IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

THU CAREY NGUYEN, and KHOEUN PECH, As Next Friends, Parents, and Natural Guardians of KEIRA YENNHI PECH, A Minor Child,	*	
Plaintiffs,	*	CIVIL ACTION NO. 09CV1563-1
v.	*	
SOUTHWESTERN EMERGENCY PHYSICIANS, P.C.; PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.; JAMES EDWARD BLACK, M.D.; and MICHAEL J. HEYER,	*	
Defendants.	*	

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EVONNE S. MULL
DOUGHERTY COUNTY
CLERK OF COURTS

COMPLAINT

Thu Carey Nguyen and Khoeun Pech, as Parents, Next Friends and Natural Guardians of their daughter Keira Yennhi Pech, a minor, file this Complaint against Southwestern Emergency Physicians, P.C., Phoebe Putney Memorial Hospital, Inc., James Edward Black, M.D., and Michael J. Heyer as follows:

I.PARTIES

1. Thu Carey Nguyen and Khoeun Pech are the biological parents and natural guardians of their minor daughter, Keira Yennhi Pech, who is now 2 years old.
2. Defendant Phoebe Putney Memorial Hospital, Inc. is a hospital operating in Dougherty County and is subject to the jurisdiction and venue of this

Court. Phoebe Putney may be served with process through its registered agent, Thomas S. Chambless, 417 3rd Avenue Albany, Georgia.

3. Defendant Southwestern Emergency Physicians, P.C. is a physician practice group which provides medical services at Phoebe Putney. Southwestern Emergency Physicians is subject to the jurisdiction and venue of this Court, has its principal office located at 1913 Palmyra Rd, Albany, Ga and may be served by second original process through its registered agent, Alfred L. Woodard, Jr., 222 Winship Drive Leesburg, Georgia 31763.

4. Defendant James Edward Black, M.D. is a physician who was the attending physician in the Emergency Department at Phoebe Putney at the time of the events at issue. Dr. Black is subject to the jurisdiction and venue of this Court, and may be served by second original process at his business address of 417 West Third Avenue, Albany Georgia 31701.

5. Defendant Michael J. Heyer is a physician assistant who provided medical services to Keira Pech on April 7, 2007 at Phoebe Putney. Mr. Heyer is subject to the jurisdiction and venue of this Court, and may be served by second original process at his business address of 1014 W Franklin St., Sylvester, Ga 31791.

6. Thu Nguyen is the duly appointed natural guardian and biological mother of her minor daughter, Keira Pech. Under O.C.G.A. §9-3-73 (b), a "minor who is not attained the age of five years shall have two years from the date of such minor's fifth birthday to bring a medical malpractice action if the

cause of action arose before such minor attained the age of five years." The cause of action here arose when Keira was 6 months old in July of 2007.

FACTS

7. Keira Pech was born on December 12, 2006. She was born healthy without any complications or health problems.
8. For the first six months of her life, Keira was in excellent health, developing as a normal child, and suffered from no known neurological deficit.
9. On July 7, 2007, when Keira was six months old, her mother, Ms. Nguyen, received a phone call at work from her daughter's babysitter telling her that Keira fell off a bed and bumped her head. Ms. Nguyen went home, observed a large contusion on the back of her head for the first time in her life, and took her daughter to the Phoebe Putney Memorial Hospital Emergency Department. The time of registration is listed as 5:21 p.m.
10. According to the medical records, the listed patient "problem" is "infant fell from bed." The onset of the presenting problem reportedly "began [2] hours ago." The medical chart confirms the infant had "no [prior] history of contusion to posterior scalp."
11. At 5:50 p.m. according to the Emergency Center Triage record, the triage nurse examined the infant. The nurse's examination was completed 3 minutes later at 5:53 according to the triage record. The nurse wrote, "Pt.

fell from bed hitting her head. Floors were carpeted. Pt. alert. Hematoma noted to occipital region. Normal motor functions noted. No distress."

12. The triage nurse categorized Keira's condition as Priority IV which is non-urgent and low priority.

13. According to the Clinician Note, a physician's assistant, Michael Heyer, examined Keira approximately nine minutes later at 6:02 p.m.

14. Mr. Heyer's examination noted "moderate traumatic soft tissue swelling over the posterior occipital scalp." According to the medical chart, the supervising "attending physician in department" was identified as James Edward Black MD.

15. There is no record indicating that any physician performed a full physical examination of Keira on July 7.

16. According to the medical records, the physician assistant examined Keira for approximately two minutes and then she was discharged home. The infant's parents believed that the physician assistant was actually a physician and the physician assistant never explained to the parents that he was not a medical doctor.

17. On that date the infant did not undergo a CT scan of her head nor receive an x-ray of her skull. A CT scan is widely considered the standard for the diagnosis of acute intracranial injury.

18. The EC Physician Medical and Order Sheet states that the infant's diagnosis on discharge was "scalp contusion"

19. According to the medical record from July 7, the primary diagnosis was "local soft tissue swelling/injury posterior occipital scalp." According to the Emergency Department record, the infant's parents received discharge instructions regarding "head injury."

20. Three days later, on July 10, the infant was taken back by ambulance to Phoebe Putney Memorial Hospital. She was found to be in "respiratory distress."

21. According to the History and Physical Examination report by Dr. Metcalf on July 10, the infant was "taken urgently for a CT scan of her head which showed a very large mixed density subdural hematoma with significant mass effect." The infant was "intubated to protect her airway and arrangements made for urgent surgery."

