

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

ANNE SPERLING, AS CONSERVATOR OF
JONATHAN BOTELLO, A MINOR,
LORENZA BOTELLO AND ALVARO BOTELLO,
INDIVIDUALLY AND AS
PARENTS OF JONATHAN BOTELLO

PLAINTIFFS,

vs.

NO. D-101-CV-2016-00742

PECOS VALLEY OF NEW MEXICO, LLC

DEFENDANT.

PRETRIAL ORDER

This matter having come before the Court pursuant to Rule 1-016 of the Rules of Civil Procedure for the District Courts and the Court being fully advised hereby ORDERS:

I. JURISDICTION AND PARTIES:

The jurisdiction of the Court is not disputed and is hereby determined to be present. There is no remaining question as to the propriety of the parties.

II. GENERAL NATURE OF THE CLAIMS OF THE PARTIES

A. Plaintiffs' Claims:

Plaintiffs deny the claims of Defendant Pecos Valley of New Mexico, LLC ("Pecos Valley").

A clinic and its employed doctors have a duty to provide proper pre-natal care to expectant mothers to keep both mom and baby safe. A mother with pre-gestational diabetes (occurring before the pregnancy) is at a high risk of having a very large baby. Very large babies born weighing over 4,500 grams are called *macrosomic*. During a vaginal delivery, a macrosomic baby is at great risk of having its one of its shoulders get stuck under the mother's pubic bone which then prevents it from passing safely on through the birth canal. This is called *shoulder dystocia*. Shoulder dystocia can lead to severe neurological injuries.

A doctor has a duty to obtain serial ultrasound examinations on a pregnant mother with gestational diabetes in order to monitor the baby's growth. This is especially important when the fetus is showing signs of being macrosomic (larger than normal), particularly when the fundal height is growing more rapidly than expected. In the case of a very large baby (in excess of 4,500 grams), the doctor must recommend a cesarean section to the mother instead of a vaginal delivery to prevent shoulder dystocia from occurring. A doctor must not perform a vacuum-assisted vaginal delivery of a baby of a diabetic mother as this greatly increases the likelihood of shoulder dystocia occurring.

On August 6, 2012, Mrs. Lorenza Botello comes into the Defendant's clinic for prenatal care. Lorenza is 36 years old, diabetic, and pregnant. Lorenza trusts Pecos Valley and its doctor with the care of her and her baby. In fact, she trusts Pecos Valley and its doctor seventeen (17) separate times over the course of her pregnancy as she returns time and again to Defendant's clinic for her prenatal care.

Lorenza trusts Pecos Valley and its doctor to treat her and her baby Jonathan in accordance with the appropriate standard of care. At Pecos Valley, Jerry McLaughlin, II, M.D. is an employee of Pecos Valley and is the doctor who manages Lorenza's care. Dr. McLaughlin knows that Lorenza's pregnancy is high risk because of her diabetes and the Pecos Valley records reflect this. However, Dr. McLaughlin fails to obtain a series of ultrasound examinations that he had a duty to do as required by the standard of care.

In November 2012, when Jonathan is at 18 weeks of gestational (fetal) age, Dr. McLaughlin refers Lorenza to the University of New Mexico Health Sciences Center in Albuquerque for genetic testing due to Lorenza's advanced maternal age. The specialists at U.N.M. were to determine if Jonathan had Down's Syndrome or other genetic problems. Two reports were sent back to Dr. McLaughlin by the specialists at U.N.M. The testing indicated that Jonathan did not have any genetic problems but both reports advised further evaluations be done, including ultrasound examination, to monitor Jonathan's fetal growth. Dr. McLaughlin failed to heed these recommendations by the specialists at U.N.M. to obtain the necessary ultrasound examinations.

Obstetricians usually perform fundal height measurements during prenatal visits to monitor the growth of the fetus. Fundal height is measured from the top of the mother's uterus to the top of the mother's

pubic symphysis. Fundal height, when expressed in centimeters, is expected to correspond to the infant's gestational age in weeks. The fundal height measurements on Lorenza began to be significantly greater than expected, indicating that Jonathan was growing to be much larger than his expected gestational age.

Even after the fundal height measurements made by Dr. McLaughlin showed these warning signs, he still failed to obtain the required ultrasound examinations. These increasingly large fundal heights are a key indicator of Jonathan becoming an exceptionally large baby. Had Dr. McLaughlin obtained the serial ultrasound examinations, they would have revealed that Jonathan was growing to be a very large baby, weighing at least 4,500 grams just before his birth. His actual birth weight was 5,150 grams ... 11½ pounds.

