CAUSE NO. 00-4057-A

DEBORAH SUE McSHANE AND JAMES PATRICK McSHANE, INDIVIDUALLY AND AS NATURAL GUARDIANS AND NEXT FRIENDS OF MAGGIE YVONNE McSHANE, A MINOR	§	IN THE DISTRICT COURT OF
PLAINTIFFS	§	
v.	§	
BAY AREA HEALTHCARE GROUP, LTD., INDIVIDUALLY AND D/B/A THE CORPUS CHRISTI MEDICAL CENTER – BAY AREA;	§	
	§	NUECES COUNTY, TEXAS
COLUMBIA HOSPITAL CORPORATION OF BAY AREA, INDIVIDUALLY AND AS A PARTNER OF BAY AREA HEALTHCARE GROUP, LTD.;	§	
SOUTH TEXAS SURGICARE INC., INDIVIDUALLY AND AS A PARTNER OF BAY AREA HEALTHCARE GROUP, LTD.;	§	
DEFENDANTS	§	28th JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL AND BRIEF IN SUPPORT

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PLAINTIFFS' MOTION FOR NEW TRIAL AND BRIEF IN SUPPORT

Plaintiffs ask the court to grant a new trial in the interest of justice and fairness.

I. INTRODUCTION

A. Background

The case of *McShane v. Bay Area Healthcare Group* was called to trial on October 20, 2003, and ended on November 14, 2003. The court submitted the cause to the jury on November 13, 2003. The jury, in question 1, was asked "did the negligence,

if any, of Bay Area Hospital, and/or its nurses, proximately cause the injury in question to Maggie McShane. The jury returned a 10-2 verdict and answered "No." The Court signed a judgment on January 8, 2004, a copy of which is attached to this motion as Plaintiffs' Exhibit "A" and incorporated for all purposes.[1] Plaintiffs attach affidavits to this motion to establish facts not apparent from the record and incorporate them by reference. The Affidavit Supporting Motion for New Trial is attached to this motion and incorporated for all purposes. Plaintiffs also attach and incorporate by reference an Appendix containing exhibits, affidavits and relevant excerpts from the Reporter's Record.

Plaintiffs raise several grounds for new trial:

A. Juror Disqualification and Juror Misconduct

1. Fraudulent jury service by Mr. Arnold Alberto Moreno, Juror Number 10. Based upon information provided by the trial court, Arnold Alberto Moreno was not summoned for jury service. He appeared, for financial gain, in the place of his son, Arnold Albeto Moreno, who had been legally summoned for jury service. This unqualified juror ultimately served on the jury and was one of ten jurors who rendered a verdict for the defendants.

2. Jury Misconduct. There was jury misconduct on the part of another juror, Mr. Chad Clanton, who visited Defendant Bay Area Hospital during the course of the trial to see his newborn granddaughter in the exact surroundings that gave rise to the lawsuit on trial. This is tantamount to a juror going to a defendant's house for dinner during trial. Mr. Clanton went even further. He drew a sketch of the floor plan of the hospital relevant to key issues at trial and shared it with other jurors.

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[1] Plaintiffs' Exhibit A, Judgment.

3. Jury Note. The jury sent a note during deliberations asking to visit the hospital. The court apparently denied the jury's request. However, the plaintiffs were not notified of the communication.

B. The court erroneously excluded testimony of the plaintiffs' expert, Arthur Shorr.

C. The court erroneously admitted evidence that was calculated to and did lead to the rendition of an improper verdict.

1. The court erroneously allowed the defendants to cross examine the plaintiffs' expert, Dr. Cardwell, about a pending lawsuit against him.

2. The court erroneously admitted superceded non-live pleadings that seriously prejudiced the plaintiffs.

D. The plaintiffs also raise issues relevant to the conduct of the trial by counsel for the defense, namely, Mr. Stephen Rodolf and Mr. Scott Johnson, Oklahoma lawyers who appeared pro hac vice in a Texas court to represent the corporation and the hospital it owns. The McShane family came to this trial knowing that they were not assured a victory. They did expect, however, an even playing field--a qualified, fair and impartial jury and counsel who comported themselves by the standards of their profession. What they got was far different. Counsel for the hospital deliberately misrepresented case law and crucial facts to the Court which resulted in judicial rulings adverse to the plaintiffs, including one that constituted a "death penalty" sanction. The improper and unprofessional misconduct permeated the proceedings. As at result, there was unfair prejudice at every level of decision-making. Throughout the trial, counsel for

the defendants misrepresented, mischaracterized, misquoted and miscited facts and authorities to gain an improper advantage at trial. As one commentator has observed:

> **In many cases, the misconduct permeates the proceedings, or is the centerpiece of jury arguments, so that one has to view it as consciously pursued trial strategy rather than a lapse in proper behavior occurring in the heat of the battle.**[2]

Viewed in the context of the trial as a whole, these grounds constitute material injury and harmful error and warrant a new trial in the interest of justice and fairness to the McShane family.

B. Legal Standard

A trial court has the discretion to grant a new trial in the interest of justice. *Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916 (Tex. 1985)(not an abuse of discretion to grant a new trial in the interest of justice and fairness). A new trial may be granted and a judgment set aside "for good cause, on motion or on the court's own motion on such terms as the court shall direct." TEX. R. CIV. P. 320. A trial court has wide discretion in granting a new trial, and the trial court's discretion in granting a new trial will not be disturbed on appeal absent a showing of a manifest abuse of discretion. *Champion Int'l Corp. v. 12th Court of Appeals*, 762 S.W.2d 898, 890 (Tex. 1988)(trial court enjoys broad discretion in granting new trial before or after judgment); *see also, Valley Steel Products Co. v. Howell*, 775 S.W.2d 34, 36 (Tex. App. –Houston [1st Dist.] 1989, no writ)(in deciding whether to grant a new trial, trial court has broad discretion and need not specify reason in its order). The trial court abuses its discretion only if the facts and the law permit it to make but one decision. *Id.* at 917(reviewing court must

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[2] Gideon Kanner, "Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts," 25 Loy. L.A. Rev. 81, 91-92 (1991).

conclude that the facts and circumstances of the case extinguish any discretion on the part of the trial court).

An order granting a new trial is not reviewable by direct appeal either from the order or from a final judgment rendered after later proceedings. *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984). Moreover, because mandamus will not issue to control the action of a trial court in a matter involving discretion, there are only two very limited situations when an order granting a new trial is even subject to mandamus. *Id. citing Johnson v. Court of Civil Appeals for the Seventh Supreme Judicial Dist. of Texas*, 350 S.W.2d 330 (1961). The first is when the trial court's order is void because the court lost plenary jurisdiction. *See, Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994); *see also, In re Jones*, 974 S.W.2d 766, 768 (Tex. App. –San Antonio 1998, orig. proceeding). Secondly, mandamus may issue when the order granting a motion for new trial states that the answers to jury questions are in fatal conflict and they are not. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d at 918.

II.

GROUNDS FOR NEW TRIAL

A. Juror Disqualification and Juror Misconduct

1. Arnoldo Alberto Moreno, Juror Number 10, was disqualified to serve on the jury.

The right to a jury of twelve qualified, fair and impartial jurors is the bedrock of our trial system. When, after a verdict has been rendered in a trial by jury, questions about the qualifications of a juror who has rendered a decisive vote arises, and in all cases where there is a possibility for serious doubt as to the qualifications of a juror, from

whatever cause, the Court, in the exercise of the discretion conferred upon it, should properly grant a new trial.

Based upon investigative materials provided to the plaintiffs and the defendants by the trial court, Mr. Arnoldo **Alberto** Moreno ("the father") fraudulently served on the jury in the place of his son, Mr. Arnoldo **Albeto** Moreno ("the son").[3] Pertinent information about Mr. Arnoldo Alberto Moreno and his son, Mr. Arnoldo Albeto Moreno, is as follows:

Father: Arnoldo **Alberto** Moreno	Son: Arnoldo **Albeto** Moreno
SSN: 449-70-1777	SSN: 463-67-1282
DOB: July 1, 1946	DOB: March 18, 1982
921 Cunningham St.	810 Ohio Ave. 3
Corpus Christi, TX 78411	Corpus Christi, TX 78404
Voter's Cert. #: 00199899	Voter's Cert. #: 00483756

Mr. Arnoldo Alberto Moreno is an employee of the Corpus Christi Army Depot ("CCAD"), a United States Government facility. Mr. Arnoldo Alberto Moreno was paid by his employer, the United States Army, and Nueces County during the time he served as a juror in the McShane trial.[4]

The son, Mr. Arnoldo Albeto Moreno, voter's certificate number 00483756, was issued a jury summons by the Sheriff of Nueces County, Texas notifying him to appear on Monday, October 20, 2003, to serve as a juror in the courts of Nueces County and

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[3] Exhibit B contains investigative materials provided to the parties by the Honorable Nanette Hasette.

[4] *Id.* at p. 10.

cautioning him, under penalty of law, to "answer this summons, in person." [5] The jury summons was issued in the name of Arnoldo Albeto Moreno, voter's certificate number 00483756.[6] According to a sworn statement by Howard M. Beers, an employee of CCAD, Mr. Beers, too, was summoned to appear for jury on October 20, 2003.[7] He saw his fellow CCAD employee, Mr. Arnold Alberto Moreno, the father of Arnold Albeto Moreno, at the court house on that day and talked briefly to him. Some time after that, Mr. Beers saw Mr. Moreno at work and they spoke about their jury cases:

> **I found out he had served approx. 18 days. He said he had even had to be there on Nov. 11, our holiday. He wondered if he could get paid overtime for that day. Somewhere, during that conversation, he told me that he had sat in the jury for his son who has the same name as he.**[8]

According to an investigative report by Mr. Ed Preusse, CCAD Investigator, Ms. Pat Felix advised him that Mr. Moreno's son, who had about the same name as his father, was issued a jury summons but would not get paid by his employer so, **"the father Mr. Arnoldo A Moreno, a CCAD employee reported on 10/20/03 at the Nueces County Court House Central Jury Room in place for his son."**[9] Mr. Preusse's investigation also revealed that he obtained a copy of the jury roll from the 28th District Court which showed juror number 10 was listed as Arnoldo Albeto Moreno, Mr. Moreno's son.[10] Mr. Preusse obtained a sworn statement from CCAD employee, Arnold Alberto Moreno, "in which he said that he sat on the jury "for myself as myself. And for no one else." He

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5 Exhibit B at p. 9, Jury Summons, Arnoldo Albeto Moreno, # 00483756.
6 *Id.*
7 Exhibit B at p. 8, Sworn Statement of Howard Beers.
8 *Id.*
9 Exhibit B at p. 6, Memo to Sue Scarlett from Ed Preusse, December 4, 2003.
10 *Id.*

signed that statement as Arnoldo A. Moreno.[11] Mr. Preusse forwarded the incident report to the Human Resources Office for further review. The court informed all parties on January 19, 2004 of the investigation and provided relevant materials relating to the investigation.

Arnold Alberto Moreno, the father, was one of the ten jurors who returned a verdict in favor of the defendants. Texas law provides that when the jury is originally composed of twelve jurors, a minimum of ten members of the original jury must concur in the verdict. Tex.R.Civ.P. 292. Texas law further provides that all individuals are competent to serve as jurors unless disqualified by statute. Tex.Gov't Code Ann. § 62.101. The general qualifications for jury service are found in Texas Government Code § 62.102. That statute provides that a person is disqualified to serve as a petit juror unless he is of sound mind and good moral character. Tex. Gov't Code § 62.102(6). As the CCAD investigation of this incident indicates, Mr. Arnoldo Alberto Moreno served on the McShane jury only because his fraudulent and dishonest conduct placed him on the jury. As the Supreme Court of Missouri observed in a similar case involving practiced deception by a juror:

> **Certainly it is also one of the highest duties of courts, in the administration of the law concerning selection of jurors and juries, to seek to accomplish that purpose by enforcing the qualifications prescribed by statute. Certainly also a party is entitled, unless he waives it, to a jury of twelve impartial qualified men. Even though three-fourths of them can decide a civil case, parties are entitled to have that decision, whether for them or against them, based on the honest deliberations of twelve qualified men. A man who uses dishonest means to get on a jury, does not usually do so for the purposes of honestly deciding the case on the law and the evidence.**

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[11] Exhibit B at p. 3, Sworn Statement of Arnoldo A. Moreno, December 3, 2003.

Lee v. Baltimore Hotel Co., 136 S.W.2d 695, 697-698 (Mo. 1939).[12]

A new trial should be granted in the interest of justice and fairness because if, as it appears, the father was deliberately deceiving his employer (the United States Army) and the Nueces County judicial system for monetary gain on behalf of his son, he is statutorily disqualified under section 62.002(4) of the Texas Government Code which provides that a person is disqualified to serve as a juror unless he is of "good moral character." The United States Supreme Court in *Carter v. Jury Commissioner*, 396 U.S. 320, 332, 90 S. Ct. 518, 525, 24 L.Ed.2d 549 (1970), stated:

> **It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.**

The father was placed on the jury panel in place of his son by deception. The plaintiffs were prejudiced and materially harmed by the presence of Mr. Arnoldo Alberto Moreno on the jury because they were deprived of the right to choose twelve qualified jurors as mandated by the Texas constitution. Denial of the right to trial by jury, guaranteed by both the federal and state constitutions, constitutes reversible error. *See Heflin v. Wilson,* 297 S.W.2d 864, 866 (Tex.Civ.App.--Beaumont 1956, writ ref'd)(approval of judgment in case involving error in selection of jury panel is tantamount to denying constitutional right of a trial by jury). Depriving the McShane's of a full jury of twelve qualified members, absent an exception authorized by the

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[12] *Lee v. Baltimore Hotel Co.*, 136 S.W.2d 695 (Mo. 1939) attached to this motion as Exhibit "C".

constitution or applicable rules, is a denial of the right to jury trial guaranteed by the Texas Constitution. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex.1995). Furthermore, in cases involving juror disqualification, the complaining party need not establish that probable injury resulted from the trial court's refusal to excuse the juror before a new trial may be granted. *Compton v. Henrie*, 364 S.W. 2d 179, 182 (Tex. 1963).

American Jurisprudence, in "Grounds for New Trial," states that the fact that a juror obtains a place on a jury by the intentional impersonation of "another person who had been called for jury duty, or by making false statements as to identity, is a proper basis for an application for a new trial." AmJur New Trial § 185 (2nd ed. 2003). In a case decided by the Supreme Court of the State of Missouri, a person not drawn for jury service impersonated one who had been drawn for jury service, answered untruthfully about his name on voir dire, and sat through the trial of the case. *Lee v. Baltimore Hotel Co.*, 136 S.W.2d at 696. The fraudulent juror was one of eleven jurors on a panel of twelve who returned a verdict in favor of the defendant. *Id.*

The trial court, on its own motion, granted the plaintiff a new trial stating that it had found as a matter of law that "said Herbert Daniel was a fraud and imposition upon the court and the parties litigant" and "by reason of said facts so found by the court, the court of its own motion hereby grants a new trial." *Id.* at 696. On appeal, the defendants argued that the trial court's actions were arbitrary and unreasonable because more than nine jurors signed the verdict without counting the fraudulent juror. *Id.* at 697. The Missouri Supreme Court disagreed and equated this situation as akin to that when a new trial is sought for newly discovered evidence and the complaining party is left without a

remedy because the party could not have timely objected because "he by due diligence could not have learned sooner." *Id.* The Court ruled that the trial court did not act arbitrarily and without any reasonable ground and held that **"this gross and willful fraud perpetrated on the court and the parties by this fraudulent juror was a reasonable ground for granting a new trial on the court' own motion during the trial term."** *Id.* at 699.

The Texas Supreme Court has addressed the importance of the Texas Government Code juror qualifications as set out in section 62.102 of that code. In *Palmer Well Services, Inc. v. Mack Trucks, Inc.*, 776 S.W.2d 575 (Tex.1989), the plaintiff, following a 10-2 verdict against it, discovered that a juror voting in favor of the verdict was under felony indictment. *Id.* at 576 citing Tex. Gov't Code Ann. § 62.102(8). The plaintiff moved for a new trial and that motion was overruled by the trial court. *Id.* at 576. On appeal, the court of appeals affirmed the trial court's ruling, holding that the juror should have been excluded, but that, plaintiff, Palmer Well Services failed "to demonstrate that the unqualified juror's presence on the jury was a material factor which was reasonably calculated to, and probably did, cause the rendition of an improper judgment." *Id.*

The Texas Supreme Court reversed and remanded the case, holding that the plaintiff was materially injured by the presence of a juror who had been indicted for felony and who was one of ten jurors necessary to render take-nothing judgment. The Court said:

> **First, the discovery of the pending felony indictment was not made until after the verdict was rendered. Second, the failure to discover the pending felony indictment was not due to Palmer's lack of diligence. Finally, if the rules and statutes governing the**

> **qualifications of jurors and the requisites of verdicts are to have any effect, litigants similarly situated to Palmer must be held to have suffered material injury as a matter of law. Therefore, because this is not an instance in which a verdict could have been rendered by less than ten jurors, as a matter of law Palmer was materially injured by the rendition of an unfavorable verdict by less than the requisite number of qualified jurors.**

Palmer Well Services, Inc. v. Mack Trucks, Inc., 776 S.W.2d at 577.

In this case, although not required, the plaintiffs can show material injury. A disqualified juror, Arnoldo Alberto Moreno, was one of 10 jurors who supported the verdict in this case. The plaintiffs have been materially harmed as a matter of law. A new trial should be granted.

2. Plaintiffs are entitled to a new trial because of jury misconduct.

Plaintiffs are entitled to a new trial based upon the misconduct of a sitting juror, Mr. Chad Clanton, which was material and based on the whole record, resulted in injury to the plaintiffs. *See, Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 375 (Tex. 2000). Rule 327 provides that a new trial may be granted on grounds of jury misconduct when it is shown that such misconduct occurred, that it was material, and that it reasonably appears from the entire record that injury probably resulted to the complaining party. *Kastanos v. Ramos*, 581 S.W.2d 740, 741 (Tex. App. -- Beaumont 1979, writ ref'd n.r.e.) *citing* Tex. R. Civ. P. 327. The act of overt misconduct in itself may, in some situations, be the most compelling factor in establishing prejudice. *Texas Employers' Insurance Association v. McCaslin*, 317 S.W.2d 916, 919 (1958). So it is in this compelling case.

During the specific voir dire of the jury panel, Mr. Chad Logan Clanton was questioned by counsel for the defendants and asked a pointed question, i.e., "[y]ou won't look at this case in hindsight or with 20/20 vision at this time? You'll try to hear these facts and be a blank board?" Mr. Clanton answered "Yes."

Q. Nothing has come up in your mind at this moment?

A. No.[13]

Mr. Clanton did not reveal that his daughter, Mrs. Daniel Canales from nearby Ingleside, Texas, was, at that very moment, pregnant and would very soon deliver a baby. Nor did Mr. Clanton inform the Court when, on November 5, 2003, during the course of the trial his daughter did deliver a baby girl and that she was born at Defendant Bay Area Hospital. Nor did he reveal to the court that he actually went to Defendant Bay Area Hospital to see his new granddaughter. Such conduct is as improper and as prejudicial as if the juror had gone to a defendant's house for dinner during trial.

At trial, the Court gave instructions to the jury which included the admonition that the jurors were not to mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. *See*, Tex. R. Civ. P. 226a. The jurors are further instructed:

> **5. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you**

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[13] Exhibit D at Tab 1, Reporter's Record, Specific Voir Dire, p. 31, lls. 14-19.

should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.

6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

Tex. R. Civ. P. 226a. The jurors in the McShane trial were asked to hear and render a verdict on a case which focused entirely on events before and after the birth of Maggie McShane at Bay Area Hospital, specifically in a birthing room and, subsequently, in its nursery. The jurors were called upon to decide whether or not Bay Area Hospital and its nurses were negligent. A number of hospital employees, some of whom were still employed by Bay Area Hospital and actively involved in labor and delivery, were called as witnesses at trial. Counsel for the defense informed the entire jury panel in voir dire that all kinds of people at Bay Area Hospital were intensely interested in the outcome of this case:

> Bay Area Hospital is made up of people just like you and me. That's Sandy Sotelo from the hospital. There's the executive staff. There's the employees and the other nurses. And all of those people that comprise collectively Bay Area Hospital are vitally ***interested in this case.*** They have feelings. They have concerns. And they're very much ***interested in this case.***[14]

The affidavit of a juror, Mary Aleman, attached to this motion show that a juror, Mr. Chad Clanton, had improper contacts with individuals outside the jury who had an

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[14] Exhibit D at Tab 2, Reporter's Record, General Voir Dire, p. 183, lls. 18-23.

interest in the outcome of this case.[15] Mr. Clanton visited Bay Area Hospital's labor and delivery unit during the trial because of the birth of a grandchild. Subsequently, during jury deliberations he sketched the floor plan of certain areas of the hospital, i.e., the birthing rooms and the nursery, that were central to crucial issues of timing in the resuscitation of Maggie McShane. These affidavits are proper proof of the misconduct at issue. A juror "may testify about jury misconduct provided it does not require delving into deliberations." *Golden Eagle Archery*, 24 S.W.3d at 370 *citing* Tex. R. Civ. P. 327(b). The Texas Supreme Court gives an example, applicable here, of a proper subject of testimony by a juror, i.e., **"a juror could testify that another juror improperly viewed the scene of the events giving rise to the litigation."** *Id.* at 370. It is also proper for a juror to testify about improper contacts with individuals outside the jury. *Id.* The affidavit of Mrs. Mary Aleman, another juror, establishes both improper contacts and the fact that Mr. Clanton viewed the scene giving rise to the litigation:

> I served as a juror during the trial in the above styled case from October 23, 2003 until November 14, 2003.
>
> During our deliberations on Thursday, November 13, 2003, the jury foreman sent a note requesting a tour of the Bay Area Medical Center's birthing room as we wanted to see the distance between the birthing room and the nursery. Our request was denied.
>
> Chad Clanton, one of the jurors, had been to Bay Area Medical Center during the time we were in trial to see his new grandchild. Since our request had been denied, Chad drew a sketch of the hospital floor plan, which showed the location of the birthing rooms in relation to the nursery. The only verbal description that I can remember was Chad saying that it wasn't too far from the birthing rooms to the nursery."[16]

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15 Exhibit E, Affidavit of Mary Aleman.

16 *Id.*

Mr. Chad Clanton went to Bay Area Hospital during the trial because his daughter had given birth to a child, his grandchild. The very fact of his daughter's presence in the labor and delivery unit of the hospital defendant means that she was attended by hospital personnel who were, by the very fact of their employment and as a matter of law "connected with or interested in the case." The fact that Mr. Clanton was in the hospital in the very labor and delivery unit with nurses employed by Bay Area and that his grandchild was delivered safely creates a situation where harm must be presumed to have occurred in the process of jury deliberations. The hospital and its nurses conduct were on trial. His grandchild was delivered alive and well and he could attribute that to care given to his family by the hospital and its nurses. His contacts with the hospital in this setting and in these circumstances are so highly prejudicial to the plaintiffs that the act itself is proof of unfairness. As the Texas Supreme Court observed:

> **Rule 327 does not preclude the drawing of logical inferences of prejudice and unfairness from the overt act itself for an action or occurrence may be so highly prejudicial and inimical to fairness of trial that the burden of going forward with proof of harm is met, prima facie at least, by simply showing the improper act and nothing more.**

Texas Employers' Insurance Association v. McCaslin, 317 S.W.2d at 921. Mr. Clanton's visit or visits to Bay Area Hospital during the trial constitutes jury misconduct on its face and is in and of itself the most compelling factor in establishing Mr. Clanton's bias in favor of the hospital. As the Court in *McCaslin* observed, when a juror has been subjected to an improper influence, "it is difficult and often impossible for that juror to maintain an impartial attitude as between the litigating parties. . . [i]n any event the trial cannot thereafter proceed to a fair and impartial jury as contemplated by Article 1, § 15

of our Constitution." *Id.* at 277-278. A new trial should be granted because the plaintiffs were denied a fair and impartial jury.

3. The trial court erred in failing to inform counsel for the plaintiffs of a communication from the jury.

Texas Rule of Civil Procedure 285 provides that the jury may communicate with the trial judge through its presiding juror in open court either verbally or in writing. Rule 286 provides that when the jury desires further instructions it shall appear in open court in a body, shall make a request in writing through its foreman, and, if additional instructions are given, they shall be in writing. *See, Ross v. Texas Emp. Ins. Ass'n*, 267 S.W.2d 541, 542 (Tex. 1954). According to an affidavit attached to this motion for new trial, during the course of deliberations the jury made a written request to the Court that they be allowed to visit Bay Area Hospital and view the area of the hospital in which the birth and resuscitation efforts took place.[17] Plaintiffs' counsel (and, on information and belief, defendants' counsel) did not receive notification of the communication. Instead, the bailiff informed the jury that they were to proceed with their deliberations.

