

**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

Christine Gambino, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 2016 CA 001884 M
v.	:	Hon. Todd Edelman
	:	
MedStar Georgetown Medical Center Inc.,	:	Next Court Event:
d/b/a MedStar Georgetown University Hospital	:	Pre-Trial Hearing
	:	September 14, 2017 @ 2:30 pm
Defendant.	:	

JOINT PRETRIAL STATEMENT

1. Certification of Rule 16(c) Meeting

The Court-ordered pretrial meeting of all counsel was held on August 17, 2017 at the offices of Planet Depos, 1100 Connecticut Ave., Washington, D.C. 20036. The following counsel attended the meeting:

Daniel C. Scialpi, Esquire, Plaintiff's counsel; Andrew J. Spence, Esquire and Karen Cooke, Esquire, counsel for Defendant MedStar Georgetown Medical Center Inc.

2. Parties and Counsel

Plaintiffs Garrett Gambino, Christine Gambino, individually and as the parent and guardian of R.G.

Patrick A. Malone (Bar No. 397142)
Daniel Scialpi (Bar No. 454937)
Patrick Malone & Associates, P.C.
1310 L Street N.W., Suite 800
Washington, DC 20005

Defendant MedStar Georgetown Medical Center, Inc.

Michael F. Flynn, Jr. (D.C. Bar No. 351304)
Andrew J. Spence (D.C. Bar No. 421341)
Karen M. Cooke (D.C. Bar No. 999767)
Gleason, Flynn, Emig, Fogleman

& McAfee, Chartered
11 North Washington Street, Suite 400
Rockville, Maryland 20850

Preliminary Matter: At the meeting of counsel, discussion was had regarding how to maintain the minor plaintiff's confidentiality during the course of the trial. The parties will request at the pretrial conference that the Court order the record, including all exhibits, and the trial transcript to be sealed. This will address the minor's confidentiality, while allowing counsel and witnesses at trial to refer to the minor plaintiff by name. Further, it will obviate the need to redact the minor's name from the medical records and other trial exhibits.

3. Nature of Case

Plaintiffs' Statement

This is a medical negligence case against MedStar Georgetown Medical Center, Inc. The case is brought by Garrett and Christine Gambino, individually, and as the parents and guardians of their daughter, R.G. The case arises out of R.G. hospitalization at Georgetown Hospital following her birth on January 2, 2013. On January 16, 2013, while R.G. was a patient in Georgetown's Neonatal Intensive Care Unit, she suffered a chemical burn on her ankle, known as an infiltration (or also an extravasation). This burn was caused by medication escaping from an i.v. inserted into R.G.'s right ankle, burning the tissue surrounding R.G.'s right ankle. R.G. suffered scarring and a deformity on her right leg for which she is still being treated today.

The Gambinos bring this suit for money damages because they contend that Georgetown's employee nurse Ellen Yeon Kim failed to follow the proper standards of care for treating a newborn such as R.G., and that these violations of the standard of care resulted in R.G. suffering the burn on her right leg. Georgetown denies all allegations.

Defendant objects to Plaintiffs' Statement; it is argumentative and misstates the claims.

Defendant's Statement of the Case:

This is a medical malpractice case in which Christine and Garrett Gambino, on behalf of their minor daughter, R.G., allege that the Defendant Georgetown Medical Center, Inc. ("MGMC") through its employees, was negligent in providing medical care related to their daughter's admission to the neonatal intensive care unit following her premature birth on January 2, 2013. The Plaintiffs allege that the Defendant failed to monitor R.G.'s peripheral IV site appropriately which lead to an infiltrate complication. Defendant denies any negligence and denies that any injuries Plaintiffs claim to have suffered were caused by negligent acts and/or omissions on their part. Additionally, Defendant contests the nature and extent of the injuries being claimed.

Plaintiffs object to Defendant's Statement as lacking sufficient information to provide the jury with a sufficient Statement of the Case.

4. Claims and Defenses

Plaintiffs' Claims

R.G. was born nine weeks premature at MedStar Georgetown University Hospital (MGUH) on January 2, 2013. On January 16, 2013, R.G., who as admitted to the MGUH neonatal intensive care unit (NICU), was receiving TPN (nutrition provided for premature babies), lipids (fat), and an antibiotic, Vancomycin, by means of an IV in her right ankle. MGUH's records indicate that at 2 pm on January 16, 2013, Nurse Ellen Yeon Kim noticed that there was puffiness at the site of the IV. Nurse Kim was the sole nurse responsible for monitoring R.G. from 7am to 7pm on January 16, 2013.

Puffiness, or swelling, at the site of an IV, especially in a premature baby, is a well-known sign of extravasation (also frequently called infiltration), which is when the IV fluid leaks outside of a blood vessel and into the surrounding tissue, causing a chemical burn. TPN, lipids, and Vancomycin are all vesicants, meaning that they are caustic to tissue outside of the vein.

Extravasation is a common occurrence in premature babies, and NICU nurses like Nurse Kim are trained to monitor IV sites – checking them at least every hour – and to remove an IV at the first sign of extravasation. But Nurse Kim did not remove the IV at 2pm. At approximately 3pm, R.G.’s mother, Christine Gambino, and her mother (R.G.’s grandmother) Shirley Goss, arrived at the MGUH NICU. Ms. Goss first saw R.G., and saw that her right leg looked like it had been “dipped in lava.” Nurse Kim came over at that time, and when Ms. Goss asked her how long it had been since someone checked on R.G., Nurse Kim responded that it had been two hours.

R.G. suffered a massive chemical burn on her right leg as a result of extravasation from the IV. R.G. received treatment for the burn at MGUH for the remaining month that she was in the hospital, but still suffered a permanent deformity and scar on her right leg as a result of this burn. This injury has also caused R.G. to suffer a leg-length discrepancy, and a loss of range of motion in her ankle, for physicians at Johns Hopkins University Hospital are still treating her. This treatment includes ongoing CO2 laser treatments on her right ankle/leg, to prevent further damage as R.G. grows.

Had Nurse Kim monitored the IV site appropriately, and removed the IV at 2pm or earlier, Raquel Gambino would not have any permanent scarring or deformity of her right leg

Defendant’s Claims:

1. Defendant claims that the medical care and treatment provided to R.G. in the MGMC neonatal intensive care unit (“NICU”) on January 16, 2013 was appropriate and within the standard of care.

2. Defendant generally denies that the care and treatment rendered to R.G. at MGMC violated the applicable standard of care and further, that no act or omission by any of its agents proximately caused any of Plaintiffs' alleged injuries.

3. Defendant maintains that R.G. was admitted to the MGMC NICU on January 2, 2013 following her premature birth at just under 31 weeks gestation, weighing approximately 3 pounds. R.G. received a high level of skilled care in the NICU throughout her admission which enabled her to thrive and to be discharged to home on February 17, 2013.

4. Defendant maintains that the nurse who was assigned to care for R.G. on January 16, 2013, Yeon Kim, R.N., was an experienced, skilled neonatal nurse well qualified to monitor, assess, and otherwise care for R.G.

5. Defendant maintains that R.G. required a peripheral IV line on January 16, 2013 in order to maintain proper nutrition and for the administration of medication, among other reasons.

6. Defendant maintains that Nurse Kim met the standard of care on January 16, 2013 by monitoring and assessing R.G.'s peripheral IV site on an hourly basis.

7. Defendant maintains that the placement of the subject peripheral IV in R.G.'s right foot was appropriate and met the standard of care.

8. Defendant maintains that the "puffiness" noted by Nurse Kim in the chart was not a sign of infiltration.

9. Defendant maintains that the infiltrate was recognized in a timely manner.

10. Defendant maintains that despite proper care, R.G. developed a known complication, an infiltrate, on January 16, 2013, that lead to tissue damage and scarring. Further

Defendant maintains that the infiltrate did not result from any negligence or violation of the standard of care on the part of any MGMC health care providers.

11. Defendant maintains that once the infiltrate complication was recognized, it was immediately and appropriately treated.

