IN THE COURT OF COMMON PLEAS
OF CUYAHOGA COUNTY, OHIO

CHARLES TENNEY, III, etc.,
et al.,

Plaintiffs,

v. Case No: 448548

URMILA PATEL, M.D., et al.,

Defendants.

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TELEPHONIC DEPOSITION OF JAMES A. O'LEARY, M.D.

Upon oral examination taken by counsel for the Defendants, on December 4, 2002, commencing at 5:05 p.m., at the offices of Gregory Court Reporting Service, 2650 Airport Road South, Suite A, Naples, Florida, before Tracie L. Mountain, RPR, Notary Public, State of Florida at Large.

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APPEARANCES

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INDEX



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EXHIBITS



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CERTIFICATE OF OATH

STATE OF FLORIDA )

COUNTY OF COLLIER)

I, Tracie L. Sitkins-Mountain, Notary Public for the State of Florida;

DO HEREBY CERTIFY

JAMES A. O'LEARY, M.D., personally appeared before me and was duly sworn by me to tell the truth.

WITNESS MY HAND AND MY SEAL in the City of Naples, County of Collier, State of Florida, this 4th day of December, 2002.

Tracie L. Mountain, RPR
Notary Public
State of Florida at Large

Thereupon,

JAMES A. O'LEARY, M.D.,

a Witness, called and duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SWITZER:

Q Hi, Doctor. This is Don Switzer. I'll be asking you questions first. I know you've testified before, but since this is by telephone, would you make sure that I finish my question before you start answering and vice versa or else we'll get cut off, okay?

A Thank you.

Q Would you state your full name, Doctor?

A James Arthur O'Leary.

Q One thing I don't have is a curriculum vitae from you. Do you have an updated one that you could give the court reporter?

A I do.

MR. SWITZER: Could you just mark that as Exhibit A?

(Thereupon, Exhibit A was marked for identification and the following proceedings were had.)

BY MR. SWITZER:

Q And, Doctor, while we're marking, do you have any notes?

A Yes.

MR. SWITZER: We'll mark that as Exhibit B.

(Thereupon, Exhibit B was marked for identification and the following proceedings were had.)

BY MR. SWITZER:

Q Doctor, Exhibit A is your CV. How current is that?

A It's current.

Q Okay. I'll look at that when we get the transcript. The notes that we've just marked, how many pages are they?

A It's one page of handwritten notes. I would say they're legible, divided into thirds, upper third, middle third and lower third.

Q When did you prepare that?

A When I initially reviewed the records.

Q Which would have been when?

A Approximately June of 2001.

Q Okay. So the only notes you prepared in this case then would have been prepared almost a year and a half ago?

A Yes.

Q I do have a copy of your report or your letter that you sent Mr. Mishkind setting forth your opinions. Do you have that with you today?

A Yes, I do.

Q And that's dated July 5, 2002. I believe it's three pages in length.

A Yes.

Q Is that the only report you've prepared setting forth your opinions?

A Yes.

Q Let me -- before I go any further, what have you reviewed besides the medical records?

A Besides the medical records I have reviewed the depositions of Colleen Zelonis, Dawn Davis, Lisa Piscola, Timothy McKnight, Dr. Patel, Charles Tenney, Jill Castenir and I have received reports from Dr. George Pettit, Linda DiPasquale, David Burkons, Martin Gimovsky and Method Duchon.

Q How about any of the other plaintiffs' experts?

A Those are the only reports I have.

Q Do you know any of the other expert witnesses in this case?

A No.

Q All right. Let me give you the names of the other plaintiffs' experts, if I can find them. Dr. David Simckes, S-I-M-C-K-E-S, do you know him?

A I don't know him.

Q David Zbarez, Z-B-A-R-E-Z, I think he's from Chicago?

A No, I don't know him either.

Q A nurse by the name of JoAnn Zelton, Z-E-L-T-O-N, I think she's also from the Chicago area?

A I don't know her either.

Q Do you consider yourself to be an expert on shoulder dystocia and brachial plexus injuries?

A Yes.

Q What states are you licensed to practice medicine in now?

A I have an active license in Florida, an inactive in New York, New Jersey, Pennsylvania, Illinois and Alabama.

Q Okay. Tell me about your current medical practice.

A It is one to two days per month as a volunteer gynecologist at a local Salvation Army clinic for women that is sponsored by the Fort Myers public health department.

Q I understand that you have written a number of publications, either journal articles or textbooks on shoulder dystocia and brachial plexus injuries.

A Yes, sir.

Q All right. Do you consider your publications to be authoritative with respect to shoulder dystocia management and brachial plexus injuries?

A I would say for the most part, yes.