The Court erred in not informing counsel of a communication with the jury. This communication, particularly, was of primary importance to the plaintiffs because it related to plaintiffs' allegations of negligence, i.e., that the hospital failed to perform neonatal resuscitation in a timely manner and that the delay in proper resuscitation caused Maggie's injuries. Related to these allegations are questions about the birthing room, its contents, position of the bed and distance from the birthing room to the nursery as well as the distance from the operating room to the nursery and birthing room. In fact, plaintiffs

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[17] Exhibit E, Affidavit of Mary Aleman.

had requested, in discovery, that they be allowed to videotape the hospital's nursery and labor and delivery unit.[18] At the pre-trial hearing on this subject, the hospital's counsel indicated that the had talked to the hospital and "they said it is impossible."[19] Furthermore, defense counsel told the Court that such a visit would be disruptive and a real problem for the hospital.[20] Mr. Freeman, plaintiffs' counsel, disagreed with defense counsel's characterization regarding plaintiffs' request for a hospital visit. He informed the Court that the actual agreement was that if the plaintiffs gave 48 hours notice of what nurses would be called at trial then the plaintiffs could see the hospital.[21]

The Court's failure to advise the plaintiffs of the jury's request further prejudiced the plaintiffs. The jury's interest in the location of certain rooms in the hospital was of obvious importance to them so much so that a fellow juror sketched a diagram of the pertinent area. That conduct, as set out in the section above, constitutes jury misconduct.

B. Erroneous Exclusion of Expert Witness

1. The Court erred in excluding the testimony of plaintiffs' expert, Arthur Shorr, because he was qualified to render opinions on the standard of care for Bay Area Hospital.

a. There were key issues at trial regarding the hospital's failure to use ordinary care in formulating policies and procedures which required expert testimony.

Plaintiffs filed suit against the defendants in this case based upon two theories: (1) vicarious liability arising out of the nurses' negligence during the time Maggie McShane and her mother were in their care; and (2) direct corporate liability of the

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18 Exhibit D at Tab 3, Reporter's Record, Pre-trial Hearing October 20, 2003, p. 48, lls. 2-6.
19 *Id.* at lls. 19-20.
20 Exhibit "D" at Tab 4, RR, Pre-trial Hearing, October 20, 2003, p. 48, l. 25; p. 49, l. 1.
21 *Id.* at p. 49, lls. 5-20.

hospital for the breach of duties it owed directly to the plaintiffs. To establish the first theory of liability, the plaintiffs designated various experts, including nurses and physicians, to set out the standard of clinical nursing care and to render an opinion as to the breach of the applicable standard by the hospital's nurses. On the second theory, Arthur Shorr was designated to offer opinions concerning the hospital's direct liability resulting from its failure to have and/or enforce appropriate policies and procedures relating to the hospital's duty to provide competent care by trained and skilled nurses during the entire labor and delivery process and to assure that there would be medical personnel and proper equipment immediately available to perform full and complete and skilled neonatal resuscitation.

At a pre-trial hearing on October 9, 2003, the court granted defendants' motion to strike Arthur Shorr. Mr. Shorr was to testify regarding the hospital's direct corporate liability in failing to use reasonable care in formulating policies and procedures relevant to the care of Deborah and Maggie McShane on November 16, 1999. The court granted the defendants' motion to strike Mr. Shorr because "he lacks the qualifications to testify under Texas law."[22] Plaintiffs properly made an offer of proof. The court erred in granting defendants' motion to strike Arthur Shorr because he was qualified to testify as to the standard of administrative care and his exclusion left the plaintiffs with no other controlling evidence on the standard of care for the hospital which is the threshold issue upon which hospital liability must be predicated.

One of the key issues litigated at this trial was whether or not Bay Area Hospital failed to use reasonable care in formulating policies and procedures that would have

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[22] Exhibit F at Tab 1, Pretrial Motions, Reporter's Record (RR), Cause No. 00-4057-A, October 9, 2003, p.39, lls. 15-19.

provided Maggie McShane optimal care by trained and skilled nurses during the entire labor and delivery process and assured her parents that, in the event of a life-threatening emergency requiring resuscitation, there would be medical personnel immediately available to perform full and complete and skilled neonatal resuscitation. Throughout this litigation, the existence or non-existence of certain policies and procedures became a question of fact. One set of policies and procedures was produced in discovery and subsequently withdrawn. A new set was produced. The nurses' testimony regarding pertinent policies was conflicting at best. For example, Nurse Sandra Sotelo testified in her deposition that she had seen in the policy and procedure guidelines that a vacuum delivery was contraindicated where there is a suspected shoulder dystocia.[23] At trial, after Mr. Rodolf's objection that there was no such policy, she did not remember such a policy nor did she know whether there should have been such a policy.[24] Nurse Sandra Hudson testified in a similar manner about the existence of a policy concerning vacuum extractors, i.e., she did not know if there was such a policy at the hospital.[25] Neither was she aware of a policy about how to respond to a shoulder dystocia.[26]

Nurse Debra Campbell, Director of Women's Services at Bay Area Hospital at the time of Maggie's birth, testified that there was no policy in place with regard to the safe use of a vacuum extractor because a "vacuum extractor is a piece of equipment."[27] She could not remember if there was a policy and procedure in place with regard to shoulder dystocia -- and did not think there "necessarily" should have been one.[28]

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23 Exhibit F at Tab 2, Sandra Sotelo, Reporter's Record (RR), October 23, 2003, p. 37, lls. 24-25; p. 38, lls. 1-12.

24 Exhibit F at Tab 3, Sotelo, RR, p. 37, lls. 8-14; p. 39, lls. 7-9.

25 Exhibit F at Tab 4, Sandra Hudson, Reporter's Record (RR), October 24, 2003, p. 58, lls. 14-19.

26 Exhibit F at Tab 4, Hudson, RR, p. 58, lls. 20-23.

27 Exhibit F at Tab 5, Debra Campbell, Reporter's Record (RR), October 27, 2003, p. 24, lls. 1-11.

28 Exhibit F at Tab 6, Campbell, RR, p. 25, lls. 9-11.

As to policies and procedures governing a trained, skilled and practiced neonatal resuscitation team? Maurice Curran testified, under oath, that there was a "code purple" neonatal resuscitation team at the hospital at the time of this delivery and that all the nurses and the doctors and the CRNA's were on the code purple team.[29] Gary Zarr testified that he was never placed on any designated code team for neonatal resuscitation.[30] Dr. Serrao had no knowledge of a code purple team.[31] Nurse Nan Budge said she could not speak to why Nurse Sue Peterson testified that she had never heard of the code purple team.[32] However, Ms. Budge acknowledges that in three volumes of hospital policies and procedures no policy on code purple is found and neither is the word "code" or the word "purple."[33] Nor, according to Ms. Budge, is there a mention in the hospital policy anything with respect to any drills or practices for the code purple team.[34] There is, however, a fire drill policy that provides for quarterly fire drills on all three shifts despite the fact that Bay Area has never had a fire.[35] Bay Area had more than one shoulder dystocia.[36]

The testimony at trial accentuates the critical need for expert opinion on exactly what policies and procedures an ordinarily prudent hospital would have in place to deal with the emergencies posed by the delivery of Maggie McShane. For example, did the failure to have and/or enforce policies related to the use of a vacuum extractor and response to shoulder dystocia constitute negligence on the part of Bay Area Hospital?

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29 Exhibit F at Tab 7, Maurice Curran, Reporter's Record (RR), October 29, 2003, p. 36, lls. 2-25; p. 37, lls. 1-5.
30 Exhibit F at Tab 8, Gary Zarr, Reporter's Record (RR), October 29, 2003, p. 80, lls. 11-14.
31 Exhibit F at Tab 9, Peter Serrao, Reporter's Record (RR), p. 5, lls. 11-12.
32 Exhibit F at Tab 10, Nan Budge, Reporter's Record 2 (RR2), p. 6, lls. 3-5.
33 Exhibit F at Tab 11, Budge, RR p. 6, lls 11-15; p. 57, l.25; p. 8,lls. 1-3).
34 Exhibit F at Tab 12, Budge, RR 2, p. 8, lls. 4-7.
35 Exhibit F at Tab 13 Budge, RR2, p. 13, lls. 2-9.
36 Exhibit F at Tab 13, Budge, RR2, p. 13, lls. 14-17.

Would a hospital of ordinary prudence have had such policies in place and/or assured that its nurses knew of such policies? Did the hospital owe the McShane's a duty to have policies and procedures in place to assure the availability of trained and practiced personnel to perform full neonatal resuscitation at all deliveries? Arthur Shorr's opinions addressed these and other questions and the excluded testimony was critical to material issues about which the jury should have been informed in order to render a decision on the direct corporate liability of Bay Area Hospital.

b. Defendants misled the court as to the subject of Arthur Shorr's anticipated testimony and, therefore, his qualifications to testify at trial on standards of administrative care for a hospital of ordinary prudence.

Plaintiffs designated Arthur Shorr, an expert on administrative standards of hospitals, to assist the jury in determining the standard of care for Bay Area Hospital and thus define the duty the defendants owed to the plaintiffs. Defendants moved to exclude his testimony with an argument carefully tailored to mislead the court, i.e., that Arthur Shorr was going to give opinions on nursing and medical care. In their attempt to disqualify Mr. Shorr, the defendants focused their attack on an area that the plaintiffs conceded and Mr. Shorr testified that he would *not* be addressing: standards of nursing and medical care.

Defendants' counsel deliberately ignored definitive statements on the part of Mr. Shorr in his deposition that he was not qualified to testify to and would not answer ***"standard of care opinions regarding clinical standard of care questions on nurses or physicians."***[37] This position was reiterated by plaintiffs' counsel in the Court's presence at the hearing--"Mr. Shorr is not going to be testifying about the clinical nursing care . . .

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37 Deposition of Arthur Shorr, August 25, 2003, p. 83, lls. 6-14 made part of the court's record in plaintiffs' offer of proof regarding the exclusion of Arthur Shorr and incorporated in this motion for all purposes.

[a]nd to the extent our designation is overbroad, I will make it clear. ***He is not going to testify about the clinical nursing care in this case***".[38] Nevertheless, Mr. Rodolf persisted, time and again, in representing to the Court that Mr. Shorr would be addressing clinical standards:

> If you're going to come in and criticize nurses, or a hospital for that matter, based on alleged violations of standard of care, and that's what he does, as this Judge said, you ought to at least be a nurse to do that. And if not a nurse, you ought to at least have some clinical expertise and experience that would enable you to make these kinds of critical pronouncements.[39]

In another instance, defense counsel demanded that Arthur Shorr have clinical expertise in neonatal resuscitation suggesting that Mr. Shorr could speak to the hospital's independent duty to ensure that its nurses know how to appropriately respond to an emergency neonatal resuscitation only if he has "at least the clinical expertise and background to know what constitutes an appropriate neonatal resuscitation."[40] In yet another assertion that clinical training is a sine qua non of one's ability to testify as to a hospital's negligence on the basis of direct corporate liability, Mr. Rodolf once again focuses his claims on Mr. Shorr's lack of clinical, medical experience:

> **He doesn't provide nursing care. He doesn't provide medical care. He makes no clinical decisions, exercises no clinical or medical judgment. He doesn't tell the obstetrician how to deliver the baby. He doesn't tell the nurse how to start an IV. He doesn't tell the neonatologist how to perform an intubation. He is utterly irrelevant to the clinical setting.**[41]

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38 Exhibit F at Tab 14, Pretrial Motions, Reporter's Record (RR), Cause No. 00-4057-A, October 9, 2003, p. 18, lls. 14-18.

39 Exhibit F at Tab 15, Pretrial Motions, RR, October 9, 2003, p. 14, lls. 5-11.

40 Exhibit F at Tab 16, Pretrial Motions, RR, October 9, 2003, p. 15, lls. 21-23.

41 Exhibit F at Tab 17, Pretrial Motions, RR, October 9, 2003, p. 16, lls.16-22.

These declarations epitomize counsel's misunderstanding and/or conscious misrepresentation of (1) the qualifications necessary to testify as to the direct corporate liability of the hospital and (2) Texas law on the bases of opinion testimony by experts.

Arthur Shorr possessed the requisite qualifications to testify as to the standard of care and the breach of the standard of administrative care by a hospital of ordinary prudence. He was qualified by knowledge, skill, experience, training and education to offer opinions on the Bay Area Hospital's failure to use reasonable care in formulating policies and procedures. Arthur Shorr is board certified in Healthcare Administration and a Fellow of the American College of Healthcare Executives. He received an M.B.A. in Health Care Administration from The George Washington University, Washington, D.C. in 1970. Mr. Shorr did a one-year administrative residency in Hutzel Hospital, The Detroit Medical Center, and from 1970 through 1976 respectively he served as Assistant Director of Patient Services.[42] For a three-year period at Hutzel Hospital he served as director of nursing services and officially supervised the clinical care of nursing services and patient care services.[43]

Arthur Shorr served as the Administrator & Chief Operating Officer of Mount Sinai Medical Center in Milwaukee, Wisconsin from May of 1976 until April of 1980. During his time at Mount Sinai he was responsible for all day-to-day operational activities of the hospital including in excess of 1600 employees and an operating budget of over 90 million dollars. For six months of that time he was Interim President and

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42 Exhibit F at Tab 18, Curriculum Vitae of Arthur Shorr, pp. 1-2.

43 Deposition of Arthur Shorr, p. 29, lls. 17-22 made part of the court's record in plaintiffs' offer of proof regarding the exclusion of Arthur Shorr and incorporated in this motion for all purposes.

Chief Executive Officer.[44] Following his tenure at Mount Sinai, Arthur Shorr became Chief Operating Officer, Senior Vice President for Administration at Cedars-Sinai Medical Center in Los Angeles. He was responsible for all operating activities including a staff of 5500 employees. In 1983, Mr. Shorr found a management consulting firm specializing in providing, among other services, strategic planning and operational consulting.[45] He is an Associate Clinical Professor at the University of Southern California, School of Policy, Planning and Development, Graduate Program in Health Care Administration, a member of the Residency Advisory Committee and a published author in the field of health care management. He presently serves on the editorial advisory board of the Medical Practice Compliance Alert.[46] Arthur Shorr is well-qualified to testify as to the standard of hospital care by knowledge, skill, experience, training and education. Tex. R. Evid. 702.

In *Mills v. Angel*, 995 S.W.2d 262, 267 (Tex. App. –Texarkana 1999, no pet.), the court observed that a hospital's standard of care in formulating its policies and procedures is "determined by expert testimony and a hospital's bylaws and policies." In *Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941, 951 (Tex. App. -- Fort Worth 1997, writ dism'd by agr.), the court held that standards set by the Joint Commission on Accreditation of Health Care Organizations (JCAHO) could also be looked at in determining the correct standard of care for a hospital.[47] Arthur Shorr's opinions in this case were based upon the administrative standards for hospitals

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44 Exhibit F at Tab 18, Curriculum Vitae of Arthur Shorr, p. 1.

45 Exhibit Fat Tab 18, Curriculum Vitae of Arthur Shorr, p. 1.

46 *Id.* at p. 2.

47 Defendants' arguments that Mr. Shorr cannot testify to JCAHO standards as the minimum standard of care for hospitals in Texas does not go to Mr. Shorr's qualifications to testify but to the weight to be given his testimony.

promulgated by Joint Commission for the Accreditation of Healthcare Organizations, and the administrative regulations for hospitals promulgated by the U.S. Center for Medicare Services, by his review of defendant hospital's policies and procedures, job descriptions, expert reports, depositions, discovery responses and textbooks relevant to the standard for care for neonatal resuscitation. He is neither a nurse nor a neonatologist. He can, however, rely on the opinions of nurses and neonatologists, and other clinicians, to testify as to standard of care.

> **The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence. Tex. R. Evid. 703.**

Texas law is clear that Mr. Shorr may rely on the clinical judgment of experts in various medical disciplines to assess what policies and procedures should have been in place and enforced in this case in order to carry out the hospital's independent duties to its patients. He did so. *See*, *Stam v. Mack*, 984 S.W.2d 747, 748 (Tex.App.-Texarkana,1999)(allowing evidence of the opinion of a radiologist, who was not present at the trial, through the testimony of a testifying expert).

2. Arthur Shorr's testimony was necessary to establish the hospital's standard of care and its breach of the standard of care separate and apart from the nurses' negligence

Under Texas law, a hospital may be liable for injuries arising from the negligent performance of a duty that the hospital owes directly to a patient. *Denton Reg's Med. Ctr v. La Croix*, 947 S.W.2d 941, 950 (Tex. App. -- Fort Worth 1997, pet. denied)(case turned on whether standard of care required the hospital to have CRNA supervised by

anesthesiologist). A hospital may be liable for not using reasonable care in formulating policies and procedures governing its medical staff and non-physician personnel. *McCombs v. Children's Med. Ctr.*, 1 S.W.3d 256, 259 (Tex. App. -- Texarkana 1999, pet. denied). Some courts have recognized a duty to use due care in enforcing such policies and procedures and in ensuring they are not violated. *Mills v. Angel*, 995 S.W. 2d at 269 *citing Penn Tanker Co.v. United States*, 310 F. Supp. 613, 617-18 (S.D. Tex. 1970). The test for determining whether or not a hospital has a duty of care and has breached that duty of care is what an ordinary hospital would have done under the same or similar circumstances. *Id.* at 950-951 *citing Hilzendager v. Methodist Hosp.*, 596 S.W. 2d 284, 286 (Tex. Civ. App. Houston [1st Dist.] 1980, no writ); *see also*, 2 GRIFFITH, TEXAS HOSPITAL LAW § 3.011 at 49. Expert testimony is generally required to determine the standard of care and whether the standard has been breached. *Id.*

Defendants argue that expert testimony on the hospital's negligence is not required because there is expert testimony relating to the negligence of the nurses and, therefore, Arthur Shorr "brings nothing to this discussion" because the medical experts for the plaintiffs will address the negligence of the nurses and the courtroom will be full of plaintiffs' experts pointing fingers at our nurses.[48] This argument was the same argument made by the plaintiffs in *Mills v. Angel*, 995 S.W.2d 262, 267 (Tex. App. – Texarkana 1999). In that case, the key issue on appeal from an instructed verdict in their direct corporate liability suit against the hospital was the appropriate standard of care a hospital owes to its patients in its administrative role of overseeing the practice of physicians who have staff privileges at the hospital. *Id.* at 265.

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[48] Exhibit F at Tab 19, Pretrial Motions, RR, October 9, 2003, p. 16, lls. 4-7; p. 17, lls. 23-24.

The plaintiffs in *Mills* contended that expert testimony on the Hospital's negligence was not necessary because the jury "had already heard expert testimony that Dr. Wells and Dr. Angel were negligent." *Id.* at 267. In this case, Bay Area Hospital argues that the plaintiffs "have nurses who are going to come in and criticize our nursing care and "physicians who will criticize the nursing care."[49] The appeals court rejected this proposition in *Mills* holding that when the underlying issue on standard of care involves the performance of medical procedures, expert testimony is generally required because the nature of the alleged negligence is not within the common knowledge of laymen. *Id.* at 268. In *Mills v. Angel* the underlying medical procedure involved a laminectomy that left the patient a quadiplegic. The underlying medical procedures in this case left Maggie McShane irreversibly brain-damaged and, as such, the plaintiffs were required to provide expert testimony to make a threshold showing of the standard of care for an ordinary hospital under the same or similar circumstances. *Id.* at 271. As the court in *Mills v. Angel* reiterated, a "physicians negligence does not automatically mean that the hospital is liable or vice versa." *Id.* at 174. Neither does a nurse's negligence. Mr. Rodolf is simply wrong about Texas law when he says that **"The jurors can and will draw their own conclusions about the hospital's corporate responsibilities for the acts of its agents... If they decide that the nurses were negligent, the will have no trouble linking that negligence to the hospital."**[50] He ignores or fails to distinguish between the allegations of direct corporate liability on the part of Bay Area Hospital and its vicarious liability for the negligence of its nursing staff.

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49 Exhibit F at Tab 20, Pretrial Motions, RR, October 9, 2003, p. 13, lls. 18-21.

50 Exhibit F at Tab 21, Pretrial Motions, RR, October 9, 2003, p. 30, lls. 12-18.

Bay Area's attempt to dismiss the importance of expert testimony as to the hospital standard of care fails. Mr. Shorr's anticipated testimony, as set out in the plaintiffs' offer of proof, was crucial to the plaintiffs' case and without it, the plaintiffs were deprived of the opportunity to present critical evidence to the jury. As the court in *Mills v. Angel* concluded:

> The Hospital's negligence turned on the proper standard of care for a hospital in its credentialing activities and in its supervision of the doctors' performance of medical procedures. Here, expert testimony was required to shed light on the role the Hospital played in David's care. Therefore, the Millses' argument that expert administrative testimony was not required in the instant case because the Hospital's negligence was within the common knowledge of laymen is without merit. *Id.* at 278.

Because expert testimony was required to shed light on the role Bay Area Hospital played in Maggie McShane's care and because Arthur Shorr was the only expert designated by the plaintiffs to testify solely to direct corporate liability, the exclusion of his testimony at trial was equivalent to a "death penalty" sanction. The plaintiffs were deprived of a meaningful trial on the merits on the issue of direct corporate liability of the hospital for the breach of duties it owed directly to the plaintiffs. This case required expert testimony on the hospital's standard of care. *Mills v. Angel*, 994 S.W.2d at 268. As the court in *Revco, D.S., Inc. v. Cooper* observed:

> In some situations, exclusion of experts may well be only an inconvenience, impairing presentation of a party's case but not precluding trial on the merits. Many cases, indeed, do not require expert testimony at all. Others, however, (medical negligence cases for example) require expert testimony and cannot be tried without it. In those cases, exclusion of experts may well have a death penalty effect.

873 S.W.2d 391, 396 (Tex.App.-El Paso,1994, orig. proceeding).

C. Erroneous Admission of Evidence

1. The admission of testimony from the medical records of a patient of Dr. Michael Cardwell, whose suit against Dr. Cardwell for medical malpractice was pending, was error and was predicated on misrepresentation by defendants' counsel

a. Counsel for defendant abrogated the agreement, made in open court, that, in the course of impeachment, counsel would not inform the jury that the nurses, the parties and/or the experts were named defendants in a medical malpractice case.

At trial, plaintiffs called Dr. Michael Cardwell, a practicing physician board-certified in both obstetrics/gynecology and in maternal fetal medicine, to testify as to the standard of care for obstetrical nurses and to offer his opinion as to the breach of the standard by the nurses involved in the care and treatment of Deborah and Maggie McShane. Dr. Cardwell was plaintiffs' sole expert to testify as to the standard of care fore the nurses and to their breach of that standard.

At a pre-trial conference on September 29, 2003, the Court entertained arguments (and at times agreements) on the part of counsel for both parties as to certain matters in the defendants' motion in limine. One of the matters subject to defendants' motion in limine, item number 30, was the propriety of using depositions (for impeachment purposes) from other lawsuits in involving the nurses, the parties and/or the experts.[51] Counsel for the defense stated: "We don't want them to come in and say. . . Bay Area has been sued before and Doctors' Regional has been sued before and that kind of stuff."[52]

Counsel for the plaintiffs made an offer of compromise, specifying that any deposition from prior litigation in which a witness had been a party, would be used only as a prior inconsistent statement:

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51 Exhibit G at Tab 1, Reporter's Record (RR), Pre-Trial Conference Defendants' Motion in Limine, September 29, 2003, p. 40, lls. 23-25; p. 41, lls. 1-25; p. 42, lls. 1-25.

52 *Id.* p. 41, lls.6-9.

> **The question then becomes -- and we've had this discussion -- what happens if we want to use one of these depositions for impeachment purposes? Then doesn't that throw front and center this case in the past as against this expert or as against the hospital or as against one of the nurses, expert on either side, throw that in? And the way to do it is simply as a prior inconsistent statement without saying and you were a party in this prior case.** [53]

Consequently, the parties agreed that in using deposition testimony from other litigation, the fact that the witness was a defendant would not be revealed. The Court announced "agreed" on the record.[54] As the hearing progressed, items 43 and 44 of defendants' motion, which addressed issues similar to that agreed upon in item 30, were discussed. Mr. Russell, defense counsel, addressed the Court as follows:

> This is the exact situation we discussed as far as prior deposition testimony and whether any experts or witnesses had ever previously been a party to any lawsuits. The deposition may be used for impeachment; ***but as far as bringing up that you were a defendant in that case, the parties have agreed they won't do.***[55]

Surely, the defendants own motion and their arguments in support demonstrates that they appreciated the prejudicial effect of such testimony. Mr. Rodolf expressly stated: "I think we have agreement on that."[56] However, once Dr. Cardwell was called by the plaintiffs to testify, Mr. Rodolf's position changed. He now had in his possession a deposition from a pending medical malpractice suit filed against Dr. Cardwell in Ohio and no longer had any compunction about what his co-counsel said was the substance of the agreement

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53 *Id.* p. 42, lls. 6-14.
54 *Id.* p. 42, lls. 22-23.
55 Exhibit G at Tab 2, RR, Defendants' Motion in Limine, September 29, 2003, p. 50, lls. 1-7.
56 *Id.* p. 50, lls. 8-9.

made in open court, i.e., questioning a witness in a way that the jury would certainly infer that he or she or, as in this case, Dr. Cardwell, was a defendant in a lawsuit.

