COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC DAR No. _____

NELSEY DELGADO JUAREZ,
PLAINTIFF/APPELLEE

VS.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL
DEFENDANTS/APPELLANTS

ON APPEAL FROM A DECISION OF THE SUFFOLK COUNTY
SUPERIOR COURT
[C.A. No. 1784-CV-00599]

APPLICATION OF DEFENDANTS-APPELLANTS KATHRYN GIBLIN, M.D., AND THE MASSACHUSETTS GENERAL HOSPITAL, FOR DIRECT APPELLATE REVIEW

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I. Request for Direct Appellate Review

Defendants/Appellants Kathryn Giblin, M.D., and the Massachusetts General Hospital request direct appellate review with respect to the judgment entered on January 22, 2025 in *Nelsy Delgado Juarez v. Kathryn Giblin, M.D., and the Massachusetts General Hospital*, Civil Action No. 1784-CV-00599, and all rulings adverse to the Defendants subsumed in such judgments, including:

(1) the trial judge's ruling that she would give the jury a missing witness instruction, where trial counsel had a "logical," "tactical," or "plausible" reason to not call the witness; and

(2) the trial judge's allowance of missing witness arguments by counsel, where defense counsel had a "logical," "tactical," or "plausible" reason to not call the witness in question, and where Plaintiff's counsel proceeded to argue a specific adverse inference.

II. Statement of Prior Proceedings

The Complaint in this medical malpractice action was filed on February 24, 2017, alleging that Dr. Kathryn Giblin was negligent in her care and treatment of Nelsy Delgado Juarez. Addendum ("Add.") 47, 58-67. The Plaintiff[1] ultimately asserted that, on March 31, 2014, Dr. Giblin recommended prescribing an improper dosage of

[1] When the Complaint was filed, Nelsy Delgado Juarez was a minor and accordingly, her mother was the Plaintiff. Nelsy Delgado Juarez was later substituted as the Plaintiff prior to trial.

Lamictal, an anti-seizure medication, Add.94-96, resulting in injuries including the development of Stevens-Johnson syndrome,[2] which caused tissue damage and vision loss in the left eye, which was correctable and corrected. Add.94-96, 250-51, 272. The Defendants filed their answer on May 17, 2017, denying liability and causation. Add.68. The Defendants ultimately asserted that the dosage recommended by Dr. Giblin, after consultation with and under the supervision of, her attending physician, Dr. Florian Eichler, was in strict compliance with the FDA dosage guidelines for Lamictal, and denied that the allegedly excessive dosage of the medication caused Nelsy to suffer injuries, including Stevens-Johnson syndrome. Add.110-116.

On March 27, 2020, the Plaintiff moved to amend the Complaint in order to add Dr. Eichler as a defendant. Add.77. The Plaintiff's motion to amend was denied on April 21, 2020, with the Court noting that the "[a]mendment would be unfair to the prospective defendants…based on events occurring in March 2014."

[2] Stevens-Johnson is a severe complication that involves an overwhelming immune response that impacts the body's mucous membranes, causing them to slough off. Add.237-38. Stevens-Johnson is a rare complication with a total incidence of about 5.3 in one million patients. Add.278-79.

Add.91. That ruling is not appealed. On December 16, 2021, the Plaintiff conducted the deposition of Dr. Eichler.

Motions in limine by both the Plaintiff and Defendants were respectively filed on December 22, 2022 and January 2, 2023, concerning potential testimony of Dr. Eichler during trial. Add.118 and Add.218. The trial judge ruled with respect to these motions that:

> Eichler may testify to his role at the hospital, his role vis-à-vis the residents: the practices and procedures of the hospital; and his practices and procedures-i.e. what is supposed to happen. He cannot testify to facts of which he has no memory, nor may he be asked hypotheticals based on assumed facts, since he is not testifying as an expert witness. Add.215.

An eight-day trial, with jury selection on January 8 and 9, 2025, and opening statements on January 10, 2025, was held. Add.55-56. At the conclusion of the trial day on January 14, 2025, the judge, without either party raising the issue, stated that "[Plaintiff's counsel] may or may not ask for a missing witness instruction with respect to Dr. Eichler if Dr. Eichler does not testify …if a request is made, I'll have to evaluate under Section 1111 whether it's appropriate or not, and if it's requested, I'll obviously be asking for both parties for their positions." Add.276.

Prior to a charge conference between the parties and the Court, the Plaintiff submitted supplemental requests for jury instructions requesting a missing witness instruction pursuant to Mass. G. Evid. § 1111. The Defendants submitted a bench memorandum regarding potential missing witness instructions, the receipt of which was acknowledged by the judge, explaining the cumulative nature of potential testimony by Dr. Eichler, and its lack of necessity to the defense. Add.336, 368-43.

At the charge conference, on January 16, 2025, the judge and counsel addressed the Defendants' primary and alternative defense theories:

> The Court: … It seems to me that you have pursued two sort of separate maybe related concepts in this case and one is that the -- Dr. Giblin followed the standard of care, her prescription followed the standard of care…(Add.333).
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> [Defendants' counsel] Mr. Cassidy:…I'm certainly arguing that the Lamictal dosing was appropriate and consistent with the standard of care. I'm also saying, Your Honor, that Dr. Giblin was acting in accord with the attending physician. (Add.334-35).
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> The Court: … [I]n your bench memo you reference the fact that [defense expert Dr.] Peters essentially opined that Eichler had approved of the treatment as well.

Mr. Cassidy:… [Y]es, that's based on Dr. Giblin's testimony and her documentation, Your Honor. (Add.336).

The Court: The … implication that… the attending agreed with this plan, it says two things… It says either this must have been the standard of care because the more experienced doctor agreed with it and it says, even if it wasn't, it's not her fault; essentially her supervisor said do this.

And, you know, *whether there is evidence to support that is disputed by the parties*, but that's the defendants' argument. *And that* makes Eichler a *pretty important* witness, someone that you would expect that the defendants would bring in to confirm that rather than letting the Plaintiffs argue over and over and over there's nothing in the note that says that and nobody has any memory of it.

So, in terms of the findings that I am supposed to make or decide whether they exist, you know, it's the third one that's at issue here, or the fourth one [see MGE §111(b)(4)], I guess. There is no logical or technical explanation for the failure to call the witness. Why wouldn't the defendants put Eichler up? (Add.337-38)(emphasis supplied)

Mr. Cassidy: Your Honor, *for the same reason that we don't call a lot of witnesses, for the same reason I didn't call Dr. Kearns*, Your Honor. I *made the judgment that I didn't want to call him, I didn't need him, and I don't have to call him*. (Add.338-39)(emphasis supplied).

[Plaintiff's counsel] Ms. Zahka: It's *not our argument* that [Dr. Eichler] didn't approve [Dr. Giblin's dosage plan]. Our argument is that we don't know. Based on her note, we don't know whether he approved it or not. We don't know what the discussion was at all. (Add.340)(emphasis added).

> Mr. Cassidy: Your Honor, it will be fatal to the defense to give a missing witness instruction in this case. It's simply not warranted, Your Honor. This witness is equally available to both sides, and what Ms. Zahka just said, I would say respectfully, makes no sense, Your Honor.
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> She says, well, we didn't say that he didn't approve it. Well, that's certainly been the insinuation. But she's saying all we're saying is we don't know. (Add.341).
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> The Court:…And just on the missing witness issue, I know what an explosive argument/instruction it can be. I have dealt with it before, so I appreciate what a significant issue this is. I don't want anyone to think that I don't. (Add.343).
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The judge's basis for her ruling that the missing witness instruction would be given did not address either that the primary defense (that the prescription complied with the standard of care) did not depend on any potential testimony of Dr. Eichler, or that, as defense counsel explained, Dr. Eichler's testimony at that point was neither necessary nor desirable from the defense's standpoint. Rather the judge's reasoning was as follows:

> The Court: All right. As to the missing witness instruction, you saw what I did [with regard to the jury instructions], so my comments on that are as follows. An instruction on missing witness is I think necessitated by the way both parties tried the case.
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> I don't see how I could not instruct the jury something about the fact that Eichler is not here.

> The defendants have explicitly told the jury not only through Dr. Giblin, but through Dr. Peters as well, their expert, that Giblin's treatment plan was approved by Eichler based on her custom and practice, based on the note, based on industry practices, and that necessarily leads to two inferences, as I said before, which is that the attending did it, so therefore it must be within the standard of care, and also, if it wasn't within the standard of care, then it's not Dr. Giblin's fault, it's Eichler's fault as her supervisor.
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> You know, she herself said she can't go rogue, she can't not do what he says. So *there really is no logical or technical explanation for the defendants not calling Dr. Eichler* but there is also no real logical explanation for the Plaintiffs not having him either, either as a witness or a defendant. (Add.344-45) (emphasis supplied).
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> The Court: …Mr. Cassidy mentioned that including the instruction is *fatal*. I think that was the word he used. I use the word *explosive*. (Add.346) (emphasis supplied).
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Defense counsel objected and further explained that the instruction would improperly invite speculation as to why Dr. Eichler was not called:

> Mr. Cassidy: [W]ith regard to the missing witness instruction. I do object, Your Honor.
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> … Your Honor, if you'll recall, the Plaintiff, in the motions in limine, actually filed a motion to preclude Dr. Eichler from testifying and now Your Honor is going to allow the Plaintiff to argue that he should have been called as a witness. I think that, you know, they can't have it both ways, Your Honor.
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> … [Y]es, the witness was not called, but it's not a "missing witness."

> Both sides made the decision not to call the witness for possibly the same reasons, possibly different reasons… [W]hen you're asking the jury to decide whether the witness was friendly to or at least not hostile to one party or the other, I think that's sheer speculation on the part of the jury, Your Honor….
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> And *the fourth [element of the missing witness instruction], Your Honor, that there is no explanation for not calling the witness again calls for speculation. The jurors are not lawyers* –(Add.347-49) (emphasis added)

The judge did not deny or dispute defense counsel's point that the instruction, if given, would require the jury to speculate. Rather, she countered that she believed that the Defendant was already asking the jury to speculate that Dr. Eichler agreed with the dosing plan. Defense counsel explained that the judge's perception was erroneous because the evidence, as already admitted, had established the inference that Dr. Eichler had agreed to the plan, providing further reason why his testimony was not necessary from the Defendants' perspective:

> The Court: You are asking the jury to speculate.
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> Mr. Cassidy: I'm not—
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> The Court: --based on other evidence in the case. But we don't have Dr. Eichler here to tell us whether he did or whether he would have agreed based on this note.

> Mr. Cassidy: But, Your Honor, I'm not asking the jury to speculate. I'm asking them to reach that decision based upon the testimony of Dr. Giblin and her documentation, both of which are in evidence, both of which are proper pieces of evidence, Your Honor, and that's not speculation.
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> I'm asking the jury to draw the inference from Dr. Giblin's testimony and from her note that Dr. Eichler did what she said he did.
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> The Court: So your objection is duly noted and so are the grounds for it, but the instruction is going to stay in. (Add.349-52) (emphasis added).

On the same day of the Court's ruling at the charge conference that missing witness argument and jury instruction concerning Dr. Eichler would be allowed, the Defendants promptly brought an emergency motion to permit video testimony of Dr. Eichler to be taken that evening and presented to the jury thereafter, noting that Dr. Eichler was engaged the following day seeing patients at the pediatric neurology clinic at the hospital and could not appear in person. Add.225-226.[3] The judge denied the motion that same afternoon. Add.223.

[3] During voir dire of the venire, the judge had informed the prospective jurors that they would likely begin deliberations following the Martin Luther King Jr. Monday holiday (i.e. on Tuesday, January 21, 2025), Add.231, 233, leaving Friday, January 17, 2025 available to present video testimony of Dr. Eichler.

With Dr. Eichler's testimony precluded, closing arguments and the jury charge, which included the missing witness instruction, occurred on January 17, 2025. Defendants' counsel in closing sought to argue that the jury could consider what Dr. Eichler would have said if the Plaintiff had called him, but was admonished by the judge to "stick to the evidence that was in this case." Add.354. However, Plaintiff's counsel in closing, enabled by the missing witness instruction, and as predicted by defense counsel, Add.341, instead of arguing "we don't know" if Dr. Eichler approved of the plan, Add.340, reversed position and argued "If [Dr. Eichler] approved the plan, why isn't he in here telling you so?" and "*If it happened the way Dr. Giblin wants you to believe, [Dr. Eichler] would have been here* to support that." Add.361-362 (emphasis supplied).

That same day, after deliberating for four hours, during which the jury also selected a foreperson and had lunch, a verdict for the Plaintiff in the amount of $8,000,000.00 was awarded, and judgment issued. Add.227. The defendant filed a notice of appeal on February 3, 2025. Add.228.

III. Statement of Facts Relevant to the Issue Presented for Direct Review.

A. *Trial Testimony of Defense Expert, Dr. Peters.*

The Defendants presented the testimony of Jurriaan Peters, M.D., an epileptologist at Boston Children's Hospital. In his practice, he prescribes Lamictal a few times a week. Add.305.

He testified that Nelsy Juarez first presented with absence seizures in 2007 at seven or seven and a half years old. Add.281. Absence seizures are brief spells where the patient freezes, and is often unaware of his or her environment and surroundings. Add.281-282. They last anywhere from a few seconds up to a minute or longer. Id. By contrast, tonic-clonic seizures are characterized by a tonic phase where the patient stiffens, and then a clonic phase where the patient makes repetitive jerks. Add.283-284. Tonic-clonic seizures in particular can be life-threatening, and can cause significant morbidity, including brain injury. Add.284-289. It is important to use medication to try to control a patient's tonic-clonic seizures for these reasons. Add.289.

When Nelsy was diagnosed with absence seizures, she was prescribed Depakote. Add.289-290. Despite this

medication, Nelsy continued to have absence seizures for some time. Add.290. In February 2014, when Nelsy had her first generalized tonic-clonic seizure, she was also prescribed Depakote to control that condition. Id. Despite taking Depakote, Nelsy had another tonic-clonic seizure approximately six weeks later in March 2014. Add.291. This was a "breakthrough seizure" – a seizure that occurred although the patient was prescribed an appropriate medication and was taking her medication properly. Add.291-292. While patients may experience breakthrough seizures due to external conditions or stressors, there was no indication of another cause for Nelsy's seizure other than her epilepsy. Add.293.

In a patient suffering breakthrough seizures, the options are to either increase Depakote or to add a second medication. Add.293-294. Nelsy was already at a high level of Depakote so her Depakote could not be increased. Id. Additionally, Depakote has teratogenic effects, meaning it can affect an unborn child causing fatal fetal malformations, so Depakote is avoided in female patients of childbearing potential. Add. 298-99. Depakote carries other significant side effects, including cognitive dulling, fatigue, and pancreatitis. Add.301.

Lamictal does not carry cognitive, behavioral, or mood side-effects. Add.302. It is also very effective, which is unusual for an anti-epileptic without cognitive side effects. Id. Lamictal does carries a risk of Stevens-Johnson syndrome. Add.303. However, Stevens-Johnson occurs in about one in 5.3 million individuals of the population at large. Id. The incidence of Stevens-Johnson syndrome in children taking Lamictal is too low to estimate, but 0.8% of children taking Lamictal develop serious rashes, which may include Stevens-Johnson syndrome along with other serious allergic reactions. Id.

Following her February 14, 2014 generalized tonic-clonic seizure, when Nelsy began treating in the Massachusetts General Hospital ("MGH") pediatric neurology clinic, and was re-prescribed Depakote, she was thirteen years and seven months old. Add.122-125, 363-367. She was small for her age, weighing approximately 60 or 61 pounds. Id. A thorough workup did not reveal any medical issue which caused her small stature. Add.268-269. Rather, it was determined to be familial in nature—her parents were also small in stature. Id.

On March 31, 2014, after another generalized tonic-clonic seizure, Nelsy was treated in the Emergency Department ("ED") and was seen there by Dr. Giblin. Add. 122-125, 363-367. At the time, Dr. Giblin was serving as a junior resident on the pediatric neurology consulting service. Add.308. In this capacity, Dr. Giblin's role was to see the patient, take a history, come up with a differential diagnosis, a preliminary plan, and then present the case to the attending physician. Add. 309-310. The attending may ask for additional information, and then there is a joint decision on how to proceed with the diagnostic plan. Id. This is how residents learn. Add.319.

On March 31, 2014, Dr. Giblin's attending was Dr. Eichler. Add.313. Dr. Giblin took a history from the patient, conducted an examination, and came up with a differential diagnosis and a preliminary plan. Add.310-311. Dr. Giblin then discussed the plan with Dr. Eichler. Add.313-314, 270-271. As the attending, Dr. Eichler had ultimate power to make medical decisions and alter Dr. Giblin's plan if it was inappropriate. Add.313-314, 319-320.

Dr. Giblin's plan included starting Nelsy on Lamictal as a second medication to try to control Nelsy's

tonic-clonic seizures, with a long-term plan to transition her off the Depakote she had been taking. Add.122-125, 363-367. Lamictal was an appropriate medication choice for Nelsy both because it carries a low risk of side-effects, unlike Depakote, and because it is considered a stronger medication which could control her breakthrough seizures. Add.298-304.

FDA guidelines serve to inform practitioners regarding the safety of dosing of medications, along with other information. Add.321-326. Dr. Giblin's dosing plan for Lamictal was in compliance with the FDA guidelines, which took into account Nelsy's age and concomitant use of Depakote (Depakote slows the body's breakdown of Lamictal, so dosing must take its use into account). Id.

For patients who have reached their twelfth birthday through adulthood, the FDA guidelines recommend the same dosage of Lamictal (factoring in other patient medications such as Depakote as discussed above), rather than basing dosage on the patient's weight, Add.324-27, because dosing is based on the body's ability to process the drug due to evolving organ maturity. Add.324-29. Nelsy was over thirteen and a half years old despite her small stature. Id. Accordingly, Dr. Peters testified

that it was appropriate, and in compliance with the FDA guidelines and the standard of care for Dr. Giblin, after consultation with Dr. Eichler, to prescribe Nelsy the FDA-recommended dosage of Lamictal for a thirteen-year-old patient who was also taking Depakote. Add.326-29. If a patient is prescribed an insufficiently low dose of Lamictal, the patient may continue to have tonic-clonic seizures which carry life-threatening risks. Add.329-30.

B. *Deposition Testimony of Dr. Eichler*

Dr. Eichler was deposed by the Plaintiff during discovery on December 16, 2021. His deposition testimony demonstrated that he had no memory of either the Plaintiff or the care afforded the Plaintiff (which occurred seven years before his deposition). Add.149[4] (no memory of Plaintiff). However, he also testified that he had no reason to disbelieve Dr. Giblin's note stating that he was consulted by her, and further that he had no reason to disbelieve her testimony that he had

[4] Both the Defendants' Motion in Limine to Permit Testimony of Florian Eichler, M.D., Add.118, and the Plaintiff's Motion in Limine to Preclude Testimony of Florian Eichler, M.D., Add.218, include Dr. Eichler's deposition testimony as an exhibit thereto. Only the exhibit to the Defendants' Motion is included to avoid duplication.

agreed with her plan. Add.191-93. Because the plan accorded with the FDA guidelines for Lamictal, he would have agreed with the plan. Id. Moreover, Dr. Eichler testified that if he had not agreed with the plan, he would have changed the course of action. Add.192-93. Dr. Eichler also testified that the weight-based dosage recommendations were not used for patients like Nelsy who were over the age of 12. Add.200-01.

C. *Relevant Concessions of Plaintiff's Expert, Dr. Adler.*

Dr. Daniel Adler, the Plaintiff's expert, acknowledged that the contents of the dosage packet provided with Lamictal had to be approved by the FDA, and that clinical studies are done on anticonvulsant medications, such as Lamictal, prior to FDA approval. Add.257-58. He further acknowledged that the studies concerning Lamictal involved cumulatively thousands of patients, and that the approval of the recommendations by the FDA are based upon those studies. Add.262-63. Dr. Adler conceded that the dosage recommendation of Dr. Giblin complied with those FDA guidelines, acknowledging that she based the dosage plan upon the specific table and column set forth in the guidelines relating to patients, such as Nelsy, who had already passed their

twelfth birthday, and were already on Depakote (also known as valproate), rather than relying upon the chart applicable to children who have not yet reached their twelfth birthday, who are also on Depakote, the table that Dr. Adler chose to rely upon. Add.264-66.

Dr. Adler maintained that his deviation from the guidelines was appropriate based on his view that "weight in children is… what determines the dosage of a medication 95% of the time," Add.242-243, and that, contrary to the guidelines, dosages should be "weight-based" until at least sixteen to eighteen years of age. Add.242.

Even though the FDA guidelines specifically setting forth dosage recommendations for patients who were twelve years of age or older were different from the FDA recommendations for children under twelve years of age, Dr. Adler asserted, contrary to the guidelines, that the weight-based approach should continue for at least four to six years beyond the FDA recommendation that weight-based Lamictal dosage cease once the patient reaches his/her twelfth birthday. (See supra; see also Add.242). Further, notwithstanding his admission that Dr. Giblin's recommended plan complied with the FDA guidelines, he contended that she acted “arbitrarily” in

choosing “to do what the package insert [which incorporates the FDA guidelines] says.” Add.244.

He also acknowledged that at the time Nelsy was seen by Dr. Giblin, she was undergoing puberty, which was a possible cause of the evolution of her seizure disorder to include her recent tonic-clonic seizures, Add.256; that it is important to not underdose a patient having tonic-clonic seizures because the seizures may not be stopped, Add.267; and on March 31, 2014, the date Nelsy saw Dr. Giblin, the goal was to give her a dose that would control her tonic-clonic seizures. Add.268.

Dr. Adler acknowledged that endocrinology and gastroenterology work-up showed that Nelsy's small stature was familial, as her father was 5' 3" and her mother was 4’ 8” or 4’ 9” in height, that Nelsy was found to have no disease or condition causing her small size, and that she is now a young adult virtually the same size as her mother. Add.268-269. He denied that the maturity of a thirteen-year-old liver with regard to the ability to break down and metabolize Lamictal bears any relevance to appropriate dosage. Add.248-249.

With regard to the relationship between attending and resident physicians, Dr. Adler acknowledged that residents are supervised by attendings, Add.235-36, as

the relationship is a “didactic” one where residents are “supposed to learn something from” the attending physicians. Add.273-74. He admitted that he was “sure [Dr. Giblin] presented the case” to Dr. Eichler, Add.270, and that Dr. Giblin's note was a summary of facts “that everyone was aware of at that point about Nelsy Juarez, including her weight." Add.270-71. Yet he disputed that one could interpret the statement at the end of Dr. Giblin's note that she “discussed with Dr. Eichler” to mean that they discussed the dosage plan set forth above in the note, contending “that's pure speculation… It simply says discussed.” Add.270-71. He further refused to acknowledge that Dr. Giblin's stating she “discussed” the case with Dr. Eichler was an indication that she “consulted” with him as her attending. Add.252. He also admitted that if Dr. Giblin was given instructions by Dr. Eichler, it would have been appropriate for her to follow his guidance. Add.253-54.

IV. Issues of Law Presented For Review

Based on the prior proceedings in this action and the summary of facts presented, supra., this application presents for review issues related to the appropriate usage of the missing witness instruction as currently

articulated in Massachusetts case law and Mass. G. Evid. § 1111.

A missing witness instruction should only be given in "clear" cases. Comm. v. Figueroa, 413 Mass. 193, 199 (1992). The instruction can have "serious consequences" upon a party's case, id., and a "substantial" effect on the jury's deliberations, Comm. v. Franklin, 366 Mass. 284, 294 (1974), since "[a]n inference which is unfairly urged or drawn may be decisive in the case." Id. Correspondingly, the instruction should not be given when the party opposing it offers a "logical," "tactical," Mass. G. Evid. §1111(b)(4), or "plausible" explanation for not calling the missing witness, Comm. v. Anderson, 411 Mass. 279, 282-83 (1991); Comm. v. Gagliardi, 29 Mass.App.Ct. 225, 244 (1990), but a trial judge's decision whether to allow the instruction is reversible only for "manifest unreasonableness." Comm. v. Saletino, 449 Mass. 657, 668, (2007).

This application requests review as to whether, in those cases where the party opposing the instruction does offer a "logical," "tactical," or "plausible" reason for not calling the missing witness, does a trial judge commit "manifest unreasonableness" *as a matter of law* by allowing argument by counsel as to the missing

witness, then issuing the related jury instruction? If not, then how would such contradictory standards be reconciled and applied – i.e. how can a judge *not* commit "manifest unreasonableness" when the judge gives a missing witness instruction even though a "logical," "tactical," or "plausible" reason has been given for the witness not being called?

The Defendants preserved the issue regarding the judge's ruling to allow argument and instruct on the missing-witness issue by objecting after the trial judge specifically ruled at the charge conference that an instruction would be given, where, during the colloquy, the judge acknowledged her awareness of the issue, explicitly ruled on it, expressed her intention to give the instruction objected to, and expressly noted the Defendants' objection to the ruling. Add.347-352; see Flood v. Southland Corp., 416 Mass. 62, 67 (1993); Rotkiewicz v. Sadowsky, 431 Mass. 748, 751-752 (2000).

V. Argument

A. *The Development of Extensive Discovery Rights Renders Clarification and Refinement of the Current Missing Witness Rule Appropriate.*

Decades before the promulgation of the current rules of discovery, Wigmore observed:

> *There remains some uncertainty in the judicial treatment of certain conditions preliminary to the [adverse] inference* [under the missing witness rule]. It is plain that the inference is based…on [a witness's] non-production *when it would be natural* for the party to produce him if the facts known by him had been favorable. 2 Wigmore, Evidence, at § 286 (3d ed. 1940). (Emphasis supplied).

Yet even presently, with broad discovery rights well established, McCormick explains:

> Despite an abundance of cases recognizing the inference, refusal to allow comment or to instruct rarely results in a reversal, while *erroneously instructing the jury on the inference, or even an erroneous argument by counsel much more frequently requires retrial.* … A number of factors support a conservative approach. *Conjecture or ambiguity of inference is often present… The availability of modern discovery and other disclosure procedures serve to diminish both its justification and the need for the inference*. 2 McCormick On Evidence, § 264 (9th ed. 2025)(emphasis supplied)(internal citations omitted).

See also Harris v. State, 458 Md. 370, 396, 182 A.3d 821, 836 (2018) ("The rationale for the missing witness rule is at best questionable."). Massachusetts cases only offer the somewhat vague and contradictory

suggestions that missing witness argument and instruction only be allowed in "clear" cases, yet each case is to be decided on its unique circumstances.[5] Courts have struggled to define when it would be "natural" to call a witness such that their absence should warrant the instruction. Wigmore, McCormick, supra; see also Saletino, 449 Mass. at 668.[6]

In this matter, this uncertainty led to a misapplication of the missing witness rule and prejudicial error to the Defendants. The Defendants submit this case for review as it offers the opportunity to minimize the harm inherent in the rule by applying safeguards, discussed infra, that would (1) lend clarity

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[5] See Saletino, 449 Mass. at 668 ("missing witness instruction should be provided 'only in clear cases, and with caution.'"), quoting Figueroa, 413 Mass. at 199; id. at 672 (noting instruction "points an accusatory finger at [the party] for not producing the missing witness."); Comm. v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986) (instruction "can have a seriously adverse effect" on deliberations); Franklin, 366 Mass. at 294 ("The effect of the [missing witness] comment may be substantial in the jury's deliberations."); Comm. v. Alves, 50 Mass. App. Ct. 796, 805 (2001).

[6] The Massachusetts Guide to Evidence ("MGE"), for example, provides that the court may instruct the jury that an adverse inference may be drawn from a party's failure to call a witness when the witness is (1) available;(2) not hostile to the party;(3) expected to give noncumulative testimony of distinct importance; and(4) when there is no logical or tactical explanation for not calling the witness. MGE § 1111(d).

and uniformity to its application, and (2) diminish its inherent risk of juror speculation.

B. *Clarification is Also Necessary to Prevent Arguments Urging Specific Adverse Inferences.*

The missing witness instruction is derived from the notion that "nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the *inference that its tenor is unfavorable to the party's cause*." 2 Wigmore, Evidence § 285, at 192 [Chadbourn rev. ed. 1979] (emphasis supplied). McCormick explains:

> Some courts have said that the party's failure to call the witness or produce the evidence creates a 'presumption' that the testimony would have been unfavorable. … [U]nlike the usual presumption, *it is not directed to any specific, presumed fact, or facts which are required or permitted to be found*. *The burden of producing evidence of a fact cannot be met by relying on this 'presumption*.' Rather, its effect is to *impair the value of the opponents evidence*, and *to give greater credence to the positive evidence of the adversary*, upon any issue, upon which it is shown that the missing witness might have knowledge. McCormick, supra at § 264 (emphasis applied).

The prior proceedings in this case evidence that this rule was not properly applied in this regard. When Plaintiff's counsel expressly stated during the charge conference that "It's *not our argument that* [Eichler]

didn't approve [the dosage plan]," Add.340 (emphasis supplied),[7] but then did an about-face during closing argument, *expressly asserting that Eichler did not approve* the plan, because otherwise he "would have been here," Add.361-362, the Plaintiff squarely violated the principle that the instruction is not to be used to infer "specific" facts. Id.[8]

Further, the closing argument's encouragement of jury speculation was particularly unfair considering that video trial testimony of Dr. Eichler, which defense counsel moved for immediately after the court declared that it was going to issue a missing witness instruction concerning him, was precluded.[9]

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[7] Defense counsel noted that the instruction itself invited the jury to prejudicially speculate, Add.349-50, and there was, in fact, ample evidence to warrant the inference that Eichler *had approved* of the plan. Add.350-51. Obvious examples included (1) Dr. Giblin's note, (2) Dr. Giblin's testimony, (3) Dr. Peters' testimony, (4) the didactic relationship between attending and resident physicians, rendering it extremely unlikely that the attending would not modify a proposed plan of care if they disagreed with it, and (5) that Giblin's proposed plan undisputedly complied with the FDA dosage guidelines.

[8] Defense counsel predicted this tactic from the Plaintiff if the instruction were given: "[Plaintiff's counsel] says, well, we didn't say that he didn't approve it. Well, that's certainly been the insinuation." Add.342.

[9] See and compare Comm. v. Mosby, 11 Mass. App. Ct. 1, 9 (1980) ("[A] party's success in excluding evidence from the consideration of the jury does not later give that

C. The "Logical," "Tactical," or "Plausible" Standard for Precluding the Instruction was Met.

As articulated, supra at 22, the missing witness argument/instruction should not be utilized when there is a "logical," "tactical," or "plausible" reason offered for not calling the witness. A "plausib[ility]" standard, see Anderson, 411 Mass. at 282-83, "asks for more than a sheer possibility," but is "not akin to a 'probability requirement.'" Moran v. Benson, 100 Mass. App. Ct. 744, 746 (2022). Accordingly, a judge cannot reject counsel's explanation for not calling a witness by simply finding that counsel's explanation is "probably" not valid. Rather, the instruction is only appropriate when its applicability is "clear." Figueroa, 413 Mass. at 199. To satisfy the fourth element necessary to give the instruction, Anderson, MGE §1111(b)(4), Figueroa, supra, the judge must find that the explanation for not calling the witness is *implausible*

party license to invite inferences (whether true or, as in this case, false) regarding the excluded evidence."); Comm. v. Harris, 443 Mass. 714, 732, 825 N.E.2d 58, 72 (2005) ("Such exploitation of absent, excluded evidence is 'fundamentally unfair' and 'reprehensible.'") (quoting Comm. v. Haraldstad, 16 Mass.App.Ct. 565, 568 (1983)); Comm. v. Hoffer, 375 Mass. 369, 378 (1978).

– *it lacks any "logic."* Gagliardi, 29 Mass.App.Ct. at 244; 20 Mass. Practice Series, §1111(4) (3d ed.).[10]

Of the four required elements for issuing the instruction, see Anderson, MGE §1111(b), supra, the plausibility element is unique. The judge, not the jury, has the requisite expert background to determine whether there is a "logical," "tactical," or "plausible" reason for the decision not to call the witness.[11] That the judge might think that they, more likely than not, would have called the witness were they the trial lawyer does not mean that it is "clear" that the witness should be called. If reasonable trial attorneys might well differ on the question, then the decision cannot *lack* logic, tactics, or plausibility.

Nor does it follow, simply because a judge has discretion to *deny* the instruction when the foundation requirements *are* met, see Comm. v. Thomas, 429 Mass. 146, 151 (1999), that they would have discretion to *allow*

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[10] This standard is highly protective against the dangerous missing witness instruction, the giving of which should be the extremely rare exception. See Alves, supra at 25 n.5, citing Figueroa, supra at 199.

[11] See Fishman v. Brooks, 396 Mass. 643, 646 (1986) (appropriateness of trial attorney tactical decisions cannot be decided without expert testimony); see also 4 Mallen & Smith, Legal Malpractice § 33.5, at 656–657 (tactical decisions within range of reasonable options as informed by expert legal opinions).

it where *some of its foundational requirements* are *not* met. See Anderson, 411 Mass. at 282-83 ("If the circumstances, considered by ordinary logic and experience, suggest a *plausible* reason for non-production of the witness, *the jury should not be advised of the inference*")(emphasis supplied.); Schatvet, supra (case must be "clear" given instruction's "seriously adverse effect on the noncalling party— suggesting, as it does, that the party has willfully attempted to withhold or conceal significant evidence").[12]

Defense counsel gave two reasons for not calling Eichler – his testimony was neither (1) necessary nor (2) desirable. Add.339-40. The judge felt Eichler's testimony was "important" to the defense – that having him testify he recalled agreeing with Giblin would stop the Plaintiff from saying "over and over" that there was "nothing in the note" regarding Eichler agreeing with the plan. Add.338-39. Her misguided remark shows how injustice can result when judges supplant counsel's view of what is "important" to a client's case with their own, rather than confining themselves to simply

[12] When such "logical," "plausible," or "tactical" reasons exist *for not calling the witness*, it could not be "natural" to expect that the witness would be called, See Anderson, 411 Mass. at 282-83.

determining if counsel's position for not calling a witness is "plausible," “logical,” or “tactical.” She failed to appreciate that, if the Plaintiff argued “over and over,” *without the benefit of a missing witness instruction,* that there was “no evidence” of Eichler's agreement with the plan, this would have *greatly aided, not harmed* the defense.

After all, the primary defense was based on Giblin's undisputed *compliance* with the FDA guidelines, *regardless of Eichler’s potential testimony.* Additionally, the Plaintiff's own expert, Adler, testified that the Eichler/Giblin relationship was didactic. Add.273-74. It would have been absurd for the jury to believe that if the teacher disagreed with the proposed plan, he would not have altered it. Lastly, without a missing witness instruction, Adler’s argument that Giblin’s note, stating that she “discussed” the case “with” Eichler, somehow did not include the dosage plan, the only treatment mentioned in the note, would have been nonsensical.

The judge also failed to consider the obvious potential negative consequences of having Eichler testify. Anything he might have said about the plan would have been cumulative of Giblin’s and Peters’ testimony,

and cumulative of Adler's testimony about the "didactic" relationship, rendering such testimony undesirable and potentially dangerous to the defense.[13]

Moreover, given the limitations of his memory at deposition, and the judge further limiting his testimony via motion in limine, Eichler's appearance would only have served the Plaintiff. She could cross examine him on his lack of memory and potential bias due to his prior working relationship with Giblin, leaving the defense to unwisely end the case on a weak note.[14] Further, taking the judge's suggestion that Eichler testify that he *now did remember* agreeing with Giblin's plan eleven years earlier would have spelled disaster for the defense after he testified he had no memory at deposition.

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[13] Harris, 458 Md. at 396 ("Most experienced litigators prefer to try a 'lean' case -- or come to regret it if they do not."); Kass, D, "What Judges Want You To Know: Litigate Smarter" Law360, https://www.law360.com/articles/2296787/what-judges-want-you-to-know-litigate-smarter- , Feb. 11, 2025 ("Respect Jurors' Time ....[Federal District Court judge explaining that] Everyone in the courtroom is getting paid except jurors… Keep that in mind...")(internal quotation marks omitted); [13] Trial Techniques with Irving Younger (1978, National Practice Institute) (Oliphant,R. Ed.) at 36 ("PUT IN JUST ENOUGH BUT NO MORE").

[14] Younger, supra, at 34 ("END ON THE 'UP-TICK.' …It is most important to end your case on an affirmative note, if possible, and each day on an affirmative note.")(emphasis supplied), citing James W. Jeans, Trial Advocacy, West Publishing Co. (1975) sec. 1.2.

Defendants also had no burden of proof and no obligation to call *any* witnesses. Thus, it is far from "clear", see Figueroa, supra. at 22, that missing witness argument/instruction was appropriate, but it is evident that the Defendants had "plausible" reasons for not calling Eichler. See Anderson, supra. at 22. On this basis, the instruction was reversible prejudicial error and abuse of discretion. Blackstone v. Cashman, 448 Mass. 255, 270 (2007).

In light of the foregoing, the judge's error in mischaracterizing the position of the defense as to potential testimony of Eichler as "disingenuous," see Add.223, is also clear.[15] To the extent that the defense changed their position regarding Eichler's testimony, they were compelled to do so by the judge raising the missing witness issue, *sua sponte*, and then erroneously giving the instruction.

[15] There was nothing "disingenuous" about counsel's obligation to (a) preserve the potential for Eichler's testimony before all the evidence was developed, but (b) then decide *before* the judge had ruled that a missing witness instruction would be given to *not* to call Eichler, and (c) then pivot to try to have Eichler testify in order to avoid the improper inference and speculation encouraged by the judge's erroneous ruling *after* she issued it. The judge's inquiry on whether Eichler would testify demonstrates that she understood counsel's duties.

VI. Statement of Reasons Why Direct Appellate Review is Appropriate.

This appeal presents issues that meet the criteria for direct review by this Court under M.G.L. c. 211A, § 10(A), and Mass. R. App. 11(a). The novel issue presented has enormous public policy importance because it affects the fair trial rights of all civil and criminal litigants in the Commonwealth. In that same vein, it presents a question of legitimate public interest that justice requires a final determination by the full Supreme Judicial Court.

As discussed in depth in the preceding section, commentators have recommended that the scope and application of the missing witness rule be revisited in light of the more recent development of broad discovery rights. There is no justification for continuing to employ the rule in a manner which, as observed by the commentators, creates serious risk of ungrounded speculation by jurors, and where litigants now have the right to take depositions and engage in other discovery that enable them to decide whether a given witness has potential testimony worth presenting or not, rendering the dangerous and general adverse inference, historically applied under the rule, now unnecessary.

To the extent that cases might arise where the rule may still retain some relevance, the adverse inference it entails should not be permitted where counsel opposing the instruction offers any plausible reason for not calling the witness, and should not depend upon the trial judge's own belief as to whether they would call the witness or not, were they the trial attorney.

Furthermore, this Court should craft a rule specifically prohibiting argument, in supposed reliance upon the *general* adverse inference allowed when the missing witnesses is given, that a jury infer the existence of *specific* facts, where such inference is not supported by the evidence admitted before the jury.

VII. Conclusion

For the above reasons, Defendants-Appellants Kathryn Giblin, M.D., and Massachusetts General Hospital request that this Court grant their application for direct appellate review.

VIII. Certified Copies of Docket Entries from the Superior Court Proceedings.

A certified copy of the docket is attached as Item 1 in the attached Addendum. Relevant colloquies in the trial transcript and rulings concerning the issues for

which direct review is sought, and referred to in the record citations herein, are collected and identified in the Table of Contents of the attached Addendum.

Respectfully Submitted
KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL
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Dated: May 1, 2025

RULE 11(B) CERTIFICATION

Undersigned counsel for the Defendants/Appellants, certify that this application complies with the rules of court that pertain to the filing of applications for direct appellate review, including, but not limited to: Rule 11(b) (length of argument); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). Compliance with the applicable length limit of Rule 11b was ascertained by use of Microsoft Word, which indicates that the total number of pages of the Argument, appearing in 12-point Courier New font, is ten pages.

/s/ Victoria Goetz Beryland_____
Victoria Goetz Berlyand

/s/ Nicholas D. Meunier_____
Nicholas D. Meunier

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2025, I served the attached document(s) through the Electronic Filing Service Provider (Provider) for electronic service insofar as the below counsel are registered users. Insofar as the below counsel are not registered users, I served the attached by conventional mail in accordance with the rules.