Q What time was Dawn Davis ready for delivery in this case?

A At 11:19.

Q Okay. Why do you say 11:19?

A Because at 11:20 the head came out.

Q Okay. And when was she prepared for delivery?

A 11:04.

Q What is your understanding of the time period that Dr. Patel came into the delivery room and remained throughout the delivery?

A She was initially present at 9:14 and I believe she was present again at 11:00.

Q When did the fetal head crown?

A That time was 11:05. She was initially fully dilated at either 9:57 or 10:02.

Q What's your understanding of when the head crowned?

A Crowning is defined as the passage of the biparietal diameter through the introitus and that would have occurred at about 11:19.

Q Okay. What's the basis for that statement?

A Because the head was completely out at 11:20. crowning is what occurs when half of the head is out. Crowning is when the biparietal diameter, which is the diameter from one ear to the other, is at the introitus. At that point in time 50 percent of the head is out and usually with the next contraction the other 50 percent comes out.

Q Let me ask you some questions in general about fundal pressure. Doctor, you authored a textbook on shoulder dystocia?

A Yes.

Q And I think it's called Shoulder Dystocia and Birth Injury Prevention and Treatment, I believe?

A Yes.

Q There is a statement at page 92 of that text and I'll just read you the sentence here. "If the head is not at station zero, fundal or suprapubic pressure should be exerted in a downward direction in an attempt to determine whether the head will enter the pelvic inlet." What does that mean?

A That is a clinical test that has been described by two obstrictions, Dr. Mueller, M-U-L-L-E-R, and Dr. Hillis, H-I-L-L-I-S, and it's a test to see if the fundal pressure will allow the head to come through the inlet down to zero station. And if it doesn't, it's a sign of cephalopelvic disproportion.

Q How often, if you're going to do this test, should fundal pressure be exerted for what period of time? I'm sorry, that was a poorly phrased question.

A Approximately 10 to 15 seconds.

Q And is there any particular time when this is to be done?

A It's preferable to do it at the pique of a contraction.

Q Why is that?

A Because that allows the clinician to see what is the affect of labor upon the descent of the head. It can be done earlier in labor. It can be done between contractions.

Q So this Mueller-Hillis maneuver that you just discussed, the purpose of that maneuver is to see if the use of fundal pressure will assist in the fetus descending?

A Yes. It's a test of the capacity of the pelvic inlet to accept and allow the head to come through.

Q There is another statement in your textbook here I wanted to ask you about. That's at page two. I'll read it to you. "Definitions of shoulder dystocia vary among institutions. However, most investigators agree that it has occurred when the standard delivery procedures of gentle downward traction of the fetal head and moderate fundal pressure fail to accomplish delivery." Now, what does that -- what do those two sentences mean?

A That either the mother may push or fundal pressure be given as the head is delivering and when gentle traction is then applied and additional pushing or fundal pressure does not affect the delivery, like it would in a normal case without a shoulder dystocia.

Q So what you're saying here -- and I'm using your term, a standard delivery procedure would include gentle downward traction of the fetal head and moderate fundal pressure; is that correct?

A That is one such definition, yes.

Q And then, obviously, I'm assuming before shoulder dystocia is discovered?

A Yes, when you're trying to deliver the baby itself. When that doesn't work, then you say I have a shoulder dystocia.

Q And what is the use of the modifier "moderate" to define fundal pressure. You used "gentle" to describe the traction. Can you define the difference between the two. Do you understand what I was asking you?

A Yes, sir.

Q Okay.

A Moderate traction would be something that is less than strong traction and greater than gentle traction and gentle traction has been variously defined as mild traction or the traction that you would use in a normal delivery without a shoulder dystocia or it has been quanitated to be about 5 to 10 pounds of force.

Q Okay. There is another statement I saw in one of your articles. Let me just find it and I'll tell you what the article was. It's called Brachial Plexus Palsy Concepts of Causation. Do you remember that?

A Yes.

Q Let me read you the -- actually, it's a few sentences, at page -- I believe it's also on your website -- G36.

"There is one obstetric procedure called fundal pressure which is not recommended clinically during shoulder dystocia because of the risk of uterine rupture. That is sometimes used to facilitate patients with their second stage of labor. When medical personnel apply fundal pressure, they exert a force behind the fetus and advance it towards the birth canal. As long as there is no obstruction, this procedure does facilitate motion of the fetus through the uterus."

Could you explain what you mean by that?

A Yes. At the end of the second stage of labor as the head is making its final movement of descent and crowning is occurring, fundal pressure at that point will not rupture the uterus or injure the mother and it will assist in the final delivery of the head once it has started to crown.