Mr. Rodolf said as much, "It is quite possible that the jury may infer that."[57] He then represented to the Court that "[t]he Court has already ruled that I can get into his previously held opinions."[58] The court had not made such a ruling. Plaintiffs' counsel suggested that questions stemming from Dr. Cardwell's deposition be asked in a hypothetical and thus not identify the Ohio plaintiff as a patient of Dr. Cardwell because then the jury would know that he is a defendant in the case. Mr. Rodolf responded:

> MR. RODOLF: But why do I have to do that? I mean why do I have to do that?
>
> MR. MUELLER: Because what you are doing otherwise -- I know you want to do this, but what you are doing otherwise is you are telling the jury about his other case and that he was sued in another case.[59]

Obviously, Mr. Rodolf was not so much interested in impeaching Dr. Cardwell with a prior inconsistent statement from the deposition, i.e., undisclosed medical records from Dr.Cardwell's patient, he was determined, at any cost, to tell the jury that Dr. Cardwell had been sued in a medical malpractice claim and thus prejudice the jury by that fact alone. He succeeded. One example: Dr. Cardwell testified that one of the nurses involved in Mrs. McShane's care and "made a mistake in this case." Mr. Rodolf immediately responded:

> Q. Like you in the Gutierrez case?
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> A. I did not make a mistake.
>
> Q. Is that what Ms. Gutierrez thinks?

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57 Exhibit G at Tab 3, Reporter's Record, Bench Conference, October 31, 2003, p. 140, lls. 22-23.
58 Exhibit G at Tab 4, Reporter's Record, Bench Conference, October 31, 2003, p. 143, lls.17-19.
59 Exhibit G at Tab 5, Reporter's Record, Bench Conference, October 31, 2003, p. 154, lls. 17-23.

A. You'll have to ask her.[60]

There is no room for inference here. His attempt to use the fact that Dr. Cardwell stood accused of negligence to show that he was negligent was so prejudicial that its exclusion was mandated under Texas Rule of Evidence 403. Defendants intended to and did taint the jury with irrelevant and inflammatory information about Dr. Cardwell. *See, Stam v. Mack*, 984 S.W.2d 747, 751 (Tex. App. --Texarkana, 1999, no pet.)(evidence that a defense expert was represented by defense counsel in a past malpractice lawsuit is inadmissible for impeachment purposes); *see also, Watson v. Isern* 782 S.W.2d 546, 549 (Tex.App.-Beaumont 1989, writ denied)(whether a person was negligent is not usually provable or susceptible of proof by other alleged acts of negligence at other times under other circumstances).

Counsel for the defendants continually mischaracterized the facts in Dr. Cardwell's case in order to have the jury believe that his case and the McShane's case involved the same issues. For example: Mr. Rodolf represented to the Court in a bench conference that Dr. Cardwell *walked off and left his patient* with a first year resident.[61] The facts are that Dr. Cardwell was called away to another hospital on another emergency and that the patient went from non-active labor to the second stage of labor to delivery in eight minutes with a doctor in attendance to deliver the infant who had Apgar scores of 8 and 9 with no brain damage.[62] There was no prior shoulder dystocia,

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60 Exhibit G at Tab 6, Reporter's Record, Michael Cardwell, M.D. November 6, 2003, p. 130, lls. 11-16.

61 Exhibit G at Tab 7, Reporter's Record, Bench Conference, October 31, 2003, p. 139, lls. 7-9.

62 Exhibit G at Tab 8, Reporter's Record, Michael Cardwell, M.D., November 6, 2003, p. 134, lls. 2-16; p. 136, lls. 2-4.

ultrasounds were done on the last prenatal visits and delivery was accomplished without the use of a vacuum extractor.[63]

To counter the impression left upon the jury by Mr. Rodolf's injection of his version of the facts of Dr. Cardwell's pending case would, in the interest of fairness, compel the plaintiffs to try a case within a case. This was not possible. Dr. Cardwell's litigation was pending. Therefore, not only was Dr. Cardwell deprived of the right to have his lawsuit tried in a court of law instead of at the hands of Stephen Rodolf, the plaintiffs were deprived a fair hearing before the jury impaneled to decide their case on the facts and on the law. A new trial is warranted in the interest of justice and fairness and in order to ensure that the administration of justice in courtrooms in the state of Texas goes forward unfettered by lawyers from Oklahoma who avail themselves of the privilege of appearing in a Texas court room and then abuse the judicial process by their "Rambo" tactics and, even more egregious, outright misrepresentation to the Court.[64]

b. The introduction of medical records from a pending lawsuit was not impeachment by prior inconsistent statement and constitutes error because such evidence was not relevant and even if relevant its probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury.

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63 Exhibit G at Tab 9, Reporter's Record, Michael Cardwell, M.D., November 6, 2003, p. 135, lls. 1-16.

64 The term "Rambo" tactics is variously defined and discussed, for example, one commentator writes that various factors have:

> **led to a lack of civility and what are referred to as "Rambo" style tactics, as well as a perception of our adversarial system as a license to harass our opponents and circumvent the rules. Lawyers using such tactics may misstate the holdings of cases, cite testimony without reference to contradictory evidence, coach witnesses to give testimony that is incredible, and pepper their briefs with accusations of bad faith.** Sofia Adrogue, " 'Rambo' Style Litigation In The Third Millennium - The End Of An Era?" 37 Hous. Law. 22 (2000)

During the course of the bench conferences on the issue of the defendants right to use Dr. Cardwell's deposition from a case in litigation, the Court made an unequivocal statement that the defendants could "get into prior inconsistent statements [i]f he says something contrary to what he's saying here."[65] That did not happen. The introduction of facts from medical records of Dr. Cardwell's patient was a purposeful, calculated decision by defense counsel to irreparably prejudice the testimony of this expert witness, *not* by the proper use of an inconsistent statement as sanctioned by Texas law, but by the improper and unethical use of private medical records unsanctioned by any code.

The Texas Rules of Evidence provide that a prior inconsistent statement is not hearsay. Tex. R. Evid. 801(e)(1)(A). However, before a witness can be examined concerning a prior inconsistent statement, "the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement." Tex. R. Evid. 613(a)(b). In addition to establishing the proper foundation, the party seeking to impeach the witness must allow the witness to admit or deny making the prior statement. *Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 506, 512 (Tex.App.-Corpus Christi 1993, writ denied) *citing Garcia v. Sky Climber, Inc.*, 470 S.W.2d 261, 266 (Tex.Civ.App.--Houston [1st Dist.] 1971 writ ref'd n.r.e.). If, at cross- examination, the witness admits unequivocally having made the statement, the impeachment is complete and the prior statement is not admissible. *Id. citing* Tex.R.Civ.Evid. 613(a).

Although the defendants led the Court to believe that they would be using deposition testimony to impeach Dr. Cardwell by prior inconsistent statement, they did not use the deposition to show any inconsistency. Mr. Rodolf chose to question Dr.

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[65] Exhibit G at Tab 10, Reporter's Record, Bench Conference, October 31, 2003, p. 140, lls. 10-13.

Cardwell using the medical records of his patient. Not once did defendants' counsel tell Dr. Cardwell of the contents of any statement and the time and place and the person to whom it was made and afford him an opportunity to explain or deny such statement as required by the Texas Rule of Evidence 613.

On direct examination by plaintiffs' counsel Dr. Cardwell was asked certain questions that, without alluding to the pending litigation, embraced some of the issues in Dr. Cardwell's case which defendants argued were pertinent to the case before the court. Dr. Cardwell was asked if he had ever done an ultrasound on a patient and been wrong on the size of the baby.[66] Dr. Cardwell answered "Yes." He further explained that in the usual case, with an ultrasound, fetal weight can be estimated within 15 to 20 percent; however, if "the mother is large, that measurement may be off. It may be off more than two or three pounds."[67] Dr. Cardwell was also asked if he had encountered shoulder dystocias in his practice. His reply: "Yes."[68] He further explained that there are certain risk factors for shoulder dystocia, among them if the mother is diabetic and, for patients in general, if the patient had previous large babies.[69]

On cross-examination by defense counsel, Dr. Cardwell was asked about the percentage risk of recurrence, in his practice, of a subsequent shoulder dystocia. Dr. Cardwell could not recall a recurrence of shoulder dystocia in his practice.[70] No room for impeachment there. Although there was no evidence or testimony that Deborah McShane had diabetes, the cross-examination then took the following turn:

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66 Exhibit G at Tab 11, Reporter's Record ("RR"), Michael Cardwell, M.D., November 6, 2003, p. 10, lls. 8-10.

67 *Id.* at lls. 11-15.

68 Exhibit G at Tab 12, Michael Cardwell, RR, p. 15, lls.10-12.

69 Exhibit G at Tab 13, Michael Cardwell, RR, p. 14, lls. 4-7.

70 Exhibit G at Tab 14, Michael Cardwell, RR, p. 78, lls.5-12.

Q. Okay. Anyway, this gestational diabetes thing, the reason that's a major risk factor is because gestational diabetics tend to have larger birth weight babies than people who are not diabetics?

A. They may or may not, depending on the particular patient.

Q. Well, I didn't say they did or didn't. I said they tend to, correct?

A. As a general statement, *yes.*

Q. Statistically there is a greater risk of macrosomia in a gestational diabetic mother than there is for a non-gestational diabetic mother. Would that be a fair statement?

A. *I agree.*

Q. Okay. And you have cared for patients who are gestational diabetics, haven't you"

A. *Yes.*

...

Q. And in fact, do you remember a patient of yours by the name of Nicole Gutierrez? Do you remember that patient?

A. Yes.

Q. She was a gestational diabetic, wasn't she?

A. I believe she was a preexisting diabetic.

Q. Whether you are a preexisting diabetic or a gestational diabetic, you are at a greater risk to have a large baby than if you were not diabetic, right?

A. *Yes.*[71]

That testimony does not contain one inconsistent statement. In fact, Dr. Cardwell is in almost universal agreement with each of the questions posed by Mr. Rodolf. Nevertheless, Mr. Rodolf persisted in framing questions with calculated commentary about a patient of Dr. Cardwell's in Ohio:

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[71] Exhibit G at Tab 15, Michael Cardwell, RR, p. 78, lls. 13-25; p. 79, lls. 1-28.

> Q. We're talking about a patient who was under your care who was carrying a major risk factor which was exacerbated by the fact that in addition to that risk factor of diabetes she was noncompliant, didn't show up for her appointments, all of which increased dramatically the likelihood that she was going to give birth to a macrosomic baby. You're here criticizing these doctors and nurses for not predicting the possibility of shoulder dystocia, right? Aren't you? [72]

Dr. Cardwell agrees with Mr. Rodolf that his expert report criticized the doctors for failing to predict shoulder dystocia.[73] No inconsistency there. Nevertheless, the questioning about Dr. Cardwell's Ohio patient continued and her medical chart, in the possession of defense counsel, became the subject of further cross-examination.[74] Defendants did not inform the Court of defendants' intention to use the medical records of Nicole Gutierrez. Yet, Mr. Rodolf proceeded to interject the contents of those records with questions calculated to lead the jury to relate Dr. Cardwell's unresolved case with the case being tried.

When this line of questioning persisted, Dr. Cardwell expressed concern about further answers because there was no signed release from Ms. Gutierrez.[75] A bench conference ensued. Counsel for plaintiffs asked that this line of questioning be stopped and objected to the relevancy of the medical records (which were not admitted into evidence) and to the fact that their use was unduly prejudicial under Texas Rule of Evidence 403.[76] Plaintiffs further objected to the fact that Mr. Rodolf was using the medical records for impeachment which, under Texas law, he can do only with a prior

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72 Exhibit G at Tab 16, Michael Cardwell, RR, p. 80, lls. 18-25; p. 81, l. 1.
73 Exhibit G at Tab 17, Michael Cardwell, RR, p. 81, lls. 6-10.
74 Exhibit G at Tab 18, Michael Cardwell, RR, p. 85, lls. 8-10.
75 *Id.* at lls. 12-15.
76 Exhibit G at Tab 19, Michael Cardwell, RR, p. 92, lls. 24-25; p. 93. lls. 1-2; p. 56, lls.6-18; p. 97, lls. 22-25; p. 98, lls. 1-9.

inconsistent statement which Mr. Rodolf admitted he had not yet done.[77] Plaintiffs' objections and requests to have the jury disregard were overruled.

After cross-examination resumed, the same line of questioning went forward. Mr. Rodolf asks Dr. Cardwell if he has been "way off" on fetal weight using ultrasounds. Dr. Cardwell responded that if the mother is large, you can be off more than 20 percent.[78] His estimation of the fetal weight in the Guitterez case was within 25 percent.[79] Again, no inconsistent statement. Nevertheless, the next question, informed the jury of yet more information about Dr. Cardwell's patient.

> **Q. In any event, unfortunately this patient with the risk factor we mentioned and her noncompliance and all those things was left to deliver vaginally this 10 pound 2 ounce infant who sustained shoulder dystocia, fractured clavicle, and nerve damage, correct?**

Dr. Cardwell expressed his reluctance to comment on that without a release.[80] Mr. Rodolf admitted he had no such release and suggested "[w]ell, let's use a hypothetical patient. Forget the name we just mentioned."[81] Unfortunately, this information and the inference that Mr. Rodolf wanted the jury to have had been published--jurors could not simply "forget" it. Plaintiffs were substantially and irreparably prejudiced by the court's failure to exclude defendants' improper impeachment of an expert witness who was critical to the plaintiffs' case on the standard of care of the hospital's nurses and their breach of that standard.

Mr. Rodolf told the Court at the bench conference that although he hadn't gotten to Dr. Cardwell's deposition yet "it is sure coming up" and that he was "getting close" to

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77 Exhibit G at Tab 20, Michael Cardwell, RR, p. 99, l. 25; p. 100, lls. 1-5; p.88, lls. 14-15.
78 Exhibit G at Tab 21, Michael Cardwell, RR, p. 106, lls. 15-21.
79 Exhibit G at Tab 22, Michael Cardwell, RR, p. 107, l. 13.
80 *Id.* at p. 107, lls. 17-25.
81 Exhibit G at Tab 23, Michael Cardwell, RR, p. 109, lls. 17-18.

going into the inconsistent statements.[82] Soon into his continued cross-examination of Dr. Cardwell, it became apparent that Mr. Rodolf was not "getting close" and that he intended to pursue Dr. Cardwell, not with his deposition which was never used to impeach him with a prior inconsistent statement as promised, but the unrelenting reference to Dr. Cardwell's patient. Here is the flavor of that focus:

- I would think that if you estimate a baby to be eight pounds by ultrasound, as you claim to have done in the Gutierrez case, that it's unlikely that the baby would have gained two and a half pounds three days later.[83]
- Just like in Mrs. Gutierrez's case you didn't to any fundal heights, did you?[84]
- Is it your testimony that you did fundal heights on Mrs. Gutierrez?[85]
- he also recorded fundal heights, and the later, just as you did in Mrs. Gutierrez's case, switched to ultrasound, right?[86]
- Clearly you're saying that the doctors knew or should have known that Maggie was macrosomic? ... Just as you would have known in Ms.Gutierrez's case?[87]
- Dr. Cardwell, you made a statement to the jury about not disclosing information regarding this patient, Ms. Gutierrez[88]
- You have before you a document signed by Ms. Gutierrez[89]
- And they should have suspected it [macrosomia] in Mrs. Gutierrez's case, correct?
- Mr. Mueller asked you if you were involved in the Gutierrez delivery. Of course you weren't, were you?[90]
- Ms. Gutierrez was -- she was admitted for induction of a large baby, right?[91]
- You left this woman to deliver her baby in the hands of a first-year resident, a woman who was a known diabetic and delivered a 10 pounds 2 ounce baby, right?[92]

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82 Exhibit G at Tab 24, Michael Cardwell, RR, p. 87, lls. 6-7
83 Exhibit G at Tab 25, Michael Cardwell, RR, p. 111, lls.19-21.
84 Exhibit G at Tab 26, Michael Cardwell, RR, p. 15, lls. 16-17.
85 Exhibit G at Tab 27, Michael Cardwell, RR, p. 116, lls.1-2.
86 *Id.* at lls. 10-12.
87 Exhibit G at Tab 28, Michael Cardwell, RR, p. 117, lls.18-22.
88 Exhibit G at Tab 29, Michael Cardwell, RR, p. 125, lls. 10-12.
89 *Id.* at lls. 18-19.
90 Exhibit G at Tab 30, Michael Cardwell, RR, p. 165, lls. 2-3
91 *Id.* at lls. 6-7.
92 Exhibit G at Tab 30, Michael Cardwell, RR, p. 166, lls. 3-6.

A review of the whole of Mr. Rodolf's cross-examination of Dr. Cardwell reveals that he misled the Court time and again in order to get what he considered prejudicial information about this witness in front of the jury. At first, defense counsel readily agreed that if a witnesses' deposition testimony from unrelated litigation was to be used for impeachment by prior inconsistent statement, the fact that the witness was a defendant in that case would not be revealed. Mr. Rodolf's questioning of Dr. Cardwell left no room for doubt that Dr. Cardwell was a defendant in the lawsuit involving his patient, Mrs. Guiterrez. Secondly, it is apparent that the Court believed Mr. Rodolf when he represented that he would impeach Dr. Cardwell with a prior inconsistent statement:

> **The Court: I think Mr. Rodolf is right in going into the inconsistent statements when he does get to them. And I'm not sure how much further he has before he gets into them.**[93]

Clearly, the Court relied upon defense counsel's statements, i.e., "I fully intend to impeach him, unless the Court instructs me otherwise."[94] And although he told the Court that he was "close" to getting to the inconsistent statement, he never got there. By making these misrepresentations to the trial court, defense counsel did accomplish what he set out to do--prejudice Dr. Cardwell and cause the rendition of an unjust and improper judgment. He did not, however, fulfill the obligation owed by a lawyer to the judiciary of "candor, diligence, and utmost respect."

2. The trial court erred in allowing the admission of plaintiffs' superseded pleadings

a. Superseded pleadings used for the purpose of interjecting the existence of claims against parties dismissed from the suit and no longer part of the trial pleadings are not admissible.

Courts have long recognized that "the use of trial pleadings as admissions has

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93 Exhibit G at Tab 31, MichaelCardell, RR, p. 101, lls. 15-18.

94 Exhibit G at Tab 24, Michael Cardwell, RR, p. 87, lls. 6-12.

been a thorny issue in the law of evidence." *Garman v. Griffin*, 666 F.2d 1156, 1157 (8th Cir. 1981). If the plaintiffs have made a factual admission in a live pleading those admissions are generally admitted. For example, in *Huff v. Harrell*, the Huff's claimed that a statement in a summary judgment pleading by Harrell, that he assumed the liabilities of Harrell Petroleum, is a judicial admission and that, therefore, the trial court erred in entering a take-nothing judgment against them. The court of appeals recognized this statement as judicial admission. *Huff v. Harrell*, 941 S.W.2d 230, 235-236 (Tex. App. --Corpus Christi 1997, writ denied).

On the other hand, if superseded or abandoned pleadings are to be used for the purpose of interjecting the existence of claims against parties dismissed from the suit and no longer part of the trial pleadings, it is not a judicial admission and is not admissible. This scenario is far different from factual statements and involves the introduction of superseded pleadings that have no relevance to the issues asserted in the live pleading, i.e., the negligence of those defendants who are submitted to the jury. The trial court erred in allowing the admission of superseded pleadings to inform the jury that the doctors who testified at trial had once been defendants in the case.

Plaintiffs went to trial in this case on their Seventh Amended Petition which differed from Plaintiffs' Original Petition, Plaintiffs' First Amended Original Petition and Plaintiffs' Second Amended Petition in that there were allegations of negligence as to individual healthcare providers, including Dr. Dale Eubank, Jr. and Dr. Bernhardt Rothschild. Plaintiffs filed their motion in limine prior to the commencement of voir dire asking that the Court instruct counsel for the defense and any and all defense witnesses to refrain from introducing superseded pleadings to inform the court that the

other healthcare providers had been sued.

The trial court, on October 1, 2003, conducted a hearing on various motions in limine. Among those considered was item number 12 in Plaintiffs' Motion in Limine which, at the hearing on October 1, 2003, the Court sustained.[95] Plaintiffs sought to exclude:

> **12. Any reference to any of the pleadings and or any letters to the Court (including but not limited to letters setting the maximum amount of damages sought by Plaintiff) filed by Plaintiff's attorney or any reference to any specific portions of any pleadings of any party except as such may be admitted into evidence for the jury**

During the discussion of this motion before the Court, counsel for plaintiffs identified the major issue involved, i.e., there "was a time when other people were parties to this lawsuit in previous pleadings. The pleadings have been amended and those other parties are not before the Court in this case."[96] Defense Counsel responded by agreeing with the Court that we go to trial on the live pleadings with the exception that if there are statements seriously made in a superseded pleading they can be introduced into evidence as ordinary admissions.[97] The issue, as articulated by the defendants is this:

> **So that if they claim that they want $40 million from Doctors A, B, and C because A, B, and C did this, and now they're claiming no, we want $40 million from Hospital A because they did it, the doctors didn't do it, that can be construed as an admission from the prior pleading, though it's not a live pleading.[98]**

Defendants' example proves plaintiffs' position and succinctly illustrates the difference between what plaintiffs allege in their superseded pleadings and what they

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95 Exhibit H at Tab 1, Defendants' Motion in Limine, Plaintiffs' Motion in Limine, Plaintiffs' Special Exceptions, Reporter's Record ("RR"), October 1, 2003, p. 95, lls. 20-22.

96 Exhibit H at Tab 2, Defendants' Motion in Limine, Plaintiffs' Motion in Limine, Plaintiffs' Special Exceptions, Reporter's Record ("RR"), October 1, 2003, p. 93, lls. 2-5.

97 Exhibit G at Tab 3, Defendants' Motion in Limine, Plaintiffs' Motion in Limine, Plaintiffs' Special Exceptions, Reporter's Record ("RR"), October 1, 2003, p. 94, lls.1-3.

98 *Id.* at lls. 4-9.

allege in their live pleading. Some of plaintiffs' superseded pleadings included claims against the hospital *and* individual healthcare providers. There was never a time that the hospital was not a defendant. Nor did the plaintiffs ever assert, as defense counsel would have the court believe, that they first considered the doctors negligent and then decided that the hospital was negligent, not the doctors **(and now they're claiming no, we want $40 million from Hospital A because they did it, the doctors didn't do it).**

Had the plaintiffs asserted that the doctors were the sole proximate cause of the plaintiffs' injuries in one pleading and then, in an amended pleading, asserted that the hospital was the sole proximate cause of the injuries there would be an inconsistency. However, contrary to defendants' statement, the plaintiffs have never alleged that the "doctors didn't do it." What the plaintiffs did, as was their right under Texas law, was to proceed to trial against the hospital as "a proximate cause" of the plaintiffs' injuries irrespective of the responsibility on the part of the doctors. There is no inconsistency which would allow the introduction of the superseded pleadings. The trial court erred in admitting the prior pleadings.

b. Admission of evidence that Dr. Rothschild and Dr. Eubank had been named in a superseded pleading was prejudicial.

Texas Rule of Civil Procedure 40 allows for the permissive joinder of parties, specifically providing that "[a]ll persons may be joined in one action as defendants" with respect to a right to relief arising out of the same occurrence. Tex. R. Civ. P. 40. The Texas rules also provide that at any time before the plaintiff has introduced all his evidence (other than rebuttal evidence), he may dismiss a case. Tex. R. Civ. P. 162. The dismissal of a defendant may not be used as evidence against the plaintiff by the remaining defendants.

