

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

IN THE FOURTEENTH JUDICIAL DISTRICT OF TEXAS

* * * * *

GREGG KIRKPATRICK, et al,
Plaintiffs,

*
*
*
*
*
*
*

CIVIL ACTION NUMBER

vs.

87-8955-A

BERNARD F. ADAMI, M.D.,
et al.,
Defendants.

* * * * *

The testimony of ELIAS GEORGE CHALHUB, M.D,
taken at the Hilton, 3101 Airport Boulevard,
Parlor A, Mobile, Alabama, on the 9th day of
October, 1990, commencing at approximately
3:30 o'clock, p.m.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

MESSRS. HARDY, MILUTIN
& JOHNS
ATTORNEYS AT LAW
909 FANNIN, SUITE 500
HOUSTON, TEXAS 77010

BY: G. P. HARDY, ESQUIRE

FOR THE DEFENDANT,
MEMORIAL HOSPITAL
OF GARLAND:

MESSRS. COWLES & THOMPSON
ATTORNEYS AT LAW
4000 FIRST REPUBLIC BANK
PLAZA
DALLAS, TEXAS 75202

BY: CYNTHIA SHEA, ESQUIRE

FOR THE DEFENDANT,
NURSE BOWMAN:

MESSRS. STRADLEY, SCHMIDT,
STEPHENS & WRIGHT
ATTORNEYS AT LAW
ONE CAMPBELL CENTRE
DALLAS, TEXAS 75205

BY: C. L. MIKE SCHMIDT,
ESQUIRE

OBSERVING FOR
STEVE JOHNSON:

MESSRS. JOHNSON & SYLVAN,
P.C.
ATTORNEYS AT LAW
4440 RENAISSANCE TOWER
DALLAS, TEXAS 75270

BY: RICHARD J. PLEZIA

ALSO PRESENT:

MS. DEBBIE JAEGLI
LYNN ROBINSON-DYKES
COURT REPORTER

I N D E X

<u>Examination</u>	<u>Page</u>
Direct - Mr. Hardy	3
Cross - Mr. Schmidt	52
Redirect - Mr. Hardy	53

E X H I B I T S

(There were no exhibits marked to this deposition.)

1 MR. HARCY:

2 Put on the record we're taking this pursuant to
3 the Texas Rules of Procedure.

4

5 ELIAS GEORGE CHALHUB, M.D.,

6 the witness, after having first Seen duly sworn
7 to tell the truth, the whole truth, and nothing **bur:**
8 the truth, was examined and testified as follows:

9

10 DIRECT EXAMINATION

11 BY MR. HARDY:

12 Q State your name, please.

13 A Elias Gecрге Chalhub.

14 Q Dr. Chalb, my name is--

15 A Chalhub.

15 Q --G. Hardy.

17 MS. SHEA:

18 It's Chalhub.

19 A Chalhub.

20 BY MR. HARDY:

1 Q Chalhub?

2 A Right.

3

1 MS. SHEA:

2 C-h-a-l-h-u-b.

3 BY MR. HARDY:

4 Q C-h?

5 A A-l-h-u-b.

6 Q C-h-a-l-h-u-b?

7 A Correct.

8 Q All right. What's **your** national origin?

9 A Lebanese.

10 Q Lebanese? I asked that only because I've never
11 heard the name Chalhub before.

12 A I was born in Boston.

13 Q Yeah, I thought that was Lebanese.

14 (WHEREUPON, THERE WAS AN

15 OFF-THE-RECORC **DISCUSSION,**!

16 BY MR. HARDY:

17 Q Well, we are here today, Doctor, to find out
18 what your opinions are about this Kirkpatrick case.

19 A Sure.

20 Q I am not going to take long with you. I
21 basically just want to get down a little information
22 that will be helpful to me in analyzing the situation.
23 When were you first contacted about this case?

1 A I believe in May of 1990.

2 Q And who contacted you?

3 A I can't remember whether it was Debbie Jaegli
4 or one of the attorneys she works for. So, I don't
5 know.

5 Q Do you know where they got your name?

7 A No, I don't.

8 e Or who suggested they contact you regarding
9 this case?

10 A No, I don't.

11 Q Have you talked to anyone other than people
12 from the Cowles & Thompson law firm about this case?

13 A No, I haven't.

14 Q Okay. May I see the correspondence?

15 A Sure.

15 Q You don't know how they heard of you one way or
17 the other?

18 A No, I really don't. I'm sure you could ask
19 them.

20 Q Well, I'm asking you.

21 A No, I don't know.

22 Q I'm asking you whether somebody recommended you
23 to them or --

1 A Well, they may have, but they didn't tell me
2 that.

3 Q They didn't share that with you?

4 A No.

5 Q Do you often get calls like this o t of the
6 clear blue sky from Dallas lawyers or Houston lawyers
7 or Mew York lawyers or California lawyers, we would
8 like for you to testify in a case for us?

9 A Well, I get lots of calls. I am a Board
10 Examiner for the American Board of Pediatrics and
11 Neurology, and, you know, i am a known expert in this
12 area. So, I do get lots of calls, yes.

13 Q Okay. Just *out* of the clear -- I guess they
14 get your name out of that source of information?

15 A No. I have published. You know, I'm known in
16 this area. My colleagues respect me. And **so**, you
17 know, I suppose they would like somebody who's
18 responsible, who will give an honest, unbiased
19 opinion.

20 Q Sure. Do you know Dr. Elton?

21 A Yes, I do.

22 Q Have you talked to him about this case at all?

23 A No.

1 Q Do you know whether he recommended they call
2 you?

3 A I have no idea.

4 Q What materials -- I guess they are all listed
5 here, that you received in order for you to form
6 whatever opinions you've arrived at in this case?

7 A Correct. And I have -- I don't know whether
8 the CT and MRI scan are on that. And then there is a
9 report from a Dr. Cccheran that I've looked at, also,

10 Q Dr. Cccheran?

11 A Yes. Rehab coordinator.

12 e May I see that?