Q That paragraph, those sentences I just read to you do not define when this is to be applied during the second stage of labor. It just says, "It's used to facilitate patients with their second stage of labor." Why didn't you include that modifier in there as to when it's supposed to be done during the second stage of labor?

A I don't remember.

Q Also this paragraph says, "The force is exerted behind the fetus and advances it towards the birth canal". It doesn't reference only being done when the head is crowning or about to crown. Why didn't you include that modifier in there?

A I don't know.

Q Have you conducted any medical research for your work in this case?

A No.

Q Let me ask you a few questions about your opinions in this case and then maybe we'll back up a minute. I do have your report and I assume you have a copy of that.

A I think so, yes.

Q On page two of the report, the third full paragraph.

A Yes.

Q There is a sentence there at the end. It says, "The application of fundal pressure by the labor nurse was inappropriate and contributed to the severity of the shoulder dystocia." What fundal pressure are you talking about?

A That particular sentence was the fundal pressure after the head had been delivered.

Q And you received that information from review of the deposition testimony of the parents?

A Yes.

Q You would agree there is nothing in the medical records about any fundal pressure being applied after the shoulder dystocia was discovered?

A Correct.

Q I understand it is your position because I've seen some of your articles and literature that it is not appropriate to use fundal pressure once the shoulder dystocia is encountered except under certain circumstances?

A Correct.

Q Those circumstances would be the -- you can probably tell us. Is it the Hibbiard --

A Yes, H-I-B-B-I-A-R-D.

Q That's the Hibbiard maneuver, is that the right term for it?

A Yes.

Q In that maneuver the use of shoulder dystocia (sic) is permitted?

A The use of fundal pressure is permitted as part of the Hibbiard maneuver.

Q The Hibbiard maneuver involves the use of suprapubic pressure in addition to the use of fundal pressure?

A Yes. More importantly, it consists of pushing the head slightly back up in the birth canal to release the stuck shoulder. Once the stuck shoulder is released, then the suprapubic pressure followed by the fundal pressure delivers the body.

Q I represent Southwest General Health Center, who employees the nurses in this case. Do you have any other opinions with respect to the deviation of the standard of care of Southwest of the nurses other than that statement in your report that I read?

A Yes, I do.

Q Okay. What is that?

A I believe that the mother was told to continue to push in the face of the stuck shoulder and I believe the nurses applied fundal pressure on two occasions prior to the crowning of the head.

Q Where did you get the information that the mother was told to continue to push after the shoulder dystocia was encountered?

A I believe it's in her deposition in several places and also in dad's deposition.

Q That's the parents' depositions?

A Yes, sir.

Q Then your other criticism was the use of the fundal pressure, I believe it's at 11:08 and 11:13?

A Yes, sir.

Q Why didn't you include that in your report?

A I don't remember.

Q Well, based on your own medical literature that you authored, the use of fundal pressure during the second stage of labor is within the standard of care, isn't it?

A If it's used at the proper time.

Q Well, you and I just went through your literature, didn't we?

A Yes.

Q And taking that literature, your own statements verbatim, the use of the fundal pressure in this case, as reflected in the records, was appropriate?

MR. MISHKIND: Let me just show an objection. This is Howard Mishkind. Go ahead, Doctor.

THE WITNESS: No, sir, that would not. All that did was force the body down the birth canal faster than it would have gone on its own and thus not allowing the shoulders to rotate properly.

Fundal pressure at the right time is when the head is crowning and as a result of the fundal pressure given during a contraction with the head crowning results in the delivery of the head.

BY MR. SWITZER:

Q Well, let's talk about the nurse's fundal pressure here then. Can you tell me the force used by this nurse when she exerted the fundal pressure twice?

A No.

Q Do you know at what angle she exerted the fundal pressure?

A I assumed it was in the proper direction, meaning from the top of the fundus down towards the birth canal.

Q Do you know how far the fetus descended with each use of the fundal pressure here?

A No.

Q Do you know whether this fundal pressure was even effective in causing this fetus to ascend when it was applied those two times?

A No.

Q Do you know the position of the fetus before the fundal pressure was applied?

A The baby was described as being in the LOA position.

Q Do you know the position of the fetus with respect to the uterus in the birth canal before the fundal pressure was applied?

A I don't understand your question, other than it sounds like the same question again.

Q Okay. It probably was then.

Well, aren't there a lot of variables present in this case with respect to determining whether or what effect this fundal pressure applied by the nurse on these two occasions had on the fetus?

A Yes, sir. I would have expected them to write down the results of this fundal pressure.

Q Doctor, tell me what effect you believe in your opinion the fundal pressure had?

A It was forcing the baby's body down towards the birth canal at the time of a contraction.

Q Okay. But you don't know how far down, if at all, the body of the fetus went, do you?