In preparation for the birth of Jonathan, the standard of care required that Dr. McLaughlin recommend to Lorenza that she have a cesarean section to give birth to Jonathan rather than a vaginal delivery. This would avoid any issue with Jonathan experiencing shoulder dystocia due to his size. Dr. McLaughlin failed to do this. Instead, Dr. McLaughlin attempted to perform a vaginal delivery.

On March 24, 2013, Jonathan Botello made his entrance into the world, but it was not as expected. Due to the willful and reckless conduct of Dr. McLaughlin, the proper steps were not taken to ensure the safety of both Lorenza and Baby Jonathan. He suffered catastrophic injuries during the birthing process.

As a result of the willful and reckless decision by Dr. McLaughlin to attempt a vaginal birth, Jonathan became stuck in the birth canal for ten (10) minutes without oxygen and without the ability to breathe on his own. Pecos Valley's employee Dr. McLaughlin failed to recommend to Lorena that she have a cesarean section instead of a vaginal delivery. This, despite clear indications of the risks associated with having Jonathan born by way of a vaginal delivery.

Compounding the problem, Pecos Valley's employee Dr. McLaughlin used a vacuum extraction device which was applied to Jonathan's head when he became stuck in the birth canal. Jonathan was then forcibly yanked through the birth canal which ripped apart his brachial plexus, the bundle of nerves running from his spine to innervate right arm and hand. Jonathan was so big that Lorenza sustained a severe laceration running from her vagina into and through her rectal wall and anal sphincter as a result of his being

ripped out of her vagina. Jonathan has been diagnosed with hypoxic-ischemic brain injury and brachial plexus palsy.

Most importantly, all of these injuries could have been avoided if the standards of care had been followed. If Pecos Valley's employee Dr. McLaughlin had followed the standard of care which required that he obtain the required serial ultrasound evaluations to monitor fetal growth and perform a cesarean section in lieu of a vaginal delivery, both Jonathan and Lorenza would be healthy and happy today. If Pecos Valley's employee Dr. McLaughlin had taken appropriate actions to meet the standard of care, the catastrophic injuries such as those suffered by Jonathan and his mom would have been avoided.

In treating Lorenza and Jonathan Botello, Pecos Valley's employee Dr. McLaughlin had a duty to but failed to possess and apply the knowledge or to use the skill and care ordinarily used by reasonably well-qualified obstetricians practicing under similar circumstances, giving due consideration to the locality involved.

Defendant Pecos Valley acting through its employee, Dr. McLaughlin, was negligent and said negligence was the proximate cause of the injuries sustained by Plaintiffs.

Plaintiffs make the following claims against Pecos Valley of New Mexico, LLC for the actions of its employee Dr. McLaughlin:

- a. Medical negligence;
- b. Willful, wanton, or reckless conduct.

The Plaintiffs assert that Jonathan sustained devastating neurological injuries, including a severe brachial plexus injury and hypoxic-ischemic brain damage. Lorenza sustained a severe laceration from her vagina into her anal sphincter. Because of the willful and reckless conduct by Defendant and its employee, Plaintiffs also request punitive damages.

B. Pecos Valley of New Mexico, LLC's Claims:

Defendant Pecos Valley of New Mexico, LLC denies Plaintiffs' claims.

Pecos Valley of New Mexico, LLC is an outpatient clinic in Hobbs, New Mexico that provides healthcare to women in southern New Mexico. Dr. Jerry McLaughlin was an ob/gyn who

was employed by, and practiced, at Pecos Valley. Dr. McLaughlin passed away January 20, 2017. Dr. McLaughlin cared for Lorenza Botello for her pregnancy with her third child, Jonathan. Mrs. Botello first presented to Pecos Valley on August 12, 2012 at approximately 17 weeks gestation and saw provider, Marva Johnston. Ms. Johnston, a registered nurse and certified nurse practitioner, determined Mrs. Botello, because she was of advanced maternal age and a diabetic, was considered a high-risk pregnancy and referred her to Dr. McLaughlin. Dr. McLaughlin first saw Mrs. Botello on August 21, 2012. He asked that she record her blood sugars to monitor her diabetes during her pregnancy. Dr. McLaughlin provided care for Mrs. Botello prenatally and, upon information and belief, on November 1, 2012, referred Mrs. Botello to University of New Mexico physicians for genetic testing. The physicians at UNM noted that Jonathan was progressing normally and was of normal size but recommended a follow up ultrasound at 24 weeks.

