

**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 1**

Edward L. Graham
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J. Layton Ruffin
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Attorneys for Respondents

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jamesetta Washington, as Guardian ad Litem for
Jayden Washington, a minor

☒ Plaintiff

v.

Edmund Rhett, Jr., M.D., Low Country Obstetrics &
Gynecology, P.A., Tenet South Carolina, Inc., D/B/A
East Cooper Regional Medical Center

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2007-CP-10-1553

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Edward L. Graham, Bar No. 2483

Address:

Graham Law Firm

PO Box 550

Florence, SC 29503

phone: (843) 662-3281 fax: (843) 665-0254

e-mail: egraham@grahamlawfirm.net other:

Defendant's Attorney:

Chilton G. Simmons*, Bar No.

Address:

Hood Law Firm, LLC

PO Box 1508

Charleston, SC 29402

phone: 843-577-4435 fax: 843-722-1630

e-mail: other:

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

* Additional Counsel of Record:

Lindsay K. Smith Yancey

Pratt-Thomas Walker, P.A.

P.O. Drawer 22247

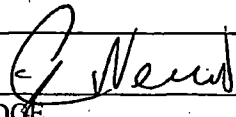
Charleston, SC 29413-2247

James E. Scott, IV

Young Clement Rivers, LLP

P.O. Box 993

Charleston, SC 29402-0993

SECTION I: Hearing Information	
Nature of Motion:	
Estimated Time Needed:	Court Reporter Needed: ☐ YES / ☒ NO
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for ☒ Plaintiff / ☐ Defendant	
Date submitted	
SECTION III: Motion Fee	
☒ PAID – AMOUNT: \$25.00 ☐ EXEMPT: (check reason)	
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☒ Motion Fee to be paid upon filing of the attached order. ☐ Other:	 JUDGE CODE: <u>227</u> Date: <u>Oct 14, 2007</u>
CLERK'S VERIFICATION	
Collected by: _____	Date Filed: _____
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Jamesetta Washington, as Guardian ad
Litem for Jayden Washington, a minor

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics and Gynecology, P.A.; Tenet
South Carolina, Inc. d/b/a East Cooper
Regional Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A No: 07-CP-10-1553

MULTI WEEK TRIAL DOCKET

CASE MANAGEMENT ORDER

FILED
2009 OCT 20 PM 3:25
JULIE J. ARMSTRONG
CLERK OF COURT

The Court hereby issues this order for the management of this case pursuant the authority conferred by the Administrative Order of the Chief Justice establishing the Multi Week Trial Docket for Charleston County, South Carolina.

COMPLEX CASE

The Court hereby finds that this case is complex in that it involves numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve, management of a large number of witnesses, a substantial amount of documentary evidence and a large number of separately represented parties. Complex jurisdiction is assigned to this Court for the disposition of remaining motions and the trial of the case. Nothing herein prevents this Court from assigning other qualified judges or special referees to resolve motions and discovery issues pending in this case.

PRIMARY CASE MANAGEMENT DATES

This case is set for jury trial for the term of multi week trial court beginning March 1, 2010. There can be no postponements, continuances, protections for counsel or parties, or other relief that would delay the trial of this case.

Last date to add a party: November 2, 2009

Last date to dismiss pursuant to Rule 40, SCRCP: February 22, 2010

Last date to amend pleadings as to existing parties: January 4, 2010

Last date for all parties to designate expert witnesses: October 30, 2009

CW
#133

Last date for all parties to designate rebuttal expert witnesses: November 30, 2009

Last date to name fact witnesses (without unanimous consent): January 4, 2009

All Discovery motions shall be filed by: January 11, 2009

All Discovery shall be completed by: January 29, 2010

All dispositive motions shall be filed by: February 1, 2009

Mediation by (required even if previously done, see below): February 15, 2010

Exchange of proposed exhibit list by: February 18, 2010

Counsels' exhibit conference concluded by: February 18, 2010

Exchange of complete witness and final exhibit lists and motions in limine by: February 18, 2010

All exhibits pre-marked and a complete list provided to Clerk by: February 26, 2010
(Exhibits which are not pre-marked may be excluded by trial judge).