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ADDENDUM TABLE OF CONTENTS

1784CV00599 Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez et al vs. Giblin, M.D., Kathryn et al

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 02/24/2017
- DCM Track:
- A - Average
- Initiating Action:
- Malpractice - Medical
- Status Date:
- 02/24/2017
- Case Judge:
-
- Next Event:
-

All Information | Party | Judgment | Event | Tickler | Docket | Disposition

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Judgments

Date	Type	Method	For	Against
01/22/2025	Judgment on Jury Verdict	After Jury Verdict	Juarez, Nelsy Delgado	Massachusetts General Hospital

Events

Date	Session	Location	Type	Event Judge	Result
08/08/2018 09:00 AM	Civil G	BOS-10th FL, CR 1008 (SC)	Malpractice Tribunal	Wilson, Hon. Paul D	Held as Scheduled
09/18/2018 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Conference to Review Status	Wilkins, Hon. Douglas H	Held as Scheduled
09/18/2018 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Pre-Trial Conference	Leibensperger, Hon. Edward P	Canceled
04/16/2020 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Pre-Trial Conference		Rescheduled-Covid-19 emergency
06/10/2020 02:30 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Motion Hearing for Reconsideration	Ullmann, Hon. Robert L	Held via Video/Phone
10/08/2020 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Trial Conference		Rescheduled
10/08/2020 02:15 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Trial Assignment Conference		Held via Video/Phone
10/19/2020 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial		Rescheduled-Covid-19 emergency
10/21/2021 02:00 PM	Civil D		Final Pre-Trial Conference	Connolly, Hon. Rosemary	Held via Video/Phone
02/23/2022 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Trial Conference	Connolly, Hon. Rosemary	Rescheduled

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02/23/2022 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Trial Assignment Conference	Connolly, Hon. Rosemary	Held via Video/Phone
03/08/2022 08:55 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Connolly, Hon. Rosemary	Rescheduled
10/20/2022 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Conference to Review Status	Wilson, Hon. Paul D	Rescheduled
12/14/2022 03:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Trial Conference	Connolly, Hon. Rosemary	Held as Scheduled
01/03/2023 09:00 AM	Civil D		Jury Trial		Rescheduled
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01/05/2023 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Ullmann, Hon. Robert L	Rescheduled
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01/07/2025 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Trial Conference	Cowin, Hon. Jackie	Held as Scheduled
01/08/2025 08:45 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Cowin, Hon. Jackie	Held as Scheduled
01/09/2025 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Cowin, Hon. Jackie	Held as Scheduled
01/10/2025 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Cowin, Hon. Jackie	Held as Scheduled
01/13/2025 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Cowin, Hon. Jackie	Held as Scheduled
01/14/2025 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Cowin, Hon. Jackie	Held as Scheduled
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01/17/2025 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Trial	Cowin, Hon. Jackie	Held as Scheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	02/24/2017	05/25/2017	90	
Answer	02/24/2017	06/26/2017	122	
Rule 12/19/20 Served By	02/24/2017	06/24/2017	120	01/24/2025
Rule 12/19/20 Filed By	02/24/2017	07/24/2017	150	01/24/2025
Rule 12/19/20 Heard By	02/24/2017	08/23/2017	180	01/24/2025
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Tickler	Start Date	Due Date	Days Due	Completed Date
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Docket Information

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02/24/2017	Case assigned to: DCM Track A - Average was added on 02/24/2017		
02/24/2017	Original civil complaint filed.	1	Image
02/24/2017	Civil action cover sheet filed.	2	
02/24/2017	Demand for jury trial entered.		
02/24/2017	Attorney appearance On this date Andrew C Meyer, Jr., Esq. added for Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez		
05/17/2017	Received from Defendant Giblin, M.D., Kathryn and Massachusetts General Hospital : Answer with claim for trial by jury;	3	Image
05/17/2017	Attorney appearance On this date Nancy Lee Watson, Esq. added for Defendant Kathryn Giblin, M.D.		
05/17/2017	Attorney appearance On this date Nancy Lee Watson, Esq. added for Defendant Massachusetts General Hospital		
05/17/2017	Request for medical malpractice tribunal filed by party for: Neurology Applies To: Giblin, M.D., Kathryn (Defendant); Massachusetts General Hospital (Defendant)	6	
05/19/2017	Service Returned for Defendant Giblin, M.D., Kathryn: Service accepted by counsel;	4	Image
05/23/2017	Service Returned for Defendant Massachusetts General Hospital: Service accepted by counsel;	5	Image
06/19/2018	The following form was generated: Notice to Appear Sent On: 06/19/2018 15:28:51		
08/06/2018	Plaintiff files offer of proof Applies To: Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez (Plaintiff)	7	
08/08/2018	Event Result:: Malpractice Tribunal scheduled on: 08/08/2018 09:00 AM Has been: Held as Scheduled Hon. Paul D Wilson, Presiding Appeared: Staff: Timothy C Walsh, Assistant Clerk Magistrate		
08/09/2018	The medical malpractice tribunal made up of Hon. Paul D Wilson, Dr. Michael Shear MD and Michelle Mannix, Esq., having met on 08/08/2018 09:00 AM Malpractice Tribunal reports that there is sufficient evidence to raise a legitimate question as to liability appropriate for judicial inquiry. Judge: Wilson, Hon. Paul D Applies To: Giblin, M.D., Kathryn (Defendant)	8	Image
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08/23/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 08/23/2018 10:15:37		
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Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/18/2018	Event Result:: Conference to Review Status scheduled on: 09/18/2018 02:00 PM Has been: Held as Scheduled Hon. Edward P Leibensperger, Presiding Appeared: Staff: Jane M Mahon, Assistant Clerk Magistrate		
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08/21/2019	Attorney appearance On this date Karen Zahka, Esq. added for Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez		
08/21/2019	Attorney appearance On this date Karen Zahka, Esq. added for Plaintiff Mailene Giovana Juarez Hernandez		
08/23/2019	Party status: Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez: Inactive;	12	
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08/23/2019	Attorney appearance On this date Karen Zahka, Esq. added for Plaintiff Nelsy Delgado Jaurez (as amended)		
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10/03/2019	Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez, Mailene Giovana Juarez Hernandez, Nelsy Delgado Jaurez (as amended)'s Notice of attorney's lien and claims for contstructive trust	13	Image
10/07/2019	Attorney appearance On this date Andrew C Meyer, Jr., Esq. dismissed/withdrawn for Plaintiff Nelsy Delgado Jaurez (as amended)		
10/07/2019	Attorney appearance On this date Andrew C Meyer, Jr., Esq. dismissed/withdrawn for Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez		Image
03/26/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Final Pre-Trial Conference scheduled on: 04/16/2020 02:00 PM Has been: Rescheduled-Covid-19 emergency For the following reason: By Court due to Covid-19 Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
03/27/2020	Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez's Motion for Letter Rogatory for the State of Texas without opposition	14	Image
03/27/2020	Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez's Motion to amend the original complaint with opposition	15	Image
04/21/2020	Letters Rogatory To: The Appropriate Authority Of The State Of Texas RE: Nelsy Delgado Juarez V. Kathryn Giblin, M.D., The Massachusetts General Hospital (Dated 4/15/20) Judge: Ullmann, Hon. Robert L	16	Image
04/21/2020	Endorsement on Motion to amend the original complaint with opposition (#15.0): DENIED (DATED 4/15/20) Denied. The deadline for Rule 15 Motions was two years ago. The court hopes top try this case in October 2020 motion standing the obscures of the COVID-19 pandemic. Plaintiffs argument in support of amendment is far from compelling. Amendment would be unfair to the prospective defendants, and would significantly delay a trial base on events occurring in march 2014. Notice 4/17/20		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/21/2020	Endorsement on Motion for Letter Rogatory for the State of Texas without opposition (#14.0): ALLOWED (Dated 4/15/20) Allowed without opposition Notice 4/17/20		Image
04/28/2020	Opposition to to the Plaintiff's Motion for Letters Rogatory to Conduct Out-of-State Deposition of Rodrigo Zepeda MD and Cross-Motion of the Defendants to Quash the Deposition of Florian Eichler MD filed by Kathryn Giblin, M.D., Massachusetts General Hospital (with opposition)	17	Image
05/18/2020	Kathryn Giblin, M.D.'s MOTION for reconsideration of Court Order dated 04/21/2020 re: paper #14.0. Applies To: Giblin, M.D., Kathryn (Defendant); Massachusetts General Hospital (Defendant)	18	Image
06/01/2020	Attorney appearance On this date Gisela M DaSilva, Esq. added for Defendant Kathryn Giblin, M.D.		
06/01/2020	Attorney appearance On this date Christine D McCleney, Esq. added for Defendant Kathryn Giblin, M.D.		
06/01/2020	Attorney appearance On this date Gisela M DaSilva, Esq. added for Defendant Massachusetts General Hospital		
06/01/2020	Attorney appearance On this date Christine D McCleney, Esq. added for Defendant Massachusetts General Hospital		
06/10/2020	Event Result:: Motion Hearing for Reconsideration scheduled on: 06/10/2020 02:30 PM Has been: Held via Video Conference Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
06/26/2020	Endorsement on Motion for Reconsideration (#18.0): DENIED after hearing for reasons stated on the record Judge: Ullmann, Hon. Robert L		Image
09/24/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Jury Trial scheduled on: 10/19/2020 09:00 AM Has been: Rescheduled-Covid-19 emergency Hon. Gregg J Pasquale, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
10/08/2020	Event Result:: Final Trial Conference scheduled on: 10/08/2020 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
10/08/2020	Event Result:: Trial Assignment Conference scheduled on: 10/08/2020 02:15 PM Has been: Held via Video Conference Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
10/14/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 10/14/2020 15:11:12 Notice Sent To: Karen Zahka, Esq. Keches Law Group 2 Granite Ave Suite 400, Milton, MA 02186 Notice Sent To: Nancy Lee Watson, Esq. Ficksman & Conley, LLP 98 North Washington St Suite 500, Boston, MA 02114 Notice Sent To: Gisela M DaSilva, Esq. Ficksman & Conley, LLP 98 North Washington St Suite 500, Boston, MA 02114 Notice Sent To: Christine D Cooledge, Esq. Ficksman & Conley 98 North Washington St Suite 500, Boston, MA 02114		
10/21/2021	Event Result:: Final Pre-Trial Conference scheduled on: 10/21/2021 02:00 PM Has been: Held via Video/Teleconference Hon. Rosemary Connolly, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/21/2021	Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez, Mailene Giovana Juarez Hernandez, Nelsy Delgado Jaurez (as amended), Kathryn Giblin, M.D., Massachusetts General Hospital's JointMemorandum Joint Pre-Trial Memorandum	19	Image
10/22/2021	The following form was generated: Notice to Appear Sent On: 10/22/2021 10:14:15 Notice Sent To: Karen Zahka, Esq. Keches Law Group 2 Granite Ave Suite 400, Milton, MA 02186 Notice Sent To: Nancy Lee Watson, Esq. Ficksman and Conley, LLP 98 North Washington St Suite 500, Boston, MA 02114 Notice Sent To: Gisela M DaSilva, Esq. Ficksman and Conley, LLP 98 North Washington St Suite 500, Boston, MA 02114 Notice Sent To: Christine D Cooledge, Esq. Ficksman and Conley 98 North Washington St Suite 500, Boston, MA 02114 Notice Sent To: Andrew C Meyer, Jr., Esq. Lubin and Meyer 100 City Hall Plaza 4th Floor, Boston, MA 02108 Notice Sent To: Karen Zahka, Esq. Keches Law Group 2 Granite Ave Suite 400, Milton, MA 02186		
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to TO EXCLUDE ANY CLAIM BASED ON ALLEGED FAILURE TO OBTAIN INFORMED CONSENT	20	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to TO EXCLUDE ANY CLAIM BASED ON BREACH OF IMPLIED AND EXPRESS WARRANTIES	21	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to REDACT PHOTOS OF PLAINTIFF'S BURNS FROM THE MEDICAL RECORDS AND TO PRECLUDE INTRODUCTION OF ANY INFLAMMATORY PHOTOS DEPICTING NELSY DELGADO JUAREZ'S BURNS	22	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to PRECLUDE EXPERT TESTIMONY UNDER DAUBERT/LANIGAN	23	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion to APPOINT AND DESIGNATE ELENA MERCURIO AS TEMPORARY OFFICIAL STENOGRAPHER FOR THE TRIAL OF THIS CASE	24	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Objection to EMPANELMENT OF LESS THAN TWELVE JURORS	25	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's PROPOSED Submission of VOIR DIRE QUESTIONS		Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Submission of Witness List	26	Image
02/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Certificate of Service	27	Image
02/18/2022	Defendants Kathryn Giblin, M.D., Massachusetts General Hospital's Assented to Motion to continue Trial	28	Image
02/22/2022	Event Result:: Final Trial Conference scheduled on: 02/23/2022 02:00 PM Has been: Rescheduled For the following reason: Converted to status conference Hon. Rosemary Connolly, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
02/22/2022	Plaintiffs Mailene Giovana Juarez Hernandez, Nelsy Delgado Jaurez (as amended)'s Submission of witness list		Image
02/22/2022	Plaintiff Nelsy Delgado Jaurez (as amended)'s Motion for attorney conducted Voir Dire	29	Image
02/22/2022	Plaintiff Nelsy Delgado Jaurez (as amended)'s Motion in limine to preclude evidence or reference to various irrelevant and inadmissible matters	30	Image
02/22/2022	Plaintiff Mailene Giovana Juarez Hernandez's Memorandum in opposition to defendant's motion to 'redact', A/K/A preclude photographs that accurately depict the plaintiff's damages in this case, as well as the natural progression of the disease course she suffered.	31	Image
02/22/2022	Plaintiff Nelsy Delgado Jaurez (as amended)'s Memorandum in opposition to defendant's motion in limine to preclude expert testimony under Daubert/Lanigan	32	Image

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02/22/2022	Plaintiff Nelsy Delgado Jaurez (as amended)'s Memorandum in opposition to defendant's motion in limine to preclude plaintiff's claim for lack of informed consent	33	Image
02/23/2022	Event Result:: Trial Assignment Conference scheduled on: 02/23/2022 02:00 PM Has been: Held via Video/Teleconference Hon. Rosemary Connolly, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
02/24/2022	Event Result:: Jury Trial scheduled on: 03/08/2022 08:55 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Rosemary Connolly, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
02/24/2022	The following form was generated: Notice to Appear Sent On: 02/24/2022 15:21:03		
03/01/2022	Endorsement on Motion to To Continue Trial (#28.0): ALLOWED (date 2/22/22) Allowed The Court shall schedule a Trial Assignment Conference via zoom and a trial counsel shall attend for the purpose of scheduling a trial date. Notice 2/23/22		Image
04/04/2022	Attorney appearance On this date Sean C Flaherty, Esq. added for Plaintiff Mailene Giovana Juarez Hernandez		
04/04/2022	Attorney appearance On this date Sean C Flaherty, Esq. added for Plaintiff Nelsy Delgado Jaurez (as amended)		
04/07/2022	Opposition to plaintiff's motion In Limine to preclude evidence or reference to various irrelevant and inadmissible matters filed by Kathryn Giblin, M.D., Massachusetts General Hospital	34	Image
04/07/2022	Opposition to plaintiff's motion for attorney conduction Voir Dire filed by Kathryn Giblin, M.D., Massachusetts General Hospital (limited)	35	Image
04/07/2022	Reply/Sur-reply to plaintiff's memorandum in opposition to defendant's motion In Limine to preclude expert testimony under Dauber/Lanigan. Applies To: Giblin, M.D., Kathryn (Defendant); Massachusetts General Hospital (Defendant)	36	Image
04/07/2022	Reply/Sur-reply to plaintiff's opposition to defendant's motion In limine to redact photos of plaintiff's Burns from the medical records and to preclude introduction of any inflammatory photos depicting Nelsy Delgado Juarez's burns. Applies To: Giblin, M.D., Kathryn (Defendant); Massachusetts General Hospital (Defendant)	37	Image
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08/25/2022	Attorney appearance On this date Nancy Lee Watson, Esq. dismissed/withdrawn for Defendant Kathryn Giblin, M.D.		
08/25/2022	Attorney appearance On this date Nancy Lee Watson, Esq. dismissed/withdrawn for Defendant Massachusetts General Hospital		
10/20/2022	Event Result:: Conference to Review Status scheduled on: 10/20/2022 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Paul D Wilson, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
10/21/2022	Attorney appearance On this date John D Cassidy, Esq. added for Defendant Kathryn Giblin, M.D.		
10/21/2022	Attorney appearance On this date John D Cassidy, Esq. added for Defendant Massachusetts General Hospital		
12/13/2022	Attorney appearance On this date Austin Dana, Esq. added for Plaintiff Nelsy Delgado Jaurez (as amended)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/13/2022	Attorney appearance electronically filed.		Image
12/13/2022	Plaintiffs Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez's Motion in limine to preclude FDA Inserts and any evidence and/or reference to them or the FDA Guidelines and motion to preclude expert testimony regarding same	38	Image
12/13/2022	Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez's Motion in limine to preclude any reference to plaintiff's immigration status	39	Image
12/14/2022	Attorney appearance On this date Gisela M DaSilva, Esq. dismissed/withdrawn for Defendant Kathryn Giblin, M.D.		Image
12/14/2022	Event Result:: Final Trial Conference scheduled on: 12/14/2022 03:00 PM Has been: Held as Scheduled Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
12/14/2022	Attorney appearance On this date Gisela M DaSilva, Esq. dismissed/withdrawn for Defendant Massachusetts General Hospital		Image
12/14/2022	Event Result:: Jury Trial scheduled on: 01/03/2023 09:00 AM Has been: Rescheduled For the following reason: Lack of Jurors Hon. Robert L Ullmann, Presiding		
12/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine for An Instruction Regarding Trial Lawyers for Justice	40	Image
12/16/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Certificate of Service		Image
12/20/2022	Plaintiff Nelsy Delgado Jaurez (as amended)'s Motion in Opposition to Defendants' Motion in Limine to Preclude Reference to the Name of Plaintiff's Counsels' Law Firm, Trial Lawyers for Justice	41	Image
12/20/2022	Plaintiff Nelsy Delgado Jaurez (as amended)'s Certificate of Service		Image
12/22/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to Permit the Trial Testimony of Fact Witness, Florian Eichler, M.D.	42	Image
12/22/2022	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Certificate of Service		Image
12/22/2022	Plaintiffs Mailene Giovana Juarez Hernandez, Nelsy Delgado Jaurez (as amended)'s Supplemental Motion in limine, to preclude FDA inserts and any evidence and/or reference to them or the FDA Guidelines and motion to preclude expert testimony regarding same	43	Image
12/22/2022	Certificate of Service		Image
12/27/2022	ORDER: procedural order see paper #44 dated (12/15/2022) notice sent (12/23/2022)	44	Image
12/27/2022	Endorsement on Motion in limine to preclude any reference to plaintiff's immigration status (#45.0): Other action taken ALLOWED without opposition. dated (12/14/2022) notice sent (12/23/2022)		Image
12/27/2022	Endorsement on Motion of the defendants in limine to preclude expert testimony under daubert/lanigan (#23.0): DENIED DENIED for reasons set forth on the record, and without prejudice to defendant's right to oppose particular witness statements. dated (12/14/2022) notice sent (12/23/2022)		Image
12/27/2022	Endorsement on Motion of the defendants, Kathryn giblin, m.d. and the Massachusetts general hospital, in limine to exclude any claim based on breach of implied and express warranties (#21.0): Other action taken ALLOWED without opposition. dated (12/14/2022) notice sent (12/23/2022)		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/27/2022	Endorsement on Motion of the defendants, Kathryn giblin, m.d. and the Massachusetts general hospital, in limine to exclude any claim based on alleged failure to obtain informed consent (#20.0): Other action taken ALLOWED for reasons set forth on the record, including, lack of any evidence of damages separate and apart from negligence damages, see generally roukounakis v. messer, 63 mass.app. ct. 482,485-487 (2005), juror confusion, lack of evidence that this was a duty of Kathryn giblin, m.d., and insufficient expert discloses. dated (12/14/2022) notice sent (12/23/2022)		Image
12/27/2022	Endorsement on Motion for attorney conducted voir dire (#29.0): Other action taken ALLOWED to the extent set forth on the record. dated (12/14/2022) notice sent (12/23/2022)		Image
12/28/2022	Defendant Massachusetts General Hospital's Motion in limine concerning the Application of G.L c. 231 Sec. 85K	45	Image
12/28/2022	Certificate of Service		Image
12/29/2022	Endorsement on Motion for An Instruction Regarding Trial Lawyers for Justice (#40.0): ALLOWED to the extent the Court will inform the Venire that Trial Lawyers for Justice and Ficksman & Conley are both private, for-profit law firms. (dated 12/21/22) notice sent 12/28/22		Image
01/02/2023	Plaintiff Nelsy Delgado Jaurez (as amended)'s Motion in limine to preclude Testimony of Florian Eichler M.D.	46	Image
01/02/2023	Plaintiff Nelsy Delgado Jaurez (as amended)'s Certificate of Service		Image
01/03/2023	Event Result:: Jury Trial scheduled on: 01/04/2023 09:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
01/03/2023	Event Result:: Jury Trial scheduled on: 01/05/2023 09:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
01/03/2023	Event Result:: Jury Trial scheduled on: 01/06/2023 09:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
01/04/2023	Plaintiff Nelsy Delgado Jaurez (as amended)'s Motion in limine to preclude Cumulative Expert Testimony of Defendants Proffered Experts	47	Image
01/04/2023	Certificate of Service		Image
01/04/2023	Opposition to Plaintiff's Motion and Supplemental Motion in Limine to Preclude FDA Inserts and Any Evidence and/or Reference to Them or the FDA Guidelines and Motion to Preclude Expert Testimony Regarding Same filed by Kathryn Giblin, M.D., Massachusetts General Hospital	48	Image
01/04/2023	Certificate of Service		Image
01/05/2023	Endorsement on Motion in limine to preclude FDA inserts and any evidence and/or reference to them or the FDA guidelines and motion to preclude expert testimony regarding same (#38.0): Other action taken see endorsed order on paper #43 dated (1/3/23)		Image
01/05/2023	Endorsement on Motion in limine to preclude any reference to plaintiff's immigration status (#39.0): ALLOWED allowed without opposition dated (1/3/23)		Image
01/05/2023	Endorsement on Motion in limine to REDACT PHOTOS OF PLAINTIFF'S BURNS FROM THE MEDICAL RECORDS AND TO PRECLUDE INTRODUCTION OF ANY INFLAMMATORY PHOTOS DEPICTING NELSY DELGADO JUAREZ'S BURNS (#22.0): Other action taken see order issued this date dated (1/3/23)		Image
01/05/2023	Endorsement on Supplemental Motion in limine to preclude FDA inserts and any evidence and/or reference to them or the FDA guidelines and motion to preclude expert testimony regarding same (#43.0): DENIED		Image

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	Denied as to any instructions for use of a drug, including but not limited to dosing. These are directions, not statements offered for their truth. See Mass. G Evid. 801 (c) (2) and notes there to. This ruling is without prejudice to either party's right to exclude study results and other state4ments offered for their truth. dated (1/3/23)		
01/05/2023	ORDER: on defendants' motion to exclude photographs of plaintiff's injuries dated (1/3/2023)	49	Image
01/05/2023	Event Result:: Jury Trial scheduled on: 01/09/2023 09:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
01/05/2023	Event Result:: Jury Trial scheduled on: 01/10/2023 09:00 AM Has been: Rescheduled For the following reason: Request of Defendant Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
01/05/2023	Event Result:: Jury Trial scheduled on: 01/11/2023 09:00 AM Has been: Canceled For the following reason: Request of Defendant Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
02/12/2023	The following form was generated: Notice to Appear Sent On: 02/12/2023 13:07:02		
03/20/2023	Event Result:: Trial Assignment Conference scheduled on: 03/20/2023 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
03/23/2023	ORDER: Trial Order (see paper No. 50 for details). (dated 3/20/23) notice sent 3/23/23	50	Image
01/02/2025	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to preclude any reference to any other lawsuits against the Defendants and/or experts	51	Image
01/02/2025	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Motion in limine to request prior review of visual aids intended to be used by the Plaintiff during opening statements	52	Image
01/02/2025	Opposition to Plaintiff's motion in limine to preclude cumulative expert testimony of Defendants proffered experts filed by Kathryn Giblin, M.D., Massachusetts General Hospital	53	Image
01/02/2025	Certificate of Service		Image
01/07/2025	Application of Defendant Kathryn Giblin, M.D. for hospital records from Boston Children's Hospital, with affidavit of notice in compliance with SC rule 13. Filed 1/6/2025 Applies To: Jaurez (as amended), Nelsy Delgado (Plaintiff)	54	
01/07/2025	Attorney appearance electronically filed.		Image
01/07/2025	Event Result:: Final Trial Conference scheduled on: 01/07/2025 02:00 PM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/07/2025	Defendants Kathryn Giblin, M.D., Massachusetts General Hospital's Motion to Appoint and Designate Allyson Pollier as Temporary Official Stenographer for the Trial of this Case	55	
01/08/2025	Endorsement on Motion to Appoint and Designate Allyson Pollier as Temporary Official Stenographer for the Trial of this Case (#55.0): ALLOWED (dated 1/7/2025) Notice sent 1/8/25		Image

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01/08/2025	Event Result:: Jury Trial scheduled on: 01/08/2025 08:45 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/09/2025	Event Result:: Jury Trial scheduled on: 01/09/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/10/2025	ORDER issued on application/motion (#54.0) to allow to inspect hospital records regarding Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez, from Boston Children's Hospital . Dated 1/9/2025 Judge: Connolly, Hon. Rosemary	56	
01/10/2025	Event Result:: Jury Trial scheduled on: 01/10/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/13/2025	Event Result:: Jury Trial scheduled on: 01/13/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/13/2025	Party(s) file Stipulation Applies To: Hernandez, Mailene Giovana Juarez (Plaintiff); Jaurez (as amended), Nelsy Delgado (Plaintiff); Giblin, M.D., Kathryn (Defendant); Massachusetts General Hospital (Defendant)	57	Image
01/14/2025	Plaintiff Nelsy Delgado Jaurez (as amended)'s Motion to Exclude Late-Disclosed, Edited Video Surveillance Footage from Evidence at Trial ENDORSEMENT: ALLOWED after hearing, and for the reasons stated on the record. Specifically, there are segments/clips missing from the video, without explanation, and no witness will testify as to the missing segments. The video is therefore not a fair and accurate representation of what it purports to show. (Dated: 1/14/25) Notice sent 1/15/25	58	Image
01/14/2025	Opposition to Motion to Exclude Late-Disclosed, Edited Video Surveillance Footage from Evidence at Trial filed by Kathryn Giblin, M.D., Massachusetts General Hospital	59	Image
01/14/2025	Event Result:: Jury Trial scheduled on: 01/14/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/15/2025	Defendant Massachusetts General Hospital's Motion for Directed Verdict Endorsement: DENIED. dated (1/14/5) Notice Sent 1/16/25	60	Image
01/15/2025	Defendant Kathryn Giblin, M.D.'s Motion for Directed Verdict Endorsement: DENIED. dated (1/14/25) Notice Sent 1/16/25	61	Image
01/15/2025	Event Result:: Jury Trial scheduled on: 01/15/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding		

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	Staff: Paul Kenneally, Assistant Clerk		
01/16/2025	Event Result:: Jury Trial scheduled on: 01/16/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/17/2025	ORDER: Ruling on Defendants' Emergency Motion For Leave To Take Deposition Of Florian Eichler DENIED. See paper #62 dated (1/16/25) Notice sent 1/21/25	62	Image
01/17/2025	Defendants Kathryn Giblin, M.D., Massachusetts General Hospital's EMERGENCY Motion for Leave To Take Audiovisual Deposition Of Florian Eichler, M.D. (Filed 1/16/25) Endorsement: Denied. See separate order. dated (1/16/25) Notice sent 1/21/25	63	Image
01/17/2025	Event Result:: Jury Trial scheduled on: 01/17/2025 09:00 AM Has been: Held as Scheduled Hon. Jackie Cowin, Presiding Staff: Paul Kenneally, Assistant Clerk		
01/21/2025	Plaintiff Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez's Motion in limine to Limit Defendant Expert Testimony Pursuant to Expert Disclosures (filed 1/9/2025)	64	Image
01/21/2025	Endorsement on Motion in limine to Limit Defendant Expert Testimony Pursuant to Expert Disclosures (#64.0): Other action taken See comments on FTR. (dated 1/9/2025) Notice sent 1/24/25		Image
01/21/2025	Endorsement on Motion to APPOINT AND DESIGNATE ELENA MERCURIO AS TEMPORARY OFFICIAL STENOGRAPHER FOR THE TRIAL OF THIS CASE (#24.0): ALLOWED without opposition. (dated 1/7/2025) Notice sent 1/24/25		Image
01/21/2025	Endorsement on Motion in limine to Permit the Trial Testimony of Fact Witness, Florian Eichler, M.D. (#42.0): ALLOWED in that Eichler may testify to his role at the hospital, his role vis-à-vis the residents: the practices and procedures of the hospital; and his practices and procedures-i.e. what is supposed to happen. He cannot testify to facts of which he has no memory, nor may he be asked hypotheticals based on assumed facts, since he is not testifying as an expert witness. (dated 1/9/2025) Notice sent 1/24/25		Image
01/21/2025	Endorsement on Motion in Limine concerning the Application of G.L c. 231 Sec. 85K (#45.0): ALLOWED without opposition by the Plaintiff. (dated 1/7/2025) Notice sent 1/24/25		Image
01/21/2025	Endorsement on Motion in limine to preclude Cumulative Expert Testimony of Defendants Proffered Experts (#47.0): Other action taken Dr. Kearns will be permitted to testify, but will not be permitted to give testimony that duplicates that given by the neurologist, including that the defendant met the relevant standard of care. (dated 1/9/2025) Notice sent 1/24/25		Image
01/21/2025	Endorsement on Motion in limine to preclude any reference to any other lawsuits against the Defendants and/or experts (#51.0): ALLOWED (dated 1/7/2025) Notice sent 1/24/25		Image
01/21/2025	Endorsement on Motion in limine to preclude Testimony of Florian Eichler M.D (#46.0): Other action taken See order on no. 42. dated (1/9/25) Notice sent 1/22/25		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/21/2025	Endorsement on Motion in limine to request prior review of visual aids intended to be used by the Plaintiff during opening statements (#52.0): ALLOWED As set forth at the final trial conference. dated (1/7/25) Notice sent 1/22/25		Image
01/21/2025	Endorsement on Motion in limine to preclude evidence or reference to various irrelevant and inadmissible matters (#30.0): Reserved For objections at trial. dated (1/7/25) Notice sent 1/22/25		Image
01/22/2025	Verdict Slip dated (1/17/25) Notice sent 01/22/25	65	Image
01/24/2025	JUDGMENT entered on this date.: Judgment on Jury Verdict After Jury Verdict Presiding: Hon. Jackie Cowin Judgment For: Nelsy Delgado Juarez Judgment Against: Kathryn Giblin, M.D. Massachusetts General Hospital Terms of Judgment: Interest Begins: 02/24/2017 Jdgmnt Date: 01/22/2025 Interest Rate: .0619 Daily Interest Rate: .000169 Damages: Damage Amt: 8000000.00 Costs Pd to Court: 285.00 Judgment Total: 11,906,213.00 47 entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) notice sent 1/24/25 dated 1/22/25	66	Image
02/03/2025	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Notice of Appeal	67	Image
02/03/2025	Notice of appeal filed. (See p#67) Notice sent 2/5/25 Applies To: Giblin, M.D., Kathryn (Defendant); Massachusetts General Hospital (Defendant)		
02/06/2025	Defendant Kathryn Giblin, M.D., Massachusetts General Hospital's Certificate of Transcript Order	68	Image
03/10/2025	Transcript of 1/8/25 1/9/25 1/10/25 1/13/25 1/14/25 1/15/25 1/16/25 1/17/25 received from Superior Court Reporters Inc (via email)		
03/31/2025	Appeal: Statement of the Case on Appeal (Cover Sheet).		Image
03/31/2025	Notice of assembly of record sent to Counsel		Image
03/31/2025	Notice to Clerk of the Appeals Court of Assembly of Record		Image
04/11/2025	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2025-P-0440) was entered in this Court on April 10, 2025.	69	Image

Case Disposition

Disposition	Date	Case Judge
Disposed by Court Finding	01/24/2025	

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 17-0599 D

NELSY DELGADO JUAREZ, PPA MAILENE GIOVANA JUAREZ HERNANDEZ, AND
MAILENE GIOVANA JUAREZ HERNANDEZ,
Plaintiff,
V.
KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2017 FEB 24 P 3:44
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

COMPLAINT

Count I.

1. The plaintiff, Nelsy Delgado Juarez, is a minor who brings this action through her Mother and next friend, Mailene Giovana Juarez Hernandez, a resident of Lynn, Essex County, Massachusetts.

2. The defendant, Kathryn Giblin, M.D., was at all times relevant to this complaint a physician licensed to practice her profession in the Commonwealth of Massachusetts.

3. At all times relevant to this complaint, the defendant, Kathryn Giblin, M.D., represented and held herself out to be a physician, skilled in the treatment of various illnesses and conditions and, in particular, represented to the minor plaintiff's parents that she was knowledgeable, competent, and qualified to diagnose and treat the minor plaintiff's condition on or about March 2014-April 2014.

4. On or about March 2014-April 2014, the minor plaintiff's parents submitted the minor plaintiff to the care and treatment of the defendant, Kathryn Giblin, M.D., who negligently, carelessly, and without regard for the minor plaintiff's health and well being, treated the minor plaintiff in a manner resulting in the minor plaintiff's severe personal injuries.

5. The injuries sustained by the minor plaintiff, Nelsy Delgado Juarez, were the direct and proximate result of the carelessness, unskillfulness, negligence and improper care and treatment by the defendant, Kathryn Giblin, M.D., including, but not limited to the following:

    a. Defendant's misrepresentations to the minor plaintiff's parents that she was knowledgeable, skillful, and competent to diagnose and treat the minor plaintiff's medical condition on or about March 2014-April 2014;

b. Defendant's failure to adequately and properly diagnose the minor plaintiff's medical condition on or about March 2014-April 2014, and her failure to prescribe proper and timely treatment for said condition;

c. Defendant's failure to recognize, or have the knowledge to recognize her inability and lack of skill to diagnose and treat the minor plaintiff, when the defendant knew or should have known in the exercise of due care, the foreseeable consequences of her inability and failure to properly and skillfully provide the minor plaintiff with acceptable medical and diagnostic services;

d. Defendant's failure to possess or negligent failure to exercise that degree of skill, training, and care as is possessed and exercised by average qualified members of the medical profession practicing her specialty; and

e. Defendant's failure to inform and to warn of the risks involved in or associated with the minor plaintiff's condition and failure to inform and to warn about the treatment of said condition.

6. As a direct and proximate result of the negligence, carelessness, and unskillfulness of the defendant, Kathryn Giblin, M.D., the minor plaintiff, Nelsy Delgado Juarez, was caused to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for her medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and her ability to enjoy life has been permanently adversely affected.

WHEREFORE, the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, Kathryn Giblin, M.D., in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count II.

1. The minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein Paragraphs One through Six of Count I of this complaint as if each were set forth here in its entirety.

2. On or about March 2014-April 2014, the defendant, Kathryn Giblin, M.D., contracted with the minor plaintiff's parents to provide professional services related to the minor plaintiff's medical care and treatment.

3. The defendant, Kathryn Giblin, M.D., expressly and impliedly warranted to the minor plaintiff's parents that she would perform and render said professional services in accordance with accepted standards for the practice of medicine, and that she would possess and exercise that degree of skill and care possessed and exercised by the average qualified members of the medical profession practicing her specialty.

4. On or about March 2014-April 2014, the defendant, Kathryn Giblin, M.D., breached her express and implied warranties by failing to perform and render professional services in accordance with accepted standards for the practice of medicine, and by failing to possess and exercise that degree of skill and care possessed and exercised by the average qualified members of the medical profession practicing her specialty.

5. As a direct and proximate result of the defendant, Kathryn Giblin, M.D.'s breach of express and implied warranties, the minor plaintiff, Nelsy Delgado Juarez, was caused to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for her medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and her ability to enjoy life has been permanently adversely affected.

WHEREFORE, the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, Kathryn Giblin, M.D., in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count III.

1. The minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein Paragraphs One through Six of Count I and Paragraphs One through Five of Count II of this complaint as if each were set forth here in its entirety.

2. On or about March 2014-April 2014, average qualified members of the medical profession practicing the defendant's specialty knew or should have known of the risks, potential consequences and alternatives to the defendant's choice of treatment of the minor plaintiff.

3. On or about March 2014-April 2014, the defendant, Kathryn Giblin, M.D., knew or should have known of the risks, potential consequences and alternatives to the defendant's choice of treatment of the minor plaintiff.

4. On or about March 2014-April 2014, the defendant, Kathryn Giblin, M.D., did not inform the minor plaintiff's parents of the alternatives to and risks and potential consequences of the defendant's choice of treatment of the minor plaintiff.

5. If the defendant, Kathryn Giblin, M.D., had informed the minor plaintiff's parents of the alternatives to and risks and potential consequences of the defendant's choice of treatment of the minor plaintiff, neither the minor plaintiff's parents nor a reasonable person in their position would have elected the defendant's choice of treatment.

6. The alternatives to and the risks and potential consequences of the defendant's choice of treatment were material to a decision by the minor plaintiff's parents and a reasonable person in their position as to whether to undergo the defendant's choice of treatment.

7. As a direct and proximate result of the defendant, Kathryn Giblin, M.D.'s failure to inform the minor plaintiff's parents of the alternatives to and risks and potential consequences of the defendant's treatment, the minor plaintiff, Nelsy Delgado Juarez, was caused to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for her medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and her ability to enjoy life has been permanently adversely affected.

WHEREFORE, the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, Kathryn Giblin, M.D., in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count IV.

1. The plaintiff, Mailene Giovana Juarez Hernandez, is the mother of Nelsy Delgado Juarez, and the person responsible for her support and medical care and a resident of Lynn, Essex County, Massachusetts.

2. The defendant, Kathryn Giblin, M.D., was at all times relevant to this complaint a physician licensed to practice in the Commonwealth of Massachusetts.

3. The plaintiff, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein the allegations contained in the aforementioned Counts pleaded by the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, against the defendant, Kathryn Giblin, M.D., in this complaint as if each were set forth here in its entirety.

4. As a direct and proximate result of the defendant, Kathryn Giblin, M.D.'s negligence, breach of warranties and failure to obtain informed consent, the plaintiff, Mailene Giovana Juarez Hernandez, has incurred and will continue to incur great expense for the medical, surgical, and hospital care and treatment of Nelsy Delgado Juarez, throughout the life of Nelsy Delgado Juarez.

WHEREFORE, the plaintiff, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, Kathryn Giblin, M.D., in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count V.

1. The plaintiff, Mailene Giovana Juarez Hernandez, is the mother of Nelsy Delgado Juarez, and a resident of Lynn, Essex County, Massachusetts.

2. The defendant, Kathryn Giblin, M.D., was at all times relevant to this complaint a physician licensed to practice in the Commonwealth of Massachusetts.

3. The plaintiff, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein the allegations contained in the aforementioned Counts pleaded by the minor plaintiff, Nelsy

Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, against the defendant, Kathryn Giblin, M.D., in this complaint as if each were set forth here in its entirety.

4. As a direct and proximate result of the defendant, Kathryn Giblin, M.D.'s negligence, breach of warranties and failure to obtain informed consent, the plaintiff, Mailene Giovana Juarez Hernandez, has suffered and will continue to suffer severe emotional distress resulting in substantial physical injury.

WHEREFORE, the plaintiff, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, Kathryn Giblin, M.D., in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count VI.

1. The plaintiff, Mailene Giovana Juarez Hernandez, is the mother of Nelsy Delgado Juarez, and a resident of Lynn, Essex County, Massachusetts.

2. The defendant, Kathryn Giblin, M.D., was at all times relevant to this complaint a physician licensed to practice in the Commonwealth of Massachusetts.

3. The plaintiff, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein the allegations contained in the aforementioned Counts pleaded by the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, against the defendant, Kathryn Giblin, M.D., in this complaint as if each were set forth here in its entirety.

4. As the direct and proximate result of the negligence, breach of warranties, and failure to obtain informed consent of the defendant, Kathryn Giblin, M.D., the plaintiff, Mailene Giovana Juarez Hernandez, has had severely restricted the benefit of the full services, society, and affection of Nelsy Delgado Juarez.

WHEREFORE, the plaintiff, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, Kathryn Giblin, M.D., in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count VII.

1. The plaintiff, Nelsy Delgado Juarez, is a minor who brings this action through her Mother and next friend, Mailene Giovana Juarez Hernandez, a resident of Lynn, Essex County, Massachusetts.

2. The defendant, The Massachusetts General Hospital, was at all times relevant to this complaint a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a principal place of business at 55 Fruit Street, Boston, in Suffolk County, Massachusetts.

3. At all times relevant to this complaint, the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, represented and held itself out to be skilled in the treatment of

various illnesses and conditions and, in particular, represented to the minor plaintiff's parents that it was knowledgeable, competent, and qualified to diagnose and treat the minor plaintiff's condition on or about March 2014-April 2014.

4. On or about March 2014-April 2014, the minor plaintiff's parents submitted the minor plaintiff to the care and treatment of the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, who negligently, carelessly, and without regard for the minor plaintiff's health and well being, treated the minor plaintiff in a manner resulting in the minor plaintiff's severe personal injuries.

5. The injuries sustained by the minor plaintiff, Nelsy Delgado Juarez, were the direct and proximate result of the carelessness, unskillfulness, negligence and improper care and treatment by the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, including, but not limited to the following:

    a. Defendant's misrepresentations to the minor plaintiff's parents that it was knowledgeable, skillful, and competent to diagnose and treat the minor plaintiff's medical condition on or about March 2014-April 2014;

    b. Defendant's failure to adequately and properly diagnose the minor plaintiff's medical condition on or about March 2014-April 2014, and its failure to prescribe proper and timely treatment for said condition;

    c. Defendant's failure to recognize, or have the knowledge to recognize its inability and lack of skill to diagnose and treat the minor plaintiff, when the defendant knew or should have known in the exercise of due care, the foreseeable consequences of its inability and failure to properly and skillfully provide the minor plaintiff with acceptable medical and diagnostic services;

    d. Defendant's failure to possess or negligent failure to exercise that degree of skill, training, and care as is possessed and exercised by average qualified members of the medical profession practicing its specialty;

    e. Defendant's failure to inform and to warn of the risks involved in or associated with the minor plaintiff's condition and failure to inform and to warn about the treatment of said condition; and

    f. Defendant's failure to exercise reasonable care in hiring, supervising, employing and/or continuing to employ its agents, servants, or employees.

6. As a direct and proximate result of the negligence, carelessness, and unskillfulness of the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, the minor plaintiff, Nelsy Delgado Juarez, was caused to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for her medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and her ability to enjoy life has been permanently adversely affected.

WHEREFORE, the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, The Massachusetts General Hospital, in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count VIII.

1. The minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein Paragraphs One through Six of Count VII of this complaint as if each were set forth here in its entirety.

2. On or about March 2014-April 2014, the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, contracted with the minor plaintiff's parents to provide professional services related to the minor plaintiff's medical care and treatment.

3. The defendant, The Massachusetts General Hospital, by its agents, servants, or employees, expressly and impliedly warranted to the minor plaintiff's parents that it would perform and render said professional services in accordance with accepted standards for the practice of medicine, and that it would possess and exercise that degree of skill and care possessed and exercised by the average qualified members of the medical profession practicing its specialty.

4. On or about March 2014-April 2014, the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, breached its express and implied warranties by failing to perform and render professional services in accordance with accepted standards for the practice of medicine, and by failing to possess and exercise that degree of skill and care possessed and exercised by the average qualified members of the medical profession practicing its specialty.

5. As a direct and proximate result of the defendant, The Massachusetts General Hospital, by its agents', servants', or employees breach of express and implied warranties, the minor plaintiff, Nelsy Delgado Juarez, was caused to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for her medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and her ability to enjoy life has been permanently adversely affected.

WHEREFORE, the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, The Massachusetts General Hospital, in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count IX.

1. The minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein Paragraphs One through Five of Count VII and Paragraphs One through Five of Count VIII of this complaint as if each were set forth here in its entirety.

2. On or about March 2014-April 2014, average qualified members of the medical profession practicing the defendant's specialty knew or should have known of the risks, potential consequences and alternatives to the defendant's choice of treatment of the minor plaintiff.

3. On or about March 2014-April 2014, the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, knew or should have known of the risks, potential consequences and alternatives to the defendant's choice of treatment of the minor plaintiff.

4. On or about March 2014-April 2014, the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, did not inform the minor plaintiff's parents of the alternatives to and risks and potential consequences of the defendant's choice of treatment of the minor plaintiff.

5. If the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, had informed the minor plaintiff's parents of the alternatives to and risks and potential consequences of the defendant's choice of treatment of the minor plaintiff, neither the minor plaintiff's parents nor a reasonable person in their position would have elected the defendant's choice of treatment.

6. The alternatives to and the risks and potential consequences of the defendant's choice of treatment were material to a decision by the minor plaintiff's parents and a reasonable person in their position as to whether to undergo the defendant's choice of treatment.

7. As a direct and proximate result of the defendant, The Massachusetts General Hospital, by its agents', servants', or employees' failure to inform the minor plaintiff's parents of the alternatives to and risks and potential consequences of the defendant's treatment, the minor plaintiff, Nelsy Delgado Juarez, was caused to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for her medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and her ability to enjoy life has been permanently adversely affected.

WHEREFORE, the minor plaintiff, Nelsy Delgado Juarez , through her Mother and next friend, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, The Massachusetts General Hospital, in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count X.

1. The plaintiff, Mailene Giovana Juarez Hernandez, is the mother of Nelsy Delgado Juarez, and the person responsible for her support and medical care and a resident of Lynn, Essex County, Massachusetts.

2. The defendant, The Massachusetts General Hospital, was at all times relevant to this complaint a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a principal place of business at 55 Fruit Street, Boston, in Suffolk County, Massachusetts.

3. The plaintiff, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein the allegations contained in the aforementioned Counts pleaded by the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, against the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, in this complaint as if each were set forth here in its entirety.

4. As a direct and proximate result of the defendant, The Massachusetts General Hospital, by its agents', servants', or employees' negligence, breach of warranties and failure to obtain informed consent, the plaintiff, Mailene Giovana Juarez Hernandez, has incurred and will continue to incur great expense for the medical, surgical, and hospital care and treatment of Nelsy Delgado Juarez, throughout the life of Nelsy Delgado Juarez.

WHEREFORE, the plaintiff, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, The Massachusetts General Hospital, in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count XI.

1. The plaintiff, Mailene Giovana Juarez Hernandez, is the mother of Nelsy Delgado Juarez, and a resident of Lynn, Essex County, Massachusetts.

2. The defendant, The Massachusetts General Hospital, was at all times relevant to this complaint a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a principal place of business at 55 Fruit Street, Boston, in Suffolk County, Massachusetts.

3. The plaintiff, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein the allegations contained in the aforementioned Counts pleaded by the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, against the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, in this complaint as if each were set forth here in its entirety.

4. As a direct and proximate result of the defendant, The Massachusetts General Hospital, by its agents', servants', or employees' negligence, breach of warranties and failure to obtain informed consent, the plaintiff, Mailene Giovana Juarez Hernandez, has suffered and will continue to suffer severe emotional distress resulting in substantial physical injury.

WHEREFORE, the plaintiff, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, The Massachusetts General Hospital, in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

Count XII.

1. The plaintiff, Mailene Giovana Juarez Hernandez, is the mother of Nelsy Delgado Juarez, and a resident of Lynn, Essex County, Massachusetts.

2. The defendant, The Massachusetts General Hospital, was at all times relevant to this complaint a corporation duly organized and existing under the laws of the Commonwealth of

Massachusetts, with a principal place of business at 55 Fruit Street, Boston, in Suffolk County, Massachusetts.

3. The plaintiff, Mailene Giovana Juarez Hernandez, repeats and reavers fully herein the allegations contained in the aforementioned Counts pleaded by the minor plaintiff, Nelsy Delgado Juarez, through her Mother and next friend, Mailene Giovana Juarez Hernandez, against the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, in this complaint as if each were set forth here in its entirety.

4. As the direct and proximate result of the negligence, breach of warranties, and failure to obtain informed consent of the defendant, The Massachusetts General Hospital, by its agents, servants, or employees, the plaintiff, Mailene Giovana Juarez Hernandez, has had severely restricted the benefit of the full services, society, and affection of Nelsy Delgado Juarez.