12. Defendant specifically denies any falsification of R.G.'s medical records on January 16, 2013.

13. Defendant maintains that all follow up care and treatment to R.G.'s infiltration wound was appropriate and within the standard of care.

14. Defendant denies that R.G. is likely to develop functional limitations attributable to the infiltrate complication.

15. Defendant denies that the recently-noted discrepancy in the length of R.G.'s right versus left legs is causally related to the infiltration or to any treatment given by Defendant's employees.

16. Defendant contests the nature and extent of the injuries and damages claimed by Plaintiffs.

17. Defendant generally denies that any negligent act and/or omission allegedly attributable to the employees of MGMC caused or substantially contributed to Plaintiffs' claimed injuries and/or damages.

18. Defendant adopts and incorporates its Rule 26(a)(2)(B) Statement, with accompanying expert reports and all supplements thereto, any testimony of the employees of MGMC, and the testimony and/or reports of Defendant's expert witnesses as to liability, causation and damages.

19. Defendant specifically denies that the employees of MGMC violated the standard of care with regard to the IV infiltration R.G. experienced on January 16, 2013.

5. Undisputed Issues/Stipulations

Agreed Upon Stipulations:

1. With the Court's permission, the parties agree that all demonstrative evidence and/or exhibits will be exchanged on October 16, 2017; Objections will be raised by exchange between the parties on October 20, 2017.

2. The parties will stipulate to the authenticity only of all medical records, bills, and imaging produced in discovery and identified in the parties' exhibit lists. The parties agree that it will not be necessary to call custodian of records to authenticate the aforementioned items at trial.

The parties do not waive by this stipulation any objection that they may assert regarding relevance, prejudice, causation, or any other reason supported by District of Columbia evidentiary or case law.

3. Plaintiffs stipulate that administration of Vitrase (hyaluronidase) following the infiltration was within the standard of care, in terms of timing and method of administration, and that no experts will testify to the contrary at trial.

4. Plaintiffs stipulate that Garrett Gambino's letters written to Georgetown's CEO and President will not be referred to or introduced as exhibits at trial.

5. Plaintiffs stipulate that they will not introduce testimony or evidence at trial pertaining to any dissatisfaction or complaints that the Gambinos had with care given at Georgetown that is unrelated to the infiltration, such as any complaints regarding Christine Gambino's care and/or R.G.'s premature birth.

6. Plaintiffs stipulate that the one-time application of a warm compress to R.G.'s right foot at 21:00, 1/16/13 did not violate the standard of care.

7. Plaintiffs stipulate that no evidence or testimony will be introduced at trial to support a claim that application of a warm compress caused exacerbation of R.G.'s infiltrate wound.

8. Plaintiffs stipulate that Shirley Goss will not offer opinion testimony at trial regarding including any testimony regarding the proper frequency of nursing monitoring of R.G.; proper placement of R.G.'s peripheral IV; the nature of the fluids in R.G.'s PIV line; or other medical or nursing opinions.

9. Defendant stipulates that at all times relevant in this case, Yeon Kim, R.N.; Nitin Mehta, M.D.; and K. Sivasubramanian, M.D. were acting within the scope of their employment at MGMC.

10. Defendant stipulates that it will call only one nursing expert to testify at trial.

11. Defendant stipulates that it will not introduce evidence at trial regarding collateral source payments.

12. Defendant stipulates that it will not introduce testimony at trial that the neglige of any non-party caused or contributed to R.G.'s infiltrate complication or ensuing wound.

13. The parties agree that, with the Court's permission, all final Exhibit Summary lists will be exchanged on October 16, 2017 (one week before the October 23, 2017 trial date).

14. The parties will attempt to agree on certain joint medical records exhibit for use at trial. (See Section L below.)

Plaintiff's Proposed Stipulations:

1. Any medical record produced in discovery and included in the trial exhibits may be used during testimony of a witness without introducing the record into evidence. At the end of the trial, only those pages of medical records referred to by a witness at trial will be admitted into evidence.

Defendant does not agree to this stipulation.

2. The parties reserve the right to use enlargements of portions of the medical records, radiographs and other exhibits at trial without advance disclosure.

Defendant agrees except as to photographs.

3. The parties may use Power Point slides or other computerized visual aids during opening statements and closing arguments without prior disclosure to opposing counsel. However, a party must disclose in advance of any jury presentation the party's intent to display a proposed exhibit, illustration or demonstrative aid before such has been admitted into evidence. The parties intend that non-disclosure be limited to primarily verbal slides summarizing evidence or argument. By this stipulation the parties do not waive any objections they may have to display of material to the jury that they deem to be improper or unfairly prejudicial.

Defendant does not agree to this stipulation and requests advance disclosure of any materials to be used in opening and closing statements except medical records disclosed by the parties in discovery.

4. The parties reserve the right to use enlargements of portions of the medical records as exhibits.

Defendant agrees except as to photographs provided that the enlargements are not admitted into evidence and are not made available for viewing by the jury in deliberations.

5. Curriculum vitae of expert witnesses may be referred to in examining such witness but the CV's themselves will not be offered into evidence.

Defendant does not agree to this stipulation and requests that expert C.V.'s be admitted into evidence at trial.

Defendant's Requested Stipulations:

1. Defendant requests that, with the Court's permission, all final trial witness lists and Plaintiffs' trial witness scheduling calendar will be identified on October 17, 2017, (one week prior to the October 23, 2017 trial date), and Defendant's tentative trial witness scheduling calendars will be identified on the first morning of trial.

Plaintiffs' Objection: Plaintiffs object to Defendant's request that they produced a schedule of their witnesses one week prior to trial. Plaintiffs have identified their likely witnesses (see below) and will do their best to inform the Defendant ahead of time as to which witness is going to be called the following day.

2. Defendant requests that Plaintiffs disclose at the time of the Pretrial Conference when they anticipate their case will conclude. Defendant requests this stipulation in order to facilitate witness scheduling and to avoid, to the extent practicable, calling witnesses out of order.

Plaintiffs' Response: As indicated below, Plaintiffs believe they will conclude their case in chief in four days, or by Thursday October 26.

3. Defendant requests a stipulation that Plaintiffs will not present testimony or evidence at trial critical of any treatment R.G. received in the NICU prior to January 16, 2013, or after January 16, 2013.

Plaintiffs believe the joint stipulation No. 5 sufficiently covers the subject of this proposed stipulation.

4. Defendant requests a stipulation that Plaintiffs will not introduce testimony or evidence at trial that care and treatment R.G. received at MGMC for her wound, after the infiltration occurred, violated the standard of care.

Plaintiffs believe the joint stipulation No. 5 sufficiently covers the subject of this proposed stipulation.

Disputed Issues

All issues of standard of care, causation, and damages, as well as any other issue not specifically stipulated above.

6. Relief Sought:

Plaintiffs:

Plaintiffs seek all damages recoverable under the law, in an amount to be determined by the jury.

Defendant:

Defendant seeks dismissal of this case with prejudice, or alternatively, judgment in their favor, and that they recover attorney fees and costs, as well as such further relief as the Court may deem just and proper.

7. Citations

Plaintiffs:

- Health care providers have a duty to act more carefully as the danger increases.
Pannu v. Jacobson, 909 A.2d 178 (D.C. 2006).
- A physician who is an expert in a procedure or a disease process can opine about standard of care even though he may not be the same specialty as the defendant.
Ferrell v. Rosenbaum, 691 A.2d 641 (D.C. 1997); *Battle v. Thornton*, 646 A.2d

315, 322 n.8 (D.C. 1994) (collecting cases in which it was held that a medical expert need not be a specialist in the procedure at issue as long as he or she was familiar with it); *Garvey v. O'Donoghue*, 530 A.2d 1141 (D.C. 1987).