Trial readiness conference conducted by: February 22, 2010

Pre-trial briefs and voir dire forwarded to Judge ^{Baxley} ~~Newman~~ by: February 27, 2010

Proposed jury charges submitted to Judge ^{Baxley} ~~Newman~~ by: February 27, 2010

Trial Date:

Term beginning: March 1, 2010

Estimated length of trial: Two Weeks

The final pre-trial conference will be conducted immediately prior to the commencement of the trial.

MANDATORY MEDIATION

This Order requires mediation between the parties prior to trial, regardless of whether a case has been previously mediated. All attorneys, parties, and insurance representatives with full settlement authority must be present at the mediation. Attendance by telephone or other electronic means is not permitted. Full settlement authority shall be defined as, in the case of the insurance carrier, "a person or persons familiar with the case and who is(are) empowered with the decision to offer a settlement sum up to the existing demand of the Plaintiff or the policy limits of coverage, whichever is less." If more than one carrier provides coverage for a particular party, each and every carrier must participate. Full settlement authority for any party means the party individually or a representative who has binding authority to make a final decision for that

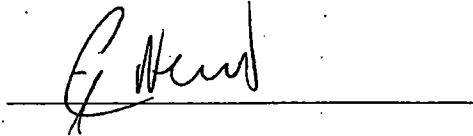
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party. In the event that insurance coverage issues are in dispute in the case, the term "all attorneys" includes coverage counsel for the carrier.

TRIAL READINESS CONFERENCE

At the trial readiness conference before this Court, the parties will be prepared to address any outstanding discovery motions, in limine motions, the exchange of actual exhibits and exhibit lists, and the exchange or viewing of demonstrative evidence. The Court will also address such issues regarding scheduling of any necessary pre-trial hearings, trial technology, jury voir dire and jury composition, any issues regarding compilation of the evidentiary record, and such other matters as the parties may bring to the Court's attention or as the Court may determine in its discretion.

Dated: 6/14/07

A handwritten signature in black ink, appearing to be "E. H. ...", is written over a horizontal line.

Presiding Judge.



Graham
Law Firm, P.A.

Edward L. Graham
Mary H. Watters

383 W. Cheves Street (29501)
P. O. Box 550
Florence, SC 29503

Telephone (843)662-3281
Facsimile (843) 665-0254

September 24, 2009

The Honorable Julie J. Armstrong
Clerk of Court – Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

Re: Jamesetta Washington as Guardian ad Litem of Jayden
Washington, a minor v. Edmund Rhett, Jr., M.D. Low Country
Obstetrics and Gynecology, P.A.; Tenet South Carolina, Inc.
d/b/a East Cooper Regional Medical Center

C/A: 07-CP-10-1553

Dear Ms. Armstrong,

Please find enclosed for filing one original and three copies of a
Multi Week Trial Docket Case Management Order together with a
check in the amount of \$25.00 to cover the filing fee. This Case
Management Order has been agreed upon by all parties for the
above reference case, as requested by Judge Newman.

Please return three copies of the enclosed document in the
enclosed postage-paid envelope once it has been filed with the
Court.

By copy of this letter, this document is being supplied to all parties
of record.

Please do not hesitate to contact our office with any questions.

With Kind Regards,

Martha Pavelek
Paralegal to Edward L. Graham

/mjp
Enc.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jamesetta Washington, as GAL for Jayden

W

☐ Plaintiff

v.

Edmund Rhett, Jr., Et Al

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2007-cp-10-1553

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Edward L. Graham; Mary H. Watters, Bar No.
2483; 69624
Address:
P.O. Box 550, Florence, SC 29503
phone: 843-662-3281 fax: 843-665-0254
e-mail: other:

Defendant's Attorney:
Linsay Smith-Yancey; Chilton Simmons; James E.
Scott, Iv, Bar No.
Address:
P.O. Drawer 22247, Charleston; P.O. Box 1508,
Charleston; P.O. Box 993, Charleston
phone: fax:
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Leave to Amend Summons and Complaint

Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: 25.00

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☒ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: 2127

Date: 11-2-09

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

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

Plaintiff,)

vs.)

Edmund Rhett, Jr., M.D., Low Country)
Obstetrics & Gynecology, P.A., East Cooper)
Community Hospital, Inc.)

Defendants.)

