

Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Voiceover:

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Welcome to the award-winning podcast, Trial Lawyer Nation; your source to win bigger verdicts, get more cases, and manage your law firm. And now, here's your host, noteworthy author, sought after speaker, and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Welcome to today's Trial Lawyer Nation. I'm here today with attorney Mike Bonamarte. Mike recently got a \$20 million verdict in a case there in Chicago, to add on top of all the other incredible verdicts he's had. He's agreed to come on and talk to us about how he's done it, how he runs a firm that allows him to try those kind of cases and work with other lawyers to get those kind of cases ready for trial, and how he learned to try a big case.

Before we do that, I want to address a couple things. First, I want to give a shout-out to LawPods. LawPods is nice enough to produce this podcast for us. They make it so easy for me. All I have to do is talk to guests and they do all the production, putting out all the neat little clips you might see on social media to let everyone know it's coming out, and I really appreciate all the great work. If you want to do your own podcast, and you should really think about it, I highly recommend LawPods.

I also want to mention that the audio quality may not be quite as wonderful as it normally is since I've gone to work with LawPods, and that is on me, not on them. I am in my Albuquerque, New Mexico office today, and I left my headset and microphone in San Antonio, Texas, so we're doing our best. That being said, Mike, how are you doing today?

Michael Bonamarte:

I'm doing great. Thank you, Michael. Thanks for having me.

Michael Cowen:

Thanks for coming on. Tell me a little bit about yourself and your practice.

Michael Bonamarte:

I have been fortunate enough to be with the same law firm for the last 20 or so years, going back to my time as a second year law student and clerk at Levin & Perconti. When I started back in 2002, 2003, we had about seven lawyers. We've grown into a 32-lawyer firm, so it's been fun for me to be a part of that.

I grew up in the north suburbs of Chicago, in Highland Park. My grandfather was a police chief for 40 years. My dad was an attorney. My dad passed away about three months after my first trial. He was young, he was 50 years old. And he had introduced me to Steve Levin, who I actually knew, because I went to high school with some of his boys. But when I was in law school and not sure what I was going to do, I started taking an interest in some of my trial advocacy classes and he told me to call Steve up. I called him up and he had a clerking position opened and everything else just sort of fell into place.

In terms of how our firm operates, we historically have handled a lot of nursing home abuse and neglect cases, as well as high profile medical malpractice stuff. We have recently expanded significantly our birth injury practice. We've partnered up with Dov Apfel and Seth Cardeli who are based out of Maryland. They actually also came into Chicago and tried this case with me, as well as my co-managing partner, Margaret Battersby and one of our younger partners, Cari Silverman. We had a really fantastic team and I was kind of lucky to be asked to be a part of it. I got involved in the case about six to eight weeks before the trial.

Michael Cowen:

I want to go back. Before we get into the trial, a little bit more background on you. What is it about trial work that attracted you to this part of the practice?

Michael Bonamarte:

Someone asked me why they think I've had this type of success in trials, and I think what it boils down to is that the type of person I am is that if I think... If I like you, if I think you've been wronged or taken advantage of or screwed over, I'm going to go to bat. And I'm not going to win every case, but we've adopted the mindset that we're going to certainly try the good ones if they're not coming to the table and paying what we think or what we perceive to be a reasonable value for a case. A lot of lawyers sometimes I think may do the opposite, because the good cases are really easy to settle. But you don't want to put yourself in a position where you're settling the good ones and trying the bad ones. You want to do it the opposite. That's kind of how we've operated. And I think in this climate, at least here, I mean, it just seems like it's a really good climate to be trying cases right now.

Michael Cowen:

Oh, absolutely.

Michael Bonamarte:

Certainly anxious to get back into it. I had a little bit of a fix before COVID took over. I had back to back trials in December of '19 and January of '20. But this one in June was the first one that I've had since the courts opened up here.

Michael Cowen:

And over the years... Most people just don't come out of the womb knowing how to try a case. What have you done to develop your trial skills over the years?

Michael Bonamarte:

Well, I tried to be a sponge. And I'll just digress and go back for a little bit. I didn't even know I wanted to be a lawyer when I went to law school. I actually was pretty mad. I think I went into college with a predisposition that I was going to be a doctor. I wasn't afraid of the additional schooling, but I wasn't

quite sure that my heart was really into it, so I actually took a year off. I continued cadding for a little bit, I bartended. I said, "You know, I'm going to take the LSATs." And I took the LSATs and then once I got into law school, I started taking an interest in some of my trial courses.

Then over the years I've talked to a couple of people that have been particularly influential. Obviously our two founding partners, Steve Levin and John Perconti, both of whom I believe to be outstanding trial lawyers. Different, but I've taken a lot of information and a lot of tips from both of them. Their styles are different and I kind of merged them a little bit. People like Moe Levine I think was way ahead of his time. And then more recently, in terms of materials that are put out there, Keith Mitnik. I mean his *voir dire*. I actually emailed him today that we got the verdict, which was Friday, June 24th. After a small celebration I was feeling particularly grateful. I sent Keith a nice email and particularly commented on some of his techniques to stave off rehab, which I'll talk a little bit about. But I want to obviously give him credit. And of course he sent me a very nice email the next morning, Saturday morning. Looking forward to getting together with him in Chicago the next time he's here.

Michael Cowen:

He's great.

Michael Bonamarte:

But when you watch this stuff, if you're really interested in it and you read, just be a sponge. I mean, there's just so much. Again, I'm only 43 years old, but I think from what I started to now, the free information, the programs that you could go to, just being on the internet, your podcast that we're here doing today. I mean I've listened to a lot of these episodes as well. There's just a ton of information, so there's really not any excuse not to indulge yourself in it and really try to soak it up and find out what's usable for you as the trial lawyer.

Michael Cowen:

Let's talk about the case. Can you give a little background on what happened?