A It's not stated in the records.

Q How many more contractions did Dawn Davis have before the delivery of the head?

A The mom was having contractions every two to three minutes. So it would be two to three minutes from 11:13 to 11:20. So that would probably be at least three contractions.

Q And how far does the fetus ascend with each contraction?

A It can descend as little as zero to as much as half a centimeter.

Q Let's assume that fundal pressure had not been used on those two occasions. Would the head still have been delivered at 11:20?

A Probably not.

Q Why do you say that?

A Because the fundal pressure assisted in the descent of the baby through the birth canal.

Q Well, you don't know if it did or not. You don't have any information that this fundal pressure assisted in the descent, do you?

A There is nothing recorded in the record.

Q Are you aware of any articles or medical literature that describes or discusses the risk to the fetus or the mother of applying fundal pressure during the second stage of labor but prior to the recognition of shoulder dystocia?

A Do you want a specific reference on fundal pressure?

Q Did you hear my full question? Maybe I should repeat it.

A Please.

Q Are you aware of any articles, whether from journals, textbooks, any medical literature that describes or discusses the risk to the fetus or the mother of applying fundal pressure during the second stage of labor, but prior to recognition of the shoulder dystocia?

A Yes, sir. There is a body of literature out there.

Q All right.

A Specifically, the American College of OB/GYN has a strong statement on the use of fundal pressure as something that should not be done. Other than that, I would have to do --

Q I want to know what the document is that you're referring to?

A I believe it is a technical bulletin entitled, Dystocia, D-Y-S-T-O-C-I-A, and also a technical bulletin entitled, Operative Vaginal Delivery.

Q Well, I think I reviewed both of those documents before, but those talk about fundal pressure after shoulder dystocia, don't they?

A They talk about it after and I believe they talked about it before, but I'm doing it from memory.

Q Okay. Well, we'll check out the articles. And then what are the risks to the fetus or the mother then that you believe are set forth in those articles?

A To the mother it would be rupture of the uterus and hemorrhage. To the baby it would be asphyxia and possible mechanical damage, such as a pneumothorax.

Q And how would a baby or a fetus get a pneumothorax?

A By the sudden increase in intrauterine pressure followed by the sudden release of intrauterine pressure leading to sudden expansion of the chest wall.

Q Shoulder dystocia occurs after delivery of the head and when the shoulders come into contact with the pelvis?

A Yes.

Q So the use of fundal pressure before the head is delivered then would be appropriate insofar as it would not cause a shoulder dystocia, correct?

A It could contribute to it by forcing the body down too fast before the shoulders have had sufficient time to rotate through the inlet.

Q Okay. Well, you don't have any information you've seen in this case that that occurred here, did you?

A I can't say one way or the other.

Q By the way, I'd like to talk a minute about the mechanical cause of shoulder dystocia, if we can. The mechanisms by which shoulder dystocia occurs are when the baby's shoulders are too large to enter the pelvic inlet?

A Too large or in the wrong position.

Q Which one of those occurred in this case?

A Probably both.

Q Which is the anterior shoulder in this case?

A The anterior shoulder here was the right shoulder.

Q Did we have a bilateral shoulder dystocia?

A We do not have a bilateral injury, so I can't say and the obstriction does not describe any evidence of bilaterality. And since the only maneuver she used was pulling on the head, it would be unlikely it was bilateral, but it still could be.

Q Where did you get the information that the only maneuver she, being Dr. Patel, used was pulling on the head?

A I believe it's her testimony that the only active maneuver that she herself performed was the traction on the head.
Q Have you looked at her delivery note?
A Yes, sir.
Q Do you have the records there, Doctor?
A Yes, sir. The delivery note does not even mention the McRoberts position and the delivery note doesn't even mention suprapubic pressure, if it was given.
Q Well, let's assume that Dr. Patel's delivery note references that both knees and hips were acutely flexed and suprapubic pressure was applied?
A That's not in the handwritten delivery note, if that's what you're referring to. If you're talking about a dictated labor and delivery summary --
Q That's what I'm talking about, Doctor.
A She does mention it there.
Q Okay. Well, isn't -- I mean, don't you think she's describing the McRoberts maneuver?
A In the dictated note she does.
Q Okay. Now, let me come back to where I think I was going with this. If you look at her dictated labor and delivery summary, then at least according to that the McRoberts maneuver and suprapubic pressure were used?