- The statement of agent or employee of party opponent is admissible as an exception to hearsay rule against principal if declaration against principal's interest concerns matter within the scope of declarant's employment. *Dist. of Columbia v. Washington*, 332 A.2d 347, 350 (D.C. 1975).
- MedStar Georgetown Medical Center, Inc., is liable for the acts and omissions of its employees pursuant to the doctrine of apparent agency: *See Street v. Washington Hosp. Center*, 558 A.2d 690 (D.C. 1989); and *Livingston v. Fuhrman*, 37 A.2d 747, 748 (D.C. 1944).
- Plaintiffs also rely upon authorities cited in their requested Special Jury Instructions, as well as their Motions *in Limine*.

B. Defendants:

1. Applicable District of Columbia case law dealing with the scope of expert testimony, including but not limited to: *Giordano v. Sherwood*, 968 A. 2d 494, 497 (2009), *Haidak v. Corso*, 841 A.2d 316, 327 (2004), *Travers v. District of Columbia*, 672 A.2d 567 (D.C. 1994) and *District of Columbia v. Wilson*, 721 A.2d 591 (D.C. 1998).

2. Applicable District of Columbia case law dealing with the scope of treating physicians' testimony, including but not limited to: *Adkins v. Morton*, 494 A.2d 652 (D.C. 1985); *District of Columbia v. Howard*, 588 A.2d 683 (D.C. 1991).

3. Applicable District of Columbia case law dealing with the sufficiency of expert testimony/qualifications, regarding the national standard of care and causation,

including but not limited to: *Hawes v. Chua*, 769 A.2d 797 (D.C. 2001); *Dyas v. United States*, 376 A.2d 827 (D.C.), cert. denied 434 U.S. 973, 98 S.Ct. 529, 54 L.Ed.2d 464 (1977).

4. Applicable District of Columbia case law dealing with the admissibility and sufficiency of Plaintiff's causation theory, including but not limited to *Lasley v. Georgetown*, 688 A.2d 1381 (D.C. 1997); *Giordano v. Sherwood*, 968 A.2d 494, 500 (D.C. 2009); *Dyas v. United States*, 376 A.2d 827 (D.C.), cert. denied 434 U.S. 973, 98 S.Ct. 529, 54 L.Ed.2d 464 (1977).

5. Applicable District of Columbia case law dealing with the sufficiency of evidence presented to establish a claim for damages, including but not limited to *Burton v. United States*, 668 F. Supp. 2d 86, 97, 2009 WL 3733960 (D.D.C. 2009); *Doe v. Binker*, 492 A.2d 857, 861 (D.C. 1985).

6. *Quin v. George Washington University*, 407 A.2d 580, n. 3 (D.C. 1979). "The trial court did not err in refusing to admit into evidence articles used for a doctor's examination. (See 2 Jones on Evidence s 12.31 (1972) ("the prevailing view of the courts is that books or treatises which deal with (medicine, surgery, mechanics) are barred by the rule against hearsay as evidence of facts or opinions stated therein, no general exception having been developed to make them admissible"); Fed.R.Evid. 803(18) (statements contained in learned treatises may be read into evidence but may not be received as exhibits). The articles were marked for identification and used extensively on re-direct and re-cross."

7. It is within trial court's discretion to disallow opening/closings that invite the Jury to protect their communities or fellow citizens. In *Scott v. Crestar Fin. Corp.*, 928

A.2d 680 (D.C. 2007) (affirmed where trial court granted JNOV even though counsel never used the phrase “send a message,” finding improper closing argument by plaintiff in employment discrimination case resulting in \$1 million excessive verdict). Scott, 928 A.2d at 685.

8. It is within trial court’s discretion to disallow statements that are prejudicial (i.e. improper to arouse passions of the Jury) or misleading. *Psychiatric Inst. of Washington v. Allen*, 509 A.2d 619, (D.C. 1986).

9. It is within trial court’s discretion to preclude statements that are based upon facts not in evidence. *Gasque v. Saidman*, 44 A.2d 537, 539 (D.C. Mun. App. 1945) (“statements not supported by admitted evidence tend to mislead the jury and are not to be commended”) (quoting *Meyer v. Capital Transit Co.*, 32 A.2d 392, 393 (D.C. Mun. App. 1943)).

10. It is within trial court’s discretion to prevent expressions of counsel’s personal opinions. Rule 3.4(e) of D.C. Rules of Professional Responsibility prohibits an attorney from: “In trial...state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.” *Irick v. United States*, 565 A.2d 26, 36 (D.C. 1989)(“key inquiry is whether the attorney is commenting on the evidence, which he may do, or expressing a personal opinion, which is taboo).

11. Defendant also relies upon authorities cited in the requested Special Jury Instructions, as well as its pleadings and briefs filed in this case, including the Defendant’s seven pending pretrial Motions in Limine.

12. To be properly admissible, the expert testimony must be helpful to the jury, *Jenkins v. United States*, 113 U.S. App. D.C. 300, 306, 307 F.2d 637, 643 (1962), and must be more probative than prejudicial, *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979). Furthermore, the admissibility or exclusion of expert witness testimony is governed by the Federal Rule of Evidence/Daubert standard. *Motorola Inc., et al v. Murray, et al.*, D.C. Ct. of Appeals, No. 14-CV-1350.

13. All citations cited in Defendant's Motions in Limine and oppositions to Plaintiff's Motions in Limine.

14. Defendant reserves the right to submit additional authorities on other issues as needed at trial, should it become necessary due to the facts, evidence, or circumstances.

9. Pending Motions

Plaintiffs:

Plaintiffs moved *in limine* to:

1. Exclude opinions not contained in defendant's experts' reports and preclude the use of medical literature at trial by defendant and its experts;
2. Exclude any defense argument, evidence, and/or comment about the alleged adverse effect of a verdict against the defendant and its employees, agents and/or servants;
3. Exclude any argument, evidence, and/or comment about alleged expressions of sympathy and benevolence from the defendant;
4. Exclude any argument, evidence, and/or comment about the good faith or good intentions of the defendant; and
5. Exclude any argument, evidence, and/or comment concerning the alleged reputation of the defendant and their employees, agents, and/or servants.

Defendant

As of the date this Joint Pretrial Statement is being filed, the following Defendant's Motions *in Limine* are pending:

1. Motion to Preclude Plaintiff's Experts From Offering Unfounded Opinions As To Timing Or Amount Of Infiltrated Fluid;
2. Motion to Preclude Plaintiffs' Counsel From Improperly Prejudicing The Jury By Using Trial Tactics Based On The "Reptile Theory";
3. Motion to Preclude Plaintiff Garrett Gambino From Testifying About Conversations With Nurses;
4. Motion to Preclude A "Colston" Argument; and
5. Motion to Preclude Plaintiffs' Testimony Regarding Emotional Distress.

10. Witnesses

Plaintiffs:

i. Lay Witnesses and Treating Health Care Providers (* indicates most likely to testify)

1. Christine Gambino*
5605 Ridgeview Dr.
Alexandria VA 22310
2. Garrett Gambino*
5605 Ridgeview Dr.
Alexandria VA 22310
3. Shirley Goss *
107 Granger Ln.
Huntsville, AL 35811

Health Care Providers:

1. Dr. Richard James Redett III*
Johns Hopkins Medicine
1800 Orleans St.
Baltimore, MD 21287
2. Ranjit Varghese, MBBS*
Johns Hopkins Medicine

1800 Orleans St.
Baltimore, MD 21287

3. Nitin Mehta, M.D.*
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
4. Kolinjavadi Sivasubramanian, M.D.*
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
5. Ellen Yeon Kim, R.N.*
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
6. Qi Rong, M.D.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
7. Eleanor Pisano, M.D.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
8. Nicole Conto, R.N.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
9. Kelsey Skeffington, C.W.O.C.N.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
10. John Delahay, M.D.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
11. Gisella Valderama, M.D.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400

