BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

ALI PIROOZI, M.D., Petitioner, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES BIXLER, DISTRICT COURT JUDGE, Respondent(s), and TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST; MARTIN BLAHNIK, M.D., Real Party in Interest.	Supreme Court Case No.: EJDC Case No.: A-10-627691-C

RESPONDENT ALI PIROOZI, M.D.'S APPENDIX VOL 3

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VOLUME 1

DOCUMENT TITLE **EXHIBIT**

VOLUME 2

VOLUME 3

VOLUME 4

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 4th day of February 2014, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **RESPONDENT ALI PIROOZI, M.D.'S APPENDIX**, postage prepaid and addressed to:

The Honorable Judge James Bixler
The Eighth Judicial District Court
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DISTRICT COURT

CLARK COUNTY, NEVADA

TIFFANI HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST,

Plaintiffs,

v.

SUNRISE HOSPITAL AND MEDICAL CENTER; MARTIN BLAHNIK, M.D.; ALI PIROOZI, M.D.; RALPH CONTI, M.D.; and FOOTHILLS PEDIATRICS, LLC,

Defendants.

Case No.: A-10-616728-C
Dept. No.: 24

DEFENDANT PIROOZI'S JOINDER TO HOSPITAL DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Ali Piroozi, M.D., by and through his attorneys, Cotton, Driggs, Walch, Holley, Woloson & Thompson, hereby Joins Defendant Sunrise Hospital and Medical Center's Opposition to Plaintiffs' Motion for Partial Summary Judgment filed on or about October 18, 2013. The arguments made in said Opposition apply to all parties and are incorporated herein. For the reasons set forth in Defendant Sunrise Hospital and Medical Center's Opposition, joined herein, this Court should deny Plaintiffs' Motion for Partial Summary Judgment.

Defendant Piroozi reserves the right to supplement additional arguments during oral

argument on the issues before the Court.

Dated this 24th day of October, 2013.

COTTON DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 23rd day of October, 2013 and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **DEFENDANT PIROOZI'S JOINDER TO HOSPITAL DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**, postage prepaid and addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST, Plaintiffs, vs. SUNRISE HOSPITAL AND MEDICAL CENTER, LLC.; MARTIN BLAHNIK, M.D.; ALI PIROOZI, M.D.; RALPH CONTI, M.D.; and FOOTHILLS PEDIATRICS, LLC., Defendants.	CASE NO.: A-10-616728 DEPT. NO.: 24 **DEFENDANT MARTIN BLAHNIK, M.D.'S JOINDER TO DEFENDANT SUNRISE HOSPITAL AND MEDICAL CENTER, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, MARTIN BLAHNIK, M.D., by and through his counsel of record, ROBERT C. McBRIDE, ESQ. of the law firm of MANDELBAUM, ELLERTON, & McBRIDE hereby submits his Joinder to Defendant Sunrise Hospital and Medical Center, LLC's Motion for Partial Summary Judgment filed on October 18, 2013.

This Joinder is made and based upon the papers and pleadings on file herein, the Memorandum

of Points and Authorities submitted with the motion, and such other documentary evidence as may be presented and any oral arguments at the time of the hearing of this matter.

Dated this 24 day of October 2013

MANDELBAUM, ELLERTON & McBRIDE

By: _____

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Martin Blahnik, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of October 2013, I forwarded a copy of the above and foregoing **DEFENDANT MARTIN BLAHNIK, M.D.'S JOINDER TO DEFENDANT SUNRISE HOSPITAL AND MEDICAL CENTER, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** as follows:

X by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or

_____ by facsimile transmission as indicated below;

_____ Via hand-delivery; or

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DISTRICT COURT

CLARK COUNTY, NEVADA

TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST, Plaintiffs, vs. SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, MARTIN BLAHNICK, M.D., ALI PIROOZI, M.D., RALPH CONTI, M.D. and FOOTHILL PEDIATRICS LLC, Defendants.	CASE NO. A616728 DEPT NO. XXIV

DEFENDANT SUNRISE HOSPITAL AND MEDICAL CENTER, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Hearing Date: 11/06/13
Hearing Time: 9:00 a.m.

COMES NOW, Defendant SUNRISE HOSPITAL AND MEDICAL CENTER, LLC (hereinafter "Sunrise Hospital"), by and through its attorneys, HALL PRANGLE & SCHOONVELD, LLC, and hereby replies in support of its Motion for Summary Judgment.

This Reply is made and based upon the papers and pleadings on file herein, the points and authorities attached hereto and such argument of counsel which may be adduced at the time of hearing such Motion.

DATED this 30th day of October, 2013.

HALL PRANGLE & SCHOONVELD, LLC

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiffs oppose this Motion by inaccurately stating facts and distracting this Court from the real issue. Many statements within Plaintiffs' Opposition were not stated in the depositions or in any expert reports. Further, Plaintiffs present many red herrings to distract the Court, but fail to provide expert support for the logical result of what they claim should or should not have occurred. Such is the problem presented with this matter.

Plaintiffs' entire theory against the NICU physicians is complete speculation. The central issue is whether there was anything the Sunrise NICU physicians did or did not do on **discharge** that caused MayRose's injury **3 months later while she was under the constant care of her pediatrician**.

Plaintiffs' entire theory rests on Dr. Conti's conduct in an imaginary set of circumstances. It is complete speculation and in fact relies on many false assumptions. Dr. Conti specifically testified that even with all the information Plaintiffs claim the NICU physicians failed to provide, he would have done the exact same thing. In fact, he testified this alleged critical information still represents a common and usual occurrence, and that he would have worked up MayRose in the same manner.

As Plaintiffs' theories of causation are pure speculation and contrary to Dr. Conti's testimony, Dr. Hermansen and Dr. Strousse should be stricken and this Motion granted. Further, the evidence demonstrates that Dr. Conti's was not foreseeable, thus he was a superseding intervening cause.

II.

RELEVANT DEPOSITION TESTIMONY

Plaintiff Tiffany Hurst testified she provided the following information to Dr. Conti at the first appointment on August 5, 2008:

> Q: So what happened when you went to Foothills Pediatrics on August 5?
>
> A: Well, Brian and I took her and I handed him the paperwork, I told him about how I was supposed to get an MRI ordered and a sweat test ordered. And he told me his staff could help me with that, which they did. And then I told him about our entire traumatizing experience from day one with **the nuchal fold** all the way to discharge. And Brian talked, we both told him about how challenging the entire experience had been, and I believe the word posttraumatic stress syndrome was used because we were just so still very freaked out about the concept of this little girl being followed, considering all the challenges she had had. And he talked about the **thalassemia,** because he always did. And we just talked about the whole thing from beginning to end.
>
> And I remember apologizing because I knew he had other patients to see, but it was **really important to me, you know, to convey, hey, this girl had been though a whole bunch of stuff, so we need to be careful with her**. And he was like, you know, we will bring you back regularly, we will keep on top of her, and he was very reassuring.
>
> ....

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Q: Do you remember having any discussions with him that day about the diagnosis of anemia of prematurity?

A: I don't specifically remember that. I just remember telling him the entire history. So I would be surprised if we left that out, since, you know, her blood transfusions were part of her history.

Q: Do you remember specifically talking to him about her blood transfusions?

A: I remember talking to him about everything we experienced. It took a long time, and I just remember feeling apologetic because he actually sit there and listen. And I knew he had other people to go.

See Deposition Transcript of Plaintiff Tiffani Hurst, attached hereto as Exhibit A, 110:8-111:6 and 113:21-114:9 (emphasis added).

Dr. Conti testified as follows:

Q: Would it likewise be important to know about abnormal test results during the prenatal period?

A: It depends on the test result. I mean, you know, there's lots of abnormal results that can come out that would be completely irrelevant to taking of the baby.

Q: Okay. If the birth mother was consulting with a perinatalogist during the prenatal course, would it be important for you to know what condition the perinatologist who was treating them was concerned about?

A: Sometimes, yes.

Q: Did you receive any education or training regarding the clinical significance of an abnormal **nuchal translucency or nuchal fold** on ultrasound during the prenatal period?

A: That's usually a sign of Down's Syndrome.

Q: And other than MayRose, are you aware of ever caring for any other infant who had an abnormal nuchal translucency or nuchal fold or ultrasound prior to delivery?

A: I believe it was mentioned from time to time.

.....

Q: Do you remember Mr. Abbington telling you that he had **thalassemia**?

A: I have no specific memory of him telling me that, no.

Q: Did you –

A: It's possible he might have. I don't recall that.

Q: Okay. Did you ever do anything to determine whether she had, MayRose had inherited her father's thalassemia?

A: To work up thalassemia, you wouldn't work that up until a little bit later date. You would look for an elevated hemoglobin A2 fraction. You get a hemoglobin electrophoresis. But that wouldn't kick in until months later. Weeks to months later.

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...

Q: You were aware that within the ten days prior to MayRose's discharge she was transfused three times? Were you aware of that when you assumed her care?

A: I have no specific memory of that. **And again, that wouldn't be unusual in a preemie**.

Q: Were you aware that her hematocrit was also falling at the time of her discharge?

A: Again, **that wouldn't be unusual for a premature baby**, that sometimes hematocrits are falling at the time of discharge. They're approaching their nadir, you know, their low point with the red cells -- which occurs at around three months anyway, so.

...

Q: Okay. So my question to you is, then should the pediatrician assuming the care of that infant, **is that an issue the pediatrician should follow up on?**

A: **You should look at every child for anemia**. I mean everyone who comes in gets looked at for anemia. **It's just part of my routine exam**. I look at the conjunctiva of the eyes, and you can see what the hemoglobin is pretty accurately.

...

Q: Were you aware that MayRose had not made it three weeks without needing a blood transfusion since the day she was born? Did you know that when you assumed her care?

A: I have no specific memory of that. **But again, that is very, very typical for preemies in the, in the NICU.**

Q: Okay. If a preemie is needing transfusions every three weeks at the time of their discharge, is that something that the pediatrician would need to follow-up on when they assume care of that baby?

[objections]

A: **You do not test on the baby – I mean you are following up on that. By looking at the baby, you are following up on it. I mean you are following up on that problem as it exists. I mean you don't want to draw a lot of blood when you don't have to.**

...

Q: In any event, whether you read [the Discharge Summary] or whether you didn't, you did not comply with the NICU doctors' request that you draw a [Blood Count] 30 days after discharge. Correct?

...

A: I did not order [the Blood Count] at the time. We order what the child needs and nothing more.

Q: And it was your opinion, based on your examination of MayRose, that she did not require a follow-up [Blood Count]. Correct?

A: Yes.

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See Deposition Transcript of Dr. Conti, attached as Exhibit B, 43:5-44:2, 59:25-60:14; 61:25-63:17; 64:21-65:14; and 130:19-131:9.

III.

LEGAL ARGUMENT

A. The Testimony of Dr. Conti Contradicts Plaintiffs' Experts' False Assumption and Speculative Causation Opinions.

Medical expert testimony in a medical malpractice case must be stated to a reasonable degree of medical probability. *Banks ex rel. Banks*, 120 Nev. at 834-835, 102 P.3d at 61. "We determined that the speculative nature of the expert's opinion that the injury " 'possibly could have been' " a precipitating factor was insufficient to support a finding of causation between the defendant's negligence and the plaintiff's injuries." *Id.* Further, the Nevada Supreme Court has stated that determining whether an expert is qualified to testify at trial is at the discretion of the trial judge. *Hallmark v. Eldridge,* 124 Nev. 492, 498, 189 P.3d 646, 650 (Nev. 2008). In making this determination, the District Court should consider whether the expert opinion is "based more on particularized facts rather than **assumption, conjecture, or generalization**." *Id.,* 124 Nev. at 500-502, 189 P.3d at 651 – 652 (emphasis added).

Plaintiffs argue that it is not a false assumption, although they agree it is an *assumption*, that Dr. Conti would have followed the NICU physicians' recommendations for the follow-up Blood Count had he been informed: that MayRose received numerous transfusions during her NICU admission, that MayRose's blood count was falling despite the transfusions, that MayRose was allegedly "transfusion dependent", and that MayRose received a transfusion three days prior to discharge. *See* Plaintiffs' Opposition, 16:21-17:4. However, counsel for Plaintiffs deposed Dr. Conti on these exact issues and asked what he would have done armed with this knowledge. Dr. Conti testified as follows:

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Q: You were aware that within the ten days prior to MayRose's discharge she was transfused three times? Were you aware of that when you assumed her care?

A: I have no specific memory of that. **And again, that wouldn't be unusual in a preemie**.

Q: Were you aware that her hematocrit was also falling at the time of her discharge?

A: **Again, that wouldn't be unusual for a premature baby**, that sometimes hematocrits are falling at the time of discharge. They're approaching their nadir, you know, their low point with the red cells -- which occurs at around three months anyway, so.

...

Q: Okay. So my question to you is, then should the pediatrician assuming the care of that infant, **is that an issue the pediatrician should follow up on?**

A: **You should look at every child for anemia**. I mean everyone who comes in gets looked at for anemia. **It's just part of my routine exam**. I look at the conjunctiva of the eyes, and you can see what the hemoglobin is pretty accurately.

...

Q: Were you aware that MayRose had not made it three weeks without needing a blood transfusion since the day she was born? Did you know that when you assumed her care?

A: I have no specific memory of that. **But again, that is very, very typical for preemies in the, in the NICU.**

Q: Okay. If a preemie is needing transfusions every three weeks at the time of their discharge, is that something that the pediatrician would need to follow-up on when they assume care of that baby?

[objections]

A: **You do not test on the baby – I mean you are following up on that. By looking at the baby, you are following up on it. I mean you are following up on that problem as it exists. I mean you don't want to draw a lot of blood when you don't have to.**

...

Q: But I think we've discussed, and I really don't want to replow ground we've been over, but you've admitted that you didn't know that her hematocrit was still falling at the time of her discharge, you didn't know that her reticulocyte was low and still falling at the time her discharge. There were things you did not know. Isn't that true, Doctor Conti?

[objections]

A: I don't agree that I didn't know. I...

Q: You knew her lab results at the time of her discharge?

[objections]

A: I don't recall like which, you know, I mean do I recall specifically knowing, do I have a specific memory of knowing exactly what the lab results were at the time? No I don't.

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> But at the same time, I mean, you get a good feeling for what's going on with the kid just by looking at him and reviewing. I mean there was some lab result stared out at me, you know, how common it is for a kid to have a falling hematocrit and a low, a borderline low, borderline low hematocrit and a low reticulocyte count at the time of discharge from the nursery? **It's common**.

Ex. B, 61:25-63:17; 64:21-65:14 and 125:12-126:16 (emphasis added).

As previously stated, Dr. Conti has passed away since this deposition and all parties agreed to use his deposition transcript at trial. Therefore, his deposition testimony will not change. He makes clear that even with the additional information Plaintiffs lay out in their Opposition is "not unusual", "common", and "very, very typical for preemies". *Id.* In fact, Plaintiffs' counsel specifically asked if this additional information is something the pediatrician should follow-up on, and Dr. Conti responded "By looking at the baby, you are following up on it. I mean you are following up on that problem as it exists. I mean you don't want to draw a lot of blood when you don't have to." *Id.*, 65:10-14. Plaintiffs acknowledged assumption that Dr. Conti would have acted differently, is not only complete speculation, but contrary to his testimony.

The NICU physicians provided Dr. Conti with Discharge Instructions recommending a follow-up test that Plaintiffs' experts agree would have changed the outcome if completed. Dr. Conti stated he chose to ignore this recommendation. Dr. Conti testified that even with additional information regarding anemia in the NICU, he would have acted the same way. There is absolutely no evidence to support Plaintiffs' speculative theory of causation.

As Plaintiffs' experts' opinions are based on speculation and false assumptions, these opinions should be stricken. Further, pursuant to NRS 41A.100, summary judgment should be granted for lack of expert support.

. . .

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B. Dr. Conti's Unforeseeable Conduct, or Lack Thereof, Was an Intervening Superseding Cause.

Plaintiffs argue that the alleged violation of the standard of care by the NICU physicians continues indefinitely, regardless of the number of physicians or doctor's visits. In this instance, three different physicians and six office visits occurred over a three month period *after* discharge. Moreover, it is uncontested that the recommendation by the NICU physicians would have prevented this injury, Dr. Conti testified additional information would not have changed his treatment, and the testimony of Plaintiffs' experts that it is reasonable for the NICU physicians to rely on the pediatrician to follow their recommendations. It is not reasonable and completely unforeseeable that the recommendations would be ignored and several physicians at Dr. Conti's office, including Dr. Conti, would fail to order a Blood Count over the three months after MayRose's discharge.

Plaintiffs' experts testified as follows:

> Q: But you agree if the pediatrician in this case had ordered the recommended tests for Mayrose within one month of her discharge that that likely would have shown some anemia?
>
> A: I think it would have almost certainly shown significant anemia.
>
> **Q: And would you agree with me if that pediatrician had ordered those tests and looked at the results that the episode of profound anemia here could have been prevented?**
>
> **A: I do.**
>
> Q: Okay. Would you expect – at least, based on the recommendations here – would you expect a competent pediatrician to actually order and assess the complete blood count and retics recommended by Doctor Piroozi within one month post-discharge?
>
> A: Yes.
>
> ...
>
> Q: The practical matter is, if once the child's in the pediatrician's hands, whether he had diagnosed it in two weeks or thirty days, still would have had the same outcome here if he doesn't do the test, correct?
>
> A: That is true.

See Plaintiffs' expert hematologist, Dr. Strouse's, deposition transcript, 50:5-51:6 and 55:12-17, attached as Exhibit I to the Motion (emphasis added).

> … if I've come up with a good plan [discharge plan] and get that plan into the pediatrician's functions, to get the pediatrician aware of the plan, agreeing to the plan and taking it over, I think the neonatologist is off the care at that point.
>
> Q: Okay. And once you've done that and gotten the plan into the hands of the pediatrician, if subsequently the pediatrician decides to ignore portions of your plan but doesn't tell you, do you think you're responsible for the conduct?
>
> A: Not if I've given him a good plan and communicated it. If I've done those then – and – no, I don't feel responsible if they go on their own route.

See Deposition Transcript of Plaintiff's Expert NICU Physician, Dr. Hermansen, 32:14-33:3, attached as Exhibit J to the Motion. Plaintiffs may disagree with the NICU physicians' discharge plan, yet they all agree that the Blood Count was necessary and a "good plan".

Dr. Conti testified as follows:

> Q: Were you aware that her hematocrit was also falling at the time of her discharge?
>
> A: Again, **that wouldn't be unusual for a premature baby**, that sometimes hematocrits are falling at the time of discharge. They're approaching their nadir, you know, their low point with the red cells -- which occurs at around three months anyway, so.
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> Q: Okay. So my question to you is, then should the pediatrician assuming the care of that infant, **is that an issue the pediatrician should follow up on?**
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> Q: Were you aware that MayRose had not made it three weeks without needing a blood transfusion since the day she was born? Did you know that when you assumed her care?
>
> A: I have no specific memory of that. **But again, that is very, very typical for preemies in the, in the NICU.**
>
> Q: Okay. If a preemie is needing transfusions every three weeks at the time of their discharge, is that something that the pediatrician would need to follow-up on when they assume care of that baby?
>
> [objections]

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A: **You do not test on the baby – I mean you are following up on that. By looking at the baby, you are following up on it. I mean you are following up on that problem as it exists. I mean you don't want to draw a lot of blood when you don't have to.**

Q: In any event, whether you read [the Discharge Summary] or whether you didn't, you did not comply with the NICU doctors' request that you draw a [Blood Count] 30 days after discharge. Correct?

...

A: I did not order [the Blood Count] at the time. We order what the child needs and nothing more.

Q: And it was your opinion, based on your examination of MayRose, that she did not require a follow-up [Blood Count]. Correct?

A: Yes.

Ex. B, 61:25-63:17; 64:21-65:14 and 130:19-131:9.

Therefore, based on the law previously cited, and the testimony above, Dr. Conti's conduct was unforeseeable and an intervening superseding cause:

> "(1) the intervention causes the kind of harm expected to result from the actor's negligence," **(It was not expected that Dr. Conti would choose to ignore the recommendations; it was reasonable to rely on Dr. Conti to follow the NICU doctors' recommendations)**
>
> "(2) the intervening event is normal or extraordinary in the circumstances," **(Extraordinary - Plaintiffs' experts testified that the NICU doctors may rely on the pediatrician to follow their recommendations; Dr. Conti failed to follow these recommendations after three months of care and six appointments, and testified he chose to ignore these recommendations)**
>
> "(3) the intervening source is independent or a normal result of the actor's negligence," **(Independent - Dr. Conti's conduct was the direct opposite of the NICU doctors' recommendations)**
>
> "(4) the intervening act or omission is that of a third party," **(It is uncontested that Dr. Conti was not affiliated with the NICU doctors or Sunrise Hospital)**
>
> "(5) the intervening act is a wrongful act of a third party that would subject him to liability, and" **(Dr. Conti was a defendant in this action based on his failure to conduct the follow up testing recommended by the NICU doctors)**
>
> "(6) the culpability of the third person's intervening act." **(Dr. Conti's failure to perform the recommended tests is uncontested to be the primary cause of MayRose's injury)**

Restatement (Second) of Torts § 442 (1965).

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Please keep in mind the NICU physicians had *four* follow-up recommendations. These recommendations were put in the Discharge Instructions given to Ms. Hurst to give to Dr. Conti, and in a copy specifically for Ms. Hurst, which she signed for and had an opportunity to ask questions. *See* Deposition Transcript of Tiffani Hurst, 222:19-224:14, attached hereto as Exhibit C; *See also* Detailed Discharge Disposition, SH02561-2564, attached hereto as Exhibit D. Three of the four recommendations were completed, mainly at Ms. Hurst's request. It is not foreseeable that this one recommendation, the Blood Count, in the Discharge Instructions would be ignored by both Dr. Conti and Ms. Hurst.

