointment by the Probate Division. The initial trustee shall designate a successor trustee. If the initial Trustee for any reason has failed to select and appoint a successor trustee, then the Special Advisor shall select a successor Trustee to serve. Upon assuming the role of successor Trustee, the successor Trustee shall have all of the powers and discretions conferred on Trustees by law and by this agreement.

E. Designation of Co-Trustees. If an additional co-trustee or co-trustees is deemed to be either necessary or appropriate, for the purpose of obtaining bonding, or otherwise, then the

7. The trustee shall not:

(a) Have an interest in trust assets;

(b) Have discretion to use trust assets for the trustee's own benefit;

(c) Self-deal by selling trust assets to the trustees or buying trust assets from the trustee; or

(d) Loan trust assets to the trustee.

ARTICLE EIGHT
Spendthrift Clause

To the fullest extent permitted by law, the interest of the Beneficiary of the Trust created herein shall be free of all of his debts, contracts and obligations and cannot be anticipated or assigned or transferred in whole or in part, voluntarily or involuntarily, or by operation of law (including being taken by execution of any legal process whatsoever) and any and all such anticipations, assignments and transfers shall be void. If any anticipation, assignment or transfer, whether voluntary or involuntary, or by operation of law shall be made or attempted by or against the Beneficiary, all further payments to such Beneficiary of income or principal of the Trust shall be suspended for such period of time or indefinitely (but in no case for longer than the term of the Trust) as the Trustee determines, and in lieu of such payments, the Trustee may apply so much of the income or principal of the Trust, or both, to which the Beneficiary would otherwise be entitled as the Trustee deems necessary for the special needs as defined in Article Three of this Agreement of the Beneficiary, and all income of the Trust not so applied shall in the absolute discretion of the Trustee be accumulated and added to the principal of the Trust at such time or times as the Trustee may deem proper.

ARTICLE NINE
Taxes

This is a grantor Trust for tax purposes. The Trustee shall pay any income tax liability of the Beneficiary which results from income received by the Trust but properly reported on the income tax return of the Beneficiary, such amount to be specified in writing and delivered by the Beneficiary's accountant or tax preparer to the Trustee. The Trustee shall solely and conclusively rely on this amount. The funds used to pay any such income tax liability shall be paid directly to the appropriate tax authority and shall not be available to the Beneficiary. The Beneficiary shall not have any right to or interest in any such funds paid by the Trustee. Any such funds are not a resource of the Beneficiary and should not be treated as a distribution of income for purposes of Medicaid qualification.

ARTICLE TEN
Miscellaneous Administrative Provisions

The following additional provisions govern the administration of each Trust created under this agreement:

A. The validity of this Trust and the construction of its beneficial provisions shall be governed by the laws of the residence of the beneficiary in force on the date of this agreement. This paragraph shall apply regardless of the current domicile of the Trustee or Beneficiary and

to be managed and appoint (and from time to time, replace) the investment manager or managers, including an Affiliated Entity, for those assets; provided that during the Guardians' lifetime, the corporate Trustee shall consult with and give consideration to the wishes of the Guardians of the beneficiary, if any, as to the selection of a manager.

3. To submit to arbitration any dispute with respect to the corporate Trustee or any other investment service offered by an Affiliated Entity.

4. To retain and sell the trust property, including any securities issued by the corporate Trustee and to invest and reinvest the same in all forms of property, including without limitation, stocks, bonds, mutual funds, notes, securities or other property, including securities issued by the corporate Trustee.

J. If a corporate Trustee is acting as Trustee then the corporate Trustee shall have the following specific powers as to trust property and may exercise the same in its sole and absolute discretion without Court order or approval but only with the consent of the Special Advisors:

1. To engage any corporation, partnership or other entity affiliated with the corporate Trustee (An Affiliated Entity) to render services to any trust hereunder, including, without limitation:

(a) To manage or advise on the investments of such trust on a discretionary or nondiscretionary basis.

(b) To act as a broker or dealer to execute transactions, including the purchase of any securities currently distributed, underwritten or issued by an Affiliated entity, at standard commission rates, markups or concessions and to provide other management or investment services with respect to such trust, including the custody of assets and to pay for any such services from trust property, without reduction for any compensation paid to the corporate Trustee for its services as Trustee.

2. To invest in mutual funds offered by an Affiliated Entity or to which an Affiliated Entity may render services and from which an Affiliated Entity receives compensation.

3. To cause or permit all or any part of any trust hereunder to be held, maintained or managed in any jurisdiction and to hold any trust property in the name of its nominee or a nominee of an Affiliated Entity.

K. The Trustee and any Affiliated Entities shall be indemnified and held harmless from and against any and all claims, demands, losses, liabilities, damages and expenses which may be sustained at any time because of any act or omission, including acts or omissions of ordinary negligence, occurring before the date the trust property was received by the Trustee.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

IN RE: Tracy Amber Anzalone, An Adult	)	Intervention Proceeding No. 101-03

PETITION TO APPROVE SETTLEMENT OF THE ADULT WARD'S MEDICAL MALPRACTICE CASE AND DISTRIBUTION OF SETTLEMENT FUNDS

Comes now the Co-Conservator, Dr. Debra Anzalone, by and through counsel, Bruce J. Klores and Bruce J. Klores & Associates, P.C., and moves this Court for an Order approving a settlement of the adult ward's medical malpractice case against the United States of America, and the distribution of these settlement funds, and as grounds refers this Court to the attached Points and Authorities.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____

Bruce J. Klores - #358548
1735 20th Street, N. W.
Washington, DC 20009
202-628-8100
Attorney for Co-Conservator, Debra Anzalone

FINAL DRAFT 6/9/06 5:00 P.M.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

IN RE: Tracy Amber Anzalone, An Adult	)	Intervention Proceeding No. 101-03

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

1. The Adult Ward, Tracy Amber Anzalone, whose date of birth is February 26, 1982 is now twenty-four years old. She is the youngest daughter of Fanancy Louis Anzalone, M. D., and Debra Anzalone, Ph.D.

2. In January, 2003 Capt. Fanancy Anzalone (U.S. Navy, Retired) was active duty United States Navy Medical Corps and was the Commanding Officer of the United States Naval Hospital in Naples, Italy.

3. On January 15, 2003, Tracy Amber Anzalone, a beautiful young scholar and athlete, was in Florence, Italy, enjoying her junior year abroad from the University of Miami. While sitting at an outdoor cafe she was struck by a motor vehicle and her leg was fractured. After Tracy was stabilized, her father arranged for her transfer back to his hospital where Tracy's leg would be treated. The operation on January 17, 2003 went smoothly, but at the end of the procedure the Navy anesthesiologist, Lt. Commander J. Avila, administered excessive amounts of narcotics and then failed to monitor Ms. Anzalone's airway as her respirations decreased from the drugs. As a result of this combination of errors Tracy Anzalone stopped breathing. By the time she was resuscitated she had suffered massive brain damage from lack of oxygen.

4. Once stabilized, Tracy was "medevaced" to Landstuhl Regional Medical Center in

have the right to a single in-house administrative "appeal" within the Navy's Judge Advocate General's Office ("JAG"). Once the Navy makes its "final determination" the case is either paid or denied. There is no right to sue.

The MCA is an arcane and unfair law. Nonetheless, its enforceability has been repeatedly upheld by Federal Courts whenever challenged (see eg. Turpeh Doe v. United States of America 28 F.3d 120 (1994 DC Cir).

7. Attached is a report from Elizabeth Latimer, M.D., a specialist in both pediatric neurology and in treating adults with severe neurologic disabilities like Tracy's (Exhibit 1). Dr. Latimer, who spent over a decade as a military physician describes Tracy's current condition and needs. Dr. Latimer notes that

> In layman's terms, I would describe her motor functioning to someone who has not had the opportunity to meet her in the following way. Her neck is arched back and is tight and painful. She has no use of her arms and legs and they are fixed in a very tight inflexible posture and occasionally she has exaggerated twisting movement. She is obviously in great discomfort when her limbs are moved or a care giver attempts to stretch her. One cannot elicit reflexes because the muscles stay rigid all the time.

Dr. Latimer goes on to say that

> Tracy is currently cared for by her parents. Her father is a board certified physician. Her mother is a nurse with a Doctorate degree in health management. Her mother does not work in order to care for her daughter. Other than taking Tracy to doctor's appointments and other health related visits, she rarely, if ever, leaves the apartment. Both parents are emotionally and physically exhausted as one may expect. They have done a remarkable job with their daughter owing to their love, dedication and very importantly their professional training and experience.

8. The Anzalones formally presented their claims to the JAG in December, 2004. Binders of proof were submitted along with the written opinions of several of the most

$3,225,879.00 *(Three Million Two Hundred Twenty Five Thousand Eight Hundred Seventy Nine Dollars)* will be used by the Navy to purchase a structured settlement annuity which will pay The Tracy Amber Anzalone Irrevocable Under 65 Disability Trust the tax free sum of $14,905.00 *(Fourteen Thousand Nine Hundred Five Dollars)* a month for the rest of her life. The payments will increase by 3% per year. (Update.) The annuity payments stop upon Tracy's death. If Tracy has a normal life expectancy this annuity will pay her $29,690,624.00 *(Twenty Nine Million Six Hundred Ninety Thousand Six hundred Twenty Four Dollars)*. (Update) The Tracy Amber Anzalone Irrevocable Under 65 Disability Trust is already established and is attached as Exhibit 3. The Trustees are Tracy's father, Fanancy Anzalone, MD, a board certified physician, and her mother, Dr. Debra Anzalone, an Intensive Care Unit nurse by training and experience, with a doctorate in health management. They are also Tracy's primary care givers.[1] The Trust (commonly known as a "Special Needs Trust") will allow Tracy to continue to receive Medicaid benefits. The trustees are not paid for their services. The trust was written by Lauchlin Waldoch, Esq, a Florida attorney who specializes in estates and trusts and representing disabled individuals.

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[1] After twenty nine years of commendable service, Captain Anzalone retired from the Navy in February 2006. The Anzalone family moved to Florida in March of 2006 where Dr. Anzalone took a position as one of the medical directors for American Airlines. The family currently lives with Debra Anzalone's brother, Father James Mericantante, a catholic priest. After this settlement comes through they will buy a home and continue to provide Tracy all of the care that she needs. She is indeed fortunate to have such skilled care givers as parents.

evaluations of Tracy, etc. Those costs are currently in excess of $60,000.00 *(Sixty Thousand Dollars) and are expected to rise.* Undersigned counsel has agreed to limit costs and fees to $1,000,000.00 *(One Million Dollars)*, thereby giving Tracy and her family at least an additional $88,000.00 *(Eighty Eight Thousand Dollars).*[2]

d. Parents and All Other Claims:

After payment of legal fees and costs, the family will receive $917,859.00 *(Nine Hundred Seventeen Thousand Eight Hundred Fifty Nine Dollars)* in tax free cash which is intended to be paid as full satisfaction for all of the parents' (and sibling's) economic and non-economic claims. These claims are sizeable. For example, Debra Anzalone would be earning over $100,000.00 *(One Hundred Thousand Dollars)* a year in the work force. She has not worked a day since January 2003, and is expected to remain at home to care for her daughter. With these funds the parents expect to purchase and refurbish a family home in South Florida.