22. According to the Operative Report by Dr. Metcalf dated July 10, the "infant was resuscitated in the Emergency Room, after which she was taken for a CT scan, which showed a very large acute subdural hematoma with significant mass effect." "Due to the presence of this life-threatening lesion the patient was taken urgently for craniotomy."

23. On examination, Dr. Metcalf noted "marked soft tissue swelling in the right parieto-occipital region with marked ecchymosis."

24. The CT Radiology Report on July 10, 2007 states, "There is large right-sided subdural hematoma. Maximum depth is approximately 1.2 cm. Density is mixed suggesting acute hemorrhage superimposed on chronic hemorrhage." The CT scan report dated July 10, 2007 by Dr. Allison Lea

Hays also noted "minimally displaced calvarial fracture involving the right parietal bone."

25. As explained in the Affidavit of Dr. Burton Bentley II attached to this Complaint and incorporated herein, the early diagnosis and treatment of intracranial hemorrhage is critical. Without appropriate monitoring and treatment, brain swelling often causes an elevation in intracranial pressure which can lead to brain herniation, brain damage, and death. To avert these catastrophic complications, subdural hematomas are commonly treated by emergency neurosurgery to remove the blood collection and thus relieve the elevated intracranial pressure. When performed in a timely manner, surgical treatment has a high rate of success. Unfortunately this infant's subdural hematoma was not timely diagnosed when she first presented to Phoebe Putney Memorial Hospital on July 7, 2007. Because she was not properly evaluated, diagnosed, and treated on July 7, the infant suffered a nearly lethal elevation in her intracranial pressure in the days following her injury. The delay in treatment resulted in severe brain injuries with attendant neurological complications.

26. It is well-established that intracranial injury in infants may present with subtle signs or no clinical neurological symptoms, especially in infants younger than 1 year. A "subdural hematoma" is a common type of intracranial injury that occurs when trauma causes bleeding beneath the dural layer of the brain.

27. If subdural hematomas are timely diagnosed and treated, patients commonly make a full recovery with no permanent neurological injuries. Unfortunately, this infant did not receive timely and appropriate treatment on July 7, 2007. Because this infant did not receive timely medical and neurosurgical care, she suffered severe neurological injuries.

28. A substantial percent of infants with acute brain injury are asymptomatic. Clinical symptoms and signs are insensitive indicators of brain injury in infants. Such infants cannot communicate which makes it difficult for the clinician to determine clinical symptoms with accuracy.

29. It is well-established that children in their first two years of life have a higher risk of significant brain injury after blunt head trauma. Because infant skulls are more vulnerable to fracture and brain injury and because infants cannot communicate their symptoms, it is well-established among emergency medicine physicians and in the published medical literature that clinicians must have a lower threshold for ordering CT scans of the head when assessing head-injured infants.

30. Clinical signs and symptoms are insensitive predictors of head injury in children less than 2 years old. The standard of care requires clinicians to have a high suspicion for intracranial injury or skull fracture in any child younger than 2 years who has sustained a head injury, especially in children younger than 12 months in whom complications are more common and clinical findings are less reliable.

31. Scalp hematomas are a sensitive indicator of intracranial injury in infants. Numerous studies in the peer-reviewed published medical literature have found significant associations between scalp hematomas and the presence of intracranial injury in infants.

32. Physicians generally use the presence of a significant scalp abnormality to dictate ordering radiographic studies in infants. Numerous studies have identified abnormal scalp examinations in infants as an important potential indicator of intracranial injury.

33. It is widely acknowledged among medical experts that scalp hematomas are a useful and leading clinical indicator which warrants CT imaging of the head in infants.

34. In this infant's treatment, she did not receive a skull radiograph on July 7. She did not receive a CT scan of her head. She did not receive a full physical examination from an attending physician.

35. On July 7, 2007, CT scan imaging was available but not provided to Keira at Phoebe Putney.

36. The care received by Keira Pech on July 7, 2007 reflects an absence of any diligence in the presence of a well-established indicator for intracranial injury in infants with vulnerable skulls. The infant could not have received a thorough physical examination in the time that the physician assistant examined her. There is no indication in the record that a physician performed a physical examination of the infant. The infant was discharged approximately 2 minutes after the physician assistant first saw

her and approximately 14 minutes after the nurse first triaged her for approximately 3 minutes. No tests were performed or ordered to diagnose the infant's condition or rule out intracranial injury or skull fracture.

37. The triage nurse categorized this infant's condition as Priority IV which is non-urgent and low priority. The triage nurse deviated from the standard of care in failing to understand the potential significance of a scalp hematoma in a 6-month infant and failure to take appropriate action to ensure the child was thoroughly evaluated and examined by the attending physician. The nurse's erroneous assessment reflected and contributed to the overall lack of diligence in evaluating this infant and contributed to the physician's failure to perform a thorough physical examination and the failure to order any CT scan of the infant's brain or radiograph of her skull.

38. According to the discharge paperwork obtained from Phoebe Putney, the attending physician and physician assistant responsible for treating Keira Pech on July 7, 2007 were employed by Defendant Southwestern Emergency Physicians.

39. Phoebe Putney Memorial Hospital employed, controlled and managed the nurses responsible for the care and treatment of Keira Pech on July 7, 2007. Such nurse or nurses failed to properly assess the serious threat to the infant if no treatment was rendered to the infant and if no diagnostic tests were conducted to evaluate the presence of intracranial injury. The

nurse failed to perform an appropriate triage assessment of the infant and alert the physician of her true condition.

40. Southwestern Emergency Physicians and Phoebe Putney are liable for the acts and omissions of the attending physician, physician assistant, and nurses responsible for the care and treatment of Keira Pech on July 7, 2007.