Lastly, Plaintiffs misrepresent their own expert's testimony regarding the diagnosis of Diamond Blackfan Anemia:

> **"Diamond-Blackfan anemia is not something I think would been diagnosed in the initial NICU stay, no matter what the evaluation would have been."**

See Plaintiffs' expert hematologist, Dr. Strouse's, deposition transcript, 53:20-54:2, attached as Exhibit I to the Motion (emphasis added). Hence, the agreement per the Stipulation previously produced.

The uncontested evidence demonstrates as a matter of law that Dr. Conti was a superseding intervening cause in MayRose's injury. Therefore, the alleged violations in the standard of care by the NICU doctors were not the actual or proximate cause of MayRose's injuries, and summary judgment is proper.

. . .

. . .

. . .

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IV.

CONCLUSION

Based on the foregoing, Sunrise Hospital respectfully requests this Court grant this Motion and issue an Order dismissing Sunrise Hospital with prejudice.

DATED this 30th day of October, 2013.

HALL PRANGLE & SCHOONVELD, LLC

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 30th day of October, 2013, I served a true and correct copy of the foregoing **DEFENDANT SUNRISE HOSPITAL AND MEDICAL CENTER, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** in a sealed envelope, via U.S. Mail, first-class postage pre-paid to the following parties at their last known address:

Dennis M. Prince, Esq.
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-and-
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Attorney for Defendant
Ali Piroozi, M.D.

An employee of HALL PRANGLE & SCHOONVELD, LLC

4827-9149-9286, v. 1

EXHIBIT "A"

DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

TIFFANI D. HURST AND BRIAN ABBINGTON, JOINTLY AND ON BEHALF OF THEIR MINOR CHILD, MAYROSE LILI-ABBINGTON HURST,	)	
Plaintiffs,	)	
vs.	)	CASE NO. A-10-616728-C
	)	DEPT. XXIV
SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, MARTIN BLAHNIK, M.D., ALI PIROOZI, M.D., RALPH CONTI, M.D. and FOOTHILLS PEDIATRICS, LLC,	)	
Defendants.	)	

DEPOSITION OF TIFFANI HURST

Taken on Tuesday, August 23, 2011

At 9:36 o'clock a.m.

At 3441 S. Eastern, Ste. 402

Las Vegas, Nevada 89169

REPORTED BY: MARY DANE McCOY, RPR, CA CSR NO. 8216

NV CCR NO. 219

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A. It is.
Q. Back up a minute. From the time that you were discharged from Sunrise on August 2, 2008, to when you went to see Dr. Conti, did you see any health care providers in that time?
A. In the three-day period, I think he was the first one.
Q. So what happened when you went to Foothills Pediatrics on August 5?
A. Well, Brian and I took her and I handed him the paperwork, I told him about how I was supposed to get an MRI ordered and a sweat test ordered. And he told me his staff would help me with that, which they did. And then I told him about our entire traumatizing experience from day one with the thick nuchal fold all the way to the discharge. And Brian talked, we both told him about how challenging the entire experience had been, and I believe the word posttraumatic stress syndrome was used because we were just so still very freaked out about the concept of this little girl being followed, considering all the challenges she had had. And he talked about the thalassemia, because he always did. And we just talked about the whole thing from beginning to end.
And I remember apologizing because I knew he

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had other patients to see, but it was really important to me, you know, to convey, hey, this girl has been through a whole bunch of stuff, so we need to be careful with her. And he was like, you know, we will bring you back regularly, we will keep on top of her, and he was very reassuring.
Q. How is it that you chose Dr. Conti as your pediatrician?
A. One of my coworkers, who is now a judge, referred him to me. When I was looking around, asking questions about the local pediatricians, I found out he had been like 2006 Best Pediatrician or something like that, and she highly recommended him.
Q. Who was your coworker that recommended him?
A. Linda Bell.
Q. When you got to Foothills Pediatrics, did you talk to the front office staff? Can you explain how the check-in process went?
A. We just gave them our insurance card and my license and insurance card, then we sat in the -- we sat in the well-side, waiting to be seen. Then they called us back, a nurse weighed her, and measured her head, then put us in a room to wait for Dr. Conti.
Q. What office did you go to on August 5, 2008?
A. I believe it was the one at St. Rose, that is

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my recollection. Although there is one in Summerlin too that we sometimes would go to, and there is one in the southwest that we sometimes would go to. But I think it was St. Rose.
Q. On your first visit on August 5, 2008, do you remember filling out a history form?
A. Certainly possible.
Q. Other than the nurse and the front office people, did you speak to anyone else or interact with anyone else at Foothills Pediatrics before Dr. Conti saw you?
A. I don't believe so.
Q. So you said you physically handed Dr. Conti the discharge instructions?
A. I did.
Q. You hadn't given them to Foothills Pediatrics prior to that?
A. I don't believe -- I don't recall that being the case. And the reason I don't recall that being the case is because they were so specific, hand it to the doctor. And I tried to follow their instructions to the T. And so that was, I mean, I bought hand cleaner for every room in my house, everywhere somebody could sit there was a bottle of hand cleaner. I bought masks for people to wear, and, you know, and I just -- I was

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so worried that I just did everything they told me to do and that included handing a copy to him.
Q. You said earlier that the people at Sunrise told you they were also sending Dr. Conti a copy of the discharge summary?
A. Yes.
Q. Do you have any knowledge whether that actually was ever sent?
A. I don't have knowledge about that.
Q. So at your appointment with Dr. Conti on that date, you said you talked to him specifically about the MRI and the sweat test that you needed to schedule?
A. Yes.
Q. He said his staff would help schedule that?
A. Yes.
Q. Was there anything else specifically you remember talking to him about that is in the discharge summary?
A. No. Because those two things were things that I was supposed to do.
Q. Do you remember having any discussions with him that day about the diagnosis of anemia of prematurity?
A. I don't specifically remember that. I just remember us telling him the entire history. So I would

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be surprised if we left that out, since, you know, her blood transfusions were part of her history.

Q. Do you remember specifically talking to him about her blood transfusions?

A. I remember talking to him about everything that we experienced. It took a long time, and I just remember feeling apologetic because he actually did sit there and listen. And I knew he had other people to go see.

Q. Do you remember Dr. Conti saying anything or asking anything about anemia of prematurity or MayRose's blood transfusions?

A. I don't remember him asking us much of anything other than standard questions, and I say standard because they were the same questions that he used to ask me when my son was born.

Q. So what are those standard questions that you recall?

A. Did I -- how is her tummy feeling, how is her -- is she eating well, is she pooping, how many diapers, is she urinating, how many diapers a day, those kinds of questions.

Q. Were you the one who called Dr. Conti's office to make the appointment that day for August 5?

A. Yes.

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Q. Do you remember anything specific about that conversation?

A. No. I'm sure I would have said that we were just discharged, we are supposed to meet in three days, because otherwise I don't think they would have gotten us in so quickly.

Q. MayRose came home to your house after the NICU?

A. Yes.

Q. She was there with you and Tristin?

A. Yes.

Q. Did Dr. Conti's office help you schedule the MRI and the sweat test?

A. Yes.

Q. Do you remember when you had those performed?

A. They were within the time frame. The MRI was supposed to be done in, I think it was in 30 -- whatever the time frame that was on the discharge summary, it was scheduled within that time frame. The sweat test, I don't think there was a time frame, but we just got it done their first available appointment.

Q. When you handed Dr. Conti the discharge instructions, did he look at them, did he put them aside? What did he do with them when you handed them to him?

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A. He may have glanced at them, but most of the visit was him listening to our traumatic experience.

Q. Do you remember if you ever wrote anything on the discharge summary you gave Dr. Conti?

A. I don't remember.

Q. Do you remember if when you received the discharge summary from Sunrise Hospital there was anything written on it?

A. I don't remember.

Q. I'm going to show you what is Bate stamped Foothills Pediatrics 0341 through 0345, it is the discharge summary in Dr. Conti's chart. In the upper right hand corner it looks like it is written Peds copy.

Is that your handwriting?

A. No.

Q. Do you know whose handwriting it is?

A. I don't know.

Q. Do you remember if it had that on it when you gave it to Dr. Conti?

A. It must have, which makes me -- when you asked me whether I had two copies, and I wasn't sure, I wouldn't be surprised that I did because this was probably the one that I was supposed to hand to him. But no, I didn't write that, and I don't know who did

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write it.

Q. Okay. You said when you handed the discharge summary to him, he may have glanced at it. Do you remember him asking any questions about anything in the discharge summary?

A. I don't recall that happening.

Q. Other than the general questions about how she is pooping, eating, do you remember him asking you any other particular questions about her time in the NICU?

A. No, but we talked about it the whole time, so he probably didn't, he probably felt like we had exhausted the topic by the time we finished talking. But no, he didn't.

Q. Did he ever talk about any plan to order any blood work for MayRose?

A. I don't recall him talking about a plan to do anything. Other than that we -- that he understood our concerns and our fears and that he would keep a close watch on her, and just in general him trying to soothe us, soothe our fears.

Q. One of the things requested in the discharge summary is a head ultrasound, and you said that that was one of your responsibilities?

A. Yes.

EXHIBIT "B"

DEPOSITION OF

RALPH CONTI, M.D.

Hurst, et al. v. Sunrise Hospital and Medical Center, et al.
Case No. A-10-616728-C
June 19, 2012

CONDENSED TRANSCRIPT AND KEY WORD INDEX

TURNER REPORTING & CAPTIONING SERVICES, INC.
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DISTRICT COURT
CLARK COUNTY, NEVADA

TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST,

Plaintiffs,

vs.

SUNRISE HOSPITAL AND MEDICAL CENTER, LLC; MARTIN BLAHNIK, M.D.; ALI PIROOZI, M.D.; RALPH CONTI, M.D.; and FOOTHILLS PEDIATRICS, LLC,

Defendants.

Case No. A10616728C
Dept.No. XXIV

DEPOSITION OF RALPH CONTI, M.D.
Taken on Tuesday, June 19, 2012
At 2:12 p.m.
At 3441 South Eastern Avenue, Suite 401
Las Vegas, Nevada

Reported By: Karen J. Berry, RMR, CCR 836

APPEARANCES:

For the Plaintiffs: JACQUELYNN D. CARMICHAEL, ESQ.
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Salt Lake City, Utah 84111

For Defendant Sunrise Hospital: JONQUIL L. URDAZ, ESQ.
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For Defendants Blahnik and Piroozi: CHRISTOPHER G. RIGLER, ESQ.
JOSEPH H. COTTON & ASSOCIATES
2300 West Sahara Avenue
Suite 420
Las Vegas, Nevada 89102

For Defendants Conti and Foothills Pediatrics: PATRICIA EGAN DAEHNKE, ESQ.
BONNE BRIDGES MUELLER O'KEEFE & NICHOLS
3441 South Eastern Avenue
Suite 402
Las Vegas, Nevada 89169

Also present: TIFFANI D. HURST
BRIAN ABBINGTON

Videographer: Patti Lucchesi
Certified Legal Videography

EXAMINATION

EXHIBITS

THE VIDEOGRAPHER: This begins the deposition of Ralph Conti, M.D. Today's date is June 19, 2012. The time is 2:12 p.m. We are at Bonne Bridges Mueller O'Keefe and Nichols, 3414 South Eastern Avenue, Suite 402, Las Vegas, Nevada, 89169.

This case is in the District Court, Clark County, Nevada, entitled Tiffani D. Hurst and Brian Abbington, jointly and on behalf of their minor child, MayRose Lili-Abbington Hurst, versus Sunrise Hospital and Medical Center, Case Number A-10-616728-C.

I'm Patti Lucchesi representing Certified Legal Videography. The court reporter is Karen Berry on behalf of Turner Reporting and Captioning.

Will counsel please identify yourselves for voice identification, then the reporter will administer the oath.

MS. CARMICHAEL: Jackie Carmichael on behalf of the plaintiffs.

MR. RIGLER: Christopher Rigler on behalf of defendants Blahnik and Piroozi.

MS. DAEHNKE: Patricia Daehnke for Doctor Conti.

MS. URDAZ: Jonquil Urdaz for Sunrise Hospital.

//

Page 5

Thereupon--
RALPH CONTI, M.D.
was called as a witness by the Plaintiffs and, having been first duly sworn, testified as follows:
EXAMINATION
BY MS. CARMICHAEL:
Q Will you please state your full name and your address for the record?
A Ralph Conti. Spell it?
Q Sure.
A R-a-l-p-h, C-o-n-t-i. And home address?
Q Yes.
A 1675 Tangiers Drive, T-a-n-g-i-e-r-s, in Henderson, Nevada, 89012.
Q Thank you. Doctor Conti, have you had your deposition taken prior to today?
A Yes.
Q On how many occasions?
A I don't recall.
Q What were the circumstances of those depositions?
A Many, many different circumstances. I've been asked to testify for families. If they're having a legal problem against the police, against various businesses, I've had to testify. I've given my

Page 6

deposition for malpractice cases in the past.
Q As an expert or as a treater?
A As a treater.
Q Okay. Have you ever given testimony as an expert witness?
A I believe some of them, yes, have asked me to testify as an expert.
Q So you were a retained expert, an attorney retained you to give expert testimony in a case?
A Yes.
Q Okay, on how many occasions have you testified as an expert?
A I don't recall.
Q It's okay if you don't have a precise number, but can you give me a ballpark?
A Five to ten.
Q Okay. And do you remember what the issues were in any of those cases that you testified as an expert?
A One was a case of Munchausens by proxy. One was a case of a bruise on a child.
This is just the ones that come to mind.
Q Okay. When was the most recent occasion that you testified as an expert witness?
A I don't recall.

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Q Within the last five years?
A Perhaps.
Q And in the five to ten occasions that you testified as an expert witness, were you testifying on behalf of the plaintiff or the defendant?
A I think sometimes on behalf of the plaintiff, sometimes on behalf of the defendant.
Q Okay. Do you recall any of the attorneys that hired you?
A Breen Arntz.
Q Excuse me?
A Breen Arntz, A-r-n-z, is I believe how he spells it.
Q Okay. Any others?
A I don't recall any other attorney names besides Breen.
Q Were there other attorneys, or were you his expert on each occasion?
A I believe there were other attorneys.
Q Have you ever given a deposition as a party to a lawsuit?
A Yes.
Q And tell me about that.
A Three different times.
Q Okay.

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A The first one was a child with encephalitis, with viral encephalitis. The second was a child with a bowel obstruction. And the third was regarding a circumcision.
Q And these were instances where you were, where allegations of malpractice were made against you?
A Correct.
Q Okay. And what was the outcome of the case concerning the child with viral encephalitis?
A I believe it was settled.
Q Okay. And how long ago was that?
A I believe it was 2001.
Q Do you recall the plaintiff's attorney in that case?
A No.
Q Do you recall the name of the party suing you?
A I think it was Howard.
Q Okay. And who represented you in that case?
A I believe Breen Arntz was my lawyer back then.
Q Mr. Arntz?
A Yes.
Q Okay. What about the bowel obstruction

case, what was the outcome of that case?
A That was also settled.
Q And do you recall the year?
A It was around 2002, I believe.
Q And did Mr. Arntz also represent you in that action?
A I think so.
Q And do you recall the name of the plaintiff in that case?
A No.
Q And then with regard to the last occasion, the circumcision case, what was the resolution of that matter?
A That also settled out.
Q In what year?
A It was about 2002 or three.
Q And who represented you in that case?
A I don't remember.
Q Do you remember the name of the plaintiff?
A I do remember. Wait. It was Bonnie Bulla, I believe was her name.
Q Bonnie Bulla?
A I think that was her name.
Q Do you recall the name of the plaintiff in that case?

A Baby's first name was Jared. And I don't remember the last name.
Q Jerry?
A Jared, J-a-r-e-d. I don't remember the name.
Q In the viral encephalitis case, was that a failure to diagnose allegation? What was the allegation in that?
A I think so. I don't recall.
Q Do you recall what the allegation was in the bowel obstruction case?
A I think it was the same thing. I think they, you know, I think it was failure to diagnose.
Q What about in the circumcision case?
A The parents didn't like the result.
Q Okay. Why?
A They didn't like the way it looked, I guess.
Q So it was simply a matter of aesthetics?
MS. DAEHNKE: Well, I object to the form of the question. Might lack foundation, call for speculation, and other interesting things.
You can answer if you can.
THE WITNESS: I believe so. Just didn't like the way it looked, so.
//

BY MS. CARMICHAEL:
Q Okay. All right. Okay. What did you review in preparation for your deposition today?
A I reviewed the chart.
Q Foothills chart?
A Yes.
Q Did you review anything else?
A Today what did I review?
Q Doesn't have to be confined to today. Just what have you reviewed in preparation for your deposition?
A I can't remember all the papers I've looked through regarding this case.
Q Well, other than the chart, what categories of papers have you reviewed?
A What categories of papers? I'm not sure if I understand.
Q Well, you're telling me you can't remember everything. What can you remember? What have you looked at in preparation for your deposition?
A There's a big notebook, there's a couple of big notebooks that are that thick.
Q Filled with what?
A Papers.
Q Medical records?

A Some of --
MS. DAEHNKE: You know, counsel, I'll represent that the binders have copies of, photocopies of the chart. And I also made photocopies of the discovery responses. That's what's in the binders.
BY MS. CARMICHAEL:
Q All right. So you've reviewed some discovery responses?
A Yes.
Q Okay. Have you reviewed any depositions, deposition transcripts?
A I believe so.
Q Have you read the depositions given by Tiffani and Brian -- Tiffani Hurst and Brian Abbington?
A I believe I read Tiffani's.
Q Okay. Did you read Doctor Weber's deposition?
A Yes, I believe I read Doctor Weber's.
Q How about the depositions given by Doctor Blahnik or Doctor Piroozi, have you read those?
A I don't recall anything specific about them, but I believe I looked at them, yes.
Q And what have you brought with you today?
A This is my chart.

Q That's the original chart?
A Yes.
Q Maintained at your office?
A Yes.
Q For MayRose Hurst?
A Yes.
Q Okay. And what dates of treatment does that span?
A Let's see. Let's see, the first progress note is from July 22 of '09. And the last one is August 5 of '08.
Wait. I'm sorry. The opposite. August 5 of '08 would be the first note, and then July 22 of '09 would be the last note.
Q Okay. All right. Other than counsel, who have you spoken with regarding the claims in this lawsuit?
A My counsel. That's pretty much it.
Q Have you talked with Kathleen Weber about her deposition?
A Not specifically about her deposition. I just, I remember the day that she did it, but I don't believe that I've talked to her about this deposition specifically.
Q You didn't ask her how her deposition went,

or any details about her deposition?
A No.
Q Have you discussed the allegations in this lawsuit with Doctor Weber?
A Early on, we had mentioned it.
Q What do you -- tell me what you discussed with her.
A I don't recall exactly what we talked about. I said, "Do you remember MayRose?" And, you know, that we're being sued on her. So that was about it. That's all I recall.
Q What do you recall Doctor Weber telling you?
A I don't remember.
Q You don't remember anything she told you?
A Not really, no. Not specifically.
Q Have you spoken with any of the other defendants regarding the claims in this lawsuit?
A I remember speaking to Doctor Malixi. I don't remember like any of the specifics of what that conversation entailed. I don't recall.
Q Do you remember anything about the conversation you had with Doctor Malixi?
A Not much. I remember her being concerned that she had never been sued before. So she was just really broken up about it.

Q And what did you tell her?
A I don't recall. I think I just said, you know, it's -- I don't recall.
MS. DAEHNKE: You're pounding your...
THE WITNESS: Oh, sorry.
BY MS. CARMICHAEL:
Q Have you ever spoken with Doctor Piroozi about the claims in this case?
A No.
Q Have you ever spoken with Doctor Blahnik about the claims in the case?
A No.
Q Do you know Doctor Piroozi or Doctor Blahnik?
A I believe I've spoken to them on the phone at various times, but I don't, I've never formally met them, no.
Q Okay. And on those occasions when you spoke to them over the phone, was it ever regarding MayRose Hurst?
A No.
(Plaintiffs' Exhibit A marked for identification.)
BY MS. CARMICHAEL:
Q Doctor Conti, I'm handing you what will be

Exhibit A to your deposition.
A Yes.
Q And I'll represent to you that this is a document that was provided to me by your counsel.
A Uh-huh.
Q As representing your curriculum vitae, is this document current and up to date?
A I believe it only goes up to, up to -- yeah, that seems, seems pretty accurate.
Q Okay.
A Uh-huh.
Q Are there any achievements or work experience that would need to be added to this to bring it current, or does this represent a current...
A It's pretty current.
Q Okay. All right. Let me ask you then, on your board certification, it indicates that you recertified in 1998. Is that correct?
A That's correct.
Q And are you due for another recertification?
A Yes. Yes.
Q When did that become due?
A It's due this year.
Q This year?
A Uh-huh.

Q And do you plan to do that?
A Yes.
Q Okay. On your work experience, it indicates that you were working at Green Valley Pediatrics before Foothills Pediatrics?
A Correct.
Q Do you see that?
A Yes.
Q And you were the managing partner at that practice. Is that correct?
A Yes, that's correct.
Q Can you tell me why you changed practices, or how that came to be that you moved from Green Valley Pediatrics to Foothill?
A We just became a very big group, and I wanted to do something smaller at the time. It was a long time ago.
Q So you just left, you left Green Valley?
A Yes.
Q And you formed Foothill Pediatrics?
A Yes.
Q Okay. Do you have any publications? Have you ever published?
A Yes, I was published on a vaccine study.
Q When was that?