11 Because of her work history and her disability, Tracy receives Medicare and Social Security Disability. Also, because of the family's military background Tracy will also receive health benefits from Tricare. It is expected that between Medicare, Medicaid and Tricare, Tracy's medical bills and hospitalizations will continue to be covered in the future as

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[2] Regarding the legal fees, undersigned counsel whose practice is almost entirely representing families like the Anzalones has spent as much time on this matter, if not more, than in similar cases where full blown litigation is undertaken.

understanding that this is one of the largest, if not the largest, Military Claims Act settlement for a single individual.

WHEREFORE, for the reasons states herein, Co-Conservator Debra Anzalone, through counsel, Bruce J. Klores and Bruce J. Klores & Associates, P.C. move this Court for an Order approving the settlement of the adult ward's medical malpractice case and the division of settlement proceeds on the terms set forth herein.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____

Bruce J. Klores - #358548
1735 20th Street, N. W.
Washington, DC 20009
202-628-8100
Attorney for Co-Conservator, Debra Anzalone

Dollars) paid to Fanancy and Debra Anzalone in full satisfaction of all their individual claims; and

c. $1,000,000.00 (*One Million Dollars*) paid to Bruce J. Klores & Associates, P.C. for legal fees and costs; and it is further

ORDERED, that the Petitioner and Co-Conservator, Debra Anzalone, may enter into the settlement as described herein.

_____
JUDGE

Copies to:

Bruce J. Klores, Esquire
1735 20th Street, N. W.
Washington, DC 20009

Tracy Amber Anzalone
c/o Debra Anzalone, Co-Guardian and Co-Conservator
2773 South Ocean Blvd. PH-2
Palm Beach, FL 33480

Dr. Fanancy and Dr. Debra Anzalone
2773 South Ocean Blvd. PH-2
Palm Beach, FL 33480

1746\pet.approve

annuity is purchased.

b. $917,859.00 *(Nine Hundred Seventeen Thousand Eight Hundred Fifty Nine Dollars)* paid to Fanancy and Debra Anzalone in full satisfaction of all their individual claims, and in satisfaction of any and all claims Tiffany Anzalone may have; and

c. $1,000,000.00 (*One Million Dollars*) paid to Bruce J. Klores & Associates, P.C. for legal fees and costs; and it is further

ORDERED, that the Petitioner and Co-Conservator, Debra Anzalone, may enter into the settlement as described herein, and execute all necessary papers to so effectuate.

JUDGE

Copies to:

Bruce J. Klores, Esquire
1735 20th Street, N. W.
Washington, DC 20009

Tracy Amber Anzalone
c/o Debra Anzalone, Co-Guardian and Co-Conservator
2773 South Ocean Blvd. PH-2
Palm Beach, FL 33480

Dr. Fanancy and Dr. Debra Anzalone
2773 South Ocean Blvd. PH-2
Palm Beach, FL 33480

BRUCE J. KLORES
& ASSOCIATES
ATTORNEYS AT LAW

Copies mailed, postage prepaid, to parties indicated above on

Death beneficiaries when they lose their parent. We have argued repeatedly that there was no case law to support this instruction.

The 2004 Revised Jury Instruction 14.05 deletes the requirement of minority as a qualifier for recovery when a parent is lost. The 2004 "14.05" is attached hereto as Exhibit 2. As the Court will note, the instruction reads as follows:

> In making your award you must also consider the loss of care, education, training, guidance and parental advice that [the deceased parent] would have been expected to give [the decedent's next of kin beneficiaries].

This 2004 instruction comports with D.C. law, and plaintiff's position that Mr. and Mrs. Consti's adult daughters can collect damages based on the evidence.

Respectfully submitted,

BRUCE J. KLORES & ASSOCIATES, P.C.

By_____
Bruce J. Klores, #358548
915 15th Street, N. W. #300
Washington, D. C. 20005
Tel.: 202-628-8100
Fax: 202-628-1240
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Supplemental Trial Memorandum on the Issue of Wrongful Death Damages was mailed, postage prepaid to the following persons this 22nd day of September, 2004:

H. Kenneth Armstrong, Esquire
204 Monroe Street #101
Rockville, MD 20850

_____
Bruce J. Klores

1622\supp.trial.memo

36 who has 4 minor children. As adults, Elinor and Desiree, along with their families, at various times lived under the same roof as Mr. and Mrs. Comsti for lengthy time periods. Mr. Comsti, Elinor, and Desiree are expected to testify to the enumerable household services Mrs. Comsti provided them and her grandchildren. In addition to Mrs. Comsti's significant contributions to the upkeep and maintenance of their home, Mrs. Comsti provided her children and grandchildren with care, guidance, and personal advice on a daily basis. Mrs. Comsti was very active in helping raise her grandchildren; she took them to school and often provided childcare services in the evenings. She spoke to or saw her daughters everyday, especially when they were living with her, and as their mother she was a constant source of personal and moral support and guidance. The loss of household services suffered by Mr. Comsti are extensive and range from Mrs. Comsti's contributions to the daily chores of cooking and cleaning, to her help in managing and maintaining the household, to her irreplaceable role as his companion who cared for and guided him throughout their thirty-three year marriage.

Defendants have advised the Court that they will seek to preclude the admission of evidence related to the wrongful death claims of anyone other than Mr. Comsti, believing that the law precludes such claims for Elinor and Desiree because they are over the age of eighteen.

This position is wrong. As this memo will show, there is no requirement that children of deceased family members be minors in order to qualify as Next of Kin beneficiaries.

ARGUMENT

In a wrongful death action, a claim for lost services brought by a family member of a decedent is not limited to only those services that would have been provided during the age of minority. There is no such limitation in the Wrongful Death Statute, D.C. Code § 16-2701, or in our common law. As such, the beneficiaries entitled to compensation for the loss of Mrs.

to mean only minority dependents, as the defendants in this case suggest. "Recoverable damages under District of Colombia's Wrongful Death include: (1) pecuniary losses resulting from the loss of financial support the decedent could have been expected to provide the next of kin had [s]he lived; and (2) *the value of lost services, such as care, education, training, and personal advice.*" Herbert v. District of Columbia, 808 A.2d 776 (D.C. 2002). There are no restrictions placed on the award of damages for lost family services other than that the jury must decide the issue on evidence that tends to prove that the claimed services would have been supplied but for the wrongful act. Doe, 292 A.2d at 860-863.

Notwithstanding the clarity of the statute and caselaw, defendants in civil cases routinely try to apply the "minority" definition. When faced with this identical argument several years ago, Judge Stephen Milliken denied the defendant's Motion in Limine to Exclude Evidence of Lost Family Services in Tina Terry v. Theodore George, Jr., M.D., Case. No.: CA 94-12025. The defendants in Terry argued that since the decedent's daughter was not a minor, she was not entitled to damages for the loss of family services resulting from her mother's death. The court, however, allowed the claim, a verdict was entered for the daughter, and the case settled before appeal. See Order attached as Exhibit "1".

The issue of damages in wrongful death cases is particularly within the province of the jury. Doe, 292 A.2d at 860. Since there is no express or implied limitation on the age of the claimants to the damages, the jury in Comsti should be entitled to hear evidence from the decedent's family as to the losses of household and familial services they have suffered as a result of Mrs. Comsti's death. The jury is free to listen to this evidence and then either accept or reject it, per beneficiary.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Trial Memorandum in Support of Lost Family Services Claims Under the Wrongful Death Act was mailed, postage prepaid to the following persons this ____ day of _____, 2004:

Kenneth Armstrong, Esquire
Robert Maynard, Esquire
204 Monroe Street #101
Rockville, MD 20850

_____
Bruce J. Klores

BRUCE J. KLORES & ASSOCIATES
ATTORNEYS AT LAW
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1735 20TH STREET, N.W.
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BRUCE J. KLORES
(D.C., MD., VA.)
SCOTT M. PERRY
(D.C., MD.)
THOMAS W. MITCHELL
(D.C., MD., VA.)

ANNE D. PILE, RN, CCRN, LNC
(NURSE CONSULTANT)

TEN IMPORTANT CONSIDERATIONS WHEN SETTLING A MINORS CASE

1. Is the settlement fair and reasonable in the light of medical, legal, and insurance coverage issues?

2. What are the jurisdiction's rules regarding these settlements?

3. Who should be the fiduciary?

4. What type of trust or other mechanism is best to hold the minor's funds?

5. Involve fiduciary counsel early.

6. Obtain structured settlement advice privately well in advance of mediation.

7. Do not negotiate using annuity numbers at mediation—use present value.

8. Does state law allow for parents' claims?

9. Spend time with family explaining finance, structure, trusts, etc. on several occasions before mediation.

10. Be realistic about case value in settlement.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TINA TERRY, Personal Representative of the Estate and Next of Kin of CATHERINE B. TERRY, Deceased Plaintiff, v. THEODORE GEORGE, JR., M.D. Defendant.	)	C.A. No. 94-012025 Calendar 10, J. Milliken

PLAINTIFF'S PROPOSED VERDICT FORM

1. Do you find that the defendant Theodore George, M. D. was negligent by failing to perform breast examinations on Catherine Terry?

Yes_____ No_____

2. Do you find that the defendant Theodore George, M. D. was negligent by failing to refer Ms. Terry for mammography?

Yes_____ No_____

3. Do you find that the defendant Theodore George, M.D. was negligent by failing to follow-up on any referral for mammogram?

Yes_____ No_____

If your answer to any of the above questions was yes, go on to question 4 now, otherwise stop here, and return your verdict in favor of the defendant.

4. Do you find the defendant Theodore George, M. D.'s negligence was a proximate cause of Ms. Terry's injuries?

Loss of Training $_____

Loss of Guidance $_____

Loss of Parental Advice $_____

I affirm under the penalties of perjury that the following reflects the unanimous decision of the jury.

_____
FOREPERSON

Date_____

1152\wf

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ANDREW L. CIBULA, JENNIFER CIBULA, and JC, their minor child, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 1:05-1386
UNITED STATES OF AMERICA, Defendant.	)	

MEMORANDUM ORDER

THIS MATTER is before the Court on Plaintiffs Commander Andrew L. Cibula, Jennifer Cibula, and their minor son, JC's medical malpractice claim against the United States Government ("the Government") arising under the provisions of the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 1402(b). The plaintiffs allege that United States Naval physicians were negligent in their treatment of Mrs. Cibula during her pregnancy which resulted in JC suffering a substantial brain hemorrhage in utero, leading to his being born with debilitating neurological impairments. The issues before the Court are: (1) did the Naval physicians violate the appropriate standard of care in monitoring Mrs. Cibula's pregnancy; (2) if the physicians violated the standard of care, did that breach proximately cause JC's injuries; and (3) if the negligence of the physicians did proximately cause JC's neurological defects, what level of

acting within the scope of his office or employment . . . ."). Venue in this case is proper in the United States District Court for the Eastern District of Virginia because, at the time of filing the Complaint, the Plaintiffs resided in this judicial district, specifically in Oakton, Virginia. Under the FTCA, venue is proper either where the medical care took place, or where the plaintiffs reside. 28 U.S.C. §1402(b) ("Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.").