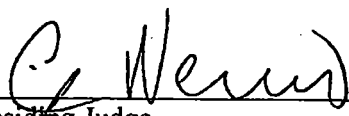
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO.: 07-CP-10-1553

**CONSENT ORDER TO
AMEND SUMMONS AND COMPLAINT**

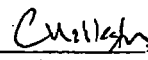
FILED
2009 NOV -4 AM 9:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter comes before the Court by Motion of the Plaintiff seeking leave to amend the Summons and Complaint in the above captioned case so as to add a new Defendant, AMN Services, Inc., f/k/a Nurses RX, Inc. A copy of the proposed amended pleading is attached hereto. Counsel for Defendants consent, and all counsel stipulate that granting leave to make this amendment will not in any way delay the trial.

AND IT IS SO ORDERED.

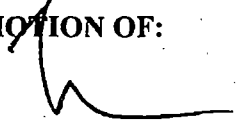


Presiding Judge
Charleston County
Court of Common Pleas

 South Carolina
October 2, 2009
Nov

[CONSENT PAGES TO FOLLOW]

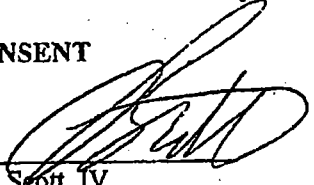
ON MOTION OF:



Edward L. Graham
Mary H. Watters
Graham Law Firm, P.A.
Post Office Box 550
Florence, South Carolina 29503
Attorney for the Plaintiff

[CONSENT PAGE TO FOLLOW]

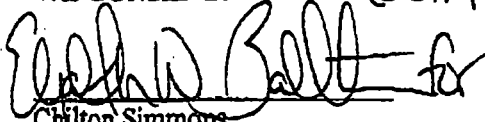
WE CONSENT



James E. Scott, IV
Young Clement Rivers, LLC
Post Office Box 993
Charleston, South Carolina 29402-0993
Attorney for Low Country Obstetrics and Gynecology

WE CONSENT:

(SC#74965)

A handwritten signature in black ink, appearing to read "Chilton Simmons", written over a horizontal line.

Chilton Simmons

Hopd Law Firm, LLC

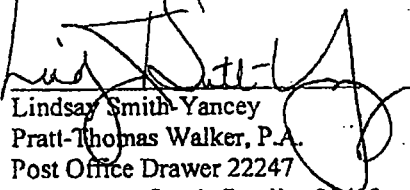
Post Office Box 1508

Charleston, South Carolina 29402

Attorney for Edmund Rhett, Jr.

[CONSENT PAGE TO FOLLOW]

WE CONSENT:



Lindsay Smith-Yancey

Pratt-Thomas Walker, P.A.

Post Office Drawer 22247

Charleston,, South Carolina 29413

and

Attorney for Tenet South Carolina, Inc. ~~XXXX~~ East Cooper Regional Medical Center

[CONSENT PAGE TO FOLLOW]

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-10-1553

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., East Cooper
Community Hospital, Inc., and AMN Services,
Inc., f/k/a Nurses RX, Inc.,

Defendants.

ORDER *Dismissing*
ATTN Services, Inc.

FILED
2010 MAR -2 PM 5:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Just
This matter came before me by Verified Petition of Jamesetta Washington, Guardian ad Litem for Jayden W. Following a hearing on March 2, 2010 at which time I heard from Petitioner, her counsel and all other interested parties, I find that the Court has jurisdiction of the parties and of the subject matter, and that all parties entitled to Notice of this Hearing have been provided proper Notice, or waived their right to Notice in writing or by personal appearance at the Hearing.

Based on the Verified Petition, comments of counsel, file materials and testimony of the Guardian ad Litem, I find that the settlement as described and set forth in the Verified Petition is in fact in the best interest of the minor child and should be approved by the Court. I find that a check should be issued, totaling \$80,000.00, payable to Plaintiff's counsel within thirty (30) days. I find that Plaintiff's attorney has done an excellent job for his client on a difficult case; and that the contractual fee of 40% or \$32,000.00 is just and proper, is approved by the Court and is payable from the settlement. I further find that litigation expenses to date incurred by counsel in excess of the gross settlement, were necessary, proper and beneficial in the