A Yes, sir.
Q What is your understanding of the time period that passed from the time of the delivery of the head to the delivery of the body?
A Four minutes.
Q Tell me what procedure -- let me back up.
There is no -- let me back up again.
The standard of care does not require the use of any particular maneuvers or use of any particular maneuvers in any order; is that correct?
A Yes.
Q And once a shoulder dystocia is encountered, then it is permissible to apply gentle traction?
A Yes.
Q Do you know whether or not there was a turtle sign here?
A It's not recorded in the records and it was not mentioned in the depositions.
Q A four-minute time period to perform the McRoberts maneuver and then use suprapubic pressure to facilitate the delivery of this fetus in conjunction with extending the episiotomy would be a reasonable time period, wouldn't it?
A No, sir. That's an extremely long time period. The vast majority of shoulder dystocias are resolved in

about 90 seconds.

Q Well, it may even take a minute to get the mother in the proper McRoberts position, wouldn't it?

A That's exceptional, but it could be possible. Normally, I would say about 15 seconds.

Q How long does it take to perform a rotational maneuver?

A Usually within 30 seconds of applying the maneuvers for rotation you will know whether or not it's going to go. If it does start to move, it may take another 30 seconds to complete the true Woods maneuver, which is a 180-degree rotation.

Q Doctor, isn't the usual time from delivery of a head in a nonshoulder dystocia case to delivery of a body two to three minutes?

A Yes, sir. And that's because you're waiting for the next contraction and you're doing other things. Such as you aspirate the mucous from both nostrils, as well as the baby's mouth and throat. You check for the cord around the neck and if it's there, you clamp and cut it. Basically, you do nothing between contractions.

Q Do you recall testifying in a case called Rebecca Eickman (phonetic) versus Patricia Kodash (phonetic).

A No, sir.

Q It was in the Illinois United States District Court.

A No, sir, I don't remember it.

Q That was a shoulder dystocia case. I think the plaintiff's lawyer was an individual by the name of Brandt Kline. Does the name ring a bell, from Indiana?

A I recognize his name, but I don't remember the case at all.

Q I'm getting back to the time period here. I just want to ask you a question. Unfortunately, you and I are not face-to-face, so I can't show you this. I'll show it to you when you come to trial, but let me just read it to you.

Question: How long does it take to perform each of the maneuvers that we talked about earlier? And I'll just use for an example the McRoberts, suprapubic and a rotational maneuver such as the Woods screw?

Answer: A matter of perhaps three minutes, four minutes, three to five minutes, depending on the variables.

Q Now, I realize you haven't seen this, but there were three maneuvers you were asked about in the time period and you indicated in that deposition three to five minutes would be an appropriate period of time. So why are you limiting the time for Dr. Patel to just 90 seconds here?

A I wasn't just limiting it to that, but that was what normal would be. What takes you out beyond three minutes will be the difficulty in dealing with the rotational maneuvers. Rotation to the right oblique or left oblique or the classic Woods maneuver could take another 90 seconds.

Q Would you agree that a severe shoulder dystocia is one that takes more than four minutes to resolve?

A That's one criteria for evaluating shoulder dystocias. Another one is simply the number of maneuvers used and sometimes it's the physician recognizing bilateral or a severe impaction. There is no one classification that would represent the norm for severity.

Q Is it possible for a fetus -- well, let me back up.

Is it possible to have shoulder dystocia if fundal pressure is applied as the head is crowning?

A No, sir. You would have to get the head out of the vagina or at least almost completely out, 90 percent or so.

Q The use of fundal pressure as the fetal head is crowning in order to assist in the delivery of the head, that cannot result in shoulder dystocia because the

shoulders have not come into contact with the pelvis yet?
A It would be because the head is almost 50 percent delivered and the amount of pressure would not be great enough to force the body down a long distance before the shoulder impacted.
Q Did Dawn Davis have any risk factors for shoulder dystocia?
A She had an excessive weight gain and she was slightly obese.
Q What is molding, M-O-L-D-I-N-G?
A Molding is the change in the shape of the baby's head as a result of the baby's skull bones changing their position.
Q And is that -- what does that indicate if that occurs?
A Molding, if it occurs, can be normal, but if it is severe, it would be a classic sign of cephalopelvic disproportion.
Q The use of epidural anesthesia, will that result in an increased incidence of shoulder dystocia?
A No.
Q Well, you said that in your textbook. Do you disagree with that now?
A Only if there is abnormal descent. I'm assuming a patient who is a normal patient without

macrosomia, that an epidural should not have an effect on shoulder dystocia.

Q Do you agree that the optimal method for treating shoulder dystocia once it occurs remains debatable?

A Yes, sir. It still is debatable, but the consensus is now to start with the McRoberts position and then suprapubic pressure and gentle traction.

Q I know this statement is in your textbook. Do you still agree there are no experts in the prevention and treatment of shoulder dystocia?

A Only expert witnesses. That was be a attempt at humor at one of my grand rounds lectures.