Washington, DC 20007

12. Benjamin Brown, M.D.
Gulf Coast Plastic Surgery
543-A Fontaine Street
Pensacola, Florida 32503
13. Frank Volberg, M.D.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
14. John Barbour, M.D.
3800 Reservoir Road NW
Main Building 3rd Floor Room 3400
Washington, DC 20007
15. Sasha Avery, M.D.
Garner Primary Care
Garner Healthplex
400 U.S. Highway 70 East, Suite 202
Garner, NC 27529
16. Jessica Long, M.D.
Spring Valley Pediatrics
4900 Massachusetts Ave, NW
Lower Level
Washington, DC 20016
17. Monica Gill, M.D.
Children's Medical Associates of Northern Virginia
6303 Little River Pkwy.
Suite 300
Alexandria, VA 22312
18. Dawn Eastbrook, M.D.
Children's Medical Associates of Northern Virginia
6303 Little River Pkwy.
Suite 300
Alexandria, VA 22312
19. Krupa Playforth, M.D.
Children's Medical Associates of Northern Virginia
6303 Little River Pkwy.
Suite 300
Alexandria, VA 22312

20. Roman Kishi, M.D.
Children's Medical Associates of Northern Virginia
6303 Little River Pkwy.
Suite 300
Alexandria, VA 22312
21. Bridgit Allard, D.O.
Children's National Medical Center
111 Michigan Avenue, NW
Washington, District of Columbia 20010
22. Albert Oh, M.D.
Children's National Medical Center
111 Michigan Avenue, NW
Washington, District of Columbia 20010
23. Matthias Donelan, M.D.
Shriners Hospitals for Children
51 Blossom St. Boston, MA 02114

Plaintiffs' Experts

The plaintiffs expect to call the following retained expert witnesses at trial, to offer opinion testimony consistent with their Rule 26(a)(2) reports and deposition testimony.

1. Marcus C. Hermansen, M.D. (neo-natology)
Southern New Hampshire Medical Center
Nashua, NH 03061
2. Sandra L Gardner, RN MS CNS PNP (neo-natal nursing)
12095 E. Kentucky Avenue
Aurora, CO 80012
3. Susan Riddick-Grisham (life care planner)
West Cary Street, #137
Richmond, Virginia 23221

Plaintiffs' experts base their opinions on their education, training, experience and review of the medical literature and the medical records of R.G. Additional literature citations in support

of Plaintiff's expert's opinions have been provided to all defense counsel in discovery responses or in the course of depositions.

Defendant's Fact Witnesses:

1. Yeon Kim, RN (MGMC Treating NICU Nurse)¹
2. Amy Peele, RN (MGMC NICU Nurse)
3. Katherine Courtenay Begert, RN (MGMC NICU Nurse)
4. Nadine Shuniak, RN (MGMC NICU Nurse)
5. Bridget Vaughn, RN (MGMC NICU Nurse)
6. Kira Alison, RN (MGMC NICU Nurse)
7. Nurse Skeffington, (MGMC Certified Wound Nurse CWOCN)
8. Gisella Valderrama, M.D. (MGMC Attending Resident)
9. Nitin Mehta, M.D., (MGMC Attending Neonatologist)
10. Elinor Pisano, M.D. (MGMC Attending Neonatology Resident)
11. Qi Rong, M.D. (MGMC Attending NICU Fellow)
12. Aleksandra Avery, M.D. (MGMC Attending Resident)
13. John Barbour, M.D. (MGMC Attending Plastic Surgeon)
14. John N. Delahay, M.D. (MGMC Treating Orthopedist)
15. K. Sivasubramanian, M.D. (MGMC Treating Neonatologist/Corporate Designee/Expert). Dr. Subramanian is expected to testify regarding care and treatment of R.G. in the NICU in his dual capacity as a treating physician and as a corporate designee of MGMC. He will testify regarding care rendered to R.G. by Nurse Kim and other providers, and will testify regarding the operation of the NICU, consistent with his deposition testimony given and Plaintiffs' request.
16. All witnesses listed by Plaintiffs herein.

¹ Ms. Kim's native language is Korean. Defendant reserves the right to have a court-certified Korean interpreter available at trial to assist Ms. Kim as necessary with her testimony.

17. Custodian of Records, Medstar Georgetown Medical Center
18. Custodian of Records, John Hopkins Hospital (including records of Richard Redett, M.D. and Ranjit Varghese, M.B.B.S.
19. Defendant reserves the right to call, as fact witness, any of R.G.'s treating healthcare providers
20. Defendant reserves the right to call, as fact witness, any healthcare provider whose name appears in the medical records of R.G.
21. Defendant reserves the right to call any witnesses identified in the witness list filed by any party in this case.
22. Defendant reserves the right to call any records custodian needed to authenticate any record that is offered into evidence.

Defendant's Expert Witnesses:

1. Richard J. Martin, M.D. (Pediatrician/Neonatologist)
Case Western Reserve University School of Medicine
5150 Three Village Drive, PHB-L
Lyndhurst, Ohio 44124
2. Derenda Hodge, RN, MSN (Neonatal Nurse)
1004 River Ridge Terrace
Nashville, Tennessee 37221-3382
3. Patricia Moloney-Harmon, RN, MS, CCNS, FAAN (Neonatal Nurse)
The Children's Hospital At Sinai
2401 W. Belvedere Avenue
Baltimore, Maryland 21215
4. Ronald P. Silverman, M.D., F.A.C.S. (Plastic Surgeon)
Associate Professor of Surgery
Division of Plastic Surgery, University of Maryland
22 . Greene Street, S8D12
Baltimore, Maryland 21201
5. Mininder S. Kocher, M.D., M.P.H.
Department of Orthopaedic Surgery
Boston Children's Hospital
300 Longwood Avenue, BCH3220
Boston, MA 02115

Plaintiffs' objection: Plaintiffs object to this previously undisclosed expert, who has not also not provided a Rule 26(a)(2) report.

6. Thomas F. Grogan, CFE (Forensic Economist)
Victoria Business Center
1489 Baltimore Pike, Suite 211
Springfield, Pennsylvania 19064

All of the opinions stated by defense experts identified above will be expressed to a reasonable degree of medical or economic certainty.

Defendant reserves the right to supplement its experts' designations to address any new or additional opinions resulting from R.G.'s current treatment, or otherwise, between now that the time of trial.

Defendant reserves the right to call any witnesses identified in the Witness Lists filed by any party.

Defendant reserves the right to call any records custodian needed to authenticate any records that is offered into evidence.

Defendant reserves the right to call any appropriately-named witnesses listed in the Joint Pretrial Statement.

11. Exhibit List

Plaintiffs:

See Plaintiffs' Exhibit List attached hereto.

Defendant's Objections to Plaintiffs' Exhibits:

1. *Exhibit Nos. 26 – 45; 74 – 84 Photographs: Defendant objects to the admission of 43 photographs as cumulative; many Dr. Barbour's photographs and possibly others are hearsay; many depict the same or similar photographs of the infant's wound; the prejudicial effect of showing multiple views of the infant's leg wound outweighs any probative value; the number should be limited.*

2. *Exhibit Nos. 48 – 60 Johns Hopkins Treating Physicians' Progress Notes: Defendant reserves the right to object to any opinions contained in these progress notes*

that were formed for purposes of/in anticipation of litigation, and/or were not formed in the course of the care and treatment of R.G.

2. *Exhibit Nos. 66 – 72 Medical Bills: Defendant objects to any bills not produced in discovery.*

3. *Exhibit 73 G. Gambino video: Defendant objects to this video as hearsay; prejudicial effect outweighs any probative value.*

4. *Exhibits 85 – 92 Medical Literature: Defendant objects to the admissibility of seven articles from the medical literature on the grounds the multiple articles are cumulative, overly broad, not probative, and pending a proper evidentiary foundation at trial for admission.*

Defendant

See Defendant's Exhibit List attached hereto.

Plaintiffs' Objections to Defendant's Exhibits:

Plaintiffs object to Defense Exhibits 9 – 17. Expert reports and CVs are inadmissible hearsay.

12. Depositions

With the Court's permission, the parties request that any deposition testimony to be read pursuant to Rule 32 be designated two weeks before trial (October 9, 2017) and any counter designations for completeness will be designated one week before trial (October 16, 2017).

