In the Matter Of:

CHRISTY T. O'CONNELL

vs.

IRIS DOMINY, M.D., et al.

DANIEL SMALL, M.D.

October 26, 2015

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1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
2 ----
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4 CHRISTY T. O'CONNELL, : CIVIL ACTION NO.
Plaintiff, :
5 : 14-cv-1339
vs. :
6 :
IRIS DOMINY, M.D., :
7 et al., :
Defendants :
8
9
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10 Monday, October 26, 2015

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Pretrial examination of DANIEL SMALL, M.D., held
12
in the offices of the Regus Conference Center,
13
100 Overlook Center, 2nd Floor, Princeton, New
14
Jersey 08540, commencing at 3:38 p.m., on the
15
above date, before Mickey Dinter, Registered
16
Professional Reporter, Certified Court Reporter
17
and Notary Public for the State of New Jersey.
18

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22

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24

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1 A P P E A R A N C E S:
2
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1 DANIEL SMALL, M.D., 123
2 Franklin Corner Road, Lawrenceville, New
3 Jersey 08648, being first duly sworn/
4 affirmed, was examined and testified as
5 follows:
6 BY MR. FOGELSON:
7 **Q. Dr. Small, my name is Matt Fogelson.**
8 **We spoke briefly. I represent Dr. Dominy.**
9 **I'm sure you've had your deposition taken**
10 **before, but I will run through the generic**
11 **deposition rules.**
12 **First, for the benefit of the**
13 **court reporter, only one person can talk at**
14 **a time. I ask that you wait until I'm**
15 **finished asking my question and I will try**
16 **to wait until you finish your answer before**
17 **I ask my next question.**
18 **Second, all answers have to**
19 **be verbal. You need to say the word "yes"**
20 **as opposed to nodding your head. Again,**
21 **that's for the purpose so the court reporter**
22 **can take down your response.**
23 **If you don't hear me or you**
24 **don't understand one of my questions, let me**
25 **know and I will reask it. If you answer a**

1 **question, I will assume that you understood**
2 **what it was I was asking, is that fair?**
3 A. Yes, I understand.
4 **Q. If you need to take a break for any**
5 **reason, just let me know, that's fine.**
6 **You're probably aware if you**
7 **want to look at anything that you may have**
8 **with you before an answer, that's fine, as**
9 **we'll take whatever time you need to do**
10 **that.**
11 **Do you have a copy of your**
12 **CV with you?**
13 A. No, I don't think I do. I think
14 I'm rather familiar with it, though.
15 **Q. Okay. Not everybody is familiar**
16 **with their own CV in my experience. I have**
17 **one that's dated May 1st, 2013. Do you**
18 **think that's the most up-to-date one that**
19 **you have?**
20 A. No, it's not. It hasn't changed
21 materially in the last two years, but
22 there are minor changes. Basically, if
23 there's board certification through 2013,
24 you can update it to the present.
25 Committees that I was on

1 through 2013, for the most part, I'm still
2 on the same committees.
3 Q. All right. I notice you have this,
4 let's see, at least on this version, your
5 CV, on page 3, there are some publications.
6 There's some clinical research experience.
7 Do any of those things on your CV, do you
8 know, have to do with any of the, directly
9 with any of the issues in this case?
10 A. Not whatsoever.
11 Q. Okay. What states are you licensed
12 to practice medicine in at present?
13 A. New Jersey and Pennsylvania.
14 Q. Have you been licensed in any other
15 states in the past?
16 A. No.
17 Q. Have you ever had your license to
18 practice medicine in New Jersey or Penn-
19 sylvania suspended or revoked or adversely
20 acted upon in some fashion?
21 A. No.
22 Q. And where do you have hospital
23 privileges at present?
24 A. Capital Health Medical Center,
25 Hopewell, New Jersey.

1 Q. Anywhere else?
2 A. No.
3 Q. And, I take it, you probably had
4 privileges in other institutions in the past?
5 A. I have.
6 Q. All right. Have your hospital
7 privileges where you now have privileges,
8 or any hospital in the past where you may
9 have had privileges or any other institution
10 that grants privileges, have those ever been
11 suspended or revoked or acted upon in any
12 fashion?
13 A. No.
14 Q. Are you a member of any, what I will
15 call, private medical societies, for example,
16 ACOG?
17 A. I am a fellow in the American College
18 of OB/GYN in ACOG.
19 Q. Are you a member of any other, I will
20 call them, similar society private
21 organizations that you joined or that aren't
22 state-licensure bodies?
23 A. The only thing that might qualify
24 would be that I'm certified and, I think,
25 I'm a member of the American Institute of

1 Minimally Invasive Surgery.
2 Q. Are there any other similar types of
3 entities that you used to belong to, but you
4 no longer do for any reason?
5 A. I think at one point, I was a member
6 of the American Association of Gynecological
7 Laparoscopy. I think by registering to get
8 their publication, you became a member of
9 the organization, but I certainly had no
10 professional affiliation with other OB/GYN
11 professional groups that I would consider
12 to be significant.
13 Q. Okay. For the two groups that you
14 have mentioned, I guess that you're presently
15 a member of, the first was ACOG, have you
16 ever been the subject of any discipline or
17 investigation by those entities?
18 A. No.
19 Q. Have you ever had any action brought
20 against you by either of those entities?
21 A. No.
22 Q. Let's talk a little about your
23 malpractice expert witness experience.
24 When did you first start
25 reviewing cases as an expert in medical

1 malpractice cases?
2 A. I'm sure you can imagine that if I
3 have done this for awhile, that I get asked
4 this kind of question with some frequency.
5 I don't really know exactly when I started.
6 I estimate it to be about twenty years ago.
7 Q. How did you -- whenever it was,
8 approximately twenty years ago, how was it
9 that you first got involved in expert
10 witness work?
11 A. I think the first case was a result
12 of having met an attorney through a medical
13 malpractice peer review situation and then
14 after that, it was word-of-mouth.
15 Q. Just take the last couple of years
16 for this question. How many records do you
17 review in a typical year, even if your
18 involvement doesn't go any further than
19 taking a look at a case for an attorney?
20 A. By your question, I take it to mean
21 how many files or how many different
22 individual matters that I'd be asked to
23 review? I would say, probably, thirty a
24 year.
25 Q. Okay. And, then, in the past

1 **matters that number, thirty a year, has that**
2 **number changed substantially over time?**
3 A. Sure. It's probably stable for the
4 last ten years or so.
5 Back in the 1990s when I
6 first started doing this, I don't remember
7 what I did per year. I might have done one
8 a year. There might have been years where
9 I did no cases. At some point, it gradually
10 started to increase until it reached the
11 present level.
12 **Q. In the past couple of years, do you**
13 **know how many times you have been deposed,**
14 **approximately?**
15 A. I'm not sure. I would imagine
16 something like ten times a year.
17 **Q. Do you know, again, just over the**
18 **last couple of years, how many times you**
19 **have testified in a medical malpractice case**
20 **that went to trial?**
21 A. Again, I don't keep the statistics.
22 I lose track of whether something was three
23 years ago or opposed to two years ago, but
24 I would think that I have been in court,
25 maybe, four times this year. It could be

1 less. It's probably about the same the last
2 few years.
3 **Q. Doctor, in the case where you get**
4 **involved as an expert witness, in other**
5 **words, where your involvement goes beyond**
6 **reviewing records, do you know how many of**
7 **those, what percentage of those you are**
8 **retained by attorneys representing a**
9 **plaintiff as opposed to an attorney**
10 **representing a defendant, some kind of**
11 **healthcare provider, doctor, hospital, mid-**
12 **level, what have you?**
13 A. I'm sure you understand that this is
14 a dynamic number as cases open and close
15 but, roughly speaking, eighty percent of the
16 work I do is on the defense side and twenty
17 percent of the work I do is on the plaintiff
18 side.
19 **Q. Is that -- when you give that figure,**
20 **from what period of time are you giving that**
21 **figure? For the past five years? Ten years?**
22 **One year? Approximately.**
23 A. I would say the last three to five
24 years that number is accurate. Before that,
25 it was probably ninety percent defense work.

1 So, the plaintiffs work has gradually
2 increased over the last five to ten years.
3 **Q. Do you know if you have ever**
4 **testified in a deposition or in a trial for**
5 **a case that was based in Maryland, whether**
6 **you were in Maryland, the case itself was**
7 **in Maryland?**
8 A. I don't remember the name, but I
9 think I have. There was a case that I was
10 hired by, I guess, defense attorneys in
11 Delaware but, I think, the case was actually
12 venued in Maryland.
13 **Q. Okay. You don't remember the name**
14 **of the case, correct?**
15 A. I do not.
16 **Q. Do you remember the name of the firm?**
17 A. I can probably figure it out, but I
18 don't remember it as I sit here today. If
19 it's important, I could probably provide
20 that to you at a different time.
21 **Q. If you can figure that out, I ask**
22 **you to provide that information to Miss**
23 **Malarkey, counsel for plaintiffs.**
24 **Have you ever done work for**
25 **Miss Malarkey or for her firm, other than**

1 **this case?**
2 A. I have looked at several files for
3 others in her firm, Salsbury, Clements
4 Bekman.
5 **Q. Do you know, approximately, the first**
6 **time was that you looked at a case for their**
7 **firm?**
8 A. It might be that this was the first
9 time. I'm not sure in terms of when
10 everything started. Maybe two years ago.
11 **Q. Do you know how they obtained your**
12 **name to send you the first case, whether it**
13 **was this one or some other one?**
14 A. I don't recall.
15 **Q. Doctor, do you now, or have you in**
16 **the past, advertised your expert witness**
17 **services in any way?**
18 A. No, I do not advertise in any way.
19 **Q. Do you have a website?**
20 A. No. Well --
21 **Q. I don't mean a practice website. I**
22 **mean a personal website related to expert**
23 **work.**
24 A. I do not have any website related to
25 my expert witness work. I tend to have a

1 practice website for my private practice.
2 **Q. Are you able, Doctor, to tell me,**
3 **I'm looking for an estimate, a dollar figure**
4 **as opposed to a percentage, how much you**
5 **earned in 2014 from your expert witness**
6 **work?**
7 A. In previous depositions, I've shared
8 a percentage. I'm not comfortable, nor do
9 I actually know for 2014 what a dollar figure
10 would be. I would be comfortable in sharing
11 a percentage. If I give you a dollar figure,
12 then you're asking me to make my income
13 public information, which does not seem
14 fair.
15 **Q. Okay. My question is as to a dollar**
16 **figure, I can't at this point control what**
17 **your answer is to that.**
18 MS. MALARKEY: I think he
19 just said he doesn't know for 2015.
20 BY MR. FOGELSON:
21 **Q. I thought you knew a percentage,**
22 **but not a dollar figure.**
23 **In any event, when is the**
24 **most recent year, whether it's percentage or**
25 **dollar figure, that you can give some sort**

1 **of answer to whether it's percentage or**
2 **dollar figure?**
3 A. A few years ago, I was asked that
4 information and looked at the tax return
5 that had been filed and came up with a
6 percentage that I shared with the attorney
7 who asked.
8 **Q. Okay. What was that percentage?**
9 A. That fifteen percent of my income
10 came from expert witness testimony.
11 **Q. Do you know what year that was for?**
12 A. No. It was a few years ago.
13 **Q. I'm going to make a request, Doctor,**
14 **I'm requesting a clarification. Sounds like**
15 **that's, whatever that fifteen percent was,**
16 **was a number of years ago. For 2014 and**
17 **'13, I ask you to try to figure that out as**
18 **far as how much you have earned from expert**
19 **witness work. I know you can't provide it**
20 **right now based on your answer.**
21 **Do you know, for this case,**
22 **prior to today's deposition, how much you**
23 **have billed?**
24 A. No.
25 **Q. Do you know how many hours,**