WHEREFORE, the plaintiff, Mailene Giovana Juarez Hernandez, prays judgment against the defendant, The Massachusetts General Hospital, in an amount which is just and appropriate to compensate her for her injuries, together with interest and costs.

PLAINTIFFS CLAIM TRIAL BY JURY.

Respectfully submitted,
The plaintiffs,
By their attorney,

Andrew C Meyer Jr

ANDREW C. MEYER, JR.
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ, ppa
MAILENE GIOVANA JUAREZ, and
MAILENE GIOVANA JUAREZ HERNANDEZ,
Plaintiffs,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

ANSWER OF THE DEFENDANTS, KATHRYN GIBLIN, M.D, AND THE MASSACHUSETTS GENERAL HOSPITAL, TO THE PLAINTIFFS' COMPLAINT

FIRST DEFENSE

COUNT I

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count I of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count I of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count I of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count I of the plaintiffs' Complaint.

5. The said defendant denies the allegations contained in Paragraph 5, including subsections (a) through (e), of Count I of the plaintiffs' Complaint.

6. The said defendant denies the allegations contained in Paragraph 6 of Count I of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against her.

COUNT II

1. The said defendant repeats and reavers her answers to Paragraphs 1 through 6 of Count I of the plaintiffs' Complaint.

2. The said defendant denies the allegations contained in Paragraph 2 of Count II of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count II of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count II of the plaintiffs' Complaint.

5. The said defendant denies the allegations contained in Paragraph 5 of Count II of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against her.

COUNT III

1. The said defendant repeats and reavers her answers to Paragraphs 1 through 6 of Count I and Paragraphs 1 through 5 of Count II of the plaintiffs' Complaint.

2. The said defendant denies the allegations contained in Paragraph 2 of Count III of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count III of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count III of the plaintiffs' Complaint.

5. The said defendant denies the allegations contained in Paragraph 5 of Count III of the plaintiffs' Complaint.

6. The said defendant denies the allegations contained in Paragraph 6 of Count III of the plaintiffs' Complaint.

7. The said defendant denies the allegations contained in Paragraph 7 of Count III of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against her.

COUNT IV

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count IV of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count IV of the plaintiffs' Complaint.

3. The said defendant repeats and reavers her answers to the aforementioned Counts of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count IV of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against her.

COUNT V

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count V of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count V of the plaintiffs' Complaint.

3. The said defendant repeats and reavers her answers to the aforementioned Counts of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count V of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against her.

COUNT VI

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count VI of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count VI of the plaintiffs' Complaint.

3. The said defendant repeats and reavers her answers to the aforementioned Counts of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count VI of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against her.

COUNT VII

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count VII of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count VII of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count VII of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count VII of the plaintiffs' Complaint.

5. The said defendant denies the allegations contained in Paragraph 5, including subsections (a) through (e), of Count VII of the plaintiffs' Complaint.

6. The said defendant denies the allegations contained in Paragraph 6 of Count VII of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against it.

COUNT VIII

1. The said defendant repeats and reavers its answers to Paragraphs 1 through 6 of Count VII of the plaintiffs' Complaint.

2. The said defendant denies the allegations contained in Paragraph 2 of Count VIII of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count VIII of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count VIII of the plaintiffs' Complaint.

5. The said defendant denies the allegations contained in Paragraph 5 of Count VIII of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against it.

COUNT IX

1. The said defendant repeats and reavers its answers to Paragraphs 1 through 5 of Count VII and Paragraphs 1 through 5 of Count VIII of the plaintiffs' Complaint.

2. The said defendant denies the allegations contained in Paragraph 2 of Count IX of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count IX of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count IX of the plaintiffs' Complaint.

5. The said defendant denies the allegations contained in Paragraph 5 of Count IX of the plaintiffs' Complaint.

6. The said defendant denies the allegations contained in Paragraph 6 of Count IX of the plaintiffs' Complaint.

7. The said defendant denies the allegations contained in Paragraph 7 of Count IX of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against it.

COUNT X

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count X of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count X of the plaintiffs' Complaint.

3. The said defendant denies the allegations contained in Paragraph 3 of Count X of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count X of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against it.

COUNT XI

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count XI of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count XI of the plaintiffs' Complaint.

3. The said defendant repeats and reavers its answers to the aforementioned paragraphs of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count XI of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against it.

COUNT XII

1. The said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Count XII of the plaintiffs' Complaint.

2. The said defendant admits the allegations contained in Paragraph 2 of Count XII of the plaintiffs' Complaint.

3. The said defendant repeats and reavers its answers to the aforementioned paragraphs of the plaintiffs' Complaint.

4. The said defendant denies the allegations contained in Paragraph 4 of Count XII of the plaintiffs' Complaint.

WHEREFORE, the said defendant denies that the plaintiffs are entitled to judgment against it.

SECOND DEFENSE

And further answering, the said defendants say that the Complaint, and each and every count thereof, fails to state a cause of action.

THIRD DEFENSE

And further answering, the said defendants say that the plaintiffs were not in the exercise of due care, but rather the negligence of the plaintiffs contributed to cause the injury or damage complained of, wherefore the recovery of the plaintiffs is barred in whole or in part, or is subject to diminution.

FOURTH DEFENSE

And further answering, the said defendants say that the plaintiff assumed the risk of injury and damage and cannot recover in this action.

FIFTH DEFENSE

And further answering, the said defendants say that this action has not been brought within the time specified by the General Laws of this Commonwealth.

SIXTH DEFENSE

And further answering, the said defendants say that the within action is barred by the provisions of the Massachusetts General Laws, Chapter 258.

SEVENTH DEFENSE

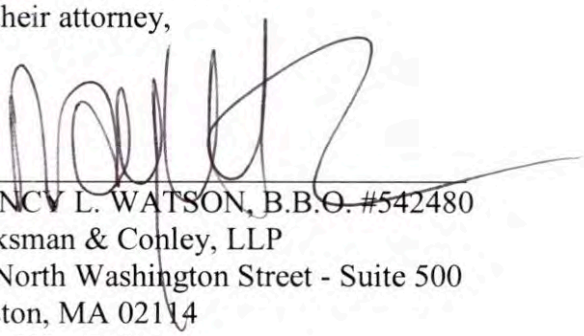
And further answering, the said defendant says that the acts and/or omissions complained of in Plaintiff's Complaint were committed, if at all, in the course of hospital activity carried on to accomplish directly the charitable purposes of the hospital; accordingly the liability, if any, of the defendant hospital is limited, pursuant to Massachusetts General Laws, Chapter 231, Section 85K.

EIGHTH DEFENSE

And further answering, the said defendant says that it is a public charity and immune from liability to the plaintiff.

THE DEFENDANTS, KATHRYN GIBLIN, M.D, AND THE MASSACHUSETTS GENERAL HOSPITAL, CLAIMS TRIAL BY JURY

Respectfully submitted
by their attorney,



NANCY L. WATSON, B.B.O. #542480
Ficksman & Conley, LLP
98 North Washington Street - Suite 500
Boston, MA 02114
617-720-1515

CERTIFICATE OF SERVICE

I, Nancy L. Watson, attorney for said defendant, hereby certify that I have this day served copies of the attached: **Notice of Appearance** and **Answer of the Defendants, Kathryn Giblin, M.D., and The Massachusetts General Hospital, to the Plaintiffs' Complaint** upon all parties by mailing copies therefore, postage prepaid, directed to:

Benjamin R. Novotny, Esq.
Lubin & Meyer, P.C.
100 City Hall Plaza
Boston, MA 02108

Signed under the pains and penalties of perjury.

DATED: May 15, 2017

NANCY L. WATSON
Ficksman & Conley, LLP
98 North Washington Street - Suite 500
Boston, MA 02114
617-720-1515
B.B.O. #542480

15

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO.: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD FLORIAN EICHLER, M.D. AND RODRIGO ZEPEDA, M.D. AS DEFENDANTS IN THIS MATTER

NOW COMES the plaintiff, Nelsy Delgado Juarez, in the above-captioned matter, by her attorney, and hereby respectfully requests that this Honorable Court ALLOW her Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter.

AS GROUNDS FOR THIS MOTION, the plaintiff states as follows:

1. This is a medical malpractice action in which the plaintiff alleges that the defendant provided negligent medical care and treatment to the minor plaintiff, which caused her to sustain severe and permanent personal injuries.

2. More specifically, the plaintiff alleges that in prescribing an anti-seizure medication, the defendant was negligent in that she did not consider 13-year-old Nelsy's small stature and well below average weight when she chose the dosing schedule. Due to the defendant's negligence, Nelsy was administered an excessively rapid and high dose of an anti-seizure medication, which caused her to suffer Stevens-Johnson Syndrome, permanent vision loss, loss of eyelid function in both eyes, scarring all over her body, and prolonged hospitalization and treatment.

3. The Plaintiff's Complaint was filed with this Court in 2017.

4. Since 2017, the defendant, Kathryn Giblin, M.D.'s, deposition was scheduled and re-scheduled by the plaintiff at least eight (8) times, all of which were cancelled by the defendant.

5. At Dr. Giblin's deposition on 2/24/20, she testified, for the very first time, that not only did she consult with two of her colleagues, Dr. Zepeda and Dr. Eichler, regarding the dosing schedule she chose for Nelsy, but that she also specifically discussed Nelsy's well below average weight in the context of that dosing schedule with both of the aforementioned physicians.

6. While Dr. Zepeda and Dr. Eichler's names are referenced in the medical records, prior to Dr. Giblin's recent deposition testimony, the plaintiff had no way of knowing that Nelsy's size and weight were specifically discussed with these two physicians. In fact, it was far more reasonable to deduce that Dr. Giblin had failed to discuss these factors with these two physicians given the context provided in the medical records and given the outcome of her alleged discussions.

7. It is well established under Massachusetts Rules of Civil Procedure that leave to amend a complaint "shall be freely given when justices so requires." Mass. R. Civ. P., Rule 15(a). Although a motion to amend is addressed to the sound discretion of the trial judge, the motion should generally be allowed absent a showing by the opposing party of prejudice or some other extenuating circumstance to justify denial of the motion. See Castellucci v. United States Fidelity & Guaranty Co., 372 Mass. 285, 289 (1977).

8. This Motion is not filed to delay these proceedings, nor will allowance of the within Motion prejudice any party hereto. In contrast, allowance of the Motion is necessary, appropriate, and consistent with the interests of justice, as the defendant, in her recent testimony, has implicated these two other physicians and will likely do the same at trial of this matter should this Motion not be allowed.

WHEREFORE, for the foregoing reasons, and in the interests of justice, the plaintiff respectfully requests that this Honorable Court ALLOW her Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter.

Respectfully submitted,
The plaintiff,
By her attorney,

Karen Zahka (mm)

Karen A. Zahka, BBO# 688909
Keches Law Group, P.C.
Two Granite Avenue, Suite 400
Milton, MA 02186
(508) 822-2000
kzahka@kecheslaw.com

CERTIFICATE OF SERVICE

I, Karen A. Zahka, counsel for Plaintiff, hereby certify that on this 6th day of March, 2020, I served Plaintiff's Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants by forwarding a copy of same by first-class mail, postage prepaid, to:

Nancy Watson, Esq.
Ficksman & Conley, LLP
98 North Washington Street
Suite 500
Boston, MA 02114

Karen A. Zahka

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

OPPOSITION OF THE DEFENDANTS, KATHRYN GIBLIN, M.D. AND THE MASSACHUSETTS GENERAL HOSPITAL, TO THE PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD FLORIAN EICHLER, M.D. AND RODRIGO ZEPEDA, M.D. AS DEFENDANTS IN THIS MATTER

Now come the defendants, Kathryn Giblin, M.D. and The Massachusetts General Hospital, who respectfully request that this Honorable Court deny the plaintiff's Motion to Amend Complaint to add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. As grounds therefore, the defendants state that: (1) Rule 15 motions to amend the complaint should have been served by April 20, 2018, nearly two years ago; (2) there is no valid reason for the plaintiff's delay in seeking to add Dr. Eichler and Dr. Zepeda; and (3) allowance of the plaitniff's motion would cause a significant delay in the disposition of this matter and would be unfairly prejudicial to Dr. Giblin, MGH, and the newly added defendants.

BACKGROUND

This medical malpractice action was filed by the plaintiff in Suffolk Superior Court on or about February 24, 2017. This action, which was filed over three years ago, alleges claims of medical negligence by Dr. Giblin resulting in permanent injury to the plaintiff, Nelsy Delgado Juarez. Now, over three years since the filing of the Complaint, the plaintiff has served a motion

to amend the Complaint to add new defendants, Florian Eichler, M.D. and Rodrigo Zepeda, M.D.

The defendants hereby oppose plaintiff's motion, and submit that the plaintiff has unduly delayed amending the Complaint and have not set forth a legitimate basis for doing so. The defendants further submit that due to plaintiff's unexcused delay, amending the Complaint to add Dr. Eichler and Dr. Zepeda will cause substantial delay in the disposition of this matter and will unduly prejudice Dr. Eichler and Dr. Zepeda as well as the defendants, Dr. Giblin and Massachusetts General Hospital.

ARGUMENT

According to Superior Court Standing Order 1-88, Rule 15 motions to amend pleadings for "A" track cases, such as this, should have been served by April 20, 2018 and filed on or before May 21, 2018. Now, nearly two years after the applicable deadline, the plaintiff is seeking to amend the Complaint to add Dr. Eichler and Dr. Zepeda as defendants in this matter.

It is well settled in Massachusetts that unexcused delays are valid reasons for denying a motion to amend. *Castellucci v. United States Fid. & Guar. Co.*, 372 Mass. 288 (1977). Since the leading decision in *Castellucci*, the Supreme Judicial Court has "emphasized the nature of a Rule 15 decision as a matter of discretion guided by such consideration as lateness, delay, futility, suspect motive, prior opportunity to plead the claim, and undue prejudice to the opposing party." *Audobon Hill S. Condo. Ass'n. v. Comm. Ass'n. Underwriters of Am., Inc.*, 82 Mass. App. Ct. 461, 471-72 (2012), *citing Mathis v. Mass. Elec. Co.*, 409 Mass. 256, 264-65 (1991); *Leonard v. Brimfield*, 423 Mass. 152, 157, cert. denied, 519 U.S. 1028 (1996).

The plaintiff has unduly delayed amending the Complaint and has not set forth no legitimate reason for doing so. The plaintiff has known of Dr. Eichler and Dr. Zepeda's

involvment in the plaintiff's care and treatment since at least September 7, 2016, when the 60L claim letters, including the records from Massachusetts General Hosptial, were served upon Dr. Giblin and the Hospital; the plaintiff has offered no reason for waiting over three years since that time to move to amend the Complaint. Further, the plaintiff had access to the plaintiff's medical records from Massachusetts General Hospital which identify Dr. Eichler and Dr. Zepeda's involvement in the care and treatment of Nelsy Delgado Juarez since prior to filing the Complaint in February, 2017. Dr. Giblin's note in the MGH records of Ms. Juarez dated March 31, 2014 (produced by plaintiff's counsel at the time of service of the 60L letter) clearly outlines the plan of care for Ms. Juarez which states that the patient was discussed with the neurology resident, Dr. Zepeda, who had seen and evaluated the patient on March 26, 2014 and the neurology consult attending, Dr. Eichler.[1] The plaintiff's delay is not the result of some recent development unearthed during discovery, but rather, the effect of the plaintiff's failure to timely move to amend the Complaint.[2]

---

[1] Dr. Giblin's note in the MGH medical record states "Plan:
-Check Depakote level
-Give PM Depakote dose as patient vomited dose
-Discussed patient with Dr. Zepeda who saw patient 3/26-- please start Lamictal (Lamictal Blue starter pack for patients already on Depakote, start with 25mg QOD for weeks 1 and 2, then increase to 25mg QD for weeks 3 and 4, then increase by 25mg QD every 1 week, i.e. 50mg QD for week 5, 75mg for week 6, etc., once dose is 200mg/d, concurrently decrease VPA to 250mg QD then discontinue VPA), with plan to see in follow up in 4 weeks and then titrate off Depakote as Lamictal is less teratogenic and better future medication anyways, also comes in chew tabs.
-Would not increase Depakote further from 250mg BID as patient was somewhat supratherapeutic at 105 last week.
-Further recommendations pending Depakote level, please page 21333 when available.
Kathryn Giblin, MD
Resident in Neurology b21333
Discussed with Neurology Consult Attending, Dr. Florian Eichler."

[2] Although the plaintiff claims that she learned for the first time the specific content of the discussions between Dr. Giblin, Dr. Zepeda, and Dr. Eichler at the time of Dr. Giblin's recent deposition, there is no validity to this argument. The record is abundantly clear that Dr. Giblin discussed the patient and the plan of care for Ms. Juarez with Dr. Zepeda and Dr. Eichler. The plaintiff's failure to conduct the deposition of Dr. Zepeda and/or Dr. Eichler (or even make any attempts to do so) prior to the discovery deadline and prior to the Rule 15 deadline in connection with obtaining more information regarding the content of the discussions does not constitute excusable delay and does not justify an amendment to the Complaint to add two new defendants at this late hour.

If plaintiff's Motion to Amend is allowed, Dr. Eichler and Dr. Zepeda will be faced with the prospect of defending alleged misconduct which occurred in 2014, approximately six years ago, and the Court will be asked to convene, at this late date, a new medical malpractice tribunal, and then to permit an entirely new round of discovery as it relates to Dr. Eichler and Dr. Zepeda. Assembling and convening a medical malpractice tribunal is a process which typically takes many months and oftentimes even longer in Suffolk County. Additionally, Dr. Eichler and Dr. Zepeda will need to conduct full and complete discovery and retain experts on the standard of care and causation issues to review this matter. Discovery has been ongoing for over three years now. Even if the Court permits additional time for Dr. Eichler and Dr. Zepeda to conduct discovery, they will be forced to prepare a defense in a significantly truncated timeframe while the other parties have been provided ample time and opportunity to prepare their cases. The Pre-Trial Conference, at which time the parties exchange expert disclosures, is currently scheduled for April 16, 2020, less than a month from now.

Further, adding Dr. Eichler and Dr. Zepeda as defendants in this matter will result in a significant delay in the disposition of this matter to the detriment of Dr. Giblin and Massachusetts General Hospital. Pursuant to the tracking order, the trial of this matter is currently scheduled for October 19, 2020, just seven months from now, a date which, in fairness to the newly added defendants would need to be continued in order for a tribunal to be convened and discovery to be completed.

As there is no justifiable excuse for the plaintiff's delay in moving to amend the Complaint long after the Rule 15 deadline and amending the Complaint to add new defendants at this late stage would result in a delay in the disposition of this matter and would be unfairly

prejudicial to Dr. Giblin, MGH, and the newly added defendants, the plaintiff's Motion to Amend the Complaint should be denied.

CONCLUSION

WHEREFORE, for the reasons outlined above, the defendants, Kathryn Giblin, M.D. and The Massachusetts General Hospital, respectfully request that this Honorable Court deny the plaintiff's Motion to Amend Complaint to add Florian Eichler, M.D. and Rodrigo Zepeda, M.D.

Respectfully submitted
By their attorneys,

FICKSMAN & CONLEY, LLP

/s/ Christine D. McCleney
CHRISTINE D. MCCLENEY
BBO# 680001
98 North Washington Street
Suite 500
Boston, MA 02114
(617) 720-1515
cmccleney@ficksman.com

CERTIFICATE OF SERVICE

I, Christine D. McCleney, attorney for said defendant, hereby make oath that I have this day served a copy of the attached:

OPPOSITION OF THE DEFENDANTS, KATHRYN GIBLIN, M.D. AND THE MASSACHUSETTS GENERAL HOSPITAL, TO THE PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD FLORIAN EICHLER, M.D. AND RODRIGO ZEPEDA, M.D. AS DEFENDANTS IN THIS MATTER

upon all parties, by mailing a copy thereof, postage pre-paid, directed to:

Karen Zahka, Esq.
Keches Law Group
2 Granite Avenue, Suite 400
Milton, MA 02186

Signed under the pains and penalties of perjury.

DATED: March 19, 2020

/s/ Christine D. McCleney
CHRISTINE D. MCCLENEY
B.B.O. #680001
Ficksman & Conley, LLP
98 North Washington Street
Suite 500
Boston, MA 02114
(617) 720-1515
cmccleney@ficksman.com

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO.: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD FLORIAN EICHLER, M.D. AND RODRIGO ZEPEDA, M.D. AS DEFENDANTS IN THIS MATTER

NOW COMES the plaintiff, Nelsy Delgado Juarez, in the above-captioned matter, by her attorney, and hereby respectfully requests that this Honorable Court ALLOW her Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter.

AS FURTHER GROUNDS FOR THIS MOTION and in reply to the defendants' Memorandum in Opposition, the plaintiff states as follows:

1. This is a medical malpractice action in which the plaintiff alleges that the defendant provided negligent medical care and treatment to the minor plaintiff, which caused her to sustain severe and permanent personal injuries.

2. More specifically, the plaintiff alleges that in prescribing an anti-seizure medication, the defendant was negligent in that she did not consider 13-year-old Nelsy's small stature and well below average weight when she chose the dosing schedule. Due to the defendant's negligence, Nelsy was administered an excessively rapid and high dose of an anti-seizure medication, which caused her to suffer Stevens-Johnson Syndrome, permanent vision loss, loss of eyelid function in both eyes, scarring all over her body, and prolonged hospitalization and treatment.

3. The defendant mistakenly claims that the plaintiff has provided no reason for the alleged delay in filing the instant Motion to Amend. This is simply not true.

    a. Since 2017, the defendant, Dr. Giblin, cancelled her deposition at least eight (8) times. It is for this reason, that the plaintiff was unable to depose the defendant until February 2020.

    b. Moreover, it would have been impossible for the plaintiff to predict that Dr. Giblin would testify at her deposition that she discussed, or specifically would have discussed, Nelsy's weight and stature with either Dr. Zepeda or Dr. Eichler. There is absolutely no evidence in the medical record that such a detailed discussion occurred as opposed to a drive by consult, which is far more common.

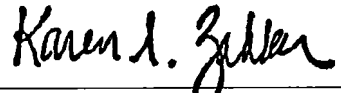
    c. The sole parameter that Dr. Giblin used to prescribe Nelsy's medication was her age. She specifically testified to this fact at her deposition. Nonetheless, she further testified that despite her only considering Nelsy's age, she would have specifically discussed Nelsy's weight with both Dr. Zepeda and Dr. Eichler. Without evidence that such a specific and detailed discussion occurred, the plaintiff would not have been able to maintain any action against either Dr. Zepeda or Dr. Eichler. Indeed, both physicians would have likely been dismissed following a Medical Malpractice Tribunal absent such evidence.

4. Similarly, the defendants' claim that the addition of Dr. Zepeda and Dr. Eichler as defendants in this matter would be unreasonable given that these events occurred in 2014 is misguided. The defendant, herself, was not deposed until February 2020. The defendant did not have any difficulty testifying despite this passage of time. Within days of learning this new evidence, the plaintiff immediately scheduled the video depositions of both Dr. Eichler and Dr. Zepeda. The plaintiff will conduct these video depositions remotely in the immediate future.

5. Finally, any movement in the currently scheduled trial date would only be for good cause. Allowance of this Motion is necessary, appropriate, and consistent with the interests of justice, as the defendant, in her most recent testimony, implicated these two other physicians and imputed knowledge upon them that is not otherwise detailed in the medical records created at the time in 2014.

WHEREFORE, for the foregoing reasons, and in the interests of justice, the plaintiff respectfully requests that this Honorable Court ALLOW her Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter.

Respectfully submitted,
The plaintiff,
By her attorney,



Karen A. Zahka, BBO# 688909
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Two Granite Avenue, Suite 400
Milton, MA 02186
(508) 822-2000
kzahka@kecheslaw.com

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO.: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

REQUEST FOR HEARING

The plaintiff respectfully requests a hearing on this matter pursuant to Superior Court Rule 9A.

Respectfully submitted,
By her Attorneys,
KECHES LAW GROUP, P.C.

KAREN A. ZAHKA
BBO #688909
Two Granite Ave, Suite 400
Milton, MA 02186
(508) 821-4337
kzahka@kecheslaw.com

CERTIFICATE OF SERVICE

I, Karen A. Zahka, of Keches Law Group, P.C., counsel for the plaintiff, hereby certify that on this 25th day of March 2020, I served the following: **Notice of Filing; List of Papers; Plaintiff's Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants; Opposition of the Defendants, Kathryn Giblin, M.D. and the Massachusetts General Hospital to Plaintiff's Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter; Plaintiff's Memorandum in Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter and Request for Hearing;**

by forwarding a copy of same by first-class mail, postage prepaid, to:

Nancy Watson, Esq.
Ficksman & Conley, LLP
98 North Washington Street
Suite 500
Boston, MA 02114

Karen A. Zahka
KAREN A. ZAHKA

04/14 Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO.: 1784CV00599

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2020 MAR 27 A 11:42
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

NELSY DELGADO JUAREZ,
Plaintiff,

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD FLORIAN EICHLER, M.D. AND RODRIGO ZEPEDA, M.D. AS DEFENDANTS IN THIS MATTER

NOW COMES the plaintiff, Nelsy Delgado Juarez, in the above-captioned matter, by her attorney, and hereby respectfully requests that this Honorable Court ALLOW her Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter.

AS GROUNDS FOR THIS MOTION, the plaintiff states as follows:

1. This is a medical malpractice action in which the plaintiff alleges that the defendant provided negligent medical care and treatment to the minor plaintiff, which caused her to sustain severe and permanent personal injuries.

2. More specifically, the plaintiff alleges that in prescribing an anti-seizure medication, the defendant was negligent in that she did not consider 13-year-old Nelsy's small stature and well below average weight when she chose the dosing schedule. Due to the defendant's negligence, Nelsy was administered an excessively rapid and high dose of an anti-seizure medication, which caused her to suffer Stevens-Johnson Syndrome, permanent vision loss, loss of eyelid function in both eyes, scarring all over her body, and prolonged hospitalization and treatment.

3. The Plaintiff's Complaint was filed with this Court in 2017.

4. Since 2017, the defendant, Kathryn Giblin, M.D.'s, deposition was scheduled and re-scheduled by the plaintiff at least eight (8) times, all of which were cancelled by the defendant.

4/15/20 - DENIED. The deadline for Rule 15 motions was two years ago. The Court hopes to try this case in October 2020 notwithstanding the obstacles of the COVID-19 Pandemic. Plaintiff's argument in support of amendment is far from compelling would appear to be prospective defendants, and would significantly delay a trial based on events occurring in March 2018. Ullmann J.

notice sent 04/17/20 AEM LTM

NWO FTCMP

KZ KLG

(MO)

5. At Dr. Giblin's deposition on 2/24/20, she testified, for the very first time, that not only did she consult with two of her colleagues, Dr. Zepeda and Dr. Eichler, regarding the dosing schedule she chose for Nelsy, but that she also specifically discussed Nelsy's well below average weight in the context of that dosing schedule with both of the aforementioned physicians.

6. While Dr. Zepeda and Dr. Eichler's names are referenced in the medical records, prior to Dr. Giblin's recent deposition testimony, the plaintiff had no way of knowing that Nelsy's size and weight were specifically discussed with these two physicians. In fact, it was far more reasonable to deduce that Dr. Giblin had failed to discuss these factors with these two physicians given the context provided in the medical records and given the outcome of her alleged discussions.

7. It is well established under Massachusetts Rules of Civil Procedure that leave to amend a complaint "shall be freely given when justices so requires." Mass. R. Civ. P., Rule 15(a). Although a motion to amend is addressed to the sound discretion of the trial judge, the motion should generally be allowed absent a showing by the opposing party of prejudice or some other extenuating circumstance to justify denial of the motion. See Castellucci v. United States Fidelity & Guaranty Co., 372 Mass. 285, 289 (1977).

8. This Motion is not filed to delay these proceedings, nor will allowance of the within Motion prejudice any party hereto. In contrast, allowance of the Motion is necessary, appropriate, and consistent with the interests of justice, as the defendant, in her recent testimony, has implicated these two other physicians and will likely do the same at trial of this matter should this Motion not be allowed.

WHEREFORE, for the foregoing reasons, and in the interests of justice, the plaintiff respectfully requests that this Honorable Court ALLOW her Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants in this Matter.

Respectfully submitted,
The plaintiff,
By her attorney,

Karen Zahka (mm)

Karen A. Zahka, BBO# 688909
Keches Law Group, P.C.
Two Granite Avenue, Suite 400
Milton, MA 02186
(508) 822-2000
kzahka@kecheslaw.com

CERTIFICATE OF SERVICE

I, Karen A. Zahka, counsel for Plaintiff, hereby certify that on this 6th day of March, 2020, I served Plaintiff's Motion to Amend Complaint to Add Florian Eichler, M.D. and Rodrigo Zepeda, M.D. as Defendants by forwarding a copy of same by first-class mail, postage prepaid, to:

Nancy Watson, Esq.
Ficksman & Conley, LLP
98 North Washington Street
Suite 500
Boston, MA 02114

Karen A. Zahka

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO.: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

JOINT PRE-TRIAL MEMORANDUM

I. AGREED UPON ISSUES OF FACT

1. At all times relevant to the Plaintiff's Complaint, the plaintiff, Nelsy Delgado Juarez, was a resident of Lynn, Essex County, Massachusetts.

2. At all times relevant to the plaintiffs' Complaint, the defendant, Kathryn Giblin, M.D., was a physician licensed to practice her profession in the Commonwealth of Massachusetts.

3. At all times relevant to the plaintiffs' Complaint, the defendant, Massachusetts General Hospital, was a hospital and corporation duly existing and organized under the laws of the Commonwealth of Massachusetts.

II. STATEMENT OF EVIDENCE

A. Plaintiff's Position

This is a medical malpractice action in which the plaintiff alleges that the defendant, Dr. Giblin, provided negligent medical care and treatment to the plaintiff, which caused her to sustain severe and permanent personal injuries. More specifically, the plaintiff alleges that in prescribing an anti-seizure medication, the defendant was negligent in that she did not consider 13-year-old Nelsy's small stature and well below average weight when she chose the dosing schedule. Due to the defendant's negligence, Nelsy was administered an excessively rapid and high dose of an anti-seizure medication, which caused her to suffer Stevens-Johnson Syndrome, permanent vision loss, loss of eyelid function in both eyes, scarring all over her body, and prolonged hospitalization and treatment.

The plaintiff expects the evidence at trial to be as follows:

Nelsy Delgado Juarez is a 13-year-old girl who suffered severe Stevens-Johnson syndrome as a result of being administered Lamictal, at an excessively rapid dosage schedule for her weight

when considering she was already using Depakote, resulting in permanent left eye vision loss, loss of eyelid function in both eyes, and prolonged hospitalization and treatment. In my professional opinion, to a reasonable degree of certainty, Nelsy's severe allergic reaction and permanent loss of vision in her left eye were the direct result of the substandard care rendered to her by Kathryn Giblin, M.D.

Nelsy's medical history includes generalized absence seizure disorder, diagnosed in 2008. She was started on Depakote sprinkles (125 mg). At the time of diagnosis, Nelsy was a small and petite girl, weighing 34.2 pounds and 44.5 inches in height.

From 2008 through 2013, Nelsy continued to be evaluated in the Child Neurology Resident Clinic at Massachusetts General Hospital.

In February 2014, Nelsy was seen at Union Hospital for a tonic-clonic seizure. She was evaluated by her primary care physician, Sarah Richards, M.D., who noted that Nelsy had not been taking her Depakote at the time. Dr. Richards renewed the Depakote prescription and scheduled a neurology appointment for 2/26/14.

On 2/26/14, Nelsy was evaluated in the MGH Child Neurology Clinic for follow up of her absence epilepsy and her recent convulsions. At this visit, Nelsy weighed 27.3 kg (60.2 pounds) and was 136 cm (53.5 inches) in height, and it was noted that she was quite small and thin for her age. The doctor's at the clinic recommended Depakote sprinkles (250 mg BID) for a goal of 20 mg/kg per day.

On 3/26/14, Nelsy was seen again in Pediatric Neurology for a follow up. It was noted that she was compliant with her medication and had not had any further seizures since her last visit. Her recorded weight at this time was 27.8 kg (61.3 pounds) and her height was 136.5 cm (53.7 inches).

On 3/31/14, Nelsy experienced a generalized tonic-clonic seizure at home in the morning, with 2 episodes of vomiting, and was taken to MGH. She was evaluated by resident Kathryn Giblin, M.D., who gave Nelsy her usual dosage of Depakote, and administered a Lamictal Starter Kit, indicated for patients already on Depakote. Dr. Giblin followed the package insert guidelines for the escalation regimen in patients over 12 years of age, and instructed Nelsy to start with 25 mg every other day for weeks 1 and 2, then increase to 25 mg every day for weeks 3 and 4, then increase by 25 mg every week. While Dr. Giblin recognized that the proper dosing and administration of Lamictal is dependent upon the concomitant use of Depakote and a patient's age, it is my medical opinion that she failed to consider Nelsy's listed weight of 27.8 kg., which is below the 5th percentile. Similarly, Nelsy's listed height was 136.5 cm., which is below the 5th percentile.

Dr. Giblin noted that Nelsy's VPA level was 82 and did not recommend changing her Depakote dose. Nelsy was discharged home that day.

On 4/22/14, Nelsy presented to MGH Urgent Care with complaints of red, itchy eyes with discharge, cough, congestion, and fever. She was seen by Jeffrey Collins, M.D., who noted, upon

exam, that Nelsy also had a diffuse body rash involving the palms and soles. Dr. Collins diagnosed Nelsy with a rash, with a suspicion for hand, foot, & mouth disease, and discharged her home with a plan to re-check in the morning.

That same day, Nelsy presented to the MGH ED for worsening symptoms, including tenderness in her hands, burning in her eyes and mouth, dysphagia, and dysuria. She had a fever of 100.7 that then increased to 105.1, and was found to have conjunctival and scleral injection bilaterally; superficial erosions on the interior of her mouth and palate with erosive inflammation on the lips; scattered erythematous papules on her torso and extremities, some with dusky gray appearance; edematous, tender papules on both palms; and superficial ulcer on her left labia minora. She was seen by Dermatology, Otorhinolaryngology, and Ophthalmology, and it was determined that, given her presentation and recent medical history, she likely had early Stevens-Johnson syndrome due to a reaction to the Lamictal.

On 4/23/14, Nelsy was evaluated in the Pediatric Neurology Service, and it was noted that she had a diffuse maculopapular rash in the extremities, hands, soles and chest, conjunctival injection, and bright lips with sloughing mucosa. A gynecological exam revealed widespread lesions including vulvovaginal involvement. Lamictal and Depakote were discontinued, and she was started on Keppra. She continued to be febrile with temperatures of 102-103 degrees F.

Over the day, she continued to have progression of disease, resulting in a more extensive rash affecting 40-50% of her body surface area, with open lesions forming on her back, sloughing of the skin, vaginal mucosal desquamation, oropharyngeal involvement, and bilateral conjunctivitis.

On 4/24/14, Nelsy was transferred to Shriners Hospital for further management of care, where she was hospitalized and treated for approximately one month.

Presently, Nelsy has recovered from the physical aspects of Stevens-Johnson syndrome; however, the allergic reaction left her severely injured in both eyes, resulting in loss of vision in her left eye and an inability to open and shut her eyelids normally.

B. Defendants' Position

The defendants, Kathryn Giblin, M.D. and The Massachusetts General Hospital, expect the evidence and expert testimony to show that Dr. Giblin complied with standard of care applicable to an average qualified neurology resident consulting on a pediatric patient like Nelsy Delgado Juarez at the time and under the circumstances in which she did. They further expect the evidence to show that nothing Dr. Giblin did, or did not do, caused or contributed to harm or injury to Nelsy Delgado Juarez.

The defendants further expect the evidence will show the following:

Nelsy Delgado Juarez's medical history is notable for a positive purified protein derivative (PPD) skin test (March 2007), short stature disorder, poor weight gain, childhood

absence epilepsy and juvenile myoclonic epilepsy.

On January 16, 2008, Ms. Juarez was seen by her primary care physician, Sarah J. Richards, M.D., at which time Ms. Juarez's mother reported that Ms. Juarez had started experiencing episodes of zoning out. Ms. Juarez was otherwise doing well and had a benign evaluation. Dr. Richards referred Ms. Juarez for an electroencephalogram (EEG) to rule out petit mal seizures.

On February 8, 2008, Ms. Juarez underwent an EEG. The study was abnormal and showed generalized, bi-frontal predominant spike and slow wave activity. Given the abnormal results Ms. Juarez was referred for a neurology consultation.

On June 25, 2008, Ms. Juarez had an initial pediatric neurology consultation at the Massachusetts General Hospital (MGH) Pediatric Neurology Clinic with Kenneth Sassower, M.D. and neurology resident Argyre Caminis, M.D. During the appointment Ms. Juarez's mother reported that in January 2008 Ms. Juarez began experiencing episodic, momentary staring spells without convulsive motor features. The last episode had occurred approximately one month prior. Ms. Juarez's mother also indicated that Ms. Juarez did not have any other symptoms associated with the events, nor did she have any notable changes in her physical or mental health around the time the episodes started. Dr. Sassower assessed that Ms. Juarez likely had a primary generalized absence seizure disorder. He noted that other medical issues included poor weight gain, tendency for dysthymia and a mitral murmur. Dr. Sassower recommended that she be started on valproic acid therapy. In particular, he prescribed her Depakote Sprinkles 125-mg. Per the dosing schedule, Ms. Juarez was to take a 125 mg capsule of the Depakote Sprinkles in the morning for the first week; if the dosage was well tolerated that week, she was to increase her dosage to one capsule by mouth, twice a day the following week.

On July 18, 2008, Ms. Juarez had a follow up appointment at the MGH Pediatric Neurology Clinic with David Holtzman, M.D. and Dr. Caminis. During the appointment Ms. Juarez's mother reported that Ms. Juarez had improved since starting the Depakote. In particular, Ms. Juarez's mother reported that Ms. Juarez's staring spells had decreased in frequency and duration, though still continued to occur. On examination Dr. Holtzman noted that Ms. Juarez was in the less than 3% range in terms of both weight and height. He recommended a bone age study and an endocrinology consultation for the purpose of following up on these issues.

On October 30, 2008, Ms. Juarez had an initial consultation at the MGH Pediatric Endocrine Unit with endocrinologists Rose Marino, M.D. and Sharon Straussman, M.D. Upon evaluation, they assessed that it was possible Ms. Juarez's short stature and below average weight were attributable to genetics, particularly given that her parents were of short stature. They found no signs concerning for systemic illnesses, though assessed that her bone age was slightly delayed. They recommended additional work up including IGF-1, IGFBP-3 and thyroid hormone function testing. They further recommended ESR and CBC lab tests, as well as a karyotype test to rule out Turner Syndrome. The karyotype test returned normal and excluded mosaicism greater than 10% at a 95% competence limit.

On January 7, 2009, Ms. Juarez had a follow up appointment with Dr. Holtzman and

neurology resident David Dredge, M.D. Dr. Holtzman assessed that Ms. Juarez had childhood absence epilepsy and continued to have absence seizures most likely due to noncompliance with her medication regimen. Specifically, he noted within his progress note that Ms. Juarez's mother was having trouble obtaining the medication due to insurance coverage issues. Accordingly, Dr. Holtzman contacted the MGH pharmacy and learned that with prior authorization, Ms. Juarez's insurance would cover the liquid form of the valproic acid tablets and generic valproic tablets. Dr. Holtzman procured a three-day emergency supply of the liquid medication for Ms. Juarez until the authorization went through.

On January 7, 2009, Ms. Juarez also had a follow up appointment at the MGH Pediatric Endocrinology Clinic with Dr. Marino. Dr. Marino recommended formal growth hormone stimulation testing with sex steroid priming for her short stature. Dr. Marino gave her a prescription for Ethinylestradiol BP 10 mcg.

On April 29, 2009, Ms. Juarez was seen in follow up by Drs. Holtzman and Dredge. During the appointment, Ms. Juarez's mother informed them that Ms. Juarez continued to have three to four absence seizures per day and she was not on pharmacologic therapy. She explained that she had not understood that once the refills for the Depakote ran out, she was to call and obtain a new prescription for Ms. Juarez. Drs. Holtzman and Dredge decided to start her on anticonvulsant medication Ethosuximide, which they felt was better tolerated and specific for childhood absence epilepsy. They informed Ms. Juarez's mother that they wished to see Ms. Juarez on pharmacologic therapy for a year or two with complete seizure freedom before considering tapering her off of it.

On August 6, 2009, Ms. Juarez had an annual well examination with Dr. Richards. Dr. Richards noted that in April 2009, Ms. Juarez had been started on new medication for her childhood absence epilepsy. However, Dr. Richards noted that she was no longer taking it.

On August 26, 2009, Ms. Juarez had a follow up appointment at the MGH Pediatric Neurology Clinic with Dr. Holtzman and neurology resident Robin Ryther, M.D. During the visit Ms. Juarez's mother reported that Ms. Juarez had taken the Ethosuximide prescribed in April 2009 for approximately one week; Ms. Juarez had then stopped taking it because she did not like the taste. She indicated that Ms. Juarez continued to have seizures on a daily basis. Drs. Holtzman and Ryther counseled Ms. Juarez and her mother regarding the importance of taking the medication. They suggested that the medication be mixed with chocolate syrup to alleviate the taste. In addition, they asked Ms. Juarez's mother to call them before stopping her medication in the future.

On November 16, 2009, Ms. Juarez had an initial consultation with gastroenterologist Uzma Shah, M.D. at the recommendation of her pediatric endocrinology team. Dr. Shah recommended CBC, LFTs, total protein, albumin, transglutaminase IgA, and total IgA, Vitamin D and calcium level testing, as well as thyroid testing. Dr. Shah also ordered stool testing.

On November 25, 2009, Ms. Juarez was seen at the Pediatric Neurology Clinic by Drs. Holtzman and Ryther, who increased her Ethosuximide dosage to 500 mg twice a day. They also recommended a sleep-deprived EEG test. They noted that Ms. Juarez continued to have two to

three seizure episodes per night.

On December 3, 2009, Ms. Juarez was seen at the MGH GI and Nutrition Clinic by Catherine Hanley, MS, RD, LDN. Ms. Hanley noted that Ms. Juarez had undergone several lab tests which were generally within normal limits, aside from testing for her Vitamin D level which showed her level was low. On evaluation Ms. Hanley found that Ms. Juarez's weight was 18.2 kg, or approximately 40.1 lbs, which placed her well below the third percentile. Ms. Hanley recommended that she try Carnation instant breakfast mix with whole milk, and that she take a Vitamin D supplement.

In June 2010, Ms. Juarez began receiving psychotherapy at MGH after her mother reported to Dr. Richards that Ms. Juarez seemed sad. Ms. Juarez had an initial consultation with Melanie Trovage, LICSW, who felt that her sadness could be related to the death of her father four years prior in Guatemala. Ms. Trovage also noted that depressive symptoms and anxiety were comorbidities of epilepsy, which needed to be considered. She recommended ongoing individual therapy and group psychotherapy.

On January 15, 2010, Ms. Juarez underwent another EEG, which was abnormal and showed similar distribution and pattern of generalized spike-wave complexes when compared to her prior EEG. Her pediatric neurology providers advised her to continue on the Ethosuximide based on the results.

On April 20, 2011, Ms. Juarez returned to Drs. Ryther and Holtzman in follow up. They noted within their progress note that Ms. Juarez remained non-compliant with her medication regimen. Because she refused to take the Ethosuximide that had been prescribed to her, Drs. Ryther and Holtzman recommended another trial of the Depakote Sprinkles at a dosage of 250 mg by mouth twice a day.

Ms. Juarez was seen in follow up by Dr. Holtzman and neurology resident Tarun Singhal, M.D. on February 1, 2012. They found that she remained noncompliant with her medication regimen and continued to have daily absence seizures up to three to four times per day. They also noted that she was not doing well in school. Drs. Holtzman and Singhal again recommended that she take Depakote Sprinkles at a dose of 250 mg by mouth twice a day.

On May 2, 2012, Ms. Juarez was seen in follow up by Dr. Holtzman and neurology resident Jenelle Gindal, M.D. Ms. Juarez's mother advised them that Ms. Juarez had been taking her Depakote Sprinkles over the prior two months and since that time had not had any witnessed staring spells. Drs. Holtzman and Gindal recommended that she continue taking the Depakote Sprinkles to control her seizure frequency.