As part of Mrs. Botello's care, Dr. McLaughlin tracked her fundal heights, which began to measure at about 1 centimeter beyond the stated gestational age. At 27, weeks Dr. McLaughlin ordered an ultrasound, however, it was not completed and since Dr. McLaughlin is not here to discuss his care of Mrs. Botello, we do not have an answer as to why the ultrasound was not done. Dr. McLaughlin also tracked Mrs. Botello's blood sugar readings and when they became elevated, he adjusted her insulin dosage and when the blood sugars did not respond he changed her prescription to Metformin. Dr. McLaughlin was attentive to Mrs. Botello prenatally and was the physician who delivered Jonathan when Mrs. Botello presented to Lea Regional Medical Center in Hobbs when she was in labor.

Mrs. Botello presented to Lea Regional Medical Center on March 24, 2013 in labor and Dr. McLaughlin performed Leopold maneuvers to determine the size of the baby which he determined to be approximately 8.5 pounds. However, during labor, it was determined that Jonathan was a larger baby. At the point Jonathan was coming through the birth canal, he became stuck and Dr.

McLaughlin had to perform quick measures to save Jonathan's life. He first attempted the McRoberts' maneuver to free Jonathan from the birth canal and when that was unsuccessful, he applied a vacuum. Eventually, Dr. McLaughlin delivered Jonathan who was 11.5 pounds. The delivery was difficult and unfortunately, Dr. McLaughlin had to break Jonathan's left humerus to fit him through the birth canal. Additionally, there was a tear of the brachial plexus nerves in Jonathan's right arm. Once Jonathan was born, his APGAR scores were low requiring resuscitation. Jonathan was resuscitated and it was determined he needed to be transferred to a higher level of care in Odessa, Texas.

While at Odessa Regional Medical Center, Jonathan was hyperthermically "cooled" for three days. This process is to help when there is a suspected hypoxic brain injury following a hypoxic event. Jonathan's MRI however, returned normal results showing no injury to Jonathan's brain. Upon discharge from Odessa, Jonathan's physician noted a diagnosis of a hypoxic brain injury in the infant and recommended follow up.

Jonathan's left arm healed but his right arm does not function normally. Jonathan underwent surgery to try and repair his arm on July 8, 2015, at University of New Mexico Hospital. He is able to move his arm at the shoulder and his elbow but he is unable to use his hand. Jonathan has not had much follow up care for his arm but he has started school and is learning to use his left hand to write. Jonathan speaks Spanish and is learning English. There is no evidence that Jonathan suffered a hypoxic brain injury and with proper therapy, modifications and adaptations for his right arm, there is no reason that Jonathan cannot live a happy and full life.

As a physician who has cared for women and their prenatal needs for decades, delivering likely thousands of babies, Dr. McLaughlin used his education, experience and training in caring for Mrs. Botello. Pecos Valley did not violate any standards of care and this case is simply about the vicarious liability for the actions of its employee, Dr. Jerry McLaughlin.

III. UNCONTROVERTED FACTS: The following facts are established by admissions in the pleadings, deposition testimony, or by stipulations of counsel at the pretrial conference:

A. Plaintiffs' Uncontroverted Facts

1. At all times relevant to this case, Jerry McLaughlin, M.D. was an employee of Pecos Valley of New Mexico, LLC.

2. At all times relevant to this case, Jerry McLaughlin, M.D. was within the course and scope of his employment with Pecos Valley of New Mexico, LLC.

B. Defendant's Uncontroverted Facts

1. Pecos Valley is a company - an outpatient clinic - that does not and cannot practice medicine and does not control the medical decision making and judgments of physicians, including Dr. McLaughlin.

2. Dr. McLaughlin was an employee of Pecos Valley at all times material to Plaintiffs' Complaint.

3. Dr. McLaughlin was licensed to practice medicine by the State of New Mexico Medical Board at all times material to the allegations in Plaintiffs' Complaint.

4. On January 9, 2013 Dr. McLaughlin recorded in his office visit note that he discussed an Order for an "Ultrasound, Fetal Survey, OB Fetal Maternal Eval" with Mrs. Botello and he noted such an Ultrasound in his Assessment/Plan section of his note for that visit as well.

5. On March 24, 2013, Mrs. Botello was admitted to Lea Regional Medical Center to give birth to her son, Jonathan Botello.

6. Following the delivery, Dr. McLaughlin noted, "Hemoglobin A1c is 10.2 which is at odds with the values of the sugar [Mrs. Botello] had been bringing in to the office." He went on to state; "I did discuss this with the patient, then indicated this could be the reason for the extreme size of the baby."

7. After birth Jonathan was transferred to Odessa Regional Medical Center and cooled.
8. A Neonatal cranial ultrasound of Jonathan Botello on 3/25/13 was normal.
9. A Neonatal EEG of Jonathan at Odessa Regional Medical Center was normal.
10. A MRI of Jonathan Botello's brain conducted on 4/1/2013 was normal.
11. A MRI of Jonathan Botello's brain conducted on 3/23/15 was normal.