I. Findings of Fact

A. Jennifer Cibula's Pregnancy

1. Andrew Cibula ("Cmdr. Cibula") is a Commander in the United States Navy. He joined the Navy in 1987, immediately after graduating from Marquette University. He is a pilot and aerospace engineer. In 1997, when JC was born, Cmdr. Cibula was stationed at the United States Naval Base in San Diego, California. He is now stationed in the Washington, D.C. area and lives in Oakton, Virginia, with his wife, Jennifer, JC, and their second son, David.

2. Jennifer Cibula ("Mrs. Cibula") obtained a bachelor's degree from the Monterey Institute of International Studies in 1994, and is one course shy of earning a master's degree. She

the fetus in pregnancy because it slows the action of the mother's heart and reduces maternal blood pressure, among other things. Obstetricians recognized in 1997 that Inderal could reduce the amount of blood, resulting in limitations in the levels of oxygen and nutrients flowing to a fetus from the mother through her placenta. These reductions, in turn, potentially retard fetal growth, causing damage to the fetus and its organs along with a serious pregnancy complication known as intrauterine growth restriction ("IUGR"). Likewise, it was known that Fioricet or Fiorinal contained caffeine, which is a vasoconstrictor. Vasoconstrictors can also reduce blood supply to the fetus through the placenta.

7. Based on this medical history and these medications, the medical staff at Balboa determined on April 22, 1997, that Mrs. Cibula was a "moderate risk" pregnancy and required monitoring by a perinatologist. Perinatologists, also known as maternal-fetal medicine (MFM) specialists, are medical doctors who specialize in high-risk pregnancies, maternal and fetal testing, and fetal therapy.

8. Bruce Kahn, M.D., an obstetrician, became Mrs. Cibula's primary obstetrician. Dr. Kahn was not a perinatologist and at the time he cared for Mrs. Cibula, he was not board certified in obstetrics. Notwithstanding her risk factors, Mrs. Cibula was never seen by a perinatologist during her pregnancy. She also

cardiologist concluded that Mrs. Cibula did not have MVP. She had, instead, a non-threatening cardiac condition known as supraventricular tachycardia ("SVT"). The Navy cardiologist recommended that Mrs. Cibula continue taking the Inderal as it was also helpful with SVT and migraines. Dr. Kahn learned of the cardiologist's findings on September 15, 1997.

12. In the meantime, Mrs. Cibula continued her regular visits to Dr. Kahn. During a visit on September 3, 1997, she described worsening heart palpitations despite an increase in her daily prescription of Inderal to 100 milligrams. Dr. Kahn's note in the medical chart that day indicates that he intended, finally, to meet with Balboa's "perinatal staff" after completion of the cardiac work-up. He never did.

13. Mrs. Cibula's medical chart as of September 3, 1997, indicates that her fetus was doing well. Dr. Kahn consistently recorded positive fetal movement, no bleeding, and no loss of amniotic fluid. In addition, the baby appeared to be growing normally.

14. Dr. Kahn and others at Balboa monitored fetal growth by measuring the height of Mrs. Cibula's fundus during office visits in lieu of performing sonograms. The fundus is the area between the top of the mother's pubic bone and the top of her uterus. Fundal height is measured with a tape measure, and recorded in centimeters. While fundal height is a useful measurement, it

18. Similar contractions continued during the entire course of Mrs. Cibula's pregnancy. Prior to November 14, however, a Balboa physician applied a fetal monitor only one time to assess the contractions and the baby's heart rate, and it was not Dr. Kahn.

19. Mrs. Cibula saw Dr. Kahn on September 25, 1997. He recorded no vaginal bleeding, no loss of amniotic fluid, and good fetal movement. The fundal height measured twenty-seven centimeters (at twenty-eight weeks), and the fetal heart rate was 140 beats per minute (110 -160 is normal). Dr. Khan ordered no additional testing. He told Mrs. Cibula to keep track of the baby's kick counts, and to return to the clinic in one month. She was about to begin her third and last trimester and by all accounts, the fetus was progressing well.

20. On October 8, at 9:00 p.m., Mrs. Cibula went to the labor and delivery unit at Balboa because of her contractions. It was the thirtieth week of the pregnancy. She was in her third trimester, and at a point where the pregnancy was likely viable outside the womb. Dr. Kahn was not on duty. Cmdr. and Mrs. Cibula remember being seen only by Dr. Youngblood, a medical student or intern, and being told that the senior resident, Dr. Rodriguez, was too busy to see them.

21. A vaginal examination was done, and it showed that Mrs. Cibula's cervix was not dilating. In order to assess the well

another test in an hour. When another NST was performed over one hour later, however, Mrs. Cibula had another non-reactive test.

24. As a result of Mrs. Cibula's second non-reactive NST, the doctors performed two additional tests -- a biophysical profile ("BPP"),[3] and an amniotic fluid index ("AFI").

25. As part of the BPP, the ultrasound machine measures the amniotic fluid inside the uterus.[4] Amniotic fluid consists mostly of fetal urine.

26. The doctors who saw Mrs. Cibuila on October 8 attributed Mrs. Cibula's preterm contractions to possible cystitis (inflammation of the bladder), and dehydration. They ordered laboratory tests, prescribed an antibiotic, told Mrs. Cibula to

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[3] A biophysical profile uses a sonogram to assess the well being of the child, including the risk of fetal hypoxia, or lack of oxygen. Five aspects of fetal well being are examined: (1)fetal breathing movements, (2)gross body movements, (3)fetal muscle tone, (4)reactive heart rate, and (5)amniotic fluid.. Each element is given a score of zero for abnormal or two for normal. Like fetal monitoring, NST and sonograms, the biophysical profile was a widely available test, both nationally and at Balboa in 1997, and it posed absolutely no risk to the mother or baby.

[4]There is a range of normal values for the amount of amniotic fluid. A normal amount of amniotic fluid indicates that the baby's kidneys are receiving enough oxygen, driven by normal fetal blood pressure and normal heart activity, and are producing normal amounts of fetal urine. A low amount of amniotic fluid can indicate that the kidneys are not functioning properly, and are producing an insufficient amount of amniotic fluid, which is referred to as oligohydramnios. Oligohydramnios is suggestive of placental insufficiency, meaning that the baby is not urinating because the supply of oxygen and nutrients from the mother through the placenta is diminished. As noted above, placental insufficiency can result in poor fetal outcome, and is also associated with Inderal.

insufficiency and IUGR, Mrs. Cibula should immediately undergo a comprehensive ("Level III") ultrasound study to assess the condition and growth of her fetus, and that Dr. Kahn should repeat the growth study at least every four weeks.

29. Dr. Tipton further instructed Dr. Kahn that Mrs. Cibula needed to have an immediate NST, and that he should repeat the NST at least every week to confirm fetal well being. Inexplicably, Dr. Kahn failed to implement Dr. Tipton's suggested care plan.

30. Mrs. Cibula began to tell Dr. Kahn around the middle of October 1997, that it was taking longer each hour for her to feel the required number of kicks from the baby. Decreased fetal movement normally raises concerns that fetus is trying to conserve energy because it is not getting enough nutrients through the placenta. Dr. Kahn performed no additional tests and took no other remedial measures in response to Mrs. Cibula's complaints of reduced fetal movement.

31. Dr. Kahn did not note in Mrs. Cibula's chart any medical basis for not implementing Dr. Tipton's suggested care plan, and after October 17, Dr. Kahn did not speak to or see Mrs. Cibula again until November 14, 1997, the day that JC was born via an emergency C-section.

32. Mrs. Cibula sought medical help at Balboa on Monday, November 10, 1997. She appeared at Dr. Kahn's office that day

unit to have a NST, AFI and an ultrasound study for growth. Still, Dr. Kahn sensed nothing ominous about Mrs. Cibula's condition and he told her to return to see him in one week. Dr. Kahn also erroneously recorded the events that transpired with Mrs. Cibula on November 14 as occurring on November 10.

34. After meeting with Dr. Khan, Mrs. Cibula proceeded directly to Balboa's labor and delivery unit. She was sent to the prep/triage room, and placed on a fetal heart monitor ("FHM"). Immediately after placement of the monitor, alarms sounded, indicating that the fetus was in distress. The fetal heart tracings ("FHT") confirmed that Mrs. Cibula was experiencing contractions. The FHT also showed that the baby's heart was experiencing "late decelerations" after contractions, no accelerations, and that there was "poor long term variability" in the heart rate. Together, these "non-reassuring" findings indicated that the fetus was not receiving enough oxygen, and had not been for some time due to the placental insufficiency. As each contraction squeezed the uterus and placenta further, the fetus received even less oxygen and nutrients. The fetal heart and contraction pattern indicated that placental insufficiency was causing fetal hypoxia and asphyxia.

35. Dr. Tipton was on duty that day, and she assumed supervisory care for Mrs. Cibula. Thus, November 14, 1997, was the first day that any perinatologist actually saw Mrs. Cibula.

enough oxygen, and had not been for some time, which put him at risk for serious organ injury or death. At this point, 5:15 p.m., Dr. Tipton advised Mrs. Cibula that she needed an emergency cesarean section delivery to save the life of her baby.

39. The operation was uneventful, according to the operative report, and Mrs. Cibula delivered JC at approximately 5:44 p.m. on November 14, 1997.

B. JC's Newborn Course

40. At birth, JC weighed 2,242 grams - slightly more than five pounds. His head circumference was 31.5 centimeters. He was close to the tenth percentile by weight, according to Balboa's growth chart, meaning that ninety of 100 babies weighed more than him at his gestational age. His head, however, was in the fifty to fortieth percentile. JC's skin color was gray, he had poor muscle tone, and he did not cry. Soon after birth, the Balboa physicians placed him on a ventilator. Cmdr. Cibula, who was present for JC's birth, described his new son as small, skinny, tired, and looking like an old man.

41. The surgeon who performed the cesarean section noticed during the operation that Mrs. Cibula's placenta appeared to be small. She sent it to the pathology department for analysis.

42. One of the physicians who had been in the operating room visited Mrs. Cibula in the next day or so, before she was discharged on November 17. The doctor told Mrs. Cibula that it

thrombocytopenia. His initial platelet count was 124,000. Over the next two days, the count fell, with the nadir of 74,000 on November 16. Decreased platelets are a sign of fetal hypoxia.

48. Also on the second day of life, JC's doctors found that he had "direct hyperbilirubinemia" - too much bilirubin in his blood.[6] Over time, JC's hyperbilirubinemia also began to resolve itself.

49. By November 17, 1997, the doctors were still concerned about JC's condition, small size, thrombocytopenia and hyperbilirubinemia. Captain Martin McCaffrey, M.D., one of the neonatologists assisting with JC's care, ordered a head ultrasound study.