TPGL 3139631v1

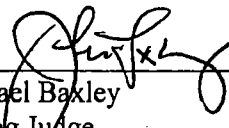
representation of the minor child, and should be approved by the Court and reimbursed, to the extent possible, out of the minor child's share of the gross recovery. I find the statutory Medicaid lien applies only to the child's net recovery of which there is none at this time and that further recovery is expected out of which the statutory Medicaid lien can be paid. I find it would be just and proper for the Guardian ad Litem to consummate the settlement, execute and deliver a proper receipt and Covenant Not to Sue the settling Defendant, AMN Services, Inc., f/k/a Nurses RX, Inc. (hereafter "AMN") on behalf of the Plaintiff, and execute and deliver any other documents necessary to effectuate the settlement. I further find that the Plaintiff through counsel has represented that, as part of the settlement, he agrees to abandon any claim at trial related to the alleged negligence of Judy Mercer, R.N. so as to extinguish any claim for indemnity by the hospital based on such alleged negligence by operation of law.

 NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The settlement agreement as set forth in the Verified Petition shall be and the same is hereby approved as being in the minor's best interest;
2. The Petitioner is authorized as Guardian ad Litem to consummate the settlement, execute and deliver the proper receipt and Covenant Not to Sue, and execute and deliver all other documents necessary to the foregoing;
3. AMN Services, Inc., f/k/a Nurses RX, Inc. or its insurer is authorized and directed to issue a check totaling \$80,000.00 payable to Plaintiff's counsel within thirty (30) days;
4. All claims against AMN and its agent, Judy Mercer, R.N., are dismissed with prejudice.

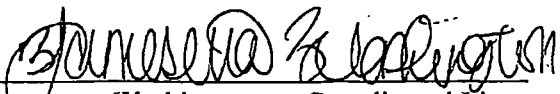
5. The Petitioner as Guardian ad Litem is authorized and directed to pay Graham Law Firm, P.A.'s contractual fee and also to use the balance of funds to partially reimburse litigation expenses as described in the Verified Petition, out of the minor child's portion of the gross recovery.
6. The Plaintiff's claims arising out of alleged negligence by Judy Mercer, R.N. are hereby abandoned by Plaintiff so as to extinguish any potential liability claim by East Cooper Regional Medical Center against the settling Defendant; with the Plaintiff having the right to proceed with other distinct liability claims against East Cooper Regional Medical Center and other Defendants.
7. The remaining claim against Dr. Edmund Rhett, Low Country Obstetrics and Gynecology, P.A. and East Cooper Regional Medical Center are to remain on the active trial roster.

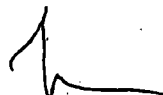
AND IT IS SO ORDERED this 2nd day of March, 2010.



J. Michael Baxley
Presiding Judge
Ninth Judicial Circuit

WE CONSENT:


Jamesetta Washington, as Guardian ad Litem
of Jayden W:
Plaintiff/Petitioner



Edward L. Graham, Esquire
Graham Law Firm, P.A.
P. O. Box 550
Florence, SC 29503
Attorney for Plaintiff/Petitioner



John K. Blincow, Jr.
Turner Padgett Graham & Laney P.A.
P. O. Box 22129
Charleston, SC 29413-2129
Attorneys for Defendant AMN Services, Inc., f/k/a Nurses RX, Inc.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Jamesetta Washington, as Guardian ad)
Litem for Jayden W minor)

Plaintiff,)

vs.)

Edmund Rhett, Jr., M.D., Low Country)
Obstetrics and Gynecology, P.A.; Tenet)
South Carolina, Inc., d/b/a East Cooper)
Regional Medical Center,)

Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2007-CP-10-01553

**ORDER DENYING
PLAINTIFF'S MOTION FOR
NEW TRIAL ABSOLUTE**
(Ending Case)

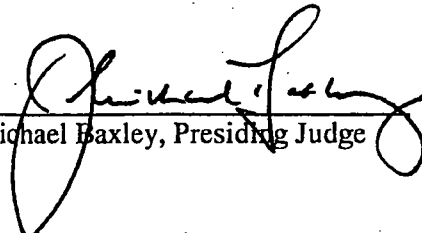
2010 SEP 3 AM 11:40
JULIE A. STRONG
CLERK OF COURT

FILED

This medical malpractice claim, after a three week trial, ended in a jury verdict for Defendants on August 11, 2010. Plaintiff has now moved for a new trial absolute, citing six (6) reasons for this requested relief. After review, the Court finds Plaintiff's cited bases for relief are not meritorious, the trial was fair, and there was substantial evidence in the record to support the jury's decision. Therefore, Plaintiff's post-trial motion is denied, and the jury verdict for Defendants is confirmed.