IV. CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are:

A. Plaintiffs' Contested Issues of Fact:

1. Defendant Pecos Valley and its employee, Dr. McLaughlin, were negligent.
2. Defendant Pecos Valley and its employee, Dr. McLaughlin violated the standard of care.
3. The negligence of Defendant Pecos Valley and its employee, Dr. McLaughlin, was the proximate cause of the injuries sustained by Plaintiffs.
4. The acts and omissions of Defendant Pecos Valley and its employee, Dr. McLaughlin were willful, wanton, or reckless.
5. An Obstetrics Report signed by William Rayburn, M.D., obstetrician specialist at U.N.M., electronically signed on or about November 24, 2012 states in part, "recommend follow-up at 22-24 weeks to re-assess the fetal cardiac anatomy and interval growth."
6. The last ultrasound was performed on Lorenza Botello was done at approximately eighteen (18) weeks.
7. For patients like Lorenza Botello who have diabetes in pregnancy there should be repeat serial ultrasounds every four (4) weeks after twenty (20) weeks gestation to monitor fetal growth and to guard against macrosomia.
8. In the Pecos Valley records, the fundal heights at twenty-nine (29) weeks, thirty-three (33) weeks, thirty-four (34) weeks, and thirty-six (36) weeks were greater than expected.

9. For any patient who is pregnant with a baby which shows excessive fundal height, ultrasound evaluation to rule out macrosomia is indicated.

10. The standard of care in this situation requires that an ultrasound examination be obtained between thirty-one to thirty-three (31-33) weeks to monitor fetal growth.

11. On March 24, 2013, the records reflect an abnormally large fundal height, but again no ultrasound was ordered.

12. An ultrasound estimation of fetal weight near Lorenza's delivery date was required to determine whether the baby weighed greater than 4,500 grams because if the weight is greater than that the guidelines from the American College of Obstetricians and Gynecologists (the "ACOG") direct that the patient should be offered a cesarean section delivery.

13. The use of vacuum delivery to assist in delivery in patients with diabetes is contraindicated because of the risk of shoulder dystocia.

14. Had an ultrasound examination been done near Lorenza's delivery date, it would have likely shown an estimated fetal weight in excess of 4,500 grams.

15. Lorenza should have been offered a cesarean section which would have prevented the shoulder dystocia and her fourth degree laceration.

B. Defendant's Contested Issues of Fact:

1. Defendant Pecos Valley and its employee, Dr. McLaughlin, were not negligent.

2. Negligence of Defendant Pecos Valley and its employee, Dr. McLaughlin, was not the proximate cause of the alleged injuries sustained by Plaintiffs.

3. The acts and omissions of Defendant Pecos Valley and its employee, Dr. McLaughlin were not willful, wanton, and/or reckless.

4. Dr. McLaughlin and/or other Pecos Valley healthcare providers did not act willfully, recklessly, or wantonly in providing care and treatment to Mrs. Botello or Jonathan Botello.

5. Pecos Valley did not authorize or ratify the acts of Dr. McLaughlin or other Pecos Valley healthcare providers.

6. Pecos Valley, in its individual capacity, did not act willfully, recklessly, or wantonly with respect to Mrs. Botello and/or Jonathan's treatment.

7. Dr. McLaughlin was not employed by Pecos Valley in a managerial capacity at times material to Plaintiffs' allegations.

8. Because Mrs. Botello was a diabetic, Dr. McLaughlin and other Pecos Valley healthcare providers instructed her to record her blood sugar levels twice per day.

9. While Mrs. Botello did not record her blood sugars on a daily basis, she submitted a number of results to Dr. McLaughlin.

10. Dr. McLaughlin documented that he believed Mrs. Botello's blood sugars were for the most part "well-controlled" during the pregnancy.

11. During the delivery, Dr. McLaughlin encountered several unexpected complications; however, he was ultimately able to deliver Jonathan.

12. There is no evidence Jonathan Botello has a brain injury.

13. Whether Lorena Botello suffered any injury as a result of the alleged negligence of Defendant.

14. Whether there is a causal connection between Plaintiffs claimed injuries and the alleged culpable conduct of Defendant.

15. Jonathan has movement in his right shoulder and elbow; his right arm is not "useless".

16. Jonathan's previous recorded delays in fine and gross motor skills are a result of his brachial plexus injury, not his alleged brain injury.

17. Jonathan's primary language is Spanish.

18. Jonathan's IQ, when tested in his primary language, is solidly within an average range.
19. There is no evidence Jonathan has a brain injury or a frontal lobe injury.
20. Nothing in Jonathan's clinical course indicates he will be unable to pursue an education or training after high school that he desires with proper motivation and support, to work or to live independently.
21. Dr. Gardner, Plaintiffs' standard of care expert, testified under oath that his only criticism of Pecos Valley was based on what Dr. McLaughlin did in the prenatal care of Mrs. Botello and Jonathan Botello and in his delivery of Jonathan Botello; he had no criticisms of anybody else.

