

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI

NATHAN ALLEY, by and through)
his mother and Next Friend,)
CATHY ALLEY,)

Plaintiff,)

-vs-

No. CW324-1293CC

F. DONALD MARSTON, M.D., and)
ST. JOSEPH OB-GYN, INC.,)

Defendants.)

DEPOSITION OF ELIAS CHALHUB, M.D., produced,
sworn, and examined on Friday, the 30th day of October,
1987, between the hours of 8 a.m. and 6 p.m. of said day at
the law offices of SHUGHART, THOMSON & KILROY, 1800 Twelve
Wyandotte Plaza, 120 West 12th Street, in Kansas City,
Jackson County, Missouri, before:

KATHY S. RALLS

a Notary Public within and for the State of Missouri, in a
certain cause now pending in the Circuit Court of Buchanan
County, Missouri, wherein NATHAN ALLEY, by and through his
mother and Next Friend, CATHY ALLEY, is Plaintiff, and F.
DONALD MARSTON, M.D., and ST. JOSEPH OB-GYN, INC. are
Defendants.

Taken on behalf of the Plaintiff

APPEARANCES

For the Plaintiff:

Mr. James R. Bartimus
Mr. Paul Kavanaugh
LANTZ WELCH, P.C.
2930 City Center Square
1100 Main
Kansas City, Missouri 64105

For the Defendants:

Mr. Kirk J. Goza
SHUGHART, THOMSON & KILROY
1800 Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105

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S T I P U L A T I O N

IT IS HEREBY STIPULATED AND AGREED BY AND
BETWEEN COUNSEL FOR THE RESPECTIVE PARTIES that
presentment of this deposition to the witness is
hereby waived.

IT IS FURTHER STIPULATED AND AGREED BY AND
BETWEEN COUNSEL FOR THE RESPECTIVE PARTIES that the
deposition of the witness may be signed before any
Notary **Public**.

I N D E X

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E X H I B I T S

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(list of records reviewed)
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(Dr. Chalhub's cases with Shughart, Thomson)
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ELIAS GEORGE CHALHUB, M.D.

(of lawful age, being produced, sworn, and examined on
behalf of the Plaintiff deposeeth and saith:)

EXAMINATION BY MR. BARTIMUS :

Q. State your full name for the Court and jury.

A. Elias George Chalhub.

Q. And what is your business or occupation?

A. I'm a physician.

Q. Your age, please?

A. 44.

Q. Your Social Security number, please?

A. 267-70-6868.

Q. And are you employed by a corporation in the state of
Alabama?

A. Yes, I am.

Q. And the name of that corporation, please?

A. Is Neurology Center, P. C.

Q. And what is the address of that corporation?

A. The -- we have -- we just moved, and we have two
offices. There's one on 3632 Dauphin Street, and
there's one on Airport Boulevard. And I really
honestly don't remember the number.

Q. That's fine.

Has that corporation held addresses at other
locations than the one you've just described?

1 A. Yes.

2 Q. Can you give me the addresses that that corporation has
3 been at in the last four years?

4 A. I don't remember all of them. There have been some
5 post office boxes, and there have been some -- let's
6 see, we were on Louselle Street.

7 I really can't give you all of them.

8 Q. You understand that you've just been placed under oath?

9 A. Yes.

10 Q. And you understand that, and you've agreed to tell the
11 truth here?

12 A. Yes.

13 Q. And has it ever been explained to you that by being
14 under oath, you have subjected yourself if you do not
15 do that to the penalty of perjury?

16 A. Yes.

17 Q. And I don't know if it's ever been explained to you in
18 this state, but I want to represent to you that perjury
19 in this state is a felony.

20 A. I understand that.

21 Q. Now, my first area of inquiry for today, Doctor, is
22 going to deal with your relationship with St. Paul Fire
23 & Marine Insurance Company.

24 Can you tell me, Doctor, in the year 1984, how
25 many times you had an occasion to review cases for

1 St. Paul Fire & Marine?

2 A. Again, as I have testified before, Mr. Bartimus, and
3 will continue to testify, I really don't know in terms
4 of St. Paul's because I don't generally review cases
5 for insurance companies; they're for attorneys. And
6 either attorneys or their representatives or claims
7 managers representing attorneys will call me. And I'll
8 review cases in that manner. So, I can't tell you
9 that.

10 2. Now, you indicated to me that that's what your
11 testimony in the past has been and that's what it will
12 be in the future. Did you just say that?

13 A. Yes.

14 2. Doctor, you were asked on May 1st, 1985, concerning
15 your relationship with St. Paul in the year 1985, the
16 question of how many times you'd had occasion to review
17 records for St. Paul, and your answer was two
18 occasions.

19 Do you have some belief today that your memory was
20 better then than it is now?

21 A No, I just told you, I don't know -- you know, as I can
22 tell you, they're usually for attorneys.

23 Now, there may be -- at that time I may get a
24 case that they not identify themselves and I'll recall
25 that it is, you know, for that insurance company.

But, you know, again, they almost invariably have an attorney. So, I'm not, you know -- I don't -- could I see the -- you know, so that as we go along today, if you wouldn't mind letting me see what you're quoting from so I can make sure that it's in the appropriate context

Q Doctor, how many times do you think that you've testified on behalf of St. Paul in the year 1984?

MR. GOZA: Well, let me object to the question as to form as to whether he testified on behalf of St. Paul I think that's an argumentative form of the question.

I doubt seriously that there are a y lawsuits which name St Paul as a Defendant in the case or a Plaintiff

MR. BARTIMUS: I'll withdraw the question.

Q. (By Mr. Bartimus) Doctor, how many times in 1984 do you believe that you consulted with any claims representatives of St. Paul?

A I don't know.

Q In the year 1985, were you, to the best of your knowledge, ever contacted by St Paul representatives with respect to reviewing any cases?

A. Excuse me, in when?

Q. 1985.

1 A. You know, I've told you again how I'm contacted, okay?
 2 And that's, you know, just the way it is. I can't --
 3 you know, I can't change that any differently than I've
 4 already told you.

5 Q. And is it your best belief that on the subject matter
 6 of the questions we've just asked you that your
 7 testimony had been consistent in that fashion?

8 A. I think so.

9 Q. Have you ever testified, Doctor, that you in the years
 10 1984 and '85 never did any work for St. Paul?

11 A. I don't know. You know, I would have to look at it and
 12 see.

13 Again, I've told you to the best of my ability
 14 the-- you know, the way it's done. And if there are,
 15 you know, individual cases in which there is no
 16 attorney involved and -- you know, I honestly don't
 17 know; or cannot recall those.

18 But I have no problem. I mean, if they're there,
 19 that's fine.

20 Q. Let's see if we can refresh you.

21 A. Okay.

22 Q. On March 17th of this year, 1987, in a case entitled
 23 Billy Ray Travis versus Anthony Hamby (phonetic), on
 24 Page 89 of that deposition you were asked these
 25 questions: Question, "How many St. Paul cases have you

1 reviewed in the last year would you say?"

2 Answer, "Again, they are very few. They're
3 usually through an attorney."

4 Question, "You don't have any idea as to how
5 many?"

6 Answer, "No, I don't."

7 Question, "You say 'very few', Can you tell me,
8 put a number on 'very few', and tell me what you mean
9 by that?"

10 Answer, "No. Of the seven, eight or nine that I
11 review each year, perhaps one will be."

12 Does that help refresh your memory?

13 A. Sure, that's exactly what I've told you.

14 Q. So, you think maybe it would be one?

15 A. As I told you, first of all, I don't know the number.

16 Second of all, that Page 89 refers to 1987, okay?

17
18 And the third thing is of those seven or eight
19 cases, they come from various sources. They may --
20 individual persons. One may be, as I said.

21 And, again, I do not know the number. If that is
22 for St. Paul's, that's fine. But I cannot recall that.
23 So, it's exactly what I've told you.

24 Q. Now, as it relates to St. Paul, have you testified
25 that, in fact, the number of cases that you received

1 from them each year -- that you're aware of -- has been
2 about consistent through '85, '86 and '87?

3 A. Have I testified to that?

4 Q. Yes.

5 A. Again, a lots -- many times I don't know where the
6 cases come from, okay? Because they will come from an
7 attorney, and I don't even know the insurance company.
8 So, I don't know -- have any way of knowing that.

9 Q. My question is a little different than that.

10 A. Ckay.

11 Q. My question was on the cases where you are aware of the
12 origin, and the origin is, to your knowledge, St. Paul
13 Fire & Marine Insurance Company through a claims
14 representative. Have you testified that the cases
15 you've received from them quantitatively has been
16 the same in 1985 and 1986?

17 A. I don't know. I would have to look back at the
18 testimony.

19 I think I've testified on several occasions that
20 it has increased over '86 and '87.

21 2. Can you give the Court and jury of Buchanan County,
22 Doctor, an indication as to how many cases you believe
23 from your personal knowledge St. Paul Fire & Marine
24 sent; you directly in 1986?

25 MR. GOZA: And, Doctor, you don't have to

1 speculate. And if you don't know the answer to
2 that question, tell him, Because I think you've
3 already said --

4 A. Yeah, I don't know.

5 MR. BARTIMUS Kirk, listen, he sees it, he's
6 been through more depositions than you have.

7 So, I'm going to tell the doctor and remind
8 him so we don't have to go through this again.

9 Q. (By Mr. Bartimus) You tell me only what you know. I
10 don't want you to guess here today, and I don't want
11 you to speculate.

12 And if I ask you a question that you believe may
13 cause speculation, you tell me that, will you?

14 A. Okay.

15 Q. And we won't have to go through this exercise again
16 about speculation. Because I don't want you to guess
17 on anything I ask you.

18 I'm going to tell you I'm going to be very careful
19 about interrupting you. I've seen a plethora of
20 instances where lawyers have been rude and have
21 interrupted you, and I'm going to try not to do that --

22 A. And I will do the same.

23 Q. You're right, that was going to be my next point,
24 because I've also seen that.

25 So, you give me the courtesy of finishing my

1 question, I'll give you the courtesy of finishing
2 your answer. Do we understand each other?

3 A. Absolutely.

4 Q. Now, my question was different than what we just talked
5 about. My question was the cases where you know you
6 have direct contact with St. Paul Fire & Marine. Can
7 you give the jury some indication quantitatively as to
8 how many cases you reviewed for St. Paul Fire & Marine
9 in the year 1986?

10 A. No.

11 Q. You receive from St. Paul Fire & Marine, and have over
12 the last four years, a tax form 1099, isn't that true?

13 A. You know, I don't know that, either. That would either
14 go to my accountant or whoever handles my things. So,
15 I honestly don't know that.

16 Q. You don't, okay.

17 Do you have any estimate, Doctor, as to the amount
18 of income you've received from St. Paul Fire & Marine
19 for the year 1984?

20 A. No, because I have no way of knowing that because St.
21 Paul's, as well as other insurance companies, have --
22 you know, are carriers in other areas, Workmen's Comp,
23 personal injury. And, you know, I have no way of
24 knowing how to separate those. So, I just don't know.

25 Q. To your knowledge, has St. Paul aided you in providing

1 you with checks which specify that this was a medical
2 negligence claim on which you had been retained
3 specifically?

4 A. No.

5 Q. Are you aware that they do that?

6 A. You know, again --

7 Q. My question was were you aware that they do that?

8 A. Well, can I -- do I have the right to answer the
9 question --

10 MR. GOZA: You have the right to answer any
11 way you see fit.

12 A. No, I can't answer it the way you want me to, so, let
13 me do it my way.

14 Okay, could you restate the question?

15 Q. (By Mr. Bartimus) Sure. And I don't want to put words
16 in your mouth. So, you do it your way. I may move to
17 have it stricken as not responsive because I'm going to
18 ask you a narrow question, if I can, and I want an
19 answer that's responsive to that question.

20 If we start getting into a diatribe about
21 collateral issues, I'm going to move to strike it, just
22 so you'll know, and I won't have to explain.

It's not being rude. But I'm going to get a judge
to rule on that you're wandering away from the area
where I inquired.

1 Now, my question was -- you asked to have it
 2 repeated -- are you aware that St. Paul, when they send
 3 you the check, that they indicate the occurrence
 4 number, the policy number, and the fact that it's a
 5 medical negligence case as opposed to Workmen's
 6 Compensation?

7 A. No, I'm not aware of that.

8 Q. Now, would you have any reason to quarrel or dispute
 9 the fact that in the calendar year 1986, you looked at
 10 60 claims, medical negligence claims, 60, for St. Paul
 11 Fire & Marine?

12 A. I would have to look at those and to see exactly, you
 13 know, what they were in reference to.

14 But I'm, you know, aware of the list that you
 15 have, and there's no way for me to look at that and
 16 tell you because I don't know the numbers and I don't
 17 even have the records. So, there's no way for me to
 18 confirm or deny it.

19 Q. Being aware of the list, then you're aware that St.
 20 Paul has in their repository information that Dr.
 21 Chalhub, you, was paid in the year 1986 -- separately,
 22 as opposed to your corporation at this point in time --
 23 \$59,411.72 for the year 1986. Does that sound about
 24 right?

25 A. Yes -- no, I mean, that sounds like what that's on

1 there, exactly, I have no quarrel

2 Q. Right. You've had these lists pr

3 A. Right, I've got those from the I'

4 Q. From the what?

5 A. The Inner Circle.

6 Q. Are you a member of the inner Circle?

7 A. No.

8 Q. Okay, I see.

9 Now, your corporation, the Neurology Center, P.C.
10 at Post Office Box 7723 was remunerated \$24,641.25 for
11 the calendar year 1986, you're aware of that document?

12 A. Let me see that (indicating).

13 MR. GOZA: Have we had these marked as
14 exhibits?

15 MR. BARTIMUS: No.

16 MR. GOZA: Because if we're going to talk
17 about them, I think we ought to have --

18 MR. BARTIMUS: I don't intend to. They're m
19 documents, and I determine what's going to be
20 marked --

21 MR. COZA: Well, then, let me object to the
22 question because you're asking the doctor to
23 comment on documents that are not part of the
24 record.

25 MR. BARTIMUS: That's fine. Then give them

back to me. We'll move on to a different topic.

Q. (By Mr. Bartimus) Doctor, it's true, is it not, that you have had conversations with St. Paul Fire & Marine representatives wherein you have agreed to come in on a case and testify on their behalf in defending a doctor based on an issue of causation without ever having looked at the medical records of the patient?

MR. GOZA: Well, let me just object to the form of the question. Again, I think you've asked if he testifies on behalf of St. Paul. I'm not aware of any cases, and you've not shown the doctor any cases, in which St. Paul has been named as a Defendant or acted as a Plaintiff in a case. And I think the form of the question is argumentative.

MR. BARTIMUS: I'll withdraw the question.

Q. (By Mr. Bartimus) Let's go at it this way: Isn't it true that you have had conversations with representatives from St. Paul Fire & Marine Insurance Company that on behalf of their insureds you would come in and testify on an issue of causation based solely on the telephone conversation, without an opportunity to review the patient or the records; isn't that true?

A. No.

Q. Do you deny that?

1 A. You know, to the best of my knowledge.

2 (Whereupon a discussion was held off the
3 record.)

4 Q. (By Mr. Bartimus) Do you know a Mr. Tom Colaizy,
5 C-o-l-a-i-z-y, from St. Paul Fire & Marine?

6 A. No.

7 Q. Do you know a Mr. Bill Myers (phonetic) of St. Paul
8 Fire & Marine?

9 A. No.

10 Q. In 1986, Doctor, can you give the Court and jury some
11 indication as to what percentage of your income was
12 derived from your testifying in medical/legal matters?

13 4. I have already put that in writing to Mr. Shadowen
14 (phonetic), who I'm sure you know. And that was ten, I
15 think, point one per cent in the cases that I could
16 remember that I could document in terms of the income
17 that I generated testifying.

18 MR. BARTINUS: I'm going to move to strike
19 his answer as not responsive, and ask that the
20 court reporter read the question back once again.

21 MR. GGZA: And let me just state for the
22 record, I think his testimony is exactly
23 responsive to the question.

24 MR. BARTIMUS: Listen, Kirk, the bit about
25 Shadowen, all that's excess. I'm going to cut all

1 that out, we're going to get to the answers to my
2 questions. I don't need all this extra about
3 Inner Circle and Shadowen

4 I asked him if he could give the Court and
5 jury an indication as to the percentage of his
6 income --

7 THE WITNESS: I told you

8 MR. BARMIMUS: No, you didn't tell me that.
9 Doctor, you got off onto a story about George
10 Shadowen

11 I'm asking the question here as it relates to
12 the campaign

13 I don't want to get into extracurricular
14 activities here about George Shadowen and that
15 you've done something in the past

16 I want an answer to my question.

17 MR. GOZA: Just --

18 MR. BARMIMUS: Now, repeat the question --

19 MR. GOZA: Now, we're not going to interrupt
20 each other, you and I are not going to interrupt
21 each other, and you and the doctor are not going
22 to interrupt each other.

23 And we are going to go about this, I
24 guarantee you, in a civil manner, or we're not
25 going to do it at all.

1 Now, I think his answer was responsive. You
2 can strike or move to have stricken any portion of
3 it that you don't like, and we can have the judge
4 rule on that.

5 But I think he has given you an answer to
6 your question.

7 MR. BARTIMUS: I move to strike it as not
8 responsive.

9 Q. (By Mr. Bartimus) Can you tell me as of 1986, during
10 the calendar year of 1986, what percentage of your
11 income would be derived from review in medical/legal
12 matters?

13 A. I don't know the answer to that. There's no way for me
14 to give you.

15 Q. Have you, in fact, answered that same question before
16 under sworn testimony?

17 A. No, I have not.

18 Q. If someone were to go about, Doctor, trying to make a
19 determination of what percentage of your income was
20 derived from medical/legal matters, how would you do
21 it?

22 A. I don't know whether I can do it.

23 First of all, I need to know what you mean by
24 medical/legal matters. Maybe if you could define that
25 for me, then, I think I might be able to better answer

1 the question.

2 Q. Okay, fair enough. And anytime you don't understand my
3 question, please ask me to clarify it,

4 We're talking about -- my reference in this
5 instance -- is your testifying in a medical negligence
6 claim.

7 We'll sort out a personal injury case against a
8 drug company, for instance. We will sort out a
9 Workmen's Compensation claim or an automobile accident.

10 I'm talking about where you have been hired as an
11 expert in a medical negligence claim.

12 Does that help now break it down further?

13 A. No, I'm still not sure I understand.

14 2. Are you having trouble with the term "medical
15 negligence"?

16 A. Right, and what you want me to give you.

17 2. All right, let's first talk about medical negligence.

18 I'm talking about where you have been retained in a
19 lawsuit where a doctor has been alleged to have
20 deviated from a standard care and that someone has been
21 injured.

22 And you have been retained many times to determine
23 whether or not that injury was in any way related to
24 anything the doctor did not do -- sometimes called
25 medical malpractice.

1 Are we working together on definitions so far?

2 A. Uh-huh.

3 Q. Is that a "yes"?

4 A. Yes.

5 Q. Now, my question **as it** relates to those type of
6 activities is: If I were to ask you what percentage of
7 your income in 1986 was derived from such reviews, such
8 participations, how would you go about determining
9 that?

10 A. I really -- there's no way for me to do that because I
11 don't keep those kind of records and I don't separate
12 them. So, there's no way for me to do that.