Michael Bonamarte:

Sure. Bonita Johnson, this was her first baby. At her 40 week ultrasound they decided that they were going to induce her, because the baby's growth rates had dropped pretty significantly actually from the 33 to the 40 week ultrasound. They diagnosed the baby with a condition called fetal growth restriction. When they induced the baby, it was October 15th of 2014, everything looked okay. The baby's biophysical profile was eight out of eight. It was a longer labor and on October 16th, after about 24 hours or so, the attending doctor had left the hospital and was already contemplating that a C-section might be in the cards because of the slow progress of the labor. She was only dilated at about five centimeters the morning of the 16th. Then once the attending doctor, the OB-GYN left the hospital, there were significant changes in the fetal heart rate strips that the attending doctor said were not brought to her attention. That, had they been brought to her attention, would've triggered her to do a cesarean section much, much sooner.

What happened ultimately is the baby is born, I believe it was about 1:28 PM the afternoon of October 16th, and suffered from brain damage. They did utilize a relatively newer treatment, cooling treatment, which is believed to potentially stop the progression of brain damage, and a lot of times it prevents the development of cerebral palsy, which it may have done in this case. Our child's injuries are pretty much strictly neurological. There is some motor dysfunction, but it's not as devastating as we're seen in CP cases.

The case basically, the way it had been worked up, sort of polarized the attending OB-GYN with three resident physicians and three resident obstetrical nurses. The attending doctor had actually written a letter to the head of the obstetrical department before lawsuits had been filed that was saying in summary basically that there was just certain information that had not been communicated to her. And AJ, the boy, we introduced just very briefly. 30 seconds to a minute. We had him come into the courtroom and say hello to the jury. He's eight years old now and largely all of the care that he needs is custodial. He should live a normal life expectancy, but it's particularly significant and sad that his neurological function, his IQ, is significantly decreased and he is pretty much going to be reliant on some level of custodial care for the rest of his life.

Michael Cowen:

I'm going to ask some follow up questions, if it's all right with you, before we get into the meat of the case.

Michael Bonamarte:

Sure.

Michael Cowen:

Because a lot of us haven't done birth injury cases. I mean, I'm in Texas and the legislature let us know in 2003 that if we want to be medical negligence detectives, we're not going to make any money doing it. And we're going to expose ourselves to a lot of personal liability, and so I've done one in almost 20 years. So, I want to just ask some follow up questions. You said that there were some changes to the fetal heart rate strip. What does that mean?

Michael Bonamarte:

The fetal heart rate strips show both the baby's heart rate, as well as the contractions on the bottom of the strip. The major changes that we saw, and I'll just say it was between about 9:30, 10 o'clock in the morning up until about 12:45 where there were multiple what are called variable decelerations. And then there were also what are called four prolonged decelerations. Both of those things are not good. I mean, you're going to see variable decelerations inevitably probably on every fetal heart rate strip. But when you've got a mom who's making slow progress in the labor and you've got a baby who has this condition called fetal growth restriction, and there's some school of thought that those types of babies may not be able to tolerate the stresses of labor as well as a normal size or a regular size baby; then those repeated insults in the form of variable decelerations, prolonged decelerations, which suggest there's cord compression and in turn a hypoxic environment for the baby; the more they happen, the more you have to probably make a decision, if you're the attending doctor and you get all the information, to go to C-section. Because obviously the more hypoxic the environment, the longer the environment is... the baby is deprived of oxygen, the greater the possibility that you're going to have this type of an outcome.

Michael Cowen:

And again, I think that I understand, but I just want to make sure I understand, so I just want to ask a couple more clarifications. Decelerations, that's the heart rate slowing down?

Michael Bonamarte:

Yes.

Michael Cowen:

And that can be from, you said, something actually pressing the umbilical cord so that the mother's blood with the oxygen is not making it to the baby.

Michael Bonamarte:

Correct.

Michael Cowen:

Then I guess then the poor baby's brain's deprived oxygen. That can cause brain damage.

Michael Bonamarte:

Correct. When it's going on for a long time. And there's other... I'm probably oversimplifying a little bit, but you're also looking at things like the variability of the heart rate, both during and after contraction. Moderate variability is when it's going up 5 to 10 beats or down 5 to 10 beats pretty consistently. That's a good thing. When you start seeing that little line that's tracking the heart rate and you get to minimal variability, that's not as good. Then in this particular case we're basically seeing almost a flat line at about 12:45 PM that morning of the 16th. That's called absent variability. In addition, the baby... there's tachycardia, the resting tone of the uterus is elevated. This combination of things, had they been presented to the attending doctor, who was a defendant in the case... I'll get to why we had to keep her in the case. But it was her testimony unequivocally that she would've had the baby out by no later than 11:00 AM, because that's when we had started seeing these signs. Combined with the fact that she had been laboring for 24 hours or so.

The reason why she remained in the case is that the nurses, although they didn't recall, suggested that they would've told the doctor each of these things at various checkpoints throughout the day. Obviously the jury did not believe the nurses or the resident physicians who were employed by the hospital. The attending doctor did get a not guilty. Which we kind of anticipate.

Michael Cowen:

And as far as the harm and injuries to the child, you said they were neurological. Can you just give a little more detail about what the kid suffered from?

Michael Bonamarte:

He can barely speak more than two word sentences or phrases. No executive function skills. Expresses frustration. May have some component of ADHD. Those are some of the... He's never going to progress beyond probably, in terms of his intelligence, beyond maybe 8, 9, 10 years old. That kind of level of intelligence. Won't ever be able to live independently. The mom, I think one of the most compelling things that she said is that she's never had a babysitter and the kid is eight years old. Other than her parents that she lives with. She just hasn't been in that position where she's felt comfortable or that level of trust to leave him with someone.

A big part of our case was our PM and our doctor worked on a life care plan for this baby, and it really involved custodial care through an agency that would have some level of consistency over the years. The defendants, I think sort of offensively, suggested perhaps he could live in a group home. Really that was just to reduce the value of the pure economic damages.