V. **CONTESTED ISSUES OF LAW:** The contested issues of law in addition to those implicit in the foregoing issues of fact are:

A. **Plaintiffs' Contested Issues of Law:**

1. Whether Defendant Pecos Valley and/or its employee, Dr. McLaughlin, were negligent.
2. Whether Defendant Pecos Valley and/or its employee, Dr. McLaughlin, violated the standard of care.
3. Whether the negligence of Defendant Pecos Valley and/or its employee, Dr. McLaughlin, was the proximate cause of the injuries sustained by Plaintiffs.
4. Whether the acts and omissions of Defendant Pecos Valley and/or its employee, Dr. McLaughlin were willful, wanton, and/or reckless.

B. **Defendant Pecos Valley of New Mexico, LLC's Contested Issues of Law:**

1. Whether Defendant Pecos Valley and/or its employee, Dr. McLaughlin, were negligent.

2. Whether the negligence of Defendant Pecos Valley and/or its employee, Dr. McLaughlin, was the proximate cause of the injuries sustained by Plaintiffs.

3. Whether the acts and omissions of Defendant Pecos Valley and/or its employee, Dr. McLaughlin were willful, wanton, or reckless.

4. Whether Dr. McLaughlin was employed by Pecos Valley in a managerial capacity.

5. Whether Pecos Valley authorized or ratified the acts of Dr. McLaughlin or other Pecos Valley healthcare providers.

6. Whether Pecos Valley, in its individual capacity, acted willfully, recklessly, or wantonly with respect to Mrs. Botello and/or Jonathan's treatment.

7. Whether Pecos Valley had any right or ability to control the medical decision-making of Dr. McLaughlin.

8. Whether Lorenza Botello suffered any damage as a result of the alleged negligence of Defendant.

9. Whether Jonathan Botello suffered any damage as a result of the alleged negligence of Defendant.

10. Whether there is a causal connection between Plaintiffs claimed injuries and the alleged culpable conduct of Defendant.

11. Whether, if Plaintiffs were damaged as alleged, which is specifically denied, such damages resulted from a pre-existing condition for which Pecos Valley may not be held responsible.

~~12. If Pecos Valley was at fault, which is specifically denied, whether other individuals, whether or not named in this lawsuit, were also at fault and such fault amounts~~

~~to comparative fault which eliminates, decreases, or offsets any recovery by Plaintiff against Pecos Valley.~~

~~13.12.~~ Whether Plaintiffs' alleged damages were the proximate result of an independent intervening cause or force, or subsequent intervening cause or force, thereby barring liability against Pecos Valley.

~~14.13.~~ Whether the Amended Complaint and all claims contained therein, fail to state a claim upon which relief can be granted against Defendant in the form of punitive/exemplary damages.

~~15.14.~~ Whether Plaintiff's claim for punitive damages is barred in whole or in part by the protections provided by the Constitution of the United States of America and/or the State of New Mexico.

VI. EXHIBITS:

The parties shall file a list of all exhibits expected to be submitted at trial no later than deadline established by the Court's Scheduling Order and shall exchange and/or identify with specificity each exhibit intended to be offered into evidence at trial by July 27, 2018. The parties shall provide four binders with all trial exhibits to the Court on the day of trial.

Visual aids and/or demonstratives to be used in voir dire and/or opening/closing presentations shall be pre-disclosed before the start of trial and no later than August 10, 2018. This does not include demonstrative aids that are prepared during trial based on things that occur during trial. Those demonstrative aids will be shown to counsel outside of the presence of the jury before being shown to the jury so as to give the opposing party the opportunity to object and for review and ruling from the Court before they are shown to the jury.

Failure to exchange exhibits intended to be offered into evidence and to pre-disclose visual

aids, demonstratives and/or opening/closing presentations will result in the exhibit being summarily denied from being admitted as evidence and the preclusion of the visual aid, demonstrative and/or opening/closing presentation from presentation to the jury in any fashion.