A About 2003, maybe, 2004. Somewhere around there.
Q And what was the study about?
A Rotavirus vaccine.
Q Any other publications?
A Another one on what they call ProQuad, which is a combination of chicken pox and MMR.
Q Another vaccine study?
A Yeah.
Q Okay, and when was that published?
A Around the same time.
Q Anything else?
A I think that's mostly it.
Q Okay. So Foothill Pediatrics, LLC, does that organization continue today?
A I don't think so. I think it's been changed.
Q It's been changed?
A Yeah, I don't think the LLC exists anymore. I think it's an LLLC, or something like that. I don't understand all that.
Q When was that change made?
A Let's see, early this year, I believe, in January.
Q Okay, what is the new entity's name?

A I believe it's still called Foothill Pediatrics, LLLC, I think is what it's called.
Q Why was the name changed?
A Because we wanted to make Doctor Garcia head of the group.
Q Doctor Garcia?
A Yes, correct.
Q So is Doctor Garcia now the managing partner?
A Yes.
Q What's Doctor Garcia's first name?
A Claudia.
Q So you have essentially stepped down then as managing partner?
A Correct.
Q And that was effective the first of this year?
A Around there.
Q And the old entity, what has become of it?
A I don't know.
Q We were informed at some point that there was a bankruptcy proceeding. Is it in bankruptcy?
A No. No longer.
Q Was it discharged?
A Yes.

Q Who are the -- are there any other managing members of the new entity other than Doctor Garcia?
A I don't believe so. Just myself.
Q You're also a managing partner?
A I don't know exactly what my title is. Am I managing partner? I don't know.
Q Okay, well, what was the purpose of the reorganization?
A So that Doctor Garcia could be the main purpose -- could be the main person doing the contracting.
Q Okay. And how many physicians are currently employed by Foothill, by the new entity?
A One, two, three, four -- six, I believe. Six.
Q Does that include yourself?
A Yes.
Q And Doctor Garcia as well?
A Yes.
Q Is Doctor Weber still there?
A Yes.
Q And Doctor Malixi?
A Doctor Malixi is in retirement.
Q Here in Las Vegas?
A She lives here part of the time, and she's

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in the Philippines a lot.
Q Okay. So who then are the other physicians besides Doctor Weber, Doctor Garcia, and yourself?
A Doctor Mendoza, Doctor Faro, and Doctor Hyla.
Q What was the last one?
A Hyla, H-y-l-a.
Q Okay. So I've got paperwork from the Secretary of State for Nevada that indicates the business license of the old entity expired February 29. I assume that that license was not renewed to that entity? Is that true?
A I don't believe so.
Q Okay. And you're now doing business under a business license for the new entity?
A I believe so, yes.
Q Where do you currently hold hospital privileges?
A St. Rose Siena, and St. Rose -- and San Martin.
Q San Martin?
A Yeah.
Q Any other hospitals?
A I have my privileges on hold at several other hospitals.

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Q Let's talk about Sunrise. Has Sunrise placed your privileges on hold?
A Yes.
Q And why was that?
A Because of my indictment in the --
MS. DAEHNKE: To the extent that answer calls for him to assert his Fifth Amendment, I have to object.
MS. CARMICHAEL: Well, I think he can say why the hospital placed his privileges on hold. I mean we're not going to get into any details of your criminal indictment.
MS. DAEHNKE: I think he said as much as, based upon the advice of his criminal counsel and me, he said as much as he can about that.
BY MS. CARMICHAEL:
Q You have been criminally indicted. Is that correct?
A Yes.
Q Are your hospital privileges also on hold at Summerlin?
A Yes.
Q Are there any other hospitals in the area where you held privileges and in which they have been placed on hold?

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A Yes.
Q What other hospitals?
A Centennial Hospital, Southern Hills Hospital, Valley Hospital.
Q But none of those hospitals have -- well, have any of those hospitals terminated your privileges?
A None of the ones that I listed, no.
Q Huh?
A No.
Q Have you ever, during your medical career, had your hospital privileges terminated by a hospital?
A Once at Spring Valley Hospital. Just this year.
Q And why were your hospital privileges terminated at Spring Valley Hospital?
MS. DAEHNKE: I would object to the extent that it calls for anything regarding implication of his Fifth Amendment right, which he's asserting and which counsel and I discussed prior to the start of this deposition.
BY MS. CARMICHAEL:
Q And if you want to assert that Fifth Amendment right, it's, you're well within your right to do so, but you'll need to assert it.

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A Okay. Based upon the advice of counsel, I assert my rights under the Fifth Amendment of the Constitution.
Q Okay. Prior to -- well, let's see. Back in 2008.
A Yes.
Q Did you have a contractual relationship with Sunrise Hospital?
A Contractual relationship?
Q A business relationship with them. Did you have some kind of a business relationship with Sunrise?
A No.
Q Okay.
A I don't think so.
Q Have you ever signed a contract with Sunrise Hospital?
A I don't think so. Just, just privileges.
Q Okay. Back in 2008, you did provide pediatric care to newborn babies born at Sunrise Hospital?
A Yes.
Q Is it true?
A Yes, I did.
Q Okay. And why don't you explain to me a

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little bit about how that would work?
I assume that anybody that had a doctor/patient relationship with you and for whom you provided pediatric services, when that party would go into the hospital to deliver, you would be notified and you would provide pediatric care to that child? Would you do that?
A Yeah, we would call the hospital in the morning. And if we have any, do we have any new babies there to see. And if they say yes, we go over to the hospital and see the new babies.
Q Okay. And would some of those babies be, belong to families with whom you had not yet established --
A Yes.
Q -- a pediatric relationship with?
A Yes.
Q Okay. And I assume that the hope then would be that they would want to continue with your practice --
A Sure.
Q -- once the child was released from the hospital?
A Yes.
Q Okay. And in attending to those babies, I

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assume you had occasion to work with babies born prematurely?
A Yes. But in general, babies born prematurely would go to the NICU, and you wouldn't work with them.
Q You would not work with premature babies?
A No. I mean not until they got out of the hospital.
Q All right. With regard to the babies you would work with, however --
A Yes.
Q -- whether that baby was going to follow with you or follow with another pediatrician, would you make sure that there was a pediatrician on board to follow that child after they were released?
MS. DAEHNKE: Object to the form of the question.
MR. RIGLER: Join.
THE WITNESS: I don't understand the question.
BY MS. CARMICHAEL:
Q In caring for babies at the hospital, while they're still at the hospital.
A Right.
Q Right. Would one of the things that you

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would do be to make sure that they were set up to follow with a pediatrician after they were released?
A Yes, I mean you would write follow up with Foothills Pediatrics by this particular date.
Q Okay. All right. When I took the deposition of Doctor Weber, one of the things she said on page 20 of her deposition is that when she was attending to babies at the hospital, she would also send the discharge notes and the admission notes to the attending pediatrician that the parents chose for the baby. Is that something that you would do?
A Send the discharge notes and the -- not ordinarily, no.
Q You would not do that?
A I don't -- I mean if it's something that needed to be signed out to another doctor, I would call the other doctor and let them know if there was some specific issue that needed to be raised with, with the child.
Q So we've talked about the three occasions you've been sued for medical malpractice. Is that right?
A Yes.
Q Have there been any other occasions other than this action?

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A I believe that's it.
Q Okay. And other than the criminal indictment that's been mentioned, have you ever been charged with a crime?
MS. DAEHNKE: I do not know what the doctor is thinking. Can we take a break? Because I need to, if it's something that's protected.
MS. CARMICHAEL: Sure.
THE VIDEOGRAPHER: Off the record at 2:44 p.m.
(A short break was taken.)
THE VIDEOGRAPHER: We're back on the record. This marks the beginning of tape number two. It's 2:54 p.m.
BY MS. CARMICHAEL:
Q Doctor Conti, there was a question pending when you asked for a recess.
MS. CARMICHAEL: (To the reporter:) Would you please repeat the question?
(The last question was read back.)
MS. DAEHNKE: And I'm going to object to that question and instruct the doctor not to answer on the grounds of relevance, privacy, and privilege.
MS. CARMICHAEL: Okay, criminal crimes are relevant because it goes to credibility. They're

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discoverable, and they're admissible. Criminal convictions are admissible.
MS. DAEHNKE: That wasn't your question. You could -- well, that wasn't your question. I have the same objection.
BY MS. CARMICHAEL:
Q Other than the criminal indictment that we're aware of, Doctor Conti, have you been convicted of any crimes in your past?
MS. DAEHNKE: And I would object on privilege, privacy, and relevance. If you want to ask him if he's been convicted of any felonies, you're entitled to that.
BY MS. CARMICHAEL:
Q Have you been convicted of any felonies?
A No.
MS. CARMICHAEL: And, you know, I am entitled to know if he's been convicted of misdemeanors as well.
MS. DAEHNKE: You, if you would like --
MS. CARMICHAEL: It may not be admissible at court, but it is discoverable.
MS. DAEHNKE: I disagree with you, and I'm instructing him not to answer on the grounds of privilege, privacy, and relevance.

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MS. CARMICHAEL: Okay. All right.
BY MS. CARMICHAEL:
Q Do you still have an ownership interest in the Foothill practice?
A Yes.
Q And what is your ownership interest?
A I don't know. What is my ownership interest?
Q Yes.
A I, I'm a part owner of the practice.
Q Excuse me?
A I'm a part owner in the practice.
Q I understand that. How much? What part do you own? What is your interest?
A I, I don't know.
Q You don't know --
A No.
Q -- what the terms of your ownership interest are with your partner?
A No.
Q Are there any other owners besides you and Doctor --
A Garcia.
Q -- Garcia?
A No.

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Q But you're telling me today that you don't know what the split is between you and Doctor Garcia?
A No, we haven't worked out any details on that yet, at all.
Q Okay. Have you been convicted of any crimes involving moral turpitude or dishonesty?
A No. What's -- I don't know what moral turpitude is.
Q Well, maybe you should discuss it with your attorney and she can tell you --
MS. DAEHNKE: The answer was no. He said no.
MS. CARMICHAEL: And then he said he doesn't know what moral turpitude is.
MS. DAEHNKE: Well, do you want to define moral turpitude for him?
MS. CARMICHAEL: I thought I would leave that to his lawyer to do. I'm not going to define --
MS. DAEHNKE: Well, his lawyer already object -- well, you asked the question, counsel. You and your client asked the question. So he's a doctor. We got a lot of lawyers in here.
MS. CARMICHAEL: Okay. I'm entitled to know if he's been convicted of any crimes involving moral turpitude. And so if you're comfortable with his

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answer, then that can stand.
MS. DAEHNKE: Well, I, counsel, you asked the question. I instructed him. We could spend all day here, if you like, on this question. He said no. And I've instructed him. And I do not think that you're entitled to anything other than conviction of a felony.
BY MS. CARMICHAEL:
Q With regard to your current criminal indictment, what are, what have you been charged with? What are the charges?
MS. DAEHNKE: And I'm going to object. And the doctor has already asserted his Fifth Amendment privilege.
THE WITNESS: Based upon the advice of counsel, I assert my rights under the Fifth Amendment of the Constitution.
BY MS. CARMICHAEL:
Q So you're declining to even tell me what the charges are?
A Based upon the advice of counsel, I assert my rights under the Fifth Amendment of the Constitution.
Q Okay. At what stage are the criminal proceedings at this point?

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A Based upon the advice of counsel, I assert my rights under the Fifth Amendment of the Constitution.
Q Do you know whether your case is going to go to trial?
A Based upon the advice of counsel, I assert my rights under the Fifth Amendment of the Constitution.
Q Have you thus far been offered any plea negotiations?
A Based upon the advice of counsel, I assert my rights under the Fifth Amendment of the Constitution.
Q Going back to the care that you provide to babies while they're in the hospital, have you ever cared for a premature baby that's not in the NICU? They were just born prematurely but they're not in the NICU?
A Yes.
Q And I want to read you some of Doctor Weber's testimony and just ask you if you agree or disagree.
A Okay.
Q I asked her on page 19 of her deposition, "And what, if anything, did you learn regarding

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concerns that would be specific to caring for premature babies following their discharge from the hospital?"
She answered, "That's a very broad question, but I'll answer it the best I can. All of them need follow-up. That's the first thing."
Do you agree with that?
A Yes.
Q She goes on to say, "So we would contact or make sure the parents have a pediatrician that they're ready to see. And if they don't, you get them connected to one."
Do you agree with that?
A Yes, we try and follow them ourselves.
Q Okay. And she goes on to say, "And that the pediatrician is aware and can accept the patient."
Do you agree with that? Is that something you would do?
MS. DAEHNKE: Object to form.
But if you can answer, go ahead.
THE WITNESS: Can you rephrase that?
BY MS. CARMICHAEL:
Q So what she's getting at here, I believe, is that in the instance when they're not going to go with your practice, that they're going to go with a

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different pediatrician, do you make sure that pediatrician is aware of the child and can accept the patient?
A If there's a specific concern regarding the patient. But if there was, they probably wouldn't be being followed by a general pediatrician. Probably would be a neo baby, a NICU baby.
Q Okay. I'm just repeating what she said --
A Okay.
Q -- she would do, or did.
Okay, she goes on to say, "If they can accept the patient, then we usually send the discharge notes or any admission notes to the attending pediatrician the parents choose for the baby."
Do you agree or disagree with that? Is that something you would do?
MS. DAEHNKE: I would object to the form. It's argumentative. It's compound. Possibly takes it out of context.
But if you can answer, go ahead.
THE WITNESS: So you're asking if, if they're not going to follow with somebody in our group, that they're going to go to somebody else, would I Xerox the discharge summary and send it to the other doctor? Typically, no.

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BY MS. CARMICHAEL:
Q Okay. Thank you.
Moving now to your office practice, your clinical practice --
A Yes.
Q -- how many premature babies have become your patients over the years?
A I have no idea. Over the course of 22 years, I don't know, maybe -- you want like a number?
Q A ballpark. Obviously, you don't know precisely.
A Say 300, 400.
Q Okay. In providing pediatric care to a premature infant, a baby that was born prematurely.
A Yes.
Q Do you believe it's important to know what occurred during the neonatal course?
A Yes.
Q Is it important to know what problems or medical conditions the infant experienced while in the NICU?
A Neos get about, there's about seven or eight problems, and they almost all have all of them.
Q Okay. Now if you could answer my question. Do you believe it's important to know what problems or

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medical conditions the infant experienced while in the NICU?
A Of course.
Q Okay. How do you go about finding out what problems or medical conditions the infant experienced while in the NICU?
A Usually, I just ask the parent. I mean it's fairly obvious.
Q You believe that the parents have the medical sophistication and knowledge to be able to explain to you completely and fully what medical problems and issues their child had in the NICU?
A Most parents, yes. I mean after their babies graduated from NICU, usually the parents take the crash course in neonatal medicine. And they're aware of what's going on. And they're usually very good historians.
Q Do you believe it is important to know and understand what medical issues continue to require follow-up after the baby's release from the hospital?
A Yes.
Q And how do you find out what those issues are?
A Again, typically, if there's a, sometimes the parents come in with a summary. Sometimes the

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NICU has called me and let me know there are certain specific issues. A lot of times, you don't have either one of those. And so, you know, the parent is a pretty accurate historian and, and that's how you do it.
Q So if the NICU doesn't call you regarding a premature infant that becomes your patient, and if the parents don't bring you a discharge summary, is it your testimony today that you would then just solely rely upon the parents' report regarding the problems that the infant had in the NICU and the problems that need following up?
A Yes, I could get enough information from the parent.
Q Do you think it is important to know about abnormal test results that the child had during the neonatal course?
A Yes.
Q And how do you find out about those abnormal test results?
A Either the NICU tells me, or it comes from a summary, or the parent lets me know.
Q So if the NICU doesn't call you, and the parents don't come with a discharge summary, you would expect parents to be able to recall and tell you

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accurately about abnormal test results their child had while in the NICU?
A Yes.
Q What do you do to educate yourself regarding your patient's neonatal course?
A What do I do -- can you rephrase that question?
Q Yeah, what do you do? What affirmative steps do you take to educate yourself regarding your patient's neonatal course?
A I, again, if there's specific concerns that were raised by the NICU doctor, if there's a summary, or if, you know, I can ask the parent questions.
Q Okay.
A Was the baby on parenteral fluid? Were they intubated? Were they on a ventilator? How long were they on the ventilator for? What's the most oxygen the baby required? Do they want us to follow up with ophthalmology? What was the state of the eyes? What's the state of the GS? What are the feeds right now? Is the baby pooping? Is the baby peeing? Was there a brain bleed?
Q These are questions though that you are asking the parents?
A Yes.

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Q Is that right?
A Yes.
Q Do you call the NICU doctor and ask him those questions?
A If there's a question, sometimes, yes.
Q Sometimes yes?
A If there's a question, if I can't understand it, or if there's something that went on that was very unusual, I would ask the NICU doctor. But that would be very rare.
Q Well, and the only way you would know whether or not something unusual went on without speaking to the NICU doctor is if the parents accurately convey that information to you. Right?
A Correct.
Q Okay. How in the world do you know if you're getting all of the facts and all of the information from the parents regarding the neonatal course?
MS. DAEHNKE: Object to the form and the tone.
But you can certainly answer.
THE WITNESS: How I do know? Because most parents are very accurate. They are. They, they learn a great deal about neonatal medicine while the

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baby is in the hospital. And they come out knowing a lot. And I have faith in my parents. I believe them.
BY MS. CARMICHAEL:
Q Is it your experience, Doctor Conti, that oftentimes, if not all of the time, the hospitals that care for premature babies in the NICU will send -- that then become your patient -- will send the discharge notes to your office? They'll copy you on those?
A Repeat that question. I'm sorry.
MS. CARMICHAEL: (To the reporter:) Will you read it back, please?
MS. DAEHNKE: Then I'll object to form and argumentative and vague and ambiguous.
(The last question was read back.)
THE WITNESS: Yes, oftentimes.
BY MS. CARMICHAEL:
Q That's pretty standard practice, isn't it?
A Yeah, oftentimes they will, they will send a discharge summary.
Q Okay. And what is your office protocol when that summary is received? What happens with that summary?
A It gets copied and put on the baby's chart.
Q By whom?

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A By Medical Records.
Q Okay. Do they notify you that the discharge summary arrived?
A No.
Q Okay. So then how do you learn, how do you come to know when a discharge summary has arrived in your office?
A You look in the chart. And if it's there, it's there. If it's not, it's not.
Q Okay. So when you review the chart and find these discharge summaries copied and placed into them, do you read them?
A Yes.
Q And in your experience, do parents -- well, I think you already testified that in your experience, parents will oftentimes bring you a copy of the discharge summary --
A Yes.
Q -- as well?
A Sometimes they do. Correct.
Q And when they do, do you read them?
A Yes, usually we, we copy them. And usually I leave the original to, to the parent, and use that copy and put it in the chart. And we read it right then.

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Q What about the prenatal course? Do you think it is important to know what occurred during that timeframe as well?
A Sure. If it's relevant.
Q Would it likewise be important to know about abnormal test results during the prenatal period?
A It depends on the test result. I mean, you know, there's lots of abnormal results that can come out that would be completely irrelevant to taking care of the baby.
Q Okay. If the birth mother was consulting with a perinatologist during the prenatal course, would it be important for you to know what condition the perinatologist who was treating them was concerned about?
A Sometimes, yes.
Q Did you receive any education or training regarding the clinical significance of an abnormal nuchal translucency or nuchal fold on ultrasound during the prenatal period?
A That's usually a sign for Down's Syndrome.
Q And other than MayRose, are you aware of ever caring for any other infant who had an abnormal nuchal translucency or nuchal fold on ultrasound prior to delivery?

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A I believe it was mentioned from time to time.
Q During your medical training and education, did you receive any training regarding the diagnosis and treatment of rare blood disorders?
A Yes.
Q What did that training consist of?
A I believe when I was a resident, we did rotations in hematology oncology.
Q Okay. And did you receive education or training with respect to how to differentiate between anemia due to prematurity and anemia caused by a specific blood disorder or genetic defect?
A Yes.
Q And what did that training consist of?
A Again, as, you know, part of your residency, you do a, you know, rotation or two in hematology oncology, and sometimes it comes up during that.
Q So how do, what do you do to differentiate between anemia during to prematurity and anemia caused by a specific blood disorder?
A You know, the diagnosis of anemia, you first look at the size of the red cells. They're either small, normal, or large.
If they're too small, you think about iron

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deficiency, you think about sideroblastic, you think about lead poisoning, you think about anemia of chronic disease.

If they're large, you think about B12 and folate deficiency.

If they're normal, you, you look at a retic count and you see if they're hemolyzing or if they're not.

I mean the diagnose -- you know, there's a thousand things that cause anemia. So.

Q And when you say small, normal, or large, you're talking about microcytic, normocytic, and macrocytic.

A Correct.

Q Correct?

A That's correct.

Q Okay. And I believe you said that -- well, we'll come back to that in a minute.

Okay. So I assume you've also then received education and training and understand how to differentiate between amenia that's the result of an iron deficiency and amenia that has nothing to do with an iron deficiency?

MS. DAEHNKE: Object to form.

You can answer if you can.

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THE WITNESS: I, I know how to diagnose anemia of iron deficiency. Is that the question?

BY MS. CARMICHAEL:

Q You would be able to determine, you know how to tell whether anemia is being caused by an iron deficiency?

A Yes.

Q Okay. All right. Other than MayRose, have you ever cared for an infant, to your knowledge, who had anemia as a result of a genetic defect or a specific blood disorder?

A I have a couple kids who have hereditary spherocytosis.

Q Did you diagnose that?

A No.

Q They came to you with that diagnosis?

A Correct.

Q Prior to MayRose, were you aware of a condition known as Diamond-Blackfan anemia?

A Yes, I've heard of it before.

Q What, what did you know about that disease?

A It's called pure red cell aplasia. It's usually -- what do I know about Diamond-Blackfan anemia is your question?

Q Yes.

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A Okay. It's called pure red blood cell aplasia. It's associated with absent radii, absent thumbs, limb defects. It's very rare. It goes under the category of normocytic anemias with a low retic count. What they call the production anemias.

Q Okay. Okay. Switching gears. Do you recall when you first met Tiffani Hurst?