41. Due to the Defendants' malpractice, negligence, and gross negligence, Keira suffered severe permanent brain injuries which could have been prevented with appropriate care to relieve her intracranial pressure. Instead, she was discharged home and later suffered brain swelling and permanent neurological injuries for which it is expected that she will need a lifetime of medical care and assistance.

42. At the time Keira Pech visited the Emergency Room on July 7, 2007, with appropriate care, her condition could have been stabilized and she would have been capable of receiving medical care as a non-emergency patient.

43. It is well-established that patients who suffer subdural hematomas may suffer delayed consequences, delayed symptoms, and delayed brain injury as the brain swells in subsequent days.

44. Under Georgia law, "[i]n an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall

be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence."

45. The Georgia Code Section defines "emergency medical care" as emergency services "provided after the **onset** of a medical or traumatic condition **manifesting itself by acute symptoms of sufficient severity,** including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." O.C.G.A. Section 51-1-29.5 (emphasis added).

46. At the time of her visit to the emergency room on July 7, 2007, the Defendants' medical providers did not find the infant was in severe pain and did not find "acute symptoms of sufficient severity...such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part."

47. The onset of the acute crisis began three days later which is consistent with the common course of subdural hematomas. That crisis could have been altogether avoided with appropriate care when the child was found stable and seen in the emergency department three days earlier.

48. The Code Section 51-1-29.5 does not apply to the facts of this case and Plaintiffs are not required to prove gross negligence by clear and

convincing evidence. Nevertheless, such gross negligence is present and this child suffered severe neurological injuries due to the gross negligence of Defendants.

49. The lack of treatment provided to this infant by the nurses, physician assistant, and attending physician on July 7, 2007 at Phoebe Putney Memorial Hospital constitutes gross negligence under Georgia law.

50. Under *OCGA § 51-1-4*, gross negligence is the absence of slight diligence, and slight diligence is defined in the Code section as "that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances."

51. There is clear and compelling evidence that this child's medical care reflected a lack of slight diligence. No CT scan was ordered despite the presence of a documented scalp hematoma in a 6 month old infant. No x-ray was taken. The attending physician did not perform a physical examination of the infant. The physician assistant examined the infant for approximately 2 minutes and then she was discharged home. With no tests to diagnose her condition, the nurses, physician assistant, and attending physician failed to monitor and observe the infant for any reasonable period of time. The triage nurse saw the infant for approximately 3 minutes. The physician's assistant examined the infant for approximately 2 minutes. All of these facts indicate a lack of slight diligence in the care of this infant on July 7, 2007 at Phoebe Putney Memorial Hospital.

52. Plaintiffs attach to this Complaint and incorporate the Affidavit of Burton Bentley, M.D, a board-certified emergency physician. Dr. Bentley's Affidavit identifies at least one negligent act or omission committed by Defendants and also identifies at least one act or omission which constituted gross negligence. Under Georgia law, Dr. Bentley may testify to the malpractice of physicians, physician assistants, and nurses practicing in the field of emergency medicine. Under O.C.G.A. Section 24-9-67.1 (c)(2)(D), "an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider." Dr. Bentley qualifies as such an expert.

COUNT I
RESPONDEAT SUPERIOR LIABILITY OF DEFENDANT SOUTHWESTERN EMERGENCY PHYSICIANS, P.C. FOR THE NEGLIGENCE AND GROSS NEGLIGENCE OF THEIR EMPLOYEES/AGENTS

53. Plaintiffs adopt and reallege the above Paragraphs as if fully set forth herein.
54. Defendant Southwestern Emergency Physicians is liable and responsible for all of the actions, omissions and negligence and gross negligence of its

agents and employees, including the attending physician and physician assistant involved in the care and treatment of Keira Pech on July 7, 2007.

55. At all times material hereto, the negligence and gross negligence of the agents, servants, and employees of Southwestern Emergency Physicians, acting within the scope of such agency/employment, proximately caused and contributed to the injuries suffered by Keira Pech.

56. Defendant Southwestern Emergency Physicians charged and received fees for the medical services rendered to Keira Pech.

57. Defendant Southwestern Emergency Physicians, P.C., by and through its agents/employees, failed to exercise a reasonable degree of medical care, or even slight diligence and skill ordinarily employed by physicians and physician assistants generally under similar conditions and like surrounding circumstances and were grossly negligent in the evaluation of Keira Pech. This failure caused and/or contributed to the severe neurological injuries sustained by Keira Pech which were preventable with appropriate treatment.

58. This action is one for professional malpractice in which Southwestern Emergency Physicians, through their agents/employees, committed gross negligence and failed to exercise the required degree and standard of care and caused injury to Keira Pech from a want of such care and skill. As required by O.C.G.A. §9-11-9.1, Plaintiffs attached to the original Complaint as Exhibit "A" and incorporate herein the Affidavit of Dr. Burton Bentley specifically setting forth at least one negligent act or

omission and at least one act of gross negligence committed by agents or employee of Defendant Southwestern and the factual basis for such claims. This Affidavit is not inclusive of each act, error or omission that has been committed or may have been committed by Defendants, and Plaintiffs reserve the right to contend and to prove additional acts, errors, and omissions on the part of the Defendants' agents/employees that reflect a departure by each Defendant from the requisite standard of care required by law and gross negligence.

59. Defendant is liable to Plaintiffs for all damages allowed under Georgia law, including the child's past, present, and future pain and suffering, medical expenses, rehabilitation, and costs of assistance necessitated by her severe neurological injuries.