In *Texaco v. Pursley*, 527 S.W.2d 236 (Tex. Civ. App. -- Eastland, 1975, writ ref'd n.r.e.), the plaintiff alleged specific acts of negligence against four defendants in his original petition. *Id.* at 240. Following the non-suit of two of the four defendants, the plaintiff proceeded to trial against the two remaining defendants with his first amended petition as the live pleading. *Id.* At trial, Defendant Texaco offered the abandoned pleading into evidence on the theory that it was inconsistent with the plaintiff's position at the time of trial, i.e., two of the original defendants were no longer party to the suit. *Id.* The trial court refused to admit the abandoned pleading. *Id.* On appeal of this issue, the defendant contended that the trial court erred in refusing to permit the introduction of the abandoned original petition as an admission against interest. *Id.* The appeals court disagreed and held that the court properly excluded from the jury the fact that two defendants had been dismissed.

There is support for this position in legal treatises and case law from other jurisdictions, to wit:

> **a plea against the dismissed defendant may not be used in evidence against plaintiff by another defendant. . . a plaintiff has the right to try his case on the issues made against a remaining defendant without regard to the charges previously made against voluntarily dismissed defendants.**

32 C.J.S. *Evidence* § 401 *citing Manahan v. Watson*, 655 S.W.2d 807 (Mo. App 1983). In *Manahan,* the lawsuit arose out of a four car chain collision. *Id.* at 809. The plaintiffs sued three drivers and subsequently dismissed two of those defendants. *Id.* The trial court permitted the defendant at trial to read to the jury the pleadings filed against the two dismissed defendants. *Id.* On appeal, the court observed that the general rule applied in cases involving multiple pleas is that a pleading on one issue may not be used as an

admission upon another issue in the case in order to impeach or discredit. Id. The court further opined that:

> **Although pleadings are generally inadmissible in evidence in the same trial, this is not true of abandoned pleadings, or pleadings in another lawsuit (cites omitted). However, we are not here dealing with abandoned pleadings, *but pleadings directed to abandoned parties. . .* a plea against one defendant may not be used in evidence against the plaintiff by another defendant (emphasis added).**

Id.

In *Estate of Spinosa v. International Harvester Co.*, 621 F.2d 1154, 1157 (1st Cir., 1980) the defendant sought to introduce allegations that the deaths of the plaintiff's wife and daughter were caused by the negligent failure of the plaintiff to maintain the truck in which they were killed and have it properly inspected and licensed. The defendant argued that it should have been allowed to show the jury an inconsistency in plaintiff's claim that in Federal court plaintiff submitted that the deaths resulted from International Harvester's defective truck, while in State court plaintiff alleged that the deaths resulted from the plaintiff's failure to maintain the truck. *Id.*

The plaintiffs alleged that it is not inconsistent for suit to be brought successively against the owner and the manufacturer of the motor vehicle since the pleadings in the prior suit claimed that the owner's actions were a cause, not the sole cause of the accident. The appeals court agreed saying "[I]t is not inconsistent for suit to be brought against the owner and the manufacturer of the vehicle, since both can have a role in the plaintiff's injury." *Id.* The court held, therefore, that without such inconsistency, and since pleadings in prior law suits are not evidence of the facts in any particular subsequent suit, the district court had discretion to exclude such material as irrelevant. *Id.* at 1157. In a footnote, the court observed that it seems likely that the question is actually controlled by

Fed.R.Evid. 403. Admission of superseded pleadings would potentially prejudice the jury. *Estate of Spinosa v. International Harvester Co.*, 621 F.2d 1154, 1157 (1st Cir., 1980).

The testimony at trial leaves little doubt that admission of evidence that Dr. Rothschild and Dr. Eubank had been named in a superseded pleading was prejudicial. There is no mistaking the allegiance of these two physicians. Dr. Rothschild met with the defendants' attorneys on more than one occasion so that he knew "to a great degree" what questions he would be asked by defense counsel.[99] Dr. Eubank talked with the lawyers for the other side and viewed a CD at their request.[100] When asked if he clearly viewed himself as being adverse to the plaintiffs, he responded, "Well, you were the one that sued me."[101] That comment and the following excerpt from Dr. Rothschild's cross-examination illustrates why courts have ruled that a superseded pleading against one defendant may not be used in evidence against the plaintiff by another defendant:

> Q. (Mr. Rodolf) Now, Doctor, do you recall that Mr. Freeman said he was not fussing at you? At one time in this case he was fussing at you, was he not? Weren't you sued originally?[102]
>
> . . .
>
> A. (Dr. Rothschild) Well, yes. I was sued for $50 million in this case. And my involvement is what you heard it was. I was in my office and I was asked to render emergency aid and I ran to help and did the best I could. It didn't work out. I'm sorry for them. But if you are in a car and see a wreck and you stop to help, you do the best you can and then you get sued for $50 million.
>
> Q . Was there a claim made that you -- your care was beneath the standard of care in this case?

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99 Exhibit H at Tab 4, Reporter's Record (RR), Bernhardt Rothschild, M.D., p. 167, lls. 3-25.

100 Exhibit H at Tab 5, Reporter's Record, Dale Eubank, M.D., p. 217, lls. 5-13.

101 Exhibit H at Tab 6, RR, Dr. Eubank, p. 274, lls. 5-10.

102 Exhibit H at Tab 7, Reporter's Records, Bernhardt Rothschild, M.D., p. 136, lls. 3-6. Plaintiffs attorney objected to this line of questioning and incorporated all previously made objections. The Court overruled the objection and noted that his objection was continued. *Id.* at p. 136, lls. 7-22.

A. Yes. $50 million worth.[103]

When Dr. Eubank was asked about his involvement in this suit as a defendant the following exchange took place:

Q. (Mr. Rodolf) Doctor, you were sued in this case, weren't you?

A. Yes, I was.

Q. Do you know why you are not sued now?

A. Not really.

Q. And do you know why the hospital is the only Defendant in this case and these nurses are accused of causing this injury?

A. I have no idea.[104]

Dr. Rothschild's testimony about his presence in the lawsuit and his outrageous statement that he had been sued for $50 million was irrelevant to any issue in the case. Likewise, evidence that Dr. Eubank was once a defendant and is now not a defendant--leaving only the hospital as a defendant--is inherently prejudicial and probative of no material fact in the case. So, too, is Dr. Eubank's statement that he delivered babies "until about a year ago."[105] The admission of this testimony served only to prejudice the plaintiffs by bringing to the courtroom the specter of tort reform, frivolous lawsuits and a myriad of issues detrimental to plaintiffs' right to a fair trial by a fair and impartial jury for all the reasons discussed in the voir dire of this case related to the publicity in Nueces County with respect to damages caps, constitutional amendments, doctors leaving the profession and increasing healthcare costs. The admission of this highly prejudicial evidence was error and mandates a new trial.

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103 Exhibit H at Tab 8, RR, Bernhardt Rothschild, p. 137, 1-10.

104 Exhibit H at Tab 9, RR, Dale Eubank, p. 273, lls. 18-25; p. 274, l. 1.

105 Exhibit H at Tab 10, Reporter's Record, Dale Eubank, M.D., p. 233, lls. 12-15.

D. Attorney Misconduct

1. Counsel for the defense misrepresented, mischaracterized, misquoted and miscited facts and authorities to gain an improper advantage at trial.

According to the Texas Lawyer's Creed, it is the duty of attorneys who practice law in Texas to respect the Court, to recognize that the Judge is the symbol of the both the judicial system and administration of justice and refrain from all conduct that degrades that symbol.[106] An attorney "will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage." [107]

Throughout the trial defense counsel engaged in misrepresentation and mischaracterization which, viewed in the context of the trial as a whole, caused harmful error and warrant a new trial in the interest of justice and fairness to the McShane family. Plaintiffs incorporate in this section the allegations of misconduct discussed in previous sections of this motion outlining misrepresentations to the Court on key issues related to crucial rulings. Plaintiffs will also show that time and again defense counsel interrupted the flow of direct examination by numerous speaking objections and improper, misleading and ill-mannered sidebars that misrepresented the evidence and/or prevented evidence from being brought before the jury in a cohesive way.

During the direct examination of Nurse Sotelo, plaintiffs' counsel was met with a constant barrage of improper objections meant to interrupt the flow of the examination and to coach the witnesses and sidebars meant to prejudice the jury--most of which took place when the examination was directed to a critical area of hospital liability. For

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106 The Texas Lawyer's Creed A Mandate for Professionalism, Promulgated by The Supreme Court of Texas and the Court of Criminal Appeal November 7; 1989, Section IV, Lawyer and Judge(1).

107 *Id.* at 6.

example, one issue that was key to the question of the hospital's liability by and through its nurses was whether or not Nurse Sandra Hudson used fundal pressure. On direct examination, Nurse Sandra Sotelo was asked by plaintiffs' counsel if she knew that Sandy Hudson was sitting on top of Mrs. McShane straddling her. Mr. Rodolf objected, claiming to be looking "at the deposition now. I'm calling you on it. That's an unfair characterization of her deposition testimony. I'm looking at exactly what she said."[108] In fact, Mr. Rodolf's sidebar notwithstanding, the testimony from the deposition transcript read at trial actually reveals that Sandra Hudson had testified that she was sitting on Mrs. McShane's abdomen:

Q. Were you *sitting* on her abdomen?

A. *I was.* I was on my knees. I straddled her.

Q. You had your knees beside her abdomen?

A. On either side of her.

Q. *How could you do that without* ***sitting*** *on her?*

A. *"I may have been."*[109]

Mr. Mueller's question was not an unfair characterization; Ms. Hudson said she was sitting on Mrs. McShane's abdomen. Mr. Rodolf's remarks, though ultimately disproven, effectively delayed and hindered the direct examination of a key witness.

At another point in her testimony, Nurse Sotelo was asked if she had seen written policies and procedures that a vacuum delivery was contraindicated in a suspected shoulder dystocia. Mr. Rodolf objected by testifying that "there is no policy saying that

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[108] Exhibit I at Tab 1, RR, Sandra Sotelo, p. 16, lls. 18-25.

[109] Exhibit I at Tab 2, RR, Sandra Sotelo, p.19, lls. 19-25; p. 20, lls. 1-2.

you don't use a vacuum extractor for shoulder dystocias." [110] Her deposition testimony, read at trial, showed that indeed Sandy Sotelo had testified to seeing a written policy and procedure guideline regarding just such a policy.[111] Once again, this obstructive tactic served to coach the witness at a critical juncture as well as interrupt counsel's direct examination and confuse the jury.

Yet another time during the direct examination of Nurse Soteolo, in a series of questions that are transcribed in seven pages, Mr. Rodolf objected and/or made side bar comments nine times. One such instance occurred when Nurse Sotelo was asked if it would be negligence if a nurse put pressure on the mother's abdomen with her forearms or her hands.[112] When plaintiffs' counsel explained, in response to a query by Nurse Sotelo, that negligence meant below the standard of care, Mr. Rodolf objected that Mr. Mueller was instructing the witness on the law.[113] Plaintiffs' counsel pointed out that Ms. Sotelo had been designated to talk about the standard of care. Immediately Mr. Rodolf said in the jury's presence: **"No, she's not. *That's untrue as well.*"**[114] Mr. Mueller objected "to the continual side bar remarks" and asked for an instruction that Mr. Rodolf be required to do proper objections.[115] Mr. Rodolf was admonished by the Court to "not to do that again" or "there will be fines assessed."[116]

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110 Exhibit I at Tab 3, RR, Sandra Sotelo, p. 37, lls. 8-21.
111 Exhibit I at Tab 4, RR, Sandra Sotelo, p. 38, lls. 1-12.
112 Exhibit I at Tab 5, RR, Sandra Sotelo, p. 53, lls.16-25.
113 Exhibit I at Tab 6, RR, Sandra Sotelo, p. 54, lls.1-15.
114 Exhibit I at Tab 6, RR. Sandra Sotelo, p. 54, lls.18-25.
115 Exhibit I at Tab 7, RR, Sandra Sotelo, p. 55, lls. 1-6.
116 *Id.* at lls. 17-24.

Mr. Mueller also asked that defense counsel be instructed not to show things to the witness or get things from plaintiffs' file and informed the court that defense counsel was interrupting his questioning and that:

> there's mumbling and talking between these two in disparaging terms about me and about what we're doing in front of the jury where the jury can hear that. I've heard it a couple of times. I think it's inappropriate.
>
> Mr. Rodolf: We'd never do that. I mean, we might think it, but we don't do that.
>
> Mr. Mueller: You did -- you did do that and I heard it. So don't give me that.
>
> The Court: Excuse me. If you could address the Court.
>
> Mr. Mueller: I'm sorry, Your Honor. I will tell you, Your Honor, that I heard them say that. And I heard them -- I heard Mr. Johnson back there muttering he's lying about this, he's lying about that. .[117]

At this point, Mr. Johnson literally charged to the bench and had to be restrained by local counsel for the defendants. Nevertheless, at the bench conference, plaintiffs produced the defendants' designation in which Sandra Sotelo was designated as an expert witness on nursing care.[118] Clearly, Mr. Mueller had not misrepresented this fact to the jury as Mr. Rodolf told the jury. Plaintiffs also cited to case law that specifically allows that a witness, with proper predicate, could be asked if certain acts or omissions were negligent.

The process described above represents the plaintiffs' struggle with just one witness. Unfortunately, defense counsel's behavior was repeated throughout trial with witness after witness. At one point Mr. Mueller objected, again, to the "continual side bar" explaining to the court that "I am questioning the witness. He doesn't like the way that it is going and so he starts telling me what I am supposed to do and show the witness.

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[117] Exhibit I at Tab 8, RR, Sandra Sotelo, p. 56, lls.1-25.

[118] Exhibit I at Tab 9, RR, Sandra Sotelo, p. 60, lls. 8-12; p. 61, lls. 15-18.

It is inappropriate."[119] The end result? Despite the fact that Mr. Rodolf's "objections" were often overruled and Mr. Rodolf admonished that we "could do without the side bars, please," the fact remains that, time and again, the jury heard prejudicial statements in the guise of legal objections, the flow of direct examination on a crucial element of plaintiffs' case had been broken up and the jury removed from the court room.[120]

At times, prejudicial statements were uttered by defense counsel without even the pretense of a valid legal objections. During the cross-examination of Dr. Ken McCoin, plaintiffs' expert economist, Mr. Scott Johnson engaged in such an egregious sidebar comment, while literally pointing at the plaintiffs' attorneys, that even he belatedly retracted after the jury had heard it:

> Q. I keep thinking, we've put all these millions and millions and millions of dollars up here. And I keep thinking about my passport account. I keep wondering who all these millions and millions of dollars are really going.
>
> A. I couldn't hear you.
>
> Q. Who are all these millions and millions of dollars really for? I mean, if you get a little bit of money in the bank, you can make a little bit of money.[121]

Plaintiffs' objections to this obvious reference to attorney fees were sustained by the Court and the jury ordered to disregard. Such inflammatory remarks in the presence of the jury are wholly improper. *See*, *Texas Emp. Ins. Ass'n v. Hatton*, 255 S.W.2d 848, 849 (Tex. 1953)(has been held by this court that a discussion of attorney's fees by the jury is material misconduct and will justify reversal).

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119 Exhibit I at Tab 10, Reporter's Record, Trial Testimony of Debra Campbell, October 27, 2003, p. 38, lls. 9-16.

120 Exhibit I at Tab 11, RR, Debra Campbell, p. 39, lls. 15-20.

121 Exhibit I at Tab 12, Reporter's Record, Dr. Ken McCoin, p. 83, lls. 6-18.

Throughout the trial, defense counsel made statements unsupported and/or contrary to facts developed in discovery so that in many instances the proceedings became a "trial by ambush." *See, Johnson v. Berg*, 848 S.W.2d 345, 349 (Tex.App.-Amarillo1993, no writ)(trial should be based upon the merits of the parties' claims and defenses, rather than on an advantage obtained by one side through a surprise attack). Counsel for the defendants represented to the jury that the nurses who were called as witnesses at trial were testifying in their deposition as if each was a "deer in the headlights" at the hands of plaintiffs' counsel so much so that they could come to trial and testify, again under oath, to a position that was diametrically opposed to their sworn deposition testimony. It is one thing for attorneys to prepare witnesses. It is another thing for attorneys to so carefully orchestrate the testimony of witnesses that a "yes" in deposition can be a "no" at trial. The extent to which defense counsel coached its key witnesses is exemplified by the recurrent use of the word "hindsight" to explain changed testimony by witness after witness. Nurse Sandra Sotelo testified in her deposition that she and Nurse Hudson were called into the delivery room to assist with an anticipated shoulder dystocia. At trial she admitted that she had read her deposition for accuracy, the answers were correct, she understood the questions and had no changes.[122] However, at trial, her testimony was, in her own words, "a little" different, Dr. Eubank ***had not*** called her in to assist with a shoulder dystocia. [123] The reason for the directly contradictory testimony?

> **A. No. That's what I said at the time. And like I said, *hindsight was a big factor.* I knew that there was possibility, as with any patient.**

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122 Exhibit I at Tab 13, RR, Sandra Sotelo, October 23, 2003, p. 7, lls. 21-25; p. 8, lls. 3-9.
123 Exhibit I at Tab 14, RR. Sandra Sotelo, October 23, 2003, p. 31, lls. 15-22; p. 34, lls. 2-9.

That's the way I practice. I know that with any delivery we could have a shoulder dystocia. So when you asked me the question, along with the nervousness and all that put into factor, I knew that there was a shoulder dystocia. So I did answer it that way.[124]

After this statement, Nurse Sotelo reiterated that though she had 30 or 60 days to review her deposition testimony she did not make this change.

Q. The only thing he told you was to come into the room for a potential shoulder dystocia?
A. Into the room to help with the delivery, yes.
Q. Well, to help with the delivery part is different now than what you said then, correct?
A. Like I said, *hindsight was a big factor.*
Q. Okay. But, again, you didn't correct it?
A. There are things still to this day that are in and out of my memory.[125]

Like Sandra Sotelo, Nurse Hudson testified in her deposition that "Yes" Dr. Eubank had called her into the delivery in anticipation of a potential shoulder dystocia problem.[126] Like Sandra Sotelo, when asked that same question on direct examination at trial her answer was an unequivocal "No."[127] Nurse Hudson insisted that notice of a potential problem, i.e., shoulder dystocia, significant enough to call in two experienced nurses to help with the delivery was "Hindsight, hindsight and foresight."[128] The willingness of defense counsel to coach witnesses to this extent is the kind of harmful and prejudicial conduct that cannot be tolerated in a court of law where cases are to be decided upon facts not orchestrated sound-bites meant to excuse material changes in testimony.

One of the hotly contested issues before and during trial was the issue of whether, under Texas law, the parents of Maggie McShane could recover damages for their mental

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124 Exhibit I at Tab 14, RR, Sandra Sotelo, October 23, 2003, p. 34, lls. 12-19.
125 Exhibit I at Tab 15, RR, Sandra Sotelo, October 23, 2003, p. 35, lls. 14-22.
126 Exhibit I at Tab 16, Reporter's Record (RR), Sandra Hudson, October 24, 2003, p. 39, lls. 22-25; p. 40, lls. 1-2.
127 Exhibit I at Tab 17, RR, Sandra Hudson, October 24, 2003, p. 38, lls. 22-24.
128 Exhibit I at Tab 18, RR, Sandra Hudson, October 24, p. 46, lls. 23-25; p. 47, lls. 1-14.

anguish. Defendants, in their attempt to convince the Court that such damages were not allowed, cited the recent Texas Supreme Court decision in *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003) which disallowed a claim for loss of consortium to parents of children who have been seriously injured. *Id.* at 119. During a pre-trial hearing on the defendants' motion in limine concerning damage issues, counsel for the defendants argued that Mr. and Mrs. McShane were not entitled to plead for mental anguish damages pursuant to the *Roberts* decision:

> And the recent Roberts case, which I have a copy of for the Court, **says that that's [mental anguish] not a recoverable element of damages.** And so they shouldn't be able to go into in voir dire or opening statement or any questions as to, you know, their mental anguish in connection with this baby's birth and what's gone on in the last four years.[129]

Counsel for the hospital continued to insist that the parents did not have a cause of action for mental anguish based on *Roberts* and suggested that "I don't think that we should be spending the Court's time or the jury's time talking about the mental anguish."[130] The defendants' statements, in light of a plain reading of *Roberts*, is not an innocent mis-reading of case law or a mistaken, but good faith, interpretation. It is quite simply a deliberate misstatement of the law.[131] Judge Kent, in *Golden v. Employers Insurance of Wausau*, admonished defense counsel as follows for much the same conduct:

> On at least two occasions in its Motion to Dismiss, Defendant takes language from controlling cases out of context, citing such language as authority for its argument, when in fact the case stands for the opposite proposition. Defendant's counsel is advised that this Court did not recently fall off the turnip truck. The Court carefully reviews all documents submitted. At this point, the Court is unsure whether counsel simply gave

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129 Exhibit I at Tab 19, Reporter's Record, Hearing on Motions In Limine, October 1, 2003, p. 15, lls. 9-16.

130 Exhibit I at Tab 20, RR, October 1, 2003, p. 17, lls. 8-11.

131 Exhibit I at Tab 21, At the hearing on October 1, 2002, the Trial Judge rightly observed that Roberts does not address mental anguish. RR, October 1, 2003, p. 18, lls. 9-11.

> these cases a cursory, reading, or whether counsel's skewed interpretation of these cases was an attempt to deceive the Court. Giving Defendant's counsel the benefit of the doubt, counsel is warned that duplicity will not be tolerated in this Court. Indeed, such misdirection and deception will be dealt with **HARSHLY. Counsel is instructed in the future to read the cases cited as authority carefully and to state the holdings of these cases accurately, or suffer severe consequences.**

Golden v. Employers Ins. of Wausau, 981 F.Supp. 467, 470 (S.D.Tex.1997). Not only does this deliberate misstatement of the law disrespect this Court, it misled the Court and led to a preliminary ruling which prevented Deborah and Jim McShane from testifying to their mental anguish when they were first called as witnesses and questioned, not only about the facts of the case, but about Maggie. The negative impact of the bifurcation of Mr. and Mrs. McShane's testimony prejudiced the plaintiffs.

Plaintiffs were left to suffer the consequences of defense counsel's misstatements and misrepresentations -- not the defendants. Such misdirection and deception should not be tolerated nor the plaintiffs made to pay the price of the defendants' misconduct.

2. Defense counsel engaged in unprofessional, offensive and disparaging behavior.

In *Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121. F.R.D. 284, 286 (N.D.Texas 1988), the court convened en banc for the purpose of establishing a standard of litigation conduct to be observed in civil actions in their district. The court wrote that "we observe patterns of behavior that forebode ill for our system of justice" and noted that they were not alone in that observation. *Id.* at 286. Among the standards of practice adopted by the court was:

> (K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Id. at 288.[132]

Defense counsels' behavior toward the witnesses and plaintiffs' trial counsel, some of which was noted above, was contrary to the conduct expected in a Texas courtroom. One example will suffice. On cross-examination of Dr. Cardwell, Mr. Rodolf asked him if, in his opinion, the Journal of Fetal Medicine was a reliable publication and if he was familiar with an article entitled "Shoulder Dystocia and Operative Vaginal Delivery."[133] Dr. Cardwell replied that the journal was generally reliable and that he was not sure of his familiarity with the article and asked to see the article.[134] Mr. Rodolf told Dr. Cardwell that the article was in the packet of materials Dr. Cardwell had brought with him into the courtroom and that "[i]t came with the stuff you brought to the witness stand."[135] The following exchange took place:

> A. Well, apparently you looked through my packet. So I guess you know.
>
> Q. Well, I'm asking you.
>
> A. I mean, I -- like I said, I guess you looked through my package.
>
> Q. **I did. It's up there on the witness stand, right?**
>
> A. I didn't give you permission, but I guess you can.[136]

By his own admission, Mr. Rodolf rifled through papers of Dr. Cardwell's left unattended on the witness stand without Dr. Cardwell's permission or his knowledge. As Dr. Cardwell pointed out, these were his personal effects and there may have been things

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132 The court also noted that these standards are consistent with both the American Bar Association and State Bar of Texas Codes of Professional Responsibility. *Id.* at fn. 9.

133 Exhibit I at Tab 22, RR, Cardwell, p. 103, lls. 14-16.

134 Exhibit I at Tab 22, RR, Cardwell, p. 103, l. 17.

135 *Id.* at 18-20.

136 Exhibit I at Tab 23, RR, Cardwell, p. 104, lls. 1-10.

in them he did not want Mr. Rodolf to see.[137] This astonishing invasion of a witness's right to privacy by an officer of the court demeans the legal profession and is the kind of conduct that "offends the dignity and decorum" of the legal proceedings.[138] So did Mr. Rodolf's parting question to Dr. Cardwell:

> Q. I forgot to ask you one other thing, Doctor. I'm sorry. Was it Rockford, Illinois where you were on the staff at the hospital?
>
> A. Yes.
>
> Q. Why did you leave?
>
> A. Personal reasons.
>
> Q. Do you want to tell the jury what they were?
>
> A. No.[139]

Once more, there was no need to answer the question. Stephen Rodolf had accomplished his goal, i.e., leaving the jury with an unmistakable, incurable and prejudicial inference that Dr. Cardwell had left the hospital in Rockford under a cloud.