In the event that a witness is unavailable for trial or by agreement of counsel, the parties reserve the right to take and use *de bene esse* depositions in lieu of live testimony in accordance with the rules.

13. Pleadings and Discovery Responses

The parties reserve the right to utilize discovery responses and pleadings for cross-examination, impeachment, and for every other purpose permitted by the Rules of Civil Procedure.

14. Demonstrative or Physical Evidence

The parties agree that they may enlarge exhibits listed herein as well as use medical diagrams, photographs, timelines, hospital guidelines/policy/protocols, power-point slides, blow-ups, illustrations, radiology studies, charts, animations, models and/or other demonstrative exhibits as aids for the jury. Subject to the Court's approval, the parties have agreed to exchange all demonstrative and physical evidence on or before October 16, 2017; and to raise any objections on or before October 20, 2017.

The parties reserve the right to object to each other's Demonstrative Evidence on any basis pending its receipt and review.

Plaintiffs:

Plaintiffs may use medical illustrations, timeline charts, photographs, demonstratives.

The parties have agreed to exchange demonstrative exhibits for inspection by October 16, 2017.

Defendant

1. Anatomical drawings and models of a saphenous vein peripheral IV and surrounding anatomy.
2. A timeline of events leading up to and after the infiltrate complication
3. The parties reserve the right to blow up any exhibit identified in Section L above.
4. The Defendant reserves the right to object to Plaintiffs' Demonstrative Evidence on any basis pending its receipt and/or investigation. Furthermore, the Defendant specifically reserves the right to object to any blow-ups of pages from the medical literature on any basis including hearsay and lack of foundation.

15. Videotapes

Plaintiffs:

Plaintiffs may play video excerpts of all depositions that have been videotaped and designated above. In addition, in the event that *de bene esse* depositions of witnesses unable to attend trial in person are conducted, Plaintiff reserves the right to play such videos.

Defendant

The Defendant reserves the right to use *de bene esse* testimony of any witness unable to attend trial.

16. Requested Jury Selection Questions – Voir Dire

Plaintiff's Requested Voir Dire:

1. Is anyone familiar in any way with the facts of this case?
2. The Plaintiffs in this case are Garrett Gambino, Christine Gambino, and their four-year-old daughter, Raquel. Does anyone know the Gambinos?
3. Patrick A. Malone and Daniel Scialpi of the firm of Patrick Malone & Associates represent the Gambinos in this case. Does anyone know Mr. Malone or Mr. Scialpi or anyone who works at Patrick Malone & Associates?
4. The Defendant is MedStar Georgetown Medical Center Inc., d/b/a MedStar Georgetown University Hospital. Is anyone an employee of MedStar Georgetown University Hospital, or know somebody who works there, or who has worked there in the past?
5. The defendants are represented by Michael Flynn, Karen Cooke and Andrew Spence of the firm of Gleason, Flynn, Emig, Fogleman & McAfee, Chartered in Rockville, Maryland. Does anyone know any of the defense counsel or anyone who work for their offices?
6. The parties may call any of the following witnesses: [the Court is requested to read from both parties' witness lists]. Does anyone know any of these potential witnesses?
7. The judge will instruct you that the burden of proof in a civil case like this is, "a preponderance of the evidence," also known as the "greater weight of the evidence." Some people believe that despite these instructions, the burden of proof in a civil case involving a patient suing a healthcare provider should be higher than that, perhaps as high

as the burden in criminal court which is “beyond a reasonable doubt.” Does anyone feel this standard for proof should be higher than “preponderance of the evidence”?

Objection: This question is improper and misleading; it usurps the role of the judge in giving jury instructions.

8. This is a medical negligence case between a patient and a doctor. Some people believe that a courtroom is the wrong place to resolve this type of dispute. Some people believe it is the proper place. Which way do you lean on this issue? Please explain why.

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

9. If any of you were injured by a negligent doctor, would you be reluctant to bring a claim for damages? Why?

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35. It is misleading and suggestive.

10. Have you or anyone close to you ever had a good reason to bring a lawsuit but decided not to?

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

11. Some people believe that if a doctor is negligent, then the doctor should take responsibility for the harm caused. Some people believe that a doctor should only take responsibility if the doctor intended to cause harm. Which way do you lean on this issue? Please explain why.

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35. It is misleading and suggestive.

12. Does anyone here feel that a doctor is more likely to be telling the truth, just because he/she is a doctor, as compared to other people?

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35. It is misleading and suggestive.

13. Has anyone here or anyone close to you ever worked in the field of medicine?

14. Has anyone here or anyone close to you ever worked in a hospital, doctor’s office, or medical clinic?

15. Has anyone here or anyone close to you ever been seriously injured by what you believed was somebody else's negligence or wrongful conduct? If so, please describe the circumstances of the event.
16. Has anyone here, a family member or someone you know well, suffered an injury while they were admitted to a hospital?
17. Has anyone here or anyone close to you ever brought a claim or lawsuit against anyone for money damages? If so, please describe the nature of that claim and/or lawsuit.
18. Has anyone here or anyone close to you ever had a claim or lawsuit brought against them by someone claiming money damages? If so, please describe the nature of that claim and/or lawsuit.
19. Do any of you, or any of your family members or close friends, have strong feelings, one way or another, about claims for personal injuries?
20. Some people have moral, religious or philosophical leanings against claims for personal injuries and compensating people with money damages. Others would not hesitate to compensate a person with money damages for their personal injuries. Which way do you lean on this issue? Please explain why.
21. This trial is anticipated to take up to two weeks. Do any of you believe that it would constitute a hardship, because of prior commitments or any other reason, to complete your service as a juror in this case?
22. Does anyone here or anyone close to you work in the field of investigating or adjusting insurance claims?

Objection: This question improperly interjects collateral source; Defendant agreed to Plaintiffs' stipulation that insurance issues will not be presented at trial.
23. Has any member of the jury panel had prior jury service? Please describe the type of case and outcome.
24. Does anyone have any strong feelings about the number of lawsuits or the size of verdicts in court these days?

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35. It also usurps the role of the judge in giving jury instructions.
25. Does anyone have any views about the jury trial system that might make it hard for you to serve as a fair and impartial juror in this case?

26. Some people feel that there should be a set limit on the amount of damages that can be provided in a case, no matter what the evidence shows about how serious the injury may be. Other people feel that the amount of damages should be judged on the facts of each individual case. Which way do you lean on this issue? Please explain why.

Objection: These issues are properly addressed by the judge in giving jury instructions. Further, general bias questions in numbers 19, 20, 25, and 35 cover this subject matter.

27. District of Columbia law provides that damages in a case like this may be given for the full effect such injuries have on the overall physical and mental suffering the plaintiff Raquel Gambino experienced on account of the burn she suffered while admitted to MedStar Georgetown University Hospital. Is there anyone here who feels that money damages should not be given for these intangible elements of her injury?

Objection: Prejudicial and argumentative; the opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

28. Some people are concerned about lawsuits being frivolous. Is there anyone that feels that even if this case is not a frivolous lawsuit, you might want to penalize the plaintiffs for bringing the lawsuit just because other people have filed frivolous lawsuits?

Objection: Prejudicial and argumentative; the opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

29. Is anyone here or anyone close to you a member of any group that advocates changes in the civil justice system -- such as limitations on the right to sue or changes in the way the jury system works?

Objection: Prejudicial and argumentative; the opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

30. Is there anyone here who feels that if you were seriously hurt by someone else's carelessness or negligence, you would not bring a lawsuit or claim against them because you don't believe in suing other people?

Objection: The opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

31. Is there anyone here who feels they would want to return a low verdict, even if you found for the plaintiff, because you feel there are too many large verdicts in other cases?

Objection: Cumulative; the opinions/biases that this question seeks are covered under the broader question numbers 19, 20, 25, and 35.