Nearly two years later, on February 14, 2014, Ms. Juarez was taken to North Shore Medical Center Emergency Department after experiencing a staring episode followed by a convulsion. On arrival she was incontinent of urine and confused. However, she improved thereafter and became oriented to the point that she was able to converse with her providers. Her mother was present and informed the emergency department providers that Ms. Juarez had been in her normal state of health, which included fairly regular episodes of staring off. She also

indicated that Ms. Juarez had last taken Depakote over a year prior. Upon evaluation Ms. Juarez was diagnosed as having experienced an epileptic seizure. The emergency department providers contacted her providers at the MGH Pediatric Neurology Clinic who recommended that she be started on Depakote 250 mg twice a day.

On February 20, 2014, Ms. Juarez was seen by Dr. Richards. Her mother reported that approximately eight days prior Ms. Juarez had suffered a generalized tonic-clonic (GTC) seizure, for which she had sought treatment at Union Hospital. Dr. Richards noted within his progress note that Ms. Juarez's mother stated that Ms. Juarez had not been taking her Depakote because it had been stopped 13 months prior by her treating neurologists. Dr. Richards renewed her Depakote prescription.

On February 26, 2014, Ms. Juarez was seen in follow up by Katherine B. Sims, M.D. and neurology resident Marcelo Rocha, M.D., at the MGH Pediatric Neurology Clinic. Dr. Sims noted that Ms. Juarez had a history of childhood absence epilepsy and longstanding difficulty with medication non-compliance and had been "lost to follow-up last year," though now returned after experiencing her first GTC seizure while off her anti-convulsant medication. She assessed that Ms. Juarez's neurological exam continued to be normal and her overall function was unchanged. She recommended that Ms. Juarez resume taking the Depakote sprinkles at 250 mg twice a day.

On March 26, 2014, Ms. Juarez was seen by Elizabeth Dooling, M.D. and neurology resident Rodrigo Zepeda, M.D. at the MGH Pediatric Child Neurology Clinic. They assessed that Ms. Juarez had been well since having been seen in the clinic on February 26, 2014, and had not had further seizures since that time. They also checked her Depakote level, which they found to be elevated at 109 mcg/ml. Drs. Dooling and Zepeda diagnosed her with a history of childhood absence epilepsy that had converted to juvenile myoclonic epilepsy (JME). They recommended that she continue on Depakote 250 mg twice a day and referred her for a follow up EEG. They also gave her a prescription for Diastat 7.5 mg to be given rectally for a seizure lasting more than five minutes.

On March 31, 2014, Ms. Juarez was brought to the MGH Emergency Department after experiencing a GTC seizure that morning. She was accompanied by her mother and uncle. Her mother indicated that Ms. Juarez had been found in their bathroom sometime around 6:40 a.m. with her eyes rolled back and shaking. The shaking stopped approximately 30 seconds later. Ms. Juarez was evaluated by emergency medicine physician Lauren Allister, M.D., who assessed that Ms. Juarez had experienced another GTC seizure and that her examination was concerning for medical non-compliance versus worsening or poorly controlled epilepsy. However, she noted that Ms. Juarez's Depakote level from five days ago was "high normal."

At the request of Dr. Allister, Ms. Juarez was seen in consultation by the pediatric neurology service. In particular, she was evaluated by resident Kathryn Giblin, M.D. Dr. Giblin's evaluation of Ms. Juarez included but was not limited to obtaining vitals and a past and interval medical history, performing a physical examination and review of symptoms, and reviewing Ms. Juarez's medication history. In part, Dr. Giblin made note that Ms. Juarez's height was 136.5 cm, her weight was 27.8 kg, and she had a BMI index of 14.9. On exam Ms. Juarez

was alert and oriented, appropriately interactive and able to follow all commands. Dr. Giblin assessed that Ms. Juarez was a 13-year-old girl with a history of childhood absence epilepsy that had converted to JME. She noted that since Ms. Juarez's first GTC seizure in February 2014 she had been doing well on Depakote 250 mg twice a day, with no side effects. Dr. Giblin checked Ms. Juarez's Depakote level which was 82. Based on her evaluation, Dr. Giblin felt it was likely that she had a new seizure semiology due to her childhood absence epilepsy converting to JME; however, she felt that it was unclear whether her seizure from that morning had occurred in the setting of her Depakote being therapeutic or whether it had occurred in the setting of GI illness, vomiting and lack of sleep.

After evaluating Ms. Juarez, Dr. Giblin consulted with neurology resident Dr. Zepeda, who had seen Ms. Juarez in the Pediatric Neurology Clinic five days earlier on March 26, 2014. Dr. Zepeda felt that Lamictal was a reasonable course of action for Ms. Juarez's breakthrough seizures. After speaking with Dr. Zepeda, Dr. Giblin consulted with her attending physician, Dr. Eichler. In consulting with Dr. Eichler, she presented Ms. Juarez's past medical history, interval history, allergies, social history, family history, vital signs, as well as the results of her EEG studies. She also discussed with him her treatment recommendations, including that Lamictal be initiated. Dr. Eichler approved and endorsed her proposed plan. After speaking with Dr. Eichler, Dr. Giblin informed Ms. Juarez's attending emergency medicine physician, Dr. Allister, of her treatment recommendations. Based on the FDA dosing and administration guidelines, Dr. Giblin recommended that Ms. Juarez take Lamictal 25 mg every other day for the first two weeks, 25 mg every day for weeks three and four, and then that she increase the daily dosage by 25 mg every week until reaching a maintenance dose of 200 mg every day (i.e., 50 mg every day for week five, 75 mg every day for week six, 100 mg every day for week seven, 125 mg every day for week eight, 150 mg every day for week nine, 175 mg every day for week ten and 200 mg every day by week eleven). She also recommended that Ms. Juarez continue taking Depakote at a dosage of 250 mg daily until the Lamictal became therapeutic. Dr. Giblin also recommended that Ms. Juarez's morning dose of Depakote be repeated that day, given that Ms. Juarez had vomited it. As the consulting service, Dr. Giblin conveyed the treatment recommendations to Dr. Allister to implement as she deemed fit.

Dr. Allister adopted Dr. Giblin's recommendations and also gave Ms. Juarez a prescription for Diastat. Kimberly Kurstat, R.N. reviewed the instructions and treatment recommendations with Ms. Juarez and her mother. The prescriptions for Lamictal and Diastat were also reviewed, along with instructions for taking the same.

On April 1, 2014, Ms. Juarez's mother contacted MGH social worked Barb Luby, LICSW to request assistance in filling the Lamictal and Diastat prescriptions. Ms. Luby spoke with Dr. Sims from the Pediatric Neurology Clinic. Dr. Sims advised her that the Diastat was no longer necessary.

On April 22, 2014, Ms. Juarez presented to the MGH Chelsea Urgent Care Center for complaints of red, itchy eyes, eye discharge, a one day history of cough and congestion and a fever that had started that morning. Ms. Juarez was evaluated by Jeffrey Collins, M.D. who assessed her to have a rash (likely hand, foot and mouth disease), conjunctivitis and an upper respiratory infection versus allergies. He also recommended monitoring her for possible

Kawasaki disease. Ms. Juarez was discharged home at approximately 10:35 a.m. However, she presented to the MGH Emergency Department later that afternoon, at approximately 5:04 p.m., after having experienced a progression of her rash to her trunk, stomach, hands and oral mucosa. She was admitted to the hospital and had an inpatient dermatology consultation with Daniela Krashinsky, M.D. who diagnosed her with Stevens-Johnson syndrome (SJS) most likely secondary to Lamictal. However, Dr. Krashinsky noted that mycoplasma-associated SJS remained on the list of differential diagnoses.

Overnight, Ms. Juarez was admitted to the PICU and given Solumedrol. She was found to have erythematous papules in various stages on her palms, arms, back, abdomen, legs, neck, face, ears and soles. By April 23, 2014, she had developed conjunctival, oral and vaginal mucosal involvement. She was seen by Verne Caviness, M.D. and Aaron Boes, M.D. from the pediatric neurology service on April 23, 2014; they recommended stopping the Depakote and Lamictal and starting Ms. Juarez on Keppra 500 mg twice a day.

Ms. Juarez was also seen in consultation on April 23, 2014 by pediatric infectious disease specialist Vandana Madhavan, M.D. who assessed that, compared to the day prior, her rash had progressed caudally and was covering a greater percentage of her body surface area. Dr. Madhavan felt that given Ms. Juarez had started taking Lamictal within the past 60 days, it was likely that the medication was the cause of her SJS. Nonetheless, she also assessed that there were several other potential inciting causes and because of this, felt it was reasonable to pursue additional studies for the sake of completeness. However, Dr. Madhavan noted that positive results in any of the additional testing most likely would not alter management of her condition.

On April 23, 2014, Ms. Juarez was transferred to Shriner's Hospital Boston for ongoing management of her SJS/toxic epidermolysis bullosa. While at Shriner's, and during the peak of her illness, she had 20-25% total body surface area (TBSA) covered with bullae. She had TBSA involvement of 50-55% at peak. She was discharged home on May 22, 2014. From a cardiovascular standpoint, Ms. Juarez remained hemodynamically stable throughout the course of her hospitalization despite the large TBSA involvement.

In June 2014, Ms. Juarez underwent mucous membrane grafting procedures on the right upper and lower lids and the left lower lid. In July 2014, she had mucous membrane grafting on the left upper lid.

In July 2016, Ms. Juarez started right eye prosthetic replacement of the ocular surface ecosystem (PROSE) treatment. In February 2017, PROSE treatment was started in her left eye. In October 2018, her providers from Boston Foundation for Sight considered corneal transplant surgery, but ultimately concluded that Ms. Juarez was not a good candidate. They assessed that PROSE was the only available alternative for providing her improvement of her visual function.

On or about February 7, 2018, Ms. Juarez was started on Lotemax every night at bedtime. Her best corrected visual acuity (BCVA) improved to 20/40 in August 2018. In September 2018, she discontinued the Lotemax and experienced regression of best corrected visual acuity (BCVA) and increased corneal haze/opacification. After a five-day course of Vigamox in January 2019, she experienced improvement of BCVA to 20/25 in the right eye and 20/60 in the

left eye. As of August 2019, Ms. Juarez continued to receive PROSE treatment bilaterally. Her condition was stable at that time. Her best corrected vision was 20/40 in the right eye and 20/50 in the left eye.

III. JOINT DESCRIPTION OF THE CASE

A. Plaintiffs' Position

This is a medical malpractice action in which the plaintiff alleges that the defendant, Dr. Giblin, provided negligent medical care and treatment to the plaintiff, which caused her to sustain severe and permanent personal injuries. More specifically, the plaintiff alleges that in prescribing an anti-seizure medication, the defendant was negligent in that she did not consider 13-year-old Nelsy's small stature and well below average weight when she chose the dosing schedule. Due to the defendant's negligence, Nelsy was administered an excessively rapid and high dose of an anti-seizure medication, which caused her to suffer Stevens-Johnson Syndrome, permanent vision loss, loss of eyelid function in both eyes, scarring all over her body, and prolonged hospitalization and treatment.

The defendant contends that at all times, she complied with the accepted standard of care, and that nothing she did or allegedly failed to do, caused or contributed to the plaintiff's injuries.

B. Defendants' Position

This is a claim of alleged medical malpractice, or, stated otherwise, professional negligence, in which the plaintiff, Nelsy Delgado Juarez, contends that the defendant, Kathryn Giblin, M.D., provided improper medical care to Nelsy Delgado Juarez resulting in injury to her. The plaintiff further contends that The Massachusetts General Hospital is legally responsible for the actions or inactions of Dr. Giblin.

The defendants assert that the care and treatment rendered to Nelsy Delgado Juarez by the defendants complied with the standard of care in all respects. The defendants further maintain that no negligent action or inaction by the defendants caused injury to the plaintiff.

IV. STATEMENT OF UNUSUAL LEGAL ISSUES

A. Plaintiffs' Position

There are no unusual issues that are known to the parties at this time, but should legal issues become contested, the parties respectfully reserve the right to supplement this section of the Pre-Trial Memorandum.

B. Defendants' Position

The defendants, Kathryn Giblin, M.D. and The Massachusetts General Hospital, anticipate no novel or unusual legal issues with regard to the instant case. The defendants reserve

the right to file motions in limine and/or address any new legal issues that may arise at or before the time of trial.

V. WITNESSES

A. Plaintiff's Witnesses

At this time, the plaintiff expects to call the following witnesses at trial of this matter. Plaintiff reserves the right to supplement and/or amend this list of witnesses prior to the time of trial. Plaintiff further reserves the right to call any witnesses identified in the plaintiff's medical records; any witnesses identified by the defendants; and any rebuttal witnesses.

1. Nelsy Juarez

2. Mailene Juarez Hernandez

3. Any and all agents, servants, and employees of Massachusetts General Hospital, including but not limited to:

   Kathryn Giblin, M.D.
   Florian Eichler, M.D.
   Rodrigo Zepeda, M.D.

4. Any and all agents, servants, and employees of Perkins School for the Blind.

5. Any and all agents, servants, and employees of Children's Hospital Boston.

6. Any and all agents, servants, and employees of Boston Foundation for Sight.

7. Any and all agents, servants, and employees of Shriners Hospital.

8. Any and all agents, servants, and employees of Massachusetts Eye and Ear Infirmary.

9. Any and all agents, servants, and employees of Boston Sight.

10. Any and all agents, servants, and employees of Lynn Public School System.

11. Daniel Adler, M.D.

B. Defendants' Witnesses

1. Nelsy Delgado Juarez (plaintiff)
2. Mailene Giovana Juarez Hernandez
3. Kathryn Giblin, M.D. (defendant)
4. John Gaitanis, M.D. (expert witness)
5. Jurriaan Peters, M.D., Ph.D. (expert witness)

6. Vicki Chen, M.D. (expert witness)
7. Gregory Kearns, Pharm.D., Ph.D. (expert witness)

The defendants adopt all witnesses as listed by the plaintiff. In addition, the defendants reserve the right to call any healthcare providers as identified in the plaintiff's medical records as a witness at trial. The defendants also reserve the right to call witnesses not listed in rebuttal to plaintiff's witnesses and to seasonably supplement this list.

VI. EXPERT WITNESSES

A. Plaintiff's Expert Witnesses

Daniel Adler, M.D.
25 Rockwood Place, Suite 110
Englewood, NJ 07631

At this time, the plaintiff expects to call the following expert witness at trial of this matter. The plaintiff respectfully reserves the right to substitute and/or amended and/or supplement this expert disclosure prior to the time of trial, depending on the expert's availability. Should the plaintiff substitute this disclosure, the plaintiff intends to offer an expert witness that will testify to the same facts and opinions disclosed here.

The plaintiff expects the expert witness to testify to the following facts and opinions:

Nelsy Delgado Juarez was a 13-year-old girl who suffered severe Stevens-Johnson syndrome as a result of being administered Lamictal, at an excessively rapid dosage schedule for her weight when considering she was already using Depakote, resulting in permanent left eye vision loss, loss of eyelid function in both eyes, and prolonged hospitalization and treatment. In the expert's professional opinion, to a reasonable degree of certainty, Nelsy's severe allergic reaction and permanent loss of vision in her left eye were the direct result of the substandard care rendered to her by Kathryn Giblin, M.D.

Nelsy's medical history includes generalized absence seizure disorder, diagnosed in 2008. She was started on Depakote sprinkles (125 mg). At the time of diagnosis, Nelsy was a small and petite girl, weighing 34.2 pounds and 44.5 inches in height.

From 2008 through 2013, Nelsy continued to be evaluated in the Child Neurology Resident Clinic at Massachusetts General Hospital.

In February 2014, Nelsy was seen at Union Hospital for a tonic-clonic seizure. She was evaluated by her primary care physician, Sarah Richards, M.D., who noted that Nelsy had not been taking her Depakote at the time. Dr. Richards renewed the Depakote prescription and scheduled a neurology appointment for 2/26/14.

On 2/26/14, Nelsy was evaluated in the MGH Child Neurology Clinic for follow up of her absence epilepsy and her recent convulsions. At this visit, Nelsy weighed 27.3 kg (60.2 pounds)

and was 136 cm (53.5 inches) in height, and it was noted that she was quite small and thin for her age. The doctor's at the clinic recommended Depakote sprinkles (250 mg BID) for a goal of 20 mg/kg per day.

On 3/26/14, Nelsy was seen again in Pediatric Neurology for a follow up. It was noted that she was compliant with her medication and had not had any further seizures since her last visit. Her recorded weight at this time was 27.8 kg (61.3 pounds) and her height was 136.5 cm (53.7 inches).

On 3/31/14, Nelsy experienced a generalized tonic-clonic seizure at home in the morning, with 2 episodes of vomiting, and was taken to MGH. She was evaluated by resident Kathryn Giblin, M.D., who gave Nelsy her usual dosage of Depakote, and administered a Lamictal Starter Kit, indicated for patients already on Depakote. Dr. Giblin followed the package insert guidelines for the escalation regimen in patients over 12 years of age, and instructed Nelsy to start with 25 mg every other day for weeks 1 and 2, then increase to 25 mg every day for weeks 3 and 4, then increase by 25 mg every week. While Dr. Giblin recognized that the proper dosing and administration of Lamictal is dependent upon the concomitant use of Depakote and a patient's age, it is my medical opinion that she failed to consider Nelsy's listed weight of 27.8 kg., which is below the 5th percentile. Similarly, Nelsy's listed height was 136.5 cm., which is below the 5th percentile.

Dr. Giblin noted that Nelsy's VPA level was 82 and did not recommend changing her Depakote dose. Nelsy was discharged home that day.

On 4/22/14, Nelsy presented to MGH Urgent Care with complaints of red, itchy eyes with discharge, cough, congestion, and fever. She was seen by Jeffrey Collins, M.D., who noted, upon exam, that Nelsy also had a diffuse body rash involving the palms and soles. Dr. Collins diagnosed Nelsy with a rash, with a suspicion for hand, foot, & mouth disease, and discharged her home with a plan to re-check in the morning.

That same day, Nelsy presented to the MGH ED for worsening symptoms, including tenderness in her hands, burning in her eyes and mouth, dysphagia, and dysuria. She had a fever of 100.7 that then increased to 105.1, and was found to have conjunctival and scleral injection bilaterally; superficial erosions on the interior of her mouth and palate with erosive inflammation on the lips; scattered erythematous papules on her torso and extremities, some with dusky gray appearance; edematous, tender papules on both palms; and superficial ulcer on her left labia minora. She was seen by Dermatology, Otorhinolaryngology, and Ophthalmology, and it was determined that, given her presentation and recent medical history, she likely had early Stevens-Johnson syndrome due to a reaction to the Lamictal.

On 4/23/14, Nelsy was evaluated in the Pediatric Neurology Service, and it was noted that she had a diffuse maculopapular rash in the extremities, hands, soles and chest, conjunctival injection, and bright lips with sloughing mucosa. A gynecological exam revealed widespread lesions including vulvovaginal involvement. Lamictal and Depakote were discontinued, and she was started on Keppra. She continued to be febrile with temperatures of 102-103 degrees F.

Over the day, she continued to have progression of disease, resulting in a more extensive rash affecting 40-50% of her body surface area, with open lesions forming on her back, sloughing of the skin, vaginal mucosal desquamation, oropharyngeal involvement, and bilateral conjunctivitis.

On 4/24/14, Nelsy was transferred to Shriners Hospital for further management of care, where she was hospitalized and treated for approximately one month.

Presently, Nelsy has recovered from the physical aspects of Stevens-Johnson syndrome; however, the allergic reaction left her severely injured in both eyes, resulting in loss of vision in her left eye and an inability to open and shut her eyelids normally.

It is Dr. Adler's professional opinion, to a reasonable degree of medical certainty, that Lamictal (generic name lamotrigine) is an anti-epileptic medication that is used to treat epileptic seizures in adults and children. The FDA guidelines for Lamictal indicate that dosing is based on the patient's concomitant medications, indication, and age. The FDA also warns that Lamictal may result in life-threatening serious rashes, including Stevens-Johnson syndrome, toxic epidermal necrolysis, and/or rash-related deaths. The risk of rash increases drastically if the patient is between the ages of 2 and 16, is concurrently taking valproate (Depakote), if the initial dosage exceeds the recommended amount, or if the dosage escalation exceeds the recommended amount.

It is Dr. Adler's professional opinion, to a reasonable degree of medical certainty, that the FDA dosage guidelines for Lamictal in patients over 12 years of age, who are also taking valproate, are 25 mg every other day for weeks 1 and 2, 25 mg every day for weeks 3 and 4, and increase by 25 to 50 mg/day every 1 to 2 weeks after week 5 to maintenance. For pediatric patients between the ages of 2 and 12, the FDA recommends smaller starting doses and slower dose escalations to reduce the risk of rash. The recommended dosage is 0.15 mg/kg per day for weeks 1 and 2, and 0.3 mg/kg per day for weeks 3 and 4. The FDA also recommends that dosing be based upon the patient's weight for children between 2 and 12 years of age. For a child that weighed 27.8 kg, the proper dosage would have been 4 mg every day for weeks 1 and 2, and then, 8 mg every day for weeks 3 and 4.

It is Dr. Adler's professional opinion, to a reasonable degree of medical certainty, that Stevens-Johnson syndrome (SJS) is a life-threatening condition that affects the skin and mucous membranes due to an adverse drug reaction. The symptoms of SJS include flu-like symptoms, swelling of the face and tongue, hives, skin pain, and a severe red or purple skin rash that spreads and causes blistering and peeling. In severe reactions, the rash may result in ocular involvement, including conjunctivitis, scarring of the conjunctiva, inflammation of the inside of the eye, corneal blisters, and/or corneal tears, which may lead to permanent vision loss, as was the case for Nelsy Delgado Juarez.

It is Dr. Adler's professional opinion, to a reasonable degree of medical certainty, that for these reasons, the accepted standard of care in Massachusetts from 2014 through the present has required the average qualified pediatric neurology physician and average qualified pediatric neurology resident to: properly follow the FDA dosage and administration guidelines for Lamictal, including consideration of concomitant medications, indication, and patient age;

recognize and appreciate the increased risk of serious life-threatening rash in pediatric patients who are concurrently taking valproate or Depakote, and adjusting the dosage and administration of Lamictal accordingly; to initiating a smaller dosage of Lamictal based on and appropriate for the patient's weight, as recommended by the FDA; in a patient with Nelsy's size and stature, to specifically request that the attending or other supervising physician physically meet with the patient to assess the proper dosing for her height and weight; to adequately communicate with the patient's other treating providers; to adequately communicate with the patient and her family; to accurately and completely document in the patient's medical record; to properly inform the patient and her family of the risks, benefits, and alternatives to the defendant's proposed course of treatment; to take a complete and accurate history; and to err on the side of caution, even where the FDA guidelines delineate dosing schedule by age, and to properly consider the fact that the patient's size is not the average size for her age bracket.

It is Dr. Adler's professional opinion, to a reasonable degree of medical certainty, the care and treatment rendered to Nelsy Delgado Juarez in March and April 2014 by Kathryn Giblin, M.D. fell below the accepted standard of care for the average qualified pediatric neurology resident when Dr. Giblin failed to properly follow the FDA's guidelines for dosage and administration of Lamictal, and base the dosage on Nelsy's age, weight, and concurrent treatment on Depakote; failed to recognize and appreciate the increased risk of serious life-threatening rash and Stevens-Johnson syndrome in pediatric patients who are concurrently taking Depakote, and thus adjusting the dosage and administration of Lamictal accordingly; failed to initiate a smaller dosage of Lamictal based on Nelsy's bodyweight, which was very low for her age; when she failed to specifically request that the attending or other supervising physician physically meet with the patient to assess the proper dosing for her height and weight; when she failed to adequately communicate with the patient's other treating providers; when she failed to adequately communicate with the patient and her family; when she failed to accurately and completely document in the patient's medical record; when she failed to properly inform the patient and her family of the risks, benefits, and alternatives to the defendant's proposed course of treatment; when she failed to take a complete and accurate history; and when she failed to err on the side of caution, even where the FDA guidelines delineate dosing schedule by age, and failed to properly consider the fact that the patient's size is not the average size for her age bracket.

It is Dr. Adler's professional opinion, to a reasonable degree of medical certainty, that Nelsy's small stature and extremely low body weight should have led to a dosage schedule calculated based on a milligram per kilogram basis. Using only her age and ignoring her small stature and extremely low weight, the dosage administered to Nelsy was six times the calculated per kilogram dosage every other day for the first two weeks of treatment, and then three times the calculated per kilogram dosage on week 3 when the rash began. It is further my medical opinion that had the dosage schedule been calculated according to Nelsy's size and weight, she would not have developed Stevens-Johnson Syndrome.

It is further Dr. Adler's professional opinion, to a reasonable degree of medical certainty, that as a direct result of Dr. Giblin's deviations from the accepted standard of care as outlined above, Nelsy suffered a severe and life-threatening reaction of Stevens-Johnson syndrome, resulting in prolonged hospitalization and treatment, and loss of vision in her left eye. Had Dr. Giblin complied with the accepted standard of care in March and April 2014, she would have

recognized and appreciated that Nelsy's risk factors for developing an allergic reaction to the Lamictal were extremely high, she would have changed how the Lamictal was administered, based on the concurrent usage of Depakote, and Nelsy's age and weight, Nelsy would have received a much smaller initial dosage of Lamictal and a much smaller dosage escalation, as recommended by the FDA, and more likely than not, Nelsy would not have suffered the severity of Stevens-Johnson syndrome that she sustained and would not live with the permanent injuries with which she lives today.

Additionally, the expert will testify that the defendant failed to inform the plaintiff and her family of the material risks of her condition and the risks associated with the defendant's proposed course of treatment, and failed to inform the plaintiff and her family of the alternatives available to the defendant's proposed course of treatment. The plaintiff and her family should have been informed of such risks and alternatives, and if she had been adequately informed of the appropriate information neither she, nor a reasonable patient in her position, would have consented to the defendant's proposed course of treatment.

The expert may also be expected to testify as to general anatomy, physiology, and medical terms and conditions applicable to this case and the care and treatment of Nelsy Juarez. The expert will also be prepared to address and respond to any medical defenses asserted by the defendants prior to and at the time of trial.

The experts may also be expected to testify regarding Nelsy's imaging studies, laboratory studies, and other diagnostic tests, as well as other aspects of her medical care and treatment and should be expected to show corresponding studies to the jury and explain the findings and significance of such findings. The expert may also be expected to testify using chalks and/or medical graphics at trial of this matter. Dr. Adler will also specifically refer to the FDA guidelines as well as the Lamictal instructions, pamphlet, manual, and warning labels, as well as other documentary evidence regarding the dosing schedule, risks, benefits, alternatives, and side effects inherent to Lamictal.

The grounds for the opinions of the aforementioned expert is his education, training, reading, and experience, as well as his knowledge of the medical records and other medical information concerning this case, including but not limited to any radiology studies, in addition to the discovery, pleadings, and depositions in this case as they reflect the patient's histories, complaints, examinations, physical findings and treatment.

Plaintiff reserves the right to supplement, substitute, and/or amend this disclosure prior to the time of trial.

B. Defendants' Expert Witnesses

Notwithstanding and without waiving any objection, at the present time, the defendants, Kathryn Giblin, M.D. and The Massachusetts General Hospital, anticipate that they

may call one or more of the following as trial expert witnesses. To the extent that the experts listed below are not available to testify at the time of trial, the defendants expect to call, as a substitute for any such unavailable expert, an expert who is expected to testify to the same opinions on the same grounds and is expected to address all issues raised by the plaintiff.

John Gaitanis, M.D.
Tufts Medical Center
Floating Hospital for Children
755 Washington Street
Boston, MA 02111

Jurriaan Peters, M.D., Ph.D.
Boston Children's Hospital
Department of Neurology
300 Longwood Avenue
Boston, MA 02115

John Gaitanis, M.D. is Chief of Pediatric Neurology at Tufts Medical Center's Floating Hospital for Children. He is licensed to practice in the Commonwealth of Massachusetts and is board certified in Neurology with Special Qualifications in Child Neurology, Clinical Neurophysiology. Dr. Gaitanis is familiar with the standard of care expected of the average qualified neurologist and average qualified neurology resident practicing in Massachusetts at the time in question.

Jurriaan M. Peters MD, PhD, is an Assistant Professor of Neurology at Harvard Medical School, and is a child neurologist and pediatric epileptologist at Boston Children's Hospital with additional expertise in clinical neurophysiology and neuroimaging. He is licensed to practice in the Commonwealth of Massachusetts and is board certified in Child and Adolescent Neurology, Epilepsy, and Clinical Neurophysiology. Dr. Peters is familiar with the standard of care expected of the average qualified neurologist and average qualified neurology resident practicing in Massachusetts at the time in question.

Dr. Gaitanis and/or Dr. Peters will base their testimony on their education, training, and experience, the relevant medical literature, their familiarity with the medical standards of care, and their review of the medical records and discovery materials in this case including pleadings, depositions transcripts, and other pertinent documents. Dr. Gaitanis and/or Dr. Peters will testify consistent with but not necessarily limited to the medical records and the facts stated in the defendants' statement of the case. They will testify on the issues of standard of care, causation and damages. They will render their opinions to a reasonable degree of medical certainty.

Dr. Gaitanis and/or Dr. Peters will testify that Kathryn Giblin, M.D. complied with the standard of care required of the average qualified neurology resident consulting on a patient like Nelsy Delgado Juarez, at the time and under the circumstances in which she cared for Ms. Juarez. They will testify that no negligent action or inaction by Dr. Giblin caused or significantly contributed to any injury to Nelsy Delgado Juarez, including the development of Stevens-

Johnson syndrome ("SJS"). Dr. Gaitanis and/or Dr. Peters will respond to and rebut the testimony and opinions of the plaintiff's expert witnesses.

Dr. Gaitanis and/or Dr. Peters will testify regarding the field of neurology and various medical terms and concepts pertaining to the field and as relevant to this case. In particular, they will testify about the conditions of childhood absence epilepsy, juvenile myoclonic epilepsy ("JME"), petit mal seizures (absence seizures), and generalized tonic-clonic seizures ("GTC"). They will testify regarding how these conditions are diagnosed and treated, and the complications and risks associated with the same, including the risks of untreated seizures and "breakthrough" seizures including but not limited to physical and neurological injury as well as sudden unexplained death in epilepsy (SUDEP). In addition, they will testify about the different types of anti-epileptic medications available in March 2014 and the known indications, contraindications, risks and associated complications for each. In particular, Dr. Gaitanis and/or Dr. Peters will testify about the medications Lamictal (lamotrigine), Depakote (divalproex sodium or valproic acid), Zarontin (ethosuximide) and Diastat (rectal diazepam gel). Dr. Gaitanis and/or Dr. Peters will testify regarding how the medications are dosed, particularly in cases of pediatric patients. They will also testify about potential interactions and effects that can occur when certain anti-epileptic medications are taken together, like Lamictal and Depakote.

Dr. Gaitanis and/or Dr. Peters will testify regarding the nature, purpose and use of FDA approved drug labels. In particular, they will testify about the FDA labels for Lamictal (lamotrigine) and Depakote (divalproex sodium) applicable at the time and the dosing and administration guidelines contained within.

Dr. Gaitanis and/or Dr. Peters will testify generally about Stevens-Johnson syndrome ("SJS"). They will discuss the known causes for the development of SJS, the signs and symptoms of SJS, the incidence rate for SJS, the diagnosis and treatment of SJS, and the prognosis for patients such as Ms. Juarez who develop SJS. Dr. Gaitanis and/or Dr. Peters will further testify regarding the subject of antiepileptic drug-induced SJS.

Dr. Gaitanis and/or Dr. Peters will testify about the role and responsibilities of an attending neurologist who is responsible for supervising a neurology resident in a hospital setting. They will also testify regarding the role and responsibilities of a neurologist asked to consult on a pediatric patient in the emergency department.

Dr. Gaitanis and/or Dr. Peters will testify that Dr. Giblin at all times complied with the standard of care required of the average qualified neurology resident in her care and treatment of Nelsy Delgado Juarez. They will testify that on March 31, 2014, Dr. Giblin performed a thorough examination and evaluation of Ms. Juarez that took into consideration Ms. Juarez's vital signs (including her weight), past medical history, presenting complaints, allergies, social history, physical examination, and current medications.

Dr. Gaitanis and/or Dr. Peters will testify that Lamictal was indicated and an appropriate choice of anti-epileptic medication for a patient like Ms. Juarez. Lamotrigine is a first-line agent in young women with primary generalized epilepsy, JME in particular. It is broad spectrum, more potent than levetiracetam (Keppra) and covers GTCs well, and in many cases also

absences. Further, Dr. Gaitanis and/or Dr. Peters will testify that valproate therapy (Depakote) is contraindicated in girls and women of childbearing potential because of serious risks the medication can pose to an unborn baby. Also, there is considerable weight gain with Depakote, and an increased risk for PCOS (polycystic ovarian syndrome, with hirsutism, acne, increased testosterone levels resulting in androgen effects). Generally, it should only be prescribed to these patients in very limited circumstances, namely, when other treatments are ineffective or not tolerated. Dr. Gaitanis and/or Dr. Peters will testify that Ms. Juarez had not yet had menarche by the time of the events in question. However, her physicians were anticipating having to wean her from the Depakote and start her on another suitable medication once she reached childbearing potential. Accordingly, given this additional consideration, the addition of Lamictal to be co-administered with her Depakote, was an appropriate and reasonable choice of anti-epileptic medication for Ms. Juarez at that time.

Dr. Gaitanis and/or Dr. Peters will testify that in 2014, the FDA drug label for Lamictal instructed that dosing be based upon concomitant medications, indication and the patient's weight for pediatric patients between 2 and 12 years of age. However, for patients over the age of 12, such as Ms. Juarez, the dosing was based on the patient's concomitant medications, indication, and age. The applicable FDA label dosing and administration guidelines for Lamictal were not weight-based in patients over the age of twelve who were prescribed the medication as an adjunctive therapy for GCT seizures/epilepsy. The FDA dosage guidelines for Lamictal in patients over 12 years of age, who are also taking valproate, such as Ms. Juarez, were 25 mg every other day for weeks 1 and 2, 25 mg every day for weeks 3 and 4, and increase by 25 to 50 mg/day every 1 to 2 weeks after week 5 to maintenance.

Dr. Gaitanis and/or Dr. Peters will testify that the Lamictal dosing recommendations that Dr. Giblin made on March 31, 2014 were consistent and in accordance with the dosing guidelines set forth in the FDA approved drug label in all respects and were in accordance with the standard of care. They will testify that the standard of care did not require Dr. Giblin to follow the label's weight-based dosing guidelines applicable to patients 2 to 12 years of age who were prescribed the medication for epilepsy, given that Ms. Juarez was 13 years old, even in spite of Ms. Juarez's below average weight (27.8 kg) at the time in question. They will testify regarding Ms Juarez's mother's age of first menarche at 12 as well as the small stature of her mother and the significance of the same. They will further testify regarding Ms. Juarez's pubertal changes noted in her medical records including the early timing of those pubertal changes. In sum, they will testify that Ms. Juarez was genetically and endocrinologically mature, at nearly 14 years old, but with a constitutionally small stature/body. Further, the standard of care did not require Dr. Giblin to begin Ms. Juarez on a Lamictal dosage lower than recommend pursuant to the FDA label dosing and administration guidelines despite Ms. Juarez's small stature and weight. Dr. Gaitanis and/or Dr. Peters will explain that various factors are considered by the FDA when determining the appropriate dosing guidelines for patients, including but not limited to liver maturity and function as well as the general development of the other major organ systems. They will discuss generally how the genetic makeup of the enzymes (the proteins that assist in the breakdown) change as an individual ages and they will discuss how this change impacts the "maturity" of the organ and its ability to metabolize medications. They will explain that most major organ systems are physiologically those of an adult by the time a person reaches the age of 12. Accordingly, the FDA has determined, based upon extensive research,

investigation and clinical studies, that with respect to certain medications, such as Lamictal, prescribing physicians should no longer consider weight as a factor for determining the appropriate dosage for patients over the age of 12.

Dr. Gaitanis and/or Dr. Peters are expected to testify regarding the communications Dr. Giblin had with Ms. Juarez's other treating providers on March 31, 2014. They will testify that Dr. Giblin's communications were appropriate and complied with the applicable standard of care in all respects. Specifically, they will testify that Dr. Giblin acted prudently and exceeded the standard of care when she consulted with neurology resident Dr. Zepeda, who had seen Ms. Juarez in the Pediatric Neurology Clinic five days earlier on March 26, 2014 regarding the patient's presentation and her recommendations for treatment. Dr. Giblin further complied with the standard of care when she consulted her attending physician, Dr. Eichler, regarding her evaluation of Ms. Juarez and her proposed treatment recommendations. The standard of care did not require Dr. Giblin to specifically request that the attending physician physically meet with Ms. Juarez to assess the proper dosing for her height and weight, particularly given that Dr. Giblin provided all of the pertinent information to Dr. Eichler in presenting the patient to him. Dr. Gaitanis and/or Dr. Peters will testify that given that Dr. Giblin cared for Ms. Juarez in the role of a consulting physician, it was within the standard of care and appropriate for Dr. Giblin to convey her treatment recommendations to Ms. Juarez's attending emergency department physician, who ultimately must decide whether to adopt and implement the recommendations of the consulting physician. They will testify regarding the communications Dr. Giblin had with Ms. Juarez and her family regarding Lamictal. The obligation to inform the patient and her family of the risks, benefits, and alternatives to the proposed course of treatment and to obtain the patient's consent lies with prescribing physician, which in this case was the emergency department physician, Dr. Allister.

Dr. Gaitanis and/or Dr. Peters will further testify regarding Dr. Giblin's medical records documentation. In part, they will testify that her documentation was in conformance with the standard of care

Dr. Gaitanis and/or Dr. Peters are expected to testify that plaintiff's contention that a lower starting dose of Lamictal would have prevented the development of SJS is purely speculative. SJS is a rare and unpredictable complication of the medication, Lamictal, which could have occurred even at a lower starting dose. The FDA drug label for Lamictal warns that the drug "can cause serious rashes requiring hospitalization and discontinuation of treatment. The incidence of these rashes, which have included Stevens-Johnson syndrome, is approximately 0.8% (8 per 1,000) in pediatric patients (2 to 16 years of age) receiving Lamictal as adjunctive therapy for epilepsy…rare cases of toxic epidermal necrolysis and/or rash-related death have been reported in adult and pediatric patients, but their numbers are too few to permit a precise estimate of the rate. Other than age, there are as yet no factors identified that are known to predict the risk of occurrence or the severity of rash caused by LAMICTAL. There are suggestions, yet to be proven, that the risk of rash may also be increased by (1) coadministration of LAMICTAL with valproate (includes valproic acid and divalproex sodium), (2) exceeding the recommended initial dose of LAMICTAL, or (3) exceeding the recommended dose escalation for LAMICTAL. However, cases have occurred in the absence of these factors."

Overall, Dr. Gaitanis and/or Dr. Peters will testify that Dr. Giblin complied with the standard of care in all respects and no negligent action or inaction by Dr. Giblin caused or significantly contributed to Ms. Juarez's development of SJS or any other injury.

Gregory L. Kearns, Pharm.D., Ph.D., FCP, FAAP
Professor of Pediatrics and Medical Education
Texas Christian University School of Medicine
North Texas Health Sciences Center, Fort Worth, TX

Gregory Kearns, Pharm.D., Ph.D. is a pediatric clinical pharmacologist. He is licensed to practice pharmacy in the State of Missouri and has received certification in Applied Pharmacology from the American Board of Clinical Pharmacology.

Dr. Kearns will base his testimony on his education, training, and experience, the relevant medical literature, his familiarity with the medical standards of care, and his review of the medical records and discovery materials in this case including pleadings, depositions transcripts, and other pertinent documents. Dr. Kearns will testify consistent with but not necessarily limited to the medical records and the facts stated in the defendants' statement of the case. He will testify on the issue of causation of Stevens-Johnson syndrome and on the putative mechanisms by which some anticonvulsant drugs produce cellular injury. He will render his opinions to a reasonable degree of clinical pharmacologic certainty.

Dr. Kearns will testify that no negligent action or inaction by Dr. Giblin caused or significantly contributed to any injury to Nelsy Delgado Juarez, including the development of Stevens-Johnson syndrome ("SJS"). Dr. Kearns will respond to and rebut the testimony and opinions of the plaintiff's expert witnesses.

Dr. Kearns is expected to testify regarding FDA guidelines set forth with respect to the dosing and administration of medications, both generally and with respect to all medications rendered to Nelsy Delgado Juarez. Dr. Kearns will testify generally regarding the various factors considered by the FDA when determining the appropriate dosing guidelines for patients. He will discuss the factors which are considered in determining when a person is classified as an "adult" with respect to dosing, including but not limited to liver and kidney maturity and function as well as the general development of the other major organ systems. Dr. Kearns will explain that the function of most major organ systems are physiologically those of an adult by the time a person reaches the age of 7 to 10 years.

Dr. Kearns is expected to testify generally regarding anti-seizure medications and will specifically testify regarding the anti-seizure medications for Ms. Juarez specifically. Dr. Kearns will testify specifically regarding lamotrigine (Lamictal). Lamotrigine is an antiepileptic drug indicated for adjunctive therapy in patients 2 years of age and older for partial seizures and for primary generalized tonic-clonic seizures. Dr. Kearns will discuss the coadministration of lamotrigine with valproate (which includes valproic acid). He will discuss the known properties, indications, contraindications, possible interactions, side-effects and incidence rates for the medication. He will further testify regarding the applicable dosing guidelines for lamotrigine and valproic acid.

Dr. Kearns is expected to testify regarding anticonvulsant associated Stevens-Johnson syndrome. He will further discuss the clinical signs and symptoms of drug-associated SJS.

Dr. Kearns is expected to testify that Dr. Giblin's dosing recommendation for Ms. Juarez's Lamotrigine, which was aligned with the FDA label and guidelines, was sound, reasonable and appropriate in all respects. Dr. Kearns will explain that the purpose and function of the FDA guidelines is to provide medical practitioners, who are not trained pharmacologists, guidance regarding the indications, contraindications, dosing, administration, and known side-effects and incidence rate of medications based upon the extensive research and investigation completed by the manufacturer and the FDA. Medical practitioners should not be left entirely to their own discretion regarding when to follow the dosing guidelines in the approved product labeling for a given medication and when to make needed adjustments in drug dosing regimen that may depart from FDA-approved guidelines Dr. Kearns will further testify that medical residents in training, such as Dr. Giblin, are unlikely to have (and are not expected to have) the expertise of a pharmacologist or the FDA with respect to the specific details regarding the various factors taken in consideration by the FDA in establishing the dosing guidelines. Dr. Kearns will explain that the FDA considers numerous factors in establish dosing guidelines including the metabolic breakdown of Lamotrigine when taken concurrently with Depakote, as well as the impact of the patient's weight, age, and organ development and maturity, all of which is extensively studied by the FDA in establishing the guidelines in an effort to obtain the optimal therapeutic level while balancing the known risks of the medication.

Dr. Kearns is expected to testify that if Dr. Giblin had recommended Lamotrigine doses at a level below those recommended in FDA approved product labeling, sub-therapeutic levels in the drug could result in loss of drug efficacy and recurrence of seizure activity, thereby putting her at significant risk for severe injury or death.

Dr. Kearns is expected to testify that even if Ms. Juarez had been dosed at a lower level, it is still possible that Ms. Juarez could have developed Stevens-Johnson Syndrome as this is an unpredictable reaction which often occurs in people who are taking the recommended dose for their weight (in patients who are 2-12 years old) and age (for patients 13 years and older), including adults for whom the weight issue is likely not as significant.

Overall, Dr. Kearns is expected to testify that no negligent action or inaction by Dr. Giblin caused or significantly contributed to any injury to Nelsy Delgado Juarez.

Vicki Chen, M.D.
Tufts Children's Hospital
New England Eye Center
Tufts Medical Center
800 Washington Street – Box 450
Boston, MA 02111

Vicki Chen, M.D. is Chief of Pediatric Ophthalmology at Tufts Children's Hospital and the New England Eye Center. Dr. Chen is board certified in Ophthalmology and specializes in

both medical and surgical pediatric eye diseases. She is, and was at all times in question, licensed to practice medicine in the Commonwealth of Massachusetts.

Dr. Chen will base her testimony on her education, training, and experience, the relevant medical literature, her familiarity with the applicable medical standards of care, and her review of the medical records and discovery materials in this case including pleadings, depositions transcripts, and other pertinent documents. Dr. Chen will testify consistent with but not necessarily limited to the medical records and facts contained in the defendants' statement of the case. She will testify on the issues of causation and damages and, particularly, regarding Nelsy Delgado Juarez's ocular issues following her diagnosis with Stevens Johnson Syndrome in April 2014. Dr. Chen will render all of her opinions to a reasonable degree of medical certainty.