13 A Sure.

14 MS. SHEA:

15 That's that rehab guy.

16 BY MR. HARDY:

17 Q Dr. Cocheran. He's not a dcctor, I take it?

18 A I think -- I guess he's not. Mr. Cocheran.

19 Q So, what you have reviewed here, just **so** that
20 we can go through this, are the medical records of
21 Cynthia Kirkpatrick from Memorial Hospital, of Garland?

22 (Pause)

23 Q And you have reviewed the medical records of

1 Joshua Kirkpatrick, I take it, then, from virtually
2 all sources, all of his medical records since his
3 birth?

4 A Yes. There are a lot of records -- I mean, a
5 lot of depositions, too.

6 Q Okay. And all of these depositions you have
7 read? And I haven't counted them up, but there are a
8 lot of them?

9 A There's a bunch of them.

10 Q You've read them all?

11 A Well, **as** many **as** I could get through. I'm not
12 sure I've read every single one of them cover to
13 cover.

14 Q Well, I was going to say, if you've read them
15 all since May, and I started in **May**, you are a hell of
16 a lot faster reader than I am. Because some of them
17 are long, aren't they?

18 A They sure are.

19 Q Which ones have you read and really studied in
20 detail?

21 A I can't tell you that. I mean, I've tried to
22 go through every single one of them. Now, some of
23 them, I -- you know, I turned quicker than others,

1 which seem to be somewhat redundant.

2 Q Dr. Chalhub, we know Joshua Kirkpatrick has a
3 form of what is called cerebral palsy. Do you agree
4 with that?

5 A Yes, I do.

5 Q Cerebral palsy is really kind of a catchall
7 term, isn't it? I mean, it's not a disease in itself
8 or a problem; it's kind of a catchall term?

9 A Well, I think it depends on who you read and
10 what your understanding is of the disease.

11 Q Well, is it a disease?

12 A Well, it's a situation or syndrome which is
13 characterized and defined as a static motor and/or
14 intellectual deficit. And depending on what
15 literature you are familiar with and what type of
16 practice you have, some people define cerebral palsy
17 being related to infection, congenital malformations,
18 poor lack of oxygen, blood flow or birth trauma.

19 Q Right. But it is a static encephalopathy that
20 you have described?

21 A Yes.

22 Q In other words, at some point In time, some
23 damage occurs to the brain of that person? And it's a

1 static problem, but the damage is there and it's going
2 to affect either their motor or intellectual function
3 for the rest of their lives?

4 A No, I don't think that's true.

5 Q Well, this child's motor and intellectual
6 function will be affected for so long as this child
7 lives?

8 A Yes, I agree with that.

9 Q All right. Now, I assume that you have read
10 Dr. Elton's deposition. It's listed here.

11 A Yes.

12 Q Was that one that you read cover to cover?

13 A Yes.

14 Q Okay. Now, incidentally, you looked at the
15 rest of these records here on Joshua Kirkpatrick, some
16 of his later treating pediatric neurologists. Has the
17 diagnosis changed?

18 A In terms of what diagnosis?

19 Q Well, Dr. Elton's diagnosis of quadriparesis,
20 or -- I don't know how to pronounce that.

21 A You did pretty well. That's not a diagnosis.
22 I think that's a description more.

23 Q Description. Has his diagnosis changed at all,

1 according to these later records from the Scottish
2 Rite or these other treating doctors?

3 A You know, I don't know which exactly you are
4 talking about. So, I really can't tell you which has
5 changed and which isn't.

5 Q Well, have the doctors -- since Dr. Elton made
7 his diagnosis of the problems existing in this child?

8 A Okay. Which problems are you talking about?
9 And then maybe I can comment on it.

10 Q We are talking about the quadriparesis, the
11 manner in which his body is affected by virtue of the
12 brain damage that occurred to him?

13 A Well, I don't know which report you are
14 referring to. He is still quadriparetic, to my
15 understanding, if that's what you mean.

16 Q Did you read where Dr. Elton had made any kind
17 of diagnosis?

18 A Well, he's assessed his physical findings and
19 come to a conclusion as to what his symptoms are, And
20 I think he's stated what he felt they were caused by.

21 Q Okay. I understand, Not in his records did he
22 state that; he stated that in his deposition; correct?

23 A Well, I think he's made some statements in his

1 records. You know, I would just have to go back all
2 the way through them,

3 Q What statements in his records **did** he make with
4 respect to what he thought caused the problem?

5 A No. Now, you were talking about what his
6 diagnosis was and what his symptoms were which he
7 said.

8 Q No, sir. No, sir.

9 A You didn't ask me about what he said about
10 cause.

11 Q Excuse me. We are going to go a whole lot
12 faster here if -- when i ask a question, I **will** try to
13 give you an opportunity to answer it. **And** by the **same**
14 token, when I'm asking **a** question, you know -- in
15 other words, she can't take us both down at the same
16 time.

17 A Oh, okay.

18 Q You've done **this** before, I know.

19 A {Witness nods head affirmatively.}

20 Q So, you know she can't take us both at the same
21 time. Okay?

22 Now let me ask you this question: You made the
23 statement that Dr. Elton had said -- that he stated

1 what his diagnosis of the symptoms were and, you know,
2 the cause?

3 A No, I don't think i said that.

4 Q Okay. Did he ever establish any cause of this
5 child's brain damage except and when he gave is
6 deposition?

7 A There ar2 a lot of records. Okay? So, I can't
3 tell you that by memory, but I will be glad to go back
9 and look through them again for you.

10 Q Well, you have those records here?

11 A No. I mean, I couldn't -- there are three
12 boxes of records. I could nor, carry all of them.

13 Q But you did read what he thought was the cause
14 in his deposition?

15 A Yes, i did.

15 Q Now, you understand that this child was being
17 treated by Dr. Elton for some period of time?

18 A Yes.

19 Q There was a CAT scan, of course, done on Josh
20 Kirkpatrick?

21 A That's correct.

22 Q And i assume you had the report. Did you have
23 the films?

1 A Yes.

2 Q Did you have the films of the MRI?

3 A **Yes.**

4 Q Do you agree that the films show a partial
5 agenesis of the corpus collosum?

6 A I do.

7 Q Now, a partial agenesis of the corpus -- that's
8 not saying that the corpus collosum isn't there, is
9 it, both sides?

