

20387

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael J. Baxley, Circuit Court Judge

Case No.: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
Jayden W., a minor.....Appellants,

v.

Edmund Rhett, Jr., M.D., Low Country Obstetrics and Gynecology, P.A.; Tenant South
Carolina, Inc. d/b/a East Cooper Regional Medical Center and AMN Services, Inc. f/k/a
Nurses RX, Inc.....Defendants,

Of Whom Edmund Rhett, Jr., M.D. is.....Respondent.

RECORD ON APPEAL
VOLUME 3

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1 legs?

2 A. He didn't like it at all.

3 Q. When did Jayden start talking?

4 A. I don't remember exactly how old he was
5 when he started talking.

6 Q. Were people able to understand him?

7 A. No.

8 Q. Were you able to understand him?

9 A. I was because I was with him every day.

10 Q. You said that you received therapy
11 services through BabyNet. How long did that
12 continue?

13 A. He received services from BabyNet until
14 he was three years old.

15 Q. And after three, did he stop therapy?

16 A. No. They referred me to a private
17 practice or he would either be going to
18 outpatient therapy at the hospital.

19 Q. Who took him to those appointments?

20 A. I did.

21 Q. Did you sometimes have to miss
22 appointments?

23 A. Sometimes, but most of the time we made
24 it.

25 Q. Were you satisfied with the therapy

1 services that Jayden received?

2 A. Jayden received therapy from a number of
3 different places. He went to Richland
4 Memorial Hospital, he went to MUSC, he went
5 to lots of private practices -- and out of
6 all those practices, I was disappointed in
7 one of them and I discontinued services
8 there.

9 Q. You said that he went to Richland?

10 A. Yes.

11 Q. Did you take him there at some point?

12 A. I moved back to Columbia in May of 2003.

13 Q. What were you doing in May of 2003 in
14 Columbia?

15 A. I was trying to go back to school.

16 Q. How did that go?

17 A. It did not go at all. It was too much.
18 I couldn't -- I didn't realize that he was as
19 sick as he was, and he needed therapy, he
20 needed to be at his doctors appointments and
21 then -- he needed so much that I couldn't
22 concentrate in school. So I stayed in
23 Columbia for a couple of years and then I
24 moved back to Charleston in 2006.

25 Q. While you were in Columbia, did Jayden

1 continue to received medical care and
2 therapy?

3 A. Yes.

4 Q. Who is paying for Jayden's care?

5 A. I believe that Medicaid is.

6 Q. And you paid for Jayden's therapies?

7 A. Medicaid.

8 Q. In your experience, are there any
9 limitations on what Medicaid will pay for?

10 A. I am not sure if there are limitations.

11 Q. Have you been able to get services and
12 therapy?

13 A. Yes, sir.

14 Q. Are you able to choose whatever provider
15 that you want to use?

16 A. Not in all cases -- it just depends.

17 Q. Is Jayden in therapy now?

18 A. Yes.

19 Q. Where does he receive therapy?

20 A. At Charleston Pediatric Rehabilitation,
21 Outpatient, and in school.

22 Q. How often does he have therapy
23 appointments outside of school?

24 A. Tuesday and Wednesday.

25 Q. Do you take him to his therapy sessions?

1 A. Yes.

2 Q. What kind of things -- do you meet with
3 the therapists there?

4 A. I do. My concerns, and I also ask them
5 how to work on certain things sometimes.

6 Q. What types of things do you ask the
7 therapists to work on?

8 A. Recently I've asked them to work on
9 reading. Reading skills are really hard for
10 him.

11 I've put him in different sports because
12 I thought that that would help with his
13 physical therapy, and she told me that that
14 was good.

15 And I just let them know his school
16 life, so that they can help him with -- be up
17 on that.

18 Q. You said that you put him in sports.
19 What kind of sports?

20 A. Soccer and basketball.

21 Q. How does he do?

22 A. I basically put him in there so that he
23 can get the exercise. He's behind like the
24 other kids but -- I put him in there for
25 exercise, and he's doing okay. He is not

1 keeping up with them but it makes him feels
2 like he is on their level. So I just put him
3 in there.

4 Q. Do you try to keep a positive attitude?

5 A. I do.

6 Q. Do you encourage him?

7 A. Always.

8 Q. What other activities does Jayden enjoy?

9 A. He enjoys playing games with his
10 cousins, playing with me. He enjoys playing
11 games.

12 Q. What kind of games does he play with his
13 cousin?

14 A. They play a video game or they'll play
15 outside, or a card game. He will just do
16 whatever they are doing.

17 Q. And he's able -- you said that he -- is
18 he able to do everything?

19 A. No, he's not able to keep up with them
20 but I let them know that 'you have to let
21 him' -- give him a chance, or 'help him do
22 what you're doing.'

23 Q. And do they help him?

24 A. They do help him.

25 Q. You said that Jayden plays basketball?

1 A. Yeah.

2 Q. Is Jayden able to run for basketball?

3 A. He is not as quick as the other kids.
4 Sometimes I feel like he can't comprehend the
5 game, but I put him in there so that he can
6 feel like he can be a part of a team.

7 Q. Does he try?

8 A. He does try verd hard.

9 Q. Is he able to shoot?

10 A. Humm -- sometimes.

11 Q. He tries?

12 A. He tries.

13 Q. How is Jayden doing in school?

14 A. Jayden is -- he's not doing well in
15 school. Just recently in the past couple of
16 months the kids have really started being
17 really mean to him -- (emotional). He will
18 come home -- he just recently came home, the
19 first of the year, with bruises on him. They
20 will bite him. They will tease him. They --
21 they pick at him, (emotional).

22 Q. Take your time.

23 A. The kids tease him about his having to
24 leave class for help, he goes to resource.
25 They tease him when they see him outside.

1 So instead of him -- he doesn't want them to
2 tease him, so he tries to act like them.

3 He will get caught up or -- for example,
4 they will throw stuff at him and when he goes
5 to throw back, he moves so slowly that the
6 teacher will catch him and she was writing me
7 notes, so at the end of the school year I
8 went to school almost every day --
9 (emotional).

10 I just started letting him ride the bus
11 and he came home with a knot and a black eye.
12 I asked him what happened to him and -- I
13 called the school and no one knew what
14 happened to him. So the next day, I went to
15 the school and I questioned everybody, I did
16 my own little investigation, because I wanted
17 to know what happened to him. So eventually
18 one of the kids on the bus said that a bigger
19 boy was teasing him and just -- hurt him.

20 So he's been acting out recently. It's
21 been hard.

22 Q. Do you participate in the educational
23 plan with the school?

24 A. Yes.

25 Q. And we heard reference to Jayden being

1 in class, a normal classroom, ---

2 A. Yes.

3 Q. Does Jayden perform the kind of work
4 that the other kids are doing in the
5 classroom?

6 A. No, no. Jayden would be in kindergarten
7 and he was -- I'd ask him teacher -- he was
8 behind, because he had to learn it, you know,
9 he wasn't on a kindergarten level.

10 After he repeated kindergarten, they
11 moved him on to the first grade; which was
12 last school year. I asked them to keep him
13 behind again because he still had not gained
14 what he needed to know. For example, if you
15 have a test in class and you have to read
16 directions like right now, 'finish a sentence
17 with these words' if he can't read that, he
18 can't pass the test. So I asked them to keep
19 him behind but they said that they can't. He
20 goes to public school and she said that they
21 can't keep him behind every year, that they
22 have to move them along.

23 Q. What grade is Jayden in?

24 A. It's like the second grade but I don't
25 know how he can make it if he can't read

1 simple directions.

2 Q. How is Jayden with making friends?

3 A. Well, he makes friends easily but he,
4 uh, -- after he makes a friend and if they
5 don't understand him, what he is saying or
6 they just feel like they don't want to be
7 bothered with him, he feels like he has to
8 follow what they're doing to keep his
9 friends.

10 Q. Jamsetta, what are your hopes for
11 Jayden?

12 A. I want Jayden to be able to live
13 independently, I want him to finish school,
14 just to have a happy life.

15 Q. What are your concerns for Jayden?

16 A. Well, my concerns are -- I mean, my
17 concerns are that he will never be able to
18 finish school or live independently.

19 I mean, if he is having problems reading
20 now, he's getting older and the older he
21 gets, I just have concerns.

22 MARY WATERS: That's all the
23 questions that I have right now. Please
24 answer any questions that counsel has.

25 THE COURT: Before you cross-

1 examine, let's take a break. We are going to
2 stand down, take our break. Please enjoy
3 your break. If you wish to step outside, we
4 will give you that opportunity. We will be
5 in recess probably fifteen minutes. Let's
6 remain where we are while the jury departs.

7 (JURY OUT @ 10:46 A.M.)

8 THE COURT: Ms. Washington, I am
9 going to ask you not to speak to the lawyers
10 on either side of the case during the break.
11 You're free to step down and take a break but
12 since you're under testimony, please don't
13 talk to any of the lawyers.

14 PLAINTIFF: I won't.

15 THE COURT: Very good. We will be
16 in recess now for fifteen minutes.

17 (BRIEF RECESS)

18 THE COURT: Please be seated.

19 EDWARD GRAHAM: Your Honor, may I
20 give you an update on our schedule?

21 THE COURT: Yes, sir. Come up and
22 tell me -- unless you want everyone to hear.

23 CHILTON SIMMONS: We would love to
24 know who the witnesses are for the afternoon
25 so that we can get ready.

1 EDWARD GRAHAM: Well, we're
2 scrambling to try to get ---

3 THE COURT: Come on up.

4 (OFF RECORD BENCH CONFERENCE)

5 THE COURT: Bring in the jury.

6 (JURY IN @ 11:08 A.M.)

7 THE COURT: Are you ready to go?
8 Need something to drink?

9 PLAINTIFF: I'm fine.

10 THE COURT: Welcome back, Ladies
11 and Gentlemen. Thank you for the notes that
12 you sent me about your scheduling. I am
13 reviewing those while we continue the
14 testimony and we will be back with you later
15 in the day.

16 You will recall that we ended direct
17 examination for the morning hour. Now we
18 move into cross-examination of the Plaintiff.
19 You may proceed.

20 CHILTON SIMMONS: Thank you, Your
21 Honor.

22 CROSS EXAMINATION

23 BY CHILTON SIMMONS:

24 Q. Good morning, Ms. Washington.

25 A. Good morning.

1 Q. Jayden's father had been in a U.S.
2 prison from the time that Jayden was born
3 until he was seven years old, is that true?

4 A. That's right.

5 Q. And you don't know anything about his
6 family history, do you?

7 A. I mean, he told me that there wasn't
8 anything to worry about. I asked him about
9 family history and he said that there wasn't
10 any problems.

11 Q. Ms. Washington, do you recall that I
12 took your deposition on June 10th, 2008?

13 A. Yes.

14 Q. If you would open that up.

15 A. (Complies).

16 Q. If you turn to Page 18.

17 A. Okay, (complies).

18 Q. At Line 22, I was asking you questions
19 about Jayden's father and I asked you, "Do
20 you know anything about his medical history?"
21 Your answer was?

22 A. "No."

23 Q. The next question was, "Do you know
24 anything about his family's medical history?"

25 Your answer was?

1 A. "No."

2 Q. Ms. Washington, are you aware that it is
3 important for your prenatal doctor to know a
4 baby's father's medical history?

5 A. Yes, I do. He wasn't really involved in
6 his pregnancy.

7 Q. Do you remember seeing a doctor in
8 Chicago, a Dr. Burton?

9 A. Yes.

10 Q. Do you remember telling her that
11 Jayden's father didn't have any medical
12 problems?

13 A. Right.

14 Q. Do you remember telling her that
15 Jayden's father's family didn't have any
16 medical problems?

17 A. Right.

18 Q. Ms. Washington, do you deny using
19 alcohol before you learned that you were
20 pregnant?

21 A. No. I used in October but once I
22 thought I was pregnant, I went to the Health
23 Department and I didn't drink anything after
24 I knew I was pregnant.

25 Q. And you are aware that it is important

1 to tell your medical provider that
2 information, aren't you?

3 A. Yes.

4 CHILTON SIMMONS: No further
5 questions.

6 THE COURT: Call your next
7 witness.

8 MARY WATERS: We call James
9 Washington.

10 (WITNESS TAKES STAND)

11 JAMES WASHINGTON, being duly sworn
12 to tell the truth, the whole truth and
13 nothing but the truth, testified, as follows:

14 DIRECT EXAMINATION

15 BY MARY WATERS:

16 Q. Good morning, Mr. Washington:

17 A. Good morning.

18 Q. Can you tell us where you live?

19 A. 775 Cartwright Drive, Charleston, South
20 Carolina.

21 Q. Who lives there with you?

22 A. My wife, one of my daughters, two of my
23 grandkids.

24 Q. Which daughter lives there with you?

25 A. Fernade (phonetic).

1 along, Your Honor, I may anticipate that one
2 ruling may affect other matters.

3 THE COURT: All right.

4 EDWARD GRAHAM: If Your Honor
5 please, our first one that we need Your Honor
6 to rule on is at Page 48, Lines 12 through
7 17. That is the question and then --
8 there's an objection to leading and outside
9 of the witness' expert. The answer obviously
10 follows the ---.

11 THE COURT: Counsel, tell me what
12 is -- who is this witness and what is their
13 expertise?

14 EDWARD GRAHAM: This is Barbara
15 Burton. She's a physician who specializes in
16 genetics at Northwestern University. So she
17 has knowledge of developmental pediatrics and
18 genetics issues.

19 THE COURT: And you want to be
20 heard on that, Ms. Simmons?

21 CHILTON SIMMONS: Yes, sir, Your
22 Honor. We certainly don't object to her
23 causation with regard to genetics, but this
24 question is clearly asking a question for a
25 neurologist, or a pediatric neurologist, when

1 it talks about does she (sic) have problems
2 with blood vessels in the brain. That is
3 outside the doctor's expertise.

4 Specifically she did genetic testing
5 on Jayden. We have no problem with counsel
6 asking her genetics opinions.

7 THE COURT: I am going to sustain
8 that. The answer says, "I don't believe that
9 there is anything wrong with the blood
10 vessels." That statement of belief is less
11 than certain in the Court's opinion, and I am
12 going to sustain that objection. Please
13 remove that exchange.

14 EDWARD GRAHAM: Yes, sir.
15 The next one, Your Honor, I believe is the
16 answer to that -- well, -- wait a minute.

17 CHILTON SIMMONS: I will be happy
18 to explain my objection, Your Honor.

19 EDWARD GRAHAM: Well, ---

20 THE COURT: Hang on a minute.
21 There is an objection to the answer. I'm
22 looking at Page 48. There was an objection
23 to the question, so we are going to strike
24 that question.

25 Then the answer, is there more on

1 that specific point?

2 CHILTON SIMMONS: On Page 49, Line

3 2 through (Page) 50, Line 14, Your Honor.

4 The question is not the problem but the

5 witness in her answer, unsolicited, she

6 starts talking about Dr. Milunsky's

7 testimony. Dr. Milunsky is our expert ---

8 THE COURT: All right.

9 CHILTON SIMMONS: --- and it is

10 pitting witnesses, clearly. I think it was

11 inappropriate, so we move to strike that

12 question and answer because she did start.

13 talking about reading Dr. Milunsky's

14 deposition and what he said.

15 THE COURT: Let me read it.

16 CHILTON SIMMONS: Yes, sir.

17 THE COURT: (Upon review), okay.

18 Counsel, I overrule the objection. I don't

19 believe -- it certainly is not indicated, the

20 question, to pit witnesses. I don't find

21 that to be a meritorious objection. The

22 witness may rely on other experts' opinions

23 and findings to render that particular

24 witness' opinion. So, overruled.

25 CHILTON SIMMONS: And, Your Honor,

1 just so that you know, she was not relying on
2 it. She was countering it. The expert that
3 she was discussing was our expert.

4 THE COURT: I follow that.

5 CHILTON SIMMONS: Thank you, Your
6 Honor.

7 THE COURT: She didn't necessarily
8 agree with it but, still, I think it's
9 appropriate for that witness to do; so I am
10 going to allow it. Next?

11 EDWARD GRAHAM: The next, Your
12 Honor, Page 61, Lines 15 through (Page) 63,
13 Line 10. This is Chilton on cross-
14 examination asking questions about the father
15 where she refers to the United States
16 penitentiary in Tucson, Arizona. We believe
17 that is completely irrelevant. He's
18 incarcerated, yes. But the specific details
19 are irrelevant and prejudicial, Your Honor.

20 THE COURT: Yes, ma'am?

21 CHILTON SIMMONS: Your Honor, your
22 ruling is that we could not discuss why he
23 was in prison, that it was armed robbery. I
24 don't believe that you said that we couldn't
25 discuss where.

1 THE COURT: How is that harmful,
2 Counsel? I mean, prison is prison. What
3 difference does it make?

4 EDWARD GRAHAM: Well, it just --
5 I anticipate that they may try to make a big
6 deal out of a 'federal crime' or something
7 like that.

8 THE COURT: At best I find that
9 harmless. I am going to overrule the
10 objection.

11 EDWARD GRAHAM: Next, Your Honor,
12 is Page 63, Line 22, through (Page) 64, Line
13 18. This is cross examination by Chilton
14 about a lawsuit against Dr Burton.

15 THE COURT: Let me read it, let me
16 see it -- (upon review), do you want to be
17 heard on why that is relevant and
18 appropriate?

19 CHILTON SIMMONS: Your Honor, I
20 just, uh, it goes to her credibility and --
21 I didn't think it was inappropriate,
22 actually. I don't see a reason why it is
23 inappropriate.

24 THE COURT: Objection overruled.
25 That's part of the credibility, believability

1 test. That's appropriate.

2 CHILTON SIMMONS: Thank you, sir.

3 THE COURT: Anything further, Mr.

4 Graham?

5 EDWARD GRAHAM: Yes, sir. The
6 next one, if Your Honor please, is Page 78,
7 (line) 19 through Page 79, Line 4.

8 This is -- you've heard this before,
9 (reading): *"If he does have a narrow or*
10 *missing transverse sinus of the brain, would*
11 *you agree that the birth process would not*
12 *cause that?"*

13 THE COURT: Let me read it. Then
14 we will come back and take argument. (Upon
15 review), all right. Tell me why you believe
16 that is not relevant.

17 EDWARD GRAHAM: Well, it is a
18 hypothetical question that has no basis in
19 this record. There is no evidence that he is
20 missing a transverse sinus or has a narrow
21 sinus. What we've got is blood compressing
22 the sinus and in the initial acute films, but
23 later on it's normal.

24 THE COURT: Well of course, that's
25 your explanation. Let me ask defense, is it

1 your position that there may be something
2 wrong with the sinus?

3 CHILTON SIMMONS: Your Honor, it's
4 not hypothetical. It's in the record, the
5 MRI. Your Honor, it is absolutely relevant
6 to causation.

7 THE COURT: I have already ruled
8 on that. Anything else?

9 EDWARD GRAHAM: Yes, sir, Page 79

10 ---

11 THE COURT: I mean, any other
12 reasons you object to that other than
13 relevance? I mean, if it mischaracterizes,
14 the jury is ---

15 EDWARD GRAHAM: I will move on,
16 Your Honor.

17 THE COURT: Very well.

18 EDWARD GRAHAM: Page 79, Lines 6
19 through 13.

20 THE COURT: All right, just a
21 moment.

22 EDWARD GRAHAM: It is really a
23 followup to the same.

24 THE COURT: (Upon review),
25 overruled for the same reason.

1 EDWARD GRAHAM: Next if Your
2 Honor please is -- Your Honor, just a general
3 comment before we get into specifics here.
4 We -- one of the reasons that we had problems
5 yesterday is that they objected to some of
6 our designations that we didn't make. Then
7 when they agreed to remove their objections
8 to designations that we didn't make, it
9 caused confusion for our videographer about
10 what that means. Does it mean that it comes
11 in when they remove their objections? Or
12 does it stay out because we never designated
13 it in the first place. It just got to be
14 very confusing, the way that they've
15 responded to our designations. There is some
16 of those on this one, too.

17 I propose to -- for example, Page
18 108, Line 4, through (Page) 109, Line 1,
19 they've objected to it but, uh, -- we didn't
20 designate it.

21 THE COURT: Is there anything
22 further that is designated that in your
23 opinion that needs to be resolved by the
24 Court? Then we will go to the defense.

25 EDWARD GRAHAM: Well, if Your

1 Honor please, they have objected to our
2 Exhibits 2 through 6, which we would like to
3 come in. Those are the test results from the
4 gene tests, chromosome tests.

5 THE COURT: All right. Tell me
6 why you believe that they should be excluded.

7 CHILTON SIMMONS: Your Honor, we do
8 not believe that proper foundation was laid
9 in the deposition by plaintiff's counsel,
10 that the reliability was not established,
11 under Rule 702, as well as just the fact that
12 the foundation was not properly established.

13 THE COURT: Do you have a
14 geneticist coming, live?

15 CHILTON SIMMONS: We do, Your
16 Honor.

17 THE COURT: And what are the
18 specific tests and what fails with regards to
19 the foundation, in your opinion?

20 CHILTON SIMMONS: The specific
21 tests the -- the geneticist for the plaintiff
22 did four specific tests: one called charge,
23 one called a microarray -- and off the top of
24 my head, I can't remember what the fourth is,
25 but they are all genetic tests. Within the

1 tests, it states that there is a margin of
2 error. In one test there is a thirty-five
3 percent margin of error. Therefore, we think
4 that those tests are not reliable and we
5 think that they should not be before the jury
6 as evidence.

7 THE COURT: All right, I am
8 prepared to rule on that. I am going to rule
9 that that goes to weight and credibility.
10 There is so much uncertainty in genetics that
11 -- again, as we discussed previously, it
12 doesn't stun the court that there may be
13 uncertainty. Unless it is shown that there
14 is something wrong with that science, that
15 the test is not an appropriate one coming
16 from another expert, the court would overrule
17 and allow those objections in -- to attack on
18 credibility and weight.

19 THE COURT: Anything further?

20 EDWARD GRAHAM: Yes, Your Honor.

21 JAY DAVIS: Before that, I just
22 want to join in Ms. Chilton's objection.
23 Also to add one argument, that what the
24 plaintiff is attempting to do is run -- is
25 to run -- to argue that four tests, out of

1 thousands, that the child would have a
2 genetic deficit. I think that's misleading.
3 The jury -- if the same expert perceives that
4 without the test, that without the genetic
5 problems, -- so what he is trying to do is to
6 use negative tests to create an overall
7 negative impression and I think that is
8 confusing.

9 THE COURT: That is -- your point
10 is well noted but, Counsel, there are risks
11 and benefits inherent in a trial. What you
12 just made was a good legal argument, also a
13 good jury argument. If he is going to come
14 in and try to paint something that is not
15 true, you can club him over the head with it
16 in final arguments or during cross or direct
17 examination on the expert that you -- so I
18 decline to grant you relief on the basis that
19 it is a jury issue. Thank you. Very good.

20 EDWARD GRAHAM: I ---

21 THE COURT: Ms. Simmons, you're
22 standing. Do you want to be heard further on
23 it point?

24 CHILTON SIMMONS: Your Honor, I
25 would join in Mr. Davis' objection. One last

1 thing that we would like to have before the
2 court is that plaintiff's counsel and I,
3 yesterday, were discussing agreeing to stop
4 the deposition at Page 95, Line 5, which
5 would take off my last -- take off my recross
6 exam and it would take off Mr. Graham's re-
7 redirect.

8 THE COURT: Okay.

9 CHILTON SIMMONS: In the interest
10 of speeding this up -- and I believe all
11 issues addressed in the recross and in the
12 re-redirect are already hashed out in the
13 initial direct and cross. So I would agree
14 with plaintiff's counsel's original removal
15 yesterday, to stop the deposition at that
16 point.

17 THE COURT: Let's do that.

18 EDWARD GRAHAM: That is what I
19 proposed to do and I'm glad that they now
20 agree to do that. But there are some more
21 that I have.

22 THE COURT: Go ahead.

23 EDWARD GRAHAM: Page 79, Line 21
24 through (Page) 81, Line 6. This -- we have
25 run into this before a couple of times, Your

1 Honor, where there will be a serious of
2 questions about 'you are not an obstetrician,
3 are you?' Then twenty followup up questions
4 which say, 'you aren't going to accuse Dr.
5 Rhett of negligence.' One time you ruled it
6 out, one time I believe that you ruled it in.
7 So we weren't sure that we had a -- we
8 weren't sure what precedent that we should
9 follow there.

10 THE COURT: Tell me again, what
11 are your lines and pages?

12 EDWARD GRAHAM: It starts at
13 (Page) 79, (Line) 21 through (Page) 81, Line
14 6.

15 THE COURT: Thank you. Let me
16 review that. (Upon review), and you --
17 argument?

18 CHILTON SIMMONS: Your Honor,
19 despite that she is a geneticist, she does
20 give some opinions out of her area of
21 expertise. So -- and, furthermore, we just
22 want to make it clear to this jury that is it
23 is absolutely relevant that she is a
24 causation witness, not a standard of care
25 witness.

1 THE COURT: Very well. I am going
2 to overrule your objection. That will come
3 in.

4 EDWARD GRAHAM: All right. The
5 next one that we have is (Page) 83, (Lines)
6 14 through 23. It's the same category, so I
7 assume the ruling would be the same?

8 THE COURT: Let me look at it.
9 (Upon review), yes, the ruling is the same.

10 EDWARD GRAHAM: And another one,
11 of similar import, Page 84, (Lines) 15
12 through 16.

13 THE COURT: (Upon review), yes.
14 Overruled. That is asked and answered.

15 EDWARD GRAHAM: Then on the --
16 there was -- (Page 94), Lines 4 through 13.
17 That is what I want in and that they objected
18 to.

19 THE COURT: Four through thirteen?

20 EDWARD GRAHAM: Yes, sir.

21 THE COURT: (Upon review), an
22 objection?

23 CHILTON SIMMONS: Yes, sir, Your
24 Honor. Overly broad.

25 THE COURT: I will sustain ---

1 CHILTON SIMMONS: Clearly out of
2 this expert's testimony.

3 THE COURT: I am going to sustain,
4 Counsel. The question asked whether there
5 was anything going on in the brain prior to
6 -- it's inartful at best but I find that it
7 is over broad. Sustained.

8 EDWARD GRAHAM: One more issue if
9 Your Honor please.

10 THE COURT: Yes, sir.

11 EDWARD GRAHAM: All of the
12 exhibits that Your Honor has ruled in over
13 their objection, the witness identified the
14 exhibit -- basically these are genetics tests
15 that had a lot of language on them. It's not
16 that easy for laymen to see where it says
17 "Negative". So in the deposition I asked her
18 if she would take a highlighter and highlight
19 the key part that says this test is negative;
20 which she did. There as an objection to the
21 highlighted copy coming in. We would like
22 for it to come in.

23 THE COURT: Do you want to be
24 heard?

25 CHILTON SIMMONS: Your Honor, we

1 have no problem with his highlighted version
2 coming in as long as my exhibits that were
3 also used at the deposition, the same exact
4 tests with my highlights on them, also come
5 in.

6 THE COURT: All right.

7 CHILTON SIMMONS: And, Your Honor,
8 I would have just had -- I asked her at the
9 time, *"Would you please highlight for*
10 *instance this portion that states that there*
11 *is a thirty-five percent margin of error?"*

12 Mr. Graham did not like the idea of
13 her highlighting my request in the same
14 document. So in an attempt to make a clear
15 record for the Court, I had her highlight a
16 different copy.

17 THE COURT: Let me -- I thought
18 that you were going to tell me that Mr.
19 Graham stole the highlighter.

20 EDWARD GRAHAM: May I be heard on
21 why they're different?

22 THE COURT: Well, I'd be --
23 certainly, go ahead.

24 EDWARD GRAHAM: Here is why they
25 are different, Your Honor. I asked the

1 witness a question, 'How you do know this is
2 a negative test?' She pointed to it and I
3 said, 'Would you please highlight the part
4 that tells you that it is a negative test?'

5 In contrast, Chilton, 'I want you to
6 highlight sentence number three.'

7 THE COURT: Okay.

8 EDWARD GRAHAM: So it wasn't
9 testimony, it was just carrying out an order.

10 CHILTON SIMMONS: Your Honor, if I
11 could just speak very quickly on this. They
12 have made a big deal about not letting
13 highlighted copies in. We agreed to that.
14 All of the records that I highlighted were
15 for demonstrative purposes. The records in
16 evidence are without highlights.

17 So if Mr. Graham wants these high-
18 lighted records in, whether he did it or his
19 witness, I would ask that our highlighted
20 version of the same tests go in.

21 THE COURT: I am going to stop the
22 tempest, folks. I am going to let it in.
23 Out of the jury's -- there are thousands of
24 pages of documents in this case and to
25 highlight something for the jury, whether you

1 agree or disagree with it, if one side gets
2 the highlighted in, the other side may
3 highlight what was highlighted.

4 EDWARD GRAHAM: May I tell you
5 one more thing real quickly, that's critical
6 to ---

7 THE COURT: All right.

8 EDWARD GRAHAM: She didn't get to
9 this to recross and she's agreed that her
10 recross comes out, so it won't be played in
11 front of the jury where she orders the
12 highlighting.

13 THE COURT: Tell me this, what is
14 it that wounds you so grievously in what
15 she's highlighted?

16 EDWARD GRAHAM: It just ---

17 THE COURT: It must be awful.

18 EDWARD GRAHAM: No, it just
19 confuses things.

20 THE COURT: Well, why don't we
21 chose a different color highlight, so that if
22 -- if that would help contrast. But I am not
23 going to let you be able to highlight
24 something that calls attention of the eye and
25 then strip from the defendant -- it is just

1 not defensible to do that, regardless of how
2 you question or attack what she chose to
3 highlight.

4 EDWARD GRAHAM: But -- if Your
5 Honor please, the jury won't see that part of
6 the deposition and those exhibits won't come
7 in through the deposition because they were
8 part of the recross that has been designated
9 to come out of the deposition.

10 THE COURT: Well, didn't I
11 understand that -- I permitted those exhibits
12 in. She covered it in recross. The recross
13 is not going in but -- to save time -- what
14 she highlighted nevertheless was highlighted,
15 so I will allow that which is highlighted.

16 EDWARD GRAHAM: It wasn't high-
17 lighted on Plaintiff's Exhibits 1 through 6.
18 She put in totally separate exhibits in a
19 different part of the deposition than will be
20 played.

21 THE COURT: Are they the same
22 exhibits, just a different copy with
23 different highlighting?

24 CHILTON SIMMONS: Yes, sir.

25 THE COURT: Well, ---

1 CHILTON SIMMONS: He didn't want me
2 to have the witness highlight the portion
3 that I wanted her to discuss.

4 THE COURT: This is not that
5 complicated, folks. Take the same documents
6 and put a highlight on it of one color for
7 the defendant and a highlight of another
8 color for the plaintiff. You can put a
9 little key up at the top: Defendant's
10 highlight, Plaintiff's highlight.

11 Really it is all to help the jury.
12 This case, I assure you, is not going to turn
13 on what may or may not be highlighted in the
14 exhibits that the geneticist -- I am just
15 trying to do what is fair. Anything further?
16 Let's move on to some productive. Anything
17 further?

18 MARY WATERS: Your Honor, just
19 for clarification, Ms. Chilton referred to
20 the records that she highlighted as the
21 cross-examination of Jamsetta. Does your
22 ruling extend to that or just as to Ms.
23 Burton?

24 THE COURT: Earlier today --
25 yesterday -- well, the first day of this

1 trial, I let in a document that was
2 highlighted. I recall seeing it here. I did
3 that because of the volume of it. You took
4 out something highlighted today, and that's
5 fine, let's leave it like that. I am just
6 really referring to what we are doing in this
7 one particular document. All right?

8 MARY WATERS: Yes, sir.

9 CHILTON SIMMONS: Thank you, Your
10 Honor.

11 THE COURT: Is lunch here yet?

12 CLERK: We are checking now.

13 EDWARD GRAHAM: Dr. Greer is
14 here.

15 THE COURT: How long will her
16 direct take?

17 EDWARD GRAHAM: I estimate forty-
18 five minutes.

19 THE COURT: All right. Let's just
20 stand down and give the jurors a few minutes
21 extra for lunch. My anticipation is that we
22 will take about thirty minutes for lunch. I
23 know that's not long for the rest of the
24 group here, but let's take somewhere between
25 thirty to forty minutes, depending on the

1 call of the jury. When they are ready we
2 will come back.

3 One other thing, Counsel. I need --
4 I received some notes from the jurors. The
5 are five numbers who have scheduling issues.

6 One of them told me that he was
7 going on a family vacation. I've wrote a
8 note that said, "What day are you leaving?"
9 The response, "I wish to speak to you on this
10 in person." So if there is no objection --
11 and I don't want to name the juror because I
12 don't want that to drive the decision that he
13 made about it, but is there any objection to
14 me going and responding to that note from
15 that one juror, to speak in person, about
16 what day that his vacation starts?

17 EDWARD GRAHAM: Not from the
18 plaintiff, Your Honor.

19 MOLLY CRAIG: No, sir.

20 THE COURT: Very good. We will
21 stand down subject to lunch and return of the
22 jury from lunch.

23 (LUNCH RECESS 12:50 - 1:30 P.M.)

24 THE COURT: Thank you, please be
25 seated. I've spoken to the plaintiff's

1 lawyer individual and one of the defense
2 lawyers about -- not about the merits at all
3 of this case, but Ms. Simmons, could you step
4 up for just a moment, please.

5 CHILTON SIMMONS: Yes, sir.

6 (OFF RECORD BENCH CONFERENCE)

7 THE COURT: Our jurors are ready
8 but let's talk a moment about scheduling. I
9 have -- I asked the jurors yesterday whether
10 anyone had a scheduling concern, and we've
11 gotten back five notes. I mentioned to you
12 -- and it was off the record, so we'll put it
13 on the record now. Tara (Clerk) had asked
14 the jurors 'if you have a scheduling issue,
15 please put it in writing to the court.'

16 I want you to know that, without
17 calling any names, these are all the
18 responses of the twelve, uh, two have
19 absolute -- have prepaid vacation plans,
20 which they absolutely need to go if we go to
21 next Monday, which means that I'd have to
22 release two for that.

23 One of those is going to leave on
24 Saturday but, in the spirit of trying to say
25 their juror responsibilities, has agreed now

1 with their family to leave on Monday.

2 A third juror starts work next week,
3 not on Monday but later in the week, but has
4 some medical appointments that she had set
5 beforehand. While we would probably have her
6 for Monday and Tuesday or next week, once we
7 got beyond that we would lose that juror.

8 Four -- the fourth concern was a
9 juror who says that they would have to leave
10 by 2:30 on Saturday if we worked on Saturday
11 because they have a commitment which they
12 cannot change -- of longstanding duration.

13 The fifth response was just someone
14 who said that if we go into next week that we
15 will have to give this juror an excuse
16 because their work apparently would be a
17 little doubtful.

18 Now, the gist of all this is that
19 without a doubt we need to stay with this
20 case and work through Saturday, and hope that
21 we can conclude this case on Saturday, rather
22 than going into next week. That is going to
23 cause major problems, not only for our jurors
24 but for court schedules -- I am sure
25 witnesses and other of interest. It's just

1 not going to be a good solution if we go to
2 next week.

3 So my intention would be that
4 tomorrow we go to the defense's case. We are
5 not going to rush the defense. You have
6 patiently waited through the plaintiff's
7 case. Then on Friday afternoon, if you can
8 finish on Friday afternoon, on Saturday
9 morning, we would argue and charge and go to
10 the jury. That is kind of where I am aiming.
11 If that is not enough time, then we will have
12 to see how long they can stay on Saturday --
13 at 2:30 on Saturday, we lose one of our
14 jurors. So I just tell you that for
15 information.

16 If anyone has a response that they
17 wish to make on the record, I will let you do
18 so. A response is not necessary. Anything
19 from the Plaintiff?

20 EDWARD GRAHAM: No, Your Honor?

21 THE COURT: From the Defendants?

22 ROBERT HOOD: Your Honor, we
23 won't be able to finish on Saturday.

24 THE COURT: You think that you
25 would go beyond ---

1 ROBERT HOOD: Yes, sir.

2 THE COURT: So Wednesday

3 afternoon, you start.

4 ROBERT HOOD: Yes, sir.

5 THE COURT: Thursday and Friday,

6 you would need to go to Saturday as well with

7 witnesses?

8 ROBERT HOOD: At least

9 Saturday. I'm talking -- I don't think we'd

10 finish the case until Wednesday or next week.

11 THE COURT: Well, so much for my

12 planning. I was under the impression that

13 you were thinking two and a half days for the

14 defense. This is not lengthy, this is just

15 my opinion of what you thought -- but that's

16 not correct?

17 ROBERT HOOD: Given where we

18 are on the case and given what I anticipate

19 cross-examination to be, I honestly don't

20 think that we will be through.

21 THE COURT: Okay. All right.

22 Before the close of today, I need to have

23 some discussion with the jurors about that.

24 I told them that we would get back with them.

25 So let me ponder that, what I have just

1 heard, because I was laboring under a
2 misapprehension; which is not anyone's fault.
3 Let me think that through and then we will
4 talk about it towards the end of the day so
5 that I can discuss it with the jury. It may
6 mean that some of our jurors, if this is
7 accurate, -- well, we will just see. Ready
8 for the jury?

9 EDWARD GRAHAM: Yes, sir.

10 THE COURT: Are we starting with
11 the video witness or a live witness?

12 EDWARD GRAHAM: Live.

13 THE COURT: Please bring in the
14 jury. While the jury is coming in, I am
15 going to step back and get one thing from my
16 office -- be right back. Everyone be at-
17 ease.

18 (JUDGE EXITS, RE-ENTERS COURTROOM)

19 (JURY IN @ 1:35 P.M.)

20 THE COURT: All right. I trust
21 that you had a nice lunch, Ladies and
22 Gentlemen. Very good. You can thank Tara
23 and the Clerk's office for that. We are
24 still in the plaintiff's case. Please call
25 your next witness.

1 EDWARD GRAHAM: Thank you, Your
2 Honor. We next call Dr. Margaret Greer-
3 Simmons.

4 (WITNESS TAKES STAND)

5 MARGARET GREER-SIMMONS, being duly
6 sworn to tell the truth, the whole truth and
7 nothing but the truth, testified, as follows:

8 DIRECT EXAMINATION

9 BY EDWARD GRAHAM:

10 Q. Doctor, would you please tell us a bit
11 about your personal background?

12 A. Personal background? Let's see. I
13 definitely call the Lowcountry home now. I
14 was raised on Navy bases mainly, so I moved
15 around quite a bit. Never lived anywhere but
16 three years until I got to the Charleston
17 area and now I am hooked. I've been here
18 about twenty-three years and enjoy it
19 tremendously.

20 Q. Tell us about your educational
21 background starting with college, please.

22 A. I started out at Florida Southern
23 University, then transferred to the
24 University of Georgia where I received my
25 bachelors in 1975. I went on to my masters

1 and received that in 1979. Worked for a
2 couple of years and decided that I really
3 needed to continue, so in 1982 I got my
4 doctorate in psychology from the University
5 of Georgia.

6 Q. So all of your degrees are from the
7 University of Georgia?

8 A. That's correct.

9 Q. Since finishing your Ph.D., how have you
10 been employed?

11 A. I worked with the Department of Mental
12 Retardation for three years. I had also
13 worked for them prior to getting my graduate
14 degree.

15 Then I worked with the Medical
16 University, Department of Pediatrics, for
17 twelve years.

18 Then I worked with the Department of
19 Psychiatry at the Medical University for
20 three years.

21 I've been in private practice now for
22 thirteen years.

23 Q. Tell us about your private practice.
24 What do you do?

25 A. Well, I have a private practice in Mount

1 Pleasant and I do nothing but testing,
2 psychological evaluations. I don't do
3 therapy. I do evaluations to rule out
4 learning disabilities; autism; mental
5 retardation, attention disorder. I see about
6 two hundred and fifty children a year.

7 I get referrals from a variety of
8 sources: pediatricians, families, the
9 military.

10 Like I say, I get to look at children's
11 learning. It's fun, it's almost like game
12 playing with children sometimes, I think.

13 Q. I have heard that there are different
14 branches of Psychology. Can you tell us
15 whether that is true or not and, if so, how
16 do you ---

17 A. There are multiple branches. I'm
18 licensed both as a clinical psychologist and
19 as a school psychologist.

20 So my -- the clinical background, you're
21 looking at different mental disorders. It
22 could be learning issues, as well. Anything
23 from brain injuries to autism.

24 My school psychology background looks at
25 how a child would function in school, whether

1 it is learning issues, getting along with
2 peers or academic issues.

3 Q. Have you been a college professor or
4 medical school professor? If so, tell us
5 about that. b

6 A. I was on the faculty at The Citadel.
7 Actually trained school psychologists there
8 for almost ten years, in their graduate
9 school department.

10 I also -- while I was at the Medical
11 University, I was an assistant professor and
12 part of my job there was to train pediatric
13 residence in screening children's
14 development, looking through medical records
15 to find developmental issues, to do
16 development screening.

17 I also helped train Psychiatry residents
18 to look at children's learning and behavioral
19 issues.

20 Q. Have you been published in the
21 Psychology literature and related areas of
22 literature? If so, please tell us about
23 that.

24 A. I've published articles and book
25 chapters and, uh, multiple grants that were

1 approved. All of them had to do with the
2 evaluation of children.

3 Now, the disorders, there's a variety
4 there. Some of it was genetic disorders,
5 some were pediatric HIV/AIDS. Some were
6 physical disabilities.

7 They all surrounded assessing a child's
8 development.

9 Q. Have you been invited to be a guest
10 lecturer at various locations around the
11 country? If so, give us an idea of some of
12 the places that you've spoken to as guest
13 lecturer.

14 A. I've spoken at the College of
15 Charleston. Gosh, I don't even remember --
16 have to search my memory here.

17 I've spoken at the Medical College of
18 Georgia.

19 Most of my presentations were at
20 different conferences, like the American
21 Pediatric Association or the national
22 association of school psychologists.

23 I've done grand rounds at the Medical
24 University on three different occasions.

25 Talked about childhood lead poisoning at

1 different state conferences. Most of them
2 have been state colleges and regional.

3 Then I did have an international
4 presentation but that was a poster
5 presentation.

6 Q. Where was that?

7 A. In France.

8 Q. Are you licensed? If so, in what areas?

9 A. I am licensed as a Clinical and School
10 psychologist by the South Carolina Board of
11 Examiners in Psychology. I'm also certified
12 by the State Department of Education as a
13 School Psychologist Level III.

14 EDWARD GRAHAM: Your Honor, at
15 this time we would proffer Dr. Greer-Simmons
16 as an expert qualified to testify in matters
17 related to School Psychology, and Clinical
18 Psychology.

19 THE COURT: All right, to the
20 offer in Clinical Psychology, what says the
21 defense?

22 ELIZABETH BALLENTINE: No objections
23 to the questions, Your Honor.

24 JAY DAVIS: No objection.

25 THE COURT: All right, the Court

1 will qualify her in the area of Clinical
2 Psychology. You may proceed.

3 EDWARD GRAHAM: Thank you, Your
4 Honor.

5 DIRECT EXAMINATION CONTINUED

6 BY EDWARD GRAHAM:

7 Q. Doctor, at my request, did you agree to
8 get involved in this case for the purposes of
9 evaluating Jayden W ?

10 A. Yes, I did.

11 Q. Tell me, when you accept such a job
12 assignment, how does a psychologist go about
13 ethically approaching that responsibility?

14 A. Well, it's a very different role from
15 being a therapist or even a referral that is
16 not related to the court system. In those
17 types of cases you come in as an advocate for
18 the child. When it is litigation oriented,
19 I'm supposed to come in as more an offerer of
20 facts.

21 I always explain to families that I may
22 sound naive because I have not looked at the
23 medical records or the school records. My
24 role is to come in as kind of a blank slate,
25 gather all the information, I score my

1 assessments, I write up that section of the
2 report and then I go to the medical and
3 school records and review those and summarize
4 them and incorporate them. But that way I
5 feel like I can be as unbiased as possible.

6 Q. In the course of your examination of
7 Jayden, who did you talk to?

8 A. Actually prior to the assessment, only
9 your office -- as far as scheduling.

10 Q. In the course of an examination, what is
11 it that you actually do? What did you do in
12 this case?

13 A. Well, one of the things first is to
14 establish some rapport. You want to work
15 with the child a little bit, make sure that
16 they are comfortable with you. I have a
17 wealth of games in my office, so depending n
18 the child's age, I get games out that are
19 geared towards that age. We start with some
20 of those and then once the child is
21 comfortable, then I proceed with the testing.
22 I usually do the intellectual measure first.
23 I know that it may not sound like it, but
24 most children think that it's a lot of fun
25 because there are -- there's pictures and --

1 it alternates between something hands on to
2 questions, so it engages most children.
3 That's usually what I start with.

4 Then I go into more of a neuro-
5 psychological measure to look at the finite
6 details of learning, with language processing
7 and motor skills, sensory motor function,
8 attention, executive function, planning and
9 organizing skills.

10 Q. Let me stop you right there just a
11 moment.

12 A. Certainly.

13 Q. You used a phrase that I would like you
14 to explain. You said neuropsychologic. What
15 is that?

16 A. That would be looking more to -- brain
17 games, but looking more at the subtleties of
18 language processing as opposed to your
19 vocabulary knowledge. We look at how you
20 understand directions, uh, how do you use
21 your fingers, how do you plan on paper.
22 Again, it is -- there's a lot of engaging
23 materials with it. These are all
24 standardized measures that are used across
25 the country and well respected.

1 Q. I'm sorry for the interruption.

2 A. That's fine. Then I usually do an
3 emotional behavior workup. Depending on the
4 child's age, I can get a self report from
5 them about their perception. I would do that
6 through either reading -- like I said,
7 depending on the age -- reading the
8 descriptors to them of how they might feel
9 and they get to tell me whether, 'Yes, that's
10 me.' Or, 'No, that's not me.'

11 I also get teacher report forms, it's a
12 standardized checklist where a teacher can go
13 through and it lists probably every behavior
14 that you can think of. They get to circle:
15 "Zero", that's not observed; "One", that's
16 observed occasionally; "Two", it is observed
17 frequently. Then I get to cluster those
18 behaviors into different domains and see what
19 might be elevated or average for their age.

20 I do the same thing with the parent
21 report. If need be, I also interview the
22 parent(s) about adaptive skills. In those I
23 would be looking at daily communications,
24 self-help skills: dressing, feeding yourself,
25 how you get around in the community.

1 Then I would also look at socialization:
2 how you get along with your peers, how you
3 strike up a conversation, how you end a
4 conversation.

5 Also, age dependent, I would look at
6 motor skills; both fine motor, which would be
7 more hands, small muscles, and gross motor,
8 which would be large muscles like running and
9 those kinds of issues.

10 Then I do achievement testing in read-
11 ing, mathematics and written language.

12 Q. Thank you. What were your conclusions?

13 A. Well, when I saw Jayden, at the time
14 that I saw him he was six years, ten months
15 of age. It didn't take long to establish
16 rapport with him. He answered all my
17 questions, complied with all my directions,
18 was very cooperative.

19 Now, we did assessment on two separate
20 days because it is rather lengthy and -- it
21 was probably about six hours with him, so --
22 that would be hard for anyone to sit through.

23 He manipulated objects appropriately.
24 He was very involved in the testing. So I
25 think that I got an accurate reflection of

1 skills.

2 What I found was that his overall IQ is
3 62. That is in what is called the extremely
4 low range. It's the first percentile.

5 He was fairly evenly developed with both
6 his verbal problem solving and visual. His
7 verbal problem solving was also in the
8 extremely low range, following below the
9 first percentile. His visual problem solving
10 was at the third percentile, also in the
11 extremely low range.

12 His memory skills were in the borderline
13 range at the six percentile.

14 His speed of processing was at the
15 thirteenth percentile, in the low average
16 range.

17 So fairly evenly developed with his
18 problem solving skills. The unfortunate
19 thing is that a -- a full scale IQ of 62
20 actually falls within the mild range of
21 mental retardation.

22 To continue the testing, I did the
23 NEPSY, which is acronym for one of the
24 neuropsychological measure. Not surprisedly,
25 with his IQ he was below average in his

1 attention skills overall: his language
2 processing, his memory and learning, his
3 motor skills and his visual perceptual
4 skills.

5 If he had to attend to just one thing at
6 a time, he could do that. But if I increased
7 the number of things that he had to attend to
8 -- even two things at a time -- he was unable
9 to do that.

10 He had a lot of difficulty comprehending
11 instruction. He had a lot of difficulty also
12 coming up with what he wanted to say in the
13 time that you would expect for his age. All
14 of this is compared to your chronological
15 age.

16 He had some variable memory skills, most
17 of them well below his age. That was whether
18 it was visual memory or listening memory.

19 He had difficulty manipulating his hands
20 and motor planning on paper. We look at
21 these kinds of things because that is going
22 to impact all of your school work. If you
23 can't motor plan from A to B, then how are
24 you going to write? How are you going to
25 plan how you put things on the paper?

1 His visual perceptual skills were
2 delayed so -- orienting that, he was having
3 some difficulty with that.

4 That's what I found on the neuro-
5 psychological measure.

6 When I did his self reports as to
7 personality, and -- again, this is something
8 that I am reading to him and he gets to tell
9 me whether, yes, that's how he feels or, no,
10 that's not how he feels. He's told that
11 there's no right or wrong answers, 'just how
12 you feel.' The other neat things that this
13 measure has on it -- there are a lot of items
14 that are reworded, so you look at 'did you
15 contradict yourself.' It also looks at, 'did
16 you give me the most glorious story or is
17 this real?' Both of those things came out
18 fine, so I think he was giving me true views.

19 On scores, he came up average for his
20 age. At risk, a little bit of a caution
21 flag, to keep an eye on it, are clinically
22 significant -- what he views as big issues.
23 Overall emotionally he did come up at-risk
24 limits. So there were some emotional
25 concerns that he was expressing.

1 His attitude at school came up
2 clinically significant. So he recognizes
3 that school is not always a fun place for him
4 and it's difficult.

5 He also -- teachers, his attitude
6 towards teachers did come up at-risk. He kind
7 of thinks that they are overly demanding, and
8 he probably does like that at times.

9 He did endorse that sometimes he keeps
10 stuck on a thought and can't seem to
11 transition, but he was feeling like he can
12 establish friendships and maintain those.
13 He wasn't endorsing any elevated anxiety but
14 depression did come up at-risk. He was
15 tending to feel sad, kind of misunderstood.
16 But he did feel like he was well liked by
17 others.

18 Then when I looked at his mother's
19 report and I scored that, his level of
20 activities and social contacts was a little
21 low and he was having significant difficult
22 in school. He came up a little high on some
23 social issues and some attention problems and
24 clinically high with one of the things that
25 he was describing -- getting stuck on

1 something and not being able to transition
2 off of it. Overall, from her checklist I was
3 getting sort of a sluggish cognitive tempo,
4 which would be a function of developmental
5 delay.

6 I did have his classroom teacher also
7 complete one of the checklists. They said
8 that he was working hard, he was behaving
9 well, he was learning at a very low rate but
10 that he was generally happy. They didn't
11 describe any clinically significant
12 elevations on their checklist.

13 When I interviewed Jayden's mother about
14 his everyday kind of skills, that came out to
15 an overall composite of seventy; which is
16 fairly consistent with his overall IQ that I
17 got of 62. So it would be significantly
18 delayed.

19 His communication skills ranged from
20 about a three year level to a five and a half
21 year level.

22 His daily living skills -- again that's
23 things like dressing, feeding yourself --
24 ranged from a three year level to a four and
25 a half year level.

1 His social skills ranged from about a
2 three and a half year level to a four and a
3 half year level.

4 His motor skills ranged from about a two
5 and a half year level to a five year level.

6 When I looked at his achievement skills,
7 they were fairly consistent, again, with his
8 overall IQ of 62. The reason that you look
9 for consistency is you wonder if you're
10 getting an accurate pattern, and the more
11 consistent things are the more accurate that
12 it is.

13 I found his reading skills at the
14 beginning kindergarten level; his math skills
15 below a kindergarten level; and his beginning
16 writing skills at a beginning to mid-
17 kindergarten level. So most everything was
18 fairly consistent.

19 At the time that I saw him, he was
20 repeating kindergarten.

21 Overall I found significant cognitive
22 and adaptive delays and diagnosed him with
23 mild mental retardation.

24 Q. Thank you, Doctor. Let me ask you, if
25 you would, to explain what it means when you

1 say that at certain categories of testing
2 that he scores at or below the first
3 percentile.

4 A. Uh, -- excuse my bluntness for putting
5 it was but what it would mean is that ninety-
6 nine percent of individuals his age are
7 learning better than he is; if he is in the
8 first percentile.

9 Q. And if he is less than the first
10 percentile, that means ---

11 A. --- that over ninety-nine percent of
12 individuals are learning better than he is.

13 Q. As I listened to you talk about
14 percentiles, I noticed that even though
15 several are listed as one or less than one,
16 some are a bit higher, like -- I don't
17 remember the exact numbers, but ---

18 A. Sixteen, I think was probably the
19 highest.

20 Q. Right. How do you reconcile that?

21 A. Well, we all have strengths and
22 weaknesses. Even when you look at the
23 criteria set out by psychological
24 associations, even the American Association
25 on Intellectual Deficiency, they talk about

1 skills that you can have, uh, that you can
2 build on. But the overall scores were fairly
3 consistent.

4 Also when I went back to previous
5 testing from the time he was about -- he was
6 tested even at three months of age, so those
7 you can't completely hang your hat on but IQ
8 is fairly stable after three years of age.
9 All of his scores were pretty consistent over
10 time.

11 Q. I know you like to do your tests before
12 you read other materials, but have you now
13 had an opportunity to read other materials,
14 such as school materials, to see how they
15 shed light on your test results? If so,
16 please explain that to the jury.

17 A. Certainly. For instance, Jayden was
18 tested at two years, ten months of age.
19 He earned a cognitive or intellectual score
20 of sixty-seven. On my testing, I scored him
21 at a sixty-two, so fairly consistent.

22 His receptive language score then was
23 sixty-three.

24 His expressive was seventy. Again,
25 consistent there.

1 Self-help, he was doing a little better
2 with an eighty-seven.

3 Fine motor was seventy-five.

4 Gross motor seventy-eight.

5 Social and emotional, he was up at
6 eighty-eight.

7 When he was tested at three years of
8 age, he earned a cognitive score of seventy-
9 one, a language score of seventy-five, and
10 gross motor of eighty-three.

11 When we was tested at three and a half,
12 on a cognitive measure at the Medical
13 University he earned a score of sixty-five.
14 Again, related back to my sixty-three, fairly
15 consistent.

16 When he was tested at three and a half,
17 his receptive language was very good. He was
18 up in the nineties, but expressive was at
19 fifty-eight.

20 He was evaluated through the school
21 district at three years, seven months, and he
22 earned a full scale IQ of seventy-five. On
23 the preschool measure, I gave the child
24 measure. His overall achievement score was
25 at seventy-one and his adaptive behavior

1 composite was at seventy-nine.

2 When he was tested again at four years,
3 ten months, his fine motor skills were
4 measured at a score of seventy. So every-
5 thing clustering around sixty-five to
6 seventy-five. So we are talking anywhere
7 from the first percentile to the fifth
8 percentile.

9 Q. What is the highest IQ that he scored,
10 on either your tests or the school tests?

11 A. Actually I think it was on my test,
12 mental processing with an eighty-three --
13 (reviewing notes), the only other one that
14 was higher were, for instance, at eight
15 months of age he got an eighty-eight.