13 I have -- and I will tell you again -- put in
14 under testimony through my attorney to the best of my
15 ability, based on my records that I could retrieve that
16 I had in testifying in cases that, one, I was not a
17 treating physician and, two, that I expected to give
18 testimony in was ten per cent.

19 And that is, you know-- and I will stick by that.

20 (Whereupon a discussion was held off the
21 record.)

22 2. (By Mr. Bartimus) Doctor, we're back on the record,
23 and you understand you're still under oath?

24 A. I understand that.

25 2. Now, Coctor, I have been provided with interrogatory

1 Answers by the Defendants' counsel in this case
 2 indicating that you, Dr. Chalhub, from Mobile, Alabama,
 3 that you're a pediatric neurologist, and that you will
 4 testify concerning interpretation of Nathan Alley's
 5 radiological studies, and that Nathan Alley's injuries
 6 were not the result of trauma at birth.

7 Were you aware that that would be the general
 8 nature --

9 A. Yes, I think that's part of it, yes.

10 Q. You think that's what?

11 A. Yes, that's in general what I'm going to say.

12 Q. I thought you first said, "I think that's part of it"--

13 A. Well --

14 Q. -- what would be the rest of it?

15 A. Well, in terms of --

16 MR. GOZA: Wait, wait. "What will be the
 17 rest", that question is so vague and ambiguous.
 18 It depends on what you ask him in terms of what
 19 he's going to testify here today.

20 Obviously, we've already spent a lot of time
 21 on things that don't have anything to do with --

22 MR. BARTINUS: Hey, partner, we're just
 23 scratching the surface --

24 MR. GOZA: I understand that. But I'm just
 25 telling you --

1 Q. (By Mr. Bartimus) As it relates to what your charge
2 was in this case, what you were asked to do, the law in
3 the State of Missouri directs counsel to provide us
4 with the general nature of your subject matter, what
5 you're going to testify to.

6 I asked you -- the record will reflect -- if this
7 is what you were to testify to.

8 Your response was, "Well, that's part of it".

9 A. Maybe I misunderstood your question. What my question
10 was intended to say is: Yes, that is the general
11 nature in terms of the causation.

12 Obviously, I have a lot, you know, to say in terms
13 of the specifics. And I'll be glad to give you the
14 benefit of those because that's what I'm here for
15 today. And I'm going to, you know, to give you those.

16 So, that's what I meant. If there was a
17 misunderstanding, I apologize.

18 2. All right.

19 Now, do you intend to offer any opinions as
20 to whether or not Dr. Marston, as an obstetrician, met
21 an acceptable standard of medical care?

22 A. No, I'm not an obstetrician.

23 2. I understand that, and I didn't ask you that. My
24 question was different than that.

25 A. Okay.

1 Q. My question was: Do you intend to offer any testimony
2 that Dr. Marston deviated from the acceptable standard
3 of medical care?

4 A. Again, the answer to that is "no" because I am not an
5 obstetrician and I will not testify as to the standard
6 of care as an obstetrician.

7 Q. And you have testified in the past that you don't, in
8 fact, testify outside of your area; isn't that true?

9 A. That is true.

10 Q. Yet, you have testified relating to the standard of
11 care of neurosurgeons, have you not?

12 A. That is within my area in terms of the diagnosis and
13 treatment of certain diseases, so, yes.

14 Q. And you have testified regarding the standard of care
15 of emergency room physicians?

16 A. Again, as a pediatric neurologist and pediatrician,
17 when I go to the emergency room and see patients in
18 that capacity, then I feel if I'm able to give an
19 opinion based on that treatment and based on my
20 assessment of that case, then I think that I can and I
21 will do that.

22 Q. And you've testified for Sid McMath's boy, Phil, down
23 in Little Rock that the Obstetrician deviated from an
24 acceptable standard of care, isn't that true?

25 A. No, that is not true. If you will read the deposition

1 of that carefully, it states that I am not an
3 obstetrician and do not testify as to the standard of
3 care as an obstetrician. I was testifying in terms of
4

5 MR. GOZA: Let me also state for the record,
6 if you're going to ask him specific questions
7 about depositions, it's impossible for the doctor
8 to answer in any reasonable context and give you a
9 rational answer unless you provide him the
10 specifics.

11 MR. BARTIMUS: That's not true, you know the
12 rules better than that --

13 MR. GOZA: Well, I think it is true.

14 And, Doctor, if anytime you think you need to
15 see something specific, you tell him.

16 Q. (By Mr. Bartimus) As a neurologist, Doctor, you've
17 testified that in your opinion an obstetrician has
18 deviated from the standard of care, isn't that correct?

19 A. Could I see where you're reading from?

20 Q. Doctor, let's try it one more time.

21 As a neurologist, you've testified that in your
22 opinion an obstetrician has deviated from the standard

24 MR. GOZA: Let me object to the form of the
25 question. First of all as to you haven't shown

1 the doctor any specifics in terms of his past
2 testimony which he could put it in the proper
3 context.

4 Certainly, someone may have asked him -- a
5 Plaintiff's attorney or a defense attorney --
6 asked him to give comments that may well have been
7 outside of his stated area of expertise, just to
8 get his input.

9 As a matter of fact, I've seen you do the
10 same thing in other cases, to ask opinions even
11 though the doctor has stated that he is not an
12 obstetrician or not in a particular specialty.

13 And I think it's impossible for him to answer
14 that question without you showing him specifics
15 and allow him to put it in context.

16 2. (By Mr. Bartimus) Dr. Chalhub, you are a neurologist,
17 are you not?

18 A. Yes, I am.

19 1. As a neurologist, you've testified that in your opinion
20 an obstetrician has deviated from the standard of care,
21 isn't that correct, sir?

22 A. Not to my knowledge.

23 If you're reading from the deposition of Mr.
24 Coalman (phonetic), if you'll read the entire
25 deposition, then, you know, I think you'll understand

1 that I did not testify as to the standard of care of a
2 obstetrician.

3 Q. The last time you delivered a child was in medical.
4 school, isn't that true?

5 A. To the best of my recollection, yes.

6 Q. And it's your custom and practice that you usually
7 don't go into the labor rooms, isn't that true?

8 A. Yes.

9 Q. And you don't consider yourself an expert relating to
10 fetal heart monitors, isn't that true?

11 A. That is true.

12 Q. And as far as pediatric participation at the time of a
13 cesarean section, again, the last time that you were
14 present would have been sometime between 1972 and 1976,
15 isn't that true?

16 A. There may have been times since then.

17 Q. Would be unusual?

18 A. Yes.

19 Q. Mr. Goza asked me if it would be necessary for you to
20 bring all of your materials up here today. And I
21 realize they are voluminous.

22 And it was represented to me, Doctor, that there
23 would be no dog-ears, no notes, no highlighting on the
24 materials that you've been provided; is that a correct
25 representation?

1 A. Yes, it is.

2 Q. And that the same materials you have before you here
3 today or have access to in this case relating to
4 depositions are the same materials that had been
5 provided to you to review: is that true?

6 A. That is correct.

7 Q. And those materials would also include depositions of
8 Plaintiff's named experts, isn't that true?

9 A.

10 Q.
11 dissuade any of Plaintiff's experts of whom you're
12 knowledgeable in any way from testifying in this case?

13 A. No, of course not.

15 the district attorney's office in the State of Alabama
16 for attempts to contact an expert witness, were you
17 not?

18 A. No, that is not true.

19 Q. You deny being investigated --

20 Q. We weren't going to interrupt each other.

21 Do you --

22 MR. GOZA: I thought he was.

1 Q. (By Mr. Bartimus) Do you deny being investigated by
2 the district attorney's office in the State of Alabama
3 relating to contacts with an expert witness?

4 A. Well, I think -- first of all, there was no
5 investigation in a trial of Horton Worsys Simmons
6 (phonetic) or no accusation made by an expert for the
7 Plaintiff.

8 However, in the investigation and in my testimony,
9 I think it's quite clear that I never talked with this
10 physician, never discussed this case with him, never
11 intimidated him, never meant to do that And that's
12 quite clear

13 And as you can recall, also, from the testimony,
14 that that was indeed what was found The case was
15 tried again and will be tried again And this expert
16 has testified again and has not made any mention of his
17 previous accusation

18 MR. BARTIMUS: Read back my original
19 question.

20 I move to strike that as not responsive.

21 (Whereupon the pending question was read back
22 by the reporter: 'QUESTION: Do you deny being
23 investigated by the district attorney's office in
24 the State of Alabama relating to contacts with an
25 expert witness?")

1 Q. (By Mr. Bartimus) Can you answer that question, sir?

2 A. Yes, I do.

3 Q. And do deny that?

4 A. Well, again, the question is two parts, okay? I was
5 investigated. And I gave you the explanation why, and
6 I'll be glad to give it to you, again.

7 Q. Did you explain to the judge that your conveyance was
8 simply -- quote -- "that they ought to take into
9 consideration the fact that their testimony --
10 regardless of the merits of their testimony -- that the
11 very fact that they testify could potentially harm the
12 department or departments at the hospital. They ought
13 to take that into consideration before they testify or
14 when they testify", period, end of quote? Was that the
15 sum and substance of your --

16 A. Could I look at the -- where you're reading from so
17 that you can see how you've taken it out of context,
18 and I'll be glad to respond to that.

19 Q. I'm going to suggest it's not taken out of context.

20 Let me ask you, Doctor, was it your opinion that
21 when anybody testifies in a situation such as Horton,
22 who has some academic affiliation, that they should
23 take into consideration any harm that could potentially
24 be done to the department for testifying on behalf
25 of the Plaintiff?

1 A. Your statements are inaccurate. So, I can't respond to
2 that.

3 Q. No, my statement was do you believe that. Whether it's
4 inaccurate or not, you can agree or disagree --

5 A. I can't believe it if what you've said is inaccurate.

6 Q. Well, then, just tell me you don't agree with it.

7 A. Okay, I don't agree with it because you're inaccurate.

8 Q. I see, all right.

9 Do you believe that when a person who holds an
10 academic appointment offers to testify on behalf of a
11 Plaintiff that they take into consideration any harm
12 that may result because of that testimony to the
13 department for which they work?

14 A. I think that any individual offering testimony needs to
15 take a number of factors into consideration.

16 One and the first, most important is that they
17 tell the truth and they give their unbiased, objective
18 opinion.

19 When anyone gives testimony, obviously, people are
20 looking and are interested in what they say and the
21 ramifications of that.

22 And we all should have the conviction to do what
23 we wish based on our opinions and conclusions.

24 And I have no question and no problem with anyone
25 who does that, provided what they say is based on the

1 facts, based on the chart, and arrive at a logical
2 conclusion.

3 Q. Are you done?

4 A. Yes.

5 Q. And, of course, one of the factors taken into
6 consideration is economics, is it not?

7 A. I don't understand what you mean.

8 Q. Sure you do. In response to my question, you said
9 there are a number of factors one should take into
10 consideration when they testify.

11 In response to that, my question now is: And one
12 of the factors in testifying is economics, isn't that
13 true?

14 MR. GOZA: Let me object --

15 MR. BARTIMUS: Well, read back his answer.
16 We're not going to quarrel about it. Read back
17 his answer.

18 MR. GOZA: Let me finish my objection, and I
19 won't interrupt you.

20 I'm going to object to the form of the
21 question. I think it's vague and ambiguous as to
22 what you're talking about in terms of economics.
23 If you can be more explicit with the term.

24 MR. BARTIMUS: Go ahead, read back his
25 answer, please.

1 (Whereupon the previous answer was read back
2 by the court reporter: "ANSWER: I think that any
3 individual offering testimony needs to take a
4 number of factors into consideration.

5 One and the first, most important is that
6 they tell the truth and they give their unbiased,
7 objective opinion.

8 When anyone gives testimony, obviously,
9 people are looking and are interested in what they
10 say and the ramifications of that.

11 And we all should have the conviction to do
12 what we wish based on our opinions and
13 conclusions.

14 And I have no question and no problem with
15 anyone who does that, provided what they say is
16 based on the facts, based on the chart, and arrive
17 at a logical conclusion.")

18 Q. (By Mr. Bartimus) The court reporter has just read
19 back your response. And if I'm correct, I believe you
20 said there were a number of factors that should be
21 taken into consideration; did you understand?

22 A. Yes, that was my response.

24 take into consideration a factor that you make a lot of
25 money doing this, testifying?

1 MR. GOZA: I'm g
2 argumentative. I don
3 and ambiguous as to y
4 Jim.

5 Q. (Sy Mr. Bartimus) Go ahe

6 A. I don't understand what y

7 Q. Let's see --

8 A. -- Mr. Bartimus.

9 Q. In 1986, your 1099 from St. Paul Fire & Marine
10 indicates that you made \$84,000 from one company. Now--

11 MR. GOZA: Are you asking him to assume that
12 fact?

13 2. (By Mr. Bartimus) Yes, let's start with that, assume
14 that fact.

15 Now, that's from one company, one endeavor, St.
16 Paul, one client.

17 Now, the fact that you make \$84,000, testifying in
18 one year, is that one of the factors you take into
19 consideration when you agree to testify, Dr. Chalhub?

20 MR. GOZA: Lst me object to the form of the
21 question.

22 First of all, the soliloquy about what St.
23 Paul is, as a client, I think it's argumentative
24 in form.

25 Dr. Chalhub has already explained to you in

1 great detail how contacts are made to him through
2 individual attorneys.

3 I think your question is still argumentative
4 and vague and ambiguous and impossible to answer.

5 Doctor, if you can formulate some response to
6 that rhetorical question.

7 Q. (By Mr. Bartimus) Go ahead.

8 A. What is the question, now, Mr. Bartimus?

9
10
11 Q. (By Mr. Bartimus) For' clarification purposes, Doctor,
12 in determining what the basis you used in testifying,
13 you indicated to us a little earlier in an answer that
14 we had read back that you believe that anyone who
15 testifies should take into consideration a number of
16 factors. And we agreed that you did say that.

17 Now, what I'm trying to find out is what factors
18 you use in making a decision that you're going to
19 testify.

20 You've told me all about the truth and the need to
21 look at the facts and the medical chart.

22 My next question to that is: Do you take into
23 consideration the fact that you make in excess of six
24 figures, one hundred thousand dollars, each year from
25 your participation in testifying?

1 MR. GOZA: Let me again object to the form of
 2 the question and, also, I think it asks the doctor
 3 to argumentatively assume a hypothetical that you
 4 posited without any substantiation, that is, that
 5 he makes in excess of a hundred thousand dollars
 6 every year from testifying --

- Q. (By Mr. Bartimus) Go ahead.

8 MR. GOZA: You can answer the question. My
 9 objection is for the record.

10 A. Well, in the first place, I don't -- from the records
 11 that you've presented to me earlier and what you've
 12 just read from -- which is a computer printout from St.
 13 Paul's -- I don't know, first of all, what all that's
 14 from. It's clear that that is from a mixture of things
 15 which go to my practice and to me.

16 And, in the first place, all of that income is not
 17 derived from testifying and not derived from
 18 medical/legal cases. So, I can't answer your question.

19 But back to the question of do I take in a number
 20 of factors. If you recall, I did not put the factor of
 economics in

21 In my decision to testify, I'm asked as an expert
 22 of a limited number of individuals with the expertise
 23 that I have to give a fair and unbiased opinion on the
 24 basis -- on a certain set of facts that I'm presented

1 with.

2 I do that to the best of my ability, as I think is
3 the responsibility of all conscientious, responsible
4 physicians to do that when asked.

5 And I am compensated for it, and there's no
6 question about that. But if one puts the time in, then
7 he deserves to be compensated at a fair price.

8 MR. BARTIMUS: I move that that be stricken
9 as not responsive.

10 Q. (By Mr. Bartimus) As it relates to that portion of
11 what you just said, do you believe that you're within a
12 limited number of individuals that possess the
13 expertise you have?

14 A. Yes.

15 Q. Give the Court and jury of Buchanan County some
16 indication of how many people this limited number
17 comprises.

18 A. There are approximately four to five hundred Board
19 Certified pediatric neurologists in the United States. ✓

20 Of that, only thirty to thirty-five of them give
21 the boards, in other words, examine other pediatric
22 neurologists, of which I am one, which puts you into
23 a further different category of limited individuals.

24 There are some greater than ten thousand cases
25 pending in the United States concerning children at the

1 present time.

2 So, I mean, if one just does simple mathematics
3 and, basically, that people need an expert on either
4 side, either one individual is going to have to testify
5 more than one time or we need 19,500 more pediatric
6 neurologists.

7 Q. So, you put yourself in a limited number. You
8 segregate out those of you who give the boards and
9 those of the physicians who take the boards?

10 A. I don't think you understand --

11 Q. I may not, that's why I asked the question.

12 A. No, you told me why I said there was a limited number
13 of individuals. I answered the question the best
14 of my ability.

15 They are five hundred Board Certified --
16 approximately, give or take a certain amount, I don't
17 know what the last figure was -- which means that there
18 are a limited number of individuals who I think are
19 able to give responsible evaluations of situations
20 concerning medical negligence and care of individuals,
21 in this particular area.

22 Furthermore, it depends on what particular other
23 area of interest you have. I am in infectious
24 diseases, and that limits it even further.

25 So, yes, the answer to your question is there are

1 limited number of individuals with the expertise that-
 2 what I have as well as other people have -- to give
 3 testimony in certain areas.

4 Q. Does Nathan Alley have brain impairment?

5 A. Yes.

6 Q. That brain impairment, was that caused or contributed
 7 to cause in any way by an infectious disease?

8 A. Not to my knowledge, no.

9 Q. A portion of your practice deals with adult neurology,
 10 too, does it not?

11 A. That is correct.

12 Q. Can you give the Court and jury some indication of the
 13 percentage of your practice that deals with adult as
 14 opposed to pediatric?

15 A. Approximately twenty-five per cent.

16 Q. You've indicated in the past that you use psychologist
 17 in your practice; is that correct?

18 A. I don't understand what you mean by that.

19 Q. Do you use psychologists in your practice in aiding you
 20 in providing care and treatment to your patients?

21 A. No, I use psychologists to seek their opinion when I
 22 wish to have the intellectual and developmental
 23 assessment of a child done to aid me in further
 24 treatment and an evaluation plan.

25 Q. I see. And can you give us some indication as to the

1 frequency that you seek the aid of those for this
2 evaluation plan, the psychologists, their help?

3 A. It depends on the situation, Mr. Bartimus. I can't
4 tell you.

5 Q. Can you give us an estimate, Doctor, in the year 1987
6 how many times you sought consultation with a
7 psychologist?

8 A. No.

9 I don't think you understand how pediatric
10 neurologists practice --

11 Q. Doctor, I didn't ask that. I asked you if you could
12 give me an estimate. I don't need the rhetorical
13 exercises that you go through in all these depositions.

14 Answer my question. Don't tell me what you think
15 I understand and don't understand.

16 Now --

17 MR. GOZA: No, not "now". You're not going
18 to reach over the table and try to intimate this
19 witness in any way.

20 You can sit there and ask the questions
21 calmly. I mean --

22 MR. BARTIMUS: Look at this, look, you're
23 halfway across --

24 MR. GOZA: We're not going to play any games
25 here --

1 MR. BARTIMUS: Hey, have him answer my
2 questions, and we won't have to.

3 MR. GOZA: He's trying to answer --

4 MR. BARTIMUS: No.

5 MR. GOZA: If you don't like his answer, you
6 can move to have it stricken.

7 And you can finish, and let me finish. You
8 interrupt him in the middle of his answer.

9 If you don't like what he says, move to have
10 it stricken, and ask the question again.

11 And if I think it's not responsive, then I'll let
13 him answer it again.

13 But you're not going to interrupt him.

14 2. (By Mr. Bartimus) Doctor, I promised you a little
15 earlier you might make that plane. At the rate we're
16 going, I don't think you're going to. So, you might be
17 thinking about alternative methods of getting home.