10 A No, it's that it's not all there.

11 Q Well, it's not fully developed?

12 A Well, that's -- yes, I mean, that may be true,

13 Q And you do know, don't you, that this was a
14 thirty-three week fetus; this was not a full term
15 **baby?**

16 A What does that have to do with the development
17 of the collosum?

18 Q Well, it's not unusual to find partial agenesis
19 of the corpus collosum in a thirty-three week fetus,
20 is it?

21 A It's unusual for me to find that, sure.

22 Q Partial agenesis of the corpus callosum **does**
23 not relegate any child to cerebral palsy, does it?

1 A I don't know, are you making a statement or
2 asking me a question?

3 Q I'm asking you a question.

4 A No, that's not true either.

5 Q Does -- every child that has partial agenesis
5 of the corpus callosum, is that child going to have
7

8
9 Q As a matter of fact, a large percentage of
10
11 corpus callosum are completely asymptomatic; isn't
12 that true? *c/c*

13 A No, that's not true,

14 Q Are there any that are asymptomatic with
15
16
17
18
19
20
21
22
23

1 of the people I see with partial agenesis have a
2 problem and a neurological problem.

3 Q Yes, sir. But, Doctor, people have partial
4 agenesis or' the corpus callosum and have no problems
5 and function like normal human beings; is that a true
6 statement or not?

7 A That's possible, but it's unusual.

8 Q Okay. Now, is it unusual, Dr. Chalhub, for a
9 thirty-three week fetus that is deprived of oxygen to
10 the brain to suffer cerebral palsy?

11 A I'm sorry. State that again.

12 Q Is it unusual for a thirty-three week fetus
13 that is deprived of oxygen to the brain to suffer
14 cerebral palsy? Is that unusual?

15 A Now, are you talking about hypothetically and
16 unrelated to this case?

17 Q I'm asking you, Doctor, this question, And if
18 you have trouble answering it, please tell me, Is it
19 unusual for a thirty-three week fetus that **has**
20 suffered oxygen deprivation to the brain to have
21 cerebral palsy? Is that unusual? You can answer that
22 yes or no and then I will let you make whatever
23 explanation you would like.

1 A No. I mean, I have to answer the questions the
2 way I can, okay, not the way you wane me to.

3 Q I'm not asking you to answer the way I want you
4 to answer them, Doctor. The question is very, very
5 simple. Is it unusual for a child that is a
5 thirty-three week fetus that has suffered oxygen
7 deprivation to the brain to develop cerebral palsy?
8 Is that unusual?

9 MS. SHEA:

10 And, G., I would just request that -- when he
11 is answering, he may be nonresponsive. If you want to
12 object nonresponsive, please do that. But I think
13 there have been a couple of times you've cut him off
14 in the middle of an answer. And I would request you
35 extend him the same courtesy he's trying to extend you
16 and let you both finish your sentences before y'all go
17 on.

18 BY MR. HARDY:

19 Q Is that unusual, Doctor?

20 A Well, to answer your question yes or no is
21 difficult, because you have to tell first of all what
22 the degree of hypoxia is, what the distribution and
23 the cause is, and then I can tell you whether that's

1 unusual or not Just to say that somebody has hypoxia
2 and then has brain damage is probably unusual Most
3 babies tolerate hypoxia quite well.

4 Q Sure

5 Now, you've got your PROM there. If you would
6 start on a fresh sheet for me I would like for you
7 to write down something for me, because I'm asking you
8 a question.

9 A No, I'm not --

10 Q Because I'm going to give you a hypothetical
11 question.

12 A Well, I'm not going to write anything down for
13 you.

14 Q You are not going to write anything down?

15 A No.

16 Q You don't want to know about this?

17 A No I do want to know about it but I don't
18 have to write it down.

19 Q Well, let me ask you this: You know this lady
20 was a PROM patient, don't you?

21 A Was a what?

22 Q PROM patient. You know what a PROM patient is?

23 A No I don't know what a PROM patient is

1 Q Premature rupture of the membranes?

2 A We don't refer to people as PROM patients,
3 but --

4 Q Well, that's the way it's referred to in the
5 literature, because it's premature rupture of the
6 membranes. So, they shorten it to the initials, you
7 know, a lot of times so you don't have to say all
8 those words.

9 A Yes, but that's not the way we refer to
10 patients. Okay? That is a description of the
11 membranes. You don't call people PROM patients.

12 Q Well, we will call this one a PROM patient, if
13 you don't mind, just so we can shorten the deposition,
14 She's premature rupture of the membranes, at
15 approximately between thirty-one and thirty-three
16 weeks. She's put in the hospital with premature
17 labor. She is put into the labor and delivery. She
18 experiences variable decelerations, early
19 decelerations and some late decelerations, by some of
20 the testimony. That for some period of time after
21 she's taken off of her fetal heart monitor, during the
22 delivery process, they have no fetal heart rate, as
23 noted in the records, And I'm sure you've seen those

1 records.

2 Does that indicate to you any oxygen
3 deprivation?

4 A No, absolutely not.

5 Q How about variable decelerations?

6 A How about them? That's normal.

7 Q Well, what does that say to you?

8 A It says nothing. I mean, you have to see what
9 the child is like and what the symptoms are and what
10 the child's subsequent course is. I mean, there are
11 babies born with prolonged late decelerations all the
12 time that are absolutely normal. So, that doesn't
13 tell you anything. A fetal monitor never diagnoses a
14 child with a hypoxia, asphyxia brain damage.