COUNT II

RESPONDEAT SUPERIOR LIABILITY OF DEFENDANT PHOEBE PUTNEY FOR THE NEGLIGENCE AND GROSS NEGLIGENCE OF THEIR EMPLOYEES/AGENTS

60. Plaintiffs adopt and reallege the above Paragraphs as if fully set forth herein.

61. Defendant Phoebe Putney is liable and responsible for all of the actions, omissions, negligence, and gross negligence of its agents and employees.

62. At all times material hereto, the negligence and gross negligence of the agents, servants, and employees of Phoebe Putney, acting within the scope of such agency/employment, proximately caused and contributed to the injuries suffered by Keira Pech.

63. Defendant Phoebe Putney charged and received fees for the medical services rendered to Keira Pech.

64. Defendant Phoebe Putney, by and through their agents/employees, committed gross negligence and failed to exercise a reasonable degree of medical care, diligence, and skill ordinarily employed by such medical personnel generally under similar conditions and like surrounding circumstances. This failure caused and contributed to the severe neurological injuries sustained by Keira Pech which were preventable with appropriate care and treatment.

65. This action is one for professional malpractice in which Phoebe Putney, through their agents/employees, including their nurses, committed gross negligence and failed to exercise the required degree and standard of care and have caused injury to Keira Pech. As required by O.C.G.A. §9-11-9.1, Plaintiffs attached to the original Complaint as Exhibit "A" and incorporate herein the Affidavit of Dr. Burton Bentley specifically setting forth at least one negligent act or omission and at least one act of gross negligence committed by agents or employee of Defendant Phoebe Putney and the factual basis for such claims. This Affidavit is not inclusive of each act, error or omission that has been committed or may have been committed by Defendants, and Plaintiffs reserve the right to contend and to prove additional acts, errors, and omissions on the part of the Defendants' agents/employees that reflect a departure by each Defendant from the requisite standard of care required by law and gross negligence.

66. Defendant is liable to Plaintiffs for all damages allowed under Georgia law, including the child's past, present, and future pain and suffering, medical expenses, rehabilitation, and anticipated lifetime costs of assistance necessitated by her severe neurological injuries.

COUNT III---LIABILITY OF DEFENDANT JAMES EDWARD BLACK FOR MEDICAL MALPRACTICE AND GROSS NEGLIGENCE

67.

Plaintiffs adopt and reallege the above Paragraphs as if fully set forth herein.

68. Defendant Dr. Black is liable and responsible for all of his actions, omissions, negligence and gross negligence concerning his care and treatment of Keira Pech on July 7, 2007.

69. At all times material hereto, the negligence and gross negligence of Dr. Black proximately caused and contributed to the injuries suffered by Keira Pech.

70. Defendant Dr. Black charged and received fees for the medical services rendered to Keira Pech.

71. Dr. Black failed to exercise a reasonable degree of medical care, or even slight diligence, and skill ordinarily employed by physicians generally under similar conditions and like surrounding circumstances and committed gross negligence in the evaluation and treatment of Keira Pech. This failure caused and/or contributed to the severe neurological injuries sustained by Keira Pech which were preventable with appropriate treatment.

72. This action is one for professional malpractice in which Dr. Black committed gross negligence and failed to exercise the required degree and standard of care and caused injury to Keira Pech from a want of such care and skill. As required by O.C.G.A. §9-11-9.1, Plaintiffs attached to the original Complaint as Exhibit "A" and incorporate herein the Affidavit of Dr. Burton Bentley specifically setting forth at least one negligent act or omission and at least one act of gross negligence committed by Dr. Black and the factual basis for such claims. This Affidavit is not inclusive of each act, error or omission that has been committed or may have been committed by Defendant Dr. Black, and Plaintiffs reserve the right to contend and to prove additional acts, errors, and omissions on the part of Dr. Black that reflect a departure by Dr. Black from the requisite standard of care required by law and gross negligence.

73. Defendant is liable to Plaintiffs for all damages allowed under Georgia law, including the child's past, present, and future pain and suffering, medical expenses, rehabilitation, and costs of assistance necessitated by her severe neurological injuries.

COUNT IV---LIABILITY OF DEFENDANT MICHAEL HEYER FOR MEDICAL MALPRACTICE AND GROSS NEGLIGENCE

74. Plaintiffs adopt and reallege the above Paragraphs as if fully set forth herein.

75. Defendant Mr. Heyer, a physician assistant, is liable and responsible for all of his actions, omissions and negligence and gross negligence concerning his care and treatment of Keira Pech on July 7, 2007.

76. At all times material hereto, the negligence and gross negligence of Mr. Heyer proximately caused and contributed to the injuries suffered by Keira Pech.

77. Defendant Michael Heyer charged and received fees for the medical services rendered to Keira Pech.

78. Mr. Heyer failed to exercise a reasonable degree of medical care, or even slight diligence and skill ordinarily employed by physician assistants generally under similar conditions and like surrounding circumstances and committed gross negligence in the evaluation and treatment of Keira Pech. This failure caused and/or contributed to the severe neurological injuries sustained by Keira Pech which were preventable with appropriate treatment.

79. This action is one for professional malpractice in which Mr. Heyer committed gross negligence and failed to exercise the required degree and standard of care and caused injury to Keira Pech from a want of such care and skill. As required by O.C.G.A. §9-11-9.1, Plaintiffs attached to the original Complaint as Exhibit "A" and incorporate herein the Affidavit of

Dr. Burton Bentley specifically setting forth at least one negligent act or omission and at least one act of gross negligence committed by Mr. Heyer and the factual basis for such claims. This Affidavit is not inclusive of each act, error or omission that has been committed or may have been committed by Defendant Heyer, and Plaintiffs reserve the right to contend and to prove additional acts, errors, and omissions on the part of Mr. Heyer that reflect a departure by Mr. Heyer from the requisite standard of care required by law and gross negligence.