32. Is there anyone here who due to a physical condition or medications they are taking would be unable to provide their full attention to the evidence during trial?
33. Has any member of the panel or member of your immediate family been employed in the legal profession in capacities such as, but not limited to, attorney, paralegal, legal secretary, court reporter, judge, magistrate, master, etc.?
34. During the course of this trial, the jurors will be instructed that they are not to discuss or otherwise communicate about this case (verbally, by computer, mobile phone, social media, or otherwise) among themselves or with any friends or family members during the breaks, in the evenings, or at any other time whether inside or outside of the courthouse. Does any juror feel that he or she would have difficulty following this instruction?
35. Are you aware of any reason whatsoever, not specifically inquired into, which you believe might make it difficult for you to fairly and impartially hear the evidence and resolve all the factual and legal issues in this case?
36. Does any member of this panel take issue with a legal system where people and companies are held financially responsible for unintentional harm to others?

Objection: Misleading and confusing; argumentative.

Defendant's Requested Voir Dire

1. The plaintiffs in this action are Christine and Garrett Gambino on behalf of their daughter, R.G. Christine Gambino is employed at the Federal Census Bureau. Garrett Gambino is employed as an investigator with the Minz Group in Washington, D.C. The Gambinos live in Alexandria, Virginia with their daughter, R.G. If any member of the jury panel, or, to your knowledge, any member of your immediate family or any of your close friends knows any member of the Gambino family, please identify yourself by name and juror number.

2. The lawyers representing the plaintiffs are Patrick Malone and Daniel Scialpi of the law firm of Patrick Malone & Associates located in Washington, D.C. If any member of the jury panel, or, to your knowledge, any member of your immediate family or any of your close friends knows Mr. Malone or Mr. Scialpi, or has had any dealings with the law firm of Patrick Malone & Associates, please identify yourself by name and juror number.

3. Georgetown Medical Center, also referred to as Georgetown University Hospital, is the defendant in this case. Have any of you, your close friends or relatives, ever received medical care at Georgetown University Hospital?

(a) If so, did you have a good or bad experience in any way?

(b) If so, would that experience prevent you from being fair to both parties in this case – or would that experience cause you to favor either party before you’ve heard any evidence in the case?

4. The lawyers representing the defendant Georgetown Medical Center, Inc. are Michael F. Flynn, Jr., Andrew J. Spence, and Karen M. Cooke, of the law firm of Gleason, Flynn, Emig, Fogleman & McAfee, Chartered, whose offices are in Rockville, Maryland. If any member of the jury panel, or, to your knowledge, any member of your immediate family or any of your close friends knows any of these attorneys, or has had any dealings with the law firm Gleason, Flynn, Emig, Fogleman & McAfee Chartered, please identify yourself by name and juror number.

5. Do any of you know any of the following health care providers who, at the time the events of this case took place were employed by defendant MedStar-Georgetown Medical Center, Inc.? Dr. Nitin Mehta, Dr. John Barbour, Dr. K. Sivasubramanian, or Nurse Yeon Kim.

6. Have any of you, your close friends or relatives, ever been employed by defendant Georgetown Medical Center, Inc., MedStar Health or worked at Georgetown University Hospital in any capacity?

7. Do you, or to your knowledge, does any member of your immediate family or close friends know or have had dealings with any of the witnesses expected to testify in this case?
[Please refer to witness lists set forth in Joint Pretrial Statement]

8. If any member of the jury panel, or to your knowledge, any member of your immediate family or any of your close friends has received medical or nursing training, please identify yourself by name and juror number and state when and where such training was received.

9. If any member of the jury panel or, to your knowledge, any member of your immediate family ever worked for a hospital or doctor, or has been employed in any other medically related field, or had a business relationship with the medical profession or a hospital, please identify yourself by name and juror number.

10. If you answered yes to either of the prior two questions, would this training, employment or association in the medical profession cause you to have a bias or prejudice for the Plaintiffs in this case?

11. Have you or a member of your family or a close friend ever felt that they were injured as a result of something that a nurse, doctor or other health care provider did or failed to do during the course of medical treatment? If so, would this affect your ability to render a fair and impartial verdict in this case?

12. Have you or a member of your family or a close friend ever suffered an IV infiltration injury, or other injury while receiving treatment in a hospital? If so, would this affect your ability to render a fair and impartial verdict in this case?

13. This case involves a burn injury. Have you or a member of your family or a close friend ever suffered a serious burn injury that required medical treatment? If so, would this affect your ability to render a fair and impartial verdict in this case?

14. Have you or a member of your family or a close friend ever had an infant that required admission to an intensive care unit or other hospitalization where you feel the infant did not receive proper medical care? If so, would this experience affect your ability to render a fair and impartial verdict in this case?

15. Do any of you possess any special knowledge in the medical fields of neonatal nursing or neonatology? Have any of you acquired some general knowledge regarding this field of specialty either from your own experience, or through reading articles in newspapers and magazines or from television news shows?

16. Have any of you, members of your family or close friends, had legal training or experience or worked for a lawyer or law firm?

17. Does anyone believe that they will be unable to sit on the jury if the case lasts until November 1st? Are there any of you who, for any reason, would prefer not to serve on this case?

18. Has any member of the jury or his or her immediate family ever been a plaintiff or defendant in any lawsuit?

- (a) If yes, did the case go to trial or was it resolved?
- (b) Was the resolution satisfactory in your mind?
- (c) Would the resolution prevent you from being fair to either side of this case?

19. Have any of you ever testified as a witness in any trial? Was it a civil or criminal case? Which side called you as a witness? Did the case involve matters relating to health care? Did that experience influence or affect in any way your ability to render a fair and impartial verdict in this case?

20. Have any of you ever been a juror in a civil or criminal trial? If so, what kind of case? Is there anyone among you who has sat as a juror in a case involving allegations of negligence or medical malpractice? Was the verdict for the plaintiff or the defendant? Did that experience influence or affect in any way your ability to render a fair and impartial verdict in this case?

21. This case involves an infant who was born prematurely, and remained in a neonatal intensive care unit for several weeks. Do any of you, your relatives, or close personal friends know of anyone whose had a premature baby or an infant who was admitted to a neonatal intensive care unit?

22. As a result of medical treatment rendered to you, a family member or close friend, do any of you have any feelings in favor of or against health care providers of the medical profession in general that would affect your ability to render fair and impartial decisions?

23. Have any of you or any member of your immediate family or your close friends ever undergone surgery or had a hospitalization and been dissatisfied with the outcome?

24. If anyone among you, either directly or through a member of your immediate family or close friend, has had any type of experience with a doctor, nurse or hospital, which has left you with a bias either for or against the medical profession or hospitals, please identify yourself by name and juror number.

25. Do you feel that you would be unable to fairly hear all of the evidence and arrive at a fair and impartial verdict because the claims are against a physician and hospital?

26. During the course of the trial jurors will be instructed not to discuss or otherwise communicate about this case, including any verbal, telephonic or computer communications, among themselves, or with any family members, friends, or co-workers, at any time until permitted to do so by the judge. Prohibited computer and cell phone communications include verbal conversations, emails, text messaging, or twittering. Also prohibited is any research on the case, the parties, the witnesses, the lawyers and the judge on Google, Yahoo, or any other search engine or format. Does any juror believe he or she will be unable to follow these instructions?

27. Is there any member of the prospective jury panel who feels that any time a medical complication occurs the healthcare providers is responsible or that the patient is always entitled to receive money for it?

28. If the plaintiffs do not prove their case, would you be able to follow the law and find for the hospital, even though Plaintiffs' claims involve a permanent injury to a child?

29. Are there any of you who have concerns regarding language, vision, hearing, or any conditions, such as a need to take medications that may cause drowsiness, which would affect your ability to sit as a juror in this case?

30. Is there any juror who does not believe that he/she can fairly hear the evidence and return a verdict pursuant to the instructions of the Court?

31. Do you feel that you would be unable to fairly hear all evidence and arrive at a fair and impartial verdict because of feelings of sympathy for the Plaintiff – who is a child in this case.

32. If the Plaintiffs do not prove their case would you be able to follow the law and award no damages, or would sympathy for a child cause you to want to award damages because the Plaintiff is a child?