18 1. Is that a threat, Mr. Bartimus?

19 2. No, sir, that's an observation, that's a conveyance.

20 Now, can you give the Court and jury of Buchanan
21 County, Doctor, some indication as to how many times
22 you have used a psychologist in aid for your patient
23 evaluations in the manner in which you've testified
24 that you use them for the year 1987, can you do that?

23 1. NO. But let me explain. And I think it's -- you know,

1 it behooves you to understand how pediatric
2 neurologists practice, and, then, maybe you can
3 understand why I cannot give you an absolute figure,

4 You see a patient, you evaluate a patient for a
5 particulat problem.

6 If a question of intellectual function or a
7 decrease in intellectual function, depending on age, o
8 school problems arise, then you may seek the evaluatio
9 by a licensed psychologist to give you an estimate of
10 their intellectual function which may aid you in, one,
11 arriving at an etiologic diagnosis and, two,
12 implementing a plan of therapy.

13 Q. Are you done?

14 A. Yes.

15 MR. BARTIMUS: Your Honor, I move so much
16 portion of the answer that followed the word "no"

17 Q. (By Mr. Bartimus) Have you found any benefit, Doctor,
18 in the aid for evaluations in the manner in which
19 you've described your uses of psychologists the
20 specific use of neuropsychologists?

21 A. You mean over and above the -- I don't understand that
22 question.

23 Q. Are you aware of a particular profession identified in
24 the allied health care field as neuropsychologist?

25 A. Yes.

1 Q. So, you do know what a neuropsychologist is?

2 A. Well, I think I know what their general -- what their
3 general thrust in life is, yes.

4 Q. And do you use those people in your practice, those
5 type of psychologists?

6 A. No, generally not.

7 Q. You indicated a little earlier, Doctor, that there is
8 some five hundred -- give or take in the numbers -- of
9 pediatric neurologists in this country.

10 You have in the past defined that. But for the
11 people of Buchanan County, would you please tell us
12 what a pediatric neurologist is?

13 A. A pediatric neurologist is an individual who is
14 licensed to practice medicine who has had pediatric
15 training and neurological training which allows him to
16 have the skills to specialize in the area of diseases--
17 medical diseases of the central nervous system of
18 infants, children and adolescents.

19 Q. While we're on definitions, perhaps we can cover a few
20 more. Would you tell the Court and Jury your
21 understanding of the definition of cerebral palsy?

22 A. Well, it's a -- depending on who you read and who you
23 accept. I can give you my definition of cerebral palsy
24 as a static motor and intellectual deficit which --

25 (Whereupon a discussion was held off the

record.)

A. The definition of cerebral palsy, as I use it, is a static neurological deficit, usually as the result of birth trauma or hypoxia and ischemia which is nonprogressive and limited to various portions of the nervous system.

Q. (By Mr. Bartimus) And the type of cerebral palsy that's identified, is that determined by the location of the lesion within the central nervous system?

A. Well, I don't generally divide or categorize cerebral palsy. So, I could not answer your question.

Q. All right.

Does Nathan Alley suffer from a condition of cerebral palsy?

A. Well, generally, I don't really use the term, okay? I use the term hypoxic ischemic encephalopathy.

And, so, you know, if you want it in terms of a general term, Nathan Alley would, under certain definitions by certain physicians, suffer from cerebral palsy.

But, basically, you know, as I would define his problem, it would be hypoxic ischemic encephalopathy.

Q. I thought you told me a little earlier -- and maybe I don't understand -- that in your defining cerebral palsy, it included birth trauma. Did you use that in

1 your answer?

2 A. That's correct.

3 Q. And was your reference to birth trauma of a hypoxic
4 ischemic type of encephalopathy from the trauma or from
5 some type of outside physical traumatic force?

6 A. Well, that's the basic pathogenetic mechanism of
7 trauma.

8 Q. I see. And I think you just told me -- in sorting this
9 out -- that you don't generally use the term "cerebral
10 palsy".

11 A. No. I mean, I acknowledge it, I have no problem with
12 it. The Cerebral Palsy Association is a fine
13 organization. But they, in fact, understand the
14 limitations of the definition.

15 And mainly the limitations are because in the past
16 it has been used to categorize a whole host of diseases
17 which, in fact, are totally unrelated, are progressive,
18 and not in the true definition as I think most people
19 intend it to be.

20 MR. BARTIMUS: Do you have his CV?

21 MR. GOZA: Yes.

22 THE WITNESS: This is an older one. And I
23 will be glad to provide you with an updated -- I
24 went out, and I apologize without -- and it's no
25 intention to do that.

1 The only thing that's different will be some
2 of the references.

3 And I will be glad to attach one to the
4 deposition.

5 MR. FARTIMUS: Good, do that for me.

6 MR. GOZA: It's got all the basic --

7 THE WITNESS: Yeah, that hasn't changed,
8 that's correct.

9 2. (By Mr. Bartimus) Has your article which you know has
10 been discussed about cerebral palsy and obstetrical
11 disease that you have worked on and is now in typed
12 form, I understand, has that ever been accepted for
13 publication yet?

14 4. No, I've decided not to publish that.

15 2. Was that your decision, or was that the American
16 College of OB-GYN Journal's decision that they wouldn't
17 accept it?

18 A. No, that was my decision.

19 2. Can you share with us why that decision took place that
20 you wouldn't publish?

21 4. Because things were changing, and I really wasn't
22 satisfied with it. And I may eventually publish it,
23 but not right now.

24 2. When you speak of cerebral palsy, and have defined it
25 in the past as lack of oxygen or blood flow or trauma,

1 I want to explore what your thinking is and what your
2 understanding of the term "trauma" relates to, "birth
3 trauma"; can you define that for us?

4 MR. GOZA: Are you going to give him a more
5 specific context --

6 MR. BARTIMUS: Sure, I will in this instance.

7 Q. Doctor, on October 12th, 1986, in the case involving
8 CIGNA Health Plan of South Florida, you were asked a
9 question on Page 57 -- and I'll hand you that page --
10 "How do you define cerebral palsy?" That's line three.

11 Line four, "Cerebral palsy is defined as lack of
12 oxygen or blood flow or trauma to a child at birth
13 which is a static, nonprogressive disorder."

14 My question to that answer is: What do you mean
15 when you use the term "trauma"?

16 A. (Indicating).

17 Q. Line three and four, sir.

18 A. Okay, it's as I've already defined it for you, and I'll
19 be glad to do it again, which is what I said, is that
20 cerebral palsy, the etiologic and pathogenetic
21 mechanisms that to -- quote, the term cerebral palsy,
22 as I understand it -- and this is as Dr. Chalhub
23 understands it, I'm not speaking for anyone else -- is
24 basically due to lack of oxygen and blood flow on a
25 number of mechanisms. The -- which will be birth

1 injuries, birth trauma, can be infection, abruption,
2 placenta previa, et cetera, and go on, that will cause
3 that same basic mechanism which injures the nervous
4 system.

5 Q. You have indicated to me in response to an earlier
6 question that Nathan Alley has some brain impairment,
7 correct?

8 A. No, that was your question. But I answered it in the
9 affirmative, yes.

10 MR. BARTIMUS: Read back the question I just
11 asked him, would you please?

12 MR. GOZA: I think maybe he misunderstood.
13 He said --

14 THE WITNESS: I'm sorry.

15 MR. BARTIMUS: No, we're going to go through
16 these every time it happens.

17 Read back my question.

18 (Whereupon the previous question was read
19 back by the Reporter. "QUESTION: You have
20 indicated to me in response to an earlier question
21 that Nathan Alley has some brain impairment,
22 correct?")

23 Q. (By Mr. Bartimus) Can you answer that question?

24 A. Yes. And as I've told you, I did say that,

25 Q. The brain impairment from which Nathan Alley suffers,

1 was that in any way caused or contributed to be caused
2 by birth trauma, using your definition?

3 A. No.

4 Q. The term "chronic", can you share with us, Doctor;
5 what Dr. Chalhub's definition of the term "chronic" is,
6 please?

7 MR. GOZA: Can you give a general answer to
8 that? Or do you need to have it put in a specific
9 context?

10 A. Well, I guess just hypothetically and unrelated to this
11 situation, "chronic" means long-lasting, of long
12 duration.

13 MR. BARTIMUS: I'm going to move to strike
14 that as nonresponsive.

15 2. (By Mr. Bartimus) Doctor, I'm not talking
16 hypothetically, I'm not talking about this case. I'm
17 talking about definitions.

18 4. Okay.

19 2. I'm testing your memory. You say these aren't memory
20 contests; I disagree with you. I think you float like
21 a butterfly all over the place. And let me just tell
22 you, I'm going to ask you your definitions on these
23 cases.

24 Now, can you tell me what your definition of the
25 word "chronic" is as it relates medically? Let's even

1 narrow it down for you.

2 MR. GOZA: Let me object to the question, and
3 let me first object to Mr. Bartimus'
4 characterization of floating like a butterfly, and
5 ask that all that be stricken.

6 And, then, with respect to the specific
7 question, I'll object because I think the term
8 "chronic" may have different meanings depending
9 upon the specific context it's used in. And I
10 don't think defining it to be in the medical
11 context is sufficient enough to give a reasonable
12 answer.

13 With that understanding, the doctor is giving
14 a general answer, go ahead if you can.

15 Q. (By Mr. Bartimus) My question is, sir: How do you
16 define "chronic"?

17 MR. GOZA: Same objection.

18 A. If you're reading from somewhere and from previous
19 testimony, I would like to look at it because I think I
20 have the right to do that.

21 Q. (By Mr. Bartimus) No, you don't.

22 A. I don't?

23 Q. No. Don't talk about what you think the right is --

24 MR. GOZA: If you can answer his question,
25 generally, if you can give a general answer to

1 what "chronic" means, with my objection noted,
2 that it's difficult to respond and may be
3 impossible to respond without specific context --

4 Q. (By Mr. Bartimus) I thought we covered this earlier.
5 If you can't do something, just tell me, don't
6 speculate. If you don't know what the term "chronic"
7 means, "Mr. Bartimus, I don't know what it means", tell
8 me.

9 All this stuff about --

10 A. It's what in reference to, Mr. Bartimus, that's what I
11 have the problem to.

12 Q. Well, tell me how "chronic" varies in its references;
13 how does it vary?

14 MR. GOZA: Let me again object. That
15 question is impossible to answer. It's vague and
16 ambiguous.

17 If you can --

18 MR. BARTIMUS: Let's go back. I'll withdraw
19 the last question.

20 Q. (By Mr. Bartimus) In your day-to-day activities as a
21 pediatric neurologist, do you find children who suffer
22 from chronic conditions?

23 A. Yes.

24 Q. In responding to my question just now with a "yes",
25 tell me what your understanding is of the word

1 "chronic".

2 A. In my practice as a pediatric neurologist, dealing with
3 the term "chronic" and "chronic diseases" is one of
4 long-standing.

5 Q. Share with us Dr. Chalhub's definition of the term
6 dysmorphology .

7 A. Well, you know, again, with the same understanding that
8 I'm not sure what you're referring to, but in
9 dysmorphology as I define it in the practice of
10 pediatric neurology in patients that I see, are
11 features which are found in individuals which are in
12 excess of what one would consider to be normal for that
13 individual in terms of race, sex, and age.

14 Q. Using the definition you have just provided for us,
15 would the term "dysmorphology" have any relationship to
16 the brain impairment that Nathan Alley suffers from?

17 A. No, I do not think Nathan Alley has a dysmorphic
18 syndrome.

19 Q. Do you in your day-to-day practice as a pediatric
20 neurologist and in your practice of medicine use
21 differential diagnoses?

22 4. Yes.

23 Q. Would you share with the Court and jury Dr. Chalhub's
24 definition of what a differential diagnosis is, please?

25 A. Differential diagnosis is a list of etiologies that one

1 arrives at in a prospective manner after having had the
2 opportunity to obtain a history, a physical, assess the
3 temporal profile, place into context the pathological
4 entity, and then give an estimation to the best of his
5 ability the diseases which may exist at that particular
6 location in tissue in concert with the temporal profile
7 and the presentation,

8 Q. Could I ask you, Doctor, when you speak, to benefit the
9 court reporter, if, instead of speaking down with your
10 hand over the side of your face -- because I saw her
11 having great deal of difficulty trying to write down
12 what you were saying. It would help us all. We want
13 an accurate record.

14 3. I'll be happy to.

15 2. I don't do that to embarrass you; I do that so that we
16 have a clear record.

17 Now, in your answer, you used the term in a
18 "prospective manner". Tell me what you mean by that
19 phrase, "prospective manner".

20 A. Well, when you're doing a differential diagnosis of a
21 patient -- and as I prefaced the question in the
22 practice of pediatric neurology -- one will see and
23 evaluate a certain number of facts, and then in a --
24 offer, based on all of the things that I said before, a
25 list of possible etiologies that may exist.

1 And that's prospective because at that point then
3 one goes out to set about either ordering tests,
3 obtaining further information to either include or
4 exclude those diagnoses.

3 Q. In your capacity as a professional witness when you're
6 retained to serve in a medical/legal case and you
7 receive charts or you receive files, do you undertake
8 in that capacity -- which is away from the clinical
9 pediatric neurology side -- do you undertake to arrive
10 at a differential diagnosis?

11 MR. GOZA: Let me just object to the extent
12 we're talking about a professional witness. I'm
13 sure it was a slip of the tongue, and I'll object
14 to the use of the form of that --

15 MR. BARTIMUS: Let me make the record
16 abundantly clear. It was not a slip of the
17 tongue. It was totally directed to Dr. Chalhub --

18 MR. GOZA: Well, if it was totally directed
19 to Dr. Chalhub, then let me object to the form of
20 the question as being argumentative.

21 Q. (By Mr. Bartimus) Go ahead, Doctor.

22 A. Okay, I don't -- you know, I do take objection to the
23 term, as I'm a practicing physician and I've given you
24 my thoughts concerning physician's reviewing charts
25 before.

1 So, based on that context, when I decide to review
 2 a chart or a set of facts for an individual, then --
 3 and this depends on what is asked. If I'm asked to
 4 say is this -- what is the matter with this child, then
 5 I will do to the best of my ability by obtaining,
 6 again, the history, the temporal profile, the
 7 laboratory studies, the physical examination, at
 8 different points, depending on the information that's
 9 received, try to make an assessment of that.

10 And in that capacity will maybe at that time form
 11 a differential diagnosis. It may or may not agree with
 12 what already exists.

13 But then, based on what I further need in terms of
 14 either further studies, an examination firsthand to
 15 further confirm my thoughts in that situation -- if
 16 that's allowed -- will then go from that point,

17 2. In the case of which you've been retained here by the
 18 defense, Nathan Alley, did you utilize a differential
 19 diagnosis methodology?

20 A. In terms of what?

21 Q. In arriving at the etiology for his brain impairment.

22 A. Yes.

23 1. Would you share with the Court and jury Dr. Chalhub's
 24 definition of a neonate?

25 A. A neonate is an individual that is from zero to 29 or

1 30 days.

2 Q. And you're familiar with the term "labor and delivery",
3 are you not?

4 A. Yes.

5 Q. And could we have Dr. Chalhub's definition of a
6 perinate?

7 A. Well, again, that varies and -- in terms of who you
8 read, who you accept -- and it varies at different
9 times -- certainly, in my education as to what I've
10 accepted.

11 So, at the present time, you know, my definition
12 is from 28 weeks to 7 days.

13 Q. From birth to seven days would be what --

14 A. That's a neonate.

15 Q. That's a neonate.

16 From 7 days to 28 days, would that be an overlap,
17 then, between perinate --

18 A. No --

19 Q. You said 28 weeks to 7 days.

20 A. That's correct.

21 MR. GOZA: Is the perinate.

22 A. 28 weeks of gestation --

23 Q. (By Mr. Bartimus) Oh, I'm sorry, you didn't explain
24 that.

25 A. Sorry.

1 Q. And a neonate would then be from 7 days to 28, or would
2 that also be inclusive, then, from birth to 28 days?

3 A. No, birth to 29 or 30 days. Again, depending on who
4 you read.

5 Q. So, there's an overlap in terminology -- again,
6 depending on who you read -- between identification of
7 a neonate and a perinate from birth to 7 days?

8 A. I think there's a great deal of difference in
9 terminology. And what we try to do in terms of
10 individuals referring to it is just to state what
11 you're talking about and not try to use a definition --
12 or term, excuse me.

13 Q. You flew up here East night?

14 A. Yes.

15 Q. And are you making charges from the time you got onto
16 the airplane until the time you get home?

17 A. No.

18 Q. Have you changed your methodology of charging from
19 portal to portal?

20 A. No.

21 Q. You understand the terminology "portal to portal",
22 do you not?

23 A. I think I do.

24 Q. Would you explain for the benefit of the Court and
25 jury, Doctor, how you conduct your pediatric neural

1 exam?

2 A. You mean just in general, that I do every day,
3 practice?

4 Q. Yes, sir.

5 A. I will, if allowed, take a history and physical, and
6 try to obtain all of the facts that I can, try to
7 obtain all the previous records pertaining to that
8 situation that I can.

9 Then once I feel comfortable with at least the
10 available history and temporal profile, I examine a
11 child.

12 And I will do a general physical examination.
13 Then a neurological examination which encompasses an
14 examination of the cranial nerves, the motor system,
15 coordination, sensation.

16 And then try to formulate an opinion,

17 Q. You used the term "temporal profile". For us lay
18 people, could you tell us what you mean by that?

19 A. That's just how things develop over time.

20 Q. T-e-m-p-o-r-a-l?

21 A. That's correct.

22 Q. As opposed to any anatomical temple. I didn't
23 understand when you were temporal --

24 A. "Temporal" means time.

25 Q. I understand that now. I didn't hear clearly what word

1 you were using. I also wanted to make sure that the
2 record was clear.

3 Do you still reside at 210 Woodlands Avenue?

4 A. Yes.

5 Q. I take it, you now live in Mobile and have since when?

6 A. 1978.

7 Q. One of the reasons you left Arkansas was you wanted to
8 go into private practice?

9 A. Yes.

10 Q. One of the reason you left Arkansas was you just didn't
11 like the Midwest?

12 MR. GOZA: Let me object to the question as
13 to -- if you can be more specific about that. I
14 think the question is vague and ambiguous.

15 MR. BARTIMUS: He knows it is. He knows he's
16 testified to that.

17 THE WITNESS: Certainly.

18 Q. (By Mr. Bartimus) Isn't one of the reasons you left
19 because you just plain didn't like the Midwest?

20 A. No, that's incorrect statement of mine.

21 You know, my preference was, since I was raised in
22 Florida and lived on the Gulf coast, that I preferred

1 of fond memories. I had enjoyment during that period.