So yeah, I mean, when you see AJ, he walked in the courtroom. He's adorable. He looks like any other seven, eight year old kid. But when he talks you can clearly tell he's just... Either he can't express himself,

or he just doesn't have the capacity to do so. And I think during closing arguments, I don't know which is actually worse. Because he is either trapped and can't say what he wants to say, which may be part of the frustration that he sometimes expresses, or he just doesn't have the capacity to think at that level.

Michael Cowen:

What were the defenses in a case like this?

Michael Bonamarte:

The major defense in the case was that fetal growth restriction was caused by some sort of unknown genetic issue that didn't allow the baby's brain to develop normally. When I got involved in the case and I was learning about it, and many people might think it now, but it seemed ridiculous. Because there actually was some genetic testing that was done at the hospital. There was a geneticist who gave a deposition in the case. They advanced this theory without having hired a genetic expert. We did. We, the plaintiff, hired... We had 11 different experts. And speaking of birth injury cases, this was the first one I had ever actually really gotten involved in. It's overwhelming from a standpoint of just the number of expert witnesses that are involved.

But that was sort of the main defense. I got to be honest, there were times in the trial where, when you can't get up there, it's hard to cross examine that defense. Because they have this 33-week ultrasound that shows the baby's head circumference, length, femur length, things like that, and everything's at the 40, 50, 60 percentile. And then you see at 40 weeks the baby's dropped off pretty dramatically. When you look at it on a graph, it looks horrible, because he's down in the 10th percentile or below. But there were a lot of references that he fell off a cliff, which I found particularly offensive. I said, "When you fall off a cliff, you see actual damage usually." Here the MRI of the brain... The brain, according to our pediatric neuroradiologist, is well developed but for the clear watershed injury. Watershed is a how they describe the type of injury that you get from what's called a partial prolonged asphyxia. Besides for that brain damage that lights up on the MRI, the brain appears to be well developed.

But there were definitely, over pretty much a month long trial, a lot of times where I'm thinking, "Man, it's starting to..." I was worried that it was going to appeal to some people. But I think at the end of the day they didn't have a geneticist. Probably because they couldn't get one. I mean, I don't know why you would offer that defense without it. And then they also didn't have a pediatric neuroradiologist. They had a pediatric neurologist. We had both a pediatric neuroradiologist and a neurologist.

But that was the main defense, that this FGR, or fetal growth restriction, was as a result of a genetic issue. They also had a weaker defense of chorioamnionitis, but it was clear that they weren't going all in on that. It was just another let's throw a dart up against the wall, see if it sticks type of defense.

Michael Cowen:

Let's start with your trial strategy. First of all, before I get into the jury selection stuff, what was your strategy or techniques for getting something this technical and making it understandable to jurors?

Michael Bonamarte:

When I first... Maybe I'm a good person to talk about it, because that's how I felt. It was extremely technical. I actually started creating on my desktop a birth injury glossary, because all of the different types of deceleration and what each one meant and all of these terms, it's a lot to really learn. And again, I got to give credit to my partner Margaret and how she worked up the case, as well as Dov Apfel and Seth who came in. But having them as a crutch on the medicine, what I'm preparing for cross examinations and stuff like that, and just that sense of comfort that if someone says something on the

stand that doesn't make medical sense, I've got them sitting at council table ready to say, "That's bullshit and don't worry about it," was huge.

But I think to keep it simple, we focused obviously more on the defendant's conduct in the medical records, because all over the defendant's medical records, they attributed the cause of AJ, the boy, his injuries, to HIE or hypoxic ischemic encephalopathy. They talked about how the data doesn't lie and our response to that that we hammered, the number of times that their own medical records shortly after the birth talk about HIE. The fact that they used this therapeutic cooling technique, which is designed specifically for HIE. Subsequent medical providers, were treating him as if he had and has HIE. That I think at the end of the day is what won out.

Michael Cowen:

Yeah.

Michael Bonamarte:

But actually, it's like any new type of case that you get involved in. I mean, I've been involved for the first time in a case that involve ORA. That can be a little bit... Or OSA, and that can be a little bit overwhelming. But when you get good experts that explain that, even though there's thousands and thousands of pages that talk about OSA regulations, here are the only two that really matter, it simplifies things.

The theme that we had in the case was a lack of initiative type of theme. Because it's clear individual nurses and individual resident physicians knew certain things, but they never got the information to the one person that could make the decision. To the extent that defense, the maternal fetal medicine doctor or their experts were saying, "Well, this is clinical judgment," that may be true, but the person that needs all the information in this case wasn't given all of the information and testified clearly what she would've done with it. I mean, very obviously that the hospital and the lawyer for the OB-GYN were at odds. I mean, the hospital's lawyer called the defendant OB-GYN our star witness during the trial. I of course on rebuttal got up and said she's not our star witness, and in the back of my mind I'm thinking, "Yeah, maybe she kind of is."

But when you polarize the defendants like that, I think it takes a little bit of steam out of the defendant's BS causation argument. Because they just didn't have the support, the medical experts, to back it up. They wanted to say that it wasn't... I think they were trying to suggest that maybe the brain damage that we saw wasn't permanent, which makes no medical sense. But then you don't have a pediatric neuroradiologist to back it up. They want to say it's genetic and they don't have a geneticist come to testify at trial.

At the end of the day it was getting... We were certainly nervous and it was a little bit scary. Just because over four weeks, when you see the same... And I give the defense lawyer credit. You see the same graphs put up that show this deceleration of growth during the last trimester, it can be a little bit unnerving. But at the end of the day I think our strategy was just to focus on the objective evidence that we had in the case and the testimony of the witnesses. Obviously that's what won out at the end of the day.

Michael Cowen:

Tell us about how you did the jury selection and what you were looking for in jury selection on a case like this.

Michael Bonamarte:

We broke up the jury selection into two days because of this particular judge's preferences and COVID restrictions and things like that. It was a little more tedious obviously, because she did not have the entire group in the courtroom. We got 36 jurors sent up and I picked... Just did one group a day actually. We got 18 in the box, which was a little bit more than at least I was used to. We usually do 14 in Cook County, so that was a bit of a challenge. Then we did the second panel the next day.