IT IS SO ORDERED.

August 26, 2010


J. Michael Baxley, Presiding Judge

This judgment was entered on this ____ day of _____ 2010.
A copy mailed first class on this ____ day of _____ 2010, to attorneys of record
as follows:

Attorney for the Plaintiffs
Edward L. Graham, Esquire
383 W. Cheves Street
Florence, SC 29501

Attorney for the Defendants
Molly H. Craig, Esquire
P.O. Box 1508
Charleston, SC 29402

CLERK OF COURT



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL
BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
HARTSVILLE, SOUTH CAROLINA 29550
TELEPHONE: (843) 383-4114
FAX: (843) 383-4116
E-MAIL: jbaxley@sccourts.org

August 26, 2010

Honorable Julie J. Armstrong
Charleston County Clerk of Court
c/o Don Michele
100 Broad Street, #106
Charleston, SC 29401

Re: Wieters v. Bon Secours-St. Francis Xavier Hospital, et al
Case Number: 06-CP-10-1397

Dear Don:

Attached please find a Form 4 Order Denying Plaintiff's Post Trial Motions that has been completed in the above listed case. Please file this Order and serve it on the parties. This case is now fully ended at the trial level.

Thank you for your assistance in this matter.

Sincerely yours,


J. Michael Baxley


Enclosure

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Jamesetta Washington, as Guardian ad Litem
of Jayden W a minor,

Plaintiff,)

vs.)

Edmund Rhett, Jr., MD, Low Country
Obstetrics & Gynecology, PA, East Cooper
Community Hospital, Inc. and AMN Services,
Inc. f/k/a Nurses RX, Inc.,

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2007-CP-101553-_____

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:
Edward L. Graham, Bar No. 2843
Address:
Graham Lw Firm, P.A.
P.O. Box 550
Florence, SC 29503
Phone: 843-662-3281 Fax 843-665-0254
E-mail: egraham@grahamlawfirm.net
Other: _____

Defendant's Attorney:
Lindsay Smith-Yancey, D. Jay Davis, Jr., Bar No.
Address:
(Smith-Yancey) Pratt-Thomas Walker, 16
Charlotte St, Charleston, SC 29403
(Davis) Young Clement Rivers, LLP, 28 Broad St,
Charleston, SC 29401
Phone: 843-727-2200, 843-577-4000 Fax _____
E-mail: lsy@p-tw.com, jdavis@ycrlaw.com
Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

12/2/11
Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT: \$ _____
☐ EXEMPT:
(check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO: 2007-CP-10-1553

Jamesetta Washington, as)
Guardian Ad Litem of)
Jayden W , a minor)

Plaintiff,)

v.)

Edmund Rhett, Jr., M.D., Low)
Country Obstetrics & Gynecology,)
P.A., East Cooper Community)
Hospital, Inc., and AMN Services,)
Inc. f/k/a Nurses RX, Inc.,)

Defendants.)

ORDER
APPROVING
SETTLEMENT *JAB*

BY
JULIE J. ARMSTRONG
CLERK OF COURT

2011 DEC -2 PM 1:09

FILED

JAB
This matter came before me by Verified Petition of Jamesetta Washington, Guardian ad Litem for Jayden W , seeking Court approval of partial settlements by the Plaintiff with Defendant Low Country Obstetrics & Gynecology, P.A. (hereinafter "OB Group") and East Cooper Community Hospital, Inc. (hereinafter "Hospital"). The case was tried against Defendants Dr. Rhett and the OB Group between July 26, 2010 and August 11, 2010. Prior to trial, I heard from the parties in open court and orally approved from the bench the Plaintiff's partial settlement with the Defendant Hospital. During trial, at the beginning of jury deliberations, I heard from the parties in open court and orally approved from the bench the Plaintiff's partial settlement with the OB Group. I am now asked to enter a formal written order to confirm my approval of these partial settlements, as well as related issues concerning attorneys fees, reimbursable litigation expenses and proposed arrangements concerning the Medicaid lien. After hearing from the parties and counsel in open court as noted above, and after careful review of the Verified Petition, attached affidavit and materials, I find that the Court has

jurisdiction of the parties and of the subject matter, and that all parties entitled to notice of the hearings were present and represented at the prior hearings.