2 Also, my wife lives in Georgia, and we wanted a
3 mutually close location. And I testified to that.

4 Q. One of the reasons you left Arkansas was because you
5 couldn't get the chairmanship down there, isn't that
6 true?

7 A. No, that is not true.

8 Q. Was the fact that you couldn't get the chairmanship at
9 the department of neurology at Arkansas, was that
10 included in your decision to leave Arkansas?

11 A. Could I see where you're reading from?

12 Q. No, sir.

13 Can you answer my question?

14 MR. GOZA: Let me object to the question. I
15 think it's vague, "included" within --

16 MR. BARTINUS: Read it back.

17 (Whereupon the pending question was read back
18 by the Reporter. "QUESTION: Was the fact that you
19 couldn't get the chairmanship at the department of
20 neurology at Arkansas, was that included in your
21 decision to leave Arkansas?')

22 A. That's your question now?

23 Q. (By Mr. Bartimus) Yes, sir.

24 A. As I have stated -- and I think the deposition that
25 you're reading in -- I will state again, my decision to

1 leave Arkansas after two years was based on multiple
2 factors. And I've already given you some of the
3 factors.

4 The other was that philosophically I did not feel
5 that the direction of neurology at the University of
6 Arkansas was going in the direction that I wished to
7 continue at that time. I thought it would take too
8 much time to develop the skills and techniques that I
9 felt were necessary and wasn't willing to wait that
10 length of time.

11 2. Prior to your leaving, just prior to your leaving, did
12 you feel Pike that you were close to ascending to the
13 position of department chairman?

14 A. I have no way to assess that.

15 2. Could we please have Dr. Chalhub's definition of the
16 term intrauterine hypoxia?

17 A. That's lack of oxygen in the uterus.

18 (Whereupon a discussion was held off the
19 record.)

20 MR. BARTINUS: Could you read his answer back
21 one more time?

22 (Whereupon the preceding answer was read back
23 by the Reporter. "ANSWER: That's lack of oxygen
24 in the uterus.")

25 1. (By Mr. Bartinus) Are you still affiliated with the

1 Albert Brewer Center?

2 A. Yes.

3 Q. What is your capacity at the Albert Brewer Center?

4 A. Their neurological consultant and the individual that
5 gives their residents neurological care.

6 Q. Is it a hospital?

7 A. No, it is a chronic care facility.

8 Q. And how many beds?

9 A. I really don't know.

10 Q. Less than fifty?

11 A. No, I think it's more than fifty.

12 Q. Is it JACY accredited?

13 A. I honestly don't know. I think it -- I don't know --
14 it's a state facility that is in the state of Alabama.

15 They have been under federal court scrutiny for a
16 long time. I would think that it has the accreditation
17 that it needs, yes.

18 Q. You practice in Neurology Center, P.C., with some other
19 neurologists, do you not?

20 A. Yes.

21 Q. And does your entire corporation help serve the Albert
22 Brewer Center?

23 A. No.

24 Q. Are you the only one in your group that does that?

25 A. Yes.

1 Q. Are your services required on a routine basis, to where
2 you go one day a week, or is it as-needed basis?

3 A. No, it's one day a week. It's not the whole day. I
4 go out there and see what the problems are.

5 Q. And does that predominantly involve children or adults
6 or both?

7 A. They have a mixture of individuals.

8 Q. So, it can be both categories, I take it?

9 A. Yes. It's a chronic care facility. And the definition
10 to be admitted to the Albert Brewer Center is dangerous
11 to yourself or to the community. And they're usually
12 individuals that are retarded aggressive and have
13 neurological problems.

14 Q. Is Nathan Alley retarded?

15 A. I don't know.

16 Q. Villa Mercy (phonetic), now, what is Villa Mercy?

17 A. Villa Mercy is a -- well, I don't know what it exactly
18 does now. it's gone under a number of changes. It is
19 a facility in, I believe, Fairhope or Daphne, Alabama,
20 which has been a nursing home at times, a hospice at
21 times, a facility which cares for various type of
22 individuals with chronic problems, and some with acute
23 problems. And what its function is right now, I really
24 don't know.

25 Q. Are you affiliated with Villa Mercy?

1 A. I see patients there and admit patients there, yes.

2 Q. On what type of frequency?

3 A. It just depends.

4 Q. How many patients do you have there now?

5 A. You don't have any patients there -- I mean, I don't
6 have any patients there in terms that I will recommend
7 they be admitted; they're cared for by the physicians
8 who are retained there.

9 Q. I see. So, when you say "I admit patients", you refer
10 patients to be admitted --

11 A. Yes, that's --

12 Q. -- as opposed to being an admitting physician as that
13 term is generally used in medicine?

14 A. Well, no, I think that the way they work that is that
15 you may be the admitting physician, but the everyday
16 care is cared for by their physicians who spend the
17 time there.

18 Q. I see. Did you have any routine where you go to Villa
19 Mercy one day a week or --

20 A. No, I only go there if my patient or the one that I'm
21 responsible for has need.

22 Q. The Rotary Rehab Center, are you still affiliated with
23 that facility?

24 A. I don't understand what you mean by "affiliated" with
25 it.

1 Q. All right.

2 MR. BARTIMUS: I'll withdraw the question.

3 Q. (By Mr. Bartimus) What is the Rotary Rehab Center?

4 A. The Rotary Rehab Center is a division of the Mobile
5 Infirmary, which is their physical therapy
6 developmental disabilities section of Gulf Health
7 Corporation and the Mobile Infirmary.

8 Q. Do you have staff privileges at the Mobile Infirmary?

9 A. Yes.

10 Q. In what capacity?

11 A. You mean what are the staff privileges in?

12 Q. Full, are they full staff privileges --

13 A. Oh, yes.

14 Q. -- or courtesy or provisional --

15 A. It's on the active, full staff.

16 Q. What other facilities do you have full active staff
17 privileges besides the Mobile Infirmary?

18 A. The University of South Alabama Medical Center,
19 Providence Hospital, Knollwood Hospital,
20 K-n-o-l-l-w-o-o-d, Spring Hill Memorial, Charter
21 Southland. I believe that's all.

22 Q. Is there one facility where you do more of your
23 practice than the others?

24 A. Yes.

25 Q. Which one would that be, please?

1 A. The Mobile Infirmary .

2 Q. How large a facility is that, please?

3 A. I believe it's about eight hundred beds.

4 Q. While you were at the National Institute of Health,
3 your research was mostly in the area of biology, wasn't
6 it?

7 A. That is correct.

8 Q. The brain impairment that Nathan Alley has that you've
9 indicated -- at least that he has some brain
10 impairment-- was that in any way caused or contributed
11 to be caused by any type of virus?

12 A. No, not in my opinion.

13 Q. You have held yourself out in the past as having a
14 great deal of neuroradiology training.

15 A. Where is that documented?

16 Q. Do you have a great deal of neuroradiology training?

17 A. I believe I held myself out in the past as being
18 trained as a neurology resident and having a number of
19 months in neuroradiology, and continue to be current
20 and -- on a clinical basis -- in this area.

21 Q. Do you believe that you have a great deal of expertise
22 within the area of neuroradiology?

23 A. Well, I don't know what you mean by a "great deal of
24 expertise".

25 Q. Do you consider yourself an expert in neuroradiology?

1 A. No.

2 Q. Do you believe that you have more experience reading CT
3 infant scans than most neuroradiologists?

4 A. The -- I have a great deal of experience in reading
5 neonatal CT scans.

6 And, again, I don't -- I can't speak for all
7 neuroradiologists.

8 If -- you know, if you tell me who they are, then
9 I can tell you whether I think I have more experience
10 than them.

11 2. Who were the persons or person most directly
12 responsible for the evaluation of your performance as a
13 resident while you were in St. Louis?

14 A. Again, there were a number of people. Dr. Phil Dodge,
15 Dr. Arthur Prinski (phonetic), Dr. Joel Volpe
16 (phonetic), Dr. Darrell Davido (phonetic), Dr. Marvin
17 Fishman.

18 Q. Now, who is Dr. Davido, was he a pediatric neurologist?

19 A. Yes.

20 Q. And was he one of your educators?

21 A. He was a member of the faculty of Washington
22 University.

23 Q. And Dr. Codge, same capacity?

24 A. That is correct. He was the chairman of the department
25 of pediatrics and Mallinckrodt professor of neurology.

1 Q. And what about -- Dr. Marvin Fishman?

2 A. Yes.

3 Q. Who is he?

4 A. He was also a staff faculty member of the -- of
5 Washington University.

6 Q. One of your teachers?

7 A. Yes.

8 Q. Was Phil Dodge the person directly responsible for you:
9 training at St. Louis?

10 A. Well, again, the question is hard to answer. All of
11 these people are -- you know, are there.

12 He's the chairman.

13 Arthur Prinski, I think, at that time was in
14 charge of child neurology.

15 So, ultimately, yes, he was responsible.

16 (Whereupon a short recess was taken.)

17 Q. (By Mr. Bartimus) Doctor, we've taken a short break.
18 We're back in the deposition. You understand you're
19 still under oath?

20 1. That is correct.

21 Q. You have provided testimony, either by way of
22 deposition or at trial, in a number of states outside
23 of Alabama, have you not?

24 A. Yes.

25 Q. That would include Arkansas?

1 A. Yes.

2 Q. Florida?

3 A. I take it back. In Arkansas, I'm not sure I testified
4 within that state. I testified by videotape
5 deposition.

6 Q. That's a good point, let me clarify that.

7 You have provided testimony either by way of
8 deposition or trial in cases arising in states outside
9 of Alabama.

10 A. Yes.

11 Q. That would include Arkansas, would it not?

12 A. Yes.

13 2. Kansas?

14 A. Yes.

15 2. Florida?

16 A. Yes.

17 2. Mississippi?

18 A. Yes.

19 2. Georgia?

20 A. Yes.

21 2. Kentucky?

22 4. Yes.

23 2. Louisiana?

24 4. Yes, I believe so.

25 2. And Missouri?

1 A. I don't know about Missouri. I'd just have to -- you
2 know, it just doesn't come to mind.

3 Q. Were you up here in January for a trial?

4 A. Was that --

5 MR. GOZA: Are you getting Kansas and
6 Missouri mixed up? We're in Missouri.

7 A. Okay, yes. I apologize I thought --

8 Q. (By Mr. Bartimus) No problem.

9 How many times have you worked or been retained by
10 the firm of Shughart, Thomson & Kilroy?

11 A. I think I made a list for you, These are the cases
12 (indicating).

13 Q. Kamm, K-l-a-m-m versus Batty; is that Larry Batty?

14 MR. GOZA: I think that's right. It's
15 B-a-t-t-y.

16 MR. BARTIMUS: I think that's right.

17 MR. GOZA: I think that's who it is.

18 Q. (By Mr. Bartimus) Carver versus Braby. That was the
19 case in January, was it not?

20 A. Yes.

21 Q. Alley versus Marston, this one. And Chagira (phonetic)
22 versus McGuire.

23 A. That's correct.

24 Q. Mr. Goza seemed to pull that out of some stack over
25 there. Have you made me any other lists?

1 A. Well, that depends on what you want to know.

2 Q. Well, I don't know. My question was: Did you make me
3 any other lists?

4 MR. GOZA: You asked for a list of things
5 that he reviewed for the deposition. And I made
6 these --

7 THE WITNESS: Those are the list.

8 Q. (By Mr. Bartimus) Anything else you want to provide
9 me?

10 MR. GOZA: You asked for what I had in terms
11 of bills --

12 MR. BARTIMUS: Off the record.

13 (Whereupon a discussion was held off the
14 record.)

15 (Whereupon Chalhub Deposition Exhibit Nos.
16 1-5, 10/30/87, KSR, were marked for
17 identification.)

18 Q. (By Mr. Bartimus) Doctor, the court reporter has
19 marked some sheets of paper that have been provided to
20 me by both you and counsel.

21 And I would like to go through those and have you
22 identify them for the Court and jury, please.

23 Chalhub Deposition Exhibit -- am I pronouncing
24 your last name correctly?

25 A. That's correct.

1 Q. Chalhub Deposition Exhibit No. 1, would you tell us,
2 please, what that document entails?

3 A. These are a list of records I reviewed concerning this
4 present case.

5 Q. Chalhub Deposition Exhibit No. 2?

6 A. Those are a list of depositions which I reviewed
7 concerning this case.

8 Q. Are you aware of any other -- through whatever source--
9 any other experts who have been retained by Plaintiff,
10 are you aware of the names of any other experts?

11 A. No.

12 Q. Chalhub Deposition Exhibit No. 3, please?

13 A. You mean -- maybe I -- let me take that back. You mean
14 that is on this list? I mean, I don't even know who
15 the other experts are. So, I mean, I can't --

16 Q. Okay, that was my question.

17 A. Okay.

18 Now, what --

19 Q. No. 3?

20 A. No. 3 is what Mr. -- since I could not remember the
21 cases that I was involved with Mr. Goza's firm, I asked
22 him to get those for me. And that's what that is.

23 Q. Chalhub Deposition Exhibit No. 4?

24 A. Yes, that is -- I think in your Notice of Deposition,
25 you requested the previous bills that I had sent him

1 concerning this case. And that's what I provided to
2 you.

3 Q. I hadn't, but he understands I like to ask that --

4 A. Oh, I'm sorry.

5 Q. -- and that will shorten it up --

6 MR. GOZA: Excuse me, he did call me and ask
7 me that.

8 Q. (By Mr. Bartimus) Chalhub Deposition Exhibit No. 5,
9 please?

10 A. Okay, And, by the way, that **was** provided by Mr.
11 Goza, not by me (indicating),

12 This is my -- just my meek attempt at notes that
13 I took today while examining Nathan Alley.

14 Q. Taken contemporaneous with the exam --

15 A. Yes.

16 Q. Do you have any additional notes of any nature or
17 reports that you have generated and provided to counsel
18 relating to this case?

19 A. No.

20 Q. Have you provided any reports to counsel?

21 A. No, he's not asked.

22 Q. Defense counsel has filed with the Court and provided
23 us that, in naming you, the general nature of your
24 subject matter will be in part, at least, that Nathan
25 alley's injuries were not the result of trauma at

1 birth.

2 You are aware of that --

3 A. Yes, that is my opinion.

4 Q. Now, we've talked about the fact Nathan Alley does have
5 some injury, has a brain impairment?

6 A.

7 Q. If it wasn't the result of trauma at birth, what was it
8 the result of?

9 A. Well, it's my opinion that Nathan Alley had a posterior
10 fossa hemorrhage at birth which was a result of --
11 within a reasonable degree of medical probability -- an
12 arteriovenous malformation, choroid plexus hemorrhage,
13 or a venous infarction.

14 Q. Was there three --

15 A. Yes.

16 Q. -- triad of things?

17 A. That's correct.

18 Q. AV malformation, No. 2 was what?

19 A. Choroid plexus hemorrhage.

20 Q. Or three?

21 A. A venous infarction.

22 Q. Do you know which of those three it was?

23 A. No, there's no way for me to tell.

24 Q. Is one more likely than the other?

25 A. I would think the fourth ventricular choroid plexus

1 hemorrhage or arteriovenous malformation is more
2 likely.

3 Q. And on what facts do you base this opinion that the
4 posterior fossa hemorrhage existed at the time of birth
5 from an etiology of those three sources, one or the
6 other?

7 A. I'm sorry, I don't understand that question.

8 Q. Sure. Bottom line is: What do you base that on?

9 A. No, I just didn't understand all of your other
10 stipulations, excuse me.

11 Q. Well, I'm just trying to --

12 I. I base that on --

13 2. Believe me, I'm trying to make my questions as clear as
14 I possibly can --

15 I. I hope I'm trying to make my answers clear.

16 Q. Well, so far we're doing just fine.

17 A. Good.

18 Q. Of the three things you just named, do you believe that
19 they were mutually exclusive of each other, or do you
20 think they may have existed in combination?

21 3. Oh, no, those are three separate pathological entities,
22 okay?

23 Q. You're not trying to suggest that: maybe two of the
24 three existed. It was either 1, 2 or 3.

25 A. Well, I can't totally rule out some venous infarction with

1 fourth ventricular hemorrhage or an arteriovenous
2 malformation because you many times will get that.

3 But as a total primary undisguised cause, no, I do
4 not -- they would be exclusive.

5 Q. And on what do you base your opinion, what facts do you
6 base your opinion that it was one of these three
7 etiologies that caused this posterior fossa hemorrhage

8 A. It's based on the records, the presentation of the
9 child, the X-rays, and the subsequent course.

10 2. Now, you used the term "with a reasonable degree of
11 medical probability", What is your understanding when
12 you use that term?

13 A. Well, it means greater than fifty per cent, as I
14 understand it.

15 2. Is that the way when you're making your differential
16 diagnosis in trying to arrive or rule out a particular
17 etiology, is that the fashion in which you rule
18 something in or rule something out, is reasonable
19 degree of medical probability?

20 A. No. I think that -- you know, again, this appears to
21 be a legal term, and that I'm constantly reminded that
22 it's not -- it doesn't make any difference unless it's
23 within a reasonable degree of medical probability.
24 Possibilities exist all the time.

25 So, you know, for the sake of complying, to the

1 best of our ability, you know, I'm trying to tell you
2 what I think the cause is.

3 Q. You're familiar with this book I'm holding which is the
4 Department of Health and Human Resources publication on
5 prenatal and perinatal factors associated with brain
6 disorders, are you not?

7 A. Yes, I am.

8 Q. You were not a contributing author or a participant in
9 the study, were you?

10 A. No.

11 Q. Have you read this study?

12 A. Parts of it, yes.

13 Q. On Page 3 -- and I'll share this with you --

14 A. My goodness.

15 Q. -- Dr. Freeman indicates about --

16 A. You can pass it over.

17 Q. Well, I want to make sure I'm reading it correctly.

18 I don't bother you standing here, do I, reading
19 over your shoulder like this?

20 A. No, it's okay.

21 Q. -- "that attorneys ask the question couched in the
22 phrase 'with a reasonable degree of medical certainty',

1 We require a far higher standard of proof. To
2 physicians, medical certainty is based on the
3 probability of a specific cause, disease or condition
4 and the consequences and the treatability of that
5 condition."

6 Did I, first of all, read that correctly?

7 A. I think you read quite well.

8 Q. Now, do you agree about Dr. Freeman's introductory
9 remarks that, as a physician, you require a higher
10 standard of proof?

11 MR. GOZA: Let me object. First of all, I
12 think it requires Dr. Chalhub to speculate as to
13 what Dr. Freeman meant.

14 Secondly, I think you asked the question in
15 a broad sense and that's written in a specific
16 context. I think it's difficult for this doctor
17 to comment on that.

18 2. (By Mr. Bartimus) Now, remember our deal, we weren't
19 going to speculate. So, don't speculate --

20 MR. GOZA: My objection is for the record,
21 and I can make my objection.

22 It may legally require speculation regardless
23 of what he might think.

24 MR. BARTIMUS: I'm not quarreling with your
25 objection. I'm reminding him I don't want him to

speculate.

A. I won't speculate. I can't tell you what Dr. Freeman meant. You would have to ask him.

Q. (By Mr. Bartimus) When you indicated to me that with a reasonable degree of medical probability that the etiology of the posterior fossa hemorrhage that existed at the time of birth was from the triad that you've named, are you saying that there's a 51 per cent chance that each one of those three existed?

A. Okay, let's -- can I just clarify one thing? I don't think I've ever stated that this occurred at the time of birth. That's what you stated.