16 Q. All right. When you say the speed of
17 the processing was eighty-something, what was
18 the percentile that that represents?

19 A. It is still in the thirteenth
20 percentile.

21 Q. What does that mean in terms of how many
22 of his age peer are faster than him in that
23 category?

24 A. Eighty-seven percent.

25 Q. Is that an IQ score or is that just one

1 subpart of ---

2 A. It is a subpart. The main things that
3 you would look at -- first of all, you would
4 look at your overall IQ or your full scale,
5 which Jayden earned a sixty-two.

6 Then when you break out the other real
7 problem solving skills, you look at verbal
8 problem solving, visual problem solving.
9 Those were fifty-nine and sixty-five.

10 Q. In terms of full-scale IQ scores, what
11 is the best that he ever did and the worst
12 that he ever did?

13 A. Sixty-two to seventy-five, I believe.

14 Q. And what percentile does sixty-two
15 represent?

16 A. The first percentile.

17 Q. What percentile does seventy-five
18 represent?

19 A. Fifth.

20 Q. And what significance, if any, do you
21 place on different IQ test results?

22 A. It could depend on the measure. They
23 are -- certainly different test designers are
24 looking at different things trying to measure
25 different skills.

1 You look at, for instance, how old the
2 test is. Most tests are updated every twelve
3 to fifteen years, because there are
4 definitely population changes.

5 You look at -- like I said, if you are
6 using the same measure over time, you look at
7 consistency.

8 You look at whether the child, also
9 separate from the test, whether they were
10 engaged, were they cooperative, were you
11 getting the best performance.

12 Q. Was there any difference between the
13 tests that you gave Jayden and those that the
14 school system gave him. If so, please
15 explain that.

16 A. He did a little better on the school
17 measure, which was the Wexler PreSchool and
18 Primary Scale of Intelligence. There he had
19 a full-scale IQ of seventy-five. That's in
20 the borderline range. Again, the fifth
21 percentile. So it's higher than my score but
22 he also -- that was the preschool version. I
23 gave the child version.

24 On the achievement measures he got an
25 overall composite of seventy-one. On my

1 achievement measures I was get some
2 variability but my overall measures were from
3 fifty-eight to seventy-four.

4 I can look at what that overall
5 achievement one was -- (upon review), --
6 overall achievement was seventy-four and the
7 school's was seventy-one. So he did a little
8 better on mine as far as achievement, a
9 little bit better on the school's as far as
10 full-scale IQ.

11 Q. And on those achievement tests, what are
12 the percentiles?

13 A. About the second or third. The third
14 percentile.

15 Q. Do you have an opinion to a reasonable
16 degree of psychological certainty as to how
17 Jayden currently matches up with his age
18 peers?

19 A. Well, I was reviewing school records,
20 his recent school records. According to his
21 latest individualized education plan, which
22 the date on that was May the 4th of this
23 year, his math performance is at the first
24 percentile and his reading performance is at
25 the fourth percentile. Those are the most

1 recent scores we have.

2 Q. Do you have an opinion to a reasonable
3 degree of psychological certainty as to how
4 this level of test scores that you've
5 described will affect Jayden as he gets
6 older?

7 A. Well, he is going to continue to have
8 significant delay. One of the analogies that
9 I like to use with parents is if we think of
10 a child, or anyone, learning, an average
11 child is learning at about a hundred miles an
12 hour -- so if we think of them as traveling
13 down the road with their learning. Jayden is
14 learning at about sixty-five miles an hour.
15 It doesn't mean that he is not learning, he
16 has certainly learned. But he will continue
17 to lag significance behind his age group, his
18 peer group and he is not going to catch up
19 with a person going a hundred miles an hour,
20 unfortunately.

21 Q. Do you have an opinion to reasonable
22 degree of psychological certainty as to
23 whether or not that lag or that gap between
24 Jayden and his age peers, over time, will get
25 greater, smaller or stay about the same?

1 A. It will probably stay about the same.

2 Q. You've expressed a number of opinions
3 today. Have all the opinions that you've
4 expressed been to at least a reasonable
5 degree of medical (sic) certainty?

6 A. Yes, I believe that they have.

7 EDWARD GRAHAM: Thank you.

8 Please answer any questions counsel may have.

9 THE COURT: Cross-examination.

10 ELIZABETH BALLENTINE: May it please
11 the court.

12 THE COURT: Yes, ma'am.

13 CROSS EXAMINATION

14 BY ELIZABETH BALLENTINE:

15 Q. Good afternoon.

16 A. Good afternoon.

17 Q. You're not a medical doctor, are you?

18 A. No, I am not.

19 Q. And you're not here to render any
20 opinions regarding the medical cause of
21 Jayden's difficulties, are you?

22 A. No, I am not.

23 Q. And the only time in your career that
24 you've worked in an elementary school setting
25 was during your internship; is that right?

1 A. That's correct.

2 Q. Which was around 1980 or '82?

3 A. That's correct.

4 Q. And you have not been actively engaged
5 in providing counseling or therapy services
6 since the late '90s?

7 A. That's correct.

8 Q. In fact you never did very much therapy,
9 did you?

10 A. No, I've always been more in the
11 assessment realm.

12 Q. And apart from criminal matters, you
13 never recalled giving any trial testimony
14 where you'd been contacted or retained by a
15 defense attorney, have you?

16 A. No, I've not. In fact, usually it's a
17 function of who calls and if it is in my
18 field of expertise.

19 Q. And you've worked with Mr. Graham
20 before?

21 A. Yes, I have.

22 Q. And Jayden W. was not referred
23 to you by the parents or any physician but by
24 the Graham Law Firm; isn't that true?

25 A. That's true.

1 Q. You mentioned that -- you quoted a brain
2 injury, you based that solely on quotes by
3 Dr. Katz and Dr. Adler?

4 A. That's true, that was their diagnosis.

5 Q. And those were two experts hired by the
6 plaintiff to testify in this case?

7 A. I believe so.

8 Q. They are not his treating physicians?

9 A. No, they're pediatric neurologists, I
10 believe.

11 Q. They are experts in their field but they
12 are not his treating physicians?

13 A. I have no knowledge of that.

14 Q. But you are not here to give opinion as
15 to the cause of any of Jayden's problems?

16 A. No, I am not.

17 Q. And you mentioned that your findings
18 were consistent with brain injury, but you've
19 seen these findings in patients who have not
20 had any type of brain injury; isn't that
21 true?

22 A. That's true. There are individuals born
23 with mental retardation from unknown causes,
24 with Down Syndrome, Fragile Egg Syndrome, so
25 there are multiple causes of mental

1 retardation.

2 Q. And you're not a neurologist?

3 A. No, I am not.

4 Q. I believe that you mentioned earlier
5 that Jayden was expressing depressive signs
6 or something to that effect?

7 A. He was endorsing some depression but I
8 did not diagnose a depressive disorder. I
9 am not sure if we were looking at something
10 transient or not. That would have to be over
11 time.

12 Q. So you don't know whether it was
13 something that was transient?

14 A. (No verbal response).

15 Q. You'd have to look at it over time.
16 Yet, you base your recommendation for
17 counseling on, in part, signs of a depressive
18 disorder?

19 A. No, just the depression but the fact
20 that he recognizes that he's different from
21 other children. More, as he grows older.
22 He's going to become aware of his differences
23 and his difficulties with not only academic
24 pursuits but learning any new tasks. That
25 makes me concerned about his emotional well-

1 being.

2 Q. And you made findings relating to
3 Jayden's verbal skills but you did not
4 consult any of his speech therapists, did
5 you?

6 A. No, I did not.

7 Q. And you recommended that he receive
8 individualized counseling and family
9 counseling?

10 A. As needed, yes.

11 Q. But you are not aware of extreme
12 conditions that his therapy providers or
13 teachers even having seen a need for such
14 counseling?

15 A. Not that I am aware of.

16 Q. And you believe that Jayden will be able
17 to do some type of employment in the future?

18 A. Yes, I do. As to what, I'm not
19 completely sure. I know that certainly he
20 could do a sheltered workshop. With his
21 handicaps, he is eligible to attend public
22 school until he is twenty-one.

23 Q. So you believe that he will be capable
24 of some type of employment?

25 A. Yes, I do.

1 Q. You've not provided your report to any
2 of Jayden's teachers or therapists?

3 A. No, I don't have a release to do so.
4 I am not allowed to give a report to anyone
5 without parental signed permission.

6 Q. So when you say that you make
7 recommendations, you basically mean just
8 preparing your report?

9 A. Preparing my report and sending the copy
10 out. Yes.

11 Q. The only diagnosis that you've made in
12 this case for Jayden is mild mental
13 retardation?

14 A. That's correct.

15 Q. And the diagnoses of mild mental
16 retardation, the two components are the full-
17 scale IQ and the significant adaptive
18 deficits?

19 A. That's correct. And onset prior to age
20 eighteen.

21 Q. And it takes both of these to reach the
22 diagnosis of mild mental retardation?

23 A. Yes, it does.

24 Q. The sole source in this case of your
25 information with respect to Jayden's adaptive

1 skills to determine whether or not he has
2 significant adaptive deficits comes solely
3 from the plaintiff, Ms. Washington?

4 A. If -- as completed at the parental
5 interview, you ask a parent to describe
6 everyday kind of skills. Part of the way
7 that it is done is kind of an open-ended kind
8 of thing. For instance, if you're looking at
9 a skill that might be -- if he is selective
10 about friends, while that is a good
11 developmental skill but if you ask does he
12 have a favorite buddy or is everybody his
13 buddy, then you're not just answering yes or
14 no kind of questions. The parent is not
15 answering just yes or no kind of questions,
16 because that would be leading them into what
17 would be a positive thing versus a negative
18 thing. So you try to rely more on
19 descriptors like, 'How is his dressing coming
20 along?'

21 Q. I appreciate that, but my question was,
22 the sole source of information as to whether
23 not he has significant adaptive skill
24 deficits came from the plaintiff, Ms.
25 Washington?

1 A. That's correct because that's the way
2 measure is designed.

3 Q. And you did not consult any additional
4 sources of information regarding his adaptive
5 skills?

6 A. No, I did not other than renewing his
7 previous adaptive testing done by the school
8 district.

9 Q. And you have made a diagnosis here today
10 of mild mental retardation but Jayden's
11 school psychologist did not find mild mental
12 retardation?

13 A. That's correct. On her measure, his
14 full-scale IQ came out to be seventy-five,
15 which is in the borderline range; and his
16 adaptive behavior composite was also seventy-
17 nine, which also in the borderline range.

18 Q. You mentioned that his school records
19 show that his previous full-scale IQ score
20 was seventy-five?

21 A. That's correct.

22 Q. And his teacher and therapists interact
23 with him on a more frequent basis than the
24 total of, I think you said, about six hours
25 that you spent with him; is that correct?

1 A. Certainly, they do.

2 Q. And you mentioned a teacher report form
3 but you never actually interviewed or spoke
4 directly with any of Jayden's teachers or
5 therapists, did you?

6 A. No, I did not.

7 Q. And his teachers and therapists never
8 made a diagnosis of mild mental retardation?

9 A. No, he's already in the public education
10 system through multiple diagnoses. They have
11 diagnosed the cognitive disorder and motor
12 disorder, so -- in addition to special
13 education, resource programming, he's getting
14 speech and language therapy, occupational
15 therapy and physical therapy. So in my
16 opinion they're doing a very good job of
17 addressing his needs.

18 Q. And a full-scale IQ score at seventy-
19 five does not qualify him for a mild mental
20 retardation diagnosis in the school system,
21 would it?

22 A. Not with the school system but it would
23 according to the Diagnostic and Statistical
24 Manual of Mental Disorders, which is used by,
25 you know, every psychologist in the United

1 States. That does give you the freedom to go
2 up to seventy-five if the -- the concurred
3 deficits in adaptive behavior are there.

4 Q. So you think that the school scores,
5 year by year, of this child would now meet
6 mild mental retardation; would they?

7 A. That's correct.

8 Q. The diagnoses that you've made in this
9 case were given only to Mr. Graham for use in
10 this lawsuit?

11 A. It was given to Mr. Graham, who shared
12 it with Ms. Washington.

13 ELIZABETH BALLENTINE: Thank you,
14 that's all that I have.

15 THE COURT: Redirect?

16 EDWARD GRAHAM: Yes, sir.

17 REDIRECT EXAMINATION

18 BY EDWARD GRAHAM:

19 Q. On the subject of school tests and
20 school diagnosis versus your tests and your
21 diagnosis, what is the difference between
22 your diagnosis and the school's?

23 A. They've made it more open-ended.

24 They've kept the same diagnosis as when
25 Jayden was a preschooler.

1 And one of the things that the school
2 system tries to do is to not label children
3 at a very early age. So all of the special
4 education kind of school programs, preschool
5 programs, are called at-risk programming.
6 That way they don't have to put a definitive
7 label.

8 But what they did say is, a cognitive
9 disorder could be an intellectual disorder
10 and a mental disorder as well as his speech
11 and language delays. They are literally
12 providing every service under the special
13 education umbrella that they can.

14 Q. In terms of your diagnosis of mild
15 mental retardation, do they have any
16 corresponding diagnosis about mental
17 retardation?

18 A. Not that I am aware of, other than
19 cognitive disorder.

20 Q. What is the significance in terms or --
21 of the relationship, if you will, between IQ
22 test scores and resources, special resources,
23 available for children with special needs in
24 the school system?

25 A. I'm sorry, I'm not following the

1 question.

2 Q. The lower your IQ goes, does that have
3 an effect on triggering special resources in
4 the school system? If so, what?

5 A. It does as far as developmental
6 disorders. You might actually have a high
7 IQ but have a discrepancy between that and
8 an area of academic achievement and then you
9 would actually qualify the child with a
10 learning disability, which would be totally
11 different. But they can also supply special
12 education simply on his diagnosis of
13 traumatic brain injury, as well.

14 Q. There were questions about the sources
15 of your information. In addition to the
16 information that you got from Jamsetta, did
17 you also have an opportunity to review the
18 school system results and the school records
19 themselves to see what light they shed on
20 these matters?

21 A. I reviewed records from Lexington School
22 District, from Oakland Elementary School,
23 from the neurologist and his medical records,
24 and I reviewed his most recent individualized
25 education plan from the school.

1 Q. You mentioned employment, do you have an
2 opinion as to whether or not Jayden will ever
3 have a realistic chance at gainful employment
4 other than other than in a sheltered
5 environment?

6 ELIZABETH BALLENTINE: Objection,
7 Your Honor. Leading.

8 THE COURT: First of all, was that
9 covered on cross?

10 EDWARD GRAHAM: It was asked,
11 about employment.

12 THE COURT: All right. So now as
13 to leading, I am going to sustain that,
14 Counsel. Your question should be more --
15 please rephrase.

16 EDWARD GRAHAM: All right.

17 REDIRECT EXAMINATION CONTINUED

18 BY EDWARD GRAHAM:

19 Q. Doctor, do you have an opinion to a
20 reasonable degree of medical (sic) certainty
21 as to whether or not Jayden W. will
22 ever be able to obtain gainful employment
23 other than in the context of an sheltered
24 employment program for folks with special
25 needs?

1 ELIZABETH BALLENTINE: Objection,

2 Your Honor. Leading again.

3 THE COURT: I will overrule as to
4 leading but I will require you to lay a
5 foundation as to expertise and as to whether
6 this witness is able to -- go ahead.

7 EDWARD GRAHAM: Okay.

8 REDIRECT EXAMINATION CONTINUED

9 BY EDWARD GRAHAM:

10 Q. Doctor, on cross examination, Ms.
11 Ballentine asked you a question about
12 employment. What is it about your knowledge,
13 training and experience that allows you to
14 talk about employment issues?

15 A. When I worked with the Department of
16 Mental Retardation, I worked only with older
17 adolescents and adults. A lot of times it
18 was behavioral issues on the job, job
19 placement kind of issues. So I do have
20 experience with adult with mental
21 retardation.

22 My concerns with Jayden -- I certainly
23 think that he could work in a sheltered
24 workshop setting. I think he is going to
25 need some kind of supervision in any other

1 types of jobs. He's not going to be able to
2 handle money efficiently. So certainly his
3 opportunities are very limited.

4 But, luckily, when he does get out of
5 school at age twenty-one, he should be
6 eligible for services under the South
7 Carolina Department of Disabilities and
8 Special Needs as an adult with mental
9 retardation.

10 THE COURT: Objection overruled.

11 EDWARD GRAHAM: Thank you, Your
12 Honor.

13 REDIRECT EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. Doctor, have you ever been requested to
16 perform work for the Hood Firm?

17 A. Yes, I have. I received a call from the
18 Hood Law Firm, they were representing a
19 psychologist accused of malpractice and
20 wanted to contract me as their expert
21 witness. I said that I'd be glad to help,
22 'please explain a little bit about the case.'
23 What it turned out to be was a child custody
24 case. Since my current expertise -- I did
25 child custody when I was at the Medical

1 University but I haven't done that in many
2 years, so I didn't feel like I was an
3 appropriate expert witness for them, so I
4 declined to follow that case and did suggest
5 two other psychologists that I know who
6 routinely deal in child custody. If they had
7 called and it had been some type of
8 developmental or brain damage issue with a
9 child, I would have been glad to have been
10 their expert witness.

11 Q. Doctor, do you have an opinion to
12 reasonable degree of medical certainty --
13 strike that -- psychological certainty as to
14 whether or not Jayden W. is mildly
15 mentally retarded?

16 A. I believe that he is.

17 Q. Do you have an opinion to a reasonable
18 degree of psychological certainty as to
19 whether or not he will most probably stay
20 mildly mentally retarded for the rest of his
21 adult -- the rest of his life?

22 ELIZABETH BALLENTINE: Objection.
23 Beyond the scope.

24 THE COURT: Of cross-examination?

25 ELIZABETH BALLENTINE: Yes, sir.

1 THE COURT: Was that covered, how
2 as that covered in cross?

3 EDWARD GRAHAM: They attacked the
4 diagnosis of mild mental retardation.

5 THE COURT: You may answer, ma'am.

6 THE WITNESS: Yes, I believe
7 that it is a permanent condition. He may
8 fluctuate between the low sixties to the high
9 sixties, so there may be some variability in
10 his IQ but I believe that he will remain as
11 an individual with mild mental retardation.

12 EDWARD GRAHAM: Thank you. No
13 further questions.

14 THE COURT: All right. Anything
15 new that was brought up that you wish to
16 cover?

17 ELIZABETH BALLENTINE: No, sir.

18 THE COURT: All right, ma'am, you
19 may step down.

20 (WITNESS STEPS DOWN)

21 THE COURT: Call your next
22 witness.

23 EDWARD GRAHAM: Your Honor, our
24 next witness is the video deposition of Dr.
25 Barbara Burton.

1 out into the 5:00 o'clock traffic, we will
2 let it clear a little bit. So we will start
3 at 9:00, end at 5:30 and our Clerk again will
4 provide lunch for you. We'll have an order
5 blank for you when you come in in the
6 morning.

7 So tomorrow I should be able to tell
8 you, and I was asking about the -- because I
9 had some comments about vacation. I was
10 asking about those. We should be able to
11 tell you tomorrow with some better degree of
12 finality where we think this case is moving
13 towards conclusion and how we wish to
14 proceed, so that you can react to how you
15 wish to proceed, whether or not we will be
16 able to conclude the case in a timely fashion
17 for everyone or whether based on somebody's
18 notes some may have to depart. We'll see,
19 but we will know better tomorrow. All right?

20 Any questions now from our jury?

21 (No response). Well, have a nice afternoon.
22 We will all remain where we are out of
23 respect as you leave the courtroom. Have a
24 good day, Ladies and Gentlemen.

25 JUROR: Your Honor, you're --

1 Saturday? You're just not sure about

2 Saturday?

3 THE COURT: I am not sure about
4 Saturday. I got your note about Saturday and
5 -- tomorrow I will be able to tell you that.

6 (JURY OUT @ 4:45 P.M.)

7 THE COURT: Are there any issues
8 now, outside the presence of the jury that we
9 need to discuss with regard to our record and
10 today's proceedings or tomorrow's witnesses
11 while we're at it.

12 EDWARD GRAHAM: Your Honor, the
13 only thing on my mind is -- it has to do with
14 what's in the record on the counter-
15 designations by Chilton of Dr. Rhett's
16 deposition, the plaintiff's part of Dr.
17 Rhett's cross-examination.

18 I believe that there was some
19 testimony in there that we need in the record
20 but because of the way that happened, we
21 don't have proof positive as to whether that
22 came in or not. Specifically what I am
23 concerned about is Page 42, Lines 12 through
24 20. I've prepared a handwritten designation
25 to use that tomorrow from his deposition if

1 please raise your hand. (No response).

2 Thank you again for complying with the
3 court's request. We are in the plaintiff's
4 case. Please call your next witness.

5 EDWARD GRAHAM: Thank you, Your
6 Honor. We call Jean Hutchinson.

7 (WITNESS TAKES STAND)

8 JEAN HUTCHINSON, being duly sworn to
9 tell the truth, the whole truth and nothing
10 but the truth, testified, as follows:

11 DIRECT EXAMINATION

12 BY EDWARD GRAHAM:

13 Q. Good morning, Ms. Hutchinson.

14 A. Good morning.

15 Q. Tell us, please, a little bit about you
16 are?

17 A. I am in private practice as a vocational
18 consultant. I evaluate individuals to
19 determine what type of work that they can do,
20 what kind of wages that they can make and
21 what kind of training might be appropriate
22 for people. I work a lot with injured folks.

23 Q. Where do you live?

24 A. I live here in Charleston.

25 Q. How long have you lived in Charleston?

1 A. All of my life except for college and
2 graduate school, a couple of years.

3 Q. Tell us, please, about your educational
4 background?

5 A. After graduating from high school here,
6 St. Andrews High School, which is no longer
7 in existence, I went to Furman University up
8 in Greenville.

9 COURT REPORTER: I'm sorry. Can
10 you speak a little louder -- what university?

11 THE WITNESS: Furman.

12 THE COURT: You might adjust that
13 microphone up a little bit.

14 THE WITNESS: I talk very fast
15 for Charleston. I went to Furman University
16 and I graduated from there in 1974. I
17 immediately went to graduate school at the
18 University of South Carolina in Columbia
19 and I majored -- I got a masters degree in
20 vocational rehabilitation counseling. I've
21 taken continuing education courses since that
22 time.

23 DIRECT EXAMINATION CONTINUED

24 BY EDWARD GRAHAM:

25 Q. Tell us about your professional

1 employment since getting your masters degree.

2 A. When I finished graduate school, I went
3 to work -- I went back to Greenville for a
4 couple of years and went to work with the
5 South Carolina Employment Security
6 Commission. You'all probably known that as
7 Job Services.

8 I went back to work helping women --
9 remember this is 1976 -- find careers. I
10 was an employment placement counselor as well
11 as an instructor in a program that I wrote to
12 help people with -- we called them reusable
13 job skills; helped them learn how to find
14 jobs so that they could change jobs in the
15 future.

16 Then after three years, since I was a
17 Charlestonian, I came back and did the same
18 thing down here with the Employment Security
19 Commission for a year.

20 I then went to work for a special
21 federal grant, the Higher Education
22 Consortium, administered by Trident Technical
23 College. I worked with nine of the tricounty
24 area high schools, helping juniors and
25 seniors, eleventh and twelfth graders, figure

1 out what school they wanted to go to, what
2 kind of career they wanted to pursue and how
3 to get financial aid. I did that for about
4 two years.

5 Then finally an opening became available
6 at the South Carolina Vocational
7 Rehabilitation Department. This is the
8 agency that puts handicapped or disabled
9 people back to work. The first four years
10 that I worked there, I worked as a vocational
11 evaluator and I evaluated individuals, here
12 again, to determine what would be the most
13 appropriate placement or training setting for
14 them considering their disability. For the
15 last almost two years there, I worked as a
16 rehabilitation counselor, actually placing
17 these individuals on jobs and working with
18 employers.

19 Since 1980, I've been in private
20 practice as a vocational consultant, my
21 capacity today; the first eight years were
22 part-time when I was still working for the
23 State and the last twenty-two years have been
24 full-time private practice.

25 Q. Ms. Hutchinson, have you ever been

1 qualified to serve as an expert witness?

2 A. Yes, I have.

3 Q. In which areas or fields?

4 A. In employability, that's what kind of
5 work that people could do; vocational
6 rehabilitation, what kind of services that
7 they might need; and wage analysis, talking
8 about what the going rate of wage is for
9 certain occupations.

10 Q. In which courts or administrative
11 tribunals have you been qualified as an
12 expert?

13 A. Common Pleas, Federal Court, Family
14 Court or divorce case; Workers Compensation;
15 Federal Workers Compensation, such as
16 longshoremen; and Social Security disability.

17 EDWARD GRAHAM: Your Honor, at
18 this time we would proffer Ms. Hutchinson as
19 an expert qualified in the areas of
20 employability and vocational rehabilitation.

21 THE COURT: All right. Are there
22 questions from the defense?

23 CHILTON SIMMONS: No, sir.

24 JAY DAVIS: No, sir, Your Honor.

25 THE COURT: Is there objection

1 from the defense?

2 CHILTON SIMMONS: No objection.

3 JAY DAVIS: No, sir.

4 THE COURT: Hearing none, the
5 witness may proceed as an expert in those
6 areas.

7 EDWARD GRAHAM: Thank you, Your
8 Honor.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. Ms. Hutchinson, did you at my request
12 evaluate Jayden Wæ for issues related
13 to your expertise?

14 A. Yes, I did.

15 Q. When did you start to work on that case?

16 A. It was about the Fall of 2008.

17 Q. What was the purpose of the work that
18 you did on his case?

19 A. We were looking at what his future
20 employability might be and his wage earning
21 capacity.

22 Q. How does a vocational expert such as
23 yourself go about ethically addressing those
24 issues?

25 A. Well, we look at whatever is in the

1 record. We look at any testing that has been
2 done on the child. Where we can't predict
3 exactly what this child might be able to do,
4 we can talk about what he may not be able to
5 do or what range of jobs, therefore what
6 range of salaries, might be appropriate for
7 him considering the information that we have
8 now.

9 Q. What materials did you use in forming an
10 opinions on this case?

11 A. I have in my file -- do you want my
12 list?

13 Q. Please.

14 A. Depositions from various therapists and
15 psychologists, medical records and his school
16 records.

17 Q. Thank you. What factors did you
18 consider in determining employability?

19 A. Well, we look at the health and the
20 functional capabilities, what this child can
21 and cannot do. That would also include
22 cognitive, mental, behavioral, how he is
23 acting, and adaptive levels. What he is able
24 to do in a social situation as compared to
25 his age level peers.

1 We also look at job requirements.

2 We look at the pay ranges for the
3 various levels of employment.

4 Q. How do those factors -- how do you
5 assess those factors with respect to Jayden?

6 A. Well, what we looked at with Jayden is
7 -- we've got a lot of information as to his
8 functional abilities and, uh, -- I believe
9 that he is age eight now. Would you like for
10 me to discuss those?

11 Q. Please. Yes. My question is how do the
12 factors apply to your evaluation of Jayden
13 Washington. Please feel free to answer that.

14 A. Okay. These factors tell us our most
15 recent evaluation of Jayden, what is going on
16 with him now. From those we can make some
17 predictions as to how he will progress in the
18 future.

19 Back in '06, he was found to have global
20 developmental delays -- which is across-the-
21 board delays. Also difficulty with language
22 skills and oral motor -- which is being able
23 to speak and pronounce words.

24 In '08, his delays were still
25 continuing. One of the doctors, Dr. Michael

1 Katz, indicated that his poor academic
2 performance thus far would have a negative
3 affect on his ability in the future as far as
4 the workplace.

5 In '08, as well, Dr. David Adler
6 indicated that he had, that Jayden had,
7 significance neurological and neuro-
8 developmental disabilities and that these
9 were permanent.

10 At that point, I think the doctors were
11 able to decide that this was permanent, that
12 improvement might be slow -- as Dr. Adler had
13 noted.

14 Dr. Adler also noted that he felt that
15 Jayden would not be able -- would not have
16 the cognitive abilities to live independently
17 -- which means that he would need to be in a
18 group home or a sheltered environment, and
19 would need lifelong supervision.

20 Also, Dr. Margaret Greer-Simmons, and I
21 believe that she has already testified, had
22 talked about his current skills and levels
23 as of last year. That he had deficits in
24 attention and executive functioning, which
25 is being able to evaluate information and

1 make decisions -- and language and memory,
2 as the other physicians and folks have talked
3 about. In her deposition, Dr. Simmons
4 indicated that she felt that Jayden would not
5 be able to graduate from high school. He
6 would most likely attend school but that he
7 would get a certificate of completion, which
8 shows that he has attended it until he is
9 eighteen or so but would have graduated from
10 the general program like the rest of the
11 students.

12 She noted that he had fine motor
13 deficits and felt that as the demands in
14 school increase that he would encounter more
15 difficulties.

16 His physical therapist indicated in her
17 deposition in January of this year that he
18 had difficulty with coordination.

19 His occupational therapist said that he
20 is meeting some goals -- occupational therapy
21 is small muscles, like using your hands. He
22 had to continually relearn these skills and
23 abilities because he would learn them and
24 then regress, so that was an ongoing --
25 (pause).

1 Then the school psychologist said in '09
2 that he was not performing at the same level
3 of his peers within his kindergarten class.

4 Q. Do you have an opinion to a reasonable
5 degree of vocational certainty as to whether
6 or not Jayden Washington will be employable?

7 A. Yes, I do.

8 Q. What is your opinion?

9 A. My opinion is that he will not be
10 employable in the competitive job market.

11 Now, the competitive job market is the
12 regular job market where everybody is
13 competing against each other.

14 I think that he will probably be
15 appropriate for sheltered employment.
16 Sheltered employment is something in the
17 neighborhood of The Hope Center, which used
18 to be on Sam Rittenburg. It is a center that
19 adults come to for work activities. They
20 work under very strict supervision, it is
21 very simple tasks such as stuffing envelopes
22 or stacking things. They don't make minimum
23 wage and it -- it is sort of a work activity.

24 It gives them some purpose in their
25 lives. But because they cannot compete with

1 -- I don't want to say "normal" people, but
2 with other folks in the competitive job
3 market, they have a place where the bus can
4 take them and they can go have a work
5 activity there and have some purpose and
6 schedule in their lives.

7 I think that would be most appropriate
8 for Jayden once he completes his time in
9 school.

10 If he had not these injuries and this
11 subsequent deficits, it's most likely that he
12 would have graduated from high school and
13 would have gone right on into the job market
14 at about age eighteen.

15 Retirement age for him, for Social
16 Security would probably be sixty-seven, so he
17 would have had that time in the job market
18 with a median wage of about \$30,316. That's
19 kind of the average.

20 Q. All right, let me follow up on a few of
21 those points.

22 You indicated your opinion that if he
23 had not sustained brain damage incurred, he
24 would have most likely have finished high
25 school?

1 A. Graduated from high school.

2 Q. And done any further education?

3 A. Probably not. He would have gone
4 straight on into the job market.

5 Q. Now, if you're wrong about that and if
6 he could have had further education, what
7 affect would that have on his future earning
8 capacity, had he not ---

9 A. If he had gone on and -- say to
10 technical school -- he would have had a
11 higher earning level throughout his lifetime.

12 Q. Now, explain to me what you mean by
13 finishing high school. It seems to me that
14 -- I've heard about high school diploma and
15 high school certificate. Could you address
16 that and explain the difference between those
17 concepts?

18 A. A high school certificate is actually a
19 certificate of attendance. This is for an
20 individual who is perhaps in special
21 education or resource classes, who does not
22 need the criteria of the certain number of
23 units set by the state for a high school
24 diploma but has attended until, I think, uh,
25 -- the age of twenty-one, so twenty-one,

1 between the age of eighteen and twenty-one,
2 and it is a certificate of attendance.

3 A diploma is the earned credits of so
4 many in English, so many in Math, and are
5 different -- it's an academic diploma.

6 Q. Do you have an opinion to a reasonable
7 degree of vocational certainty as to whether
8 or not Jayden will earn a high school
9 diploma?

10 A. Yes, I do.

11 Q. What is your opinion?

12 A. That he will not, that he will most
13 likely receive a certificate of attendance.

14 Q. Of what benefit is a certificate of
15 attendance to Jayden's future employability?

16 A. It really is none, but it does give
17 those individuals a certificate and denotes
18 their time that they have spent in high
19 school.

20 Q. You mentioned that but for the brain
21 damage at birth your opinion is that Jayden
22 would have earned a median salary of \$33,316
23 with -- if he stopped his education at high
24 school?

25 A. \$30,316. That's the median for

1 individuals with a high school diploma. That
2 takes into consideration all different
3 occupations.

4 Q. What year is that, that you're focusing
5 on? The \$33,000 (sic), would that be for the
6 rest of his work life or is that limited to a
7 certain time period?

8 A. That's the median as -- I think that is
9 two hundred nine dollars, because that's the
10 most recent from the Department of Labor,
11 that's the median as of then. Of course that
12 would increase as time goes on.

13 Q. And is it within your expertise to talk
14 about those wage increases in the future, or
15 would you defer to a different type of expert
16 for that?

17 A. I would need to defer to the economist
18 on that.

19 EDWARD GRAHAM: Thank you.
20 Please answer any questions that the
21 defendants may have.

22 THE WITNESS: Certainly.

23 THE COURT: Cross-examination.

24 ELIZABETH BALLENTINE: May it please
25 the Court?

1 THE COURT: Yes, ma'am.

2 CROSS EXAMINATION

3 BY ELIZABETH BALLENTINE:

4 Q. Good morning, Ms. Hutchinson.

5 A. Good morning.

6 Q. All the work you do is connected to
7 litigation; is that true?

8 A. That's correct.

9 Q. Your job is to evaluate people for
10 lawsuits with respect to employability?

11 A. And wage amounts.

12 Q. It is not part of your job to treat
13 patients, is it?

14 A. No.

15 Q. And the majority of the evaluations that
16 you do are with adults?

17 A. I do adults and children, but the
18 majority are adults.

19 Q. In fact, less than ten percent of your
20 work is with young children; isn't that true?

21 A. That's probably about right.

22 Q. You don't have any sort of medical
23 degree, do you?

24 A. No.

25 Q. And you're not rendering any medical

1 opinions in this case?

2 A. I am not.

3 Q. And you're not rendering any opinions on
4 the cause of injuries or disabilities that
5 Jayden may have?

6 A. I am not.

7 Q. And in evaluating children, a lot of
8 information is obtained from the parents; is
9 that true?

10 A. It is, but I rely heavily on objective
11 information from testing and from the various
12 therapists.

13 Q. But you rely on the parents to provide
14 you with information regarding the child's
15 deficits, where they are; isn't that true?

16 A. The majority of what I rely on is the
17 testing and the various treating individuals
18 like the therapists.

19 Q. And you've never offered an opinion that
20 a child with cognitive deficits, such as
21 this, would have some level of future
22 employability; is that true?

23 A. I think we have to look at everything
24 individually. As far as Jayden is concerned,
25 I don't think that he will be competitively

1 employed.

2 Q. In fact, you've never offered an opinion
3 that a child with deficits such as these
4 would have any level of future employability?

5 A. That's most likely correct because the
6 cases that I get are of severely impaired
7 individuals.

8 Q. You did not speak with any of Jayden's
9 treating physicians?

10 A. No, I had the records.

11 Q. You did not speak to any of Jayden's
12 therapists?

13 A. I had their records, as well.

14 Q. But you did not speak with any of them,
15 discuss Jayden?

16 A. No.

17 Q. You did not speak with any of Jayden's
18 teachers?

19 A. No, I had that information as well.

20 Q. As the time that you rendered your
21 opinion, you did not have any of the school
22 records to determine his performance in
23 school; did you?

24 A. I think that I had some very basic ones,
25 just from the beginning of school.

1 Q. But you did not have the majority of the
2 school records at the time that you rendered
3 your report, did you?

4 A. No, I did not.

5 Q. You met Ms. Washington and Jayden on
6 November 11th, 2008, for about an hour?

7 A. That's correct.

8 Q. And you have never met with them or
9 spoke with them since that time?

10 A. I have not.

11 Q. And this meeting took place at Mr.
12 Graham's office?

13 A. It did.

14 Q. And you did not actually observe Jayden
15 having any problems with walking or climbing
16 stairs or anything like that when you were
17 with him, did you?

18 A. I did not see them arrive and there were
19 not steps involved where we were.

20 Q. In fact, your only interaction with
21 Jayden was his drawing of a picture?

22 A. I had him draw a picture for a number of
23 reasons, to watch how he handled and also so
24 that he would stay quiet while his mom and I
25 talked.

1 Q. And that was your only interaction with
2 him during the meeting?

3 A. That's correct.

4 Q. And he was able to color appropriately
5 during that time?

6 A. He was.

7 Q. And you noticed that he can help clean
8 and do chores, ride a bike and play computer
9 games?

10 A. I believe that was in my records, yes.

11 Q. Now, a person's IQ factor, you factor
12 into an employability evaluation; is that
13 true?

14 A. That's true.

15 Q. A person's IQ can factor into their
16 employability evaluation but you did not know
17 his IQ at the time that you rendered your
18 report, did you?

19 A. No, I did not but I had the rest of the
20 records.

21 Q. But you did not know what his IQ was?

22 A. I did not, not at that time.

23 Q. Now, I believe that you mentioned
24 retirement age. If Jayden's grandfather
25 retired at age fifty-five, would it be

1 reasonable to expect that Jayden would also?

2 A. No.

3 Q. Why not?

4 A. I think for Jayden, when he gets to be
5 that age, -- most people retire when they can
6 get Social Security. That would be sixty-

7 seven for him. Most likely when you're in

8 just a regular job that does not have a

9 super-duper 401-K or anything like that, most

10 people retire at the point when they can get

11 Social Security. That's how we generally

12 judge it as -- entering the job market and

13 leaving it at Social Security age.

14 Q. So you have never considered the fact

15 that his grandfather retired at fifty-five, a

16 lower age?

17 A. I have no information on the grand-

18 father, what he did or what his retirement

19 plan was.

20 Q. Thank you. Have you not performed your

21 own evaluation of what Jayden was capable of

22 or not capable of -- is that true?

23 A. That's correct, I looked at the

24 information in the file.

25 Q. In fact, most important to you in

1 rendering your opinion today are the reports
2 of Dr. Katz and Dr. Adler?

3 A. Dr. Katz, Dr. Adler, the occupational
4 therapist, the physical therapist, the school
5 psychologist, the psychological evaluation of
6 Dr. Barbara Greer. I took into consideration
7 all of that.

8 Q. But the time that you actually rendered
9 your report and gave your opinions initially,
10 what was most important to you in rendering
11 your opinions were the evaluations of Dr.
12 Katz and Dr. Adler; isn't that true?

13 A. That's correct, as well as the pediatric
14 speech and language evaluation that was also
15 in the file at that time.

16 Q. And these were two experts that we hired
17 by the plaintiff, is that true?

18 A. I believe so.

19 Q. And two are two doctors that were not
20 Jayden's treating physicians nor had they
21 ever spoken with Jayden's treating
22 physicians?

23 A. You'd have to ask them. I don't know.

24 Q. Well, you were aware that they were not
25 treating physicians and were not seeing

1 Jayden on a regular basis, isn't that true?

2 A. That's right. I knew that they were
3 hired in this case, not his treating doctors.

4 Q. Your opinion that Jayden will never
5 graduate from high school, you're not aware
6 that any of his teachers have confirmed that,
7 have you?

8 A. I am not aware of what his teachers have
9 said on that subject.

10 Q. You are rendering an opinion here today
11 that Jayden will never be employable in any
12 capacity, based on your personal involvement
13 that you had one hour when he was six years
14 old?

15 A. And based on the records that I have in
16 the file.

17 Q. But as far as your personal involvement
18 with Jayden, you're basing your opinion that
19 he will never be employable at all based on
20 any interview that happened in one hour when
21 he was six years old and when your only
22 interaction with him was when he drew a
23 picture.

24 A. It is based on that but it is also based
25 on the information in the file.

1 ELIZABETH BALLENTINE: No further
2 questions.

3 THE COURT: Very well. Is there
4 redirect?

5 EDWARD GRAHAM: Yes, Your Honor.

6 THE COURT: Go ahead.

7 EDWARD GRAHAM: Thank you, Your
8 Honor.

9 REDIRECT EXAMINATION

10 BY EDWARD GRAHAM:

11 Q. Ms. Hutchinson, questions were put to
12 you about IQ. Did her come a time in your
13 evaluation when you get obtain the IQ test
14 results?

15 A. Yes.

16 Q. What effect, if any, did that have on
17 your opinions?

18 A. It confirmed my opinions.

19 Q. And the question was put to you about
20 not having the complete school records at the
21 time of your initial opinion. As a child
22 gets older, uh, -- tell us whether or not it
23 is necessary to update school records with
24 each passing year?

25 A. It's always helpful to have further

1 information but at the time that I did my
2 report, I felt that I had enough information
3 to formulate my opinion and the further
4 information that I've gotten since that time
5 has confirmed that opinion as accurate.

6 Q. In terms of the most recent school
7 records, do you have an opinion to a
8 reasonable degree of medical (sic) certainty
9 as to whether Jayden's gap, lagging behind
10 his age peers is increasing or not?

11 A. It is continuing to ---

12 ELIZABETH BALLENTINE: Object, Your
13 Honor. She is not a medical doctor.

14 THE COURT: Sustained.

15 EDWARD GRAHAM: I'm sorry. She
16 is not what?

17 ELIZABETH BALLENTINE: A medical
18 doctor.

19 THE COURT: Objection was that she
20 is not a medical doctor. Your question was
21 to a degree of medical certainty.

22 EDWARD GRAHAM: I'm sorry. I
23 apologize.

24 REDIRECT EXAMINATION CONTINUED

25 BY EDWARD GRAHAM:

1 Q. Ms. Hutchinson, do you have an opinion
2 to a reasonable degree of vocational
3 certainty as to whether or not the school
4 records indicate Jayden's lag behind his age
5 peers is getting smaller, staying the same or
6 getting greater?

7 ELIZABETH BALLENTINE: Objection.
8 Leading.

9 THE COURT: Overruled on that
10 point. You may answer the question, ma'am.

11 THE WITNESS: Thank you. The
12 information that I have in the file indicates
13 that Jayden's deficits are continuing and, as
14 Dr. Greer indicated, they are becoming a more
15 difficult situation for him as he gets into
16 more complicated school work and personal
17 relationship.

18 REDIRECT EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. Now, we heard yesterday that Jayden's
21 grandfather retired from the Department of
22 Defense at the age of fifty-five. Do you
23 have an opinion to a reasonable degree of
24 vocational certainty as to whether or not
25 Jayden will qualify for Federal Government

1 retirement benefits?

2 A. Yes, I do.

3 Q. What is your opinion?

4 A. He would not.

5 EDWARD GRAHAM: Thank you.

6 THE COURT: Ma'am, you are free
7 to stay down and you're free to leave if you
8 wish.

9 (WITNESS STEPS DOWN)

10 THE COURT: Please call your next
11 witness.

12 EDWARD GRAHAM: Your Honor, we
13 anticipate that our next witness would be
14 here no later than 9:30. Can I speak with
15 cocounsel?

16 THE COURT: Go ahead.

17 MARY WATERS: Your Honor, I
18 spoke with our next witness and she assured
19 me that she would be here this morning.
20 I've tried her cell and I cannot reach her.

21 THE COURT: All right. Do you
22 have another witness ready?

23 EDWARD GRAHAM: We do not, Your
24 Honor.

25 THE COURT: Are there any more

1 depositions to publish?

2 EDWARD GRAHAM: Oh, -- if Your
3 Honor please, we would like to publish one
4 brief portion -- no videos, I'm going to read
5 it -- a brief portion of Dr. Rhett's
6 deposition testimony.

7 THE COURT: All right. Is there
8 any objection?

9 JAY DAVIS: No, sir.

10 THE COURT: Hearing none, ---

11 MOLLY CRAIG: No, sir.

12 THE COURT: --- then you may
13 proceed to publish an additional portion of
14 Dr. Rhett deposition.

15 EDWARD GRAHAM: Thank you, sir.
16 This, again, was a deposition taken at the
17 law office of the Hood Law Firm on Meeting
18 Street here in Charleston on July 21, 2008,
19 starting at 3:10 p.m.

20 Page 42, starting at Line 12,
21 (reading):

22 Q. Since your residency, tell me
23 about your employment?

24 A. I started solo private practice
25 in 1977 and I did that approximately nine

1 years. Then I joined with Granger Osborne,
2 O-s-b-o-r-n-e, and we formed Lowcountry Ob-
3 Gyn somewhere along in there.
4 I left them -- in February of '07, I went
5 into private/solo gyn practice. I stopped
6 doing obstetrics on September 29th, 2005. I
7 only remember the date because it's my
8 mother's birthday. Three of those patients
9 named babies after my mother, they did,
10 called them Mary.

11 That concludes it, Your Honor, at
12 Line 24.

13 THE COURT: All right. Are there
14 further designations in response to that,
15 from either defendant?

16 JAY DAVIS: No, sir.

17 MOLLY CRAIG: No, sir.

18 THE COURT: Hearing none, Ladies
19 and Gentlemen, we will stand down for a
20 moment while we determine the status of this
21 witness. We will reconvene either with
22 another witness or the witness that we're
23 waiting for in just a moment. We will let
24 you return to the jury room. Enjoy the
25 break. We will remain seated while the jury

1 exits.

2 (JURY OUT)

3 THE COURT: Your next witness,
4 behind the witness who is missing, is ---

5 EDWARD GRAHAM: Dr. Voight, the
6 life care planner.

7 THE COURT: What time is he
8 supposed to be here?

9 EDWARD GRAHAM: We anticipate him
10 about 10:15 -- 10:00 to 10:15 is what he told
11 me last night.

12 THE COURT: Very good. Whoever
13 comes next, just let us know and we will --
14 we realize that there was an accident. Where
15 is the witness from that you're waiting on?

16 MARY WATERS: I think she lives
17 in West Ashley. I know she works in West
18 Ashley.

19 THE COURT: Very good. We will
20 wait for her. Please continue to try to
21 contact her.

22 EDWARD GRAHAM: Yes, sir. Thank
23 you, Your Honor.

24 THE COURT: We will be at-ease.

25 (BRIEF RECESS)

1 THE COURT: Are we ready for the
2 jury?

3 MARY WATERS: Yes, sir.

4 THE COURT: Please bring in the
5 jury.

6 (JURY IN)

7 THE COURT: Welcome back, Ladies
8 and Gentlemen. Call your next witness.

9 MARY WATERS: We call Kristen
10 Priolli.

11 (WITNESS TAKES STAND)

12 KRISTEN PRIOLLI, being duly sworn to
13 tell the truth, the whole truth and nothing
14 but the truth, testified, as follows:

15 DIRECT EXAMINATION.

16 BY MARY WATERS:

17 Q. Good morning. Can you tell us where you
18 live?

19 A. I live in Charleston, I live in West
20 Ashley.

21 Q. And can you tell us a little bit about
22 your background, educational background?

23 A. I did my undergraduate and my graduate
24 degree, both, in physical therapy and I've
25 got a masters degree in physical therapy.

1 Q. Can you tell us a little bit about your
2 background and employment history?

3 A. I have been employed with Charleston
4 Pediatric Rehabilitation since April of 2007,
5 and for a brief time -- for a three-year
6 period, I have also worked with the geriatric
7 population at a nursing home.

8 Q. Could you explain for us what a physical
9 therapist does? We've heard from an
10 occupational therapist and a speech therapist
11 but please explain how what you do is
12 different from what ---

13 A. A physical therapist works -- our job is
14 mainly to work on the large muscles of the
15 large muscles of the body and to work on
16 gross motor skills, so stretching, firming,
17 jogging, running, as well as general balance,
18 stairs negotiation, things of that nature.
19 It works on the gross motor skills.

20 Q. Is there any overlap between what you do
21 as a physical therapist and what an
22 occupational therapist and/or speech
23 therapist do?

24 A. There is always an overlap between the
25 therapies because we like to have everybody,

1 you know, know what everybody is working how
2 and try to incorporate it in our sessions as
3 well.

4 Occupational therapy and physical
5 therapy in the pediatric setting overlaps
6 greatly. The occupational therapist, she
7 works on a lot of the fine motor skills,
8 including balance, and that also is include
9 in the gross motor skills that we work on.

10 Q. Thank you. Have you provided physical
11 therapy to Jayden W. ?

12 A. Yes, I have.

13 Q. How long have you provided physical
14 therapy for Jayden W. ?

15 A. Since 2007.

16 Q. Almost three years?

17 A. Be three years.

18 Q. Tell us about the type of children that
19 you provide therapy services to?

20 A. A lot of diagnoses are general
21 developmental delays, general gross motor
22 delays, and I also work with autism, cerebral
23 palsy, Down Syndrome, anyone -- anything that
24 will help them acquire gross motor skills
25 that they don't have at that time.

1 Q. Do you also work with children who have
2 suffered traumatic brain injury?

3 A. Yes, ma'am.

4 Q. And you work with Jayden W. 1?

5 A. Yes.

6 Q. How often do you see Jayden?

7 A. One time a week.

8 Q. Give us some examples of the types of
9 things that work with, do with Jayden.

10 A. With him we are working on balance
11 rehabilitation ---

12 Q. I'm sorry?

13 A. Balance rehabilitation. We -- our
14 ability to get feedback from our environment,
15 through our feet and our hands and our large
16 muscles and how we interpret auditory and our
17 visual system, how we interpret what we see.
18 With Jayden, we're working on what we call
19 balancing and we work on -- which is very
20 difficult for him. When we take one or the
21 other system, really he -- specifically if we
22 take away visual feedback, he -- so we need
23 to work on that and that's what we do.

24 Q. Can you give some specific examples of
25 activities that you do with Jayden?

1 A. We're working on doing things like
2 walking on the balls of his feet, walking on
3 a balance beam, catching and throwing a ball.
4 Specifically when his -- his cognitive
5 aspect, when he is thinking about something
6 else, his balance suffers. So when we're
7 doing things like throwing the ball or
8 throwing things like that, we talk about
9 things like his day or his weekend -- we work
10 on things in that aspect where when he has to
11 focus on other things, how does it affect his
12 balance.

13 Q. How does Jayden do with that kind of
14 therapy?

15 A. He has great days and then he has bad
16 days where he is not focused at all. When
17 his mind is focused on something else his
18 body and his balance really, really suffers.

19 I coach him with speech therapy, so we
20 do a lot of things where we're talking to him
21 and asking him questions and -- asking him
22 about putting things in categories and things
23 like that.

24 During times that he is focused on
25 answering the questions, he is not focused on

1 getting feedback from the floor or from his
2 visual system, so it's difficult for him.

3 He loses his balance frequently. His
4 footing is not firmly placed on the ground.
5 His coordination is not great.

6 On his good days he does very well but
7 they are not consistent.

8 Q. Tell us a little bit more about his good
9 days, what are some of Jayden's strengths?

10 A. He is fun -- he comes in, he works hard
11 even when he doesn't want to.

12 He has gained a lot of things where he
13 has learned more about his environment
14 and he -- when I first started working with
15 him, he couldn't walk up and down stairs
16 without losing his balance. His balance was
17 not good. Now he can. So we are gaining
18 slow progress with his gait and his tilt.

19 Q. Is Jayden's skill level comparable to
20 what you what you would expect for a
21 typically developed eight-year-old?

22 A. No, it is not. A typically developing
23 eight-year-old would be able to throw a ball,
24 he would be able to walk on six-inch wide,
25 eight-foot I-beam without stepping off, he'd

1 be able to do jumping jacks consistently
2 without losing his balance or losing his
3 coordination. Those are the type of things
4 that we are working on with Jayden because he
5 cannot do all those types without losing his
6 balance at this point.

7 Q. Did you bring your chart with you here
8 today?

9 A. Yes, ma'am.

10 Q. I would like to refer your attention to
11 Jayden's physical therapy progress note dated
12 June 1st through June 29th.

13 A. Yes.

14 Q. This has been previously identified as
15 Exhibit 14-510. Is this document one that
16 was created by you in the course of providing
17 therapy for Jayden?

18 A. Yes, ma'am.

19 MARY WATERS: Your Honor, we
20 would like to offer this exhibit into
21 evidence at this time.

22 THE COURT: Is there an objection?

23 CHILTON SIMMONS: No, sir, Your
24 Honor.

25 THE COURT: Hearing none, you may.

1 It's in evidence without objection.

2 (SO ENTERED AS PLAINTIFF EXHIBIT 14-510)

3 DIRECT EXAMINATION CONTINUED

4 BY MARY WATERS:

5 Q. Ms. Priolli, this document is for
6 demonstrative purposes only. I don't know
7 that we need you to actually read it but
8 we're going to need for you to describe for
9 us what this document represents, what your
10 observations and your findings are in working
11 with Jayden?

12 A. Working with Jayden, there are our
13 progress notes that we create every month.
14 We have goals for a carry-over, home exercise
15 program, which Jayden had been complying with
16 as far we know. She told us that he had been
17 doing the things that we had asked him to and
18 Jayden reported to us that he had been
19 working on stuff at home, so that always a
20 good thing to hear.

21 We are also working on jumping jacks.
22 The reason it's not been achieved yet because
23 he is not able to do it consistently without
24 losing his coordination, without losing his
25 footing, without losing his balance and his

1 focus. So we have not been able to achieve
2 that for him.

3 We are also working on hopping on one
4 foot, which is also working on his balance.
5 Jayden is able so do these things sometimes
6 more consistently than others. His right
7 side is stronger than his left side. He
8 struggles a lot with hopping on one foot
9 because he doesn't have the core muscle
10 support that is required for hopping on one
11 foot.

12 We are also working on a balance beam
13 that is six inches wide, eight feet long. We
14 go back and forth with him, he has a real
15 difficult time but we walk along the side
16 while is walking on the balance beam, sort of
17 support him so that he can feel successful.
18 Feeling successful is also a bit part of
19 therapy, so we want him to feel successful in
20 his task. We go back to quite frequently.

21 We worked on walking a balance line
22 where he puts one foot in front of the other
23 and he steps off that line quite frequently.

24 We also work with a soccer ball,
25 dribbling in the distance of a hall for fifty

1 feet.

2 We are also catching a beanbag ball so
3 we can improve his arms, support. He has to
4 actually move from one side to the other to
5 catch the ball. It is not thrown directly to
6 him. When he does catch the ball or when he
7 hits a ball that's thrown it disrupts his
8 balance, he over, uh, over -- I can't think
9 of the word -- over-anticipates where it is
10 going to go, so he will kind of jump, or he
11 may underanticipate. Once the throw gets
12 really really outside of what he anticipates,
13 he really, really struggles with that.

14 We also work on catching the beanbag with one
15 hand.

16 He is doing all right with all of that.
17 He has some great days and he has some bad
18 days. When he is really motivated, he is
19 even more motivated than on another day and
20 tries a lot harder. He is still not anywhere
21 near a hundred percent accurate in any of his
22 activities.

23 Q. So by the time of these progress
24 reports, had Jayden achieved any of the goals
25 you'd set for him?

1 A. Not by the end of June.

2 Q. When you established these goals, were
3 this goals that you would established for a
4 typical eight year old?

5 A. A typically developing eight year old
6 would be able to perform this skills, yes,
7 but I felt that typical eight year olds would
8 already know these skills. Jayden needs help
9 in gain the basic skills.

10 Q. Has Jayden improved since you've been
11 working with him?

12 A. He has made steady progress. Like I
13 said, he wasn't able to work up and down
14 stairs without help and now he can.

15 He wasn't able to do any work standing
16 on one foot when I first started working with
17 him and now we are working on hopping on one
18 foot.