1 **approximately, you've spent on the case?**
2 A. No. If I knew how many hours I had
3 spent, I could tell you how much I had
4 billed.
5 **Q. Have you ever been named as a**
6 **defendant in a medical malpractice case**
7 **yourself?**
8 A. Yes.
9 **Q. How many times?**
10 A. Six times.
11 **Q. All right. What is -- how long ago**
12 **was the most recent case?**
13 A. There's one case currently open.
14 **Q. What about the case before that, the**
15 **second?**
16 A. That was 2002. Around here, things
17 take a long time to resolve. I was dropped
18 with prejudice from the 2002 case about a
19 year ago.
20 **Q. Of any of those six cases, did any**
21 **of those cases, including, and the most**
22 **recent one, no pending cases, other than**
23 **very generally, did any of them involve**
24 **allegations similar to the allegations in**
25 **this case?**

1 A. No. If it's helpful to you, none
2 involved the use of methotrexate or miso-
3 prostol. None involved an abortion.
4 **Q. Going back to your training, Doctor,**
5 **what residency program or programs have you**
6 **completed?**
7 A. You'll see on the CV that I did my
8 OB/GYN training at the Medical College of
9 Pennsylvania from 1982 to 1986.
10 **Q. Are there any residency programs that**
11 **you started that you did not complete, for**
12 **whatever reason?**
13 A. No, that's the only residency. I
14 started it and I completed it.
15 **Q. And am I correct you didn't complete**
16 **any fellowships after that OB/GYN residency?**
17 A. You are correct.
18 **Q. You are board certified. Looking**
19 **at your CV, you're board certified in**
20 **obstetrics and gynecology since 1988, is**
21 **that correct?**
22 A. Yes.
23 **Q. And, then, it looks like you**
24 **recertified every ten years until they**
25 **started to impose the annual requirement.**

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1 **And, then, there's 2008, '9, '10, '11,**
2 **'12. And, I take it, have you recertified**
3 **since 2012?**
4 A. Yes. My recertification is current.
5 **Q. Okay. In any of those, either the**
6 **initial board certification exam when you**
7 **took it in '88 or any of those**
8 **recertifications from '98 to the present,**
9 **did you pass those on the first attempts?**
10 A. Yes, on all of them.
11 **Q. Okay.**
12 A. Well, it's a little bit inaccurate,
13 perhaps, as a question and answer for the
14 yearly recertification in the sense they
15 are online articles that you read and answer
16 questions about. I guess you could fail
17 that. Maybe the question and answers are
18 accurate but, no, I have never failed
19 anything. It's hard for me to imagine how
20 somebody can fail when you have the article
21 in front of you and you're being asked
22 questions open book on the article that's
23 in front of you, but the only real exams
24 were '98, 2008 and, then, a written exam
25 that I had to take a year or two ago.

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1 Maybe in 2014 you had to sit for another
2 written exam.
3 **Q. As long as you can represent to me**
4 **that you've passed all of them, that's**
5 **probably as far as I need to go with that.**
6 A. I did pass each of the exams.
7 **Q. On the first attempt?**
8 A. Right. I haven't failed any of the
9 exams. I haven't done any multiple attempts
10 on any aspect of any board certification
11 or recertification.
12 **Q. That's the only board certification**
13 **that you hold, correct?**
14 A. Yes.
15 **Q. Are you board eligible, if you know,**
16 **in any other specialty?**
17 A. I am not.
18 **Q. Can you tell me, Doctor, what**
19 **positions, what position or positions you**
20 **hold as a physician at present? In other**
21 **words, where you work, if you have any**
22 **academic assignments, any other things that**
23 **take up a substantial portion of your time**
24 **in your work as a physician?**
25 A. I'm a partner at Lawrence OB/GYN

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1 Associates where I practice as a full-time
2 obstetrician/gynecologist. That's the vast
3 majority of my professional activity.
4 I'm involved in various
5 hospital committees. That's not for com-
6 pensation, that's just part of my function
7 at the hospital. I'm also the director of
8 gynecologic minimally invasive surgery and
9 chairman of the rotobics program at Capital
10 Health Medical Center.
11 **Q. Do you hold any academic position at**
12 **present?**
13 A. I do not.
14 **Q. Have you ever held any in the past?**
15 A. Yes, though I'm not an academic.
16 I'm a general OB/GYN who practices in the
17 community.
18 I was on staff for two years,
19 1986 and 1987, with an active staff position
20 at Thomas Jefferson University Hospital in
21 Philadelphia. I actively taught students
22 and residents during that period of time.
23 I held the position of instructor in OB/GYN
24 through, I believe, the year 2000. I will
25 have to look at my CV that you have in

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1 front of you. I think it's 2000, because I
2 wasn't utilizing Thomas Jefferson. I gave
3 up those privileges at that time.
4 I was the psych coordinator
5 for the gynecology surgery rotation for the
6 residents from the University of Medicine
7 and Dentistry of New Jersey at Cooper.
8 That's the Camden-based OB/GYN residency
9 program in New Jersey.
10 Those residents came to my
11 institution and I was the one that ran
12 their rotation for three years. That was
13 2006 to 2009. That was my last academic
14 affiliation or function.
15 **Q. Can you just, talking about the**
16 **present now, Doctor, can you break down for**
17 **me how you spend your professional time,**
18 **whether it be clinical, any research? You**
19 **mentioned being a director of gynecological**
20 **minimally invasive surgery. Can you tell**
21 **me what a typical week or month looks like?**
22 **Whatever way makes sense for you to explain.**
23 A. Generally speaking, my week starts
24 with a two-hour meeting at the hospital from
25 about eight to ten in the morning on Monday

1 where I meet with the midwives and
2 physicians from my practice to discuss
3 patient care matters, high-risk patients,
4 difficult-to-manage issues, that kind of
5 thing.
6 I see patients in the office
7 the rest of the day all day Monday and
8 Tuesday. On Wednesday, I work either half
9 or a full day seeing patients as well. On
10 Thursdays, I operate. Sometimes depending
11 on surgical volume, Wednesday afternoons I
12 will do surgery as well.
13 There are occasional hospital
14 committee meetings and that sort of thing
15 mixed into that schedule that I have given
16 you.
17 On Thursdays, I will generally
18 spend most of the day in the operating room
19 and sometimes that's also doing proctoring
20 or teaching other physicians in the field
21 of gynecology.
22 On Fridays, I usually see
23 patients from eight in the morning to 1:00,
24 1:30 in the afternoon. I usually take the
25 rest of Friday afternoons off. Sometimes

1 that's when I read medical malpractice
2 matters. And, I'm sorry, I realize there's
3 a couple of other things that I haven't
4 mentioned. I also have shifts that I do,
5 twelve-hour shifts at the hospital, that
6 take the place of some of the days that I
7 mentioned, as a laborist, where I take care
8 of emergency obstetric care and emergency
9 room matters having to do with obstetrics
10 and gynecology. I also have those hospital
11 shifts that I do.
12 Q. Do you take, other than what you
13 just told me, do you take call for your
14 practice or elsewhere?
15 A. The only call I'm currently doing
16 are those 12-hour laborist shifts.
17 Q. Are there things, are there things
18 in the field of obstetrics you don't do?
19 How often are you doing deliveries? Is it
20 just those twelve-hour shifts?
21 A. That's correct.
22 Q. So, when it comes to when one of
23 your patients is pregnant and goes into
24 labor, those shifts aside, someone else
25 handles it?

1 A. That's right.
2 Q. Has that always been the case? Or,
3 if not, for how long has it been the case?
4 A. I stopped doing night call about two
5 years ago. That's the privilege of aging.
6 Q. Within, within the field of OB/GYN,
7 is there anything that officially or
8 unofficially you specialize in? I know you
9 mentioned minimally invasive surgery.
10 A. I'm a general OB/GYN. I'm not a
11 subspecialist. I tend to do much more
12 minimally invasive gynecologic surgery in
13 rotobics than most people in my field and
14 have some expertise in that area and do some
15 teaching in that area.
16 Q. This case, obviously, involves a
17 patient going to a provider that provides
18 elective -- people that do not want to carry
19 a baby to term, not necessarily for a
20 medical reason, but for another reason. Is
21 that something that you do in your practice?
22 A. I tend to perform elective abortions.
23 Q. Okay. What percentage of your total
24 practice, and when you say, when you say
25 "elective abortions," are you referring to,

1 what do you mean by elective abortions?
2 A. I think the term is self-explanatory,
3 but an elective abortion is when someone
4 chooses to end a pregnancy as opposed to
5 that there is spontaneously miscarrying or
6 something along those lines. That can be
7 done for medical reasons, like an abnormal
8 pregnancy, or it can be done because of
9 patient volition. Both of those are elective
10 abortions.
11 Q. Within that category of elective
12 abortions, do you do, do you perform
13 abortions in both situations, medical ones
14 that may be medically necessary and ones
15 which are not?
16 A. I do abortions. I'm a pro-choice
17 physician. When somebody comes to me and,
18 let's say, they are two months pregnant and
19 that individual does not want to be pregnant
20 anymore, I will do a pregnancy termination.
21 Q. Got it. What percentage of your
22 practice involves providing elective
23 abortion services?
24 A. A small amount. I don't know the
25 percentage. I probably do one or two

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1 abortions in a month.
2 Q. All right. And when we're talking
3 about abortions, you do both medical and
4 surgical?
5 A. No. I only do surgical abortions.
6 If one of my patients wants a medical
7 abortion -- well, we don't have a contract
8 for RU-486. I refer the patient to someone
9 else to provide medication.
10 Q. For medical abortions, have you ever
11 done one?
12 A. So, here, probably, the wording gets
13 a little bit difficult because there are
14 times, in particular for second trimester
15 pregnancy termination, that labor is induced
16 as a way of terminating the pregnancy. That
17 would be a medical abortion. I do perform
18 that kind of medical abortion. But a first
19 trimester medical abortion using RU-486 or,
20 for that matter, doing what the doctors at
21 American Associates did, using misoprostol
22 and methotrexate, that I don't perform
23 myself. I use methotrexate for termination
24 of ectopic pregnancy which, I suppose, is
25 a different kind of medical abortion.