12 Q. No, you told me the hemorrhage existed, already
13
14 existed, at the time of birth.

15 A. No, I did not say that.

16 Q. Oh, then, I did misunderstand you, I did misunderstand.

17 When do you believe that the posterior fossa
18 hemorrhage took place?

19 A. Sometime in the first day of life.

20 Q. Can you be more quantitative in saying "in the first
21 day of life"? Would it have been within the first six
22 hours, the next six hours? Is there any way that you
23 can quantitatively aid us in making that determination?

24 A. Well, I think that there are a number of facts which
25 would indicate that it was considerably after the time

1 of birth, by the fact of normal Apgars, normal exam,
2 and a normal acting infant.

3 And I can't tell you in terms of when this
4 hemorrhage exactly began and got to a size that it
5 caused additional things.

6 But, certainly, somewhere around the time of five
7 A.M. to six A.M., the child had symptoms in retrospect
8 which were consistent with that hemorrhage.

9 2. Do you believe, sir, that the child possibly suffered
10 head trauma resulting in brain impairment during the
11 birthing process?

12 A. No, I do not believe that.

13 2. You don't believe it's possible?

14 4. Well, I think anything is possible.

15 aut in terms of, you know, my assessment of the
16 case, in terms of the etiology, I do not think that the
17 trauma was the etiological factor responsible for the
18 posterior fossa hemorrhage in this case.

19 MR. BARTIMUS: I move to strike that as not
20 responsive.

21 2. (By Mr. Bartimus) Let me repeat my question to you.

22 Do you believe --

23 MR. GOZA: Let me just state for the record--
24 I don't want to, by my silence, have anybody think
25 that I think Mr. Bartimus is right. And I think

1 it is entirely responsive.

2 MR. BARTIMUS: Well, you know the rules as
3 well as I do.

4 Q. (By Mr. Bartimus) Do you believe, sir, that this child
5 possibly suffered head trauma resulting in brain
6 impairment during the birthing process?

7 A. Well, as I've already answered the question, I think
8 anything is possible.

9 I do not think that is the probable cause.

10 Q. Just so we're abundantly clear, I did not ask you if
11 that was the probably cause. I asked you was it
12 possible that this child suffered head trauma,
13 resulting in brain impairment, during the birthing
14 process.

15 MR. GOZA: And let me object because I think
16 it's been asked and answered. I think he's given
17 you a responsive answer..

18 And I think the question now as to what is
19 possible is irrelevant and you're being
20 argumentative with the witness.

21 Q. (By Mr. Bartimus) Go ahead, sir, answer my question.

22 4. I think it's possible, but I need to explain. And as I
23 have already stated, that I do think that as I've --
24 you know, as I've already stated, I think anything is
25 possible.

1 But in terms of what I think the probable cause
2 is, I think I've already given you those reasons.

3 Q. Thank you.

4 You would agree, Doctor, that it's important when
5 you're hired to offer your opinions that you need to
6 review the chart carefully and be certain that the
7 testimony you're giving here as in the Nathan Alley
8 case, under oath, is fair to the child?

9 MR. GOZA: Excuse me. I'm not sure I
10 understand exactly what you're trying to ask him.
11 Maybe you could just clarify that for me.

12 I'm probably slow -- .

13 MR. BARTIMUS: Again, I don't think you ought
14 to continue to make references on the record
15 that's going to be part of the permanent -- .

16 Q. (By Mr. Bartimus) Doctor, isn't it true that you want
17 to be certain that in your testimony you give that
18 you're fair to this child, isn't that true?

19 MR. GOZA: Let me just object as
20 argumentative as to what's fair and what's not
21 fair. I think he's told you that -- well, that's
22 my objection for the record.

23 You can answer that --

24 Q. (By Mr. Bartimus) Can you answer that question?

25 A. No, I can't.

1 Q. Can we agree that you want to offer your expert
2 opinions based on the facts that are provided in the
3 hospital chart and the other medical records, isn't
3 that true?

3 A. That is true.

6 Q. And you, yourself, practice medicine based upon
7 laboratory, physical exam, X-rays, what you know
8 pathological, and then come to a conclusion; isn't that
9 true?

10 A. Yes.

11 Q. Concerning this case, and what the lawyer says you're
12 going to be saying and what you provided us in part,
13 did you make any attempt to look through the literature
14 to find any type of similar situation as that presented
15 with Nathan?

16 A. You mean did I make any specific literature search?

17 Q. Yes, sir.

18 A. No.

19 Q. In arriving at your conclusions about this triad of
20 probabilities relating to Nathan's etiology for the
21 posterior fossa hemorrhage, is there any additional
22 information that you need in supporting your opinions?

23 A. Well, I don't know what will transpire between now and
24 the time of the trial. So, I certainly reserve the
25 right to have that available to me if anything else --

1 I have not formally gone over the arteriograms because
2 they have just not been available to me, myself.

3 I don't see where that is going to change my
4 opinion, necessarily. I have read the report.

5 But other than that, I don't see anything at least
6 that I can recall at the present time that I need.

7 Q. Did the arteriogram report indicate the presence of any
8 arteriovenous malfunction?

9 A. No. But that's -- as you well know -- is not uncommon.

10 MR. BARTIMUS: Move to strike the answer as
11 not responsive so much of it following the word
12 "no".

13 Q. (By Mr. Bartimus) Can either CT or ultrasonography
14 successfully detect the direction of blood flow?

15 A. Ultrasound can, yes.

16 Q. The ability of ultrasound to detect blood flow, is that
17 something new within this year?

18 A. I don't think so. I think that Dr. Volpe has been
19 using that for a number of years.

20 Q. You've told me that you didn't make a specific
21 literature search. Is there any literature, Doctor,
22 concerning your etiologies, this triad of etiologies,
23 on causation in this case that you believe that you
24 will have occasion to refer to at the time of trial?

25 MR. GOZA: Let me object to what extent he

1 might refer to something at the time of trial. It
 2 might depend on the questions that I might ask
 3 him. And I think that constitutes work product.
 4 And I'm going to object to that question.

5 Q. (By Mr. Bartimus) Go ahead, Doctor.

6 MR. GOZA: And instruct him not to answer.

7 MR. BARTIMUS: Do you represent him, do you
 8 represent this witness?

9 MR. GOZA: I didn't say I represented him.

10 MR. BARTIMUS: Are you instructing him --

11 MR. GOZA: I am instructing him not --

12 MR. BARTIMUS: Certify --

13 MR. GOZA: You can certify that question.

14 MR. BARTIMUS: Certify that question.

15 Let the deposition clearly show that counsel
 16 has indicated that he is instructing this witness
 17 not to answer a question;

18 2. (By Mr. Bartimus) Am I correct, Doctor, that you have
 19 a file of articles that as of February '87 is over
 20 1,500 in number?

21 A. No. I believe the testimony was 15 years. If that's
 22 incorrect, then that's incorrect.

23 Q. So, if you've indicated in the past that "I have files
 24 of over 1,500 articles", that wouldn't be true?

25 A. Yo, I think that's probably an error.

1 I may have 1,500. I mean, I don't know, but it's
2 a lot of articles.

3 Q. You saw Nathan several hours ago. And we have had
4 marked Deposition Exhibit No. 5, which is -- I think
5 you told me -- your meek effort --

6 A. I don't write very well.

7 Q. I don't either, so, no one is going to hold that
8 against you.

9 How long were you with Nathan?

10 A. About thirty minutes.

11 Q. And did you conduct a pediatric neurological exam upon
12 Nathan?

13 A. Only a limited portion.

14 Q. From the examination that you did conduct upon Nathan
15 today, did that any way support your conclusions of
16 this triad regarding the etiologies?

17 A. Well, it's supported by his findings on neurological
18 exam that he, in my opinion, did have neurological
19 signs which could be attributed to the posterior fossa
20 area, yes.

21 Q. But as to the underlying etiology of the posterior
22 fossa hemorrhage, did your exam offer you any insight
23 as to the etiology of that?

24 A. No.

25 Q. So, by examining Nathan, by looking at him and doing

1 what you did today, you would not be able to sort out
2 as a clinician whether or not the posterior fossa
3 hemorrhage was caused by trauma during the birthing
4 process or by, perhaps, the triad that you've already
5 testified to?

6 A. No, not by an exam at six years of age, that is
7 correct-- now, wait a minute, let me -- unless, of
8 course, somebody would have other symptoms that would
9 be related to a pathologic process like that.

10 But in Nathan Alley, no.

11 Q. Yes, I wasn't dealing hypothetically --

12 A. Okay, I'm sorry.

13 Q. -- I'm dealing with the client I represent.

14 Now, you have in the past, where you've been
15 retained for a St. Paul Fire & Marine insured, you have
16 offered testimony on causation where the child was
17 alive, but, yet, you had not examined the child; isn't
18 that true?

19 A. Yes.

20 Q. Did you feel that an examination of Nathan Alley today
21 was necessary to support your opinions concerning the
22 etiology of posterior fossa hemorrhage?

23 A. Yes.

24 Q. Why?

25 A. Well, because I think that, you know, in -- many times,

1 different physicians in their evaluation of children
2 see things differently, It's why we ask for different
3 opinions at different times.

4 And I think that if the opportunity arises and on
5 is allowed, that one should have the most information
6 available. And, so, one should make every attempt tha
7 they can, I think, to gain all of the information.

8 And that was the purpose.

9 Q. That's good medical practice, isn't it?

10 A. I think so.

11 Q. When you're making a clinical decision, it's important
12 that you have as many of the indices that are availabl
13 to aid you in arriving at your decisions as a health
14 care practitioner, isn't that true?

15 MR. GOZA: Let me object to the vague nature
16 of the question. I think it would depend on the
17 circumstances.

18 Q. (By Mr. Bartimus) Go right ahead, Doctor.

19 A. As I practice medicine in the field of neurology and
20 hypothetically and unrelated to this case, yes.

21 Q. Doctor, tell me why it was hypothetically and unrelate
22 to this case. Why wouldn't it be related to this case

23 A. Well, because I don't know what you're referring to.

24 If you're referring to the neurologist taking care of
25 the child or the obstetrician -- I can't testifying as

1 to the obstetrician. **So**, I have to clarify that.

2 Q. Oh, you **feel** that that clarification is necessary in
3 order to offer an opinion to my last question?

4 A. Well, since you've indicated or implied that I've
5 testified as to the standard of care of an
6 obstetrician, then, you know, I have to clarify **it**.

7 **So**, if we can just go under the assumption that
8 I'm not going **to** testify as an obstetrician, then I
9 will not make any reference to **it**.

10 Q. Great, let's go on the assumption that you won't
11 testify as to the standard of care in this case of Dr.
12 Marston. Let's establish that right here and now.
13 Fair enough?

14 A. Fair enough.

15 Q. Now, let's go back to my question. Is it important as
16 a medical practitioner that you utilize the indices
17 that are available in arriving at your decisions on
18 clinical practice of a patient?

19 A. Well, I --

20 MR. GOZA; Same objection. There's no
21 specific facts which the doctor can use to
22 reasonably -- if you can give him a general
23 answer--

24 A. Again, I can't speak for every practitioner. I can
25 speak for myself. And, yes, the answer to **that** is yes.

1 Q. (By Mr. Bartimus) Again, I'm not holding you here as a
2 representative of all the other doctors in the world or
3 the United States or Missouri or Alabama.

4 I'm here to get Dr. Chalhub's opinions. So, I
5 don't care about the others; I want to know what you
6 think.

7 A. But that wasn't your question.

8 Q. Now, which list has all of the records that you've
9 looked at, where do we have those?

10 A. They're exhibits. It's in one of your files.

11 Q. No, I don't have them,

12 MR. GOZA: Exhibits 1 and 2.

13 A. (Indicating).

14 Q. (By Mr. Bartimus) Deposition Exhibit No. 1 indicates
15 that you have read eleven different enumerated items,
16 including the charts of Kathy Alley, Dr. Marston in
17 '80, in '78, 12/9/83, that you have looked at the
18 Methodist Medical Center records relating to Neal, born
19 in '78, Nathan born in '81.

20 I don't see where you've looked at the child born
21 in '83 -- yeah, they're here, Nicholas.

22 That you've looked at the Albany Research Center
23 records, that you've looked at the Family Guidance
24 Center records, that you've looked at the Mercy
25 Hospital: records, and that you've looked at some films.

- 1 My first question that is a preparatory remark is:
- 2 Did you read the records in their entirety?
- 3 A. To the best of my knowledge, yes.
- 4 Q. Did you find to the best of your knowledge that the
- 5 records were legible?
- 6 A. The majority of them. I think there were areas that I
- 7 could not read.
- 8 Q. Do you have any reason to believe the areas you could
- 9 not read might have some impact upon your decisions
- 10 here today?
- 11 A. No, I've already formulated my opinions.
- 12 But, you know, if for some reason, you know, they
- 13 turn out to be different than I had assumed they were,
- 14 then I, you know, would have to look at them.
- 15 Q. So, your decisions aren't carved in granite. If, in
- 16 fact, the records were important and you couldn't read
- 17 them, it might change your mind?
- 18 A. I think that's a fair statement, yes.
- 19 Q. You know Gene Baska over at Mercy, don't you?
- 20 A. Yes.
- 21 Q. He was the treating physician for this child?
- 22 A. Yes.
- 23 Q. You've read his deposition?
- 24 A. Yes, I have.
- 25 Q. You've seen the Albany records, and you've seen the

1 Family Guidance Center records?

2 A. Yes.

3 Q. And can we agree that insofar as the existence of a
4 posterior fossa hemorrhage, you're all in agreement
5 that one existed?

6 A. No question about it. I don't know who you mean by
7 "you all", but, I mean, I'm in agreement --

8 Q. Well, the records that you've seen, the references in
9 the records from the physicians who have made an
10 indication that they likewise agree that a posterior
11 fossa hemorrhage existed.

12 A. Okay, but I don't know who -- okay, the ones I've
13 looked at, yes.

14 Q. Sure. And I think you've seen all the records. I'm
15 not trying to sandbag you and say there's other records
16 someplace.

17 A. Okay, I just didn't know who you were referring to.
18 I'm sorry.

19 Q. In other words, as you've gone through these records,
20 you've seen -- at least so far as your opinion is
21 concerned -- the posterior fossa hemorrhage, that's
22 consistent with what all the experts have said and all
23 the physicians have said in this case.

24 A. I don't have any disagreement with that.

25 Q. It seems that where the disagreement is now arising co

1 an extent is to the underlying etiology of the
2 posterior fossa hemorrhage --

3 A. Exactly.

4 2. -- isn't that true?

5 4. Is that a question?

6 2. Yes, it is. Isn't that true?

7 A. I assume that that's -- by, you know, reading the
8 deposition testimony, that that's an area of
9 contention.

10 2. Right. Because you know in reading Dr. Baska's
11 deposition that he believes that the posterior fossa
12 hemorrhage took place as a result of a traumatic birth

13 A. Well, I had -- there were some differences of opinion
14 expressed in his deposition.

15 Where were you, in fact, referring to? And I'll
16 be glad to look at it.

17 2. Well, let me ask you: Do you have a recollection as to
18 sit here now as to what Dr. Baska's opinion was as to
19 the underlying etiology for the posterior fossa
20 hemorrhage?

21 MR. GOZA: If you don't have --

22 A. I don't. I mean, I would be glad to look at it. I
23 can't remember all of these depositions.

24 I'm not denying it, I just can't remember --

25 1. (BY Mr. Bartimus) Oh, I understand, I understand.

1 It's nothing different than everybody else doesn't do
2 in depositions. You know, "If you don't know, tell him
3 you don't know". We established that long ago.

4 MR. GOZA: Why don't we just hold -- I mean,
5 are there other depositions that you're going to
6 ask him about besides Baska --

7 MR. BARTINUS: I don't think so.

8 MR. GOZA: Let me just go get that so I can
9 follow along.

10 (Whereupon a short recess was taken.)

11 Q. (By Mr. Bartimus) Did you find, Doctor, evidence on
12 the CAT scans of Nathan Alley the presence of an AV
13 malformation?

14 A. You mean any of the three that I reviewed?

15 Q. Anything that you've reviewed.

16 A. No.

17 Q. Yet, that is one of the triad-of probabilities that you
18 believe exist for the etiology of the posterior fossa
19 hemorrhage; am I correct?

20 A. That is correct,

21 Q. What clinical documentation do you use to support that
22 view, that an AV malformation may have existed?

23 A. The reason that I feel that that's a probability is,
24 one, by the location of the hemorrhage, and, two, by
25 the fact that it's a term infant, and, three, by the

1 appearance of the CT scans, and my experience in this
2 particular area with other individuals, and also the
3 fact that the arteriogram is negative, which is usually
4 the case in posterior fossa arteriovenous
5 malformations, the arteriogram rarely demonstrates the
6 AVM in this particular location.

7 Q. Are you done?

8 A. Yes, you wanted to know my reason.

9 Q. Yes, sir, I just didn't want to cut you off. You pause
10 sometimes, and I don't want to be thought of as
11 interrupting.

Now, isn't it true, Doctor, that the location of
13 this hemorrhage is as equally consistent with an
14 excessively traumatic delivery as it is with an AV
15 malformation?

16 A. Not in my opinion.

17 Q. Isn't it true, Doctor, that the fact that this is a
18 term infant as consistent in an excessively traumatic
19 breech delivery as it is with an AV malformation?

20 A. I don't understand that question.

21 Q. Sure. What's your understanding of the weight of
22 Nathan?

1 that outside your area?

2 A. I was just going to say, that's probably in the area of
3 the obstetrician.

4 Q. You've told me that you have ruled out the fact that
5 Nathan's injuries were not the result of trauma at
6 birth, correct?

7 MR. GOZA: Could you just read that back
8 because there were two double negatives, and I
9 think --

10 Q. (By Mr. Bartimus) You've told me that you have ruled
11 out the fact that Nathan's injuries were --

12 MR. BARTIMUS: You're right, I think there'
13 were.

14 MR. GOZA: Yes, that's --

15 Q. (By Mr. Bartimus) Nathan's injuries, as far as you're
16 concerned, didn't happen at the time of birth from
17 trauma, correct?

18 A. Yes, that is my opinion.

19 Q. Now, in arriving at that opinion, did you take into
20 consideration as to whether or not Nathan Alley was a
21 baby that would be viewed as a primigravida in as much
22 as the mother's pelvis was not proven from an
23 obstetrical viewpoint?

24 A. Did I take that into consideration?

25 Q. Yes.

1 A. Yes, I took it into consideration.

2 Q. Can we not agree that term infants over eight pounds
3 who are in breech presentation and delivered vaginally
4 have a higher incidence of posterior fossa hemorrhage
5 than children who are delivered under eight pounds in
6 frank breeches?

7 4. I don't think I know the answer to that because I
8 haven't taken and listed all of the birth weights of
9 breech deliveries with posterior fossa hemorrhage that
10 are recorded in the literature. So, I don't know the
11 answer to that.

12 2. Tell me how you ruled out birth trauma as an underlying
13 etiology for the posterior fossa hemorrhage.

14 A. Okay, first of all, the mother was fully dilated.
15 There was no evidence of head trauma on examination of
16 the baby. The time was -- of symptoms was not at the
17 time of birth. Ana, finally, I think the most
18 compelling evidence is the CT scan.

19 2. Why do you believe that's the most compelling evidence?

20 1. Because, as I've already stated, the location of the
21 hemorrhage in my experience is inconsistent with a
22 traumatic etiology.