19 So well there has been progress, the
20 progress has been very slow. It's not that
21 he maintains the skills that he is learning
22 so sometimes we have to do back and relearn
23 or refresh a skill. It isn't that he have
24 lost the memory of an entire skill but he
25 will lost the muscle memory of the skill,

1 whether it is his balance, whether it is
2 coordination.

3 Q. Based on your experience as a physical
4 therapist and your experience in working with
5 Jayden, do you foresee a time when it would
6 be viable for Jayden to stop physical
7 therapy?

8 A. When he's achieved all the skills that
9 he can acquire for the age that he is, say
10 nine, ten, eleven, and he has acquired all
11 the skills, then he may be able to stop
12 therapy but I don't know when that point
13 would be, if it is going to be or at what age
14 he is going to achieve that.

15 For example the skill of hopping on one
16 foot is a skill that a typical four or five
17 year old would be able to do very easily and
18 Jayden is now eight, almost eight. So things
19 like that, I don't see any time in the near
20 future that he would be able to stop that
21 kind of therapy.

22 Q. Based on your experience as a therapist,
23 what would you expect to see if Jayden
24 stopped receiving therapy.

25 A. I would expect to see regression of

1 skills that we have worked on if he does not
2 use them. He has progressed with therapy but
3 without it, I don't foresee that he would be
4 able to retain the skills.

5 Q. Do you have any concerns for Jayden
6 regarding his feeling of success?

7 A. I have big concerns for Jayden feeling
8 he is successfully. His mind -- his body
9 can't keep pace with his mind. He wants to
10 run, he wants to kick the ball and he wants
11 to do the jumping and all that but his mind
12 is a bit slower and that contributes to some
13 of the lack of balance, he doesn't always
14 have great attention and will consistently
15 trip. He wants into things sometimes because
16 he doesn't pay attention to where they are.
17 When he -- even when he does know where
18 things are there is no guarantee that he is
19 not going to trip and fall. He has poor
20 balance and he has poor coordination, so he
21 is apt to fall and injure himself.

22 MARY WATERS: Thank you.
23 Please answer any questions that defense may
24 have.

25 THE COURT: Cross-examination?

1 ELIZABETH BALLENTINE: Thank you,
2 Your Honor, may it please the Court.

3 CROSS EXAMINATION

4 BY ELIZABETH BALLENTINE:

5 Q. Good morning, Mr. Priolli. Although
6 Jayden does not cerebral palsy, I believe
7 that you just advised that you do treat
8 children who have it. Is that correct?

9 A. Yes.

10 Q. What limitations do children with
11 cerebral palsy have?

12 A. They can have a wide range of
13 limitations. They can have very minimal
14 limitations to being in a wheelchair and not
15 having any movements that are voluntary.

16 Q. And Jayden is making improvement,
17 correct?

18 A. Somewhat.

19 Q. And all of the costs incurred by you and
20 Charleston Pediatric Rehab are paid by
21 Medicaid; correct?

22 A. As far as I know. I am not really sure.

23 Q. Thank you, those are all my questions.

24 THE COURT: Redirect?

25 MARY WATERS: Nothing, Your

1 Honor.

2 THE COURT: You may step down and
3 you are free to leave, if you wish.

4 (WITNESS STEPS DOWN)

5 THE COURT: Please call your next
6 witness.

7 EDWARD GRAHAM: Your Honor, our
8 next witness is Dr. Robert Voight.

9 (WITNESS TAKES STAND)

10 ROBERT D. VOIGHT, being duly sworn
11 to tell the truth, the whole truth and
12 nothing but the truth, testified, as follows:

13 DIRECT EXAMINATION

14 BY EDWARD GRAHAM:

15 Q. Dr. Voight, good morning.

16 A. Good morning.

17 Q. Tell the Ladies and Gentlemen a bit
18 about who you are, just some personal
19 background so that they will understand how
20 you're involvement relates to this case.

21 A. I've been in rehab for probably since
22 '78, 1978, when I graduated from the
23 University of Michigan with my doctorate in
24 Rehab Counseling.

25 I do case management. I do long-term

1 care planning with severe disabilities of
2 children and adults.

3 I've run a rehab program in New Orleans
4 since '88, two programs in New Orleans,
5 they're adults with brain injury.

6 I run a program in Virginia Beach that's
7 a twelve-bed for brain injuries.

8 Also a new project is running a forty-
9 bed dementia and Alzheimer's unit for --
10 probably my patients average between the age
11 of sixty to one hundred one.

12 That's what I do on a daily basis. I
13 was -- all my life I've been in disability
14 rehab.

15 Q. Where do you reside?

16 A. Virginia Beach, Virginia.

17 Q. And what organizations, if any, with
18 regard to brain damage and rehabilitation
19 have you been active in?

20 A. International Brain Injury Association,

21 Brain Injured Association of America,

22 NABIS, North American Brain Injured

23 Society -- I developed that organization and

24 was the chairperson until a month ago.

25 I served on the -- let's see -- served

1 on St. Mary's for Disabled Children, which is
2 a ninety-bed program for the -- the most
3 severe children in Virginia go to that place,
4 reside there until they are eighteen years
5 old.

6 I am a member of the Board of World
7 Federation of Neuro-Rehab.

8 I think that's it.

9 Q. You mentioned an International Brian
10 Injury Association?

11 A. Yes.

12 Q. Have you served as an officer in that
13 group? Is so, what?

14 A. I was the chairperson of that group.

15 Q. Have you from time to time been called
16 upon to make presentation both across this
17 country and internationally? If so, please
18 tell the jury about that.

19 A. I probably have gave invited lectures
20 about two hundred over my lifetime, all in
21 the area of disabilities, brain injury and
22 long-term care costs and, uh, -- I've been a
23 consultant to various organizations to set up
24 rehab programs around this country, Europe
25 and Asia. I went to the Phillippines and

1 help set up a long-term care program for the
2 document of Phillippines. I've went to
3 London and get the same thing. But I lecture
4 probably -- I've lectured in probably thirty
5 foreign countries, most states in this
6 country. I give seventy percent of my
7 lectures to physicians and therapists, case
8 managers, but the rest are to lawyer groups.

9 Q. Let me ask you, sir, you mentioned a
10 doctorate from the University of Michigan.
11 Tell us about your educational background
12 starting with college.

13 A. I was raised in Grand Rapids, Michigan.
14 I went to a private religious college called
15 Calvin College. I got my bachelors degree
16 from there in Elementary Education. I taught
17 Special Ed during my training there and I
18 worked with the college for two years in
19 counseling.

20 I went to the University of Michigan,
21 received my master's in rehab counseling and
22 stayed on for my doctorate in the same field.

23 I did my internship at the University of
24 Michigan Hospital in rehab.

25 Q. Thank you, sir. What licenses and

1 certifications do you have?

2 A. Certified as a clinical examiner with
3 the American Academy for the certification of
4 Brain Injury Specialists.

5 I have my license, uh, as a certified
6 rehabilitation provider in Virginia.

7 National Board of Certified Counselors..

8 I'm licensed as -- dual licensed as a
9 vocational rehabilitation counselor and a
10 professional counselor in Louisiana.

11 I have my certified rehabilitation
12 counselor certification.

13 I am also licensed to run my treatment
14 centers in New Orleans and Virginia Beach.

15 Q. Thank you, sir. Have you published in
16 journals in your field? If so, just give us
17 an idea about that.

18 A. Yes. Probably have, uh, fifty
19 publications. I do publish in a brain
20 injured professional called Putting Their
21 Heart and Soul in Brain Injured Rehab and
22 Life Care Planning.

23 I publish in a brain injury, I wrote an
24 article called -- from my speech in Italy, in
25 Rome, at the Vatican in 2000, Melding the

1 Human Spirit and Medical Experience for the
2 21st Century. That was published in Moscow,
3 Russia.

4 I've published an article called Impact
5 of Treatment and Survivor Roles of Persons
6 With Traumatic Brain Injury. That was
7 published in the Functional Rehabilitation in
8 Neuro-Surgery and Neuro-Traumatology.

9 Q. Thank you. Have you served as a
10 professor teaching courses at universities?
11 If so, where?

12 A. I got my first real job at New Orleans,
13 graduating from the University of Michigan in
14 '78. I got a job at LSU Medical Center in
15 New Orleans. I stayed there for two years
16 teaching in rehab counseling. I had a
17 clinical practice with, uh, children and
18 adults, did long-term care planning with
19 them, counseling with them.

20 I later taught at St. John's University
21 in New York City, a rehab counseling program,
22 masters and doctoral program.

23 A friend of mine put me on the faculty
24 at Ohio State. I consented on my resume,
25 being from Michigan, so I resigned after two

1 years.

2 I'm a faculty member at the University
3 of North Dakota, doing research with them and
4 lecture every semester on brain injury to
5 engineers at that college.

6 Q. What is life care planning?

7 A. It's been around since World War II.
8 Soldiers coming back -- you know, in World
9 War I everyone died from amputations and
10 blasts and things like that. World War II,
11 people survived during World War II war
12 wounds. So they were coming back, amputees,
13 burns, shot. The government started programs
14 in voc rehab counseling to get these veterans
15 back to work.

16 In '73, government realized that more
17 and more people were living with severe
18 disabilities like Christopher Reeves, things
19 like that, who usually died from the
20 injuries. So government set up a rehab
21 counseling program and they called it rehab
22 planning -- still today, life care planning
23 is a take off of individualized
24 rehabilitation planning from the government.

25 Q. Have you been qualified in various

1 courts as an expert in life care planning?

2 A. Yes. Probably three hundred times.

3 Q. Let me ask you, sir, about Medicaid. Do
4 you have any expertise in terms of Medicaid
5 and how Medicaid interacts with life care
6 plans? If so, please describe that?

7 A. Yes, I was appointed by the Governor
8 Warner in 2002, before he became a senator,
9 to the Medicaid Board, DMAS, as overseas
10 Medicaid budget and Medicaid policies.
11 I was selected chairperson of that in 2006.
12 So I served my four-year term as chairperson.
13 We passed policy on medications and, uh,
14 oversaw four or five billion dollars in
15 spending. So I -- I have real knowledge of
16 Medicaid and what Medicaid pays for.

17 Also my running programs for thirty
18 years, you know, twenty-five years, made me
19 aware of what Medicaid would pay for.

20 I am on the St. Mary's Board, which is
21 ninety-five percent funded by Medicaid, so I
22 know what Medicaid pays for.

23 EDWARD GRAHAM: Thank you, sir.

24 Your Honor, at this point we would proffer
25 Dr. Voight as being an expert qualified to

1 address matters related to rehabilitation,
2 life care planning and Medicaid as it
3 interacts with life plans.

4 THE COURT: Is there any objection
5 or questions for the questions?

6 ELIZABETH BALLENTINE: No, sir.

7 JAY DAVIS: Your Honor, I would
8 object to him being qualified as a Medicaid
9 person at this point simply because I had no
10 previous knowledge that he was going to offer
11 opinions in that matter.

12 THE COURT: All right.

13 ELIZABETH BALLENTINE: Your
14 Honor, we would join in that.

15 THE COURT: Very good. Counsel,
16 I am going to certify the witness in the area
17 of life care planning. Clearly there has
18 been no objection to that. If there is a
19 question about Medicaid funding that you
20 believe is beyond the scope, that would be
21 inappropriate, please object
22 contemporaneously and the Court will rule at
23 that time.

24 EDWARD GRAHAM: Thank you.

25 DIRECT EXAMINATION CONTINUED

1 BY EDWARD GRAHAM:

2 Q. Dr. Voight, have you at my request
3 agreed to review certain materials regarding
4 Jayden Washington for the purposes of
5 formulating a life care plan for him?

6 A. Yes.

7 Q. How does one go about doing that,
8 ethically?

9 A. I have read the medical reports on him
10 since his birth, uh, there's probably a stack
11 of medical records eight inches tall.

12 I reviewed the medical records for my
13 life care plan and later, when my I did the
14 life care plan, I read medical records
15 produced in 2008 by Dr. Alder, Dr. Katz. Dr.
16 Greer-Simmons, and other providers.

17 I read deposition of the mom and father,
18 I think the mother and sister.

19 I saw Jayden and his mom in their former
20 apartment before they moved to Charleston and
21 spent two hours.

22 It is one thing to read their records
23 but -- you know, he's diagnosed in the
24 records with global developmental delay.

25 What does that mean today, today? Can you

1 read -- you can read it in the records but I
2 have to see the child and the family to know
3 how it impacts that specifically. So I took
4 the notes from my visit with them, combined
5 it with the history.

6 Medical records give me the diagnoses.
7 I was trained to figure out the handicaps
8 based on that diagnoses, so that you can say
9 the -- say the diagnosis in a sense is an
10 amputation at the wrist, your right hand is
11 missing. That is a diagnosis. The handicap
12 is not using two hands to play the piano, not
13 using two hands to get on the computer.

14 So the diagnosis is -- his diagnosis is
15 global developmental delays, mild mental
16 retardation. How does that play out in his
17 life? I heard the physical therapist how
18 functionally he does day to day. So we have
19 to understand that medical records, that
20 gives us the basis for my opinions and my
21 interview with the child and the mother.

22 So I put together the life care plan.
23 Members of my team call on providers and
24 vendors to see if they will provide care to
25 Jayden, what it will cost. We put that

1 together in the life care plan.

2 Q. Without further ado, would you please
3 tell the jury about the life care plan that
4 you have prepared, and to assist you I will
5 ask our assistant to display the life care
6 plan starting with the -- (working with
7 ELMO), the screen is not working.

8 THE COURT: Very good. We will
9 just wait here a moment or two. Please
10 return to your jury room. If you wish to go
11 outside, we will make that opportunity
12 available. Enjoy your break.

13 (JURY OUT @ 10:30 A.M.)

14 THE COURT: Doctor, you may also
15 step down but please don't speak to the
16 lawyers on either side while you are under
17 testimony.

18 (RECESS TO WORK ON ELMO)

19 THE COURT: Please bring in the
20 jury. Please be seated everyone, the jury is
21 coming in.

22 (JURY IN @ 10:50 A.M.)

23 THE COURT: Welcome back, Ladies
24 and Gentlemen. We were in the plaintiff's
25 direct examination. We have the audio-visual

1 now working. Please proceed, Mr. Graham.

2 EDWARD GRAHAM: Thank you, Your
3 Honor. Your Honor, before we publish
4 portions of the life care plan, I would offer
5 it into evidence as Plaintiff's Exhibit 38.

6 THE COURT: What say defendants?

7 ELIZABETH BALLENTINE: We would
8 object on the basis that the no doctor has
9 testified that a life care plan is necessary,
10 therefore it is speculative and not reliable.

11 THE COURT: Mr. Davis?

12 JAY DAVIS: I would also argue
13 that at this point that it is cumulative as
14 to his testimony on the stand.

15 ELIZABETH BALLENTINE: We would join
16 in that objection, as well.

17 THE COURT: The Court is going to
18 overrule the objection as to cumulative
19 simply because there is a lot of documentary
20 evidence in this case and I believe that it
21 would assist the jury to have it. So to the
22 reliability or speculative nature, that's for
23 the jury to determine and the court overrules
24 that as well. Mark it as an exhibit over
25 objection.

1 (SO ENTERED AS PLAINTIFF'S EXHIBIT 38)

2 DIRECT EXAMINATION CONTINUED

3 BY EDWARD GRAHAM:

4 Q. Dr. Voight, is this the portion of the
5 life care plan that you would like to start
6 with?

7 A. Yes.

8 Q. Please explain, first of all, the
9 format, the various columns that you have and
10 -- so that we will understand this better as
11 you go through.

12 A. Can you get it more in focus?

13 Q. (Adjusting).

14 A. Okay. Okay. Divided in two sections,
15 uh, you know, Jayden gets sick from time to
16 time, ear infections and congestion. The day
17 before I saw him, he was in the E.R. for
18 congestion and ear infections.

19 So -- but he's medically pretty stable.

20 It's not like he's on a breathing machine.

21 He doesn't have pneumonia every day. So his
22 medical interventions are a small part of his
23 life care planning.

24 He is handicapped and disabled, not
25 typically sick. So I divided it into medical

1 evaluations and treatment and then there will
2 be therapy, therapeutic interventions, then
3 there is long term care and then there's --
4 and so the final page will wrap up all this
5 stuff on a yearly basis.

6 EDWARD GRAHAM: Your Honor, may I
7 approach the witness one ---

8 THE COURT: Yes, you may.

9 EDWARD GRAHAM: (Tenders laser
10 pointer to witness), -- in case you need to
11 highlight anything, Doctor, it's the top
12 button.

13 THE WITNESS: Thank you.

14 DIRECT EXAMINATION CONTINUED

15 BY EDWARD GRAHAM:

16 Q. Okay.

17 A. Can I talk?

18 Q. Please.

19 A. He sees a pediatrician, uh, -- I did my
20 life care plan where they were living before
21 and he saw his pediatrician six times a year.
22 But, uh, since they've moved to Charleston,
23 uh, I had to get a new pediatrician for them.
24 So the pediatrician is there, followup
25 visits. He goes six times a year to age

1 eighteen. His internal medicine kicks in and
2 he don't see a pediatrician -- all your life.

3 This is duration, frequency for year,
4 costs -- we call it the Pediatric Primary
5 Care on Ashley Avenue. They said -- they
6 gave us a range from \$100 to \$287. Some
7 people gave us a specific number.

8 That's how managed care is done -- short
9 visits, \$100; medium visit is probably \$200;
10 long visits are probably \$287. They don't
11 know what they are going to charge you when
12 you have an appointment. It ranges from \$100
13 to \$287. So in my final analysis, I took the
14 median on that, the average between \$100 and
15 \$287.

16 So he goes -- presently he goes to see
17 the pediatrician six times a year, and I just
18 said that -- I think that as he gets older
19 that he is not going to see him as much.

20 Internal Medicine, when he is eighteen
21 years old, and , uh, in order to set up a
22 file you have to go through an initial
23 session. They charge \$220 for that session
24 and the following visits for life, is going
25 to go two to three times a year, an average

1 person goes to the internist once a year, so
2 that -- you have to take off one visit from
3 this. They charge \$80 to \$160 at Internal
4 Medicine.

5 So, you know, Dr. Adler in his report
6 said that he is going to need pediatrics,
7 internal medicine, neurology, orthopaedic and
8 physiatry.

9 Neurology is next to age eighteen.
10 After age eighteen once a year.

11 I would like to remove this neurosurgeon
12 because his brain is stable. That would save
13 \$150 a year. So I will remember to do that.

14 Next page.

15 Q. Before we leave that page, sir, I want
16 to ask you one thing. I see something there
17 that looks a bit odd to me. Under
18 neurologist, initial evaluation, it says
19 Charleston WB. Is that a typo?

20 A. Yeah, it's -- it should be Charleston,
21 South Carolina.

22 He goes to see an ENT on average once a
23 year. I've -- ENT, once a year.

24 Cardiologist. He saw a cardiologist for
25 awhile. I don't have a value on that. As-

1 needed. It doesn't translate into a value
2 an, uh, uh, there, I have no money set aside
3 for cardiology but as needed.

4 High risk clinic, one time to assure him
5 -- for the high risk clinic, he, children
6 like this go to, uh, developmental
7 pediatricians there.

8 Next page.

9 Physiatry. I don't have orthopaedics
10 and as Dr. Adler talked about, he talked
11 about physiatry. We have him seeing a
12 physiatrist once a year at a cost of \$90 to
13 \$190 a year.

14 So the next section starts the
15 therapies.

16 Q. Doctor, excuse me just a moment. Before
17 we move into the therapies, would you define
18 what physiatry is?

19 A. Physical medicine. That's a group that
20 works in disabilities. They don't see normal
21 people. They see everybody with handicaps.
22 Some physiatrists work in pain, work in
23 headaches, but most I know work with kids
24 with these delays and adults with quadra-
25 plegia, brain injuries, things like that.

1 They are board-certified physical medicine.

2 Q. So let me understand before we go into
3 therapeutic evaluations. So far we have just
4 been talking about initial evaluations?

5 A. Initial evaluations and ongoing
6 treatment. Psychiatrists once a year for
7 life.

8 Q. Thank you. Please continue.

9 A. That will add up to \$1,500 a year for
10 medical evaluations and treatment. That
11 doesn't say that he's -- it doesn't set aside
12 money for him to go into hospitals for
13 surgery and things like that. That is just
14 for followup treatment.

15 Neuropsychological, uh, Dr. Greer-
16 Simmons, who wrote her report, tested him,
17 uh, -- because he's a young person he's going
18 to change over time and typically they give
19 them every three years, uh, so, she charges
20 \$1,350 for the neuropsych exam.

21 Educational. Every three years the
22 school system sets up the hearing every three
23 years. South Carolina sets up every three
24 years. A lot of states set it up once a
25 year. School -- I've found that Dr. Savage

1 works well with the school system and
2 evaluates a person like Jayden, working with
3 this school system to make sure that he had
4 the best gains.

5 P.T. evaluations to age eighteen, once a
6 year. \$200. That's just an eval. That's not
7 treatment as the physical therapist talked
8 about this morning.

9 Occupational therapy eval to age
10 eighteen, once a year. That doesn't have
11 anything to do with work. That is bathing,
12 dressing, buttoning buttons, all things that
13 are accomplished by your arms and hands.

14 Speech therapy is into age eighteen.
15 This is just evaluation and cognitive
16 remediation. That works on the memory and,
17 uh, education to age eighteen, once a year.

18 That was evaluations.

19 Now, the treatment program is a harder
20 life care plan. People, various doctors have
21 said that he needs counseling and the family.

22 Uh, -- three times for life per one year,
23 once a week. So fifty-two sessions times
24 three sessions, three times in his life is
25 one hundred fifty-six session with his

1 counseling to himself just to his disability.

2 Family counseling, just for one year,
3 once a week.

4 His P.T. to age -- I was conservative on
5 this P.T., to age twelve, O.T. to age twelve
6 twice a week. This is the cost of that.

7 Speech therapy to age eighteen because
8 that's a bigger concern.

9 Next page.

10 Cognitive therapy. That works on
11 organization, planning initiation, sequencing
12 and things like that. It works on his money
13 counting, counting. So case manager, that's
14 to the age of eighteen.

15 He has no therapy after the age of
16 eighteen for the rest of his life.

17 Case manager, that -- he or she,
18 accordingly, -- I've got a guy in Charleston,
19 West Virginia that is the best in the
20 country. He goes/travels throughout this
21 country case managing kids with disabilities.
22 He can do it by phone two hours a month. He
23 coordinates all the therapies -- other sport
24 care, attendant care, things like that, other
25 doctor visits. Twice a month at \$125 per

1 hour.

2 This really gets to the sport care.

3 Sport care -- think about a parent. Children
4 at the age of twelve or fourteen years old
5 typically they can make a sandwich, they can
6 thumb their iPhone better than I can, they
7 can fry an egg, microwave, count change in a
8 store. If I leave my fourteen year old
9 daughter for six months and go to vacation, I
10 -- it's un--, -- my fourteen year old, when
11 she was twelve years old, -- a twelve year
12 old doesn't have an adult brain. That's why
13 you have parents, to lead and guide these
14 kids. If a twelve year old didn't have
15 parents, they'd never go to school, never
16 brush their teeth, would stay up all night.

17 Because of these challenges,
18 intellectual challenges -- Dr. Adler says
19 that he is never going to live on his own for
20 life. Somebody else, Jean Hutchinson, said
21 the same thing. All the diagnoses from
22 neuropsychologists tells me that he is not
23 going to develop an adult brain.

24 He can -- he will learn to dress
25 himself, make his sandwich, go to the store

1 and give them a dollar for a candy bar but he
2 never develops an adult brain.

3 So I said, 'Mom, I will give you four
4 hours a day to help you out with Jayden.'
5 He's not a typical child, he needs attention
6 every day. You know, for falling and things
7 and things like that.

8 After the age of eighteen years old, I
9 think he needs care around the clock by
10 somebody other than his mother. Typically
11 people go to college, get a job, move into an
12 apartment.

13 So I gave you two choices. They are
14 interim health care at \$18.50 an hour.
15 Comfort Keepers, that's a local one in South
16 Carolina, \$16.00. I averaged those two
17 together.

18 Next page.

19 I gave an option for living in a long-
20 term program. Medicaid doesn't pay for this.
21 Medicaid only pays for nursing homes.

22 JAY DAVIS: We are getting into an
23 area subject to my previous objection.

24 THE COURT: All right.

25 ELIZABETH BALLENTINE: And we would

1 object as well to foundation beyond his
2 qualifications.

3 THE COURT: Counsel, was this
4 provided to the other side previously?

5 EDWARD GRAHAM: They had an
6 opportunity to depose him. I can't recall
7 Your Honor whether they asked him questions
8 about Medicaid or now.

9 THE COURT: Very good. Mr. Davis?

10 JAY DAVIS: (Inaudible due to
11 projector fan).

12 THE COURT: Did you get that, Ms.
13 Burns?

14 COURT REPORTER: No, sir.

15 THE COURT: Say that again.

16 JAY DAVIS: Sure. It was not
17 provided to us in his expert disclosure nor
18 disclosed to us when we asked about his
19 opinions in this case.

20 THE COURT: Again, the issues
21 earlier, of Medicaid, came up and there were
22 objections at the time. The Court determined
23 that the door was opened and that it had
24 become an issue. Thus, I am going to allow
25 this witness to testify on it and I overrule

1 the objection. I will give you cross
2 examination on the issue, if you wish. You
3 may proceed.

4 EDWARD GRAHAM: Thank you, Your
5 Honor

6 DIRECT EXAMINATION CONTINUED

7 BY EDWARD GRAHAM:

8 Q. Please continue.

9 A. So this is long-term options. Learning
10 Services in North Carolina. There is no
11 place in South Carolina that takes care of
12 adults other than nursing homes. So that is
13 just an alternate. I would say that I would
14 want him to stay in a house with round the
15 clock care.

16 So mother -- she carries Jayden, all the
17 time, to stores and things like that. I
18 thought that a stroller would be appropriate
19 for her. One time purchase.

20 AFO's on the ankle to help him walk.
21 They are \$46 per -- he has two on each -- one
22 on each ankle. They grow up and they break
23 down, they are made of plastic. Uh, four
24 times a year -- to the age of eighteen.

25 Q. So what is an AFO?

1 A. It's a plastic brace. It's, you know,
2 probably -- it's this long, made of molded
3 plastic to fit him.

4 Q. Next page?

5 A. I think the next page is a summary page.
6 So -- care costs for Jayden Washington, at
7 the top -- the top section is one time or
8 nonannual costs. That is not a cost for
9 incident doctor visits. For a one-time eval,
10 that would go there.

11 Long-term followup would go down here.

12 For instance, uh, Internal Medicine is
13 down here.

14 Physical therapy and occupational
15 therapy will end at age twelve. They are not
16 going to go to age eighteen. The only
17 therapy that is going to go to age eighteen
18 is speech therapy and cognitive therapy.

19 Equipment is a stroller.

20 Counseling is two years, three years of
21 counseling for him. One year for his mother.
22 That includes the neuropsych's \$6,000 -- I
23 can't read it -- \$6,750.

24 So the total of one year's time cost or
25 nonannual cost, short-term cost, is one

1 hundred fifty-eight, one hundred fifty-eight
2 thousand, one hundred fifty-eight, one
3 hundred thousand -- one fifty eight two nine
4 three, \$158,293.

5 So we go to the annual cost. I broke
6 that down by -- after eighteen for life:
7 Sport, Home, programmed care.

8 So to age eighteen, four hours every
9 day, medical treatment costs \$1,649.

10 Therapy evaluation is going to cost him
11 \$2,467. Therapies for speech therapy and
12 cognitive therapy is going to be \$31,200 a
13 year.

14 Case management is going to be \$3,000 a
15 year.

16 Four hours of sports care is going to
17 cost \$25,185 a year.

18 And equipment, AFOs, to age eighteen.

19 So that totals, every year until he is
20 eighteen, if we give mom this help, a case
21 manager, we pay for, he pays for therapies,
22 will be \$63,689.

23 So that's to age eighteen. After age
24 eighteen, for life, for the rest of his life
25 to the day that he dies, you see that we've

1 got less medical care, less medical visits.

2 It is going to cost us \$920 a year versus
3 sixteen forty-nine.

4 Case management is going to be the same
5 thing, \$3,000 a year.

6 Therapies are out.

7 Equipment is out.

8 Sport care.

9 Twenty-four hours a day, 365 days a
10 year, is \$151,110 a year.

11 Programmed care would cost \$200,000 a
12 year.

13 So totals, living in a house with rotund
14 the clock care, would be one fifty-five
15 thirty (\$155,030) and, uh, programmed would
16 be \$205,670 per year.

17 Either is -- this figure is factored
18 into the life care program or either this
19 figure here if he lives at home with round he
20 clock care. This is my preference right
21 here.

22 Q. Doctor, you mentioned earlier that you
23 wanted to take the neurosurgeon's figures out
24 of your plan?

25 A. (Affirmative nod).

1 Q. Have they been removed? If not, where
2 do they need to be removed from?

3 A. They would be removed -- just give me a
4 minute. Subtract \$150 from this figure here,
5 that's \$1,500. So this column is less \$150.
6 This column is less \$150. So that's seven
7 seven seventy for medical doctors.

8 Q. Doctor, underneath -- I realize that the
9 top part is a one time nonannual costs. But
10 once you start with the annual costs, to
11 eighteen and after age eighteen, are there
12 typically -- help us understand. Are those
13 for his own life or just per year?

14 A. Per year. The figure here is until age
15 eighteen. He's eight now. It's for ten more
16 years. So simply you've got it multiplied
17 \$63,000 times ten years, \$630,000.

18 At age eighteen he is going to incur
19 this amount per year, \$155,000 per year, if
20 you want to give him appropriate care.

21 So that would be multiplied -- Dr.
22 Adler, Dr. Katz says that he is going to live
23 a normal life expectancy -- I have this here
24 (searching files), 2007, uh, he had a life
25 expectancy of sixty-five more years. In

1 2010, he's got a life expectancy of sixty-
2 three more years. You take the ten off of
3 that from -- so he's got fifty-three after
4 the age of eighteen that he's going to live.
5 You multiply \$155,000 times fifty-three, that
6 would give you the total cost of care added
7 to this, added to this:

8 So this is per year, \$155,000 per
9 year and you have to multiply that times
10 fifty-year.

11 You have to multiply sixty-three
12 times ten.

13 Add this one.

14 Add this one.

15 And this one.

16 Together for the total cost of care.

17 Q. Doctor, what years cost figures are
18 these numbers based on?

19 A. This year.

20 Q. Is it within your expertise to address
21 whether those costs will likely change in the
22 future or would you defer to another type of
23 expert?

24 A. In thirty years, I've never seen
25 healthcare costs go down. I run thirty-five

1 beds for brain injury, run forty bed in an
2 Alzheimer's unit, you know, medical care
3 costs are higher -- go up higher than
4 typically inflation goes up.

5 Q. Do the numbers, the way that you
6 presented them, take into account medical
7 inflation?

8 A. No. That simply says that the cost of
9 care is going to be the same in fifty years
10 as it is now.

11 Q. Do you believe that to be true?

12 A. No.

13 Q. Would you defer to another type of
14 expert to address inflation issue and ---

15 A. Yes. An economist.

16 Q. Thank you. Sir, let me ask you. You've
17 talked briefly about Medicaid. Do you have
18 an opinion to a reasonable degree of
19 rehabilitation certainty as to whether or not
20 your life care plan can be provided for by
21 Medicaid?

22 A. No.

23 ELIZABETH BALLENTINE: Please note
24 our objection.

25 THE COURT: Noted.

1 JAY DAVIS: Same objection.

2 THE COURT: And overruled. You
3 may answer.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. Please continue.

7 A. Medicaid, uh, uh, -- doctors don't have
8 to accept Medicaid, they have a choice
9 accepting Medicaid. Not all providers accept
10 Medicaid. I don't know if his doctors accept
11 Medicaid. But typically Medicaid will pay
12 for medical treatment. Schools should pay
13 for therapies. I have heard the P.T. saying
14 that Medicaid would pay her agency. I don't
15 know if that is true or not.

16 ELIZABETH BALLENTIN: Your Honor,
17 objection because he said that he doesn't
18 know.

19 THE COURT: I am going to overrule
20 that because he gave a basis as to what was
21 in the testimony. As an expert witness he
22 may do that. Overruled.

23 DIRECT EXAMINATION CONTINUED

24 BY EDWARD GRAHAM:

25 Q. Thank you.

1 A. So that -- they may pay for therapies.

2 They don't pay for case management.

3 They don't pay for sport care.

4 So as an adult, probably they will pay for
5 medical treatment.

6 They won't pay for case management, his sport
7 care.

8 Medicaid pays for nursing homes but I can't
9 imagine Jayden W. living his life in
10 a nursing home. That would be an awful
11 outcome.

12 JAY DAVIS: Your Honor, I object
13 to that.

14 ELIZABETH BALLENTINE: Object, move
15 to strike.

16 THE COURT: On what basis?

17 JAY DAVIS: There has been basis
18 that he is an expert on -- (inaudible due to
19 projector's fan).

20 THE COURT: Overruled. 701, 702.
21 You may proceed.

22 DIRECT EXAMINATION CONTINUED

23 BY EDWARD GRAHAM:

24 Q. Doctor, even as to those types of
25 treatment services that Medicaid will

1 sometimes pay for if a physician is
2 appropriate, do you have an opinion to a
3 reasonable degree of rehabilitation certainty
4 as to whether or not Medicaid places limits
5 on the frequency of treatments?

6 A. You know, I resigned my position as
7 chairperson of the Medicaid because I saw
8 disasters on the forefront. Medicaid is
9 going to be cut back. Families aren't
10 eligible -- they're raising -- they're
11 lowering the bar for eligibility for
12 Medicaid.

13 ELIZABETH BALLENTINE: Objection,
14 Your Honor. Speculation, not expertise.

15 THE COURT: All right, let's just
16 do this. Let's just note a continuing
17 objection to Medicaid testimony. The court
18 has overruled any objections. You may
19 include in your -- proceed.

20 DIRECT EXAMINATION CONTINUED

21 BY EDWARD GRAHAM:

22 Q. So ---

23 A. So, uh, Medicaid is, uh, they are
24 lowering the threshold for Medicaid. That
25 means that people that made \$25,000 a year

1 will be exemptible out of the system. They
2 may cut off at \$20,000 a year. So, uh, if --
3 even if Medicaid paid his cost, they would
4 pay for -- hopefully would pay for his
5 medical care. They won't pay for is sport
6 care. That's part of the life care plan.
7 So they probably will pay for one percent of
8 his care.

9 Q. One percent?

10 A. At most.

11 Q. You mentioned that Medicaid will not pay
12 for case management. Please explain the
13 importance of case management and the risk to
14 a patient if it is not provided.

15 A. Case management, uh, supervises the
16 sport care. People in the house provide care
17 to them. I acted as a person overseeing
18 that, that role of a case manager, uh,
19 coordinates their care, make sure that Jayden
20 gets to the doctors on time, things like
21 that. His mom has been doing a great job
22 case managing him. But I want to give her
23 relief.

24 Q. Sir, as to the one percent or so of
25 Medicaid -- future medicals that Medicaid may

1 pay for, do you have an opinion to a
2 reasonable degree of rehabilitation certainty
3 as to whether or not that Medicaid
4 eligibility is affected by recovery of money
5 in a lawsuit against the party who negligence
6 allegedly caused the injury that requires
7 treatment?

8 A. Yes.

9 THE COURT: All right. Counsel, I
10 know that I gave you a continuing objection
11 on Medicaid. This is a new issue in
12 Medicaid. I am going to sustain the
13 objection to that. It gets into other issues
14 that are legal, beyond the life care plan and
15 therefore please proceed to another issue.

16 EDWARD GRAHAM: Thank you, Your
17 Honor.

18 Direct EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. Dr. Voight, do you have an opinion again
21 as to the one percent or so of future medical
22 care that Medicaid may pay for, do you have
23 an opinion to a reasonable degree of
24 rehabilitation certainty as to whether or not
25 the recipient of that Medicaid benefit must

1 repay Medicaid to the extent that they
2 recover on a lawsuit?

3 JAY DAVIS: Objection.

4 ELIZABETH BALLENTINE: Objection.

5 JAY DAVIS: Out of the scope of
6 this witness' expertise.

7 ELIZABETH BALLENTINE: We join that
8 objection.

9 THE COURT: Sustained for the same
10 reason the previous objection was sustained.

11 EDWARD GRAHAM: I will move on,
12 Your Honor.

13 THE COURT: Please do.

14 DIRECT EXAMINATION CONTINUED

15 BY EDWARD GRAHAM:

16 Q. Doctor, have you -- you've expressed a
17 number of opinions today. Have all of the
18 opinions you've expressed been opinions that
19 you hold to at least a reasonable degree of
20 rehabilitation certainty?

21 A. Yes.

22 EDWARD GRAHAM: Please answer any
23 questions that the defense may have.

24 THE COURT: Cross-examination.

25 ELIZABETH BALLENTINE: May it please

1 the Court.

2 CROSS EXAMINATION

3 BY ELIZABETH BALLENTINE:

4 Q. Good morning, sir.

5 A. Good morning.

6 Q. You are not a medical doctor, is that
7 correct?

8 A. Right.

9 Q. And you've not made an medical
10 diagnosis?

11 A. Right.

12 Q. And you do not write prescriptions for
13 treatment or medications?

14 A. No.

15 Q. And you're not rendering any medical
16 opinions in this case, are you?

17 A. No.

18 Q. You do not do medical evaluations or
19 give medical opinions?

20 A. Right.

21 Q. And you've provided no medical care to
22 Jayden Washington?

23 A. Right.

24 Q. And you're not rendering any opinions as
25 to the cause of his injuries?

1 A. No.

2 Q. You've not spoken with any of Jayden's
3 treating physicians or caregivers; is that
4 true?

5 A. Right.

6 Q. You are a rehabilitation counselor but
7 you are not certified as a life care planner;
8 is that true?

9 A. I am a certified rehab counselor. That
10 gave me training, masters program, doctoral
11 program in, uh, life care planning. They
12 have a certification in life care planning by
13 people, uh, organizations that certify life
14 care planner. I think with my background, my
15 training at the University of Michigan in
16 life care planning that I didn't have to seek
17 that certification in life care planning.

18 Q. So it is fair to say that you do not
19 have a life care planner's certification?

20 A. Right.

21 Q. And in this case you've been paid to
22 prepare a life care plan for the future
23 medical treatment for a case that's in
24 litigation; is that fair?

25 A. Right.

1 Q. And the majority of the life care plans
2 you prepare are for litigation purposes?

3 A. Probably seventy percent.

4 Q. And about eighty percent of your work
5 is as a life care planner for litigation
6 purposes is for the plaintiff?

7 A. Yes.

8 Q. And you bill between ten and eleven
9 thousand dollars for preparing your report?

10 A. Yes.

11 Q. And this was paid by Mr. Graham?

12 A. Hopefully.

13 Q. In preparing your report on Jayden, you
14 compared his limitations to a checklist for a
15 child his age, to compare his skill level to
16 determine how he is delayed; is that true?

17 A. Well, I did more than that. I read all
18 the reports from treating doctors, retained
19 experts. I read the school records, the
20 IEPs.

21 I did a checklist typically, uh, -- for
22 four-year-olds, I have a list of three-year-
23 olds skills, four-year-old's skills, five-
24 year-old's skills, etc.

25 Q. So part of your report was comparing

1 those to a checklist?

2 A. Right.

3 Q. And you've been using this same
4 checklist for twenty years?

5 A. Right.

6 Q. And you don't recall which publications
7 you ---

8 A. I can't remember twenty years ago.

9 Q. You don't know if it has ever been
10 updated?

11 A. No. This is the same thing that I see
12 from time to time in evaluations by
13 neurologists and physical therapists, things
14 like that.

15 Q. At that time that you rendered your
16 opinion, you were not aware of Jayden's
17 current medical or developmental condition;
18 is that true?

19 A. Right. But I updated, uh, in 2010. The
20 life care plan that you saw on the screen, it
21 was 2010.

22 Q. I think that you said that you had
23 conversations with Jayden's treating
24 physicians to discuss his condition. True?

25 A. Right, I read their reports.

1 Q. And in this case you interviewed Ms.
2 Washington and Jayden during a home visit?

3 A. Right.

4 Q. That was on August 11th, 2006, for
5 approximately two hours?

6 A. Right.

7 Q. And you have not seen or spoken to
8 either of them since that date?

9 A. No, I just read the deposition of --
10 (searching files) -- oh, uh, I read the
11 depositions of, uh, the neuropsychologists
12 that were taken last year in November; uh,
13 O.T. was taken this year; uh, P.T. was taken
14 this year; uh, speech therapy was taken this
15 year. I read the school psychologist -- was
16 taken last year. Uh, I read the, uh,
17 updated, uh, evals from Dr. Adler, Dr. Katz,
18 and -- probably eighteen months ago. So I
19 got, uh, uh, uh, prognosis from Dr. Adler,
20 Dr. Katz, uh, Jean Hutchinson and Dr. Greer.
21 Q. Yes, sir. But as far as actually seeing
22 or speaking to Ms. Washington or Jayden, you
23 have not seen or spoken to them since August
24 of 2006?

25 A. No.

1 Q. Your introduction in your report listing
2 limitations of developmental delays, this is
3 information that you got from ---

4 A. It's from the records and from Ms.
5 Washington.

6 Q. In your life care plan, one of your item
7 is case management that you discussed
8 earlier.

9 A. Right.

10 Q. You reference this guy I believe in West
11 Virginia that you like so much.

12 A. Right.

13 Q. No doctor has ever prescribed a case
14 manager for Jayden, is that true?

15 A. It doesn't require prescription. No --
16 I say -- I think Greer's report said ---

17 Q. Actually my question was, no doctor has
18 prescribed a case manager for Jayden.

19 A. It's not prescription for case managers.

20 Q. Thank you. And this is something that
21 his mother has been doing his entire life.

22 Correct?

23 A. Yes.

24 Q. And you also included things in your
25 report such as visits to an ophthalmologist

1 for the rest of his life?

2 A. Right.

3 Q. Even though that is related to a genetic
4 defect that he was born with?

5 EDWARD GRAHAM: Objection.

6 THE COURT: What is your
7 objection?

8 EDWARD GRAHAM: Assumes facts not
9 in evidence.

10 THE COURT: Overruled.

11 THE WITNESS: He needs an
12 ophthalmologist. I didn't include except to
13 use internal medicine. Everybody sees a
14 doctor at least once a year. He has to see a
15 vision doctor because it was crossed eyes.

16 CROSS EXAMINATION CONTINUED

17 BY ELIZABETH BALLENTINE:

18 Q. You mentioned that and I know that you
19 testified earlier about Jayden's ear
20 infections, with his mother getting medical
21 treatment. You would agree that it is
22 routine medical care that all children must
23 get. Correct?

24 A. Well, typically a child doesn't go into
25 E.R. for asthma and ear infections.

1 Q. So would you agree that ear infections
2 and things of that nature is something that
3 children normally get?

4 A. Some children get it. He's more
5 susceptible to infections.

6 Q. On page five of your report where you
7 discuss the therapy evaluations, you have
8 four to six thousand dollars for educational
9 evaluations and no doctor has prescribed
10 either; correct?

11 A. No. It doesn't require a 'script.

12 Q. Thank you. Jayden is currently to walk
13 unassisted. There would not be any need for
14 the stroller that you have in your life care
15 plan, which I believe was around \$1,900.

16 A. You know, mom carries him everywhere.
17 He can walk but he falls down. Uh, -- that's
18 a -- that's not medically necessary but it
19 would save mom's back.

20 Q. And you testified early that you based
21 Jayden's need for support care, I believe, on
22 reports and information from Dr. Katz, Dr.
23 Adler and Dr. Greer-Simmons.

24 A. And his presentation, my thirty years of
25 seeing kids with his disabilities.

1 Q. Are you aware that these are all experts
2 that were hired by the plaintiff in this
3 case?

4 A. Yes.

5 Q. Does Medicaid or Medicare pay for
6 patients with cerebral palsy or brain injured
7 patients in your facility?

8 A. No.

9 Q. Has any medical doctor approved your
10 life care plan in this case?

11 A. I really don't know.

12 ELIZABETH BALLENTINE: Your Honor,
13 at this time we would move to strike the life
14 care plan of Dr. Voight, that he is not a
15 qualified doctor to ---

16 THE COURT: Very good. For the
17 same reason, you join with the objection, Mr.
18 Davis?

19 JAY DAVIS: Yes, sir.

20 THE COURT: For the same reason
21 that I overrule it for the same reason that
22 I previously overruled it. This is for the
23 jury to determine, the weight and
24 credibility, believability. That's for the
25 jury to determine. Anything further?

1 ELIZABETH BALLENTINE: No, sir.

2 Thank you, Your Honor, I have no further
3 questions.

4 JAY DAVIS: I have a few
5 questions, Your Honor, may I follow up on
6 some of the ---

7 THE COURT: Yes, sir, Mr. Davis.

8 CROSS EXAMINATION

9 BY JAY DAVIS:

10 Q. Doctor, do you have the report that you
11 did up there?

12 A. I have three of them.

13 Q. Well, whichever one that you were
14 talking about earlier. Your most recent one,
15 how about that?

16 A. I have ---

17 Q. I have a report here, Doctor, that's
18 thirty-four pages. Does that seem right to
19 you?

20 A. Yeah.

21 Q. All right. In that thirty-four page
22 report of yours, did you anywhere state that
23 you felt that this child would have a one
24 percent chance of getting the services that
25 he needed?

1 A. I don't understand.

2 Q. You don't understand?

3 A. No.

4 Q. Remember that you testified a minute ago
5 that you thought that there was a one percent
6 chance that Medicaid might pay for some of
7 these services. Do you recall that
8 testimony?

9 A. No, they -- I testified that of all
10 these items Medicaid would hopefully pay for
11 one percent of the services.

12 Q. Right, sir. Is that opinion anywhere in
13 the report that you have in front of you?

14 A. No.

15 Q. You've read your deposition, haven't
16 you?

17 A. Right.

18 Q. It wasn't in there either, was it?

19 A. Right.

20 Q. When you tell us that you have that
21 opinion, ---

22 A. He asked me. I didn't tell him
23 anything.

24 Q. Fair enough. Now, you mentioned, I
25 think that the \$151,000 support care -- do

1 you remember that number in your report?

2 A. Right.

3 Q. You said that was to relieve some of the
4 burden on the mother, is that correct?

5 A. No, the -- before age eighteen, the, uh,
6 -- (pause) -- the three twenty-five thousand
7 dollars per year until age thirteen, four
8 hours sport care, uh, a day, uh, per year,
9 would relieve the mom.

10 Q. Okay, I appreciate you clarifying that
11 for me. Let me ask you one other question
12 about these numbers here in the cost report.
13 The numbers that you put up -- I think you
14 testified and you can correct me if I am
15 wrong, but those are the provider charges.
16 Is that correct?

17 A. Right.

18 JAY DAVIS: I don't have any
19 further questions.

20 THE COURT: All right. Now, is --
21 is there redirect?

22 EDWARD GRAHAM: Yes, Your Honor.

23 REDIRECT EXAMINATION

24 BY EDWARD GRAHAM:

25 Q. Doctor, the question was put to you by

1 Ms. Ballentine about whether or not you were
2 a certified life care planner. My question,
3 sir, if you are not a certified life care
4 planner, then why should we place any value
5 on your opinions about a life care plan in
6 this case?

7 A. My history, I'm a certified
8 rehabilitation counselor. That's an exam
9 given over two weekends. You have to
10 graduate from a program in rehab counseling.
11 That's the first body that certified rehab
12 counselors to do life care planning. Rehab
13 counselors do life care planning, case
14 management and counseling with people with
15 disabilities and their families. So life
16 care planning is a tool used by rehab
17 counselors to project future care and costs.
18 About ten years ago, persons that were not
19 trained in rehab counseling at the university
20 basis, probably five organizations -- there's
21 a nurse organization that you go to Utah for
22 a weekend for classes, you take the test on
23 Sunday, you pass the test -- a hundred
24 percent of the people that took that test
25 passed that test.

1 ELIZABETH BALLENTINE: Your Honor,
2 I am sorry to interrupt the doctor, but the
3 answer is not responsive to the question.

4 THE COURT: Overruled.

5 THE WITNESS: To get certified
6 as a life care planning nurse.

7 The organization in Florida that
8 certifies life care planners hasn't had
9 anybody fail their test. So -- (pause).

10 I went through a program that I --
11 I got good grades, I passed all my tests in
12 all my courses. I think that gives me, with
13 having seen ten thousand people with
14 neurological challenges, running my program
15 since '85, consulting with three hundred
16 programs around the world, that gives me a
17 good perspective on long-term care needs.

18 THE COURT: Anything further,
19 Counsel?

20 EDWARD GRAHAM: Yes, sir.

21 THE COURT: Briefly, go ahead.

22 EDWARD GRAHAM: Thank you, Your
23 Honor.

24 REDIRECT EXAMINATION CONTINUED

25 BY EDWARD GRAHAM:

1 Q. Doctor, there was a question put to you
2 about whether you had told the defense
3 lawyers about your Medicaid opinions. My
4 question to you, sir, did you -- did the
5 defense lawyers ask you questions about your
6 curriculum vitae?

7 A. No.

8 Q. Does your curriculum vitae recite the
9 fact that you have served on boards related
10 to Medicaid?

11 A. Yes.

12 THE COURT: Counsel, you are
13 leading your witness.

14 JAY DAVIS: Thank you.

15 THE COURT: Anything further?

16 EDWARD GRAHAM: Yes, sir.

17 THE COURT: Go ahead.

18 REDIRECT EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. Sir, tell me what, if anything, that
21 your CV says about your involvement in
22 Medicaid activity.

23 A. Chairperson of, uh, Medical Assistance
24 Services DMAS, which is the oversight
25 community on Medicaid throughout the states.

1 Every state has this.

2 Q. Thank you. If the defense counsel had
3 asked you any questions about Medicaid, tell
4 us whether or not you would have answered
5 those questions.

6 A. Yes.

7 Q. You talked about the need for ophthal-
8 mology more than most people because of the
9 cross-eyed. We have heard testimony that
10 this child has a birth defect called coloboma
11 in one eye. If that is the reason for --
12 well, first of all, can you tell us whether
13 or not problems with coloboma are the reason
14 why you recommended ophthalmology?

15 ELIZABETH BALLENTINE: Objection.

16 Leading.

17 THE COURT: I am going to sustain
18 that. Step up, Counsel, for a moment if you
19 would.

20 (OFF RECORD BENCH CONFERENCE)

21 THE COURT: I will sustain the
22 objection. Please proceed.

23 EDWARD GRAHAM: Thank you, Your
24 Honor.

25 REDIRECT EXAMINATION CONTINUED

1 BY EDWARD GRAHAM:

2 Q. Dr. Voight, do you know of anyone who
3 has more knowledge, training and experience
4 than you with regard to rehabilitation ---

5 JAY DAVIS: Your Honor, I object.
6 Leading.

7 EDWARD GRAHAM: --- of brain injury
8 patients; and, if so, who?

9 ELIZABETH BALLENTINE: We join in
10 the objection.

11 THE COURT: All right. I am going
12 to overrule the objection. It goes to weight
13 and credibility. You may answer.

14 THE WITNESS: I am too humble
15 to answer that question. I work every day
16 with people in my programs, see them seven
17 days a week. I've seen ten thousand people.
18 I've given two hundred lectures, written
19 fifty articles. I know this population of
20 kids with disabilities. I've followed kids
21 for thirty years.

22 EDWARD GRAHAM: Thank you, sir.
23 Please -- that's all that I have.

24 THE COURT: Very good. All right,
25 sir, you are free to step down and free to

1 leave if you wish.

2 THE WITNESS: Thank you, sir.

3 (WITNESS STEPS DOWN)

4 THE COURT: Ladies and Gentlemen,
5 we are going to go into the next witness. I
6 will tell you when your lunch arrives, which
7 they estimate to be about 12:45 today. We'll
8 break and you may have lunch, so we are not
9 going to hold you here while your lunch is
10 waiting in the back.

11 Please call your next witness.

12 EDWARD GRAHAM: Dr. Oliver Wood.

13 (WITNESS TAKES STAND)

14 OLIVER G. WOOD, JR., being duly
15 sworn to tell the truth, the whole truth and
16 nothing but the truth, testified, as follows:

17 DIRECT EXAMINATION

18 BY EDWARD GRAHAM:

19 Q. Dr. Wood, good afternoon.

20 A. Good afternoon.

21 Q. Let me ask you, sir, please start off by
22 telling the Ladies and Gentlemen something
23 about yourself.

24 A. I was born in Greer, South Carolina.

25 Lived there for about eighteen years.

1 I have a Bachelor of Science degree in
2 Business Administration from the University
3 of South Carolina in 1958; I have a Master's
4 degree in Economics, University of South
5 Carolina in 1963; a Doctorate in Economics
6 from the University of Florida, 1965.

7 Q. After you earned your doctorate, tell us
8 about your professional background?

9 A. I was hired by the University of South
10 Carolina in 1965 to teach Economics, Banking
11 and Finance courses. I taught at the
12 University for twenty-nine years. I am now
13 a Distinguished Professor *Emeritus*;
14 translated, that means that I am retired from
15 teaching.

16 Q. Have you served in the military? If so,
17 please tell us about that.

18 A. Yes, I served on active duty in the
19 United States Navy from 1959 to 1961.

20 Q. Have you served in the Reserves? If so,
21 tell us about that.

22 A. Yes, I served in the Naval Reserves from
23 1961 to 1987 when I retired.

24 Q. When you retired, what was your rank?

25 A. Captain.

1 Q. Dr. Wood, have you had any practical
2 experience in addition to your teaching, any
3 practical experience in the business world?

4 JAY DAVIS: Your Honor, I hate to
5 interrupt but if it would move things along,
6 I would be happy to stipulate on behalf of my
7 client. He is well qualified as an
8 economist.

9 CHILTON SIMMONS: We would agree.

10 THE COURT: Doctor, -- you may so
11 stipulate but the plaintiff is not required
12 to accept the stipulation. You may proceed
13 to ask or you may go directly into the merits
14 of your testimony.

15 EDWARD GRAHAM: All right.

16 DIRECT EXAMINATION CONTINUED

17 BY EDWARD GRAHAM:

18 Q. Have you told us about your business
19 experience?

20 A. I was just getting started. I have
21 helped to start up eleven banks and two
22 savings and loan associations.

23 I served on the Board of Director for
24 Republic National Bank in Columbia for about
25 ten years. When we sold that Bank, I went on

1 the advisory board for the Lexington State
2 Bank. Then when we sold that Bank to BB&T, I
3 went on BB&T's advisory board.

4 Then about six years ago, -- we started
5 First South Bank in Spartanburg, and I went
6 on their advisory board when they moved to
7 Columbia.

8 Then four years ago we started Bank
9 Meridan in Columbia and I am on their Board
10 of Directors.

11 I've served on the Board of Directors
12 for Edisto Farm Credit in Orangeburg for
13 about eight years, we made farm loans in the
14 lower part of the state.

15 I served on the investment policy
16 committee for the AG First Bank in Columbia.
17 That's the old Federal Land Bank. That
18 committee sets the investment policies for
19 the active and retired employees.

20 Lastly, I own five farms in Tennessee
21 which are businesses.

22 Q. Thank you, sir. What special
23 experience, if any, have you had in the field
24 of investments?

25 A. I taught a graduate course on Money

1 Markets at the university for about twenty-
2 seven years.

3 I've taught MBA field studies or led
4 them in the summer for about twenty years.
5 That dealt with investments.

6 The banks that I have been involved in,
7 I have been involved directly or peripherally
8 with bank investments. Presently I am
9 chairman of the Asset Liability Committee.