These actions, plus the cumulative effect of these action, denied Maggie McShane her day in court. The whole trial was tainted by defense counsel's belligerent and "win at any cost" tactics. These tactics should not be tolerated in a Texas courtroom because they demean the judicial process and impair the plaintiffs' right to a fair and impartial trial. A lawyer is an officer of the legal system and a public citizen having special responsibility for the quality of justice. Supreme Court of Texas, Texas State Bar Rules, art. 10, § 9, Preamble (1). The Texas Lawyer's Creed reminds those attorneys privileged

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137 Exhibit I at Tab 24, RR, Cardwell, p. 106, lls. 22-24.

138 The Texas Lawyer's Creed A Mandate for Professionalism, Promulgated by The Supreme Court of Texas and the Court of Criminal Appeal November 7; 1989, Section IV, Lawyer and Judge (5).

139 Exhibit I at Tab 25, RR, Cardwell, p. 139, lls. 16-23.

to practice law in the state of Texas to be mindful of their duty to the judicial system.[140] The creed serves to remind lawyers that zealous advocacy does not excuse injudicious behavior. Cook, et al, *A Guide to the Texas Lawyer's Creed: A Mandate for Professionalism*, 10 Rev. Litig. 673, 678 (1991).

III.
PRAYER

For these reasons, the plaintiffs ask the court to grant the plaintiffs' motion for new trial, to set aside the existing judgment and to grant a relitigation of the issues in this case and for such other and further relief to which the plaintiffs may be entitled.

Respectfully submitted,

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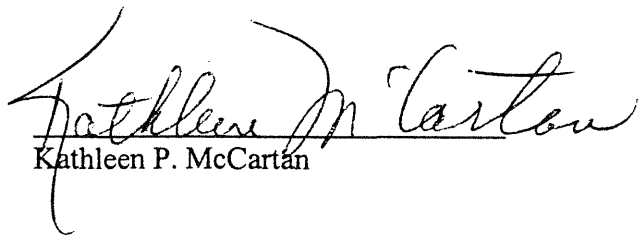
By: _____
Mark R. Mueller
State Bar No. 14623500
Kathleen P. McCartan
State Bar No. 03783450

ATTORNEYS FOR PLAINTIFFS

[140] "The Texas Lawyer's Creed—a Mandate for Professionalism," Order, November 7, 1989.

CERTIFICATE OF SERVICE

I certify that on this the 26th day of January 2004, a copy of Plaintiffs' Motion for New Trial was served on all counsel of record by hand delivery or certified mail return receipt requested.



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ATTORNEYS FOR DEFENDANTS, BAY AREA HEALTHCARE GROUP, LTD. D/B/A CORPUS CHRISTI MEDICAL CENTER-BAY AREA, COLUMBIA HOSPITAL CORPORATION OF BAY AREA, SOUTH TEXAS SURGICARE, INC.

CAUSE NO. 00-4057-A

DEBORAH SUE McSHANE AND JAMES PATRICK McSHANE, INDIVIDUALLY AND AS LEGAL GUARDIANS AND NEXT FRIENDS OF MAGGIE YVONNE McSHANE, A MINOR	§	IN THE DISTRICT COURT OF
VS.	§	NUECES COUNTY, TEXAS
BAY AREA HEALTHCARE GROUP, LTD., INDIVIDUALLY AND D/B/A THE CORPUS CHRISTI MEDICAL CENTER – BAY AREA; ET AL.	§	28TH JUDICIAL DISTRICT

AFFIDAVIT SUPPORTING MOTION FOR NEW TRIAL

STATE OF TEXAS *
*
COUNTY OF NUECES *

BEFORE ME, the undersigned, on this day personally appeared Mark R. Mueller who is personally known to me and who first being duly sworn according to law, upon his oath deposed and said:

> "My name is Mark R. Mueller. I am over eighteen years of age and am fully competent to make this affidavit.
>
> I am the attorney of record for the plaintiffs in the above-styled case. This case was called to trial on October 20, 2003, and ended on November 14, 2003.
>
> I have read Plaintiffs' Motion for New Trial. The documents in Exhibit B attached to the Motion for New Trial were provided to the plaintiffs by the Honorable Nanette Hasette, 28th District Court Judge, on January 19, 2004 and contain the results of an investigation by Mr. Ed Preuse, Investigator, Corpus Christi Army Depot concerning Arnold A. Moreno, a juror in Cause No. 00-4057-A, McShane, et al vs. Bay Area Hospital, et al., including the sworn statement of Mr. Howard M. Beers. The

documents in the Appendix contain the Affidavit of Mary Aleman. Otherwise, I have personal knowledge of the facts stated in the Motion for New Trial and they are true and correct.

Mark R. Mueller

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 25th day of January, 2004.

Notary Public in and for the State of Texas

ALINE JORDAN
(Printed Name)

My commission expires: July 15, 2007

ALINE JORDAN
Notary Public, State of Texas
My Commission Expires
July 15, 2007

CAUSE NO. 00-4057-A

DEBORAH SUE McSHANE AND JAMES PATRICK McSHANE, INDIVIDUALLY AND AS LEGAL GUARDIANS AND NEXT FRIENDS OF MAGGIE YVONNE McSHANE, A MINOR	§	IN THE DISTRICT COURT OF
V.	§	NUECES COUNTY, TEXAS
BAY AREA HEALTHCARE GROUP, LTD., INDIVIDUALLY AND D/B/A THE CORPUS CHRISTI MEDICAL CENTER – BAY AREA; ET AL.	§	28TH JUDICIAL DISTRICT

ORDER

On _____, 2004, came on to be heard Plaintiffs' Motion for New Trial and the Court, after having considered the same, is of the opinion that the motion should be and is hereby GRANTED.

Dated this ___ day of _____ 2004.

_____

JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA LOCKE, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE, MOTHER AND AS NEXT FRIEND OF ALEXIS NICOLE BARRERA, DECEASED	§	
Plaintiff,	§	
v.	§	**CASE NO. CIV-01-213-W**
CIMARRON MEMORIAL HOSPITAL AND MANUEL J. RAMIREZ, M.D.,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MULTIPLE MOTIONS FOR PROTECTION AND MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY SANCTIONS

Plaintiff Andrea Locke, Individually and as Personal Representative, Mother and Next Friend of Alexis Nicole Barrera, Deceased, asks the court to sanction Defendant Cimarron Memorial Hospital, Manuel J. Ramirez, M.D., Leary Hood, Paulene Davis, Jeff James, Tommy Grazier, Bonnie Heppard, Carolyn Topper, RN, Debbie L. Sappenfield, RN, Linda J. Cook, RN, and Lynna Brakhage, RN, for discovery abuse and for impeding the discovery process.

A. Introduction

1. Plaintiff is Andrea Locke, Individually and as Personal Representative, Mother and Next Friend of Alexis Nicole Barrera, Deceased. Ms. Locke lost her baby due to the negligence of Defendants. Defendant's Cimarron Memorial Hospital. Manuel J. Ramirez, M.D., Carolyn Topper, RN, Debbie L. Sappenfield, RN, Linda J. Cook, RN, and Lynna Brakahge, RN are health care providers who rendered treatment and care to Andrea Locke, individually, and her daughter Alexis Nicole Barrera, deceased, at the time of her birth. The balance of the

Defendants are members of the Board of Control of Cimarron Memorial Hospital, who are charged with the responsibility of appointing only competent and qualified members to the medical staff of Cimarron Memorial Hospital. Plaintiff asks the court to sanction all of the above-referenced Defendants based upon the following facts, which constitute discovery abuse and impeding the discovery process.

B. Facts Upon Which Request for Sanctions is Predicated

2. Plaintiff, Andrea Locke and her attorney of record traveled from their respective homes in Liberal, Kansas and Austin, Texas to Oklahoma City to attend depositions scheduled for December 5 through 7th, 2001. Defendant Cimarron Memorial Hospital had noticed the Plaintiff's deposition for December 5, 2001 at 1:00 pm. (attached as Exhibit "1"). Plaintiff noticed the depositions of Manuel J. Ramirez, M.D. for December 6, 2001 at 9:00 am (attached as Exhibit "2"), Carolyn Topper, RN, for December 6, 2001 at 1:00 pm (attached as Exhibit "3"), the current administrator of Cimarron Memorial Hospital for December 6, 2001 at 3:00 pm, (attached as Exhibit "4"), Lynna Brakhage, RN on December 7, 2001 at 10:00 am (attached as exhibit "5"), Debbie L. Sappenfield, RN on December 7, 2001 at 1:00 pm (attached as Exhibit "6"), and Linda J. Cook, RN for December 7, 2001 at 3:00 pm (attached as Exhibit "7"). This was the ***third*** time these depositions of defense witnesses had been noticed since they were first requested in July of 2001. Each time previously, Defendant Cimmaron Memorial Hospital, by and through their attorneys of record, had reassured Plaintiffs' counsel that their witnesses would be produced timely. The Court's scheduling order required designation of expert witnesses by January 11, 2002, and the testimony of the witnesses noticed by the Plaintiff are required to meet that deadline.

3. One day prior to the Plaintiff's deposition, Mr. Christopher Liebman filed a Motion to Withdraw as counsel to Manuel J. Ramirez, M.D. (attached as Exhibit "8") but, curiously also filed an answer to the First Amended Complaint later that same day (attached as Exhibit "9"). Upon arrival in Oklahoma City on December 4, 2001, in anticipation of depositions to begin the following day, the undersigned counsel of record for the Plaintiff spoke with Mr. Geremy Rowland, an attorney who has made an appearance on behalf of all Defendants, save and except Manuel J. Ramirez, M.D. He advised at that time his client, Carolyn Topper, RN, would not be attending her deposition as noticed, and it was his understanding Manuel J. Ramirez, M.D. would not attend his noticed deposition as well.

The following day and prior to commencement of the Plaintiff's deposition, a flurry of motions by the Defendants were filed, and an effort by counsel for Cimarron Memorial Hospital was made to obtain an expedited hearing before the court. A separate Motion for Protective Order was filed by Christopher Liebman on December 5, 2001, for protection from proceeding with the deposition of Manuel J. Ramirez, M.D. on December 6, 2001, due to an allegation of extreme prejudice to his right of representation by counsel at ***his*** deposition. Cimarron Memorial Hospital's Motions for Protective Order are based on:

1) The allegation that the administrator of the hospital had no personal knowledge of relevant facts;
2) Ms. Topper's present work schedule would not permit her to be absent from work for a period which would allow adequate time for preparation, travel, and time allowance at deposition;
3) The fact that the putative father of the deceased child who is believed to be currently serving a sentence in Kansas for sexual assault on another woman has filed a Motion to Intervene; and,
4) Dr. Ramirez would not be present for depositions based upon the motion of Mr. Liebman to withdraw as his counsel.

4. Defendant's respective Motions for Protective Order were not filed in good faith and were calculated to impede discovery for the following reasons:

1) Manuel J. Ramirez, M.D. is a party to this litigation who is represented by counsel who had agreed to produce his client as noticed. The court had not heard nor granted Mr. Liebman's Motion to Dismiss and he was, therefore, still represented by counsel. Mr. Liebman's last minute Motion to Withdraw and Motion for Protective Order were calculated to and in fact, did impede the proper discovery of evidence in this matter.

2) Carolyn Topper, RN was properly noticed by agreement for her deposition for December 6, 2001 at 1:00 pm. Defendant's offered to pay for her expenses in traveling to Oklahoma City where this case is pending for her deposition in this matter. Counsel for Ms. Topper did not advise Plaintiff's counsel that she would not attend her deposition as noticed until after he had traveled to Oklahoma City for the purpose of taking her deposition. See attached Exhibit "1", Affidavit of Evelyn Garrett.

3) The current administrator of the hospital has knowledge of relevant facts. Counsel for Cimarron Memorial Hospital, Mr. Geremy Rowland, invited Plaintiff's counsel to notice the current administrator rather than the former administrator, Carol Blakely, who is no longer with Cimarron Memorial Hospital. Failure of the hospital to produce the current administrator of the hospital is based solely on its own estimation of what relevant evidence may be adduced from a witness who has been properly noticed for his deposition by the Plaintiff.

5. Rather than going forward with the Plaintiff's deposition as scheduled at 1:00 pm on December 5, 2001, Cimarron Memorial Hospital, by and through their attorney's of record, Johnson, Hanan, Herrin and Trout were at the court house seeking a hearing. The undersigned counsel of record indicated that unless they began the deposition by 3:00 pm, he would send his client, the Plaintiff, Ms. Andrea Locke, back to her home in Liberal, Kansas due to the four hour car ride it would entail. Defendant's counsel did appear for the deposition at 3:00 pm, but continually argued on the record about moving forward with the deposition until the undersigned insisted that they begin the deposition at 3:20 or cancel her deposition. Counsel for Defendants began the Plaintiff's deposition at that time and insisted on recessing for the day at 5:00 pm and resuming again at 9:00 am the following morning. Therefore, Ms. Andrea Locke stayed over in Oklahoma City for an additional night and began her deposition again at 9:00 am the following morning. During the course of her deposition, Mr. Scott Johnson continually objected and

interrupted the examination of this witness with a protracted argument regarding whether there was proper diversity in the case. Counsel objected to Mr. Johnson's comments in form as he was not examining the witness on behalf of the Defendants (the interrogation was being handled by Mr. Jeremy Rowland of his firm), and for interrupting with non-relevant comments which were calculated to harass and upset the Plaintiff, who had appeared for deposition concerning the death of her newborn child.

6. During an intervening brief recess to make a record on the non-appearance of Dr. Manuel J. Ramirez, M.D. for his deposition as noticed, Mr. Christopher Liebman made an appearance and handed a Motion for Protection to Plaintiff's counsel and indicated that Manuel J. Ramirez, M.D. would not appear for his deposition as scheduled. Whereupon, Mr. Scott Johnson indicated the Plaintiff's deposition would not continue at that time, but rather be suspended until a ruling had been obtained from the court on their Motions for Protection. He then advised that none of the hospital witnesses noticed for December 6 and 7, 2001, would be produced for their depositions. Plaintiff and her counsel then packed their bags and went home.

C. Plaintiff's Motion for Sanctions

7. The court should award sanctions for the conduct of the respective Defendants which was calculated to impede and, in fact, did impede discovery in this matter by striking their pleadings and awarding monetary sanctions.

D. Argument

8. The purpose of sanctions is to secure compliance with the discovery rules, deter violations of the discovery rules by others, and to punish parties for discovery violations. See *National Hockey League vs. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96th Supreme Court, 2778, 2781 (1976). When considering sanctions the court should ensure that any

discovery sanctions comports with due process. See *Ham & Packing Co., vs. Arkansas*, 212 U.S. 322, 349-354, Supreme Court 370, 379, 381 (1999). The sanctions imposed must have a direct relationship to be offensive conduct.

9. The court should grant the Motion for Sanctions because the Defendants were properly notified that their depositions were to be taken as cited above and Defendants did not appear at the depositions as required.

10. The sanctions sought are not excessive, will ensure compliance of the rules, and will deter future violations. There is a direct relationship between the conduct of the Defendants as cited above in the request for sanctions.

E. Conclusion

WHEREFORE PREMISES CONSIDERED, Plaintiff Andrea Locke, Individually and as Personal Representative, Mother and Next Friend of Alexis Nicole Barrera, Deceased, respectfully requests the Court to sanction Defendants for their discovery abuses as requested above.

Respectfully submitted,

MUELLER LAW OFFICES
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(512) 478-1236
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By: _____
MARK R. MUELLER
State Bar No. 14623500
HUNTER THOMAS HILLIN
State Bar No. 09677930

ADMITTED PRO HAC VICE
ATTORNEYS FOR PLAINTIFF/RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of December, 2001 a copy of the foregoing Plaintiff's Response To Defendant's Multiple Motions For Protection and Memorandum In Support Of Motion For Discovery Sanctions, was served on counsel of record as listed below pursuant to the Federal Rules of Civil Procedure.

Mary Hanan
Johnson, Hanan, Heron and Trout
Bank One Center, Suite 2750
100 North Broadway Avenue
Oklahoma City, Oklahoma 73102
VIA FAX 405/232-6105

Christopher Liebman
104 North East Sixth
Guymon, Oklahoma 73942
VIA FAX 405/239-6766

Hunter Thomas Hillin

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA LOCKE, et al.,

Plaintiffs,

- VS - No. CIV-01-0213-W

CIMARRON MEMORIAL HOSPITAL, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF HEARING

HAD ON WEDNESDAY, JANUARY 9, 2002

UNITED STATES COURTHOUSE

OKLAHOMA CITY, OKLAHOMA

BEFORE: THE HONORABLE LEE R. WEST, U. S. District Judge

APPEARANCES:

MR. HUNTER T. HILLIN and MR. PHILLIP G. WHALEY, Attorneys at Law, appeared on behalf of the Plaintiffs.

MR. A. SCOTT JOHNSON, MS. MARY B. HANAN, MR. GEREMY A. ROWLAND; and MR. CHRISTOPHER J. LIEBMAN, Attorneys at Law, appeared on behalf of the Defendants.

(PROCEEDINGS HAD WEDNESDAY, JANUARY 9, 2002:)

THE COURT: As I explained earlier to some of you, we're holding this hearing in chambers at my request simply because my courtroom is under construction, having suffered substantial damage back during the winter.

I need to call on, first, counsel for the plaintiff to note their appearances and appearances of any other parties that they represent, if you will.

MR. HILLIN: My name is Hunter Hillin; and I'm here for plaintiff Andrea Locke, individually; as personal representative, mother and next friend of Alexis Nicole Barrera, deceased.

I'm assisted by local counsel Phil Whaley, who is to my left. This is my nurse, Aline Jordin; and the plaintiff, Andrea Locke.

THE COURT: Okay. And for the defendants? Mary?

MS. HANAN: Mary Hanan, I represent the hospital defendants, which include the board members, the hospital, and the nurses who have been named.

THE COURT: Would you name those nurses, and particularly if they're present.

MS. HANAN: Carolyn Topper, Debbie Sappenfield, Linda Cook, and Lynna Brakhage.

THE COURT: And they are all present in chambers?

MS. HANAN: Correct.

THE COURT: And you're assisted, of course, by Mr. Johnson, as co-counsel.

MR. JOHNSON: Yes. And Geremy Rowland, Your Honor.

MR. ROLAND: Geremy Rowland.

THE COURT: Thank you, Geremy.

Now, then, is Doctor Ramirez or Mr. Liebman present?

MR. LIEBMAN: Chris Liebman appearing as counsel for Doctor Ramirez, who is present in person.

THE COURT: Let the record so reflect.

Do we have everybody we need here, then, counselor?

MR. HILLIN: I believe we do. Is there a representative for the hospital who's here?

MR. JOHNSON: They're the named parties.

MR. HILLIN: I mean Cimarron Memorial Hospital is the defendant, I didn't know if there was a representative for the hospital other than the nurses.

Is there anyone here for the hospital other than the nurses?

MR. JOHNSON: Other than the nurses, we don't have another person here, we have all the named nurses involved in the deposition rounds.

THE COURT: Is your motion for sanctions against the hospital itself?

MR. HILLIN: Yes.

THE COURT: Is anyone needed here, aside and

apart from counsel?

MR. JOHNSON: No, sir.

MS. HANAN: No.

THE COURT: Did you all request that anyone else be here other than -- or is the hospital requested to be present, or a corporate representative?

MR. HILLIN: Just by your order, Judge, not by us, just by your order in terms of what parties are to appear, all parties against whom sanctions are requested.

THE COURT: Okay.

I believe it's your motion, I'll let you proceed.

MR. HILLIN: Yes, Your Honor. I believe that our position on this is really very succinctly and fully stated in our motion that we did file with the Court. We filed a response and objection to the defendants' multiple motions for protective order, and our own motion for sanctions and a brief in support of that. And we set out the facts in there.

Very briefly, Your Honor, we have been requesting the depositions of the nurses, Doctor Ramirez, and the administrator of the hospital since July of this last year. We were concerned about the Court's standing scheduling order that required us to designate our experts in October of 2001.

There were some discussions with the hospital's attorney, and even though they weren't producing their witnesses on any particular days, even though they had not offered any

particular days for their witnesses to give testimony, they assured us that they would cooperate with us in discovery. Of course, I was encouraged by that.

But lacking any dates that were given, we -- and lacking the depositions having been taken, we agreed to submit a new order for your consideration to extend the deadlines for completion of discovery and for designation of experts.

THE COURT: What was the original discovery completion date schedule, Mr. Hillin?

MR. HILLIN: Your Honor, I don't have the order in front of me, I want to say that it was October or November.

THE COURT: You say by agreement that was -- by agreement of the parties, and then permission of the Court, that would be extended to when, now?

MR. HILLIN: That's right. The deadline for designation of expert witnesses was extended to January Eleventh, which is two days from now, of 2002, by agreement between the parties. And we submitted an order to you that was then signed.

Even in light of that order, even in light of that agreement, we still obviously had this discovery that had to be done in order to be able to meet our deadline for designation of experts and get meaningful reports from our experts. So we noticed the depositions, absent any dates that have actually been given by the hospital. Even though there was some

discussions on the telephone about possible dates in October, I never got any definitive word from the hospital, sent out notices in October.

Then before those depositions were to be taken in October, the hospital told me, no, that we can't do it then, you know. And I said, well, when can you do it? We need to get these depositions taken. Again, there was some discussions on the telephone and some general ideas about Mr. Liebman being available in November for the depositions. And we talked about November 21st and 22nd as potential dates. Never heard anything definitive from the hospital about whether they would produce their witnesses at that time. So I went ahead and sent out the notices so we could reach this deadline that was now fastly approaching. And again, shortly before the depositions I was contacted by Mr. Geremy Rowland for the hospital.

THE COURT: Let me kind of interrupt you here to say, were the notices proper in all respects?

MR. HILLIN: Yes

THE COURT: Were the notices contrary to any assurances or agreements that you had made to counsel for the defendants?

MR. HILLIN: No, absolutely not. And just not having any definitive word from the hospital, you know, on dates, and needing to get the depositions taken, I went ahead and noticed in November for dates that we had discussed, even

though there were no confirmations on those dates.

And shortly before the November dates, I was again contacted by Mr. Rowland, who indicated that those would not be good dates but, you know, we should work on getting some dates in December that we can work with. And I voiced my concern that it had been an ongoing concern about getting these depositions taken and that we had to get 'em done, and that I didn't mind extending into December if we could shore up the dates shortly into December, giving our experts time to review the depositions and include information in their evaluation of the case.

THE COURT: Was there anything in that conversation that varied or contradicted the notice, other than your willingness to consider different dates on the depositions?

MR. HILLIN: As a matter of fact, we talked about these specific dates of December Fifth, Sixth and Seventh for getting these depositions taken. And we all agreed that that would be a good time to do this. And Mr. Rowland gave me assurances that he could get his people there. The only problem he might have would be working things out with Carolyn Topper, because she lived in Colorado, and she was a party and she was a nurse and that she had a work schedule. And I said, "Well, you talk to Miss Topper and tell her, you know, we've got to do it sometime, let's get the deposition taken." And he

said, "Yeah, I don't think that will be a problem."

So I went ahead and noticed them. And then next thing I know, my nurse and I, Aline Jordin, have traveled up here to take the deposition. I had earlier in the day, before we left the office, I had received a copy of a motion to withdraw that had been filed by Mr. Liebman. And because the Court had not ruled on that, and because the deposition was scheduled the very next day, and because we had to get the discovery done in order to get everything accomplished that needed to be accomplished, and I hadn't heard from Mr. Liebman that he was not going to appear at the deposition or that Doctor Ramirez was not going to appear at the deposition, I got on a plane with my nurse, who was prepared to come with me and help me with the deposition.

We came to Oklahoma City. We got off the plane. I checked my voice mail, and there were messages waiting for me from Mr. Liebman and from Mr. Rowland. And I contacted Mr. Rowland, he indicated that he had heard from Mr. Liebman that he was not going to be producing Doctor Ramirez the following day for his deposition. And I indicated that, no, we're going forward with depositions, and if Doctor Ramirez doesn't show up, that's going to be a problem.

And the next morning, of course, I got a call from Miss Hanan saying that they were not wanting to produce their witnesses, all the nurses, because Doctor Ramirez had filed a

motion to withdraw. And, you know, I indicated to them, well, the fact that -- I'm sorry, Mr. Liebman had filed the motion to withdraw. And I said, well, you know, the mere fact that he's going to withdraw as counsel, perhaps if the Court allows him to at sometime in the future doesn't have any effect on our need to get these depositions taken or on your obligation to produce your witnesses. We need to move on with the discovery, and if he doesn't appear for his deposition, he'll have something to answer to. And if Mr. Liebman doesn't attend the depositions of the nurses, maybe he's got a problem with Doctor Ramirez that they need to straighten out, but we need to get our discovery done.