23 2. That was going to be my next question.

24 So, in looking at the CT scan, you say it's
25 your opinion that this location is inconsistent with

1 the type of hemorrhage you would expect to see in this
2 location from birth trauma.

3 A. That is correct.

4 Q. Where did you get the idea that there wasn't any
5 bruising on the head at the time of the delivery?

6 A. I didn't see any description of any bruising.

7 Q. Okay. So, by the absence of it in the chart, you're
8 assuming it didn't exist?

9 A. Well, I don't know how to assume otherwise --

10 Q. Okay, no, that's fine. I just didn't know if you had
11 some other information.

12 A. No.

13 Q. It's your belief that it's important for you to rely
14 upon the medical records in your opinions, isn't that
15 true?

16 A. Yeah, to the best -- to the extent that you can,
17 certainly.

18 Q. Do you have any information that would demonstrate that
19 this was an uncontrolled delivery by the physician of
20 this infant?

21 A. Do I have any evidence?

22 Q. Yes, sir.

23 A. No, that's out of my area of expertise.

24 Q. Hypothetically, if this were, in fact, an uncontrolled
25 delivery of an infant, would that have any bearing upon

1 your decision hypothetically that birth trauma may have
2 existed at the time of the delivery of any frank
3 breech?

4 MR. GOZA: Let me object to the question. I
5 think it's vague. First of all, it asks the
6 witness to assume facts not in evidence.

7 Secondly, you failed to provide him specific
8 facts upon which he can --

9 MR. BARTIMUS: Let me withdraw it.

10 Q (By Mr. Bartimus) I'm not asking you to assume
11 anything. I'm asking you hypothetically, Doctor.

12 MR. GOZA: You're asking him to
13 hypothetically assume --

14 MR. BARTIMUS: No, I'm not asking him to
15 assume in this case. I'm asking you from a
16 hypothetical viewpoint.

17 A I'm not arguing. What is your question? I mean --

18 Q (By Mr. Bartimus) I understand, you're not the lawyer.

19 A Okay.

20 Q My question is this: Hypothetically, if an uncontrolled
21 delivery, in fact, takes place, can that have bearing
22 upon your decision-making process as to whether or not
23 a posterior fossa hemorrhage took place by reason of
24 the uncontrolled delivery?

25 MR. GOZA: Well, again --

1 Q. (By Mr. Bartimus) If you can't answer it, just tell me
2 that.

3 MR. GOZA: Well, I still am entitled to make
4 an objection --

5 MR. BARTIMUS: Oh, you go ahead, you --

6 MR. GOZA: But I think that question, to the
7 extent it's a hypothetical, it fails to posit
8 sufficient facts to the doctor to answer. It
9 doesn't give him any specifics in terms of what
10 the CT scans might show, what kind of clinical
11 symptoms are there, any of the specifics I think
12 he'd need to answer the question fairly, Jim.

13 With that objection you can --

14 2. (By Mr. Bartimus) Go on.

15 4. Okay, Mr. Bartimus, what do you want me to do?

16 MR. GOZA: If you can answer it, you can
17 answer it.

18 1. (By Mr. Bartimus) Answer my --

19 A. The question is sufficiently vague. And,
20 hypothetically, even if -- and I assume you're saying
21 that it was an uncontrolled frank breech. And if we
22 had the -- if it was just a posterior fossa hemorrhage
23 in a different location that we see in this child, then
24 I might assume that it was related to trauma.

25 But if it is the facts as I understand it in this

1 case, then, no.

2 Q. What are the facts that you understand in this case,
3 are they anything different than the record?

4 A. No, I mean, I say, the location of the hemorrhage is
5 not consistent with a traumatic etiology in my opinion
6 based on all of the symptoms, the -- you know, all of
7 the history -- okay?

8 Q. I understand.

9 So, irrespective of the methodology of the
10 delivery, the fact that the hemorrhage is in a
11 particular location, to you is inconsistent with a
12 traumatic event taking place at the time of birth. Do
13 you understand my question?

14 A. No.

15 Q. Let me rephrase it.

16 MR. BARTIMUS: Strike the last question,
17 please.

18 Q. (By Mr. Bartimus) The actual delivery process is not
19 described in the record beyond the fact that it was
20 either a spontaneous or a spontaneous-assisted
21 delivery, isn't that true?

22 A. Yes.

23 I. And there was some confusion in Dr. Marston's
24 deposition, was there not, as to whether or not it w s
25 a spontaneous or a spontaneous-assisted delivery?

1 MR. GOZA: Again, you're asking him to
2 speculate about --

3 MR. BARTIMUS: No, I'm asking if there was.

4 MR. GOZA: Well, I think you are asking him
5 to speculate as to who was confused about what I
6 think is a bigger question --

7 MR. BARTIMUS: Strike the question. I'll
8 withdraw it.

9 I've got all day, I don't have to go
10 anywhere.

11 Q. (By Mr. Bartimus) What is your understanding of how
12 this child was delivered, was it assisted spontaneous
13 or a spontaneous delivery?

14 A. It's my understanding that it was an assisted
15 spontaneous delivery.

16 Q. What does that mean to you?

17 A. I mean -- you know, I'm not an obstetrician, okay? All
18 I can do is read, you know.

19 And as I understand it, it was not with forceps,
20 it was a spontaneous delivery, and he helped the baby
"I out.

22 Q. Do you believe that this child's injuries, this brain
23 impairment that he suffers, was in any way caused by

1 question?

2 Q. No, no --

3 A. Okay, I'm sorry.

4 Q. Repeat my question. I don't care whether it's a
5 standard of care or not. I want to know if you believe
6 that Dr. Marston's actions in any way caused or
7 contributed to cause this child's injuries.

8 A. Well, it seems to me that is a --

9 Q. No, it's not, Doctor.

10 A. Okay, maybe I misunderstood it.

11 Q. Don't get off in the legal field. Stay --

12 A. I'm not. I want to understand the question because I
13 want to testify based on my expertise, And if it's as
14 an obstetrician, I can't do it.

15 Q. I know that, I don't want you to.

16 The question I have is: Do you believe that any
17 of the --

18 MR. BARTIMUS: Strike that, strike the
19 question.

20 Q. (By Mr. Bartimus) Let's go on to another topic.

21 Now, you have told us that you're relying upon the
22 location of the posterior fossa hemorrhage as being
23 inconsistent with a traumatic birth event.

24 Tell me, Doctor, what location do you believe
25 makes it so inconsistent, where's --

- 1 A. Well, the -- at least by examination of the CT scans
2 and the description, the area of the hemorrhage appear
3 to be in the area of the fourth ventricle and -- in or
4 around that area -- extending up the tentorium,
5 possibly into the cerebellum. And based on all of the
6 other factors, that, to me, is inconsistent with a
7 traumatic etiology.
- 8 Q. How do you know it extended up rather than started in
9 the cerebellum or the tentorium and extended down into
10 the fourth ventricle, how do you know that?
- 11 A. How do I know what?
- 12 Q. How do you know it extended up? You say it extended up
13 into the tentorium and the cerebellum.
- 14 A. Well, because it goes up over the "tent" and you have
15 also blood in the temporal horn. So, it would have to
16 to extend upward.
- 17 Q. Do you believe that the bleeding took place and started
18 in the fourth ventricle?
- 19 A. Based on the sequence of events that I see, that is
20 what I feel occurred in that area, yes.
- 21 You said you base that upon the films and the
22 observations, you used that term a minute ago. What do
23 you mean by "observations"?
- 24 Of the later presentation of the infant, the normal
25 Apgars, the normal behavior at birth, then the

1 presentation of a child that appears acutely ill. And,
 2 then, with the CT scan with the appearance of this
 3 child. Also, in the absence of any significant head
 4 trauma by examination, and the appearance of the
 5 X-rays.

6 Q. You're not able to tell from those CT scans the
 7 direction of blood flow, are you, Doctor?

8 A. No, we're not talking about blood flow.

9 Q. I didn't ask you that.

10 I asked you: Can you tell from those X-rays the
 11 direction of blood flow?

12 4. What do you mean by direction of blood flow? Maybe I
 13 don't understand. Because I don't think I do
 14 understand your question.

15 2. Then we'll move along to maybe another area that you
 16 will.

17 You indicate that you believe the posterior fossa
 18 hemorrhage took place sometime within the first day
 19 of Nathan's life; is that correct?

20 A. That is correct.

21 2. Is there some event that would precipitate or cause
 22 either the AVM to rupture, cause the fourth ventricle
 23 rupture, or cause -- I forget the third one you talked
 24 about -- was there some event that took place in the
 25 record that would cause you to believe that

1 precipitated the bleed?

2 A. No.

3 Q. Venous infarction, was that it?

4 A. Yes.

5 Q. So, there's nothing in the record --

6 A. Well, now, there -- in terms of venous infarction --

7 if, indeed, that is the etiology -- that may well be

8 related to the respiratory problem and the cardiac

9 problem that the child appeared to have with the

10 murmur, enlarged heart, and increased vascularity,

11 which can cause an increase in venous pressure, which

12 could cause a venous infarction, stasis, coagulation

13 and hemorrhage.

14 Q. Now, the child's cardiac problems that you've just

15 described, were those confirmed?

16 A. I'm sorry, what confirmed?

17 Q. The murmur --

18 A. Well, it was documented in the chart, yes.

19 Q. So, there's nothing in the chart that you can see that

20 would cause you to believe that there was a

21 precipitation of the fourth ventricle bleed?

22 A. (No response.)

23 MR. GOZA: Do you understand the question?

24 MR. BARTIMUS: Everybody looks so puzzled.

25 Let me try again.

1 MR. GOZA: Let me --

2 MR. BARTIMUS: Withdraw it.

3 MR. GOZA: The only question I had I was

4 going to tell you. But go ahead, that's fine.

5 MR. BARTIMUS: I don't want to know. Keep

6 these things to yourself.

7 MR. GOZA: Okay.

8 MR. BARTIMUS: You've got your little side

9 over there. Just hold on. .

10 Q. (By Mr. Bartimus) Doctor, as it relates to the fourth

11 ventricle bleed, was there any event in the record' --

12 again, so that I'm abundantly clear and so I can pass

13 this on to my experts -- that would cause the fourth

14 ventricle to bleed at a particular time?

15 A. Okay, the fourth ventricular hemorrhage -- which arises

16 out of the choroid plexus -- is oftentimes unassociated

17 with any other factors.

18 And in this particular case, without any evidence

19 of head trauma, without any evidence of other entities,

20 the spontaneous intraventricular hemorrhage from

21 choroid plexus occurs. So, we don't know what the

22 precipitating event is.

23 Oftentimes, there is a precipitating event. It

24 can be seen in prematory (phonetic) infants related to

25 hypoxia and term infants related to hypoxia. But

there's no evidence of hypoxia in this particular situation.

So, I would have to say that I do not see in the chart evidence of a precipitating event that I could relate to the choroid plexus hemorrhage.

4 Q. Okay. When you say no evidence of head trauma, you
5 mean there was no bruising recorded on the record?

6 A. Well, if you have head trauma, you've got to have
7 evidence of it.

8 Q. You say there was no evidence of head trauma. I
9 suppose you looked for it?

10 A. Sure.

11 Q. What were you looking for besides bruising?

12 A. Well, in traumatic breech deliveries that I'm aware of
13 that I see as a physician, they oftentimes will have
14 cephalohematomas, they will have subgaleal hematomas,
15 they have bruising all over the head, fractures.

16 And I find nothing.

17 Q. I see, okay.

18 When is the last time you were in an OR or in a
19 delivery room for a frank breech delivery?

20 A. I can't remember when.

21 (Whereupon a short recess was taken.)

22 (By Mr. Bartimus) Doctor, we've taken a break. Again,

1 you understand you're back under oath?

2 A. Yes, I do.

3 Q. Do you have an opinion as to whether or not the parents
4 in any way caused or contributed to cause in any way to
5 Nathan's brain impairment?

6 A. No, I do not believe the parents contributed.

7 Q. Do you believe that up until and including the time of
8 birth, Nathan was a child without brain impairment?

9 A. I mean, I don't know, I don't know the answer to that.

10 I've had many babies that are born that appear to
11 be normal that obviously have developmental problems.
12 So, I don't know that.

13 Q. Well, your opinion was that this posterior fossa
14 hemorrhage took place sometime after birth, the first
15 day.

16 A. That is correct.

17 Q. And what I want to eliminate now is some type of
18 congenital, existing congenital defect at the time of
19 delivery.

20 A. I don't know how to eliminate that.

21 Q. Do you have any reason to believe with any type of
22 probability that a congenital defect existed relating
23 to this hemorrhage?

24 A. Well, there's been no other X-rays done since that
25 time. So, I don't know -- you know, such 'as an MRI

1 scan might, you know, show any other type of
2 developmental malformation.

3 So, I can't tell you unequivocally.

4 Q. I understand.

5 A. I don't have any reason to suspect that. But to say
ti categorically that doesn't exist, no.

Q. That's fine.

8 So, based on the evidence -- at least that's been
9 provided to you to date -- there's no reason to believe
10 that a congenital malformation or defect exists at this
11 time?

12 A.

13
14 Q. I understand.

15 A. Okay.

16 Q. My question was directed to the information and films
17 that have been provided to you to date.

18 A. That **is** correct.

19 Q. All right.

20 Were you aware of whether or not any bruising
21 existed on Nathan following his delivery?

1 A. Yes.

2 2. I take it, from your opinion, that the posterior fossa
3 hemorrhage developed sometime the first day after
4 Nathan was born, that the methodology of delivery would
5 have no bearing upon your opinion, then, whether it was
6 by C-section or by vaginal?

7 A. Wait a minute. I'm not sure I understand that again.

8 2. Sure. You've indicated that the posterior fossa
9 hemorrhage developed sometime the Day 1 of birth, birth
10 through the next 24 hours, took place sometime in that
11 time period, correct?

12 A. That is correct. So, I take it, then, based on what
13 that opinion is, that the methodology of birth plays no
14 role in that opinion. Whether he was born at 7:44 by
15 C-section or whether he was born at 7:44 by vaginal
16 delivery, that has no bearing upon your opinion?

17 A. I don't know whether that's entirely true.

18 You know, again, you don't take things in
19 isolation just because of the fact that something
20 doesn't exist or something does exist.

21 The fact of the presentation, the location, and
22 the circumstances surrounding this birth are all not
23 consistent with a traumatic etiology.

24 The -- a posterior fossa hemorrhage can occur in
25 a C-section, as well as a vaginal delivery, as -- you

1 know, as well as associated with multiple factors.

2 But based on my knowledge and my review and my
3 evaluation, I do not think that the evidence
4 substantiates the fact that this posterior fossa
5 hemorrhage was traumatic in etiology.

6 Q. Not knowing when in that first 24 hours the hemorrhage
7 began -- and you have told me that, true?

8 A. That's true.

9 Q. And not knowing which of the three underlying
10 etiologies caused the posterior fossa hemorrhage --
11 true again? You don't know which one of the three?

12 A. No, I can't tell you absolutely, unequivocally that X
13 caused it, that's true,

14 Q. Oh, maybe we've got a problem communicating here. I'm
15 not asking you to deal in absolutes and unequivocal.

16 Of the three that you've named me, do you have
17 an opinion that one has any greater weight than the
18 other three?

19 A. As I've already stated, it was my opinion that the
20 fourth ventricular hemorrhage was more likely.

21 Q. Because of the cardiac problems?

22 A. No, I think you missed the boat. He knows
(indicating).

23 By the fact of the clinical, presentatron and the
24 CT scans.

1 The cardiac problems are related to the venous
2 infarction.

3 Q. Right.

4 Now, the remaining two, the AV malformation and
5 the second thing you've told me about --

6 A. No, you're naming one. There's only three. We've
7 already talked about two.

8 Q. Well, can you put them in order? Put them in order for
9 me as a layperson.

10 A. Okay.

11 Q. 1, 2, and 3, the most likely of the
12 three and the least likely of the three. .

13 A. Well, the first is a fourth ventricular hemorrhage.
14 The second is an arteriovenous malformation. The third
15 is a venous infarction.

16 Q. Is there any evidence on the film of a venous
17 infarction?

18 A. Yes, it can look exactly like that.

19 Q. Do you find any evidence on any of the reports by
20 people who interpreted the films at the time they were
21 taken of the presence of a venous infarction?

22 A. No.

23 But, again, that's not unusual.

24 MR. BARTIMUS: I move to strike so much of
25 your answer following the word "no"..

1 Q. (By Mr. Bartimus) Now, do you find any evidence on any
2 of the reports of the presence of an AV malformation?

3 A. Yes, they do make reference to excluding an
4 arteriovenous malformation, which is what usually you
5 do.

6 Q. Do you practice with those folks?

7 A. No, I just read the report. You asked me if I read the
8 report. And the report says --

9 Q. No, that isn't what I asked you at all.

10 A. Oh.

11 Q. Shall I ask it to you again?

12 A. Okay. Maybe I misunderstood the question.

13 Q. Let's try it one more time. Do you find any evidence
14 on any of the reports from the films of the presence of
15 an AV malformation?

16 4. You mean -- let me just -- could I ask you a question
17 to clarify that?

18 2. Absolutely.

19 4. You're saying that -- did any of the reports say that
20 unequivocally there was an arteriovenous malformation?
21 Is that what your question is?

22 2. I don't put "unequivocal" in there.

23 I say does it say that there's the presence of an
24 AV malformation?

25 A. No, that is correct.

1 Q. All right.

2 Have you ever seen in your experiences and
3 training -- some depositions in '87 you say 15 years,
4 some you say 20. How long have you been practicing
5 pediatric neurology?

6 A. Well, I've been practicing pediatrics and medicine
7 since 1969.

8 Q. 18 years?

9 A. Right.

10 Q. Have you seen during the 18 years of your practice in
11 medicine any instance of a fourth ventricle bleed such
12 as you believe Nathan Alley has with some degree of
13 probability that was caused by medical negligence?

14 A. I don't think I can answer that question. I just don'
15 know.

16 Q. Tell me pathophysiologically what would cause the star'
17 of the fourth ventricle bleed,

18 A. I'm sorry, say that again.

19 Q. How does the fourth ventricle bleed get started,
20 pathophysiologically?

21 A. Well, it's thought to -- by comparison with other
22 studies -- to start in the choroid plexus in the fourth
23 ventricle.

24 Now, what causes the abnormality in the choroid
25 plexus can be an anatomic abnormality, it can be

1 related to a metabolic problem, it can be related to
2 some other etiology.

3 I don't know that. And I don't think anybody else
4 can because there's no way to study it.

5 But we do know the location, we do know where it
6 comes from. And that's how it occurs
7 pathophysiologically.

8 Q. Now, the parents have testified in their depositions
9 about a popping sound. And you recall from your review
10 of other depositions that being described, do you not?

11 A. Yes, I do.

12 Q. And did the fact that the parents testified under oath
13 that they heard this popping sound at the time of
14 delivery play any part in you formulating your opinion:
15 as to the cause of Nathan's posterior fossa hemorrhage?

16 A. No. I mean, the -- first of all, it's not in the
17 chart.

18 Second of all, I accept the description.

19 Third of all, the popping that I'm associated with
20 is usually a cervical cord injury that -- a noise that
21 occurs at the time of birth. And that's not present in
22 this case.

23 And, finally, the presence of the hemorrhage. And
24 for all the other factors we've gone through are not
25 consistent with a traumatic etiology.