A Yes, when she had her first baby Tristin.

Q And you remember caring for Tristin?

A Yes.

Q Do you have an independent memory of MayRose?

A Yes.

Q Did you or anyone from your office ever show up to see MayRose while in the NICU?

A No.

Q Why not?

A Because that typically wouldn't be the practice. That wouldn't be standard practice. Usually they're being taken care of by the NICU until, until the time they're discharged from the NICU, and then I would see the baby.

Q Okay. Do you recall any phone calls from Ms. Hurst while MayRose was in the NICU asking you to become involved in her care?

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A I have no memory of that, no.

Q Did you ever speak with Doctor Blahnik or Doctor Piroozi or any physician at Sunrise Hospital regarding MayRose Hurst prior to her discharge?

A I don't recall speaking to one of the doctors regarding MayRose, MayRose prior to discharge, no.

Q How about following her discharge?

A Following her discharge, yes, I met her in the office.

Q No, how about following her discharge, did you speak with Doctor Blahnik or Piroozi or any physician at Sunrise Hospital who had cared for her in the NICU?

A No, I do not believe so. I have no recollection of that.

Q Why would you -- why not? Why didn't you contact them?

A Because she seemed like a typical preemie.

Q So there -- okay. What do you mean by a typical preemie? What is a typical preemie to you?

A She had one of the, she had a couple of the conditions that preemies usually have a lot of times.

Q Such as?

A NEC, N-E-C. And that's what I remember

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primarily about her history, that she had NEC.
Q What is your understanding of MayRose's neonatal course?
A I've learned a lot, of course, since, since this case began, and before that, you know, after she got sick, you know. At the time, I learned what was important about it.
Q Okay, and realizing it may be difficult for you, but I want you to try to distinguish between what you know now and what you knew then. And I'm asking you specifically when MayRose started treating with you as her pediatrician, what was your understanding at that point of her neonatal course?
A Again, the thing that stands out the most to me is that she had developed necrotizing enterocolitis. And that was the most significant thing about her medical history.
Q And what was your understanding of her condition upon discharge from Sunrise?
A She was still of a low birth weight -- she was still of a low weight. So we were going to have to grow her.
And I remember, you know, I remember the thing about the NEC.
And I remember there was some question about

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her, her brain. And so at a later visit, we got an MRI of her brain.
That was the main things I remembered about her.
Q Okay.
A At the time.
Q And were you aware of, besides the MRI and the NEC, were you aware of any other medical issues that needed specific follow-up care on?
A I remember them asking me about cystic fibrosis. There was some question of cystic fibrosis based on her course, which I thought was unusual, because it's very rare in African Americans. So.
Q Anything else?
A Well, now I know about the anemia.
Q But you did not know about the anemia at the time?
A I have no specific, I don't remember whether I, whether or not I dealt with the anemia specifically. No, I mean it's very, almost all preemies, when they come out of the NICU, have the diagnosis of anemia. Most of them have received transfusions. It's just a typical part of the history.
Q And do you know as you sit here today

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whether or not you were aware that MayRose had received transfusions during her stay in the NICU?
A I believe the mom had mentioned it, yes.
Q So this information that you obtained about the NEC, the question about her brain, the cystic fibrosis, the anemia, the transfusions, how did you learn that information?
A I, I believe that the, that Tiffani, her mom, told me those things right at the time of when I met the baby.
Q Okay. Given this information that Tiffani provided to you, did you feel that it would be beneficial to review the discharge summary for MayRose, to find out specifically what the NICU physicians were recommending as far as follow-up?
A I've dealt with babies like that many, many, many times before. And I didn't feel any specific need at that point in time that, that a summary needed to be reviewed. I mean, you know, I've seen, you know, 500 kids like MayRose before and had no trouble dealing with them.
Q You've seen 500 kids with an undiagnosis -- undiagnosed case of Diamond-Blackfan anemia?
A No. Preemies.
Q Do you have any knowledge regarding Tiffani

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Hurst's hospital course before MayRose was delivered?
A Regarding the mother's hospital course?
Q Right.
A No. I, I don't recall. I know it was a difficult pregnancy.
Q Did you have any knowledge of what treatments or medications she and the baby received prior to delivery?
A I have no specific memory.
Q Did you know if MayRose was a vaginal birth or a C-section delivery?
A I believe she was a C-section, but I do not remember.
Q Were you, did you know of any medications that were administered to try to stop the labor?
A No, that would be, typically, when they try and stop labor they would use terbutaline. But that's really not very relevant.
Q Did you have an understanding as to why MayRose was delivered prematurely?
A Happens all the time. I mean like, you know, typically, there is no reason. I mean.
Q Okay. Anecdotal responses aside, in this specific instance, did you have an understanding as to why MayRose was delivered prematurely?

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A I don't think I, did I specifically know why MayRose was -- I mean almost never do you find out why the baby was delivered prematurely. I mean premature births happen all the time. I mean usually there is not a specific reason.

Q So the answer is no, you did not know why MayRose was delivered prematurely?

MS. DAEHNKE: The answer is what he said.

Doctor, if you want to look at your chart, or if you need to clarify the answer for counsel, given that you're not an OB.

THE WITNESS: I mean this is typically not something that we would deal with. As a general pediatrician, you wouldn't.

BY MS. CARMICHAEL:

Q What, if you know, what would be the clinical significance of delivery at 28 and a half weeks for the child? What are the biggest concerns at that point?

A The biggest concerns would be lung maturity. You know. The need for surfactin. Brain bleed, by far more that would be way up there. Did the baby have a PDA? Was there an infection that was treated? That's where the NEC comes in.

Almost all of them during the course of

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anemia hospitalization, particularly a 28-weeker, is going to develop anemia at some point. And almost always it's from the frequent blood draws.

So, you know, anemia is like pretty much the diagnosis of I would say virtually every 28-weeker who's ever been born. Usually requiring frequent transfusions. Or multiple transfusions, I should say.

Q Okay. What do Apgar scores tell you?

A Very little. An Apgar score is kind of an outdated, you know, it stands for appearance, respiration, grimace, activity, and reflex. So I mean it's sort of a gross approximation of what a baby's brain is doing at the time. Like their condition when they're born at one minute, and then at five minutes, and then again at ten minutes. But they have very little import on care anymore.

Q Okay. All right. Did you ever know what MayRose's Apgars were?

A I don't recall specifically, no.

Q Okay. With regard to hematocrit, do you know what the normal range for a premature infant is?

A It depends on the age at gestation.

Q Okay. So what would the normal hematocrit be, what would be the normal range be for a 28-and-a-half-week-old?

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A I do not know specifically.

Q And I think you've indicated that there are lots of different reasons for anemia. Is that true?

A Yes. But a preemie, there's primarily one.

Q And what is that?

A That would be blood loss anemia from the frequent blood draws.

Q Frequent blood draws to, to do CBC's?

A To monitor CBC, electrolytes, blood gases.

Q Okay. Did you ever review any of MayRose's neonatal lab results during the time she was your patient?

A I don't recall. I don't believe so, no.

Q Now, what is your understanding -- or what was your understanding when MayRose became your patient as to the status of her anemia at the time of her discharge from Sunrise?

A I don't recall. I believe -- I remember Tiffani mentioning that the baby had, had had anemia and required some transfusions.

Q Okay. Did you do anything to follow up on that to see if the baby was still anemic?

A You do what you need to do. You know. You give every baby the tests that they need, and you do nothing more.

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Q Did you do anything to follow up on MayRose's anemia to see if she was still anemic?

A You examine the baby. And I would examine MayRose, and on every patient you kind of do this to the eyes and you can see if they're anemic or not.

Q You can tell --

A Every baby.

Q You can tell --

A Absolutely.

Q -- on a baby by looking in their eyes if they are anemic?

A By looking at the conjunctiva of the eyes, yes, you can.

Q And was MayRose anemic?

A No.

Q What is your understanding, or what was your understanding, when MayRose became your patient, with regard to her reticulocyte count at the time of her discharge from Sunrise?

A I don't remember what her reticulocyte count was at the time of discharge.

Q You didn't know. You had no idea what the reticulocyte count was at the time of discharge, did you?

MS. DAEHNKE: Object to form. Are you

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asking what he knows now, what he knew then?
MS. CARMICHAEL: I'm talking about what he knew then, when she became his patient.
MS. DAEHNKE: That wasn't your question.
THE WITNESS: The reticulocyte count is not something you're typically going to look at on preemies who come out of the NICU. I mean.
BY MS. CARMICHAEL:
Q Unless, of course, they had an issue with their reticulocyte count. Right?
A Perhaps.
Q And if they had a very low reticulocyte count that basically demonstrated they weren't making any reticulocytes, that would be something that you would probably want to follow. Do you agree with that?
MR. RIGLER: Objection to form and foundation.
MS. DAEHNKE: Join. I'm joining the objection.
THE WITNESS: Again, a reticulocyte count is not, I mean it can be high or low on a preemie. And it's almost never relevant. I mean if a baby has iron deficiency anemia, the reticulocyte count is going to be low. So, you know, when you put them on iron,

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sometimes it goes up, and sometimes it doesn't.
BY MS. CARMICHAEL:
Q Isn't just the reverse the case, Doctor, that if it's an iron deficiency, the reticulocyte count will typically be high?
A Not if, as a matter of fact, you use the, you put them on iron. If the reticulocyte count goes up after that, then you think, gee, it could be iron deficiency anemia.
But then after you've had then on iron for awhile, the reticulocyte count is going to be normal or low anyway. So no, the reticulocyte count is typically not that important.
Q Okay. Do you know whether, or did you know, when MayRose became your patient, whether a different natural diagnosis regarding the cause of her anemia was ever undertaken during the neonatal course?
A Can you repeat that question? Did I know whether?
MS. CARMICHAEL: (To the reporter:) Will you repeat the question, please?
(The last question was read back.)
MS. DAEHNKE: Do you have that question clear? Is the question did you or did you?
MS. CARMICHAEL: Did, when she became his

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patient.
THE WITNESS: Yes.
I'm sorry, the question, can you repeat it?
MS. CARMICHAEL: (To the reporter:) Would you read it again?
MS. DAEHNKE: Well, the question as you phrased it, which she's going to read back, says do you or did you. And so did you want her to read it just saying did you?
MS. CARMICHAEL: I'll clarify.
BY MS. CARMICHAEL:
Q When MayRose became your patient.
A Yes.
Q Did you at that time have an understanding as to whether or not a differential diagnosis regarding the cause of her anemia was ever undertaken during her neonatal course?
A I don't recall that being a question, no.
Q Did you know that her father had thalassemia?
A No.
Q You don't recall --
A I don't recall that. I don't recall that being a question or an issue.
Q Do you remember Mr. Abbington telling you

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that he had thalassemia?
A I have no specific memory of him telling me that, no.
Q Did you --
A It's possible he might have. I don't recall that.
Q Okay. Did you ever do anything to determine whether she had, MayRose had inherited her father's thalassemia?
A To work up thalassemia, you wouldn't work that up until a little bit later date. You would look for an elevated hemoglobin A2 fraction. You get a hemoglobin electrophoresis. But that wouldn't kick in until months later. Weeks to months later.
Q Let me ask you this: When MayRose became your patient, did you have an understanding of whether her anemia was microcytic, normocytic, or macrocytic?
A You know, again, typically, you know, if you look at preemies, if you look at babies in general, the cells are a little bit larger than when you look at it for an older child of four and adult. So those numbers about macrocytic, microcytic on a preemie, on a newborn baby, they're kind of skewed. They're kind of skewed to the high side. So again, what looks to be a normocytic anemia can actually be a macrocytic

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anemia in an older kid, or a microcytic.
Q And my question was, did you have any understanding, when you assumed MayRose's care, as to what her anemia had been in the NICU? Normocytic, microcytic, or macrocytic?
A It wouldn't be something you would typically look at. I mean, you know, almost all the anemias that come from the nursery, there are the regular normocytic iron deficiency blood loss anemias that you see just from frequent blood draws.
Q Okay.
A It's true on almost all preemies.
Q And did you check to see if in fact MayRose's had been normocytic?
A I do not recall checking to see whether it was normocytic or not.
Q Okay. Diamond-Blackfan anemia is macrocytic, characterized by reticulocytopenia. Is that correct?
A Typically, Diamond-Blackfan is going to fall under the normocytic anemias.
Q Do you agree that Diamond-Blackfan anemia is characterized by reticulocytopenia?
A Yes.
Q Were you aware that within the ten days

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prior to MayRose's discharge she was transfused three times? Were you aware of that when you assumed her care?
A I have no specific memory of that. And again, that wouldn't be unusual in a preemie.
Q Were you aware that her hematocrit was also falling at the time of her discharge?
A Again, that wouldn't be unusual for a premature baby, that sometimes hematocrits are falling at the time of discharge. They're approaching their nadir, you know, their low point with the red cells.
Q So if it's --
A -- which occurs at around three months anyway, so.
Q If it's not uncommon then, if it's normal for a baby's hematocrit to be falling at the time that they're discharged from the NICU, is that an issue then that the pediatrician should follow up on or not?
MS. DAEHNKE: If you can answer -- object to form. If you can answer the question, just answer the question.
THE WITNESS: Okay, I'm sorry, repeat. Should I notice that the hematocrit is falling?
BY MS. CARMICHAEL:
Q No, my question is, I believe your testimony

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is that it's not uncommon for the hematocrit to be falling --
A Correct.
Q -- in a premature infant that's getting discharged from the NICU?
A At about three --
Q That's not uncommon?
A -- to four months. Correct.
Q Okay. So my question to you is, then should the pediatrician assuming the care of that infant, is that an issue that the pediatrician should follow up on?
A You should look at every child for anemia. I mean everyone who comes in gets looked at for anemia. It's just part of my routine exam. I look at the conjunctiva of the eyes, and you can see what the hemoglobin is pretty accurately.
Q Okay. So then why, Doctor, would the NICU doctors find it necessary to draw blood to check her hematocrit if they could just simply look at her eyes and, "Oh, she's fine"?
MR. RIGLER: Objection, form, foundation.
MS. DAEHNKE: Join.
MS. URDAZ: Calls for an expert opinion, speculation.

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MR. RIGLER: Join.
THE WITNESS: NICU doctors do a lot of blood tests. You know. That is the reason that the babies become anemic is because they do a lot of blood tests. And they know that, and we expect that. And, you know, they have to get some electrolytes. I mean they're looking at not only just what the hemoglobin is, there's looking at the platelet count. I mean there's a lot of reasons, you know, to get a blood test. And it's nice to, you know, if you're going to draw it for something else, you might as well look at what the hemoglobin is also.
So I don't see what your point is.
BY MS. CARMICHAEL:
Q Okay. But as you sit here today, it's your testimony that you can tell whether a child's hematocrit is normal simply by --
A Yes.
Q -- looking at their eyes?
A Yes, it is.
Q Were you aware that MayRose had not made it three weeks without needing a blood transfusion since the day she was born? Did you know that when you assumed her care?
A I have no specific memory of that. But

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again, that is very, very typical for preemies in the, in the NICU.

Q Okay. If a preemie is needing transfusions every three weeks at the time of their discharge, is that something that the pediatrician would need to follow-up on when they assume care of that baby?

MS. DAEHNKE: Object to form.

You can answer if you can.

THE WITNESS: You do test on the baby -- I mean you are following up on that. By looking at the baby, you are following up on it. I mean you are following up on that problem as it exists. I mean you don't want to draw a lot of blood when you don't have to.

BY MS. CARMICHAEL:

Q And for those babies that have serious genetic blood disorders, how does your eye test work for them?

A You should still be able to tell whether they have anemia or not. I can tell whether they have anemia or not. Whether it's, I mean by these rare, you know, like you're saying, these rare genetic blood disorders.

Q Were you aware that within the ten days prior to MayRose's discharge she had a low and falling

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retic count? Did you know what when you assumed her care?

A Didn't we just answer that question before?

Q I don't, I don't remember you answering that one.

A Repeat the question then.

Q Did you know when you assumed her care that she had a low and falling retic count at the time she came out of the hospital?

A I know you asked me that question earlier.

MS. DAEHNKE: Well, just for purposes -- asked and answered. You can answer again so we can just move on.

THE WITNESS: No, I do not believe I was specifically aware that her retic count was falling at the time.

BY MS. CARMICHAEL:

Q What is the clinical significance of a low and falling reticulocyte count?

A Didn't I answer that one also? Okay. A clinical significance of a falling retic count could be that the baby was just put on iron. You know. Like when you first put them on iron, the retic count initially rises, and then it falls, it goes back down to normal.

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So the fact that the retic count was falling, you know, usually it's not going to be very relevant.

Q And if they haven't just been put on iron, what would the clinical significance be, if you know, of a low and falling reticulocyte count?

A That it's probably iron deficiency anemia.

Q Are you aware that a low reticulocyte count can indicate bone marrow disorders or aplastic crisis?

A Yes. It goes under the production anemias, yes.

Q And in fact, it points to suppression of the bone marrow and aplastic anemia. Right?

A Or a viral infection which also suppresses the bone marrow.

MS. CARMICHAEL: (To the reporter:) Would you mark that?

(Plaintiffs' Exhibit B marked for identification.)

BY MS. CARMICHAEL:

Q Doctor Conti, I've handed you what will be Exhibit B to your deposition.

A Yes.

Q And I'll represent that I pulled these from your chart.

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A Yes.

Q And I believe they represent the six office visits that MayRose had with your clinic.

Could you just look those over and tell me if that is correct?

A Yeah, these were the six from August -- before she got very sick. Before she got sick.

Q Okay, yes.

A Yes.

Q Thank you for that correction. Yes.

Okay, so August 5 being the first one, October --

A Yes.

Q -- 24th being the last?

A Correct.

Q Okay. All right, let's just look at the first visit. This visit, she actually saw you. Is that correct?

A Yes, that's correct.

Q And this was a well check?

A Yes, that's correct.

Q She had just been discharged from the hospital a couple of days earlier?

A Correct.

Q Is that right?

A Uh-huh.
Q Okay. And who's writing is on this?
A It's probably Tiffani Rainstanos, probably like my nurse who writes my notes for me.
Q Okay. And here you note, she, I guess, Tiffany noted under "Development," she has a plus with "smiles." So the baby was smiling at this time?
A Correct. Correct.
Q All right. Did you, in addition to this chart note here, did you make any independent notes of your own?
A I don't believe so, no.
Q Is that not your practice, you don't do your own notes?
A Typically, no.
Q Okay. What do you recall the parents telling you on this visit?
A I remember hearing about the NEC. I remember hearing about -- I mean necrotizing enterocolitis. I remember hearing about the cystic fibrosis question. I remember, you know, we were concerned about the brain at that time. And, you know, but the fact that she was smiling was encouraging. We talked about how she was feeding, how she was pooping, peeing, sleeping. We talked about

scheduling. We mentioned about development. How do you tell when the baby is going to get sick, feeding, lethargy, irritability.
Q And what did you tell the parents with regard to how to tell when the baby gets sick?
A Typically, a baby is going to be not eating well, lethargic, or irritable. Lethargic means not sucking on the feeder well. Irritable means weak, whining, crying, doesn't stop.
Q How did MayRose appear on this visit, do you recall?
A She appeared well. I mean she, you know, for a preemie who had just been through what she had been through, she appeared to be doing quite well.
Q Okay. If you'll turn to the next visit.
Well, and let me just ask you back on the first one. So have you told me everything you recall the parents telling you?
MS. DAEHNKE: Mr. Abbington, do you need to take a break? Because we could just take a quick break and you could get some water or something?
MR. ABBINGTON: I'm okay.
THE WITNESS: Okay. I'm sorry?
BY MS. CARMICHAEL:
Q Have you told me everything you recall the

parents --
MR. ABBINGTON: What did I do?
MS. DAEHNKE: Nothing. I thought you needed a break. I'm sorry.
MR. ABBINGTON: I'm okay.
MS. DAEHNKE: Okay.
MR. ABBINGTON: Thank you though.
MS. DAEHNKE: Okay. Okay.
Okay, sorry, Doctor.
THE WITNESS: That's okay.
MS. CARMICHAEL: If anyone, including you, ever needs a break, just say so.
THE WITNESS: Okay, thanks.
BY MS. CARMICHAEL:
Q Back on the first visit. Do you, have you told me everything that you remember mom and/or dad discussing with you about MayRose on that visit?
THE VIDEOGRAPHER: Excuse me, you're covering the mic.
THE WITNESS: Oh, I'm sorry. Thank you.
Everything that they said to me? I mean that was four years ago. So I don't know if I can recall exactly everything that was being said to me at that time.
//

BY MS. CARMICHAEL:
Q Well, sure. I'm asking you if you told me everything you remember about your conversations with mom and dad on that date?
A I'm sure if you asked me later, I could probably tell you a couple more things. But I believe to the best of my ability I'm telling you, the best of my memory I'm telling you what I remember.
Q Okay. And what do you remember about MayRose yourself on that occasion?
A She was little. You know, she had the typical preemie, like, it's not like exactly muscle wasting, but I mean, you know, real, real skinny.
But she was breathing well. She looked pretty good. I mean, you know, considering, you know, that she had been through the NEC.
And she had been through, you know, there was a question of cystic fibrosis. I thought that was unusual. But we went ahead and like, I remember the mom mentioning like, you know, she wanted, you know, I remember Tiffani mentioned she wanted that ordered. And I said, "Okay, if that's what, you know, if that's what we're doing, I mean, yeah." You know, if that's what, you know, mom wanted and, you know, the neos wanted, she mentioned the neos wanted it. And so.