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1 Q. When you say you don't do it, when
2 you say you don't do those and you refer
3 it, is that -- have you ever done that or
4 have you always referred them?
5 A. For a first trimester medical
6 abortion, for an intrauterine pregnancy, and
7 here I'm talking about an elective abortion
8 with a healthy intrauterine pregnancy, I
9 have never, ever done that kind of abortion.
10 Q. Doctor, within the field of OB/GYN,
11 the field you practice in, is there any
12 literature or texts or journals that you
13 consider to be a reliable authority?
14 A. Well, certainly, it would depend on
15 what subject we're talking about. I use all
16 sorts of literature to add to my knowledge
17 base. With any particular source of
18 literature, I would look at that particular
19 source and try to judge whether the section
20 on the subject that I was dealing with was
21 reliable.
22 Q. With respect to this case, have you
23 done any research of any kind in formulating
24 your opinions?
25 A. I would say no. I certainly am

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1 familiar with medical literature in my field
2 and for my opinions on the review of the
3 materials that I was sent. I did, knowing
4 that it existed, pull out an ACOG bulletin
5 that I knew existed, as I mentioned, on the
6 medical management of first-trimester
7 abortions.
8 Q. Do you have that ACOG bulletin with
9 you?
10 A. I did bring it.
11 Q. Okay.
12 (Exhibit D-1 Small, a Practice
13 Bulletin titled Medical Management of
14 First-Trimester Abortion, marked for
15 identification.)
16 BY MR. FOGELSON:
17 Q. What is now marked for identification
18 as Exhibit 1 -- first of all, Doctor, if you
19 want to, assuming they have copying
20 facilities where you are, if you want to
21 make a copy and retain the original, that's
22 fine. We can sort that out after the
23 deposition is over.
24 Can you just identify, since
25 I can't see it, what that bulletin is and

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1 where it's from?
2 A. I'm not trying to be cute. I realize
3 that -- maybe I was. It's Bulletin Number
4 143 from March 2014. The exact title is,
5 "Practice Bulletin." The first title is
6 "Medical Management of First-Trimester
7 Abortion."
8 Q. Okay. And what role, if any, does
9 that document, Exhibit 1, did that play, in
10 your opinion, in this case.
11 A. It just supported the point of view
12 I had based on my knowledge and experience
13 in our field.
14 Q. So, is it my understanding, you say
15 your opinions are not based on that document,
16 but that document is, rather, confirmatory
17 of opinions that you held at the time you
18 went and retrieved that document?
19 A. That's right.
20 Q. What records have you received in
21 connection with this case?
22 A. Let me try to figure that out. I've
23 got records from American Medical Associates,
24 from Maryland Perinatal Associates. I have
25 Christie O'Connell's chart. That seems to

1 be eighty pages.
2 **Q. Do you know if her chart --**
3 A. Let me open this up and figure this
4 out. I don't see a cover letter identifying
5 them, so I have to kind of reconstruct what
6 the documents are.
7 The chart has forty-five
8 encounters, and I see the name of Lindsay
9 Hill, a physician's assistant. They are
10 office records.
11 **Q. What is the address on the progress**
12 **notes?**
13
14 MS. MALARKEY: That's the
15 medical record from Frederick Primary
16 Care.
17 THE WITNESS: It's eighty
18 pages, Emily. Then, that's the right
19 one. I also have records -- let's see.
20 The front page is "Frederick, Plan
21 Delivery. Location: Frederick Memorial
22 Hospital Inpatient." And this appears
23 to be office records, I think, from the
24 OB/GYN center in Frederick, Maryland.
25 BY MR. FOGELSON:

1 **Q. Okay.**
2 A. I have in front of me, as well, the
3 Certificate of Qualified Expert that I
4 authored. I have the deposition of Christy
5 O'Connell. I just dropped something, so I
6 will go get that. And I don't have with me,
7 but I've read electronically, the deposition
8 of Dr. Dominy. I also received billing
9 records that I don't have with me.
10 **Q. Anything else besides those items you**
11 **have used?**
12 A. I haven't intentionally omitted
13 anything. I believe those are all the
14 materials I have reviewed.
15 **Q. Okay. What about, I'm looking at,**
16 **and I'm not suggesting, I'm not suggesting**
17 **anything, what about newspaper articles**
18 **relating to Dr. Brigham and Kaji?**
19 A. I certainly have seen articles,
20 though I don't recall that it was
21 specifically in reference to this litigation.
22 I believe I saw articles just in the course
23 of reading the newspaper.
24 **Q. Okay. My question is, do you know**
25 **if you were provided any newspaper articles**

1 **or other articles in the context of this**
2 **case?**
3 A. You know, I don't recall. I actually
4 don't have any specific newspaper articles
5 in mind that I was provided. And if that's
6 not true if I was provided one, I'm just
7 failing to remember this at the moment. I
8 know I've seen articles that I've just saw
9 reading the New York Times, for example,
10 and local papers in the Trenton area.
11 **Q. Have you received the Complaint or**
12 **any Complaint filed in connection with this**
13 **case?**
14 A. It seems likely that I would have
15 seen that, but I don't actually recall
16 seeing that.
17 **Q. What about a Certificate of**
18 **Qualified Expert and Report of Dr. Gareau?**
19 A. I have not seen that. I don't know
20 who Dr. Gareau is.
21 MS. MALARKEY: I have not
22 sent that to him. She is the expert for Dr.
23 Dominy.
24 BY MR. FOGELSON:
25 **Q. While you were reviewing those**

1 **records, Doctor, other documents you have**
2 **identified, did you take any notes, either**
3 **on a computer, on a note pad, or the**
4 **documents themselves?**
5 A. I don't recall taking notes. I
6 often do but, generally, don't keep them
7 after I've authored a report.
8 **Q. Have you received correspondence**
9 **from counsel for plaintiff, either e-mails,**
10 **letters, faxes, with regard to this case?**
11 A. I assume that there was a cover
12 letter with the original file, but I don't
13 see it. The only cover letter I have is
14 what accompanied the deposition of Christy
15 O'Connell. There's no content to that.
16 Certainly, Miss Malarkey and
17 I have had some telephone and e-mail
18 correspondence since I originally looked at
19 those records, you know, generally, having
20 to do with what my thoughts were in my
21 review.
22 **Q. And turning just for a minute to**
23 **your reports, it looks like you authored,**
24 **I'm not talking about drafts, I'm talking**
25 **about reports you have signed, it looks like**

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1 **you have authored three separate reports in**
2 **this case, is that correct?**
3 A. I'm assuming you must be right, but
4 let me just look.
5 MS. MALARKEY: I thought it
6 was two.
7 BY MR. FOGELSON:
8 **Q. Let me give you the date I have. I**
9 **have a report on your letterhead dated**
10 **June 16, 2015. It's about two and a quarter**
11 **pages long. I have your Certificate of**
12 **Qualified Expert. I have your Certificate**
13 **of Qualified Expert and your report dated**
14 **March 23rd. There's handwriting on it,**
15 **"March 23, 2014, two payments." I have**
16 **another report on a separate Certificate of**
17 **Qualified Expert that's dated August 3, 2015.**
18 A. It sounds like there would be four
19 of them, then.
20 MS. MALARKEY: The August 3rd
21 is the one.
22 MR. FOGELSON: I have this
23 one. That's the Certificate.
24 MS. MALARKEY: Certificate of
25 Qualified Expert.

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1 MR. FOGELSON: Right.
2 MS. MALARKEY: Got it.
3 MR. FOGELSON: I'm not
4 counting the certificates themselves.
5 MS. MALARKEY: Got it. Okay.
6 Sorry.
7 BY MR. FOGELSON:
8 **Q. Those are the three that I have.**
9 A. I'm not aware of any other materials
10 that I have authored.
11 In going through those papers
12 in front of me, I also noticed I have the
13 Statement of Claim which, I suppose, is
14 legally the same as the Complaint. So, you
15 asked me earlier whether I had that document
16 and I said I wasn't sure.
17 **Q. Okay. With the Statement of Claim**
18 **that you have, who is, who are listed as**
19 **the healthcare providers?**
20 A. I didn't understand what you asked.
21 **Q. Who is listed, if you have the**
22 **Statement of Claim at the top, either on**
23 **the left-hand side somewhere, either the**
24 **defendants or the healthcare providers?**
25 A. I just didn't-- the video, the audio

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1 quit out for a minute. Defendants are
2 Associates in OB/GYN Care, American Medical
3 Associates, Rose Health Services Company,
4 Iris Dominy.
5 **Q. Got you. Okay. Let me fax this**
6 **over. I have a report dated August 3rd,**
7 **2015. I want you to take a look at that**
8 **since you don't have it.**
9 MS. MALARKEY: The one that
10 he's referring to is the Certificate of
11 Qualified Expert and Report that you
12 signed in the separate lawsuit that was
13 filed against Dr. Brigham and Dr. Kaji.
14 THE WITNESS: I have that.
15 BY MR. FOGELSON:
16 **Q. Whichever reports you have, Doctor,**
17 **can I mark them? I don't want to drag this**
18 **part out too long. This is just the dis-**
19 **advantage of being in separate locations.**
20 A. The one report that it looks like I
21 don't have is the March, I think you said,
22 March of 2015.
23 **Q. 2014.**
24 A. 2014. I think I neglected to bring
25 that.

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1 **Q. Okay.**
2 A. I might need a copy of that just to
3 help things go more smoothly.
4 **Q. With regard to those reports, the two**
5 **that you have and that March 3rd, 2014, one,**
6 **my question, if you need me to break it**
7 **down by individual report, I can certainly**
8 **do that, I will ask it intentionally as a**
9 **compound question for now. How were those--**
10 **who wrote those reports? And by that, I**
11 **mean, did you write them? Sometimes reports**
12 **are written by the physicians who sign them;**
13 **sometimes the reports are written jointly**
14 **with the attorneys who retain the physicians;**
15 **sometimes the reports are written after by**
16 **the attorneys or by the law offices after**
17 **a conversation and then the doctor then**
18 **reviews them.**
19 A. So, whatever you have from 2014, I
20 don't know what you have because I don't
21 have it in front of me. I can't answer you
22 until I see what document we're talking
23 about.
24 **Q. Okay.**
25 A. In terms of the reports over my

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1 signature of August 3rd, 2015, those are
2 reports that I take ownership of and that's
3 why I sign them. I believe that the original
4 version of those was something written by
5 the attorney because there's some stylistic
6 things that would not have been mine, but
7 that I specifically edited those reports to
8 my satisfaction before I sign them.
9 Q. Turning to sort of the scope of your
10 opinions, when we take a break, I will fax
11 this over so we can clear this up, assuming
12 we can fax it.
13 The scope of your opinions,
14 am I correct, you're not going to be giving
15 any opinion regarding the health of
16 Mrs. O'Connell's son in this case?
17 A. I believe that's generally true.
18 I'm not going to be offering you opinions,
19 for example, on what the etiology is of any
20 deficit that he may have, though I know that
21 the medications that he received during
22 this pregnancy have the potential to cause
23 problems of the sort that resulted in this
24 pregnancy and thereafter.
25 Q. If I understand what you're saying,

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1 you're saying the medications that Miss
2 O'Connell was given can cause problems but,
3 in this particular case, you're not going
4 to be offering opinions about whether they
5 did actually cause problems to Miss
6 O'Connell's son, am I correct?
7 A. I think you are paraphrasing it
8 correctly. I'm saying that, certainly, I
9 know these medications have the potential to
10 cause problems like growth retardation and
11 then complications from prematurity, but I'm
12 not saying that I know that there isn't
13 another cause for his issues.
14 Q. You're going -- you have standard of
15 care opinions about, obviously, Dr. Dominy,
16 who is my client, correct?
17 A. That's certainly the bulk of my most
18 significant opinions in this litigation.
19 Q. And, then, you have standard of care
20 opinions about Dr. Kaji, correct?
21 A. I have standard of care opinions
22 about Dr. Kaji and Dr. Brigham pending
23 further discovery and understanding exactly
24 what he did of their relationships with the
25 functioning of the clinic.