15 Q Well, tell me what a late deceleration is.
16 Just describe it, if you would.

17 A Well, a late deceleration is a prolonged
18 deceleration after a contraction and takes a long time
19 to come back to the baseline.

20 Q Is that your definition of a late deceleration?

21 A Yes. I'm not an obstetrician, you know. So,
22 that's not an area of my expertise.

23 Q Well, tell me what a variable deceleration is.

1 You've told the jury here that it's a perfectly normal
2 circumstance?

3 A No. You've mischaracterized my statement.

4 Q Tell me what a variable deceleration is.

5 A A variable deceleration is due to cord
6 impingement and will have decreasing heart rate at
7 variable times during the contraction.

8 Q Okay. What is an early deceleration?

9 A It's due to head compression.

10 Q Do you know what -- is early deceleration
11 always due to head compression?

12 A Well, the majority of the time that's what it's
13 thought to be due to.

14 Q Well, how about -- I want you to tell me -- you
15 can't define late deceleration for me?

16 A I have.

17 Q Well, what is a late deceleration? You say
18 it's a slow return to baseline?

19 A Correct.

20 Q Is that your understanding of what a late
21 deceleration is?

22 A Well, it -- you know, again, I'm not an
23 obstetrician, okay, and I don't read fetal monitors.

1 And a late deceleration, you know, is a prolonged
2 deceleration coming after the contraction with a late
3 return to baseline.

4 Q What causes a late deceleration?

5 A Well, it's thought to be due to hypoxia to the
6 heart.

7 Q How about placental insufficiency?

8 A How about it?

9 Q Is a late deceleration caused by placental
10 insufficiency?

11 A Well, I suppose indirectly it could be caused
12 by placental insufficiency. But in terms of saying
13 that placental insufficiency causes late
14 decelerations, no. That's not a one to one
15 correlation.

16 Q Well, what is the correlation?

17 A What is what correlation?

18 Q What is the correlation? You **say** it's not a
19 one to one correlation. Tell me what the correlation
20 is.

21 A I don't understand your question.

22 Q Well, if it's not one to one, is it two to one,
23 five to one, ten to one? What is the correlation

1 between late deceleration and placental insufficiency?

2 A Well, I mean, you can see a late deceleration
3 with placental insufficiency; you may not. You can
4 have a baby that has problems or you can have a baby
5 that does not. And they vary from all kinds of
6 problems and none of which may be related at all.

7 Q Would you agree with me, Doctor, that a
8 thirty-three week fetus has less reserve than a term
9 baby?

10 A I don't think I know the answer to that.

11 Q You know what I mean when I say reserve?

12 A No.

13 Q All right. You know what a decel is, a
14 deceleration?

15 A Yes.

16 Q What happens to the baby **in** a deceleration?

17 A Well, usually nothing.

18 Q Does the baby -- is there less oxygen flowing
19 to the baby's brain in a deceleration?

20 A You mean in terms of the fetal heart tones
21 being decreased? You know, again, the heart rate
22 decreases, but there may or may not be, because there
23 are compensatory mechanisms in the baby and in the

1 baby's body.

2 Q Now, are those compensatory mechanisms in the
3 baby and in the baby's body as functional in a
4 thirty-three week fetus as they are in a term baby?

5 A I would think so.

5 Q So, a thirty-three -- there is no difference in
7 the labor and delivery of a thirty-three week fetus
3 and a term baby?

9 A No, that's not what you asked.

10 Q No. I asked if a thirty-three week fetus has
11 less reserve than a term baby?

12 A But that's not the same question.

13 Q Well, it's all leading to the same question.

14 A But i can't answer it the same way, because
15 there are different answers.

16 Q Does a deceleration affect a thirty-three week
17 fetus the same as it would a tern baby?

18 A Well, what kind of deceleration and what
19 situation and -- you know, it's too general to answer.
20 I can't answer it.

21 Q All right. Let's start with an early
22 deceleration. Does an early deceleration affect a
23 thirty-three week fetus the same as it would a term

1 baby?

2 A You know, again, in general, as a pediatric
3 neurologist, my understanding is no. But, again, you
4 are not defining, you know, what situation you are in.
5 But in general, no.

6 Q Does a variable deceleration affect--

7 A No.

8 Q --a thirty-three week fetus any differently
9 than it affects a term baby?

10 A Not to my knowledge.

11 Q Does a late deceleration affect a thirty-three
12 week fetus any differently than it affects a term
13 baby?

14 A Well, it depends on the late deceleration, the
15 cause of the late deceleration, the extent of them and
16 then the symptoms of the baby after birth.

17 Q Would you agree with me that any time you have
18 a late deceleration the baby is stressed?

19 A No.

20 Q Okay. You are, of course, aware that this
21 child was born with the cord around its neck?

22 A Yes.

23 Q Would that explain the variable decelerations

1 throughout the labor of this child?

2 A It could.

3 Q Now, you do -- I assume you did look at the
4 fetal heart monitor tracings?

5 A I looked. I don't read them. So, I don't --

6 Q But you don't know what they **say**. So, you
7 don't know whether the child had one or fifteen
8 variable decelerations or one or three late
9 decelerations, because that's not your field of
10 expertise?

11 A That's correct.

12 Q Is that correct?

13 A That is correct.

14 Q Now, have you read Nurse Thompson's deposition?

15 A I believe so.

16 Q Have you read Nurse Davis' deposition?

17 A Yes.

18 Q Have you read the deposition of Nurse Bowman?

19 A Yes.

20 Q Okay. Now, of course, you do know that Nurse
21 Bowman delivered this child?

22 A That's correct.

23 Q Okay. Now, what was the condition of the **baby**

1 at birth, if you know, based on what you've read?

2 A Well, it looks to me like the baby was in
3 excellent condition, with Apgars of eight over eight.

4 Q Are you using the Apgars as a measure of
5 this -- a one and a five minute Apgar as a measure of
5 this baby's brain condition at birth?