50. The head ultrasound was performed on November 18 and showed that JC had suffered a Grade IV intraventricular hemorrhage ("IVH").

51. Dr. McCaffrey received the results of the head ultrasound. He also noticed possible seizure activity in JC, in the form of twitching arms. Dr. McCaffrey then ordered a CT scan of JC's head, which would provide a more detailed radiographic picture of the IVH.

52. The November 18 CT scan confirmed the head ultrasound

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[6] Bilirubin is a chemical formed from the breakdown of hemoglobin in red blood cells. Bilirubin is carried to and processed by the liver. Hyperbilirubinemia is a sign that the liver is not processing bilirubin normally, and that the liver may have been be injured by a lack of oxygen.

and that "bad things happen to good people." He also mentioned how a small placenta may have caused JC's problems.

56. Mrs. Cibula asked Dr. McCaffrey to call her father, Dr. Charles Allen, a medical doctor, to discuss JC's condition. Dr. Allen was a pathologist, and Mrs. Cibula thought that her father would be able to help her understand what happened to JC. Dr. McCaffrey called Dr. Allen on November 18. Dr. McCaffrey told Dr. Allen that JC had suffered a Grade IV IVH, and that JC had suffered hypoxia before birth, which was likely due a placental abruption. Dr. McCaffrey said nothing to Dr. Allen to implicate medical treatment as a possible cause of JC hypoxia or bleed. Dr. McCaffrey's reference to a placental abruption suggested to Dr. Allen that medical treatment was not a cause of the bleed. Dr. Allen testified that he understood placental abruption to be a normal complication of pregnancy.[7]

57. JC remained critically ill at Balboa for another month. He had several more head ultrasounds, CT scans, and MRI studies to track the progress of the hemorrhage, and its consequences.

58. JC's doctors had two principal concerns as a result of the bleed. First, the blood in JC's ventricles and brain tissue

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[7]According to the textbook, Williams Obstetrics, cited by Plaintiffs on this issue in opposition to Defendant's motion to dismiss, the causes of placental abruption are generally unknown and unrelated to medical treatment. (Pltf.'s Opp. To Def.'s Mot. to Dismiss, 15-16 (citing JACK A. PRITCHARD ET AL., WILLIAMS OBSTETRICS 397 (17th ed. 1985.))

62. Dr. McCaffrey, the attending physician and a board certified neonatologist, wrote a note on November 18, 1997, stating that the thrombocytopenia and abnormal increase in some of JC's red blood cells may have been due to an "in utero insult which stressed/depressed bone marrow (low platelets)." In the same note, Dr. McCaffrey wrote as follows: "PN [prenatal] history also remarkable for [decreased] fetal movement, placenta small with infarcts. Picture c/w [consistent with] placental insufficiency and in utero insult."

63. After he was informed about the results of the head ultrasound study, Dr. McCaffrey wrote the following in the chart: "Possibly in utero compromise may have led to bleeding but consider other etiologies, including Anti-Phospholipid Antibody Syndrome, Protein C/S or AT III deficiency. APA syndrome would be consistent with placental findings in this case. Coags WNL [within normal limits] this PM."

64. In order to rule out other causes for the hemorrhage, Dr. McCaffrey ordered a panel of coagulation tests on JC's blood. More specifically, Dr. McCaffrey ordered tests on the prothrombin time ("PT"), activated partial thromboplastin time ("PTT"), and protein C and protein S levels. These tests were performed three times between November 18-19. The results were negative each time. That is, JC's tests results were always within the normal range for a child of his age. The tests did not reveal a

the next several months. He received regular physical and occupational therapy, and early infant education. Mrs. Cibula took him for regular visits to a pediatrician at Balboa, and advised the doctors of her concerns about JC, including his lethargy, long periods of sleep, irritability, and posturing. All was normal, she was told.

70. On April 30, 1998, Mrs. Cibula was referred to a pediatric neurologist at Balboa, Dr. Mary Zahller. During this visit, Dr. Zahller initiated a discussion about caring for babies with cerbral palsy ("CP"), on the assumption that someone had already told Mrs. Cibula that JC, in fact, had CP. This, however, was the first time that anyone had conveyed to the Cibulas that JC definitively had CP.

71. The physical manifestations of JC's CP progressed over the next several months. By October 1998, close to JC's first birthday, his right arm rotated into fixed position near his body, and his right hand remained in a closed fist. His right leg became more extended, and even his left leg showed signs of extension. The Cibulas continued to watch for abnormal growth of JC's head, as that would be a sign of hydrocephalus.

73. In January of 1999, the Navy reassigned Cmdr. Cibula to the Washington, D.C. area. Shortly after settling here, JC's head started to grow rapidly. The doctors at the Walter Reed Army Medical Center diagnosed JC as suffering from hydrocephalus,

Every expert witness on the standard of care in this case acknowledged that such testing was necessary due to Mrs. Cibula's increased risk for placental insufficiency, IUGR and other potential adverse outcomes to the baby.

75. The Court credits the testimony of Dr. Curtis L. Cetrulo, Plaintiffs' board certified expert in the field of maternal fetal medicine (high risk pregnancies), professor of obstetrics and gynecology at the Tufts University School of Medicine, and author of innumerable publications in his fields of expertise, who testified that the Government physicians caring for Mrs. Cibula violated the standard of care in managing her pregnancy. Dr. Cetrulo has cared for women with high risk pregnancies for over 30 years, and delivered over 5,000 babies from such pregnancies.

76. Dr. Cetrulo testified, and Navy specialist Dr. Tipton conceded at deposition, that Mrs. Cibula's medical history, particularly her taking Inderal, put her at risk for IUGR caused by placental insufficiency. The Inderal reduced the amount of blood flowing to the placenta, and to the fetus. The effects of placental insufficiency to JC would have become most apparent in the third trimester of Mrs. Cibula's pregnancy, when reduced blood flow began severely to impair the placenta's delivery of nutrients and oxygen to JC. Dr. Cetrulo showed how JC's growth slowed down, and probably stopped, late in pregnancy, and that he

started the increased monitoring in September during the twenty-eight week of the pregnancy, October 8 was the absolute latest date permitted under the standard of care to begin these tests because it was then that Mrs. Cibula showed the first signs of potential fetal jeopardy from placental insufficiency. By mid-October 1997, there were more ominous signs of fetal compromise, including Mrs. Cibula's reports to Dr. Kahn about decreased fetal movement. Inexplicably, Dr. Kahn did nothing about this, despite specific instructions on October 21 from Dr. Tipton, the high risk pregnancy specialist at Balboa, to begin testing.

79. The Court finds persuasive Dr. Cetrulo's testimony that if Dr. Kahn had performed the required fetal testing, then the tests would have revealed a trend, beginning in late October-early November, of increasing fetal compromise, which would have mandated delivery prior to the devastating effects of hypoxia setting in. The growth ultrasound tests would have shown that JC stopped growing in utero, and that the size of his head became disproportionately larger than the size of his torso. Dr. Cetrulo testified that this "head sparing" effect resulted from the fetus' efforts to channel the inadequate blood supply to the most critical organs, such as the head and brain, and away from less vital organs, such as the kidneys. The tests would have shown that JC's weight became abnormally low for a child of his

results. Fourth, Defendant breached the standard by not repeating the non-stress test and biophysical profile testing on October 9, 1997 after Mrs. Cibula had made a visit the night before to Balboa's labor and delivery ward. Fifth, Defendant failed to begin regular fetal testing on October 17, 1997, when Mrs. Cibula began to report decreased fetal movement to Dr. Kahn. Sixth, Defendant breached the standard of care by not following Dr. Tipton's directive on October 21 to immediately begin a program of regular growth ultrasound and weekly non-stress tests. Seventh, Defendant did not perform any fetal testing on November 10, 1997, and sent Mrs. Cibula home from the hospital without ever seeing a physician. Eighth, Defendant breached the standard of care by not delivering JC on or before November 10.

81. Dr. Stokes' testimony also rebutted the Government's proffered defense in this case that had the physicians at Balboa performed the prenatal tests required for his risk pregnancies, they would not have necessarily delivered JC on or before than November 10, 1997, prior to JC suffering any permanent damage in utero.

82. Dr. Stokes, who has delivered more than 7,000 babies, explained that ultrasound studies done between October 21 and November 10 would have shown that JC was growth restricted. For this, he relied on several facts from the medical records. The first was JC's low birth weight of 2242 grams. According to the

83. Dr. Stokes next explained why the missing NSTs, if begun on October 21, would, more likely than not, have been non-reactive during the three weeks before JC's birth. Relying in part on the report and unrebutted testimony of Cynthia Kaplan, M.D., an expert in the field of placental pathology, who brought the slides from Mrs. Cibula's placenta to Court and explained in detail how those slides showed placental insufficiency lasting for weeks before JC's birth, Dr. Stokes correlated the pathologic findings with JC's abnormally small size and asymmetric growth at birth. According to Dr. Kaplan, the placental tissues also demonstrated a low amount of amniotic fluid, which Dr. Stokes correlated to the lack of any fluid on November 14. Decreased amniotic fluid would have been evident prior to November 14.

83. Dr. Stokes also highlighted four other signs of JC's poor in utero status on November 10. First, the fetal heart tracing on November 14 exhibited flat "beat-to-beat variability" and "late decelerations." In laymen's terms, the November 14 tracing of JC's heart showed that his vital signs were in an extremely depressed state and he was inactive. Absent a uterine contraction, his heartbeat stayed at virtually the same number of beats per minute. After contractions, it slowed down dramatically. Both of these findings indicated that JC had been hypoxic, but not asphyxiated, for several days before delivery. Second, JC's heartbeat showed no reaction when the fetal

was injured.

86. The Court's finding that Defendant deviated from the standard of care is also supported by Defendant's own admissions, and the trial testimony of its fact and expert witnesses. The Government conceded in its pretrial submissions, opening statement and closing argument, that "Naval physicians deviated from the standard of care by failing to conduct growth ultrasounds during the latter part of Mrs. Cibula's pregnancy, beginning in the twenty-eighth week of her pregnancy, or approximately at the occasion of Mrs. Cibula's visit to the prenatal clinic at Balboa on September 26, 1997."

87. Dr. Tipton, the perinatologist at Balboa, was the Government's only fact witness. She testified that the NST was the most common fetal surveillance tool that she used in 1997 to determine the health of a fetus at risk for placental insufficiency and IUGR. She testified that she personally performed 8,000 of them during her nine years at Balboa, approximately 1,000 per year. She testified that Dr. Kahn called her on October 21 because he was worried about Mrs. Cibula's use of Inderal, and wanted her views about how to manage the pregnancy going forward. She advised him to immediately begin serial growth scans and weekly NSTs because he needed those tests to determine when to deliver JC. Yet, she saw no evidence in the medical records that Dr. Kahn ever followed her advice, nor did

Dr. McCue candidly testified on cross-examination that the Government doctors taking care of Mrs. Cibula committed no less than six violations of the standard of care in not performing the required testing, all of which would have provided critical information about the health and well being of her baby. The Court notes that Dr. McCue had treated only a "handful" of patients taking Inderal.