Q Do you believe Dr. Patel was present when the nurses applied this fundal pressure?

A It appears from the record as if she were.

Q If you assume that Dr. Patel asked the nurse to apply the fundal pressure, is it your position that the nurse should have refused to do that?

A Yes.

Q Why?

A Because it's something that is associated with increased harm and risk if it's done at the wrong time.

Q And you believe it was done at the wrong time. Again, I'm talking about before the shoulder dystocia?

A Yes, sir.
Q Okay. If Dr. Patel read your textbook on shoulder dystocia, she would not realize from reading your textbook that it would have been done at the wrong time, would she?
MR. MISHKIND: Objection. Go ahead, Doctor.
THE WITNESS: The reason I didn't specify the time is it's such an elemental piece of information that you learn at the beginning of your residency training program. It's an obvious thing to obstrictions.
BY MR. SWITZER:
Q Well, that may be your opinion, but I think there are going to be people disagreeing with you. By the way this textbook you wrote, Shoulder Dystocia and Birth Injury Prevention and Treatment, it was your intention with that textbook to provide information that was generally in accordance with the standard of care?
A Yes, sir.
Q That's why you believe that to be an authoritative textbook?
A In parts, yes.
MR. MISHKIND: John, let me object. I believe you're getting argumentative, but go ahead, Doctor.
MR. SWITZER: Actually, I wasn't. That's a

pretty soft way to get argumentative.

MR. MISHKIND: You're a soft-spoken guy.

BY MR. SWITZER:

Q Doctor, when is the last time you delivered a baby?

A 1996.

Q Do you have admitting privileges at any hospital?

A No, sir. I've been semi-retired approximately three years.

Q What percentage of your professional time do you spend in the active clinical practice of gynecology?

A The one or two days per month that I would see patients at the Salvation Army.

Q Can you give me a percentage of that?

A I would estimate on a weekly basis I spend approximately eight to ten hours, either on reviewing medical literature, journals and articles that I'd be working on. And of that eight to ten hours, I would estimate at least four hours per clinic session.

Q Is more than 90 percent of your income from your medical/legal work?

A Yes.

Q During the period starting in the late 1980s until 1996 did you average maybe one or two deliveries a year?

A Those were just private cases. I did many more deliveries in the teaching of interns and residents.

Q Well, those were weren't hands-on deliveries by you, were they?

A Very frequently they were. I was physically present and scrubbed with gloves on and gown on.

Q The last time you had a shoulder dystocia delivery was in 1987?

A '87 or '88, I'm not sure which.

Q Are most cases of brachial plexus injury transient or temporary?

A Yes, 90 percent.

Q Doctor, how would Nurse Zelonis know that the request to apply the fundal pressure by Dr. Patel was inappropriate?

MS. METZ: Objection.

MR. MISHKIND: Let me show an objection as well. Go ahead, Doctor, you can answer.

THE WITNESS: Because the head was not crowning at that time and the fundal pressure was being used to force the baby's body down through the bony pelvis without a good reason, such as fetal distress.

BY MR. SWITZER:

Q Let's assume the head was crowning during that time.

A If the head were crowning at 11:08 and fundal pressure was given, then the baby's head would have been delivered within the next minute.

Q Well, you're assuming that the fundal pressure would have been effective?

A Fundal pressure for assisting in the delivery of the head is only given at the point where the head is crowning so that it's almost always effective. Sometimes you do need a second contraction.

Q Are you ruling out the scenario that the head was crowning here and the request was made for the nurse to apply fundal pressure twice and the belief that that would result in a delivery of the head and it just didn't happen?

A I don't know.

Q Okay. I take it that it's your opinion in this case that there was excessive traction applied at some point?

A Excessive traction, excessive lateral downward tilting of the head and turning and twisting of the head.

Q And you're basing that on the parents' description in their deposition testimony?

A Yes, as well as the facial bruising would be consistent with that also and the scalp edema was described as severe.

Q The amount of traction to apply, is that a subjective test to some extent?

A It is semi quantitative. Gentle traction is best described as either mild traction or the degree of traction that you normally apply in the delivery of a child without a shoulder dystocia.

Q Do you agree that shoulder dystocia is generally unpredictable?

A Yes.

Q I think this baby weighed approximately 4500 grams.

A Yes, sir.

Q Do you consider that to be macrosomic?

A Yes, sir.

Q Okay. Is macrosomia generally unpredictable?

A Yes.

Q Do you believe in this case that the shoulder dystocia or the macrosomia should have been predicted?

A No.

Q If Dr. Patel knew that she was dealing with a 4500-gram fetus in this case going into labor, would it have been appropriate to have her try a trial of labor?