80. Defendant is liable to Plaintiffs for all damages allowed under Georgia law, including the child's past, present, and future pain and suffering, medical expenses, rehabilitation, and costs of assistance necessitated by her severe neurological injuries.

COUNT V-DECLARATORY JUDGMENT STRIKING GEORGIA STATUTE REQUIRING PLAINTIFFS TO PROVE GROSS NEGLIGENCE

81. Plaintiffs repeat the allegations of the foregoing paragraphs as if fully stated herein.

82. The facts in this case support a finding of gross negligence under O.C.G.A. Section 51-1-29.5. Nevertheless, any requirement to prove gross negligence by "clear and convincing evidence" under that Code Section is unconstitutional as it violates the Equal Protection Cause of the United States Constitution and the State of Georgia Constitution.

83. O.C.G.A. Section 51-1-29.5 (c) provides in pertinent part:

(c) In an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department

> or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence.

84. This Code Section is unconstitutional as it violates the Equal Protection Clause of the United States Constitution and State of Georgia Constitution.

85. Standing to challenge a statute on constitutional grounds in the State of Georgia depends on a showing the plaintiff was injured in some way by the operation of the statute or that the statute has an adverse impact on the plaintiff's rights. Such is the case here.

86. One challenging a statute on equal protection grounds must initially establish that he is similarly situated to members of the class who are treated differently from him. This child is similarly situated to members of the class of civil tort victims.

87. In every type of medical malpractice case (except emergency department care) and every type of civil tort case, injured individuals may prevail by proving negligence with the preponderance of the evidence.

88. Yet when the injured individual such as this child suffers catastrophic permanent injuries due to the malpractice of medical providers in the emergency department of a hospital, she cannot recover anything unless she proves gross negligence by clear and convincing evidence.

89. No rational basis exists for treating this child differently because of the location of the medical treatment at issue. There is no rational reason to

potentially foreclose recovery to this child simply because she was injured by medical malpractice in the emergency room of a hospital instead of an operating room or doctor's office.

90. It is an affront to justice to afford such protection and favoritism to a limited class of defendants who are in a position to cause severe damages to individuals such as this infant.

COUNT VI-DECLARATORY JUDGMENT STRIKING GEORGIA STATUTE CAPPING NON-ECONOMIC DAMAGES

91. Plaintiffs repeat the allegations of the foregoing paragraphs as if fully stated herein.

92. Keira Pech faces a lifetime of neurological disabilities and suffering associated with such disabilities due to the Defendants' negligence and gross negligence. Yet under Georgia law, because she received such injuries from medical malpractice, her recovery for non-economic damages is capped at grossly inadequate levels.

93. Georgia law caps recovery of non-economic damages available to victims of medical malpractice.

94. O.C.G.A. Section 51-13-1 provides in pertinent part:

> (b) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.
> (c) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against a single medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for

noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of separate causes of action on which the claim is based.

(d) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against more than one medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00 from any single medical facility and $700,000.00 from all medical facilities, regardless of the number of defendant medical facilities against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(e) In applying subsections (b), (c), and (d) of this Code section, the aggregate amount of noneconomic damages recoverable under such subsections shall in no event exceed $1,050,000.00.

95. This Code Section is unconstitutional as it violates the Equal Protection Clause of the United States Constitution and State of Georgia Constitution.

96. Standing to challenge a statute on constitutional grounds in the State of Georgia depends on a showing the plaintiff was injured in some way by the operation of the statute or that the statute has an adverse impact on the plaintiff's rights. Such is the case here.

97. One challenging a statute on equal protection grounds must initially establish that he is similarly situated to members of the class who are treated differently from him. This child is similarly situated to members of the class of civil tort victims.

98. In every type of civil tort cause of action except medical malpractice, injured individuals may obtain full recovery for their non-economic damages as determined by a jury.

99. Even in medical malpractice cases when an individual's pain and suffering is limited in duration or degree, the injured individual may obtain full recovery for his or her non-economic damages.

100. Yet when the injured individual such as this child suffers catastrophic permanent injuries that will likely affect her throughout her life, she cannot recover in full for her non-economic damages as determined by a jury. Instead her recovery is capped at $350,000.00 per defendant.

101. No rational basis exists for this child differently because her non-economic damages are far more severe. There is no rational reason to foreclose full recovery to this child simply because she was injured by medical malpractice.

102. It is an affront to justice to deem catastrophic injuries to a child less valuable under the law in the context of medical malpractice cases than in any other type of tort case.

Plaintiffs hereby demand trial by jury on all issues.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

(a) That the Plaintiffs have judgment against Defendants for all damages allowed under Georgia law, including the child's past, present, and future pain and suffering, past, present, and future medical expenses, past, present, and future rehabilitation, and past, present, and future costs of assistance necessitated by her severe neurological injuries caused by the Defendants' gross negligence and negligence.

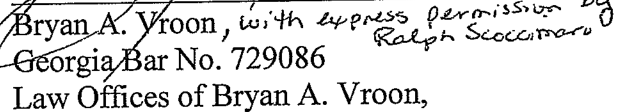
(b) That all costs and attorneys' fees be cast against the Defendants;

(c) That the Court declare that O.C.G.A. Section 51-1-29.5 (c) violates the Equal Protection Clause of the United States Constitution and the Constitution of the State of Georgia.