Based on the Verified Petition, comments of counsel, file materials and testimony of the Guardian ad Litem at the hearings and by Affidavit, I find that the settlement as described and set forth in the Verified Petition is in fact in the best interest of the minor child and should be approved by the Court. I find that Plaintiff's attorney has done an excellent job for his client on a difficult case; and that the contractual fee is a fair and reasonable fee based on all of the factors to be considered under the Rules of Professional Conduct and should be approved by the Court. I further find that the expenses in the total amount of \$353,319.65 and net amount of \$305,319.65 after application of \$48,000 from a prior partial settlement, itemized in an exhibit, were necessary, proper and beneficial in the representation of the minor child, and should be approved by the Court and reimbursed out of the minor child's share of the gross recovery. I further find that Plaintiff is responsible for satisfying all statutory liens and insurance subrogation demands, if any, but I further find that no private health insurance company has asserted a subrogation demand; and Plaintiff is seeking compromise of the Medicaid lien. I find that Plaintiff seeks leave to execute and deliver to the settling Defendants the necessary settlement documents, pay her contractual attorneys fees (except for \$47,410.92 in fees to be held in escrow) and expense reimbursements and retain the balance of \$99,091.27 (representing net after attorneys fees and expenses and \$47,410.92 in escrowed attorneys fees) in trust pending further negotiations or court proceedings regarding a potential compromise with Medicaid. I find it would be just and proper for the Guardian ad Litem to consummate the settlement, execute and deliver a proper receipt and release on behalf of the minor Plaintiff, execute and deliver any other documents necessary to effectuate the settlement, and hold the balance of

\$99,091.27 in trust pending further negotiations or court proceedings regarding a potential compromise with Medicaid.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

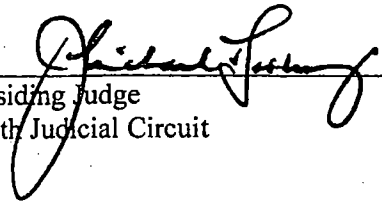
1. The settlement agreement as set forth in the Verified Petition shall be and the same is hereby approved as being in the minor's best interest;
2. The Petitioner is authorized as Guardian ad Litem to consummate the settlement, execute and deliver the proper receipt and release, and execute and deliver all other documents necessary to the foregoing;
3. The Petitioner is authorized to execute and deliver the necessary settlement documents to the settling Defendants; and Defendants are authorized and directed to promptly issue and deliver to Plaintiff's counsel their respective checks totaling \$595,000, payable to Plaintiff's counsel; \$395,000 from the Defendant Hospital and \$200,000 from the Defendant OB Group.
4. The Petitioner as Guardian ad Litem is authorized and directed to pay Graham Law Firm, P.A. its contractual attorneys fees as set forth in the Verified Petition (except that \$47,410.92 shall be retained in escrow pending resolution of the Medicaid lien);
5. The Petitioner as Guardian ad Litem is also authorized and directed to pay to Graham Law Firm, P.A. reimbursement of net litigation expenses as described in the Verified Petition out of the minor child's portion of the gross recovery;
6. The Petitioner and her counsel are authorized and directed to retain the sum of \$99,091.27 (representing \$51,680.35 in net after attorneys fees and \$47,410.92 in escrowed attorneys fees) in the Graham Law Firm Trust Account pending

23
3

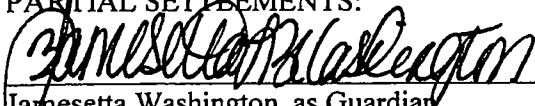
resolution of the Medicaid lien by satisfactory compromise, settlement negotiations or further court proceedings;