1 So, it does not play any part.

2 MR. BARTIMUS: I'm going to move to
3 strike so much of his answer following the word
4 "no".

5 Q. (By Mr. Bartimus) Do you believe I asked you if that
6 was in the chart, do you believe I asked you that?

7 A. You asked me the response as to whether I believed it
8 was pertinent and responsible and related.

9 And I tried to give you the best answer that I
10 could. And I can't do it in the answer "no".

11 And I do believe that I have the right to explain
12 my answers.

13 And if I don't, then let's stop and ask the judge.

14 Q. You're trying to start sounding like an advocate,
15 Doctor--

16 A. I'm --

17 MR. GOZA: We're not oing to -- no, you're
18 not going to spar with him, you're not going to
19 have any discussion --

20 2. (By Mr. Bartimus) If that was your best answer, that's
21 all I can ask for.

22 MR. GOZA: That's all --

23 2. (By Mr. Bartimus) Give me your best answer.

24 (Whereupon a discussion was held off the
25 record.)

1 Q. (By Mr. Bartimus) Do you find any evidence in this
2 case, Doctor, as to Nathan Alley having suffered any
3 periods of intrauterine hypoxia?

4 A. No, I do not.

5 Q. You did not have the opportunity to review a fetal
6 heart monitor, did you?

7 A. No.

8 Q. Exhibit 5, your notes from the examination of Nathan.
9 Please feel free to refer to those if you need to. I
10 believe the easiest way to find out what you found at
11 the time of your examination is just to ask you.

12 I could go through it, seriate them from top to
13 bottom.

14 But if it's comfortable for you, could you just
15 give me a narrative of what your exam disclosed
16 relating to Nathan?

17 A. I'll even do better than that; I plan to dictate a
18 report and send you a copy of it.

19 Q. That would be fine.

20 A. Okay.

21 Q. But for right now, for purposes of the deposition --
22 and I'm not going to go back and take your report and
23 look at the deposition and compare the two --

24 A. I understand.

25 Q. I want a ballpark idea of what you believe you found

1 and observed and made a determination was present as it

2

3 A. I appreciate that because as I dictate it, the
4 phraseology may be somewhat different. The content
5 will be the same.

6 Q. No problem.

7 A. I hope.

8 Nathan is now six years of age.

9 I was not allowed to ask any questions, so, I
10 can't comment on his current status.

11 Q. You understand why that is, do you not?

12 A. No, I really don't.

13 Q. Let me just tell you, the law allows you, as a
14 deponent, to examine a child.

15 Let me just tell you, they deal -- it's a reality,
16 Doctor, you're on the other side of a lawsuit.

17 And it says an opposing party -- it says "opposing
18 party" has the right to examine someone. It's called a
19 statutory exam.

20 Nathan Alley is the only party in this lawsuit.
21 His parents are not parties to the lawsuit.

22 Ana, so, the law says you're entitled, as a
23 physician -- he's not, and that's why he wasn't in the
24 room. Very specific about what you can and cannot do.
25 You, as a physician, are entitled to a statutory

1 examination of Nathan.

2 You're not entitled to anything else relating to
3 his family. You're not entitled to ask his mother, hi
4 father, anybody else about the child.

5 So, we produced -- and by agreement -- Nathan
6 Alley for you to examine. So, that's why, because the
7 rules provide that. They don't provide for anything
8 different.

9 And as the lawyer for the Alleys, I'm not going
10 outside of what the rules say you should and should not
11 do. And that's why.

12 I think you should understand that.

13 MR. GOZA: I think -- first of all, that was
14 all well and good, but I don't think it's
15 necessarily an accurate interpretation. I think
16 we might have some disagreement between --

17 MR. BARTIMUS: I challenge you right here and
18 now. Go, get the rule.

19 MR. GOZA: No, what constitutes an
20 examination. I'm not arguing with you what it
21 says. But what constitutes an examination, what's
22 included with that, I think is subject to some
23 dispute.

24 We didn't have any problem. I left the
25 room. He didn't ask any questions.

1 So, he's just telling you he didn't take a
2 history, that's all he's telling you --

3 Q. (By Mr. Bartimus) You said you wanted to know, and I
4 responded --

5 A. The only reason that I add that, before you asked me
6 how somebody practices medicine. They do that by
7 trying to ask some questions about how somebody is
8 currently functioning because it helps in your
9 determination.

10 Q. Sure.

11 A. Especially, you know, a child who is shy, is reticent.

12 And that's my only reason. It would have helped
13 me to further define, which I wanted to do to the best
14 of my ability on this day in October, that's my only
15 reason, okay?

16 Q. Sure.

17 A. Now, if the laws are that way, I can't -- that's fine.
18 I respect the law. But just so that we understand
19 that.

20 Q. We don't have a quarrel about that.

21 A. All right. So, it was a limited to general
22 neurological physical examination.
23
24
25

 He has an area of scar which his mother did say

1 was due to a burn which he received by way of -- while
2 he was with his father, over the chest.

3 Q. Do you know what the cause of that burn was?

4 A. We didn't get into it.

5 Q. Did that burn have any significance to you from a
6 neurological viewpoint?

7 A. I'm getting into my observations that you asked me.

8 Q. I know --

9 A. Let me finish, and then you can ask me some questions,
10 okay? If you don't mind.

11 Q. Okay, I'll get your notes back. Is that indicated on
12 your notes?

13 A. Yes.

14 Q. Okay, you go ahead and tell me everything, and, then,
15 give me your notes, and I'll go back and try to
16 decipher one at a time what you meant for something --
17 if that's more comfortable for you to do it that way.

18 A. Well, it is more comfortable for me to give you my
19 findings. And if you have questions, I'll be glad to
20 answer them.

21 Q. Shoot.

22 A. I just have to think in a logical manner.

23 Q. Shoot, go.

24 A. Okay, he had some scars over his body which were not
25 unusual.

1 He had some areas of abrasions which were healing

2 He was very pleasant. He was cooperative. He was
3 bright. He followed my directions quite well.

4 His cranial nerve examination showed slightly
5 dilated pupils. He was wearing glasses. He had some
6 mild rotatory nystagmus on lateral gaze.

7 He had dysarthric speech when he spoke.

8 He, on examination of his motor system,
9 demonstrated no significant weakness. His reflexes
10 were brisk. His plantar responses were flexor.

11 He had evidence of what is termed dysmetria
12 or difficulty with coordination on -- which was more
13 prominent on the right side -- both in the arm and
14 leg-- than the left.

15 His gait was clumsy, unsteady and broad-based and
16 also occurred when running.

17 His sensation was intact.

18 His head circumference was of normal size --
19 although I didn't have a chart -- I feel it was
20 probably within the normal range.

21 So, in summary, I think that he represents a child
22 who has evidence of dysmetria, ataxia, dysarthria,
23 with normal responsiveness.

24 Q. Are you done?

25 A. Yes.

1 Q. The deficits which you found, are they all directly
3 related to the posterior fossa hemorrhage?

3 A. They're all directly related to the posterior fossa.
4 Whether it's due to the hemorrhage or related to
3 another pathogenetic mechanism, I can't be certain.

6 Q. Do you have any evidence that there may be some other
7 pathogenetic cause other than hemorrhage in the
8 posterior fossa region?

9 A. Well, there was hydrocephalus which existed.

10 There was also prominence of veins. There may
11 have been infarction besides the hemorrhage.

12 There was probably, in addition, some vasospasm
13 which occurs with subarachnoid hemorrhage. So, I can't
14 tell you, you know, that it's all just related to the
15 hemorrhage.

16 Q. The deficits -- at least from a neurological
17 viewpoint-- all arise from the posterior fossa region
18 of the brain?

19 A. At least on the examination that I saw.

20 But, again, that -- you know, I don't think that
21 one can totally exclude a supratentorial etiology.

22 Q. Did you make any observations as to whether or not
23 Nathan has any type of emotional problems?

24 A. I couldn't do that since I wasn't allowed to go into
25 that further.

1 Q. Is the answer "no"?

3 A. "No".

3 Q. Thank you.

4 In the report that you plan on dictating and you
5 have agreed to provide me with a copy of it through
6 your --

7 A. I'll send it directly to you if you would like.

8 MR. GOZA: Send it through me.

9 Q. (By Mr. Bartimus) Again, under the rules, send it to
10 him.

11 Now, do you intend on your reports -- and I
12 haven't seen your report -- but having some familiarity
13 with medical records, do you intend to offer a portion
14 that says "impressions"?

15 A. No, I'm going to give you my physical findings.

16 Q. I see. Have you formulated any impressions as to the
17 degree of brain impairment that Nathan has on any type
18 of quantitative scale?

19 A. I would say at this point, just based -- and, again,
20 I'll have to do some -- you know, when I dictate and
21 reassess it -- it's certainly mild to moderate.

22 Q. Have you formulated any opinions as to Nathan's life
23 expectancy?

24 A. No, I haven't.

25 Q. Can you do that, based on the examination which you

1 performed here today?

2 A. Yes, but I hadn't been asked to do that, so, I --

3 Q. I'm asking you now. Can you, as we sit here now, make
4 a determination as to whether Nathan's life expectancy
5 can in any way be shortened?

6 A. I would have to sit down and reflect on that.

7 But if Mr. Goza asks me to testify, then I will be
8 glad to provide you with my opinion prior to the court

9 Q. Well, whether or not Mr. Goza does or not, I am right
10 now --

11 MR. GOZA: Well, he's told --

12 MR. BARTIMUS: Don't interrupt --

13 MR. GOZA: I'm sorry.

14 MR. BARTIMUS: You get so excited.

15 MR. GOZA: I didn't mean to interrupt --

16 MR. BARTIMUS: Sit back and relax.

17 2. (By Mr. Bartimus) The fact is, I want to know if you
18 have any opinions or conclusions. You've told me that
19 you could come up with some, based on the data that you
20 have. I want to know what they are if you're going to
21 offer them at trial, and I want to know it ahead of
22 time. And I'm entitled to do that under the rules.

23 So, if he makes a trial strategy or decision and
24 he's going to ask you that and bring that up, I want to
25 know about it ahead of time.

1 A. Absolutely.

2 Q. Does the fact that Nathan was term as opposed to
3 premature play any role in the incidence of an increase
4 in the triad possibilities that you've told us about?

5 A. Yes. The entities that I made reference to are
6 considerably 'more common in "prematory" infants -- I
7 mean in term infants, excuse me.

8 Q. You better repeat that one more time, just so the
9 record is clear and there's no misunderstanding.

10 A. The entities which I have outlined as I think is a
11 probable cause are considerably more common in term
12 infants.

13 Q. Are you aware of any studies, as a pediatric
14 neurologist, that relate to an increase incidence of
15 traumatic damage as a result of the birthing process of
16 a frank breech when the child is greater than eight
17 pounds?

18 A. I think you asked me that before. I said I had not
19 gone through the, you know, evidence of -- in terms of
20 related to posterior fossa hemorrhage and other trauma
21 and plotted them all out with relation to birth weight.

22 I'm certainly familiar with Williams' textbook
23 which states that there's an increased incidence in
24 greater than eight pounds.

25 But I don't -- you know, I honestly don't -- in

1 the pediatric literature, it's not stated like that.

2 Q. Well, I think you've answered my question at least yes
3 in Williams' textbook on obstetrics --

4 A. That's not a neurological assessment, that's an
5 obstetrical observation. And they make no reference to
6 what the type of injuries are and what the
7 circumstances are.

8 And oftentimes, when you don't have the data, it's
9 difficult to come to a conclusion.

10 Q. I see.

11 In your CV, you said, I believe, that there may be
12 some additional entries from the one that you provided
13 us to update it --

14 A. There are also some errors in there, just because of
15 the secretary who types it.

16 But I'll get you a correct version.

17 Q. Have you written on the topic or on the causation
18 etiologies that we've discussed here today relating to
19 Nathan?

20 A. I'll have -- I just don't know. In terms of a term
21 baby, in terms of a posterior fossa hemorrhage, I can't
22 recall specifically.

23 I've certainly written on areas in terms of
24 arteriovenous malformations and venous infarction. But
25 I -- you know, I can't tell you specifically whether

1 all the details are similar to this situation.

2 Q. You, in fact, haven't written on posterior fossa
3 hemorrhage, have you?

4 A. No, I've told you that.

5 But there are areas of articles which refer to
6 different things. So, I don't want to be -- you know,
7 to just give you false information.

8 Q. I don't want that, either.

9 In infants that have posterior fossa hemorrhage as a
10 result of a traumatic birth -- are you aware that that
11 can happen, first of all?

12 A. Say that again.

13 2. Are you aware, from the literature or from your own
14 experience at any time, an instance where an infant
15 who is delivered in a frank breech position can suffer
16 birth trauma resulting in a posterior fossa hemorrhage?

17 A. Yes.

18 2. You're aware of that?

19 A. Yes.

20 2. In those instances where that takes place, isn't it, in
21 fact, true that it may be hours or days before infants
22 exhibit progressive neurological signs due to
23 accumulating blood in the posterior fossa?

24 A. I think in certain instances that is the case, yes.

25 2. Mr. Goza had the article -- I think it's right there in

1 front you -- by Steven Xocher (phonetic) and others,
 2 "Neonatal Posterior Fossa Subdural Hematoma".

3 Did that artericle play any role in you arriving
 4 at your opinions here today?

5 A. Did it have any role?

6 Q. Yes, did it have any impact or did it --

7 A. No, not really.

8 Q. Okay.

9 (Whereupon Chalhub Deposition Exhibit Nos.
 10 6-13, RSR, were marked for identification.)

11 (Whereupon a short recess was taken.)

12 testified, and that there may be other cases in
 13 which he's worked with Shughart, Thomson and has
 14 not provided testimony or perhaps even been
 15 identified as an expert.

16 Is that correct, Mr. Goza?

17 MR. GOZA: That's correct.

18 Q. (By Mr. Bartimus) Now, Doctor, I'm going to hand you
 19 what have been marked as Exhibits 6, 7, 8, 9, 10, 11,

1 12, and 13, and ask you if you would go through those.

2 And I think, again, the best way to do it is in a
3 narrative form. Throw up a film, identify it for us,
4 tell us where it was taken and when it was taken, and
5 then tell us what your findings are, based from that
6 film.

7 Now, that's one method of doing it. Another
8 method is we can go jump through the hoops and do it
9 each individual --

10 A. No, we'll do it whatever way you want --

11 MR. GOZA: We'll do it the most quick way we
12 can.

13 Q. (By Mr. Bartimus) Well, you tell me what's easiest for
14 you--

15 A. Well, first of all --

16 Q. -- I can do it either way.

17 A. Let's do it by date, that's first, and then we'll go
18 from there.

19 And I'll just, you know, tell you my description.
20 If you have any further questions, I'll be glad to
21 answer them. I mean, I don't --

22 Q. That's fine.

23 On the films, there are more than one picture on
24 each film. Could you tell us by row and by location
25 within the row, working from the top down, what you're

1 pointing at?

2 A. Well, you do understand what a CT scan is and how it's
3 taken?

4 Q. I do, but the problem we have is when those films then
5 did not accompany the transcript, in other words, we
6 get it back --

7 A. I mean, it will simplify my way I explain it to you as
8 long as you understand it.

9 I mean, a CT scan is taken from the lowest portion
10 of the skull up to the top. And that's the sequence
11 I'll be describing it in.

12 Q. That's fine. But what I was referring to is you will
13 find some rows there of photos --

14 A. Okay.

15 Q. In other words, there are three on the top row
16 here --

17 A. Oh, I see.

18 Q. -- then the next row, then the next row, then the next
19 row.

20 And I do have some familiarity with CT scans.

21 So, if you will just when you identify the frame
22 you're looking at, either middle top, middle second
23 row, middle third row, whatever, then describe --

24 A. We're looking at the CT scan of Nathan Alley, June 27th
25 4th, 1981, St. Luke's Hospital --

1 Q. Exhibit number?

2 A. Exhibit No. 10 and 11.

3 Q. All right, sir.

4 A. And these are done without contrast,

5 Q. Yes, sir.

6 Describe for us the film that you have up there,
7 which is Exhibit 11, what is significant within that --

8 A. What is significant is that you see in the second row,
9 third box a large posterior fossa hemorrhage with,
10 also, blood in the temporal horns.

11 Q. All right, sir.

12 A. Or lateral ventricles.

13 And, then, the third row down, you see --

14 Q. First picture?

15 A. First -- well, all three of them, actually, but it's
16 more prominent in the first picture. You see a
17 localized, high density area in the mid portion,
18 consistent, as it is on enhanced, with blood in a very
19 localized manner.

20 It -- then as one goes higher, one sees -- in
21 terns of the third row, middle box ventricular
22 dilatation, which means enlargement of the ventricles.
23 You still see the hemorrhage present. You see the
24 falx, which is the high density area below that.

25 Then you see that on the next box over to the

1 right, which is third row, third box.

2 Again, the more prominent vascular structure
3 there, and on the bottom row, you see some ventricular
4 dilatation and the falx.

5 Now, this --

6 Q. I don't want to leave 11 yet. Let's put them up one at
7 a time.

8 On 11, is the falx midline, or is it offset any?

9 A. No, it's midline.

10 Q. Now, on 11, in looking at those CT films alone, in and
11 of themselves, while they're on the viewbox, is there
12 anything about those films that is inconsistent with a
13 traumatic birth etiology for the posterior fossa
14 hemorrhage?

15 A. Yes.

16 Q. What?

17 A. First place -- well, you don't see any evidence of any
18 type of skull displacement or fracture or occipital
19 osteodiastasis. The hemorrhage is in the midline, it's
20 not adjacent to the inner table of the skull, and is
21 located in the area of the fourth ventricle.

22 Q. And that's what makes it inconsistent with a birth
23 trauma etiology for posterior fossa hemorrhage?

24 A. Totally related to the CT scans --

25 Q. Yes, sir.

1 A. -- yes.

2 Q. Anything else about film 11?

3 A. Okay, the other aspect is that there is no hemorrhage
4 in any other areas like subgaleal, cephalohematoma,
5 skull fracture, you know, which would indicate trauma
6 that one usually sees with a difficult breech
7 extraction, okay?

8 Q. Identify the next one for us, please.

9 A. 10.

10 Q. Date?

11 A. Same date, same patient, same hospital.

12 Q. All right, sir.

13 A. And, again, this is a very similar film. Again, this
14 is without contrast.

15 And you -- and I'm not sure this is not the same
16 copy, I don't know whether this is just another copy of
17 it or not.

18 Q. Kind of looks like it.

19 MR. GOZA: I think we're just two of each.

20 Q. (By Mr. Bartimus) Let's make a note, I think that's
21 right, I think 10 and 11 are the same.

22 A. I didn't appreciate that, but I think they are the
23 same.

24 And I think what you've got is you've got two --

25 Q. If that's the same, then what I would like to do is

1 withdraw one --

2 A. Why don't we withdraw Exhibit 13.

3 Q. No, I tell you what, give me 10.

4 A. (Indicating).

5 Q. All right, now, you put the next one up and hand me the
6 duplicate of it. That way, Mr. Goza and I are dealing
7 with the same deck of cards.

8 All right, so, you have Exhibit 12 on the viewbox,
9 do you not?

10 A. That is correct.

11 Q. And I'm holding Exhibit 13, which is not a duplicate
12 of 12.

13 A. What now?

14 Q. 13 is not a duplicate of 12, I guarantee you.

15 A. Just look for the "C" over here. There's no "C" here
16 (indicating), okay? So, this is with contrast.

17 (Whereupon a discussion was held off the
18 record.)