In Illinois there's not a magic set of words. I know some states say a strike against, things like that. We don't have that. At least to my knowledge, and I've done my own research and asked other people. Historically I've always been... If I can get them to say one side starts out a little bit ahead, that seems to be enough in terms of emotion for cause. Each side was given seven peremptories. Day one was a little bit, in my opinion, two heavy. Unintentionally, but it got into... I don't know if it was just coincidental, but it seemed like a lot of people had experiences with different types of issues during labor, some birth injuries, things like that.

I thought things were rolling pretty nicely. I went in to make our motions for cause and I got zeroed on my motions for cause.

Michael Cowen:

Oh wow.

Michael Bonamarte:

And I had to use... Despite I think I'm getting... people are saying the right things. And what I learned was that... I have nothing but great thing to say about the judge, but she was receptive to rehab, either by herself or by defense counsel. I sit down, then they get up, someone says, you could be fair, they say yes. Oh, you're on. What I was doing wasn't enough.

I will say that I've done, for the last several trials, a version of Keith Mitnik's apple pie, cherry pie. Being in Chicago, I do deep dish versus thin crust pizza and it sits nicely. I thought that it was an original idea until I went back to Don't Eat The Bruises and of course Keith says deep dish versus thin crust in Chicago, which I pointed out to him after the trial.

But what I thought was, I had to switch gears day two, because we had to use four peremptories of our seven on the first day, and I was a little bit nervous based on what had happened. I went to one of the shows. My founding partner Steve Levin is also a junkie for all things related to trial strategy and storytelling and voir dire, and he said that Keith has something out there on staving off of rehab. And I looked at it. It was really helpful. I put some of my own little twist on it, but it's the whole mutual respect part of the process.

What it was was I do the same type of thing. Someone starts out ahead, and then you throw a bone to the other side. Because inevitably people will say that I start out ahead even though I'm only asking whether the defense starts out ahead. Then you say, "I appreciate you respecting the process. You've been honest with us, you've respected this process and it's a process of mutual respect. What is meant by that? You respected the process by being honest with your answers. We'll respect you by the fact that no one in the courtroom is going to twist your arm and try to get to change how you feel." I took it maybe a step further and I said, "You might even get asked whether you could be fair and you'll probably say yes, but that doesn't change the fact that the other side starts out a little bit ahead." That worked wonders. And it wasn't a huge difference from day one to day two, other than that exception, but the genius of it is that no one really even touched these witnesses and even tried to rehabilitate them, because they probably figured they'd look like an asshole if they do that.

I went from using four peremptories to having either all of my motions for cause granted or agreed to and using zero peremptories on day two. That was obviously huge.

But after the initial... For those of you that don't know, the pie or the pizza, or whatever analogy, that's to introduce bias as a concept. Bias or prejudice don't have to be bad words in this courtroom. I don't particularly like deep dish pizza. I'll eat it if it's in front of me. But what you do is you ask the jury to divide themselves. And it was interesting, the first day everyone loved deep dish and the second day everyone liked thin crust. But once you've introduced that concept you say, "I want you to imagine that I as a lawyer am asked to judge a pizza-making contest. And Mr. Smith over here is making deep dish and Ms. Jones over here is making thin crust. Who here thinks that I should tell these contestants that I don't particularly like deep dish?" Everybody raises their hand of course, because that's the fair thing to do. "And who here thinks that by telling them that that somehow that makes me an unfair person?" No one raises their hand.

By exposing your bias towards something lighthearted like pizza or whatever it is, you actually conveyed the idea of the concept that that's actually the fair thing to do. And then this is obviously not about something as lighthearted as that. It's about a medical malpractice, birth injury, and you go into who here has feelings about that? It just flows really nicely. And again, I think Keith is just one of those lawyers out there that, for lawyers of all levels of experience especially... Well, I shouldn't even say especially. Of all levels of experience, he's someone that I think puts out material that's really instantly usable. And this is a perfect example, because it happened overnight basically. Something I watched really change the progression of voir dire the next day.

Michael Cowen:

Yeah, that's one thing I like about Keith's stuff, because it's got stuff, I think, for anybody. But even after over 120 trials, I'll still like... "Okay, that's great. I'll try that." It's really effective, practical stuff instead of just some grand theory. And he tests it. I mean, he's trying cases all the time, which makes a huge difference.

I want to just ask real quick, why did you all seek 18 jurors instead of the 12 and two alternates like you normally would?

Michael Bonamarte:

I may have been less than clear.

Michael Cowen:

Okay.

Michael Bonamarte:

We actually only ended up with 12 and two alternates.

Michael Cowen:

Okay.

Michael Bonamarte:

We were hoping to get more alternates, but that would've had to be... We would've had to have another day of jury selection. It just worked out that we had 14. What I meant was that for the questioning during jury selection, I had to question 18 at a time.

Michael Cowen:

Okay.

Michael Bonamarte:

Which, I don't know. Maybe that's normal in other jurisdictions. It seemed a lot for me, given we also were somewhat limited on time, which is another reason why I think introducing bias in a simple way helps get to the point, and you can do the voir dire a little bit faster. Because I don't think I even got to a lot of the planned topics on day two. It was just so effective how it went when I was staving off rehab, just talking about personal injury, med mal cases.

At least in Cook County in my experiences we've only had to question 14 at a time. But it presented a little bit of a challenge, because they had 18 in the box.

Michael Cowen:

Well, you're lucky. Try 48 and getting 30 minutes with it.

Michael Bonamarte:

Right.

Michael Cowen:

How about opening statement? What was your theory for opening statement and trying to, again, simplify a complex case?

Michael Bonamarte:

My partner Margaret Battersby gave the opening statement. I did all of voir dire, she did the opening, I did the closing, and then we sort of divided up between four of us the different examinations. I begrudgingly did a direct. Margaret and I joke about prior trials that we've had together. There was one where I actually offered to do two of the planned cross examinations that she was going to do, if she would do one direct that I was going to do.