10 Q. Have you authored any books in the field
11 of economics and finance? If so, please tell
12 us about those.

13 A. Yes, I've authored or coauthored seven
14 books and monoliths.

15 Q. Returning to the issues in this case,
16 what experience do you have in estimating
17 economic loss in personal injury, wrongful
18 death and business loss cases?

19 A. For the last forty-one years, I've made
20 studies in cases where someone has been
21 killed, injured, where a business has
22 sustained a loss or for any number of reasons
23 -- someone has been fired from their job for
24 either age, race, sexual reasons -- and
25 reported on the results of those studies.

1 Q. What experience have you had in
2 instructing lawyers in matters relating to
3 your field of expertise?

4 A. Various bar association groups have
5 asked me to appear at their seminars about
6 twenty-five times since 1972.

7 I've served as a guest lecturer in the
8 Damages course at the University of South
9 Carolina Law School from about 1970 to 2004.

10 Since 2004, I've been a guest lecturer
11 at the Charleston School of Law; and two
12 years ago they named me their Economist-in-
13 residence.

14 Q. What methodology do you use when you are
15 evaluating economic loss. How does that
16 compare with your profession, generally?

17 A. Well, the basic methodology in economic
18 loss is that the objective, and this is
19 required by our court system, is to determine
20 the present value of a sum of money that will
21 replace the earning capacity, or in this case
22 fund a life care plan for the child.

23 Q. How does that match up against the
24 approach used by economists generally?

25 A. All economists use the same approach.

1 EDWARD GRAHAM: Your Honor, at
2 this time we submit Dr. Wood as an economic
3 expert in the evaluation of economic loss in
4 this case.

5 THE COURT: The defendants have
6 already stipulated to his qualifications.
7 He is so admitted. You may proceed.

8 DIRECT EXAMINATION CONTINUED

9 BY EDWARD GRAHAM:

10 Q. Dr. Wood, were you retained by me to
11 perform an evaluation of the economic loss in
12 this case?

13 A. Yes.

14 Q. What have you done in that regard, what
15 have you considered?

16 A. In this case, I interviewed Ms.
17 Washington, the mother.

18 Jayden was born on July 16th, 2002.

19 The event occurred on July 16th, 2002.

20 According to South Carolina Code Section
21 19-2-150, his life expectancy at that time
22 was an additional 76.62 years.

23 Jean Hutchinson, a vocational evaluator,
24 looked at Jayden's before and after-injury
25 / earning capacity.

1 According to Ms. Hutchinson, had Jayden
2 not been injured it is likely that he would
3 have graduated from high school and
4 subsequently entered the competitive job
5 market. According to Ms. Hutchinson, the
6 median wage for a high school graduate is
7 \$14.58 an hour.

8 According to Ms. Hutchinson, Jayden is
9 not expected to graduate from high school,
10 nor is he expected to compete in the open job
11 market. He will be unable to earn wages and
12 most likely will be unable to live
13 independently.

14 If I assume that Jayden would have
15 employed from age twenty through his age of
16 sixty-seven, which is the normal Social
17 Security retirement age, -- if you were born
18 after 1960, normal Social Security retirement
19 age is sixty-seven. If you were born before
20 1937, it is sixty-five. Between those two
21 points, sixty-five and seventy, anybody born
22 in '37 to '60, it gradually goes up in month
23 increments.

24 Next I interviewed Ms. Washington on
25 extra-ordinary care. From the time that he

1 was discharged from the hospital, for about
2 the first six months, she indicated that she
3 did about an hour a day of extraordinary
4 care.

5 From that point to when he was four
6 years old, she said that she did about two
7 hours a day.

8 Since that point she's been doing three
9 hours a day.

10 I valued those on a current basis at
11 \$8.00 an hour. I assume that's about the
12 minimum that you would have to pay someone to
13 get to come to your house to do this kind of
14 activity.

15 Lastly, I considered Dr. Voight's life
16 care plan, that he just presented.

17 Q. Based on these facts, do you have an
18 opinion to a reasonable degree of economic
19 certainty as to the past and future economic
20 loss in this case?

21 A. Yes.

22 Q. Have you prepared any charts to
23 illustrate the loss?

24 A. Yes.

25 EDWARD GRAHAM: Your Honor, we

1 would ask that Dr. Wood step down in front of
2 the jury and explain his charts.

3 THE COURT: He may.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. Go ahead.

7 A. This first chart looks at the before
8 trial (sic) loss. The only loss that I
9 considered in the before trial (sic) period
10 has been the extraordinary care provided by
11 the mother. You heard me list that as one
12 hour, two hours, three hours.

13 So for these various subperiods before
14 2008, I valued that at \$7.00 an hour. In
15 beginning in '08, I valued it at \$8.00 an
16 hour. The number of hours per week has gone
17 from seven to fourteen to forty-nine.

18 For the various subperiods, this is the
19 value of the extraordinary care. You add it
20 up and you get \$52,620.

21 This is based on my interview with Ms.
22 Washington.

23 Chart Two looks at Jayden's earning
24 capacity. Earning capacity means what is he
25 capable of earning in his highest and best

1 use.

2 Jean Hutchinson said that for a high
3 school graduate the median income is \$15.00
4 an hour.

5 I started him at age twenty at the
6 equivalent \$7.00 and then moved him up to
7 \$15.00 after five years. Seven to fifteen.

8 This chart right here looks at his
9 future earning capacity. I assume over this
10 period of time that he would get cost of
11 living increases that average 2.53 percent
12 per year. I assumed that he would never get
13 any promotions, no merits increases, no
14 productivity increases, only cost of living.
15 Over this period of time he would have earned
16 \$3.595 Million dollars.

17 However, our court system requires that
18 before any money flows here, that are going
19 to occur in the future we have to in fact
20 look at them now. They have to be discounted
21 to what is known as present cash value. So
22 the discounted value of Jayden's earning
23 capacity is \$583,579. That sum, plus
24 interest, will equal what he would have earned
25 over his lifetime.

1 Chart Three looks at medical costs,
2 inflation. This data is taken from the
3 Bureau of Labor Statistics, which is an
4 agency of the federal government.

5 If you go back to 1960, the index for
6 medical inflation was 22.3. To give it some
7 realism, I set that equal to \$100. Then
8 tracked that index from 1960 to 2009. So by
9 1990, what cost \$100 thirty years early now
10 costs \$730; by the year 2000, \$1,169; by
11 2009, \$1,684. That is the annual compounding
12 of over six interest. You don't have to be a
13 professional economist to understand that
14 we've had medical inflation, and there it is
15 right there.

16 The Bureau of Labor Statistics also
17 collects information on various subgroups of
18 things. From 1992 to 2009, the general
19 inflation rate has been 2.53. This is benign
20 or below historical standards. We've been in
21 a period of relatively mild inflation.

22 Medical inflation is 4.09. Yes, it is
23 above 2.53 but it has been relatively subdued
24 over that seventeen or eighteen year period
25 at four percent.

1 Professional services, meaning doctors,
2 3.57 percent; ophthalmologists 1.92; services
3 of other medical professionals, 2.78; non-
4 prescription medical equipment and drugs,
5 1.31. I suspect this low rate right here is
6 influenced by cheaper import. That rate down
7 below is actually the inflation rate.

8 Chart Five is the life care that Dr.
9 Voight did but I reduced it to two pages.
10 I have the elements, the frequency -- meaning
11 how often he needs it, -- the costs, the
12 duration means how long he needs it. He has
13 just gone over this, so I am not going to go
14 over every item.

15 For example, the pediatrician. The
16 annual cost if \$968 in 2010 when he was (sic)
17 age eighteen.

18 You can go down through here, the
19 subcategories. "A" is the evaluations,
20 "B" the therapeutic evaluations; "C", the
21 treatment program.

22 All right. The treatment program
23 includes this care -- now, Dr. Voight had one
24 option of caring for him up to age eighteen
25 and kind of a hands-on care from eighteen for

1 life. Then he also had enough option and
2 that was to put him in a sustained living
3 rehabilitation program, so you kind of had
4 "A" and "B". All right.

5 Under this treatment program here the
6 annual cost is \$200,750 but I have subtracted
7 what I call normal living expenses, \$16,243.
8 The reason that you do that is because if you
9 put him in a facility, he's got shelter, he's
10 got food, he's got electricity. So if you're
11 providing for that with a loss of earning
12 capacity, you double count it if you put it
13 in here again. So I subtracted it and that
14 is \$184,507. That's from age eighteen for
15 life.

16 The stroller, \$1,947 and the AFO \$188.

17 All right. Taking this life care plan,
18 in Chart Six and looked at it. Under Option
19 One and Option Two.

20 Option One has care until the age
21 eighteen, as does Option Two.

22 Option One has hands-on care and Option
23 Two has got that rehabilitation program. The
24 costs of this program is right here
25 (indicating chart), it's in his care, it's

1 \$4.6 Million and \$5.4 Million.

2 I don't express any opinion about which
3 one is the most appropriate. I am an
4 economist, not a medical doctor. I am not a
5 vocational assessor.

6 These are the costs for either Option.

7 Now, I have these broken out. If for
8 reason you don't need one of them, all you
9 have to do is go to my chart, take that
10 number and subtract it from the bottom line.

11 If you don't want to give him the
12 stroller, take that \$1,945 and subtract it
13 from that (indicating bottom line).

14 If you think that he needs double the
15 pediatrician, double that (indicating figure)
16 and add it to the bottom line.

17 By having this in various line items,
18 you can subtract and add very easily. The
19 bottom line of these costs is \$4,707,048,
20 that's one option; and \$5,574,668, the second
21 Option.

22 I've taken this in Chart Seven and
23 looked at his after-trial loss. We know his
24 loss in earning capacity is \$583,573 in
25 either scenario. There's a difference in

1 medical costs, \$4.7 and \$5.5 Million, making
2 a total in the future \$5.2 or \$6.1 -- and
3 here's the last chart.

4 The last chart takes the after-trial
5 loss and before trial loss and adds the two
6 together. As you can see, the sum is \$5.3 or
7 \$6.2 Million.

8 Once again, I express no opinion as to
9 which one of these is most appropriate.
10 That's not my job.

11 Q. Thank you, sir.

12 EDWARD GRAHAM: Your Honor, at
13 this time we would offer the charts as our
14 next exhibit.

15 THE COURT: What say the
16 defendants?

17 CHILTON SIMMONS: Cumulative.

18 THE COURT: I am going to overrule
19 that objection due to the complicated nature
20 and volume of evidence in the case. We will
21 allow a copy of the charts to go into
22 evidence.

23 EDWARD GRAHAM: What number will
24 that be?

25 COURT REPORTER: 99.

1 EDWARD GRAHAM: That is Exhibit
2 99, Your Honor.

3 THE COURT: Thank you.

4 (SO ENTERED AS PLAINTIFF'S EXHIBIT 99)

5 THE COURT: Anything further?

6 EDWARD GRAHAM: Yes, sir.

7 DIRECT EXAMINATION CONTINUED

8 BY EDWARD GRAHAM:

9 Q. Doctor, let me understand -- if the
10 medical billable as just described, uh, --
11 what does that represent? You talked about
12 present value. Can you explain to us exactly
13 how that would work for present value in
14 those amounts to take care of future needs?
15 What are you taking into account?

16 A. Well, the life care plan has been
17 adjusted for inflation. His earning capacity
18 has been adjusted for inflation with no
19 productivity. That sum of money today would
20 replace his earning capacity and provide for
21 the elements of the life care plan. During
22 his life expectancy, his medical needs would
23 be funded.

24 Q. If that money were available at the
25 conclusion of this case, do you have any

1 concerns about whether or not that money
2 would still be available over Jayden's life
3 time?

4 A. That's why we have, per the court
5 system, to serve as guardians and protectors
6 of money for people in that condition and
7 corps of youth, children.

8 Q. Thank you, sir. Do your figures include
9 anything for pain and suffering, loss of
10 enjoyment of life?

11 A. No.

12 Q. Do your figures include anything for
13 past medical care costs?

14 A. No.

15 Q. Have you had an opportunity to review
16 the itemized figures submitted for the South
17 Carolina Department of Health & Human
18 Services showing the Medicaid expenses that
19 they've paid to date?

20 A. I did.

21 Q. Have you had an opportunity to go
22 through those and determine the retail value
23 of the itemized services according to the
24 government report?

25 A. You mean the submissions by providers?

1 JAY DAVIS: Objection in regard to
2 Medicaid payments with any of these
3 witnesses.

4 CHILTON SIMMONS: We join that
5 objection.

6 THE COURT: Objection note.
7 Overruled. You may proceed.

8 THE WITNESS: Yes.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. What is that, please, sir?

12 A. The charges submitted were \$223,403.59.

13 Q. Thank you. Were you able to determine
14 from the government report how much of that
15 Medicaid actually paid?

16 A. \$99,091.27.

17 EDWARD GRAHAM: May I approach,
18 Your Honor?

19 THE COURT: You may.

20 DIRECT EXAMINATION CONTINUED

21 BY EDWARD GRAHAM:

22 Q. Is this the document that you referred
23 to?

24 A. Yes.

25 EDWARD GRAHAM: Your Honor, we

1 would offer that as previously listed as
2 Exhibit 39.

3 THE COURT: Any objection?

4 JAY DAVIS: Do you have a copy,
5 may we look at it?

6 EDWARD GRAHAM: Sure, (tenders).

7 JAY DAVIS: (Reviewing).

8 THE COURT: Do you have further
9 questions of the witness?

10 EDWARD GRAHAM: Your Honor, may I
11 correct the exhibit number there? I'm sorry.
12 It's 59, 50.

13 THE COURT: While we are waiting
14 for defense to look at it, do you have
15 further questions?

16 EDWARD GRAHAM: I don't believe
17 so, Your Honor.

18 THE COURT: Okay.

19 CHILTON SIMMONS: Your Honor, we
20 would object to relevance.

21 THE COURT: We are going to defer
22 ruling on that at this point, take it under
23 advisement. I will give you a ruling on that
24 at a later time.

25 JAY DAVIS: Thank you, Your Honor.

1 THE COURT: Anything further now?

2 EDWARD GRAHAM: No further

3 questions, Your Honor.

4 THE COURT: Let me ask a moment --

5 Counsel, not limiting you but how long do you

6 believe that your cross will be?

7 CHILTON SIMMONS: Very brief

8 THE COURT: And yours?

9 JAY DAVIS: No questions.

10 THE COURT: Very good. Let's

11 proceed then.

12 CROSS EXAMINATION

13 BY CHILTON SIMMONS:

14 Q. Good afternoon.

15 A. Good afternoon to you.

16 Q. How are you?

17 A. Great.

18 Q. You're an economist, is that right?

19 A. Yes.

20 Q. As an economist, your job is to

21 calculate numbers that are provided to you?

22 A. Yes.

23 Q. You make no determination on issues such

24 as liability or fault?

25 A. Correct.

1 Q. And you've testified at trial
2 approximately several thousand times?

3 A. Yeah, that's probably true.

4 Q. You do not necessarily verify
5 information that is provided to you, do you?

6 A. No, I rely on the life care planner to
7 provide that.

8 Q. So you are not commenting on the
9 appropriateness of the life care plan?

10 A. No.

11 Q. And you base your loss of earning
12 capacity solely off the report of the
13 plaintiff's vocational experts that Jayden
14 is unable to earn waging or live
15 independently?

16 A. Correct.

17 Q. You are not making any independent
18 judgment as to whether he will be employable?

19 A. Correct.

20 Q. And you are not making any representa-
21 tion or assessment as to the validity of the
22 life care planner or vocational reports in
23 this case?

24 A. Correct.

25 Q. I would like to ask you what your total

1 calculations would be if Jayden did not
2 require twenty-four support care or in-
3 facility care?

4 A. (Upon review), under Option One \$79,792.

5 (Upon review), the same answer for
6 Option Two.

7 Q. That would be only for the total ---

8 A. With earning capacity?

9 Q. Yes, sir.

10 A. (Upon review), Option One, \$636,193.

11 (Upon review), Option Two, \$715,985.

12 That's eliminating all support care.

13 Q. Can you also tell me briefly what the
14 loss would be without the loss of earning
15 capacity.

16 A. (Upon review), Option Two, \$132,412.

17 Give that first number and that will
18 help me out.

19 Q. Under Option One?

20 A. Yeah. \$600,000-something.

21 Q. \$583,573?

22 A. That's his loss of earning capacity.

23 So, (upon review), Option One \$132,412.

24 Q. Thank you. Your report does not take
25 into account the fact that Jayden may not

1 need the services of the life care plan;
2 correct?

3 A. Correct.

4 Q. And it does not take into account the
5 fact that he may graduate from high school
6 and participate in the labor market?

7 A. Right.

8 Q. And all of your opinions are based on
9 information that has been given to you by the
10 experts that Mr. Graham has hired in this
11 case?

12 A. Right, Ms. Hutchinson and Dr. Voight.

13 CHILTON SIMMONS: No further
14 questions.

15 THE COURT: Mr. Davis?

16 JAY DAVIS: Yes, just briefly,
17 Your Honor.

18

19 *CROSS EXAMINATION

20 BY JAY DAVIS:

21 Q. Good afternoon, Dr. Wood.

22 A. Good afternoon, Mr. Davis.

23 Q. One of items given to you was Dr.
24 Voight's cost report, is that right?

25 A. You mean case manager?

1 Q. No, it's a cost report -- let me just
2 show you, (tendering to witness). Do you
3 rely on the cost report from Dr. Voight in
4 preparing some of your numbers?

5 A. Yes.

6 Q. Okay.

7 A. (Returns document to Mr. Davis).

8 Q. Thank you.

9 JAY DAVIS: No further questions,
10 Your Honor.

11 THE COURT: Is there redirect?

12 EDWARD GRAHAM: No, Your Honor.

13 THE COURT: All right. Then, sir,
14 you are free to leave.

15 (WITNESS STEPS DOWN)

16 THE COURT: All right. Ladies and
17 Gentlemen, I am pleased to report that as
18 witness Dr. Wood ended, your lunch arrived.
19 So it's good timing. We are going to take
20 our lunch break at this time.

21 We will reconvene in probably forty-
22 five minutes or so. We are going to give you
23 time for your lunch. We may have some issues
24 that we need to take up in the interim before
25 you return to the courtroom, so we will call

1 for you when that is completed.

2 Enjoy your lunch. Let's all remain
3 where we are while the jury departs.

4 (JURY OUT @ 12:31 P.M.)

5 THE COURT: Anything else before
6 we close the proceedings for the morning
7 hour?

8 EDWARD GRAHAM: Your Honor,
9 before we rest, we would like the chance to
10 make sure that all our exhibits are formally
11 in.

12 Also, I was a little puzzled by Your
13 Honor's ruling on the Medicaid expense
14 document.

15 THE COURT: Well, let me explain
16 it to you. The reason that I did that as I
17 did, we will have to develop a charge on
18 suborgation and how that works, so before we
19 put things into evidence I need to make sure
20 that the charge is consistent, that the
21 attorneys have an agreement or an agreement
22 to disagree. Some of it, we need to talk
23 about that. That's ---

24 EDWARD GRAHAM: I understand. I
25 just want to be protected, that we get those

1 in one way or another to cover the past
2 expenses.

3 THE COURT: I understand. Then we
4 get into an explanation of the reduced amount
5 that Medicaid pays, how much is the
6 subrogation lien and all those things, so we
7 need to sort that out among ourselves and at
8 least come to a decision as to how we are --
9 first, let the parties object or take
10 whatever position that they wish.

11 EDWARD GRAHAM: So I won't be
12 prejudiced by resting before that is ---

13 THE COURT: Not at all.

14 EDWARD GRAHAM: Thank you.

15 THE COURT: Anything further
16 before we close for the lunch hour?

17 JAY DAVIS: I expect to have some
18 Motion before we start into ---

19 THE COURT: When we come back, my
20 intention would be that the plaintiff is
21 going to rest, we would go directly into
22 Motions, take up whatever there would be at
23 the end of the plaintiff's case and be ready
24 to come back after lunch in the defendants'
25 case. I suspect that it will probably take

1 us an hour, well, probably thirty or forty-
2 five minutes for lunch and maybe fifteen
3 minutes for these Motions and arguments.
4 Then in an hour to an hour and fifteen
5 minutes we will be back in the courtroom to
6 begin the defendants case. That will be
7 good.

8 ROBERT HOOD: Your Honor, the
9 plaintiff voluntarily went into Medicaid.
10 We, by our silence, don't agree that that is
11 something that the court should comment on in
12 its charge.

13 THE COURT: I understand that.
14 I am well aware that this is going to be a
15 disagreement, as we have had many, but we
16 will work that out and everyone will be
17 protected in their positions. Okay. Very
18 good. We are going to adjourn at this time
19 for the lunch hour. Court is in recess.

20 (LUNCH RECESS)

21 THE COURT: Now, Plaintiff, at the
22 close of the morning hour you were on the
23 verge of resting. What is the plaintiff's
24 position?

25 EDWARD GRAHAM: Yes, sir. If

1 Your Honor please, we have gotten together
2 with the court reporter about what her
3 records show are in evidence and we would
4 like to move at this time, if Your Honor
5 please, for the introduction of:

6 Exhibits 20, 21, 27 and 28.

7 Exhibits 39 through 58 for ID Only.

8 THE COURT: Let's take the ones
9 in the twenties and tell me what they are,
10 please.

11 EDWARD GRAHAM: Exhibit 20 is the
12 George Hair school records. If Your Honor is
13 inclined to let the whole thing is versus
14 individual -- we haven't had any individual
15 rulings yet, but we've moved them in at this
16 time subject to any individual rulings.

17 Exhibit 21 is the same category but
18 a different school, Oakland Elemenary.

19 Exhibit 27 are MUSC records for
20 Jamsetta and Jayden, redacted in accordance
21 with your prior instructions.

22 Exhibit 28 in the FDA Public Health
23 Advisory. Now, I thought that Your Honor had
24 ruled it in but the court reporter had it for
25 ID Only. I am thinking that have been the

1 blowup for ID Only. I thought that the
2 actual FDA document was in evidence. If it
3 is not, I move it in at this time.

4 THE COURT: Does the defense wish
5 to respond on any of those proposed exhibits.

6 CHILTON SIMMONS: Your Honor, we
7 have no problems with Exhibits 20 or 21,
8 subject to some further redaction or hearsay
9 and so forth which we can try to agree on.

10 No problem with Exhibit 27, which is
11 the MUSC records for Jayden and Jamsetta.

12 We would renew our objection to
13 Number 28, which is the FDA Public Health
14 Advisory. It was previously stated that the
15 FDA does not create a medical standard of
16 care.

17 THE COURT: It is the court's
18 recollection that that document was going to
19 be permitted into evidence. Under Rule
20 803(8), so for that reason the court
21 overrules your objection and will permit that
22 document in under Rule 803(8).

23 EDWARD GRAHAM: Thank you.

24 CHILTON SIMMONS: Your Honor, just
25 briefly, I don't believe that document was

1 shown to the plaintiff's doctor
2 intentionally.

3 EDWARD GRAHAM: The blowup
4 certainly was.

5 JAY DAVIS: Your Honor, (standing).

6 THE COURT: I recall going over
7 the testimony about it in the evidence, in
8 at least one of the witnesses' testimony,
9 because I recall the parties -- the witness
10 standing in front of the jury when discussing
11 -- I believe that it was Dr. Oakes.

12 Therefore, I overrule your objection.

13 EDWARD GRAHAM: Your Honor, the
14 ID Only Exhibits are 39 through 58. That
15 covers CDs and reports for our expert reports
16 and CDs of experts on both sides. We had an
17 agreement that those CDs would come in for ID
18 Only on both sides.

19 THE COURT: Let's go back a
20 moment. Mr. Davis joins in the objection
21 just made to the FDA document.

22 JAY DAVIS: Yes, sir.

23 THE COURT: He stood up. You may
24 not have seen that from your position, Madame
25 Court Reporter. That objection is noted.

1 JAY DAVIS: Thank you, Your Honor.

2 THE COURT: Admitting those items
3 in as ID Only, is there any objection from
4 anyone?

5 MOLLY CRAIG: No, sir, not as
6 Court exhibits.

7 THE COURT: Hearing none, they
8 were marked for ID Only, not for the jury.

9 EDWARD GRAHAM: We would ask that
10 defense counsel state on the record their
11 agreement that their CDs come in for ID Only.
12 We never reduced that agreement to writing.
13 It has been reiterated but out of an
14 abundance of caution, I just want to make
15 sure that we have that agreement on the
16 record.

17 CHILTON SIMMONS: Your Honor, we
18 stipulate that these are not evidence.

19 THE COURT: The Court is the
20 gatekeeper on that and no CDs come in.

21 EDWARD GRAHAM: Very good. And,
22 finally, that Exhibit 99 that we marked at
23 the end of the last witness, we just reserve
24 our rights -- it is not officially in yet but
25 I understand that it will be, in some

1 version, subject to Your Honor's decisions
2 about that. We just want to be protected.

3 THE COURT: It is my policy that
4 you've done all you can in the evidence to
5 get it in and now it is just the decision of
6 how the court is going to -- whether the
7 court is going to permit it as an exhibit and
8 how far that issue is going to be taken to
9 the jury, what the charge will say. All
10 subject to defendant's objections. So that
11 is a thinking matter in process.

12 EDWARD GRAHAM: If Your Honor
13 please, we didn't offer that information
14 through Jamsetta. It is anticipated that we
15 could get it in faster through Dr. Wood. I
16 am happy to make an offer of proof that ---

17 THE COURT: No. What I am saying
18 to you, Mr. Graham, is that it is in. You've
19 done all you can do. It is where it needs to
20 be from your side. The question is, am I
21 going to permit it not. Again, I just simply
22 need to think further about the ramifications
23 of that issue and how far we go with that.

24 JAY DAVIS: Your Honor, may I be
25 heard on one matter?

1 THE COURT: Yes, sir.

2 JAY DAVIS: (Inaudible due to
3 projector's fan).

4 THE COURT: Speak up, please.

5 JAY DAVIS: I will object to any
6 numbers that are not Medicaid numbers,
7 numbers provided as charges. If we allow
8 numbers to go in that are not Medicaid
9 numbers, (inaudible).

10 THE COURT: This is becoming very
11 confusing. I can tell by the way that you
12 worded your objection.

13 Here's the general way that this
14 works: the medical records go in just dollar
15 for dollar and the collateral source rule
16 precludes Medicaid, insurance or any other
17 source from which they may be paid; thus, it
18 would also exclude the reimburs-ables, the
19 writeoffs, all the other accounting entries
20 that have to be made in conjunction with
21 that. That is normally how that happens.

22 But we've gone into Medicaid issues.
23 The court anticipated early on that that may
24 happen and now we've got to decide what the
25 best way is to put that in, so I -- I heard

1 your objection.

2 I think we're not quite on the same
3 wavelength with the issue but at some point,
4 hopefully tomorrow or the next anything, I
5 will be prepared to make a ruling and discuss
6 it further with you and let you or any side
7 object for the record.

8 JAY DAVIS: Thank you, Your Honor.

9 ROBERT HOOD: We join that,
10 Your Honor.

11 EDWARD GRAHAM: Only one more
12 thing, Your Honor. We would make an offer of
13 proof of about four or five pages of Ms.
14 Gomez-Carrion's deposition that got cut off
15 because of technical issue. Just in an
16 abundance of caution, we would like to make a
17 proffer of that just in case the other side
18 makes an issue of any of those items that she
19 would have responded to that explained.

20 THE COURT: At this point, I will
21 allow you to take it up on reply if indeed
22 that should happen.

23 EDWARD GRAHAM: Thank you.

24 MARY WATERS: (Inaudible due to
25 projector's fan motor running), person who

1 have come to support Dr. Rhett (inaudible).

2 THE COURT: I am going to deny you
3 relief on that. This is a public forum,
4 people have a job, they come from their job,
5 they show up in court and I would decline to
6 take any action with regard to persons who
7 are here or -- noted for the record,
8 overruled.

9 Anything further now from the
10 plaintiff? (No response).

11 That takes care of the plaintiffs.
12 Now at the end of the plaintiff's case, let
13 me hear from the defendants with regard to
14 any Motions?

15 COURT REPORTER: Can we turn that
16 projector off if they're not using it?

17 THE COURT: Yes. Thank you. (No
18 response). All right, then we will bring in
19 the jury and we will let you close formally
20 in front of the jury.

21 (DISCUSSION ABOUT ELMO EQUIPMENT)

22 THE COURT: Bring in the jury.

23 (JURY IN @ 1:15 P.M.)

24 THE COURT: Welcome back, Ladies
25 and Gentlemen. I trust you had a good lunch.

1 Does the plaintiff wish to call any
2 additional witnesses?

3 EDWARD GRAHAM: No. Your Honor,
4 at this time we rest our case.

5 THE COURT: All right, Plaintiff
6 rests. We will proceed with the defendants'
7 case.

8 Let's just take a moment for -- I
9 want to recognize someone -- today is her
10 birthday, and that's our court reporter,
11 Gayle Burns. Today is her birthday.

12 The other matter that I wanted to
13 discuss with you is that we believe at the
14 day -- as I said we will work today until
15 5:30 I know you've asked if we might work
16 on Saturday and I believe that we will have a
17 better feel for when we believe that this
18 case will end.

19 What I would like to do through and
20 finish -- we are finished with the
21 plaintiff's case and now we will move into
22 the defendants. We will get through today we
23 will let you go back to the jury room for
24 moment while we talk among ourselves about
25 scheduling, expert witnesses and other

1 matters. Then we will come back before you
2 at the end of the day and give you an idea of
3 where we are going, so that you will know
4 today. All right. So we haven't forgotten
5 that issue. We will just have to get back to
6 you.

7 ROBERT HOOD: Your Honor, we
8 didn't know that the equipment was going to
9 break on us. Maybe that's why it has been so
10 noisy. If we could just go ahead and get
11 started.

12 THE COURT: Call your first
13 witness, please.

14 ROBERT HOOD: We call Dr.
15 Edmund Rhett.

16 THE COURT: Doctor, please be
17 careful as you come forward. We've got
18 equipment scattered around, please just
19 watch your step as you come forward.

20 (WITNESS TAKES STAND)

21 EDMUND RHETT, being duly sworn to
22 tell the truth, the whole truth and nothing
23 but the truth, testified, as follows:

24 DIRECT EXAMINATION

25 BY ROBERT HOOD:

1 Q. Good afternoon, Dr. Rhett. We've been
2 here awhile, haven't we?

3 A. Yes, sir.

4 Q. This jury is anxious to know why we're
5 here. Were you negligent?

6 A. No, sir.

7 Q. Did you cause harm to this baby?

8 A. I did not.

9 Q. Have you delivered one thousand babies
10 with a vacuum without causing harm to one
11 thousand babies?

12 A. Yes, sir.

13 EDWARD GRAHAM: Objection, Your
14 Honor.

15 THE COURT: On what basis?

16 EDWARD GRAHAM: Leading and
17 hearsay.

18 THE COURT: Sustained as to
19 leading.

20 DIRECT EXAMINATION CONTINUED

21 BY ROBERT HOOD:

22 Q. How many babies have you delivered with
23 a vacuum?

24 A. Around a thousand.

25 Q. Any complications?

1 A. No, sir.

2 Q. Did you do anything to tear the blood
3 vessels in this baby's head?

4 A. I did not.

5 Q. Doctor, I want to introduce you to the
6 jury. You were born and raised right here in
7 Charleston?

8 A. Yes, sir.

9 Q. Actually ended up in Atlanta going to
10 high school in your young years; correct?

11 A. Northside High school in Atlanta,
12 graduated in 1965.

13 Q. That is a public high school in Atlanta?

14 A. Yes, sir, it is.

15 Q. And you applied and was accepted to the
16 University of the South in Sewanee,
17 Tennessee?

18 A. I went to Sewanee from '65 to '69.

19 Q. What did you major in in college?

20 A. I majored in Biology.

21 Q. What?

22 A. Biology.

23 Q. You didn't have too man people majoring
24 in Biology with you, did you?

25 A. We had a few but not many.

1 Q. I was in the same college at the same
2 time.

3 A. Yes, you were.

4 Q. I stayed away from Biology. You
5 graduated and then went to med school where?

6 A. I went to the Medical College of Georgia
7 in Augusta, Georgia.

8 Q. Graduated when?

9 A. 1974.

10 Q. After graduation, what did you do?

11 A. I did a residency in Jacksonville,
12 Florida, from 1977 -- from 1974 to 1977.

13 Q. Now, when you finished Sewanee, did you
14 teach first?

15 A. I taught high school physics for one
16 years at Avondale High School, a public high
17 school in the Atlanta area.

18 Q. Okay. After teaching for a year, you
19 then applied and went to med school?

20 A. Yes, sir.

21 Q. Got through with med school in what
22 year?

23 A. 1974.

24 Q. And what did you decide to practice, in
25 what area of specialty?

1 A. I elected to do obstetrics and
2 gynecology, so I found a program that I liked
3 that was in Jacksonville, Florida. I
4 actually was referred to it as an externship,
5 where you go down while you are still a
6 student and work with the staff and the
7 residents in Jacksonville, then I applied for
8 that residency.

9 Q. Did you complete that program?

10 A. I did.

11 Q. Why is it called a residency?

12 A. It's where you reside while you're
13 learning the skills that are necessary to do
14 the specialty that you're trying to become
15 adept at.

16 Q. How long is a residency?

17 A. Mine was three years.

18 Q. When you completed that, what did you do
19 next in your training?

20 A. I came to Charleston and I set up a solo
21 practice here in Charleston, in Mount
22 Pleasant.

23 Q. In what field of medicine?

24 A. Obstetrician, gynecologist. That's how
25 I had been trained.

1 Q. Did there come a time when you took oral
2 and written examinations to be Board-
3 certified in that field of medicine?

4 A. When we finished the residency itself,
5 about the last week of residency, we take an
6 extensive written exam. I took that exam and
7 I passed it. Subsequently, after you've been
8 in practice -- and it's not until after
9 you've been in practice that you're allowed
10 to complete a case list of what you've done
11 for the last year, submit it the American
12 Board and then apply to take the Board exam.
13 I did that in 1979, which was the first year
14 that I was eligible to take the exam. I
15 passed that exam the first time that I took
16 it.

17 Q. So you became Board-certified in Ob-Gyn?

18 A. Yes, sir, I did.

19 Q. And since becoming a doctor specializing
20 in Ob-Gyn, about how many babies have you
21 delivered?

22 A. I've always counted the babies that I
23 delivered in residency and I estimate that
24 I've delivered about seven thousand babies
25 over my career.

1 Q. One of your medical partners is here,
2 Granger Osborne. The gentleman at the table
3 there with glasses on. Did you deliver any
4 of his children?

5 A. I delivered his youngest child and then
6 I delivered his first grandchild.

7 Q. How did his youngest child do?

8 A. She was summa cum laude at Sewanee and
9 in Phi Beta Kappa.

10 Q. That was his youngest child. Then what
11 about his grandchild?

12 A. The grandchild is now six years old. I
13 delivered her in 2004.

14 Q. Did you deliver her after the child at-
15 issue in this case?

16 A. Yes, sir, I did.

17 Q. Was there anything unusual or peculiar
18 about the vacuum itself, the vacuum what is
19 in evidence -- somewhere -- that you used in
20 the delivery of this child?

21 A. No, sir, it was evaluated by the
22 physicians at East Cooper, it was called East
23 Cooper Regional Medical Center there, and all
24 of those who were practicing obstetrics at
25 the time -- when we started using vacuums,

1 found this one to the most efficacious one
2 that was available. It's still in use.

3 Q. So from the time vacuums were starting
4 to be used at the Mount Pleasant Regional
5 Hospital, where you delivered babies, or at
6 Roper or at St. Francis, where this child was
7 delivered, was that vacuum -- were there
8 other options for vacuum or was that the only
9 one?

10 A. We had eliminated other options and
11 that's the only one that we used for -- until
12 I quit practicing in 2005.

13 Q. Now, do you we have in the courtroom
14 some of your family?

15 A. We do. We have my mother, my wife, my
16 youngest child ---

17 Q. Katie Rhett.

18 A. (Affirmative nod), Katie Rhett.

19 Q. Have you done things in the community
20 here in Charleston? For example, have you
21 served on the board of any organizations?

22 A. I was on the board at the Charleston Day
23 School but -- one of my proudest achievements
24 is that I've been on the Board at the
25 Canterbury House for the last twenty-five

1 years. The Canterbury House is an Episcopal
2 retirement center on Market Street, a
3 thirteen floor high rise that has about two
4 hundred and fifty residents. The average age
5 is about eighty-three. They all live
6 independently. I've been president of that
7 board of directors for the last seventeen
8 years.

9 Q. Just in case the jury isn't familiar
10 with the Canterbury House, it's three blocks
11 off of my hand from here and it's a high rise
12 building?

13 A. Yes, sir. I am also on the board of
14 the Bank of South Carolina. I've been on
15 that board for eleven years.

16 Q. You were asked in earlier testimony
17 about your rate of the use of vacuums. Have
18 you gone back and actually looked at records?

19 A. I did. I went and tried to figure out
20 what my rate was since it was such a big
21 issue. I found that -- I could find three
22 hundred twelve consecutive deliveries and I
23 used the vacuum sixty-one times.

24 Q. That is a rate for the use of the vacuum
25 of what?

1 A. About twenty percent.

2 Q. The jury have heard the words "clinical
3 judgment" mentioned from time to time. In
4 your thirty or thirty-five years of
5 delivering babies, tell us about clinical
6 judgment as it applies to what you did for a
7 living.

8 A. Well, I spent a long time in school;
9 I spent a long time in residency; and I've
10 spent a long time in practice. So my
11 education and my training and my experience
12 all go into how I make up my mind how to do
13 a given procedure or not to do a given
14 procedure in a given circumstance. That's
15 clinical judgment.

16 Q. In this case you gave a deposition for
17 five hours about the delivery in this case.
18 Right?

19 A. Yes, sir, I did give a five-hour
20 deposition.

21 Q. And in that deposition, which the jury
22 has heard, there were some things that
23 weren't read to this jury, that they didn't
24 hear. I want to just go to a few of those
25 examples ---

1 ROBERT HOOD: Can we hand the
2 doctor a copy of his deposition?

3 THE COURT: You may.

4 ROBERT HOOD: (Tenders)

5 Direct EXAMINATION CONTINUED

6 BY ROBERT HOOD:

7 Q. Let's first talk about the tone of this
8 deposition and the interrogation about
9 medical terms rather than the delivery of
10 this baby. On Page 25, Line 12, you were
11 asked, "What is molding?"

12 Your answer on Line 13, Page 25, was
13 what, Doctor?

14 A. (Reading): "Molding is where the baby's
15 head tends to elongate to try and get out of
16 the pelvis.

17 Q. Then you were asked, (reading):

18 Q. When a baby's head is molded
19 and elongated, what part of the head should
20 the obstetrician refer to in determining
21 whether or not the baby is engaged?

22 Your answer?

23 A. (Reading):

24 A. Well, you see molding in most

1 *deliveries and most all of us are still*
2 *talking about the presenting part. Sometimes*
3 *the molding is more than other. Sometimes it*
4 *is very hard to determine how much of the*
5 *baby is actually down in the pelvis and how*
6 *much is not.*

7 Q. (Reading):

8 Q. Please explain.

9 A. (Reading):

10 A. When you have molding, which
11 *you have in most vaginal deliveries, you'll*
12 *see that the baby becomes not pointy but less*
13 *rounded and more elongated. As the baby*
14 *moves down, it's easier to get the baby out*
15 *when they're elongated rather than a*
16 *perfectly round head. That's just a natural*
17 *process that occurs in delivery.*

18 Q. These are Mr. Graham's question. The
19 next question is, (reading):

20 Q. You said something about
21 *sometimes it's difficulty to tell if the baby*
22 *is in the pelvis or not?*

23 Your answer?

24 A. (Reading):

1 A. No.

2 Q. Then you were asked, (reading):

3 Q. Because of the molding?

4 A. (Reading):

5 A. I don't think it's difficult to
6 tell if it's in the pelvis. It's difficult
7 sometimes to tell how far down in the pelvis
8 it is.

9 Q. (Reading):

10 Q. Please explain why that is?

11 A. (Reading):

12 A. I missed your question.

13 Q. (Reading):

14 Q. Please explain why it's
15 difficult to tell how far down?

16 A. (Reading):

17 A. You can't ever tell how much
18 molding there is. Sometimes you can't tell.
19 Usually you can tell. You can feel the
20 baby's ears if you're not real sure.

21 Q. (Reading):

22 Q. What is the anterior
23 fontanelle?

24 A. (Reading):

1 A. *That's the soft spot in the*
2 *front of the baby's head.*

3 Q. (Reading):

4 Q. *What is the posterior*
5 *fontanelle?*

6 A. (Reading):

7 A. *The soft spot in the back of*
8 *the baby's head.*

9 Q. (Reading):

10 Q. *What is a sagittal suture?*

11 A. (Reading):

12 A. *That's the line between the*
13 *two.*

14 Q. (Reading):

15 Q. *Have you ever heard of a*
16 *cranial pivot or a flexing point?*

17 A. (Reading):

18 A. *I'm not familiar with those*
19 *terms.*

20 Q. (Reading):

21 Q. *What does it mean to refer to*
22 *the position of the head or the orientation*
23 *of the head coming through the birth canal?*

24 A. (Reading):

1 A. *That's when you're trying to*
2 *tell whether the baby is face up or face*
3 *down.*

4 Q. (Reading):

5 Q. *Can you explain to me what*
6 *occiput anterior means?*

7 A. (Reading):

8 A. *Occiput anterior means the*
9 *occiput bone which is on the back of the*
10 *head, is up towards the anterior part of the*
11 *mother's vagina.*

12 Q. (Reading):

13 Q. *What would LOA and ROA refer*
14 *to?*

15 A. (Reading):

16 A. *Left occiput anterior and right*
17 *occiput anterior.*

18 Q. (Reading):

19 Q. *What is left occiput anterior?*

20 A. (Reading):

21 A. *If this is straight up and*
22 *down, this is occiput anterior. Then if the*
23 *baby is cocked off a little bit to the*
24 *mother's right side as I'm -- if I'm the*

1 mother, then that would be the right occiput
2 anterior. If it's off to the left side, it
3 would be left occiput anterior.

4 Q. (Reading):

5 Q. Are you familiar with a portion
6 of the pelvis referred to as the ischial
7 spines?

8 A. (Reading):

9 A. Yes, sir.

10 Q. (Reading):

11 Q. What is that?

12 A. (Reading):

13 A. The little bony places off of
14 the posterior part of the pubic ramus, off of
15 the -- off the posterior part of the pubic
16 bone as it comes around.

17 Q. Dr. Rhett, something else that was not
18 shown to the jury ---

19 EDWARD GRAHAM: Excuse me, Your
20 Honor. They didn't finish the designation
21 that they published to us that they would be
22 using.

23 ROBERT HOOD: I don't know what
24 he's talking about. If he wants to bring

1 something out, he can read whatever he wants.

2 THE COURT: Go ahead. Overruled.

3 ROBERT HOOD: Thank you.

4 DIRECT EXAMINATION CONTINUED

5 BY ROBERT HOOD:

6 Q. You were asked about -- you don't know
7 nothing about the risk of a vacuum basically.
8 Well, what did you say in this five-hour
9 deposition about the risks of a vacuum? On
10 Page 52, Line 22? You were asked by Mr.
11 Graham, (reading):

12 Q. Are there any risks to the baby
13 from use of vacuum extractors?

14 A. (Reading):

15 A. The baby can get a small
16 subcutaneous bruise. The baby could get an
17 intracranial bleed, but there's some question
18 as to whether that's from the vacuum or from
19 the vaginal delivery itself.

20 Q. (Reading):

21 Q. Please explain.

22 A. (Reading):

23 A. You don't have -- in a number
24 of large studies that have been done, you

1 don't have an increased number of bleeds in
2 babies that were delivered by vacuum
3 extraction compared to babies that were
4 delivered by spontaneous vaginal delivery.
5 So although you can see the subcutaneous or
6 subdural bleed, it's hard to determine
7 whether that was done by vacuum extraction or
8 just by vaginal delivery.

9 Q. (Reading):

10 Q. Where do you get from that
11 assertion that there is no increase in
12 cranial bleeds from vacuum extraction?

13 A. (Reading):

14 A. Something I've read years and
15 years ago. I've read all of this stuff an
16 all those textbooks and all those little
17 pamphlets that come out. I don't recall
18 those by name, author or anything else.

19 Q. So then generally, over the thirty
20 years, have you kept up with the matter in
21 the literature?

22 A. Yes, I have.

23 Q. Have you gone to seminars and programs
24 to be educated about new areas of medicine?

1 A. Well, there are multiple ways to keep up
2 with what is going on in medicine, which is
3 moving forward every day.

4 I've spent a lot of time going to
5 continuing medical education courses, both
6 here and out of town.

7 Journals would come that I subscribe to.
8 Some journals are just sent to you. They've
9 got good articles in them.

10 You meet with other doctors, you discuss
11 problems -- when you're waiting for babies
12 and another doctor is waiting for babies, you
13 discuss a lot of medical care.

14 You keep up through things that are sent
15 from the American College, things that just
16 sent from other sources. It just keeps going
17 every day. You read as much of it as you
18 can.

19 You want to be up to date, you want to
20 do everything that you can to help your
21 patients and protect them.

22 Q. And in doing that over the last thirty
23 years, about on average how many hours a year
24 do you spend on education like that? Formal
25 education where you're sitting down being

1 lectured to by doctors?

2 A. Probably thirty or so hours a year over
3 the last thirty years, and then probably
4 another hundred hours a year reading.

5 Q. Thirty is double what lawyers do, I
6 believe.

7 So the risk of the vacuum, you've told
8 us in your deposition and now I'm asking you
9 about recognizing indications for using the
10 vacuum for the delivery. Here on Page 58,
11 you were asked, Line 24, (reading):

12 Q. What are the recognized
13 indications for using a vacuum to deliver a
14 baby?

15 A. (Reading):

16 A. In this particular case it
17 seems to be fetal distress. The baby was
18 crowning. The mother had fatigue. All of
19 those would be some of the indications to do
20 an operative vaginal delivery, which is what
21 a vacuum extraction is.

22 Q. And you were asked, I think, about
23 indications -- sorry, let me start over,
24 (reading):

1 Q. I asked about indications
2 generally and you answered by talking about
3 this case..

4 Did you think that's why you were at
5 your deposition?

6 A. Yes, sir, it is why I thought I was at
7 the deposition.

8 Q. What was your answer?

9 A. (Reading):

10 A. Well, you asked me. So that
11 was three things that I thought of: maternal
12 fatigue -- there was fetal distress, there
13 was -- because of the maternal fatigue, the
14 mother was not able to push well, needed some
15 assistance. The indication here was of all
16 those things.

17 Q. (Reading):

18 Q. One is fetal distress, one is
19 maternal fatigue and one is poor pushing?

20 And you said?

21 A. (Reading):

22 A. Poor maternal effort to push
23 the baby out.

24 Q. (Reading):

1 Q. Poor maternal effort to push
2 the baby?

3 And you said? Line 18?

4 A. (Reading):

5 A. Same idea, poor pushing.

6 Q. Then you were asked; (reading):

7 Q. And understand, I'm not asking
8 about the Washington delivery. Just in
9 general, are there any indications to you for
10 use of a vacuum to delivery a baby other than
11 those three that you mentioned?

12 A. (Reading):

13 A. I am certain that there are
14 plenty more but I just can't think of at this
15 time.

16 Q. (Reading):

17 Q. Those are the only three that
18 you can think of as you sit here today?

19 A. (Reading):

20 A. Well, I'm focused on this case.
21 I'm sure I've done others. I don't recall
22 any other indication at this particular time.

23 Q. Doctor, we are going to get to that in
24 detail in just a few minutes.

1 A. That's fine.

2 Q. Then the last that was not read to the
3 jury and they weren't shown, questions that
4 were asked of you in the deposition, Page
5 111, you're explaining the use of the vacuum,
6 the second time that you were asked,
7 (reading):

8 Q. You told me that you believe
9 there were three indications for vacuum in
10 this case, one of which was fetal distress?

11 A. (Reading):

12 A. Yes, sir.

13 Q. (Reading):

14 Q. Tell me the basis of that,
15 please, sir?

16 A. (Reading):

17 A. Fetal heart tracing.

18 Q. (Reading):

19 Q. Can you be more specific?

20 A. (Reading):

21 A. Well, after rocking along
22 rather uneventfully until about 1924, we
23 started seeing ...

24 Q. And that's a number on the fetal

1 monitoring strips that we're going to look at
2 in a minute.

3 A. Yes, sir.

4 Q. 1924?

5 A. Time of day.

6 Q. Yes, sir.

7 A. (Reading continued):-

8 A. ... we started seeing a pattern
9 of late decelerations and then deep
10 decelerations as this baby came down. You
11 will see that at 1918, the fetal heart tones
12 dip down after a contraction into the 90's
13 and didn't recover until well into the next
14 contraction and then dipped down again. It
15 was a prolonged deceleration that ended about
16 1934, at which time -- with the next
17 contraction the fetal heart tones did the
18 same thing again, this time dipping down to
19 as low as 65 or so. Subsequently, when I saw
20 this next deceleration that's when I said,
21 'This baby is sitting right here, I can get
22 it out. Mom can push.' That is exactly what
23 happened. In about two minutes we had the
24 baby out.

1 Q. (Reading):

2 Q. You are saying there were two
3 critical late decels?

4 A. (Reading):

5 A. Well, look back at -- I
6 described them just then. Starting at 1924
7 you see a late deceleration, then you see
8 another one at 1926, and then at 1928 you've
9 got another one that goes down and it's
10 profound and it stays down. Then it takes
11 five minutes to recover. To me, that's a
12 sign that this baby is in trouble.

13 Q. Trouble, meaning brain damaged, lack of
14 oxygen?

15 EDWARD GRAHAM: Your Honor,
16 excuse me. I object to the ---

17 THE COURT: Counsel is
18 substantially leading. Do not lead your
19 witness.

20 DIRECT EXAMINATION CONTINUED

21 BY ROBERT HOOD:

22 Q. What does "trouble" mean?

23 A. Trouble means that this baby doesn't get
24 enough oxygen, that if we prolong this

1 delivery for a long period of time then we're
2 going to have prolonged lack of oxygen. This
3 baby been a developed, uh, a severe hypoxia
4 encephalopathy. What does that mean? That
5 means cerebral palsy, where this baby would
6 be confined to a wheelchair, can't feed
7 himself, can't do anything actually -- if it
8 survives.

9 ROBERT HOOD: At this time,
10 Your Honor, we would introduce into evidence
11 Lowcountry Ob-Gyn's office chart, the mama's
12 labor and delivery chart, the baby's chart of
13 delivery and the fetal monitor strips; all of
14 which have been premarked.

15 THE COURT: Is there an objection?

16 EDWARD GRAHAM: No objection,
17 Your Honor, except as to -- as Your Honor
18 mentioned earlier, that you wanted to go
19 through the additional pages.

20 THE COURT: All right. Then
21 without objection -- there may be some
22 redactions of material that is irrelevant.
23 Without objection, then they are so admitted.

24 COURT REPORTER: Could you give me
25 the numbers of those exhibits.

1 ROBERT HOOD: Yes, ma'am,
2 someone will help you with the numbers.
3 We've premarked them.

4 CHILTON SIMMONS:
5 Lowcountry Ob-Gyn Exhibit 1;
6 East Cooper Hospital on Jamsetta and
7 Jayden, Exhibit 2;

8 Do you want the others?

9 ROBERT HOOD: The fetal monitor
10 strips.

11 CHILTON SIMMONS: Lowcountry Ob-Gyn
12 is Exhibit 1.

13 ROBERT HOOD: So two is both
14 mama and baby?

15 CHILTON SIMMONS: Yes, sir.

16 ROBERT HOOD: Thank you. Set
17 up the fetal monitor strips, please. Your
18 Honor, we have blown up the fetal monitor
19 strips. Dr. Rhett may like to come down and
20 explain some of these to the jury -- not all
21 of them.

22 THE COURT: Very good.

23 DIRECT EXAMINATION CONTINUED

24 BY ROBERT HOOD:

25 Q. While they are setting up, Dr. Rhett,

1 how long was this lady in labor?

2 A. She had gone in -- had been put in labor
3 at 7:00 o'clock the night before. So she'd
4 been in labor for twenty-four hours.

5 Q. Twenty-four hours?

6 A. Yes, sir.

7 Q. In labor something that is easy?

8 A. Labor is described as labor because it's
9 work. It's a tremendous amount of work. In
10 this particular case, Jamsetta had to do from
11 being barely dilated to completely dilated.
12 It took twenty-four for her uterus to do that
13 work, her body is working with her to get
14 that done.

15 Q. And were you there those twenty-four
16 hours?

17 A. No, sir, I was just there from about
18 noon on.

19 Q. So ---

20 A. Until the delivery of Jayden.

21 Q. So before you were there, was another
22 doctor from Lowcountry Ob-Gyn there?

23 A. Dr. Molly Joseph admitted Jamsetta and
24 inserted something called Cervadil about 7:00
25 o'clock on the night of the 15th. Cervadil

1 was the medicine that causes uterine
2 contractions and softening of the cervix so
3 that the cervix may allow dilation or further
4 thinning out, called effacement, and
5 subsequent delivery.

6 The next morning, Dr. Osborne came in
7 and administered an epidural, which was given
8 in a continuous fashion; that is, it's got a
9 slow drip, it's pushing medicine into the
10 epidural space to relieve pain. The
11 work/labor still goes on even though some of
12 the pain is relieved.

13 Q. Okay. So when you get there, she's been
14 on a fetal monitor strip and is -- it's a
15 strip of paper that is coming off on a
16 machine; correct?

17 A. Yes, sir.

18 Q. Explain it so that the jury understands
19 what the fetal monitor is doing.

20 A. Well, the fetal monitor monitors two
21 things for the mother and the baby. It
22 monitors the intensive and frequency and
23 length of uterine contractions. It has a
24 hard time with intensity but it measures the
25 length and the frequency of uterine

1 contractions. If I could, I should show on
2 this ---

3 Q. Yes, sir. You've got two graphs. Who
4 is on the top graph?

5 A. The top graph represents the baby's
6 heart beat. So this is Jayden's heart beat.

7 Q. If you could, come on back and turn so
8 that the court reporter can hear you.

9 A. Okay.

10 Q. Thank you.

11 A. There are two graphs here. They are
12 being done simultaneously.

13 This one reflects uterine contractions,
14 on the bottom. This is the work that the
15 uterus is doing.

16 The one on the top reflects the baby's
17 heart rate. This is heart tone here. We'd
18 been monitoring those. We'd been monitoring
19 them actually for twenty-four hours now.

20 This spot right here represents twenty-three
21 minutes after 7:00 o'clock on the 16th, in
22 the evening.

23 Q. So that one page that has been blown up,
24 how many minutes of monitoring of the baby's
25 heart is that?

1 A. Eight.

2 Q. Eight minutes?

3 A. It goes from 1923 to 1931.

4 Q. So we've got sixteen minutes on the --
5 now?

6 A. Yes, sir.

7 Q. Who is on the bottom graph?

8 A. The bottom graph represents the uterine
9 contractions.

10 Q. As a doctor coming in to take care of
11 this patient, do you look back at the fetal
12 monitor strips before ---

13 A. Yes. I first looked at this monitor
14 strips at about 12:40. At 12:20 there a
15 deceleration that -- and we changed
16 Jamsetta's position and over about a forty-
17 five minute period of time the fetal heart
18 tones came back up.