Dr. Chen will address Ms. Juarez's visual acuity both prior to and after her diagnosis with SJS. She will testify in detail regarding the ophthalmologic care and treatment Ms. Juarez has received since her SJS diagnosis and through the present, consistent with Ms. Juarez's medical records. In part, she will testify regarding the general information about the PROSE treatment Ms. Juarez has received. She will comment on medical record data provided by the Boston Foundation for Sight regarding symptoms that Ms. Juarez has reported including dryness, redness, itching, double vision, and poor vision.

Dr. Chen will testify that since 2017, her right eye vision has fluctuated between 20/20 to 20/40 with the use of PROSE contact lenses. Her vision was 20/20-2 at her most recent exam in 5/2021. Dr. Chen will testify that vision of 20/20 to 20/40 in one eye is considered good and useful, and with this vision she would be able to obtain a driver's license without any restrictions. Dr. Chen will opine that if the vision in her right eye was damaged in the future, her left eye still has useful vision of 20/60+1 (at her most recent eye exam in 5/2021), with which she would be able to drive a car with a restricted license in MA (driving during daytime and fair weather). Her vision has fluctuated between hand-motion and 20/40 vision in the left eye since 2019, which means that sometimes vision may be quite limited in the left eye. Dr. Chen will comment on the medical record provided by the Massachusetts Eye and Ear Institute that states she appears to be unable to open her eyes during the most recent examination in 5/2021 which suggest sensitivity to light despite the fact that she has not reported this symptom to her doctors at MEEI since 2017. Her functional vision has not been tested in PROSE lenses.

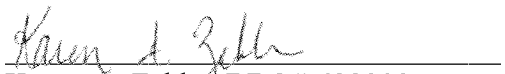
VII. ESTIMATED LENGTH OF TRIAL

The parties expect the trial of this matter to last approximately seven (7) to ten (10) trial days exclusive of jury selection.

VIII. SETTLEMENT

There have been no settlement discussions to date.

Respectfully submitted,
The plaintiff,
By her attorney,



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Respectfully submitted,

By their attorneys,

/s/ Christine D. Cooledge

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

MOTION OF THE DEFENDANTS IN LIMINE TO PERMIT THE TRIAL TESTIMONY OF FACT WITNESS, FLORIAN EICHLER, M.D.

Now come the defendants and hereby move in limine to permit the trial testimony of fact witness, Florian Eichler, M.D. As grounds therefore, the defendants submit the following.

This is a complex medical malpractice action in which the plaintiff, Nelsy Delgado Juarez, alleges that the defendant, neurology resident, Kathryn Giblin, M.D., was negligent in her care and treatment of her in 2014. More specifically, the plaintiff alleges that Dr. Giblin was negligent when she allegedly failed to consider Ms. Juarez's small stature and below average weight for a 13 year old when she recommended the dosing schedule for the antiepileptic medication, Lamictal. Dr. Giblin submits that, as documented in her note in the medical record, she discussed the patient's presentation, her evaluation of the patient, and her recommendations for treatment with her attending, Dr. Florian Eichler, prior to making the recommendations for treatment to the Emergency Department. ***See Consult Note of Dr. Giblin attached hereto as Exhibit A; see also Deposition of Kathryn Giblin, M.D. attached hereto as Exhibit B,*** *pp. 69-72, 75.*

The defendants intend on calling Dr. Eichler to testify at the trial of this matter in his role as a fact witness, specifically regarding his involvement in the care and treatment of Ms. Juarez. It is anticipated that Dr. Eichler will testify, consistent with his deposition testimony, that although he has no memory of the events that occurred on March 31, 2014, nearly nine years ago, he has no reason to dispute that Dr. Giblin spoke with him regarding Ms. Juarez as she would have been required to present the case to an attending given her role as a resident at the time and she contemporaneously documented that she, in fact, spoke to Dr. Eichler. ***See Deposition Transcript of Florian Eichler, M.D. attached hereto as Exhibit C,*** *pp.58-59.* It is further anticipated that Dr. Eichler will testify regarding the custom and practice in 2014 of the neurology residents in presenting cases to the attending neurologist including the types/categories of information that would be conveyed. Dr. Eichler will further testify consistent with his deposition testimony that he was in agreement with the recommendations of Dr. Giblin as he would have changed the recommended plan of treatment if he was not in agreement. *See Exhibit C.*

The defendants have absolutely no intention of eliciting expert testimony from Dr. Eichler at the trial of this matter. Dr. Eichler will *not* be testifying regarding whether Dr. Giblin complied with the standard of care. *Exhibit C, pp. 47-50.* He will also *not* be testifying regarding the cause of Ms. Juarez's Stevens Johnsons Syndrome. *Id.* Dr. Eichler has not been retained as an expert. *Id.* Upon information and belief, Dr. Eichler has not reviewed Ms. Juarez's medical records in their entirety and has not reviewed any records beyond his involvement on March 31, 2014. *Id.* Defense counsel will not be eliciting any testimony regarding any opinions Dr. Eichler has formulated since the start of this litigation (if any exist).

Rather, the extent of Dr. Eichler's testimony will be limited to his knowledge of the medical issues (eg. epilepsy, Lamictal and Depakote dosing and side-effects, Stevens-Johnson Syndrome, etc.) he had at the time Dr. Giblin consulted with him in March 2014, his custom and practice in March 2014, and any opinions he formulated in connection with his involvement in Ms. Juarez's care and treatment. It is anticipated that he will testify that, although he has no memory of Ms. Juarez, it would have been his custom and practice to revise any recommendations for treatment presented to him by a resident if he was not in agreement with the resident's proposed treatment. *Exhibit C, pp. 58-60.* In this case, given that the treatment recommendations were in accordance with the dosing guidelines for Lamictal, he would have agreed with Dr. Giblin's recommendation and would not have made any revisions. *Id.*

The defendants submit that there are no grounds to preclude the testimony of fact witness, Dr. Eichler. To the extent plaintiff's counsel feels a question is asked that is likely to elicit expert testimony, such concern can be addressed at side-bar upon plaintiff's objection. A preclusion of Dr. Eichler's testimony altogether would be patently unfair, highly prejudicial and would deprive Dr. Giblin of an opportunity to present her defense.

WHEREFORE, the defendants respectfully request that this Honorable Court permit the trial testimony of fact witness, Florian Eichler, M.D.

Respectfully submitted,
By their attorneys,

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EXHIBIT “A”

Notes from 8/21/2000 through 10/7/2016 (cont)

03/31/2014	Pediatric Neurology ED Consult	Final	Giblin, Kathryn A., M.D.

Patient: DELGADO JUAREZ,NELSY 4472974(MGH) 08/21/2000 U
Author: Electronically Signed by Kathryn A. Giblin, M.D.

Signed 03/31/2014 13:44
Visit Date: 03/31/2014

MASSACHUSETTS GENERAL HOSPITAL

HARVARD MEDICAL SCHOOL

PEDIATRIC NEUROLOGY ED CONSULT NOTE

Name: DELGADO JUAREZ,NELSY Y
MRN: 4472974(MGH)
Date: 03/31/2014
RFC: GTC this morning, vomited AM medication-- question if should give AM dose of medication again, question epilepsy medication adjustment

HPI: Nelsy is a 13 year-old girl with a history of absence epilepsy. She first presented in February, 2008 with staring episodes and had an abnormal EEG with spike and slow wave at 3-3.5 Hz. She was evaluated by neurology and started on Depakote. In January, 2009, Nelsy had been having 3 or 4 absence seizures a day that were secondary to medication non-compliance due to insurance issues. Unfortunately although this concern was resolved, Nelsy's mother had stopped giving Depakote when she ran out of refills because she did not understand that she was supposed to continue taking the medicine and call for new refills. As a result, in April, 2009, Nelsy had been continuing to have absence seizures daily.

The staring spells are stereotyped 1-2 second brief losses of attention with no eye blinking or oro-motor automatisms. She immediately resumes her activities after a few seconds. She has no postictal confusion. Her mother thinks the frequency of these episodes did not change significantly while she was on the Depakote and has not increased significantly since she stopped taking it, prompting a change in medication to ethosuximide for seizure control in April, 2009. Mom started the new medication but Nelsy did not like the taste and so mom discontinued it after a week. At our visit in 8/2009 she was having seizures on a daily basis with no medication. There were extensive discussions at that visit regarding the importance of the medication for seizure control in consultation with our social work colleagues. Nelsy started ethosuximide on 9/24/2009 and although she initially took the medication, she had breakthrough seizures, prompting an increase in dose in November, 2009 to 500 BID. She then began to refuse liquid medication in January, 2010, prompting a transition to pills. At our visit in August, 2010, Nelsy was still refusing to take liquid medication and "gagged" on pills. She agreed to try a pill swallowing cup and to take her medication with her favorite juice. At our visit on 4/6/2011, Nelsy had missed several follow-up appointments. We also learned that she refused to take any medication in any form. During the last visit, a meeting was arranged with our social worker, Barb Luby who met with Nelsy and her family indivdually and they had agreed to restart her on Depakote sprinkles. She was last seen in our office on December 2012, at which time she was not taking her medications thoughit was not clear that she needed to be treated any longer. Hyperventilation at that time did not elicit any abnormal behavior or starring. The plan was to continue to see how Nelsy does off of medication, particularly given the expectancy that absence epilepsy might improve with age.
She was lost to follow-up while off depakote since December 2012. On average, she has been experiencing 6 starring spells (lasting 1-2 seconds) with occasional arm flapping daily for the past several months. The seizures are always witnessed before she goes to school in the morning. She is unsupervised in the afternoons at home, however, there have been no reports of spells at school, nor has there be any decline in her academic performance.

She had a first generalized convulsion in February, 2013, when her mother found her down in the morning with her eyes open, shaking her arms and legs which lasted for 2 minutes, associated with incontinence and followed by unconsciousness for ensuing 10 minutes. She was seen in her local ED, received Depakote 250 mg and discharged home. She then had been taking 125mg Depakote BID for the past two weeks. She occasionally forgets to take the pills in the morning. She was then seen in follow-up in our clinic and her Depakote was continued on 250mg BID.

Interval history:
She was last seen in clinic on 3/26/2014 and at that time her VPA level was 105, she had been compliant with her medication, and had no further seizures on the increased dose of Depakote (125 BID increased to 250mg BID 2/26/2014) nor side effects.
Unfortunately, this morning, she had a generalized convulsion consistent with her prior GTC. She did not sleep well last night, but reports medication compliance and denies any infectious symptoms, although she did vomit prior to seizure this morning. She had one of her usual staring spells this morning lasting 3 seconds with myoclonic jerks in her arms. Later,

Notes from 8/21/2000 through 10/7/2016 (cont)

Patient: DELGADO JUAREZ,NELSY 4472974(MGH) 08/21/2000 U — Signed 03/31/2014 13:44
Author: Electronically Signed by Kathryn A. Giblin, M.D. — Visit Date: 03/31/2014

mother heard a thump, and found Nelsy on the floor with eyes open, unresponsive, drooling, arms and legs shaking, lasting ~1 minute, followed by confusion, no weakness or numbness. She is currently back to baseline. She has no change in the frequency of her absence seizures, with several per day.

The past medical history is significant for:
- childhood absence epilepsy: initially started on Depakote but transitioned to ethosuximide in April, 2009, significant concerns with noncompliance
- positive PPD in 03/2007, previously treated with INH
- poor weight gain
- short stature

Medications
Depakote Sprinkles (DIVALPROEX Sprinkles) 250 MG (125MG CAP SPRINK Take 2) PO BID

Allergies: NKDA

Her birth history is unremarkable, she was born via c/s at full term with no perinatal complications nor any complications during pregnancy, according to her mother.

Developmentally she was appropriate throughout with no concerns from mom or the pediatrician.

For social history, the patient lives with her mother, younger sister, and stepfather. She moved with her family from Guatemala to the US several years ago. She speaks English at school and Spanish at home. She continues to perform well in school with As and Bs in all areas. There are no behavioral complaints by the teachers or family. She is well adapted at school and has a few good friends.

The family history is significant for no history of seizures.

There have been no changes in vision or hearing, headaches, neck pain, tinnitus, vertigo, weakness, numbness, difficulty with comprehension, speaking, language, swallowing, eating, balance or gait. General review of systems was negative for fevers, chills, rashes, change in weight, energy level or appetite, chest pain, palpitations, shortness of breath, cough, abdominal pain, nausea, vomiting, and change in bowel or bladder habits (i.e incontinence).

PHYSICAL EXAM:

Vital Sign

97.9	81	102 / 58	18	100	

Ht 136.5 cm, Wt 27.8 kg, BMI 14.9

GEN: Patient appears stated age, well-developed, well-nourished, well-appearing in no acute distress
HEENT: Sclerae anicteric, mucous membranes moist, clear oropharynx
NECK: Supple
PULM: Clear to auscultation bilaterally.
CV: RRR, normal S1 & S2, no murmurs

ABDOMEN: Soft, non-tender, non-distended, normoactive bowel sounds.

Neuro:
MENTAL STATUS: The patient was fully alert and oriented, and was following all commands and appropriately interactive. There was complete fluency without paraphasic errors. The concentration, attention and memory were intact.

CRANIAL NERVES:

Notes from 8/21/2000 through 10/7/2016 (cont)

Patient: DELGADO JUAREZ,NELSY 4472974(MGH) 08/21/2000 U
Author: Electronically Signed by Kathryn A. Giblin, M.D.

Signed 03/31/2014 13:44
Visit Date: 03/31/2014

I: Not tested.
II: VF full to confrontation. PERRL
III,IV,VI EOMI w/o nystagmus (or diplopia). No ptosis.
V: Sensation intact to LT/PP.
VII: Face symmetric without weakness.
IX,X: Voice normal. Palate elevates symmetrically.
XI: SCM and trapezii 5/5.
XII: Tongue protrudes midline without atrophy or fasciculations.

MOTOR: Normal bulk and tone; no fasciculations, no tremor, no rigidity, or bradykinesia. No pronator drift.

	Delt	Bi	Tri	FE	IP	Quad	Hamst	TibAnt	EHL	Gastroc
	C5	*C6*	*C7*	*C8/T1*	*L2*	*L3*	*L4-S1*	*L4*	*L5*	*S1*
R	5	5	5	5	5	5	5	5	5	5
L	5	5	5	5	5	5	5	5	5	5

REFLEXES:

	Bi	Tri	Bra	Pat	Ank	Toes
	C6	*C7*	*C6*	*L4*	*S1*	
R	2	2	2	2	2	Down
L	2	2	2	2	2	Down

SENSATION: Light touch and temperature intact throughout.

COORDINATION: The finger-to-nose and rapid alternating movements were normal. There was no truncal ataxia.

GAIT: The stance and stride were normal, as was the ability to tandem, toe, and heel-walk. The Romberg test was negative.

DATA:
2/7/2008 EEG:
Abnormal EEG due to the presence of intermittent bursts of generalized, symmetric, bi-frontal predominant spike and slow wave activity at 3-3.5Hz lasting up to 10 seconds without observed clinical accompaniments. A number of these bursts occur in response to photic stimulation, consistent with a photoparoxysmal response.

1/15/2010 EEG:

Abnormal EEG because of frequent bursts of well formed 3-3.5 Hz generalized, spike-wave activity that were more frequent when awake but seen in all states as well as with photic stimulation without any distinct annotated clinical manifestations. COMPARISON: Upon direct comparison, today's study showed similar distribution and pattern of generalized spike-wave complexes that were a bit shorter (up to 6 seconds) but more frequent (21 bursts in a 50 minute study) in comparison to the previous EEG.

ASSESSMENT and IMPRESSION:
Nelsy is a 13 year-old girl with history of childhood absence epilepsy which has now converted to JME, who had been lost to follow-up until this February when she presented with a generelized convulsion while off anti-convulsant medication. Since her generalized convulsion she had been doing well on Depakote 250mg BID with no side effects, but unfortunately now she

Notes from 8/21/2000 through 10/7/2016 (cont)

Patient: DELGADO JUAREZ,NELSY 4472974(MGH) 08/21/2000 U — Signed 03/31/2014 13:44
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returns with another GTC, likely with new seizure semiology due to her CAE converting to JME, but it is unclear if the seizure this morning is in the setting of her being Depakote being therapeutic at this time as level has not yet been checked or if this is in the setting of GI illness, vomiting, and lack of sleep.

Plan:

-Check Depakote level
-Give AM Depakote dose as patient vomited dose
-Discussed patient with Dr. Zepeda who saw patient 3/26-- please start Lamictal (Lamictal Blue starter pack for patients already on Depakote, start with 25mg QOD for weeks 1 and 2, then increase to 25mg QD for weeks 3 and 4, then increase by 25mg QD every 1 week, i.e. 50mg QD for week 5, 75mg for week 6, etc., once dose is 200mg/d, concurrently decrease VPA to 250mg QD then discontinue VPA), with plan to see in follow up in 4 weeks and then titrate off Depakote as Lamictal is less teratogenic and better future medication anyways, also comes in chew tabs.
-Would not increase Depakote further from 250mg BID as patient was somewhat supratherapeutic at 105 last week.
-Further recommendations pending Depakote level, please page 21333 when available.

Kathryn Giblin, MD
Resident in Neurology b21333
Discussed with Neurology Consult Attending, Dr. Florian Eichler.

ADDENDUM
VPA level is 82; would not recommend changing VPA dose.
Follow-up appointment scheduled with Dr. Dooling (who saw patient last week 2/26/2014 as well) to staff on 4/23/2014 at 4PM in Yawkey 6.

Kathryn Giblin, MD
Resident in Neurology b21333

EXHIBIT “B”

Volume: I
Pages 1-114
Exhibits: 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO: 1784CV00599

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NELSY DELGADO JUAREZ, PPA MAILENE GIOVANA JUAREZ HERNANDEZ, AND MAILENE GIOVANA JUAREZ HERNANDEZ,

Plaintiff

V.

KATHRYN GIBLIN, M.D., AND THE MASSACHUSETTS GENERAL HOSPITAL,

Defendants

- - - - - - - - - - - - - - - - - - x

AUDIO/VIDEO DEPOSITION of KATHRYN GIBLIN, M.D., called on behalf of the Plaintiff, taken pursuant to the provisions of the Massachusetts Rules of Civil Procedure, before Debra Blessin, a Professional Court Reporter and Notary Public, in and for the Commonwealth of Massachusetts, at the Offices of Keches Law Group, P.C., 2 Granite Avenue, Suite 400, Milton, MA on Monday, February 24, 2020, commencing at 10:06 a.m.

DEBRA LENTZ

COURT REPORTING SERVICES

P.O. Box 1337

Center Harbor, NH 03226

(603) 253-5221

Q So he would have been a resident that was in the same program as you were as opposed to a child neurology resident?
A Correct.
Q Was he in the same year as you in your residency?
A Correct.
Q So "Discussed patient with Dr. Zepeda who saw patient 3/26, please start Lamictal." And we can read through the rest of that, but the decision to start Lamictal, was that made after your discussion with Dr. Zepeda?
A It was made after my discussion with both Dr. Zepeda and Dr. Eichler.
Q Why didn't you include Dr. Eichler's name in the same sentence with Dr. Zepeda if you had discussed that plan with both of them?
A Because I had discussed the entirety of the note and plan with Dr. Eichler.
Q So at the point in time where you discussed Nelsy with Dr. Eichler, you would have already had a discussion with Dr. Zepeda and regarding your plan to start Lamictal?
A Yes.

Q So it wasn't as if you went to Dr. Eichler saying, for example, what do I do in this situation, you recommended a plan to Dr. Eichler as far as the Lamictal went?

MR. WATSON: Objection.

Go ahead.

A It is most likely that I discussed it with Dr. Zepeda and said you saw her most recently, she's breaking through on Depakote, what do you think the most reasonable course of action is. He probably said well, the only thing that's recommended in this instance is Lamictal and then I said okay, let me talk to Dr. Eichler about this.

Q When you -- based on your custom and practice -- I know you don't have a memory of your discussion with Dr. Zepeda, but based on your custom and practice, would you have discussed with Dr. Zepeda the specific dosing listed on the packaging insert?

A No.

Q Would you have had that discussion with Dr. Eichler?

A Yes.

Q Why would you have that discussion with Dr. Eichler and not with Dr. Zepeda?
A Because Dr. Zepeda was -- Dr. Eichler was ultimately my attending and responsible for the plan in this care and, you know, is a pediatric neurologist. Dr. Zepeda, I would simply try to get his opinion on a general course of action. I wasn't trying to get a detailed recommendation from him.
Q Based on your custom and practice, what would you have said to Dr. Eichler regarding this patient?
A I would have presented the full case.
Q Which is what?
A The entirety of my note. I would have presented the history of present illness, I would have presented the interval history, past medical history, her current medications, allergies, any birth history, social history, family history, vital signs, physical exam, EEG findings. I would have presented my current assessment and what I might think would be a potential next therapeutic step. And then we would have

formulated the assessment and impression together.

Q When you say you would have communicated the physical exam to Dr. Eichler, would you have specifically communicated Nelsy's height and weight to him?

A I would have communicated the weight.

Q Why would you have communicated the weight and not the height?

A Because it is common practice in pediatrics to present weight as one of the vital signs.

Q Why is that?

A It simply is.

Q Anything else that you would have said to Dr. Eichler regarding this patient?

A No.

Q Back in the 2014 time frame, were you familiar with how a patient's weight could impact how much medication they could tolerate?

A It would ...

Q I can try a different -- tolerate probably wasn't the best word.

Back in the 2014 time frame, were

decrease clearance by about 50 percent.
Q Based on your note, are you able to tell me how you communicated with Dr. Eichler, whether it was by phone or in person?
A No. I'm not able to tell from my note whether I discussed it in person or via phone.
Q Are you able to tell me whether or not Dr. Eichler actually met with Nelsy?
A I'm certain that he would have.
Q Why are you certain about that?
A Because that's how the consult service worked, that after the patient was discussed that the attending, when they were finished seeing the patients that they were rounding on then went to the patients that did staffed and staffed them.
Q If the attending had seen Nelsy, wouldn't you expect to see an addendum from the attending verifying that?
A Either -- I would either see it in the electronic record or sometimes in a handwritten note.
Q Have you ever seen a handwritten note from

EXHIBIT “C”

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO: 1784CV00599

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NELSY DELGADO JUAREZ,

Plaintiff

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,

Defendants

- - - - - - - - - - - - - - - - - - x

REMOTE/ZOOM DEPOSITION of FLORIAN EICHLER, M.D., called on behalf of the Plaintiff, taken pursuant to the provisions of the Massachusetts Rules of Civil Procedure, before Debra Lentz, a Professional Court Reporter and Notary Public, in and for the Commonwealth of Massachusetts, at 115 Lake View Avenue, Cambridge, MA, on Thursday, December 16, 2021, commencing at 10:04 a.m.

DEBRA LENTZ
COURT REPORTING SERVICES
40 Morning Glory Drive
Dennis, MA 02638
(508) 694-7698

A P P E A R A N C E S

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(617) 720-1515
Counsel for the Defendants

Also Present: Stephen Morey, Claims Mgr.
CRICO

I N D E X

E X H I B I T S

(Exhibits provided electronically to court reporter)

S T I P U L A T I O N S

It is hereby stipulated and agreed by and between counsel for the respective parties that the deponent shall have thirty (30) days in which to read and sign the deposition transcript, after which time it shall be deemed to have been signed, and that the filing and sealing of the deposition transcript are waived.

It is further stipulated and agreed that all objections, except objections as to the form of the question, and all motions to strike, shall be reserved to the time of trial. It is also agreed that an objection for one is an objection for all.

FLORIAN EICHLER, M.D., having been satisfactorily identified and duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ZAHKA:

Q Good morning, Doctor.

A Good morning.
Q You heard from your attorney who I am, but my name's Karen Zahka and I represent Nelsy Juarez in this case that's been brought against one of your former colleagues at Mass. General. Today is my opportunity to ask you some questions about your involvement, if you had any, with this patient back in the 2014 time frame. Have you ever had your deposition taken before?
A I have not.
Q Okay. So, I'm sure your attorney went over some of the ground rules, but let me just give you a quick refresher. Even though we're on video, we need all your answers to be verbal. So we're human, right, instinctually we want to do things like say "um-hmm" or nod our heads, but just for the sake of the record, we need all your answers to be clear and verbal, okay?
A Um-hmm.
Q So that's what --
A Yes.
Q Okay, you got it. If you don't understand a

question that I ask you, please just tell me and I'm happy to rephrase it, otherwise if you answer my question, I'm going to assume that you understood it. Does that sound fair?

A Fair.

Q You can take a break at any time, the only thing that I ask is if I have a pending question, that you answer that question prior to taking the break, okay?

A Okay.

Q Sometimes in this process it might be easy to anticipate where I'm going with a question, but I need you to just hold off and wait until I get that full question out before you answer and that's really for two reasons. One, it makes the court reporter's life a lot easier if we're not talking over each other, but two, I don't want you answering a question that you haven't actually heard, okay?

A Yes.

Q Can you please state your full name?

A Florian Eichler.

MS. COOLEDGE: Karen, usual stipulations?

MS. ZAHKA: Yes, that's fine.

MS. COOLEDGE: Okay.

MR. WILKINSON: And he'll read and sign, too, give us 30 days.

MS. ZAHKA: Sure, let me know if you need more.

Q Where do you currently live?

A 115 Lake View Avenue, Cambridge, Mass.

Q And for how long have you lived at that address?

A About eight years.

Q Who lives there with you at that address?

A My wife and my two boys.

Q Is your wife working?

A Yes.

Q What does she do for work?

A She's a neurologist.

Q And where does she practice as a neurologist?

A At MGH.

Q What's her name?

A April Eichler.

Q Okay, same last name, okay. Is she in

pediatric neurology, as well?

A No.

Q Okay. So she's adult neurology?

A Yes.

Q What is your business address?

A 55 Fruit Street, Cambridge, Mass. -- Boston, Mass., 02114, MGH.

Q Okay. And your office is located within MGH?

A Yes.

Q Okay. Other than -- well, strike that. Back in March of 2014, did you have the same business address?

A Yes.

Q Okay. And in 2014 and now, you're an employee of Mass. General Hospital?

A Yes.

Q Is your malpractice insurance provided by Mass. General?

A Yes.

Q Did you independently seek out -- sometimes health care providers will seek out an additional policy, either another primary or excess umbrella policy. Did you do that for your malpractice coverage?

A No.
Q Other than Mass. General, do you have privileges at any other hospital in Massachusetts?
A No.
Q Have you ever?
A No.
Q Okay. Do you do any work at the Brigham?
A No.
Q Okay. What's your title at MGH?
A I'm an Associate Professor of Neurology.
Q And what does that mean? What are your current duties and responsibilities in connection with that title?
A I'm an attending on the Clinical service, and see outpatient neurology patients, and I have an academic appointment at Harvard Medical School.
Q Which clinical service do you oversee as an attending?
A Pediatric neurology.
Q Do you treat adults, at all, or is it only pedi?
A On the inpatient side, I only see pediatrics.

On the outpatient side, I also see adults.

Q Do you currently have any specific involvement with the Residency Program for neurology at Mass. General?

A Yes, I supervise the residents on the Inpatient Service and I provide teaching in the form of lectures and I also supervise them on the outpatient side.

Q How often are you giving formal lectures?

A It varies. Probably two, three times a year.

Q You mentioned that you supervise the residents both on the inpatient side and the outpatient side. Do I have that right?

A That's right.

Q Can you explain to me a little more about what that means, as far as -- you can start with inpatient if that's easier, but what that means that you're supervising the residents?

A So they run the cases of patients past me and discuss the cases with me, and I will examine the patients with them, formulate recommendations and -- yeah. On the outpatient side, it's very similar. So,

again, I would be reviewing their findings and examining the patient as needed, and discussing the recommendations with them and the patients.

Q On the inpatient side, you said that you would examine the patients with the residents. Did I hear that right?

A In part. They will first examine the patients on their own, and then they will discuss the findings with me and I will validate as needed.

Q What does that mean?

A That means I will come by and see whether the patient has the findings that they report, and depending on the history and the findings, that will entail an exam, it might not.

Q Okay. Are there ever circumstances where, on the Inpatient Service, the resident runs the case by you and you don't go to personally examine the patient?

A That can happen, yes.

Q Okay. Explain to me what the circumstances are when that happens where you don't go to

examine the patient.

A If the patient is well-known to the Service and has been seen by other attendings in more recent past, if the events have occurred and resolved, and if the patient is stable and has no ongoing neurologic issues.

Q When it comes to the Outpatient Service, you mentioned that you would examine the patient as needed. Can you explain what that means?

A That's, yeah, it's pertains to both, the inpatient and outpatient side. So, on the outpatient side, again it will depend on if they're pertinent exam findings that are in question or when the resident and family or the patient disagrees about certain findings or whether the findings are going to change the diagnosis or the management.

Q Okay. Is it safe for me to assume that if it's a brand new patient to the Service, you would be going to examine them yourself?

A I likely would, not always will.

Q Okay. Why not?

A It depends on the reason that the patient is there.

Q How so?
A So if the findings are -- if they're -- if people are not there for a certain neurologic complaint, then certainly on the outpatient side I would not examine them, if it's a question of just a genetic finding, discussing of lab results or family history or future risks. On the inpatient side, if they are new to the Service, it's less likely. I would probably be seeing the patient and examine them or have the resident who's presented to me present the pertinent findings.
Q And how is it determined which findings are pertinent, I guess, how does that process work?
A That usually comes from the history and how the patient is presenting or what complaints the patient is coming with.
Q Just for clarification, if a pediatric patient is in the Emergency Department, is that outpatient or inpatient?
A That's inpatient.
Q Okay. Is it safe for me to assume that if a

pediatric patient is in the Emergency Department but they're well-known to the Service, that that's probably not a scenario where you would go to personally examine them?

A It really depends on the history. If the findings are new, if the resident is, you know, unclear about exam findings, if the situation is evolving, I would certainly be going to examine the patient.

Q Okay. When you do examine a patient personally, do you typically write a note?

A I will often write an addendum if I see the patient in person, yes.

Q And why do you do that?

A Just to usually support the findings in the joint note of the resident and myself.

Q Are there ever circumstances where you would not write a note after you personally examined a patient?

A It can happen and often the resident would then say, you know, discussed with or examined with Dr. Eichler, but I might have forgotten to add my own addendum to it.

Q How often does that happen?
A Very rarely.
Q Everything we just went over, as far as what your custom and practice is in regards to examining patients whether they're inpatient or outpatient, was that the same back in the March 2014 time frame?
A I would say so, yeah.
Q Do you know who Kathryn Giblin is?
A She was one of the adult neurology residents.
Q Do you have a memory of her?
A Vaguely.
Q Okay. Tell me what you vaguely remember of her.
A I remember some of her appearance.
Q Okay. Tell me about that. What does she look like?
A I think she had brown hair and, as most of the residents, she was astute and smart, but I don't have much of a recollection beyond that.
Q Okay. As you sit here today, do you have a memory of any conversations that you had with her?

A I do not.
Q Even if you don't remember conversations, as you sit here today, do you have a memory of any interactions with her?
A I do not.
Q When's the last time you interacted with Dr. Giblin?
A I don't remember.
Q Okay. Do you know whether or not you've spoken to her or seen her since she completed her residency?
A I have not.
Q Do you have a memory of Nelsy Juarez?
A I do not.
Q So, I'm assuming as you sit here today, you don't have a memory of ever, you know, personally meeting or examining her, do you?
A That's correct.
Q As you sit here today, do you have a memory of being involved in her care, at all?
A I do not.
Q As you sit here today, do you have a memory of any of your colleagues at Mass. General, including the residents, ever speaking about

her with you?

A No.

Q Even if you don't remember her by name, do you remember the pediatric patient, in the 2014 time frame, that was diagnosed with Stevens-Johnson syndrome?

A Can you clarify your question?

Q Sure. I know you don't have a memory specifically of Nelsy. Do you have a general memory of a patient in -- a pediatric neurology patient at Mass. General being diagnosed with Stevens-Johnson syndrome in the spring of 2014?

A I do not.

Q Just to confirm something with you really quick. So you don't have a memory of ever being consulted regarding the dosing schedule for Lamictal when it comes to Nelsy Juarez, correct?

A I do not.

Q In that same regard, you don't have a memory of ever being consulted, in regards to the dosing schedule for Depakote for Nelsy Juarez, correct?

A That is correct.
Q Can you walk me through your educational background? So high school, college, medical school.
A Sure. I grew up in Vienna, Austria. I went to high school in Vienna and graduated from medical school in 1997. I went to Hopkins for a neurogenetic scholarship and then completed residency training in neurology in 2005. And since then, I've been on the Pediatric Neurology faculty at MGH.
Q I know sometimes in other countries, other than the United States, the college and medical school program functions a little differently. Was college and medical school connected in Vienna or was it two separate institutions?
A It's connected.
Q Okay. So what year did you start college or the medical school program? I might be mincing words here, so you tell me how it worked, please.
A It was, I think, it was 1989.
Q Okay. So were you in school from 1989

through 1997?

A That's right.

Q Okay. And then when did you start at Hopkins?

A 1999. So I was at the -- in residency training in Austria and Vienna right after graduation and then I went to Hopkins 1999.

Q Okay. And then, I think, you said after completing your fellowship, that's when you started at Mass. General. Do I have that right?

A That's right. First I went to -- I did my pediatric training at the Geisinger, and then after that I did my adult neurology training, pediatric neurology training at Mass. General.

Q Okay. I'm sorry, I just didn't hear the name. Was it Geisinger?

A Geisinger, yes.

Q Where is that?

A That's in Pennsylvania.

Q Okay. So what year did you start at Mass. General?

A It was 2002. I would have to check dates,

but roughly.

Q Okay. I'm assuming you're licensed to practice medicine in Massachusetts, is that correct?

A That's correct.

Q Has your license always been in good standing?

A It always has.

Q Has your license ever been investigated, suspended or revoked?

A It has not.

Q Have any complaints been made against you with the Board of Registration in Medicine in Massachusetts?

A No.

Q Other than Massachusetts, have you ever been licensed in any other state or country?

A No.

Q So, for example, did you have a limited license in Pennsylvania during your training?

A Oh, that's true, as a resident, yes.

Q Okay. I'm assuming you allowed that to lapse after your training was completed, correct?

A That's correct.

Q Okay. Did you have a license in Vienna, as well?
A Again, limited license as a trainee.
Q Okay. So you don't have a license there currently?
A That's correct.
Q Have you ever applied for a license in any other state?
A No, I have not.
Q Can you give me a sense of what your schedule is currently? So, on a typical work week, what does it look like, your hours and where you are on what days.
A I usually have a full day clinic on Wednesdays and the rest of my time is divided between bench research and clinical research. I -- when I'm attending on service, which is twice a year in two-week blocks, that takes over.
Q Okay. And which service do you oversee as the attending twice a year for those two-week blocks?
A The Pediatric Neurology Inpatient Service.
Q Is there a particular time during the year

that you had those two blocks?

A It varies, but usually in the summer and winter.

Q Was that the case, as well, back in the 2014 time frame?

A It might not have been.

Q Okay. Tell me about that. Why do you think it might not have been?

A Because the attending schedules change.

Q Okay, but in the 2014 time frame, were you still doing those two blocks per year?

A Yes.

Q Okay. And back in 2014, did you still have the schedule otherwise, as far as the full day in the clinic on Wednesdays and the other days being devoted to research?

A I might have had a half-day clinic. My outpatient clinic has grown over the years.

Q Okay. Which day do you think was likely that half-day for clinic in 2014?

A Oh, I think it was still the Wednesday.

Q Okay, I see what you're saying. So Wednesday, clinic could have been a half-day and now it's grown into being a full day?

A That's correct.
Q Okay. When you're performing research -- I saw that Mass. General has a lab named after you, is that true?
A Yes.
Q Okay. When you're doing your research, is it out of that lab?
A Yeah, in part, yes. I do both lab research, as well as clinical research.
Q Okay. Is there anywhere else you're physically located when you're working on your research, other than the lab?
A My office.
Q Okay, and that's within Mass. General's campus, correct?
A Yes.
Q Okay. So maybe I should ask it this way. Anywhere else you're working on research, other than Mass. General?
A No.
Q When you were -- if you were in the clinic for a half-day on Wednesdays, in the 2014 time frame, what time frame would that be? So what time in the morning would you start

and what time would you end?

A While I'm on the Inpatient Service attending?

Q Oh, I was talking about the clinic day, the Wednesdays.

A Okay. Sorry, can you clarify your question? You're asking about March 2014 and my outpatient schedule?

Q So, I think you told me and maybe I misheard you, and if I did, I'm sorry. I think you told me that on Wednesdays you likely had a half-day in the clinic in the 2014 time frame, is that right?

A That's correct, yes.

Q Okay. Can you tell me what half-day means, what the hours are typically for a half-day in the clinic?

A Half-days, either 9 to noon or 1 to 5.

Q Okay. And is it safe for me to assume, then, currently a full day in the clinic means 9 to 5?

A Yes.

Q When you were the attending for the Inpatient Service in the 2014 time frame, would you be physically in the hospital?

A Yes.
Q Okay. Was there ever a time where you would not be in the hospital and still serving as the attending for the Inpatient Service?
A So overnight, I'm at home, I'm not in the hospital.
Q Okay, but during the day, you would typically be within Mass. General?
A That's correct.
Q And what hours would you typically be within Mass. General while you were the attending of the Inpatient Service in 2014?
A Usually, it's 9 to 5.
Q And just for my own clarification, you've already told me the Emergency Department falls under the umbrella of inpatient, correct?
A That's correct.
Q What other services or departments fall under that umbrella of inpatient?
A The Inpatient Pediatric floors, the Pediatric ICU, the Neonatal ICU, the Newborn Nursery. There can be some other affiliated services, as well.

Q Okay. And then what falls under the umbrella of outpatient?
A I'm not sure I understand the question.
Q I guess what I'm trying to gather is when you say outpatient, is that specifically just the clinic?
A Yes, that is exactly just it.
Q Okay. Do you also or did you, in 2014, also have your own patient panel? So people that you -- pediatric patients that you would follow regularly.
A Yes.
Q And is that the same currently?
A Yes.
Q Okay. And whether it was in 2014 or today, where would you see your panel of patients? Would it be in the clinic?
A I've always seen my patient -- my panel of patients in the clinic.
Q Okay. After completing your fellowship, did you pursue any further education of any kind?
A So, I completed a neurogenetic fellowship before I went into child neurology residency training. So I didn't after my child

neurology residency training pursue further.

Q Okay, thank you for that. In 2014, any other sources of income, other than your employment at Mass. General?

A No. I sometimes get asked to do some consulting services, based on my expertise in neurogenetics but it’s minor.

Q Okay. Who do you offer those consulting services to?

A Usually, various biotechnology companies that are looking for my expertise.

Q Which companies are those?

A It varies widely.

Q Do you do any consulting work for Biogen?

A I do not.

Q Other than offering those consulting services, did you have any other source of income, beyond the consulting services or your work at Mass. General in either 2014 or today?

A Not to my knowledge.

Q Have you ever been asked to review a medical legal case as an expert witness?

A I have not.

Q In 2014, did you have any call responsibilities, beyond that block where you were serving as the attending for the Inpatient Services?
A I did not.
Q Do you currently?
A I do not.
Q Are you a member of any hospital committees at Mass. General?
A Yes.
Q What committees are you a member of?
A I'm a member of an MGH Research Council. I'm also part of the -- I'm Director of a fellowship on neurogenetics and gene therapy.
Q Any other committees that you've been a member of at Mass. General, other than those two?
A Yes, I've been a member of various different committees over the years. I can't recall all of them now, --
Q Okay.
A (Inaudible) a long career.
Q Can you recall any of them?
A Yeah, I've been part of the Pediatric

Neurology Residency Committee, I've been part of a Rare Disease Think Tank just to name a few.

Q Okay. I think I have an understanding of how the neurology residency works at Mass. General, but I'm probably going to need you to clarify some things for me, if you can. So, it's my understanding that in the neurology residency, there'd be a rotation in both adult neurology and pediatric neurology, is that correct?

A Sorry, a rotation of what?

Q Of both adult neurology and pediatric neurology, is that right?

A They would both rotate through the Pediatric Neurology Services, is that what you're asking?

Q Yes.

A Yes, that is correct.

Q Okay. Do you know how long that rotation was in the Pediatric Neurology Service?

A Sorry, please clarify your question.

Q Sure. Maybe I can try it this way. Which residency program was Dr. Giblin in?

A Dr. Giblin was on the -- was an adult neurology resident.
Q Okay. And as an adult neurology resident, she still did a rotation in pediatric neurology, correct?
A That is correct, yes.
Q Do you know for how long that rotation was? How long that lasted?
A I do not recall. It is changing over the years and I'm less involved in the allocation of time for residents now.
Q Okay. Do you know currently how long the rotation is in pedi neuro for an adult neurology resident at Mass. General?
A I don't know exactly.
Q Okay. Do you have any general sense as to the number of weeks or months?
A Usually, they spend two months rotating through child neurology, both at Mass. General as well as at Boston Children.
Q And is that -- are those two months at Mass. General and Children's, is that the only aspect of the adult neurology residency program where the resident rotates through

pedi?

A It's a very much combined program, so both the child neurology residents will be rotating through adult neurology, and an adult neurologist will be rotating through child neurology, and there would be joint lectures and joint education. So, it's -- there are many other aspects of this.

Q Okay. I guess where I'm trying to get a sense of and maybe you can answer this for me. Dr. Giblin was in that pediatric neurology rotation in March of 2014, would you have known who she was prior to that rotation?

A I would have, yes, I think so.

Q Okay. How so?

A Because they come through child neurology at Mass. General in their last year of training and so, by that time, they've already been exposed to various outpatient clinics and gone through many years of training at Mass. General.

Q Okay, but where would you have seen her outside the context of pediatric neurology?

A As I said, it's a joint program, so adult neurology and pediatric neurology are very connected and the hospital is all under one umbrella, so with joint lectures and meetings. So, by that time, I usually have seen the adult neurology residents.

Q Okay. Prior to her -- prior to Dr. Giblin's rotation in pediatric neurology, though, you wouldn't have served as an attending for her, right?

A I likely did serve as an attending in the outpatient side, because they all rotate through the outpatient clinics, as well.

Q Okay. Do you know how many rotations they do in the Pediatric Clinic?

A I do not.

Q Are you Board Certified?

A Yes.

Q In what specialties are you Board Certified?

A I have the American Board for Psychiatry & Neurology Certification with sub-specialty expertise in child neurology.

Q And for that sub-specialty of child neurology, was that a separate Board exam?

A Yes.
Q When did you become Board Certified in each of those Boards?
A So, sorry, to be clear, the American Board of Psychiatry & Neurology has one dedicated exam for child neurologists, okay.
Q Okay.
A And I would have to go back and recall when I originally got that certification, but I did my recertification about a year or two ago.
Q Okay. So, safe to say even if you can't remember the exact year, you were Board Certified in child neurology as of March of 2014?
A I was definitely certified, yes.
Q Okay. And was there an oral and written component to that exam?
A I think when I originally did my certification, there was a written and oral part. I think the -- so the recertification was all written.
Q And did you pass the original Board exam and the recertification exam on the first attempt?

A Not on my first attempt, not the first one.
Q Okay. How many times did you take the first exam in child neurology?
A I think I took it twice.
Q Do you know why you failed it the first time, what was giving you difficulty?
A I don't recall.
Q I know you have a number of publications. Do any of those publications talk about the side effects of Lamictal or Depakote?
A They do not.
Q Do any of those publications talk about the dosing regimen or a titration schedule for Lamictal or Depakote?
A They do not.
Q Do any of those publications talk about Stevens-Johnson syndrome?
A They do not.
Q Have you ever been named a defendant in a lawsuit?
A No.
Q Have you ever been a plaintiff in a lawsuit, in other words have you ever sued anybody else?

A No.
Q I know you told me this is your first deposition today, but other than today, have you ever given any testimony under oath of any kind? So, you know, it could be in a courtroom, it could be an affidavit, anything like that.
A Not that I recall.
Q So I know Attorney Wilkinson is representing you today, is that correct?
A That's correct.
Q I don't want to know about any conversations you've had with him, okay, those are privileged, but other than speaking with your attorney, did you do anything else to prepare for today's deposition?
A I looked at the note in question.
Q Okay, and is that the note from March 31, 2014 by Dr. Giblin?
A That's correct.
Q Okay. Had you seen this note before preparing for today's deposition?
A Can you clarify the question?
Q Sure. When you looked at this to prepare for

today, did it look familiar to you? Have you reviewed it in the past?