A Yes, if she did clinical pelvimetry prior to the starting of the Pitocin.

Q Do you know if that was done or not?

A No, sir, it was not done. She was not there.

Q Okay. What is the incidence of shoulder dystocia in a 4500-gram baby or fetus, I guess?

A Approximately 9 percent.

Q What is the incidence of shoulder dystocia in a 3500-gram fetus?

A About one in 300.

Q That's what, .03 percent, maybe?

A Yes, sir.

Q So it's about, what, more than 20 times more likely to occur?

A Yes, sir.

Q Was this fetus dysmorphic?

A No, sir.

Q I'm almost done, Doctor. I'll let Carol ask you questions about Dr. Patel.

CROSS-EXAMINATION

BY MS. METZ:

Q Hi, Doctor. My name is Carol Metz and I represent Dr. Patel in this matter. I want to return to your opinion dated July 5th, 2002.

A Yes.

Q It is my understanding from the third full paragraph on page two that you ruled out any intrapartum causes of the brachial plexus injury?

A Yes.

Q Could you please tell me what causes you ruled out and how you ruled those out as possibilities?

A The ultrasound examination that was done at approximately 22 weeks excluded uterine defects or anomalies, uterine tumors, malpositions, fetal evidence of tumors or cysts in the neck.

Q Are these the only causes of intrapartum -- excuse me, are these the only intrapartum causes of brachial plexus injuries?

A Yes.

Q You indicated that the injury occurred in the course of delivery because of inappropriate and excessive forceful maneuvers. Could you please tell me what inappropriate maneuvers you felt were taken by Dr. Patel?

A Excessive traction, excessive lateral tilting or traction on the head, turning and twisting of the head, having the mother continue to push and fundal pressure applied.

Q And all of these are based on the deposition testimony of the parents?

A And the extensive facial bruising, scalp bruising and the neurological injuries itself.

Q Could there be another cause of the bruising and neurological injuries?

MR. MISHKIND: Objection. Go ahead, Doctor.

THE WITNESS: No.

BY MS. METZ:

Q You indicated the mechanism of the injury was the stretching of the neck. What evidence do you have that Dr. Patel stretched the neck during the delivery?

A The extensive permanent neurological injury that Charles suffered, the bruising of the scalp and bruising of the face.

Q How does bruising of the scalp and bruising of the face indicate that there was a stretching of Charles's neck?

A That represents the fingerprints or points of force at which the tips of the fingers are dug into the baby's soft tissues.

Q You indicated that proper adherence to the standard of care would have prevented the permanent brachial plexus injury. If I'm not mistaken the maneuvers and the mechanisms used by Dr. Patel, as outlined in her report, you felt were appropriate, being McRoberts, the subpubic pressure and gentle traction?

A Those are the appropriate maneuvers.

Q So using those maneuvers were not below the standard of care, correct?

A If they were properly carried out. The McRoberts maneuver is simply placing the mother in a different position. It's called the McRoberts position. That in and of itself does nothing to release the stuck shoulder. The combination of the suprapubic pressure, if properly given, when combined with gentle traction will resolve approximately 90 percent of these cases.

Q Is it possible to have permanent brachial plexus injury without a tugging of the neck?

A Only from a prelabor factors.

Q And are those the factors we've previously discussed?

A Yes. You can add into that list on a very, very rare basis viral infections that get into the nervous system and congenital absence of nerves and muscles in the child's neck, but all of these would be evident at the time the baby was examined in the nursery.

Q If I understand correctly, you said 90 percent of your income comes from your legal/medical work?

A Yes.

Q Approximately how many cases do you review a year over the last three years?

A It's down to about one or two per month in the past year.

Q Of the cases you've reviewed over the last three years, what percentage of those have been for plaintiffs and what percentage have been for the defense?
A I currently have about 70 active cases, of which seven or eight are defense cases.
Q So the remaining 62 to 63 are plaintiff's cases?
A Yes, ma'am.
Q Have you ever testified in the state of Ohio, either in a deposition or in trial?
A Yes.
Q When was the last time you testified in the state of Ohio?
A I believe approximately two years ago. A case of -- I don't remember the case now, but it was Mr. Peter Weinberger, I believe.
Q Have you ever worked for Mr. Mishkind or his firm previously?
A Perhaps one case, I'm just not sure.
Q Approximately how long did you spend reviewing the records before today's deposition, in total before your July 5, 2002 report?
MR. MISHKIND: Are you talking about all the way from the start?
MS. METZ: That's correct.