And Miss Hanan offered to pay for our expenses in traveling up to Oklahoma City to take those depositions in light of all the developments. And I told her that if I had any available time between that and our deadline for designation of experts when we could reasonably get these depositions taken and reviewed by our experts before our deadline, that I would cooperate with her there. But I checked with my office and I didn't -- I had very full schedule in December and in January. And I told her, "No, I'm sorry, we're going to have to move forward with them."

And the response from the hospital was to file multiple motions for protection and to try to get a hearing that afternoon, on the afternoon of the -- I believe it was the

Fifth. And because they were seeking a hearing and you weren't in town, you know, I told them -- I said, well, I'll hold on to my plaintiff, who they had noticed for deposition at One o'clock, I'll hold on to her until Three o'clock but she's got a four-hour drive ahead of her. If you're going to take her deposition, you need to start it by 3:00.

So they came over at 3:00 and we sat down. And Mr. Rowland, during the course of the time between 3:00 and 5:00, did ask some questions, he did examine the witness on behalf of the defendant. But there was also a lot of argument on the record.

Mr. Johnson appeared at the deposition, Miss Hanan appeared at the deposition, and Mr. Geremy Rowland was there, all for these defendants. And they wanted to stop her deposition at Five o'clock that day because the local rules said you could stop at 5:00 and resume at 9:00, and that they intended to take a seven-hour deposition of her because -- And that each of these attorneys individually were going to examine this witness, this mother of a stillborn child at the hospital, who doesn't have seven hours to say in this case. They were going to take a seven-hour deposition.

So we -- we agreed to appear at Nine o'clock in the morning and resume her deposition. And we started her deposition, and then Mr. Johnson made -- started making a bunch of what I considered to be harassing comments on the record

about, you know, there being a lack of proper diversity of jurisdiction in the case and that the Federal Court didn't have jurisdiction in this case. Which I thought was improper in terms of the deposition of this plaintiff. It was also very upsetting to this person, who's lost her baby, who's appearing for a deposition, and she's trying to do her best to give her testimony and she's hearing this sort of thing. And all this argument going around the room about taking these depositions, and all three of these attorneys wanting to examine her.

And we take a break about 15 minutes into this so that I can make a record that Doctor Ramirez in fact has not appeared, as noticed, over at their office for a deposition that morning. I had a court reporter over there to establish that he had not appeared, and we were in a different location so I needed to do this. We were in the process of doing that when Mr. Liebman walks in the door.

THE COURT: You're in the deposition then?

MR. HILLIN: In the deposition. Mr. Liebman walks into the door, and we all kind of stop. And of course I'm not making my phone call because Mr. Liebman can -- can actually put on the record right there whether or not Doctor Ramirez is going to appear and give his deposition that day or not. And so we have a discussion about the fact that he's now filed a motion for protection, which we're aware of now, a motion for protection from Doctor Ramirez's deposition going forward

because of his pending motion to withdraw as counsel.

THE COURT: Now, that is the motion that had --

MR. HILLIN: That's the motion Mr. Liebman --

THE COURT: -- been filed by Mr. Liebman not only to withdraw but to protect the doctor's deposition testimony because of his motion to withdraw?

MR. HILLIN: That's right.

THE COURT: Okay. Neither of which had been --

MR. HILLIN: Ruled on.

THE COURT: -- treated or ruled on by the Court, okay.

MR. HILLIN: That's correct. And Mr. -- I think it's very important to note here that Mr. Liebman had not filed a motion for protection against all the other depositions going forward of these nurses.

THE COURT: Just Doctor Ramirez.

MR. HILLIN: Just Doctor Ramirez. Yet when Mr. Johnson heard that he had filed a motion for protection from Doctor Ramirez's deposition he said, "Okay, that's it, we're not producing our nurses this week after all. We're not going to do it." And I said, "So I don't need to stick around here in Oklahoma City and wait until the times that they would appear for their depositions because they're not going to be there? Is that what you're telling me?" He said, "Yeah, that's what I'm telling you."

So we went back to Austin and I filed my motions, Your Honor.

We are trying to get discovery done in this case. We are trying to get the facts, and we are having nothing but problems with this hospital in getting it done. And these multiple motions, just everything that could come down the pike, they filed a motion for protection on.

The plaintiff -- the putative father coincidentally during this time frame had filed a motion to intervene.

THE COURT: That's been withdrawn now.

MR. HILLIN: He's withdrawn. And he never had the right to intervene, and it shouldn't have had any effect on the taking of the depositions as scheduled. But again, this was another thing that was used by the hospital as the reason why.

Now, I think it's important to also note when they're filing all these motions for protection, that they're also telling me that Carolyn Topper couldn't get off work, couldn't get away, she couldn't make it to her deposition. So even before all these motions are filed because of Doctor Ramirez not appearing for his deposition, Mr. Liebman withdrawing as counsel for Doctor Ramirez, the putative father filing a motion to intervene, even before all that has happened, they already know that Carolyn Topper is not going to be there for her deposition. And in my estimation they're doing everything they can in their power to throw as many obstacles to us just

getting the depositions taken as possible.

So since July I've been trying to get these depositions taken, and I still don't have 'em; and I've got a deadline, an expert deadline, two days from now.

THE COURT: Okay. Let me get a response from Miss Hanan or Mr. Johnson, whoever wishes to respond, and then we'll decide what testimony or evidence, depending on what kind of dispute there is with regard to the facts.

Who wishes to respond?

MR. JOHNSON: I'll start, Judge. I first was advised of this about Doctor Ramirez not appearing in -- just prior to the meeting we had at our office with everybody, plaintiff's counsel and all of us to sit down and try to figure out some way to prevent the outcome being that these ladies would be deposed twice, potentially; that the plaintiff might be exposed to that. We offered to pay expenses, we offered -- we weren't going to object to anything that needed to be done.

We had in place -- and the ladies are here -- an avenue to bring all of 'em to do these depositions. We had no idea a motion to intervene was going to be filed. We had no idea that Doctor Ramirez didn't intend to show up. We had no idea this was going to happen.

Mr. Ryan -- we all sat there and talked and I thought it was a good discussion. Mr. Ryan sat there and talked with us

very professionally about all of this. And I said, "Well, let's get over to the courthouse and see if we can do something because none of us want to waste the time or expense."

At that point, I'm not sure exactly when the motion to intervene was filed, but at that point I didn't know about that, and I don't think, I don't know whether Mary did or not, and I don't --

MS. HANAN: I don't remember.

MR. JOHNSON: We knew about the motion to withdraw, and I think we heard that Doctor Ramirez just flat wasn't going to show up. So that was why we were all discussing and trying to figure out what to do about this. These folks were four-and-a-half hours away, they were ready to come, they were -- made themselves available, save and except Carolyn Topper, who did have problems in travel, and we did discuss that. We did not say we wouldn't produce her. We absolutely did not.

Now, as to what my interaction in the deposition was, first of all, I wasn't there at the first part of the first session --

THE COURT: Let me ask this, Mr. Johnson: Did you all reach any agreement by and between you as to --

MR. JOHNSON: Just till Three o'clock.

THE COURT: Just till Three o'clock?

MR. JOHNSON: Just till Three o'clock.

THE COURT: All right. Now, at Three o'clock was

there any other agreement for any additional time, or is his recitation with regard to that correct?

MS. HANAN: Originally he agreed to put the depositions off. He said, "If you call my office and get some dates on which we can do these depositions, I'll agree to do it.

THE COURT: Now, "originally," when are you talking about? That day?

MS. HANAN: That morning. That morning. Because I told him it was all messed up. These witnesses are going to go to undue expense, let's just back up and do it when we can agree, and when everybody can be here. And so he said, "Fine. I'll do that if you --" if me "-- does the work on it." And I said, "Fine, I'll do it. And we would pay your expenses."

At that time I called his office and got some dates from his secretary, and coordinating with my schedule. When he called back and he said, "No, I'm not going to agree to it." And I said, "Well, I thought we already had an agreement." "No, I'm not going to agree to it, it's going to put me to too much work," or whatever, I can't remember exactly what he said. Withdrew his agreement.

So at that point -- by then we were late in the morning, I thought I had an agreement. So then I started drafting the motions to get it in front of you or get it in front of a magistrate, drafted motions on all the particular objections to

the different depositions, as well as the mess that we were in with people not showing up and not being represented at the depositions. Brought it over here, presented it to your law clerk. She said that we could go to a magistrate.

I went to Judge Purcell, found out that he was in trial. They -- left it there over the noon hour, they called back and said that they couldn't hear it.

So I came back to your law clerk, and she said she would try and get ahold of you. And I said, "Okay, I will wait to hear from you."

And in the meantime, we had this face-to-face discussion, which is required.

THE COURT: This all sounds to me as if you all did not reach an alternate meeting of the minds and agreement with regard to a different date from the noticed deposition. Am I incorrect in that? That's a clear reading of what you -- what I understand it to be.

MS. HANAN: No, we were in the process. I thought I had an agreement from him, but when I got back with him on the dates that his office had proposed, he said "no."

THE COURT: Again, you all did not have an agreed deviation from the scheduled notice date at the time the depositions were scheduled to start; is that correct?

MS. HANAN: Correct.

THE COURT: Okay. Now, then, go ahead.

MR. JOHNSON: I'm sorry, I thought we had an agreement that when we got dates from his office and did all of this, that we would change it. And then when Mary did all of that and talked to him the second time --

THE COURT: That's not my understanding. I understand there's some discussion of that but there never was a meeting of the minds and agreement.

MR. HILLIN: If I can just shed a little light on that. When I first talked to Mary about that, my discussion with her was, "You know, I don't have a problem in principle with that, but you're going to need to get dates when I'm available to see if this can even work."

Meanwhile, she's making a call to my office. I'm calling my office, and I'm finding out that the only dates that I have are dates that just will not work, that won't give us the time that we need to get the depositions taken, to start with.

Number two, they won't give us time to get 'em reviewed by experts in the case. So I immediately, after I got off the phone with my office, when I knew what other, you know, slim dates, that I had one or maybe two dates, that I called her back on the phone so that she wouldn't -- you know, there would be no delay there. And I told her, I said, "no, I -- all right. We talked about potentially doing this, but I now see what the dates are and I can't make that kind of agreement with you."

So there was no agreement that was withdrawn. There was a "let's look at it and see." And then I immediately let her know that there was no way that could happen. I mean I was not trying to be an obstructionist about it, I was just trying to be practical. And here we are, we still didn't have depos.

THE COURT: Okay, here's my dilemma: I'm going to need to take some testimony here and put some people under oath.

MR. HILLIN: Okay.

THE COURT: Your contention is that you noticed the deposition, that you never agreed, a meeting-of-the-mind agreement that would deviate from that noticed deposition.

MR. HILLIN: That is correct.

THE COURT: And your position, is it different from that? If it is, I need to put some people under oath here.

MS. HANAN: Yes. My understanding that morning was that I had an agreement with him that we would get alternate dates when both of us could present depositions and everybody could be there. And also, since we're talking about agreements, my understanding -- it was not me personally, but my office had talked to Mr. Hillin prior to these depositions, and my understanding was that he had agreed that Carolyn Topper did not need to be there, that she did not need to be there, that -- that was my understanding.

THE COURT: I think you're repeating something that someone else told you, is that correct?

MS. HANAN: That's correct.

THE COURT: All right. Let me put both of you under oath at this time.

Do you and each of you swear that the testimony you will give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?

MR. HILLIN: I do.

MS. HANAN: I do.

THE COURT: On the record, now, go ahead and repeat your testimony with regard to that, and I'll allow opposing counsel to cross-examine you in that regard.

MR. HILLIN: On the morning of December Fifth, Miss Hanan and I had a telephone conference in which she offered to pay our expenses if we could reschedule these depositions for the nurses. I told her at that time that I thought my schedule was going to be too tight, but she was welcome to call my office to see if there were other available dates, and then we would get back on the phone after she had done that. And if she could arrange to have her nurses on those alternate dates and those alternate dates would work under my schedule, -- and I had court-ordered deadlines for expert reports in this case -- that I would consider that agreement and move those depositions off of the dates that they

were scheduled.

And after we got off the phone, I contacted my office separately just to see what dates were available, knowing that she would be checking as well. But I was curious because I didn't know whether -- I had serious doubts that I had enough time. And when I contacted my office, I believe I was given two dates that looked like they were good on my calendar. And I believe one of those dates was a date that I had to travel because the deposition that was scheduled the next day was going to be starting in the morning, it was going to be out of state, there wouldn't be any -- you know, one of those dates just wasn't going to work out from a practical standpoint anyway, plus it wouldn't give us adequate time to get the depositions taken and meet our deadlines.

So I immediately picked up the phone and called Miss Hanan and told her "I've checked with my office myself and the dates that I have on my calendar will not work. I'm sorry, I cannot agree to reschedule these depositions of the nurses and they will go forward as noticed." And that was all in the morning of December Fifth.

And when I came over to her office and we had our discussion over there, and then the motions were subsequently filed, that point was abundantly clear, it had already been made over the telephone to Miss Hanan that morning.

THE COURT: Do you wish to examine with regard to

his testimony?

MS. HANAN: Did we have a telephone conversation that morning of the deposition wherein we discussed putting the depositions off?

MR. HILLIN: We discussed the potential for doing that, that's true.

MS. HANAN: Did you agree with me that I was to call your office to obtain dates from your secretary to do depositions on other days?

MR. HILLIN: Yes.

MS. HANAN: Did you agree that I was to do that, and you agreed that I was to do that?

MR. HILLIN: I think I've already said that.

MS. HANAN: And you agreed that the depositions would be put off, and that it was my responsibility to call your secretary and to get dates?

MR. HILLIN: No. That is not what happened. I did not agree in that conversation to postpone those depositions. I agreed to let you contact my office and see if I had any availability so we could then discuss potential for putting off those depositions. But no agreement was reached at that time.

MS. HANAN: Did you agree that if dates were available, that you would put the depositions off?

MR. HILLIN: I told you that it depends on my

availability and when it is, whether I will be able to put those depositions off.

MS. HANAN: Did you agree that if I found dates that were available, that you would put the depositions off?

MR. HILLIN: If the dates met my calendar and met our needs in this case, that I would.

MS. HANAN: Did I call you back and propose additional dates that I had gotten from your secretary?

MR. HILLIN: I called you back and I told you that I had talked to my office, and that the dates that they had on the calendar that were available dates were not dates that would work.

MS. HANAN: Were there dates available on your calendar where you could do depositions in this case?

MR. HILLIN: As I mentioned earlier, I believe that there were -- my memory is that there were two dates that I was given by my office when I could do depositions because my schedule was clear on those dates, but I asked a few follow-up questions of my office about, well, what do I have the next day or the day before? Where am I coming from or where am I going? And I believe one of those dates was -- there was a deposition the following day that was out of state, in the morning, and I'd have to travel the day before, which would, you know, interfere with my ability. I wasn't clearly open on the day before to do depositions.

MS. HANAN: Did our office reasonably work with you in an attempt to schedule these depositions at an agreed time?

MR. HILLIN: Absolutely not. I got repeated assurances from you for several months that you would cooperate in discovery, never got dates from you. And I've never taken the depositions, and I've noticed them three times.

MS. HANAN: That morning of the depositions, did I propose additional dates to you to present these witnesses?

MR. HILLIN: I don't believe you did. I think you discussed the dates that you had gotten from my office. You didn't tell me that the nurses would be available on those dates.

MS. HANAN: So I didn't tell you that we would present those witnesses on the dates that had been proposed by your office?

MR. HILLIN: That's not my recollection.

MS. HANAN: That's all, Your Honor.

THE COURT: Do you have any testimony you wish to give?

MS. HANAN: Sure. It's my understanding, Your Honor, that morning I talked to Mr. Hillin because this was such a big mess, we were concerned about our witnesses having to travel from Boise City, go through an expense, and appear for their depositions, have to be cross-examined, run the risk

of having to be cross-examined at a later time with additional deposition testimony being taken, have to travel again for their depositions, it was an undue burden and expense for them.

So I proposed to Mr. Hillin that we get this matter in front of the Court or that we agree to do these depositions on another date. After much discussion, Mr. Hillin said, "Fine, I'll agree to do that if you, Mary, will call my office and get the dates."

I called his office, I talked to his secretary. She gave me two dates, to my memory, that his office was available for deposition.

I believe that I called you back, I'm not sure. I do know that we talked very quickly after that telephone call. And he withdrew his prior agreement wherein I was to get dates and reschedule these depositions.

I had done my part, I felt like, and then he withdrew his agreement. And so at that point I started drafting motions in order to get it in front of you.

THE COURT: Do you wish to examine her?

MR. HILLIN: No.

THE COURT: All right. Based upon the testimony of the parties, I don't think there's -- I think it's obvious there was not a clear meeting of the minds that would vary the requirement of the noticed depositions, so we'll proceed on. That will be the basic finding.

Now, let's proceed on with any other part of your motion that you wish to present at this time.

MR. HILLIN: Well, I -- okay. Our motion, Your Honor, is, simply stated, near the end. What we're seeking out of all of this, and based upon the representations that I've made to the Court and the evidence that we have filed with the Court, first, we're seeking the Court to order that the plaintiff's deposition, Andrea Locke's deposition, she gave a two-hour deposition. She appeared the next morning for limited testimony the following morning. That based upon the behavior of counsel, the fact that they did examine the witness, and the fact that she came down to give her deposition and it should have been concluded at that time; and this abusive conduct by Mr. Johnson in talking about no proper diversity in the case and the case shouldn't be in Federal Court, making all these comments to her that would seem very scary, I would think, to a common layperson who just appeared to give testimony about the stillborn child.

In light of the fact that they didn't have a basis to take her deposition and then stop her deposition, either they feel like they have the grounds to take her deposition and they want to take it and we're taking the risk of having to produce her twice, which I know is not a risk. But we produced her there, we wanted her deposition taken; we think the Court ought to order that her deposition's concluded.

The second thing we've requested in our motion is to have the answer and pleadings of Doctor Ramirez stricken in this case. Doctor Ramirez, as the Court may recall, it was -- you had to order him to get an attorney by a certain date and to file an answer in this case, and he got Mr. Liebman to represent him in the case. But he has ignored written discovery, he's never answered it; we sent it to him a half-a-year ago, he's never answered it. He ignored his notice of deposition.

His attorney filed a motion to withdraw the day before the deposition and doesn't appear for him. He has no intention of getting other counsel or appearing for his deposition. He is completely -- he has demonstrated to the Court that he is completely unwilling to participate in this litigation. And because of that, we're seeking what we consider to be pretty significant and severe sanctions against him.

THE COURT: All of what you say is adequately reflected in the case, or do you need to put on any testimony in regard to that?

MR. HILLIN: I would -- no, I think it's enough.

THE COURT: Let me deal with that one. At this point I'll call on Mr. Liebman to respond to the motion to expunge the defense and, in effect, grant judgment against the doctor, your client in this case, counselor.

MR. LIEBMAN: Yes, sir. It appears that the

original written discovery was served on my client's previous counsel, Mr. Mike Hill, in the midst of Mr. Mike Hill's motion to this Court to withdraw as Doctor Ramirez's counsel.

THE COURT: But it was before he was allowed to withdraw.

MR. LIEBMAN: Your Honor, I believe the Court record will reflect that it was actually before this Court did grant Mr. Hill that ability to withdraw.

THE COURT: So there isn't any question that he was the attorney of record for Doctor Ramirez at the time he was ordered to do certain things?

MR. LIEBMAN: That's my understanding, Your Honor. His then counsel did not do anything substantially to assist my client in completion with discovery, but did in his motion to withdraw ask for an extension of time for my client to obtain different counsel. I have never been served another copy of the written discovery on me as the new counsel of record. I don't believe my client --

THE COURT: Why would you require it since it's already been served on counsel representing your client?

MR. LIEBMAN: Your Honor, I didn't ask this Court for an order to require additional. My client was never actually physically served and I was never physically served.

THE COURT: It doesn't afford your client any relief that second counsel was not furnished something that had

been previously furnished to his attorney of record.

MR. LIEBMAN: Yes, sir.

THE COURT: Doesn't afford him any defense or relief of any kind from his obligation.

MR. LIEBMAN: Yes, sir.

THE COURT: Just so we understand that.

MR. LIEBMAN: In mitigation, I just wanted to show that the posture of my client's defense at that time was an attorney that was representing him, that was doing his darnedest to escape at that point, and to a person that had been deemed pro se for a period of time after Mr. Hill was allowed to withdraw --

THE COURT: Wait a minute, I'm not sure I understood all of what you're saying.

MR. LIEBMAN: Your Honor, Mr. Hill, of course, did not complete or assist my client in completing discovery. Basically, there was a window in which Mr. Hill was allowed to withdraw that my client was, in effect, pro se. And Mr. Hillin said there was a time period that you gave him to either designate whether he was going to proceed pro se or get alternate counsel, and I did enter my appearance as alternate counsel.

What the posture of the case with regard to discovery was is that the discovery had been served on an attorney of record that was in a position where they were doing their darnedest to

withdraw from further responsibility of representation or assisting with discovery. And Your Honor, I know it's not a defense, I'm just trying to point out what the mitigation is. And we would honor any deadline that this Court would have to completely answer that discovery, the written discovery that's still outstanding at this time. It has not been complied with as we present before Your Honor today.

THE COURT: Response, counselor?

MR. HILLIN: Your Honor, we feel like it's not just a question of the interrogatories, even though that is one of the points that I wanted to make, that there has been a lack of cooperation all the way along, it's gone on from there forward. And for Mr. Liebman to file a motion to withdraw as counsel the day before he's already agreed to depositions, a deposition scheduled on December Fifth, Sixth and Seventh; and then the day before, he files a motion to withdraw as counsel; and then he's not going to appear and his client is not going to appear for deposition?

THE COURT: Of course, we're addressing a different problem now.

You're not contending that your motion to withdraw would in any way excuse you or your client from appearing at a noticed deposition, are you?

MR. LIEBMAN: Your Honor, what the situation is, as it occurs to me, I -- three days before my client's deposition

I had faxed down, although it had not been filed because I had mailed it from Guymon to get to Oklahoma City, I had both orally and by fax communicated my intention or my request to withdraw to Mr. Hillin, to Mr. Ryan's office, Mr. Whaley's office, and to Miss Hanan and Mr. Rowland's firm.

I contacted this -- Your Honor's chambers to be -- to get advice on what I needed to do to get a ruling on my motion to withdraw, three days before my client's deposition. I was advised that as long as there was no substantive disagreement on my withdrawal, it was granted as a matter of course. But if there was going to be an issue on my withdrawing, then we would have to have a hearing on that matter.

THE COURT: I don't want to interrupt, but is there anything in all of that that you outlined that would in any way excuse either you or your client from appearing at a noticed -- or are you contending that would in any way excuse you or your client from attending a noticed deposition?

MR. LIEBMAN: No, sir. But if I could just develop, go along the line that I was heading. I had contacted Mr. Rowland over the phone, and I had actually contacted Mr. Ryan over the phone, on that day that I had mailed the filed motion to withdraw and faxed the filed motion to withdraw, indicating what my intentions were. Everyone was able to be agreeable to have a hearing on the motion, even if they weren't going to agree to the motion on that day. But the

three calls that I made to Mr. Hillin's firm went unanswered. I even relayed a message through Mr. Ryan to try to get Your Honor, while you were in chambers, to hear the motion to withdraw on that date, three days prior to my client's deposition. And to the day of the deposition that I appeared for my client, Mr. Hillin never did return the phone call. So I had made it known repeatedly to all parties of my intention, and all other parties indicated a cooperation to at least bring the matter before Your Honor.

THE COURT: Counsel, you made it clear to them, you made it known to the Court, and it was obvious that you wanted to withdraw.

MR. LIEBMAN: Yes, sir.

THE COURT: Is there anything in all of that that would excuse you or your client from appearing at a noticed deposition without an order of the Court?

MR. LIEBMAN: Only that I had asked for the ability to have a hearing with Your Honor, which was granted --

THE COURT: Oh, you just ask for a hearing and it automatically excuses you from appearing at a noticed deposition; is that it?

MR. LIEBMAN: No, sir.

THE COURT: You ask to withdraw and automatically you and your client are excused from a noticed deposition?

MR. LIEBMAN: No, sir.

THE COURT: I agree, counselor, that if that is your position, we're wasting your time and mine. But go ahead with anything else you want to say.