A. Plaintiffs' Exhibits:

1. Select Medical Records from Defendant Pecos Valley
2. Select Medical Records from Lea Regional Hospital
3. Select Medical Records from U.N.M.
4. Select Medical Records from Shriners
5. Select Medical Records from Hobbs Occupational Therapy
6. Select Medical Records from MECCA Therapy
7. Select Medical Records from Med-Trans
8. Select Medical Records from Odessa Regional Hospital
9. Select Medical Records from Quality Pediatrics
10. Select Medical Records from Therapy Services Associates
11. Select Medical Records from Texas Tech University Health Sciences Center
12. Select Medical Records from U.N.M. Pediatric Neurology
13. Select Medical Records from U.N.M. Children's Hospital
14. Select Medical Records from U.N.M. Health Sciences Center
15. Select Medical Records from Jerry McLaughlin, M.D.
16. All medical records used and/or exchanged in depositions
17. CV and Report of Michael Gardner, M.D.
18. CV of Brian Woodruff, M.D.
19. CV and Reports of Rodney N. Isom, Ph.D.
20. CV and Report of Arthur Joyce, Ph.D.
21. Photos of Jonathan Botello

22. Documents produced by Defendant in response to RFP
23. All exhibits used in depositions
24. Demonstrative exhibits including timelines and medical records with call outs, charts, diagrams, drawings, summaries, anatomical illustrations and general medical literature
25. Any pleadings in this case
26. Any exhibits or depositions necessary for rebuttal purposes and impeachment.

In addition, Plaintiffs reserve the right to introduce documents identified or produced by Defendant in discovery, including interrogatory answers, responses to requests for production and responses to requests for admission. Plaintiffs identify herein and reserve the right to use and all exhibits identified, referenced or selected by Defendant to this matter and any and all items necessary for impeachment of any witness.

Plaintiffs will have PowerPoint slides for opening and closing arguments and demonstrative aids, which have not yet been created, but which may utilize some of the exhibits or information indicated above, as well as contain other visual and demonstrative aids.

This list does not include documents or evidence that may be used for impeachment or rebuttal purposes. This list does not include medical articles and texts that may be used for demonstrative, impeachment, or rebuttal purposes.

In addition to the forgoing, Plaintiffs also may offer as exhibits at trial any of the following:

- a. Any document sought to be introduced at trial by any party not objected to by Plaintiffs;
- b. Any document listed as an exhibit by any party not objected to by Plaintiffs;
- c. Any document obtained through discovery in this matter;
- d. The depositions of Drs. Teicher, Wilson, and Kirk and any exhibits attached to depositions;
- e. Any party's answers/responses to Interrogatories, Requests for Production, and/or Requests for Admissions made in connection with this case; and
- f. Any document required to rebut a party's allegations.

Plaintiffs reserve the right to amend or modify this list pending rulings by the Court on pending motions.

Plaintiffs reserve the right to amend or supplement this list as necessary before trial.

B. Defendant Pecos Valley of New Mexico, LLC's Exhibits:

Pecos Valley may introduce the following into evidence as exhibits:

1. Plaintiffs' Second Amended Complaint;
2. Lorenza Botello's prenatal records from Desert Valley Women's Health;
3. Lorenza Botello's labor and delivery records from Lea Regional Medical Center;
4. Select records from Odessa Regional Medical Center, including: (a) imaging records related to Jonathan Botello's cranial ultrasound on March 25, 2013, (b) imaging records related to Jonathan Botello's brain MRI on April 1, 2013; (c) cooling records for Jonathan Botello; (d) Jonathan Botello's lab results; and (e) EEG.
5. Select MECA Therapies records, including: Jonathan Botello's Annual Development Assessment that was performed by MECA Therapies on June 26, 2015;
6. Select records from Therapy Service Associates, including: (1) Jonathan Botello's patient registration sheet and (2) records related to missed appointments;
7. Select records from the University of New Mexico Hospital, including: Imaging records related to Jonathan Botello's brain MRI that was performed on March 23, 2015;
8. Andra L. Dingman, M.D.'s CV and report regarding her opinions;
9. John W. Kirk, Ph.D., ABPP/CN's CV and report regarding his opinions and examination of Jonathan Botello;
10. CV of Pam Wilson, M.D.;
11. David E. Pitcher, M.D., FACS's CV and report regarding his opinions;

12. Darius Garcia, RN, BSN, CLNC, MSCC, CNLCP's CV and response to Plaintiffs' expert, Rodney Isom's plans;

13. CV of Eric Christensen, PhD and report, if and when completed;

14. Photo of Jonathan Botello as evidence or as a demonstrative aid;

15. Any and all exhibits that are listed by any other parties to this litigation insofar as they are not objected to by this Defendant;

16. Any exhibits necessary for rebuttal purposes and impeachment, including but not limited to discovery responses and deposition transcripts and errata sheets;

17. Enlarged audio and/or visual demonstrative exhibits which have not yet been determined;

18. Demonstrative exhibits including timelines and medical records with call outs, charts, diagrams, drawings, summaries, anatomical illustrations and general medical literature;

19. Medical articles, journals and texts that may be used for demonstrative, impeachment, or rebuttal purposes;

20. Pecos Valley reserves the right to amend or supplement this list as necessary before trial.

VII. DISCOVERY:

Discovery has been completed.