7 A No. You asked me what condition the baby was
8 in. And the Apgar is used to describe whether a baby
9 needs to be resuscitated or not immediately after
10 birth, And this **baby** had good Apgars.

11 Q Would you agree or disagree with me that Apgars
12 of one and five minutes are nondiagnostic?

13 A Nondiagnostic of what?

14 Q Of whether or not a child has suffered brain
15 damage?

16 A Oh, I agree with you.

17 Q Okay. Because cerebral palsy may not show up
18 in a child for several months?

19 A No, that's not true.

20 Q Well, it's not unusual that it wcn't show up
21 for several months, **is** it?

22 A Yes, it is unusual.

23 Q It is unusual? Okay. How soon would you

1 expect it to show up?

2 A Well, if you, you know, knew the situation, the
3 cause and the factors surrounding it, babies that
4 sustain -- and I assume you mean intrapartum causes
5 Now, obviously if you mean genetic causes or
6 congenital malformations of the brain or problems
7 prior to birth, then they may take a longer period of
8 time, depending on the observer, to be diagnosed. But
9 if it's an intrapartum condition, meaning during the
10 birth process, then the symptoms are there and that

11 are serious symptoms

12 Q Well, it would, of course, appear upon the
13 level of brain damage, wouldn't it?

14 A No, that has nothing to do with it.

15 Q It has nothing whatsoever to do with the amount
16 of brain tissue that has been injured or is injured?

17 A I don't think I understand your question.

18 Q Well, the question is simple Does it awe --
19 whether or not or how -- how long it takes to diagnose
20 the problem, does it have anything whatsoever to do
21 with the amount of brain tissue that has been injured?

22 A Again, I don't understand Does what have
23 anything to do with it?

1 Q The ability to diagnose the problem?

2 A No. The ability to diagnose the problem has to
3 do with the examiner and the studies that are done.

4 Q Could you automatically diagnose cerebral palsy
5 in a two week child, no matter what the level of
6 injury to the brain is?

7 A Well, you will have to tell me more about the
8 situation, when the insult occurred, the degree, the
9 factors surrounding it and the symptoms, and then I
10 will be able to tell you that.

11 Q Well, say it's not a significant degree of
12 brain damage but enough to affect the child's
13 developmental process?

14 A Again, I'm having a very hard time
15 understanding you, because you are using things that
16 are not --

17 Q Sure.

18 A Not equal or consistent.

19 Q Sure.

20 Now, was there any evidence in these records
21 that this child had any kind of hypoxic event, that
22 you could find?

23 A When and what record?

1 Q Either during labor or delivery or immediately
2 after delivery?

3 A No.

4 Q Nothing you could find?

5 A That's correct.

6 Q Now, you've said and talked about this Apgar of
7 eight; is that right?

8 A That's correct,

9 Q What was the color of the child at birth, if
10 you recall?

11 A The child was dusky,

12 Q Okay. And the child -- when was the child put
13 on oxygen, if you remember?

14 A I think shortly after birth.

15 Q And how long did the child remain on oxygen?

15 A I will have to go back and look exactly.

17 Somewhere around twenty minutes. Maybe longer, but I
18 will have to -- I will be glad to look if you want me
19 to.

20 Q If a child is dusky at birth and then given
21 thirty percent and then reduced to twenty-five percent
22 oxygen Doctor, would you expect the child to pink up?

23 A it may or may not. It depends on the

1 gestation. It depends on the type of infant. It
2 depends on the circulatory status.

3 Q Let's talk about the Kirkpatrick baby. Now,
4 you know what the gestation was, don't you?

5 A Yes.

6 Q What was it?

7 A Thirty-three weeks.

8 Q Okay. Would you expect a thirty-three week
9 fetus to pink up after being on oxygen for however
10 long you said he was on oxygen?

11 A Well, it may or may not. It depends on the
12 baby's overall condition.

13 Q Well, you've already said the baby's overall
14 condition was good: he was in good health at birth,

15 A I'm sorry. What's your question?

16 Q My question is: You've already said that the
17 baby's overall health was good at birth; he was in
18 good condition, Apgar of eight, at birth. How long is
19 it going to take that good healthy thirty-three week
20 fetus, given oxygen, to pink up?

21 A Well, you know, it's variable. Again,
22 depending on the premature infant, I would expect it
23 to take probably some length of time.

1 Q Why would this baby be dusky at birth?

2 A Well, premature infants tend to be dusky at
3 birth.

4 Q All of them?

5 A Sure. They have acrocyanosis. Th ir
6 peripheral vasculature and their vessels are thin so
7 that they may look somewhat darker than full term
8 babies.

9 Q You read Nurse Bowman's testimony, didn't you?

10 A Yes.

11 Q She said the baby was pink?

12 A Well, it was pink at 5:30. Which I think is
13 ample time.

14 Q Did you read her deposition?

15 A **Yes.**

16 Q She said it was pink in the delivery room?

17 A Okay. Well, then, let's get it out and look at
18 it. You know, there are over thirty depositions.

19 Q That's an important deposition.

20 A Well, I mean, they are all important.

21 Q Well, she's the one that delivered the baby.
22 You don't remember her deposition?

23 A Well, you know, I can't remember everything.

1 It's not a memory contest.

2 Q Why don't you get it out?

3 A I don't have it. But I will be glad to look at
4 it if you want me to comment on it.

5 Q Well, I don't have it with me. I assumed you
6 would bring all your records with you.

7 A I can't carry three boxes of records.

8 Q Well, you don't consider a dusky baby to be
9 hypoxic at birth?

10 A No, absolutely not.

11 Q Even though thirty percent oxygen is necessary
12 to revive that baby and bring it to the status of
13 pinking it up, so to speak?

14 A Well, in the first place, we don't know whether
15 that's what was required. Oftentimes premature babies
16 will appear dusky just by their color and their
17 peripheral circulation and they are not hypoxic.

18 Q Now, i understand what you are saying. But
19 dusky can be evidence of hypoxia; would you agree or
20 disagree with thac?