17. Pattern Jury Instructions

Jointly Agreed Upon Jury Instructions

<u>Instruction</u>	<u>Subject</u>
Chapter 1 – Function of Judge and Jury	
1.01	Function of the Court
1.02	Function of the Jury
1.03	Significance of Party Designations
1.04	Juror’s Duty to Deliberate
1.05	Attitude and Conduct Of Jurors
1.06	Instructions to Be Considered As A Whole
1.07	Court’s Commenting on the Evidence
1.08	Court’s Questions to Witnesses
1.09	Jury Not to Take Cue From Judge
1.10	Rulings on Objections
1.11	Equality of Litigants – Corporations
1.12	Equality of Litigants – Individuals
Chapter 2 - Weighing the Evidence	
2.01	Evidence in the Case
2.03	Inferences
2.04	Inadmissible and Stricken Evidence
2.05	Statements of Counsel
2.06	Jury’s Recollection Controls
2.08	Burden of Proof
2.09	Evidence Produced By Adversary
2.10	Direct and Circumstantial Evidence
Chapter 3 - Evaluating the Witnesses	
3.01	Jury to Determine Credibility of Witnesses
3.02	Number of Witnesses
3.03	Expert Opinion
3.05	Depositions as Evidence
3.08	Impeachment by Prior Inconsistent Statements
3.09	Adopting Prior Inconsistent Statements
3.10	Charts and Summaries
Chapter 9 – Malpractice and Other Professional Negligence	
9.01	Nature of the Medical Malpractice Claim
9.02	General Standard of Care of Professionals
9.03	Professional Liability – Elements of Claim
9.04	Professional Liability – Proximate Cause – Substantial Factor

- 9.05 Standard of Care for Hospital
- 9.07 General Standard of Care – Naturally Certified Specialist
- 9.08 Standard of Care Determined by Expert Testimony

Chapter 12 – Damages—General

- 12.01 Damages – Jury to Award
- 12.02 Extent of Damages – Proximate Cause

Chapter 13 – Personal Injury Damages

- 13.01 Damages- Elements
- 13.03 Medical Treatment – Past and Present
- 13.09 Recovery for Emotional Distress
Defendant requests that this instruction be limited to the minor Plaintiff's claims
- 13.10 Life Expectancy

Plaintiff Requested Instructions

Chapter 5 – Negligence

- 5.01 Elements of a Negligence Cause of Action
- 5.02 Negligence Defined
- 5.03 Relative Concept
- 5.12 Proximate Cause Defined
- 5.13 Concurring Causes

Defendant objects to these requested instructions; these issues are cumulative; negligence instructions are covered in Chapter 9, above.

Defendant Requested Instructions

Chapter 5: Negligence

§5.19 Fact of Accident Alone
(See Defendant’s Proposed Special Jury Instruction No. 4)

Chapter 9: Medical Malpractice And Other Professional Negligence

§ 9.06 Bad Result

Chapter 12: Damages — General

§ 12.03 Burden of Proof – Speculative Damages

18. Non-Pattern Standard Jury Instructions

Joint

SPECIAL JURY INSTRUCTION NO.

Agency & Vicarious Liability

The plaintiff claims that Nurse Kim was the employee of the defendant, MedStar Georgetown Medical Center, Inc. A corporation is liable for the acts of its employees. In this case, the defendant agrees that Nurse Kim was its employee at the time of R.G.'s NICU admission.

In this case, MedStar Georgetown Medical Center, Inc. admits that Nurse Kim's treatment of R.G. on January 16, 2013 was in furtherance of the business of her employer. Therefore, if you find that Nurse Kim committed negligent acts or failures to act, her employer is responsible for her negligence.

Standard Civil Jury Instructions for the District of Columbia, Nos. 6.01, 6.02, and 6.03 (2017 ed. rev.)

Plaintiffs:

Plaintiff's Proposed Non-Standard Instruction No. 1 (Negligence – Relative Concept – Malpractice)

Negligence is a relative concept. A reasonable healthcare provider under the standard of care conforms her conduct according to the danger she knows, or should know, exists. Therefore, as the danger increases, a reasonable healthcare provider under the standard of care acts in accordance with those circumstances.

Citations: *Pannu v. Jacobson*, 909 A.2d 178 (D.C. 2006).

Defendant's objection: Chapter 9 Standard Jury Instructions cover negligence in medical malpractice actions. This proposed instruction is duplicative and intended to promote the Plaintiffs' "Reptile" theory.

Plaintiffs' Proposed Special Jury Instruction No. 2 (Purpose of Compensatory Damages)

Compensatory damages in our legal system are intended to make the victim of wrongful conduct whole, or put another way, to restore the victim, as far as money damages can do so, to the condition the victim was in before the wrongful injury.

Citations: *Croley v. Republican National Committee*, 759 A.2d 682, 689 (D.C. 2000) (“In the District of Columbia, the primary purpose of compensatory damages in personal injury case “is to make the plaintiff whole.””), quoting *District of Columbia v. Barriteau*, 399 A.2d 563, 566 (D.C. 1979), quoting in turn *Kassman v. American University*, 178 U.S. App. D.C. 263, 267, 546 F.2d 1029, 1033 (1976).

Defendant's objection: Chapter 12 Standard Jury Instructions sufficiently cover damages to be awarded; it is cumulative and argumentative.

Plaintiff's Proposed Special Jury Instruction No. 3 (Purpose of Tort System)

The law allows for compensatory damages in cases like this only when the plaintiff has proven by a preponderance of the evidence that harm was caused by negligent acts or omissions of the Defendant. The law does not compensate everyone who has been injured, but only compensates those persons whose injuries are caused by negligence. That is because the legal system is interested in deterring future negligent conduct. Damages may be awarded, however, only to the extent that they compensate for any actual harms caused. Damages may not be awarded to punish the defendant.

Citations: *Washington Metropolitan Area Transit Authority v. Johnson*, 726 A.2d 172, 176 (D.C. 1999) (“one aim of tort law is to deter negligent (and certainly reckless) behavior by actors such as WMATA's train operator...”); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998); *District of Columbia v. Washington Hosp. Center*, 722 A.2d 332, 336 (D.C. 1998); *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1270 (D.C. 1987); *Carter v. District of Columbia*, 795 F.2d 116, 138-39 n. 18 (D.C. Cir. 1986) (“Compensatory damages in cases such as this one indeed are intended to serve a deterrent function, see *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir 1983), and plaintiffs’ summation next time around may legitimately point that out.”); cited with approval, *Finkelstein v. District of Columbia*, 593 A.2d 591, 599 D.C. 1991).

Defendant’s objection: Chapter 12 and 13 Standard Jury Instructions agreed upon above cover the topic of damages. This proposed instruction is intended to promote the Plaintiffs’ “Reptile” theory.

Defendant:

DEFENDANT’S SPECIAL INSTRUCTION NO. 1:

Liability for Breach of Standard of Care

You are instructed that the law does not impose liability on healthcare providers for a mistake in judgment, except where that mistake or error results from failure to comply with the recognized standard of care exercised by physicians or hospitals acting under the same or similar circumstances.

Price v. Neyland, 320 F.2d 674 (D.C. 1963)

Plaintiffs' Objection: This instruction is likely to confuse the jury about the meaning of "standard of care," as set out in the Standard Jury Instructions requested by both parties from Chapter 9 (Professional Negligence).

DEFENDANT’S SPECIAL JURY INSTRUCTION NO. 2

Discretion in the Exercise of Medical Skill and Judgment

You are instructed that in the treatment of patients, healthcare providers are permitted to exercise a wide range of discretion in the exercise of their medical skills and judgment. A healthcare provider is not to be held liable for negligence unless it is shown that the course pursued by him/her was not recognized as medically acceptable in the medical profession under the same or similar circumstances.

Robbins v. Footer, 553 F.2d 123 (D.C. Cir. 1977)

Plaintiffs’ Objection: This instruction is both duplicative of the Standard Jury Instructions requested by both parties from Chapter 9 (Professional Negligence), and likely to confuse the jury about the meaning of “standard of care.” The Chapter 9 instructions are a better and more complete statement of the law.