7. The balance of the \$51,680.35, if any, remaining after satisfaction of the Medicaid lien shall then be payable for the benefit of the minor, Jayden W. , either to a Pooled Special Needs Trust or, if the net cash exceeds \$10,000, to a Conservator appointed by the Charleston County Probate Court; and
8. If the net cash for the minor's benefit does not exceed \$10,000, no Conservator will be required; and Plaintiff's counsel may pay the net recovery to the Guardian ad Litem, on behalf of the minor, if she chooses not to establish a Pooled Special Needs Trust for her son;
9. Nothing herein shall be construed to suggest that Medicaid is entitled to any of Plaintiff's attorneys fees earned and approved in this Order. Escrowing a portion thereof is intended to protect the settling Defendants from any potential responsibility for the Medicaid lien, and is not intended to require Plaintiff's attorney to pay his client's Medicaid lien in whole or in part. The escrowed attorneys fees shall be paid to Plaintiff's counsel upon resolution of the Medicaid lien.
10. These partial settlements shall not in any way prevent Plaintiff from proceeding with the appeal and any further claims against Dr. Rhett, except to the extent that any setoffs may be appropriate in the future in case of a successful appeal and further recovery by the Plaintiff.

AND IT IS SO ORDERED this 21st day of November, 2011.


Presiding Judge
Ninth Judicial Circuit

WE CONSENT AND WAIVE OUR RIGHT TO ANY FURTHER HEARING ON THESE
PARTIAL SETTLEMENTS:


Jamesetta Washington, as Guardian
ad Litem of Jayden W. [redacted]
Plaintiff/Petitioner


Edward L. Graham, Esquire
Graham Law Firm, P.A.
P.O. Box 550
Florence, SC 29503
Attorney for Plaintiff/Petitioner

(see attached consent)

Lindsay Smith-Yancey, Esquire
Pratt-Thomas Walker
16 Charlotte Street
Charleston, SC 29403
**Attorney for Defendant East Cooper Community
Hospital, Inc.**

(see attached consent)

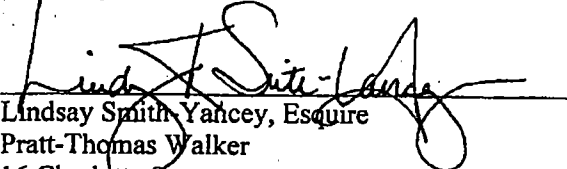
D. Jay Davis, Jr., Esquire
Young Clement Rivers, LLP
28 Broad Street
Charleston, SC 29401
**Attorney for Defendant AMN Services, Inc.
f/k/a Nurses RX, Inc.**

Presiding Judge
Ninth Judicial Circuit

WE CONSENT AND WAIVE OUR RIGHT TO ANY FURTHER HEARING ON THESE
PARTIAL SETTLEMENTS:

Jamesetta Washington, as Guardian
ad Litem of Jayden W:
Plaintiff/Petitioner

Edward L. Graham, Esquire
Graham Law Firm, P.A.
P.O. Box 550
Florence, SC 29503
Attorney for Plaintiff/Petitioner



Lindsay Smith-Yancey, Esquire
Pratt-Thomas Walker
16 Charlotte Street
Charleston, SC 29403
**Attorney for Defendant East Cooper Community
Hospital, Inc.**

D. Jay Davis, Jr., Esquire
Young Clement Rivers, LLP
28 Broad Street
Charleston, SC 29401
**Attorney for Defendant AMN Services, Inc.
f/k/a Nurses RX, Inc.**

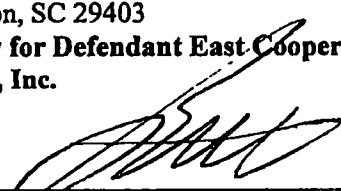
Presiding Judge
Ninth Judicial Circuit

WE CONSENT AND WAIVE OUR RIGHT TO ANY FURTHER HEARING ON THESE
PARTIAL SETTLEMENTS:

Jamesetta Washington, as Guardian
ad Litem of Jayden W:
Plaintiff/Petitioner

Edward L. Graham, Esquire
Graham Law Firm, P.A.
P.O. Box 550
Florence, SC 29503
Attorney for Plaintiff/Petitioner

Lindsay Smith-Yancey, Esquire
Pratt-Thomas Walker
16 Charlotte Street
Charleston, SC 29403
**Attorney for Defendant East Cooper Community
Hospital, Inc.**