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THE VIDEOGRAPHER: We need to change tapes.
MS. CARMICHAEL: Okay.
THE VIDEOGRAPHER: This marks the end of tape number two. It's 3:53 p.m. We're off the record.
(A short break was taken.)
THE VIDEOGRAPHER: We're back on the record. This marks the beginning of tape number three. It's 4:05 p.m.
BY MS. CARMICHAEL:
Q Doctor Conti, taking you then back to this first visit that you had with MayRose.
A Yes.
Q Do you have a memory of both of her parents being with her on that visit?
A Yes.
Q Okay. And we were going over sort of the, the information that you were discussing with the parents on that visit.
Do you remember whether or not the topic of the brain bleed came up on that visit?
A You know, the brain's always a concern and it tends to be kind of like where I tend to focus. I, I believe that did come up. I have no specific memory talking about a bleed in the brain. But I know that,

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you know, it's just such a common thing in preemies that I always ask about it.
Q Okay.
A And, and the degree of the bleed and, you know, how we're going to follow it up, and what it means for the development, and so on.
Q Do you remember what the parents told you with regard to the brain bleed?
A I do not specifically remember, no. I'm sure they would have mentioned it, but I don't remember specifically what they said, no.
Q Do you believe you had an understanding on this, as of this first visit as to the, to the degree of the bleed, or the seriousness of the bleed?
A I, I would have understood it at the time. But I, I, yes, I believe I would have had an understanding of the degree -- you rank them one to four. So depending on what the rank was.
Q And as we sit here today, what is your understanding as to the level of MayRose's brain bleed?
A I don't recall.
Q Do you know whether or not you ever knew the degree, what the degree of her bleed was?
A I'm sure I would have known at the time,

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yeah. If there was a brain bleed, I would have asked like what grade it was, and I can tell you based on that. Do I remember what they told me it was then or, you know, what it is now? Or, I mean I don't even, to be quite honest, I'm not even recalling that there was actually a brain bleed. But.
Q Okay. Do you, but any information that you would have obtained regarding the brain bleed would have come from MayRose's parents. Is that correct?
A Probably. Probably. I mean almost always the parent knows, you know, the degree of the bleed. I mean, you know, they know that that's a real important number, and they know it, you know, it really impacts the baby's future.
Q Okay. In MayRose's case, did you, do you know whether or not you did any independent research to determine what, whether she had a brain bleed and what degree of bleed it was?
A I do not recall specifically. I know I would have asked about it. I ask on every preemie: Do we have a bleed in the brain? Do we have a ventricular hemorrhage, is what it's called. And what was the grade of it.
I don't recall specifically whether she had one or not, or if she did, what grade it was.

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Q Okay. As of this first visit, what, if any, concerns did you have for MayRose?
A Mainly development.
Q In what regard?
A Any preemie, even one who has had an uncomplicated course, can show signs late of developmental problems.
Q What kinds of developmental problems?
A Stiffness, spasticity, anything ranging from ADHD's to severe mental retardation. I mean that's, you know, that's the range of things you can see. But I mean, you know, you're always hopeful, you know, based on what, you know, the -- typically, the thing that impacts that most is the history of, of a brain bleed. And if there's not one, if there's a low grade one, you say okay, we should be okay here. Let's, you know, let's remain cautiously optimistic.
Q Okay. And do you remember seeing anything in your examination of MayRose on this date that caused you to have concern for her?
A No. She was just a, a preemie. She had the unusual-shaped preemie head. I think the fancy medical word is plagiocephaly. But we affectionately call it "toaster head." You know, I mean it's typically what you see in a preemie who's been through

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a NICU course.
Q Did you express any concerns, share any concerns with mom or dad about MayRose on that date that you recall?
A I don't, I don't recall expressing any specific concerns. Again, you're always going to watch out for the brain. I mean that's one thing we really focus on, so.
Q Okay. All right, and in fact, at some point at, at Ms. Hurst's request, you helped her to obtain a follow-up MRI of MayRose's brain. Do you recall that?
A Correct. I believe it was the second visit. And I remember her mentioning about an ultrasound of the head. And I said let's get the real one, you know, because MRI's are much better tests, I think. I think it really shows even subtle defects.
Because they can have this condition called PVL, periventricular leukomalacia, that sometimes doesn't appear until late. And it can even appear like late, late. But I mean but that can, you know, the best sign of that, or the best test for that would be an MRI rather than a head ultrasound. Head ultrasounds sometimes does not show if it's there.
Q Okay. And you, and so you helped her order a follow-up MRI?

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A Correct.
Q Okay. And do you recall the test results of that MRI?
A I thought it was normal. To my recollection, it was a normal MRI.
Q Okay. All right. And that -- let's see if I have that.
MS. CARMICHAEL: (To the reporter:) Will you mark that, please?
(Plaintiffs' Exhibit C marked for identification.)
BY MS. CARMICHAEL:
Q And I'm handing you, or you've been handed what will be Exhibit C to your deposition. And are those in fact the MRI results that you received back on MayRose Hurst?
A Looks like it, yeah. I believe that's true.
Q And it appears from that document --
MS. CARMICHAEL: There you go, Patricia.
MS. DAEHNKE: Thank you.
BY MS. CARMICHAEL:
Q -- that that test was done on September 30. Is that right?
A Yes, correct.
Q Okay. So that was almost two months after her discharge from the NICU. Is that correct?
A That's about right.
Q Okay. And those results are indeed normal. Is that right?
A Yes, they are.
Q Okay. And do you remember that Mrs. Hurst also asked you to help her schedule some follow-up testing? I believe it's called a chloride sweat test?
A Yeah, that was the cystic fibrosis -- I thought we, I thought they were, it was more like a blood test we were looking for to -- I'm trying to remember now. It was, it was either there was like kind of a like a soft marker that she might have the gene for CF, cystic fibrosis, and so order the sweat chloride, or that we had to do the sweat chloride later. I thought they wanted genetic testing done for CF. I thought it was more like a blood test that we had ordered. But I don't recall specifically. I remember there was a test for CF that was ordered. Whether the sweat test or, or the actual genetic test, which is more accurate.
Q Okay.
A Sometimes a sweat test won't be abnormal until later.
(Plaintiffs' Exhibit D marked for

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identification.)
BY MS. CARMICHAEL:
Q I'm handing you what will be Exhibit D to your deposition, Doctor. And it's a two-page exhibit. Do you see that?
A Okay.
Q And does that refresh your memory --
A Yes.
Q -- regarding --
A Oh, yes.
Q -- what test was ordered by your office?
A Uh-huh.
Q And what test was ordered?
A They ordered a sweat test. And it was a Grade I intraventricular hemorrhage. So we ordered a, looks like they were going to order a head ultrasound, CT scan. But I know it was an MRI that we eventually ordered.
Q Okay. But you did order the sweat chloride test.
A Correct.
Q Is that right?
A Correct.
Q And do you remember the result from the sweat chloride test?

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A I believe it was normal.
Q Okay. All right. And then just taking you back to that first page of Exhibit D, where you've got Grade I IVH?
A Yes.
Q Her medical records reflect a Grade I germinal matrix bleed. Is there any distinction between a germinal matrix and an IVH?
A Grade I is also known as a germinal matrix hemorrhage.
Q Okay. And with Grade I, the prognosis is generally very good. Is that true?
A Pretty good. Yes. Absolutely.
Q Okay. All right. And as we discussed, the MRI came back normal. Correct?
A Correct.
Q Okay. And it is your memory that the sweat chloride test also came back normal?
A Correct.
Q All right. And then on that page one of Exhibit D, it indicates that you're also ordering I believe Synagis to start in September?
A Yes.
Q And is that a treatment that's preventive to avoid RSV?

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A That's correct.
Q Okay. All right. Do you remember also ordering a swallowing study? She was referred to speech therapy, I believe, for a swallowing test?
A That's possible. I don't recall specifically doing that. But that's a lot of preemies will have difficulty eating, swallowing. So you order what they call a modified barium swallow test.
Q Okay. And do you recall what the results of MayRose's swallow study was?
A I do not recall.
Q All right.
A I imagine it was normal, otherwise we would have...
Q Taking you back then to Exhibit B to your deposition, the chart notes, the visit notes?
A Yes.
Q If we could go to the next visit?
A Okay.
Q You saw her on this occasion. Is that correct?
A Yes.
Q And again, the writing on this chart note is not yours other than your signature. Is that true?
A Correct.

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Q Okay. So would you have filled out any other paperwork or notes --
A No.
Q -- in connection with this visit? Okay.
Do you have an independent memory of this visit?
A An independent memory, no.
Q Do you remember whether both parents were present, or just one?
A I thought just mom was there.
Q Okay. And do you remember how MayRose looked on that occasion?
A I thought, again, I thought she was looking okay. She was gaining weight, which I thought was good. She -- what else? There was some questioning about that she was refluxing. But she wasn't -- I'm just taking that from the chart. Independent memory -- I believe that's when the conversation occurred regarding the MRI versus the head ultrasound.
Q Okay. All right. And you can refer to your note for these next questions.
A Uh-huh.
Q So what, what was going on with her, according to your note, on this visit?
A Let's see. She was breast feeding. Was

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also being supplemented and Enfamil AR at the time. She was pooping and peeing good. We looked for signs of reflux. She wasn't screaming in pain. She wasn't losing weight. She wasn't turning blue. There was no diarrhea, vomiting, constipation. She was smiling. She was not rolling yet.
Let's see, we talked about head injury, ingestions, water injuries, thermal injuries, car seat. We asked about a pool. The baby was not colicky.
Immunizations were up to date at that point. And that's when we did the first set. It probably was actually the second set. The first set we give them in the hospital. Typically, that's what would be done.
Her exam was normal. Her neck supple without rash. Eardrums and throat were clear. The chest was clear. Heart without murmur. Abdomen was soft. Normal female.
Well child with a question, you know, with a question of static encephalopathy, which is like a kind of a code word for CP. So that's why we were getting the MRI.
Q Okay, and that's because she had the Grade I bleed?

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A Correct.
Q During her neonatal --
A You have to sort of. Right.
Q Okay. Did you see any other, I mean other than knowing that she had had the Grade I bleed that needed follow-up --
A No.
Q -- were there any other indications?
A No memory of any problems at that point in time.
Q Okay.
A I remember, and I think the mom had said we needed to get a referral for PT, OT, and ST. I mean that's why we would typically do that. I believe the mom had requested that that referral be done, and so we did that as well.
Q Okay. Do you remember Mrs. Hurst telling you that she, the baby was receiving those services through Summerlin -- or excuse me, through Sunrise, I believe, Hospital, and she wanted to have those services provided elsewhere, and asked you for the referrals?
A That's a possibility. I have no specific memory of that. But...
Q And those services --

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A It's highly possible.
Q -- are typical for a preemie?
A I mean most of them don't require that. But some do. Some do.
Q Okay. All right. Anything about MayRose on the second visit that caused you any concern?
A No.
(Plaintiffs' Exhibit E marked for identification.)
BY MS. CARMICHAEL:
Q Doctor Conti, if you'll look at Exhibit E to your deposition. This document came from your chart. Is this something that you have parents fill out when you assume the care of their children?
A Yes.
Q Okay. And do you read these documents?
A Almost never.
Q So you're admitting that you don't typically read these?
A No.
MS. DAEHNKE: Object to form.
BY MS. CARMICHAEL:
Q Okay. How did you know -- you mentioned that you did give the baby some immunizations. How did you know what immunizations the baby had received

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and where to pick up with those?
A I didn't. I mean typically if the baby is in the hospital in the NICU for two months or more, they'll usually do the first set of immunizations.
Q So you would just make that assumption and then go from there as far as which immunizations to give next?
A Well, you wouldn't just make the assumption. You would ask the mom, has the baby received any immunizations yet.
Q And if the mom wasn't sure what had been given, what would you do in that case?
A Then we would have to call the hospital. Because that would be, you know, very significant.
But typically, you know, 99.9 percent of your moms are intelligent women, like Mrs. Hurst, like Tiffani. And so I would take her at her word. If she said immunizations had been given, and usually they will say, yeah, the first set has been given. I mean parents know that. They're, they're mostly a pretty intelligent crowd.
Q All right. If you will turn to page two of this document?
A Uh-huh.
Q Do you see down there in section G, where it

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says, "Has your child had," and it goes through a list of various immunizations. Do you see where Ms. Hurst has drawn a bracket and said, "Unsure, check the discharge statement"?
A Yeah, I see that's written there.
Q Now, your testimony is you wouldn't, you probably wouldn't have read this. Right?
A Correct.
Q So I'm just wondering, how do you, do you have any knowledge about how you would have determined what MayRose had had and where those immunizations should pick up at that point?
MS. DAEHNKE: Other than what he's already testified to?
MS. CARMICHAEL: That the mother told him?
MS. DAEHNKE: He testified what his custom and practice was if they weren't certain.
But go ahead, answer.
BY MS. CARMICHAEL:
Q I'm asking in this specific case of MayRose Hurst?
A I don't recall. I mean I don't, again, this, I don't recall seeing this. So, okay, what is my typical practice?
Q No, I'm asking you, do you have a memory of

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what you did in MayRose's case?
A No specific memory. I mean typically, again, the mom will mention it to me.
Q Okay. Where she's referring you specifically here to the discharge statement, do you have a memory of going then and reviewing the discharge statement at that time?
A The discharge statement? Oh, the discharge summary?
Q Right.
A I do not recall whether or not I saw the discharge summary at this point in time.
Q Okay. Okay, if we could go to the next office visit.
A Uh-huh.
Q Now, this does not -- this is a sick visit. Right?
A Correct.
MR. RIGLER: What is the date of that?
MS. CARMICHAEL: The date is September 30, 2008, Foothills Pediatrics 0122.
BY MS. CARMICHAEL:
Q Did you see the baby on this date?
A Yes.
Q Okay. And do you have an independent memory

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of this visit?
A No.
Q Okay. Based on your chart note then, or what we have here -- and again, none of this is in your writing. Correct?
A Correct.
Q Okay. What were the, what were the concerns or what was the purpose of the visit on this date?
A The baby was having some cough and congestion, as the chief complaint. There was no fever. Baby had some sniffles. Baby had some cough. There was no vomiting or diarrhea, no constipation. The baby didn't seem to be in pain. The baby had a little rash on the face. Was eating all right and peeing all right.
Baby had a history of NEC. Nobody smoked in the house. Baby didn't go to day care.
Exam was pretty normal except for a little rash on the face. Baby had a little congestion in the nose, a little redness in the throat. The lungs were clear.
So the baby ways diagnosed with seborrhea, upper respiratory infection, cough, pharyngitis, which is a sore throat. Come back if symptoms gets worse or temp is greater than 102.

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The RSV test was negative, so no RSV. Also we said usual URI treatment, which means suck out the sniffles with saline drops. Keep her sitting up. And one percent hydrocortisone cream for the face if necessary.
Q Okay. Do you remember anything about this visit, any conversation you may have had with Mrs. Hurst about MayRose?
A Specific conversation, no.
Q Okay. Was there anything about this visit that alarmed you or concerned you?
A No.
Q Okay. All right. And will you turn to the next page, please? Foothill Pediatrics Bates 0121. The date is October 1, 2008. So the very next day.
A Uh-huh.
Q And this is the regularly scheduled well visit. Is that right?
A Correct.
Q Okay. And do you have an -- did you see the baby on this date?
A Yes, I did.
Q Okay. And do you have an independent memory of this visit?
A No, I don't.

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Q Okay. Then based again on the chart note, what can you tell me about this visit?
A Baby was on formula. Had begun some stage one foods. Was pooping and peeing good. There was no diarrhea, vomiting, constipation, or pain with pee. The baby was smiling. The baby was not rolling yet.
We talked about head injury, ingestional injuries, water injuries, thermal injuries, and car seats. Baby was not a colicky baby. Shots were discussed and were apparently up to date. And mom didn't have a pool. Everything else was okay.
The exam was normal. Her neck supple. With without rash. Eardrums and throat were clear. Chest was clear. Lungs without murmur. Abdomen was soft. Was a normal female. Well child.
Come back at six months. Second hepatitis B shot was done.
Q Okay. And on the ENT portion of the exam?
A Uh-huh.
Q What does that say, TM and OP?
A Oh, tympanic membranes and oropharynx.
Q Clear?
A Yeah, ears and throat.
Q Is there any indication on this chart that the eyes were examined?

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A You wouldn't ordinarily note that.
Q You would not note that?
A No. I mean you always, I always examine the eyes. It's just one thing, you know, you look, you just go like that with the conjunctiva. You can look at the baby.
Q And that is something you do on every visit with every child?
A Pretty much.
Q But you never note it?
A No.
Q All right. So on this visit, this is just the day after she was there with the cough?
A Uh-huh.
Q She's assessed as a well child?
A Yes.
Q So she's better from whatever she, issues she was having? Yes?
A I would imagine, yes.
Q Okay. Any concerns at this point for the baby?
A Doesn't look like it, no.
Q Okay. All right. Okay, if you'll just turn to the next visit?
A Uh-huh.

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Q Dated October 18, 2008.
A Yes.
Q Foothill Pediatrics 0120.
A Uh-huh.
Q Now, on this occasion, you did not see the patient. Is that correct?
A No. Correct. It was Doctor Malixi.
Q Okay. Did you have any conversations with Doctor Malixi about this visit?
A No.
Q Did you ever discuss this visit with Doctor Malixi?
A I don't believe so.
Q All right. Did you ever review this chart note?
A I believe I've looked at this chart note since, yes.
Q Okay. In conjunction with this litigation?
A Yes.
Q All right. Did you look at it prior to this litigation being filed?
A No.
Q Okay. And just from your review of this chart note, what were the baby's, what was concerning about the baby on this occasion?

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A Baby had vomited three times the day before. Then she writes in her note, "Vomited three times yesterday. Last one was this morning, was about two hours before the office visit." Let's see. Something diaper. She was passing gas. She had a bowel movement the day before. Oh, she had had a wet diaper in the morning. She was passing gas. She had a bowel movement the day before.
Past history: Ex-preemie. History of NEC. Older sibling was throwing up five days ago. Nanny's children had also vomited. So looks like there was a virus going on in the house.
She writes, "No acute distress." I'm trying to see what she writes here. Not in distress -- oh, not sick looking, not in distress.
She looked at the mouth. She says the oral mucosa was moist. So the baby is not too dehydrated. Abdomen is soft. There's the healing midline scar, which would have been from the NEC, the N-E-C. The, let's see, abdomen was soft, flat, nontender, no guarding. Bowel sounds were nonreactive. That's good. Assessment then was vomiting with no dehydration.
She said continue the Pedialyte. Something as needed. I'll figure that out in a little bit. I'm

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not sure exactly what she says what the plan. Oh, no, no milk, it looks like. Or she can do milk. BRAT -- okay, there we go. I thought that means BRAT diet and milk as needed.
Q Okay. Do you have any criticisms of the care that was rendered by Doctor Malixi on this date?
A No.
Q Okay. All right. Then taking you to the next chart note.
A Uh-huh.
Q This is the visit on October 24, 2008, with Doctor Weber. Is that right?
A Uh-huh.
Q Foothill Pediatrics Bates 0119.
A Uh-huh.
Q Okay. Now, Doctor Weber had just recently started with your office as of the date of this visit. Is that true? Within a few months of that?
A I don't remember when exactly when she started. I suppose it's possible. Probably somewhere around there.
Q All right. And you had a policy, since she was a new doctor, of reviewing her chart notes?
A Correct.
Q At that time. Is that correct?

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A Correct.
Q All right. And why is it that you felt the need to do that?
A You pretty much do it on all the, everybody when they first start.
Q Okay. Just to make sure they're following your office protocols and that their treatment is in line with the kind of treatment you would want them to provide?
A Uh-huh.
Q As your employee?
A (Nods.)
Q Yes?
A Yes.
Q Okay. So you signed this note. Is that true?
A Yes, correct.
Q Okay. Did you, does that indicate that you read the note?
A Yes -- no. Not necessarily. You know, there were like a thousand charts that would stack up. And so I would, you know, sign them and, you know, you, you -- I mean, you know, you glance through the note and you make sure it's decently written, and that the care is adequate and.

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Q Are you acknowledging that you may not have read this chart note?
A It's possible.
Q At the time, in October of '08, how often would you, like what was your policy with regard to reviewing Doctor Weber's notes? Would you do it on a daily basis? Would you get to it a week later, a month later?
A Weekly.
Q Weekly?
A Yeah.
Q So her notes were accumulate over a week's period of time?
A Correct.
Q And then you would go through them?
A Correct.
Q And sign them?
A Correct.
Q Okay. So do you have any idea of the precise date you would have signed this note?
A No.
Q But it would likely have been at least a week later?
A Probably less than a week. You know, they would accumulate up over a week. And so once a week I would go there and I would sign the notes.
Q Was it a particular day of the week that you would dedicate to signing these notes?
A Yes, but at the time I don't know what day of the week it would have been. Someone has to go to, I was going on Tuesdays sometimes, sometimes on Wednesdays, and sometimes on Thursdays at various times. And I don't know what, what day of the week I would have been there in this particular week in October of '08.
Q Okay. Take a look at this note. And what does it, and what can you tell me about MayRose's presentation on this day and what Doctor Weber has noted as the assessment and plan?
A Oh, okay, assessment and plan. She has GERD, gastroesophageal reflux disease. She's vomiting. And she's got some weight loss.
MS. DAEHNKE: Doctor, hands away.
THE WITNESS: Oh.
MS. DAEHNKE: Thank you.
THE WITNESS: I'm sorry.
MS. DAEHNKE: That's okay.
THE WITNESS: She's got some gastroesophageal reflux disease, vomiting, and some weight loss. She wanted her back in a week. She

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planned to put her on Gentlease and Zantac.
BY MS. CARMICHAEL:
Q Okay. Is there any indication anywhere in this note that you can see that would lead you to believe that Doctor Weber suspected the baby may have the flu or a viral illness?
A Not based on this note, no.
Q Do you know as we sit here today whether or not you read -- do you recall reading this note?
A I have no specific memory of reading this specific note. You mean before, before the legal thing began?
Q Correct. Correct.
A I have no specific memory of reading this note before. I've read it since.
Q Okay. At some point in time, did you become aware that Doctor Weber had ordered some labs --
A Yes.
Q -- in connection with this visit?
A Yes.
Q And when did you first become aware of that?
A I believe after I read through the case.
Q Oh, so after the litigation was filed you became aware of that?
A Correct.