21 A Well, it can be consistent with a lot of
22 things.

23 Q I'm asking you, Doctor, is it consistent with

1 hypoxia?

2 A No, not unless there are other symptoms that go
3 along with it.

4 Q How can you recognize those symptoms in a
5 thirty-three week fetus?

6 A Well, because they usually require intubation.
7 They usually have ventilatory failure. They have
8 renal failure, heart failure, have seizures, have an
9 extended hospital stay. And that's not what you're
10 seeing in this situation.

11 Q Would you agree or disagree with me that the
12 seizure activity in a thirty-three week fetus might be
13 very subtle?

14 A No, I would disagree with you.

15 Q It would have to be profound?

16 A No, I didn't say that either.

17 Q It would take a trained person to recognize
18 seizure activity; would you agree or disagree with
19 that?

20 A Well, what do you mean by trained person, now?

21 Q Someone as skilled as yourself?

22 A No, certainly not.

23 Q You think a nurse could recognize seizure

1 activity?

2 A Or recognize activity that might be consistent
3 with it, sure.

4 Q Well, they would have to know what to look for,
5 wouldn't they?

6 A Well, any unusual activity in a baby could be
7 construed as seizure activity. And that would then
8 have to be looked at by other studies.

9 Q Well, in this hospital, had this child needed
10 ventilation, they would have been in a heap of
11 trouble, wouldn't they?

12 A I don't know what you mean.

13 Q They didn't have the equipment to do it, did
14 they?

15 A Well, many hospitals don't have the equipment,
16 but you intubate a baby and Ambu them and then you
17 transfer them.

18 Q I see. Why not transfer them ahead of time?

19 A What do you mean?

20 Q Say, a week, a week ahead of time, if **you've**
21 got a problem pregnancy?

22 A I'm not an obstetrician. You will have to ask
23 them.

1 Q And may i take it from your testimony that you
2 put no stock whatsoever in the labor progress of Mrs.
3 Kirkpatrick?

4 A I don't think I understand thac question
5 either.

6 Q Well, you know what labor progress is?

7 A No. I mean, what -- just why don't you tell me
8 what you are referring to?

9 Q Well, you are a practicing physician and I
10 don't think I'm using words -- her labor progress
11 means from the time she is supposedly in active labor,
12 as that labor progresses and she's on a fetal heart
13 monitor strip. And that fetal heart monitor strip **has**
14 a purpose and that is to show what's going on with the
15 baby's heartbeat, Would you agree or disagree with
16 that?

17 A I don't have any problem with that, but that's
18 not labor progress.

19 Q Well, labor progress also has to do with
20 dilation and so forth of the cervix; correct?

21 A I would think so.

22 Q But when I'm talking about the labor progress -
23 because Cynthia Kirkpatrick is not hurt; this baby is

i the one that's hurt - I'm talking about what's going
2 on with the baby's heartbeat during the labor process.
3 You put no stock whatsoever in the decelerations noted
4 on the fetal heart mcnitor strip?

5 A Sure. I consider all of the facts, but the
6 facts have to be all consistent, you know, with a
7 problem and not inconsistent.

8 Q Well, on any of the films that you observed,
9 did you see periventricular leukomalacia?

10 a Yes.

11 Q Tell me what that is.

12 A Periventricular leukomalacia is a distal field
13 infarction in the periventricular germinal matrix of
14 premature babies.

15 Q Would you agree or disagree with me that that
15 is -- the most common cause of periventricular
17 leukomalacia is hypoxia?

18 A No, I disagree with you.

19 Q What is the most common cause of
20 periventricular leukomalacia? The most common cause?

21 A Well, the pathogenetic mechanism is ischemia.

22 Q Okay. What is ischemia?

23 A It's decreased blood flow.

1 Q Now, you are going to have to describe that to
2 me. What do you mean decreased blood flow?

3 A Just what I said. There is no other way to
4 describe it.

5 a No. Well, I don't understand how you've
6 answered that question. I want you to tell me what
7 decreased blood flow is. Does that mean less blood to
8 the brain?

9 A Yes.

10 Q Well, what causes that?

11 A Well, infection, hypotensive episodes, toxins,
12 systemic diseases, placental insufficiency, ruptured
13 uterus, abruption of the placenta, placenta previa,
14 toxemia.

15 Q Okay. And of all of these things that you have
16 mentioned, number one, there is no evidence of
17 infection, intrautero infection, is there, at all in
18 any of these records?

19 A Well, most of them are silent. So, I can't
20 tell you about it.

21 a I say, there is no evidence whatsoever in any
22 of these records of intrautero infection, is there?

23 A I'm saying I don't know because most of them

1 are silent.

2 Q I'm asking you if any -- in any of the records
3 that you have reviewed, is there any evidence? I'm
4 not asking you if they are silent. I'm asking you if
5 there is any evidence there?

5 A Well, the evidence is of periventricular
7 leukomalacia. I mean, that's one of the causes.

8 Q Well, I know. We are going to come to the
9 causes. But is there any evidence of infection?

10 A Well, that is the evidence. That certainly
11 could be the evidence.

12 Q It can also be evidence of hypoxia, can't it?

13 A No. I've told you the answer to that and you
14 don't seem to believe me.

15 Q Well, you are right about that.

15 Now, we are going to go to number two. Is
17 there any evidence at all of toxic exposure of this
18 lady?

19 A Evidence where?

20 Q Ever, anywhere in the records, that she was
21 exposed to any toxic substance that would cause
22 periventricular leukomalacia to this child?

23 A I don't know that. There is not a detailed

1 history about toxic exposure,

2 Q Is there any evidence that she took any drugs
3 that would have caused this fetus to suffer
4 periventricular leukomalacia?

5 A I don't know of any.

5 Q And is there any evidence that there was ever
7 any, number one, placental insufficiency during the
8 progress of labor to the child?

9 A Well, the baby has periventricular
10 leukomalacia, has partial agenesis of the corpus
11 callosum, has aspastic quadriparesis, optic atrophy
12 and micrencephaly.