D. Causation

90. The Court finds that Defendant's failure to properly monitor the health of Mrs. Cibula's fetus, as required by the standard of care, caused Defendant to wait until November 14, 1997, to deliver JC, by which time he had already suffered the irreversible effects of asphyxia and the brain bleed. If Defendant had complied with the standard of care and timely performed all of the required fetal monitoring, then JC would have been delivered on or before November 10, and he would not have suffered the IVH or any brain damage at all. It is again important to note that the Government's only causation witness, Dr. Barks, agreed with the Plaintiffs that JC would be normal if delivered either before November 10, or sometime between November 10 and November 14.

90. The Court's findings on causation originate with the testimony of Dr. Marcus Hermansen, a board certified pediatrician and neonatologist. During Dr. Hermansen's twenty-four year

has suffered "acute asphyxia" during the birth process, the number of blood platelets in the first blood sample is normal, but fall one or two days later, and reach their low point after three or four days. JC's platelets, however, were already low at birth. This showed that JC had suffered asphyxia several days before birth. The other lab test related to JC's nucleated red blood cells. When a fetus suffers in utero asphyxia, it releases immature, or "nucleated," red blood cells into circulation, in an effort to get more oxygen carrying cells into the bloodstream. The longer the asphyxia is present, the higher the number of nucleated red blood cells. JC had a very high count of nucleated red blood cells at birth. This means that JC's asphyxia lasted a long time. As each day passed, JC's brain became more fragile, and it eventually hemorrhaged before birth on November 14. As Dr. Hermansen testified, JC would not have suffered the IVH, and he would be a normal child today, if the Navy doctors had delivered him on November 10 or 11, instead of November 14, because JC's bleed occurred towards the end of the period of asphyxia, not the beginning.

91. The Court also credits the causation testimony of Dr. M. Elizabeth Latimer, a preeminent, board certified pediatric neurologist who testified on Plaintiffs' behalf. Dr. Latimer was the only pediatric neurologist to testify at trial. She was formerly the Chief of Pediatric Neurology at Georgetown

Dr. Cynthia G. Kaplan, who is board certified in the fields of anatomic, clinical and pediatric pathology (the subspecialty in pathology that studies placentas). She microscopically analyzed three slides containing tissue from Mrs. Cibula's placenta. Dr. Kaplan testified that the slides showed that there was inadequate uteroplacental blood flow, which prevented the placenta from growing normally in the third trimester of the pregnancy. The placenta weighed only 300 grams, which was small for JCs gestational age. It was small because it was chronically undernourished. Based on the histological appearance of the placental tissue, the abnormal growth of Mrs. Cibula's placenta was caused by hypoxia and ischemia, which lasted for at least two to three weeks before JC's birth, and likely began even earlier. This meant that JC did not get the nutrients and oxygen that he needed during the last few weeks of the pregnancy. As Dr. Kaplan testified, the placental tissue showed that there had been a decreased amount of amniotic fluid for weeks before November 14. Finally, Dr. Kaplan testified that there was no pathologic evidence that Mrs. Cibula ever suffered an abrupted placenta, nor was there any evidence of blood clots in the placenta which she testified would likely be present if the child had a clotting disorder that could have caused the bleed in JC's brain.

94. Defendant's causation expert, Dr. John Barks, agreed with Drs. Hermansen, Latimer, Cetrulo, and Stokes on the key

96. Plaintiff also offered a report authored by Dr. Guy Young, a board certified pediatric hematologist from California which analyzed and refuted Dr. Barks' clotting theory. The parties stipulated to the admission of Dr. Young's report in lieu of his testifying at trial. Dr. Young stated in his report that JC's physicians in the NICU considered whether a clotting disorder may have caused the bleed. For that very reason, they ordered a panel of tests on JC's blood. The lab at Balboa ran the tests on three different occasions in the first week of JC's life. The results were negative each time. The Court credits Dr. Young's conclusion that there is no evidence that JC had a clotting disorder that caused the brain hemorrhage.

E. Injury

97. Based on the testimony of Dr. Latimer, the Court finds that JC has suffered severe neurologic injuries that are permanent, and all of them are attributable to the process of sub-acute asphyxia, followed by the IVH.

98. JC's neurologic deficits include CP, right hemiparesis and left lower leg weakness. CP is a neuromuscular disability characterized by abnormal control of movement or posture. Right hemiparesis means that the right side of JC's body, including his right arm and leg, are weak and partially paralyzed.

99. JC's IVH also caused his hydrocephalus, a condition in which there is excessive cerebrospinal fluid in the ventricles of

rendered detailed testimony about the extent of JC injuries, his developmental status, and his future life care needs. During his thirty-five year career in the field of rehabilitation psychology, he has held positions at the Junior Village International Institute of Mental Health, the State of Maryland Board of Mental Health and Hygiene, the Montgomery County, Maryland Public School system, and the Division of Vocational Rehabilitation in Montgomery County and Prince George's County, Maryland. Dr. Minsky reviewed all of JC's medical records; he interviewed the Cibulas on multiple occasions about JC's needs; and, he conducted extensive testing on JC in order to develop a comprehensive plan for JC's future needs. Dr. Latimer fully supported the treatment needs and services as outlined by Dr. Minsky, as do Cmdr. and Mrs. Cibula. The Court credits in part Dr. Minsky's findings and recommendations, including his estimates of the current costs of the items in his recommendations.

103. As explained by Dr. Minsky, JC has severe developmental problems. He meets the DSM-IV diagnosis of mental retardation.[9]

104. JC's IQ is measured at forty-eight, putting him in the

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[9] The essential feature of mental retardation, according to the DSM IV, is sub-average general intellectual functions, accompanied by significant limitations in adaptive functioning in at lease two skill areas: communications, self-care, home living, social and interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.

sensory input and intensive application of special education resources in a quiet, structured, and verbally rewarding manner in order for him to reach his maximum potential.

108. JC has dyspraxia, which is the partial loss of the ability to perform coordinated movements. For example, in order to walk, he needs braces on his legs and feet, and a walker. The Court observed JC's difficulties with mobility during the trial. Without support, JC ambulates on his knees, or uses a wheelchair, which he cannot operate on his own. He cannot get into or out of bed, a chair, a bathtub, or a car without assistance. The Cibulas, mostly Mrs. Cibula, must physically lift JC to perform all of these daily activities.

109. JC has dysphasia - a speech impairment consisting of difficulty in arranging words in their proper sequence. He also has dysarthria - impairment of speech articulation. The dysphasia and dysarthria are both caused by damage to JC's central nervous system. To date, he has received intensive speech therapy.

110. Because of his multiple disabilities, JC needs the intensive physical, occupational, speech and language, and other types of therapy outlined by Dr. Minsky for the rest of his life. For example, JC has been engaged in adaptive aquatics and horseback riding therapy. Both types of therapies, though somewhat unconventional, have greatly assisted in JC's

Kenalog cream, cotton pads, peroxide, and pedialyte.

113. Finally, JC will never live independently, and is unemployable. As testified to by Dr. Latimer, Dr. Minsky and Mr. Lester, JC is totally dependent on others for all aspects of his care. JC cannot be left alone. He needs full time care - twenty-four hours per day, 365 days per year - now, and for the rest of his life. That level of care has been provided to date by Cmdr. and Mrs. Cibula with the assistance of JC's grandparents, one of whom is a medical doctor.

114. JC's parents testified that their current home is not handicapped accessible and is currently not configured to permit JC easy access to the bathrooms and showers. Additionally, the Cibulas testified that the hallways of their home are not wide enough for JC's walker and wheelchair. JC also requires a modified van for transportation outside the home, that can accommodate his wheelchair.

115. The Government's expert on JC's future care needs, Mr. Lester, testified that JC needs full-time care from an LPN, and Plaintiffs agree.

116. Although disabled, JC is expected to live a normal life expectancy of approximately 72.8 years. Dr. Latimer gave the basis for this opinion, and the Government offered no evidence in opposition.

117. Mrs. Cibula has suffered severe emotional and physical

extent Defendant renewed its motion for dismissal on statute of limitations grounds at closing argument, the Court denies it for the reasons previously stated, based on the evidence adduced at trial. *See* Order Denying Defendant's Partial Motion Dismiss Plaintiffs' Claims for Lack of Subject Matter Jurisdiction, November 02, 2006.

3. Under *United States v. Kubrick*, 444 U.S. 111, 120 (1979), the accrual of a medical malpractice claim under the FTCA does not occur until "the plaintiff became aware - or would have become aware through the exercise of due diligence - both of the existence of injury and of its cause." While there is no dispute that Plaintiffs knew of JC's IVH beginning on November 18, 1997, the evidence shows that Cmdr. and Mrs. Cibula did not know, or have reason to know, that the cause of JC's IVH was improper medical treatment until June 2000. Prior to that time, the Cibulas believed, based on statements from Government doctors, that the cause of the bleed was either unknown, unknowable, or the result of a placental abruption, which did not happen in this case. In *Kerstetter v. United States*, the Fourth Circuit defined the awareness of cause triggering the statutory time period to be knowledge of "who has inflicted the injury," and not the knowledge of the precise medical diagnosis or knowledge of the existence of some harm to the patient. 57 F.3d at 365. In this case, the Cibulas, both personally and through Dr. Allen, Mrs.

litany of prophylactic measures that would be taken with Mrs. Cibula during a future pregnancy in order to prevent a bleed such as the one that JC suffered, including serial ultrasound growth studies and NSTs. The doctors stated that the planned tests were standard procedure given Mrs. Cibulas medical history. They asked what these tests showed during her pregnancy with JC, and were shocked when Mrs. Cibula told them that none of those tests had been performed. This meeting was the first occasion on which Mrs. Cibula received information from anyone that JC's IVH was preventable - that it may have been caused by negligent medical treatment she received at Balboa, as opposed to an abrupted placenta, or an act of God. Within two years of the June 5, 2000, meeting, the Cibulas timely filed the appropriate SF-95 forms with the United States Navy. For that reason, all Plaintiffs' claims are timely.

5. The FTCA provides that the Government's liability is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). In this case, the parties do not dispute that the events giving rise to the allegations in the Complaint occurred in the State of California. Therefore, the substantive law of California applies, including the measures of damages to be awarded. *See, e.g., United States v. Muniz*, 374 U.S. 150, 153 (1963); *Richards v. United States*, 369 U.S. 1 (1962); 28 U.S.C. § 1346(b) and § 2674.

week of Mrs. Cibula's pregnancy, and in no event later than October 8, 1997; that the program had to include at least monthly comprehensive ultrasound growth studies, weekly non-stress tests, and weekly biophysical profile tests; that despite the regular regime, such testing should also have been performed whenever Mrs. Cibula notified a healthcare provider of preterm contractions and decreased fetal movement, including during Mrs. Cibula's visits to Balboa on October 9, October 17, and November 10; and, that the standard of care did not allow Mrs. Cibula's pregnancy to go beyond November 10, 1997.