A I had looked at it ever since there were plans for the deposition.

Q Okay. Prior to becoming aware of your potential deposition, had you looked at this note before?

A I don't recall.

Q So, it's a five-page note. Do you have that in front of you?

A I do.

Q Okay. Did you author anything contained within this note?

A I did not.

Q And you didn't add an addendum to this note either, correct?

A That's correct.

Q Based on what we talked about earlier, is it safe for me to assume that, given the fact you did not author anything in this note and that you did not provide an addendum to this note, that you probably didn't personally examine Nelsy on this date?

A That's likely correct.

(Whereupon a brief conversation was held off the record.)

Q Other than reviewing this note by Dr. Giblin from March 31st of 2014, did you look at any other documents to prepare for today?
A I did not.
Q I think I already asked you this, but I just want to make sure I did. Have you spoken to Dr. Giblin, let's say in the last five years?
A I have not.
Q Do you know who Rodrigo Zepeda is?
A I think he's another adult neurology resident.
Q Okay. Do you recall --
A He was.
Q Okay. Do you know where he is now?
A I don't know.
Q Okay. I'm assuming you haven't talked to him in the last five years either, right?
A I have not, no.
Q Okay. Do you recall having any discussions with him about this patient Nelsy Juarez?
A I do not.

Q In 2014, were you familiar with Stevens-Johnson syndrome?
A Yes.
Q Okay. What is that syndrome?
A It's a serious condition involving skin, mucus membranes, eyes. Usually due to an allergic reaction to medication.
Q And you had that understanding back in the March 2014 time frame, correct?
A That's correct.
Q Back in the March 2014 time frame, did you have an understanding as to whether or not there were any medications that were more likely to create that allergic reaction when it came to a pediatric neurology patient?
A I had some understanding, yes.
Q Okay. What was your understanding at the time in regards to that?
A That medications like Depakote or Lamictal can cause Stevens-Johnson.
Q What is or if you know, or did you know at the time in 2014, what it was about Depakote or Lamictal that could cause Stevens-Johnson syndrome?

A I do not.
Q Okay. In 2014, did you have an understanding as to how Depakote and Lamictal would interact with each other?
A Some understanding, but apart from the fact that they can interact with each other, not much.
Q Okay. Do you know whether or not Depakote or Lamictal makes the other more potent if given together?
A Can you rephrase your question?
Q Sure. In 2014, did you have an understanding as to whether or not co-admission of Depakote and Lamictal could increase the potency of one of the medications?
A No.
Q Okay. You don't know that -- how about today, do you know whether or not that's true?
A No.
Q Okay. So you don't have an understanding that if Depakote and Lamictal are given to a patient at the same time, that the Depakote increases the potency of Lamictal?

A I think it can change metabolism. I don't know if that's -- that's not the same as potency.
Q Okay. Tell me how it changes the metabolism.
A I think that the levels of the medications can change.
Q How so?
A When you administer one drug, you might change the levels of the other drug.
Q Okay. Did you have that understanding, back in the 2014 time frame, that the way one of those medications could be metabolized would be impacted by co-administration of Depakote and Lamictal?
A Yes.
Q Do you know how one impacts the other? Is it, you know -- or strike that. In 2014, did you have an understanding as to how Depakote and Lamictal would impact the way the drug was metabolized?
A No.
Q Okay. Did you have an understanding, in 2014, that the co-administration of Depakote and Lamictal could increase the risk for

Stevens-Johnson syndrome?

A Yes.

Q Can you quantify that, in any way, how much of an increased risk it is?

A I cannot.

Q In your career, have you treated pediatric patients with Stevens-Johnson syndrome?

A I think on the Inpatient Service I've seen, at most, a handful of patients over the last 20 years.

Q Okay. In that handful of patients, do you know what the causes were for their Stevens-Johnson syndrome?

A I don't recall.

Q As you sit here today, are you familiar with the dosing schedule for Lamictal for a pediatric patient?

MS. COOLEDGE: Objection.

Q You can answer, sorry.

A I usually look it up, but if you consider that familiarity, then yes.

Q Okay. And where would you go to look that up?

A I look it up in the prescription guidelines.

Q Okay. And would you have the same level of familiarity when it comes to the dosing schedule of Lamictal back in 2014, as well?
A That's correct.
Q Okay. And is it the same for Depakote both in 2014 and today, that you would look it up?
A That's correct.
Q Based on your custom and practice, if a neurology resident consulted you, regarding the dosing for Lamictal, would you have advised that resident to look up the dosing schedule, given that you wouldn't have it offhand?
A Yes.
Q Okay. And was that the same back in the 2014 time frame?
A Yes.
Q Okay. Given that you treat pediatric patients, I'm assuming you have a general understanding as to what the average weight is at certain ages, is that true?
A Somewhat.
Q Okay. Do you have any understanding as to what the average weight is for a 13-year old?

A Can you clarify your question?
Q Sure. Let me try it this way. Nelsy Juarez was 13 in March of 2014, and she weighed about 61 pounds. Can we agree that that's significantly less than the average 13-year old?
A That's correct.
Q Do you have any understanding as to how much the average 13-year old weighs, if you can -- by estimate?
A Yeah, about maybe close to twice as much, but I do not know for sure.
Q Okay. Back in the 2014 time frame, did you expect the residents in your program to factor in the child's weight when it came to treatment decisions with medications?
MS. COOLEDGE: Objection.
A I have no reason to think otherwise.
Q And back in 2014, did you expect that of your residents when it came to all pediatric patients, regardless of their age?
A I'm sorry, what is your question exactly?
Q Sure. So, I had originally asked you whether back in 2014 you would have expected your

residents to factor in the pediatric patient's weight when it came to prescribing medications and, I think, you told me you would, correct?

A So the question of whether to factor in weight depends on age.

Q How so?

A According to your prescription guidelines, you follow either weight or age according to the guideline.

Q Okay. Are there ever circumstances where a child doesn't fit squarely within those guidelines, whether it be by age or by weight?

MS. COOLEDGE: Objection.

A Can you rephrase your question?

Q Sure. So, earlier we talked about the fact that, in March 2014, Nelsy was 13 years old, but I think you told me she weighed approximately half the weight of the average 13-year old, correct?

A You told me that -- or you gave me her weight, yes, and I think that's underweight.

Q Okay. So, are there circumstances where

pediatric patient's weight and age doesn't fit perfectly together in those dosing schedules?

MS. COOLEDGE: Objection.

MR. WILKINSON: When we're talking about dosing schedules, I think, are you -- this started off with all medications. Are you talking now specifically about Lamictal?

MS. ZAHKA: I'm just talking about all medications right now.

MR. WILKINSON: Oh, okay. Okay.

She's talking about all medications, Doctor.

THE WITNESS: Sure.

A So, usually the guidelines account for that, that's why there are prescription guidelines.

Q How is it that you know the guidelines account for that?

A Because they mention both age and weight.

Q Okay. So, is it safe for me to assume that both age and weight should be considered in creating a dosing schedule for a pediatric patient?

MS. COOLEDGE: Objection.

A In accordance with the guidelines.
Q Do you plan on testifying as an expert witness at this trial?
A I do not.
MS. ZAHKA: Can I accept that representation, everybody?
MR. WILKINSON: Not from me.
A I don't know what the question entails.
Q Okay. Well, do you have any plans to testify at trial?
A The difference between expert and witness are, in my mind, different things.
Q Okay. Let's just start as a witness. Do you have plans to testify as a witness at trial?
A I see myself here more as a witness than as an expert.
Q Okay. Do you know when the trial is in this case?
A I do not.
Q Okay. Even if you don't know when it is, do you have any plans to testify at the trial? So not today in the deposition, but physically in the courtroom.
A I do not, no.

Q So, is it safe for me to assume that you don't have any opinions as to whether or not Dr. Giblin complied or violated with the standard of care in March 2014, correct?
A I see no evidence thereof.
Q My question, Doctor, is do you have any opinions as to whether or not she complied with the standard of care, any expert opinions?
A Again, I'm -- I see my role here as a witness, not as an expert.
Q Okay. I just want to confirm with you. So experts typically offer opinions as to whether or not the defendant complied or violated with the standard of care. So since you're telling me you're not going to be an expert, I just want to make sure I'm understanding you correctly that you don't have an opinion and you don't plan to express an opinion as to whether or not Dr. Giblin complied or violated the standard of care. Do I have that right?
A I honestly don't understand the question.
MS. COOLEDGE: Karen, if I may, he

has not been identified as a witness. We exchanged expert disclosures and submitted a joint pre-trial memorandum and we did not identify on behalf of the defendant him as an expert witness in this case.

MS. ZAHKA: Okay. I've just seen circumstances where, you know, because he's a medical provider, then all of a sudden he's offering expert opinions on the stand, even if he's not disclosed, it depends on the Judge truthfully.

Q So I just want to make sure, as we're sitting here today, you don't have an expert opinion regarding whether or not Dr. Giblin complied with the standard of care, correct?

A Yeah, I don't see myself as an expert in this scenario. I am a witness to what happened.

Q Okay. So you don't have an opinion, correct?

A I don't know how I can have an opinion on something that I'm not asked to be.

Q Okay. So you are not going to offer any opinions as to the standard of care, correct?

A I'm glad to be a witness as I supervised the adult neurology resident, but I –- so it all

depends on what you consider opinion here.
Q Okay.
A I think it's a difference between being an expert and being a witness, and honestly, I don't know enough about that to give you an opinion right now.
Q Okay. I'm a lawyer, so I hang on words, which is probably very frustrating for you, so I'm sorry, but I just want to confirm with you that because you're saying you're not an expert in this case, that that means you're not going to offer any opinions as to whether or not Dr. Giblin complied with the standard of care.
A I don't -- honestly, I don't know enough about this, how this works, so I can't answer that right now. My understanding is that there are differences between being an expert and being a witness. I feel comfortable being a witness, but I don't feel comfortable making expert statements.
Q Okay, that's what I needed to hear, so thank you. Outside of any discussions with your attorney, do you have any understanding as to

what Nelsy's treatment course was after March of 2014?

MS. COOLEDGE: Objection.

A No.

Q As you sit here today, do you have any opinion as to what caused Nelsy's Stevens-Johnson syndrome?

A No.

Q As you sit here today, do you have any opinion as to the permanency of her injuries?

A No.

Q I can't remember if I asked this, so if I'm being repetitive, I'm sorry, but as you sit here today, do you have a memory of any conversations with any health care provider at MGH regarding Nelsy?

A No.

Q In that note from March 31st, authored by Dr. Giblin, on the last page under her signature, it says, (Reading):

"Discussed with neurology consult attending Dr. Florian Eichler."

Do you see that?

A I do.

Q Do you have any memory as to whether or not that discussion occurred in person or over the phone?

A I do not.

Q Is there anything about this note and the way it's written that helps you determine whether or not that conversation was in person or over the phone?

A No.

Q Were there times, in 2014, when you were the attending that, even though you were in the hospital, you would consult with the residents over the phone, because you were in a different part of the hospital at the time?

A It's possible.

Q Do you know how often that was, as opposed to consulting in person?

A I do not.

Q In the 2014 time frame, when you were serving as the attending, would you be the only attending on the Service during that time frame?

A Yes.
Q Okay. So, for example, there's reference in this note to a Dr. Dooling. Do you see that below?
A I do.
Q Dr. Dooling wouldn't have been an additional attending on this day, correct, it would have just been you?
A That's correct.
Q In 2014, did you have an understanding as to how or if weight impacted how Depakote would be metabolized in a pediatric patient?
A Yes.
Q Can you explain that to me what that understanding was?
A If you have a lower weight, you should be giving a lower dose; if you have a higher weight, you should be giving a higher dose.
Q Was the same true for Lamictal?
A The same is true for almost all drugs.
Q Okay. And why is that that if they're a lower weight, it should be a lower dose, and if they're higher weight, it should be a higher dose? What's the reason behind that?

A So, at least in pediatrics, there are larger weight changes early in life.
Q Okay, but how does that translate to -- I guess, strike that. What I'm trying to gather is what's the purpose for the lower dose based on the lower weight? What are you guarding against?
A You're guarding against giving too much medication if the patient's weight is lower.
Q Okay. And what can happen to a pediatric patient that's given too much Depakote?
A As with most medications, patients can get drowsy and they can experience side effects.
Q Can those side effects include allergic reaction, such as Stevens-Johnson syndrome?
A It can.
Q What can -- in 2014, what was your understanding as far as what could happen to a patient that was given too much Lamictal?
A My understanding was very similar to what I just outlined for Depakote.
Q Okay. So they could become drowsy or have other side effects, such as an allergic reaction, including Stevens-Johnson syndrome,

correct?

A That's correct.

Q In 2014, would you have expected your residents rotating in the Child Neurology Program to have that same knowledge?

A Yes.

Q So, I think that's all the questions I have. I just want to run back through my notes really quick, if that's okay?

MS. ZAHKA: So we can go off for a couple of minutes.

MS. COOLEDGE: Karen, can we just take a five-minute break?

MS. ZAHKA: Sure, yeah.

MS. COOLEDGE: I am going to have some questions.

MS. ZAHKA: Okay, sure.

(Short break was taken.)

Q I just have one more question and then the attorney for Dr. Giblin has some more questions for you, Doctor, okay?

A Okay.

Q Have I exhausted your memory today, as far as anything that you can recall, regarding any involvement in your treatment with Nelsy Juarez, including any conversations that you may have had with any other health providers at Mass. General?

A I do not recall anything about this case.

Q Okay, thank you, that's all the questions that I have.

CROSS EXAMINATIOM

BY MS. COOLEDGE:

Q Good morning, Dr. Eichler. My name is Christine Cooledge. As Attorney Zahka had mentioned, I represent Dr. Giblin and Massachusetts General Hospital in this case. I do have a few follow-up questions and I apologize for skipping around a bit.

You testified just a few moments ago about generally speaking with medications that if there -- if the patient has a lower weight, you should be giving a lower dose, and if the patient has a higher weight, you should be giving a higher dose. Do you

recall that testimony?
A Yes, within the early pediatric range according to prescription guidelines.
Q Okay. What do you mean by early pediatric range?
A According to the prescription guidelines, you give patients with a lower weight a lower dose, and those with a higher weight a higher dose.
Q And if the prescription guidelines state that at a particular age you consider only the age and not the weight, do you still then look at the patient's weight to determine whether to do a lower dose or a higher dose?
MS. ZAHKA: Objection to the extent that this is calling for an expert opinion.
A So do I?
Q You can answer.
A You follow the prescription guidelines and if they are clear, then you follow those.
Q You were also asked about, with respect to Depakote and Lamictal, if a patient is given too much of these medications, whether the patient could have an allergic reaction, such

as Stevens-Johnson syndrome. Do you recall that testimony?

A That's right.

Q Do you know whether a patient can have an allergic reaction, such as Stevens-Johnson syndrome, even if they aren't given too much of the medication?

A My experience is that you can get Stevens-Johnson independent of dosing.

Q So, even if the guidelines are followed with respect to dosing?

A That's correct.

Q I'd like to take a look back at Dr. Giblin's note that Attorney Zahka had questioned you about. Do you see in the note what the recommendation was by Dr. Giblin with respect to the dosing of Lamictal for Nelsy?

A I do see that, yes.

Q Can you tell me -- I understand you don't recall the conversation with Dr. Giblin when she consulted with you on March 31, 2014, but do you recall the type of information that she would have provided to you?

MS. ZAHKA: Well, I'm going to

object to this one, but go ahead.

A I don't recall anything here, but I see the note in front of me.

Q Dr. Giblin would have discussed her plan of care with you?

MS. ZAHKA: Objection.

A She states that she did and I have no reason to believe she did not.

Q You would have concurred with the recommendation with respect to the dosing schedule for Nelsy, is that correct?

MS. ZAHKA: Objection to form and this is also calling for an expert opinion. He has no memory of this. He's made it very clear he has no opinions as to Dr. Giblin, whether or not she complied or violated the standard of care. I made that very clear on direct, so I am going to object to this line of questioning.

A I can speak to the note in front of me. I cannot speak to any recollections.

Q If Dr. Giblin would have presented a plan of care or any treatment for this patient that you did not agree with, what would have been

your next steps?

A To change the course of action accordingly.

Q The recommendation, with respect to dosing that Dr. Giblin made for this patient, is that a recommendation that was appropriate according to the guidelines?

MS. ZAHKA: Same objection, Christine, this is calling for an expert opinion and I made a point to make it very clear on direct that he's not providing opinions as to Dr. Giblin's care and this is going directly to an expert opinion.

MS. COOLEDGE: This is a line of questioning for a patient -- for a doctor who was consulted on this patient and he would have made a determination as to the appropriateness of the recommendation at the time.

MS. ZAHKA: He has no memory of it. Jim, if you're talking, we can't hear you.

MR. WILKINSON: You can answer the question.

MS. ZAHKA: Sure, same objection, though, just for the record.

A Since what is written in the note is in accordance with prescription guidelines, I would have agreed with it.

Q Thank you, I have no further questions.

MS. ZAHKA: I just have a couple.

REDIRECT EXAMINATION

BY MS. ZAHKA:

Q Doctor, I thought you told me earlier that you don't have a memory as you sit here today as to what the prescription guidelines say. Do you recall telling me that earlier?

A That is correct --

Q So my --

A -- but what is outlined is in accordance with what is written in the treatment prescription guidelines.

Q How do you know that if you have no memory as to what the guidelines say?

A I looked them up.

Q When?

A Oh, I just -- I did look that up.

Q When?

A Today.

Q When today?
A Before this call.
Q But I asked you during this call if you knew what the prescription guidelines stated for Lamictal and you told me you did not, didn't you?
A No, I said I would have to look them up.
Q Okay. Since I asked you that question, have you looked them up?
A Since you asked, I didn't look them up since you asked that question, but I had looked them up before when I was looking at this note.
Q Okay. When I asked you earlier if you knew what the prescription guidelines said for Lamictal, you told me no. And then to Christine's questions, the attorney for Dr. Giblin, you're somehow able to recall them and then testify that you would have agreed with this recommendation in this note?
A So, again, when you asked me how would I -- would I know what the dosing is for Lamictal, I said no, I would have to look it up. When I read this note, I did look up the

prescription guidelines to check whether this was in accordance, and yes, it is. I'm not contradicting myself in the sense that I --

MR. WILKINSON: You've answered the question, Doctor.

Q What does the dosing recommendations say? What do the guidelines say? Tell me everything you remember about the guidelines.

A It says in the guidelines that a patient above 12 years of age --

Q What are you reading?

A I'm looking at the note that was from Dr. Giblin.

Q Okay. I'm not asking you to tell me the information in the note. I'm asking you to please tell me everything the guidelines say for Lamictal.

MR. WILKINSON: He was and then -- but you then asked him what he was looking at. He can look at something and tell you something.

MS. ZAHKA: I'm asking him from his memory, Jim.

MR. WILKINSON: I understand that,

but somebody can be looking at something and testifying and it doesn't mean that they're looking at that note to testify. Do you understand what I'm saying? In other words, I'm looking at this right now.

MS. ZAHKA: I don't.

MR. WILKINSON: You don't?

MS. ZAHKA: I don't, I really don't.

MR. WILKINSON: Okay. Well, let me explain it to you then.

MS. ZAHKA: I don't need you to.

MR. WILKINSON: I've got a document right here --

MS. ZAHKA: I don't need you to, Jim.

MR. WILKINSON: All right, well.

Q Doctor, are you able to tell me what the dosing guidelines for Lamictal say without looking at Dr. Giblin's note?

A I cannot tell you what the dosing regimen is without looking at the prescription guidelines and that's what I did. I looked at the prescription guidelines and I compared

them with the note and they're correct.
Q But as you sit here today, you can't tell me what the guidelines say?
A I can tell you what I just read and I jotted down some notes on. Do you want me to tell you that?
Q You have some notes in front of you?
A I wrote down the prescription guidelines --
Q When --
A -- as I looked at the note.
Q When did you make those notes?
A Just before the call.
Q If you had those notes in front of you during this call, why didn't you tell me that you do know what the dosing guidelines say for Lamictal?
A You didn't ask me that. You asked me whether I would know them independent of the prescription guidelines and I do not, I have to look them up.
Q Doctor, that's what I asked you just now, but about an hour and a half ago, I asked you if you know what the guidelines say for Lamictal and you told me that you did not. Do you

recall that?

A Yeah, but that -- it's true that I don't have -- that did not mean that I don't look them up. I looked them up.

Q How many pages of notes do you have in front of you?

A I have the five pages that you mentioned of the notes.

Q Okay. I meant your handwritten notes. How many pages of handwritten notes do you have in front of you?

A I don't have any other pages of handwritten notes. I just made a note of the dosing on the last page.

Q Okay, I'm going to ask for a copy of those notes, okay?

A Mm-hmm.

Q So if you can scan those and send them to your attorney, I'd appreciate it, okay?

A Okay.

Q But can you read to me what your handwritten notes say?

A Okay, (Reading):

"25 milligrams, q.o.d. for week one plus two, 25 q.d. three plus four," which is short for week three plus four and then, "50 milligrams, 75 milligrams."

Q Any other handwritten notes that you made anywhere about this patient or this dosing schedule?

A I wrote down below the different weight-based dosing, as well.

Q Okay. Can you read to me everything you wrote about that?

A (Reading):

"0.3 milligrams per kilo per day in one to two doses and 0.15 milligrams per kilo per day in one to two doses."

Q And what was that in reference to?

A That is if the child had been younger.
Q I thought you just told me it was based on weight?
A That is if the child had been younger.
Q Okay. You told me the notes you just made were in reference to weight, so what did you mean when you said that?
A I wrote down from the prescription guidelines the dosing for weight for younger children.
Q Okay. What parameters for weight resulted in those notes that you just read to me?
A Can you repeat your question?
Q Sure. So you told me the notes you just read to me, I think it 0.3 to 1 per day. Do I have that right?
A No.
Q Okay. Tell me what you said, then, please.
A I wrote down 0.3 milligrams per kilo per day in one to two doses, and I wrote down 0.15 milligrams per kilo per day in one to two doses.
Q Okay. What weight ranges are those doses based on?
A What weight ranges, they're based on age up

to -- from 2 to 12.

Q Doctor, when it says per kilogram, what is it referring to?

A It's referring to weight until 12 years of age.

Q Okay. I'm not asking about age, I'm asking what weight it's referring to.

MS. COOLEDGE: Objection.

Q Is that for every patient up to age 12?

A That's right.

Q Okay. If Nelsy had been 12 years old instead of 13, her dosing would have been calculated by that medication schedule that you just read to me, is that right?

A If she had been up to 12 years of age, that's correct.

Q Okay. She weighed 61 pounds, correct?

A Um-hmm.

Q Yes?

A 27.8 kilos, yes.

Q Which is roughly 61 pounds, correct?

A Yes.

Q Based on a weight of 61 pounds, if she had been 12 years old, what would the dosing have

been according to your notes?
A If she had been younger than she was?
Q Correct, if she was 12 years old and weighed 61 pounds, what would her dosage be of Lamictal according to your notes?
A Again, this is not my notes, this is the prescription guidelines and so that would have to be calculated by the prescription guidelines.
Q Doctor, you wrote down 0.3 milligrams per one kilogram, correct?
A Um-hmm.
Q Yes?
A Yes.
Q Okay. Based on your notes, what would the calculation be for Nelsy had she been 12 years old?
A Approximately 10 milligrams per day.
Q Okay. Significantly less than what she was ultimately prescribed, correct?
A She was given 25 milligrams every other day, which is 12.5 milligrams, on average, per day.
Q Can we agree the dosage would have been

significantly less had she been 12 years old?

MS. COOLEDGE: Objection.

A It would have been less.

Q Do you know where in the dosing schedule you took those notes from, the 0.3 per one -- 0.3 milligrams per one kilogram?

A I took it from the prescription guideline that said 2 to 12 years of age.

Q Okay. And do you know where you took the other notes you wrote from, which portion of the guideline?

A From above 12 years of age.

Q Did you read the entirety of that packet in anticipation of today or just look at those dosing schedules?

A I looked at the dosing schedules.

Q So you didn't read anything else contained within that packet?

A No, I looked at the dosing schedules.

Q Okay. For example, you didn't look at any of the warning labels?

A I did not.

Q Did you look at the dosing schedule for a pediatric patient that's taking Depakote

versus not taking Depakote?

A I did.

Q Okay. Do you recall what the dosing schedule was for each of those, for a patient taking Depakote versus not taking Depakote?

A I do not. So, at least for the age of Nelsy, I recall that there was no difference.

Q Did you look at the Depakote dosing schedule in anticipation of today?

A I did not.

Q Why not?

A I didn't think it was as pertinent.

Q Why?

A Because the question was whether the Lamictal dosing was appropriate.

Q Who told you that that's the question?

MR. WILKINSON: Well, I object.

Doctor, if you heard that from me, you know, you're not to discuss any conversations that we had, but you can answer the question.

THE WITNESS: Okay.

A What is the question?

Q Did anyone, other than your attorney, tell

you that the question you were supposed to answer today is whether the dosing of Lamictal was appropriate?

MR. WILKINSON: Well --

A No.

Q Okay. As you looked at Dr. Giblin's note, you saw that she prescribed, that Nelsy was prescribed two medications for her seizures, both the Depakote and the Lamictal, correct?

A That's correct, that's what I see from the note.

Q Right. And so earlier you told me that you knew Depakote and Lamictal could interact with one another if they're prescribed simultaneously, correct?

A That's right.

Q But you couldn't tell me how one impacted the other, as far as how they're metabolized, correct?

A That's right.

Q Okay. Is there a reason that you didn't look at the Depakote schedule in anticipation of today, given that both Lamictal and Depakote were prescribed?

MS. COOLEDGE: Objection.

A No, I looked at the Lamictal dosing.

Q Okay. Do you know whether or not the prescription for Depakote was in accordance with the scheduling, the dosing schedule?

A Sorry, can you repeat your question?

Q Sure. You told me that you don't know offhand what the dosing schedule is for Depakote, is that still correct?

A That's correct.

Q And you didn't look at the Depakote dosing schedule that was in effect in 2014 in anticipation of today, correct?

A That's correct.

Q So I'm assuming, likewise, you can't tell me whether or not the level of Depakote Nelsy was prescribed on this date was appropriate in accordance with the dosing schedule for Depakote, correct?

MS. COOLEDGE: Objection.

A So I -- in the note, I see Depakote levels drawn, otherwise I don't have any recollection apart from what the Depakote levels were here.

Q Right. You don't have a recollection and you didn't proactively look at the Depakote dosing schedule in effect in 2014 in anticipation of today, correct?
A I did not, no.
Q And is there any other reason, other than what you've already told me, as to why you chose to look up the Lamictal dosing schedule and not the Depakote dosing schedule?
MS. COOLEDGE: Objection.
A The Lamictal was the change that was made at that visit.
Q Okay. Given that you knew at the time and you know now that Lamictal and Depakote can interact with each other, is there any other reason, other than what you told me, for why you only looked up the Lamictal schedule and not the Depakote schedule in anticipation of today?
MS. COOLEDGE: Objection.
A Can you repeat your question?
Q Sure. So we've already been over that in anticipation of today you looked up the dosing schedule for Lamictal and compared it

to Dr. Giblin's note, correct?

A Um-hmm.

Q Yes?

A Yes.

Q I'm just asking real-world logistically is there any other reason, other than what you've already said to me, for why you only looked up the Lamictal dosing schedule and not the Depakote dosing schedule?

MR. WILKINSON: That he hasn't already told you?

MS. ZAHKA: Right, that he hasn't already told me, exactly.

A (Inaudible).

Q I'm sorry, I didn't hear that.

A No, no was the answer.

Q At the time, in 2014, when you were being consulted by residents in treatment plans, for example in a situation like this if you had been, would you be looking at the actual chart before making that recommendation or would you be relying on the information that the resident told you?

A Would I be relying on -- sorry, what's the

question?

Q Sure. So, if you had been consulted as the note says here, for purposes of that consult, would you be looking at the patient's chart or would you be relying on the information and data that the resident gives to you in order to help come up with that treatment plan?

A I would, first and foremost, be relying on the resident.

Q Okay. Based on your custom and practice, would you have also looked at the chart before that consult with the resident or would it just be that conversation?

A It would usually be just that conversation.

Q Did you have any conversations with Attorney Cooledge before this deposition today?

A I did not.

Q Did you have any conversations with anyone from her office before today?

A I did not.

Q Have you ever spoken to an Attorney Nancy Watson?

A I've not -- I don't recall whether I talked to her. I had an email exchange with her.
Q Okay. And in that email exchange, did you have an understanding that she was your lawyer?
A Yes.
Q Okay. Outside of that email exchange, did you have any other conversations or correspondence with either Attorney Watson, Attorney Cooledge or anyone at their office?
A No.
Q Do you know when in time that email exchange was? I don't want to know the content of it, but when that email exchange occurred with Attorney Watson.
A I think it was sometime last year.
Q Do you know whether or not it was before or after your deposition was scheduled for the first time?
A I don't recall.
Q But it was within the year of 2021?
A I believe it was last year, so 2020. I --
Q Okay.
A (Inaudible) –- more on the details.

Q Was there only that one email exchange?
A I don't recall.
Q Other than the notes that you've written on the note in front of you, the March 2014 note, have you made any other notes about this patient or the care or this case at any point in time?
A I have not.
Q That's all the questions I have for you, Doctor, thank you for your time today.

MS. COOLEDGE: I have no further questions. Thank you, Dr. Eichler, for your time.

MR. WILKINSON: Okay, thanks, Doctor. Good to see everyone.

(Whereupon the deposition was concluded at 11:50 a.m.)

E R R A T A S H E E T

Nelsy Delgado Juarez v Kathryn Giblin , M.D.

Deposition of Florian Eichler, M.D.

Re:	LINE	CORRECTION	REASON

I, Florian Eichler, M.D., do hereby certify that I have read the foregoing transcript of my testimony given in the aforementioned matter, and further certify that said transcript is a true, accurate and complete record of said testimony.

Signed under the pains and penalties of perjury this _____ day of _____ 2022.

_____

Florian Eichler, M.D.

C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE COUNTY

I, Debra Lentz, a Professional Court Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that the foregoing deposition of Florian Eichler, M.D., was taken before me on December 16, 2021. The said witness was duly sworn before the commencement of his testimony; that the said testimony was taken audiographically by myself and then transcribed under my direction. To the best of my knowledge, the within transcript is a complete, true and accurate record of said deposition.

I am not connected by blood or marriage with any of the said parties, nor interested directly or indirectly in the matter in controversy.

In witness whereof, I have hereunto set my hand and Notary Seal this 28th day of December, 2021.

Debra Lentz

Debra Lentz, Notary Public
My Commission Expires:
November 10, 2028

BC

12/28

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NOTICE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

MOTION OF THE DEFENDANTS IN LIMINE TO PERMIT THE TRIAL TESTIMONY OF FACT WITNESS, FLORIAN EICHLER, M.D.

Now come the defendants and hereby move in limine to permit the trial testimony of fact witness, Florian Eichler, M.D. As grounds therefore, the defendants submit the following.

This is a complex medical malpractice action in which the plaintiff, Nelsy Delgado Juarez, alleges that the defendant, neurology resident, Kathryn Giblin, M.D., was negligent in her care and treatment of her in 2014. More specifically, the plaintiff alleges that Dr. Giblin was negligent when she allegedly failed to consider Ms. Juarez's small stature and below average weight for a 13 year old when she recommended the dosing schedule for the antiepileptic medication, Lamictal. Dr. Giblin submits that, as documented in her note in the medical record, she discussed the patient's presentation, her evaluation of the patient, and her recommendations for treatment with her attending, Dr. Florian Eichler, prior to making the recommendations for treatment to the Emergency Department. ***See Consult Note of Dr. Giblin attached hereto as Exhibit A; see also Deposition of Kathryn Giblin, M.D. attached hereto as Exhibit B, pp. 69-72, 75.***

1/9/25. Allowed, Dr. Eichler may testify to his role at the hospital, his role vis-a-vis the residents: the practices and procedures of the hospital; and his practices and procedures - i.e. what is supposed to happen. He cannot testify to facts of which he has no memory, nor may he be asked hypothetical questions based on assumed facts, since he is not testifying as an expert witness. Counsel if.

The defendants intend on calling Dr. Eichler to testify at the trial of this matter in his role as a fact witness, specifically regarding his involvement in the care and treatment of Ms. Juarez. It is anticipated that Dr. Eichler will testify, consistent with his deposition testimony, that although he has no memory of the events that occurred on March 31, 2014, nearly nine years ago, he has no reason to dispute that Dr. Giblin spoke with him regarding Ms. Juarez as she would have been required to present the case to an attending given her role as a resident at the time and she contemporaneously documented that she, in fact, spoke to Dr. Eichler. ***See Deposition Transcript of Florian Eichler, M.D. attached hereto as Exhibit C, pp.58-59.*** It is further anticipated that Dr. Eichler will testify regarding the custom and practice in 2014 of the neurology residents in presenting cases to the attending neurologist including the types/categories of information that would be conveyed. Dr. Eichler will further testify consistent with his deposition testimony that he was in agreement with the recommendations of Dr. Giblin as he would have changed the recommended plan of treatment if he was not in agreement. *See Exhibit C.*

The defendants have absolutely no intention of eliciting expert testimony from Dr. Eichler at the trial of this matter. Dr. Eichler will *not* be testifying regarding whether Dr. Giblin complied with the standard of care. *Exhibit C, pp. 47-50.* He will also *not* be testifying regarding the cause of Ms. Juarez's Stevens Johnsons Syndrome. *Id.* Dr. Eichler has not been retained as an expert. *Id.* Upon information and belief, Dr. Eichler has not reviewed Ms. Juarez's medical records in their entirety and has not reviewed any records beyond his involvement on March 31, 2014. *Id.* Defense counsel will not be eliciting any testimony regarding any opinions Dr. Eichler has formulated since the start of this litigation (if any exist).

Rather, the extent of Dr. Eichler's testimony will be limited to his knowledge of the medical issues (eg. epilepsy, Lamictal and Depakote dosing and side-effects, Stevens-Johnson Syndrome, etc.) he had at the time Dr. Giblin consulted with him in March 2014, his custom and practice in March 2014, and any opinions he formulated in connection with his involvement in Ms. Juarez's care and treatment. It is anticipated that he will testify that, although he has no memory of Ms. Juarez, it would have been his custom and practice to revise any recommendations for treatment presented to him by a resident if he was not in agreement with the resident's proposed treatment. *Exhibit C, pp. 58-60.* In this case, given that the treatment recommendations were in accordance with the dosing guidelines for Lamictal, he would have agreed with Dr. Giblin's recommendation and would not have made any revisions. *Id.*

The defendants submit that there are no grounds to preclude the testimony of fact witness, Dr. Eichler. To the extent plaintiff's counsel feels a question is asked that is likely to elicit expert testimony, such concern can be addressed at side-bar upon plaintiff's objection. A preclusion of Dr. Eichler's testimony altogether would be patently unfair, highly prejudicial and would deprive Dr. Giblin of an opportunity to present her defense.

WHEREFORE, the defendants respectfully request that this Honorable Court permit the trial testimony of fact witness, Florian Eichler, M.D.

Respectfully submitted,
By their attorneys,

/s/ Christine D. Cooledge
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT CIVIL ACTION NO.: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

V.

KATHRYN GIBLIN, M.D., AND
THE MASSACHUSETTS GENERAL HOSPITAL,
Defendants.

PLAINTIFF'S MOTION *IN LIMINE* TO PRECLUDE TESTIMONY OF FLORIAN EICHLER M.D.

NOW COMES the plaintiff in the above-entitled action and hereby respectfully requests this Honorable Court ALLOW her Motion *in limine* to and order that Florian Eichler, M.D. be precluded from testifying at trial of this matter.

IN SUPPORT OF THIS Motion *in limine*, plaintiff states the following:

- The proffered testimony of Florian Eichler M.D. has no evidentiary value and is an attempt by Defendant to backdoor expert opinions and bolster credibility through a "fact" witness that has absolutely no knowledge of the facts relevant to this trial.

It is undisputed that Florian Eichler M.D. has no memory of ever being involved in the care of the Plaintiff. Dr. Eichler testified at his deposition that he does not have a memory of Nelsy Juarez or being consulted with respect to her medical care:

Q: As you sit here today, do you have a memory of being involved in her care, at all?

A: I do not.

Q: So you don't have a memory of ever being consulted regarding the dosing schedule for Lamictal when it comes to Nelsy Juarez, correct?

A: I do not.

Q: In that same regard, you don't have a memory of ever being consulted, in regards to the dosing schedule for Depakote for Nelsy Juarez, correct?

A: That is correct.

Attachment A: Florian Eichler M.D. Deposition, p. 14-18. In addition, Dr. Eichler testified that if he examines a patient in person, he typically authors an addendum and accompanying note. ***Attachment A, p. 14.*** Here, no such addendum and accompanying note exist. Permitting this witness to testify will leave an impression with our jury that Dr. Eichler did perform an examination, which there is absolutely no evidence thereof, and will further leave an impression with our jury that he supervised this patient's care and therefore Dr. Giblin complied with the standard of care. This is improper.

Moreover, not only does Dr. Eichler lack any memory of Nelsy or her care, he does not even recall a patient with Stevens-Johnson Syndrome in 2014:

Q: Sure. I know you don't have a memory specifically of Nelsy. Do you have a general memory of a patient in – a pediatric neurology patient at Mass. General being diagnosed with Stevens-Johnson syndrome in the spring of 2014?

A: I do not.

Attachment A, p. 17. Dr. Eichler has no memory of any conversations regarding Nelsy either. ***Attachment A, p. 50.*** He unequivocally stated at one point, "I do not recall anything about this case." ***Attachment A, p. 55.*** At his deposition, Dr. Eichler also confirmed that he does not plan to testify at trial and holds no expert opinions. ***Attachment A, p. 47-48.***

Furthermore, the Defendant, herself, does not have a memory of any discussions with Florian Eichler M.D. with respect to Plaintiff's care. ***Deposition of Dr. Giblin, p. 96.*** At his deposition, when defense counsel attempted to elicit expert opinions of Dr. Eichler after he expressly stated he has none, undersigned counsel vehemently objected and stated the following:

> Q: You would have concurred with the recommendation with respect to the dosing schedule for Nelsy, is that correct?
>
> MS ZAHKA: Objection to form and this is also calling for an expert opinion. He has no memory of this. He's made it very clear he has no opinions as to Dr. Giblin, whether or not she complied or violated the standard of care. I made that very clear on direct, so I am going to object to this line of questioning.

Attachment A, p. 58. Moreover, counsel for the defendant, Dr. Giblin, unequivocally represented to undersigned counsel that Dr. Eichler was not disclosed as an expert witness. ***Attachment A, p. 48.*** Undersigned counsel relied upon this representation.

Permitting Dr. Eichler to answer hypothetical questions as a fact witness is akin to permitting expert opinion testimony that was never disclosed and is wholly improper. In the litigation setting, a hypothetical question does not seek facts but rather calls for an opinion by an expert witness. *See, e.g ., Wing v. Commonwealth*, 359 Mass. 286, 288-89 (1971). Asking a hypothetical question, e.g., "Assuming the following facts, what would you have done?" is precisely what should be prohibited from a fact witness, such as Dr. Eichler.

The Defendant purports to offer Florian Eichler M.D. to testify about his involvement in the care and treatment of Ms. Juarez, however he has no recollection whatsoever of being involved in Ms. Juarez's care. This is a thinly veiled attempt by the Defendant to illicit inappropriate expert testimony from Dr. Eichler. Specifically, the Defendant intends to have Dr. Eichler testify that *if* Dr. Giblin had presented him with a proposed course of action and he was not in agreement with it then he would have revised the plan. While it may be cleverly worded, this is nothing more than an expert opinion regarding the standard of care applicable to Dr. Giblin. It is not as if Dr. Eichler is even being asked to comment on the standard of care in regard to *himself*, as he is not a defendant

in this matter. Dr. Eichler would essentially be testifying that if he thought Dr. Giblin was violating the standard of care, he would not let it happen. In essence this testimony boils down to asking Dr. Eichler, who has no memory of any fact relevant to this case, to look at the Defendant's actions in this case retrospectively and tell the jury that the actions were consistent with the standard of care and if they had not been he would have revised Defendant's plan. This is expert testimony being offered by a supposed fact witness and should not be permitted. Permitting such testimony would prejudice the plaintiff's case and result in a substantial miscarriage of justice.

WHEREFORE, due to the foregoing reasons, and in the interests of justice, the plaintiff respectfully requests that this Honorable Court **ALLOW** her Motion *in limine* and order that Florian Eichler, M.D. be precluded from testifying at trial of this matter.

Respectfully submitted,
The plaintiff,
By her attorneys,

/s/ *Karen Zahka*

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/s/ *Austin Dana*

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Notify 62

Juarez v. Giblin, et al.
No. 1784-CV-00599

Ruling on Defendants' Emergency Motion for Leave to Take Deposition of Florian Eichler

Denied.

By way of background, the defendants gave every indication they intended to call Dr. Eichler as a live witness at trial, filing a motion to allow his testimony and arguing emphatically (and successfully) against the plaintiff's attempt to preclude Eichler's testimony. The defendants then proceeded to build their case around the premise that Dr. Eichler had agreed with the plaintiff's recommendation – counsel referenced Eichler's approval of Dr. Giblin's decision during opening; Dr. Giblin repeatedly stated, on direct and cross, that Eichler approved of her plan; and the defense expert testified that Eichler was informed of and approved the plan.

It was not until some point during the third day of trial, on Tuesday, January 14, that defense counsel indicated to the Court that they "might" *not* call Dr. Eichler. In light of that, the Court explicitly informed both parties at the end of trial on Tuesday that they should consider whether a missing witness instruction would be appropriate.

Even so, the defendants opted not to call Dr. Eichler, and informed the Court at the end of trial on Wednesday, January 15, that they had no more witnesses and would rest. Since there had been no charge conference and counsel were not prepared to close on Thursday, the Court told jurors not to appear on Thursday and instead held a charge conference, at which both parties were heard extensively on the missing witness instruction; the Court took the matter under advisement; and decided to include an instruction. Significantly, the Court ruled it would allow *both* parties to argue that the jury should draw an adverse inference from Eichler's absence, and instruct the jury to decide whether an adverse interest should be drawn, and if so, against whom.

The defendants then filed their emergency motion to take an AV deposition of Eichler at 2:30 p.m. on Thursday (while the Court was hearing afternoon motions). The motion fails in numerous respects. First, the issue did not "only become ripe" after the charge conference, as the motion states. As described above, Dr. Eichler's status as a "missing witness" was raised on the third day of trial, at which point the Court promptly alerted counsel that his absence may lead to a missing witness instruction – thereby affording counsel time to decide whether foregoing Eichler was worth the risk of a missing witness instruction. The defendants' implication that they were caught unaware by the Court's decision to give a missing witness instruction begs the imagination.

Second, the issue of Dr. Eichler's absence is not due to "establishment of the Court's position regarding Dr. Eichler's testimony." As noted above, the defendants have made Dr. Eichler a focal point – if not the focal point – of this case. Given the role that the *defendants* have attributed to Eichler in the case, the proposition that his testimony is now necessary only because the Court recognized that he is, in fact, a missing witness, is disingenuous.

Third, allowing this motion would be unduly prejudicial to the plaintiff for numerous reasons, and there is simply no reason to visit such prejudice on the plaintiff by taking the highly unusual step of allowing the defendants to take an AV deposition the night before closing arguments, and then present that video, after defendants informed plaintiff and the Court they would rest. If Eichler is available and willing to sit for an AV deposition now, then he was available and willing to testify previously. (If he was not willing, the defendants could have issued a subpoena.)

Whatever the defendants' reason for not calling Eichler, it cannot genuinely be said that the missing witness instruction (which, again, will leave it to the jury as to against whom the inference should be drawn) is a surprise, or anything other than a result of the defendants' own decisionmaking.

Dated: January 16, 2025
@ 3:34 p.m.

Jackie Cowin
Justice of the Superior Court

NOTIFY

63

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

Filed: 1/16/25
Paul Kennedy
Asst. Clerk

EMERGENCY MOTION OF THE DEFENDANTS FOR LEAVE TO TAKE THE AUDIOVISUAL DEPOSITION OF FLORIAN EICHLER, M.D.

NOW COME the Defendants in this matter and request leave of Court to conduct an audiovisual deposition for trial of treating witness, Florian Eichler, M.D.