19 Q. Okay. Then you continued to -- did you
20 continue to watch the fetal distress?

21 A. We did.

22 Q. Why are you worried about or why is it
23 part of your job to watch these strips?

24 A. Well, the strips are there to tell us
25 whether this baby is having any problems or

1 not. We want to -- we also want to monitor
2 how much uterine activity there is. If there
3 is not enough uterine activity, this baby
4 isn't going to be able to get out.

5 So down here at this strip we're looking
6 at uterine contractions, and then over here
7 we are looking at pushing activity. Up here
8 we're looking at the fetal heart tone.

9 As I mentioned before, right after --
10 when we decided that she was going to be
11 examined or found her completely dilated, we
12 see a small little subtle late deceleration.
13 This doesn't recover until we're really to
14 the next contraction. Then after the next
15 contraction the heart rate goes back down and
16 takes this period of time to -- which is ---

17 Q. Doctor, everybody can not see you.

18 A. I'm sorry.

19 Q. Stop for a second and let's turn this
20 thing just a little bit -- this one, let's
21 try to turn it without knocking it down,
22 (adjusting display chart).

23 A. All right. So this is a mild late
24 deceleration. The reason that I classified
25 it like that is that at the end of this

1 contraction this heart rate doesn't
2 recuperate, really until the next
3 contraction, and as soon as this contraction
4 is over we see that the baby's heart rate
5 goes back down. It's a pattern of this going
6 back down that worries me the most.

7 We get over here to -- this is the
8 twenty-seventh and the twenty-eighth ---

9 Q. Let me just stop you on that frame.

10 A. Yes, sir.

11 Q. First of all, to get to this page these
12 many strips have been going on?

13 A. Yes, sir, that's correct.

14 Q. This isn't all of them but they're in
15 evidence if the jury wants to look at them.

16 A. Right.

17 Q. This is the instrument, is that correct,
18 that's doing the monitoring?

19 A. Yes, sir, that's called the fetal scalp
20 collector.

21 Q. Show that to the jury and explain that
22 word.

23 A. Well, it's obviously a little teeny
24 screw that we can take and just put right
25 into the scalp -- this one may be dull, but

1 it just goes into the edge of the scalp,
2 attaches itself and it gives us a way to
3 monitor the baby's heart rate by like an
4 electrode cardiogram. There's another way to
5 do and that's why isolation, which means
6 that you listen to the baby's heart tone but
7 -- in this part we were using this monitor,
8 which makes the most accurate monitoring of
9 the baby's heart.

10 We put this in about 1:00 o'clock when
11 we had the previous deceleration that'd had
12 worried us a little but then recuperated. So
13 we kept moving forward with this labor
14 process.

15 Q. So since 1:00 o'clock, now up to here,
16 7:00 o'clock or something, 7:23, all of these
17 monitors are being done. When you're there,
18 you're checking on them. Are you seeing
19 anything here other than what you've told us
20 about that worried about this mama or this
21 baby?

22 A. Well, just prior to this, if you go back
23 about twenty minutes, to 7:00 o'clock, the
24 baby's heart rate, which has started to lose
25 something called variability -- and I am

1 going to explain "variability" like I used to
2 explain it to medical students when I was a
3 resident.

4 Variability is a measure of how alert
5 the baby is. If you're driving a car and
6 you're not impaired, as you drive you make
7 subtle changes -- and you see the heart rate
8 kind of go up and down kind of like that.

9 When you lose variability, you get
10 impaired and you start driving like this --
11 that's what I had seen in the twenty minutes
12 prior to that, that we had lost this
13 variability.

14 What that means to me is that this baby
15 is losing it's reserve. In other words, it's
16 becoming ill because of this labor process.
17 That means that I am supposed to be paying
18 attention.

19 When we get to completely dilated, then
20 we see this deceleration followed by this
21 decel followed by this prolonged
22 deceleration. This goes down as low as
23 seventy and stays over an almost five minute
24 period of time until it finally recuperates
25 right here.

1 Q. What message is that sending to you as a
2 trained obstetrician?

3 A. It says to me that there is not enough
4 oxygen is getting to this baby, something is
5 preventing oxygen to getting to the baby.

6 Q. What choices do you have at that point?

7 A. Well, there are four choices.

8 One of which is to do nothing.

9 That's not a choice that I am going to make
10 in this situation. Doing nothing, to me
11 means that I am waiting for this baby to get
12 hypoxic encephalopathy. I would be waiting
13 for this baby to get brain damaged before I
14 would do anything.

15 So I can either use forceps, and
16 I've got a set of forceps ---

17 Q. Let me take that from you and give you
18 some forceps, (tendering).

19 A. Okay. I would apply forceps to the
20 baby's head.

21 Q. Hold those up so that everybody can see
22 them.

23 A. (Displaying), these are forceps. What
24 we do is we take them and put them around the
25 baby's head and around the baby's head and

1 then we pull them together and guide the
2 baby's head out. That's how forceps work.

3 Q. When my wife had children, every how
4 many years ago that was, thirty plus years
5 ago, was this the only way to help get the
6 baby out?

7 A. Thirty years ago we were just beginning
8 to use vacuum but this was the primary way of
9 getting babies out from the middle of the
10 16th Century, the end of the 16th Century,
11 until the new modern Silastic vacuums came on
12 the scene.

13 Q. Tell the jury that history. I thought
14 that was fascinating when you explained it to
15 me earlier.

16 A. Well, there was a fellow who was a
17 friend of the court in England who wanted to
18 help the Queen or one the princesses have a
19 baby without dying. That was one of the
20 consequences of labor -- it still can be one.
21 He invented the rudimentary forceps, in those
22 days, and he would slide -- and he would do
23 it all in secret. Nobody could see what he
24 did. So he would come in, he would slide
25 these around and he'd pull the baby out and

1 then he'd hide it so that nobody could see
2 it. So it was sort of a secret for over a
3 hundred years and then they became very
4 widespread, saved the lives of many mothers.
5 As you can see, it can put a lot of
6 compression on the baby's head. So this --
7 this is what we use a lot, I did a lot of
8 these forceps deliveries when I was a
9 resident.

10 We started using vacuums at the end of
11 my residency and then -- but the only vacuums
12 that we had then were hard metal and they
13 really weren't useful. It took a long time
14 to get it and -- you didn't use them but in
15 very limited circumstances.

16 Then in the early '80s the Silastic, the
17 softer rubber vacuums came along and we were
18 able to put these on and create a vacuum in a
19 fairly rapid sense and just guide the baby
20 down. You work with the mother while she is
21 pushing so that you can bring this baby down.

22 Q. All right, we're back to what your
23 options were given what's on the fetal
24 monitor strips.

25 A. Okay. So we had ---

1 Q. This was one.

2 A. --- one, to do nothing, and I thought
3 that would lead to a terrible consequence of
4 waiting, because there would not be enough
5 oxygen going to Jayden's brain.

6 I could use forceps, that was an option.

7 I'd been using the vacuum as my

8 preferred method of delivery for at least

9 seven or eight years, in 2002.

10 Q. Why not just do a C-section?

11 A. Well, I was going to do a C-section but
12 when I did an exam I found that Jayden was
13 just inside the vagina.

14 Q. Now, let's explain that with the model
15 of the pelvis -- (displaying model).

16 A. There is a point right here, at 1934,
17 where this heart rate has gone along and gone
18 along and it's been down for a long time. So
19 this is a model of the pelvis. Now, we've
20 talking a lot about this. You all have been
21 sitting on these a lot time now (indicating
22 tuberosities). If you lean back a little bit
23 you're probably sitting on your sacrum just a
24 bit.

25 The baby has got to fit down their

1 pelvis, like that.

2 These are the ischial spines and this is
3 where we make measurements from. In my
4 deposition, I had a hard time remembering --
5 I hadn't done a delivery in three years and I
6 hadn't thought about the terminology during
7 that period time, because I had gone on about
8 non-obstetrical cares.

9 Q. Dr. Rhett, at the time of your
10 deposition you had not delivered a baby in
11 three years. Why?

12 A. I gave up obstetrics in 2009.

13 Q. Why?

14 A. I spent eleven years worth of nights in
15 the hospital.

16 Q. Eleven years sleeping in the hospital
17 with mothers who were having babies?

18 A. Right. That was after thirty-two years,
19 I got every third night off or so. Sometimes
20 I had less frequent than that, but most of
21 the time I spent the night at the hospital.

22 When I was taking my youngest child,
23 Katie, to a tennis tournament, and she was
24 about ten and I said:

25 'What are you going to do when you grow

1 up?'

2 She said, 'I want to be a doctor.'

3 Great. 'You going to deliver babies?'

4 "No, Daddy."

5 'Why not?'

6 "They don't have enough time to spend
7 with their children."

8 So as we got a little older, you know,
9 out of the mouth of babes comes the truth.

10 As we got a little older, I had
11 grandchildren, five grandsons and a grand-
12 daughter. I have older children. I want to
13 spent time with all of them, and my wife, and
14 my mother. So, anyhow, that's why I stopped
15 doing obstetrician. I loved it, it was great
16 fun, it was a challenge, it had a lot of work
17 to it but the delivery of a baby is a
18 wonderful thing.

19 So we get to this point right here and
20 I've seen about five minutes where I think
21 that there is very low or no oxygen going to
22 this unborn baby, Jayden.

23 So at that point I kind of puzzled
24 around, I'd gotten everything as ready as I
25 can to do a vaginal delivery, and we've

1 gotten Jamsetta in a position -- I've got her
2 mama holding one leg so that it rotates the
3 leg up a little bit, so that the baby can get
4 out. I've got her sister holding the other
5 leg, so that she can help me position and
6 help Jamsetta get in a position where she can
7 push better.

8 I do an exam and what I -- and you can
9 see it on the video. When I do an exam, here
10 is the fetal scalp electrode -- right there.

11 Q. Turn around and let everybody see it?

12 A. There's -- and there's my fingers inside
13 the vagina. You can see it, right there.

14 Well, I am going to tell you all that
15 this measuring device that from that ischial
16 spine ---

17 Q. Which is ---

18 A. The ischial spine is this little boney
19 thing sticky out right here, (indicating).

20 As the baby comes down ---

21 Q. Stop right there. Let's make sure that
22 everybody knows where the ischial spine is.
23 These two little points right here, is that
24 right?

25 A. Yes, sir.

1 EDWARD GRAHAM: Your Honor, we
2 object to what I anticipate is going to be
3 the use of a measuring instrument to measure
4 a dimension that has absolutely no relevance.

5 THE COURT: Overruled. Again, you
6 will have cross examination on this.

7 DIRECT EXAMINATION CONTINUED

8 BY ROBERT HOOD:

9 Q. Tell the jury why this is relevant.

10 A. Well, there was all this talk about was
11 the baby engaged or not engaged, did I know
12 what I was talking about. So what it means
13 when the baby gets engaged is that the
14 leading part of its head gets to the ischial
15 spine, right across there. As it comes
16 further down into the pelvis, we count these
17 as positive stations.

18 In my deposition, I had a hard time
19 remembering that. I hadn't done it in three
20 years. I hadn't thought about the definition
21 in three years. I really hadn't thought
22 about the definition in a long time. I just
23 used it clinically. What does that mean? It
24 means that I used it so many times in what
25 I'd done that I'd forgotten -- in a way, I --

1 I can't tell you the mechanics of riding a
2 bicycle but I can still ride one. I know it
3 takes levitation, momentum -- but I can't
4 remember all that stuff.

5 But I can tell that from these ischial
6 spines to the opening of the bony part, about
7 seven centimeters, -- well, when I reach my
8 fingers in that far, to touch this on
9 Jayden's head, I am -- Jayden's head is four
10 centimeters past the ischial spine, so that
11 means that he is not at a mid station, he is
12 at a very low position in this pelvis. He is
13 sitting right there, (indicating), that is
14 the leading part of his head. His head is
15 this right there.

16 Q. Hold it up so that everybody can see
17 exactly what you're talking about.

18 A. (Displaying). I reach my fingers in and
19 you can see me taking this off of Jayden's
20 head. That's how far in that I have to go to
21 reach that, the fetal scalp ---

22 Q. All right, let's show that.

23 A. Shows he's past the ischial spines,
24 which means that he is at a very position
25 station, not a mid station, low.

1 Q. Why is it not ---

2 A. Well, if the baby had not come down I
3 wouldn't want to deliver him that way. Had
4 he not come down deep in the pelvis, I don't
5 want to put the vacuum on it.

6 I put the vacuum on when he is way down
7 low.

8 Q. Is that the proper way to do it?

9 A. It is the proper way.

10 Q. Is it the correct technique?

11 A. I used the correct technique.

12 Q. Is it a method that you've used a
13 thousand times to ---

14 EDWARD GRAHAM: Judge, he is
15 continue to leading.

16 THE COURT: Counsel, you objected
17 many times to Mr. Graham when he led his
18 witness. You can't lead your witness. You
19 know that. Did you hear me?

20 ROBERT HOOD: Yes, sir, Your
21 Honor.

22 THE COURT: Very good. Please
23 proceed.

24 DIRECT EXAMINATION CONTINUED

25 BY ROBERT HOOD:

1 Q. Did you ever have a problem when you put
2 the vacuum extraction onto a child, like
3 they're claiming in this case?

4 A. No, sir, I've not had a problem with
5 vacuums in the approximate one thousand
6 deliveries that I've done with a vacuum
7 extraction.

8 Q. When you saw this event shown on these
9 fetal monitor strips that are in evidence,
10 and these are frame numbers -- so that the
11 jury can find it again, East Cooper Hospital
12 pages 309 and 310, what was your clinical
13 judgment and obstetrical opinion?

14 A. Well, my clinical judgment said I've got
15 one warning sign, I've got another warning
16 sign and now I've got a deep prolonged
17 bradycardia. It stayed down for a long
18 period of time. That bradycardia says, 'I am
19 not getting what I need.'

20 If you think of an old Navy diver with a
21 bell where they pump the air down to his
22 bell, and that's how we did it before we got
23 SCUBA tanks. If you cut the air off to the
24 bell, that diver doesn't have very long to
25 survive and you've got to figure out how to

1 open that air chamber back up.

2 So in this case, because he was so low,
3 I thought that I could deliver Jayden in a
4 short period of time and that in doing that I
5 would decrease the amount of time that he had
6 to hold his breath, which is essentially what
7 he had to do.

8 Q. Let's look at the birth video that we
9 have that's in evidence, (video playing).

10 Pause it for just a minute. Tell the
11 jury where you are in the delivery here.

12 This is you with the white gloves on.

13 A. Well, ---

14 Q. Come on the other side of the screen so
15 that you are aiming at the court reporter.

16 A. Yes, sir. If you get too close, you
17 can't actually focus on it.

18 Q. We will back this off a little bit so
19 that you can see.

20 A. I'm doing an exam. I can see -- can you
21 put something in motion just for a second? I
22 can't quite orient myself.

23 Q. Go forward just a second, (video
24 playing).

25 A. Okay. Right there, I've just put my

1 fingers in, in Jamsetta's vagina, to try and
2 take this fetal scalp electrode off. The
3 reason that I wanted to take the fetal scalp
4 electrode off is because, just like anything
5 else, it has a suction. If there's a little
6 piece of something inbetween, it won't create
7 suction. So if this fetal scalp electrode
8 wire was between the head and the bell,
9 then I can't create the suction that I need
10 to get the baby out.

11 Q. So what are your hands -- what are you
12 doing with your right hand at this moment?

13 A. I am taking the fetal scalp electrode
14 off.

15 Q. The video is in evidence and we're
16 looking at the time of the video of 7:40
17 p.m., July 16th, 2002; is that right?

18 A. That's correct.

19 Q. Okay.

20 A. Move forward now.

21 Q. Very slowly, (video playing). Now what?

22 A. Still trying to get the fetal scalp
23 electrode off, and now I've got it.

24 Q. Stop right there. What does it tell you
25 as an obstetrician from that picture, about

1 the position of the baby's head?

2 A. Well, it's what I was trying to show,
3 when I was trying to take the fetal scalp
4 electrode off, that's where my fingers went
5 to. If you look at this as the ischial
6 spine, this is where my fingers were touching
7 Jayden's head. That's at least that far down
8 from where the ischial spines are. That's
9 all as far as my fingers went. I ran into
10 his head.

11 Q. What does that mean?

12 A. It means that he is at a low station.
13 That is, he's not at a mid station. He's not
14 high up in the pelvis. He is sitting right
15 inside the pelvis, right there.

16 Q. What does that mean that you can do at
17 this point to help with the delivery?

18 A. Well, it means that applying the vacuum
19 and getting Jamsetta to push, which we work
20 all this out together, that I can move the
21 baby down and slowly -- and what happens is
22 that at about six or eight pushes, she's
23 brought the baby all the way down through the
24 pelvis. It takes less than three -- well, it
25 takes three minutes and seven seconds.

1 Q. Now what are you doing as we go forward
2 on this (video)?

3 A. That's the vacuum extractor in my right
4 hand.

5 Q. What are you doing now?

6 A. I am pushing the labia apart and I'm
7 putting it in. She's pushing down a little
8 bit.

9 Q. Where is the baby's head?

10 A. Well, the baby's head is sitting right
11 here, like this (indicating). I'm putting
12 this in. If you will give me the vacuum, I
13 will show you what happens next.

14 ROBERT HOOD: This is Exhibit
15 72, Your Honor. I am going to take it out of
16 the bag for him, (tenders to witness.

17 DIRECT EXAMINATION CONTINUED

18 BY ROBERT HOOD:

19 Q. Okay.

20 A. All right. What happens with this
21 particular vacuum is that I-- it's flexible,
22 you can squeeze it, bend it up a little bit,
23 you can put it in the vagina like that.

24 When I do, it goes not on top like that
25 but it goes around the baby's head. You will

1 see at the end of delivery that Jayden's head
2 is up into this space right here.

3 Q. Show all the jurors, do that twice
4 please.

5 A. (Complies), when I bend this soft side
6 up and I slide it into the vagina it goes
7 around Jayden's head. Now, the whole thing,
8 up to about right there, goes inside the
9 vagina.

10 Jayden's head is not into this part, so
11 that -- and, you know, as we go forward you
12 can still see his head is still in the
13 vagina, down to a very positive state.

14 All of us "oblong" heads, I suppose, but
15 when you're trying to be born your head
16 becomes more like a football than like
17 anything else. It is oblong. I mean, it's
18 really got to get oblong just so that it can
19 get out of the vagina.

20 Try to think of taking something as big
21 as your head and pushing it through the
22 vagina. It's very hard. So in order to get
23 down through the pelvis, you know, changes
24 have to be made: the cervix has to dilate,
25 the head changes shape a little bit and

1 that's called molding -- there was molding
2 here.

3 It's not an easy process, it's a ton of
4 work, and it is -- fraught with danger. Most
5 of the time it's like flying an airplane.
6 You're riding along and everything is just
7 grand. But what I see here is I think we've
8 lost one engine. I'm the pilot and I've got
9 to react and land this plane.

10 I can -- in about twenty minutes, I
11 could go do a C-section. I can't hold my
12 breathe for twenty minutes, I can't hold my
13 breathe for five minutes. The baby has a
14 little bit better reserve than that, but I
15 thought the baby had run our reserve. So I
16 -- I said, 'I am going to land the plane.'

17 If you go ahead, you'll see what
18 happened next.

19 Q. (Video playing).

20 A. I'm checking it all the way around. I
21 want to make sure that there is none of the
22 vagina -- that none of the mama's vagina --

23 Q. What are you doing with your fingers?

24 A. When you put this on, you want to make
25 sure that there is none of the vagina stuck

1 inside it.

2 Q. Human tissue, the mother's tissue.

3 A. Yes, the mother's tissue. You want just
4 baby. You don't want cervix, you don't

5 vagina, you don't want any maternal tissue in

6 there. So you gotta check all the way around

7 to see if that is what you've one. Go ahead.

8 Q. (Video playing)

9 A. What I am doing is I am checking one

10 side and then the other to make sure that

11 there is no maternal tissue. I am pulling

12 down -- stop just a second.

13 Q. Now what is happening?

14 A. One of the things that you need to know

15 is that -- labor is painful, delivery is

16 worse. All you women probably already know

17 that... It's not an easy process, even with an

18 epidural. It hurts. The way that you

19 generate energy to get the baby out is that

20 you ballast out -- what is a ballast outward?

21 It's the same thing you do when you're trying

22 to move your bowels, you've got to hold your

23 breath and push down. It's harder when

24 you're delivering a baby than when you're

25 just having a bowel movement. You have to

1 hold your breath and -- you can't ballast
2 outward and talk at the same time. You've
3 got to hold your breath. So there is a point
4 here when I say "stop" and what I mean by
5 that is, 'let's get organized, let's figure
6 out what we're doing here.' Go ahead --
7 everybody is stopping -- (video playing).

8 Q. Stop right there. Where is the vacuum
9 right there?

10 A. Well, it's on Jayden's head and it's
11 coming out of the vagina but you can't tell
12 because of the elbow.

13 Q. Go ahead, (video playing).

14 A. We stopped the push and get her to
15 breathe, we push for about ten seconds, --
16 all right. It's hard to push. So we push,
17 and she gave a good effort. You see, this
18 much has emerged out of the vagina in that
19 one good push. Go ahead.

20 Q. What's emerged?

21 A. If we are looking at it we can now see
22 that this was all inside and now this much is
23 outside and there is only this much left
24 inside.

25 Q. Referring to?

1 A. I am referring to the vacuum cup. Go
2 ahead, please.

3 Q. (Video playing)

4 A. It hurts. We're resting. She's pushing
5 and I am pulling out.

6 Q. Are you doing any rocking and rolling or
7 wiggling?

8 A. No, sir, I have not done any of that.

9 Q. (Video playing)

10 A. I am making sure that there is nothing
11 around the side or back.

12 Q. Stop here, please. Point to the vacuum
13 for the jury to make sure that we're all on
14 the same sheet of music.

15 A. This is the vacuum right here.

16 Q. Stand aside so they can see.

17 A. (Complies), sorry. This is the vacuum
18 right here.

19 Q. Is it in the proper location?

20 A. Yes, sir.

21 Q. The technique that you're using, tell us
22 about that?

23 A. I am giving -- I'm pulling down while
24 she is pushing down, and the two things
25 together generate enough energy to get this

1 baby to move down the pelvis. We've only got
2 two good pushes so far, we've moved the baby
3 about that far.

4 Q. Doctor, are you using any unusual force
5 in this delivery?

6 A. No, there is a monitor that goes -- this
7 lead goes off to a nurse and she's got a
8 vacuum pump, the pump's got a safety gauge on
9 it, and the instruction are to keep it in the
10 green. I've never known anybody to go past
11 the green. I would never allow that to
12 happen and it didn't happen here.

13 Q. And when the gauge for the -- when the
14 nurse says that it shows that it is in the
15 green, what does that mean to you?

16 A. It's a safety zone that goes from some
17 number of millimeters or mercury to some
18 other number of millimeters of mercury. When
19 you say in that safety zone, the chances of -
20 - it's supposed to be the safe zone.

21 Q. When you place the vacuum on the child's
22 head, do you slam it on there?

23 A. No, sir, it goes around the baby's head
24 like that.

25 Q. Then how does the pressure get built up?

1 A. Well, you know, -- my hand isn't perfect
2 symmetrical, but you hand it off to the nurse
3 and she's got a vacuum pump, a hand-held
4 vacuum pump, she is watching the gauge and
5 she creates a vacuum on this cup.

6 Q. So then as to the placement of the cup
7 and the nurse's job, what is your role?

8 A. My job is to place the cup and hand the
9 nurse the vacuum tube.

10 Q. Is there any exertion ---

11 A. Yeah. When I've got this on, I'm trying
12 to encourage the baby to come down the birth
13 canal, trying to encourage mom to push the
14 baby down the birth canal. The two things
15 together is what accomplishes delivery.

16 Q. Did that pop off?

17 A. No, sir.

18 Q. Did it break or not work right?

19 A. No, it worked just like it is supposed
20 to.

21 Q. Did anything happen in the use of this
22 vacuum unusual, unforetold?

23 A. No.

24 Q. All right.

25 A. It did not.

1 Q. Let's continue with the delivery, (video
2 playing).

3 A. She is taking a deep breath, she is
4 pushing down, ---

5 Q. What are you doing with your fingers
6 right there?

7 A. I am just pushing down on the bottom
8 part of the vagina. You do what ---

9 Q. What does it do

10 A. When I do that, it does two things. It
11 sort of gives the vagina a little bit room
12 and it creates an urge to push.

13 Q. All right. (Video playing), -- what are
14 you doing with your hand there?

15 A. I am just holding my finger on the
16 posterior part of the vagina.

17 I am checking around to make sure that
18 there is no vagina tissue caught.

19 I'm pushing down, guiding the baby's
20 head along.

21 Q. The direction that you are guiding ---

22 A. I am guiding -- the baby has got to come
23 down, then up and out. I've got the baby to
24 here, now we've got to go up this way. I am
25 guiding the baby down, up and out.

1 Q. Is that technique appropriate?

2 A. Yes, sir. Now all I am doing is pushing
3 back the opening of -- and we stop, breathe.
4 You can stop just a second.

5 Q. (Video paused)

6 A. This is Jayden's head. This is the cap
7 that has gone up into the vacuum. Go ahead
8 now.

9 Q. (Video playing)

10 A. I let go because now she is pushing the
11 baby up and out, just like it is supposed to
12 happen.

13 Q. What did you do just then?

14 A. I took it off. Now I am taking the
15 nuchal cord from around the baby's -- the
16 nuchal cord is a cord wrapped around the
17 baby's neck.

18 Q. What kind of cord?

19 A. It's the umbilical cord and it's what
20 brings oxygen and all the other nutrients
21 that the baby needs during the entire
22 pregnancy and labor.

23 Q. Did you know the nuchal cord was wrapped
24 around the baby's neck before delivery?

25 A. No, sir, there is no way to tell that.

1 Q. What did you do with the nuchal cord?

2 A. Well, -- here's the problem. If the
3 cord -- the cord was not tight but the cord
4 -- everybody has a bellybutton. So instead
5 of being out in the rest of this area where
6 the placenta and the amniotic fluid and the
7 rest of the uterus is, the cord has gotten
8 around the baby's neck. Well, what happens
9 is that as the baby comes down the cord can
10 get compressed by anything in this pelvis --
11 whether it is the bones of the sacrum, bones
12 of the side walls or the bones of the
13 posterior cartilage. When it's compressed,
14 it's that Navy diver whose bell of oxygen
15 just got cut off, and that's -- that's -- I
16 think that is one of the things that caused
17 this problem.

18 Q. All right, do you see a picture of that
19 on the fetal monitor strips -- before you
20 deliver this baby?

21 A. If you go over here ---

22 Q. I'll hold it and you come around to my
23 right.

24 A. Okay.

25 Q. Now, explain ---

1 A. When we get completely dilated, that's
2 also the time that the baby starts to move
3 down.

4 So we're completely dilated here and on
5 this contraction you see, right here, that's
6 there's this long slow return to normal.

7 Then on the next contraction there's a
8 long slow return to normal.

9 Then on the next contraction this heart
10 rate comes down way below ninety.

11 Stays down below a hundred ten for a
12 long period of time.

13 It finally recovered. It never
14 recovered to the baseline until after I take
15 the fetal scalp electrode off and start the
16 process of delivering Jayden.

17 Q. So in the context of this delivery with
18 the cord where it was on the baby's neck does
19 that have anything to do with the explanation
20 of what you've seen on these monitoring
21 strips?

22 A. Yes, sir, the cord is being compressed,
23 it's being compressed, it's being compressed.
24 Finally when we get around to delivering
25 Jayden, right there, the beat -- then there

1 was artifact after that, but when we get
2 around to delivering him then we can see that
3 the cord has been a part of the problem.

4 If the cord is around the neck, the
5 dangers are that, A), it can be real tight
6 -- well, this wasn't a tight nuchal cord.
7 This was a loose nuchal cord. But the
8 problem is that when it's wrapped around the
9 neck like that, it is being pushed down, it
10 can be caught by a shoulder, it can be caught
11 by the chest wall, it could be caught on the
12 back and it compresses the umbilical cord so
13 that the baby doesn't get what the baby
14 needs.

15 ROBERT HOOD: We have so many
16 fetal monitoring strips in the records, I'd
17 like to highlight these two with a yellow
18 highlighter so that they can be found again,
19 if Your Honor will allow me.

20 THE COURT: Yes, sir.

21 ROBERT HOOD: Madame Court
22 Reporter, do you have the ones that are in
23 evidence?

24 COURT REPORTER: No, sir.

25 ROBERT HOOD: What I have -- do

1 we want to put them in.

2 CHILTON SIMMONS: 310 and 309.

3 THE COURT: Thank you.

4 ROBERT HOOD: Return to the
5 stand.

6 DIRECT EXAMINATION CONTINUED

7 BY ROBERT HOOD:

8 Q. We were talking about your background
9 and training. When did you get licensed to
10 practice medicine in South Carolina?

11 A. When I finished my residency, I applied
12 in South Carolina, in 1977.

13 Q. You got licensed and have continually
14 practiced since that time?

15 A. Yes, sir, I have.

16 ROBERT HOOD: Your Honor, I
17 would move Dr. Rhett in as an expert in the
18 field of ob-gyn?

19 THE COURT: Is there an objection?

20 EDWARD GRAHAM: If Your Honor
21 please, we will let the question for forward
22 at this time and use cross-examination for
23 that.

24 THE COURT: Without objection, you
25 may proceed. He is so admitted.

1 ROBERT HOOD: Thank you very
2 much. Now he's an expert in Ob-Gyn.

3 DIRECT EXAMINATION CONTINUED

4 BY ROBERT HOOD:

5 Q. Did you cause harm to this baby?

6 A. No, sir. I did not.

7 Q. Is that your opinion to a reasonable
8 degree of medical certainty, most probably,
9 Dr. Rhett?

10 A. Yes, sir.

11 Q. Let's see what some other people in the
12 community think about you. Who is this?

13 A. I can't see her.

14 Q. I will hand it to you, (tendering).

15 A. In 2004, the College of Nursing at the
16 Medical University gave me the 2004 Nursing
17 Advocate Award for Outstanding Support of
18 Nursing.

19 Q. You like nurses?

20 A. I like nurses, they do a great job.

21 This had to do with the certified nurser
22 midwifery program at the Medical University.
23 My practice had many years before gotten
24 midwives to come out into the community and
25 work with us. Then after they had been

1 working with us for a couple of years, they
2 started bringing nurse midwifery students,
3 these are registered nurses who are going
4 through training to delivery babies. They
5 started rotating through our office and do so
6 continuously -- at least while I was still
7 practicing -- until 2007.

8 Q. When you say a nurse wifery, we've got
9 some men on this jury. What is the word that
10 you're using?

11 A. A midwife is a person who is trained in
12 the delivery of children. Certified nurse
13 midwives are registered nurses who go through
14 either an eighteen-month or two-year
15 specialized training in prenatal care and
16 delivery of infants.

17 Q. Have you enjoyed being involved in that
18 program, helping train those ladies?

19 A. We did for many, many years. It was
20 very beneficial to us and to them. You
21 always learn something new every time that
22 you talk to somebody different.

23 Q. What did the hospital say when they gave
24 you this?

25 A. They just thanked me, it says: In

1 grateful appreciation from ANMIE, Cooper
2 Community Hospital as a founding board member
3 from 1985 to 1993.

4 Q. You'd been on the Board since the
5 Hospital opened?

6 A. I was on the Board for eight years.

7 Q. When you gave your deposition, had you
8 been studying the birth video that we've been
9 over in detail today?

10 A. No, sir. I'd viewed it once. I thought
11 in June that I had done a really good job of
12 delivering this baby. I didn't study it. I
13 have subsequently studied it along.

14 Q. Just so that the numbers are clear on
15 those fetal monitor strips, you arrived at
16 what time?

17 A. I came over at 1:00 o'clock but I
18 arrived in the room when the nurse was
19 concerned. I was watching the fetal
20 monitoring strip down the hall, but the room
21 called me and I went immediately into the
22 room. I went in, I think, at 1931, which is
23 7:31 in the evening.

24 Q. P.M.?

25 A. Yes, sir.

1 Q. And the mother at that point had been in
2 labor for how many hours?

3 A. Twenty-four.

4 Q. And the fetal monitor strips that we
5 looked at, when you looked at the films at
6 1924 and 1926, was the baseline normal?

7 A. From twenty-four to twenty-six, you see
8 the first mild deceleration.

9 From twenty-six to twenty-eight you see
10 a second deceleration that says 'I am not
11 normal here.

12 Then at twenty-nine, you have the five-
13 minute deceleration down below a hundred and
14 it takes five minutes to get back to normal.

15 Q. What is a deceleration, just so that we
16 don't lose what you're talking about.

17 A. It is a decrease in the baby's heart
18 rate. The baby's heart rate goes down.

19 Q. You mentioned the mother's condition
20 when you examined her and what was going on.
21 Explain to the jury how she was doing before
22 the birth.

23 A. She was exhausted, had done twenty-four
24 hours of labor. To think that the only part
25 of labor that simply wears you out is the

1 pushing is a little bit beyond the pale for

2 me. Work/labor. Labor is work. She had

3 been doing that work for twenty-four hours.

4 Q. Doctor, can you have a hemorrhage in a

5 newborn without the vacuum having anything to

6 do with it?

7 A. Yes, sir.

8 Q. From what cause?

9 A. From unknown causes. From spontaneous

10 vaginal delivery. We see bleeds when we do

11 C-sections and there's never even been any

12 labor. You can see it when there are

13 abnormalities in the fetal circulation.

14 There are probably lots of other reasons that

15 I can't think of at this time.

16 Q. Was the baby at the perineum or the

17 midstation when you applied the vacuum?

18 A. It was not on the perineum, which I said

19 in my deposition. I had viewed this once, I

20 saw how simply Jayden came down this vacuum

21 and so I made that assumption. But the baby,

22 as I showed with that demonstration, was

23 mounted midpelvis, but way past midpelvis --

24 at least plus three, and I thought plus four.

25 Q. You were asked, and I am talking about

1 your deposition, whether you had read some
2 things from the FDA, package inserts or
3 whatever. Were you shown any of those things
4 in your five-hour deposition?

5 A. No, sir, I wasn't shown any documents, I
6 wasn't shown the video.

7 Q. Were you asked to read any document to
8 see whether or not you agreed with it
9 scientifically?

10 A. No, sir, I was not.

11 Q. Did you understand what the word
12 "reliable" means to judges and lawyers about
13 medical text?

14 A. Well, I was under the understanding that
15 reliable means that every word, every comma,
16 every pencil point is accurate to the nth
17 degree. So to be reliable would be to say
18 that that's the only way that you can do
19 something, and that's certainly not what I've
20 learned in my education and training and
21 continuing education. Things that we used to
22 think 'that was a good idea' aren't quite as
23 good an idea now, or may be totally outdated.

24 (OFF RECORD DISCUSSION RE: ELMO & SCREEN

25 ROBERT HOOD: I have got some

1 other children that are lawyers that are
2 taller than I am and they always do it for
3 me. I've never had that problem before. I
4 forgot. I need to practice that at home.

5 How are we doing?

6 THE WITNESS: We're just fine.

7 ROBERT HOOD: Your Honor, I've
8 been talking for over an hour. Do you want
9 to give us a break?

10 THE COURT: How much longer do you
11 believe for direct you need?

12 ROBERT HOOD: Your Honor, I
13 really don't know. Twenty, thirty minutes.

14 THE COURT: All right, let's take
15 a break at this time, Ladies and Gentlemen.
16 We will do that. Please enjoy your break.
17 Let's all remain where we are while our jury
18 returns to the jury room.

19 (JURY OUT @ 3:14 P.M.)

20 THE COURT: Doctor, I will ask
21 that you not speak with lawyers on either
22 side during the break. You are welcome to
23 stand down. We will be in recess now for
24 approximately fifteen minutes.

25 EDWARD GRAHAM: Your Honor, may

1 we be heard on one matter before ---

2 THE COURT: Why don't you come up
3 here and speak to me about it -- Mr. Hood,
4 come up here if you will.

5 (OFF RECORD BENCH CONFERENCE)

6 COURT REPORTER: At this time
7 I marked Exhibits 1, 2, 4, 5, 9, 12, 13, 14,
8 15, 16, 17.

9 At this time, Exhibits that went in
10 were 20 and 21, the entire records; 27, both
11 mother and Jayden; 28, which was the FDA
12 advisory; 33, 34, 35, 36, 37 and 38 -- I
13 think that they were marked in the other day.

14 And 76, which is the photo showing
15 the delivery.

16 99, which was Dr. Wood's chart.

17 100, which was the brace and the
18 boot exhibits.

19 101, which was the Health Tracks
20 document.

21 102 was the East Cooper Hospital
22 fetal monitor strips.

23 (BRIEF RECESS)

24 THE COURT: You told the court
25 that there was an issue that you wanted to

1 place on the record. Go ahead, Mr. Graham.

2 EDWARD GRAHAM: Thank you, Your
3 Honor. If Your Honor please, we've been
4 operating for many months after a case
5 management order as part of the multiweek
6 document.

7 There were deadlines for identifying
8 trial exhibits and demonstrative exhibits.
9 We have been frustrated in our efforts trying
10 to get the demonstrative evidence of the
11 other side. They never listed any until the
12 day of opening. Right before opening they
13 showed us a short animation that had no
14 resemblance to the facts of this case.

15 Your Honor, today, during the direct
16 examination of the Defendant Dr. Rhett, we
17 were introduced, for the first time, during
18 his examination to five demonstrative
19 exhibits that had never been listed, never
20 shown to us, never hinted about in any way,
21 consisting of an electrode, the forceps, the
22 pelvic model and two awards. They used two
23 blowups that they hadn't told us about but at
24 least those blowups of the strips were from
25 strips that we had discussed as coming into

1 evidence.

2 Now I understand that they are
3 getting ready to try to use the animation
4 that they first showed to us on the day of
5 closing (sic).

6 If Your Honor please, I wanted to
7 call this to your attention. To me, I think
8 that it shows a willful violation of the
9 court rules and I would just ask Your Honor,
10 in your discretion, to consider whether these
11 circumstances are appropriate for an
12 imposition of an Order for sanctions and also
13 whether Your Honor believes that it would be
14 appropriate to give an instruction to the
15 jury that the defense has violated the court
16 orders by springing exhibits in trial that
17 they did not exchange with us, as we had done
18 with them in accordance with the spirit and
19 the letter of discovery.

20 THE COURT: Very good. What
21 defense do you have?

22 CHILTON, SIMMONS: Your Honor, the
23 scheduling Order required changing proposed
24 exhibit lists. That's what we did for the
25 evidence.

1 We agreed at that conference, which
2 was two weeks ago, to exchange demonstrative
3 exhibits at a separate time. So we all
4 agreed that demonstrative exhibits would be
5 looked at at a separate time.

6 Throughout the course of this trial,
7 counsel has shown me or someone on our trial
8 team, what demonstrative exhibits they would
9 use the day of the witness or the night
10 before. I was not privy that the pelvis was
11 going to be used, but with regard to the
12 other items, Your Honor, the forceps, in Ms.
13 Craig's opening she stated that she would
14 show the jury forceps, so defense counsel had
15 notice of that. She stated in her opening
16 that Dr. Rhett received those awards, so the
17 fact that they were brought in, I don't see
18 how that is prejudicial in any way.

19 As far as plaintiff alleging that
20 the trial is by ambush, both sides are
21 planning this and specifically we would say
22 that they knew of the opinions of -- Dr.
23 Gates, Dr. Zimmerman and the Medicaid
24 numbers, we feel that is more trial by ambush
25 than these demonstrative exhibits that are

1 purely just to aid Dr. Rhett in explaining to
2 the jury these complex issues.

3 THE COURT: Very good. The better
4 course obviously is to disclose these in
5 advance but I don't find any harm, Counselor.
6 Every one of these is something that either
7 has been discussed or would be anticipated
8 based on the allegations in the case, so I am
9 going to decline to grant sanctions and
10 decline to caution counsel in front of the
11 jury or to give a curative instruction.

12 Now, the animation, the next one
13 coming, is there some objection to the
14 animation?

15 EDWARD GRAHAM: Your Honor, as I
16 understand the rules, it needs to bear some
17 resemblance to the facts and circumstances of
18 this case.

19 During the brief period of time that
20 we were allowed to look at that last
21 Wednesday, we could tell that it is a totally
22 different vacuum, a different size and shape
23 of vacuum, a different station of the baby's
24 head and a smooth delivery, not the rocking
25 back and forth.

1 Plus, we had a vacuum on the baby's
2 head that miraculously shifts positions
3 during the course of delivery, which is just
4 -- not in keeping with the laws of science,
5 of the reality of delivering a baby, and
6 which certainly doesn't match the facts of
7 this case.

8 THE COURT: How long is the
9 animation?

10 CHILTON SIMMONS: Your Honor, I
11 think the animation lasts less than thirty
12 seconds. The point is not to show what kind
13 of vacuum it is. Plaintiffs have alleged
14 that the way that Dr. Rhett pulled up on the
15 baby was not in keeping with the way the baby
16 should get out of the birth canal. All this
17 animation shows is the way in which the baby
18 does move out of the birth canal.

19 THE COURT: Can you play it so
20 that I can see it?

21 CHILTON SIMMONS: Yes, sir,
22 (animation playing).

23 MOLLY CRAIG: Can you see it?

24 ROBERT HOOD: The court's big
25 screen broke.

1 THE COURT: I can see it
2 relatively well. Go ahead.

3 ROBERT HOOD: (Animation
4 playing).

5 THE COURT: For what purpose do
6 you intend to put it up?

7 ROBERT HOOD: To help the
8 doctor explain that this is an example of the
9 rhythm and method of using a vacuum, and that
10 it is no different than what is shown on the
11 live video.

12 THE COURT: I will allow it to
13 show what's -- how it should be, but not as a
14 depiction of what is happening on the video.

15 ROBERT HOOD: Okay.

16 THE COURT: Because the video
17 shows itself. We will not let the animation
18 alter what the video shows.

19 ROBERT HOOD: Yes, sir.

20 THE COURT: Mr. Graham, I deny
21 your objection -- I am not to overrule yru
22 objection and allow it for use as a
23 demonstrative showing of what a vacuum system
24 in a vaginal delivery should be.

25 EDWARD GRAHAM: Your Honor, could

1 you instruct the jury that the vacuum is a
2 totally different type?

3 THE COURT: Well, -- what do you
4 say to that?

5 ROBERT HOOD: Your Honor, I am
6 just showing this to the jury for the
7 demonstrative purpose of showing the birth
8 canal and the way that a child comes out of
9 the birth canal with the assistance of a
10 vacuum extractor. That's all.

11 THE COURT: I think it is
12 appropriate to show that it is not the type
13 of vacuum -- or to tell the jury that this is
14 not the type of vacuum used ---

15 ROBERT HOOD: I will do that.

16 THE COURT: If you -- you can do
17 that by asking the witness, is this the same
18 type?

19 ROBERT HOOD: I will do that.

20 THE COURT: With that curative,
21 the court will allow the animation. Please
22 bring in the jury.

23 (JURY IN @ 3:42 P.M.)

24 THE COURT: Welcome back, Ladies
25 and Gentlemen, please be seated.

1 (BRIEF RECESS)

2 DIRECT EXAMINATION CONTINUED

3 BY ROBERT HOOD:

4 Q. Dr. Rhett, I am going to ask you about
5 some things that require this noise
6 (projector roaring) and then I will move on
7 to another subject.

8 First, there's been an issue in this
9 case about informed consent. Was there an
10 informed consent form signed by this patient
11 for this delivery?

12 A. Yes.

13 EDWARD GRAHAM: Objection, Your
14 Honor.

15 THE COURT: On what basis?

16 EDWARD GRAHAM: The basis is that
17 there's a general consent form signed.

18 THE COURT: I understand.

19 ROBERT HOOD: Speaking
20 objection.

21 THE COURT: That is -- well, I
22 asked him. Rather than an objection, that's
23 really something for cross examination as
24 opposed to an objection. Overruled. Go
25 ahead.

1 THE WITNESS: Yes, sir, he did
2 sign a permission sign for me to take care of
3 her.

4 DIRECT EXAMINATION CONTINUED

5 BY ROBERT HOOD:

6 Q. Let's look at it.

7 A. Okay.

8 ROBERT HOOD: Without my
9 glasses, I can't read it. Molly, could you
10 read what is highlighted here, that's right
11 in front of you?

12 MOLLY CRAIG: "Patient", it
13 says Jamsettta Washington. (Reading) "I,
14 knowing that I am suffering from a condition
15 requiring hospital care, diagnosis, medical
16 or surgical treatment, do hereby voluntarily
17 consent to medical surgical treatment and
18 laboratory tests, which may include but are
19 not limited to acquired immune deficiency
20 syndrome testing, which Dr. Osborne or which
21 the physician on duty at East Cooper Regional
22 Center, or his assistant or designee, may
23 deem necessary."

24 The other highlighted portion says,

1 (reading): "I am aware that the practice of
2 medicine and surgery is not an exact science
3 and I acknowledge that no guarantees have
4 been made to me as the result of treatment or
5 examination in the hospital."

6 DIRECT EXAMINATION CONTINUED

7 BY ROBERT HOOD:

8 Q. What is the date on that?

9 MOLLY CRAIG: 7/15/2000.

10 ROBERT HOOD: Who signed it?

11 MOLLY CRAIG: Jamsetta

12 Washington.

13 ROBERT HOOD: I move it into
14 evidence, Your Honor.

15 EDWARD GRAHAM: It is already in
16 evidence, Your Honor.

17 THE COURT: Overruled, Counsel.
18 It's been highlighted and marked.

19 ROBERT HOOD: I will substitute
20 one that is not highlighted.

21 THE COURT: You may.

22 COURT REPORTER: That would be
23 Exhibit 103.

24 ROBERT HOOD: Thank you.

25 THE COURT: For defense, over

1 objection, in evidence.

2 DIRECT EXAMINATION CONTINUED

3 BY ROBERT HOOD:

4 Q. Okay, while we are looking at the ELMO,
5 that's what this little machine is called,
6 let's look at the word "vacuum". There's
7 been a lot of conversation in the last five
8 or six days of testimony about your
9 recommendation of this delivery.

10 How many times is "vacuum" referenced in
11 the mother's and the baby's charts?

12 A. It's a total of six times that it is
13 written in the mother's and the baby's
14 charts, together. I believe that there is
15 three in each.

16 Q. Did anyone try to hide the fact that a
17 vacuum was used for this delivery?

18 A. No, sir, we weren't hiding anything.

19 Q. In fact, the nursery nurse, where was
20 she during delivery?

21 A. The nursery nurse was in the delivery
22 room. I handed the baby off to the nursery
23 nurse in the delivery room. I put the baby
24 in the warmer and the nursery nurse was
25 standing that.

1 Q. Was she there when you used the vacuum?

2 A. Yes, sir.

3 Q. All right, let's look at the times in
4 the medical records where the word "vacuum"
5 is used? This is 707, this is the one that
6 you were asked about. What is highlight
7 there?

8 A. Well, "VEVD" means vacuum extraction vg
9 delivery. That is my handwriting.

10 Q. Okay, let's go to the next one, please.
11 That is Exhibit 2-002 that's in evidence, the
12 next one is 2-017 that's in evidence -- no,
13 sorry 2-20. Okay? 2-020. Method of
14 delivery -- go up to the top and highlight
15 it, Method of Delivery -- go back up --

16 A. Okay.

17 Q. Right where she is highlighting, what
18 does it say under method of delivery?

19 A. Vacuum extraction.

20 Q. This is in evidence, too. It is Page 2-
21 020. Next one. That's called the labor and
22 delivery summary, correct?

23 A. Yes, sir. It's important that you
24 understand that a copy of that -- it's a
25 triplicate form, and a copy of that goes with

1 the baby, with the nursery nurse to the
2 nursery. It is part of the nursery chart.
3 It is also part of the mama's chart. So it
4 goes both places, simultaneously.

5 Q. So later in the day when they put the
6 baby on the helicopter, did this go with the
7 baby?

8 A. It's in the medical record that's gone
9 to the nursery.

10 Q. All right, sir. Now we are looking at
11 Exhibit 2-017. What does it say?

12 A. 1937, vac-assisted del. That means a
13 vacuum assisted delivery.

14 Q. What is 1937?

15 A. That is the time that he was delivered.
16 That's thirty-seven minutes after 7:00
17 o'clock in the evening.

18 Q. Next one. Can you read the word here,
19 abbreviations for it?

20 A. That says vacuum vaginal delivery.

21 Q. What number is that?

22 A. (No verbal response).

23 MOLLY CRAIG: 105.

24 DIRECT EXAMINATION CONTINUED

25 BY ROBERT HOOD:

1 Q. What is 105? What is VVD under
2 "Delivery".

3 A. Vacuum vaginal delivery.

4 Q. Does that go in the mama's chart?

5 A. That is in the baby's chart.

6 Q. The baby's chart?

7 A. (No verbal response).

8 Q. The next one? What are we looking at
9 here, Page 2-108, Nurses Notes Continued.
10 What is written right at the top?

11 A. One male delivered with vacuum
12 assistance per Dr. Rhett.

13 Q. Is there anything confusing about the
14 vacuum used for delivery?

15 A. I don't think so, and that's in the
16 nurse's notes.

17 Q. Let's go to the next one, 0085. Under
18 type of delivery, what does it say?

19 A. Vacuum vaginal.

20 Q. Is this on the actual transport form
21 that goes with the baby to MUSC?

22 A. Yes, sir.

23 Q. Next one? 2-090. Under "Vacuum", what
24 does it say?

25 A. There is a check mark that checks

1 Vacuum. That's part of the nursery chart.

2 Q. The next, 2-113. What does it show?

3 A. Vacuum extraction was the method of
4 delivery and that's the chart that was --
5 that's the thing that I said went immediately
6 with the baby with the nursery nurse to the
7 nursery.

8 Q. Now, there's a document that is marked
9 2-021, signed by you. I want to ask you,
10 what we have highlighted there, what does
11 that mean right there?

12 A. I can't see it. Oh, I'm sorry. Yes, I
13 can. It says meconium.

14 Q. Meconium?

15 A. Meconium, (affirmative nod).

16 Q. How do you spell meconium?

17 A. M-e-c-o-n-i-u-m.

18 Q. Is the first word ---

19 A. I'm sorry, I was asked for on the jurors
20 to spell it again.

21 Q. Yes, sir, please spell it again.

22 A. M-e-c-o-n-i-u-m.

23 Q. Why is the recordation of meconium
24 important to you as an obstetrician, Dr.
25 Rhett; if it is, sir?

1 A. It shows that there was distress. This
2 baby was under distress, needed to be born.
3 When you have meconium passage, there's
4 distress. The anal sphincter of the unborn
5 baby relaxes and the baby has a bowel
6 movement sometime before it is born. There
7 was meconium.

8 Q. Did you see it?

9 A. Yes, sir.

10 Q. Did you have your hands in it?

11 A. Well, I try not to get my hands in it
12 but, you know, we just wipe the baby off.

13 Q. The fact that it is there and the fact
14 that you had those fetal monitor strips, how
15 does all that add up to what you were dealing
16 with in this delivery?

17 A. Well, the monitor strips showed fetal
18 distress. The meconium shows me distress.
19 The arterial blood gas shows me pending
20 acidosis.

21 Q. I will ask you about that in just one
22 second, there is one more entry here, 2-114,
23 and it has the same words on it, it says
24 "Term meconium". What does the word term
25 mean when used as to meconium?

1 A. It means that as the baby was delivered
2 or sometime just before it was delivered,
3 there was -- it loosened its bowels and
4 pooped.

5 Q. Now, you said something else. Did you
6 do a test after this child was born, about
7 oxygen?

8 A. Yes, sir, I took a small needle and took
9 -- stuck it into one of the arteries -- the
10 baby has two arteries and one vein. I stuck
11 it into one of the arteries and I withdraw an
12 arterial blood gas sample.

13 Q. What does that mean?

14 A. Well, it is a measure of acid-based
15 balances, is the main thing that you look
16 for. This baby had a reading of 7.21.
17 7.199 is acidosis, so this is really close to
18 being acidotic.

19 In addition, it had increased levels or
20 carbon dioxide. Carbon dioxide is what we
21 breathe out when we breathe out. It had
22 decreased levels of oxygen.

23 So what I think was happening is that we
24 weren't getting enough oxygen to this baby
25 and it was in distress. I delivered it. I

1 delivered it before it became acidotic,
2 before it became hypoxic, which means low
3 oxygen, and before it had brain damage from
4 that low oxygen.

5 Q. I think that we can turn the ELMO off.
6 Thank you. So, Doctor, if you had not used
7 the vacuum and delivered this baby in three
8 minutes and several seconds and let this
9 strip continue and these decelerations
10 continued, where was this child heading in
11 delivery?

12 A. Well, I am worried that this baby was
13 going to become very hypoxic, and that means
14 very low oxygen, what we all breathe in, and
15 very acidotic, because there was too much
16 carbon dioxide and you start making acid in
17 your bloodstream and then you start
18 destroying brain tissue, kidney tissue,
19 heart, bowels, etc.

20 To me, this was rescuing a baby that was
21 in severe difficulty, doing it in the way
22 that I thought would help this baby the most.

23 Q. Go back now to the birth video, and I'll
24 ask just a couple of questions. During the
25 video, do you hear the child's heartbeat

1 while in utero?

2 A. Well, you can hear it. It keeps -- you
3 can hear it a lot during the video.

4 Q. Does it become slower and is there an
5 indication for delivery?

6 A. Well, the indication is off the fetal
7 heart monitor. You can hear the reflection
8 of the fetal heart monitor sometimes on the
9 video and sometimes not.

10 Q. For a doctor that wasn't there to say
11 that this baby was fine, would you agree with
12 that?

13 A. No, sir.

14 Q. Why not?

15 A. Well, if the baby was fine then they
16 should have showed us the fetal heart strips
17 and showed us where it was fine. I showed
18 you where it wasn't fine. I showed you where
19 this baby was in distress. I showed you the
20 signs of distress, and I showed you what I
21 was trying to do to save this baby's life.

22 Q. In the video, we see your fingers high
23 into the patient's vagina. What are they
24 doing?

25 A. My fingers are down on the bottom part

1 of the vagina, under Jayden's head. I am
2 pressing down on that just to see if that
3 increases Jamsetta's urge to push. You know
4 when you push down on that part of the
5 vagina, it really creates an urge to
6 evacuate. That's what I was trying to do, I
7 was trying to sort of evaluate what sort of
8 position that we were in. You know, I can't
9 specifically without looking at it tell you
10 exactly what I was doing at any given moment.
11 I've seen it more than I had seen it before I
12 did my deposition.

13 Q. Was there a time when you take your
14 fingers and go around the circumference of
15 the child's head in utero?

16 A. Yes, sir.

17 EDWARD GRAHAM: Objection.

18 THE COURT: You're leading.

19 DIRECT EXAMINATION CONTINUED

20 BY ROBERT HOOD:

21 Q. Is there a time when you use your
22 fingers?

23 A. I do. I want to make sure that there is
24 no vaginal tissue caught between Jayden's
25 head and the tissue, because that would just

1 tear the vagina. That's one of the risks of
2 doing this procedure.

3 Q. During this five-hour deposition that
4 you had, were you shown the video of this
5 birth?

6 A. No, sir, I was not.

7 Q. Did you document that this child was at
8 the plus four station?

9 A. No, sir, I did not.

10 Q. Why not?

11 A. I was more concerned about the care of
12 the baby and the mama than I was documenting
13 in the chart.

14 Q. The documentation that we just saw of
15 the use of a vacuum, was that in your
16 professional opinion reasonable and
17 appropriate?