MR. MISHKIND: Okay.
THE WITNESS: Perhaps six to eight hours.
BY MS. METZ:
Q I know on your July 5th, 2002 report you reserved the right to change your opinion based on new information or evidence that's provided after the writing of this report. I notice some of the depositions you reviewed occurred after the writing of this report. Has anything you've reviewed after this time changed your opinions? I hope you can understand that because it was poorly worded.
A I do understand it and I have no new opinions other than what I've already expressed here today.
Q Outside of the use of what you feel is excessive force and stretching of Charlie's neck, do you have any other criticisms of Dr. Patel?
A The use of fundal pressure, having the mother continue to push while the shoulder was stuck and not attempting other maneuvers.
Q The use of fundal pressure, I assume you mean after the head was delivered?
A Yes.
Q And that was based on the parents' testimony?
A Yes.
Q What other maneuvers did you feel needed to be

attempted by Dr. Patel?

A After approximately a minute or two, the next step would have been to turn the shoulders 45 degrees either to the right or left using one hand. If that doesn't work, you could then use two hands, one on the posterior shoulder and one on the anterior shoulder and do the corkscrew maneuver. If that didn't work, then you further enlarge the episiotomy and deliver the posterior arm.

Q Do you have any further opinions regarding the care of Dr. Patel?

A No.

Q Is it my understanding you have no criticism of the prenatal care provided by Dr. Patel?

A Correct.

Q Is it possible to have brachial plexus injury such as this from a shoulder dystocia alone?

A No.

Q What do you charge an hour for reviewing records?

A $250.

Q And what do you charge for testimony?

A Trial testimony I charge $350 an hour, plus any travel expenses that I incur.

Q How long have you been involved in

legal/medical work?

A Thirty-one years.

Q Do you have an estimate of how many cases you've reviewed in those 31 years?

A It would be several hundred, I'm sure.

Q And how many of those deal with shoulder dystocia?

A Since 1985, the number has progressively increased to the present where approximately 30 or 40 percent of my cases are shoulder dystocia cases.

Q And how many of those involve brachial plexus injuries?

A I believe they all did.

Q All 30 to 40 percent?

A Yes.

Q Of your current caseload, which you said was approximately 70 active cases, approximately how many of those involved shoulder dystocia and brachial plexus injury?

A 30 to 40 percent.

Q I don't believe I have any further questions.

A Thank you.

REDIRECT EXAMINATION

BY MR. SWITZER:

Q Doctor, just a few more. Have you reviewed any prior cases for Mr. Mishkind or any of his associates or partners?

A I may have reviewed one. I just don't recall for sure.

Q Do you advertise at all?

A No.

Q I wrote down something. I just wanted to make sure that I didn't hear you incorrectly. Did you say that the McRoberts maneuver needs to be used in conjunction with suprapubic pressure?

A It doesn't have to be. You can use the McRoberts position and gentle traction. Most people do both together because it's more effective.

Q Okay. Have we covered all of your opinions, either in your report or your testimony today with respect to the deviations from the standard of care of the defendants?

A Yes.

Q Do you believe you've adequately explained the grounds for your opinion and again I'm incorporating your report?

A Yes.

Q Did we pay you in advance or are you going to send Howard a bill? How do we handle this?

A I will send an invoice to Mr. Mishkind.

Q Make sure you have your tax ID number on that and are you going to leave your CV and notes with the court reporter?

A I already have.

Q Thank you very much.

MR. SWITZER: Tracie, would you go ahead and send me a copy of the transcript as soon as possible?

THE REPORTER: Okay. You want it expedited?

MR. SWITZER: Yes. This is Don Switzer. You can call my secretary, Karen. You probably have our number. We're the ones that hired you. I'm the one who hired you.

MR. MISHKIND: I'd like a copy.

Doctor, did you have any problems hearing the questions from Mr. Switzer or Ms. Metz?

THE WITNESS: No, I don't think so.

MR. MISHKIND: Ms. Reporter, how about you? Did you have any difficulty at all with the telephone?

THE REPORTER: No.

MR. MISHKIND: Doctor, if you want to read the deposition transcript, that will be fine with me. If you prefer to waive the reading of the deposition, that will be fine with me.

THE WITNESS: I will waive.

(Deposition concluded at 6:15 p.m.)

C-E-R-T-I-F-I-C-A-T-E

STATE OF FLORIDA )
COUNTY OF COLLIER )

I, Tracie L. Sitkins-Mountain, Registered Professional Reporter and Notary Public in and for the State of Florida do hereby certify that I was authorized to and did stenographically report the foregoing deposition, that the transcript is a true record of the testimony given by said deponent and all proceedings had at the session at which said deposition was taken; and that the reading and signing was waived and notice of filing be waived.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 5th day of December, 2002.

Tracie L. Sitkins-Mountain, RPR
Notary Public
State of Florida at Large