In light of the Court's position, as of today – January 16, 2025 – that Dr. Florian Eichler is a necessary witness in this matter, counsel for the Defendants, John Cassidy, has had further contact with counsel for Dr. Eichler regarding Dr. Eichler's availability to testify at trial in this matter on Friday, January 17, 2025. Because of his clinical schedule, Dr. Eichler has expressed that he is not available to appear in court on January 17. However, he is willing to provide an audiovisual deposition, via the Zoom videoconferencing system, to be recorded this evening, January 16, at any time after 6 p.m.

Accordingly, the Defendants request leave of court to conduct this audiovisual deposition and display it for the jury on Friday, January 17, 2025.

The Defendant makes this request pursuant to Mass. R. Civ. P. 30A(m) which indicates that "any party intending to call a treating physician…at trial as that party's own witness may take the oral deposition of any such treating physician…by audio-visual means for the purpose of being used as evidence at trial in lieu of oral testimony." As this Motion only became ripe

Denied. See separate Order. Leave of 1/16/25

following establishment of the Court's position regarding Dr. Eichler's testimony on January 16, 2025, the Defendants request leave of Court to forego the normal timing and notice provisions of Mass. R. Civ. P. 30A(m). However, the Defendants will provide the Court with a full copy of the recorded deposition for the purpose of ruling on any objections that are made during the deposition. On the basis of any rulings made by the Court on those objections, the video will be edited, removing any stricken portions of the testimony. Alternatively, Judge Cowin could rule on the objections in person while the video is playing in Court, just as she would if the witness was testifying in person.

Counsel for the Defendants has conferred with counsel for the Plaintiff who opposes this Motion.

Respectfully submitted,
By its attorneys,

/s/ Nicholas D. Meunier
JOHN D. CASSIDY, BBO # 078480
NICHOLAS D. MEUNIER, BBO # 667494
Ficksman & Conley, LLP
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Boston, MA 02114
(617) 720-1515
nmeunier@ficksman.com

NOTIFY 66

JUDGMENT ON JURY VERDICT

Trial Court of Massachusetts
The Superior Court

DOCKET NUMBER: 1784CV00599

John E Powers, III
Suffolk County Civil

CASE NAME:
Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez et al
vs.
Giblin, M.D., Kathryn et al

COURT NAME & ADDRESS
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

JUDGMENT FOR THE FOLLOWING PLAINTIFF(S)
Nelsy Delgado Juarez PPA Mailene Giovana Juarez Hernandez

Notified 1/24/25 KB DDC NDM CDC AGM SCF AD

JUDGMENT AGAINST THE FOLLOWING DEFENDANT(S)
Kathryn Giblin, M.D.
Massachusetts General Hospital

This action came on for trial before the Court, Hon. Jackie Cowin, presiding, the issues having been duly tried and the jury having rendered its verdict,

After Jury Verdict, it is **ORDERED AND ADJUDGED**:

That the plaintiff(s) named above recover of the defendant(s) named above, the "Judgment Total" with interest thereon as outlined below as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint	02/24/2017
2. Date Judgment Entered	01/22/2025
3. Number of Days of Prejudgment Interest *(line 2 - Line1)*	2889
4. Annual Interest Rate of 0.06/365.25 = Daily Interest rate	.000169
5. Single Damages	$8,000,000.00
6. Prejudgment Interest *(lines 3x4x5)*	$3,905,928.00
7. Double or Treble Damages Awarded by Court *(where authorized by law)*	$
8. Statutory Costs	$285.00
9. Attorney Fees Awarded by Court (where authorized by law)	$
10. **JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S)** *(Lines 5+6+7+8+9)*	$11,906,213.00

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
01/22/2025	X Paul Kennedy

JUDGMENT ENTERED ON DOCKET 1/24/25
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

NOTICE OF APPEAL

Notice is hereby given, pursuant to Mass. R. App. P. 3, that the Defendants, Kathryn Giblin, M.D. and Massachusetts General Hospital hereby appeal from the January 24, 2025 judgment on jury verdict (Docket Entry # 66).

Respectfully submitted,
The Defendants
By their attorneys,

/s/ Nicholas D. Meunier
JOHN D. CASSIDY, BBO # 078480
NICHOLAS D. MEUNIER, BBO # 667494
Ficksman & Conley, LLP
98 North Washington Street - Suite 500
Boston, MA 02114
(617) 720-1515
jcassidy@ficksman.com
nmeunier@ficksman.com

CERTIFICATE OF SERVICE

I, Nicholas D. Meunier, attorney for said defendant, hereby make oath that I have this day served a copy of the attached:

NOTICE OF APPEAL

upon all parties, by emailing a copy thereof directed to:

Karen Zahka, Esquire
Trial Lawyers for Justice, P.C.
421 W. Water Street
Decorah, IA 52101

Sean C. Flaherty, Esquire
Austin Dana, Esquire
Keches Law Group
2 Granite Avenue, Suite 400
Milton, MA 02186

Signed under the pains and penalties of perjury.

DATED: February 3, 2025

/s/ Nicholas D. Meunier
NICHOLAS D. MEUNIER, BBO # 667494
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98 North Washington Street - Suite 500
Boston, MA 02114
(617) 720-1515
nmeunier@ficksman.com

Pages: 1-320
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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NELSY DELGADO JUAREZ, *
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Plaintiff, *
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v. *
*
KATHRYN GIBLIN, M.D., AND *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*
Defendants. *
*
* * * * * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

Wednesday, January 8, 2025
Courtroom: 314

THIS TRANSCRIPT HAS NOT BEEN PROOFREAD OR CORRECTED BY THE COURT REPORTER. DIFFERENCES WILL EXIST BETWEEN THE UNCERTIFIED DRAFT VERSION AND THE CERTIFIED VERSION.

Maria Santos
Court Reporter

depends on a couple of different things.

So if you are picked for the jury, you'll be excused for today. You may leave the courthouse, and you'll receive a call later on telling you when to return for the trial.

It'll either be tomorrow or Friday. We expect to finish with the evidence and hand the case to the jury for its deliberations no later than Tuesday, January 21st. That is two weeks from yesterday.

So we expect to have trial most or all of next week and then be ready for deliberations, again no later than January 21st, which is the day after Martin Luther King Day, a holiday.

That Monday is off. We do think the trial will likely

Pages: 1-402
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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NELSY DELGADO JUAREZ, *
*
Plaintiff, *
*
v. *
*
KATHRYN GIBLIN, M.D., and *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*
Defendants. *
*
* *

BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

Thursday, January 9, 2025
Courtroom: 314

Maria Santos
Court Reporter

case is handed over to the jury for deliberations and a verdict.

Now, we're going to begin trial, meaning begin presenting evidence tomorrow morning, Friday. So, if you're picked for the jury today, you'll be excused for the day with directions to return tomorrow morning a few minutes before 9:00 o'clock.

We expect to finish presenting evidence and finish with closings and instructions, at the latest, on Tuesday, January 21st. So, that is -- that is not next Tuesday, but the Tuesday after it.

We hope that the case will not take that long. We'll finish before that, but we use that date to be safe. That's the latest date that we think

Pages: 1-380
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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*****
NELSY DELGADO JUAREZ, *
*****
Plaintiff, *
*****
v. *
*****
KATHRYN GIBLIN, M.D., AND *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*****
Defendants. *
*****
*** ***

BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

TRIAL TRANSCRIPT

Friday, January 10, 2025
Courtroom: 314

Maria Santos
Court Reporter

in the city of New York.

Upon completion of medical school, I trained first as a pediatrician at what was then called Babies Hospital; it's now referred to as the Children's Hospital of New York. I was there for two years doing pediatrics and after that I returned to Einstein to do a residency in pediatric neurology. Following that, I had one additional year of training in the treatment of diseases of muscles and nerves.

Q You're the first expert witness or medical witness to testify in this case. Could you please explain to the jury what a residency program is?

A Sure. You go to medical school and get a medical degree, but it doesn't necessarily make you qualified to treat patients, so

then you have postgraduate training, an internship or a residency, where you go to a hospital in your chosen specialty, are supervised by other health care providers who are attending physicians and learn how to practice pediatrics, how to practice pediatric neurology.

Q And your residency was in pediatric neurology, correct?

A Correct. My training -- after two years of pediatrics, I spent a year doing adult neurology and then two years doing pediatric neurology.

Q And where did you complete your residency program?

A At Einstein.

Q After completing your residency program, did you continue on to a fellowship program?

A That was the neuromuscular

this case, Dr. Giblin, caring for a pediatric epilepsy patient in March of 2014?

A Yes.

Q Based on your education, training and experience, are you familiar with a condition known as Stevens-Johnson syndrome?

A Yes.

Q Could you please explain to the members of the jury what Stevens-Johnson syndrome is?

A Stevens-Johnson syndrome is a severe, catastrophic and potentially life-threatening complication that involves the skin, the mucous membranes, meaning, you know, your eyes, mouth; in this case, Nelsy is a female, the inside of the vagina.

Anywhere there is a mucous membrane you can get an

overwhelming immune, meaning the immune system is activated by something and you get sloughing of the skin, meaning the skin bubbles up and then falls off. Same thing happens in the eye and in other parts of the body, in the mouth.

Q What are the known risk factors for Stevens-Johnson syndrome?

A Primarily medicines.

Q Are there certain medications that carry a higher risk of Stevens-Johnson syndrome particularly in children or pediatric patients?

A There are, and lamotrigine is among those meds that has the highest risk.

Q And just for the sake of clarity, when we say lamotrigine, that's the same thing as Lamictal?

A Correct. I'll refer to it as

to understand how they work independently and then together.

Q So, if a patient is already on the Depakote, that will double the blood concentration of the Lamictal?

A It would result in a blood concentration that's twice as high as if you were using Lamictal by itself.

Q Okay. And the Lamictal by itself carries a risk of Stevens-Johnson syndrome, correct?

A Yes. Independent of all other medicines, it's a drug where Stevens-Johnson syndrome is a possible outcome.

Q Is the risk of Stevens-Johnson syndrome increased if there is also Depakote being administered with the Lamictal?

A It does because in part, the

blood concentrations of Lamictal are much higher than expected. The risk of Stevens-Johnson syndrome is determined by how much medicine does the patient take and how fast you get to the dose of medicine you want, because you can't use these medicines -- with exceptions, you can't use these medicines in a way where you give someone the right dosage on the first day.

You have to build up the dosage. You don't do that with antibiotics, but with these medicines you do that, so if you thought, you know, the right dose of Lamictal was hypothetically going to be 50 milligrams, you wouldn't start 50 milligrams on day one.

You would start at a smaller dosage and build your

way up to that dosage. But when you're on a drug that hinders the liver's ability to metabolize Lamictal, that dosage needs to be modified, because you're going to get a blood level that's incredibly high.

So the dose, the speed at which it's increased, the blood concentration, those are the -- and then the age, meaning children are much more at risk than adults and young children as opposed to older children. You need to take care and use a dosage that's appropriate for the child that you're treating.

Q Is weight a factor in determining the proper dosing of a drug like Lamictal in a child, even at age 13?

A Well, you know, children are

Adler, without mentioning what anyone else --

A Sure.

Q -- may have said?

A Sixteen to 18 is the cutoff where you start thinking about using adult dosages, but below that, it's weight based.

But you have to factor in the weight, because you can have a 200-pound 12-year-old, and if you do a weight-based dosage on a 12-year-old, you might be at a dose that's higher than the recommended adult dose of a particular medication, whether it be an antibiotic or an antiseizure medication.

So you can't ignore age and you can't ignore weight. The weight in children is, in my view, what determines the dosage of a medication 95

percent of the time.

Q I want to take a step back with you and talk to you a little bit about your work as an expert witness if we could.

A Okay.

Q In addition to your clinical practice, do you also agree to review medical malpractice cases like this one?

A I mean, everything I review doesn't involve health care providers. I review cases in which children have been injured in some fashion neurologically and offer opinions about the cause of their injuries.

The majority of the time that's the opinion I give more -- it's more -- it's rare that I would provide an opinion about how a doctor's actions caused that injury. I've been

medication. Depakote interacts with Lamictal.

You have to be careful when you use it. As I said earlier, these medicines require respect. And Dr. Giblin arbitrarily chose to do what the package insert says, which is that children over 12 get treated with adult dosages, but Nelsy Juarez only weighed 60 pounds at that point, and the proper choice would have been to, while factoring in the age, understand that the weight was more critical and is always more critical and as such, instead of sending Nelsy home with what's called a starter pack -- the manufacturer of Lamictal is GlaxoSmithKline.

They make starter packs where you open up the pack and it's got pills that you can

doesn't tell you what choice to make and how to follow the patient or whether you should do blood tests. This is an information packet. This is something you use to help you make a decision. It isn't the decision.

Q Focusing back on page 280 in Tab L there, first, I want to point to you the -- there is a box on the left-hand side on the top that says "Warning: Serious skin rashes." Do you see that?

A I do.

Q First, can you just explain to us what that box is and then explain what the contents of that box entails?

A So the black box on the top on the left that's headed "Warning: Serious drug rashes," that's called a black

box warning. You see that in lots of different medications.

It's the way the FDA, by its rules, alerts health care providers -- and by the way, this is an information packet that patients have access to as well, but it alerts people to the most serious risks associated with a particular product.

Q If we look at that black box warning, if we follow down from the heading, it says, "Cases of life-threatening, serious rashes including Stevens-Johnson syndrome, toxic epidermal necrolysis and/or rash-related death have been caused by Lamictal."

Did I read that correctly?

A You did.

Q "The rate of serious rash is

greater in pediatric patients than in adults." Did I read that correctly?

A You did.

Q And Nelsy without a doubt was a pediatric patient as of March 2014, correct?

A Without a doubt.

Q "Additional factors that may increase the risk of rash include," and then we have a bullet-point list here. The first one is "coadministration with valproate." That's Depakote?

A Correct.

Q That means if the patient is taking Depakote with the Lamictal, there is an increased risk for Stevens-Johnson syndrome?

A Correct. The mere combination exaggerates the risk.

Q And that was applicable to

quickness or overly fast increase in the dosage. I mean, that's in the package insert.

It's in everything that's ever written about lamotrigine/Lamictal in combination with Depakote. And the incidence of Stevens-Johnson syndrome from lamotrigine alone is really low, and it's all my opinion that all those factors which we've discussed more than once is a direct cause of this girl's Stevens-Johnson syndrome -- Nelsy's Stevens-Johnson syndrome.

Q I'd like you to assume that there will be testimony in this case that Nelsy being age 13, her liver had sufficiently matured to metabolize the higher dose of Lamictal. Do

you agree with that statement?
A I think that, well, number one, from an age point of view, that could be true, but I think it's pure speculation as to how mature her liver was, but it doesn't -- the issue is moot because the issue isn't whether her liver is mature, the issue is the impact of the Depakote on the liver and how it would handle the Lamictal, that's what's critical.

Whether her liver was working and in good order is irrelevant. What's relevant is that the drugs were used in combination and the Lamictal dosage was too high and increased too fast.
Q Let's assume for a moment that Nelsy did have a fully mature liver at age 13. Does that mean you can disregard the

MS. ZAHKA: Thank you, Your Honor.

(DIRECT EXAMINATION OF DANIEL ADLER, M.D., CONTINUED)

BY MS. ZAHKA:

Q Dr. Adler, before we took the lunch break, we were starting the discussion about how Nelsy's vision has been impacted by the Stevens-Johnson syndrome. Can you tell us how her vision has been impacted by the Stevens-Johnson syndrome?

A I mean, there was injury to the lining of the globe, the conjunctiva, and according to the medical records there's been a permanent visual impairment that followed.

Q And if you could turn to page 183 of Tab E, it's the Massachusetts Eye and Ear records, and let me know when you're there.

A I am.
Q On the bottom of the page just below the middle hole punch, we see a heading that says “visual fields.” Do you see that?
A Yes.
THE COURT: I’m sorry, Ms. Zahka, what page are we on?
MS. ZAHKA: I apologize, Your Honor. Page 183 of Tab E.
THE COURT: Thank you.
BY MS. ZAHKA:
Q And there is a chart there on page 183 under “visual fields.” Does that illustrate the vision loss that Nelsy has in her left eye?
A It does.
Q And that was a result of the Stevens-Johnson syndrome?
A Yes.
Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether

A I don't believe I used the word "arbitrary."
Q Okay. So then we can agree then that Dr. Giblin's -- that the dosing that was recommended for Nelsy Juarez on March 31st of 2014, was not arbitrary?
A No. I just think she made a conscious choice to use the dose pack at the -- the blue starter pack for Lamictal, which was improper for a child who weighed 27.8 kilos.
Q Are you aware, Doctor, that she consulted with Dr. Eichler that day?
A There's no -- the word "consult" with Dr. Eichler is not contained within that emergency room note. It says "discussed." To me, that's not necessarily consulted.
Q Okay. Well, discussed means that they talked with each

other, correct?
A There was oral discourse between the two of them. What it was, unclear.
Q And that's documented, Doctor, on page 58 of the book, correct?
A Correct. They had some sort of discussion.
Q Right. If we look at page 58, if you would, please, Doctor, under Dr. Giblin's name and where it says -- this is in the middle of the page just above the middle binder ring, it says, "Discussed with neurology consult attending, Dr. Florian Eichler." Did I read that correctly?
A Yes.
Q Okay. You would agree with me, Doctor, that that would be an appropriate thing for Dr. Giblin to do as the neurology

resident, correct; that is to discuss the case with the neurology attending?

A Correct.

Q And you'd further agree with me, Doctor, that it would be appropriate for Dr. Giblin to follow any instructions that she was given by her attending?

A If she was given instructions by Dr. Eichler as a junior resident, because that's what she functioned as despite the fact that she was near the end of her training, would have been appropriate for her to follow his guidance.

Q Right. And the fact, Doctor, that she was functioning as a so-called junior resident that day is because she was an adult neurology resident rotating in the pediatric neurology service, correct?

A Right. Hyperventilation is a seizure activator.
Q Right. "Follow up was recommended in six months or sooner if indicated." Did I read that correctly?
A Yes.
Q Okay. Now do you know, Doctor, did Nelsy and her mom go for that follow-up visit six months later?
A No, not that I'm aware of.
Q Okay. Was the next time that they were seen, Doctor, after Nelsy suffered the generalized tonic-clonic seizure on February 14th of 2014?
A Correct.
Q So that was about 15 months later, correct?
A Correct.
Q And about nine months after when she was supposed to return for follow-up, correct?

had an EEG," do you see that?
A Yes.
Q Okay. "Nelsy has not had an EEG since her seizure pattern changed from typical absences to absences, myoclonic jerks and generalized seizures. She is undergoing puberty, a possible cause for evolution of her seizure disorder to JME," which is juvenile myoclonic epilepsy, correct?
A Correct. We talked about that earlier, but, yes, that's what that means.
Q Okay. And with juvenile myoclonic epilepsy, what you tend to see is not so much absence seizures but generalized tonic-clonic seizures, correct?
A Right, and they refer to myoclonic jerks. That's very common in that disorder as

well.
Q Right. Okay. Now you talked, Doctor, earlier this morning about the Lamictal package insert, correct?
A By packaging, you mean the package insert, the product insert?
Q That's what I said, the package insert.
A I'm sorry, I didn't hear that. Yes.
Q Yes. We can agree, Doctor, that that document and the contents of that document have to be approved by the Food and Drug Administration?
A Correct.
Q Can we also agree, Doctor, that there are clinical studies, clinical trials, as well as PK studies done, before a medication is approved by the -- at least an anticonvulsant

medication is approved by the FDA?

A Well, the studies are done by the pharmaceutical entity, submitted to the FDA in a new drug application for approval.

Q Right, exactly. And that's how all -- virtually all clinical studies are done, correct -- clinical trials?

A At the end of the clinical trial, data is submitted as part of -- with a new drug application, yes.

Q Right. You told us earlier, Doctor, that you yourself have worked with pharmaceutical companies with respect to their clinical trials, correct?

A Yes.

Q Right. And your role, Doctor, was you were enrolling your patients in those studies, correct?

well.
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A Yes.

Q Right. And your role, Doctor, was you were enrolling your patients in those studies, correct?

A Yes.
Q And every time you would enroll a patient in one of the studies, you would be paid for that, correct?
A Correct. We were hired to enroll patients and paid for our time, yes.
Q Right. And just so it's clear, Doctor, you weren't actually conducting the study, correct?
A I don't know what you mean by conduct. We were collecting data and others were doing the analytics, so --
Q That's what I'm referring to, Doctor.
A No. The analytics were done elsewhere, that's true.
Q You weren't analyzing the information?
A True.
Q Now, when you were talking earlier, Doctor, about one

portion of the package insert, you said something about, "Well, one study involves, I think, 26 people and one study involved 29 people." Do you recall that?

A I do.

Q Those were just two small pieces of the studies that were done, correct?

A In that particular instance, yes.

Q Right. There were studies, Doctor, involving thousands of patients on this drug, correct?

A Cumulative studies, meaning when they collect the data from multiple studies. I don't think that any of the studies that I was involved in --

Q No, I'm not asking you about studies you were involved in, Doctor. I'm talking about --

A Right. But you asked the

question about studies. I'm trying to explain to the jury what those studies mean.

No one would ever enroll 1,000 patients. They would never permit it. It's a cumulative study, otherwise you have enrollment site bias, so you can't do that. You have to have small numbers of patients that you then collect.

Q Doctor, I think you're misunderstanding. I'm not asking you now about enrolling patients, I'm asking you now simply about the fact that the studies that were done on Lamictal involved thousands of patients. I'm not saying they were all enrolled by the same doctor or anything like that.

A I'm not suggesting you were. I'm saying -- I'm saying that that's relevant, that's all.

12 Years of Age with Epilepsy." Did I read that correctly?

A Yes.

Q Okay. And then if you go to the second column from the left, Doctor, it says "for patients taking valproate," correct?

A Yes.

Q And so, in other words, this is saying this is the dosing recommendation that we're making for patients to get Lamictal who are also taking valproate, correct?

A Correct.

Q And what's set forth here, Doctor, in that column is the dosing recommendation that was made for Nelsy Juarez, correct?

A No. It's a general recommendation about pediatric patients above the age of 12. It's not standard of care, it's

not a way to manage patients. It's saying for 12-year-olds and higher, but that's only the recommendation, it's not -- this document doesn't tell you how to manage patients.

MR. CASSIDY: Move to strike.

THE COURT: I'm going to deny that, but I don't think the witness has finished his answer, so I'll end the answer now. Next question.

MR. CASSIDY: Thank you.

BY THE WITNESS:

A It --

THE COURT: No. I've ruled that the --

THE WITNESS: Apologies.

THE COURT: -- answer has completed. We'll have a next question.

BY MR. CASSIDY:

Q Doctor, I think perhaps you

didn't understand my question. This, what you see in this column here, is the same as the recommendation that was made for Nelsy Juarez at the Massachusetts General Hospital on March 31st of 2014, correct?

A I'm sorry, I didn't realize you were asking that. Yes, that -- verbatim almost.

Q Right. That's what I was asking, Doctor. What we see here is the same recommendation that was made on March 31st of 2014, correct?

A Correct.

Q Now if we turn over, Doctor, the next page, 288, this is the chart for patients who are two years old to 12 years old, correct?

A Correct.

Q And that's a weight-based chart, correct?

Did I read that correctly, Doctor?
A Yes.
Q And we can agree, Doctor, that Nelsy Juarez weighed less than 30 kilograms, correct?
A Correct.
Q Would you agree with me, Doctor, that in treating patients with generalized tonic-clonic seizures, you do not want to underdose the patient, correct?
A You want a proper dosage that will stop the seizures.
Q Right. Because if you underdose the patient, the chances are that the seizures will not be stopped, correct?
A Correct.
Q And the risk of those seizures will exist, correct?
A As long as the patient is not adequately medicated, the risk

of seizures exists.
Q Right. And so can we agree, Doctor, that on March 31st of 2014, the goal was to give Nelsy Juarez Lamictal in a dose that would control her tonic-clonic seizures?
A Yes.
Q Now you've talked about her weight, Doctor, and her small stature, correct?
A Correct.
Q Are you aware, Doctor, that Nelsy Juarez was worked up or evaluated for her small stature by both the endocrinology department and the gastroenterology department at the Massachusetts General Hospital?
A Yes.
Q And will you agree with me, Doctor, that the results of that workup, the results of

that evaluation was that Nelsy had no disease or condition that was causing her small size; it was determined to be familial, correct?

A Correct.

Q And you know, Doctor, that Nelsy's father is five-feet, three inches tall?

A Correct.

Q And you know that her mom, I believe, is four-feet, eight or nine inches tall, correct?

A Yes, they're short people.

Q Right. And you know, Doctor, that Nelsy now in young adulthood at the age of 23 or 24 is virtually the same size as her mother, correct?

A I think I observed that today in the courtroom.

Q Right. Now some people are just smaller than others, correct?

the content of the above note with Dr. Eichler, correct?
A No. In my view, that's pure speculation what they talked about. It simply says discussed. I have no idea what took place during that conversation.
Q Well, Doctor, one possibility is that they discussed the content of the note, correct?
A One of many possibilities.
Q Well, Doctor, the format that's followed in a teaching hospital when a resident communicates with the attending, he or she presents the case, correct?
A Correct. I'm sure she presented the case.
Q Right. And what her note is, is a summary of the case, correct?
A Her note is a summary of facts that everyone was aware of at

that point about Nelsy Juarez.
Q Including the patient's weight, correct?
A It's in the note. Whether -- it's certainly in the note, that was known.
Q Including the patient's BMI or body mass index?
A Correct.
Q And, Doctor, if I ask you to assume that Dr. Giblin did inform Dr. Eichler of the patient's weight, that would have been appropriate, correct?
MS. ZAHKA: At this point, I am going to object, Your Honor.
THE COURT: That's overruled.
MS. ZAHKA: May I be seen?
THE COURT: No. It's posing a hypothetical. That's okay.

ophthalmologist regarding her current condition with her eyes. I'm familiar with the ophthalmologic consequences of Stevens-Johnson and I was simply telling the jury what the chart says is the problem with her eyes and the chart says that these problems are related to Stevens-Johnson syndrome.

Q And, Doctor, you will agree with me that Nelsy Juarez does have correctable and corrected vision, correct?

A That's what the chart says.

Q And, in fact, Doctor, her corrected vision is sufficient so that if she chose to, she would be able to get a driver's license in Massachusetts and drive a car, correct?

A I don't know that I'm qualified to say that. If her vision is

Q You were asked some hypothetical questions about whether Dr. Eichler gave instructions to Dr. Giblin regarding the dosing of Lamictal. Do you recall that?
A Yes.
Q Is there any evidence in this case that Dr. Eichler gave Dr. Giblin any instructions regarding the dosing of Lamictal?
A What took place during that conversation in my view is completely unknown. It's not discussed in the medical records and to speculate what conversation they had wouldn't be proper. You can only give opinions about what you see.

They had a conversation. What does that mean? Could have been as simple as I have a child in the emergency room who

takes Depakote for juvenile myoclonic epilepsy, doesn't seem to be working, and then the attending might say -- because it's didactic, you know, you're supposed to learn something from these people. So the conversation could be --

THE COURT: I think I'm going to stop the doctor here because it's going beyond the scope of the question.

THE WITNESS: Okay. Sorry.

MS. ZAHKA: Understood. Thank you, Your Honor.

THE COURT: That's okay.

BY MS. ZAHKA:

Q Is there any evidence in this case that Dr. Giblin ever requested that Dr. Eichler come to see and examine Nelsy himself?

MR. CASSIDY: Objection,

Pages: 1-200
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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NELSY DELGADO JUAREZ, *
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Plaintiff, *
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v. *
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KATHRYN GIBLIN, M.D., AND *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*
Defendants. *
*
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BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

TRIAL TRANSCRIPT

Tuesday, January 14, 2025
Courtroom: 314

Maria Santos
Court Reporter

an issue, so I may as well raise it now.

Ms. Zahka or Mr. Dana may or may not ask for a missing witness instruction with respect to Dr. Eichler if Dr. Eichler does not testify and I -- you may not do so, but if you do, I'd rather people be prepared for it than have us have to deal with it without people having thought about it.

So just keep that in mind, that if a request is made, I'll have to evaluate under Section 1111 whether it's appropriate or not, and if it's requested, I'll obviously be asking for both parties for their positions. Okay. All right. Yes, Mr. Meunier?

MR. MEUNIER: It's not on that topic, just --

THE COURT: Okay.

Pages: 1-197
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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*****
NELSY DELGADO JUAREZ, *
*****
Plaintiff, *
*****
v. *
*****
KATHRYN GIBLIN, M.D., AND *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*****
Defendants. *
*****
*** ***

BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

TRIAL TRANSCRIPT

Wednesday, January 15, 2025
Courtroom: 314

Maria Santos
Court Reporter

Nelsy Juarez and her mother, Ms. Hernandez?
A Yes, those are included.
Q Okay. And Dr. Giblin?
A Yes.
Q Dr. Zepeda?
A Yes.
Q Dr. Eichler?
A Yes.
Q Doctor, based upon your review of all of the records and materials in this case, have you formulated an opinion as to whether Dr. Kathryn Giblin complied with the standard of care of the average neurologist in her care and treatment of Nelsy Juarez on March 31, 2014?
A Yes. And I --
Q And what is that opinion, Doctor?
A She did comply.
Q Okay, Doctor. And we're going to get to the details and the

reasons for your opinion as we go along.

First, let me ask you, Doctor, can you explain to us -- talk with us about the two different kinds of seizures that Nelsy Juarez has suffered from, the absence seizures and then the generalized tonic-clonic seizures?

A Sure. So, absence seizures -- and so, let me back up a little bit and explain why this is important.

So, when somebody has a seizure, there's different seizure types. Different seizure types are important for prognostication to -- for diagnostic information. Some seizures are a reason to look further and look into imaging. And other seizures are much more part of the patient's own

genetic makeup or the way their brain happened to be built without any, like, big and obvious errors like a malformation in the area of the brain that wasn't formed well.

So, we have something called the seizure type, but then we have other points of data where we look at the patient's age and the patient's gender and so on. And we try to see if the -- and whether or not the patient has a normal intelligence, for example.

And then we try to combine the seizure type with knowledge like the age of onset and so on and our exam findings into what's called an epilepsy syndrome. And so, we'll -- I guess we'll talk about an epilepsy syndrome later.

But the first -- the

reason why an epilepsy syndrome is important is so that you can figure out what pathways and what clinical standards to adhere to when you're trying to think of what treatments to choose and where to take it from there. It helps with prognostication. It helps with learning from the literature what others have done and so on.

So, backing up, the seizure type that Nelsy presented with when she was, I believe, seven or seven and a half was absence seizures. And historically, they were referred to as petit mal or petit mal seizures. And they are clinically brief spells of staring and behavioral arrest where the patient freezes and stops doing what they're doing.

There may or may not be a little bit of like a body sway or some movements, but typically the patients don't fall.

And they are often unaware of their environment and their surroundings, so they miss information. And if these events happen in dangerous moments, they may get hurt. But it's basically a brief brain freeze, if you will, and it lasts anywhere from a few seconds to up to a minute or longer.

On EEG, these are associated with a very specific pattern. We call it 3hz spike and wave, so three times per second the EEG will fire broadly over the whole brain. And that coincides one-to-one with the behavior that you

observe in the patient.

If the EEG pattern or the clinical seizures are quite different, let's say the patient screams or has shaking of an arm, or the EEG pattern is 4 to 5 hertz instead of 3 hertz, then, you know, you are -- have to be on your toes and think, like, is there something different here?

Nelsy presented with pretty classic absence seizures.

Several years later, in February 2014, she presented with a generalized tonic-clonic convulsion. Those are grand mal seizures in the old terms. And those are the kind of seizures that you would see in a movie, like where people fall on the floor and start to shake.

Technically speaking, it's called a tonic-clonic convulsion because the tonic phase is where the patient stiffens, and then slowly it comes -- the clonic phase follows, and that is where the patient makes repetitive jerks. So, it's a tonic, then clonic convulsive seizure.

And those can be, you know, as you can imagine, life-threatening because they can happen at very bad timing. People can fall, get injured, people can drown. And if the seizure goes on long enough, you can get significant brain injury from them.

Q And, Doctor, is there morbidity and, unfortunately, occasionally mortality associated with generalized tonic-clonic seizures or

juvenile myoclonic epilepsy?

A Yeah, there is. So, juvenile myoclonic epilepsy, in general, other than a direct result from the seizures, comes with a higher degree of comorbid depression, substance abuse, higher divorce rates, impaired socioeconomic performance, like people not being able to hold jobs.

And so, there's a big fallout from this diagnosis, I guess in part related to how successfully you treat, but even in patients who are under pretty good control, there can still be significant burden of this disease.

From the seizures themselves, people can get injured, like I said, by falls, by biting on their tongue, by seizures happening in very

unfortunate circumstances, people falling in fires and people falling off from heights, people falling into machinery. And so, you can come up with any scenario like that.

And then there's a cognitive fallout that happens, again, in part, that may be related to the medication, due to the underlying disease mechanisms, and there's a cumulative burden from seizures. So, the more seizures you have, the more prone you are to have problems with memory, processing speed, cognition in general, and the more often mood problems arise and so on.

And then finally, there's a thing called SUDEP, which is sudden unexplained

death in epilepsy. And I -- when I explain it to my patients, I tell them it's like SIDS, like what happens to infants, but then for patients with epilepsy.

So, typically, what happens is that patients are found dead in their bed in the morning, which is awful, obviously. And the majority of these events is preceded by a seizure, from what we know. And, in fact, some of these have happened with cameras on and so on.

And the risk for sudden unexplained death in epilepsy is about one in 5,000. And that's one in 5,000 patient years. So, if you were to have 5,000 patients that you would follow for one year, on average there would be one patient of

that group that would die from SUDEP every year.

And the risk factors change. For example, nocturnal seizures are a risk factor, convulsive seizures are a risk factor, being on multiple medications is a risk factor, strangely enough, because that represents that the patient is hard to treat and therefore has more seizures. But if the multiple medications lead to seizure control, the risk is actually lower.

And so, that is a real risk that we actually have as one of the quality indicators of the care you provide is SUDEP education. So, it's one of those things that people really want to know about and really are -- want to be informed about. It's a real

risk.

Q And, Doctor, for the reasons that you've just talked about, is it important to try to control patients' seizures with the available medications?

A Yes. Uncontrolled epilepsy is much worse, for all the obvious reasons, than controlled epilepsy. Although, I would say the complete burden is not necessarily relieved, but uncontrolled seizures are a major burden on life and on the quality of life and associated with these morbidities and mortality that we just discussed.

Q Now, Doctor, in Nelsy Juarez's case, you indicated that she had started originally back in 2007 or 2008 with absence seizures. And was she prescribed medication by her

neurologist for those seizures?
A Yes. She was prescribed, at first, valproic acid or Depakote and then later switched to ethosuximide or Zarontin and then switched back to Depakote.
Q And even while she was on those medications, Doctor, did she continue to have those absence seizures?
A She did.
Q Now, in 2014, Doctor, in February of 2014, you mentioned that she had her first generalized tonic-clonic seizure, correct?
A Yes.
Q And after having that seizure, was she then put on medication by her neurologist?
A Yes, she was put on Depakote.
Q Now, from the time of that initial generalized tonic-

clonic seizure, Doctor, which I think was right on or about Valentine's Day of 2014, February 14 of 2014, up through March 26 of 2014 when she was seen by Dr. Dooling and Dr. Zepeda in the neurology clinic, had she had any further generalized tonic-clonic seizures while on the Depakote?

A No, she did not.

Q Unfortunately, Doctor, several days later, on March 31st of 2014, did she have another tonic-clonic seizure?

A Yes.

Q And was that seizure, Doctor, a breakthrough seizure?

A Yeah. To our knowledge, she was compliant with the Depakote. And so, when people are on medication and the medication is properly chosen and properly dosed, some

patients still have seizures. And we call that a breakthrough seizure because that suggests that you can control the epilepsy but that it broke through regardless.

So, it's kind of a -- yeah, it's a way of thinking where you decide whether -- it doesn't mean that the patient is refractory because you can have -- "refractory," meaning not responding to medication in general, because you can have seizures that come through even if you are compliant and even if the medication is typically effective.

For example, when people have fever or when people have high stress levels and in particular with juvenile myoclonic epilepsy, that's the syndrome that Nelsy has, the --

there are lifestyle issues that can lead to seizures. For example, sleep deprivation or alcohol use. And there can be missed medications. There can be high stress levels or intercurrent illness when somebody has a fever or a flu. Sometimes people have seizures despite the fact that they are normally well controlled.

So, in this case, I guess with her good Depakote levels and illness, because she was vomiting, it could have been a breakthrough seizure.

Q And, Doctor, in those circumstances where a patient is believed to have suffered a breakthrough seizure, what are the treatment options?

A Well, her levels were excellent. And you can't have a patient seize every time that

there is an illness or a little bit of sleep deprivation. So, the option was, I guess, to increase Depakote, which was not possible because her levels were high.

And so, the -- and in this case, it was decided to add a medication. So, sometimes you need two medications to control seizures.

Q And, Doctor, when you do that, when you add a medication to an existing medication, is that called adjuvant therapy?

A Yes.

Q In this case, Doctor, when Lamictal was added to Nelsy Juarez's Depakote, would that be considered monotherapy?

A No. There were several suggestions in the chart that she was -- that the longer-term

goal was to be on monotherapy, like the note from Dr. Zepeda suggested to switch to Depakote -- to Lamotrigine in case there were more seizures, suggesting that switching to something is not adding something on.

And Dr. Giblin also said, when she spelled out the titration schedule, she suggested to perhaps come off the Depakote in the longer term. So, the way it -- a drug is added, typically, to a regimen is not to taper the first one first because then you are unprotected and you are at risk for seizures.

The typical way of doing this is to add a medication and if things are successful, then to consider taking the other one away. And that was the trajectory that was chosen or

opted for for Nelsy.
Q And so, Doctor, on March 31st of 2014, when Dr. Giblin recommended that the patient take Lamictal in conjunction with or together with Depakote, was that at that time adjuvant therapy?
A Yes. It was added to a standing regimen of Depakote, so therefore adjuvant.
Q And she was going to continue to take the Depakote along with the Lamictal, correct?
A Yes. She had a follow-up appointment in clinic where, you know, adjustments could be made based on tolerability levels, efficacy, and so on.
Q And are you referring, Doctor, to the follow-up visit that was made for Nelsy Juarez that was supposed to take place on April 23rd with Dr. Dooling?

A Yes.
Q Now, back in March of 2014, Doctor, in these circumstances, such as Nelsy was having, that is she had had absence seizures, she developed generalized tonic-clonic seizures, she was taking Depakote, and now Lamictal was being added, are you familiar, Doctor, with both of those drugs, Depakote and Lamictal?
A I am. I prescribe them regularly.
Q And do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether Lamictal was an appropriate drug to be added to the patient's Depakote based upon her presentation on March 31st of 2014?
A Lamictal was a very appropriate choice for her in this

scenario, absolutely.

Q And why is that, Doctor? What is it about Lamictal that makes it appropriate?

A Well, it's for two reasons. One is that Depakote is not as clean of a medication as Lamotrigine is. And by "clean," I mean that Depakote comes with a whole slew of side effects that are, you know, manageable, but they are plenty and require close monitoring.

But in particular, for women, there are so-called teratogenic effects of Depakote. "Teratogenic" means that it can affect the unborn child and have -- comes with fetal malformations. In this case, Depakote can affect the closure of the spinal cord, so you can get spina bifida or -- I don't know if anybody's heard

of that, but it's an open -- it's an unclosed and unfinished spinal cord, and it's a terrible complication of this medication, and that's well known.

Q You're referring, Doctor, to spina bifida in the unborn child?

A In the unborn child, when women are pregnant and taking Depakote. So, we try very hard to avoid Depakote for that reason in women of childbearing potential, as it's called. It's a little bit of a clinical description, but women who are able to have children.

And there are also effects on -- for significant weight gain, which was one of the reasons why the team chose Depakote to begin with in her when she was younger.

And there is something called PCOS. So, Depakote can cause polycystic ovarian syndrome, which are painful cysts in the ovaries. It can be associated with anovulatory cycles, meaning the menstrual cycle will go through its cycle, but there will be no ovulation, and it can be very painful. But it's also associated with testosterone, higher testosterone levels and some insulin resistance. So, people get terrible acne, and I'm talking women, get excessive hair growth, and it's a condition that you want to avoid as well.

And there's now even some data that suggests that people that take Depakote may have longer-term risks for abnormal pregnancy as well.

Lamotrigine is clean. I call it clean because it's cognitively and behaviorally clean, and it's clean in terms of its mood side effects.

So, we didn't really talk about all the other side effects of Depakote yet, but one of their problems is called cognitive dulling, where people feel that they are slow or almost as if they're hungover and don't feel well, and there's fatigue. There are issues with monitoring the white blood cells and the platelets because they can be depressed and so on.

And so, the list -- and there's pancreatitis, and the list goes on and on and on. For most of these things, you can monitor, but it's still a drug that comes at a very high

price and that you try to avoid in women, unless they're really young.

Then Lamotrigine, again, is clean from all of those standpoints, behaviorally, cognitively, and mood-wise. And, in fact, psychiatrists use it for mood stabilization sometimes. And it's also potent, which is rare for a drug that is otherwise that clean.

So, when medications are strong and effective, usually that comes at a high cost because these medications work on the brain, and the stronger the medication is the more side effects the brain will have, like sleepiness and so on.

And Lamotrigine is strong, but does not have any of those cognitive side

rare, even with lamotrigine. The total incidence is about 5.3 in a million. With Steven -- with lamotrigine, there -- the numbers are too low to truly estimate, but the incidence of serious rashes, which includes Stevens-Johnson syndrome, was thought to be about 0.8 percent in children.

But serious rashes include other serious rashes as well, like a rash that is an allergic rash associated with very severe hives or angioedema where there's swelling in the face or anaphylactic shock, I guess, as well.

So, serious rashes includes rashes that are severe enough to stop the medication, even if it's a relatively trivial rash. It includes hospitalizations for rashes and

Stevens-Johnson and toxic epidermal necrolysis.

Q And, Doctor, you indicated that the incidence -- that means the occurrence rate, the incidence?

A Yes.

Q The incidence or occurrence rate of Stevens-Johnson syndrome is 5.3 in 1 million?

A Yes. And that is, like, probably based on registries of Stevens-Johnson syndrome.

Q And, Doctor, you also said something I'd just like you to explain a little bit. You said that Stevens-Johnson syndrome is, in fact, so rare that it's hard to measure how often it happens. What did you mean by that?

A Well, if the -- so, first of all, the doctors don't always agree if something is Stevens-Johnson syndrome. That's not

close to 20 epileptologists at our hospital, and many of them are full-time clinicians, so we would not be prescribing this medication.

Q So, Doctor, have you yourself prescribed Lamictal?

A I do.

Q And with what frequency, Doctor? How often do you prescribe Lamictal?

A I'd say at least a few prescriptions per week that I either start or refill.

Q And has that been true throughout your career, Doctor?

A Yes.

Q And have you ever, Doctor, seen a case of Stevens-Johnson syndrome in one of your patients?

A I have not. I've seen one of those other serious rashes called DRESS, and that is more

of a classic allergic response, but it's also pretty serious. And it was very scary.

Q But not Stevens-Johnson, right?

A Not Stevens-Johnson.

Q Now, when a patient -- in those very rare cases, Doctor, where a patient develops Stevens-Johnson syndrome, is that something that a pediatric neurologist would typically treat, or are there other specialists who would typically treat the Stevens-Johnson syndrome?

A A child neurologist would not be leading the treatment of Stevens-Johnson syndrome. Part of the treatment is to withdraw the drug, the offending drug. So, child neurologists would be involved to make sure that the patient doesn't develop seizures from switching to

something else rapidly, but there's no time to, like, taper a drug slowly when you have Stevens-Johnson syndrome.

But the other aspects of care, skin care, the intensive care level that some patients need for their respiratory system, their eyes, and so on, would not be in my area of expertise.

Q Right. Now, Doctor, in Nelsy Juarez's case, you're aware that on or about April 22, 2014, she developed some problems, some pain in her eyes, some rash, and she presented for treatment, correct?

A Yes.

Q Okay. And she was, in fact, subsequently diagnosed at the Massachusetts General Hospital with Stevens-Johnson syndrome,

correct?
A Yes, that's correct.
Q Okay. Now, on March 31, 2014, you're aware that Nelsy Juarez was treated by Dr. Giblin in her capacity as a junior resident on the Pediatric Neurology Consulting Service that day, correct?
A Yes. Now, you've told us, Doctor, that you're involved in the bedside teaching of residents at Children's Hospital, correct?
A Yes.
Q Okay. And are you familiar, Doctor, with the way that the teaching works in a teaching hospital such as Children's Hospital or Massachusetts General Hospital? And what I'm referring to is the relationship between the residents and the attending.