VIII. WITNESSES:

The parties have exchanged both fact and expert witness lists. Each party shall provide the other party the anticipated order of witnesses who will be called by the Friday before trial and will update the anticipated witness order at the end of each trial day for the following day.

A. In the absence of reasonable notice to opposing counsel to the contrary, Plaintiffs will call, or will have available at the trial:

Plaintiffs will call the following:

1. Plaintiffs
2. Michael Gardner, M.D.
3. Brian Woodruff, M.D.
4. Rodney N. Isom, Ph.D.
5. Arthur Joyce, Ph.D.
6. Conservator Anne Sperling
7. Corporate Representative of Defendant

Plaintiffs may call:

1. Any of Defendant's designated experts or witnesses
2. Foundational and rebuttal witnesses as necessary

Defendant Pecos Valley will call:

1. Andra L. Dingman, M.D.
The Children's Hospital Colorado
13123 East 16th Ave., B155
Aurora, Colorado 80045
(720) 440-4588
2. Pam Wilson, M.D.
Children's Hospital Colorado
Department of Physical Medicine and Rehabilitation
University of Colorado Denver at Anschutz Medical Campus
13123 East 16th Ave
Aurora, Colorado 80045
(720) 777-8354
3. John W. Kirk, Psy.D., ABPP/CN
Kirk Neurobehavioral Health
400 South McCaslin Boulevard, Suite 212
Louisville, Colorado 80027
(303)-915-0108
4. David E. Pitcher, MD, FACS
Executive Physician UNM Health System

Assistant Dean for Clinical Affairs
Office of Clinical Affairs
UNM School of Medicine

Professor of Surgery
Department of Surgery
Division of General Surgery
UNM School of Medicine

2211 Lomas Blvd, NE
Albuquerque, NM 87131
(505) 272-2121

5. Darius Y. Garcia, RN, BSN, CLNC, MSCC, CNLCP
DYGarcia Medical Legal Resource Consulting, LLC
P.O. Box 3418
Edgewood, New Mexico 87015
(505) 720-6103

6. Eric Christensen, PhD
16889 Hubbard Trail
Lakeville, MN
(703) 244-3224

Defendant may call:

7. Representative(s) of Pecos Valley of New Mexico, LLC
c/o Rebecca S. Kenny
Michael J. Dekleva
Holly E. Armstrong
Madison, Mroz, Steinman & Dekleva, P.A.
P.O. Box 25467
Albuquerque, New Mexico 87125
Telephone: (505) 242-2177
8. Plaintiff Anne Sperling as conservator for Jonathan Botello
c/o B. Kent Buckingham
Rick Barrera
Buckingham Barrera Law Firm
1707 W. Wall Street
Midland, Texas 79701
(432) 570-1919
9. Plaintiff Lorenza Botello
c/o B. Kent Buckingham
Rick Barrera
Buckingham Barrera Law Firm

1707 W. Wall Street
Midland, Texas 79701
(432) 570-1919

10. Plaintiff Alvaro Botello
c/o B. Kent Buckingham
Rick Barrera
Buckingham Barrera Law Firm
1707 W. Wall Street
Midland, Texas 79701
(432) 570-1919

11. Foundational and rebuttal witnesses as necessary.

Pecos Valley specifically reserves the right to amend and/or supplement this list of witnesses, and identification of its will call and may call witnesses, as necessary depending on Court rulings on pretrial motions and issues. Pecos Valley reserves the right to withdraw the designation of any expert and to aver positively that any such previously designated expert will not be called as a witness at trial, and to redesignate same as a consulting expert who cannot be called by opposing counsel.

IX. REQUESTS FOR JURY INSTRUCTIONS:

Jury instructions shall be filed and presented to the Court in three packets. One packet shall consist of those instructions which are stipulated to by both parties. A second packet shall consist of the Plaintiffs' additional proposed instructions. The third packet shall consist of the Defendant's additional proposed instructions. Each jury instruction submitted shall indicate the UJI source for such instruction. In connection with any modification(s) sought from UJI language, counsel shall indicate in bold typeface on each such instruction any and all proposed modification(s) from New Mexico uniform jury instructions. In addition, the legal authority for any proposed modification shall be set forth in each proposed jury instruction. All proposed jury instructions shall be filed on or before August 7, 2018.