(d) That the Court declare that O.C.G.A. Section 51-13-1 violates the Equal Protection Clause of the United States Constitution and the Constitution of the State of Georgia.

(e) That the Court grant such other and further relief as it deems just and proper.

Respectfully submitted this 19th day of June, 2009.

By: 
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<u>**AFFIDAVIT OF DR. BURTON BENTLEY II, M.D.**</u>

1. I, Burton Bentley II, M.D., being sworn, certify that the following statements are true and correct and based upon my personal knowledge.
2. My name is Burton Bentley II. I am a medical doctor licensed to practice medicine in the State of Arizona. I have been licensed to practice medicine in the State of Arizona since 1994. I graduated from the University of Arizona College of Medicine in 1990. After graduation, I completed an internship in Internal Medicine at The Medical College of Wisconsin, 1990-1991. I then completed my residency training in Emergency Medicine at The Medical College of Wisconsin between 1991 and 1994.
3. I am a Fellow of the American Academy of Emergency Medicine. In 1995 I was board certified by the American Board of Emergency Medicine and recertified in 2004.
4. Between 1994 and the present, I have continuously practiced emergency medicine with Northwest Tucson Emergency Physicians, P.C. and serve as an Attending Emergency Department Physician at both Northwest Medical Center and Oro Valley Hospital.
5. I have practiced continuously and regularly in the field of Emergency Medicine since my residency training began in 1991. I have also supervised and worked with physician assistants and nurses in the field of Emergency Medicine since 1991. I am thoroughly familiar with the standard of care applicable to physicians, physician assistants, and nurses in the field of Emergency Medicine and the evaluation and treatment of head injuries in children and infants.
6. My education, training, and publications are listed in my curriculum vitae, a copy of

which is attached to my Affidavit.

7. My education, training, and research focused on the field of emergency medicine. I have practiced continuously in this field since 1991. In particular, I have extensive experience in evaluating and diagnosing infants and children with scalp trauma and intracranial injuries. I have diagnosed or assisted in diagnosing such conditions hundreds of times in the previous seven years and countless times in my medical career.
8. Based on my education, training, and experience, I am familiar with the standard of care applicable to physicians, physician assistants, and nurses under like and similar circumstances as those presented when Keira Pech presented to the Emergency Department at Phoebe Putney Memorial Hospital on July 7, 2007.
9. I have reviewed certified medical records concerning Keira Pech from Phoebe Putney Memorial Hospital dated July 7, 2007 and July 10, 2007 and other medical records concerning the infant's subsequent clinical course.
10. Based upon my education, training, and experience in the field of emergency medicine, as well as upon my review of the medical records of this infant, it is my medical opinion that on July 7, 2007, the attending physician responsible for supervising this infant's care breached the standard of care generally practiced by physicians under similar circumstances. The physician assistant and nurses at the hospital also committed breaches of the standard of care generally practiced by such medical personnel under similar circumstances. Because of such violations of the standard of care, this infant's intracranial injury was not timely diagnosed and treated and she suffered severe neurological consequences. I hold the opinions stated in my Affidavit to a reasonable degree of medical probability.

11. On July 7, 2007, this infant was taken to the Phoebe Putney Memorial Hospital Emergency Department. The time of registration is listed as 5:21 p.m.
12. At 5:50 p.m. according to the Emergency Center Triage Record, the triage nurse examined the infant. The nurse's examination was completed 3 minutes later at 5:53 according to the Triage Record. The nurse wrote, "Pt. fell from bed hitting her head. Floors were carpeted. Pt. alert. Hematoma noted to occipital region. Normal motor functions noted. No distress." The triage nurse categorized this infant's condition as Priority IV which is non-urgent and low priority.
13. According to the Clinician Note, the physician assistant, Michael Heyer, examined the infant approximately nine minutes later at 6:02 p.m.
14. Mr. Heyer's examination noted "moderate traumatic soft tissue swelling over the posterior occipital scalp." The supervising "attending physician in department" was identified as James Edward Black MD.
15. There is no record indicating that a physician performed a full physical examination of the infant.
16. On July 7 the infant did not receive a CT scan of her head. She did not receive an x-ray of her skull. A CT scan is widely considered to be the standard of care for the diagnosis of acute intracranial injury. A skull x-ray is widely considered to be the standard of care for screening for skull fractures.
17. According to the medical records, the physician assistant examined the infant for approximately two minutes and then discharged her.
18. According to the medical records, the listed patient "problem" is "infant fell from bed." The onset of the presenting problem reportedly "began [2] hours ago." The medical chart

confirms the infant had "no [prior] history of contusion to posterior scalp."

19. According to the medical records from July 7, 2007, the supervising "attending physician in department" was identified as James Edward Black MD.

20. The EC Physician Medical and Order Sheet states that the infant's diagnosis was "scalp contusion." The physician's signature is not legible to me.

21. According to the medical record from July 7, the primary diagnosis was "local soft tissue swelling/injury posterior occipital scalp." According to the Emergency Department record, the infant's parents received discharge instructions regarding "head injury."

22. Three days later, on July 10, the infant was taken back by ambulance to Phoebe Putney Memorial Hospital in "respiratory distress."

23. According to the History and Physical Examination report by Dr. James Metcalf on July 10, the infant was "taken urgently for a CT scan of her head which showed a very large mixed density subdural hematoma with significant mass effect." The infant was "intubated to protect her airway and arrangements made for urgent surgery."