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1 Q. Do you have standard of care opinions
2 about -- strike that. I believe you have
3 standard of care opinions about persons, at
4 least, that were identified in the Complaint
5 and as the "office manager" who interpreted
6 the sonogram, supposedly interpreted, the
7 sonogram in this case?
8 A. If it is an office manager who's
9 interpreting the sonogram, there are
10 significant issues about standard of care
11 and causation with the ultrasound outcome.
12 So, I'm critical of the "office manager" to
13 the extent that that's what happened.
14 Q. Do you have any opinions on the --
15 I take it, you don't have any opinions on
16 the cost of raising Miss O'Connell's son?
17 A. True.
18 Q. And you mentioned before that you
19 had been sent some bills. Do you know what
20 bills you were sent?
21 A. I think I was sent the bills or, at
22 least, the amounts of medical care received
23 between twelve weeks' gestation and the end
24 of the year when the delivery occurred on
25 the cost of medical care in the fall and the

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1 cost of the hospitalization in December.
2 Nothing after that.
3 Q. Do you know what the bills totaled
4 as far as the dollar amount?
5 A. I don't. I apologize that I don't
6 have that with me. It was in the tens of
7 thousands; not in the hundreds or five or
8 six-figure range.
9 Q. Do you have any opinions about those
10 bills, having reviewed them?
11 A. Only that they seemed in the general
12 range of medical bills that I have seen for
13 this kind of medical care in the past; the
14 bills seemed reasonable for what they were
15 supposed to be.
16 Q. Do you have any opinions in any other
17 areas of this case? I'm asking what they
18 are, if there's some area that I'm over-
19 looking here?
20 A. It's kind of a broad question. I
21 think you've covered it but, perhaps, as we
22 go through the deposition, I will realize
23 that you haven't.
24 Q. All right. Let's start with
25 Dr. Brigham and Dr. Kaji. I recognize that

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1 **you said you have opinions pending further**
2 **discovery in the case.**
3 **At this point in time,**
4 **looking at that log, at that report that's**
5 **dated August 3rd, 2015, the first thing in**
6 **that report says, "It's my opinion that a**
7 **combination of methotrexate and misoprostol**
8 **is not sufficiently effective to inducing a**
9 **complete abortion limited to approximately**
10 **eight weeks' pregnant to the extent or knew**
11 **that this regimen was regularly administered**
12 **in their clinic and that they violated the**
13 **standard of care."**
14 **My question is: Do you know**
15 **at this point in time to what extent Drs.**
16 **Brigham and Kaji established, approved and/or**
17 **knew that this regimen was regularly**
18 **administered in their clinics?**
19 MS. MALARKEY: Let me put a
20 general objection on the record for a
21 second. Certainly, you want to ask him
22 questions about the report, and that's
23 fine. Dr. Brigham hasn't filed an Answer
24 yet, neither has Dr. Kaji. Neither of
25 them have counsel to represent them at

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1 the deposition.
2 The doctor said we've got to
3 do a lot more discovery. If you want to
4 ask him what's the basis of this --
5 BY MR. FOGELSON:
6 **Q. That's what I'm asking. I'm only**
7 **asking for what you know at this point in**
8 **time. I understand, as counsel indicated,**
9 **things may change in the future. I'm asking**
10 **what the basis of your knowledge is at this**
11 **point in time about those things? Do you**
12 **want me to repeat the question?**
13 A. I think I know where you're headed.
14 Based on my review of these
15 materials, it appears to me that there was
16 a regimen in place, put in place by someone
17 other than Dr. Dominy and that Dr. Dominy
18 eventually agreed to utilize, but that the
19 system that was put in place was put in
20 place by another individual. Based on the
21 relatively small amount of information
22 available, it would appear that that would
23 have been put into place by Dr. Brigham
24 and/or Kaji and, to the extent that those
25 two doctors established, approved or knew

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1 of that regimen, they violated the standard
2 of care given the information that was being
3 provided to patients in their clinics.
4 **Q. What leads you to your -- do you**
5 **remember what you just stated, that it would**
6 **appear to be, I'm paraphrasing, if I mis-**
7 **state, let me know, that it would appear**
8 **that Dr. Brigham and Kaji, perhaps, were the**
9 **most likely to put that in place? What leads**
10 **you to that conclusion or tentative**
11 **conclusion sitting here today?**
12 A. That I understand Dr. Brigham to be
13 the person who owned and managed these
14 clinics and then at some point passed re-
15 sponsibilities to Dr. Kaji, so I don't have
16 all the information to know exactly who put
17 these regimens into place. I know that
18 Dr. Dominy was involved to the extent that
19 Dr. Dominy has said that that's who hired
20 her and that's who came to introduce her to
21 the way the office was being run when she
22 first gained employment. So, those would
23 seem the likely candidates if it was not
24 Dr. Dominy who, herself, decided how to
25 proceed.

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1 **Q. I hear you mention Dr. Dominy's**
2 **deposition. What I'm trying to figure out,**
3 **what is your source of knowledge, for**
4 **example, Dr. Dominy was involved in the**
5 **clinic, what are the sources of knowledge**
6 **that have given you that understanding?**
7 A. The main source of knowledge is that
8 Dr. Dominy says that's who hired her and
9 that's who showed up when she started her
10 employment to show her her way around.
11 **Q. Any other sources of knowledge on**
12 **that front at present?**
13 A. I mean the American Medical
14 Associates or American Medical Service are
15 names that have been published in newspaper
16 articles as entities under which Steven
17 Brigham did business. He has been identified
18 as an owner.
19 **Q. Is Steven Brigham -- do you know**
20 **Steven Brigham personally or professionally?**
21 A. I'm not aware that I have ever met
22 him. I don't think I have.
23 **Q. Okay. Outside of anything you have**
24 **gleaned from this case, is the source of**
25 **your knowledge what you mentioned before,**

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1 **which is reading about Dr. Bingham and Kaji**
2 **in newspapers for reasons not related to**
3 **your review of this case?**
4 A. I didn't understand that question.
5 MS. MALARKEY: I object
6 belatedly.
7 BY MR. FOGELSON:
8 **Q. You testified before that you have**
9 **read some newspaper articles about Drs.**
10 **Bingham and Kaji in the past, correct.**
11 A. I think I know that -- I have read
12 newspaper articles, in the plural, about
13 Dr. Bingham and I recall one newspaper
14 article, I'm not sure that I recall others,
15 where Dr. Kaji's name was mentioned.
16 **Q. Okay. At this point in time, are**
17 **those newspaper articles, whatever they were,**
18 **is that the other, is that the only other**
19 **source of knowledge you have as far as what**
20 **Dr. Brigham, about Dr. Brigham or about**
21 **this particular practice of his medical**
22 **practice or is there something else that you**
23 **gleaned information from?**
24 A. I'm sorry, when you say "this
25 particular medical practice," talking about

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1 a particular clinic site or the use of
2 methotrexate a medical practice? I don't
3 understand the phrase.
4 **Q. I mean the business entity, the**
5 **medical practice, not the practice of using**
6 **methotrexate; American Medical Associates.**
7 A. I think my only knowledge, other than
8 Dr. Dominy's testimony and, perhaps, if
9 Dr. Brigham's name appeared somewhere in the
10 records, though I don't recall that, was
11 that Miss Malarkey informed me that he was
12 the owner of this clinic.
13 **Q. The second thing, going back to your**
14 **report, it's the fourth paragraph down, it**
15 **speaks about "establishing policies and**
16 **procedures that allow untrained individuals**
17 **including 'office managers' to interpret**
18 **sonograms" -- do you see where I'm looking?**
19 A. I do.
20 **Q. -- "to perform and read them."**
21 **What is the basis for those**
22 **opinions at present? Is that the same as**
23 **for what we just discussed? The source of**
24 **knowledge, sorry, not the basis.**
25 A. I'm not quite sure how to answer you.

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1 Dr. Dominy says, more or less, I wasn't the
2 one who decided that that's who was doing
3 the ultrasound; that's the way it worked
4 there, and it was another physician,
5 presumably, or some other managing entity,
6 that decided what the office procedures were.
7 It's my understanding, erroneously or not,
8 that it is Dr. Brigham and/or Kaji that ran
9 the office. It is that individual who would
10 be responsible for putting into place an
11 unacceptable regimen of an untrained
12 individual doing ultrasounds. If I'm wrong
13 that that's who owned or ran the office, then
14 I would have to change the name of the
15 individuals that I have identified.
16 **Q. Is that true, going onto the second**
17 **page of your report, first full paragraph,**
18 **where it's talking about informed consent,**
19 **is it, essentially, the same situation for**
20 **that, that you have an understanding that**
21 **they were the ones, as the owners, that were**
22 **responsible for setting up the documents**
23 **related to informed consent and, therefore,**
24 **if that is in fact true, then they would be**
25 **responsible for any, they would have been**

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1 **responsible for any improper informed**
2 **consent?**
3 A. You've just jumped to a conclusion
4 that I'm not suggesting in my report. I
5 agree that they are responsible. I don't
6 agree that they are solely responsible or
7 fully responsible because, of course, a
8 physician who's enacting someone else's
9 treatment machine still has a responsibility
10 to analyze and think through what she's
11 being asked to do to be sure that it's
12 consistent with the standard of care. But,
13 they would have partial responsibility for
14 putting into place a system, for example,
15 that involved the false information about
16 RU-486 not being available in the United
17 States, potentially false information about
18 the efficacy of their treatment regimen.
19 Those things they would have responsibility
20 for; not sole responsibility, but, yes, they
21 would have responsibility. So, let me --
22 never mind. I can end my answer there.
23 **Q. Okay. What's your understanding,**
24 **Doctor, of Dr. Dominy's status with American**
25 **Medical Associates, at least, when the events**

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1 **of this took place?**
2 A. She is an employed physician is my
3 understanding.
4 **Q. There's one document I didn't ask**
5 **you about. Have you seen the independent**
6 **contractor agreement between Dr. Dominy and**
7 **American Medical Associates?**
8 A. I do not believe so.
9 **Q. Okay. Speaking generally just for a**
10 **minute, Doctor, if you have a situation**
11 **where a physician assistant, an employee**
12 **of the practice which, I think, you just**
13 **testified was your understanding of Dr.**
14 **Dominy's status, in other words, not a**
15 **partner or owner of that practice, does the**
16 **standard of care, in general, require that**
17 **physician to know the qualifications of the**
18 **other, what I will call, code employee**
19 **healthcare workers who may also examine or**
20 **in some way treat those patients?**
21 A. Require her? No. It's not like I
22 expect her to look at the employment records
23 and training of the other individuals but,
24 certainly, I would assume that she has
25 knowledge of that based on her day-to-day

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1 employment there and would then be
2 responsible for acting appropriately with
3 that information as she gathered it.
4 **Q. Okay. You went specifically to Dr.**
5 **Dominy. I was asking, in general, what the**
6 **standard of care requires in that situation**
7 **where you've got an employee physician and**
8 **then a co-employee, another provider, be it**
9 **a nurse, a PA, whatever, anybody working in**
10 **a medical position, what does the standard**
11 **of care require as far as the employee's**
12 **position needs to know or steps they must**
13 **take to ascertain the qualifications of**
14 **those other employees?**
15 A. I don't think --
16 MS. MALARKEY: Objection to
17 the form. You can answer.
18 THE WITNESS: I don't think,
19 for example, if I'm working with a
20 medical assistant, that, and I'm an
21 employed physician, that I have to go to
22 the owner of the practice or to that
23 medical assistant and say, "I need you
24 to show me your qualifications for doing
25 this job."