18 A. It told everybody how the baby was
19 delivered.

20 Q. Were you trying to hide this fact that a
21 vacuum was used, for any reason?

22 A. It is in the chart six times. I wrote
23 it on the front page, where the first thing
24 when you open up and look at the chart is the
25 front page.

1 Q. Did you inappropriately pull on this
2 child's head during the delivery?

3 A. I did not.

4 Q. Did you have any problems applying the
5 vacuum?

6 A. It went on very simple.

7 Q. Did the nurse appropriately and properly
8 increase the pressure on the vacuum?

9 A. To the best of my knowledge, I think she
10 did.

11 Q. And when it was time to remove the
12 pressure, which is to remove the vacuum, did
13 she relieve the pressure so that it could be
14 removed?

15 A. Very easily. She was paying close
16 attention.

17 Q. Was there any ripping or tearing to get
18 it off of the baby?

19 A. No, sir, it just came right off as soon
20 as we loosened the vacuum.

21 Q. When this child was born, were there any
22 cuts or lacerations of his head?

23 A. No, sir, there were no cuts or
24 lacerations.

25 Q. How long was the vacuum on the child?

1 A. By my best guess it was three minutes
2 and seven seconds.

3 Q. Was that an excessive amount of time?

4 A. No, sir, it was a very short period of
5 time.

6 Q. In fact, what would be an excessive
7 amount of time?

8 A. More than twenty minutes is considered
9 an excessive period of time.

10 Q. Were you doing anything to try to hasten
11 the delivery of this child?

12 A. I was trying to hasten the delivery of
13 this child, yes. I thought that he was in
14 danger, I thought that he needed to be
15 delivered.

16 Q. Were you, because of some other personal
17 commitment that you had, in a hurry to
18 deliver this child?

19 A. No, sir, I was on call at the hospital
20 until 8:00 o'clock the next morning. I
21 didn't have any place to go.

22 Q. You were going to sleep in the hospital
23 either way?

24 A. Yes, sir.

25 Q. And you did?

1 A. I did.

2 Q. Okay. We're talking about the next
3 morning, 8:00 a.m. versus p.m.?

4 A. Yes, sir, 8:00 a.m. the next day.

5 Q. Did you discuss the use of the vacuum
6 with the mother?

7 A. No, sir, I did not.

8 Q. Did you have time to discuss it with the
9 mother?

10 A. I thought that I had an obstetrical
11 emergency that needed to be handled right
12 away.

13 Q. Was that covered in the informed consent
14 that she signed?

15 A. I think it is. It's the informed
16 consent that we use for all of our
17 deliveries.

18 Q. And is that the custom and practice, to
19 your knowledge, of other obstetricians?

20 A. Yes, sir, that's what is done with all
21 the vaginal deliveries that I know of,
22 whether they are spontaneous, they have
23 forceps or they use the vacuum.

24 Q. Is there any requirement that you know
25 of that the hospitals where you have staff

1 privileges, particularly East Cooper where
2 this baby was born, to get a separate form
3 when a vacuum is used?

4 A. None of the three hospitals where I have
5 privileges require a separate form for vacuum
6 or forceps.

7 Q. Say it one more time, Dr. Rhett.

8 A. None of the three hospitals where I have
9 privileges require an obstetric form for
10 operative vaginal delivery.

11 Q. Now, what about the Apgars, the scoring
12 of this baby at birth? What do they show
13 with regard to you and your performance as an
14 obstetrician, in your professional opinion?

15 A. This baby had good Apgar scores. It had
16 good Apgar scores because we moved in a
17 timely manner to rescue him from this
18 situation that he was left in -- that he came
19 to become in.

20 Q. Dr. Rhett, if a child had a congenital
21 birth defect, was there any way that you as
22 the delivering doctor could have predicted or
23 prevented that?

24 A. No, sir, that is not preventable.

25 Q. If the child has small fragile blood

1 vessels and a transverse sinus smaller than a
2 normal vein, one whole side of the child's
3 head, is that -- if the vessels were smaller,
4 much smaller than normal, and predisposed
5 this child to a hemorrhage, is there any way
6 that you as the delivering doctor could know
7 that, prevent that or predict that?

8 A. No, sir, there is no way that you can do
9 that.

10 Q. Did anything occur during this delivery,
11 in your professional opinion, to a medical
12 degree of certainty most probably which would
13 or could have caused a tear or a bleed of the
14 blood vessels in this child's brain or head?

15 A. No, sir.

16 Q. What do you base that 'no' on, Doctor?

17 A. Well, there's multiple causes of brain
18 bleeds. There was nothing in this delivery
19 that -- it was straightforward and seemingly
20 simple, without excessive pressure, without
21 excessive pulling that would have increased
22 the risk.

23 Q. When you handed this baby over to the
24 nursery nurse and the Apgar scores were done,
25 did you in your wildest dreams anticipate

1 that you would be sitting here talking for
2 five or six days, that we would all be
3 talking, about the delivery of this baby?

4 A. No, sir, I thought that we -- I thought
5 that I'd saved this baby's life, I thought I
6 had saved it's brain from hypoxic damage --
7 that means not enough oxygen going to the
8 brain.

9 Q. Is that why you are standing tall trying
10 this case?

11 A. Yes, sir.

12 Q. If something happened here with this
13 child's anatomy, unpreventable, unpredict-
14 able, inside the child's head, for whatever
15 reason, is that anything that any
16 obstetrician in American could stop, prevent,
17 keep from happening?

18 A. No, sir.

19 Q. If this child had a bleed in his head,
20 did it have anything -- in your professional
21 opinion -- to do with your use of the vacuum
22 for this delivery?

23 A. No, sir, it did not.

24 Q. Were you negligent in this delivery?

25 A. I was not negligent in his delivery.

1 Q. And with regard to your care of this
2 patient and her child, did you comply with
3 the reasonable standard of care appropriate
4 for an obstetrician in delivering a baby?

5 A. Yes, sir, I did.

6 Q. Is that your opinion, most probably as
7 an expert in Ob-Gyn to a medical degree of
8 certainty?

9 A. Yes, sir, it is.

10 ROBERT HOOD: Dr. Rhett, please
11 answer any questions that counsel may have
12 for you.

13 THE COURT: Cross-examination.

14 EDWARD GRAHAM: Thank you, Your
15 Honor.

16 ROBERT HOOD: Your Honor, I
17 have an animation. I have one more thing
18 before I sit down, please.

19 THE COURT: All right. He hasn't
20 begun so we will allow counsel to continue.

21 ROBERT HOOD: Thank you.

22 DIRECT EXAMINATION CONTINUED.

23 BY ROBERT HOOD:

24 Q. Dr. Rhett, we've got an animation --
25 it's not of this baby, it is not the same

1 kind of vacuum but it does show the birth
2 canal and how a baby is born and how a baby
3 is born with the assistance of a vacuum. I
4 want you to just talk about it after the jury
5 sees it, please -- play it, (animation video
6 playing).

7 Doctor, in your words, tell this jury
8 -- given what they just saw and what you did,
9 ---

10 A. Well, what we have demonstrated with
11 this video is that there -- it's a different
12 vacuum, lays in a little different position,
13 but I has to come down and it can come with
14 contractions or it can come down with
15 maternal pushing. Maternal pushing at the
16 end is stronger than uterine contractions.
17 So every time the mom pushes, we advance the
18 baby a little bit. Mom pushes, we advance
19 the baby. When we get the baby -- as it
20 comes down the birth canal, then it's got to
21 turn up and out, it can't go through the back
22 end of the mama, it's got to come up away
23 from the coxait and the anus and come up and
24 out. That's exactly what this demonstrates.
25 That's exactly what you see in the video of

1 me delivering Jayden.

2 Q. Is that the proper technique?

3 A. Yes, sir.

4 Q. Is it reasonable and appropriate to
5 follow that technique in the delivery of a
6 child with a vacuum, in your professional
7 opinion, most probably?

8 A. It is.

9 Q. Did you do that with this delivery?

10 A. I did that with this delivery.

11 ROBERT HOOD: Thank you, Dr.
12 Rhett.

13 THE COURT: Now cross-examination.

14 EDWARD GRAHAM: Yes, sir. Thank
15 you, Your Honor. Could we get this material
16 moved?

17 THE COURT: You certainly can.

18 CROSS EXAMINATION

19 BY EDWARD GRAHAM:

20 Q. Dr. Rhett, good afternoon, sir.

21 A. Good afternoon.

22 Q. How does your knowledge of the internal
23 anatomy of the birth canal compare today with
24 your knowledge back at the time that I took
25 your deposition?

1 A. My knowledge of the birth canal today is
2 like it was when I was delivering babies.

3 Q. So you do recall the question?

4 A. It's better today than it was the day
5 that I did my deposition, four years after I
6 stopped delivering babies.

7 Q. Okay. So did you practice, did you pull
8 out the literature and try to learn about the
9 maternal anatomy before you spoke to the
10 Ladies and Gentlemen this afternoon?

11 A. I went back and reviewed books and
12 articles that I'd read for years and years
13 that I hadn't been looking at for three years
14 when I did my deposition.

15 Q. Which books did you look at, sir?

16 A. A number of books.

17 Q. Which?

18 A. I can't tell you.

19 Q. Can you tell me a single one?

20 A. Not off the top of my head; no, sir.

21 Q. So how many hours did you spend studying
22 those books?

23 A. I have no idea.

24 Q. Did you read any of the materials from
25 the FDA?

1 A. I've read lots of materials from the FDA
2 over the years.

3 Q. Have you read materials from the FDA
4 between the time of your deposition and this
5 afternoon?

6 A. I have read stuff from the FDA on a
7 continuing basis.

8 Q. Really?

9 A. (No verbal response).

10 Q. And you knew about the FDA warnings at
11 the time of your deposition?

12 A. I think at the time of my deposition
13 that I knew of problems with vacuum
14 extraction vaginal delivery. I am not sure
15 that I was aware specifically of an FDA
16 warning.

17 Q. Have you read the ACOG literature from
18 Technical Bulletin Number 17, published in
19 2000 or thereabouts, about how to safely use
20 a vacuum to avoid brain bleeds?

21 A. I think that I have read most of the
22 times that the ACOG has ever sent me.

23 Q. What I am asking you, sir, is did you
24 read that literature between the time of your
25 deposition and today?

1 A. Would you show me the literature,
2 please, sir, and I'll be glad to tell you
3 whether or not I've read it.

4 Q. I will be happy to do so.

5 EDWARD GRAHAM: Your Honor, this
6 has previously been marked as Exhibit 31.

7 THE COURT: Very good.

8 CROSS EXAMINATION CONTINUED

9 BY EDWARD GRAHAM:

10 Q. (Tendering), this is what the first page
11 looks like, Practice Bulletin Number 17, June
12 2000, Operative Vaginal Delivery. Did you
13 read that between the time of your deposition
14 and the time that you started testifying
15 today?

16 A. I've read a lot of material between the
17 time of my deposition and today's date. I've
18 read that.

19 Q. Did you read that between your
20 deposition and today?

21 A. I've read a lot of things between my
22 deposition and today, and I've read that
23 since my deposition.

24 Q. Thank you, sir. Had you ever read this
25 before your deposition?

1 A. I can't specifically say what I had read
2 in 2008. That came out in 2000, that was
3 eight years before my deposition.

4 Q. Yes, sir.

5 A. Most of the things that came across from
6 the American College, almost everybody that I
7 know who practices obstetrician reads that.

8 Q. So had you or had you not read ACOG
9 Practice Bulletin Number 17 at the time you
10 pulled Jayden W out from his
11 mother's birth canal with a vacuum device?

12 A. I believe that I would have to say that
13 I did read that. Do I recall reading that?
14 I can't specifically say.

15 Q. Sir, did you absorb the information,
16 learn the information set forth in this
17 practice bulletin before applying the suction
18 device to Jayden's head?

19 A. I paid attention to all the risks and
20 warnings that were from other practitioners,
21 we saw them in meetings, we read them in
22 journals, we read them in periodicals that we
23 came to see, that came to our office.

24 Q. Sir, do you understand my confusion
25 about what you knew and did not know at the

1 time of Jayden's delivery?

2 ROBERT HOOD: Was that a
3 question Your Honor? I objection if it is.

4 THE COURT: Overruled.

5 THE WITNESS: Could you repeat
6 the question?

7 ROBERT HOOD: Please.

8 THE WITNESS: I am not sure
9 that I understood it.

10 CROSS EXAMINATION CONTINUED

11 BY EDWARD GRAHAM:

12 Q. Sir, can you understand my confusion
13 about your level of knowledge at the time
14 that you delivered Jayden W. ?

15 A. I could see where after I'd quit doing
16 deliveries for three years that my level of
17 knowledge of obstetrician had decreased a
18 lot.

19 Q. How many hours of study did you spend on
20 learning about how to deliver a baby safely,
21 the anatomy of the birth canal and use of a
22 vacuum between your deposition and today?

23 A. How many hours did I spend? It only
24 took me a few hours to go back and remember
25 things that I had studies and learned and

1 used for a thirty-year career of delivering
2 babies -- actually thirty-one years.

3 Q. Just a few hours?

4 A. Just a few hours.

5 Q. Can you be more specific -- or are we
6 talking less than five?

7 A. I have no idea.

8 Q. Are we talking less than two?

9 A. I don't have any idea how I spent ---

10 Q. Less than ---

11 A. I'd used it for thirty-one years.

12 Q. Sir, ---

13 A. I had not used it for three years and
14 subsequently I had to go back and review some
15 stuff. It didn't take me three or four hours
16 to remember everything that I'd been doing
17 for thirty-one years.

18 Q. Is it your testimony that you acquired
19 the knowledge that you conveyed today about
20 how to delivery a baby in only three to four
21 hours of study since your deposition?

22 A. I developed the knowledge that I had to
23 deliver a baby safely through four years of
24 medical school, three years of residency, and
25 at the time of Jayden's delivery twenty-plus

1 years of practical clinical experience,
2 including going to continuing education
3 meetings, reading journals, talking with
4 other physicians, going to meetings with
5 other physicians where we discussed the risks
6 and benefits of almost everything we do.

7 So in order for me to go back and refresh my
8 memory, it might have taken three hours, it
9 might have taken five.

10 Q. Is it your testimony that it took no
11 more than five hours, that you spent no more
12 than five hours relearning the obstetrics
13 after your deposition?

14 A. I really can't answer that question
15 definitively. I don't think that it took
16 very long. I'd done this for so many years,
17 all I had to do was look up about five key
18 words and it all came back into my head.

19 Q. All right, sir. Did you practice giving
20 answers to questions about this case prior to
21 today?

22 A. Yes, sir.

23 Q. After the deposition?

24 A. Yes, sir.

25 Q. How many hours did you spend practicing

1 how to answer questions?

2 A. I don't know the answer to that.

3 Q. Was it more or less than a hundred?

4 A. It was way less than a hundred.

5 Q. Was it more or less than twenty-five?

6 A. It was probably in the range of four
7 hours, maybe six.

8 Q. Did you practice in front of a video
9 camera?

10 A. Yes, I practiced in front of a video
11 camera.

12 ROBERT HOOD: Judge, I am going
13 to object to his privilege.

14 THE COURT: Overruled.

15 ROBERT HOOD: The doctor did
16 something with his attorney, that is the
17 basis of my objection.

18 THE COURT: Yes, sir.

19 ROBERT HOOD: Just like his
20 client did. I don't think that I have a
21 right to ask her what she did with him.

22 THE COURT: Attorney-client
23 privilege provides protection for the advice
24 given by an attorney and the comments made by
25 counsel -- I mean, by the client to the

1 attorney but if there is a question about the
2 method, it may relate to the credibility and
3 believability and that's why I overruled the
4 objection.

5 EDWARD GRAHAM: Thank you, Your
6 Honor.

7 CROSS EXAMINATION CONTINUED

8 BY EDWARD GRAHAM:

9 Q. Dr. Rhett, you did practice in front of
10 a video camera as to how to testify
11 effectively in front of the jury?

12 A. At the advice of my attorney and with
13 his guidance, we did some questioning after
14 I'd done my video deposition.

15 Q. On how many days did you practice in
16 front of a video camera, over how many days?

17 ROBERT HOOD: Judge, all of
18 this is privileged. Whatever he did.

19 THE COURT: No, sir, it is not
20 privileged. Overruled. You may proceed.

21 EDWARD GRAHAM: Thank you, Your
22 Honor.

23 CROSS EXAMINATION CONTINUED

24 BY EDWARD GRAHAM:

25 Q. On ---

1 A. I think that I met with my attorney at
2 his request on three different occasions for
3 probably two or three hours each time.

4 Q. You are referring to the times when you
5 practiced in front of a video camera?

6 A. I am referring to meetings with my
7 attorneys and we videotaped -- yeah.

8 Q. The question is, did you meet on three
9 separate days to practice testifying in front
10 of a video camera?

11 A. I think that's the best that I can come
12 up with, that we met three different times.

13 Q. How many hours did you spend, total,
14 practicing your testimony in front of a video
15 camera?

16 A. We met four hours, three hours and two
17 hours, whatever that would add up to -- four
18 and three is seven and two is nine. So we
19 met for nine hours over three different days.

20 Q. Did you also spend time reviewing your
21 performance on the video camera?

22 A. Did I look back at the video camera
23 thing?

24 Q. Yes, sir.

25 A. No, sir, I did not.

1 Q. Dr. Rhett, being an obstetrician is a
2 privilege, just like being licensed to drive
3 an automobile on the roads of our state;
4 correct?

5 A. I am -- it is a tremendous privilege to
6 be an obstetrician.

7 Q. Just like a privilege to drive?

8 A. It requires licensure, if that's what
9 you mean.

10 Q. And with that privilege comes
11 responsibilities, just like the privilege to
12 drive an automobile; correct?

13 A. Yes, sir, that would be correct.

14 Q. And when one has the privilege of
15 driving an automobile, one is subject to
16 rules of the road; correct?

17 A. That would be correct.

18 Q. Sir, in your opinion, is an obstetrician
19 licensed to deliver babies subject to any
20 rules of the road or does he get to make them
21 up as he goes along?

22 A. The rules that we work under are called
23 the standard of care. The standard of care
24 is what a reasonable physician would do in a
25 similar circumstance. Those are the 'rules

1 of the road.' They have multiple books,
2 periodicals, warnings, you go to multiple
3 meetings, but we try and figure out how we
4 can safely do what we're trying to do in any
5 given circumstance.

6 Q. Sir, by what rules do you claim your
7 actions in this case should be judged?

8 A. By the standard of care.

9 Q. And do you recall when I took your
10 deposition that I asked you what a standard
11 of care was?

12 ROBERT HOOD: If the Court
13 please, he is not a lawyer. These are
14 questions for the court to instruct the jury
15 on, not for counsel to ask the witness about.

16 EDWARD GRAHAM: It is not a
17 phrase that I introduced to this examination.
18 Mr. Hood asked it in many leading questions,
19 if I recall correctly.

20 THE COURT: I am going to
21 overrule. The door was opened in direct.
22 You may address this issue.

23 EDWARD GRAHAM: Thank you, Your
24 Honor.

25 CROSS EXAMINATION CONTINUED

1 BY EDWARD GRAHAM:

2 Q. Sir, at your deposition did you ---

3 A: Am I -- I'll answer the last question if
4 you'd prefer me to.

5 Q. I would certainly be happy to allow
6 that, sir.

7 A. So when I was asked about standard of
8 care, standard of care is a legal term more
9 than a medical term, and the legal definition
10 -- which I didn't know at the time of my
11 deposition was that -- and I can state it
12 very clearly now, is what a reasonable
13 physician with a level of training would do
14 in a given situation. In other words, what
15 would another obstetrician do if he or she
16 were put in the circumstances that I was put
17 in or that my patient was put in? What would
18 they do?

19 Q. Where would one look to find out what
20 the standards of care are for the use of a
21 vacuum extraction under the facts and
22 circumstances of this case?

23 A. Well, the standard of care is an
24 evolving thing. It came from my years of
25 medical school, my years of residency and my

1 years of experience. In those years of
2 experience, you run into a tremendous number
3 of situations.

4 Every time you run into a situation, you
5 have to figure out what is the appropriate
6 thing to do. It is not written down some-
7 where where you can look it up, or on the
8 internet or where you can all of a sudden grab
9 it out of space -- or written on page
10 seventy-one of some book. It is the extent
11 of education, training and experience that
12 you have over that period of time.

13 Q. You are referring to the training and
14 experience that Dr. Rhett has had over that
15 period of time?

16 A. What a reasonable physician, that is
17 somebody who knows what they are doing, who
18 has had good training, who is Board-
19 certified, who has practiced the art of
20 medicine and has worked hard at doing the
21 right thing every time that you get a chance,
22 that's what the standard of care is.

23 It's not written down that you have to
24 do "X" or "Y" on an occasion, because you
25 don't know what that occasion is going to be

1 until it presents itself.

2 Q. Are you telling this jury that Dr. Rhett
3 should be judged by Dr. Rhett's rules?

4 A. Dr. Rhett should be judged by what a
5 reasonable physician would do under similar
6 circumstances, somebody with equal training.

7 Q. What are the leading obstetrician texts
8 that can provide information about how
9 doctors should conduct themselves with a
10 vacuum?

11 A. There are many, many texts. There are
12 some compendium texts where they have
13 multiple authors put together, books.

14 There are -- the question came up 'is
15 that reliable?' Every word in it isn't the
16 truth. They don't get it all correct and they
17 are there in certain circumstances. The
18 purpose of writing the book(s) is to give us
19 guidelines so that we can figure out what to
20 do in a given situation.

21 That comes with my education, formal
22 education, medical school, and came with the
23 training that we got, spending a hundred to a
24 hundred and ten hours a week, in labor and
25 delivery, in the hospital taking care of

1 mothers and their unborn babies.

2 So the standard of care is not what you
3 can write down on once piece of paper. It's
4 probably thousands of pieces of papers and
5 thousands of judgments.

6 Q. Dr. Rhett, do you recall the question?

7 A. I just answered the question.

8 Q. No, sir, you gave a nice little speech.

9 I'll give you credit.

10 ROBERT HOOD: He is making a
11 speech.

12 THE COURT: That was a speaking
13 objection. What is the objection?

14 ROBERT HOOD: It was not a
15 question.

16 THE COURT: Objection to the form?

17 ROBERT HOOD: Yes.

18 THE COURT: Sustained. Please
19 rephrase.

20 CROSS EXAMINATION CONTINUED

21 BY EDWARD GRAHAM:

22 Q. The question, sir, is an you identify a
23 single obstetrical textbook by which you are
24 willing for your actions to be judged?

25 A. No, sir.

1 Q. Are you ---

2 A. That's because you can't find it,
3 everything that you need to do, in a single
4 obstetrical textbook.

5 Q. Sir, can you identify a single writing
6 from ACOG by which you are willing for your
7 actions to be judged?

8 A. The ACOG recommendations change and I
9 follow the guidelines in -- in relationship
10 to my training. You can't take something and
11 say 'now, this is the only way to go it.'
12 That just doesn't happen. You've got to know
13 what you have been educated about, what you
14 have been trained about and what your
15 experience has been.

16 Q. Dr. Rhett, are you willing for this jury
17 to judge your actions by what the American
18 College of Obstetricians & Gynecology
19 published as being the right way, the safe
20 way to do an operative vaginal delivery back
21 in June of 2000?

22 A. I am not willing to say that that
23 article has the be-all and end-all of
24 obstetrical care.

25 That's not -- that's one of the ways

1 that we make a standard. They send out
2 recommendations. They've not gotten them
3 right every time. You can -- it is very
4 difficult to say that theirs is the standard,
5 because it is not that way.

6 It is what would a reasonable physician,
7 well-trained, well-experienced, do in a given
8 situation.

9 Q. Sir, I don't recall asking you if ACOG
10 Bulletin Number 17 was the end-all and be-all
11 of obstetrics. The question, sir, is, are
12 you willing for these Ladies and Gentlemen to
13 judge your actions in this case by comparing
14 them to what your College says is the safe
15 way to deliver babies with a vacuum?

16 A. For the reasons that I've stated a
17 number of times now, the American College can
18 make recommendations they become part of what
19 we use to make the right decision at the
20 right time.

21 Q. Sir, do you believe that you're smarter
22 about how to deliver a baby safely with a
23 vacuum than your College is?

24 A. I am a very experienced obstetrician.
25 I've done -- if not a thousand, at least

1 multiple hundreds of vaginal deliveries.
2 I've paid attention to all of the literature,
3 I knew the risks that were involved with
4 vacuum extraction, I knew the risks of what
5 was involved with spontaneous vaginal
6 delivery, with forceps deliveries, with C-
7 section delivery, and I took all of into
8 consideration in the decision that I made.

9 Am I willing to say that this is a text
10 that you can just write down and say 'that's
11 it', no, sir, I am not.

12 Q. Sir, do you recall the question?

13 A. I answered the question.

14 Q. No, sir. The question is, do you
15 consider yourself smarter than the American
16 College of Obstetricians & Gynecology?

17 A. I am a well-trained, well-experienced,
18 Board-certified obstetrician-gynecologist.
19 I am part of the American College.

20 But am I going to say that this one text
21 has everything in it that I'm supposed to
22 know and do? No, I am not going to say that
23 because that's not how you get to the
24 standard of care.

25 Q. Sir, are you willing for the Ladies and

1 Gentlemen to judge your actions in this
2 delivery by the rules set forth by the
3 American College of Obstetricians &
4 Gynecology in Practice Bulletin Number 17?

5 A. There are no rules set forth by the
6 American College of Obstetricians &
7 Gynecology in Practice Bulletin Number 17.
8 There are suggestions from the American
9 College that are supposed to become of your
10 overall knowledge and your overall experience
11 and that's what they are.

12 ROBERT HOOD: Your Honor, I
13 would object to any further questions on this
14 document.

15 He's not been shown any part of the
16 document and asked proper questions about the
17 document. It's being misused under our
18 Rules. Under 803(17), it's very
19 inappropriate examination of the witness.

20 This is not what is being asked
21 about.

22 THE COURT: That's a speaking
23 objection.

24 ROBERT HOOD: It is.

25 THE COURT: I know it is.

1 ROBERT HOOD: I wills it down
2 but you might want to look at what he is ---

3 THE COURT: Very good. Thank you.
4 Now I am going to, uh, -- first of all, for
5 the jury's purposes, what I had cautioned
6 counsel about in their objections, both sides
7 of the case, before we ever began the case
8 was to what I call speaking objections or
9 speaking -- that last exchange was about
10 speaking objections.

11 I am going to overrule the objection
12 because it was a speaking objection.

13 But, Counsel for the Plaintiff, I
14 would urge you to move on.

15 EDWARD GRAHAM: Thank you.

16 CROSS EXAMINATION CONTINUED

17 BY EDWARD GRAHAM:

18 Q. Dr. Rhett, by whom are were you employed
19 on July 16th, 2002?

20 A. Lowcountry Ob-Gyn.

21 Q. When you delivered Jayden W. ,
22 were you acting within the scope of that
23 employment?

24 A. Yes, sir.

25 Q. Now, I will ask you, please, -- your

1 attorney had designated certain parts of your
2 deposition to be read today and he stopped
3 short on the one that's Page 25, Line 12
4 through (Page) 28, Line 12. Do you have that
5 deposition in front of you, sir?

6 A. I do.

7 Q. All right. He read the part where you
8 were talking ---

9 A. Would you please repeat what the page
10 and line number is?

11 Q. I direct your attention to Page 28,
12 Lines 10 through 12, which is what he left
13 off of his designation. Now the context was,
14 he was reading about ischial spines. My
15 question, (reading):

16 Q. *Is that a phrase you were*
17 *trying to think of earlier?*

18 What was your answer?

19 A. (Reading):

20 A. Yes, sir.

21 Q. You couldn't think of any of the words
22 for the key parts of the anatomy and the
23 baby's body for, say, delivery back on your
24 deposition date, could you?

25 A. No, sir, I could not. I had not

1 delivered a baby in three years. I hadn't
2 thought about these terms in that period of
3 time. I still did gynecology but these terms
4 don't apply in gynecology like they do in
5 obstetrics.

6 Q. Sir, let me ---

7 ROBERT HOOD: I would ask that
8 he read the next question and answer.

9 THE COURT: Please -- he wishes to
10 do a designation for an additional point. We
11 will let Mr. Hood publish it or you may
12 publish it, counsel, if you wish.

13 EDWARD GRAHAM: The next question
14 and answer. All right. He hadn't designated
15 it, but -- (reading):

16 Q. What significance do ischial
17 spines have in the context of the baby's
18 station?

19 A. That is when the has gotten its
20 -- now I have to think. I haven't done this
21 in awhile. Probably going to get this wrong.
22 The definition is, when the baby's temporal
23 bones are at the ischial spine, that's
24 considered zero station. That is usually
25 about two to three centimeters up from the

1 vaginal introitus.

2 CROSS EXAMINATION CONTINUED

3 BY EDWARD GRAHAM:

4 Q. Is that your answer?

5 A. That was my answer on that day and that
6 was incorrect. I was a bit confused that
7 day. I was dazzled. I thought that we were
8 going to talk about a case and then we
9 started talking about this and that, we
10 started -- we didn't talk about the case.
11 We talked about whether I could remember all
12 the terms that are related to obstetrics,
13 when I had not done obstetrics in three
14 years.

15 A. Doctor, let me see if we may agree on
16 anything. May we agree that an obstetrician
17 should never needlessly endanger a baby?

18 A. An obstetrician should do the best they
19 can to help a baby in every circumstance.

20 Q. The question, sir, may we agree that an
21 obstetrician should never needlessly endanger
22 a baby?

23 A. Yes, we could agree to that.

24 Q. May we agree that there are two ways to
25 proceed in management of a labor and delivery

1 and if one way is more dangerous for the baby
2 that the obstetrician should choose the safer
3 alternative?

4 A. I think that's what I did in this case.

5 Q. Sir, the question is, may we agree that
6 that is what an obstetrician should ---

7 A. They should and that's what I think that
8 we did in this case.

9 Q. May we agree that that is what an
10 obstetrician should do?

11 A. Yes. That's what I did in this case.

12 Q. May we agree that if an obstetrician
13 lacks sufficient knowledge to make a safe
14 decision for the baby, that lack of knowledge
15 poses a risk of harm to the baby?

16 A. Well, in my deposition, my answers were
17 awful. I hadn't delivered a baby in three
18 years. I had forgotten the terminology.

19 Once I missed one question -- I felt like I
20 should know all the answers because I had
21 done it for so long, but I'd quit doing it
22 for three years.

23 So if the question is do I have enough
24 knowledge or did I have enough knowledge in
25 2002 to delivery Jayden W--- as safely

1 as possible. The answer is, yes, I did.

2 Did I answer the questions well in 2008,
3 no, I did not.

4 Q. Today, sir, you're not answering my
5 question at all. My question is, may we
6 agree that if an obstetrician lacks
7 sufficient knowledge to make safe decisions
8 for a baby that lack of knowledge poses a
9 risk of harm to the baby?

10 A. That would be a true statement, that
11 would be why we have standards of care for
12 practicing physicians operating under similar
13 circumstances, with the same degree of
14 training, would make the same decision.

15 Q. Thank you for answering my question.
16 May we agree that an obstetrician cannot
17 apply knowledge that he does not have?

18 A. I could agree to that.

19 Q. May we agree that an obstetrician should
20 not use a vacuum without an indication?

21 A. I would agree to that.

22 Q. May we agree that you did not have any
23 discussion with Jamsetta about the use of a
24 vacuum before you placed it on Jayden's head?

25 A. Yes, that's correct. It was an

1 emergency. I was acting in an emergency as a
2 similar physician with my training would do
3 and I delivered this baby as safely as
4 possible, in as short a period of time as
5 possible so that this baby would not have to
6 be without oxygen for an extended period of
7 time.

8 Q. May we agree that you did not warn
9 Jamsetta of the danger of brain bleed from
10 the use of a vacuum before you used it to get
11 -- to pull on Jayden's head?

12 A. I did not warn her of that at the time
13 of this emergency, no.

14 Q. Back in July of 2002, I am confused
15 about whether or not you even knew the risks
16 of brain bleeds from the use of a vacuum. So
17 I ask you, sir, in July of 2002 do you claim
18 to have had knowledge that there is an
19 increased risk of brain bleeds to a baby from
20 the use of a vacuum?

21 A. There is an increased risk. There were
22 old studies that showed the risk of a vacuum
23 was the same as the risk of vaginal delivery.

24 The risk of bleed in a vaginal delivery
25 is somewhere in the nature of -- spontaneous

1 delivery without any operation is somewhere
2 in the range of one in nineteen hundred.

3 The risk of delivery with -- to a baby
4 with a vacuum is about one in nine hundred,
5 so it's about double the risk.

6 Q. That is coming from the New England
7 Journal of Medicine article cited in the ACOG
8 practice bulletin; is that correct?

9 A. It's coming from the body of knowledge
10 that I've acquired over the last thirty
11 years.

12 Q. Sir, you indicated that you -- you claim
13 that there was literature before 2002 that
14 says that there was no increased risk of
15 brain bleeds from the use of a vacuum.
16 After you said that in your deposition, I've
17 searched high and low without success. Can
18 you give us a citation of any such
19 literature, sir?

20 A. No, sir, I cannot.

21 Q. You cannot?

22 A. (No verbal response).

23 Q. You came here to court today to make
24 that proclamation but you can't back it up.
25 Is that true?

1 A. You read over a thirty-year career and
2 training so many articles, so many things.
3 When we found the vacuum initially, we
4 started using it and there didn't seem to be
5 any increased risk. That changed over this
6 period of time and in 2002 when Jayden was
7 born there was an increased risk.

8 The whole situation is, would I have
9 done the same thing again? The answer is
10 that this baby was about to have hypoxic
11 encephalopathy. That means that 'I am going
12 to be born with cerebral palsy and I can't
13 think, I can't do anything on my own.' I
14 wanted to stop that. The most efficacious
15 way to do that was to use the three minutes
16 of vacuum that I used to deliver this baby.

17 Q. Doctor, you claim that you've read
18 something recently that shows that a double
19 risk of brain bleeds from a vacuum compared
20 to a vaginal delivery. Is that correct?

21 A. I have read multiple articles about this
22 and the increased knowledge base. Yes.

23 Q. Can you cite the source for any of
24 those?

25 A. No, sir, I cannot.

1 Q. You came into court today without any of
2 that information?

3 A. (No verbal response).

4 Q. Is that correct?

5 A. I have read -- if I have read one
6 periodical, I've read thousands. That would
7 only be thirty years and we get a hundred a
8 year. I've read books, I've read bulletins
9 from the ACOG. I've read most of the
10 literature that comes across my desk. So I
11 can't cite one place where I've increased my
12 knowledge. It might have been at a meeting
13 that I went to.

14 Q. Can you tell me whether or not ACOG
15 Practice Bulletin Number 17 refer to an
16 article from the New England Journal of
17 Medicine on that very topic?

18 ROBERT HOOD: Your Honor, my
19 objection is 803.17, requires showing
20 whatever he is referring to to the witness.

21 THE COURT: Just a moment. (Upon
22 review), exception to the hearsay rule? It
23 requires that the document be shown.

24 ROBERT HOOD: Under the learned
25 treatise. If you would like for me to read

1 it, ---

2 THE COURT: I have it. Thank you.

3 (Upon review) -- counsel, how many more
4 questions do you have on that document?

5 EDWARD GRAHAM: Not many --
6 dependent on his answers, really.

7 THE COURT: The objection is that
8 counsel says that you need to let him take a
9 look at it, review it to determine whether or
10 not he perceives it to be a learned treatise.

11 EDWARD GRAHAM: I am happy to do
12 that.

13 THE COURT: Then respond to your
14 questions after having been so reviewed.

15 CROSS EXAMINATION CONTINUED

16 BY EDWARD GRAHAM:

17 Q. Dr. Rhett, I hand you an article from
18 the New England Journal of Medicine dated
19 December 2, 1999, entitled "Effect of Mode
20 of Delivery in Nulliparous Woman on Neonatal
21 IntraCranial Injury", the author is Deena
22 Towner.

23 A. (Reviewing).

24 Q. Doctor, please let me know when you are
25 ready for my next question.

1 A. (Upon review), okay.

2 Q. Thank you, sir. Have you seen that
3 article before?

4 A. I believe I have.

5 Q. Is that one of the articles, really the
6 primary article, that you were referring to
7 earlier as indicating a doubling of risks in
8 that sample of patients?

9 A. I am not certain that this was the
10 article that I was referring to or not. In
11 this article, one of the things they conclude
12 is that babies delivered by C-section during
13 labor, by forceps and by vacuum extraction
14 had an increased risk of brain bleeds over
15 babies delivered by spontaneous labor.

16 Q. Dr. Rhett, please focus on my question.
17 Is that the article that you referred to in
18 your prior testimony?

19 A. I am not certain that it is. I've read
20 so many articles over my lifetime that I
21 can't tell you that this is the article that
22 I referred to. I can tell you what is in
23 this article.

24 Q. Well, sir, let me ask you this -- when
25 vacuum extraction babies were compared with

1 vaginal delivery babies, the vacuum
2 extraction babies didn't describe what the
3 station of the baby's head was, did they?

4 A. (No verbal response).

5 Q. The study did not ---

6 A. That's a question that I think you'll
7 have to restate.

8 Q. The article did not try to control for
9 the baby's station. Correct?

10 A. The article actually concludes that the
11 major cause of brain bleeds is abnormal
12 labor. That is, labor where a C-section was
13 done, labor where forceps were used, labor
14 where vacuums were used.

15 EDWARD GRAHAM: Your Honor, I
16 would object to that answer and move to
17 strike as being nonresponsive.

18 THE COURT: Well, I am overrule --
19 the jury is sitting right here with us and
20 they can take it as they wish, good or bad
21 for either side.

22 ROBERT HOOD: Your Honor, if he
23 is going to refer to the article, I would ask
24 that he follow the Rule 803.18, which
25 requires him to show him whatever part of the

1 article that he wants to ask him about, let
2 him read it, and then ask him questions to
3 see if the doctor considers it reliable or
4 not.

5 THE COURT: Overruled. I find
6 that he has complied substantively, with the
7 requirements of the Rule.

8 Do you have further questions about
9 the article?

10 EDWARD GRAHAM: Yes, sir.

11 ROBERT HOOD: Do you have a
12 copy of the article? It wasn't produced.

13 EDWARD GRAHAM: (No verbal
14 response).

15 ROBERT HOOD: I would like to
16 be reading it. I might have some questions,
17 too.

18 THE COURT: All right. Do you
19 have another copy?

20 EDWARD GRAHAM: I don't have
21 another copy with me.

22 THE COURT: Hang on -- before we
23 go to our next question, any other
24 objections?

25 ROBERT HOOD: (No verbal

1 response).

2 THE COURT: Are there further
3 objections before we go to our next question?

4 ROBERT HOOD: No, it's just
5 this Rule. I want him to follow the Rule,
6 the way that the Rule is written I think it
7 is pretty clear.

8 THE COURT: Very good.

9 ROBERT HOOD: Thank you.

10 THE COURT: You may proceed.

11 EDWARD GRAHAM: Thank you, Your
12 Honor.

13 CROSS EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. Doctor, please listen to my question and
16 try to answer it. Would you agree that
17 within that study all vacuum extractions are
18 lumped together without making a distinction
19 between whether the babies were outlet
20 extraction, low or midpelvis?

21 A. I've not had a chance to read the entire
22 article, so I can't respond to that question.
23 I've read an abstract -- that means a, a
24 Readers Digest version of this article. I
25 have not had a chance to read this entire

1 article and digest it to say -- I can tell
2 you that this is not what is considered
3 authoritative. This is an article, it goes
4 into the compendium that makes up the
5 knowledge that I base my judgments on.

6 Q. May I have that back, please, sir?

7 A. (Tenders).

8 Q. Thank you. Doctor, are you telling the
9 Ladies and Gentlemen that the New England
10 Journal of Medicine is not reliable?

11 A. I'm telling you'all that if I call it
12 reliable, it means that any sentence in
13 there, that you can take out of context any
14 way that you want to can be used to say,
15 'Well, you didn't follow this or you didn't
16 follow that.'

17 The New England Journal is a
18 respected journal. It is widely read.
19 It -- but -- is this article reliable in the
20 legal sense, in that everything in it is
21 totally accurate and everybody should change
22 what they are doing today because of what's
23 in that article? The answer to that is no.
24 You can't say that it is reliable under those
25 circumstances.

1 Q. Sir, have you ever encountered any
2 obstetrician literature that you thought was
3 reliable enough that you should modify your
4 practice to come into compliance with the
5 literature's recommendation?

6 A. I've read, as I stated now at least
7 fifteen times, thousand of articles, hundreds
8 of journals. I've read multiple textbooks --
9 all of those -- I've gone to multiple
10 meetings, I've talked to hundreds of
11 physicians who do what I do. I've gone to
12 the meetings that they have at the Medical
13 University, I go and -- when I get a chance
14 to get more education, I go.

15 So is there one thing that might change
16 -- I might go to a meeting that lasts two
17 days and there is one thing out of those two
18 days that I might consider in changing the
19 way that I practice medicine.

20 So, is it reliable? The legal
21 definition is beyond me.

22 What I am looking for is my years of
23 education and training and experience to
24 figure out what to do given the situation to
25 help a given mama and a given baby.

1 Q. Dr. Rhett, have you ever changed your
2 habits of delivering babies to come into
3 compliance with recommendations from ACOG
4 about how to safely deliver babies with a
5 vacuum?

6 A. I've change the way that I've practiced
7 medicine when I've read volumes and talked
8 with multiple physicians, spoken with
9 professors, and looked things up online -- to
10 see what other physicians in this area do.

11 So have I ever changed anything when I
12 got an article? I've probably change things
13 -- in a very deliberate manner, but not from
14 one article or on journal or one meeting or
15 one anything else.

16 It's a compendium. It goes on and on.
17 I've got to use everything that I've been
18 given in my years of education, training,
19 experience and continuing education to make
20 the right decision in a given moment.

21 Q. May we agree that an obstetrician can-
22 not warn a patient of dangers that the
23 obstetrician is ignorant of?

24 A. It would be hard to warn somebody in an
25 emergency situation. It would be hard to

1 warn somebody if you weren't aware of the
2 dangers. That'd be true.

3 Q. May we agree that you did not discuss
4 with Jamsetta alternatives to use of a vacuum
5 before using a vacuum to pull out her son?

6 A. I did not. I saw an emergency. I
7 thought it was very important to resolve this
8 emergency to prevent permanent, irreversible
9 brain damage from low oxygen to Jayden. So I
10 made the decision, I did an exam, I found a
11 situation that I could remedy and I remedied
12 it.

13 Q. May we agree that in your thousands of
14 vacuum extractions you had never warned a
15 patient about brain bleeds from the use of a
16 vacuum?

17 A. I never felt that it was necessary to
18 warn a patient, because I've never had that
19 complication.

20 Q. May we agree that in your thousand of
21 vacuum extractions that you have never
22 discussed with a patient the reason why you
23 believe that the vacuum was necessary?

24 A. I am not sure that I can say that, but I
25 usually ask patients -- have been asked by

1 patients to take care of them. When they are
2 pushing and the baby is not coming out, they
3 don't much care what I do -- just get the
4 baby out and do it safely. I've gone that
5 for ---

6 Q. May we agree ---

7 A. I did that for thirty-one years.

8 Q. --- that in your thousands of vacuum
9 extraction deliveries that you'd never
10 discussed with the laboring mother the
11 alternatives that were available to the use
12 of a vacuum?

13 A. When I was getting ready to deliver a
14 baby, I delivered the baby. I did it the
15 most efficacious safe way that I knew
16 possible at the time under the circumstances
17 that were involved.

18 Q. On July 16, 2002, were you conscious of
19 the increased dangers of brain bleeds from
20 the use of a vacuum?

21 A. I was conscious and aware of those risks
22 and I was also conscious and aware of the
23 risk of doing nothing.

24 Q. You decided to use the vacuum without
25 discussion with the mother or warnings and/or

1 alternatives or even to express that you were
2 even thinking about using it, even though you
3 were conscious of those dangers of brain
4 bleeds? Is that true?

5 A. I took my thirty -- twenty-nine at that
6 time, or twenty-eight years of experience and
7 I put them altogether in an emergency
8 situation and I did everything that I could
9 to save Jayden's brain from hypoxic brain
10 damage.

11 Q. Do you recall the question, sir?

12 A. I answered it.

13 Q. In July of '02, you used the vacuum on
14 Jayden W without telling his mama
15 about the risks, without telling her about
16 the alternatives, without telling her why you
17 thought a vacuum was appropriate or should
18 even be considered and you were conscious of
19 the increased risk of brain bleeds from doing
20 that? True?

21 A. I made a decision to help a baby who was
22 in deep trouble, to do it on an emergent
23 basis. I'm the pilot of this airplane, I
24 have one engine out and one engine failing.
25 I have to get this plane on the ground as

1 safely as possible. There are dangers to
2 this landing. I make the decision, as the
3 pilot, without a lot of discussion from
4 everybody else and I do the best job that I
5 can to save this boy's brain. He is dying,
6 and I'm trying to save him.

7 Q. Let's talk about flying a plane. Are
8 you a pilot?

9 A. No, sir, I am not.

10 Q. Are you aware that pilots have rules to
11 follow?

12 A. I don't -- I am aware there are rules of
13 the road but I don't want the pilot to call
14 back in an emergency situation and see who
15 wants to land on the field on the right, who
16 wants to land on the water on the left. I
17 want the pilot to take care of this plane the
18 best way he can, get me down there as safely
19 as he possible can.

20 Q. Do you want the pilot to follow the
21 rules?

22 A. I want the pilot to take care of the
23 situation.

24 Q. You understand that the rules for pilots
25 are there for passenger safety; correct?

1 A. I understand that a pilot puts
2 everything that they've done through their
3 education, training and experience to do
4 everything that they can to land a plane
5 safely.

6 Q. Sir, you talked a minute ago about
7 experience being your teacher. Are you
8 telling these Ladies and Gentlemen that
9 experience is always a good teacher?

10 A. Is experience a good teacher? Every
11 time that you do something you learn
12 something, so experience is a good teacher.

13 Q. Let's talk a golfer who can't break a
14 hundred. If he plays a thousand rounds, two
15 thousand rounds, seven thousand rounds and
16 never breaks a hundred, is his experience
17 been a good teacher?

18 A. If he went to lessons and if he went to
19 training courses and he got the basic
20 education and he paid attention to those
21 things during those two thousand rounds, if
22 he practiced some, if he thought about it,
23 if he'd gotten some lessons, he'd have broken
24 a hundred.

25 If he kept doing the same thing over and

1 over again without getting any education,
2 without reading articles that come in golf
3 magazines or whatever they come in, then he
4 wouldn't get any better, would he? His
5 experience would be of no value whatsoever.

6 Q. And an experienced driver is not
7 necessarily a better driver because of his
8 experience, is he?

9 A. An experienced driver is one that pays
10 attention to what's going on around him, that
11 knows what's going on, has read the manuals,
12 has done the things that you're supposed to
13 do and paid attention to what is going on.

14 Q. All right. I asked about experience and
15 you answered by telling me that a good driver
16 should do what he is supposed to do.

17 What if a driver decides, he chooses for
18 whatever reason, 'From now on I am going to
19 start taking shortcuts. I am going to speed
20 up my trip home from work. I am going to go
21 through that Yield sign without slowing down,
22 without looking.' If he gets through that a
23 thousand times without hitting anybody, it is
24 not a good teacher for his experience to
25 teach him you can go through Yield signs

1 without looking. Is it?

2 A. Reckless behavior, which is what you're
3 asking about, -- reckless behavior says that
4 you're not paying attention. I was paying
5 strict attention in this delivery.

6 Q. If ---

7 A. I paid strict attention in all
8 deliveries that I did. They are ---

9 Q. Did you ---

10 A. --- not casual, they're not running red
11 lights, they are not running through the
12 Yield sign. I'm paying attention to
13 everything that we do.

14 Q. If a driver or an obstetrician takes
15 shortcuts to speeds things up, sooner or
16 later something bad is going to happen;
17 correct?

18 A. If you're not paying attention to what
19 you're doing, you're going to have problems.
20 I was paying attention. I was paying close
21 attention.

22 Q. May we agree that when an obstetrician
23 chooses to do a vacuum extraction the pulls
24 with the vacuum should be smooth pulls?

25 A. We can agree that the pulls should be in

1 the direction of the delivery, we can agree
2 that it comes down the path of the vaginal as
3 the birth canal allows you to, they give you
4 -- we can agree that when you have the mama's
5 pushing forces helping you, that's when you
6 pull. That's how I did this delivery.

7 Q. May we agree that vacuum pulls should
8 not go off to the side, left or right, of the
9 birth axis?

10 A. There was no pull off to the side of
11 this birth axis.

12 Q. Do you recall the question, sir?

13 A. I agree.

14 Q. May we agree that vacuum pulls should
15 not go off the side, left or right?

16 A. We should agree -- I did no pulls off to
17 the left or right in this delivery.

18 Q. May we agree that an obstetrician who
19 chooses to use a vacuum should follow the
20 manufacturer's instructions for safe use of
21 that vacuum?

22 A. You have to be very careful. Sometimes
23 they state things in the manufacturer's use
24 that aren't good ideas.

25 Q. So you do not agree that an obstetrician

1 should follow the manufacturer's instruction
2 for safe use of his product?

3 A. Manufacturers have (coughing) -- state
4 the witness again. I got distracted, sorry
5 -- getting some water here.

6 Q. The question a moment ago was, may we
7 agree that an obstetrician who chooses to use
8 a vacuum should follow the manufacturer's
9 instructions for safe use of that vacuum.
10 It sounded like you would not agree to that.

11 A. Well, everything that they put in their
12 safe use doesn't necessarily apply.

13 Q. So do you ---

14 ROBERT HOOD: Your Honor, I
15 would ask that under Rule 803.18 be followed
16 at this time if he wants to ask him about a
17 manufacturer; to show it to him, let me
18 establish that it is reliable before we asks
19 a question.

20 THE COURT: Overruled. It's a
21 general question as it applies to
22 instructions.

23 ROBERT HOOD: Prior to these
24 rules being adopted, there was a case called
25 *Baker v. Fort City Steel Erectors* that I

1 tried which says the same thing, and that's
2 the law in this state, I believe.

3 THE COURT: Anything else for the
4 jury, Mr. Hood?

5 ROBERT HOOD: That ---

6 THE COURT: Do not make another
7 speaking objection, sir.

8 ROBERT HOOD: I am just citing
9 a case.

10 THE COURT: Yes, sir, but you just
11 spoke to the jury and told the jury that I
12 was wrong in my ruling and you cited the
13 case. I appreciate that, for jury impact.
14 My ruling is the same, it's overruled. That
15 was a general question about the
16 manufacturer's instructions. He did not ask
17 about a specific line in the instructions.
18 My ruling was appropriate. It remains as it
19 is. Please move on.

20 ROBERT HOOD: Thank you.

21 EDWARD GRAHAM: Thank you, Your
22 Honor.

23 THE COURT: Thank you. Go
24 ahead.

25 CROSS EXAMINATION CONTINUED

1 BY EDWARD GRAHAM:

2 Q. Dr. Rhett, is it your testimony that it
3 is safe for an obstetrician to violate the
4 manufacturer's instructions about how to
5 safely use a vacuum?

6 A. That is not my testimony at all. If you
7 have something about the instructions that
8 you'd like for me to look at and tell you
9 whether they are right or wrong, I'd be glad
10 to read the rules.

11 Q. May we agree that if a manufacturer's
12 instructions say that its vacuum product is
13 contraindicated for a mid-pelvic application
14 that such vacuum should not be used for that
15 purpose?

16 A. If you would show me the manufacturer's
17 instructions, I'd be glad to read them in
18 context and answer your question.

19 Q. So you can't just answer my general
20 question?

21 A. I can't answer the general question
22 because it's taken out of context.

23 Q. May we agree that you have never
24 successful and safely delivered a baby from
25 the midpelvis?

1 A. No, we cannot.

2 Q. Let me ask you, sir, to please turn to
3 your deposition at Page 145, starting at Line
4 5. Let me know when you're ready.

5 A. I'm ready.

6 Q. Do you remember giving this deposition?
7 You were under oath. Right?

8 A. Yes, sir.

9 Q. You were at your lawyer's office?

10 A. (No verbal response).

11 Q. At the Hood Law Firm, correct?

12 A. I was giving a deposition, yes.

13 Q. Your lawyer, Ms. Craig, was present with
14 you, correct?

15 A. Yes.

16 Q. And starting at Line -- 145, starting at
17 Line 5, my question, (reading):

18 Q. How many times have you done a
19 mid vacuum extraction?

20 What was your answer?

21 A. (Reading):

22 A. Zero.

23 Q. (Reading):

24 Q. You have never done that?

25 A. (Reading):

1 A. I don't think -- I might have
2 attempted. How many of them were successful?

3 Q. Whoa, whoa, whoa.

4 A. Let me get that straight. That wasn't
5 the question that you just asked me a minute
6 ago. You asked me if I had ever had a mid-
7 pelvic delivery. That's a different question
8 than this.

9 This is a question about have I ever
10 done a vacuum extraction from the mid-pelvis.
11 I am reminded now that I did do one, on a
12 second twin -- oh, fifteen years ago. But
13 I'd forgotten about that. Now, I do remember
14 that. So I've done a successful mid-pelvic
15 delivery on a second twin, after the first
16 twin had already opened the pathway up.

17 And I have done mid-pelvic deliveries
18 with forceps, because we did that in my
19 training -- a lot.

20 Somebody would come down, they would get
21 halfway through the delivery, the baby can't
22 turn its head, we'd put forceps on and turn
23 the head and bring the baby down and out. So
24 I've done mid-pelvic deliveries. That was
25 the question that you just asked me.

1 Now, have I done mid-pelvic vacuum
2 deliveries? I can think of one now that I
3 couldn't think of at the time that we did
4 this deposition in '08.

5 Q. Sir, I am going to read the question and
6 the answer, since you started reading the
7 answer and then the next question and then
8 the next answer. Starting at Line 5,
9 (reading)

10 Q. How many times have you done a
11 mid vacuum extraction?

12 A. Zero.

13 Q. You've never done that?

14 A. I don't think -- I might have
15 attempted. How many of them were successful?

16 Q. How many have you attempted?

17 A. A few.

18 Q. Okay?

19 A. Yes, and it goes on to say, (reading):

20 Q. What is your definition of mid-
21 pelvic vacuum extraction?

22 A. Zero. At the zero station.

23 Q. All right, sir. But when I took your
24 deposition, you couldn't cite a single safe
25 successful mid-pelvic vacuum extraction.

1 Correct?

2 A. I didn't remember the ones that I've
3 just told you about. So the answer is -- I
4 probably have done successful mid-pelvic
5 deliveries but the only one that I can
6 actually recall is the second twin I
7 delivered about fifteen years ago. She is
8 now a patient of mine.

9 THE COURT: Mr. Graham, how long
10 do you believe cross will continue?

11 EDWARD GRAHAM: A bit more than
12 ten minutes.

13 THE COURT: More than ten minutes?

14 EDWARD GRAHAM: Yes, we've got a
15 ways to go.

16 THE COURT: Then let's go this. I
17 need -- I told the attorneys and I told you,
18 Ladies and Gentlemen of the jury, that before
19 we quit for the day, that we would work until
20 5:30, that we would have an opportunity to
21 talk about whether we were going to proceed
22 over the weekend or for the remainder of the
23 case. So let's do this, let's let you go
24 back and take a break in the jury room for a
25 moment while I talk with the lawyers about

1 that. We will be back to you in just a few
2 minutes to make a decision.

3 (JURY OUT @ 5:15 P.M.)