DEFENDANT’S SPECIAL JURY INSTRUCTION NO. 3

Duty of Reasonable Care

You are instructed that healthcare providers do not guarantee the results of treatment and procedures, nor do they guarantee that no complications will develop. In general, it is the duty of healthcare providers to give a patient such reasonable care and attention as the patient's known condition, or the condition as it ought to be known, requires. This duty is measured by the degree of care, skill and diligence customarily exercised by physicians nationwide under the same or similar circumstances at the time of the events in question.

Morrison v. MacNamara, 407 A.2d 555 (D.C. App. 1979)
Garfield Mem. Hosp. v. Marshall, 204 F.2d 721 (D.C. 1953)

Plaintiffs’ Objection: This instruction is both duplicative of the Standard Jury Instructions requested by both parties from Chapter 9 (Professional Negligence), and likely to confuse the jury about the meaning of “standard of care.” The Chapter 9 instructions are a better and more complete statement of the law.

DEFENDANT’S SPECIAL JURY INSTRUCTION NO. 4

Presumption of Due Care

There is a legal presumption that the Defendant exercised the requisite skill and care. The burden is on the Plaintiffs to overcome this presumption of due care by the preponderance of the evidence, and to prove that the Defendant's negligence was the proximate cause of the Plaintiffs’ alleged damages/injuries.

This requested Special Instruction is derived from standard instruction § 5.19 (Fact of Accident Alone), modified in accordance with the facts of this medical negligence case.

Plaintiffs’ Objection: This instruction is both duplicative of the Standard Jury Instructions regarding burden of proof requested by both parties from Chapter 5 (Negligence) requested by the Plaintiffs, and Chapter 9 (Professional Negligence), and likely to confuse the jury about the meaning of “standard of care.” The Chapter 5 and 9 instructions are a better and more complete statement of the law.

DEFENDANT’S SPECIAL JURY INSTRUCTION NO. 5

Expert Testimony Requirement

You are instructed that the issue of whether the Plaintiffs’ injuries were proximately caused by negligence on the part of the defendant is a question calling for expert testimony, since this issue is peculiarly within the realm of medical science. The burden is on the Plaintiffs to establish by qualified expert testimony and by a preponderance of the evidence that the alleged negligence of the Defendant was the cause of the damages that the Plaintiffs claim.

Clark v. District of Columbia, 708 A.2d 632 (D.C. App. 1997)
Messina v. District of Columbia, 663 A.2d 535 (D.C. App. 1995)

Plaintiffs’ Objection: This instruction is both duplicative of the Standard Jury Instructions requested by both parties from Chapter 9 (Professional Negligence), and likely to confuse the jury about the meaning of “standard of care.” The Chapter 9 instructions are a better and more complete statement of the law.

DEFENDANT’S SPECIAL JURY INSTRUCTION NO. 6

Opinions Founded on Speculation or Guesswork Cannot Support Verdict

In considering the expert testimony, a verdict cannot be founded on speculation or possibilities. Before the Plaintiffs may recover damages against the defendant for injuries, it must be shown with a reasonable degree of medical certainty that the minor Plaintiff's injuries were the result of a breach of the standard of care by the Defendant. Speculation of possibilities is to be disregarded.

Stewart v. Bepko, 576 F. Supp. 182, 184 (D.D.C. 1983); *aff'd without op.*, 236 U.S. App. D.C. 351, 735 F.2d 617 D.C. Cir. (1984)

Plaintiffs’ Objection: This instruction is both duplicative of the Standard Jury Instructions requested by both parties from Chapter 9 (Professional Negligence), and likely to confuse the jury about the meaning of “standard of care.” The Chapter 9 instructions are a better and more complete statement of the law.

DEFENDANT'S SPECIAL INSTRUCTION NO. 7

Burden of Proof

The Plaintiffs have the burden of proving that her alleged damages were in fact the direct result of injuries caused by the Defendant and, in addition, to establish with reasonable certainty the amount of damages suffered as a result of the Defendant's conduct. Whether or not you find for the Plaintiffs on the question of liability, if you find that any of the claimed damages which are the subject of this action were not a result of the Defendant's conduct but were due to the preexisting physical condition of the plaintiff which was unrelated to the Defendant's conduct, you should not award any damages to compensate the plaintiff for such alleged injuries or conditions.

Manes v. Dowling, 375 A.2d 221 (D.C. App. 1977); *Central Dispensary and Emergency Hospital v. Harbaugh, Inc.*, 84 App.D.C.371, 174 F.2d 507 (1949); *Avrutick v. U.S.*, 164 F. Supp. 585 (D.D.C. 1958)

Plaintiffs' Objection: This instruction is both duplicative of the Standard Jury Instructions requested by both parties from Chapter 12 (Damages-General) and 13 (Personal Injury Damages). Furthermore, there is no evidence in this case that R.G. had any preexisting physical condition relevant to her injuries and damages.

DEFENDANT'S SPECIAL JURY INSTRUCTION NO. 8

Award Not Subject to Tax

You are instructed that any award of damages in this case is not subject to either state or federal income taxes. Therefore, you should not give any consideration to income taxes in determining what amount, if any, should be awarded to the Plaintiffs.

Psychiatric Inst. of Washington v. Allen, 509 A.2d 619 (D.C. App. 1986)

Plaintiffs' Objection: It is unnecessary and inappropriate to tell the jury about the potential tax implications of damages.

19. **Verdict Sheet**

A. **Plaintiffs:**

PLAINTIFFS' PROPOSED VERDICT SHEET

1. **Do you find that MedStar Georgetown Medical Center Inc. d/b/a MedStar Georgetown University Hospital, through its employees, was negligent?**

Yes _____ No _____

If your answer is "Yes" to Question #1, proceed to Question #2. If your answer is "No" to Question #1, please stop here and return the verdict sheet to the clerk.

2. **Do you find that MedStar Georgetown Medical Center Inc. d/b/a MedStar Georgetown University Hospital's negligence, through its employees, was a proximate cause of Raquel Gambino's injuries?**

Yes _____ No _____

If your answer is "Yes" to Question #2, proceed to Questions #3 and #4. If your answer is "No" to Question #1, please stop here and return the verdict sheet to the clerk.

3. **What is fair compensation for the damages incurred by Raquel Gambino?**

4. **What is fair compensation for the damages incurred by Garrett and Christine Gambino?**

TOTAL COMPENSATION TO PLAINTIFFS: _____

Defendant objects to Plaintiffs' Proposed Verdict Sheet.

B. Defendant:

DEFENDANT'S PROPOSED VERDICT FORM:

1. Do you find that the Plaintiffs have proven by a preponderance of the evidence that MedStar Georgetown Medical Center, acting through its employee Yeon Kim, R.N., departed from the standard of care in her treatment of the minor Plaintiff?

YES _____ NO _____

NOTE: If you answered NO to Question 1, STOP and return your verdict. If you answered YES to Question 1, go to Question 2.

2. Do you find that the Plaintiffs have proven by a preponderance of the evidence that the negligence of MedStar Georgetown Medical Center, acting through its employee, Yeon Kim, R.N. proximately caused the minor Plaintiff's injuries and damages alleged by Plaintiffs?

YES _____ NO _____

NOTE: If you answered NO to Question 2, STOP and return your verdict. If you answered YES to Question 2, go to Question 3.

3. In what amount do you award Plaintiffs against Defendant for the following?

The Minor Plaintiff's Past Medical Bills	\$ _____
The Minor Plaintiff's non-economic damages	\$ _____

Plaintiffs object to the Defendant's Verdict Form.

20. Settlement

The parties have failed to reach a resolution of this case.

21. Estimated Length of Trial

The parties estimate that the length of this trial will be approximately 8 days.

Respectfully submitted,

/s/ Daniel C. Scialpi

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Joint Pretrial Statement was served upon all counsel of record registered with the Court's electronic filing system on this 7th day of September 2017.

/s/ Daniel C. Scialpi