Q And not before?
A I don't recall. I mean it, it may, like once I knew she was sick, I could have read through it back then. I don't recall specifically.
Q Okay. Do you remember having any conversations with Doctor Weber about this visit in close proximity to the time it occurred?
A I don't recall any specific conversations. I believe we had talked about it, and I said, "How did she look then?" She said, "Well, she looked like she was refluxing." And I don't really -- I don't recall any specific conversations with Doctor Weber regarding this particular note.
Q Shortly after this October 24, 2008 visit, did you learn that MayRose had been hospitalized at Summerlin Hospital?
A Yes.
Q Okay. And how did you come to learn that?
A Tiffani called me and told me.
Q Tell me what you recall about that conversation. What did she tell you?
A I remember she had said the baby was in the hospital. And she said she had a hemoglobin of one. And I thought, you know, are we sure that that's right? I remember, I remember that part of the

conversation.
Q Because that would be quite highly incompatible with human life, wouldn't it?
MS. DAEHNKE: Object to form.
MR. RIGLER: Join.
THE WITNESS: It will be low. I thought it was a lab error.
BY MS. CARMICHAEL:
Q What else do you remember about that conversation?
A I remember we talked about what, what might be causing it. You know. We talked about perhaps a B12 deficiency. We needed to look at, you know, and then I called the, the PICU shortly after that and spoke to the other doctors there about her daughter.
Q You did? And tell me about that conversation. Who did you speak with?
A I don't remember. I don't remember the doctors' name.
Q One or more doctors?
A I think I spoke with, oh, over the course of the hospitalization, I spoke with, I think at least two doctors.
Q Okay, and what did they tell you?
A At the time we were looking at -- I remember

they said she coded for awhile in the ER. And that they had brought her up. And that they were looking at could this be histio -- erythrophagocytic histiocytosis. So it's just a really unusual, you know, disease where the white cells get converted by a virus into like these red cell-eating cells. So.
Q Did you come to know, in discussing this with the PICU doctors, that she, when she presented to Summerlin she was in severe anemic shock?
A She was in hypovolemic. And -- she was in hypovolemic shock. Her blood fluids were really low. Her blood pressure was very low. And yes, incidentally, it was found that her hemoglobin was very low.
Q So someone did tell you that she had severe anemic shock?
A Yes. Tiffani was the first one to tell me though.
Q Okay. Did, did Tiffani ask you to come to Summerlin and participate in the care of her child?
A You know, we were talking on the phone quite often then. I don't recall her specifically asking me to go to Summerlin Hospital and look at the child. I mean, you know, once they're in the PICU, I mean the doctors who are looking at her there are quite good.

And I have confidence in them, so.
Q Did you ever visit MayRose while she was at Summerlin?
A In the hospital, no.
Q How many conversations did you have with Tiffani while MayRose was in Summerlin?
A Several.
Q And can you recall the substance of any of the other conversations?
A How was she doing. You know. I remember us trying to get her to Denver. I remember talking about Denver. That's where she wanted her to go upon discharge.
Q And why Denver? Do you recall what --
A There's where.
Q -- MayRose's diagnosis was --
A Yeah, at the time, it was several days into the hospitalization they diagnosed she had watershed influx in her brain. We were expecting then, you know, her to have some neurologic deficit. So Tiffani had researched it and wanted her to go to Denver. And so we just made it happen.
Q Do you have any understanding, did anybody convey any information to you as to the cause of the watershed brain injury that MayRose sustained?

A It can happen from hypotension. I mean, you know, she was a full code. So it could have happened anytime during that course. It could have even been directly from the virus itself. I mean we, we considered all those things. All that was talked about. It could have been from the, you know -- I mean I'm not an ICU doc, so.

Q I'm just asking you if anybody told you or gave you a diagnosis or a cause for that watershed brain injury? I'm not asking you for your theories.

A It's called hypoxic ischemic encephalopathy. So it can be from lack of oxygen, lack of blood flow. That's what this is called. Yeah.

Q Okay. All right. After learning about MayRose ending up at Summerlin Hospital, did you go back to Doctor Weber and discuss with her this clinic visit?

A I have no specific memory of talking with Doctor Weber right after this. I probably asked her, but I don't recall specifically about a conversation with Doctor Weber four years ago.

Q Do you recall going back and reading this chart note, taking a close look at it to see what was going on with the baby on this date?

A Yes, at the time, I believe I looked at the

note. But again, I have no specific memory of right, right when, when I did that.

Q Okay. Did you look at lab values that came into your office from the labs that Doctor Weber had ordered?

A No, I do not believe seeing any lab values from the labs that Doctor Weber ordered. I mean not at the time.

Q Did you know from talking to Doctor Weber that she had ordered labs on that visit?

A I remember her mentioning something about labs being ordered.

Q But you didn't ever inquire as to the results of those labs?

A I may have. I don't recall.

Q Did you ever see the lab values that were taken in the ER room of Summerlin Hospital when MayRose presented there?

A I have no -- I may well have checked on them, but I do not recall specifically.

(Plaintiffs' Exhibit F marked for identification.)

BY MS. CARMICHAEL:

Q Doctor Conti, referring you to Exhibit F of your deposition -- let me just find my copy here. It

is Foothill Pediatrics Bates 0159, 0160 and 0161.

I want you to look at those three documents together. They appear to be the same lab results, but each document's slightly different.

A Yes.

Q Do you see that? On the one Foothill Pediatric 0161.

A Uh-huh.

Q Do you see where it's listed the physician name Weber, K?

A Yup, uh-huh.

Q Okay. So I believe these are the labs that Doctor Weber ordered. And can you tell me, can you read for me the tests ordered there?

A Let's see. CMP14 -- Comprehensive Metabolic Panel 14.

Q What was that?

A Comprehensive Metabolic Panel is what you see listed underneath. Plus a GFR, glomerular filtration rate. Venipuncture. Non-LCA request. Okay, it was probably, that probably means it was a, it was requested from another lab, probably. And there was a request problem.

That's what it says under "Tests Ordered" that I'm reading.

Q Okay. And if you look down under, do you see at the bottom of that page where it says "Request Problem"?

A Yes.

Q Okay. And there it identifies a test, a CBC with a differential platelet. Do you see that?

A Yes, I do.

Q And they're apparently indicating that they had an insufficient specimen to be able to do that test?

A Right.

Q Okay. Let me just ask you this: See the initials on that page KW?

A Uh-huh. KW.

Q Do you recognize those?

A Yes.

Q Are these Doctor Weber's --

A Yes.

Q -- initials?

A Yeah, looks like Doctor Weber's.

Q All right. And do you see the writing, "Was admitted Wednesday, October 29, 2008, due to severe anemia"?

A Yes.

Q Do you recognize that writing?

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A I don't know it, although -- I do not recognize that writing specifically, no.
Q Do you recognize the signature or the initials below that writing?
A No, I do not. I'm sorry.
Q Okay. Looking at this, these lab results, those that they were able to obtain?
A Uh-huh.
Q Is there anything of concern in those results?
A In retrospect, or right at the time? I mean the CO2 is low. So, you know, it shows like the baby's fluids are going to be low. So, yeah, there's a little cause for concern right there, the CO2.
Q So looking at that in the context of it coming back in October of '08, would that low carbon dioxide value indicate to you the baby was dehydrated?
A Yes.
Q Would it have any meaning beyond that to you?
A That would be the main thing I would be concerned about.
Q Okay. All right. Okay, looking at Foothill Pediatric 0160.
A Uh-huh.

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Q The middle sheet in that three-page document.
A Uh-huh.
Q Do you recognize the writing in the margin of the upper left-hand corner?
A No, I do not. EM.
Q Okay. Then we also have Doctor Weber's initials on this?
A Yes, correct.
Q This document as well. Correct?
A Yes.
Q Okay. If you compare the two documents, you've got a date the sample's collected. And those match as October 28?
A Uh-huh.
Q A date entered of October 29. And that matches on both documents. Correct?
A We're talking about the previous form?
Q Right.
A Yes.
Q The middle one and the last one.
A What they collected. Yes.
Q Do you see the date reported? Do you see where those differ? We've got one that says 10/31, and one that says 10/30?

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A Yes.
Q Do you have any explanation for why those dates would differ?
A Probably this was the first report that came out, and this was the second one, I would imagine. This sheet was printed up on the 31st, and this was printed up on the 30th.
Q Okay. And then if you'll look at the first page of that exhibit, Foothill Pediatric 0159?
A Yes.
Q Do you recognize the handwriting in the, at the bottom of the page, where it says, "Did not have enough for CBC and was in ER at the time, called for redraw and per mother did not need to be done at that time"?
A Yes.
Q Whose writing is that?
A I do not know.
Q Oh, you do not recognize?
A I do not recognize the handwriting, yeah.
Q Okay. Was any of this reported to you during this October 31st timeframe?
A I don't remember specifically it being reported. I have seen, there is this note on the front page of my chart where I've written on a

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prescription pad "MayRose Hurst," and I've written "October 27, hemoglobin hematocrit."
So was I aware -- I don't know what the significance of this is either. That may have just been something I wrote down. I don't know.
Q Is that your handwriting on that?
A Yes, this one is.
Q Okay. I have that. We'll talk about that next.
Before we go on to that though, do you see how the date the specimens collected is October 28; and then the date reported, depending on the document, is either the 30th or the 31st?
A Yes.
Q And this is, the lab we're talking about here is LabCorp. Right?
A Yes.
Q Does your office have experience dealing with LabCorp on a regular basis?
A Yes.
Q And is that two- to three-day lag in the date that the specimen is collected and the date it's called in and reported to your office, is that typical for LabCorp?
MS. DAEHNKE: Object to the form of the

question.
THE WITNESS: At the time, I don't remember what would have been, you know, par for the course for them. You know, I haven't had any major problems with LabCorp in the past.
BY MS. CARMICHAEL:
Q How often do you typically get lab results back from LabCorp?
A Couple times a week, I would suppose.
Q No, no, no. How often, from the time you send the patient in for the blood draw to the time the result comes back, what is typically the length of time?
A Twenty-four to 48 hours.
Q Okay. So a day to two days is typical?
A Yeah.
Q And sometimes as many as three days?
A Depending on the result, but possible.
Q Okay. Do you ever expect to get those results as soon as four hours?
A Yeah, if they're markedly abnormal, then yes.
Q If they're markedly abnormal?
A Correct.
Q Okay. All right. If you sent a patient in

with an order for labs and you mark the order stat, how soon would you expect to get those results back?
A For a CBC, if I drew it in the morning, I would expect to get it by that evening.
Q So a whole day, a whole business day? That is, not 24 hours, but eight hours?
A It could be as much as eight hours, yeah.
Q And that's for a stat order?
A Yeah.
Q Okay. And an order that's not stat, the 24 to 48 hours, is typical?
A Would be typical.
Q Okay.
(Plaintiff's Exhibit G marked for identification.)
MS. CARMICHAEL: Actually, that goes with that.
THE WITNESS: Yeah, it's on the back.
BY MS. CARMICHAEL:
Q Okay, Doctor, referring you then to what will be Exhibit G to your deposition?
A Uh-huh.
Q It's a two-page document. And I believe that you've just fairly testified that that is in your writing. Is that correct?

A Yes, correct.
Q Is both page one and two of that document in your writing?
A Not the whole thing is in my writing. The word, on the first page, the word "Quest" is not in my writing. And on the second page, "Quest LabCorp, no labs reviewed" -- no labs reviewed. That's not my writing either.
Q Okay. All right. So this is, it looks like a prescription from your prescription pad. Right?
A Correct.
Q It has MayRose Hurst's name on it?
A That's correct.
Q And it appears that you're ordering a hemoglobin hematocrit test. Is that right?
A Not necessarily. It's probably just I was writing a note that on October 27, this was done, ordered, and -- but I don't know. I have a date written down, and I have hemoglobin hematocrit, and I have MayRose's name. So I mean as to what it means now, or what was being told to me, or when it was written, I really have no idea.
Q Okay. Well, in looking at your chart, MayRose saw Doctor Weber on October 24. Is that right?

A Yes.
Q Okay. And there is no visit with your office on October 27. Is that right?
A Yes.
Q Okay. So do you have any memory of how you would have come to be writing this on October 27?
A It could have been a thousand ways. I mean that doesn't necessarily mean I was writing this on October 27. It may have been that someone showed up on October 27 to get a hemoglobin hematocrit drawn and they couldn't do it. It may have been -- I mean to ask me what it means now, I would have no idea.
Q Okay. But you're not suggesting that you, on October 27, ordered a hemoglobin and hematocrit lab to be done on MayRose, are you?
A I don't believe so. I, I don't know.
Q All right.
A It's possible I was.
THE VIDEOGRAPHER: We need to change the videotape.
MS. CARMICHAEL: Okay.
THE VIDEOGRAPHER: This marks the end of tape number three. We're off the record at 5:02 p.m.
(A short break was taken.)
THE VIDEOGRAPHER: We're back on the record

at 5:06 p.m. This marks the beginning of tape number four.
BY MS. CARMICHAEL:
Q Doctor, you've submitted some written answers to discovery requests in this case. Do you recall doing that?
A No.
Q Okay.
(Plaintiffs' Exhibits H and I marked for identification.)
BY MS. CARMICHAEL:
Q Would you review what will be Exhibit H and I to your deposition?
A Sure.
Q Take a look at those. Does that refresh your memory about providing discovery responses in this case?
A Okay.
Q Did you review those answers, those responses?
A I'm looking at them now.
Q Well, I appreciate you're looking at them now.
A Yes.
Q Did you sign these verifying that you had

reviewed them, you knew the contents to be true, and that you're declaring under penalty of perjury that they are true?
A Yes, I did.
Q Okay. Okay, so they are your responses?
A Yes.
Q And you stand by them?
A Yes.
Q Okay. All right. Okay, have you ever reviewed the, MayRose's discharge summary?
A Yes.
Q You have. Okay.
(Plaintiffs' Exhibit J marked for identification.)
BY MS. CARMICHAEL:
Q Okay. When do you recall reviewing that discharge summary for the first time? When is the first time you reviewed it?
A My first very specific recollection of reading it is in 2010, in August of 2010, was the first time I specifically remember going through it.
Q Okay.
A But I may have seen it before that. I do not recall.
Q All right. And in response to request for

admission number two, you acknowledge that your office was provided with the discharge orders, that you did receive those?
A Yes.
Q Okay. You just don't know when or how that occurred because you didn't ever read them until August of 2010. Is that correct?
A My first specific memory --
MS. DAEHNKE: I object. That misstates his prior testimony.
But go ahead.
THE WITNESS: My specific memory of reading it was in August of 2010. But I may have read it before. I do not have any specific memory of whether I did or whether I did not read it before.
BY MS. CARMICHAEL:
Q Well, if you had read it when you assumed the care of MayRose Hurst, you would have seen that you were being asked by the NICU doctors to follow up with her with a CBC and differential test within 30 days?
A Yes.
Q Is that correct?
A Yes, that would be correct.
Q Okay. And had you taken the time to read

the discharge instruction and actually seen that order, I assume you would have executed on that. Is that true?
MS. DAEHNKE: Object to form.
THE WITNESS: Can I answer it?
MS. DAEHNKE: Yeah. Yeah.
THE WITNESS: Not necessarily. You know, you do what tests, you do what you do on the baby based on what the baby needs. Not necessarily what they're requesting here.
I mean if you didn't, you know, if you believe at the time the cause of the anemia is chronic blood loss anemia from blood draws and you get a kid that doesn't look very anemic, why are you going to bother drawing the blood at that point in time?
BY MS. CARMICHAEL:
Q Okay. So your testimony today is that even if a group of NICU doctors felt that part of her discharge orders required her to get a follow-up CBC in 30 days, you may disagree with that and may not actually do as they recommended. Is that your testimony today?
A That's, um -- okay, rephrase that question before I answer it. Can you, can you repeat the question before I answer it?

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Q I can. Do you need me to word it differently, or do you just --
A No, that's okay. You can just word it.
MS. CARMICHAEL: (To the reporter:) Go ahead and read it back then.
(The last question read back.)
THE WITNESS: Those discharge orders are a suggestion. And they're not requiring, I believe the word "require" is incorrect. I mean they're suggesting that that's what you get when you look at that.
But, you know, if you decide that it's not necessary, I, you know, I believe that you shouldn't do it. I mean you could give every kid what they need and no more and no less.
BY MS. CARMICHAEL:
Q Okay. And do you take into account the difference in knowledge that you would have seeing the baby as she comes into your care versus the knowledge that the NICU physicians would have of the entire course of their care while she was in the NICU?
MS. DAEHNKE: Object to form, foundation. It's ambiguous. Argumentative.
But go ahead. Answer if you can.
THE WITNESS: So am I totally discounting

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what they -- am I --
MS. DAEHNKE: Let's just try and answer her question. If you can't answer it, then ask her to rephrase it.
THE WITNESS: Okay, can you repeat it again?
(The last question was read back.)
MS. DAEHNKE: Same objections.
You can answer if you can.
THE WITNESS: Do I discount their opinion? No, of course not. Like I respect their, their opinion. But I'm going to have an opinion of my own. And it, you know, it's going to agree with them most of the time, and there may be some instances when I do not agree with them.
BY MS. CARMICHAEL:
Q Okay. So to be clear, in this case, is it your testimony that even if you had read this discharge order on the first day that MayRose came to you, on August 5, 2008, based on your assessment of her as time goes on that she was not anemic, you would have chosen not to do this test, the CBC with differential?
MS. DAEHNKE: Object to the form of the question. It's argumentative. It misstates -- mischaracterizes his testimony.

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But if you can answer.
THE WITNESS: I don't recall whether I read the discharge summary or not.
If I had read it, and I'm looking at the kid, and I'm looking at this, I'm looking at MayRose, and I think she absolutely didn't need this, I probably wouldn't do it.
Unless sometimes, for instance, patient comes in and mom wants an allergy referral. I've seen this kid for allergies. He's been well treated in the past. But he really doesn't need an allergy referral. But if mom wants and requests it, I would definitely do it.
Sometimes a patient comes in and they're being recommended, they're here to be cleared for ear, nose and throat surgery to put tubes in the ears. And you look at the ears and they look perfectly fine. And I would say, well, maybe we should, you know, maybe we should wait. Maybe just, you know, give the ears a week or so, and let's see how they look in a week.
So I might not agree with the specialist who recommended a certain thing. That's a possibility. If it was in the best interest of the child to avoid a procedure, avoid a test, you know, if it's not

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indicated, and then it's contraindicated and then it shouldn't be done.
So I, you know, I'm the one looking at the child right then. You know. I would expect a three-month-old preemie, like three months old after the date they were born, to be, you know, to be at kind of like at their low point for anemia. Like they would be hitting their nadir right around then.
So unless the kid was, you know, markedly anemic, I mean you could actually cause anemia by continuing to draw blood on the child, if they didn't, you know -- if they weren't that anemic -- if they were the anemic and you continue to draw blood on them, you could actually make them anemic.
So considering the cause of the anemia -- I'm sorry, go ahead.
BY MS. CARMICHAEL:
Q Are you done?
A Yeah.
Q Okay. All right. So without speaking to the neonatologist that cared for this child, you would only be guessing as to why they wanted a CBC diff and retic one month after her discharge. Is that true?
A No. Again, almost always -- I'm basing it on, you know, at this point in time, 18 years of

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experience, having taken care of preemies and, you know, knowing the neonatologists, you know, like, you know, they draw so much blood there, and so many of these kids come out of the NICU have anemia of chronic blood loss. I would, you know, I'm not trying to discount any of their opinions or say that my opinion is more valuable than theirs.

But I'm not just guessing, I'm basing it on past experience, and I'm looking at the child and trying to decide what is best for this child right now.

Q Okay. But I think we've discussed, and I really don't want to replow ground we've been over, but you've admitted that you didn't know that her hematocrit was still falling at the time of her discharge, you didn't know that her reticulocyte was low and still falling at the time of her discharge. There were things you did not know. Isn't that true, Doctor Conti?

MS. DAEHNKE: Objection. That misstates his testimony. If you want to replow that, go right ahead.

THE WITNESS: I don't agree that I didn't know. I...

BY MS. CARMICHAEL:

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Q You knew her lab results at the time of her discharge?

MS. DAEHNKE: Which lab results would you like him --

THE WITNESS: I don't recall like which, you know, I mean do I recall specifically knowing, do I have a specific memory of knowing exactly what the lab results were at the time? No, I don't.

But at the same time, I mean, you get a good feeling for what's going on with the kid just by looking at him and reviewing. I mean there was some lab result that stared out at me, you know, how common it is for a kid to have a falling hematocrit and a low, a borderline low, borderline low hematocrit and a low reticulocyte count at the time of discharge from the nursery? It's common.

BY MS. CARMICHAEL:

Q Well, you didn't review her labs though, any of her labs from her NICU stay. Correct?

A I don't know if I said I had been reviewing any of the labs from the NICU stay. I mean I'm sure we reviewed pertinent information from the NICU stay.

Q Did you review labs from the NICU stay?

MS. DAEHNKE: I object to the form, the tone. You're badgering the witness. If you would like him to re-answer questions you've asked before, show him a lab and ask him if he recalls if he reviewed it or not.

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MS. CARMICHAEL: Thank you for your advice. This is my deposition --

MS. DAEHNKE: Excuse me. This is my client and I'm entitled to assert objections on his behalf. Yes?

MS. CARMICHAEL: I understand that.

MS. DAEHNKE: And you've asked him certain questions. You're mischaracterizing his testimony. Just because it's late in the day and you have to get a flight doesn't mean that he needs to change or admit that he's testified differently than he already has.

MS. CARMICHAEL: Thank you.

MS. DAEHNKE: Uh-huh.