4 THE COURT: Dr. Rhett, I am going
5 to let you step down if you wish. We have
6 finished for the day, the questioning. I'd
7 ask you overnight not to speak to your
8 attorneys or lawyers on the other side of the
9 case since you're a witness that remains
10 under testimony.

11 DR. RHETT: I totally understand
12 that. Thank you very much.

13 THE COURT: Let me just start this
14 process by speaking to the defendants up here
15 at the bar for just a moment. Let's talk
16 about where we are.

17 (OFF THE RECORD BENCH CONFERENCE)

18 THE COURT: Please bring the jury
19 in.

20 (JURY IN @ 5:25 P.M.)

21 THE COURT: Ladies and Gentlemen,
22 let me talk with you for a moment or two
23 about our schedule.

24 The first thing that I want to say to
25 you is that this year, in the year 2010, it

1 has been my privilege to have been
2 appointed by our Chief Justice to preside
3 over what we call our multiweek trial
4 docket. These are for civil cases that are
5 expected to take more than a week to try.

6 Sometimes because cases are expert
7 intensive or perhaps document intensive or
8 the issues are so complex, the case just
9 takes longer than a week to try. This is
10 the situation that we're in in this case.
11 Obviously it has taken longer than a week,
12 we're in our second week now.

13 I want to say to you that the
14 length of the case is not really the fault
15 of any particular party. You know, the
16 plaintiff is charged with putting up their
17 case. The defendant is charged with
18 responding to those allegations and it just
19 takes a long time sometimes.

20 I know you think that the court
21 operates from 9:30 to 5:00, you'all could
22 go get a real job where you have to produce
23 something in a certain period of time. To
24 that, I respond that we're about some
25 pretty important business here and some

1 things you just cannot rush through. You
2 can't just say 'We are through here, let's
3 move on. Next.' It just doesn't work that
4 way.

5 I have talked with the lawyers in
6 the case while you were out a moment ago
7 and they've given me their good faith
8 estimate of how long they believe the
9 remainder of the case will take. Neither
10 party control that, because there is --
11 for every witness that there is direct
12 examination there's cross examination and
13 the other side doesn't control how long the
14 other takes. Also when we argue and charge
15 at the end of the day, that takes a little
16 bit of time as well.

17 I say all that to tell you this,
18 we cannot complete this case this week.
19 Even if we work on Saturday, we cannot
20 finish this case. I cannot tell you when
21 we will finish this case. I know that it
22 will be next week, but I don't know what
23 day.

24 Two of you wrote to me that you
25 have vacation plans for next week, and I

1 respect that and would not want to
2 interfere with that. What I would ask you
3 to do is, overnight, consider as to whether
4 or not you wish to remain with us or
5 whether you wish to be released.
6 Understand that I cannot tell you when this
7 case will end. I am not even going to
8 estimate, because if I do I will estimate
9 incorrectly. I don't want to be unfair to
10 you. I know that it will end next week.
11 It will not go into an additional week. Of
12 that, I am certain. That's all that I am
13 certain of.

14 So I would like for you to discuss
15 with your families what you wish to do.
16 The two of you that have come in and
17 already written me a note that you have
18 vacation.

19 I always when I qualify the jury,
20 if someone comes in and they are in court
21 on Monday and they say 'I've got prepaid
22 vacation next week', I will let them go.
23 But when you'all came in on Monday -- a
24 while back now, it wasn't the same so I
25 didn't -- we couldn't predict it in

1 advance. Thus, I couldn't let you go at
2 first. I don't want you to feel that your
3 time has been wasted thus far. But I do
4 want to say to you that if you want to be
5 released, I will release you first thing
6 this morning (sic) and seat the alternates
7 in your place and then we will move
8 forward. All right? That's as to our two
9 jurors that had sent notes that they had
10 paid and planned vacation.

11 Another juror sent a message that
12 said, 'I start back to work next week.'
13 It's a teaching position. And, 'I have
14 some medical appointments before.' I
15 believe that we are going to comply with
16 that schedule, that we're going to be okay
17 on that. So you don't need -- that
18 particular juror does not need to worry
19 about it anymore.

20 It's the two that told me about
21 vacation plans that -- which I'm primarily
22 concerned about now.

23 With that said, are there
24 questions that anyone wants to ask at this
25 point?

1 JUROR: We don't have to be here
2 on Saturday, right?

3 THE COURT: No, sir. We would
4 only come on Saturday if we could finish
5 this case.

6 JUROR: All right.

7 THE COURT: And when we come on
8 Saturday -- you know, you might say, 'Well,
9 let's do it anyway.' Well, there's a lot
10 to that because this courthouse is closed,
11 there are staffing considerations, there
12 are security issues, energy plans, people's
13 schedules and lives, staff and everyone
14 else, so it's not so easy to say 'oh, come
15 on, let's go on Saturday.' Since we can't
16 finish -- if we could, we would do that.
17 But since we can't finish, there is no need
18 to do that. So we will not be here
19 Saturday.

20 We will come back Monday. We will
21 probably leave a little bit early Friday
22 evening just like we did last time, for
23 those of you who have business things that
24 you need to during a weekday. Come back
25 Monday morning.

1 Any other questions? Some of you
2 got letters yesterday, you may need
3 additional letters, you may even need a
4 contact from the court staff to your
5 employer. We will go ahead and do that.
6 We will do whatever is necessary to put
7 your employers or others of significance in
8 your life at-ease about what we're doing
9 here.

10 I will just tell you this now, and
11 it is my best estimate, as to where we are,
12 we will definitely go into next week.
13 Anything further? Yes, sir?

14 JUROR: Schedule for tomorrow?

15 THE COURT: We will start
16 tomorrow morning at 9:00 and we will
17 probably work until about 5:30. We will
18 have lunch again here -- today, I trust
19 that your lunch was good. We will do it
20 again.

21 Again, our other jurors who are on
22 vacation, if you want to go, I will need
23 you to come in tomorrow and let's talk
24 about it further and we will make a
25 decision at that time rather than make it

1 right now. All right. Anything else? (No
2 verbal response).

3 Ladies and Gentlemen, have a nice
4 day. Out of respect to you, we are all
5 going to remain where we are while you
6 depart the courtroom.

7 (JURY OUT @ 5:33 P.M.)

8 THE COURT: Anything before we
9 close the record for today?

10 9:00 o'clock tomorrow morning,
11 everyone. We will be in session at 9:00.
12 Is there anything that I need to come in
13 early before or we just will get started at
14 9:00 o'clock?

15 EDWARD GRAHAM: We don't have
16 the lineup for tomorrow yet, so I don't
17 know if there might be something.

18 THE COURT: We are in recess
19 until 9:00 tomorrow morning.

20 (COURT IN RECESS)

21 (TRANSCRIPT CONTINUED NEXT PAGE)

22

23

24

25

1 AUGUST 5, 2010

9:00 A.M.

2

3

THE COURT: Goof morning. We

4

need to talk about the schedule of the

5

jurors this morning, and I got notice that

6

the defendants want to do that on the

7

record. To accommodate the privacy of the

8

jurors, in case they want to tell me

9

something, I went back and asked them did

10

they have something that they wanted to

11

tell me privately -- just the two that have

12

prepaid vacation plans. They did not. So

13

I will let them come out and talk to them

14

on the record, so that everyone has an

15

opportunity to hear it.

16

It is my impression that at least

17

one of our jurors will be leaving us,

18

though. If that is the case, -- because I

19

believe that juror may be upset about his

20

decision, I think what we will do is a

21

little unusual but we'll recommend -- we

22

might give her sort of a round of applause

23

if indeed she does elect to leave. So -- I

24

just don't want you to be taken aback as to

25

what's unusual. I just would like to give

1 her a compliment, because it was a very
2 difficult decision, I think, for the
3 jurors.

4 And there are some other matters
5 that we need to discuss, maybe an
6 evidentiary ruling on cross examination.

7 EDWARD GRAHAM: If Your Honor
8 please, what I wanted to put on the record
9 is my strenuous objection to the continuing
10 violation of Your Honor's order.

11 Mr. Hood is as experienced a trial
12 lawyer as there is in this community. He
13 repeated, willfully, violated Your Honor's
14 instructions about leading his own client
15 yesterday.

16 I would estimate that the
17 testimony was like forty or fifty percent
18 Mr. Hood's testimony as opposed to Dr.
19 Rhett's.

20 It continued, continued. It put
21 me in a bad position where if I objected
22 every single time that he asked a leading
23 question that it looked like I was trying
24 to hide things from the jury. I think it
25 was willful on his part to do that.

1 Secondly, if Your Honor please,
2 with regard to the various demonstrative
3 exhibits that were used yesterday without
4 notice to us, we would ask that several of
5 them be made court exhibits, including the
6 pelvic model, the electrode and the two
7 blowups of the pages from the strips.

8 Finally, if Your Honor please, one
9 of my staff members who is a little quicker
10 with her vision than am I noticed that on
11 one of the ELMO presentations by the
12 defense yesterday, that was published and
13 displayed in the jury's presence, material
14 that Your Honor had ordered be redacted.

15 Again, these are experienced
16 counsel. I can only conclude that these
17 are willful attempts to prejudice the jury
18 and I just wanted to make a record of our
19 strenuous objections to those and to ask
20 Your Honor again, if you believe that it
21 would be appropriate, to impose sanctions
22 for those willful acts.

23 THE COURT: Rather than take
24 argument from the other side, Counsel, the
25 court will respond. I've allowed you to

1 put your position on the record. I made my
2 position clear yesterday in talking with
3 defense counsel.

4 If you wish to place those
5 documents in evidence -- excuse me -- as a
6 court's exhibit -- not in evidence but for
7 identification purposes, we will do that at
8 a later time. We will have to -- they may
9 be used in the trial, so rather than mark
10 them at this point before we end this
11 proceeding we will mark them as court's
12 exhibits.

13 EDWARD GRAHAM: I just don't
14 want them to leave the courtroom.

15 THE COURT: Very good.

16 ROBERT HOOD: Your Honor, as
17 long as we can get them back at the
18 conclusion of the trial, I have no problems
19 marking them right now as defendant's
20 exhibits.

21 THE COURT: Of course, the
22 exhibits don't come back at the end of the
23 trial. There is an appeal process where
24 they remain as part of the documentary
25 evidence.

1 ROBERT HOOD: We borrowed
2 these from some other physicians. We are
3 not the owners. I am not -- I think they
4 help. They use them at the Medical
5 University for teaching some courses.
6 Anyway, I don't have a problem for the
7 purpose of this case of them being in
8 evidence, court's exhibit or whatever, but
9 I do have a problem at the end of the case
10 if we're not able to return them.

11 THE COURT: Counsel, you pulled
12 them out and used them as demonstrative
13 exhibits during the trial, so -- just as I
14 have accommodated every side who has wanted
15 to make something a court's exhibit. If
16 the plaintiff feels that they have been
17 aggrieved by that, and you're heard them
18 say that they were, and they want to
19 preserve it for appellate purposes, then
20 the court will allow them to make them
21 court's exhibits, which means that we keep
22 them at the end of trial. It may not be
23 appealed. If it is not appealed, then it
24 goes back wherever it goes. But I can't
25 tell you that now.

1 ROBERT HOOD: So you want me
2 to mark them. Let's get that done, so that
3 ---

4 THE COURT: Well, I thought that
5 they might be used again in this process
6 but if you wish to mark them in, that's
7 fine.

8 ROBERT HOOD: I want to end
9 this soliloquy. Can I have whatever we're
10 talking about?

11 THE COURT: Lack of civility
12 might be a better word.

13 ROBERT HOOD: I think it
14 definitely it.

15 THE COURT: Okay.

16 ROBERT HOOD: Sort of like
17 when I call and ask, 'Will you agree for me
18 to take a vacation that I've already paid
19 for and planned for a year', "no, I can't
20 agree to that." That's exactly what it's
21 like. In forty-some or thirty-something
22 years, I've never had a lawyer tell me that
23 -- or a judge.

24 THE COURT: Well, Gentlemen, and
25 Ladies, as Rodney King so famously said

1 years ago, "Can't we all just get along?"
2 Let's do our best to get along, go forward
3 and get to the end of this process still in
4 one piece, without anyone injured further.

5 ROBERT HOOD: (Sidebar with
6 co-counsel).

7 THE COURT: Rather than delay,
8 let's just move on. We've got a jury
9 waiting on. We'll mark them during the
10 course of the morning. Is there anything
11 else that we need to do?

12 EDWARD GRAHAM: Your Honor, let
13 me just put on the record, that one of my
14 staff members talking what was published to
15 the jury, was something about Jamsetta
16 being a pot smoker. We would like to get
17 that on the record. Again, we would ask
18 Your Honor to ask the defendants -- or to
19 order the defendants, if Your Honor please,
20 to use redacted versions of any documents
21 that they publish in front of the jury.

22 THE COURT: I did not see that.
23 I am not saying that it didn't happen, but
24 -- whatever it was had to have been quick
25 because it went by most of the people here

1 in the courtroom. I don't know that you
2 want me to give a curative instruction but
3 if you want a curative instruction, I will
4 give it to you -- you probably would rather
5 just be silent about it, or they will be
6 aware. Both sides are to use redacted
7 documents.

8 All right, anything further? (No
9 response). Bring in the jury. If we have
10 to seat an alternate, our first alternate
11 will be seated.

12 (JURY IN AT 9:15 A.M.)

13 THE COURT: Welcome back, Ladies
14 and Gentlemen. Good morning. Let me ask,
15 since we were last together is there any
16 member of the jury panel who has had a
17 discussion about the facts of this case
18 with anyone? If so, please raise your
19 hand. (No response). Please let the
20 record reflect that no one has raised their
21 hand.

22 Now, at the end of the day I was
23 talking, yesterday, with two of our jurors
24 -- or about two of our jurors who had
25 notified me that they had vacation plans

1 for next week, that the case was going to
2 spill over into next week. I asked you to
3 think about it overnight what we need to
4 do, what your response would be.

5 What I would ask is, our two
6 jurors, if you would kindly stand, give us
7 your juror number -- and you can give us
8 your names, too, if you wish, though I
9 don't require you to do that because we try
10 to use some degree of anonymity with our
11 juries, but, uh, -- and tell us what your
12 decision is with regard to that and any
13 fact that may influence that decision.

14 Who wishes to go first.

15 JUROR NUMBER 338: Unfortunately
16 my family said that they will not go on
17 vacation without me, so I am going to have
18 to relinquish my seat, regrettably.

19 THE COURT: Ms. Starr, I know
20 that was a difficult decision for you,
21 ma'am. I want to express my gratitude to
22 you, and I am sure the rest of us do, and
23 tell you that we appreciate your service.

24 What we are going to do is, rather
25 than you remain here for the rest of the

1 day, there's no need for you to do that, we
2 are going to let you go. We are going to
3 seat Ms. Heather Benton, Juror Number 304,
4 in your seat.

5 I have asked Tara is she would
6 please give you her phone number and her
7 name so that you, next week, can ask -- you
8 can call her and find out what happened in
9 this case if you wish to. You have friends
10 on the jury panel and you may wish to find
11 out from one of them. Of course, you're
12 free to make that call.

13 I am going to come down and -- in
14 a few days, you are going to come down and
15 -- that check is going to be the County's
16 expression of gratitude for your service,
17 for mileage, per diem. I want to come
18 around and shake your hand as you leave.
19 My best wishes to you, ma'am.

20 (JUROR NUMBER 338 EXCUSED)

21 (JUROR NUMBER 304 SEATED ON JURY)

22 THE COURT: Your number, sir.

23 JUROR NUMBER 336: Juror 336,
24 Phillip Sewell. In sort of a deliberation
25 with my wife, I have chosen to forego my

1 vacation plans to perform my civic duty
2 with a request from both parties that -- as
3 a jury panel we understand a lot of things
4 that go on and we prefer not going through
5 the back door to get through the house, but
6 coming through the front door. So if we
7 can break this down a little bit and make
8 it a little more simplified and a little
9 quicker, maybe I can salvage some of my
10 vacation time. My wife, she doesn't
11 understand -- but I would like to spend
12 some time with her. I am a newlywed, so
13 that is even more important. So I
14 respectfully request if you can kind of
15 condense it -- you both have a job to do
16 and I understand that, but out of respect
17 if you could condense it as much as
18 possible we'd appreciate it a lot.

19 THE COURT: Very good. Mr.
20 Sewell, thank you for your willingness
21 to remain with us. With the court's
22 gratitude, we gladly accept you remaining.

23 Now, let me ask, which is Heather
24 Benton. Ma'am, you are two weeks into that
25 seat where you are. Are you more

1 comfortable there or do you want to move
2 down and sit on the second row?

3 JUROR NUMBER 304: Wherever
4 you like.

5 THE COURT: Why don't you come
6 down and sit, please. We thank you for
7 that. Very good.

8 Now, Counsel, we are in cross-
9 examination and -- Dr. Rhett, if you would,
10 return to the stand. Let me ask you, do
11 you remember that you remain under oath?

12 DR. RHETT: Yes, sir.

13 (WITNESS TAKES STAND)

14 EDMUND RHETT, having been
15 previously sworn, continued to testify,
16 as follows:

17 CROSS EXAMINATION RESUMED

18 BY EDWARD GRAHAM:

19 Q. Dr. Rhett, I hold in front of you a
20 still image extracted from the videotape,
21 marked as Exhibit 76. Would you acknow-
22 ledge to the jury that this is a true and
23 correct photograph taken from the videotape
24 of this birth?

25 A. Yes, sir.

1 Q. Now, let me ask you, sir, I am going to
2 put on these easels the diagram that we've
3 shown before of the outlet presentation
4 with the vacuum, the low presentation with
5 the vacuum, and the mid-pelvic presenta-
6 tion.

7 I would ask you, sir, looking at
8 the amount of vacuum that is outside the
9 birth canal, do you contend to this jury,
10 as you did in deposition, that this is an
11 outlet presentation?

12 A. I corrected that. I said in my direct
13 testimony that this was a low vacuum and --
14 I was mistaken in my deposition. I had not
15 studied the video, I had looked at the
16 video.

17 Q. Well, there was a complaint that you
18 weren't shown the birth video during your
19 deposition. In fact, you saw it before
20 your deposition, didn't you, sir?

21 A. I saw it briefly before my deposition.
22 I saw it one time.

23 Q. So you no longer contend that these are
24 a match, is that fair?

25 A. That's correct.

1 Q. All right. Now, let's move to the next
2 one. This is the low presentation, do you
3 contend in front of us here today that the
4 image from the birth video matches the low
5 presentation?

6 A. That was the low presentation. I
7 showed yesterday by demonstration, by
8 showing where the baby's head was when I
9 put the vacuum on it, that it was a low
10 vacuum.

11 Q. We will get to that demonstration
12 later, I assure, you, Dr. Rhett. But I am
13 asking you now, sir, do you contend that
14 the image from the birth video showing this
15 much vacuum inside the birth canal and this
16 much outside matches the low presentation
17 diagram?

18 A. I am not sure you can say that. There
19 is no demonstration of where the vagina is
20 on that -- on that thing that you have
21 called low presentation vacuum extraction.

22 Q. There is no indication of the vaginal
23 on there?

24 A. You see one? I see bones.

25 Q. Sir, what does plus five tell you about

1 where the vaginal opening is?

2 A. Sir, if you look at the demonstration
3 that I showed you yesterday it's seven
4 centimeters from the ischial spine to the
5 outside. So if you're saying that it's all
6 exactly the same, then that's not correct.

7 And I will tell you something else. I
8 showed yesterday very clearly that my
9 fingers was that far inside the vagina,
10 that far. That's about two centimeters.
11 I showed you with the pelvic model and with
12 the tape measure that that was at least
13 seven centimeters from where my fingers
14 were to the ischial spine.

15 Q. And ---

16 A. And, therefore, it is a low vacuum. It
17 may not have been an outlet vacuum but it
18 was a low vacuum.

19 Q. And I can't wait to ask you questions
20 about that demonstration, about the seven
21 centimeter measure that you told this jury
22 about. But, first, sir, my question is, do
23 you claim that this image matches the low
24 presentation showing approximately half of
25 the vacuum cup outside of the birth canal,

1 outside of the plus five station?

2 A. Where is the vagina? You don't have
3 the vagina drawn on there. Because you
4 don't have the vagina drawn on there it's
5 not going to be the same thing. You've got
6 the bony structures but you don't have what
7 the baby has to come through besides the
8 bones.

9 Q. Are you telling the Ladies and
10 Gentlemen that the vagina is somewhere else
11 other than plus five? If so, what are you
12 trying to tell them?

13 A. I'm telling you that on top of bone is
14 flesh.

15 Q. Are you trying to tell us today that
16 the vagina is a plus seven station?

17 A. Well, I demonstrated very clearly
18 yesterday, with the pelvic model and a tape
19 measure, that -- measure from the outside
20 and it is seven centimeters. You can call
21 it plus five if you want to, but you've got
22 to be a long way down. I could touch this
23 baby's head.

24 Q. Sir, as you sit in front of us today,
25 under oath, are you telling us that the

1 vagina is at plus seven?

2 A. Well, it would appear to be since it's
3 seven centimeters from the ischial spine to
4 the pubic synthesis. The pubic synthesis
5 had the covering on it.

6 Q. Do you have any literature that you can
7 bring into the courtroom, today or at any
8 time during this trial, that says that a
9 vagina is at plus seven?

10 A. You didn't draw the vagina on this
11 demonstration.

12 Q. Sir, let me ask ---

13 A. You need to draw the vagina on these
14 colored pictures that you have in front of
15 me.

16 Q. Let me show you ---

17 A. So -- you can't tell where it would be.

18 Q. Sure. Sir, let me ask you this. Look
19 at this picture up here, is there a vagina
20 on this image?

21 A. There is.

22 Q. All right. Are you claiming that this
23 image on the low presentation matches this
24 image on the real world ---

25 A. I am telling you that when this baby at

1 the plus four station, I could put this
2 vacuum on him. I demonstrated that very
3 clearly yesterday.

4 Q. Sir, the question is, are you claiming
5 that this matches this?

6 A. Well, you've drawn a picture and you
7 say that that matches the two, but -- you
8 know, I showed very clearly yesterday that
9 this, that those two things didn't match.

10 Q. In fact, sir, ---

11 A. And you didn't draw a vagina down on
12 the bottom part, you just drew the bony
13 part.

14 Q. In fact, sir, Exhibit 76, the photo
15 taken from the real videotape of this
16 delivery matches the diagram of the mid-
17 pelvic presentation, doesn't it?

18 A. I demonstrated very clearly yesterday
19 that it was not a mid-pelvic delivery. It
20 was a low delivery.

21 Q. Sir, let me ask you, speaking of that
22 centimeters business, were you trying to
23 tell the Ladies and Gentlemen the truth
24 about the birth canal or were you trying to
25 fool them?

1 A. I merely -- they can hold that model,
2 they can look at it, they can make the
3 measurements themselves.

4 ROBERT HOOD: We object on the
5 basis of argumentative.

6 THE COURT: Overruled -- excuse
7 me, sustained. It's argumentative,
8 Counsel.

9 EDWARD GRAHAM: Thank you, Your
10 Honor. I will move on.

11 THE COURT: Please do so.

12 CROSS EXAMINATION CONTINUED

13 BY EDWARD GRAHAM:

14 Q. Sir, when you measured your seven
15 centimeters, what were you measuring from?
16 What was on one end and what was on the
17 other end?

18 A. I was measuring from the ischial spine
19 to the outside.

20 Q. Is this the ischial spine?

21 A. I can't tell what you've got in that
22 picture.

23 Q. Let me let you see it, (tendering). Is
24 this the ischial spines?

25 A. (Upon review), that is the ischial

1 spines.

2 Q. So you're telling the Ladies and
3 Gentlemen of the jury that to get seven
4 centimeters, you measured from the ischial
5 spines to where?

6 A. To the pubic bone, to the outside of
7 the bony part of the outlet to the pelvis.

8 Q. To the plus five station?

9 A. It was seven centimeters when you'all
10 clearly saw it yesterday. It was not five,
11 it was seven. So what I demonstrated was
12 that when the baby gets to the outlet,
13 which is the public bones -- if I may use
14 the model I'll show them again now. That
15 when the baby gets to those -- it come down
16 seven centimeters from the ischial spines.

17 Q. Sir, on the bottom part, were you
18 measuring at the introitus or ---

19 A. I was measuring at the outlet. The
20 outlet is the bony parts of the outside.
21 It -- where is the model? I'll show you.

22 Q. And it is shown on this diagram as plus
23 five. Correct?

24 A. Let's look at it in the real model.

25 ROBERT HOOD: May the witness

1 have the model that he has asked for, Your
2 Honor?

3 THE WITNESS: May I see the
4 real model.

5 EDWARD GRAHAM: I am asking the
6 questions, not direct.

7 ROBERT HOOD: Please note my
8 objection.

9 THE COURT: All right. I am
10 happy to do that later, gentlemen. I want
11 to finish the -- I am going to let Mr.
12 Graham question the witness as he wishes.
13 Thank you, Counsel. Go ahead, Mr. Graham.

14 CROSS EXAMINATION CONTINUED.

15 BY EDWARD GRAHAM:

16 Q. Dr. Rhett, you were measuring from the
17 bony outlet; correct?

18 A. I measured from the outside of the bony
19 outlet.

20 Q. Outside of the bony outlet to the
21 ischial spines?

22 A. Yes, sir.

23 Q. All right. Dr. Rhett, tell us, please,
24 sir, is the leading part of the baby's head
25 in the birth canal ever at the ischial

1 spines?

2 A. That's the zero station, that's
3 engagement.

4 Q. It's not at the ischial spines, is it?
5 It's at the plane between the ischial
6 spines. Correct?

7 A. Yes, sir.

8 Q. The true measure, the only helpful
9 measure for us today is to take the point
10 from the middle of the plane between the
11 ischial spines and measure from there to
12 the outside of the bony outlet. Correct?

13 A. That is exactly what I demonstrated
14 yesterday. I put my fingers between the
15 ischial spines, I held a tape measure and
16 I measured it -- seven centimeters. I know
17 it was in the plane of the ischial spines.

18 Q. You just told us that you measured from
19 the ischial spines to ---

20 A. I'm sorry. You're trying to fool me.
21 I will tell you exactly what I did. I put
22 my fingers on the ischial spines yesterday
23 and I put the tape measure right there
24 where it would hold and I measured from the
25 plane of the ischial spines out to the

1 outlet of the pelvic. You all saw, just
2 like I demonstrated, that that was about
3 seven centimeters. If my fingers had gone
4 in about that far, which is about two
5 centimeters, maybe it is two and a half,
6 but that meant that the baby was four plus
7 centimeters past the ischial spines.

8 Q. Doctor, let me ask you about the FDA
9 warnings. I am confused, sir. In your
10 deposition you said that you were not aware
11 of any government warnings, correct?

12 A. Yes. I stated that -- I did. You
13 asked me if I had seen a piece of paper
14 that came out eight years previous. I had
15 read most of the things that came out but I
16 wasn't specifically aware of that one on
17 the day that you took my deposition in July
18 of '08.

19 Q. My question, sir, is as you sit here
20 today, have you changed your testimony on
21 that point?

22 A. No, sir, I -- I would have to say that
23 I was aware of the problems with vacuum
24 extractions and delivery. Was I
25 specifically aware of that FDA warning,

1 I -- you didn't show me that paper that
2 day. If you had shown it to me, I may have
3 remembered.

4 Q. I am showing it to you now, sir, ---

5 A. Well, show me the org--, -- show me a
6 document that I can read in front of me,
7 like a piece of paper, if you've got it.

8 Q. I'd be happy to, Dr. Rhett.

9 EDWARD GRAHAM: Ma'am Court
10 Reporter, may we have ---

11 COURT REPORTER: It's down there
12 (on exhibit table).

13 EDWARD GRAHAM: (Reviewing
14 exhibits).

15 CROSS EXAMINATION CONTINUED

16 BY EDWARD GRAHAM:

17 Q. (Tendering), here you are, sir.
18 Exhibit 28.

19 A. (Review).

20 Q. My question, sir, now that you've had
21 an opportunity to look at that document,
22 can you tell us whether or not you had read
23 that document on or before July 16th, 2002?

24 A. I don't know the answer to that. A lot
25 of information comes across my desk. I

1 read to read it. I was aware of the risks
2 that are associated with vacuum extraction.

3 Q. Tell us whether you were aware of the
4 widespread discussion among your ACOG
5 colleagues about the FDA warnings of
6 increased risks of brain bleeds from use of
7 vacuums?

8 A. I was aware of risks of increased brain
9 bleeds from my discussions with multiple
10 obstetricians, meetings that we had been
11 to.

12 Q. Were you aware that the risk of
13 increased brain bleeds was even more
14 increased the higher you went up the birth
15 canal, into the mid-pelvic section?

16 A. I was aware that the higher that it was
17 the more the risk was. That's why I didn't
18 do any mid-pelvic vacuum delivery, except
19 the twin that I told you about yesterday,
20 the second coming twin.

21 Q. Let me ask you about this, sir. Could
22 you please turn to -- may I have that back?
23 I need to direct your attention to ---

24 A. (Tenders).

25 Q. --- right here. Sir, please turn to

1 the page that addresses Recording Adverse
2 Events to FDA. Do you see that?

3 A. Yes, I do.

4 Q. (Reading): *The Safe Medical Devices*
5 *Act of 1990 requires hospitals and other*
6 *user facilities to report deaths, serious*
7 *illnesses and injuries associated with the*
8 *use of medical devices. This includes the*
9 *complications described above from vacuum-*
10 *assisted delivery devices.*

11 Sir, did you report to the FDA
12 that Jayden Washington sustained a brain
13 bleed following your vacuum extraction of
14 him?

15 A. Sir, I am not a hospital and I am not
16 a user facility. I am a physician. It
17 requires the hospital, not the doctor.
18 That's what it says in the language.

19 Q. That is what it says in this part.
20 Let's look in another part. Please turn
21 to the prior page, under Recommendations.
22 The first bullet points says, (reading):

23 *Be sure that persons who use*
24 *vacuum devices for assisted deliveries are*
25 *versed in their use and that they are aware*

1 *of the indications, contraindications, and*
2 *precautions as supported in the accepted*
3 *literature and current device labeling.*
4 *See the list of sample references and*
5 *resources.*

6 Sir, were you aware of the contra-
7 indications for the vacuum that you had
8 used for over a thousand vacuum deliveries?

9 A. I was aware of the indications, the
10 contraindications, and the risks.

11 Q. Had you read the manufacturer's
12 instructions and warnings before July 16th,
13 2002?

14 ROBERT HOOD: Asked and
15 answered.

16 EDWARD GRAHAM: I asked about
17 government warnings. I'm asking about
18 manufacturer's warnings.

19 THE COURT: Overruled as to the
20 manufacturer's warnings. Go ahead, you may
21 answer.

22 DR. RHETT That I specifically
23 read? I might have read it when the device
24 first came out. We'd been using the device
25 since 1982 or '84 when it -- we never

1 changed devices and I'd used it in hundreds
2 of deliveries without any problems.

3 CROSS EXAMINATION CONTINUED

4 BY EDWARD GRAHAM:

5 Q. The manufacturer's warnings indicated
6 that it was contraindicated to use that
7 device for a mid-pelvic extraction. True?

8 A. I don't have that document in front of
9 me.

10 Q. As you sit here today, Dr. Rhett, you
11 can't tell us whether or not you know that
12 the vacuum that you used over a thousand
13 times is contraindicated for mid-pelvic
14 deliveries?

15 A. If you'll show me the document, I will
16 be glad to look at it and tell you exactly
17 what it says.

18 Q. We will get to that momentarily. The
19 second ---

20 A. I did not memorize everything that came
21 around. I've been driving a car for, lo,
22 this last forty-five years. Every car
23 comes with a set of instructions and I'd
24 look at a few things if I couldn't figure
25 out how to turn on a new device but I

1 haven't read those books and I've driven
2 those cars pretty safely most of that time.

3 Q. Let's look at the second bullet point
4 from the FDA, (reading):

5 *Before using a vacuum-assisted*
6 *delivery device, read and understand the*
7 *device's instructions. Pay particular*
8 *attention to the manufacturer's*
9 *instructions regarding cup placement,*
10 *vacuum strength to be used, duration of*
11 *applications and number of recommended*
12 *extraction attempts. The recommended use*
13 *for all these products is to apply steady*
14 *traction in the line of the birth canal.*
15 *Rocking or applying torque to the device*
16 *may be dangerous. Since the instructions*
17 *may be different for each device type or*
18 *style, it is Important to use the*
19 *instructions provided by the manufacturer*
20 *of the particular product being used.*

21 Did I read that accurately, sir?

22 A. Yes, sir.

23 Q. All right. Can you tell us whether or
24 not you heeded the manufacturer's warnings

1 and instructions?

2 A. I believe that I did. I knew the
3 risks, I knew how to use the device, I'd
4 used this particular device about a
5 thousand times. It'd been a very safe
6 device and it was safe to use, at least
7 in my hands to deliver at least a thousand
8 babies.

9 Q. The final recommendations is to, Report
10 Reactions Associated with the Used of
11 Vacuum-Assisted Delivery Devices to the
12 FDA. Correct?

13 A. I believe that they gave that job to
14 the hospitals, as stated specifically in
15 the paragraph that you read before.

16 Q. All right. Did you even tell the
17 Hospital in your delivery notes that you
18 had used the vacuum?

19 A. In the hospital form it clearly says
20 that I did a vacuum delivery. Again, in
21 the nurses notes it clearly says that I did
22 a vacuum delivery. On the face sheet when
23 you open the chart, here's what you look at
24 and it says that I did a vacuum delivery.
25 The hospital staff knew that I did a vacuum

1 delivery, the nursing staff knew that I did
2 a vacuum delivery. The Hospital was aware
3 that I did a vacuum delivery.

4 Q. But in your delivery notes you said not
5 a word about a vacuum. Correct?

6 A. I'd written it in about three other
7 places. Sometimes when you're taking care
8 of patients, you sometimes don't hit one
9 little spot. I'd already written it in two
10 other places that I can think of.

11 Q. In fact, Dr. Rhett, this page being
12 published now, Exhibit 202, is the only
13 place where you actually wrote that you had
14 used a vacuum. Correct?

15 Could we show the bottom of that,
16 please? Is this your handwriting with the
17 list of procedures?

18 A. That's my handwriting. I wrote that at
19 the time of delivery.

20 Q. You wrote that at the time of delivery?

21 A. I did.

22 Q. But in fact you dated it the day after
23 the delivery?

24 A. Robert Stone, dated 7/17/02. That's
25 the discharge date.

1 Q. That is somebody else's date? You
2 didn't date it 7/16/02, did you, sir?

3 A. No, sir, I just wrote all the things
4 that we had done with Jamsetta in delivery.

5 Q. This page is for capturing billing
6 opportunities; correct?

7 A. No, sir, it's the face page.

8 Q. It's the face page of ---

9 A. It is there so that people can look ---

10 Q. You don't ---

11 ROBERT HOOD: I'd ask that the
12 witness be allowed to answer the question.

13 DR. RHETT: --- and see what is
14 in the chart, what happened ---

15 THE COURT: Dr. Rhett, patience,
16 please.

17 DR. RHETT: Sorry, I am a little
18 hard of hearing.

19 THE COURT: That's all right.
20 We had three people talking at one time,
21 Ladies and Gentlemen. How are you'all
22 doing over there?

23 JURORS: (Laughter).

24 THE COURT: Just a moment.

25 Here's what we need to do. When there is

1 an objection, please stop so that I can
2 respond.

3 EDWARD GRAHAM: Thank you, Your
4 Honor.

5 THE COURT: Now let's go back
6 and redo it. There were three of you
7 talking at the same time. You objection
8 was, Mr. Hood?

9 ROBERT HOOD: The doctor was
10 trying to answer his question and he kept
11 talking ---

12 THE COURT: I will sustain that.

13 EDWARD GRAHAM: I apologize,
14 Your Honor. I thought that he was
15 finished.

16 THE COURT: Thank you. You may
17 continue.

18 EDWARD GRAHAM: Thank you, Your
19 Honor.

20 CROSS EXAMINATION CONTINUED

21 BY EDWARD GRAHAM:

22 Q. Dr. Rhett, the face sheet in fact is
23 used by the coding personnel and the
24 billing personnel at the hospital.
25 Correct?

1 A. It may be used by the billing and
2 coding personnel but it's the title of a
3 book. This is the title of a book that
4 says, "Pregnancy, 41 Weeks" -- it should
5 say "Delivered". Then it says -- it shows
6 that these are the "chapters", this is what
7 we did during this person's hospitaliza-
8 tion. The codes may come along and use it
9 but I put it on there so that when somebody
10 looks at the front page, and they go 'what
11 happened with this', there it is.

12 Q. Doctor, you asked to see the manu-
13 facturer's instruction.

14 A. May I have a copy, please?

15 Q. Absolutely, sir, (tendering).

16 EDWARD GRAHAM: Your Honor, this
17 is Exhibit 73.

18 CROSS EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. I would ask you to please turn to page
21 four.

22 A. Okay.

23 Q. Dr. Rhett, please read contra-
24 indications for use number two.

25 A. Let me read it so that I know where you

1 are. (Upon review), Contraindications for
2 Use: CPD

3 Number One -- is encephlo pelvic
4 disproportion; which means that the baby is
5 too big to come through the pelvic canal.

6 Number Two -- Unengaged mid-station
7 fetal head.

8 Q. Thank you. Number two is unengaged or
9 mid-station fetal head. Correct?

10 A. Correct.

11 Q. This vacuum that you used for thousands
12 of times is contraindicated for mid-pelvic
13 applications; correct?

14 A. It is, and -- you've got to remember
15 that I didn't use this in the mid-pelvis.

16 Q. Well, you were ---

17 A. Jayden was at a low station.

18 Q. Were you ---

19 A. Where I could get Jayden delivered as
20 safely as possible, as quickly as possible.

21 Q. Are you finished, sir?

22 A. I am now.

23 Q. As of July 16th, 2002, were you aware
24 that the vacuum that you were using was
25 contraindicated for mid-station vacuum

1 application?

2 A. We'd not been using vacuums for mid-
3 station because we were aware of the risks
4 that were essentially involved.

5 Q. Is your answer that you were aware of
6 the risks of ---

7 A. I was aware of the risks of a mid-
8 pelvic delivery.

9 Q. Were you aware that this vacuum that
10 you had been using exclusively for a
11 thousand or more vacuum extractions, was
12 contraindicated for mid-pelvic extraction?

13 A. It was.

14 Q. And you were aware of that on that
15 time?

16 A. I hadn't used it that way. I think
17 most of the people that were using vacuums
18 were using it at the low and outlet.

19 Q. Sir, I believe that it would -- it
20 would -- I would appreciate you answering
21 this question: Were you aware at the time
22 that you applied the vacuum to Jayden

23 W's head that the vacuum that you
24 were using was contraindicated for mid-
25 pelvic extraction?

1 A. I think I was. I was not using it in
2 that fashion and hadn't used it in that
3 fashion.

4 Q. In recent decades, obstetricians who
5 were Board-certified must keep up with
6 obstetrics, getting recertified
7 periodically; correct?

8 A. People who became Board-certified after
9 1985 are required to get recertified.

10 Q. So in the last twenty-five years, any
11 newly Board-certified obstetrician must
12 keep up and prove that he had kept up by
13 recertifications; correct?

14 A. They do have to go through a re-
15 certification process. That's correct.

16 Q. And you're grandfathered in, so you
17 don't have to do that; correct?

18 A. I don't have to go through the re-
19 certification process. I do have to keep
20 up.

21 Q. And even though some of your aged peers
22 chose to get recertified anyway, despite
23 the absence of a requirement, you chose to
24 not get recertified; correct?

25 A. I am still certified. I've been Board-

1 certified since 1979. Nobody has ever
2 questioned my certification. I see no
3 reason to jump through hoops that don't
4 help with inpatient care. I see no reason
5 to go back and put myself through what is
6 -- what is really strenuous -- and by that,
7 I mean that you have to put cases together
8 and it takes a tremendous amount of time.
9 I'd rather spend my time with meetings,
10 with books, with periodicals, keeping up by
11 going to conferences and seminars, in
12 speaking with other physicians than passing
13 another book test.

14 Q. And the book learning that you've done
15 since your deposition didn't help any of
16 the babies you delivered in July of '02,
17 did it?

18 A. No, the book learning I've done since
19 then helped a lot. I saved Jayden

20 W 's life by delivering him. If I
21 had done a C-section at the same time, he
22 would have suffered from a lack of oxygen
23 for over a twenty-minute period of time.

24 There's no difference between the incidence
25 of bleed in a patient who has gone through

1 labor and then had a C-section and the
2 incidence of a brain bleed in a woman who
3 has gone through labor and has a vacuum
4 delivery.

5 Doing a C-section and doing the vacuum
6 delivery, you can have the exact same brain
7 bleed.

8 A twenty-minute wait in a desperate
9 situation means that we're killing brain
10 cells over time.

11 Q. Doctor, when you were practicing, after
12 your deposition for your testimony before
13 this jury, did you practice not answering
14 my questions?

15 A. I'm answering your, Counselor. I'm
16 giving a complete explanation why I did
17 what I ---

18 Q. Please listen to my question. The book
19 learning that you've done after your
20 deposition did not help any of the babies
21 that you delivered in July of '02, did it?

22 A. I'd kept up, daily, weekly, monthly,
23 yearly with conferences, reading
24 periodicals, etc. After I stopped
25 practicing in '05, obstetrics was not a

1 part of what I really studied any more.

2 So what I've studied since my deposition
3 was things that reminded me of stuff that
4 I knew in '02 and '01 and '05, but ---

5 Q. You don't -- excuse me. Were you
6 finished?

7 A. --- that had slipped out of my daily
8 usage but '08.

9 Q. Are you finished, sir?

10 A. I am.

11 Q. You told us yesterday that you had
12 check some vacuum rate records. You didn't
13 produce those to our side of this case, did
14 you?

15 A. No, sir, I didn't.

16 Q. In fact, your team fought to keep us
17 from getting those records. Correct?

18 A. I have no knowledge of that.

19 Q. Did you bring those records with you to
20 the courtroom?

21 A. I don't have those records.

22 Q. What time period do you claim those
23 statistics were gleaned from?

24 A. Somewhere between 1998 and 2000 and
25 2002?

1 Q. But you didn't bring those charts with
2 you today?

3 A. I didn't bring the charts.

4 Q. How many of those deliveries were C-
5 sections?

6 A. Of the three hundred twelve deliveries,
7 one hundred and forty I think were C-
8 sections. Half of those were primary C-
9 sections and half of those were ---

10 Q. And how many of those deliveries had
11 other doctors involved in the care or
12 played a part in the role of delivery?

13 A. When we do C-sections, there are
14 usually two physicians or caregivers in the
15 room to do the C-section. Sometimes we may
16 have a midwife that can assist us and
17 sometimes we have another doctor who can
18 assist us.

19 Q. I am talking about the three hundred
20 twelve. You said that you had three
21 hundred and twelve deliveries that you
22 studied, without bringing the charts. Of
23 those, how many times was another doctor
24 involved in the delivery?

25 A. In all of the C-sections.

1 Q. I am asking about the vaginal
2 deliveries.

3 A. I may have done a vacuum delivery on a
4 nurse midwifery patient. They cannot use
5 the operative instruments. So there may
6 have been a nurse midwife but I -- I was
7 the primary care provider, the one who was
8 responsible for those deliveries.

9 Q. Were there other physicians involved in
10 some of those deliveries?

11 A. Not that I am aware of. Those were my
12 deliveries.

13 Q. But you didn't bring those records for
14 us to check?

15 A. I did not bring those records, no.

16 Q. Now, at 1240 in the delivery, you told
17 us yesterday that you saw some
18 decelerations in the strips. Correct?

19 A. I saw decelerations at 1240, they went
20 on for about five minutes; we stopped the
21 Pitocin, turned the patient, she was about
22 four centimeters dilated. She'd had good
23 beat variability after -- before she had
24 this deceleration and then she had good
25 beat variability afterward.

1 Q. Did you give the mother oxygen?

2 A. We gave the mother oxygen.

3 Q. Did you give the mother extra fluids?

4 A. We were giving her fluids the whole
5 time. We had given her a fluid to increase
6 her blood pressure and circulation to the
7 baby.

8 Q. And when you did that at 1240, the
9 baby's deceleration went away. Correct?

10 A. It did.

11 Q. The baby responded reassuringly to a
12 change of position, correct?

13 A. Change of position, oxygen, fluids, and
14 stopping her contractions temporarily.

15 Q. Yesterday you told us that when there
16 was a deceleration later on in the
17 afternoon or early evening that you only
18 had four options: to do nothing, to pull
19 the baby out with forceps, to pull the baby
20 out with the vacuum or to do a C-section.
21 You left out the safest option, didn't you,
22 Doctor?

23 A. (No verbal response).

24 Q. You didn't tell us then that you could
25 have simply changed the mother's position,

1 stopped the Pitocin, given her fluid and
2 given her oxygen.

3 A. We had.

4 Q. That'd worked before, correct?

5 A. Yes. The problem is this, that this
6 was -- this was a different atmosphere.
7 We'd lost the beat variability, which means
8 that we'd lost the baby's fetal reserve.

9 Like I explained yesterday, the driver
10 is moving along kind of this -- and you can
11 see that on the baby's heart rate. When
12 you get impaired, you drive like this and
13 you don't have -- that baby's heart rate
14 does a whole lot less of what we call beat
15 variability.

16 That had been going on for about twenty
17 minutes when we discovered, by exam, that
18 the cervix was completely dilated.

19 Subsequently, the next contraction that she
20 had was what appeared to be a late
21 deceleration; then the next contraction
22 after that she appeared to have a late
23 deceleration. A late deceleration says 'I
24 am not getting enough of what I need, I am
25 going to get hypoxic' -- low oxygen.

1 I am about to then turn acidotic, which
2 means that I am going to start making acid
3 in my bloodstream because my carbon dioxide
4 is going up, my oxygen level is going down.

5 Subsequent to that she had a prolonged
6 deceleration that lasted until essentially
7 I came in the room, and I thought this baby
8 was in danger of severe hypoxic brain
9 damage. That means not enough oxygen going
10 to your brain.

11 So waiting on a vaginal delivery was
12 not an option. I thought that the baby
13 would have brain damage between the time
14 that I could wait this out and the baby
15 would be delivered.

16 I could go do a C-section but that was
17 going to take twenty minutes. Twenty
18 minutes of not enough oxygen is going to
19 leave him brain damaged.

20 I did an exam. The exam showed me that
21 the baby was way down, close to the opening
22 of the vagina and I thought that I could
23 safely deliver the baby in a short period
24 of time, get oxygen to him and that's what
25 I did.

1 Q. Doctor, yesterday you told us that
2 doing nothing was an option. Correct?

3 A. It was not a good option. It's an
4 option.

5 Q. You told us that it was one of four
6 options.

7 A. (Affirmative nod), and it's not the one
8 that I chose because doing nothing would
9 have left this baby in a severe low-oxygen
10 atmosphere.

11 Q. Another option was to change the
12 position, give fluid, give oxygen and stop
13 Pit. That was an option, wasn't it, sir?

14 A. That is an option, yes. Yes, sir.

15 Q. But you didn't tell us about that
16 yesterday, did you?

17 A. Well, I didn't think it was a viable
18 option. I didn't -- I think that I
19 explained very clearly that I thought this
20 baby was in severe distress. It was my
21 judgment as pilot of this airplane to land
22 this aircraft as safely as I could, with as
23 little damage as possible.

24 Q. Is the -- (sidebar with Ms. Waters).
25 Dr. Rhett, this isn't what you had

1 yesterday, is it?

2 A. (No verbal response).

3 Q. Is this what you had yesterday?

4 A. Yes, that's the fetal scalp electrode.

5 Q. Didn't it have a plastic ---

6 A. That's just the applicator.

7 Q. Well, yesterday you had the applicator;

8 correct?

9 A. Yes, but we don't use it with the
10 applicator. We use the applicator to put
11 it on.

12 Q. You used this yesterday in front of the
13 jury. Sir, is this the electrode that you
14 used to delivered Jayden W ?

15 A. I didn't use an electrode to delivery
16 Jayden W.

17 Q. Is the ---

18 A. I used an electrode to monitor his
19 heart beat during labor.

20 Q. Is this the electrode that you used in
21 the labor and delivery of Jayden
22 W ?

23 A. I think that's the model of electrode
24 that we used.

25 Q. Well, is it the one that you used?

1 A. I think it is. It's the one that they
2 had at the hospital. You know, I -- I
3 can't identify it from eight years ago.

4 Q. Where did this come from?

5 A. From the hospital.

6 Q. Which hospital?

7 A. East Cooper.

8 Q. Did you get it?

9 A. No, sir, I asked somebody else to get
10 it for me. I was busy here in court.

11 Q. Now, which end has the leads?

12 A. If you'll bring it over to where I can
13 see, I can point them out.

14 Q. Yes, sir.

15 A. This is the end that goes into the
16 baby's scalp. It's got a little teeny
17 electrode, a little teeny wire and that
18 wire -- with that applicator thing, that
19 long white thing, we just turn that and it
20 goes right into the skin of the scalp, just
21 like that.

22 Q. And you can remove that by just
23 untwisting the wires, correct?

24 A. Well, you can sometimes. In Jayden's
25 case it was twisted up in the hair. So I

1 took my fingers and untwisted it and that's
2 how I knew where it was. It was right
3 there, I was trying to get it out of his
4 hair.

5 Q. You had -- sir, I am not asking for a
6 speech. I would just like for you to tell
7 me on this pelvis what is the point from
8 which you measured seven centimeters.

9 A. May I hold it, please?

10 Q. Yes, sir, (tenders).

11 A. Across here are the ischial spines.

12 I think I showed you all this yesterday.

13 I measured from the level of the ischial
14 spines to the level of the pelvic outlet,
15 to these bones right here. So I measured
16 from this plane across here to this area
17 here, which is about that far.

18 Q. Which ---

19 A. If you will give me a tape, I will tell
20 you exactly how far it is. So here is the
21 plain of the ischial spines, here is the
22 outlet and here is how far it is.

23 Q. Where did you get this model?

24 A. I got it from a physical therapist who
25 I see on a regular basis, to keep me from

1 falling apart.

2 Q. And is it your testimony to this jury
3 that in the normal female anatomy that
4 there is seven centimeters from the plane
5 between the ischial spines to the pelvic
6 outlet?

7 A. It is. That's -- you'all can measure
8 it yourselves with that model and a tape.
9 Put your finger there, put your finger here
10 and see how far it is. It's seven
11 centimeters.

12 Q. Sir, you are under oath. I'm asking
13 you, is it your testimony that in normal
14 female anatomy that there's seven
15 centimeters from the plane of the ischial
16 spines to the plus five station at the
17 vaginal outlet?

18 A. I've shown that multiple times now, Mr.
19 Graham.

20 Q. Is that your sworn testimony, that ---

21 A. I'd showed it. That's my testimony.

22 Q. Now, yesterday when we saw on the birth
23 video where you were moving the vacuum from
24 side to side, you had some explanations for
25 what was -- for some purpose other than

1 endangering the baby. Can you run through
2 that explanation again for why you believe
3 that it's appropriate to move the vacuum
4 from side to side?

5 A. I moved the vacuum over a little bit so
6 that I could make certain that there wasn't
7 any vaginal tissue caught in the vacuum
8 with the baby's head.

9 Q. I thought that you had already done
10 that, sir.

11 A. Well, you want to make sure that things
12 are staying like you thought they were.

13 Q. Will you admit to this jury that you
14 did pull the vacuum to the side?

15 A. I did not pull the vacuum to the side.
16 I moved it over a little bit. I checked.
17 I was not pulling like this. I was not
18 rocking, I was not twisting, I was
19 examining and I was moving to make sure
20 that there was no vaginal tissue caught in
21 the vacuum.

22 Q. On the animation that you showed
23 yesterday, we saw a nice gentle straight
24 pull consistent with the birth axis. Are
25 you telling us today that that is what you

1 did on this birth video?

2 A. I did. I gave this -- we had about
3 seven or eight smooth downward and outward
4 and upward pulls.

5 Q. And in your deposition you said that
6 there was one pull, correct?

7 A. Well, I had not -- you did not show me
8 the video in my deposition. I'd not
9 studied the video before the deposition. I
10 was incorrect in my deposition.

11 Q. You would ---

12 A. I was going from memory. The delivery
13 had been done six years before. I'd seen
14 the video once.

15 And I looked at the video to see if I'd
16 done something wrong. I didn't measure
17 every little thing and I didn't memorize
18 the video. I have to tell you that I've
19 memorized the video now.

20 Q. You had seen the video right before the
21 deposition, had you not?

22 A. I had seen the video before the
23 deposition, I don't think that I can say it
24 was right before the deposition.

25 Q. So that's another thing that you've

1 changed your testimony about?

2 A. Well, -- yeah, I can't tell you exactly
3 what's in this. If you have something that
4 says that I said something else, that's
5 fine. I may have been a little confused.
6 I sure was confused with a lot in my
7 deposition.

8 Q. If the jury finds that in fact when you
9 were applying the vacuum that in fact you
10 did move it from side to side, ---

11 A. The jury can look at it and they'll
12 realize that I am not pulling it from side
13 to side. I am examining the patient, ech
14 side, to make sure that I've got the vacuum
15 on correctly.

16 Q. If the jury were to find that you did
17 in fact pull with the vacuum from side to
18 side, that would indicate that you broke
19 the rules about how to safely use a vacuum.
20 Correct?

21 A. If I had pulled from side to side, that
22 would have been incorrect use.

23 Q. You admit that was incorrect use?

24 A. I did not pull from side to side.

25 Q. You admit that it would be incorrect

1 use if you pulled from side to side,
2 correct?

3 A. It depends on how much side to side
4 motion there is. Am I pulling over here,
5 am I pulling over there, or am I looking
6 around to see that I've got the right
7 application of this vacuum. That's what I
8 did.

9 Q. Did you know on July 16th, 2002, that
10 it was dangerous to the baby to pull the
11 vacuum from side to side?

12 A. I knew the dangers and I knew how to
13 use the vacuum.

14 Q. Did you know specifically on that date
15 that it was dangerous to pull the vacuum
16 from side to side?

17 A. I did know the dangers of using the
18 vacuum on July 16th, 2002.

19 Q. And did you know that if you pulled
20 from side to side that that would increase
21 the chance of causing the brain of the baby
22 to bleed?

23 A. I did not what the risks of doing a
24 vacuum extraction the right way and the
25 wrong way were.

1 Q. I think that I am entitled to a yes or
2 no, sir. Did you know that pulling the
3 vacuum from side to side would increase the
4 risk of the baby's brain bleeding?

5 A. Yes, I did.

6 Q. Thank you. During the opening we heard
7 an awful lot about what a hero you were for
8 saving this baby from a dangerous nuchal
9 cord. Do you feel like a hero for saving
10 this baby from a dangerous nuchal cord, Dr.
11 Rhett?

12 A. I think I explained that very
13 carefully. This was a nuchal cord that
14 pulled the baby's umbilical cord down over
15 it's chest, shoulder, back, somewhere it
16 was being compressed. Now, it as not
17 tight, but it was creating a lack of oxygen
18 to the baby, just like crimping an air hose
19 going down to an underseas diver.

20 Q. A nuchal cord is pretty common, would
21 you admit?

22 A. I said yesterday that a third of the
23 babies are born with a nuchal cord.

24 Q. And in your deposition you said thirty-
25 five to forty percent? Correct?

1 A. That would be a third.

2 Q. A nuchal cord is not significant unless
3 it is tight. True?

4 A. That is not true. A nuchal cord means
5 that you pull the cord down over -- as far
6 as strangulating the baby, if the cord is
7 really tight, then you're strangulating the
8 baby with the cord. But when the cord is
9 pulled from the umbilicus, that's the belly
10 button, and it's gone up around the baby's
11 neck, then as the baby comes down through
12 the birth canal, the cord is being
13 compressed and -- and, indeed this cord was
14 being compressed and the baby wasn't
15 getting enough oxygen.