But the opening was certainly more scripted. We also worked with Eric Oliver in this case, who helped us with... I've worked with Eric quite a bit. I'm a big fan of how he likes to present the cases, which I think is some... There's a lot of similarities between what he and David Ball do. I think a major difference is that, and I think it flows nicely, is that he presents the right way first. How is it supposed to look? And it was pretty simple. I mean, I actually have Margaret's opening in front of me. We started off with what's the basic premise when a first time mom comes into the hospital? A safe vaginal delivery is the goal. But when the circumstances changed and a safe vaginal delivery no longer seems likely, then you have to go to plan B. That's as simple as this case was.

We kind of divided it up into two stages of labor: the uneventful first stage of the labor, which started on October 15th in the late afternoon and continued into the morning of October 16th. Everything's okay, although it's going a little bit slow. When the doctor leaves, she's clearly... And this is a big point. I think why the... I, at least when I looked at the case, and obviously the jury based on the result believed the attending doctor, is that it is documented in the medical record from one of the nurses that the doctor indicated that she was contemplating a C-section because just of the slow progress. That alone was enough for her to start contemplating a C-section.

When you add in everything that happened over this period of time, 9:30, 10 o'clock in the morning up until the time of delivery, which was 1:28, I mean, it's weird how things stick with you. I remember the

time, the prolonged decelerations now as I'm talking about it. But I think that's why our side of the story was believable, because there's documented objective evidence in the medical record. Which, as I'm saying, it ties into why I think the jury believed us on the causation. Because all of the objective evidence said the baby has HIE, not some unknown, unidentified genetic condition that caused this fetal growth restriction absent any visible damage or abnormalities in the brain but for the brain damage.

I mean, that was another thing. I mean, one of the defendant neurologists in his deposition said basically... This was a clever question by one of my colleagues that was working up the case. It's like, "So, we can probably do all the genetic testing known to mankind. It may not reveal anything, but you're still going to have the opinion that this baby had a genetic condition," and he said yes. That's just something that you can't... That just shows the bias on his part. I mean, there's nothing we were ever going to say to this guy that would change his mind. I cross-examined him via Zoom at the trial, which was a bit of a challenge. I would've liked to have him live I think.

Michael Cowen:

How did Margaret set up this dichotomy of either you believe one set of people at the hospital, or you believe the doctor and were suing both of them?

Michael Bonamarte:

Well, I think we soft played why we were suing the OB-GYN. I mean, it was very clear that we were putting everything on the hospital. I don't think we really minced words. Even our own expert said, "Look, if the defendant OB-GYN attending knew all of these things, then the standard of care would've required him to deliver." So his testimony in terms of a criticism, if you call it that, against the OB-GYN was sort of hypothetical, because it's just a issue of the facts. And our position was it's not really for us to decide. You have to decide the facts.

Then from the OB-GYN's position, her case is, "Look, I sort of agree you got to decide the facts, but this is why our testimony's more credible." She's maintained her story for seven years. She wrote a letter after this event saying that she was upset by what happened. She was shocked when she got to the hospital and delivered the baby to find that the baby was brain damaged. The medical records say she was contemplating a C-section and none of the nurses or resident physician had any memory of telling her this. They just said that they believe they would've, because that's their custom and practice. I don't think we had a choice but to keep her in, but it was very clear how we put the case on that we were targeting the hospital and the residents and the nurses as the main culprits here.

Michael Cowen:

Yeah. I'm guessing there's nothing in the medical records indicating that they informed the doctor of the changes.

Michael Bonamarte:

No. There were a couple of conversations, but even those sort of hurt them. I'm trying to remember. There was one that said something and then they... Oh, told of a vaginal exam. Told the results of a vaginal exam. And whichever obstetrical nurse or resident testified about it said, "Well, when I talked to her and told her about that, obviously I told her everything else that was going on." It was one of those situations where they could not point to any documentation to clearly say that they informed her of these specific findings on the fetal heart rate strips.

Voiceover:

Each year the law firm of Cowen Rodriguez Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death or catastrophic injuries and would like to partner with our firm, please contact us by calling 210 941 1301 to discuss the case in detail and see where we can add value in a partnership. And now, back to the show.

Michael Cowen:

You said it was a four-week trial. How much of that time was y'all presenting the plaintiff's case and how much of that time was the defense putting on the defense case?

Michael Bonamarte:

Let's see. Well, it's probably four weeks all in. We started right after Memorial Day. We closed on June 23rd. I think most of it was in our case, because the defendants... In Illinois, and I'm sure in other jurisdictions, we are allowed to play statements from the discovery depositions of the defendants. In our case in chief we actually did not call anyone adversely. And then the defendant hospital who employed the residents and the nurses did not call any of those individuals. The only defendant that was called live was the attending OB-GYN during her part of the case. I think ours was probably two weeks and theirs was probably one week to seven days, and then there's probably about four or five days of motions in limine and jury selection combined. Ours was a little bit longer.

Michael Cowen:

Why do you think they didn't call their people live?

Michael Bonamarte:

Because it would've given us another chance of cross examining them.

Michael Cowen:

And then what was your strategy for playing their discovery deposition clips instead of calling?

Michael Bonamarte:

Well, traditionally it's because it sort of give us two bites at the apple. In this case I think that factored into it, but it was just strong statements that we had for each of these individuals. We really put a lot of thought into the way that they were organized when we put them on, so it just nicely polarized all of the defendants against each other and took us out of that discussion the way we did it. I've done it several times.

I did it in another case with Eric Oliver where I got a \$12 million verdict in a failure to diagnose lung cancer for a 40-year smoker that was 70 something years old at the time. You want to talk about a scary voir dire, I'll digress for two seconds. The first question I asked during that voir dire was, "My client smoked for 40 years. She developed lung cancer and now she's suing her doctors because they didn't diagnose this. How do y'all feel about that?"

Michael Cowen:

Wow.