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1 I certainly do think if
2 information becomes available to me in
3 the course of my doing, my doing my job,
4 that would lead me to believe that some-
5 one was not appropriately qualified,
6 that I needed then to consider that
7 information and act on it.
8 BY MR. FOGELSON:
9 **Q. Okay. So, if I'm understanding you**
10 **correctly and, again, I'm not trying to put**
11 **words in your mouth, I'm trying to make sure**
12 **I understand. A physician in that situation**
13 **doesn't have a duty to affirmatively inquire**
14 **into the qualifications, but if information**
15 **comes to light, the physician may have a**
16 **responsibility to act based upon that**
17 **information about the qualifications of**
18 **another person in the office, for example**
19 **a medical assistant, is that what you're**
20 **saying, essentially?**
21 A. I think that's fair. It's a little
22 vague because the question is so big. We
23 both know you're asking about the ultra-
24 sonographer and Dr Dominy. Maybe we should
25 talk about Dr. Dominy and the ultrasono-

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1 grapher.
2 **Q. I will ask it specifically. I'm**
3 **trying to figure out the parameters of your**
4 **standard of care opinion.**
5 **Turning to Dr. Dominy, do you**
6 **have an opinion as to whether Dr. Dominy had**
7 **some responsibility or some requirement to**
8 **know the qualifications of the people**
9 **performing the sonograms at American Medical**
10 **Associates?**
11 A. I think it would have been fair for
12 her to assume that the individual performing
13 the sonogram was appropriately qualified
14 until she began to work there and understood
15 that the office managers were the ones doing
16 the sonograms.
17 **Q. Okay.**
18 A. And, I think, working with somebody
19 on a daily basis, it would quickly become
20 apparent that that person had no formal
21 ultrasound training.
22 **Q. All right. The title of office**
23 **manager, notwithstanding, do you have any**
24 **information, one way or another, about what**
25 **training that individual or those individuals**

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1 **had with regard to ultrasound?**
2 A. I understand that the office manager
3 in each of the facilities was doing the
4 ultrasounds. Unless they were in the habit
5 of making their ultrasound technicians the
6 office managers, that tells you that the
7 ultrasound service is being provided by
8 someone without that kind of medical
9 training.
10 **Q. Is it fair to say you're, and, again,**
11 **correct me if I'm wrong if I'm not**
12 **understanding you, you're assuming that**
13 **because the person that has been identified**
14 **as "doing" the sonograms has been identified**
15 **as an office manager that, therefore, they**
16 **were not trained as a sonographer?**
17 A. I am making that assumption. I'm
18 also, in part, basing my opinion on the
19 retrospective knowledge of the incompetence
20 with which the ultrasound was done, which is
21 a level of incompetence that I can't imagine
22 can be done of somebody with ultrasound
23 training.
24 You realize this is a really
25 egregious basic failure in the ultrasound.

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1 There's no way that you can come up with how
2 someone who's trained to do ultrasound can
3 miss a pregnancy at twelve weeks. I know
4 you and I both know that.
5 **Q. So, as far as your actual knowledge**
6 **about the training of these, "office**
7 **managers," you don't have any knowledge at**
8 **this point, you don't have any information**
9 **about what their training was, is that**
10 **correct?**
11 A. I don't have specific information
12 about their training. I have just the
13 deposition testimony that they seemed to
14 have been office managers who were trained
15 by the folks on location and that they
16 didn't have formal ultrasound training. If
17 information comes out to the contrary, I
18 would withdraw the training criticism of my
19 opinions.
20 **Q. Okay. Given your understanding, the**
21 **assumption you made, what was Dr. Dominy**
22 **required to do in that circumstance?**
23 A. In which circumstance now?
24 **Q. Okay. I think you've testified that**
25 **your assumption is that these individuals**

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1 **were not trained as sonographers and**
2 **Dr. Dominy was aware of that fact. My**
3 **question is: What was she required to do**
4 **under those circumstances with that**
5 **knowledge?**
6 A. Well, I think she should have
7 questioned whether she wanted to continue to
8 provide services in an office or clinic
9 setting where people weren't appropriately
10 trained to provide the service that they
11 were providing. At the very least, she
12 should have done the ultrasound herself so
13 that she could have seen that it was
14 accurate and, certainly, she then would have
15 known that she was treading on, what I will
16 charitably call, very thin ice to simply
17 sign the reports of incompetent ultrasono-
18 graphers and then take the point of view at
19 deposition that she doesn't have to read the
20 ultrasound, she just has to sign the report
21 because she's not a radiologist and that's
22 only for radiologists to do. Instead of
23 having an OB/GYN physician perform the
24 ultrasound or read the ultrasound, remember,
25 she didn't even look at the pictures. We

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1 have a non-physician untrained in ultrasound
2 and Dr. Dominy felt that was preferable
3 because she wasn't the radiologist, that's
4 a bit of a problem.
5 **Q. I will get to that part of the case,**
6 **I assure you. But, as far as the office**
7 **managers, did you read, do you recall Dr.**
8 **Dominy's deposition that she testified she**
9 **did not know what their qualifications were?**
10 A. I actually got that electronically
11 and don't have a copy of it with me. I'm
12 sure you're paraphrasing relatively correct,
13 but I don't have an encyclopedic memory of
14 the deposition line-by-line.
15 **Q. Assume for my question she testified**
16 **she didn't know what the qualifications of**
17 **the people performing the sonographs were,**
18 **how, if at all, does that factor into your**
19 **opinions?**
20 A. If she had reason to believe that
21 they were qualified, I don't think she had
22 to question whether or not they were
23 performing the ultrasounds. There's a big
24 difference between performing and reading.
25 She still has to take responsibility for

1 reading the ultrasounds.
2 **Q. Okay. Is it your opinion that here**
3 **she had reason to know that they were not**
4 **qualified and that's where your opinions**
5 **flow from?**
6 A. It is my impression that she knew
7 that they were not trained and the exact
8 wording of it, I don't remember. I would
9 have to go back to the deposition. I think
10 that it was her understanding that they had
11 not had ultrasound training; that this was
12 a nonmedical individual who had been given
13 some training, perhaps, by the doctors in
14 the abortion clinic to do crown rump.
15 **Q. Switching gears for a minute, Doctor,**
16 **do you have an understanding of what state**
17 **law in Maryland was or was in 2012 regarding**
18 **what point in time it was no longer legal,**
19 **what point during a pregnancy, it's no**
20 **longer legal to conduct an abortion?**
21 A. I'm not sure what the state law is
22 exactly. Of course, there's a difference
23 between doing it for a viable and a non-
24 viable pregnancy, but for a viable pregnancy,
25 meaning one in which there weren't anomalies

1 and compatible with life, my understanding
2 is it would be at the point where life was
3 possible outside the womb. I thinking
4 that's, roughly, 23, 24 weeks.
5 **Q. You mentioned before that the**
6 **medications that were administered were**
7 **methotrexate and misoprostol and you had,**
8 **yourself, mentioned RU-486 in the deposition.**
9 **My question is, what is your opinion, in**
10 **general, about what the standard of care**
11 **required as far as medications used to per-**
12 **form a medical abortion in 2012?**
13 A. Are we distinguishing first-trimester
14 from second-trimester abortions?
15 **Q. First trimester.**
16 A. So, now, the question is, what is the
17 standard of care in terms of medication in a
18 first-trimester abortion?
19 **Q. Yes.**
20 A. I think that the most efficacious
21 medication was RU-486. And that if an
22 alternative regimen was going to be utilized,
23 that there had to be appropriate, informed
24 consent around the utilization of a less
25 efficacious regimen.

1 **Q. When you say RU-486 is the most**
2 **efficacious, are you able to give, basically,**
3 **numbers as to the efficacy rate of RU-486?**
4 A. Well, I would refer to literature
5 having to do with specific gestational ages.
6 So, for example, if we go to the Practice
7 Bulletin that we referred to earlier, on
8 page 682 of that Practice Bulletin for
9 gestational age up to 49 days, mifepristone
10 is listed as being 92 percent successful
11 when followed by misoprostol. That was with
12 a lower dose of misoprostol. That's the
13 regimen approved by the USFDA among
14 physicians providing first-trimester
15 abortions.
16 It's commonly felt that there
17 are more efficacious regimens involving
18 differing doses of mifepristone, misoprostol.
19 Those regimens are depending on what study
20 you read, those 95 up to approximately
21 63 days' gestational age.
22 **Q. So the range, the difference between,**
23 **if I'm understanding you, the difference**
24 **between the method that Miss O'Connell was**
25 **administered here and RU-486 is 92 percent**

1 **versus, somewhere in the range of, versus**
2 **95 to 99 percent for RU-486, is that correct?**
3 A. No, that's not what I said.
4 **Q. Where am I -- if I got something**
5 **wrong, let me know.**
6 A. I think you just totally misheard
7 me unless I misspoke, and I don't think I
8 did. I gave you two different numbers for
9 two different regimens of mifepristone,
10 otherwise known as RU-486. 92 percent was
11 for the USFDA regimens. 95 to 99 percent
12 was for the alternative regimens that are
13 preferred by many abortion providers.
14 **Q. I did mishear you. I apologize.**
15 **What's your understanding of**
16 **what the efficacy rate is for the method of**
17 **the medication that was administered to**
18 **Miss O'Connell?**
19 A. I would think that was more about
20 eighty percent.
21 **Q. What's the basis of your testimony**
22 **that it's about eighty percent?**
23 A. Well, one: Substantial literature
24 that says that methotrexate is less
25 efficacious and, also, that her gestational

1 age was potentially quite a bit different
2 than what they told her it was.
3 She had an ultrasound that
4 put her at eight weeks and some by mid-July
5 in which case, you know, I don't have the
6 paper in front of me, but I know I have
7 figured out or referenced in my report, that
8 by that ultrasound she was over nine weeks
9 at the time that they administered these
10 medications.
11 Q. I guess right now I will get to
12 that issue as well. My question is: With
13 regard to the eighty percent figure that you
14 have mentioned thus far, you mentioned the
15 literature. Do you have specific literature
16 you are relying on for that figure?
17 MS. MALARKEY: Other than the
18 ACOG bulletin?
19 BY MR. FOGELSON:
20 Q. Sure. I don't know whether it's in
21 the ACOG bulletin or not.
22 A. It's so unusual to use methotrexate
23 in this manner that I don't have literature
24 available at my fingertips about its lack of
25 efficacy at this gestational age.

1 Even with ectopic pregnancy,
2 when you have a viable embryo and metho-
3 trexate is utilized, it generally doesn't
4 work and that's often with much lower beta
5 ACG levels than would have been the case in
6 this particular pregnancy.
7 I can certainly find
8 literature that would support that, but I
9 don't have a specific reference as I sit
10 here. You will also notice that there is
11 reference to efficacy in the AMA paperwork
12 that they gave to the patients.
13 Q. And do you have an opinion about the
14 correctness or incorrectness of that
15 information just on that one point?
16 A. Based on my general understanding of
17 the literature, I thought the quote that
18 they gave was about half the actual failure
19 rate and that was part of the informed
20 consent issue that I took issue with in
21 reviewing their records.
22 Q. So, as far as in 2012, what was the
23 standard of care required as to medication?
24 If you have anything to adjust, let me know.
25 What you said was -- strike that.