16 Q. Sir, do you still have your deposition?

17 A. I do.

18 Q. Please turn to Page 98.

19 A. Okay.

20 Q. I am going to read the question and
21 answer and then ask you if I read it
22 correctly, starting at Line 17:

23 Q. If the nuchal cord was tight,
24 you would have so documented it; correct?

25 A. Yes, sir.

1 Q. The nuchal cord ---

2 A. Thirty-five or forty percent

3 of babies have at least one nuchal cord.

4 It's not significant unless it's tight,

5 unless it gets in the way of the delivery.

6 Is that the answers that you gave to my
7 questions?

8 A. That's exactly the answer that I gave
9 to your questions.

10 Q. And this nuchal cord was not tight, was
11 it?

12 A. No, sir, it was not tight.

13 Q. And any compression of the cord
14 responded earlier to a change of position,
15 stopping the Pit, giving fluids and oxygen;
16 correct?

17 A. At the time that we did that the mother
18 was four centimeters dilated, the baby was
19 at a minus one station, and it did respond.
20 It had a lot of fetal reserve seven hours
21 earlier.

22 EDWARD GRAHAM: Are the blowups
23 of the fetal heart strips used yesterday in
24 the courtroom? If so, I would like to
25 examine this witness about those.

1 CROSS EXAMINATION CONTINUED

2 BY EDWARD GRAHAM:

3 Q. Doctor, yesterday you were telling us
4 about these two monitor strips; correct?

5 A. I can't see what you have in your hand,
6 Mr. Graham.

7 Q. (Displaying).

8 A. Yes, I was.

9 Q. And you were telling us that this
10 showed the time period right before the
11 delivery of the baby, including delivery of
12 the baby. Correct?

13 A. That's correct.

14 Q. I am going to ask you, sir, if you
15 would to please mark with a red pen where
16 the baby was delivered.

17 A. (Complies), about right here.

18 Q. Would you please put "DEL" for
19 delivery?

20 A. (Complies).

21 Q. All right, sir. Now would you show us,
22 please, -- let me take that marker back,
23 please, sir, so that we can keep it
24 straight.

25 Now I give you a blue pen and ask you,

1 sir, can you show us on the strips where
2 you claim the electrode was removed?

3 A. (Complies, marking on exhibit in blue).

4 Q. Okay. Thank you, sir. So your
5 testimony is that the electrode was removed
6 -- how many seconds are in these boxes,
7 twenty seconds?

8 A. Yes, sir.

9 Q. So this was removed at about 1933?

10 A. 34, I think.

11 Q. Somewhere in there?

12 A. (No verbal response).

13 Q. And you're saying that the baby was
14 delivered ---

15 A. 1937.

16 Q. And you believe that this strip truly
17 and accurately reflects the event of this
18 delivery?

19 A. I think it does.

20 Q. You've been studying it, right, since
21 your deposition?

22 A. Yes, sir.

23 Q. Thank you, sir. Go ahead and take your
24 seat.

25 A. (Complies).

1 Q. Doctor, yesterday you were telling us
2 that you had informed consent because
3 Jamsetta had signed a permission slip;
4 correct?

5 A. Yes, sir.

6 Q. What does the word "informed" mean to
7 you in the context of informed consent?

8 A. It means that I told somebody or had
9 somebody informed as to what's going on.

10 Q. You never did that with Jamsetta,
11 correct?

12 A. I think explaining all the risks of
13 pregnancy, all the risks of delivery, all
14 the risks of C-section, all the risks of
15 vaginal extraction, forceps delivery,
16 becomes more scary than informative. I --
17 my practice has always tried to educate
18 patient throughout pregnancy. But for me
19 to tell, in an emergency situation, what my
20 decision is and how we are going to do that
21 is not what I am going to do. I've been
22 asked to take as safe care of the patient
23 and their unborn baby as I possibly can,
24 and that's what I try to do.

25 Q. What you described as the permission

1 slip signed by Jamsetta is now revealed on
2 the screen, and it's been marked as Exhibit
3 2004. At the time that Jamsetta signed
4 that document, you had not informed her of
5 the risks of vacuum extraction; had you?

6 A. No, sir, I had not.

7 Q. You had not told her of your alleged
8 good reason or indication for using the
9 vacuum, had you?

10 A. No, sir, this was the beginning of the
11 labor process.

12 Q. You had not told her about the
13 alternatives to a vacuum extraction, had
14 you?

15 A. No, sir, I had not.

16 Q. There was nothing informed at all about
17 this permission slip, was there?

18 A. What this permission slip says is that
19 'I'm coming into this hospital, there are
20 some dangers involved with what I'm doing
21 and I am giving you permission to take care
22 of me.'

23 Q. All right. I hand you the document,
24 sir, (tendering). Show me the part about
25 'there's dangers in what I am about to do.'

1 Show me that part, please.

2 A. (Reading): "I am aware that the
3 practice of medicine and surgery is not an
4 exact science and I acknowledge no
5 guarantees have been made to me as the
6 result of treatment or examination in the
7 hospital."

8 Q. That is the part about dangers?

9 A. I will read the rest of it then,
10 (reading: "Jamsetta Washington, knowing
11 that I am suffering from a condition
12 requiring hospital care and diagnosis,
13 medical or surgical treatment, do hereby
14 voluntarily consent to such medical
15 surgical treatment, laboratory tests, which
16 may include but are not limited to acquired
17 immunity deficiency syndrome testing, which
18 Dr. Osborne or the physicians at East
19 Cooper Regional Medical Center, his
20 assistant(s) or designee(s) deem
21 necessary."

22 Q. Do you remember the part of the
23 question that asked you about where is the
24 dangers in that document?

1 A. It doesn't say anything about "danger"
2 in this document. It says that "I am
3 suffering from a condition requiring
4 hospital care, diagnosis and surgical
5 treatment and hereby consent to such
6 medical surgical treatment."

7 Q. It says nothing about dangers, true?

8 A. It says nothing "dangers".

9 Q. It says nothing about alternatives;
10 true?

11 A. It lists "medical" and "surgical".

12 Those are alternatives.

13 Q. Yesterday you told the Ladies and
14 Gentlemen that you had observed meconium on
15 this baby's body after delivery. Correct?

16 A. Meconium -- the baby has passed
17 meconium during the delivery process,
18 correct.

19 Q. You told the Ladies and Gentlemen that
20 you saw meconium on the baby after
21 delivery, that you wiped it off; correct?

22 A. I wiped the baby off from head to foot,
23 so if there was meconium there I would have
24 wiped the meconium at the same time.

25 Q. And we know that a nurse said something

1 about term meconium, but you didn't; did
2 you, sir?

3 A. To whom?

4 Q. In the records?

5 A. It is clearly marked in the delivery
6 notes. If you wish to look at the record
7 again, it's marked -- meconium.

8 Q. Is it in your delivery notes, sir?

9 A. It is not in my handwritten note. That
10 is not the most important document. The
11 most perceived document about this labor
12 and delivery process is the hospital note
13 that we showed you yesterday, that said the
14 kind of delivery, the time of delivery,
15 said there was meconium.

16 Q. That was the record that the nurse
17 created. Correct?

18 A. The nurse created it as we were doing
19 the process, the record that goes to the
20 nursery with the baby so that the
21 information is right there. As a matter of
22 fact, the nursery nurse is in the room when
23 we delivery the baby.

24 Q. Sir, you indicated in your deposition
25 that you did not recall anything about the

1 meconium. Correct?

2 A. In my deposition, I did not recall
3 anything about the meconium.

4 Q. Are you contending today that you all
5 of a sudden have an independent memory of
6 meconium?

7 A. Well, -- no. It's off that record
8 right there that I have now had a chance to
9 study.

10 Q. Okay. All right. The nurse wrote down
11 meconium, so you're assuming that to be
12 true?

13 A. I think you can see the meconium in the
14 video, which I've also had a chance to
15 study; which is dark poop-looking stuff
16 around the cord as we finish up the
17 delivery.

18 Q. All right. You saw meconium around the
19 cord as you finished the delivery?

20 A. That means that the baby had passed
21 meconium; yes, that would be true.

22 Q. And that is pretty good evidence that
23 the baby had been in distress at some time
24 prior to observing the meconium. Correct?

25 A. That's correct.

1 Q. Doctor, would you agree that if a
2 vacuum -- if a vacuum sucks on the baby's
3 brain so as to cause massive bleeding that
4 that that involves distress to the baby
5 that might cause him to pass meconium?

6 A. The delivery process itself is
7 stressful, whether we do it by C-section,
8 vaginal extraction, forceps or just waiting
9 on the baby to come out. It is stressful.
10 In the distress that this baby suffered
11 during its delivery, the distress of not
12 having enough oxygen, it had -- it's anal
13 sphincter relaxes and it lets that poop
14 out.

15 Q. Sucking one's brains out causes anal
16 sphincter to relax a bit, too, doesn't it,
17 Doctor?

18 A. I think that's an obtuse way to
19 describe this delivery. I didn't suck
20 anybody's brains out. I guided this baby
21 through the pelvic canal with the vacuum
22 extraction.

23 Q. Sucking on the brain, elongating the
24 brain so as to tear the veins and cause a
25 slow leak is distressful to a baby;

1 correct?

2 A. You're making a description of
3 something that I am certain that I can say
4 occurred.

5 Q. Well, let's ---

6 A. We have -- he -- Mr. Graham is trying
7 to tell us that we have pulled this brain
8 out, that this -- this baby had an
9 elongation of its head, like most baby's
10 get in the birth canal, and I applied the
11 vacuum and guided the baby with about eight
12 gentle pulls, with mom pushing, and -- to
13 describe this as "sucking the baby's brains
14 out" is an incorrect description of what
15 happened.

16 Q. Sir, I agree with you. I misspoke when
17 I said that and I apologize for mis-
18 speaking. But let me ask you, sir, and I
19 would ask for a yes or no question (sic) --
20 answer.

21 You don't have any evidence of meconium
22 from this baby before you pulled on the
23 vacuum, do you?

24 A. We don't have any evidence that the
25 baby passed meconium until the delivery,

1 that's correct.

2 Q. So ---

3 A. Because the baby was blocking the birth
4 canal at this point, so you're not going to
5 see the meconium because it can't get
6 around the head, the chest -- and you
7 wouldn't see it. But when you deliver the
8 baby, you see the meconium then.

9 Q. When the meconium was first noted by
10 the nurse, that was after the delivery with
11 the vacuum was complete. True?

12 A. When we got the baby's bottom out, you
13 could see that meconium had been passed.
14 Prior to that, meconium had been kept up by
15 the head, the chest, the rest of the body
16 until we got that out of the way.

17 Q. Yesterday you told the jury that you
18 had done nothing in this delivery to
19 increase the risk of brain damage. Do you
20 still maintain that?

21 A. I maintain that. I had three choices
22 to save this baby's life. One of them was
23 to do a C-section, one was to do a vacuum
24 delivery, one of them was to do a forceps
25 delivery. My choice was to do the delivery

1 that I could do the safest and quickest,
2 because I was worried about loss of brain
3 tissue because there wasn't enough oxygen
4 going to the baby's brain.

5 Q. You're telling ---

6 A. I subsequently know that the risk of
7 having a brain hemorrhage from a C-section,
8 the sustained moment in the delivery
9 process, if I could have done is
10 instantaneously, would have been exactly
11 the same as doing the vacuum delivery.
12 Forceps is a little bit increased over
13 that. Those were the three choices that I
14 had in order to effect the delivery of a
15 baby that I thought was in distress.

16 Q. By your own testimony about your
17 learning, use of a vacuum more than doubles
18 a baby's risk of brain bleeds?

19 A. Over spontaneous vaginal delivery,
20 which was not an option at this time. I
21 didn't have and Jayden didn't have fifteen,
22 twenty, thirty minutes to get out of there
23 without having brain damage, according to
24 what I was seeing on the fetal monitoring.

25 Q. I believe that I am entitled to a yes

1 or no answer, Doctor. Use of a vacuum more
2 than doubled this baby's chance of bleeding
3 in his brain. Correct?

4 A. Of the choices that I had to make, it
5 doubled it over a spontaneous vaginal
6 delivery; which I did not think was a
7 choice that I had to make, that I could
8 make.

9 Q. Doctor, we were talking yesterday about
10 some of the things that we could agree on.
11 May we agree that you continue to accept
12 (sic) responsibility for these brain
13 bleeds?

14 A. What did you say?

15 Q. You continue to refuse to accept (sic)
16 responsibility for these brain bleeds,
17 true?

18 A. I didn't cause this brain bleeds. I
19 sued a labor process that itself didn't
20 cause these brain bleeds. As I have
21 explained about fifteen times now, when you
22 get to this stage of labor and you have
23 distress, you have three choices. All of
24 those three choices have an increased risk
25 of a brain bleed.

1 Had the baby already had brain bleeds,
2 in some -- in some of the things that we
3 have learned over the years, we find that
4 it is the labor process itself and not the
5 method of the delivery that actually causes
6 the brain bleeds.

7 Q. These brain bleeds occurred on your
8 watch, true?

9 A. These brain bleeds occurred during this
10 labor and delivery process, yes.

11 Q. May we agree that you had learned
12 anything from this delivery about the
13 dangers of the use of a vacuum from a mid-
14 pelvic station?

15 A. That is sort of a backwards way of
16 asking the same question for the fifteenth
17 time.

18 I understood the risk to this baby, I
19 understood the risk to the other seven
20 thousand babies and the thousand or so that
21 I'd delivered with vacuum extraction.
22 I understood the risks of labor.
23 I understood the risks of delivery.
24 I understood the risk of C-section.
25 I understood the risks of forceps.

1 I understand all those risks when I was
2 practicing medicine, doing obstetrics.

3 Q. Knowing about the massive brain bleeds
4 that had occurred on your watch during the
5 delivery of Jayden W , if you had
6 the chance to go back and do this again,
7 what if anything would you do differently?

8 A. Well, here's the difficult situation.
9 We have a baby that's moved way down deep
10 in the pelvis. We all of a sudden have
11 what appears to be severe fetal distress.

12 What are my choices of things to do?

13 One of which is wait for a spontaneous
14 vaginal delivery, where I think that there
15 will be brain damage.

16 The second is to do a C-section. The
17 incidence of brain bleeds with a C-section
18 at this particular point of labor is the
19 exact same as vacuum delivery, and it would
20 take twenty minutes longer to get to that
21 point -- to get the C-section done. That's
22 twenty minutes that you don't have oxygen
23 going to his brain.

24 You could put forceps on him. That's
25 an increased risk over vacuum.

1 Since vacuum and a C-section are the
2 same and I could effect this delivery in a
3 little over three minutes, that's seventeen
4 minutes or more that Jayden would have been
5 without oxygen had we elected to do a C-
6 section and we wouldn't have decreased the
7 risk of bleeding.

8 So I would do the same thing again, as
9 I think that I saved his life and I think
10 that I saved -- his brain tissue from lack
11 of oxygen and damage from that lack of
12 oxygen.

13 Q. Doctor, I think that I am entitled to
14 an yes or no answer. Let me ask the
15 question one more time. May we agree that
16 if you had another opportunity to handle
17 this delivery, get the baby out safely,
18 knowing what you know about the massive
19 brain bleeds, you would do everything the
20 same way that you did this go-round?

21 A. For the reasons that I just explained,
22 have explained now at least ten times, I
23 would do the same thing because I think
24 that I saved his life and I think that I
25 saved a lot of his brain tissue from lack

1 of oxygen and destruction from lack of
2 oxygen.

3 Q. Nothing different? You would do
4 nothing different?

5 A. I have a crashing airplane. I'm the
6 pilot. I know the risks everywhere around
7 me. I am trying to find the safest way to
8 land this plane. I did that.

9 Q. You were the captain of this aircraft,
10 to use that analogy. Correct?

11 A. I was the pilot of this airplane.

12 EDWARD GRAHAM: Nothing further.

13 THE COURT: Will there be any
14 redirect?

15 ROBERT HOOD: Yes, sir.

16 THE COURT: How long do you
17 believe your redirect will be?

18 ROBERT HOOD: Five minutes.

19 THE COURT: All right. Go
20 ahead.

21 REDIRECT EXAMINATION

22 BY ROBERT HOOD:

23 Q. You've been asked questions for several
24 hours here, very few about the delivery of
25 Jayden W. I want to ask you

1 specifically, looking back at your
2 deposition, which we have already read to
3 the jury, in light of the questions that
4 you were asked on Page 52, questions asked
5 by Mr. Graham back when you gave the
6 deposition in '08, are there any risks to
7 the baby from use of a vacuum extraction?

8 EDWARD GRAHAM: Objection, Your
9 Honor. This is not new. He read this same
10 thing in the record.

11 ROBERT HOOD: I sure did. But
12 we heard two hours of questioning about it
13 and I would like to ask you to give that
14 one answer.

15 EDWARD GRAHAM: Yes, sir. I am
16 going to sustain the objection. Again,
17 this is redirect on new issues. The jury
18 has heard the information.

19 ROBERT HOOD: They have.

20 REDIRECT EXAMINATION CONTINUED

21 BY ROBERT HOOD:

22 Q. The nuchal cord that was looped around
23 the neck, what was happening with the bony
24 structure now in the cord?

25 A. Right. If the cord was pulled up

1 around the neck, the baby is coming out
2 this way, then the cord could be sort of --
3 the cord is floating up where all the rest
4 of the stuff is in the top of the uterus.
5 When he comes around the neck, the danger
6 is that it will be too tight. The second
7 danger is of it getting caught between the
8 baby and some of the pelvic structure,
9 whether it is the baby's shoulder, the
10 baby's chest, the -- but it compresses that
11 cord. When it compresses that cord, it is
12 cutting off the oxygen to the baby.

13 Q. You were asked extensive about federal
14 government publications here. Does that
15 have anything to do with whether or not you
16 complied with the standard of care in
17 dealing with the handling of this baby?

18 A. I complied with the standard of care in
19 handling the baby, specifically.

20 Q. You were asked about the fetal
21 monitoring strips, anything about those
22 fetal monitoring strips that you were asked
23 about change your opinion that this child
24 needed to be delivered immediately?

25 A. No, sir, it did not at all.

1 ROBERT HOOD: I would like to
2 put these two blowups in evidence, Your
3 Honor.

4 EDWARD GRAHAM: They are already
5 marked as court's exhibits, Your Honor.

6 ROBERT HOOD: I would like to
7 have them in evidence. Since they've been
8 written on, I want the jury to have them in
9 deliberations.

10 THE COURT: What say you?

11 EDWARD GRAHAM: That's fine.

12 THE COURT: Let's do it now,
13 Counsel, and then there won't be confusion
14 for that objection.

15 (SO ENTERED DEFENDANT'S EXHIBITS 104 & 105)

16 THE COURT: Defense Exhibits 104
17 and 105 in evidence, without objection.

18 REDIRECT EXAMINATION CONTINUED

19 BY ROBERT HOOD:

20 Q. You were asked a lot about this vacuum
21 extractor and the use of it in this
22 delivery. When you delivered your
23 partner's grandchild, what did you use?

24 A. I used this vacuum.

25 Q. The same one?

1 A. (No verbal response).

2 Q. What year was that?

3 A. 2004.

4 Q. Two years after this?

5 EDWARD GRAHAM: If Your Honor
6 please, this is not relevant.

7 THE COURT: Go ahead.

8 REDIRECT EXAMINATION CONTINUED

9 BY ROBERT HOOD:

10 Q. On cross-examination yesterday, you
11 were asked questions for an hour and forty-
12 some minutes, and none of those questions
13 were asked about the delivery of this
14 child. Do you -- do any of the questions
15 that were asked, yesterday or today, change
16 your opinion that you were reasonable and
17 complied with the standard of care in this
18 delivery?

19 A. I complied with the -- I was reasonable
20 and I was within the standard of care in
21 delivering Jayden Wa

22 Q. You were asked questions about whether
23 or not you had done successful mid-pelvic
24 deliveries. Was this a mid-pelvic
25 delivery?

1 A. No, sir, it was not.

2 Q. What was it?

3 A. It was a low delivery..

4 Q. And what is the proof of that?

5 A. I examined -- and you can see on the
6 video -- that I examined and I could touch
7 the baby's head that far into the vagina.
8 It's got to be that far past the ischial
9 spines.

10 For it to be a mid-pelvic delivery, it
11 would have had to that back closet to the
12 ischial spines. That close.

13 This baby was this much further down
14 than -- and I showed you clearly on the
15 model the plane of the ischial spines and
16 where the baby's head was and where my
17 fingers were when I touched that fetal
18 scalp electrode.

19 Q. To a medical degree of certainty, most
20 probably, Dr. Rhett, did you comply with
21 the standard of care?

22 A. I did.

23 ROBERT HOOD: Thank you.

24 THE COURT: All right. Other
25 questions, Counsel?

1 EDWARD GRAHAM: I have no
2 further questions.

3 THE COURT: You may step down
4 then, Dr. Rhett.

5 (WITNESS STEPS DOWN)

6 EDWARD GRAHAM: I would like to
7 know what the exhibit number is for the FDA
8 brochure.

9 THE COURT: Madame Court
10 Reporter, can you tell us that?

11 COURT REPORTER: I certainly can.
12 I believe that it is Exhibit 28.

13 THE COURT: Exhibit 28. All
14 right, let's take our morning break, Ladies
15 and Gentlemen. Enjoy your break and we
16 will reconvene in about fifteen or twenty
17 minutes. If you wish to go outside, we
18 will give an opportunity to do so. Please
19 remain seated while the jury is excused.

20 (JURY OUT @ 10:45 A.M.)

21 THE COURT: Court is in recess.

22 ROBERT HOOD: Your Honor,
23 I've got a witness who has got an airplane
24 flight at 1:30.

25 THE COURT: We will take him or

1 her next.

2 ROBERT HOOD: Yes, sir.

3 THE COURT: Very good, we will
4 do that. I think that the comments from
5 the juror were instructive to both sides.
6 The jury gets it. They're ready to move
7 on. So just be aware.

8 EDWARD GRAHAM: May we ask who
9 the witness is, Your Honor?

10 THE COURT: You can discuss that
11 with counsel.

12 ROBERT HOOD: Actually two
13 witnesses.

14 THE COURT: Court in recess.

15 (BRIEF RECESS)

16 THE COURT: Call you -- well, I
17 guess we need to get the jurors back first.
18 Bring in the jury.

19 EDWARD GRAHAM: Your Honor, can
20 I put one thing on the record.

21 THE COURT: Be quick, the jury
22 is coming.

23 EDWARD GRAHAM: If Your Honor
24 please, -- (inaudible due to people talking
25 in gallery of courtroom).

1 ROBERT HOOD: Your Honor --

2 (number of people talking in courtroom).

3 THE COURT: Order, please. The
4 jury is coming in. Thank you.

5 (JURY IN @ 11:10 A.M.)

6 THE COURT: Welcome back, Ladies
7 and Gentlemen. You will recall that we are
8 in the defendants' case now. Please -- you
9 may call your next witness.

10 ROBERT HOOD: Yes, sir, at this
11 time we call Dr. Olan Milunsky.

12 (WITNESS TAKES STAND)

13 OLAN MILUNSKY, being duly sworn to
14 tell the truth, the whole truth and nothing
15 but the truth, testified, as follows:

16 DIRECT EXAMINATION

17 BY ROBERT HOOD:

18 Q. Good morning, Dr. Milunsky. You are
19 Board-certified in how many fields of
20 medicine?

21 A. Three.

22 Q. They are?

23 A. I'm Board-certified in Internal
24 Medicine, in Pediatrics and Clinical
25 Genetics.

1 Q. I have your CV in my hand. It's quite
2 extensive. You've written books, you
3 lectured ---

4 I have written approximately twenty-five
5 books, yes.

6 Q. Twenty-five books. You've given
7 lectures all over the world?

8 A. I have.

9 Q. On the subject of genetics, you're a
10 world authority?

11 A. I didn't say that.

12 Q. I'm saying it. In fact, do you have a
13 book that is coming out -- or that just
14 came out?

15 A. Yes, Genetic Disorders and Fetus
16 Diagnosis & Treatment just came out, the
17 Sixth Edition, a few months ago.

18 Q. I have a flier about it right here that
19 you gave me about it.

20 A. Yes. Have you bought the book?

21 Q. Not yet. You practice in Boston?

22 A. I do.

23 ROBERT HOOD: Your Honor, I
24 want to move the case along. I could ask
25 him about his CV for twenty minutes but I

1 ask that you qualify Dr. Milunsky as an
2 expert in Genetics, Pediatrics.

3 EDWARD GRAHAM: No objection to
4 his being ---

5 THE COURT: Without objection,
6 he ---

7 EDWARD GRAHAM: I do have some
8 questions.

9 THE COURT: Any objection from
10 the defendants?

11 JAY DAVIS: No, sir, Your Honor.

12 THE COURT: Mr. Graham, if you
13 have questions on expertise, you may
14 examine the witness.

15 EDWARD GRAHAM: Thank you.
16 Dr. Milunsky, Good morning.

17 THE WITNESS: Good morning.

18 EDWARD GRAHAM: You told me at
19 your deposition that there is no scientific
20 basis upon which to reach a statistical
21 likelihood for the alcohol role in any of
22 Jayden's birth defects. Do you still ---

23 ROBERT HOOD: Your Honor, that
24 has nothing to do with his qualifications.
25 I move to strike the question and allow me

1 to proceed.

2 JAY DAVIS: I join that

3 objection and Motion, Your Honor.

4 THE COURT: Counsel, this has to
5 do with qualification, not a specific issue
6 within the merits. This would be for
7 qualification of -- I will sustain that
8 objection. If you have a question about
9 qualification, please proceed.

10 EDWARD GRAHAM: Well, if
11 Counsel, please, will I have an opportunity
12 to followup at the appropriate time if this
13 is not it?

14 THE COURT: You are not
15 questioning about the expertise of the
16 witness but the science that he testifies
17 to?

18 EDWARD GRAHAM: Yes, sir. In
19 certain limited areas.

20 THE COURT: Counsel, the best
21 way for me to do that and not delay these
22 proceedings is to ask you to hold that
23 objection and we will take it up at the end
24 of the testimony as to whether or not there
25 may be some objection to the science

1 itself. If so, then the court will make a
2 curative instruction. If not, we will
3 remain where we find ourselves.

4 EDWARD GRAHAM: Very good.

5 THE COURT: You may proceed.

6 Let me ask, is there an objection to the
7 qualifications of the expert witness, Mr.
8 Graham?

9 EDWARD GRAHAM: Not generally,
10 Your Honor.

11 THE COURT: So the witness may
12 give his opinions in Genetics ---

13 ROBERT HOOD: Is he qualified
14 as an expert without objection?

15 THE COURT: Yes, sir. Well, I
16 don't know about without objection but the
17 court has qualified him in the areas of
18 Genetics and Pediatrics, which is what he
19 was offered in.

20 ROBERT HOOD: Okay.

21 Direct EXAMINATION CONTINUED

22 BY ROBERT HOOD:

23 Q. Doctor, have you lectured on the
24 subject of Genetics?

25 A. Yes, sir.

1 Q. Do you teach that subject in Boston,
2 Massachusetts at the Boston University
3 School of Medicine?

4 A. Yes, sir.

5 Q. Are you on the editorial boards of all
6 kinds of medical journals, like the New
7 England Journal of Medicine?

8 A. No, not now.

9 Q. But you have been?

10 A. I have been on various boards, yes.

11 Q. There is a whole list of them, I think
12 maybe twenty-five of them in your CV?

13 A. Somewhere in there, yes.

14 Q. You've received a lot of honors in your
15 career as a doctor over the years?

16 A. Well, some. I think the most important
17 is the Royal College of Physicians, where I
18 was elected a Fellow of the Royal College
19 of Physicians for contributions to the
20 field of medicine.

21 Q. In this case, does this child have some
22 genetic problems?

23 A. This child has a range of -- Jayden has
24 a range of abnormalities with which he was
25 born.

1 Q. Let's look at the medical records that
2 establish that. The first one is Exhibit
3 27-123, a Medical University record.
4 Though -- I know you won't pass the eye
5 test, and I wouldn't either, so I am going
6 to give you my copy of these -- (tendering)
7 -- they are highlighted in yellow.

8 ROBERT HOOD: I would like to
9 put them in evidence also, Your Honor. We
10 will put in copies without the yellow
11 highlighting at lunch if that's okay.

12 THE COURT: Okay.

13 DIRECT EXAMINATION CONTINUED

14 BY ROBERT HOOD:

15 Q. The first one is the diagnosis of
16 coloboma. What does that word mean?

17 A. Is that a question for me?

18 Q. Yes, sir. Please tell the jury what
19 that word means medically in the case of
20 this child.

21 A. Actually it's a word that comes from
22 the Greek and it means -- in Greek it means
23 "mutilate" but in medical terminology it's
24 basically used as a "defect".

25 Q. Does this child have a diagnosis of

1 that?

2 A. It's a defect in the eye or within the
3 eye.

4 Q. The next one, Exhibit 27-799. Does
5 this child have a coloboma on the left eye?

6 A. Yes. It's like a tent -- the failure
7 of the fusion of tissues. That's a
8 coloboma. It's a developmental defect.

9 Q. And the next one, Exhibit 27-995. Does
10 this child have hyperextensibility?

11 A. The records indicate that the child has
12 loose joints or hyperextensibility.

13 Q. And the next one, Exhibit 27-124.

14 ROBERT HOOD: I want to put
15 all of these in evidence. I'll put them in
16 as one package, Defendant's Exhibits.

17 DIRECT EXAMINATION CONTINUED

18 BY ROBERT HOOD:

19 Q. Does this child have a cardiac problem?

20 A. The child was found to have a murmur
21 initially. Subsequently, I believe that
22 there was no actual heart defect but there
23 were -- the cardiologist concludes that
24 there was some narrowing of the blood
25 vessels that go to the lung, so called

1 pulmonary artery branch stenosis.

2 Also there was a report from imaging
3 studies that one sinus or vein within the
4 skull, transverse sinus, was hyperplastic
5 or undeveloped; or, they thought initially
6 could even be absent. But at the very
7 least it is not absent, it seems to have
8 been smaller, implying that there is some
9 issue about his blood vessels.

10 Q. The next one is Exhibit 27-894. That
11 is the page number of the records here.

12 Does this show that the child has a heart
13 murmur?

14 A. I just mentioned that, yes.

15 Q. And that record is as recent as
16 November of '07?

17 A. Yes.

18 Q. The next one is bilateral hydroceles,
19 Page 27-007.

20 A. Yes.

21 Q. Why is -- is that a birth problem?

22 A. It is also a birth defect. It means
23 that the valve pops through the internal
24 ring, it's called, -- or maybe I should
25 step back and say that in the development

1 of the fetus, ultimately the child, the
2 testes actually begin on the back of the
3 internal wall of the abdomen and they
4 slowly move down and through a ring on both
5 sides into the groin. They go down a canal
6 in the groin and then exit into the bag or
7 scrotum, where the testes are. So that's
8 the normal course of events.

9 In this particular instance, what
10 occurred on one side at least is that some
11 of the valves, some of the testis went the
12 wrong way because of the internal ring and
13 also the external ring, again implying that
14 there is something about this child's
15 connective tissue that is not right. It's
16 too stretchable, too weak.

17 Q. All right, sir. Is that a significant
18 disorder?

19 A. It is a disorder.

20 Q. Okay. The next one, pulmonary artery
21 stenosis, did the treating doctors record
22 that?

23 A. Yes. We mentioned that a few minutes
24 ago.

25 Q. That is on Page 11-001. Pulmonary

1 artery branch stenosis. What is that?

2 A. That is ---

3 Q. In laymen's terms, what does that mean?

4 A. We mentioned a few minutes ago that it
5 is a narrowing of the blood vessels that go
6 to the lung.

7 Q. All right. The next one, Page 9-002,
8 undescended testes.

9 A. This is the failure of the testes to
10 actually go through the course that I
11 mentioned on the back of the abdominal wall
12 down through the groin, through that canal,
13 called in inguinal canal, into the sac, the
14 scrotum. So the failure of the testes to
15 actually reach the sac, which we describe
16 as "undescended testes" or what may be
17 called cryptorchidism.

18 Q. And the next one, this abnormality,
19 this here, 18-003. I am not sure how to
20 pronounce it?

21 A. (Phonetic), but that is not in here.

22 Q. Then we won't talk about it. How about
23 the MRI of the child's brain that was done
24 on 7-18-02. This is a picture of the
25 brain, MRI. What does it show that is

1 significant?

2 A. Well, I am not sure which one that this
3 is specifically, but initially it showed
4 bleeding -- is that the one that you're
5 talking about?

6 Q. Yes, sir.

7 A. Yes. There were three categories of
8 bleeding that are recorded: there was
9 bleeding of the scalp, there's bleeding
10 underneath the tight envelope that wraps up
11 the bone of the skull, and also there was
12 bleeding in the back portion of the skull
13 called the posterior fossa.

14 Q. Is there an absence of flow on this CAT
15 scan, in the left transverse sinus, of this
16 patient?

17 A. Yes, and that's -- that is when I
18 mentioned that there were issues about
19 whether the actual sinus was missing or
20 whether it was underdeveloped.

21 Q. Okay. We've got it on the board and
22 I've got it on a blowup, "absence of flow
23 in the left transverse sinus, suggested
24 thrombosis and compression", Page 27-4272.
25 Why in this child with this claim is this

1 important?

2 A. I think, again, that it is pointing
3 genetically at the questions of the
4 integrity, the normalcy of the blood
5 vessels in this child. In this case that
6 -- subsequently we know that the transverse
7 sinus is not absent but I think the reason
8 that it couldn't be seen is because it was
9 underdeveloped. Subsequently it's become
10 clear that it was present but, again, the
11 indication is pointing fingers at the
12 integrity of the vessels.

13 Q. Please come down so that you can see
14 what we have done here.

15 A. (Complies).

16 Q. We have taken that list, put it on one
17 page -- the birth disorders of this child.
18 Stand, if you will, right here so that the
19 court reporter can hear you. Go through
20 these for the jury.

21 A. Can you hear me without a microphone?

22 Q. Yes, sir, we can hear you -- I will
23 stand over here to make sure that the court
24 reporter can hear you.

25 A. Given my accent, you never know.

1 Q. We talk funny in Charleston, too.

2 A. I know that.

3 Q. You'all say eighty-eight, we say etty-
4 etty (phonetic).

5 A. Well, whatever you said. Anyway, the
6 real troubles, I think signaled initially
7 in the pregnancy was when an ultrasound
8 showed what is called an echogenic cardiac
9 focus. In simply language, what that means
10 is that you see a white spot in the heart
11 around the -- on the ultrasound study --
12 from about sixteen, eighteen, twenty weeks.

13 We know from very extensive experience
14 with ultrasound that these white spots are
15 an indication for either conditions like
16 chromosome disorders, Down Syndrome for
17 example, or cysticfibrosis or cardiac
18 abnormalities.

19 We don't actually understand what makes
20 these spots like white. It's not clear
21 where it is an inflammatory spot or what
22 the origin is, or why it appears. But it's
23 a signal of potential trouble, that's all
24 that you can say about it. Nothing else.

25 Q. The next one?

1 A. We talked about the coloboma, the
2 failure of fusion of tissue as the eye is
3 forming. Nothing to do with hemorrhage, of
4 course, or bleeding.

5 The undescended testes, we talked
6 about, the failure to descend into the sac.
7 We talked about the laxity, the looseness
8 of the canal and the rings of the canal, in
9 getting to that canal and then to do down.

10 The bilateral hydroceles, you talked
11 about the envelope of tissue that wraps up
12 that fill with fluid. That's called a
13 hydrocele.

14 The scoliosis, here is a picture
15 showing Jayden with actually some curvature
16 of his spine. You already know that bony
17 abnormalities and connective tissue -- that
18 bony abnormalities are often associated
19 with ligaments, with joints, with muscles,
20 as sort of a looseness. The scoliosis, or
21 likely scoliosis, pointing to the
22 likelihood of this situation with Jayden,
23 that there is something wrong about this
24 connective tissues -- and blood vessels,
25 which are also connective tissue.

1 The hyperextensibility of his joints,
2 the looseness of his joints.

3 Hypertonia is the floppiness,
4 looseness.

5 The wide spaced nipples. The nipples
6 sit down here, which is the anterior line.
7 They should be in the midline. It's a
8 minor anomaly, having no significance by
9 itself. It's just an observation that it
10 is not quite right. Just like a tic in the
11 eye is there, something happened when he
12 was a fetus, maybe in those first few
13 months.

14 Cognitive delay, we knows that he has
15 speech, language and some learning issues
16 as well. No basis to believe that has to
17 do with the bleeding. It involves the back
18 of the brain, which has everything to do
19 with things like balance.

20 Delayed myelination. There is an MRI
21 of the brain which shows that there is a
22 delay in myelination. What that means is
23 -- we all see electrical cords, they're all
24 insulated, they are made with insulation
25 around the cords. The myelin is the

1 insulation. When the myelin is defective,
2 delayed or is not operating correctly then
3 the connectivity, the connections between
4 the brain neurons, between brain cells, is
5 impaired. There are all kinds of diseases
6 with disorders of the myelination. He
7 doesn't have that, but there is delay --
8 there is something wrong. That's all that
9 I can say, I can't say much more than that.
10 There's no good explanation of why he has
11 this myelination.

12 When you look at Jayden from the back
13 from the photograph, which I've never had
14 the opportunity to actually examining him,
15 you see that his ears tend to be more
16 prominent. Connective tissue. One of the
17 ways of determining that somebody who has
18 connective tissue disorder, like I often
19 see patients who walk into the office and
20 before they've sat down I'm already aware
21 that there is problem -- and there are a
22 number of other items that I can tell, just
23 before they sit down what the issues are.
24 So his ears are somewhat prominent. That's
25 all that I can say about it.

1 We talked about the pulmonary artery,
2 the pulmonary artery narrowing.

3 We talked about the transverse sinus
4 before.

5 Strabismus simply means crossed eyes.
6 So he has some cross-eyed issue. Again, we
7 don't know precisely why.

8 The problem is that he has all of these
9 issues and none of them have anything to do
10 with bleeding in the back of the brain.
11 That is the key point.

12 Q. All of these issues, do they have
13 anything to do with the labor and delivery
14 of this child, the handling of that by Dr.
15 Edmund Rhett?

16 A. Absolutely not. This is part of his
17 developmental, if you like, mal -- there is
18 something wrong.

19 The other point, of course, is that
20 when you begin to ask the question -- I'm
21 getting croaky.

22 Q. Would you like some water?

23 A. I'll get some. It's humid outside but
24 not in here -- (gets waters).

25 When you begin to ask the question why

1 this is occurring, there is no answer.

2 Q. When you reviewed the mother's records,
3 what did you learn?

4 A. The important thing about that child,
5 seeking the cause of why this all happened,
6 there is history in the record that draws
7 attention to the mother having used
8 alcohol. I have no idea, and the record
9 doesn't indicate, how much alcohol. It
10 sits there as an item, and that's all that
11 we can really say.

12 What we do know is remarkable
13 involvement on the mother's spine, because
14 the records show that heredity -- of course
15 your spine is mainly up of blocks called
16 vertebrae and there is a cushion inbetween
17 called the disks -- people refer to disk
18 trouble in their back. Each vertebra has a
19 disk inbetween but she has a fusion where
20 two of these blocks, two of the vertebra
21 are actually fused together as a block.
22 As we count down there is C-1, C-2, etc.
23 and then in the chest there is the vertebra
24 called T-1, T-2 and so on. So she's got T-
25 6 and T-7 fused. On top of that there is a

1 gap (phonetic) in the vertebrae. Also the
2 fusion is partial in T-5 and T-8, so there
3 is a whole long strip of vertebra in her
4 back that are seriously abnormal.

5 Now, on top of all that she has
6 multiple spina bifida defects at C-6, which
7 is just at the top of the neck, C-7 and C-8.
8 Important about this is that spina bifida
9 usually means that there is an opening in
10 the spine, usually lower down, through
11 which the spinal cord might emerge, causing
12 paralysis, causing -- pain, etc.

13 This is not what it is.

14 This however shows that development is
15 actually open -- but it doesn't show on the
16 skin of the mother, this we would only see
17 on an x-ray. The issue here however is
18 that there are multiple openings, multiple
19 hidden spina bifidas right down the spine;
20 that is positively abnormal, which means a
21 higher likelihood of having a child with a
22 true spina bifida. But that's another
23 issue.

24 There is also lordosis, which means
25 that -- normally your neck has this curve

1 and when it -- with this bony structure, it
2 goes straight, it doesn't have the curved
3 part.

4 Then on top of all that, we have twelve
5 but she has thirteen pairs of ribs.

6 So there is no discussion or argument
7 that mother has a connective tissue
8 disorder, which basically shows from the
9 record and that's how I know, from the
10 record, that the mother has serious issues.
11 That's all that I can say, from the record
12 because I have not examined her. The
13 record, of course, says nothing more.

14 Q. Connective tissue means what to the
15 functionability of this child?

16 A. Well, connective tissue disorder is
17 common. It simply means that there may be
18 a susceptibility to not stretch, a tendency
19 for a vessel to give way under pressure,
20 essentially in delivery a vessel may have
21 just popped. So there would be a suspicion
22 that the transverse sinus would tear, ease
23 or bruise and then bleed. It's highly
24 likely that there is a genetic transmission
25 from mother to child or a propensity or a

1 susceptibility for tissue integrity to be
2 breached. That's really all we can say.

3 But the real point is that under
4 ordinary circumstances that you would not
5 have thought that labor and delivery would
6 create any of these issues, even with the
7 application of the suction cup. But if the
8 vessels are weaker, if they don't stretch
9 normally, if they tend to be easily
10 breached, then they might tear and that's
11 what I believe happened in this case.

12 Q. Is that your opinion to a medical
13 degree of certainty, most probably, Doctor?

14 A. Yes.

15 Q. So then -- if you could refer to -- I
16 have so many things that I wanted to ask
17 you.

18 Do the multiple factors of this child
19 and this mother -- is it reasonable to say
20 medically that they attributed to the child
21 having a hemorrhage?

22 EDWARD GRAHAM: Objection, Your
23 Honor. Leading.

24 THE COURT: Counsel, I will
25 sustain that objection. You may not lead

1 the witness.

2 DIRECT EXAMINATION CONTINUED.

3 BY ROBERT HOOD:

4 Q. What is the significance of these
5 multiple factors?

6 A. I think that I have already explained
7 that the connective tissue involvement in
8 so many of those items that are listed can
9 apply. A weakness in the connective tissue
10 and blood vasculature of the child, blood
11 vessels.

12 Q. When this child was delivered, -- we
13 looked at the fetal monitoring strips --
14 and I know that you don't deliver babies?
15 But you did ---

16 A. I've delivered seventy-five babies.
17 Would you believe that?

18 Q. That's wonderful. Doctor, did this
19 child have a degree of hypoxia at birth,
20 lack of oxygen?

21 A. There is evidence to suggest that this
22 was the case. The evidence is such that
23 the acid level, we call it the pH, was
24 really nominal and low at 7.42, very low,
25 implying that there was an issue with the

1 state of the child. The child needed
2 oxygen at birth. There were abnormalities
3 on the electronic fetal monitoring strips.
4 There were plenty of indications that it
5 would be wise to get Jayden out of the
6 birth canal and delivered. And, of course,
7 the indications were that there was
8 evidence of lack of oxygen.

9 In fact, later -- about forty-eight
10 hours or more, it was reflected yet again
11 by another feature and that is the
12 platelets -- let me explain. In our blood
13 we have red cells, white cells and then
14 little cells that are called "platelets"
15 which have a lot to do with bleeding and
16 clotting. If we don't have a good number,
17 a normal number of platelets, we will
18 bleed. Platelets are made in the bone
19 marrow. When there is a lack of oxygen,
20 the bone marrow separates and starts
21 delivering platelets, which of course if
22 the amount drops to a certain level you
23 will bleed. There is no magic limit.
24 His dropped to 78,000 from values that were
25 160,000, so the indication simply is that -

1 - the drop in platelets is significant
2 evidence of hypoxia, or lack of oxygen, in
3 the birth process, during the birth
4 process.

5 Q. Was that recorded at MUSC, the Medical
6 University of South Carolina records, Page
7 27-489?

8 A. Yes, sir.

9 Q. And it says, "Platelet Count 78" -- and
10 can you explain the importance of that?

11 A. It is 78,000.

12 Q. That's 78,000. Is that normal?

13 A. No, it's not normal at all.

14 Q. All right. That is on Page 27-489 of
15 the MUSC records. What does that platelet
16 count tell you about the timing of this
17 child's injury?

18 A. It takes about forty-eight to seventy-
19 two hours for the platelet count to drop
20 like that once there is a lack of oxygen in
21 the birth process.

22 Q. You need more water?

23 A. I think I need another throat, but --
24 go ahead. Sorry.

25 Q. Why is this narrow or absent transverse

1 sinus important?

2 A. Because, again, it is simply implying
3 that the blood vessels are not normal.

4 Q. And the narrow pulmonary artery, why is
5 that important?

6 A. Same story.

7 Q. These genetic abnormalities, did Dr.
8 Rhett cause any of these?

9 A. No.

10 Q. Did he have any way to predict or
11 prevent these genetic abnormalities?

12 A. No way.

13 Q. To a medical degree of certainty, most
14 probably, does this child have connective
15 tissue disorder?

16 A. Yes.

17 Q. Did that make this child susceptible to
18 any injury?

19 A. Probably, yes.

20 Q. And is it genetically based, the fact
21 that this child had a bleed?

22 A. Well, as I have written in a new book
23 that I've finished called "Your Genes, Your
24 Health", everything is genetic.

25 Q. Thank you. Did the brain hemorrhage

1 cause this child to have the developmental
2 delays -- the damage that the case is
3 talking about, the developmental delays of
4 this child?

5 A. It is more probable than not that the
6 developmental delays, speech-language
7 issues, uh, learning issues have to do with
8 the rest of him, that the -- and we don't
9 actually know precisely how or why these
10 fifteen items on that list have occurred
11 but they shouldn't be too surprising. We
12 don't know today, even with the amazing
13 genetic technology that we currently use,
14 we don't know the cause of major birth
15 defects in about forty percent of cases.
16 When the clinicians are relatively mild in
17 and of themselves, that percentage rises to
18 fifty or sixty percent that we can't figure
19 out how this happened. It's not at all
20 unusual.

21 Q. Looking back at the first trimester of
22 the pregnancy and alcohol abuse, does this
23 child have ---

24 EDWARD GRAHAM: Objection, Your
25 Honor.

1 THE COURT: Is it leading?

2 EDWARD GRAHAM: It is not only

3 leading but it assumes facts in evidence

4 and it's defamatory, saying that ---

5 THE COURT: Before you answer

6 the question, let me hear the question,

7 sir, and I will respond to the objection.

8 Go ahead.

9 DIRECT EXAMINATION CONTINUED

10 BY ROBERT HOOD:

11 Q. Doctor, did you review the mother's

12 medical records?

13 A. Yes.

14 THE COURT: That is a different

15 question, but go ahead.

16 DIRECT EXAMINATION CONTINUED

17 BY ROBERT HOOD:

18 Q. And what of significance in the first

19 trimester did you find in the mother's

20 records?

21 A. That there was a history of alcohol use

22 in the first trimester, the first three

23 months of pregnancy.

24 Q. With regard to this child and his

25 problems and developmental delays, how is

1. that relevant?

2. A. Well, it is potentially relevant in the
3. sense that the prenatal records indicate
4. alcohol use but does not indicate how much
5. and precisely when. So it sits there as an
6. undefinable concern that may or may not
7. have to do with one or more of these items.

8. Q. Are these the kind of delays that you
9. see alcohol ingestion?

10. EDWARD GRAHAM: Objection.

11. Leading, Your Honor.

12. THE COURT: Overruled as to that
13. question.

14. THE WITNESS: There is something
15. called fetal alcohol syndrome

16. DIRECT EXAMINATION CONTINUED

17. BY ROBERT HOOD:

18. Q. Say that word again, those words?

19. A. Fetal alcohol syndrome, that is what it
20. is called.

21. Q. Yes, sir.

22. A. I can say that Jayden does not have the
23. fetal alcohol syndrome.

24. Q. Okay.

25. A. However, the medical literature is very

1 clear about something called an incomplete
2 fetal alcohol syndrome.

3 Q. Incomplete?

4 A. Incomplete, (affirmative nod). So just
5 like anything else in life, there are
6 gradations -- slow, slight, not quite there
7 yet -- involvement of anything that you
8 might care to think so. It is possible --
9 that's all that I can say -- that there was
10 alcohol taken that wasn't so severe as to
11 cause the entire syndrome, which by the way
12 includes mental retardation, heart defects
13 and other significant birth defects but was
14 enough to cause troubles. But this is all
15 speculation. We don't know. It sits there
16 undefined. It's an item.

17 Q. Does this child have neurocognitive
18 delays?

19 A. This child has delays, no question.
20 Very often, in association with multiple of
21 what appear to be minor birth defects, what
22 we call congenital abnormalities, there is
23 frequently an associated involvement of the
24 brain: learning issues, disorders of
25 speech and language, medical and nonmedical

1 in combination.

2 Q. To a medical degree of certainty, most
3 probably, Dr. Milunsky, does this child
4 have these neurocognitive delays as a
5 result of what you learned from the medical
6 records with regard to the mother's use of
7 alcohol in the first trimester?

8 THE COURT: Counsel, I -- there
9 was an earlier objection to leading and
10 that is a leading question that you've
11 posed to the expert. Please ---

12 ROBERT HOOD: I will rephrase
13 it. Yes, sir. Thank you, Your Honor.

14 THE COURT: Thank you.

15 DIRECT EXAMINATION CONTINUED

16 BY ROBERT HOOD:

17 Q. To a medical degree of certainty, most
18 probably, has the alcohol had an impact in
19 this case?

20 A. I think I've already stated that it is
21 not possible to, uh, assign a risk to
22 Jayden from the alcohol taken; since, to
23 begin with, we don't know how much was
24 taken and when precisely it was taken. So
25 it remains an item of concern that it could

1 be a contributing factor, yet one of the
2 multiple factors that are operating in
3 Jayden's case to cause the issues or some
4 of the issues but we don't actually know
5 for sure.

6 Q. All right. Is there any way to
7 scientifically know for sure, a hundred
8 percent?

9 A. No, actually not.

10 Q. What about fifty-one percent?

11 A. No, no. There is no way to assign a
12 population or any other kind of risk with
13 reference to the alcohol here. It is more
14 probably than that that Jayden's problems
15 occurred as a consequence of multiple
16 factors that have nothing to do with the
17 bleeding, but rather from either the
18 alcohol and/or his vasculature problem, his
19 connective tissue problems.

20 Q. Is that your opinion to a medical
21 degree of certainty, most probably, Doctor?

22 A. Yes.

23 ROBERT HOOD: Thank you for
24 coming. We put the blowups in evidence.

25 THE COURT: Counsel, do you mean

1 the blowups with the conditions listed?

2 ROBERT HOOD: Yes, sir.

3 THE COURT: We will give Counsel
4 an opportunity to speak on that later. Go
5 ahead. Cross examination?

6 EDWARD GRAHAM: Yes, sir, thank
7 you, Your Honor.

8 CROSS EXAMINATION

9 BY EDWARD GRAHAM:

10 Q. Doctor, do you have your deposition in
11 front of you?

12 A. No.

13 EDWARD GRAHAM: Your Honor, may
14 I approach with the original.

15 THE COURT: You may

16 EDWARD GRAHAM: Here you are,
17 sir, (tendering).

18 THE WITNESS: Thank you.

19 CROSS EXAMINATION CONTINUED

20 BY EDWARD GRAHAM:

21 Q. Doctor, let me ask you at the outset,
22 were you furnished the deposition
23 transcripts of any radiologists in this
24 case?

25 A. Yes, Dr. Zimmerman.

1 Q. Do you know Dr. Zimmerman?

2 A. Yes.

3 Q. Have you invited Dr. Zimmerman to speak
4 at the international conferences that you
5 host on an annual basis?

6 A. At least twice.

7 Q. Do you consider Dr. Zimmerman to be one
8 of the top pediatric neuroradiologists in
9 the world?

10 A. I wouldn't choose him otherwise.

11 Q. You just told us that hypoxia caused
12 this child to have a drop in platelets; did
13 I understand that correctly?

14 A. I did say that.

15 Q. In fact, brain bleeds cause a drop in
16 platelets; don't they, Doctor?

17 A. No. What happens is that when there is
18 a bleed and clotting occurs, clots are
19 sequestered. In other words, the clot
20 grabs the platelets and platelet count
21 drops. So they go hand in hand, the
22 bleeding and the clotting.

23 Q. Let me ask you, sir, please turn to
24 Page 78 of your deposition.

25 A. I've got it.

1 Q. Starting at Line 15, I asked the
2 following question, (reading):

3 Q. Am I correct that you cannot
4 testify to a reasonable degree of medical
5 certainty that the most probable cause of
6 the reduction of platelets was hypoxia?

7 A. I just answered the question,
8 it's one of the other or both.

9 You were referring to either hypoxia
10 causing platelets or brain bleeds causing
11 platelets. Correct?

12 A. Good answer.

13 Q. Correct?

14 A. Good answer.

15 Q. Then I asked, the next line, Line 21,
16 (reading):

17 Q. Okay. But I'm really asking
18 about the probability questions, more
19 likely than not. Can you tell the jury --
20 do I have to worry about you telling the
21 jury that it's more likely than not hypoxia
22 caused the drop in platelets?

23 A. I've answered as best I can,
24 namely, that it's the intrapartum hypoxia
25 and/or the sequestration of platelets.

1 Correct?

2 A. Good answer. The evidence -- if you're
3 getting at the evidence of hypoxia, I'm not
4 sure what you actually are getting at, but
5 if you're getting at the question of the
6 hypoxia issue related to platelets, just
7 like anything else, someone has to look at
8 everything not just at a platelet count.

9 So you have the other evidence of the child
10 not doing well, needing oxygen, the pH, the
11 acidosis, the acid state of the child.

12 There are multiple factors that are
13 operating that imply and indicting and
14 point to the fact that there is a lack of
15 oxygen operating which must have caused the
16 drop in platelets. But that also
17 acknowledges that if there is a bleed of
18 any major significance, then platelets can
19 also be sequestered/grabbed.

20 Q. Doctor, do you recognize that Jayden

21 W. 's bleeds in various locations in
22 his brain were significant bleeds?

23 A. Yes, -- and what you regard as
24 significant and what I regard as
25 significant.

1 Q. You do regard it as significant?

2 A. Yes.

3 Q. And significant bleeds like that are
4 frequently associated with a drop in
5 platelets, correct?

6 A. They may be.

7 Q. And also when there is a drop -- when
8 there is massive bleeding, the blood
9 vessels can't do the job that they're
10 designed to do or delivering oxygen and
11 nutrients to the developing tissues of a
12 baby; correct?

13 A. That's too vague and extensive
14 statement to have any meaning.

15 Q. All right. Blood vessels deliver
16 nutrients and oxygen to developing tissues,
17 correct?

18 A. Yes.

19 Q. If the blood pours out into the spaces
20 instead of where nature intended it to go,
21 the oxygen and nutrients don't get where
22 they were intended to go. Right?

23 A. Like where? To the base of the brain?

24 Q. To the developing tissues?

25 A. Where is that?