X. **AMENDMENTS TO PLEADINGS:** None anticipated at this time.

XI. **OTHER MATTERS:**

The Court has recently ruled on various motions. There are multiple pending motions before the Court that may alter the proceedings and further motion practice is anticipated on various disputed facts and issues of law as well as witnesses, experts and fact, and exhibits, including Pecos Valley's Motion for Protective Order and Motions in Limine as to plaintiffs' experts Dr. Brian Woodruff and Dr. Rodney Isom. As such, the parties reserve the right to amend their respective portions of the Pre-Trial Order and request an Amended Pre-Trial Order be entered after all such pre-trial motions and issues are resolved based upon the Court's rulings on those motions.

XII. **MODIFICATIONS - INTERPRETATION:**

This Pre-Trial Order has been formulated after conference at which counsel for the respective parties participated. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing by the Court. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties, the Court, or by order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the record of this conference to the extent reported by stenographic notes, and to the pleading.

XIII. **TRIAL SETTING:**

The case is set for trial with a jury on the ~~13th~~15th day of August, 2018, at 8:30 a.m.

XIV. **TRIAL MATTERS:**

A. Allocation of Time. Estimated length of trial is 6 days, as follows: August 15, 16, 17, 20, 21, and 22, 2018. The parties must finish with presentation of evidence by 5:00 p.m. on Tuesday, August 22, if at all possible. If necessary, Plaintiff's final expert may be called on

August 22 at 8:30 a.m. Trial time, however, is calculated based upon the presentation of evidence ending at 5:00 p.m. on Tuesday. Trial begins each day at 8:30 a.m. and ends at 5:00 p.m., which provides for 6.5 hours for instructions, argument, motions, and testimony. Allowing 30 minutes for the Court's preliminary instructions on August 15, this yields 32 hours of trial time, which will be allocated between Plaintiff and Defendants as follows:

1. 55% or 17 hours and 36 minutes to Plaintiff, 45% or 14 hours and 24 minutes to Defendant.

2. A side's time consists of the side's opening statement, direct and redirect of witnesses that the side calls, cross of the other side's witnesses, any motions a side makes, and any response to motions made by the other side. If objections become too time consuming, then they will count against the party losing the objection.

B. *Jury Instructions and Closing Arguments.*

1. The Court and parties will have at least one additional working session to finalize jury instructions before August 22. Such working sessions will take place over lunch or in the evening, as necessary. This is an iterative process and may be off the record or recorded without a log or transcript.

2. On the day the case is submitted before the instructions are finalized, counsel are to resubmit any instructions which they want given and to which there has not been agreement. Those are to be submitted with citations and a place to indicate Given, Modified, Refused, Withdrawn. Even if instructions were tendered before trial, they must be re-tendered at this time in order to make a record. Prior to the jury instructions being finalized, counsel will be given an opportunity to request on the record any instructions that have previously been declined or to object to instructions that are being given. Because the working sessions will have allowed counsel opportunity to explain their positions to the Court, if time is limited before the jury is

instructed, counsel will be allowed to make more extensive records while the jury is deliberating. Counsel must be prepared to provide revised copies of proposed instructions and to submit clean instructions during the trial.

3. Each side will be given one hour for closing arguments. Plaintiffs may divide their hour between initial argument and rebuttal, and different attorneys may handle the initial argument and rebuttal.

C. *Alerting the Court and Opposing Counsel to Issues the Day Before; Working During Breaks and Over Lunch.* To the extent possible, counsel must call the Court's and opposing counsel's attention to any anticipated issues prior to court starting via email so that the Court and counsel can report early and take the issues up before the jury reports. If counsel fails to do this or if counsel keeps the jury waiting, this will also count against the time of the party causing the delay. In addition, the Court and counsel will work during jury breaks or over lunch, if necessary, to address issues, so as to avoid losing jury time.

D. *One Attorney per Witness and Motion.* Only one attorney may handle a witness per side. In other words, the same attorney must do the direct and redirect and handle objections during cross-examination or do the cross-examination and handle objections during direct and redirect, as the case may be. In addition, only one attorney may argue a motion.

E. *Witness Order and Disclosure.* By the close of business of each day, counsel must inform opposing counsel what witnesses will be called the next trial day. A party must have enough witnesses present to testify so that jury time is not lost because no witness was available. Witnesses will be taken out of order if necessary so as not to lose jury time. If a side fails to have a witness present, the lost jury time will count against that side's trial time.

XV. MEMORANDUM. . Possibility of settlement of this case is considered not good.

Estimated length of trial is 7 days.

IT IS SO ORDERED.



HON. GREGORY S. SHAFFER
DISTRICT JUDGE

REDLINES REFLECT CHANGES
BY THE COURT TO THE PROPOSED ORDER
SUBMITTED BY THE PARTIES

The foregoing proposed Pre-Trial Order (prior to execution by the Court) is hereby approved this 14th day of August, 2018.

SUBMITTED BY:

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