A Yes. There's a certain chain of command or hierarchy, if you will, although attendings and supervising staff try very much not to, you know, have there be a power differential between the attending and the resident as to, you know, optimize learning.

But typically, what happens in the ER, for example, or in the outpatient setting in clinic is that a resident will see the patient, take a history. If the patient is known to them, that will be an update to the history. Listen to the current situation and come up with a differential diagnosis, which means like considering all the things that may be causing the problems and then come up with a preliminary plan or if the resident is not

sure what to do, there won't be any plan.

And then presents the case to the attending who reviews the specifics and may ask for more questions or additional information. And then there's a joint decision on how to proceed with either diagnostic plans or further treatment.

Q Now, have you reviewed, Doctor, as part of your review of the documents in this case, Dr. Giblin's note from March 31, 2014, which appears -- which begins on page 55 of the jury book?

A Yeah, I've reviewed that.

Q Okay. And why don't you open to that if you would, please, Doctor.

Now, you've seen this note previously, Doctor?

A I have.
Q And do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether Dr. Giblin's note, her documentation, complies with the standard of care as it existed in March of 2014?
A Yes, my opinion is that she did comply with the standards of care.
Q And why is that, Doctor?
A Well, she saw the patient, completed a thorough history and updated the history with the current events, assessed the situation, discussed it with her attending, and came up with a plan.

And I think the specifics of the plan are in compliance with the standard of care.
Q And, Doctor, I'm sorry, maybe I

seen Nelsy five days earlier on March 26th?
A Yes. She did speak to Dr. Zepeda.
Q And, Doctor, was that an appropriate thing for her to do, a good thing for her to do?
A I'd say that's above and beyond.
Q Why is that?
A Well, it's not always custom to call with the outpatient provider when a patient presents to the ER. Like maybe in an ideal world it would always be done, but it's not -- in practice, not what happens.
So, in this case, because she was seen only five days earlier and, you know, things were active, this was a very good call to make and attests to her being thorough.
Q Now, Doctor, after obtaining

the history, Dr. Giblin then performed a complete neurologic examination. Are you aware of that from her notes?

A Yes.

Q And based upon your review of her documentation, Doctor, was the neurologic examination that she performed upon Nelsy both thorough and complete?

A Yes. It covers all pertinent aspects of a neurological exam.

Q Okay. And, Doctor, you know from Dr. Giblin's note that she discussed this patient, Nelsy Juarez, with her attending supervisor, Dr. Eichler, correct?

A Yes, she documents that in her note.

Q And, Doctor, was that an appropriate thing for Dr. Giblin to do on March 31, 2014?

A Yes. The residents discuss and present their case to the attending --
Q Okay.
A -- of record.
Q And is that a routine part of the process, Doctor?
A Yeah, it's the -- it's what is typically done.
Q And, Doctor, when a resident presents a patient, presents a case to the attending, who has the ultimate decision-making authority in that situation?

MS. ZAHKA: At this point, I'm going to object based on disclosure, Your Honor.

THE COURT: Based on what was the last part?

MS. ZAHKA: Disclosure.

THE COURT: One moment.

MS. ZAHKA: As well as leading.

THE COURT: I'm going to ask to see counsel at sidebar for just one moment.

Folks, feel free to stand up and stretch.

(SIDEBAR CONFERENCE)

THE COURT: I just -- I called you over here because I need some time to look at the disclosure.

MS. ZAHKA: Okay.

THE COURT: I didn't want to do it while everybody was --

MR. CASSIDY: I can direct Your Honor if you'd like.

THE COURT: Yes.

MR. CASSIDY: Page 18, Your Honor.

THE COURT: Yup.

MR. CASSIDY: The third paragraph from the bottom. Third paragraph up from the

bottom.

THE COURT: Yup. Okay. And the question, remind me of the question.

MR. CASSIDY: My question was, in this context, who has the ultimate decision-making authority.

THE COURT: Okay. So, I do find it's in the disclosure. What --

MS. ZAHKA: So, I just want to remind the Court that I brought this up during our discussions about Dr. Eichler specifically about the word "authority" or "approval," "the ultimate decider." That's nowhere in the disclosure.

And Mr. Cassidy represented to the Court that he would get that in not through his experts, but through Dr. Giblin. So, that's

what I'm getting at with this.

I don't believe the disclosure covers who has the "ultimate authority."

THE COURT: I'm having a failure of memory here. Was that with me or with --

MS. ZAHKA: Yes, with you.

THE COURT: With me?

MS. ZAHKA: Yes.

THE COURT: That --

MS. ZAHKA: This was at the pretrial when we were discussing aspects of Dr. Eichler's testimony.

THE COURT: And did I make a ruling?

MS. ZAHKA: No, you didn't make a ruling.

THE COURT: Okay.

MS. ZAHKA: I'm just telling the Court that Mr. Cassidy had represented he

would get the issue of authority and approval authority in through Dr. Giblin and not through his experts.

THE COURT: Oh, okay. I think I have a memory because there was a question about whether the expert would know what the rules were at Mass General.

MS. ZAHKA: Right. Right.

THE COURT: Okay. I'm going to allow the question and allow the answer subject to my instruction that the witness is testifying based on his own experiences -- based on his own experiences.

And if you want to explore more about the basis for what he's saying, I will allow you to do that. And I will allow you to point out

ultimate power to make the medical decision?

A The final responsibility lies with the attending.

Q And has that been true, Doctor, in all of the teaching hospitals in which you've either been trained or worked over the course of your career?

A Yeah. It's the way that residents learn. Like, there are -- the attending supervises them and has the -- makes the final call and -- because, ultimately, you're delivering care and it's not just about the learning.

And the attendings are board-certified and fully licensed, whereas residents are not.

Q And, Doctor, just to be clear, you've not yourself worked at the Massachusetts General

Hospital, have you?
A I rotated through there early in my residency.
Q Okay. So, you were a resident there at Massachusetts General Hospital?
A Yes.
Q Okay. And while you were a resident there, Doctor, in your experience, was this the practice that was followed, that is that the resident would present the case to the attending?
A Yes.
Q And has that been your experience throughout your career at the Children's Hospital?
A Yes, in all hospitals where I rotated and worked.
Q And are both the Massachusetts General Hospital and the Boston Children's Hospital teaching

hospitals affiliated with the Harvard Medical School?
A Yes.
Q Now, do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether the recommendations that were made with respect to Nelsy Juarez by Dr. Giblin after presenting the case to Dr. Eichler were in compliance with the standard of care as it existed in March of 2014?
A I do, and she was in compliance.
Q And why do you say that, Doctor? What is the basis for your opinion?
A Well, she assessed the patient and made an appropriate decision with regards to the treatments -- next steps in treatment. I don't know in which specifics you're

asking --

Q Okay.

A -- me to comment on more.

Q Sure. So, Doctor, let's talk about Lamictal and Lamictal dosing, okay. Are you familiar, Doctor, with the FDA package insert for Lamictal?

A Yes, I'm familiar with that.

Q And are you familiar, Doctor, with the guidelines that are contained in that FDA package insert with respect to Lamictal dosing?

A Yes.

Q Can we agree, Doctor, that the dosing regimen that's described in Dr. Giblin's note on page 58 -- and feel free to take a moment to read it if you need to.

Can we agree, Doctor, that that dosing regimen is consistent with the FDA

guideline which is set forth in Table 1, which is on page 287 of the jury book?

A Yes. That is following that prescription.

MS. ZAHKA: Objection to leading.

THE COURT: I'll overrule that on this question.

BY MR. CASSIDY:

Q And, Doctor, are you at page 287?

A I didn't go there. I know the -- I know Table 1.

Q Okay. But why don't you just go there for a moment, if you would.

And so, Doctor, Table 1 is entitled "Escalation Regimen for Lamictal in Patients Over 12 Years of Age with Epilepsy," correct?

A Yes.

Q And then in the second column

from the left it says "for patients taking valproate," correct?

A That's right.

Q Okay. Nelsy Juarez was taking valproate, correct?

A Yeah. Valproate slows down the breakdown of lamotrigine. So, when you are taking Depakote, the titration schedule for lamotrigine needs to be adjusted.

Because the breakdown is less fast, you need less of the medication to reach goal levels, and you more than double the half-life.

Q Okay. And that's what this table takes into account in the dosing recommendation, correct?

A Correct. There's one for medications that don't affect the breakdown of lamotrigine, that's the one in the column in

the middle. And are -- there's one on the right that is for patients who take medications that speed up the breakdown of lamotrigine. And then the one on the left is for, we call them concomitant medication, medications that the patient is also taking, in this case Depakote, which slows down the breakdown of lamotrigine.

Q And, Doctor, just so it's clear, did -- is the dosing recommendation made by Dr. Giblin on -- in her note consistent with the second column from the left here in Table 1?

A Yes, for patients taking valproate.

Q Okay. And do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether it was

appropriate, and by appropriate I mean consistent with the standard of care, for Dr. Giblin to make that recommendation with respect to Nelsy Juarez based upon Table 1?

A Yes, it was appropriate.

Q Do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether Table 1 is, in fact, the applicable table, if you will, for Nelsy Juarez as of March 31, 2014?

A Yes. The lamotrigine dosing schedule was and should be based on that table.

Q If we turn over, Doctor, a page to page 288, there is a table, Table 2, entitled "Escalation Regimen for Lamictal in Patients 2 to 12 Years of Age with Epilepsy." Do you see

that?
A Yes.
Q And once again, Doctor, the second column in from the left is for patients who are also taking valproate, correct?
A Yes, for patients 2 to 12.
Q Right. Do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether Dr. Giblin should have made dosing recommendations based upon Table 2?
A I do have an opinion and she --
Q What is your opinion, Doctor?
A She should not base her dosing recommendations based on Table 2.
Q Why is that, Doctor?
A Well, because Nelsy was four months away or so from being 14, so she was, like, way past 12. And while she was constitutionally small, we have

She was a small person and she was -- and her body mass index suggested that she was underweight, but it was -- but many aspects of her were completely proportional.

So, she was a small person, like her mom and like her father. And once you reach the age of 12, the science that supports -- that informs the package insert suggests that you no longer use weight-based dosing, and that is because your organs that process these medications reach a certain weight and a certain -- again, a weight proportional to the rest of the body, a certain physiology, a certain genetic maturity where proteins become available that break down the medication in a mature pattern.

All of these

maturational processes are part of normal growth and development. And while she was small, we have no reason to believe that these processes were delayed or not working in her.

So therefore, the dose chosen was based on age and not weight because there's also a risk of underdosing.

Q And let's talk about that, Doctor. What are the risks associated -- first of all, Doctor, on March 31, 2014, Nelsy had presented, as we all know, with a generalized tonic-clonic seizure.

What was the -- was that a potentially life-threatening condition?

A Well, every seizure comes with its own dangers, correct. And so, any seizure can eventually

lead to life-threatening complications.

Q And, Doctor, what is the risk, if there is a risk, associated with underdosing the patient?

MS. ZAHKA: Objection, disclosure.

THE COURT: Overruled.

BY THE WITNESS:

A If you -- so, lamotrigine is already a slow medication to titrate up. And with a low dose, it would take more than just a few months to get to a goal dose. If you underdose, then you have a risk of ongoing seizures. It's really quite simple.

Q And, Doctor, knowing that there's this five in a million or 5.3 in a million chance of Stevens-Johnson syndrome by giving Lamictal, should that cause you to deviate in any way

from the FDA guideline-recommended doses?

A Well, the five in a million chance that we cited earlier is for all of the United States. So, for Lamictal-related or not, some of these -- Stevens-Johnson syndrome can be related to infections, in particular mycoplasma, other medications, other drugs, including trivial ones like NSAIDs, non-steroidal anti-inflammatory drugs, ibuprofen.

So, that number does not pertain to lamotrigine specifically, but --

Q That pertains to all causes of Stevens-Johnson syndrome?

A Yes.

Q Okay. So, the number for Lamictal would be even smaller than 5.3 in a million?

A I would suggest it would be

Pages: 1-105
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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NELSY DELGADO JUAREZ, *
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Plaintiff, *
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v. *
*
KATHRYN GIBLIN, M.D., AND *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*
Defendants. *
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* * * * * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

TRIAL TRANSCRIPT

Thursday, January 16, 2025
Courtroom: 314

Maria Santos
Court Reporter

I correct?

MR. CASSIDY: Yes, Your Honor.

THE COURT: Okay. On that matter, let me ask the defendants. It seems to me that you have pursued two sort of separate maybe related concepts in this case and one is that the -- Dr. Giblin followed the standard of care, her prescription followed the standard of care or was the standard of care.

And then also -- let me ask you a different way. Recognizing they have the burden of proof, what is your defense in this case? What are you saying in this case? How did Dr. Giblin act appropriately?

MR. CASSIDY: Dr. Giblin acted appropriately in all

respects, Your Honor. She did what she was supposed to do acting as a second-year resident on the pediatric neurology service.

She gathered the information, obtained the history, performed a physical examination, spoke with Dr. Zepeda, which, as you've heard, is not necessarily required or part of the standard protocol. She then presented the case to Dr. Eichler.

She then recorded the plan that was arrived at in conjunction with her discussion with Dr. Eichler and communicated that verbally and through her note in writing to the emergency department. And, yes, Your Honor, I mean, I'm certainly arguing that the Lamictal dosing was appropriate

and consistent with the standard of care. I'm also saying, Your Honor, that Dr. Giblin was acting in accord with the attending physician.

THE COURT: Dr. Giblin testified that although she doesn't have a specific memory of it, she can tell, based on her custom and practice and from the fact that she included a discussion with Dr. Eichler in her notes, that Eichler agreed with her recommendation. Are you going to be referencing that evidence during your closing?

MR. CASSIDY: I would expect so, Your Honor.

THE COURT: Okay.

MR. CASSIDY: It's part of her note, it's in evidence, yes.

THE COURT: All right.

Just one moment. So you also say in your memo -- in your bench memo you reference the fact that Peters essentially opined that Eichler had approved of the treatment as well.

MR. CASSIDY: That's -- I'm sorry.

THE COURT: No, go ahead.

MR. CASSIDY: No. I just was going to say, yes, that's based on Dr. Giblin's testimony and her documentation, Your Honor.

THE COURT: Okay.

MR. CASSIDY: I mean, obviously he's not a percipient witness, he wasn't there, but based on Dr. Giblin's testimony and Dr. Giblin's note, that was the basis for his opinion.

THE COURT: Okay. A

couple of the arguments that the defendants make as to why it should not be included, I'm not persuaded by.

The argument, or at least the implication that, look, the attending agreed with this plan, it says two things. It says two things to the jury. It says either this must have been the standard of care because the more experienced doctor agreed with it and it says, even if it wasn't, it's not her fault; essentially her supervisor said do this.

And, you know, whether there is evidence to support that is disputed by the parties, but that's the defendants' argument. And that makes Eichler a pretty important witness, someone that you would expect that the

defendants would bring in to confirm that rather than letting the plaintiffs argue over and over and over there's nothing in the note that says that and nobody has any memory of it.

So, in terms of the findings that I am supposed to make or decide whether they exist, you know, it's the third one that's at issue here, or the fourth one, I guess. There is no logical or technical explanation for the failure to call the witness. Why wouldn't the defendants put Eichler up?

MR. CASSIDY: Your Honor, for the same reason that we don't call a lot of witnesses, for the same reason I didn't call Dr. Kearns, Your Honor. I made the judgment that I didn't want to call him,

I didn't need him, and I don't have to call him.

If I may, Your Honor, we don't have to -- the defense doesn't have to call any witnesses. This -- we don't have the burden of proof. This witness, Dr. Eichler, was equally available to both sides, Your Honor. He was previously deposed by the plaintiff.

I could just as easily, Your Honor, be making a request for a missing witness instruction on Dr. Eichler with respect to the plaintiff. The plaintiff is claiming, Your Honor, that Dr. Eichler didn't approve this, and why aren't they bringing him in to say that? Your Honor, this is --

THE COURT: So that gets to the argument that is more

persuasive in your memorandum, which is that -- which really goes to number two, the witness is friendly or at least not hostile to the party that would be expected to call him.

One might ask why didn't the plaintiff call him to say the opposite, to say I didn't -- I don't have any memory of this conversation and I'm not willing to acknowledge it just because she put in her note that we had the conversation. So what does the plaintiff have to say to that?

MS. ZAHKA: It's not our argument that he didn't approve it. Our argument is that we don't know. Based on her note, we don't know whether he approved it or not. We don't know what the discussion was at all. Calling someone like him

based on untimeliness.

Your Honor, it will be fatal to the defense to give a missing witness instruction in this case. It's simply not warranted, Your Honor. This witness is equally available to both sides, and what Ms. Zahka just said, I would say respectfully, makes no sense, Your Honor.

She says, well, we didn't say that he didn't approve it. Well, that's certainly been the insinuation. But she's saying all we're saying is we don't know. Well, in that case, that's exactly what Dr. Eichler said at his deposition, which is he can't recall the conversation and he has no memory, so that fits squarely with Ms. Zahka's argument here and in that case,

why didn't she call him?

THE COURT: Okay. All right. I'm going to think about this one for a few minutes. Does anyone want to add anything before we close on this topic?

MS. ZAHKA: Nothing from plaintiff, Your Honor.

MR. CASSIDY: No, thank you, Your Honor.

THE COURT: Okay. All right. Why don't I do this? Why don't I -- why don't we break for a bit, I'll make the revisions that I've already discussed, I'll make my decision on the missing witness instruction, I'll have the revised instructions sent to counsel and then you want to come back.

I think at that point it would probably be just to put

your objections on the record to what I have or -- well, we'll have a further -- we'll finish up the charge conference. Why don't we do it that way?

Before break, there are a few other things for us to talk about. By the way, is that schedule all right with everybody if I ask you to, you know, we break for about a half hour, 45 minutes, come back? Okay.

And just on the missing witness issue, I know what an explosive argument/instruction it can be. I have dealt with it before, so I appreciate what a significant issue this is. I don't want anyone to think that I don't.

With respect to the contention that it's more a

of care being the same as a doctor's on page 2.

I buffed up about the doctor not needing to be perfect as the defendants requested, but I decided that the second -- defendant's request number two really was already there in my instructions on breach. I did rework directions as to where to go on the verdict slip as requested by the defendants.

All right. As to the missing witness instruction, you saw what I did, so my comments on that are as follows. An instruction on missing witness is I think necessitated by the way both parties tried the case.

I don't see how I could not instruct the jury something about the fact that Eichler is

not here. The defendants have explicitly told the jury not only through Dr. Giblin, but through Dr. Peters as well, their expert, that Giblin's treatment plan was approved by Eichler based on her custom and practice, based on the note, based on industry practices, and that necessarily leads to two inferences, as I said before, which is that the attending did it, so therefore it must be within the standard of care, and also, if it wasn't within the standard of care, then it's not Dr. Giblin's fault, it's Eichler's fault as her supervisor.

You know, she herself said she can't go rogue, she can't not do what he says. So there really is no logical or technical explanation for the

decide whether they should draw any adverse inference from the fact that he's not here and if so, against whom should they draw it.

So I'm making the findings required by Section 1111. I think they all exist for both parties here, and so I'm including the instruction in the way that I added it. The only thing I'll add that I'll leave off with is that the -- Mr. Cassidy mentioned that including the instruction is fatal. I think that was the word he used. I use the word explosive.

I will just tell you that I have -- in my time, I have included it twice, once in a criminal case, once in a civil. I don't remember what happened in the criminal case.

otherwise, we're content.

THE COURT: Okay. Defendants.

MR. CASSIDY: Thank you, Your Honor. The only issue I have, Your Honor, is with regard to the missing witness instruction. I do object, Your Honor.

I think the fact that Your Honor is saying in this instruction that both sides didn't call this witness, I think, Your Honor, that sort of underscores the fact that this is not a missing witness.

And, in fact, Your Honor, if you'll recall, the plaintiff, in the motions in limine, actually filed a motion to preclude Dr. Eichler from testifying and now Your Honor is going to allow the plaintiff to argue that he should have

been called as a witness. I think that, you know, they can't have it both ways, Your Honor.

And I think the fact that either side could have called this witness and the fact that Your Honor is instructing the jury in that way means that it is not a missing witness, Your Honor. I mean, yes, the witness was not called, but it's not a "missing witness."

Both sides made the decision not to call the witness for possibly the same reasons, possibly different reasons, but for whatever reasons, Your Honor. And I think, Your Honor, the -- when you're asking the jury to decide whether the witness was friendly to or at least not

hostile to one party or the other, I think that's sheer speculation on the part of the jury, Your Honor.

They have no way of knowing whether Dr. Eichler was friendly to or hostile to Dr. Giblin or the hospital or to the plaintiff. And the fourth, Your Honor, that there is no explanation for not calling the witness again calls for speculation. The jurors are not lawyers --

THE COURT: You are asking the jury to speculate.

MR. CASSIDY: Excuse me, Your Honor?

THE COURT: You are the party asking the jury to speculate --

MR. CASSIDY: I'm not --

THE COURT: -- based on other evidence in the case.

But we don't have Dr. Eichler here to tell us whether he did or whether he would have agreed based on this note.

MR. CASSIDY: But, Your Honor, I'm not asking the jury to speculate. I'm asking them to reach that decision based upon the testimony of Dr. Giblin and her documentation, both of which are in evidence, both of which are proper pieces of evidence, Your Honor, and that's not speculation.

I'm asking the jury to draw the inference from Dr. Giblin's testimony and from her note that Dr. Eichler did what she said he did.

THE COURT: Okay. All right. I had forgotten that the plaintiff moved to preclude Dr. Eichler. If anything, that assists the plaintiff. Right,

they didn't want him here, which would -- it doesn't assist the -- I'm not changing my decision to put it in as to both parties, but as to that argument, they didn't want him here in the first place, sure, because they expected he would say something bad, then he doesn't get called, and they're left to believe maybe he wouldn't -- maybe it would have been unfavorable to the defendant. I'm not changing it. I'm just saying that that doesn't assist the defendants' position in this matter.

As to the jury having to find whether he was friendly or hostile, that's what they need to do and they need to do it based on the evidence that they heard, but I am not sending this case to the jury without

talking about Eichler.

We heard his name more than anyone else's in this case, so -- and the jury isn't going to go -- going to leave the courtroom without any instruction from me as to what to do with that. So your objection is duly noted and so are the grounds for it, but the instruction is going to stay in. All right.

Why don't we arrive at 9:00 tomorrow. We'll -- I'll see the plaintiff's chaulks before then, we'll talk to Juror No. 7, and then we'll give -- I will give the legal instructions, we'll have closings, and then the general instructions. All right. We're adjourned. Thank you.

MS. ZAHKA: Thank you.

THE COURT OFFICER:

Pages: 1-181
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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NELSY DELGADO JUAREZ, *
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Plaintiff, *
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v. *
*
KATHRYN GIBLIN, M.D., AND *
THE MASSACHUSETTS GENERAL HOSPITAL, *
*
Defendants. *
*
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BEFORE THE HONORABLE JACKIE COWIN
DOCKET NUMBER 1784CV00599

TRIAL TRANSCRIPT

Friday, January 17, 2025
Courtroom: 314

Maria Santos
Court Reporter

THE COURT: Mr. Cassidy, stick to the evidence that was in the case.

MR. CASSIDY: Okay.

You might consider those things in thinking about Dr. Eichler and why he was or was not called.

Now, let's talk about the plan that was put into place on March 31st of 2014. As you know from the documentation, the plan was to give Lamictal, and it was to give Lamictal in accordance with the FDA dosing guidelines for children over the age of 12. You're all familiar with this. It's table number 1.

You heard from Dr. Peters. Dr. Peters, an epileptologist from the Children's Hospital. You heard from Dr. Peters that Dr. Giblin

believe her or not as you choose. It's documented in her note. But, in a way, members of the jury, whether she spoke to Dr. Eichler or she didn't, whether he approved it or didn't, in a way, it really doesn't matter.

Why? Because the recommendation that she made, whether approved by Dr. Eichler or not, was the proper recommendation. You heard from Dr. Peters. He prescribes Lamictal, I think he told you, you know, several times a week at least. And he has never seen a case of Stevens-Johnson Syndrome. And he told you that Dr. Giblin was acting appropriately in Nelsy Juarez's case by following the guidelines, by not conducting an experimental one.

Now, Nelsy's epilepsy, unfortunately, continues. She had to be taken off the Lamictal, obviously, when she developed Stevens-Johnson Syndrome. She's not a candidate anymore to receive Lamictal. She's been on different medications. She's been on Depakote. And her seizures continued.

And you'll see in the records, if you go -- I think it's tab F is the Children's Hospital, if I remember correctly. You'll see she was followed there by a Dr. Libenson, and she continues to be followed at Children's Hospital.

And you may recall Ms. Zahka was asking Dr. Peters some questions about the seizures and their impact on

Nelsy, et cetera. And Dr. Peters mentioned that seizures can and do have impact on cognitive ability. And, in fact, if you look at Dr. Libenson's notes, they start at page 192 in the book.

You'll see he's expressing concerns about Nelsy's intellectual ability, her cognitive ability, in conjunction with the seizures. And incidentally, you'll also see in Dr. Libenson's notes that begin there on 192 and thereafter, Dr. Libenson says that the titration of Lamictal that was given in the emergency room on March 31st of 2014 was standard. It's there in Dr. Libenson's notes. You can take a look at it. He's her neurologist at the Children's Hospital.

It's not Dr. Giblin saying it. It's not Dr. Eichler saying it. It's not Dr. Peters saying it. It's Dr. Libenson saying it.

I submit to you members of the jury that it was well within the standard of care for Dr. Giblin to dose Nelsy in the manner that she did and to make that recommendation, that dosing recommendation, to the emergency department at the Massachusetts General Hospital. And then as you've heard, it's actually, as a matter of protocol, it's actually the emergency department that orders and prescribes the medication.

And I'm not suggesting that they did anything wrong. They were following the recommendations.

Lastly, let me talk to you a little bit about Dr. Giblin. You've had the opportunity to meet and listen to Dr. Giblin when she took the witness stand.

Does Dr. Giblin strike you a rule breaker or a rule follower? Does she strike you as somebody who was going to ignore the protocols, the time honored way of presenting a patient to an attending physician and go off and do something on her own? Or does she strike you as somebody who is inclined to do what she's supposed to do, as she did in this case?

Members of the jury, there is absolutely no scientific evidence for weight-based dosing of a 13-and-a-half-year-old child for

Lamictal.

The only evidence that you've received in this case is the opinion of Dr. Adler without any scientific support. Dr. Adler pointed to nothing other than his own experience. And interestingly, in his experience, he says he's seen five children with Stevens-Johnson Syndrome.

He pointed to no studies. He pointed to nothing. And I submit to you the reason is that there is no scientific basis to support weight-based dosing in a 13-and-a-half-year-old patient.

Now, Her Honor has talked with you about the verdict slip. The first question asks you whether Dr. Giblin was negligent. I submit to you, based upon all

computer next to each other and -- is that credible?

She doesn't even know if the conversation was by phone or in person. She has no memory. No memory.

She was the neurologist who communicated the plan to the emergency department, the only neurologist who communicated that plan.

It's a bit of an elephant in the room, isn't it? A pretty big elephant. Where is he? Where is Dr. Eichler? You never heard from him.

Remember, Mr. Cassidy stood up in opening and affirmatively represented to you that Dr. Eichler approved the plan, so that means it was okay. If he approved the plan, why isn't he in here telling you so?

If it happened the way Dr. Giblin wants you to believe, he would have been here to support that.

The Court instructed you or will instruct you that you can draw what's called an adverse inference regarding Dr. Eichler if certain criteria is met, so I want to talk to you about that criteria.

First, the party knew of the witness. Well, the defendants in this case are Dr. Giblin and Mass General Hospital, certainly they knew of Dr. Eichler. I don't think anyone mentioned his name more than counsel for the defendant and the defendant herself. I mean, have you ever heard someone so eager to throw someone else under the bus?

The witness was friendly

03/31/2014	Pediatric Neurology ED Consult	Final	Giblin, Kathryn A., M.D.

MASSACHUSETTS GENERAL HOSPITAL

HARVARD MEDICAL SCHOOL

PEDIATRIC NEUROLOGY ED CONSULT NOTE

Name: [redacted]
MRN: [redacted]
Date: 03/31/2014
RFC: GTC this morning, vomited AM medication-- question if should give AM dose of medication again, question epilepsy medication adjustment

HPI: [redacted] is a 13 year-old girl with a history of absence epilepsy. She first presented in February, 2008 with staring episodes and had an abnormal EEG with spike and slow wave at 3-3.5 Hz. She was evaluated by neurology and started on Depakote. In January, 2009, [redacted] had been having 3 or 4 absence seizures a day that were secondary to medication non-compliance due to insurance issues. Unfortunately although this concern was resolved, [redacted] mother had stopped giving Depakote when she ran out of refills because she did not understand that she was supposed to continue taking the medicine and call for new refills. As a result, in April, 2009, [redacted] had been continuing to have absence seizures daily.

The staring spells are stereotyped 1-2 second brief losses of attention with no eye blinking or oro-motor automatisms. She immediately resumes her activities after a few seconds. She has no postictal confusion. Her mother thinks the frequency of these episodes did not change significantly while she was on the Depakote and has not increased significantly since she stopped taking it, prompting a change in medication to ethosuximide for seizure control in April, 2009. Mom started the new medication but [redacted] did not like the taste and so mom discontinued it after a week. At our visit in 8/2009 she was having seizures on a daily basis with no medication. There were extensive discussions at that visit regarding the importance of the medication for seizure control in consultation with our social work colleagues. [redacted] started ethosuximide on 9/24/2009 and although she initially took the medication, she had breakthrough seizures, prompting an increase in dose in November, 2009 to 500 BID. She then began to refuse liquid medication in January, 2010, prompting a transition to pills. At our visit in August, 2010, [redacted] was still refusing to take liquid medication and "gagged" on pills. She agreed to try a pill swallowing cup and to take her medication with her favorite juice. At our visit on 4/6/2011, [redacted] had missed several follow-up appointments. We also learned that she refused to take any medication in any form. During the last visit, a meeting was arranged with our social worker, Barb Luby who met with [redacted] and her family indivdually and they had agreed to restart her on Depakote sprinkles. She was last seen in our office on December 2012, at which time she was not taking her medications thoughit was not clear that she needed to be treated any longer. Hyperventilation at that time did not elicit any abnormal behavior or starring. The plan was to continue to see how [redacted] does off of medication, particularly given the expectancy that absence epilepsy might improve with age.

She was lost to follow-up while off depakote since December 2012. On average, she has been experiencing 6 starring spells (lasting 1-2 seconds) with occasional arm flapping daily for the past several months. The seizures are always witnessed before she goes to school in the morning. She is unsupervised in the afternoons at home, however, there have been no reports of spells at school, nor has

there be any decline in her academic performance.

She had a first generalized convulsion in February, 2013, when her mother found her down in the morning with her eyes open, shaking her arms and legs which lasted for 2 minutes, associated with incontinence and followed by unconsciousness for ensuing 10 minutes. She was seen in her local ED, received Depakote 250 mg and discharged home. She then had been taking 125mg Depakote BID for the past two weeks. She occasionally forgets to take the pills in the morning. She was then seen in follow-up in our clinic and her Depakote was continued on 250mg BID.

Interval history:
She was last seen in clinic on 3/26/2014 and at that time her VPA level was 105, she had been compliant with her medication, and had no further seizures on the increased dose of Depakote (125 BID increased to 250mg BID 2/26/2014) nor side effects.
Unfortunately, this morning, she had a generalized convulsion consistent with her prior GTC. She did not sleep well last night, but reports medication compliance and denies any infectious symptoms, although she did vomit prior to seizure this morning. She had one of her usual staring spells this morning lasting 3 seconds with myoclonic jerks in her arms. Later, mother heard a thump, and found [redacted] on the floor with eyes open, unresponsive, drooling, arms and legs shaking, lasting ~1 minute, followed by confusion, no weakness or numbness. She is currently back to baseline. She has no change in the frequency of her absence seizures, with several per day.

The past medical history is significant for:
- childhood absence epilepsy: initially started on Depakote but transitioned to ethosuximide in April, 2009, significant concerns with noncompliance
- positive PPD in 03/2007, previously treated with INH
- poor weight gain
- short stature

Medications
Depakote Sprinkles (DIVALPROEX Sprinkles) 250 MG (125MG CAP SPRINK Take 2) PO BID

Allergies: NKDA

Her birth history is unremarkable, she was born via c/s at full term, with no perinatal complications nor any complications during pregnancy, according to her mother.

Developmentally she was appropriate throughout with no concerns from mom or the pediatrician.

For social history, the patient lives with her mother, younger sister, and stepfather. She moved with her family from Guatemala to the US several years ago. She speaks English at school and Spanish at home. She continues to perform well in school with As and Bs in all areas. There are no behavioral complaints by the teachers or family. She is well adapted at school and has a few good friends.

The family history is significant for no history of seizures.

There have been no changes in vision or hearing, headaches, neck pain, tinnitus, vertigo, weakness, numbness, difficulty with comprehension, speaking, language, swallowing, eating, balance or gait. General review of systems was negative for fevers, chills, rashes, change in weight, energy level or appetite, chest pain, palpitations, shortness of breath, cough, abdominal pain, nausea, vomiting, and change in bowel or bladder habits (i.e incontinence).

PHYSICAL EXAM:

Vital Sign

97.9	81	102 / 58	18	100	

Ht 136.5 cm, Wt 27.8 kg, BMI 14.9

GEN: Patient appears stated age, well-developed, well-nourished, well-appearing in no acute distress
HEENT: Sclerae anicteric, mucous membranes moist, clear oropharynx
NECK: Supple
PULM: Clear to auscultation bilaterally.
CV: RRR, normal S1 & S2, no murmurs

ABDOMEN: Soft, non-tender, non-distended, normoactive bowel sounds.

Neuro:
MENTAL STATUS: The patient was fully alert and oriented, and was following all commands and appropriately interactive. There was complete fluency without paraphasic errors. The concentration, attention and memory were intact.

CRANIAL NERVES:

I:	Not tested.
II:	VF full to confrontation. PERRL
III,IV,VI	EOMI w/o nystagmus (or diplopia). No ptosis.
V:	Sensation intact to LT/PP.
VII:	Face symmetric without weakness.
IX,X:	Voice normal. Palate elevates symmetrically.
XI:	SCM and trapezii 5/5.
XII:	Tongue protrudes midline without atrophy or fasciculations.

MOTOR: Normal bulk and tone; no fasciculations, no tremor, no rigidity, or bradykinesia. No pronator drift.

	Delt	Bi	Tri	FE	IP	Quad	Hamst	TibAnt	EHL	Gastroc
	C5	*C6*	*C7*	*C8/T1*	*L2*	*L3*	*L4-S1*	*L4*	*L5*	*S1*

R	5	5	5	5	5	5	5	5	5	5
L	5	5	5	5	5	5	5	5	5	5

REFLEXES:

	Bi	Tri	Bra	Pat	Ank	Toes
	C6	*C7*	*C6*	*L4*	*S1*	
R	2	2	2	2	2	Down
L	2	2	2	2	2	Down

SENSATION: Light touch and temperature intact throughout.

COORDINATION: The finger-to-nose and rapid alternating movements were normal. There was no truncal ataxia.

GAIT: The stance and stride were normal, as was the ability to tandem, toe, and heel-walk. The Romberg test was negative.

DATA:

2/7/2008 EEG:

Abnormal EEG due to the presence of intermittent bursts of generalized, symmetric, bi-frontal predominant spike and slow wave activity at 3-3.5Hz lasting up to 10 seconds without observed clinical accompaniments. A number of these bursts occur in response to photic stimulation, consistent with a photoparoxysmal response.

1/15/2010 EEG:

Abnormal EEG because of frequent bursts of well formed 3-3.5 Hz generalized, spike-wave activity that were more frequent when awake but seen in all states as well as with photic stimulation without any distinct annotated clinical manifestations. COMPARISON: Upon direct comparison, today's study showed similar distribution and pattern of generalized spike-wave complexes that were a bit shorter (up to 6 seconds) but more frequent (21 bursts in a 50 minute study) in comparison to the previous EEG.

ASSESSMENT and IMPRESSION:

[redacted] is a 13 year-old girl with history of childhood absence epilepsy which has now converted to JME, who had been lost to follow-up until this February when she presented with a generelized convulsion while off anti-convulsant medication. Since her generalized convulsion she had been doing well on Depakote 250mg BID with no side effects, but unfortunately now she returns with another GTC, likely with new seizure semiology due to her CAE converting to JME, but it is unclear if the seizure this morning is in the setting of her being Depakote being therapeutic at this time as level has not yet been checked or if this is in

the setting of GI illness, vomiting, and lack of sleep.
Plan:
-Check Depakote level
-Give AM Depakote dose as patient vomited dose
-Discussed patient with Dr. Zepeda who saw patient 3/26-- please start Lamictal (Lamictal Blue starter pack for patients already on Depakote, start with 25mg QOD for weeks 1 and 2, then increase to 25mg QD for weeks 3 and 4, then increase by 25mg QD every 1 week, i.e. 50mg QD for week 5, 75mg for week 6, etc., once dose is 200mg/d, concurrently decrease VPA to 250mg QD then discontinue VPA), with plan to see in follow up in 4 weeks and then titrate off Depakote as Lamictal is less teratogenic and better future medication anyways, also comes in chew tabs.
-Would not increase Depakote further from 250mg BID as patient was somewhat supratherapeutic at 105 last week.
-Further recommendations pending Depakote level, please page 21333 when available.

Kathryn Giblin, MD
Resident in Neurology b21333
Discussed with Neurology Consult Attending, Dr. Florian Eichler.

ADDENDUM
VPA level is 82; would not recommend changing VPA dose.
Follow-up appointment scheduled with Dr. Dooling (who saw patient last week 2/26/2014 as well) to staff on 4/23/2014 at 4PM in Yawkey 6.

Kathryn Giblin, MD
Resident in Neurology b21333

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
NO: 1784CV00599

NELSY DELGADO JUAREZ,
Plaintiff,

VS.

KATHRYN GIBLIN, M.D, and
THE MASSACHSUETTS GENERAL HOSPITAL,
Defendants.

BENCH MEMORANDUM OF DEFENDANTS, KATHRYN GIBLIN, M.D. AND THE MASSACHUSETTS GENERAL HOSPITAL, REGARDING POTENTIAL FOR "MISSING WITNESS" ARGUMENTS OR INSTRUCTIONS

NOW COME the Defendants, Kathryn Giblin, M.D. and Massachusetts General Hospital (MGH), in the above-entitled action and submit this bench memorandum for the Court's review regarding the potential for any "missing witness" arguments or instructions in this matter. The Defendants submit this memorandum following the Court's discussion of this issue at the close of the trial day on January 14, 2025. Specifically, the Defendants argue that any such argument or instruction is not appropriate in this matter, is not supported by the evidence, and would be highly prejudicial to the Defendants.

I. BACKGROUND

At the conclusion of the trial day on January 14, 2025, the Court began discussion with the parties regarding the charge conference and formulation of jury instructions in this matter. In doing so, the Court invited the parties to consider whether a "missing witness" jury instruction would be necessary or appropriate.

Certainly, the context of the Court's suggestion is both parties' discussion during testimony of Dr. Florian Eichler, the supervising attending physician of the Defendant, Dr.

Giblin. In brief summary, the Defendants have asserted that Dr. Giblin's care for the Plaintiff as a resident physician was done, in consultation with and with supervision by, her attending, Dr. Eichler. The Plaintiff has focused on the fact that Dr. Eichler does not have an entry in the Plaintiff's record memorializing his involvement. Dr. Eichler has not yet testified at trial, although at present the Defendant's case is not complete.

II. ARGUMENT

Pursuant to Mass. G. Evid. § 1111, a jury instruction from the Court regarding a "missing witness" is interrelated with, and is only necessary if, counsel are permitted to argue the import of a missing witness, which they are not permitted to do without first obtaining judicial approval. See Mass. G. Evid. § 1111(a). The Defendants argue that in this case such approval should **not** be given.

As an initial matter, it is abundantly clear from review of the case law that this issue is vastly more applicable to criminal cases than civil cases. Virtually all of the foundational case law on this issue are criminal cases, which is understandable considering the different burdens of proof incumbent on prosecutors rather than civil attorneys, the Constitutionally protected rights of a criminal defendant to challenge evidence brought (or not brought) against him, and the vastly different ability of parties to a criminal matter to potentially access witnesses for the other side. In discussing one of the foundational elements of a missing witness instruction, the strength of the case against a defendant, the court asks whether the defendant is "innocent," a term only applicable in criminal cases. Comm. v. Broomhead, 67 Mass. App. Ct. 547, 552 (2006).

Relatedly, any defendant, in a civil or criminal case, has no burden of proof and is not obligated to call any witness. A defendant could prevail at trial simply by challenging, through cross examination or documentary evidence, the evidence put forward by the plaintiff.

The case law is also clear that a missing witness argument should only be allowed "with caution" as it is a serious allegation that can have a "seriously adverse effect on the party that is accused of purposefully not calling a witness. Comm. v. Williams, 450 Mass. 894, 900-901 (2008). Courts have been clear to distinguish that such an argument, and a subsequent jury instruction from the Court that an adverse inference could be drawn from the absence of a witness, is not simply an allegation by a party that evidence is somehow insufficient, but that it allows a party to argue that an opposing party is willfully attempting to withhold or conceal significant evidence, id., and that the jury should "conclude affirmatively that the missing evidence would have been unfavorable to the non-calling party." Comm. v. Salentino, 449 Mass. 657 (2007). Again, this calculus is far more relevant in a criminal case, where the prosecution has inherent obligations to produce exculpatory evidence.

Moreover, the foundational elements that might allow such an argument/instruction are not present in this case. First, the case against the Defendant is not so strong that there is no explanation for not calling the missing witness. See Comm. v. Broomhead, *supra*. While Dr. Giblin has argued that her treatment decisions needed to be, and were, approved by Dr. Eichler, her documentation, at the very least, suggests this inference even without Dr. Eichler's testimony. The Defendant's expert, Dr. Peters, will also support that Dr. Giblin's treatment decisions were approved by Dr. Eichler without his testimony.

Additionally, regardless of the interaction between Dr. Giblin and Dr. Eichler, the Defendants have presented a medical expert witness, Dr. Jurriaan Peters, who has testified that, even assuming *arguendo* the treatment decisions were entirely Dr. Giblin's, they were appropriate and compliant with the standard of care. Accordingly, there is sufficient reason that the Defendants would choose to not call Dr. Eichler, and to allow the Plaintiffs to suggest that

they have not solely because Dr. Eichler would not support the defense case would be highly inappropriate, against the weight of the evidence, and prejudicial. See Comm. v. Anderson, 411 Mass. 279, 282-83 (1991) ("If the circumstances, considered by ordinary logic and experience, suggest a plausible reason for nonproduction of the witness, the jury should not be advised of the inference."); Evans v. Multicon Constr. Corp., 6 Mass. App. Ct. 291, 294 (1978).

It would also be completely inappropriate to allow a missing witness argument by the Plaintiff when the witness in question, Dr. Eichler, was equally available to the Plaintiff. In fact, the witness should not be considered "absent" if a party (the Plaintiff in this instance) could have subpoenaed them to testify. Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 641 (2001). The Hoffman court is particularly instructive in this circumstance as they ruled that a missing witness argument/instruction was not appropriate when the plaintiffs themselves could have called the witness and had the witness listed on their pre-trial witness list. Id. at 640.

This is exactly true here – the Plaintiff did list Dr. Eichler on their witness list and deposed him three years ago. The Defendants issued a trial subpoena to Dr. Eichler and the Plaintiff could have done the same. The Hoffman court also ruled that the defendant could have tactically chose to not call a witness because of limitations placed on their testimony. Id. at 640-641. Prior to trial in this case, the Court made clear that Dr. Eichler would only be allowed to testify as to certain issues. Accordingly, it is perfectly appropriate for the Defendants to potentially choose to not call Dr. Eichler and rely instead on the medical documentation already in evidence and the testimony of Dr. Giblin and their expert(s).

III. CONCLUSION

For the above reasons, the Defendants request that no party be allowed to make a missing witness argument to the jury and, consequently, that no missing witness jury instruction be given.

Respectfully submitted,
By its attorneys,

/s/ Nicholas D. Meunier

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