1 What did the standard of care
2 require if a patient comes in the first
3 trimester, wants a medical abortion, what
4 does the standard of care require as far as
5 not informed consent about what medication
6 is to be used for that medical abortion?
7 A. Well, I think, you should use the
8 most efficacious regimen or the FDA-approved
9 regimen and not use a less efficacious,
10 non-approved FDA regimen.
11 Certainly, there are all
12 sorts of examples in American medicine where
13 things are used off label. If you're using
14 off-label medication that is less
15 efficacious at the very least, you have to
16 have a discussion with the patient about why
17 you're suggesting a less efficacious
18 medication and have them agree to that.
19 Q. Does the fact that a medication is
20 off label, does that -- methotrexate, you
21 are testifying, it's an off-label use to use
22 it for a medical abortion?
23 A. Right.
24 Q. Does that fact alone make it a breach
25 of the standard of care to use it for a

1 medical abortion?
2 A. No. What I just testified was that
3 it was not a breach to use that off label.
4 But, if you're going to use it off label and
5 it's less efficacious, a reasonable patient
6 would want to know that. So, the standard
7 of care requires that the patient be given
8 that information for proper informed consent.
9 You would want to know if you
10 were being told to use a less efficacious
11 medication and there were an alternative
12 available.
13 Q. With regard to sonograms, in general,
14 in general, not with respect to this case,
15 do you agree that an OB/GYN can rely on a,
16 let's start with a radiologist's report, of
17 their interpretation of an imaging study?
18 For example, an MRI.
19 A. Sure.
20 Q. An OB/GYN can pick up that report
21 and rely on the findings?
22 A. Yes.
23 Q. Is that also true for an OB/GYN,
24 that they can rely on the report of a sono-
25 grapher for the findings after sonograms

1 **they have performed?**
2 A. No.
3 **Q. Why not, speaking generally?**
4 A. It's the OB/GYN's responsibility to
5 read that ultrasound. A sonographer isn't
6 licensed to read the ultrasound. A sono-
7 grapher is licensed to perform the actual
8 study, to use the transducer, and take the
9 pictures. It's the OB/GYN's responsibility
10 to look at those pictures and make a
11 determination.
12 I suppose for a very, very
13 simple study, if based on a history of
14 experience with a particular sonographer,
15 you decide not to actually look at the
16 pictures then, in a given circumstance, you
17 could just sign off on the report, under-
18 standing that you are then taking
19 responsibility for the accuracy of the
20 photos.
21 **Q. Does the standard of care require**
22 **that the OB/GYN be present while the sono-**
23 **gram is being performed? Or something else?**
24 A. No.
25 **Q. What does it require that one does**

1 **to be in compliance with the standard of**
2 **care?**
3 A. The question is, unfortunately, too
4 vague as asked. You don't have to be in the
5 room. You moved onto what is the standard
6 of care requiring a -- I don't know what
7 you mean.
8 **Q. You told me you don't need to be in**
9 **the room. What does the physician need --**
10 **how does the physician -- you testified**
11 **before, a physician needs to look at the**
12 **pictures. What does a physician -- my**
13 **question is, essentially, follow-up -- what**
14 **does a physician need to do in order to**
15 **review the sonogram themselves? Does that**
16 **make sense?**
17 A. You have to look at the pictures.
18 **Q. Okay. So, the picture is taken by**
19 **the sonographer and then provided to the**
20 **OB/GYN?**
21 A. Right. You are reading the ultra-
22 sound. You are reading the ultrasound. You
23 have to read the ultrasound.
24 **Q. Miss O'Connell was seen at American**
25 **Medical Associates on July 26, 2012. In**

1 **what ways on that date did Dr. Dominy breach**
2 **the standard of care, in summary form, and**
3 **then I will go through those in detail.**
4 A. I have to try to distinguish what
5 happened that day as opposed to fourteen
6 days later. I don't have the report. And
7 some of that information is summarized.
8 If you would fax that report
9 to the office here so I can have the report
10 in front of me, I would appreciate it
11 **Q. Sure. Okay.**
12 A. Can we take a break to do that?
13 **Q. Definitely.**
14 (Recess taken 5:06 p.m.)
15 ----
16 (Back on the record, 5:13 p.m.)
17 MS. MALARKEY: Is that the
18 first office visit?
19 THE WITNESS: So, it's my
20 understanding that this is the informed
21 consent visit. In large part, this is a
22 visit at which the informed consent for
23 the medical abortion occurred.
24 So, one breach is that Dr.
25 Dominy did not provide, what I consider

1 to be, proper informed consent regarding
2 the nature of the medical abortion and
3 its material risks and alternatives.
4 Miss O'Connell testified that
5 she was told that mifepristone was not
6 available in the United States and the
7 paperwork from American Medical
8 Associates -- this is the second page of
9 the document I have from that office --
10 says that RU-486 is not, not available
11 in the United States.
12 That same document -- let me
13 just add a little bit. I sometimes have
14 a speech pattern of hesitating, but it's
15 not that I'm done talking. My wife will
16 tell you that she has the same problem
17 with me.
18 In that same page, the one
19 titled "Medical Abortion Consent," it
20 said that over 92 percent of all patients
21 will experience a complete emptying of
22 the uterus within two weeks, but I don't
23 think that that was true in particular
24 because the gestational age that Miss
25 O'Connell was at the time of the admin-

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1 istration would not have been associated
2 with the 92 percent success rate.
3 The major thing that day is
4 the informed consent issue. In addition,
5 seeing the competence with which the
6 ultrasound in August was done and the
7 fact that we have an ultrasound and a
8 radiologist office placing the patient
9 at significantly greater gestational age
10 than the crown rump length documented on
11 July 26th, I think it's likely that that
12 is not an accurate crown rump length.
13 Dr. Dominy is responsible for
14 the reading of the ultrasound and takes
15 responsibility for it with her signature
16 and, I think, it's likely that that crown
17 rump length, had she actually looked at
18 the film and judged its accuracy, would
19 have been considered to be a poorly
20 taken crown rump length that under-
21 estimated the gestational age because
22 the gestational age would then have been
23 underestimated. It means that the
24 patient was given further false
25 information about the efficacy of the

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1 methotrexate regimen.
2 BY MR. FOGELSON:
3 Q. Let's start with just going back to
4 your opinion about informed consent. You
5 had identified -- number 1, the document
6 says that RU-486 was not available, so that's
7 one error, so to speak, in your opinion,
8 with regards to informed consent, correct?
9 A. Yes.
10 Q. And, then, you also identified the
11 efficacy rate as not being correct given
12 your further opinion that the gestational
13 age was not calculated correctly at that
14 time, so that's a second criticism with
15 regard to informed consent, correct?
16 A. That's correct. And, also, the
17 efficacy rate, in general, was, I think,
18 overestimated regardless of the fact that
19 the gestational age was calculated
20 incorrectly.
21 Q. What do you mean by that?
22 A. Well, we talked about that a little
23 bit earlier. They overestimated the efficacy
24 of their regimen.
25 Q. You're saying even if it had been,

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1 even if the gestational age had been
2 calculated correct, you wouldn't have agreed
3 with the 92 percent efficacy rate for a
4 pregnancy at that point in time?
5 A. For Miss O'Connell, that is correct.
6 Q. Do you have anything else to add as
7 far as the efficacy rate and why, in your
8 opinion, that is incorrect?
9 A. The other important concepts were,
10 this is relative efficacy. If a patient is
11 not given the information that the
12 alternative, the regimen would be more
13 efficacious, that's also a problem. If I
14 tell you something that's 90 percent
15 effective and isn't that wonderful, you
16 might think it's wonderful until you knew
17 something else was 96 percent effective, in
18 which case you would be less enthusiastic.
19 That's an informed consent issue as well.
20 Q. Okay. Are there things, in addition
21 to those three things, that you have
22 identified that, in your opinion, made the
23 informed consent here improper or in-
24 sufficient?
25 A. That's, that's all that occurs to

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1 me right now.
2 Q. Okay. What is, to put it in the
3 positive, what is required to be, or in
4 2012, rather, what was required to be
5 discussed with the patient? What would
6 constitute an appropriate informed consent
7 for Miss O'Connell on the date she walked
8 in?
9 A. That would be what a reasonable
10 patient would want to know under the same
11 set of circumstances.
12 Q. What are those things here?
13 A. I would say what the true efficacy
14 is, what the alternatives are, which
15 includes alternatives in terms of medical
16 abortions as well as surgical and, certainly,
17 if they're only giving the particular
18 medical regimen that they're utilizing up to
19 a specific gestational age, it's incumbent
20 upon them not to underestimate the
21 gestational age.
22 I'm sort of wandering from
23 the original question, perhaps, but Miss
24 O'Connell needed to be told, "RU-486 is
25 available in the United States, we just

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1 don't do it here, but I can let you know who
2 does; that it is more efficacious than what
3 we're going to give you," and based on what
4 her true gestational age was, they should
5 have been able to tell her what the risks
6 and benefits were of that treatment,
7 including its efficacy.
8 Q. As far as the gestational age, what
9 is the basis of your opinion that it was --
10 what's your understanding of how it was
11 calculated on that day, on July 26, 2012?
12 A. Well, there's a page, let me find
13 it. So, there's the page labeled,
14 "Obstetrical Sonogram Report, 7/26/12," and
15 they list the gestational age as seven
16 weeks, four days. The gestational age at
17 that particular point in a pregnancy is
18 more accurately dated by a crown rump length,
19 but they seem to have done it by a
20 gestational sac. So that, in itself, is
21 inaccurate.
22 I realize I had noticed that
23 when I originally read the records, but
24 didn't notice it again until just now.
25 If we look at the ultrasound

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1 that was done in the radiology office, it's
2 fairly inconsistent with that ultrasound at
3 American Medical Associates.
4 Q. Before we get to that ultrasound,
5 is it a -- are you saying it's a breach of
6 the standard of care to utilize a crown
7 rump, sorry, the gestational sac if methods
8 to evaluate the gestational age, regardless
9 of whether you get it right or wrong, is
10 that an inappropriate method to use to make
11 the calculation?
12 A. Yes.
13 Q. Okay. I understand what you already
14 said. In addition to that, it was, somehow
15 it was miscalculated as well, is that right?
16 A. I'm not sure I understood that last
17 question.
18 Q. What's the basis of your opinion
19 that the gestational age was incorrectly
20 determined here?
21 A. Well, it's well known in obstetrics
22 that a crown rump length is-- well, perhaps,
23 very early in pregnancy before you can
24 measure a crown rump, you might date a
25 pregnancy by the sac size, but it's

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1 generally recommended that the patient then
2 return seven or fourteen days later when a
3 crown rump can be measured. That's more
4 accurate than a sac size.
5 On July 16th, in this case,
6 we have an ultrasound done at Community
7 Radiology Associates which measures a crown
8 rump of eight weeks, two days. Ten days
9 later, on July 26th, that fetus would be
10 nine weeks, five days. Instead, using the
11 less accurate version of a sac size, they
12 estimate the gestational age to be two
13 weeks' less. So that is not supposed to be
14 done that way; you are supposed to use a
15 crown rump length or two when combined with
16 the obvious incompetence of the ultrasound
17 three weeks later. It just confirms that
18 this is somebody who doesn't know how to do
19 ultrasound well enough. The crown rump
20 was there. Why not measure the crown rump?
21 It's right in front of you. The fetus is
22 inside that sac.
23 Q. So your opinion is that, more likely,
24 the gestational age on July 26, 2012, was
25 nine weeks, five days based on the other

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1 earlier ultrasound?
2 A. Based on obstetric principles, that
3 would be the correct gestational age.
4 Q. Okay. What about -- I'm going to
5 ask you to do a little math here, which is
6 terrifying if I'm ever asked to do that.
7 Now, if you go forward to
8 October 5, 2012, what would you expect the
9 gestational age to be at that date if it
10 was nine weeks, five days on July 26th?
11 A. Let me get a pen. I don't have a
12 wheel in front of me. Nine weeks, five days,
13 we said, on 7/26. Now, you're asking me
14 what would the gestational age be at what
15 date?
16 Q. October 5th.
17 A. It will take a moment, obviously.
18 Q. Sure. Take whatever time you need.
19 A. If the fetus had been growing
20 appropriately, and my math is correct and,
21 of course, I wouldn't expect it to be
22 growing appropriately because it had been
23 exposed to methotrexate, I would expect the
24 gestational age would be 19 weeks, 6 days
25 on October 5th.