Michael Bonamarte:

People start raising their hand and the first person that raises their hand is holding up an imaginary pack of cigarettes and they're saying, "Well, there's a label right here." In that case I made seven... And then I'm of course, "Who else feels that way?" Everybody's raising their hand. I'm going into panic mode, thinking there's no way we're ever going to win this case. But I made seven motions for cause of the first 14 that I question and the judge granted six of them in that case, and we ended up getting a big verdict. We've done this in other cases where... I think if you give it enough thought in terms of how you're presenting the admissions... For example, in that other case that I just digressed to for a second, we would play the admissions of the radiologist and then we would call our radiologist live.

Michael Cowen:

Right.

Michael Bonamarte:

Now the jury is thinking, "Boy, the defense has admitted to a lot of things that the plaintiff's own experts say." And now we're setting the stage for later cross examinations of the defense experts. Because both in this case and in that other case, and I'm sure other ones, the defendants have admitted to things that are sort of what the plaintiff's experts are saying. Now they're just like hired guns basically that are coming in and saying the complete opposite, or at least ignoring all the objective evidence and the testimony that's been given to date in the case.

One of the defense experts in this case was the maternal fetal medicine doctor. I'll just tell you a funny story, because this has never happened to me before. He has a reputation for not always being that prepared. I have not had any personal experience with him. But during his direct examination, the defense lawyer put up no medical records, no fetal heart rate strips. All he had in front of him was this demonstrative timeline that of course left out a lot of the key information, at least what we thought was key information. And my partner Margaret is sitting next to me and I'm literally about to stand up for the cross examination, and she whispers, she says, "I think you could trick him a little bit." And I said, "Margaret, I don't think I'm going to have to. Just watch." I decided that the first question I'm going to ask the guy, "Doctor, what are the names of the three resident physicians whose conduct you've been hired to defend in this case?" Dead silent.

Michael Cowen:

Wow.

Michael Bonamarte:

I mean, dramatic. Because I'm letting it linger. And I don't like to stand behind a podium, so I'm pacing around, looking at my... My lawyers are fighting to contain their smiles. A defense table... The lead attorney has got his head on his chest like this. There's a representative from the hospital whose eyes are as big as her head. She's leaned almost across the table. And I let it go for about 30 seconds to a minute. And finally the guy blurts out the name of a doctor that had been involved on October 15th. Recall that nothing was going on. This guy's not a defendant in the case. I said, "No doctor, he's not a defendant." Then he says, "Well, Dr. Johnson, she's the OB-GYN." I said, "No doctor, she's got her own lawyer. He's sitting right there." Then finally I let him go and I just tell him the names. But after that, the cross examination was sort of over at that point.

Michael Cowen:

That's great, because the jurors don't...knowledge of who's telling the truth in the medicine, but they know that you don't know your own client's name.

Michael Bonamarte:

You would think, Michael, right?

Michael Cowen:

You would think. Well the thing is because it doesn't matter. They're going to say the same thing every time no matter what the facts are, so why do they have to look at them?

Michael Bonamarte:

Right. Another just funny story. I hope it's not one where you had to be there, but we were trying to come up with analogies. Because what they were really doing, they were saying fetal growth restriction, therefore abnormal brain development, without really making the connection as to how. They couldn't identify a part of the brain that was underdeveloped or developed less than optimally. It was like they were missing a link.

And we were trying for weeks to come up with analogies. I had said, for example, if you're in the NBA, you're probably tall. But not all tall people are in the NBA. I didn't like it and there were a few others that I didn't like either. I can't remember what we settled on.

But in the minutes before I was going to give the closing argument, the judge had actually come out, I saw Eric Oliver sitting next to my partner, John Perconti in the gallery, I run over to him and I've got about two minutes before the closing's about to start and I said, "Eric, I hate all of our analogies. I don't like them. I don't feel comfortable with any of them." His first response is to go like this. Like, "You're telling me now? You're about to give the closing argument." And he said, "Well, you could use Bob Nora." Because we had talked about the fact... Bob Nora is a defense lawyer. He represented the attending OB-GYN who got a not guilty, and I have a very nice relationship with him. He's about 6'5. Maybe when I was playing high school football, basketball and baseball, I was probably listed at 5'9, 5'10, but it's probably a stretch. I'm probably about 5'8. And I run over to Bob and I said, "Bob, I may ask you to stand up during my closing argument. Would you just do it?" And he says yes.

So I'm sort of talking about the baby wasn't overly small, he was like five pounds, three ounces. The baby's lot in life wasn't predetermined by this fetal growth restriction. And I said, "Bob, stand up." And I go shoulder to shoulder with him and he's about a head taller than me. And I looked at the jury and I said, "Ladies and gentlemen, people come in all different shapes and sizes." And the judge starts laughing, the jury starts laughing, the gallery starts laughing. It was probably one of the more memorable moments that I think I've had in a trial. Obviously I can smile about it because we won. I would never talk about it had we lost. But it was pretty funny. I'll talk about it for years.

Michael Cowen:

Absolutely. What else would you do to bring it home and motivate your good jurors to go back into the jury room and fight for you?

Michael Bonamarte:

I think on the topic of the damages, it hit kind of close to home. I mean, this is just an interesting sort of symmetry. I have a daughter that's seven. She turned seven on June 22nd of 2015. I was giving the closing argument on June 23rd on behalf of a, at the time, seven-year-old boy who was brain damaged. I

can get a little bit emotional when I'm thinking about some of the people that I represent. I always go home and prepare for my closing argument at my house. I got a good setup. No one's there, no one bothers me. If I need something, I call people at the office. I was fortunate that I got to take a quick break, say happy birthday to my daughter.

And of course, when I was prepping for the closing argument, I was thinking to myself, "I'm not going to make it through," because I'm crying at my house as I'm thinking about the parallels between what this boy has to deal with and what his mom has to deal with and what he's going to have to deal with for the rest of his life, versus all of the opportunities that I'm able to afford my daughter and my partner Margaret's able to give her kids. For some reason that was just making me really emotional, on top of the fact that it's my daughter's birthday. And Bonita, the mom of AJ, our client, we find out a couple of months before the trial, is pregnant. She goes into labor during the last week of the trial and has her second child, who I'm glad to say is healthy, happy. Everybody's doing great-

Michael Cowen:

Oh great.