24. According to the Operative Report by Dr. Metcalf dated July 10, the "infant was resuscitated in the Emergency Room, after which she was taken for a CT scan, which showed a very large acute subdural hematoma with significant mass effect." "Due to the presence of this life-threatening lesion the patient was taken urgently for craniotomy."

25. On examination, Dr. Metcalf noted "marked soft tissue swelling in the right parieto-occipital region with marked ecchymosis."

26. The CT Radiology Report on July 10, 2007 states, "There is large right-sided subdural hematoma. Maximum depth is approximately 1.2 cm. Density is mixed suggesting acute hemorrhage superimposed on chronic hemorrhage." The CT scan report dated July 10,

2007 by Dr. Allison Lea Hays also noted “minimally displaced calvarial fracture involving the right parietal bone.”

27. In the operative report from the emergency craniotomy on July 10, Dr. Metcalf notes, "The dura was noted to be somewhat tense and upon opening the dura there was noted to be a moderate amount of subdural fluid of two different ages. Some of the fluid appeared to be rust colored of a somewhat subacute nature and there was significant fresh gelatinous clot."

28. Both the surgeon’s operative findings and the CT scan indicate that this infant suffered an injury to her brain in the days before her presentation to the emergency room on July 10 with respiratory distress.

29. The early diagnosis and treatment of intracranial hemorrhage is critical. Without appropriate monitoring and treatment, brain swelling often causes an elevation in intracranial pressure which can lead to brain herniation, brain damage, and death. To avert these catastrophic complications, subdural hematomas are commonly treated by emergency neurosurgery to remove the blood collection and thus relieve the elevated intracranial pressure. When performed in a timely manner, surgical treatment has a high rate of success. Unfortunately this infant’s subdural hematoma was not timely diagnosed when she first presented to Phoebe Putney Memorial Hospital on July 7, 2007. Because she was not properly evaluated, diagnosed, and treated on July 7, the infant suffered a nearly lethal elevation in her intracranial pressure in the days following her injury. The delay in treatment resulted in severe brain injuries with attendant neurological complications.

30. It is well-established that intracranial injury in infants may present with subtle signs or no

clinical neurological symptoms, especially in infants younger than 1 year. A "subdural hematoma" is a common type of intracranial injury that occurs when trauma causes bleeding beneath the dural layer of the brain.

31. If subdural hematomas are timely diagnosed and treated, patients commonly make a full recovery with no permanent neurological injuries. Unfortunately, this infant did not receive timely and appropriate treatment on July 7, 2007. Because this infant did not receive timely medical and neurosurgical care, she suffered severe neurological injuries.
32. Scalp hematomas are a sensitive indicator of intracranial injury in infants. Numerous studies in the peer-reviewed published medical literature have found significant associations between scalp hematomas and the presence of intracranial injury in infants.
33. Physicians generally use the presence of a significant scalp abnormality to dictate ordering radiographic studies in infants. Numerous studies have identified abnormal scalp examinations in infants as an important potential indicator of intracranial injury.
34. A substantial percentage of infants with acute brain injury are asymptomatic. Clinical symptoms and signs are insensitive indicators of brain injury in infants. Since infants cannot verbally communicate, it is often difficult for the clinician to determine clinical symptoms with accuracy.
35. It is well-established that children in their first two years of life have a higher risk of significant brain injury after blunt head trauma. Because infant skulls are more vulnerable to brain injury and because infants cannot communicate their symptoms, it is well-established among emergency medicine physicians and in the published medical literature that clinicians must have a lower threshold for ordering CT scans of the head when assessing head-injured infants.

36. Clinical signs and symptoms are insensitive predictors of head injury in children less than 2 years old. The standard of care requires clinicians to have a high index of suspicion for intracranial injury or skull fracture in any child younger than 2 years who has sustained a head injury, "especially in children younger than 12 months in whom complications are more common and clinical findings are less reliable." Thiessen M, Woolridge D, "Pediatric Minor Closed Head Injury," *Pediatric Clinics of North America*, 1, 9 (2006).
37. It is widely acknowledged among medical experts that scalp hematomas in infants are a useful and leading clinical indicator which warrant imaging studies including CT imaging of the head and/or skull radiographs.
38. For example, in an article published in 1999 in *Pediatrics*, the Official Journal of the American Academy of Pediatrics, the authors recommended "radiographic screening for all asymptomatic infants younger than 1 year of age with any scalp hematoma." Greenes D, Schutzman, "Clinical Indicators of Intracranial Injury in Head-Injured Infants," 104 *Pediatrics* 861-867 (October 1999).
39. In 2001, an expert panel published proposed guidelines in *Pediatrics*, the Official Journal of the American Academy of Pediatrics, which addressed the evaluation and management of infants younger than two years old with apparently minor head trauma. The expert panel reported that in infants with scalp hematomas, "CT or SR (skull radiograph) should be considered." Schutzman S, Barnes P, Duhaime A, Greenes D, Homer C, Jaffe D, Lewis R, Luerssen T, Schunk J, "Evaluation and Management of Children Younger Than Two Years Old With Apparently Minor Head Trauma: Proposed Guidelines, *Pediatrics* 2001;107; 983-993. "When deciding between these imaging modalities, issues to consider include the clinical scenario, availability of SF and CT, accuracy of imaging

interpretation, expertise of available radiologist, and the need for sedation." *Id.* "Children with acute SF [skull fracture] noted on SR [skull radiograph] should undergo CT because SF significantly increases the likelihood of ICI [intracranial injury]." *Id.* "If radiographic imaging is not performed, consensus is that the infant should be observed for 4 to 6 hours post-injury for the development of symptoms (e.g., vomiting or change of level of alertness, behavior or neurologic examination)." "If symptoms develop, CT is indicated." "If the patient remains without significant symptoms and fulfills all discharge criteria the infant may be discharged."