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1 And what I've done, just if
2 we want to reconstruct the math, on July 26,
3 I have nine weeks, five days. There's five
4 more days in July, 31 days in August, 30 days
5 in September and five in October until we
6 get to October 5th. Adding up those numbers,
7 that's 71 days ago, ten weeks and a day.
8 Add ten weeks and a day to nine weeks and
9 five days.
10 Q. What about at -- jumping forward
11 another month, approximately November 9th
12 of 2012, same question.
13 A. So, in a normal growth curve, a baby
14 that was not ultimately growth retarded, the
15 gestational age would be 24 weeks, 6 days
16 on November 9th.
17 Q. All right. I only have two more of
18 these.
19 A. If I had known, I would have brought
20 a wheel. That's why we use those things.
21 Q. Doctor, I don't want your answer to
22 be -- I'm not saying your math was wrong. I
23 don't want your answer to be a miscalculation
24 by a wheel. If you later wheel this out and
25 you find a different date --

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1 A. I will let you know.
2 MS. MALARKEY: You will have
3 a chance to look at the transcript and
4 make any corrections.
5 MR. FOGELSON: Right.
6 BY MR. FOGELSON:
7 Q. I will give you both of these,
8 December 7, 2012, and December 19, 2012.
9 A. So, gestational age based on being
10 nine weeks, five days on 7/26, it would be
11 28 weeks, 6 days on December 7th; 30 weeks,
12 four days 12 days later on the 19th.
13 Q. All right. Do you have an opinion
14 in this case, Doctor, to a reasonable degree
15 of medical probability, that this particular
16 baby was not growing at a normal rate?
17 A. I don't know that I ever heard of a
18 baby growing normally after administration
19 of methotrexate. Anyone specifically given
20 to poison and shrink placental tissue, I
21 would expect in a pregnancy of that kind
22 that there would be growth retardation.
23 Q. Is that a yes, that is your opinion
24 to a reasonable degree of medical
25 probability?

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1 A. It is my opinion, to a reasonable
2 degree of medical probability, that this
3 baby would not have grown normally having
4 been exposed to methotrexate.
5 Q. Do you have any further opinion, I
6 know I asked you about this before, along
7 those lines that the baby would not have
8 grown normally, do you have any more
9 detailed opinion how the baby would have
10 grown other than, say, not normally?
11 A. I don't understand you.
12 Q. Okay. Do you have a more specific
13 opinion, given your opinion that the baby,
14 you would not expect the baby to have grown
15 normally, do you have a more specific
16 opinion about how you would have expected
17 the baby to have grown, in other words,
18 one week behind developmentally, two weeks
19 behind, three weeks, what have you?
20 A. I understand. I can't tell you
21 specifically. Certainly, there would be a
22 much greater likelihood of intrauterine
23 growth restriction having had the placenta
24 poisoned by the methotrexate in the first
25 trimester. Intrauterine growth restriction

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1 would be a baby in less than the tenth
2 percentile for growth. So, there would be
3 a much greater incidence of that and,
4 certainly, of babies that are between the
5 10th and 50th percentile than would
6 otherwise be predicted by a bell curve.
7 Q. Can you tell me, Doctor, to the
8 extent that you have a baby that is allowed,
9 that is allowed to continue after the,
10 where the abortion is not successful and the
11 baby continues to develop, is there a way to
12 determine whether or not that baby is
13 affected by the methotrexate?
14 A. Often, you can't. Sadly, some of the
15 babies affected by methotrexate have
16 significant defects, things like absent
17 limbs and small brains and other specific
18 anomalies. It's not unusual to have things
19 like missing digits and one bone in the
20 lower leg instead of two, abnormal growth of
21 the long bones. So, there are specific
22 ultrasound abnormalities that you may see.
23 In the absence of the abnormalities that are
24 less specified and still possible and
25 prenatally it would be impossible to know,

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1 for example, if a kid's brain function is
2 going to be affected. I don't think there's
3 a way to determine that if the brain is of
4 normal size or somewhat normal size.
5 Q. You also mentioned the signing of
6 the ultrasound report here. Your report
7 mentions that. Your report mentions some-
8 thing along the lines of by signing the
9 report, Dr. Dominy, let me find it. That
10 would be in your June 16th report. "By
11 signing the office manager's report, Dr.
12 Dominy accepted responsibility for the
13 interpretation, even though she did not
14 personally perform the ultrasound and
15 review the images."
16 My question is, how did you
17 reach that opinion?
18 A. That's based on my thirty years of
19 experience in obstetrics and gynecology.
20 Sonographers don't bill for ultrasounds.
21 They don't interpret ultrasounds. They are
22 technicians who physically take the pictures.
23 It's my responsibility as an obstetrician/
24 gynecologist to read the ultrasound. It was
25 Dr. Dominy's responsibility to read the

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1 ultrasound. If she's going to take the
2 shortcut of not looking at the pictures, not
3 to mention, for crying out loud, in a
4 situation where, I think, she knows that
5 this is an office manager who doesn't have
6 any specific training in ultrasounds, then
7 when she signs that report, she's saying,
8 "I own this. I'm taking responsibility that
9 this is accurate." If she doesn't think
10 it's accurate, she's got to put the trans-
11 ducer on herself or, at the very least, and
12 see if they represent what they are supposed
13 to be representing.
14 Did the ultrasound sono-
15 grapher even take a picture of the uterus in
16 mid-August?
17 Q. In August or July?
18 A. I meant in mid-August.
19 Q. Okay.
20 A. In July, I know she took a picture
21 of the uterus because she's measuring a sac,
22 unless she measured an ovarian cyst and
23 called it a sac. I'm not suggesting that
24 happened. I think she's measuring the
25 gestational sac in July.

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1 If she doesn't see the baby
2 in the uterus, I don't understand how you
3 can miss that if you're looking at the
4 uterus. If she had looked at the picture,
5 Dr. Dominy would have realized that she
6 didn't take a picture of the right part of
7 the uterus or the uterus itself. How do you
8 miss a 10 to 12-week fetus?
9 Q. I'm just asking right now about your
10 opinion about the signature.
11 Hypothetically, Dr. Dominy
12 testified at her deposition that she did not
13 sign -- the purpose of her signing the
14 ultrasound reports in this case was not to
15 endorse their interpretation but, rather,
16 for some other reason. Does that have any
17 bearing on your opinion?
18 A. Well, that would be --
19 MS. MALARKEY: Objection.
20 THE WITNESS: That would be
21 a novel answer to the question of what
22 a signature on a report means. A
23 signature on an ultrasound report means
24 that you're taking responsibility for
25 reading that report. That's the way it's

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1 done in OB/GYN. So, if she has some
2 other interpretation, I will listen to
3 it, but it would be the first time in
4 thirty years I have heard such a thing.
5 BY MR. FOGELSON:
6 Q. Okay. Well, that's why I'm asking
7 you to assume hypothetically that's what
8 she said. Does that have any bearing on
9 your opinion?
10 MS. MALARKEY: I object. I
11 don't think she said that. If that's
12 what you're asking the doctor to assume,
13 go ahead.
14 THE WITNESS: I'm assuming
15 signing the report means some other
16 vague, unspecified thing, but isn't an
17 endorsement of what's on the report at
18 all. Well, then, she's agreeing to take
19 care of a patient based on an ultrasound
20 that she's taking no responsibility for.
21 I wonder why she doesn't do
22 a urine or a blood pregnancy test? And
23 I wonder why she doesn't go back in and
24 put the ultrasound transducer on herself?
25 Whoever heard of an ultra-

1 sound being done without it being
2 interpreted by a physician? When, in
3 anywhere in American medicine, is there
4 an imaging study that's done that's not
5 interpreted by the physician who's
6 responsible in that specialty?
7 Do cardio echo's get done by
8 the sonographer? Do mammograms get read
9 by the mammogram tech? Dr. Dominy is
10 coming up, then, with a novel event in
11 American medicine.
12 BY MR. FOGELSON:
13 Q. So, fair to say, regardless of the
14 signature or not or the purpose of signing
15 the document or not, that ultimately -- I
16 mean your opinion is that she's responsible
17 for the interpretation of that study?
18 A. I believe that's fair. For example,
19 if she had not signed the page at all, I
20 would hold her similarly responsible unless
21 it was represented to her that another
22 physician had read that ultrasound.
23 Q. Any other opinions about the July 26,
24 2012, appointment that we have not discussed
25 at this point? Just that first visit...

1 A. The first visit, you know, no, sir.
2 Essentially, that's the informed consent
3 stuff and the problem with the gestational
4 sac instead of the crown rump length because
5 I hold Dr. Dominy responsible for the
6 ultrasound. I hold her responsible as well
7 as the technician on that day.
8 Q. Got it.
9 August 17, 2012. That's the
10 second time that Miss O'Connell comes to
11 American Medical Associates, correct?
12 A. Right.
13 Q. In what ways did Dr. Dominy breach
14 the standard of care on that day?
15 MS. MALARKEY: Aside from
16 what he just said or --
17 MR. FOGELSON: What he just
18 said.
19 MS. MALARKEY: He said about
20 the ultrasound.
21 BY MR. FOGELSON:
22 Q. I'm asking for one sentence and
23 then I will come back to it.
24 Your opinion is there was a
25 breach of the standard of care in inter-

1 preting the ultrasound that day?
2 A. On August 17th, right.
3 Q. Any other breaches of the standard
4 of care on August 17th?
5 A. I feel that a pregnancy test should
6 have been done.
7 Q. What test?
8 A. I don't care. I don't care whether
9 they did a urine test or a blood test, but
10 on some level we know that this is a patient
11 who didn't pass tissue. She certainly didn't
12 pass all of the tissue in the pregnancy.
13 In fact, it's overwhelmingly likely that
14 she passed no pregnancy tissue. So, how is
15 it that appropriate communication with a
16 patient on August 17th didn't reveal that
17 what happened to her was not consistent with
18 her having past an almost 10-week size
19 fetus?
20 Q. When you say -- go ahead, sorry.
21 A. When she comes back in mid-August,
22 if you're really talking to the patient, you
23 would have realized this doesn't sound like
24 a complete miscarriage of an almost 10-week
25 gestation on July 26th; it doesn't even, by

1 history, sound like a complete miscarriage
2 of a seven and one-half week pregnancy if
3 you were operating under the erroneous
4 assumption that the pregnancy was only seven
5 and one-half weeks on July 26th. So, if she
6 hasn't actively passed a significant amount
7 of tissue, you have to be sure that there's
8 no pregnancy tissue left behind. An ultra-
9 sound isn't sufficient for that. An
10 ultrasound tells you that the sac is either
11 collapsed or has been passed, but it doesn't
12 tell you that you have passed all of the
13 placental tissue.
14 So, the combination of the
15 ultrasound problem and what must have been
16 the history, they don't record the history,
17 so we don't have this for posterity, should
18 have lead them to this. We have to be sure
19 that she's completed this miscarriage. A
20 urine pregnancy test is incredibly simple to
21 do. To do a urine pregnancy test two weeks
22 after an abortion is a commonplace thing.
23 The last time I did that was three hours ago,
24 and you're able to confirm that there is no
25 pregnancy tissue left behind in that woman's