MR. LIEBMAN: Yes, sir. It's just that I understood that my obligations were to continue to represent my client until I got an order from the Court.

THE COURT: Did you have him here for the noticed deposition?

MR. LIEBMAN: No, sir. He was not present. I did not advise him not to appear.

THE COURT: Did you advise him -- was he noticed to give his own deposition on that day?

MR. LIEBMAN: He was noticed through my office, through communication.

THE COURT: Did you advise him that he was required to appear on that day?

MR. LIEBMAN: Yes, sir.

THE COURT: You did notify him, okay.

MR. LIEBMAN: Your Honor, what I'm getting at is that all parties were available for a hearing on the issue of withdrawal based on my conflict, as was your chambers available at any time.

THE COURT: Well, whatever, whoever is available, if you don't get the hearing and you don't get the order, counsel, you've got a noticed deposition that you're required

to appear for.

MR. LIEBMAN: Yes, sir.

THE COURT: There isn't any certainty at all that I would have granted it. I can tell you, based on that, there's almost an absolute certainty that you would not have been allowed to withdraw in this case.

MR. LIEBMAN: Yes, sir. But we're casting aspersions about cooperation issues and --

THE COURT: No, I'm not casting any aspersions. I know what you wanted to do --

MR. LIEBMAN: Mr. Hillin was casting aspersions.

THE COURT: -- and you didn't get it done, counselor. You were obligated to appear yourself, in my opinion. You not only were obligated, you were obligated to notify. Now, you can't make him come, but you were obligated to notify your client that he was required to be here.

MR. LIEBMAN: Yes, sir.

THE COURT: Well, you apparently appeared at some point, and the doctor did not, as I understand. Is that correct?

MR. LIEBMAN: Yes, sir. Your Honor, the only thing that I wanted to bring to the Court's attention is that the issues that Miss Hanan has brought out about the cooperation of the plaintiff on some of these pending -- what I consider to be very meritorious -- issues were certainly addressed by

Mr. Ryan, certainly addressed by Miss Hanan's firm. But no matter how many people I tried to relay the message to Mr. Hillin to, he didn't even give me the courtesy of an objection to scheduling a hearing on my motion to withdraw. There was no communication from his office whatsoever for three days prior to my own client's deposition.

What I'm trying to say is everyone was cooperating on at least hearing me out on the issues that would -- that I believe were substantially meriting my motion to withdraw at that time, except I could not even get the issue before Mr. Hillin. And that's where -- that's where I have -- I'm taking issue with his intimation that there was intentional nonproduction of my client. There was repeated attempts at notice at his office that were unheeded, apparently.

THE COURT: I'll give him an opportunity to respond.

MR. HILLIN: Thank you, Your Honor. First, the motion to withdraw that he's talking about being served or filed three days before his client's deposition, I received it faxed on December Fourth, the day of the certificate of service on this document. I left that day, later in the day, to come up here to Oklahoma City. Traveled with Aline Jordin up here to Oklahoma City to take these depositions. And Mr. Liebman had left a message for me about his motion to withdraw.

The Court, as the Court may be aware, you weren't -- and

Miss Hanan, the following day when she was trying to get her motions set, you were out of town.

You know, I don't know what Mr. Liebman's talking about, you being in chambers and available to hear anything. I had received a message on my -- at my office that Mr. Liebman had called on the Fourth about his motion to withdraw. And my opinion about that is, well, he can get that set for hearing, and I doubt that the Court is going to let him out. But that has nothing to do with production of his witness on December the Sixth, two days later, or now the evening before. And now it's December the Fifth, and the first time I get a motion for protection from Doctor Ramirez having to come to give his deposition, not this motion to withdraw, but why I came up to Oklahoma City, to take Doctor Ramirez's deposition, I believe I received a copy of that motion on the morning of December the Sixth, when Mr. Liebman walked in the door with it, into the middle of Andrea Locke's deposition on the morning of December the Sixth.

So, you know, whatever problems he has with his client and his desire to withdraw as counsel for his client, that's one thing, that can be taken care of in due course. But that's not why I traveled here; I traveled to Oklahoma City to take a deposition of Doctor Ramirez. And there was no motion for protective order filed on that on the Fourth or the Fifth.

I heard through the grapevine that Mr. Liebman wasn't

going to produce his witness as scheduled. But there was no attempt to file a motion or get a hearing on that matter, and thus there could be no way for me not to cooperate in that regard.

He first walked into the door on the morning of the Sixth and handed me his motion.

MR. LIEBMAN: Judge, I had been trying to set a hearing on that for the three days prior to my client's deposition. That was the crux of my testimony, that everyone was agreeable to at least having a hearing on my motion prior to my client's deposition, but for Mr. Hillin's failure to return any of my calls. He had even known of my intention but still failed to return my calls on the issue of whether I could even get a hearing date set. Every other counsel present was cooperative in at least allowing my motion to be set down for hearing except Mr. Hillin. I think I handed him a copy of my protection order the day of.

I had faxed that same protective order on the Fourth, I had notified people of my motion to withdraw on the Fourth, and maybe even on the evening of the Third of December. So because -- if we're going to talk about the issue of actual notice, Mr. Hillin's office had actual notice the evening of the Third, before he would have even left from Dallas to come to Oklahoma City.

Now, the motion had not been filed at that point. The

motion had not necessarily even been faxed at that point. But oral notice had been given on the evening or the late afternoon of the Third. And so we had a period of three days, where I repeatedly tried to get ahold of this counsel, that went unheeded. And so he's talking about lack of cooperation, I think that the issue of a hearing, where all other counsel are in agreement on having a hearing on motion to withdraw, whether you would have granted it or not, is very much at issue, because I thought that that was a significant-enough thing that you should rule on it prior to my client's physical presence, or compelling his physical presence.

THE COURT: I understand what you think. But the problem is, it did not occur, for whatever reason, lack of cooperation or what. And under those circumstances, regardless of what you thought, you were clearly obligated to appear and produce your client, and you failed to do so, as I understand it.

And you have expressed no -- nothing to this Court, other than your desire to withdraw and your desire to prevent your client from appearing, and your desire to get some sort of a hearing on that, very late before the scheduled hearing, within a day or two or three days at the very most; and you admit and agree that you failed to get any of those things.

And I can think of absolutely no legal justification for your not having appeared and been here despite the fact that

you didn't want to be here. If that be the case, any time a deposition was scheduled, you didn't agree with the date, just file a motion to withdraw and tell your client or tell him either be there or not, the deposition's off. And you've got to understand, I don't think even in the provinces of Guymon or Antlers, Oklahoma, you know, you can't ignore a noticed deposition on that sort of a basis.

So do you have anything else you want to add with regard to that?

MR. LIEBMAN: No, sir.

THE COURT: All right. Do you have anything further?

MR. JOHNSON: Me?

THE COURT: Yeah. Either of you.

MR. JOHNSON: Well, I'd like to respond.

THE COURT: With regard to these motions, do you all want to respond in any way?

MR. JOHNSON: All I'd like to say is, I still -- while we've had this discussion, I flipped through this record and I still don't understand what it is counsel contends I did to obstruct anything. I came late the first morning -- or first afternoon when we were going to start because I was working with the court clerk and stuff trying to figure out what to do with this.

I didn't say -- there was a record made by all counsel

talking back and forth, I thought properly by everybody, up to page 14. I never said anything about any seven-hour deposition. I don't know where that comes from. Mr. Hillin made the comment about seven hours, and I -- to which I said, "I just doubt that in the time we have today, we're going to be done," I said. I never said that.

And once the deposition started, Mr. Rowland conducted the deposition, I don't see where I said another word. In fact, I left early, as I said, to go back and continue on this. I don't see where I said another word about anything, or objected to anything in the whole body of this until the next -- I wasn't there the next morning, Miss Hanan wasn't there because she was still working on this; three of us that are going to question, we didn't say that.

All I said was, "The board has some individual issues, and I think that I may want to examine over the board issues, nonmedical." That's stated right here in the deposition. And I never made another statement at all.

And this subject matter jurisdiction issue came up simply at a point at which there was some discussion over the fact that Mr. Hillin didn't want to give us a medical authorization. We weren't examining the witness, we were talking back and forth about this medical authorization. And Mr. Rowland had done the questioning. I never said a word to this witness. I was talking to Mr. Hillin.

Mr. Hillin then asked for a break when counsel walked in. We took a break. That's all there is in this. I don't -- for the life of me, I didn't understand, when the motion was filed, that Mr. Hillin, Mr. Ryan, Miss Hanan or myself had done anything except try to figure out a way to deal with a situation where we had a motion to intervene that had just been filed, we had these various problems with Doctor Ramirez that we were trying to figure out what to do. We had these witnesses -- and they're here, Judge, and you can ask them, and I know you will -- prepared to present, and we expressed over and over again our concern that in the eventuality that Doctor Ramirez decided to participate in this, he'd have a right to once again take these nurses and that we would agree to pay expenses. We would agree to any times that would work. We would agree to come to you when you were available and agree to anything to make this work out for everybody.

I do not see -- I didn't ask the witness any questions. I do not see anything other than Mr. Hillin saying, "You're threatening to take a seven-hour deposition." To which I said, "I'm not saying that." I said, "I am saying to you, sir, that I doubt we'll be able to finish because we started late on the first day."

I still don't understand what we as a group did other than try to cooperate, offered to pay expenses, offered to come see you, all of us, to try to get over and figure out what to do

because of the various motions that might require additional expense, additional time and the additional problems. And so I am baffled at that -- the notion that I interfered with or tried to intimidate his witness.

We took a break, and he wanted to question her himself in this record. I didn't say a word to her, not one single word.

THE COURT: Do you wish to respond?

MR. HILLIN: Your Honor, no, he wasn't asking her any questions, he was just talking about -- let's see.

"In addition to that" -- page 90, line 12, starting, "In addition to that, as long as we're on the subject, I think you woefully lack the requisites for diversity jurisdiction under the Federal Rules of Civil Procedure, in that diversity jurisdiction is founded in a wrongful death case on the place of the decedent. It cannot be changed." Blah, blah, blah.

He goes on about comments. No, he's not examining the witness, he is scaring the witness.

MR. JOHNSON: Page 19?

MR. HILLIN: Page 90, line 12.

MR. JOHNSON: Page 90?

MR. HILLIN: Yeah. He's always also indicating that he's intending to examine the witness and that he has questions for her that he's going to ask her, you know. And that's also succinctly stated in the deposition. I think if you read the transcript in this case you would find that there

are threats for three of them to examine this one witness and that they're going to have to be -- it's going to take a while to get her deposition taken. They're arguing about diversity on the record. I think -- I think their conduct in the deposition was sanctionable. And they -- Mr. Rowland did take several hours worth of actual testimony from her. And that's why we're asking that her deposition be --

THE COURT: That's one of the remedies you seek. What other remedies are you seeking, other than her testimony is concluded, that Doctor Ramirez's defenses be, in effect, stricken. What else?

MR. HILLIN: Right. The next one is that I would like the Court to order these nurses to appear on specific dates and times. And I will even offer, as we did before, and as we clearly communicated from our office before, we will cover Miss Topper's expenses for travel from -- from her home in Montrose, Colorado, to Oklahoma City to give her deposition. But we want an order from the Court that requires her to appear, and all of the other nurses to appear on specific dates for their deposition testimony.

And that only one witness from this -- or I'm sorry, only one attorney from this office, representing all of those defendants, everybody but Doctor Ramirez, that only one be entitled to examine any witness in this case so that we don't get into this thing again where they have three attorneys from

one office trying to ask a witness questions.

THE COURT: What rule do you cite in support of that? I know in the courtroom we don't let double-teaming, so forth. But can you cite a rule of federal civil procedure that won't allow more than one attorney to examine or cross-examine witnesses in a deposition?

I'm not saying there is one, I'm just not as familiar with that. We don't let 'em have a double bite at the apple in the courtroom, obviously.

MR. HILLIN: Yeah.

THE COURT: And that's a -- I'm not sure that's a rule based on civil procedure or just a courtroom rule, our own individualized courtroom rule.

MR. HILLIN: Well, we're just seeking the Court's discretion there. I'm not sure that there is a rule that actually requires that, but it's improper and -- for two -- if there is an attorney from an office who is -- has made an appearance for all of the defendants, like Geremy Rowland had made an appearance for all of the defendants, and he's examining the witness --

THE COURT: Except for Doctor Ramirez.

MR. HILLIN: Except for Doctor Ramirez. And he's examining that witness, and he has noticed her deposition, that he is the examiner; and that --

THE COURT: Let me turn to counsel. Mary, have

you all -- can you all cite a rule that would authorize more than one attorney to conduct for one client, or three clients, or for more than one attorney to examine on a deposition? And if so, what rule is it?

MS. HANAN: I believe each party is entitled to be represented by their own counsel, and many of these witnesses have different issues that apply to them and it's difficult on a case this big. The plaintiff has sued the board members for personal liability and for their liability as board members, so immunities apply to those board members; were they acting within the scope, what were they doing as board members. That's completely separate issues than from what the nurses did. Many of these nurses were only present at the resuscitation of the patient, not present during the delivery of the patient. So the resuscitation of the patient has different issues for those nurses than does the delivery.

Carolyn Topper is the nurse that was mainly at the delivery of this patient and she's going to have separate issues from the other nurses. So it's difficult for one attorney, even though we're all from the same office, it's difficult for one attorney to prepare across-the-board to cross-examine on behalf of each and every witness.

THE COURT: Have you all in fact divided down the responsibilities or were you just all three there asking the same questions or pretending to ask the same question?

MS. HANAN: No. I was going to represent Miss Topper.

MR. JOHNSON: And I was going to ask some questions about the board. That's what I said in the record, Judge, that's all I said. And I told Mr. Hillin that that's what I wanted to do. None of us -- Mary and I did not question this witness at any time.

THE COURT: Let me ask Mr. Hillin this: You don't --

MR. JOHNSON: Rule 611 I think pertains to it, Judge.

THE COURT: You don't deny that if the three nurses were represented by three separate counsel out of different firms that each of them would have the right to question in their own depositions?

MR. HILLIN: There's no doubt about it, because there would be different firms involved. But all these attorneys are with the same firm and we're talking -- in the context of this case, when this discussion comes up, when the issue is raised, we're talking about the plaintiff, a patient who goes to the hospital, and she knows what she knows because she was there, and that's all she knows. She doesn't -- she can't answer questions about the board of control, she had no idea there was even a board of control in charge of the hospital. All she knows is she went to the hospital to have a

baby.

THE COURT: So it's your contention this was not seeking of any information by three different defendants but an attempt to harass the plaintiff --

MR. HILLIN: Absolutely.

THE COURT: -- by multiple examination?

MR. HILLIN: If Mr. Johnson, in his obligation to represent those board of control members, if that's who he represents, feels like he needs to be the person that -- to take the examination of a hospital administrator expert that we designate in the case, by all means he should be the one taking the examination because he's the one most equipped on those particular issues. But when you're sitting there taking the plaintiff's deposition and you have three attorneys there, there aren't three different sets of issues that that witness can address, that she's going to be able to address. All that is just -- that is posturing, that is harassment, is what it is.

MR. JOHNSON: First, Judge, I'd just like to say, there weren't three attorneys there the second day; Miss Hanan wasn't there at all on the second day.

Second, at page 55 is where I talked about diversity jurisdiction, I think it's our obligation to discuss that. It appeared after Mr. Rowland had asked some questions that I believed, after answered by the plaintiff, pertained to the

issue of subject matter jurisdiction and diversity jurisdiction.

Secondly, there are claims made by this plaintiff against this board. And just the fact that what he has stated at this point, that she doesn't know anything about the board, may well be relevant to motions for summary judgment based on any agency claims. And, you know, and I don't know if she went and talked to board members; but in any event, she was instructed not to answer any questions and I didn't attempt to do anything. I didn't do anything but make a record, as all counsel make. All of the questioning, save and except, best I can tell, one objection I made, was done by Mr. Rowland. And all the interaction otherwise on the record was between counsel, and even that's pretty minimal.

As I have told Your Honor, I was a little bit perplexed with all the -- mutual, both sides, tried to do to straighten up what we all -- or we certainly perceived as a pretty big mess. And everything, I thought, was done from both sides appropriately in discussing this, talking about it, trying to work it out. And I still don't see anywhere in this that anyone made any kind of threats towards this lady, I just don't see it in this record. And I challenge plaintiff's counsel to show where anybody did anything that was threatening.

I don't see how talking about diversity jurisdiction threatens anybody. I think we have an obligation, and I think

Rule 611 of the federal rules speaks to the very fact that Your Honor will determine the mode and method of cross-examination. And I know Your Honor wouldn't let cumulative cross occur. But I also know that due process, and Your Honor would acknowledge it, may have different issues as it pertained to other parties, and as long as we're not conflicted out because of a conflict between parties, which we don't perceive, why wouldn't we be able to address those issues separately? And that's all that's happened.

And I still remain somewhat baffled after all of the offers and attempts and everything we were doing and trying to make it as convenient as we could for everybody, everybody had to travel four or five hours, why -- what -- I just don't understand I guess, Judge.

MR. HILLIN: Your Honor, we've submitted the whole deposition transcript to the Court so you can read for yourself, because we can argue and interpret all day long, but what happened is right there on that record. And I don't think that any discussion, much less these lengthy discussions Mr. Johnson went through on diversity, has any place in a deposition of a witness that's supposed to be interrogated by somebody and asked questions that she can answer if she can; if she can't, she won't.

But getting back to what we're looking for, Your Honor; what we want is an order from the Court that would require them

to appear for depositions on specific days and we get those done. We're asking -- I'd ask the Court that we continue the trial setting from its current setting and continue our deadlines --

THE COURT: When is the case scheduled for trial?

MR. HILLIN: I believe it's set for the month of April and our deadlines for designation of experts are January Eleventh.

THE COURT: Reserving the disputes at this point, let me ask if we can reach an agreement --

MR. JOHNSON: We absolutely agree and we will pay the expenses, as we have offered continuously --

THE COURT: Let's do it one at a time. You agree that the trial date should be continued. Do you all have an agreement with regard to when that new trial date should be?

MR. HILLIN: No, we don't. I would be proposing the fall of this year, because that should -- I mean -- should allow --

THE COURT: We're turning into a status docket right now. What about October of this year?

MR. HILLIN: That will be fine for us.

THE COURT: And you want to change the discovery dispute dates to September the First, then?

MR. HILLIN: September First on discovery and designation --

THE COURT: Designation of expert witnesses to when?

MR. HILLIN: Concurrent dates in, say -- I think that June or July would be appropriate, I don't have a preference there.

THE COURT: If you can agree, we'll designate it.

MS. HANAN: Say July.

MR. HILLIN: Say July.

THE COURT: July.

MR. HILLIN: For that.

THE COURT: All right. What about the doctor's testimony, deposition?

MR. HILLIN: Well, Your Honor, in addition to seeking his pleadings to be stricken and --

THE COURT: Aside and apart from that. Assuming if I do that, then you may or may not want to take his deposition. But if I don't do that, let's pick a date.

MR. HILLIN: We definitely need a date for his deposition. And I would propose, because Mr. Liebman had actually even offered that in his response to the motion, to produce him today for his deposition, since he is here in town; and some information I have is that, you know, he's not long for Oklahoma.

MR. JOHNSON: First we've heard of anything of that.

MR. HILLIN: Well, it was in the pleading.

MS. HANAN: Yeah, first we've heard of his depo today.

MR. HILLIN: In his pleading, that he would offer his client up, if the Court so ordered, for his deposition today. And we'd like an order from the Court.

THE COURT: Let's hear first from Mr. Liebman and then I'll give you an opportunity.

What is your position with regard to that?

MR. LIEBMAN: Yes, sir, my client is available today for deposition, I did -- I did plead that that was a possible remedy that this Court might have for my client's deposition, in my responsive pleadings to the motion.

THE COURT: You did plead that?

MR. LIEBMAN: Yes, sir

THE COURT: Did you all get a copy of that pleading?

MR. JOHNSON: I'm trying to find it, Judge.

THE COURT: Well, aside and apart from that, that was only filed when, counselor?

MR. LIEBMAN: The 18th of December, the 19th of December, something along those lines.

THE COURT: Well, let's discuss now or some future date as a possibility. You're available now and --

MR. HILLIN: In fact, I brought my nurse with me

so we could do it, if possible.

THE COURT: Okay. Tell me why we shouldn't go ahead and do it today.

MS. HANAN: We may need to examine, and I am not ready to take his deposition.

THE COURT: Why not?

MS. HANAN: First I've known, and I have to sit down and --

THE COURT: Mary, answer my question. Why not?

MS. HANAN: I have not looked at the record.

THE COURT: You've had actual notice or been put on notice since the 18th of December. But aside and apart from that, why can't you take the man's deposition?

MS. HANAN: I have not prepared for cross-examination today, I don't have documents ready; and we need to -- I'm just not ready for his depo.

THE COURT: What we may do is go ahead and let the plaintiff take his deposition today. And then if you all don't feel like you're in a position to depose him or examine, then arrange for a later time for you all. How is that?

MR. HILLIN: My only point there, Your Honor, this deposition of Doctor Ramirez was noticed for December Sixth. Until December Fourth, or I guess Fifth, they thought Doctor Ramirez was going to be appearing for his deposition, so I'm kind of surprised to hear from Miss Hanan --

THE COURT: That's right, Mary, you had notice of his deposition back on the date when these others were scheduled. Why wouldn't any date thereafter be appropriate and proper?

MS. HANAN: Well, it takes me a while to get ready and --

THE COURT: That's no excuse not to conduct the deposition, though. The fact that you are or are not ready, or were not ready on that date, is no excuse not to be ready now.

MS. HANAN: I may have been ready back then but that was, what, a month ago, three weeks ago? And I --

THE COURT: Have you got unready, Mary?

MR. ROWLAND: Your Honor, if I may. I think the problem may lie in the fact that there are probably close to 700 to 900 pages of credentialing documents, which I suspect may come into issue not only during the course of Doctor Ramirez's deposition but in this case. And as Your Honor may be aware, that would take anyone quite some time to prepare for at any given time, a deposition may --

THE COURT: All right. Mr. Liebman, he's available now. When could he be available in the future for further deposition by either the plaintiff or the defendant?

MR. LIEBMAN: Your Honor, I'd just ask if we could just present one time. I hate, if we're going to have to make multiple trips here, I'd rather -- if it's possible to just

schedule it for one day total.

THE COURT: Well, you had it scheduled for one day, counselor, and you didn't show. Now, you're hardly in a position to start dictating when your client is going to be deposed. The other side has a pretty wide-ranging right to demand when since he failed to appear at the first one.

MR. LIEBMAN: Yes, sir.

THE COURT: That's very strongly the Court's inclination.

MR. LIEBMAN: Yes, sir.

THE COURT: You know, I'm having a little bit of difficulty thinking here everybody can just ignore the orderly procedures and sort of set their own deadlines at their own conveniences and their own inconveniences. I don't think we would get very many lawsuits tried if I let everyone do that.

Counselor, what do you have to say?

MR. HILLIN: Your Honor, what I would add to this equation is that -- what I fear is that if Doctor Ramirez doesn't give all of his deposition today, that he'll give half of his deposition today and then fly off to the Dominican Republic, where he's been wanting to fly before, and that the hospital will not -- they'll claim that they haven't had an opportunity to cross-examine him and somehow that will work to my disfavor in using the testimony that I have adduced from the witness.

THE COURT: Can we pick an alternate date today? How soon can you be ready?

MR. JOHNSON: I'll be in trial --

THE COURT: Any delay you're going to have to pay for, you know. You're going to have to pay. All the expenses of getting these people to a deposition are going to be borne by you if it's not done today.

MR. JOHNSON: We understand.

THE COURT: Tell me when you want that and we'll see if we can pick a date that's agreeable.

MS. HANAN: Week after next? I don't know what that date is.

MR. HILLIN: Do you have your -- we're trying to check our calendar.

My problem, Your Honor, is that I've got a --

THE COURT: Do you want to do this during the lunch hour?

MR. HILLIN: Work out the dates?

MS. HANAN: Sure.

MR. HILLIN: I think we should be able to.

THE COURT: Meet here at One o'clock. I have another hearing at 1:30, so we'll need to meet you here at One o'clock. See if you can't get these dates worked out.

There's a couple of things -- I'm going to need some briefing with regard to witnesses and what kind of sanctions,

if any, I impose on anyone. I'm not making any rulings.

But right now I want you all to -- we've agreed upon an alternate trial schedule, alternate discovery completion date, alternate day to list expert witnesses. And you're now going to reach an agreement during the noon hour, if you can, with regard to the depositions of all the persons that need to be deposed, and who were not deposed earlier. If you can't, then I'm going to set 'em.

MR. HILLIN: Okay.

THE COURT: You'll be better off reaching an agreement.