13 Q All these words are nice. I'm asking you if
14 there's any evidence -- other than the net result of a
15 brain damaged baby,--

16 A No.

17 Q --is there any evidence of hypoxia, an ischemic
18 event, placental insufficiency during the labor
19 process?

20 A No, there is no evidence during the labor
21 process. There is considerable evidence of **a**
22 prepartum insult to the baby.

23 Q Well, I thought we had said that if she had a

1 late deceleration during the progress of her labor,
2 that could very well be caused by placental
3 insufficiency?

4 A That may be what you **said**. I mean, I don't
5 understand what you are talking about.

6 Q Do you disagree with that?

7 A I don't understand your question and what
8 context it is in.

9 Q Is a late deceleration evidence of placental
10 insufficiency?

11 A Hypothetically it's possible, yes, if
12 everything else is consistent and the pattern is
13 consistent, the symptoms are consistent, the x-rays
14 are consistent and the baby has the neurological
15 problem that's consistent.

16 Q Doctor, if the baby -- if there was a late
17 deceleration, would there have been placental
18 insufficiency?

19 A I don't understand that at all.

20 Q Can placental insufficiency cause the ischemic
21 event that you are talking about?

22 A Sure.

23 Q How about a VRD, cord compression?

1 A How about it?

2 Q Huh?

3 A How about it?

4 Q Can that cause an ischemic event?

5 A Sure. If -- you mean as an intrapartum event
6 or a prepartum event or what?

7 Q Intrapartum event?

8 A Yes.

9 Q During labor?

10 A Hypothetically, sure it can.

11 Q Now, we do know the baby has periventricular
12 leukomalacia?

13 A Nu question about it.

14 Q And you would agree that one of the causes of
15 periventricular leukomalacia is an ischemic or hypoxic
16 event that might have occurred to the child?

17 A When?

18 Q During the course of labor?

19 A No, that's not possible in this case,

20 Q At delivery?

21 A No.

22 Q Why is it not possible in this case?

23 A Because the baby has absolutely no symptoms

1 consistent with that.

2 Q And you are talking about the eight Apgar
3 again; right?

4 A No. I'm talking about all of the symptoms.

5 Q Well, he was dusky at birth?

6 A So? The majority of premature babies are dusky
7 at birth.

8 Q And that's the way you explain that away?

9 A No, that's not the way I explain that away.
10 What are you talking about? Explain what away?

11 Q I'm asking you. Is that the way you explain
12 that away, because premature babies are dusky at
13 birth?

14 A I don't understand what you mean.

15 **8** Well, is duskiness evidence of hypoxia to some
16 degree?

17 A I've already answered that. No.

18 Q Okay. Never?

19 A No, I didn't say that.

20 Q I want to pin you down. Never or--

21 A No.

22 Q --sometimes or always?

23 A When the facts are supportive and the

1 laboratory data, the x-rays, the clinical course of
2 the infant is supportive, then they may be.

3 Q Well, tell me about the laboratory data.

4 A What about it?

5 Q Well, what did the laboratory data show when
6 they drew blood from this baby? I want you to tell me
7 what it showed.

8 A The baby had perfectly normal blood gases.

9 Q All of them?

10 A Sure.

11 Q Blood sugar perfectly okay?

12 A . Yes.

13 Q Everything okay? No abnormalities at all?

14 A Well, I don't know which -- you want me to turn
15 the pages? Which would you like to see?

16 Q Doctor, I'm asking you what -- you've said
17 everything was hunky-dory when that blood was taken.
18 I just want to know what you thought these first --
19 this first blood showed that was taken from the baby?

20 A I don't think I used the term "hunky-dory."
21 So, what are you referring to?

22 Q I'm referring to the first blood test that was
23 drawn. How was the baby's blood sugar?

1 A Well, there is a report here of forty, which is
2 normal for a newborn,

3 Q What is the date on that report or what time
4 was it drawn?

5 A Okay. 7/14 at 1 36 a.m.

5 Q 7/14?

7 A Yes.

8 Q That's not right after birth, is it?

9 A Okay. Well, I mean, tell me what you are
10 referring to and I will be glad to look at it.

11 Q Look at a report of 7/13/'85 and the lab tests
12 that were drawn.

13 MS. SHEA:

14 Blood gas or sugar? Which one do you want him
15 to look at?

15 BY MR. HARDY:

17 Q What is thyroxine?

18 A It's a thyroid hormone.

19 Q Low or high?

20 A I don't understand what you mean,

21 Q Was the report low or high?

22 A Well, I **will** have to find it.

23 Q Does it show was it low or high?

1 MS. SHEA:

2 You mean back on the 13th now?

3 MR. HARDY:

4 (Nods head affirmatively.)

5 A It's in the low normal.

6 BY MR. HARDY:

7 Q Is that meaningless?

8 A That doesn't mean anything.

9 Q How about blood sugars?

10 A Okay. I mean, the only one that I have is a
11 forty, which is normal for a premature infant.

12 Q How about calcium?

13 A Seven point seven. As -- for a premature
14 infant would be on the low normal side.

15 Q Those don't mean anything to you?

16 A Well, sure, they mean a lot of things to me. I
17 mean, what it means is in the context of the
18 situation.

19 Q Well, the child **was** acidotic at 4:45 a.m., was
20 he not, when the blood gases were taken?

21 A Which blood gases?

22 Q It says minimally acidotic?

23 A Where does it say that?

I Q You've got the records there. I don't have the
2 records.