BY MS. CARMICHAEL:

Q Doctor Conti.

A Yes, ma'am.

Q Are you testifying now that you reviewed MayRose Hurst's labs from her stay in the NICU?

A I do not have any memory specifically of reviewing her labs, no.

Q Thank you. I did believe that we established that earlier. Okay.

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MS. DAEHNKE: It's a different question, Jackie.

BY MS. CARMICHAEL:

Q You -- knew, the things you did know though, you did know she had been in the NICU for almost three months. Right?

A Yes.

Q You did know that. And you do know that neonatologists issue discharge instructions. Right? You know that?

A Yes.

Q Okay. And you knew from her parents that she had had a complicated course. Correct?

A No more complicated than most other 28-week preemies.

Q Okay. But complicated nonetheless. She had had NEC. Right?

A Fairly typical course for a NICU grad.

Q You knew she had NEC. Correct?

A Yes.

Q You knew she had anemia. Correct?

A Yes.

Q You knew she had blood transfusions?

A Yes.

Q Okay. You knew that she had a brain bleed?

A Yes.
Q Okay. All right. And you knew from your experience that hospitals typically send copies of the discharge orders to the pediatricians. You knew that as well. Right?
A Yes.
Q Okay.
A I mean they often do.
Q All right.
A I can't say usually. But they often do. And they often call me also. But...
Q But in this case, you did not find it important enough to go to the file, or go to the NICU doctors, or go to whatever source you needed to do to find out what the NICU doctors were recommending for her follow-up care. Is that true?
A No, it's not true that I didn't find it important enough. I found MayRose very important, as I find all my patients. And I wanted to give her the best care possible. So it's not like I didn't find her important enough to check it out.
I had done it the way I've always done it, which is to rely on, you know, what the mother can tell me. Knowing what I know about neonatology, which is, you know, quite a bit; and knowing the cause of

the anemia in 99.9 percent of the cases of NICU grads; and knowing that a Grade I bleed is not usually a big serious thing; and knowing that, you know, NEC, once it resolves, the kid is usually fine; I mean do I think she wasn't important enough? Absolutely not. And I think that that's...
Q Well, not her necessarily. But whatever the NICU physicians were recommending was not --
A No --
Q -- that important to you?
A No, of course it's important to me. Okay.
Q Can you tell me then why you didn't read the discharge instructions in this case?
MS. DAEHNKE: Object. And that mischaracterizes once again his testimony.
THE WITNESS: I don't recall whether or not I read the discharge summary or not.
BY MS. CARMICHAEL:
Q Okay. In any event, whether you read it or whether you didn't, you did not comply with the NICU doctors' request that you draw a CBC and diff with retic count 30 days after discharge. Correct?
MS. DAEHNKE: Object to form with regard to comply.
But answer the question if you can.

THE WITNESS: I did not order a CBC with retic count at the time. We order what the child needs and nothing more.
BY MS. CARMICHAEL:
Q And it was your opinion, based on your examination of MayRose, that she did not require a follow-up CBC with differential and retic count. Correct?
A Yes.
MS. DAEHNKE: Well, object as to what time.
MS. CARMICHAEL: Thank you. That will be all.
THE WITNESS: Thanks.
MS. URDAZ: No questions.
MR. RIGLER: No questions.
THE VIDEOGRAPHER: This concludes the deposition of Ralph Conti, M.D. It's 5:25 p.m. We're off the record. Digital tape number four.
(The deposition concluded at 5:25 p.m.)

CERTIFICATE OF DEPONENT

PAGE LINE CHANGE

I, RALPH CONTI, M.D., deponent herein, do hereby certify and declare under penalty of perjury the within and foregoing transcription to be my testimony in said action, that I have read, corrected, and do hereby affix my signature to said transcript.

RALPH CONTI, M.D.
Deponent

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Karen Berry, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify:

That I reported the taking of the deposition of the witness, RALPH CONTI, M.D., commencing on June 19, 2012, at 2:12 p.m.

That prior to being examined, the witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of shorthand notes taken down at said time.

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in my office in the County of Clark, State of Nevada, this____day of_____ 2012.

_____

EXHIBIT “C”

DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

TIFFANI D. HURST AND BRIAN ABBINGTON, JOINTLY AND ON BEHALF OF THEIR MINOR CHILD, MAYROSE LILI-ABBINGTON HURST,	)	
Plaintiffs,	)	
vs.	)	CASE NO. A-10-616728-C
	)	DEPT. XXIV
SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, MARTIN BLAHNIK, M.D., ALI PIROOZI, M.D., RALPH CONTI, M.D. and FOOTHILLS PEDIATRICS, LLC,	)	
Defendants.	)	

DEPOSITION OF TIFFANI HURST

Taken on Tuesday, August 23, 2011

At 9:36 o'clock a.m.

At 3441 S. Eastern, Ste. 402

Las Vegas, Nevada 89169

REPORTED BY: MARY DANE McCOY, RPR, CA CSR NO. 8216

NV CCR NO. 219

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A. That I -- yeah.
Q. You were consenting to treatment?
A. That I was consenting, yes, to treatment.
Q. And you were consenting to the authorization of the physicians who had privileges at the hospital to treat you; is that correct?
A. Correct.
Q. We talked quite a bit about your discharge from Sunrise Hospital, I believe on August 2, 2008?
A. Correct.
Q. And we reviewed the discharge summary that you were to give Dr. Conti, correct?
A. Correct.
Q. Do you recall a different form being given to you and reviewed with one of the nurses prior to discharge?
A. It sounds familiar. There may have been something about car seats, I don't know.
Q. Okay, and I will give you what I'm going to mark as Defendants' Exhibit B, it is SH2562. Why don't you go ahead and review that and see if it looks familiar to you.
(Defendants' Exhibit B was marked.)
THE WITNESS: It does look familiar to me.
///

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BY MS. URDAZ:
Q. If you can look at the last page, there is a signature on the bottom. Is that your signature?
A. That is my signature.
Q. Did you sign that under acknowledgment that you had been explained the discharge instructions?
A. I did.
Q. Do you recall receiving a copy of that to take home with you?
A. I believe I did.
Q. Was Mr. Abbington with you when they were going through the discharge instructions?
A. He was.
Q. Did you have an opportunity to ask any questions about what was within those discharge instructions?
A. I did.
Q. Okay, now I believe in the middle of the last page there is some instructions, what needs to be followed up on, the very last page in the middle in capital letters. Second to the last page, I'm sorry, right above your signature.
A. Yes.
Q. Do you recall that portion being reviewed with you by the nurse before you were discharged?

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A. Yes.
Q. Can you read out loud what that portion states?
A. OT/PT/ST one to two times a week for six months. Script given to parents. Sweat test at three months of age. CBC with differential, one month after discharge. Head J/S, one month after discharge.
Q. Were you given a prescription for that first part when they reviewed the discharge instructions with you?
A. Yes.
Q. Do you recall having any questions about any of those instructions?
A. I didn't.
Q. I don't think I have any -- oh, I do have one question. Does Tristin have anemia also?
A. No.
Q. That is good. If you will give that to the court reporter and I think I'm done.
MS. ROSENTHAL: Just a couple of questions, I'll be brief.
FURTHER EXAMINATION
BY MS. ROSENTHAL:
Q. Did any doctor at Foothills Pediatrics during the entire time you treated there ever mention

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performing a hemoglobin test in the office?
A. No.
Q. Did you ever try to contact Dr. Conti after you left his practice?
A. Only to get records.
Q. Other than to get medical records, there was no other contact with his practice?
A. I don't think so. Because I think I was trying to get -- actually, I may not have even contacted them for records. I think I got those -- I know I got those before I left. So I think that I've been -- still get bills from them. But I think that may have been it. I don't remember contacting, talking to them.
Q. You said you still get bills from Dr. Conti's office?
A. Uh-huh.
Q. Do you know how much you owe Dr. Conti's office, what the bills are for?
A. No, maybe $50 or something.
Q. That are still outstanding?
A. That bill is, yes.
Q. Did the babysitter, not the nanny, but did any of your babysitters ever go to any appointments with MayRose?

EXHIBIT "D"

DETAILED DISCHARGE DISPOSITION

DISCHARGE DISPOSITION AS OF 1001 ON 08/03/08: ROUTINE HOME/SELF CARE (01)
DIS DATE/TIME: 08/02/08/1435

Pt Name:	HURST,BG-TIFFANI		
Attend Dr:	BLAHNIK,MARTIN J		
Acct#:	D00097976535	Age/Sex:	00M 00D/F
unit#:	D001796258	Status:	IN
Adm Date:	05/14/08	Dis Date:	08/02/08

SUNRISE HOSPITAL & MEDICAL CENTER
3186 Maryland Pkwy
Las Vegas, Nevada 89109

DISCHARGE DISPOSITION FORM

NICU DISCHARGE PLANNING

Community Resources / Follow-up Care:

Nevada Early Intervention Services: Y WIC: N Prescription Given:
Nevada Early Intervention Services Appointment:
1151 South Valley View ** Las Vegas, Nevada Phone: 486-7670
Date/Time: 2 WEEKS AFTER DISCHARGE

Public Health Nurse: N Home Health: N

>>>>HOME HEALTH REFERRALS<<<<

Agency Name: Phone:
Durable Medical Equipment:
:

Agency Name: Phone:
Durable Medical Equipment:
:

Agency Name: Phone:
Durable Medical Equipment:
:

>>>>Follow-Up Appointments<<<<

Physician: CONRAL CONTI,RALPH M Phone: (702)614-5437
:6301 MOUNTAIN VISTA SUITE 205
Date/Time: PEDIATRICIAN
Comment: PARENT TO MAKE APPOINTMENT FOR 3 DAYS AFTER DISCHARGE
Physician: REYTR REYNA,TROY M Phone: (702)650-2500
:3121 S. MARYLAND PKWY SUITE 400
Date/Time: SURGEON
Comment: PARENT TO MAKE APPOINTMENT FOR 2 WEEKS AFTER DISCHARGE
Physician: SNYBR SNYDER,BRUCE E Phone: (702)733-9271
:2845 SIENNA HEIGHTS DRIVE SUITE 300
Date/Time: EYE DOCTOR
Comment: APPOINTMENT MADE FOR AUG. 13TH AT 8:00 AM WEDNESDAY
Physician: Phone:
:
Date/Time:
Comment:
Physician: Phone:
:
Date/Time:
Comment:

Physician: Phone:
:
Date/Time:
Comment:
Physician: Phone:
:
Date/Time:
Comment:
Physician: Phone:
:
Date/Time:
Comment:

NICU DISCHARGE PLANNING

Baby Care: Attended Baby Care Class: N Date:
Attended CPR Class: Y Date: 08/02/08

>>>>NeoNatal Feeding Instructions<<<<
: MOMS BREAST MILK AS MUCH AS BABY WILL TAKE EVERY 3-4 HOURS.
: MAY SUPPLIMENT AS NEEDED W/ 20CAL SIMILAC OR ENFAMIL
:
:

Avoid giving baby other food, drink, or vitamins until instructed by the baby's physician.

Bulb Syringe: Y
Use to suction mucous from mouth or nose. Squeeze air out before starting.

Diaper Change: Y
Check at least every 3-4 hours while baby is awake. There should be 6-8 wet diapers per 24 hours. Bowel movements for breast fed babies may be more frequent than for bottle fed babies. Stools should be formed, not liquid.

Skin Care: Y
Use mild soap. No baby oil, lotions, or powders unless approved by doctor.

Circumcision Care: N
If Vaseline gauze is in place, soak off with warm water the next morning. Report any bleeding, excessive swelling, or odor to pediatrician.

Umbilical Care: N
Cleanse with alcohol-soaked cotton balls at every diaper change until cord falls off (about 7-10 days). Keep clean and dry. Fold diaper below cord, and no tub baths until cord falls off. Notify physician of any odor, drainage, or excessive bleeding.

Positioning: Y Back is the recommended position. May position on right side.

Signs and Symptoms to report to your Pediatrician after discharge: Y
Vomiting, diarrhea, poor feeding, listlessness, extreme irritability, increased jaundice (yellow color), or temperature above 100.0 F axillary.

Instructed on how to measure baby's Temperature: Y Jaundice Information Sheet Given: N

Metabolic Screening 1st: Y Date: 05/14/08 Metabolic Screening 2nd: Y Date: 05/21/08
Referral for Follow-Up: Y Date: 06/03/08
Metabolic Screening (PKU) may be done at any of the following places:Baby's Doctor's Office
Diagnostic Center, 3006 S. Maryland Parkway, 1st Floor
Monday - Friday, 8:00 am - 4:30 pm NO CHARGE
Health Department, 625 Shadow Lane, 385-1291
Monday - Friday, 8:00 am - 2:00 pm $5.00 Charge

Car Seat Test: Y Date: 07/31/08 Passed: Y
Following Special Instructions Given to Caregiver: N
Assure infant is positioned correctly according to carseat manufacturer's directions. Keep infant's head turned to either side. Observe infant's

color, and if blue, position head to keep airway open. Keep a bulb syringe in the car seat at all times. An adult must be in the back seat with the infant at all times. Check with your pediatrician as to when these restrictions may be stopped.
INFANT'S CAR SEAT MUST BE PROPERLY INSTALLED AT A 45-DEGREE ANGLE.

NICU DISCHARGE PLANNING

ADVISORY NOTICE FOR CHILD TRANSPORTATION RESTRAINING DEVICE:
In Nevada it is mandatory that any person transporting a child under six (6) years of age and weighing less than sixty (60) pounds in a motor vehicle secure the child in an approved restraining device (NRS 484.474). A violation of this mandatory requirement may give rise to prosecution for felony child endangerment (NRS 200.508) as well as other criminal charges. A child less than 20 pounds must be in an approved restraining device in rear-facing position in the back seat. A child must remain in the backseat until the age of 12.

Hearing Screen: Y Date: 08/01/08 Referred: N
Special Instructions: PASSED; REPEATED TODAY; ABX DISCONTINUED ON 7/27/08

Special Needs: Y :OT/PT/ST 1-2 X PER WEEK FOR 6 MONTHS; SCRIPT GIVEN TO PARENTS
:SWEAT TEST @ 3MONTHS OF AGE
:CBC W/ DIFF ONE MONTH AFTER DISCHARGE
:HEAD U/S ONE MONTH AFTER DISCHARGE

Discharge Instructions communicated/provided to patient in (language):
Other:

Patient/Family has all valuables/belongings at discharge (list reviewed): N
Family/Caregiver verbalizes understanding of and demonstrates Baby Care: Y
Number of Parent Access Badges Returned: 0

Immunization Card given to parents/caregiver: Y >>Vaccinations<<

Hepatitis B:	Y	Date: 08/01/08	Date:	Date:			
DTAP:	Y	Date: 08/01/08	Date:	Date:			
HIB:	Y	Date: 08/01/08	Date:	Date:			
IPV:	Y	Date: 08/01/08	Date:	Date:			
PCV7:	Y	Date: 08/01/08	Date:	Date:			

Synagis: N Date of last dose:
Referral Instructions:

Medications Ordered to be Taken at Home: Y Prescriptions given: N *Y= YES N= NO

Oxygen Prescribed: N Oxygen Instructions:
Medication Related Equipment: NA

DO NOT GIVE OVER THE COUNTER DRUGS WITHOUT PERMISSION FROM YOUR PHYSICIAN
IF PAIN IS NOT UNDER CONTROL, CALL YOUR PHYSICIAN
>> BRING THIS MEDICATION LIST WHENEVER YOU VISIT A HEALTHCARE PROVIDER <<

Patient/Responsible Person verbalized or demonstrated understanding of discharge instructions provided.

Signature: _____ Reviewed by: Monrad RN Date: 8-02-08
Time all care and Instructions were completed (ready to leave): 1435

MIL
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
PRINCE & KEATING
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117
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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

Tiffani D. Hurst and Brian Abbington, jointly and on behalf of their minor child, MayRose Lili-Abbington Hurst,

Plaintiffs,

vs.

Sunrise Hospital and Medical Center, LLC, Martin Blahnik, M.D., and Ali Piroozi, M.D.,

Defendants.

CASE NO. A-10-616728-C

DEPT. NO. XXIV

PLAINTIFFS' MOTIONS IN LIMINE NO. 2: EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL

HEARING DATE: **January 8, 2014**
HEARING TIME: **9:00 a.m.**

Plaintiffs, by and through their attorneys of record, hereby submit the foregoing Motion in Limine. This Motion is based on the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument this Court may wish to entertain.

DATED this 12 day of November, 2013.

EISENBERG, GILCHRIST & CUTT

JACQUELYNN D. CARMICHAEL
Utah Bar No.: 6522
215 South State Street, #900
Salt Lake City, Utah 84111
Attorneys for Plaintiffs

Eisenberg Gilchrist & Cutt
215 South State Street, Suite 900
Salt Lake City, Utah 84111
(801) 366-9100· Fax (801) 650-0065

NOTICE OF HEARING

TO: DEFENDANTS ABOVE NAMED:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **PLAINTIFFS' MOTIONS IN LIMINE NO. 2: EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL** for hearing on the 8th day of January, 2014 at 9:00 a.m. in Department XXIV of the Eighth Judicial District Court for Clark County, Nevada.

DATED this 12 day of November, 2013.

EISENBERG, GILCHRIST & CUTT

JACQUELYNN D. CARMICHAEL
Utah Bar No.: 6522
215 South State Street, #900
Salt Lake City, Utah 84111
Attorneys for Plaintiffs

AFFIDAVIT OF COUNSEL PURSUANT TO E.D.C.R. 2.47

State of Utah)
)ss
County of Salt Lake)

I, Jacquelynn D. Carmichael, after being duly sworn, depose and say as follows:

1. I am licensed to practice law in the State of Utah and am the attorney of record for Plaintiffs.

2. I have personal knowledge of the facts contained in this affidavit.

3. On July 3, 2013, I spoke to counsel for the parties in this matter conferred via conference call regarding the contents of this Motion.

4. Counsel for Defendants did not agree to stipulate to this Motion.

5. Given that the parties do not agree to Plaintiffs' Motion, the parties are at an impasse and court intervention is required.

6. This Motion is not brought for purposes of undue delay or to harass any party.

Further this affiant saith naught.

DATED this 5th day of November, 2013.

JACQUELYNN D. CARMICHAEL

Subscribed and sworn to before me
this 5th day of November, 2013.

NOTARY PUBLIC, in and for
Salt Lake County, Utah.

CANDACE A. GLEED
Notary Public
State of Utah
Comm. No. 656763
My Comm. Expires Jul 9, 2016

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This case arises out of a medical malpractice action against Defendants Martin Blahnik, M.D. ("Dr. Blahnik"), Ali Piroozi, M.D. ("Dr. Piroozi"), and Sunrise Hospital and Medical Center, LLC ("Sunrise Hospital") for their negligent care of the minor-Plaintiff MayRose Lili-Abbington Hurst ("MayRose"). As a result of such negligence, MayRose suffered a massive watershed brain injury when she was only 5 months old, which left her severely disabled.

As the court is aware, this matter originally included Ralph Conti, M.D. ("Dr. Conti") and Foothill Pediatrics. However, these Defendants reached a confidential settlement with Plaintiffs in October 2012 and were dismissed from this suit accordingly.

Defendants should be barred from referring to the settlement with Dr. Conti. Under Nevada law, trial defendants cannot introduce evidence of a settlement because it creates improper speculation among jurors. Due to its significant prejudicial impact, this Court should enter an Order excluding such evidence.

Nevada law also prohibits the allocation of fault to defendants who settled the claims against them before trial. The court should therefore also enter an Order precluding Defendants from allocating or comparing their fault to Dr. Conti's fault at the trial and/or on the verdict form in this case.

Finally, Plaintiff's full measure of damages should be admitted, even those damages that have been satisfied by Dr. Conti's settlement. Defendants are entitled to a credit off the jury award in the amount of the settlement. In order for Defendants to not reap double the reduction, Plaintiff should be able to present all the damages sustained, including those satisfied by Dr. Conti's settlement, and the court may then reduce the award by the amount of settlement post-trial.

II.

STANDARD OF REVIEW

The Nevada Supreme Court has stated that motions in limine are the proper means to provide the Court an opportunity to determine in advance of trial whether specific evidence should be admitted or excluded from the trial. *See State ex rel. Dept. of Highways v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976). District courts have broad discretion when determining whether evidence is admissible at trial so long as it is based on guiding legal principles. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P .2d 720, 722-23 (1993).

III.

ARGUMEMT

A. Defendants Cannot Introduce Evidence of Dr. Conti's Settlement or Settlement Amount.

This Court should enter an Order prohibiting Defendants from referencing **either** the existence of a settlement with Dr. Conti or the amount of such settlement.

NRS 41.141 provides in pertinent part:

> If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and **the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury.**

N.R.S. 41.141(3) (emphasis added). The Nevada Supreme Court applied this statute to a similar situation in *Moore v. Bannen*, 799 P.2d 564 (Nev. 1990). In *Moore*, plaintiffs were the parents of Alex Moore, who was allegedly treated negligently when he showed signs and symptoms of jaundice. The plaintiffs sued both Dr. Bannen (the treater) and Dr. Hoffman (the pediatrician). Before trial, the parents settled with Dr. Hoffman and they proceeded to trial against Dr. Bannen. The parents sought to exclude evidence of the settlement. The trial court granted the motion but

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reserved the right to determine whether the jury should be instructed about the settlement at the conclusion of the case. At the end, the court decided to tell the jury that Dr. Bannen used to be a co-defendant in the case but reached a settlement with the parents before trial. The parents appealed after a small verdict was rendered in their favor.