MR. JOHNSON: I would like to also say, Judge, that along with our response to the motion filed by plaintiff, we had a counter motion; and I'd like to say that it's moot. It had to do with times and problems with traveling for Miss Topper, and I'm withdrawing it.

THE COURT: Withdrawing it, okay.

MR. JOHNSON: It's absolutely withdrawn.

MR. HILLIN: We did bring our plaintiff from Liberal City, Kansas, because they filed that motion. Okay

THE COURT: Okay. That all can be taken into consideration when I've determined about what sanctions to apply in terms of pay. And primarily that's going to be in terms of paying costs for rescheduled depositions, so forth. And I think I made myself pretty clear. I doubt, I'm almost

certain I'm not going to expunge the doctor's defenses or records, he may be partially responsible for some expense of being deposed again, and I'll take that into consideration when making a determination.

But mainly I'm going to decide, we're going to get these new depositions made, completed; and both the hospital and the doctor are probably going to bear the expense.

All right. See you all at One o'clock.

MR. JOHNSON: Thank you, Judge.

MS. HANAN: Thank you, Judge.

(THE NOON RECESS WAS HAD)

THE COURT: Let me make a record. During the luncheon recess the parties have reached some tentative agreements, or at least some agreements, with regard to newly-scheduled deposition dates. And let me ask you to announce the schedule of the nurses and the hospital representative, have you all agreed upon dates with regard to them?

MR. HILLIN: We've agreed on the nurses to March the Fifth starting at 1:00 P.M., and continuing on March the Sixth until completed.

THE COURT: Now, let me ask, is that agreeable also to the doctor?

MR. LIEBMAN: Yes.

THE COURT: Go ahead.

MR. HILLIN: We have not actually discussed the administrator, I think we need to do the administrator on another date.

MS. HANAN: Okay.

MR. HILLIN: And you can choose among the dates in March that we have available for that, which includes March the 12th, 13th, 14th, and 15th.

THE COURT: Can you do that right now?

MS. HANAN: Yes. We had discussed this, Hunter, and you know that the current administrator has no factual knowledge of this case. Do you still want the current administrator or do you want a hospital representative?

MR. HILLIN: I will take -- a hospital representative will be fine, one who will have knowledge of the policies and procedures as they existed in 1999, and credentialing of Doctor Ramirez as of 1999.

THE COURT: All right. Now, can we agree upon the date without naming that person?

MR. HILLIN: I can agree to any of those dates, 12th, 13th, 14th, or 15th.

THE COURT: Let's pin them down, though.

MR. HILLIN: Yeah. And I appreciate your help there.

(PAUSE)

MS. HANAN: How about the 13th?

MR. HILLIN: Okay. Now, also offered --

THE COURT: Now, is that agreeable with Mr. Liebman and the doctor?

MR. LIEBMAN: Yes, sir.

THE COURT: Okay.

MR. HILLIN: And we can start that deposition at One o'clock.

We have also offered the plaintiff, if so ordered by the Judge, that her deposition be continued on the 12th, and now the 14th and 15th.

THE COURT: Pick a date if you can.

(PAUSE)

MS. HANAN: Let's do the 14th.

MR. HILLIN: Is that agreeable with you, Mr. Liebman?

MR. LIEBMAN: Yes, sir.

THE COURT: That leaves only the doctor?

MR. HILLIN: The doctor, we discussed January 21st, starting at 9:00 A.M., here in -- all of these depositions to occur in Oklahoma City.

THE COURT: Is that agreeable with the defendants?

MS. HANAN: Yes.

THE COURT: And the doctor agrees?

MR. LIEBMAN: Yes.

THE COURT: Okay. We have all that pinned down, don't we?

Now, I'm making a ruling, applicable to these depositions only, and subject to further change if it's researched and I'm advised differently, but only one attorney from the firm can -- same as the courtroom applies. If you all represent them as a group, then whoever, it doesn't make any difference who it is, whoever starts the deposition will examine and cross-examine rather than three or four bites at the apple.

All right. Now, the only other thing I want to talk to you about, I'm pretty sure, I'm virtually certain what I'm going to do, is simply require the defendant to pay for the costs of all the parties to this next deposition of the nurses; and I'm going to require Doctor Ramirez to pay for all the costs of his rescheduled deposition.

I want to ask you, how do we go about getting a determination with regard to those costs? Do we need to do it now or can we wait until after those depositions are completed and have the party simply submit their actual costs?

MR. JOHNSON: Travel costs.

MR. HILLIN: I would suggest that we just simply submit the travel cost of the depositions. In the case of the deposition of Doctor Ramirez, that we submit all of our expenses in that connection to Doctor Ramirez's counsel. And that when we take the nurses' and -- you didn't mention the

hospital administrator but I felt like you were including that; is that correct?

THE COURT: Sure.

MR. HILLIN: And so the nurses and the hospital administrator, the cost of those depositions, to -- to Miss Hanan.

MR. JOHNSON: We've agreed, Judge, we've been agreeing to that all along.

THE COURT: I understand. I don't think that's an issue. We do have one item I want to be heard on, though. What about the cost of this particular hearing? Let me hear from the plaintiff first.

MR. HILLIN: Your Honor, it's my position that the cost of this hearing be borne equally by the hospital and Doctor Ramirez because they both filed these motions and they both failed to appear for the depositions as scheduled back in December.

THE COURT: Let me hear from counsel for the defendant in response to that.

MR. JOHNSON: Judge, I think for this hearing, it would certainly have simplified matters and not had a lot of costs because we had absolutely agreed to appear before Your Honor when we could get it set, and that I was personally going to take the responsibility for the decisions made as to these defendants, and have, Judge.

THE COURT: The problem is, though, scheduled depositions, for whatever reason, were not taken, or at least not taken properly. And I'm determining that the fault for that lies equally, or at least -- I don't know whether "equally" is a good word, but upon the defendant and upon Doctor Ramirez.

Now, we've had a motion for sanctions, we have had cross motions for sanctions, and so forth; and we had the cost of everybody attending this hearing to debate those issues, and so forth. And it appears to me that the cost of that should be borne by the persons at fault in not having the original scheduled deposition. I'm asking now, how is the best way to assess that by and between the two defendants?

MR. JOHNSON: Judge, I don't know what the travel costs for coming over here has been, I have no way of knowing. I know these ladies' travel costs as a result of having them here. When I have said and said again, the judgment call here, whether I was right or wrong, I don't know, it was my call. They were ready, they were going to come. They had scheduled time out; and, you know -- so if you want to talk about travel expense. This was something I thought that the lawyers ought to be able to do without incurring any of this, and so I don't believe -- I don't think the costs for today was even necessary at all. But of course, if Your Honor orders that we figure out something for travel costs --

THE COURT: I've already done it.

MR. JOHNSON: All right.

THE COURT: Now, then, tell me how that's to be assessed as between -- determined and assessed as between the defendants and Doctor Ramirez.

Now, you will have to take care of any --

MR. JOHNSON: This is my responsibility.

THE COURT: You take care of all of your own people, you'll have to take care of that. I'm not ordering to you to pay your clients', I'm ordering you to pay the plaintiff's.

MR. JOHNSON: For the record, I am going to reimburse these folks for their time, Judge.

THE COURT: I understand that. But how do you want to break that down between you and Doctor Ramirez? He's got to pay for the one that he failed to appear at and a proportionate cost. Do you want to divide the cost of this equally between the defendants?

MR. JOHNSON: What are we talking about, travel expenses for coming here?

THE COURT: Yeah, that and counsel fees, I guess, attorney fees.

MR. HILLIN: It would just be our travel expenses and Mrs. Locke's travel expenses. I had brought nurse Aline Jordin with me today based on representations from

Mr. Liebman. Her expenses, my expenses, and Mr. Whaley's expenses. There haven't been any --

THE COURT: You didn't get Whaley to buy lunch, did you?

MR. HILLIN: No, I had to pay for his lunch too.

THE COURT: You're only asking for travel expenses?

MR. HILLIN: I am, Your Honor; we don't have that kind of record.

THE COURT: Why don't we just submit those to counsel for both sides, I'll order and direct them to pay them equally. If you all can't agree upon 'em, we'll have another hearing on that. But I suspect you ought to be able to reach agreement on that cheaper than you can come back up here and litigate it, for crying out loud.

MR. LIEBMAN: We'll agree to it.

THE COURT: Are there any other things that we need to do? We've got a new trial date, a new discovery completion date, a new everything. And I think I've made a necessary ruling on all of the motions now.

MR. HILLIN: The only thing that we haven't mentioned specifically is the expenses of Mrs. Locke. I mentioned the other depositions, but we didn't mention Miss -- the expenses of Miss Locke continuing her deposition. Will that be borne equally by the defendants?

THE COURT: She'll be paid for the last one that she attended that was thwarted, she'll get paid for that. And ordinarily she'd have to bear her own expense to the -- or yeah, I assume the plaintiff would, she'll be required to pay her own expense to one of the depositions.

MR. HILLIN: One, okay. So I guess she will pay her expenses --

THE COURT: And appearing up here, are you asking for -- you included her mileage for this hearing?

MR. HILLIN: Yeah.

THE COURT: Okay. In other words, she'll get paid for the one that was thwarted.

MR. HILLIN: Okay.

THE COURT: Anything else?

Are we through except for --

Cindy?

THE LAW CLERK: His motion to withdraw.

THE COURT: Oh, yeah.

MR. LIEBMAN: That was not actually -- was not noticed up for a hearing at the same time all these were. If I could present it, I'd like to. But I don't have any objection of counsel --

THE COURT: Anybody have any objection? I need to get some assurances and some notices to the doctor if you're to be let out.

MR. LIEBMAN: Yes, sir.

THE COURT: Go ahead and state your reasons. You recognize what a problem we have if someone withdraws.

MR. LIEBMAN: Yes, sir.

THE COURT: We've got to get new counsel on board or pro se, and attempt to proceed on. And if that isn't communicated very clearly to the client, --

MR. LIEBMAN: Yes, sir.

THE COURT: -- he may not know or understand --

MR. LIEBMAN: Yes, sir.

THE COURT: -- what dire consequences can occur if he does not do as he's required to do under the Federal Rules of Civil Procedure. Now, having said that, tell me why you want out.

MR. LIEBMAN: Sir, it's basically twofold. I'm in a position where I had -- I had entered into this case with the thought that it was a relatively simple matter between the doctor and the plaintiff. And with the additional allegations brought in among the hospital board and the possible allegations that are going to be leveled against my client in the other defendants' defense of their part of the case, to be honest with you, sir, this is -- one, it's become an issue that's over my head as a practicing lawyer. It's basically, I don't believe at this time that I am effectively able to represent Doctor Ramirez with these additional allegations that

have been brought up during the course of the discovery.

THE COURT: Hold up just a little bit. The initial allegations by the plaintiff are one thing.

MR. LIEBMAN: The negligence of my client was one thing.

THE COURT: What do you anticipate, blaming or charges by the other defendants?

MR. LIEBMAN: I anticipate it's going to be a situation where the other defendants are, in some manner, going to try to allege exclusive negligence on my client's behalf as between the respective defendants. And I -- as Miss Hanan stated and Mr. Rowland alleged about the total volume of documentation on certification, this is just way beyond. I'm a sole practitioner, Judge. I have basically two office assistants. My practice consists of primarily criminal defense and divorce work. And I don't think that I'm in a position to offer Doctor Ramirez the assistance that he really requires with the new wrinkle. And I don't want to call it "new," because I think the other defendants were added several months ago.

But after I had a chance to prepare for the original depositions and I realized the volume of other possible allegations that were -- that might come in with regard to the other defendants, I called Doctor Ramirez up and I basically -- I gave him an almost unreasonable financial ultimatum

because it was -- it would be eventually like me reinventing the wheel to get up to speed on these additional issues. And I'm just in a financial morass with regard to this particular case right now and my client is not financially able to reimburse me.

THE COURT: You're not retained by an insurance company to defend the doctor?

MR. LIEBMAN: No, sir, I'm not.

THE COURT: As far as you know, you're being retained by the doctor?

MR. LIEBMAN: Yes, sir. And in good faith, he has done everything that he financially can, which is, to be honest with you, Judge, insufficient to the point that it's not going to cover one trip to Oklahoma City, or answering pleadings to -- on the initial petition, sir. And it's kind of a late date, but the part that really concerned me was the inexperience I have with regard to the issues that are going to come up with regard to the hospital.

THE COURT: I'm going to interrogate him in a moment. But is it your understanding that he is willing -- or is in agreement with your application to withdraw?

MR. LIEBMAN: It's my understanding that he is in agreement.

THE COURT: Let me interrogate him in regard to that.

Doctor, do you understand your attorney has asked this Court to allow him to withdraw from representing you in these proceedings; do you understand that?

DOCTOR RAMIREZ: Yes, sir.

THE COURT: You've heard him testify as to the reasons for that. Do you have any disagreement with your attorney with regard to anything that he stated here?

DOCTOR RAMIREZ: No, sir.

THE COURT: Would you like an opportunity to question him about any additional aspects of this, his right to withdraw at this time?

DOCTOR RAMIREZ: No, sir; we have talked about this.

THE COURT: Now, then, Doctor, do you have any objection to him withdrawing?

DOCTOR RAMIREZ: No, sir.

THE COURT: I want you to fully understand that if he is allowed to withdraw, which I'm strongly inclined to do, that you will be required to either retain additional counsel or to represent yourself pro se; do you understand that?

Do you understand that term, "pro se"?

DOCTOR RAMIREZ: If you could be so kind to explain that.

THE COURT: What that means is you'll either get a legal attorney, an attorney authorized to practice before the

court to represent you, as Mr. Liebman has done; or you do have the right to represent yourself as what they call a "pro se defendant." In other words, you can be your own lawyer.

Now, I'll offer an awful lot of reasons, if you want to hear them, why I would be very concerned if you did that; not only for your sake but for the benefit of the Court and the court proceedings. But I think that if you'll consult with almost anyone, including Mr. Liebman, he would advise you that it would be a very difficult legal situation to put yourself in in a case this complicated, to attempt to represent yourself. But you do have that right. And if I allow him to withdraw, you will be required to either notify the Court within a fairly short period of time of whether you want to represent yourself or whether you intend to replace yourself with counsel -- or replace him with counsel and get that attorney of record.

And I would say in this case, and I'll kind of ask, I'll say ten to 30 days would be a maximum period that you would be able to -- I'd be able to allow you to make this decision and act on it in order to avoid the same sort of a problem of delaying this case.

Does that sound reasonable, including you, does that sound about right?

MR. LIEBMAN: Yes, sir.

THE COURT: So I guess what I'm telling you is that if you're going to represent yourself or get an attorney,

you're going to have to do it within 30 days. And nothing, almost nothing, will allow this case to be delayed by your failure to do so within that period of time.

In other words, if you don't do it and you attempt to represent yourself, it will go on. It's on the track now, it got off track a while and it's back on track, and these things have to be brought along at a regular pace, and so forth, and according to schedule.

So I guess what I'm trying to tell you, without being threatening, is that you're not apt to be able to get any further delays in this case by reason of representing yourself or not having an attorney of record right now.

Do you understand that, sir?

DOCTOR RAMIREZ: I do, sir.

THE COURT: All right. Do you have any questions or responses to that that you wish to ask me or Mr. Liebman at this time?

DOCTOR RAMIREZ: No. In essence, I would have to wade through your decision, Judge, as to which way we're going to be.

THE COURT: What I'm going to do, I'll be frank with you, I'm going to let Mr. Liebman withdraw in this case unless you can furnish me some additional reasons why I should not at this time.

DOCTOR RAMIREZ: No, sir. As I said before, we had

talked about this earlier, and have some understanding of his side, as well as realizing my current position. The only comment I have is if that's seemingly your inclination, what would happen with my deposition January 21st?

THE COURT: Okay. Those are all pretty well -- Do you have a question about that?

MR. HILLIN: Yeah, Your Honor. Just for the record, I oppose Mr. Liebman's motion to withdraw at this time. I think that it would be appropriate for Doctor Ramirez to get other counsel and potentially substitute counsel; or in the very least, not allow Mr. Liebman to withdraw until after the ordered deposition of Doctor Ramirez on January 21st to avoid --

THE COURT: If we do this, with this caveat, or inclusion in the order, that he is allowed to withdraw subject to his obligation to continue to forward all orders of the Court to him until new counsel of record appears of record. Is that not adequate in this case?

MR. JOHNSON: Well, Judge, I hate to agree with opposing counsel here, but I have a real concern in that. And this is a due process problem, frankly. And I'm not suggesting anybody is going to do or has done anything wrong, but for whatever reason, if counsel for the doctor and/or the doctor is not there, we're going to be back facing the potential of a double deposition of all parties, at everybody's expense, which

is what brought us here to begin with. And I don't have a clue as to how to resolve that, but I don't want to be back in that spot again.

MR. HILLIN: Your Honor, my comment on that, as far as Doctor Ramirez's deposition is concerned, I'm in total agreement with Mr. Johnson about that. I think because Mr. Liebman is here, if he's going to be allowed to withdraw, he should have to produce him for deposition as the Court is ordering. If Doctor Ramirez chooses not to attend the depositions of the nurses, he's on notice now when those depositions are going to be taken, he has --

MR. JOHNSON: We're good with that, as long as the Court understands and counsel and everybody agrees that if, for whatever reason, without coming before you in advance and getting an order, he doesn't show up, we're not going to have to do this twice.

MR. HILLIN: Right.

THE COURT: You're still counsel of record, so I can still call on you. What's your response to this?

MR. LIEBMAN: Your Honor, it's your decision. I understand exactly where counsel is coming from about having to avoid duplication. I think Your Honor can order Doctor Ramirez to appear at that hearing; and if he's going to have counsel, to have counsel, alternate counsel, with him or be prepared to proceed pro se. But if you want me to be in attendance through

the deposition, that's fine, although my druthers would be --

THE COURT: Let me inquire if this would be adequate. Have you all picked the date yet?

MR. HILLIN: January 21st.

THE COURT: Why can't I on the record advise Doctor Ramirez he is noticed totally and properly to appear at that deposition, and that he can do so either pro se, or if I allow Mr. Liebman out, it's going forward with or without a new counsel. But that if he does not appear to be deposed, he runs the risk of two different things. He runs the risk of having his defense in this case abolished, which is what you requested in this instance. And quite frankly, the second strike would be probably a lot more effective; and the additional thing is that eventually you would be required, if I had it up, ordered it again, you would be required to pay for all of the expenses of that, plus some additional sanctions, so forth. Do you understand that sufficiently, Doctor Ramirez?

DOCTOR RAMIREZ: Yes, sir. But looking from my side, if the Court does go ahead with what you just said, Judge, part of the reason why I have had difficulty is that in this judiciary system, in order to get any sort of proper representation, they want a retainer fee plus the normal and usual expenses, at which point, right now in my actual phase in my life, my financial resources are, quote, unquote, strapped, to say the least. So if the Court does order me to be here

January 21st and also orders me to, in essence, go out there and try to locate another lawyer, which I have attempted to do ever since Mr. Liebman and I had the original conversation in December, I honestly don't think, if ever, I'm going to get proper representation, least of which will be in ten days prior to the 21st of January for the deposition. It's not the actual presence at the deposition, it's to have my rights hopefully properly preserved by some type of representation at the deposition.

MR. HILLIN: Your Honor, that's -- what Doctor Ramirez said just now punctuates why I believe that Mr. Liebman should not be allowed to withdraw until after the deposition has been taken on January 21st as we have scheduled it.

MR. JOHNSON: Judge, can I say one more thing? We really have two issues here. Though I elect to cooperate on any of them, my main interest is as it was in the beginning. If for some reason nobody shows up when these nurses are scheduled to be deposed, I don't want to then later be back in the same spot of, "okay, now we've got to depose them again because the doctor wasn't there." I'm not suggesting that he won't be there at all, I'm not suggesting any wrongdoing here, Judge, but that's what got us here. I'm willing to work on any system that will work to protect these folks from having to be deposed twice.

THE COURT: Okay. I'm going to keep you in,

counselor, at least through that deposition. You'll just have to -- you got yourself in there, I'm going to let you out as soon as we can do so without jeopardizing the proceeding. But I say to you and to your client, it only creates difficulties and problems if you fail to show up.

MR. JOHNSON: And we've got scheduled depositions for these nurses.

THE COURT: You're going to bear the burden of all these additional expenses, plus some additional sanctions.

MR. JOHNSON: We've got scheduled exact dates for the nurses's depositions, if for whatever reason, right, I don't think, or otherwise --

THE COURT: What date are those, now?

MR. HILLIN: Those are March Fifth and Sixth.

THE COURT: I think the ruling would be adequate to put the doctor on notice that I'm going to allow you to withdraw after his scheduled deposition, and that his representation at those hearings will be his responsibility, at these other depositions will be his responsibility; and his failure to be there, either personally or with representation, will not prevent those depositions from going forward and being binding as to the doctor himself.

MR. JOHNSON: We won't have to do it later if he tries to get in --

THE COURT: Exactly.

MR. HILLIN: Just because we're trying to nail all this down and have proper notice here, all of the depositions of the nurses will take place at Johnson, Hanan, Heron and Trout, at 100 North Broadway Avenue, Suite 2750; correct?

MR. JOHNSON: That's correct.

THE COURT: And as far as Doctor Ramirez's deposition, could you host that as well?

MR. JOHNSON: Sure.

THE COURT: Would you agree to produce him there?

MR. LIEBMAN: Yes.

MR. HILLIN: Then we will produce the plaintiff for the continuation of her deposition on the date that we selected, March 13th, at the same court reporting office where we started at, which the, what --

MR. JOHNSON: City Reporters.

MR. HILLIN: City Reporters.

MR. JOHNSON: That's fine.

MR. HILLIN: And that the hospital representative that we discussed, on March 13th at 1:00 P.M. Andrea Locke is on the 14th, correct?

And the 13th is the hospital representative. And the hospital representative will be deposed at Johnson, Hanan, Heron and Trout at the same address; correct?

MS. HANAN: Is that the correct date? They are correct.

MR. JOHNSON: The only thing, I want to be sure that Doctor Ramirez understands if for whatever reason he or counsel don't appear for those depositions, that we're not -- we don't have a problem here.

THE COURT: No problem, you can proceed and the deposition testimony will be binding on or at least applicable to all the parties to this lawsuit, whether they're present or not.

MS. HANAN: Okay.

MR. JOHNSON: Thank you.

THE COURT: Anything else left up in the air?

MR. HILLIN: I guess the only other thing, all the suggestions here, the same rules will apply as far as not being able to depose twice on Andrea Locke and her scheduled deposition.

MR. JOHNSON: That's fine with us, we're agreed with that.

MR. HILLIN: Okay. Very good.

THE COURT: All right?

MR. HILLIN: Thank you, Judge.

MR. JOHNSON: Thank you.

THE COURT: Good luck.

(PROCEEDINGS CLOSED)

A TRUE AND CORRECT TRANSCRIPT

Certified: _____

TIM HOLMES, CSR, CM

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

ANDREA LOCKE, Individually, as Personal Representative, Mother and as Next Friend of Alexis Nicole Barrera, Deceased,

Plaintiff,

vs.

CIMARRON MEMORIAL HOSPITAL et al.,

Defendants.

No. CIV-01-213-W

ORDER

Upon review of the record, the Court

(1) GRANTS the Application to Withdraw as Counsel of Record filed on July 17, 2002;

(2) hereby PERMITS attorneys A. Scott Johnson and Mary B. Hanan and all other attorneys with the firm of Johnson, Hanan, Heron and Trout, P.C., to withdraw as counsel of record for defendants Cimarron Memorial Hospital ("Hospital"), Larry Hood, Paulene Davis, Jeff James, Tommy Grazier, Bonnie Heppard, Carolyn Topper, Debbie Sappenfield, Linda J. Cook and Lynna Brakhage, subject (a) to the condition that all subsequent papers shall be served upon these attorneys for forwarding purposes unless and until these

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defendants have appeared by other counsel[1] or, in the case of the individual defendants, pro se, see Rule 83.5, Rules of the United States District Court for the Western District of Oklahoma, and (b) to the condition that they comply with all Orders entered by this Court regarding the payment of attorneys' fees and expenses;

(3) DIRECTS the individual defendants within seven (7) business days either (a) to file a paper indicating their intention to proceed pro se or (b) to retain new counsel; and

(4) because the Hospital may not appear pro se, Rule 17.1, Rules of the United States District Court for the Western District of Oklahoma, DIRECTS the Hospital to retain new counsel within seven (7) business days.

ENTERED this 19th day of July, 2002.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

[1]New counsel shall enter an appearance by signing and filing an entry of appearance on the form provided by the Clerk of the Court. Rule 83.4, Rules of the United States District Court for the Western District of Oklahoma.