3 THE WITNESS:

4 Let me see if yours are clearer.

5 BY MR. HARDY:

6 Q I believe the report said he was -- there was
7 minimal metabolic acidosis?

8 A Well, that's the interpretation, but the -- I
9 thought that was seven point three eight. Is that --

10 MS. SHEA:

11 It's the second one there. Weren't there two
12 that day?

13 A Seven point three? Three? I don't have mine
14 clear. Anyway, seven point three **is** normal.

15 BY MR. HARDY:

16 Q Well, I'm just going by what that report says.

17 A Well, I understand, but that's normal.

18 Q Minimally acidotic,

19 A We accept seven point two or greater to be
20 normal.

21 Q I was just going by whatever that doctor said.
22 That lab says the child was minimally **acidotic**?

23 A I understand.

1 Q Metabolically acidotic?

2 A Well, I understand what you're saying. But
3 with a base excess of minus point five -- five point
4 five and minus point two, there is no significant
5 acidosis.

6 Q Acidosis, is that evidence of hypoxia?

7 A It can be or it could not be.

8 Q Of course, you did review the CAT scan reports
9 that were returned from the radiologist that read the
10 original CAT scans?

11 A Yes.

12 Q You do recall, of course, that that radiologist
13 said that ail of this is consistent with an hypoxic,
14 ischemic event?

15 A I have no problem with that.

16 Q That **was** his feeling about what was reported on
17 that CAT scan?

18 A Sure. I mean, that's what causes
19 periventricular leukomalacia in terms of the
20 pathogenesis.

21 THE WITNESS:

22 Let's just take a two minute break.

23 (BREAK)

1 BY MR. HARDY:

2 *a* We are just about through here.

3 What is the most common cause of
4 periventricular leukomalacia?

5 A Prematurity.

6 Q Prematurity?

7 A (Witness nods head affirmatively.)

8 Q Whether it's a hypoxic, ischemic event or
9 toxicity or -- what causes the brain to bleed?

10 A It's not due to bleeding.

11 Q It's not due to bleeding at all?

12 A No.

13 Q All right. It's due to an ischemic event?

14 A Yes.

15 Q I take it you've done this before; you've given
15 your deposition before?

17 A Sure.

18 Q Row many times have you testified on behalf of
19 defendants in cases like this?

20 A The vast majority.

21 Q Well, how many times?

22 A Oh, I don't know. I can give --

23 Q Give us a rough ballpark guess.

1 A I give five to fifteen depositions a year.

2 Q Okay. And how many years have you been doing
3 this?

4 A Eight years,

5 Q And the vast majority are on the behalf of the
6 defendants?

7 A Yes, that's the vast majority.

8 Q How many states have you testified in?

9 A Ten or twelve states

10 Q How many times in Texas?

11 A Three times, maybe four times.

12 Q What cities?

13 A Houston and Texarkana.

14 Q Do you remember who the lawyers were?

15 A I believe Mr. Sartwell was involved and Mr.
15 McFall. And Mr. Havfinka -- Lavinka.

17 Q Do you know who the plaintiffs' lawyers were,
18 who represented the injured people?

19 A No, I really don't.

20 Q You don't recall?

21 A No.

22 Q When was it you testified In Houston?

23 A About three years ago.

1 Q You don't recall the style of that case, do
2 you?

3 A No.

4 Q Or who the lawyers were? Was that Sartwell's
5 case?

6 A Yes.

7 Q In Houston? And Don McFall?

8 A Yes.

9 Q Do you have dealings with Houston doctors
10 frequently?

11 A Reasonably frequently. The Baylor Department
12 of Pediatrics was principally the department at
13 Washington University where I trained. So, I have a
14 great deal of colleagues and the chairman is a very
15 good friend of mine.

16 Q Okay, You know Dr. Rita Lee?

17 A No, I don't,

18 MR. HARDY:

19 Off the record,

20 (WHEREUPON, **THERE** WAS AN

21 OFF-THE-RECORD DISCUSSION.)

22 MR. HARDY:

23 I think that's all I have this afternoon.

1 THE WITNESS:

2 Okay. Thank you.

3 MR. HARDY:

4 Perhaps we will see you in Dallas.

5 THE WITNESS:

6 I'm looking forward to it.

7 MR. HARDY:

8 So am I.

9 CROSS EXAMINATION

10 BY M^{RS}. SCHMIDT:

11 Q You weren't involved in those cases in
12 Texarkana where the -- the incubator baby cases?

13 A No.

14 Q What's that term?

15 A Retrolental fibroplasia?

16 Q Yes.

17 A No, that's --

18 Q RLF. You weren't in the RLF cases?

19 A No. No, that's not an area of my expertise.

20 MR. SCHMIDT:

21 Okay. That's all.

22

23

REDIRECT EXAMINATION

BY MR. HARDY:

Q How many brain damaged baby cases have you testified in on behalf of defendants?

A I don't know.

Q Rough guess, over the years? Over the last ten years? A hundred?

A No. Thirty.

Q Thirty.

MR. HARDY:

Okay. That's all i have.

MS. SHEA:

Nothing else, Mike?

MR. SCHMIDT:

No.

MS. SHEA:

Okay. We will reserve our questions until time of trial.

FURTHER, DEPONENT SAYETH NOT.

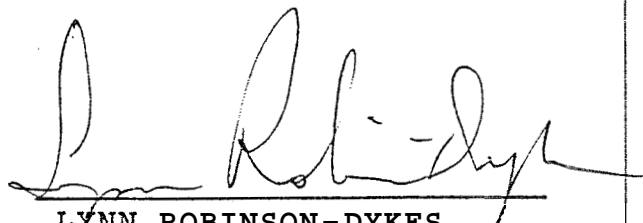
C E R T I F I C A T E

STATE OF ALASAMA:

COUNTY OF MOBILE:

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I anywise interested in the result of said cause.



LYNN ROBINSON-DYKES
COURT REPORTER

CERTIFICATE OF WITNESS

I, ELIAS GEORGE CHALHUB, M.D., do hereby
certify that on this, the ____ day of _____,
1990, I have read the foregoing transcript, and to the
best of my knowledge, it constitutes a true and
accurate transcript of my testimony taken on oral
deposition on October 9, 1990.

SUSCRIBED AND SWORN TO BEFORE
ME ON THIS THE ____ DAY OF
_____, 1990.

STATE OF ALABAMA AT LARGE