The Nevada Supreme Court reversed, explaining that "allowing the jury to be informed about the existence of settling codefendants can lead to improper speculation." *Id.* at 681. It did so after analyzing and adopting Vermont's "court rule" as articulated in *Slayton v. Ford Motor Co.*, 435 A.2d 946 (Vt. 1981):

> The question presented, whether it is proper to instruct the jury regarding absent settling defendants, has not been addressed by the courts of this state. In many recent cases, courts in other states have held that it was error to so inform the jury. *See, e.g., Slayton v. Ford Motor Co.*, 140 Vt. 27, 435 A.2d 946 (1981); *cf. Greenemeier by Redington v. Spencer*, 719 P.2d 710, 714 (Colo.1986) (jury may be informed of existence, but not amount, of settlement); Tatum v. Schering Corp., 523 So.2d 1042, 1045 (Ala.1988) (jury may be informed of both the existence and amount of settlement). In *Slayton*, the Vermont Supreme Court adopted this so-called "court rule," reasoning that giving the jury any information on the subject could lead to speculation that the settling defendant admitted liability and is therefore solely responsible.
>
> Alternatively, the Slayton court postulated that providing the jury with such information might lead to speculation that one defendant's settlement is an admission of negligence that should be imputed to a non-settling defendant. Because allowing the jury to receive such information can thus lead to speculation in favor of either party, the court in Slayton noted that the "court rule" is favored by both plaintiffs and defendants alike. ***For this reason, the Slayton court held that the jury could not be informed as to either the amount or existence of a previous settlement, and that any apportionment that was needed would be done by the court.***
>
> ***We agree with the Vermont Supreme Court that allowing the jury to be informed about the existence of settling codefendants can lead to improper speculation.***

Id. at 681 (emphasis added) (internal citations omitted). Based on NRS 41.141 and *Moore*, Defendants should be prohibited from introducing either the settlement with Dr. Conti or the settlement amount.

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Defendants are likely to argue that they are entitled to have the jury's award offset by the amount of the settlement. Plaintiffs do not object to this, provided it is done post-verdict. NRS 41.141 provides in pertinent part:

> The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

N.R.S. 41.141 (3). The statute contemplates the existence of a verdict before any reduction takes place. Therefore, any impact of the settlement or its amount should only occur post-verdict on a post-trial motion.

B. Defendants cannot Apportion or Compare their Fault to Dr. Conti's Fault Under Nevada Law.

The Court should also enter an Order prohibiting Defendants from "comparing" or "apportioning" fault to Dr. Conti at trial. NRS 17.245 allows a plaintiff to settle with one tortfeasor without losing the right to proceed against additional tortfeasors. However, the remaining defendants at trial are **not** permitted to apportion or compare fault with the settled defendants.

The Nevada Supreme Court has held that when a plaintiff settles with one defendant and proceeds to trial against the other defendants, the trial defendants can still point the **entire** blame at nonparties, like Dr. Conti. **However, they may not "compare" or "apportion" fault**. *See Banks v. Sunrise Hosp.*, 102 P.3d 52 (Nev. 2004) ("Nothing in NRS 41.141 prohibits a party defendant from attempting to establish that either no negligence occurred or that the entire responsibility for a plaintiff's injuries rests with nonparties, including those who have separately settled their liabilities with the plaintiff.")

The Nevada Supreme Court has concluded trial courts commit reversible error by allowing trial defendants to compare fault to settled defendants. *See Warmbrodt v. Blanchard*, 692 P.2d 1282, 1286 (1984) (holding that district court erred in instructing the jury to consider and apportion

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negligence of nonparties to the trial via special verdict). Accordingly, this Court should prohibit Defendants from "comparing" or "allocating" fault to Dr. Conti during the trial of this matter, and Dr. Conti should therefore not be permitted on the verdict form either.

C. Plaintiffs Should Be Able to Introduce Evidence of Their Entire Measure of Damages.

While Plaintiff understands that Defendants are entitled to a reduction of the jury award by the settlement amount, that does not preclude Plaintiffs from presenting their entire measure of damages, including those damages already satisfied by Dr. Conti's settlement.

NRS 41.141(3) allows a judge to "deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts." If Plaintiffs were not permitted to introduce those damages satisfied by the settlement, Defendants would reap a double credit off the jury award.

Specifically, Ms. Hurst used the settlement proceeds to buy and retrofit a handicap accessible home for MayRose, pay off MayRose's outstanding medical bills, purchase a handicap-accessible car, and other medical and educational things for the benefit of MayRose. Since the remaining defendants will receive a credit for the funds utilized to purchase these items for MayRose, the costs associated with these purchases and others should still be presented to the jury. If they are not, and Defendants receive their credit pursuant to NRS 41.141, they would be receiving a double discount off the verdict.

Given that Dr. Conti's settlement is per se inadmissible, the court should enter an Order prohibiting Defendants from making any argument to the jury that these items necessary for MayRose's treatment and well-being have been paid for using other funds. By the same account the court should permit Plaintiffs to present their full measure of damages, as though no prior settlement has occurred and as though those items were still needed. That way, when the offset for

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the settlement amount is given post-trial, it will accurately cancel out those items the settlement has paid for and will not result in a double discount for the defendants.

IV.

CONCLUSION

Based on the foregoing, Plaintiffs hereby request an Order in Limine excluding evidence of Dr. Conti's settlement, precluding Defendants from allocating to or comparing their fault with Dr. Conti or placing him on the verdict form, and allowing Plaintiff to present her full measure of damages.

DATED this 7th day of November, 2013.

EISENBERG GILCHRIST & CUTT

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2013, I mailed a true and correct copy, postage prepaid, of the foregoing **PLAINTIFFS' MOTIONS IN LIMINE NO. 2: EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL** to the following:

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CLERK OF THE COURT

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Attorneys for Defendant Ali Piroozi, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

TIFFANI HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST,

Plaintiffs,

v.

SUNRISE HOSPITAL AND MEDICAL CENTER; MARTIN BLAHNIK, M.D.; ALI PIROOZI, M.D.; RALPH CONTI, M.D.; and FOOTHILLS PEDIATRICS, LLC,

Defendants.

Case No.: A-10-616728-C
Dept. No.: 24

DEFENDANT PIROOZI'S PARTIAL OPPOSITION TO MOTION IN LIMINE NO. 2 (TO EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL)

Defendant Ali Piroozi, M.D., by and through his counsel of record, COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON hereby submit this Opposition to Plaintiffs' Motion in Limine No. 2 (To Exclude Dr. Conti's Settlement from Trial). Based on the arguments made below and any arguments made during the hearing on this matter, this Court should deny Plaintiffs' Motion in Limine No. 2 except where it is unopposed.

Dated this 9th day of December, 2013.

COTTON DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
CHRISTOPHER G. RIGLER, ESQ.
Attorneys for Defendant Ali Piroozi, M.D.

MEMORANDUM AND POINTS OF AUTHORITY

I. Introduction/Facts

As this Court is aware, former Defendant Ralph Conti, M.D. and Foothills Pediatrics, LLC settled out of this case and are no longer Defendants (hereinafter "Conti Settlement"). Through Plaintiffs' Motion in Limine, they seek three things, to wit: (1) Prohibit mention of Conti Settlement and Conti Settlement amount; (2) Prohibit apportionment or comparison of fault (with offset after trial and removal of Conti's name from the verdict form); and (3) Allow introduction of entire damages. See generally Plaintiff's Motion.

Defendant Piroozi is in agreement that the settlement should not be mentioned during the trial. However, as will be explained below, Defendant Piroozi has every right to have Conti and Foothills Pediatics on the verdict form so that the jury can properly apportion fault. In addition, Plaintiffs should only be able to enter evidence of damages that were actually paid.

II. Law and Argument

A. A Medical Malpractice Defendant's Right To Apportionment Is Absolute

NRS 41A.045 in clear and unambiguous terms abrogates joint and several liability for medical malpractice defendants as the statute provides:

> In an action for injury or death against a provider of health care based upon professional negligence, **each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.**
>
> This section is intended to **abrogate joint and several liability** of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

(emphasis added).

By its terms, NRS 41A.045 is not limited to certain types of medical malpractice cases and must be construed as applying to all medical malpractice cases. In a medical malpractice case, a defendant can only be held liable for his/her/its ***percentage*** of negligence. A defendant in a medical malpractice case cannot be liable for his/her/its "percentage of negligence" if all

reasonable parties who could be responsible for the negligence are not included in the jury's analysis. In this statute, the word "percentage" must have meaning.[1] To remove potentially responsible parties from the verdict form would essentially subject medical malpractice defendants to the concept of "joint and several" liability, which was specifically abrogated by its terms through NRS 41A.045. The Nevada Legislature left it to the Courts to protect the clear and unambiguous intention of ensuring that no defendant in a medical malpractice case is held liable for more than his/her/its percentage of negligence/fault for an alleged injury by a plaintiff. Accordingly, the Court cannot allow a jury to find any defendant subject to liability beyond that defendant's percentage of fault.

Defendant Piroozi would have no objection to allowing the jury to complete "special interrogatories" apportioning fault in the case, and then putting the percentages only on the verdict form for the parties who are present at trial. The "Special Interrogatories" would basically serve as a "worksheet" to allow the jury to compute the "percentage of fault" for those parties who remain at trial. Any other approach would subject a non-settling defendant to liability beyond its percentage of fault and would convert NRS 41A.045 to a meaningless statute and by default, a reversion to joint and several liability.

Without providing a key cite, Plaintiffs contend that defendants in a medical malpractice case cannot compare or apportion fault when dealing with settling parties. See Plaintiffs' Motion at 7 (citing Banks v. Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004). However, even assuming *arguendo* that this Court were to broadly construe Banks to somehow prohibit apportionment or comparative fault, the Court should be aware that the Nevada Supreme Court did not analyze the Keep Our Doctors In Nevada Statue (hereinafter "KODIN") in connection

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[1] The Nevada Supreme Court has held that a statute, "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory. . . . Further, every word, phrase, and provision of a statute is presumed to have meaning." Butler v. State, 120 Nev. 879, 892-893, 102 P.3d 71, 81 (2004) (internal citations omitted).

with NRS 41.141 in the Banks case. Specifically, Banks went to trial in 1999, prior to the enactment and subsequent revisions of the Medical Malpractice Act in 2001 and 2004. Banks, 120 Nev. at 829, 102 P.3d at 57-58 (noting trial in 1999); NRS 41A.045 (noting addition to NRS by 2004 initiative petition, Ballot Question No. 3). As such, the holding in Banks is inapplicable as the Nevada Supreme Court was analyzing NRS 41.141 prior to the carve out allowing for apportionment of fault in NRS 41A.045. When analyzing under current law, the Court must take into account the language requiring a jury to determine "percentage of negligence." Under this analysis, the Court can easily deny the Motion in Limine as it pertains to Plaintiffs' request to keep Conti and Foothills Pediatrics off the verdict form.

B. Plaintiffs Should Only Be Able To Present Damages Accrued Based On The Amounts Paid Through The Settlement Funds

Plaintiffs seek to provide evidence of all damages accrued and prohibit argument that certain items have been paid for by the settlement. See Plaintiffs' Motion at 8-9.

Defendant Piroozi agrees, as noted previously, that the settlement cannot be specifically referenced. However, Plaintiffs should be limited by their own analysis in the settlement documentation provided in the Motion to Compromise Minor's Claim. Specifically, the Motion filed on or about November 21, 2012 set out what Plaintiffs believe are the total amount of damages.[2] As Plaintiff has taken a legal position regarding the actual amount paid, they cannot then take a different position before the jury as such would allow for double recovery which the Nevada Supreme Court clearly does not allow. Banks, 120 Nev. at 847, 102 P.3d at 69. To prevent double recovery and recovery or funds not actually expended, this Court must deny this portion of the Motion in Limine.

[2] As the Motion was filed under seal, the actual amounts will not be discussed herein and can be obtained by the Court as a previously filed document.

III. CONCLUSION

A health care provider in Nevada has a statutory right to be held liable for ONLY his/her/its percentage of negligence in a medical malpractice case. That right must be protected no matter what other parties do vis-a-vis settlement. The only way to ensure that a health care provider is not held liable for more than his/her/its percentage of negligence is to allow any reasonable party who is alleged to have caused or contributed to the alleged outcome to be placed either on the verdict form or on special interrogatories instructing the jury to apportion fault among the actors involved in the case. Finally, to prevent double recovery, this Court must only allow presentation of damages actually incurred as stated by Plaintiffs in their previous pleadings.

Dated this 9th day of December, 2013.

COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
CHRISTOPHER G. RIGLER, ESQ.
Nevada Bar No. 010730
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant Ali Piroozi, M.D.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 6th day of December, 2013 and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing, **DEFENDANT PIROOZI'S PARTIAL OPPOSITION TO MOTION IN LIMINE NO. 2 (TO EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL)**, postage prepaid and addressed to:

Jackie Carmichael, Esq.
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An employee of Cotton, Driggs, Walch, Holley, Woloson & Thompson

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CLERK OF THE COURT

OML
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DISTRICT COURT

CLARK COUNTY, NEVADA

TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST,

Plaintiffs,

vs.

SUNRISE HOSPITAL AND MEDICAL CENTER, LLC.; MARTIN BLAHNIK, M.D.; ALI PIROOZI, M.D.; RALPH CONTI, M.D.; and FOOTHILLS PEDIATRICS, LLC.,

Defendants.

CASE NO.: A-10-616728
DEPT. NO.: 24

DEFENDANT MARTIN BLAHNIK, M.D.'S OPPOSITION TO PLAINTIFFS' MOTIONS IN LIMINE NO. 2: EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL

Date of Hearing: January 8, 2014
Time of Hearing: 9:00 a.m.

Defendant, MARTIN BLAHNIK, M.D., by and through his counsel of record, ROBERT C. McBRIDE, ESQ. and S. MARIE ELLERTON, ESQ., of the law firm of MANDELBAUM, ELLERTON, & McBRIDE hereby submits his Opposition to Plaintiffs' Motion in Limine No. 2: Exclude Dr. Conti's Settlement from Trial.

This Opposition is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, such other documentary evidence as may be

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/ / /

presented and any oral arguments at the time of the hearing of this matter.

DATED this 9th day of December 2013.

MANDELBAUM, ELLERTON & McBRIDE

By: Marie Ellerton

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Attorneys for Defendant
Martin Blahnik, M.D.

MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION

This case involves claims of negligence related to the care and treatment provided to MayRose Lili-Abbington Hurst, by *inter alia,* this Defendant, Martin Blahnik, M.D. ("Dr. Blahnik.") When Plaintiffs filed their Complaint, Ralph Conti, M.D. (Dr. Conti) and Foothills Pediatrics were among the named Defendants. In October of 2012, Plaintiffs reached a settlement with Dr. Conti and Foothills Pediatrics and they were dismissed.

The parties, by stipulation, have a agreed to not mention the settlement between Plaintiffs and Defendant Dr. Conti.

Dr. Blahnik does not however agree with Plaintiffs' assertion that Nevada law prohibits the allocation of fault to defendants who have settled prior to trial, therefore Defendants cannot apportion or compare fault to Dr. Conti. In addition, Dr. Blahnik is not in agreement with Plaintiffs' arguments related the introduction of evidence of their damages. Thus, Dr. Blahnik files this opposition as to those issues.

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///

II.

LEGAL ARGUMENT

A. Defendants Can Apportion and/or Compare Their Fault and Dr. Conti Should be Included on the Jury Verdict Form.

Plaintiffs' contention that at trial the Defendants should be prohibited from comparing or apportioning fault to Dr. Conti, with whom they reached a settlement, is incorrect. NRS 17.245 does allow a plaintiff to settle with one or more tortfeasor and continue with claims against others. However, there is nothing in NRS 17.245 to support the assertion that the remaining defendants are prohibited from apportioning or comparing fault. NRS 17.245 states the following:

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.
>
> 2. As used in this section, "equitable indemnity" means a right of indemnity that is created by the court rather than expressly provided for in a written agreement.

The applicable law in Nevada is found at NRS 41A.045, which was added to the statutes governing actions for medical malpractice. By way of the 2004 Initiative Petition, Keep Our Doctors in Nevada (KODIN), joint and several liability was abrogated as to medical malpractice cases. Specifically, NRS 41A.045(1) sets out the following:

> In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.

NRS 41A.045(2) states:

> This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

Pursuant to NRS 41A.045, Dr. Blahnik and the other providers of health care that remain as defendants can be found liable for only the part of the judgment that "represents the percentage of

negligence attributable to that defendant." Thus each defendant, including a defendant who has reached a settlement, is responsible for only their percentage of damages. The remaining Defendants cannot be held liable for any other of the defendants percentage, including the percentage of negligence attributable to Dr. Conti. Under NRS 41A.045, the defendants are liable to the plaintiffs, severally, for their individual portion, which requires apportionment and comparing of fault.

The California Civil Code Section 1431.2, which relates to joint and several liability is resembles NRS 41A.035. In Andrade v. Pangborn Corp., 2004 U.S. Dist. Lexis 22704, 2004 WL 2480708 (U.S. Dist. Ct. Northern District of California, San Jose Division, 2004), wherein plaintiffs, an injured employee and his wife, sued a manufacturer to recover for work related injuries sustained while operating a machine. In its conclusions of law, the Court set out the following:

> California Civil Code Section 1431.2 provides that in an action for wrongful death, personal injury, or property damage, each defendant's liability for the plaintiff's non-economic damages shall be several only, not joint, and that each defendant shall be liable only for the percentage of non-economic damages which corresponds to that defendant's proportionate share of fault. Section 1431.2 applies to strict products liability claims as well as negligence claims. Wilson v. John Crane, Inc., 81 Cal. App.4th 847, 851-859, 97 Cal. Rptr.2d 240 (2000). Section 1431.2 applies to a non-joined third party, such as Hyatt, who can be added to the special verdict form upon a sowing (by evidence at trial) that the third party was at fault. Roslan v. Permea, Inc., 17 Cal. App. 4th 110, 110-113, 21 Cal. Rptr.2d 66 (1993), and Wilson v. Ritto, 105 Cal.App.4th 361, 367, 129 Cal. Rptr.2d 336 (2003).

In McCarthy v. AstenJohnson, Inc., 2009 U.S. Dist. Lexis 16856 (U.S. Dist. Ct. Central District of California, 2009), in which suit was brought by survivors of a decedent who died from mesothelioma that was allegedly due to exposure to toxic asbestos products that were manufacturers by the defendant. The Court granted plaintiffs' motion for partial summary judgment. In it's discussion, the Court stated the following:

> In 1986, California voters adopted Proposition 51, which limits a defendant';s liability for noneconomic damages in wrongful death and person injury actions to the percentage of damages that corresponds with that defendant's proportionate share of fault. Cal. Civ. Code § 1431.2. Thus, a defendant can affirmatively reduce its liability by laying blame on other defendants or even non-parties. *See, e.g.,* Taylor v. Crane, Inc., 113 Cal. App. 4th 1063, 1068-71, 6 Cal. Rptr.3d 695 (2003); Wilson v. Ritto, 105 Cal. App. 4th 361, 129 Cal. Rptr.2d 336 (2003). (Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries.).

Thus, in interpreting the California Code Section that is similar to NRS 41A.045, the courts in that state have indicated that a defendant can reduce his liability by blaming other defendants, and others who

are not party to the matter. The degree of fault of other tortfeasors can be considered and damages can be apportioned to non-parties. Those who may share in the liability can, appropriately, be added to the verdict form.

This Court should find the above cases instructive. Even though Dr. Conti settled and was dismissed from this matter, the Defendants remaining should be allowed to argue his percentage of negligence, and he should be included on the verdict for. In accordance with NRS 41A.045, this will allow the jury to apportion Dr. Conti's fault.

B. Defendants Should be Allowed to Cross Examine Plaintiffs and their Experts Regarding Purchased Made from the Settlement with Dr. Conti.

Defendants are entitled to an offset of the jury award for the amount of Dr. Conti's settlement. Plaintiffs acknowledge this and agree. Plaintiffs argue that this does not preclude them from presenting the entire measure of damages, including damages satisfied through the settlement with Dr. Conti.

Defendants should be allowed to cross examine the Plaintiffs and their expert witness about the costs of products, equipment or other such that were paid with funds from the settlement. In fact, if the Plaintiffs plan to claim damages for items they have purchased using funds from the settlement, they are required, under NRCP 16.1, to produce invoices and receipts that reflect identifying data and the actual cost of each and every item.

Plaintiffs must not be allowed to introduce evidence of purchases without proof, through said invoices and receipts, that the purchase was actually made and the amounts paid out. This is true, even if moneys from the settlement with Dr. Conti were not used. Plaintiffs are required to supplement their claimed damages, and Defendants are entitled to cross examine witnesses regarding these damages.

As previously set out, Defendant Dr. Blahnik agrees to not mention the settlement with Dr. Conti, or that certain items were purchased with funds from the settlement. However, if Plaintiffs wish to introduce evidence of their entire measure of damages, they must provide documentation related to purchases made.

III.

CONCLUSION

Based upon the foregoing, Defendant, Martin Blahnik, M.D., respectfully requests that Plaintiffs'

Motion in Limine No. 2: Exclude Dr. Conti's Settlement From Trial be denied as to Plaintiffs' argument that Defendants cannot apportion or compare their fault to Dr. Conti's fault, and that Dr. Conti cannot be placed on the verdict form; that it be granted as to Defendants not introducing into evidence Dr. Conti's settlement and the settlement amount; that Plaintiffs be required to produce receipts, billing statements, and invoices regarding any and all items that have been purchased which they intend to claim as damages; that Defendants are allowed to cross examine Plaintiffs and their experts as to these items, and for any other relief it deems just and proper..

DATED this 9th day of December 2013.

MANDELBAUM, ELLERTON & McBRIDE

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2013, I forwarded a copy of the above and foregoing **DEFENDANT MARTIN BLAHNIK, M.D.'S OPPOSITION TO PLAINTIFFS' MOTIONS IN LIMINE NO. 2: EXCLUDE DR. CONTI'S SETTLEMENT FROM TRIAL** as follows:

X by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or

_____ by facsimile transmission as indicated below;

_____ Via hand-delivery; or

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