40. In this infant's treatment, she did not receive a skull radiograph on July 7. She did not receive a CT scan of her head. Instead of being monitored for 4 to 6 hours, she was discharged approximately 14 minutes after the triage nurse first examined the infant noting a "hematoma" on the "occipital region", and only 2 minutes after the Physician Assistant, Mr. Heyer, noted "moderate traumatic soft tissue swelling over the posterior occipital scalp."

41. On July 7, 2007, CT scan imaging was available but not provided to this infant. The infant received such a CT head scan 3 days later which immediately detected the subdural hematoma.

42. The care received by this infant on July 7, 2007 reflects an absence of any diligence in the presence of a well-established indicator for intracranial injury in infants with vulnerable skulls.

43. The triage nurse categorized this infant's condition as Priority IV which is non-urgent and low priority. The triage nurse deviated from the standard of care in failing to understand the potential significance of a scalp hematoma in a 6-month-old infant and

failing to take appropriate action to further assess and monitor the infant. The nurse's erroneous assessment reflected and contributed to the overall lack of diligence in assessing this infant and contributed to the physician's failure to perform a thorough physical examination and the failure to order any CT scan of the infant's brain or radiograph of her skull. The triage nurse's assessment also contributed to the failure to monitor this infant for an extended reasonable time period as required by the standard of care.

44. The infant could not have received a thorough physical examination in the time that the physician assistant examined her. There is no indication in the record that a physician performed a physical examination of the infant. The infant was discharged approximately 2 minutes after the physician assistant first saw her and approximately 14 minutes after the nurse first triaged the infant for approximately 3 minutes. No tests were performed or ordered to diagnose the infant's condition or to rule out an intracranial injury or skull fracture.

45. Based on my education, training, and experience, the lack of treatment provided to this infant by the nurses, physician assistant, and attending physician on July 7, 2007 at Phoebe Putney Memorial Hospital constitutes gross negligence as I understand the definition under Georgia law.

46. I understand that under Georgia law, gross negligence is the absence of slight diligence, and slight diligence is defined as "that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances." Unfortunately, there is clear and compelling evidence that this infant's medical care reflected a lack of slight diligence. No CT scan was ordered despite the presence of a

documented scalp hematoma in a 6 month old infant. No x-ray was taken. The attending physician did not perform a physical examination of the infant. The physician assistant examined the infant for approximately 2 minutes prior to sending her home. With no tests to diagnose her condition, the nurses, physician assistant, and attending physician failed to monitor and observe the infant for any reasonable period of time. The triage nurse saw the infant for approximately 3 minutes. The physician assistant examined the infant for approximately 2 minutes. All of these facts indicate a lack of slight diligence in the care of this infant on July 7, 2007 at Phoebe Putney Memorial Hospital. This failure of diligence all happened with an infant who presented with a leading indicator of intracranial injury.

47. This Affidavit identifies at least one negligent act or omission committed by the physicians, nurses and physician assistant, but does not encompass all of my opinions in this matter.

FURTHER AFFIANT SAYETH NOT:

Signed, sealed and delivered this 18 day of June, 2009 in the presence of:

Alyson Buttrey
Notary Public

BY: ____________________
Burton Bentley II, M.D.

[SEAL]

ALYSON BUTTREY
Notary Public - Arizona
Pima County
Expires 02/17/2011

My Commission Expires: Feb 17, 2011

Curriculum Vitae

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CERTIFICATION AND EDUCATION

Fellow, American Academy of Emergency Medicine.
Diplomate, American Board of Emergency Medicine. Certificate #940059; 1995. Recertification, 2004.
Residency: Emergency Medicine, The Medical College of Wisconsin; 1991 - 1994.
Internship: Internal Medicine, The Medical College of Wisconsin; 1990 - 1991.

- **Flight Physician:** Flight for Life Aeromedical Transport; Milwaukee, Wisconsin; 1992 - 1994.
- **Certified Life Support Provider:** Basic Life Support; Advanced Cardiac Life Support; Pediatric Advanced Life Support; Advanced Trauma Life Support.
- **Professional Organizations:** American Academy of Emergency Medicine

Doctor of Medicine, The University of Arizona, College of Medicine; 1990.

- **Licensure:** State of Arizona: Medicine and Surgery, Certificate #22362.
- **Awards:** ALPHA OMEGA ALPHA; Hewlett-Packard Top Medical Graduate.
- Diplomate of the National Board of Medical Examiners, Certificate #384961.

Bachelor of Science, Magna Cum Laude, The University of Arizona; 1986.
Major in Biochemistry, with Honors.

- **Awards & Honors:** PHI BETA KAPPA; Phi Kappa Phi; Mary Ann Farman Memorial Scholarship; Samuel Morris Scholarship; Golden Key Honor Society; University of Arizona Honors Program.

CLINICAL and PROFESSIONAL EXPERIENCE

- Emergency Medicine Litigation Analysts (EMLA), Inc. President and Founder, 1995 - Present. EMLA, Inc., is a nationwide resource for litigation support for both plaintiff and defense.
- Northwest Tucson Emergency Physicians, P.C., Tucson, Arizona. Attending Emergency Department Physician at Northwest Medical Center, 1994 - Present.
- St. Mary's Hospital - Ozaukee; Port Washington, Wisconsin. Medical Staff, 1992 - 1994.

- St. Luke's Hospital; Milwaukee, Wisconsin. Medical Staff, 1993 - 1994.

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