19 MR. BARTIMUS: Let the record show that
20 Exhibits 10 and 11 are identical.

21 MR. GOZA: And --

22 A. We're going to look at Exhibit 12 and 13 together now.

23 Q. (By Mr. Bartimus) All right, which are the same as
24 Exhibits 9 and --

25 MR. GOZA: No, I think I'm wrong*

1 A. No, I don't think it's the same as 9.

2 Q. (By Mr. Bartimus) All right.

3 A. This is a different date. This is June the 15th.

4 Q. Let's do this. Put one of those up, and tell me if
5 there's a duplicate film in front of you.

6 A. I don't think there's a duplicate --

7 Q. All right, so, we're dealing with what film now,
8 please?

9 A. We're dealing on Exhibit 13.

10 (Whereupon a discussion was held off the
11 record.)

12 Q. (By Mr. Bartimus) All right, we're now looking at
13 Exhibit 13 on Nathan Alley of what date?

14 A. June 4th, 1981.

15 Q. And the location of the facility?

16 A. St. Luke's Hospital.

17 Q. All right what is significant to you as a pediatric
18 neurologist in arriving at your opinions here today
19 relating to Nathan that are demonstrated on Exhibit 13,
20 please?

21 A. Okay. Well, this is a CT scan done in a different
22 manner -- it's done with contrast infusion -- and which
23 highlights certain vascular structures in certain
24 areas.

25 And the fact of the matter is that there are

multiple areas of enhancement over the tentorium cerebelli.

And looking at row three, the middle section, which is further substantiated in the far right section of row three. And it's clear on this one that the hemorrhage extends above the "tent". And there appear to be areas of decreased densities in the frontal area: and slight area of enhancement in the left -- I'm sorry -- .

Q. I don't see a plate on there,

A. I assume that --

Q. Upper left-hand, for purposes of identification?

A. Okay, yeah, on the upper left-hand portion of the film, And I reserve -- because I don't see --

2. Sure.

A. -- right and left differentiation --

2. You're talking about the middle frame on the bottom row.

A. Yes. And that may or may not be artifact just because you're going through bone and it's just difficult to be certain.

Q. Before you put the next one up, if I can --

A. Well, these have to be done in sequence, okay?

Q. All right, go ahead, keep it handy, then.

A. And, again, the same thing goes on -- for, you know,

1 13, about the location. That's not any different than
 2 the hemorrhage being in the midline, away from the
 3 inner table, no evidence of hemorrhage in any other
 4 place.

3 2. And, therefore, that would support your opinion that
 6 the etiology was not birth trauma, is that what you're
 7 telling us?

8 1. Well, it is consistent with the findings that I've
 9 enumerated for you in the previous three hours.

10 2. But is it inconsistent with the finding of birth
 11 trauma?

12 1. Based on all of the other information in conjunction
 13 with the CT scan, it's my opinion that it is.

14 3. That's fine, go ahead.

15 1. And this is just a further continuation of the previous
 16 scan, taking higher cuts as one moves from the base of
 17 the skull to the top.

18 And, again, you see the ventricular dilatation,
 19 that is, the diffuse areas of enhancement.

20 And that may or may not be just related to the
 21 amount of the dye. It may be related to some
 22 disturbance in the blood brain barrier. I can't really
 23 tell you based on the films alone.

24 That's Exhibit 12?

23 Yes.

1 Q. Which is a continuation of the series that was begun on
2 Exhibit 13 with contrast, correct?

3 A. That's correct.

4 Q. Anything else about 12?

5 A. do.

6 Q. Thank you. Next ones, please?

7 MR. BARTIMUS: Mr. Goza, I would like copies
8 of films 11, 12, and 13.

9 I think we have them, if we can just compare
10 them --

11 MR. GOZA: Yeah, you definitely have them.

12 A. Now we'll look at Exhibits 6 and 7, which are dated
13 June 8th, 1981, Nathan Alley, St. Luke's Hospital.

14 Looking at Exhibit 6, this is an unenhanced CT
15 scan, and this --

16 2. (By Mr. Bartimus) Explain to the jury what you mean by
17 "unenhanced".

18 2. Well, which means without contrast. This is done just
19 with the infant lying without any intravenous dye.

20 It's a film which is overexposed, so, it's
21 extremely light. And I assume, you know, it's a
22 copy, so, it's difficult to tell about densities
23 in total, especially on the lower cuts because it's
24 hard to differentiate it from bone.

25 But there still appears to be a very prominent

1 posterior fossa hemorrhage in mid position in the area
2 of the fourth ventricle and vermis of the cerebellum,
3 again, which is seen predominately on row two, middle,
4 right, row three, all three of them. Again, extending
5 up over the "tent".

6 On the higher cuts, one still sees some mild
7 ventricular dilatation,

8 Q. What extends up into the "tent"?

9 A. Blood.

10 Q. How do you know it didn' originate supratentoria ly
11 and go inferiorly?

12 A. Well, it doesn't usually do that, for one thing, you
13 don't usually see such a prominent lower hemorrhage,
14 which is where the predominant amount of hemorrhage is.
15 And, basically, would go further up if it originated
16 up, rather than went down, that's just what one usually
17 sees.

18 Q. Physiologically.

19 A. Eight.

20 Q. Anything else about Exhibit -- what's up there?

21 A. 6.

22 Q. -- 6?

23 A. No.

24 Q. Is 7 a sequence of Exhibit 6?

25 A. Yes.

1 Q. Still without contrast?

2 A. Still without contrast. This is just a continuation
3 going up the head.

4 And one sees, again, very little evidence of
5 hemorrhage on the higher cuts. One sees less
6 ventricular dilatation than before.

7 And, again, I can't really comment because of the
8 exposures on these in terms of the relative difference
9 in density of the brain.

10 Q. Anything else?

11 A. No.

12 And this is Exhibit 8 and 9, dated June 15th, '81, St.
13 Luke's Hospital, Nathan Alley.

14 And this is an unenhanced CT scan, meaning,
15 without contrast.

16 And there is somewhat of a rotation of the head
17 with it turned to the right -- I suspect, because this
18 is right here (indicating).

19 And for reference to the other scans, the right is
20 on the left of the films and the left is on the right.

21 Q. That's fine. It's because there's a marker on the
22 second row, is there not?

23 A. Yes. The other ones didn't have it or I missed it, one
24 or the other.

25 Q. Go ahead.

1 A. And what we see here is less prominent hemorrhage.
 2 Again, located in the midline on row three to the far
 3 right. It is still present on row three, far left,
 4 middle. It's not viewed, really, any other place.

5 There is ventricular dilatation, meaning
 6 enlargement of the ventricles,

7 And, again, the densities are difficult to comment
 8 on.

9 Q. Is there evidence of proptosis?

10 A. Not really. I mean, I think it's probably due just to
 11 the rotation and turning of the head.

12 Q. Okay.

13 A. And this is a continuation -- this is Exhibit 9 -- of
 14 Exhibit 8, unenhanced scan, showing the continuation of
 15 the ventricular dilatation seen in the top three
 16 sequences.

17 And, then, the second row just shows the
 18 upper portion of the cortex, without any other
 19 significant changes,

20 Q. Does that now comprise all of the X-ray films which you
 21 viewed in arriving at your opinions?

22 A. Well, I viewed the ultrasounds, but I don't have copies
 23 of those. But it doesn't change my -- you know, my
 24 opinion.

25 Q. Was there anything in the ultrasounds which supported

1 your opinion?

2 A. Well, it just supported there was a hemorrhage-

3 Q. From the ultrasound itself, you were not able to opine
4 the etiology of the hemorrhage?

5 A. No. No, the CT is far better for that.

6 Q. Well, irrespective of whether it's better, that
7 indicates to me at least some quantitative aspect to
8 it. Did the ultrasonography films aid you at all in
9 determining underlying etiology for the posterior fossa
10 hemorrhage?

11 A. No, all I saw was xerox copies, and they were very
12 difficult to make anything of.

13 I've not seen the arteriogram, as I've already
14 commented on.

15 Q. You read the report.

16 A. Yes.

17 (Whereupon a discussion was held off the
18 record.)

19 Q. (By Mr. Bartimus) Do you know how long after birth it
20 was before Nathan was transferred to St. Luke's
21 Hospital?

22 A. I believe it was in the second day of life.

23 Q. So, at the time of transfer to St. Luke's, the
24 posterior fossa hemorrhage had already been in the
25 process of developing?

1 A. Yes.

2 Q. At what point do you believe that Nathan suffered
3 irreversible brain impairment?

4 A. At the time of the hemorrhage.

5 Q. At that moment?

6 A. Well, I mean, I can't tell absolutely. I mean, you
7 know, it could have been -- and then the few hours
8 after that with the cerebral edema or vasospasm that
9 developed, i don't know.

10 But, certainly, around that time.

11 Q. You've testified in Phil McMath's case that with a
12 ventricular hemorrhage, the sooner you identify it and
13 recognize it and attempt to treat it, the better chance
14 you have of lessening the deficit, you've testified to
15 that before, haven't you?

16 A. I'll have to look at that. It depends on the
17 circumstances. That was a different set of
18 circumstances, I believe.

19 2. All right, let's take this instance with the posterior
20 fossa hemorrhage. Would it be true that the sooner
21 that that was identified and attempts were made to
22 treat it, the better chance it would have been for the
23 child, or would it have made any difference?

24 A. It's a difficult question to answer with a hemorrhage
25 in this location, okay? A supratentorial hemorrhage is

1 a different situation, which I think was the case in
2 Mr. McMath's case.

3 Q. And in this case, you don't believe that this was a
4 supratentorial bleed that migrated into the fourth
5 ventricle, but, rather, a fourth ventricle bleed that
6 migrated above the "tent".

7 A. Well, that's not entirely accurate, you know.
8 Supratentorial, when I refer to that, is usually in,
9 you know, the parietal occipital frontal temporal lobe
10 okay?

11 When you're talking about above -- this is the
12 tentorium cerebelli, okay? And, you know, that could
13 be a result of the tearing of the "tent" or, you know,
14 some other.

15 But I don't believe that the evidence is that that
16 exists in this case.

17 Q. You don't believe it was a tearing of the edges, you
18 believe it was a fourth ventricle bleed.

19 A. As I've told you before, arteriovenous malformation,
20 venous infarction.

21 Q. Right, the triad we've talked about at some length.

22 A. (Witness nods head.)

23 Q. Do you have an opinion, based on your examination of
24 Nathan and based upon the records and the films that
25 you've reviewed, as to whether or not Nathan will

1 require institutionalization at some point in time in
2 his life?

3 A. Well, just based on my little exposure to him today, I
4 think that would be unlikely, based on his function and
5 his intelligence.

6 Q. There's been reference in the medical records that
7 Nathan has cerebral palsy. And I know you don't
8 normally use that term. But as that term is defined in
9 the medical practice and as you've told us, gave us a
10 definition earlier, does Nathan have cerebral palsy?

11 A. Yeah, with all of the exceptions that we made in the
12 past, yes, I think as a general layman's term, yes.

13 Q. So, if I were to tell the jury up in Buchanan County
14 that my client has cerebral palsy, from a layman's
15 viewpoint, I'd be accurate?

16 3. Yes, and I would be happy to explain what I mean by
17 cerebral palsy.

18 Q. I may ask or may not ask you to do that. But your
19 counsel can determine if he wants to.

20 Doctor, there was some reference in Dr. Max Borton
21 depo, I believe, about a term called
22 "contrecoup" -- and I don't know if that's a hyphenated
23 word or one from a neurological viewpoint. Are you
24 familiar with that term as it relates to a
25 neurological, mechanical event?.

1 A. Yes.

2 Q. What does it mean?

3 A. Contracoup usually means -- and, again, that's related
4 mostly to head trauma from accidents, where the brain
5 will go back and forth in a rigid skull. And that's
6 usually a developed skull, not a very compliant skull.
7 And where, if an injury occurs in the front, the back
8 will be injured.

9 And the difference is this is the "coup" injury
10 and this is the "contrcoup".

11 Q. Is that term inconsistent with the mechanics of a birth
12 trauma, hypothetically?

13 A. You mean just birth trauma in general?

14 Q. Yes.

15 A. No, I mean, I suppose that's possible in a birth trauma
16 in general. But, you know, not in a posterior fossa
17 with a hemorrhage like this.

18 Q. Well, I'm not talking about Nathan. I'm talking about
19 is that term consistent hypothetically with a birth
20 trauma injury?

21 A. It's unusual, okay? I'd have to say that I'm not even
22 sure I've ever seen one in a neonate.

23 Q. Now, Doctor, you probably saw from Dr. Rose's
24 (phonetic) deposition and some of the ones that Mr.
25 Goza has done of my experts -- we get towards the end,

1 and I'm going to do my best to see that you catch your
2 plane -- and I think we all know about what I'm going
3 to ask because everybody in the room is chuckling.

4 But I just don't want to be surprised when you
5 come venturing back to Buchanan County in St. Joe that
6 I didn't cover -- as Mr. Goza put it with Dr. Borton --
7 the waterfront.

8 What I would like to know is have I essentially
9 covered the general nature and subject matter of your
10 testimony as it relates to causation and the issues o
11 Nathan Alley? Subject to his objection --

12 MR. GOZA: Subject to my objection, which,

13 Jim --

14 Q (By Mr. Bartimus) Well, we just do that as lawyers, I
15 think, to protect ourselves.

16 But we've been here now over four hours. You have
17 been identified, not as a liability witness, but as a
18 causation witness -- and you know what those terms mean
19 from your vast experience.

20 What I'd like to know is have we covered the
21 waterfront as it relates to your opinions in this case?

22 MR. GOZA: Let me just say so I can have my
23 objection stated for the record that I think we
24 have been here four hours and it's tough for the
25 doctor to go Sack and try to reconstruct

1 everything that we discussed --

2 MR. BARTIMUS: We all know that. Come on,
3 let's get on with it so --

4 MR. GOZA: My objection is to the form.

5 Q. (By Mr. Bartimus) Go ahead.

6 A. Well, you probably already know, Mr. Bartimus, that
7 there's no way for me to respond to that unless you
8 tell me what you're going to ask me.

9 And if you have a specific question, I'll be glad
10 to respond.

11 I can't be held, you know, accountable that I will
12 not have any other thoughts, close my mind or not think
13 about this case --

14 Q. I'm not suggesting that, I'm nor suggesting that.

15 You knew when you came up here that I was going to
16 be asking your opinions about the general nature of
17 causation --

18 A. Right, well, you have got my opinion about the general
19 nature of causation.

20 Now, in terms of specifics, reasons, all of the
21 above, I can't, you know, tell you that I'm
22 unequivocally --

23 Q. I'm not asking you to do that, I'm not pinning you
24 down.

25 The only thing that will be talked about up in St.

1 Joe is what you've testified to here today.

2 I want some general ideas and some major areas.

3 And your lawyer is over there nodding, nodding -- and
4 say your lawyer because he's --

5 A. No, he's not my lawyer.

6 Q. But the fact is, to get an idea on behalf of my
7 client--

8 A. I will not come to St. Joe and say that Nathan Alley
9 has phenylketonuria, okay?

10 Q. But that does raise a point that I want to explore with
11 you just for a moment.

12 You gave me the triad that we've talked about of
13 the fourth ventricle bleed and the AV malformation and
14 the venous infarction.

15 Are there other possibilities that you entertain
16 or have considered in this case that there's evidence
17 to support?

18 A. No.

19 Q. And, again, so that I'm abundantly clear -- and I'm not
20 making an apology, but I want the record to reflect, I
21 don't mean to be repetitive -- but so that I
22 understand, the tenor of your opinions is that birth
23 trauma was excluded for the reasons that you've already
24 enumerated, but included in those was the location of
25 of the bleed.

1 A. Yes.

2 Q. Do you have an opinion as a pediatric neurologist who
3 has reviewed the facts and testimony in this case that
4 Nathan Alley's posterior fossa hemorrhage was
5 preventable?

6 A. Well, no, based on what I've testified, that it was no
7 preventable.

8 Q. Do you have an opinion from a pediatric neurological
9 viewpoint that the brain impairment that Nathan
10 presently has and the degree to which he has that
11 impairment was preventable or could have been lessened

12 A. Yes, I have an opinion.

13 Q. What is that opinion?

14 A. That it could not, one, have been prevented, and, two,
15 could not have been lessened.

16 Q. Your charges, as I recall, are \$125 to review and \$200
17 for your depositional testimony per hour: is that
18 correct?

19 A. Yes.

20 Q. And we got started at about 11:30, I believe, and I
21 show that it's 3:15. And my charge that you're going
22 to bill me or the lawyer is \$200 an hour.

23 A. That's correct.

24 (Whereupon a short recess was taken.)

25 Q. (By Mr. Bartimus) We're back on the record after a

1 very short break.

2 In your opinions of the fourth ventricle bleed,
3 the AVM and the venous infarct, are there any studies
4 that can be done with Nathan alive that would offer any
5 further insight into ruling in or ruling out those
6 possibilities?

7 A. No, I really don't think so. One could repeat an
8 arteriogram, you know, if you had an intellectual
9 interest.

10 But the risks with that procedure would not
11 justify, in my opinion, subjecting that child to that
12 procedure just if somebody wanted to know.

13 Q. So, the risk would outweigh --

14 A. Oh, absolutely, unequivocally.

15 MR. BARTIMUS: I don't have any further
16 questions.

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either party or of the attorney of either party, or
otherwise interested in the event of this suit.

IN WITNESS WHEREOF, I have hereunto set my hand
and affixed my Notarial seal at my office in Kansas City,
Jackson County, Missouri, this 3rd day of December, 1987.

KATHY S. RALLS, Notary Public
within and for the State of
Missouri.

4-261> Estate of Ashley Carr
DEPOSITION OF ELIAS CHALUB, M.D.
[Estate of Cathy Alley]

TAKEN ON October 30, 1987
by James R. Bartimus, Esq

Pg / Ln

11/13 Doesn't know about income because his accountant handle.: it

20/10 Doesn't keep records of how many cases he works on

23/10 - 16 Testified as to standard of care as it relates to neurosur-
geons and ER physicians

27/14 Denied that he was investigated by the State of Alabama DA's
office for attempts to contact an [opposing] expert witness

29/23 As it relates to being investigated: "that they ought to
take into consideration the fact that their testimony --
regardless of the merits of their testimony -- that they
very fact they testify could potentially harm the department
or departments at the hospital."

30/25 - 31/2 Has no problem with anyone **who** testifies based on **the** facts,
the chart and arrives at a logical conclusion

33/9 In `86, 1099 from St. Paul Ins. indicates income of \$84,000

38/16-24 Use psychologists in your practice to assess intellectual
and developmental functions

42/6 Doesn't use a neuropsychologist

41/15 (?) Uses HIE for cerebral palsy

54/ Formulation of a differential based on subsequent- exam

65/25 - 66/1 Not an expert is neuroradiology

75/25 - When making a differential diagnosis, ". . . it doesn't
75/24 make any difference unless it's within a reasonable degree
of medical probability. Possibilities exist all the time."

84/25 Keeps a personal file of articles

97/13-17 Important to rely on medical records

105/6 Venous infarction:

Respiratory problems - increased vascularity

Increased venous pressure