Michael Bonamarte:

... on my daughter's birthday the day before the closing argument.

I tried to just think about that and the defense... I don't like to obviously get too personable. Well, number one, it could be objectionable, but the defendant talked about being a grandpa. And then on rebuttal I said, "I'm a dad. I have a seven-year-old. And seven-year-old kids, they're wonderfully curious. They perceive things, they understand things, they can tell you what their dreams are." And I noticed when I was talking about that, just putting... not anything overly profound, but putting it into words and things that people could understand and relate to, that I was really connecting with people. I mean, every mom on the jury was crying. I'm sure every dad on the jury was crying at least on the inside. But I think that really brought it home.

Obviously I get a little bit indignant on rebuttal. I try not to be quite as much during the opening part of the closing, but by the time you get to rebuttal, the guys talking about our experts when his own experts don't even know the names of the clients and just crazy stuff, so it was sort of a free for all.

One thing that... The 20 million was a compromised verdict, because I talked to some of the jurors and the vast majority of the damages were for the economic part. If I was going to say I was disappointed in anything, that would be it. Because I did think I really connected on the intangible part of the case. I think I've heard someone, or we've been talking about, at least in our office, about trying to make the intangible damages tangible. Pain and suffering, the opposite of that is peace and comfort. So that something has actually been taken away. And it's also a way of double counting. Unintentionally double counting.

But when I talked to some of the jurors, a lot of them stayed and talked to us, were giving us hugs. It's like a love fest after a successful trial. But they said that the majority of them were in the 30 to 35 million range and they significantly compromised the non-economics. Gave every bit of our life care plan, which was in the 15, 16 million. It was finally a chance where I really just got to bring everything home in terms of pointing out the ridiculousness of the defendant's, quote, "genetic theory" and just really hammering all of the objective evidence that we had in our favor.

Why they never really got serious in terms of settlement, I don't know. I was not involved when we had mediated the case years ago. I think officially they'd offered five. They offered a high low and we turned it down and just worked out good. I mean, we gave the case to the jury on the 23rd, they deliberated for

three hours, three or four hours, and then they came back the next day after another three or four hours and it was a good way to start the weekend.

Michael Cowen:

Absolutely. I want to kind of changed gears. You did such a great job in that trial, but one thing, you're not just a trial lawyer, you're also one of the managing lawyers at your firm. You and I were talking a little bit before the show. You talked about how a lot of times you're coming in, like this case, closer to the end when other people at the firm have worked up the case. How do you run a firm in a way that allows you to get great workup done through others?

Michael Bonamarte:

One of the things that I didn't mention to you before is the longevity of the people that we have. I've mentioned my partner Margaret who tried this case. Any time she asked me to get involved in a trial, I'm really comfortable that no stone has been left unturned. But our younger partners and our more senior associates, almost everybody that we have here, with some recent exceptions, started at the firm either as a first year lawyer or even before that as a law student.

We have, I think, the 10 or 11 partners and we've broken things down a little bit into different team approaches and each of us has our own things that we're particularly good at or we like to talk about. I mean, I have a partner, Cari Silverman, who can teach any associate how to set up any type of case. I get more involved in the strategy and the case plan and who to depose. I get involved in cases once they're set for trial at different times, depending on the magnitude of the case, who's worked the case up. With someone more experienced I could jump in three, four, five, six weeks in advance of a trial. I think it's actually a really good thing, because I get into the weeds, obviously, and I understand the details and I understand the medicine. But I also can see the big picture as somebody that's really reading all the testimony for the first time.

Michael Cowen:

Well, I think that's so important, because the jurors are seeing it the first time. And you've been living a case for years, everything becomes second nature. You have this curse of knowledge and it's just like, "Well, everyone knows this."

Michael Bonamarte:

Right.

Michael Cowen:

But coming in fresh towards the end, you really do get to look at it like a juror would look at it and you see the missing links, you see the holes, you see where we're skipping steps and you really can come in and helps solidify the case. It's a fun way to practice. If you're with people to do it right.

Michael Bonamarte:

Right. I think that we have a really solid group of younger partners, senior associates, and younger associates that... I'm 43 years old. Most of the lawyers at the firm are younger than me and I don't consider myself to be an old guy. But it's really exciting, because I think the firm is in a good position. But it's also... I think we have a responsibility to make sure that all of these younger lawyers are getting the right type of supervision. And when you have enough younger partners and senior partners that are

really invested in the success of the firm and really want to do right by the clients, we take a very, very collegial approach to the practice of law. People have their caseloads, but they know, with some exceptions like right now, because my door is closed and will remain closed because I'm starting another trial next week with Margaret; we have an open door policy. I regularly talk to lawyers every single day. My door's always open. They know how to reach me. I make myself accessible. I think when you do that with younger people, they're receptive to that and they want that.

It's hard in our business, I think, hiring. It can be difficult. Because I don't know. In a 15, 30-minute interview, what are you going to find out about whether someone's got what it takes to be a trial lawyer? I mean, frankly, I ask people to tell me something about themselves that's not on their resume, just to get them talking to see if I can have a conversation with people. It's not perfect, but we have a really solid group in place right now that I think are eager to learn, that are receptive to the ideas that we have, that are receptive to the fact that there is a ton of information that's available to them on the internet and at seminars and things like that. There's, I think, a certain it factor when it comes to being a trial lawyer, but I think we've got a lot of people that can do it and I'm excited about it.

Michael Cowen:

Yeah, me too. And I share what you feel. Practicing with other people that are all trying to get better and all trying to do a good job, it just brings joy. That makes it more fun to go to work every day. Having that collaboration and not being stuck in an island, like I was when I was solo decades ago. It's a great way to practice.