9. The Court concludes that Plaintiffs have met the burden of proving that the Defendant healthcare providers breached the applicable standard of care by not performing any fetal surveillance testing after October 8, 1997, despite numerous opportunities and directives to do so, and by not delivering JC on or before November 10, 1997.[10]

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[10] The Government raised the defense of contributory/comparative negligence for the first time in its Proposed Findings, filed on the first day of trial and later in it's post trial Findings of Fact and Conclusions of Law. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 1230 (1975) ("As we have indicated . . . the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault."). The factual basis for this defense is that Mrs. Cibula failed to respond to a purported October 21, 1997, telephone message from Dr. Kahn to "schedule fetal surveillance ultrasounds." Though the defendant failed to introduce any evidence to support this contention at trial and Mrs. Cibula testified that she did not receive this message on her home answering machine, the Court need not address the merits as under the Federal Rules of Civil Procedure,

normal and would live to a normal life expectancy.

12. The Court rejects the Government's contention that Plaintiffs' experts were "speculating" when they testified that the missing tests would have shown JC to be hypoxic and growth restricted between October 21-November 10, 1997, and would have mandated an earlier delivery for JC. The opinions of Dr. Cetrulo and Dr. Stokes on this point were well supported by the clinical and empirical evidence from the medical records. The evidence that JC began to suffer the effects of growth restriction beginning in mid-October 1997 included: (a) growth data from the July 1997 sonogram, (b) the results of the October 8, 1997, NSTs and BPP, (c) Mrs. Cibula's reports of decreased fetal movement beginning in mid-October 1997, and worsening between November 10-14, 1997, (d) the fetal monitoring strips from November 14, 1997, (e) the lack of amniotic fluid on November 14, 1997, (f) the lack of fetal response to implantation of the FSE, (g) JC's low birth weight and head circumference, (h) the growth restriction data from the Williams Obstetrics textbook, (i) JC's asymmetrical growth pattern, (j) the results of tests on JC's blood shortly after birth, (k) his appearance at birth (looking tired and droopy, with sagging skin), and, finally, (l) the opinions of JC's treating physicians that his injury was caused by a prolonged period of in utero hypoxia. These facts provided a reliable basis for Plaintiffs' experts to opine that JC

> law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly.

Hicks, 368 F.2d at 632.

C. Damages

15. In cases arising under the FTCA, the law of the state where the misconduct occurred governs substantive tort liability, including the nature and amounts of damages to be awarded. *Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that "we conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred"). As all of the events relevant to this litigation took place in California, that is the law to be applied in this claim.

D. Economic Damages

16. Damages for past and future medical care are fully recoverable under California law. *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 241-44, 116 Cal. Rptr. 733 (1974). An item of future medical expense is recoverable if it is reasonably certain that the expense will be incurred. *Mendoza v. Rudolf*, 140 Cal. App. 2d 633, 637, 295 P.2d 445 (1956). In cases involving expenses to care for an injured minor, California law allows either the parent or the child to recover future medical expenses. *See e.g., Laughner v. Bryne*, 18 Cal. App. 4th, 904,

present value by Plaintiff's expert economist Dr. Lurito, are recoverable because they are fair, reasonable, and likely to be incurred. These needs include quarterly visits by JC to a neurologist and developmental pediatrician, semi-annual visits to an orthopedist, gastroenterologist, and dentist, and annual visits to an ophthalmologist and neurosurgeon, plus allowances for surgical procedures to replace JC's VP shunt every five (5) years, and a one time ophthalmologic procedure to correct JC's vision. Though the Cibula family is entitled to receive their health care free of cost through the United States Navy, the collateral source rule as applied in the state of California does not permit the tortfeasor to deduct from a damages award an amount for expenses that would normally be covered by insurance. *Smalley v. Baty*, 128 Cal. App. 4th 977, 985 (Cal. Ct. App. 2005); *see also* RESTATEMENT (SECOND) OF TORTS §920A(2) ("[B]enefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable.").

19. In addition, the Court finds that Plaintiffs are entitled to recover the cost of future attendant care by a licensed practical nurse ("LPN") on a 24-hour/day, 365 days/year basis, except when JC is being cared for at school, as outlined by Dr. Minsky, and agreed to in principal by Mr. Lester. Defendant does not dispute that JC needs to be cared for by a

monitor, printer (including supplies and special educational supplies), a slant table, modified bed, gastroenterological tubes, bath/shower chair, toileting chair, desitin, periwash, IV pole, syringes, Vaseline, Kenalog cream, cotton pads, peroxide, and pedialyte. Plaintiffs are also entitled to the cost of purchasing and replacing a modified van for transporting their son outside the home for the duration of his life expectancy. The Court finds that in light of the damages award, that an additional recovery for costs to remodel the Cibulas' home would be a windfall. Plaintiffs may, with the advice and consent of JC's appointed advocate, *see infra* Part II, ¶ 30, purchase a new home that can accommodate all of JC's medical needs. The Court also finds that an award for tuition for private school for the Cibulas is unwarranted. Pursuant to Va. Code § 22.1-214 (A), the Commonwealth and the County of Fairfax are required to provide JC with a "free and appropriate education" and Plaintiffs cannot seek any redress from the United States for any perceived shortcomings with JC's education.

23. Plaintiffs are also entitled to recover for all future medical expenses they are reasonably certain to incur as a result of the Defendant's negligence. Only one economist testified during the trial, Plaintiffs' expert Dr. Richard Lurito. The Court admitted into evidence, with the parties' agreement, Dr. Lurito's written reports. Having read Dr. Lurito's reports and

He used a conservative estimate in that range for each item.

26. Next, Dr. Lurito calculated the present value of JC's total future care needs. That is, Dr. Lurito calculated the amount of money that is needed today, if invested prudently for the rest of JC's life, to pay for the care that JC will need each year, such that no money will be left at the end of his normal life expectancy. Dr. Lurito found that investing an award of damages in this case in a portfolio of investments that includes government, municipal and high grade corporate bonds, certificates of deposits and treasury bills, would earn investment returns ranging from 7.69 % per year for U.S. Government bonds to 8.63% for Aaa corporate bonds. Although these figures could justify a higher rate of return, Dr. Lurito used a more conservative after tax discount rate of 4.25% per year. To finish his calculation, Dr. Lurito escalated each category of the yearly costs for each year of need, as indicated by Dr. Minsky's report, and then discounted the cost of each item to its present value using the 4.25% discount rate. The Court credits Dr. Lurito's computation method as acceptable.` *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 547-48 (1983).

27. After reviewing the extensive testimony regarding Plaintiffs' life care plan, the Court concludes that most of the items in the Plaintiffs' life care plan are medically reasonable and necessary for the future treatment of JC's injuries, all of

31. The Court now turns its attention to JC's loss of future earnings as a result of the brain damage he sustained. In California, an injured plaintiff, including an infant minor, may recover damages for loss of earning capacity that may reasonably be expected in the future as an element of general economic damages. *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 656, 151 Cal. Rptr. 399 (1978). The recovery of lost earning capacity is not measured by what a person was actually earning at the time of the injury, but what he or she was capable of earning. *Neumann v. Bishop*, 59 Cal. App. 3d 451, 462-64, 130 Cal. Rptr. 786 (1976). Thus, a plaintiff can recover loss of earning capacity without proof of any actual earnings before or after the injury. *Handelman v. Victor Equip. Corp.*, 21 Cal. App. 3d 902, 906, 99 Cal. Rptr. 90 (1971).

32. The Court credits Dr. Lurito's assumption, based on the recommendation of Dr. Minsky, that JC would have attained a Bachelor's. The Court finds this to be a reasonable assumption in light of the educational level of JC's parents, their testimony about the importance of education for their child, and their demonstrated efforts to have JC attain a high level of education despite his disability. Dr. Lurito further assumed, based on U.S. Department of Labor statistics, that JC would have earned a yearly income in his first year of work ($23,674) that is equivalent to the typical male in the United States who had

TAB 9

October 27 and November 2, 2006. The trial court granted the Hospital's motion for summary judgment based on appellant's failure to file the complaint within the period allowed by the applicable statute of limitations. Before filing a medical malpractice action, a plaintiff must give "not less than" ninety days' advance notice to the intended defendants. D.C. Code § 16-2802 (2009 Supp.). If, as was the case with appellant, such notice is given within ninety days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action is "extended 90 days from the date of the service of the notice." D.C. Code § 16-2803 (2009 Supp.). Appellant filed his complaint on the ninety-first day after service of the notice was effected on October 27, 2009, which the trial court ruled was one day too late. Appellant asserts that it was impossible to comply with the required ninety days' advance notice and yet file the complaint within the ninety-day extended period of limitations. We disagree with appellant's interpretation of the relevant statutory provisions, which creates an unnecessary conflict between them, and thus affirm the trial court's grant of summary judgment.

We begin with the statute of limitations period itself. For medical malpractice actions, the period of limitations is the default period of three years. D.C. Code § 12-

of the statutory provision requiring advance notice of the intention to file a medical malpractice action. In pertinent part, D.C. Code § 16-2802(a) reads: "Any person who intends to file an action in the court alleging medical malpractice against a healthcare provider shall notify the intended defendant of his or her action not less than 90 days prior to filing the action." Appellant argues that D.C. Code §§ 16-2802 and -2803 could not both be satisfied because the statute of limitations expired on day ninety, while the earliest he could file his action and be in compliance with the notice statute was the day after ninety full days had passed. Appellant argues that since he was required to serve the intended defendant "not less than 90 days prior to filing the action," he was precluded from filing his complaint on day ninety. D.C. Code § 16-2802.

The problem that is presented is sometimes called the "clear day" issue. *See Mayor of Oakland v. Mayor of Mountain Lake Park*, 896 A.2d 1036, 1042 (Md. 2006). Where a certain action is required to take place a given amount of time before another action may take place (for example, five days), must five full (that is, "clear") days elapse between the two actions, thus constituting, in effect, a period of five full days and a fraction, or is the first or last day included in the period of computation, thus effectively reducing the period to four days and a fraction?

with approval the maxim that

> [i]n the absence of anything showing an intention to count only 'clear' or 'entire' days, it is generally held that in computing the time for performance of an act or event which must take place a certain number of days before a known future day, one of the terminal days is included in the count and the other is excluded.

Id. (quoting 74 AM. JUR. 2d *Time* § 15, at 598 (1974)); *see also* J.A. Bock, Annotation, *Inclusion or Exclusion of First and Last Days in Computing the Time for Performance of an Act or Event Which Must Take Place a Certain Number of Days Before a Known Future Date*, 98 A.L.R.2d 1331, § 3 (1964).[3] In *Belton*, the statute at issue provided that the certificate of a chemist's analysis of a controlled substance had to be provided to defense "no later than 5 days prior to trial." 580 A.2d at 1291. We held that where the trial was held on Thursday, November 3, the government was required to deliver the certificate by Thursday, October 27, which, excluding the two weekend days, met the statutory "5 days" prior to the trial date. *Id.* at 1291-92 (a

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[3] A line of older cases in our jurisdiction may, at first blush, appear to conflict with the holding in *Belton*. *See Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 168 U.S. App. D.C. 149, 158-59 & n.63, 513 F.2d 407, 416-17 & n.63 (1975) (citing a series of District of Columbia cases). However, those cases, interpreting a statutory provision requiring thirty days notice to terminate a lease, turned on the nature of the landlord-tenant relationship and an intent to require "full days" notice.