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1 womb with a negative pregnancy test. You
2 can get the results in hours or a day in a
3 urine pregnancy test.
4 Either of those things would
5 have been acceptable, but they had to do
6 something given what the history must have
7 been on that day.
8 Q. Just backing up. In general, when a
9 person comes in for a follow-up appointment
10 after a first trimester medical abortion, is
11 it always required that an ultrasound and
12 some other test be done, or is that other
13 test a urine or blood test, is that only
14 required in certain circumstances?
15 A. I think a pregnancy test should be
16 done in all of those circumstances. An
17 ultrasound is not necessary in all
18 circumstances. If the urine pregnancy test
19 was negative, an ultrasound would be
20 superfluous --
21 Q. Okay.
22 A. -- or a blood pregnancy test.
23 Q. So, just to put it another way, is
24 what you're saying, that just an ultrasound
25 being done at the follow-up visit, such as

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1 the one here on August 17th, that's never
2 sufficient?
3 A. Well, with a medical termination of
4 pregnancy, correct. With a surgical
5 termination of pregnancy and documentation
6 of removal of product, that would be
7 different.
8 Q. So, if, hypothetically, again, a
9 medical termination of pregnancy, if,
10 hypothetically, an ultrasound is done when
11 a patient comes back for follow-up and that
12 ultrasound is read and is saying there is no
13 intrauterine pregnancy, assuming the
14 correctness of that reading, hypothetically,
15 not this case, you would, under those
16 circumstances, still say that the standard
17 of care requires that another test, urine
18 test, blood test, be done?
19 A. Right, because an ultrasound isn't
20 a pregnancy test. There are exceptions to
21 what I'm laying out as a standard.
22 I suppose, for example, if
23 somebody brought in the product of conception
24 and you visually inspected them and felt
25 that it represented an intact fetus sac and

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1 placenta, I suppose there are circumstances
2 where I would think that that, together
3 with the clinical picture, you would accept
4 that repeating a pregnancy test wasn't
5 negative, but you have no evidence that she
6 ever passed tissue in that ultrasound and
7 pregnancy test. That's kind of a bad
8 combination.
9 Q. When you say "there's no evidence
10 she ever passed tissue," what are you basing
11 that on?
12 A. Well, she didn't pass tissue. She
13 continued with her pregnancy.
14 Q. I'm saying what-- is there something
15 in the record that you're referring to?
16 A. There is no documentation that she
17 testified that she passed tissue.
18 Q. Is that a no to my question as far
19 as what you're relying on?
20 A. I have gotten mixed up with
21 pertinent positives and negatives now. I
22 have to hear the question again.
23 Q. Sure. Fair enough.
24 I asked you, is there some-
25 thing, is there something in the medical

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1 records of this case, or in Miss O'Connell's
2 or in the depositions, that you're basing
3 that conclusion on?
4 A. It's retrospectively obvious to me
5 she didn't pass tissue because I know she
6 continued the pregnancy. I see no
7 documentation of the reporting of passing
8 of tissue, so I'm taking the lack of
9 documentation of that to be significant.
10 I'm not saying one couldn't
11 pass tissue and have somebody neglect to
12 document it but, certainly, there is no
13 active documentation to support the passing
14 of tissue in these records. There is
15 reference to the fact that her bleeding
16 wasn't heavier than a normal period, that
17 she didn't have severe cramps.
18 She's certainly not reporting
19 to the provider in any way that the provider
20 chose to document that there had been
21 passage of tissue.
22 Q. Any other opinions about what other
23 testing should have been done to confirm
24 that the abortion had been successful before
25 I move on to something else?

1 A. I don't see that she did a bimanual
2 manual exam. She should have had a uterus
3 the size of a grapefruit by that visit, but
4 I don't think that that was done either.
5 I'm not saying that each time you have to
6 do a bimanual exam. It was my training that
7 that was the standard.
8 I always do a bimanual exam
9 two weeks after a miscarriage, after an
10 abortion procedure. I don't know if there
11 is somebody out there that doesn't feel that
12 that needs to be done if other things are
13 being done.
14 The number of ways in which
15 the continuation of the pregnancy hasn't
16 been figured out is disturbing. It appears,
17 also, that the patient is saying she is
18 continuing to have symptoms of pregnancy.
19 Even with that, they don't do a bimanual
20 exam, a physician-performed ultrasound, a
21 pregnancy test, any other kind of follow-up
22 testing. Why is she still having symptoms
23 of pregnancy?
24 Q. Can a patient still have symptoms of
25 pregnancy following a medical abortion and,

1 in fact, not be pregnant?
2 A. I mean someone who isn't pregnant at
3 all and has never been pregnant can have
4 symptoms of pregnancy. Breast tenderness,
5 nausea are nonspecific symptoms, but when
6 someone was just pregnant and continues to
7 have those symptoms it should, at least,
8 raise a question in the doctor's mind, "What
9 do I have to think about that's causing
10 those symptoms?"
11 Q. As far as the ultrasound that was
12 done on August 17, I take it our discussion
13 about Dr. Dominy or a physicians'
14 responsibility for interpreting ultrasound
15 holds true on August 17th? Same discussion,
16 same opinions, as with July 26th.
17 A. It does. I know your client takes
18 a different point of view and I understand
19 this is who you're defending, but the doctor
20 is the one who is reading the ultrasound
21 and the doctor on August 17th, had to read
22 the ultrasound and take responsibility for
23 it.
24 So, the same discussion that
25 we've had in a couple of other parts of this

1 deposition would hold at the time of this
2 visit.
3 Q. All right. Just so I can make sure
4 I've got it all here, your opinion on that,
5 for August 17th, what was Dr. Dominy's
6 responsibility? How did she breach the
7 standard of care with regard to the ultra-
8 sound on August 17th?
9 A. She has a patient who, I presume,
10 has not passed tissue who reports pregnancy
11 symptoms. She doesn't do a bimanual exam,
12 doesn't look at the ultrasound herself and
13 she doesn't do a pregnancy test. And, then,
14 when asked at deposition, she says she is
15 not a radiologist and she doesn't have to
16 read ultrasounds and it's so difficult to
17 get somebody to leave a urine specimen, that
18 peeing in a cup is just an extraordinarily
19 thing to do, essentially, it doesn't hold
20 together. It's just not right. I think we
21 all know it's not right.
22 Q. As far as your standard of care
23 opinions with regard to the ultrasound, it's
24 your opinion on August 17th, I take it,
25 that Dr. Dominy was required to read that

1 ultrasound for herself?
2 A. Yes. There is no other physician
3 there. Another physician could have read
4 the ultrasound. If one of the other doctors,
5 if another doctor was in the office, the
6 other doctor could have read the ultrasound
7 and she could have relied on the reading of
8 another physician. She can't rely on the
9 reading of an ultrasound tech, much less
10 an ill-trained ultrasound tech.
11 Q. If, hypothetically, the ultrasound
12 tech that performed the, was involved on
13 August 17, 2012, was properly trained, would
14 that change your opinions in any way, your
15 standard of care opinion, as to Dr. Dominy
16 and her responsibility for the ultrasound
17 in this case?
18 A. It's really bad to think someone
19 with a 10- to 12-week fetus isn't pregnant
20 anymore. The hypothetical is tough because
21 I can't see how somebody properly trained
22 could ever make that mistake, but it's Dr.
23 Dominy's responsibility to read the ultra-
24 sound no matter what technician is performing
25 the ultrasound.

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1 **Q. Okay.**
2 A. I think it's her responsibility to
3 look at the picture because, in addition to
4 documenting that there is no fetus left in
5 the ultrasound, she ought to be looking to
6 see that it doesn't look like there are
7 products of conception, meaning placental
8 tissue or other fragments of the embryo
9 still inside the uterus. She certainly can't
10 rely on an ultrasound technician for an
11 interpretation like that. So, she has to
12 look at the picture. If she decides not to,
13 then she's taking responsibility for
14 interpreting the ultrasound without looking
15 at the picture. I disagree with that.
16 But, that's on her. She made that bed;
17 she's got to lie in it. She had to read the
18 ultrasound. She had to look at the pictures
19 and if she didn't look at the pictures,
20 that's a problem, but she still has to take
21 responsibility for having read the
22 ultrasound.
23 **Q. In the records that you have, the**
24 **record from American Medical Associates, do**
25 **you have any pictures from the ultrasound?**

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1 A. I have a xerox of one or two pictures
2 that are unreadable. I would imagine in the
3 original chart, there might be something
4 readable.
5 **Q. Doctor, that was going to be my next**
6 **question.**
7 **With regard to the picture or**
8 **pictures that you have seen, are you able to**
9 **draw any conclusions from those pictures?**
10 A. Nothing. No, they are totally
11 unreadable. They don't show anything. When
12 I say "they," I think it may only be one.
13 Hold on a second. I will double-check that.
14 **Q. Sure.**
15 A. It looks, to me, like the July
16 ultrasound is just the one-page report, but
17 no picture. And on August 17th, I have the
18 single image that I'm sure you have as well
19 that's unreadable. It's just a white
20 smudge, so it might be that the original of
21 the August 17th would give a little bit more
22 information, but this is not interpretable.
23 Of course, the interpretation that day was
24 it didn't show a fetus. So, either it shows
25 a fetus, which is hard to imagine, or it

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1 doesn't show a fetus, in which case it
2 doesn't take a picture of where the fetus
3 was.
4 Q. Have we, Doctor, at this point with
5 the caveat that, I think, counsel for
6 plaintiff put in earlier, with the caveat
7 that there may be additional opinions as to
8 Dr. Brigham and Kaji depending on future
9 discovery, other than that, have we covered
10 the opinions you intend to express at trial
11 in this case?
12 A. I am comfortable that I have
13 expressed my opinions about Dr. Dominy and
14 the ultrasound technician.
15 Q. Okay. And if you do have more
16 opinions, I ask that you let Miss Malarkey
17 know that so I can find out what the
18 opinions are just before the time of trial.
19 A. I understand that instruction.
20 Q. Give me one second. I have no other
21 questions. Thank you.
22 MS. MALARKEY: Doctor, under
23 the Maryland rules, you have the right
24 to read a copy of the transcript, make
25 any changes and sign it. The only

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1 caveat is that if it's a change of a
2 substantive nature, it has to be done
3 within thirty days and counsel has the
4 right to ask you questions about the
5 substantive changes you make. If it's
6 a typo, that doesn't apply. You can
7 waive signature. It's your choice.
8 THE WITNESS: I would like to
9 read my deposition and not waive
10 signature.
11 MS. MALARKEY: Okay.
12 (Deposition concluded, 6 p.m.)
13 ----
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1 SIGNATURE PAGE
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3
4 I hereby acknowledge that I
5 have read the foregoing transcript,
6 and the same is a true and correct
7 transcription of the answers given by
8 me to the questions propounded, except
9 for the changes, if any, noted on the
10 errata sheet.
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4 testimony and the proceedings in the
5 aforegoing matter are contained fully and
6 accurately in the stenographic notes taken
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