Michael Bonamarte:

And you got to remind, I think, the younger lawyers, what we're doing. Every trial that I've had, there's a couple losses in there obviously too, I send an email out and I talk about what happened and who we represent. I tell stories about what these people have said to me and how appreciative they are. Because sometimes, especially when you have a lot of cases, you think of them as a case and you lose sight of the fact that these people have a story. This is their only case. They are looking for somebody to tell that story for them. To speak up for them, to stand up for themselves.

We've been talking lately about there's been a period of time... I don't think we're living in it right now, but there's still people out there that think trial lawyers are the bad guys. And no matter what you think about us, we're standing up for people that were screwed over. I think that when you... We remind especially the younger lawyers that you don't have 30 or 40 cases. You've got a bunch of individual clients that need our help. And when you do right by them, the joy that they feel and the level of appreciativeness that they express to you, it means the world. I mean, there's not a better feeling in the world after you've resolved a case, either successfully by settlement or by trial, to have your client reach out to you and say nice things about you or-

Michael Cowen:

Absolutely. I've got one last question. You don't have to answer it if you don't want to. We can edit it out, because it's not a question that I told you I was going to ask, because it's not one that I normally ask. But you seem self-assured enough to maybe answer it. Everyone likes to talk about their wins, and you've had lots and lots of multimillion-dollar wins. But you admitted that, like most of us who've tried cases, you haven't won every trial. How do you bounce back after a loss?

Michael Bonamarte:

The way you can bounce back after loss is by feeling that you did everything you could. What would be hard, and I know that this is maybe a bit nuanced, I think it would be hard to bounce back from a loss if I didn't feel like I left everything on the table during that trial.

Michael Cowen:

Yeah.

Michael Bonamarte:

You might be on the right side of the case, but you're not going to win necessarily every one. I mean, I experienced it once early in my career in a case I tried with Steve Levin. And I bounced back pretty quickly, because the jury came up and said that they loved everything that we did. They thought that the doctor was negligent. They just didn't think that the anticoagulants had enough time to work to fix the pulmonary embolism that was massive that our clients suffered for.

I guess my advice is, if you try a case and you've got, let's just call it a good case, which I think really just means there's upside, you can ring the bell. There's egregious conduct. It's a gut feeling. I mean, no one knows the value of a case except for 12 jurors. I mean, prior settlements are sort of meaningless. They're what a couple of lawyers decided under different facts, under different circumstances at a different time what a case was worth. That doesn't tell you what your case is worth. As long as you put everything out there, it just happens.

I mean, it sucks. It's the worst feeling, I think, in our profession. I don't know what can be worse. Am I missing something, Michael?

Michael Cowen:

No, you're not. You're not.

Michael Bonamarte:

Than losing your trial. But you know that there's a next one and you know gave it your best shot. Most of the time, even when... I think there's been two or three cases I've lost. I'm saying two and a half, because one, there was a settlement in the middle and I thought it was a really hard case. It was kind of a half lost but not a full loss. But all of those people have been afterwards extremely appreciative that I stood up and fought for them, because that's what they're asking for.

Michael Cowen:

Absolutely.

Michael Bonamarte:

Yes. They want to be compensated for the wrong that they went through. But how many times have you heard when a client calls you that they're not in this for the money?

Michael Cowen:

Yeah.

Michael Bonamarte:

I mean, everybody says that. And I'm sure some of them want to be compensated and rightfully so. But most of the really good people that you represent, after I've had a loss, have said how thankful they were that I at least fought. And that's all you can do. It's like anything else in life. You don't win everything.

Michael Cowen:

We only control our output. I think all we can do is put it all in there and just know if you get back in there the next time, you got a shot at winning the next one.

Michael Bonamarte:

Right. I mean, there was a smaller case that I tried. It was an ankle fracture where a woman's husband... I'll admit, I was not particularly excited about trying the case. I tried to resolve it. I called an adjuster up that I knew from a company. I said, "What's going on with this adjuster? Why won't you just settle the case? We could settle it for 100, 200 grand." It was an ankle fracture. It healed in three months and the guy died a year or so later of unrelated causes. I'm not thinking I'm going to bring the bell there.

That was a situation where the adjuster sort of made it easy, because they offered like 25,000. I said, "All right. I'll just take a shot." And we got a \$550,000 verdict and that woman was so happy. She was an older woman. It was her husband who was in a skilled nursing facility. She was so happy. Her husband had been dealing with a lot of medical conditions and this actually just... It doesn't sound crazy, but when you're already dealing with a lot and you add insult to that, it's tough. That woman, months later, sent me and my wife baby clothes for my daughter. It was one of the prouder cases I've tried. Half a million dollars for an ankle fracture. Most of the clients are like that. They're just appreciative of you standing up for them.

Michael Cowen:

Well Mike, thank you so much for coming on the show. I know I've learned a lot. I hope all of our listeners have learned a lot from you too. If someone wants to find you or reach out to you, talk about a case or to follow up on something, what's the best way to find you?

Michael Bonamarte:

Two numbers, on my direct number, 312 516 1129, or my email address is M, as in Michael, F as in Frank, B as in Boy, @lavinperconti.com. That's L-E-V-I-N-P-E-R-C-O-N-T-I.com.

Michael Cowen:

Thank you. Just a couple things closing out. I'm going to be on the road speaking at some events. If you guys are at any of these events, please come by and say hi. I love it when people come by and tell me that they listen to the podcast. It just makes me feel happy. I'm going to be at the Trial Lawyers University event in Las Vegas from October 27th through 29th. On the 29th we're actually going to be recording some podcast episodes live. So, if you want to come and watch us record one, you can do that. We'll both be speaking and actually having workshops where you can bring a case and I'll help you brainstorm one of your cases.

I'm also speaking at the AAJ Trucking College in Denver, Colorado, November 7th through 9th. Again, that's another one where we will be working with people in small groups as well as teaching. It should be fun. It's a great opportunity to develop your skills. And at the Indiana Trial Lawyers Association

Conference November 17th through 18th in Indianapolis. I'll be there as well. If you guys are at any of those, please come by and say hi. I look forward to talking to you.

Michael Bonamarte:

Thanks for having me.

Michael Cowen:

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Voiceover:

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