Nothing in the legislative history that is cited to us gives any indication of a desire to impose a "clear day" notice requirement. The addition of phrases such as "at least" and "not less than" in front of a stated time period would be naturally read as intending no more than to clarify that the required action may be taken prior to the designated minimum date. Most importantly, to construe the notice statute as requiring ninety clear days prior to the filing of the law suit would create the square conflict discussed *supra* between the two statutory provisions. In this case, the ninetieth day, January 25, 2010, did not fall on a Saturday, Sunday, or legal holiday, nor does appellant contend that the court was closed for any reason, and so it must be included in the computation. *Id.* Appellant, therefore, could have complied with both §§ 16-2802 and -2803 by filing his lawsuit on January 25, 2010.

It may be true that filing the complaint on any date prior to January 25 would have violated the 90-day notice requirement of § 16-2802, and any date after January 25 was untimely. However, this court has previously noted that such an interpretation of the statute is not unreasonable. *Lacek v. Washington Hosp. Ctr. Corp.*, 978 A.2d 1194, 1199 (D.C. 2009) ("While the Council, with greater foresight, might reasonably

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[5](...continued)
45 and Super. Ct. Civ. R. 6(a). See *supra* note 4. The Maryland court interpreted that general statutory provision as rejecting the clear day rule.

TAB 10

Nonetheless, there are undoubtedly circumstances in which a plaintiff has her own motives for wishing settlement terms to remain confidential, such as preventing other persons from learning precisely how much (or little) she has recovered.

The Inquiry, however, goes beyond the confidentiality of the settlement terms, and raises the question whether, as part of the settlement, one lawyer may prohibit another from further disclosure of already public information, including the name of the defendant and the allegations of the complaint, as well as information that can readily be inferred from the public record, such as the fact that the litigation settled. Once the complaint was filed in court, the name of the defendant and the plaintiff's allegations against it are available to the public. While terms of a settlement are frequently confidential, the fact of settlement rarely is. If a settlement is not announced by the parties, the public record may not actually disclose that it has occurred, although in cases where settlements require court approval, it will. But the voluntary dismissal will alert most knowledgeable persons that there has almost certainly been a settlement, and in most instances, a number of people will become aware that the case has settled. [2]

Nevertheless, a lawyer has a duty to abide by his client's decision whether to accept an offer of settlement. D.C. Rule 1.2(a). This is so even if the lawyer believes the decision to be unwise. D.C. Rule 5.6(b), however, prohibits lawyers from including certain types of terms in settlement agreements: A lawyer may not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties." This is generally understood to mean an explicit agreement as part of the settlement prohibiting plaintiff's counsel from representing other persons. [3] Thus, for example, a settlement of a case brought on behalf of consumers against the manufacturer of a product may not be conditioned on plaintiffs' counsel agreeing not to represent other consumers of the product against the settling manufacturer. [4] This same rule, or a similar version, also has been interpreted to prohibit an agreement not to use information learned in the course of the case in a future representation against the same party. Enforcement of such an agreement might effectively prevent the lawyer from representing future clients since the only way for the lawyer to ensure that he does not use information that he has learned is to decline to represent anyone else in a similar case. [5] Other jurisdictions also have prohibited similar clauses in settlement agreements restricting "plaintiff or plaintiff's counsel from using case information to assist other litigants or claimants;" [6] requiring plaintiff's counsel to turn over her entire file, including her work product, to defense counsel to be sealed; [7] "barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party;" [8] or forbidding disclosure of "the business or operations of the defendant corporation" [9] An underlying rationale for all these opinions is that the prohibited provisions restrict the lawyer's right to practice by effectively preventing him or his firm from representing clients in certain kinds of cases against the settling party.

Underlying each of the opinions disapproving restrictions on the future conduct of lawyers, under the rule equivalent to D.C. Rule 5.6, is the intent to preserve the public's access to lawyers who, because of their background and experience, might be the best available talent to represent future litigants in similar cases, perhaps against the same opponent. [10] A similar rationale underlies the interpretation of D.C. Rule 5.6 (a), forbidding restrictions on lawyers moving from one firm to another. [11] We believe that the purpose and effect of the proposed condition on the inquirer and his firm [12] is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer's ability to

allowing clients to identify experienced counsel by prohibiting confidentiality clauses in settlement agreements of otherwise public information, strikes us as a reasonable application of Rule 5.6(b). It also has the virtue of offering clear guidance to practitioners.

Our broad reading of D.C. Rule 5.6(b) is consistent with the Court of Appeals' equally broad interpretation of Rule 5.6(a). Almost any financial disincentive to a lawyer's changing firms has been determined to be an impediment that violates Rule 5.6(a) because it interferes with clients' ability to choose lawyers. [18] A similar approach leads to the conclusion that the proposed settlement provision, by inhibiting a lawyer's ability to attract clients, interferes with clients' ability to obtain the most competent representation.

We acknowledge that confidentiality provisions, such as the one at issue, might have value that the client can trade in order to get better terms from the other side. If a lawyer may not agree to such a provision, he deprives his client of that value. Yet an agreement that the lawyer will not represent future clients against the settling defendant also has value that his client could trade. In most cases, we suspect the value of the lawyer's agreement not to sue again exceeds the value of the prohibition on further disclosing public information. Yet the Rules of Professional Conduct prohibit such agreements not to sue as part of settlements. This is a policy choice that the value to future clients of the ability to choose the best lawyer to represent them exceeds the harm to the current client of not being able to trade for consideration her lawyer's ability to sue the settling defendant in the future. Moreover, when such settlement terms are taken off the table because they are prohibited, clients are not harmed. If all parties are prohibited from agreeing to such provisions, they have no value. It seems improbable that if such confidentiality clauses are prohibited to all litigants, there would be any measurable effect on the number of settlements or on the value of those settlements.

We emphasize, however, that if a client withholds permission for her lawyer to disclose public information, the lawyer should comply with his client's wishes. D.C. Rule 5.6(b) concerns only settlement agreements. If a client wishes her lawyer not to disclose further public information, she does not need the mechanism of a settlement agreement to enforce her instructions. The only reason to make confidentiality a provision of the settlement agreement is to give the opposing party a mechanism to enforce confidentiality. We believe such opponent-driven secrecy clauses are restrictions on the lawyer's right to practice in violation of Rule 5.6(b).

Adopted: May 16, 2006

1. [Return to text] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000); Colo. Bar Ethics Comm., Formal Op. 92 (1993); N.M. Bar Ethics Adv. Op. Comm., Adv. Op. No. 1985-5 (1985).
2. [Return to text] For example, when a case settles, the prospective witnesses are informed. If the case draws media attention, as this one has, the media becomes aware of the settlement when the case is dismissed.
3. [Return to text] *See* D.C. Rule 5.6, Comment [2].
4. [Return to text] *In re Hager*, 812 A.2d 904, 918-19 (D.C. 2002). *See generally* D.C. Ethics Op. 35 (1977).
5. [Return to text] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000).
6. [Return to text] Tenn. Bd. of Prof'l Resp., Formal Op. 98-F-141 (1998).
7. [Return to text] N.M. Bar Ethics Adv. Op. Comm., Adv. Op. 1985-5 (1985). This opinion says, cryptically, such a restriction may in some, but not necessarily all, cases inhibit the representation of future clients.
8. [Return to text] Colo. Bar Ethics Comm., Formal Op. 92 (1993).

WEB WATCH *by Robert J. Ambrogi*

The 10 Best Legal Web Sites

MY fascination with the Internet began in 1993, when, as a solo practitioner, my search for affordable legal research drove me online. When I discovered how much was available, all free, I wanted to show other lawyers. Articles grew into a column, which evolved into the *LegalEase* newsletter, complete with a five-star rating system and its annual *Best of the Web for Lawyers* awards.

Now, I've written a book, *The Essential Guide to the Best (and Worst) Legal Sites on the Web*, published by ALM Publishing. It reviews and rates hundreds of sites in seven two-dozen practice areas. The goal remains to pinpoint the sites most useful to legal professionals.

With the book's publication this month, it seems an appropriate occasion to offer my personal list of the *10 Best Web Sites for Lawyers*. As I do in the book, I pick from the perspective of a site's overall usefulness. The best measure of this, in my view, is content. I also consider design, ease of use and originality.

In no particular order, here are my top 10:

FindLaw
www.findlaw.com

Started in 1994, FindLaw has evolved into a multi-faceted portal, boasting the highest traffic of any legal site. Its core remains its comprehensive index of links to resources in more than 20 practice areas. But beyond its index are a host of features, including an ever-growing library of free court opinions and statutory codes. When West Group purchased FindLaw last January, it promised to build on this popular formula. The core features will remain, West says, and will continue to be free. Plus, West planned to expand FindLaw's legal news and career centers, create on-demand CLE, and incorporate its West Legal Directory.

LexisONE
www.lexisone.com

From Lexis-Nexis comes this impressive, free service, aimed at solos and small firms. Launched in July 2000, it features Supreme Court cases since 1790 and selected federal and state cases from 1996, some 6,000 legal forms, the Martindale-Hubbell Law Digest, and a broad collection of links to legal resources. Other sections focus on practice management, professional development, marketing and lifestyle. New reports cover court decisions and the legal industry, while The Loop is home to discussion boards devoted to legal topics.

ROBERT J. AMBROGI is the author of *The Essential Guide to the Best (and Worst) Legal Sites on the Web*, available at www.lawmarket.com. E-mail: rambrogi@asbar.com.

Law.com
www.law.com

I am anything but objective here. American Lawyer Media Inc. — publisher of this magazine and my employer — is closely aligned with law.com and shares common ownership. That said, it is beyond debate that law.com has become a premier legal destination. It is the primary place online to find legal news and features from ALM's own national and regional magazines and newspapers. Beyond that, it offers nationwide job listings, columns, practice centers, and, more recently, an online suite of practice-management software.

Legal Information Institute
www.law.cornell.edu

Cornell Law School's Legal Information Institute established the first law site on the Internet in 1992 and the first legal Web site in 1993. It became the leading Internet site for dissemination of Supreme Court opinions and later added the N.Y. Court of Appeals. Its hypertext U.S. Code remains its most heavily used feature, too. It has published a host of significant legal documents. As a lawyer once put it to me, "They deserve a lifetime achievement award."

Google.com
www.google.com

Beyond its sheer breadth, the Google search engine stands out thanks to its unique PageRank technology. Simply put, Google interprets a link to a Web page as a vote for its quality. The more sites that link to a page, the more valuable it must be and the higher its ranking. Adding to its value was its recent acquisition of Deja.com's archive of messages posted since 1995 to Usenet — the Internet's original bulletin board.

FirstGov
www.firstgov.gov

The federal government's vast online network makes many resources, but finding your way can be daunting. FirstGov is the official portal to U.S. government information on the Internet, offering access to some 20,000 sites. Organized primarily by topic, rather than agency, it enables users to browse for federal resources related to "Arts and Culture," for example, or "Consumer Services and Safety."

Thomas
http://thomas.loc.gov

When Newt Gingrich became speaker of the House in 1994, he vowed to use the Internet to open the legislative process to the public. On Jan. 5, 1995, Gingrich and the Library of Congress unveiled the legislative information site, "Thomas." Today, Thomas includes the full text of bills, public laws and legislation; the complete Congressional Record since 1989; committee information; roll-call votes since 1989; and a library of historical documents.

Securities and Exchange Commission
www.sec.gov

In 1994, the nonprofit Internet Multicasting Service began offering the S.E.C.'s EDGAR database of corporate filings free via the Internet. A year later, as its funding was about to expire, Dill urged the S.E.C. to continue what it would have off. At first, the S.E.C. hedged, but then decided to continue free Internet access to EDGAR. Today, the S.E.C.'s site stands out as an important destination not simply for securities lawyers, but for any lawyer representing, researching or litigating against a corporation.

ABAnet
www.abanet.org

Consider the numbers: the American Bar Association's site is the online home of an organization composed of more than 2,300 entities (24 sections, five divisions, 80-plus committees, forums and task forces, and more than 1,700 subcommittees), which together publish some 70 periodicals and more than 1,200 titles. Virtually all of these entities and resources are organized under and accessible through this site, creating an enormous virtual warehouse of resources dedicated to law and law practice.

Federal Judiciary Homepage
www.uscourts.gov

In 1995, I surveyed the availability of free court opinions on the Internet. I found only a handful of courts' opinions published by an even smaller number of trailblazing sites. Then, the judiciary's homepage stood as a symbol of how dramatically the Web has changed the legal landscape. Its "Links" page illustrates how extensively available court information now is on the Web, with each court's site likely to include its opinions, local rules and sometimes even its docket.

LAW OFFICE TECHNOLOGY September 1998

...edical sites on the Web

Peter C. Quinn

Medicine is a popular subject for sites on the Web. An attorney surfing for information on a medical topic can search library databases, medical association sites that often include abstracts or the full text of association publications, and other specialized sites.

Library databases

National Institutes of Health (NIH)
www.nih.gov

A biomedical center dedicated to acquiring knowledge about all kinds of diseases and disabilities, NIH has a site search engine, links to NIH research laboratories such as the National Cancer Institute, and an online library of catalogs and journals.

National Library of Medicine (NLM)
www.nlm.nih.gov/databases

The world's largest medical library, NLM provides free access ... MEDLINE database of more than 9 million references to ar... published in 3,800 biomedical journals through two search engines, PubMed and Internet Grateful Med. PubMed enables ...hing by simple keywords or Boolean expressions. Grateful ...ows users to restrict searches by categories that include the publication type and the subject age group.

Medical associations and journals

American Medical Association (AMA)
www.ama-assn.org

The AMA's site contains a "Doctor Finder" database that includes almost every one of the approximately 650,000 physicians licensed in the United States—including osteopaths but not chiropractors—whether or not they are AMA members. Information on AMA members includes their residency training and board certification. The site also has a "Hospital Finder" database (about 6,000 hospitals) and a "Medical Group Practice Finder." In addition, a user can search the archives of the *Journal of the American Medical Association (JAMA)* and other AMA publications for abstracts of articles.

Other medical association or publication sites by specialty include:

- Anesthesiology
  Society for Education in Anesthesia
  www.umcs.ccf.org:8080/sea
- Cardiology
  Alliance of Cardiovascular Professionals
  www.atlanticinteractive.com/acp
  American Association of Cardiovascular and Pulmonary Rehabilitation
  www.jhbmc.jhu.edu/aacvpr/aacvpr.html
  American College of Cardiology
  www.acc.org
- Emergency room medicine
  Society for Academic Emergency Medicine
  www.saem.org
  Society for Critical Care Medicine
  sccm.org/home
- Endocrinology
  American Association of Clinical Endocrinologists
  aace.com
  The Endocrine Society
  www.endo-society.org
  Society for Endocrinology
  www.endocrinology.org
- Family practice
  American Academy of Family Physicians
  www.aafp.org
  Society of Teachers of Family Medicine
  www.stfm.org
- Gastroenterology
  American Gastroenterological Association
  www.gastro.org
  The Society for Surgery of the Alimentary Tract
  www.ssat.com
- General surgery
  American Society of General Surgeons
  www.thasgs.org
- Geriatrics
  American Geriatrics Society
  www.americangeriatrics.org
- Gynecology and obstetrics
  The American College of Obstetricians and Gynecologists
  www.acog.org
- HMOs
  Managed Care magazine
  www.managedcaremag.com
- Hematology
  American Society of Hematologists
  www.hematology.org
- Hospitals
  American Hospital Association
  www.aha.org
- Immunology
  American Academy of Allergy Asthma & Immunology
  www.aaaai.org
- Midwifery
  American College of Nurse-Midwives
  www.acnm.org
  Midwives Alliance of North America
  www.mana.org
- Neurology
  The American Academy of Neurology
  www.aan.com

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Useful Web Sites

Assets

www.treas.gov/offices/enforcement/ofac/
(The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction)

Computer

www.shaunakelly.com/word/
(Microsoft Word™ help)

Corporate

www.Incspot.com
(Corporate services company—corporate searches and forms from other states)

www.nass.org
(National Association of Secretaries of State)

Courts

www.uscourts.gov
(Clearinghouse for information from and about the Judicial Branch of the US Government)

www.uscourts.gov/courtlinks
(Geographic boundaries of federal courts)

www.ncsconline.org/D_KIS/info_court_web_sites.html
(Judicial branch links for each state, focusing on the administrative office of the courts, the court of last resort, any intermediate appellate courts, and each trial court level)

www.law.emory.edu/FEDCTS/
(Emory Law—Federal courts finder)

www.supremecourtus.gov
(Official Web site for the Supreme Court of the United States)

Criminal

www.nsopr.gov
(US Department of Justice National Sex Offender Public Registry)

www.bop.gov
(Federal Bureau of Prisons inmate locator)

www.criminalinfo.com
(National criminal records search)

Environment

www.environmental-law.net
(Web site of the Schnapf Environmental Law Center with links to various environmental topics including Climate Change, MTBE, EPA documents and Regulations, and Mold)

www.eli.org
(Web site of the Environmental Law Institute)

http://elpc.org
(Web site of the Environmental Law & Policy Center – focuses on protecting the Midwest's Environment and Natural Heritage)

https//envirocenter.research.yale.edu
(Web site for Yale University Cenert for Environmental Law & Policy)

www.findlaw.com/01topics/13environmental/sites.html
(FindLaw's Web page covering environmental Law Web sites with over 40 links to environmental law Web sites including blogs, databases, government agencies, primary materials, ABA, Greenpeace, National Rural Water Association, and Chemical Scorecard)

Expert Witnesses

www.expertresources.com
(National expert witnesses in all fields)

www.expertlaw.com
(Complete source of expert witnesses with links to other legal resources)

www.romingerlegal.com/expert
(Browse for expert witnesses by specialty, geographic location, and keyword search)

Useful Web Sites

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www.hmc.psu.edu/healthinfo/
(Health and disease information)

www.jdmd.com/glossary/
(Reference guide for medical and dental abbreviations)

www.ucomparehealthcare.com
(Information on nursing homes or long-term care facilities)

www.cms.hhs.gov
(Centers for Medicare and Medicaid services)

www.dr-411.com/default.asp
(Medical data collection with lists from leading professional associations)

www.nlm.nih.gov/medlineplus/
(Information on health topics, drugs and supplements, and medical encyclopedia, dictionary, and directory)

www.pharma-lexicon.com
(Medical abbreviations, dictionary, news, ICD-9 codes, etc.)

www.cms.hhs.gov/HIPAA/geninfo
(*Health Insurance Portability and Accountability Act* of 1996 (*HIPAA, Title II*) and related information)

www.medilexicon.com
(Information on medical abbreviations, medical definitions and the ICD-9 codes—a great site for anyone who summarizes medical records)

Miscellaneous

www.timeanddate.com/calendar
(Free customizable calendars for any year with time zones and world clock)

www.balisjudgmentenforcers.com/calculator.html
(Judgment interest calculator)

www.fedstats.gov/mapstats/
(map statistics for US states, counties and cities)

www.time.gov/
(Official US time)

www.manuelsweb.com/kg_lbs.htm
(Calculator to convert kilograms & pounds)

www.halfprice.com
(Resources and information on half-price books, textbooks and laptops)

www.paralegalgateway.com
(Hosted by a Georgia paralegal who wanted a site oriented toward paralegals as well as attorneys—links include articles on current topics, paralegal schools, resources for students and a career center)

www.katsuey.com
(Free legal directory for legal professionals researching law related topics on the Internet and lay-people who want to know more about the law, understand their legal rights and obligations and search for an attorney to assist them)

www.law.cornell.edu/uniform/
(Uniform laws locator)

www.courthouse.direct.com
(Links to Courthouse records. Grantor Grantee Indexes and Images of Real Property Records nationwide including Deeds, Mortgages, Liens, Oil & Gas Leases, Abstracts of Judgment, Releases, Bankruptcies, etc.)

www.theultimates.com
(25 net services on one site – white pages, yellow pages, email directory, etc.

www.maps.google.com
(Satellite imagery with roadmaps superimposed to get the "lay of the land")

www.msbar.org/guide_to_legalese.php
(Mississippi Bar Association site with alphabetized guide to common legal terms)

www.einvestigator.com/links/default.htm
(An extensive collection of Private Investigation resources)

www.nfoic.org/foi-center
(Freedom of Information Center – links to state and international FOI laws)

www.firstamendmentcenter.org/Press/information/topic.aspx?topic=how_to_FOIA#request
(First Amendment Center—How to File a FOIA Request)

www.publicrecords.netronline.com
(Public records online directory)

USEFUL WEBSITES

EXPERT WITNESSES

- www.expertresources.com
  (National expert witnesses in all fields)
- www.expertlaw.com
  (Complete source if expert witnesses with links to other legal resources)
- www.romingerlegal.com/expert
  (Browse for expert witnesses by specialty, geographic location, and keyword search)

MEDICAL

- www.nlm.nih.gov/medlineplus
  (Information on health topics, drugs, and supplements, and medical encyclopedia, dictionary, and directory)

PERSONAL INJURY

- www.statutes-of-limitations.com
  (Legal site with links to the personal injury statutes of limitations for all states)

CRIMINAL

- www.criminalinfo.com
  (National criminal records search)

COURTS

- www.uscourts.gov/courtlinks
  (Geographical boundaries of federal courts)
- www.nesconline.org/D_KIS/info_court_web_sites.html
  (Judicial branch links for each state, focusing on the administrative office of the courts, the court of last resort, any intermediate appellate courts, and each trial court level)