D. Jay Davis, Jr., Esquire
Young Clement Rivers, LLP
28 Broad Street
Charleston, SC 29401
**Attorney for Defendant
Lowcountry Obstetrics & Gynecology, P.A**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., Tenet
South Carolina, Inc., d/b/a East Cooper
Regional Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO.: 07-CP-10-1553

COMPLAINT

2007 APR 16 PM 3:05
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

COMES NOW Plaintiff complaining of Defendants above named and would show unto the
Court as follows:

1. Plaintiff Jamesetta Washington (hereinafter, "Plaintiff") is a citizen and resident of Lexington County, South Carolina, and is the mother of Jayden W. (hereinafter, "Jayden").
2. Plaintiff has been appointed, or is in the process of being appointed, as Guardian ad Litem for Jayden and brings this action as Guardian ad Litem for Jayden.
3. Defendant Rhett (hereinafter "Rhett") is, upon information and belief, a physician duly licensed to practice medicine within the State of South Carolina, who hold himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care, who is a citizen and resident of Charleston County, South Carolina, and who maintains an office in Charleston County, South Carolina, for the practice of obstetrics and gynecology.
4. Defendant Low Country Obstetrics & Gynecology, P.A., (hereinafter, "OB/GYN,

P.A.") is, upon information and belief, a professional corporation or professional association which holds itself out to the public as having specially trained physicians, facilities, equipment and staff for the provision of high quality obstetrical and gynecological care, and which conducts its business in Charleston County, South Carolina. Defendant OB/GYN, P.A. is, upon information and belief, the employer of Defendant Rhett.

5. Defendant Tenet South Carolina, Inc. (hereinafter "Tenet") is, upon information and belief, a hospital corporation which owns and operates a hospital in Charleston County, South Carolina, commonly known as "East Cooper Regional Medical Center", and holds itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical care. Defendant Tenet is named as a party to this action by virtue of the acts and/or omissions of its employees and agents, within the course and scope of that respective employment and agency.

6. In 2001, Plaintiff Jamesetta Washington became pregnant with her son, Jayden. and submitted herself to the medical care and attention of various physicians at the OB/GYN, P.A., including but not limited to Defendant Rhett.

7. On July 15, 2002, Plaintiff Jamesetta Washington was admitted to Tenet for labor and delivery services at the direction of Defendant Rhett or one of the other employees of Defendant OB/GYN, P.A..

8. At approximately 7:46 A.M. on July 16, 2002, Plaintiff's labor was induced by artificial rupture of her membranes and the administration of Pitocin.

9. Jayden's station within the birth canal was noted to be 0 at approximately 6:15 P.M. that evening, and cervical dilation was noted to be complete at 7:24 P.M..

10. Defendant Dr. Rhett applied a vacuum extractor to Jayden's head at 7:35 P.M., and

delivered Jayden by vacuum extraction at 7:37 P.M..

11. There was no recorded entry of a station lower than zero, and no documentation of the station at the time the vacuum extractor was applied.
12. Apgars were reportedly 7 at one minute, and 9 at five minutes.
13. Blood gases were reported to be 7.21.
14. The newborn records refer to a "rough" labor and delivery, and describe Jayden as being lethargic with poor muscle tone, apnea, desaturations, bradychardia, and coarse breath sounds.
15. Presumed sepsis was not substantiated by culture examination.
16. Jayden was transferred to the Medical University of South Carolina (hereinafter, "MUSC") on 7/17/02.
17. At MUSC, Dr. Jennifer Braden's Discharge Summary notes that a head CT "revealed a large posterior fossa bleed with intraventricular extension as well as a subdural hematoma." A subsequent MRI "revealed mass effect on the 3rd or 4th ventricle and brain stem as well as 2 subdural hematomas, a subgaleal hematoma, and an absence of transverse sinus."
18. Dr. Jeffrey Campbell performed neurosurgery to evacuate the posterior fossa hemorrhage.
19. Negligence and other wrongful conduct on the part of each Defendant joined and concurred with negligence and other wrongful conduct on the part of the other Defendants, to directly and proximately cause Jayden certain injuries, losses and damages.
20. Defendant Rhett was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including but not limited to, the following particulars:
 - (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about

obstetrics generally, and use of a vacuum extractor in particular, before attempting to manage Plaintiff's labor and delivery;

- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) choosing to make an unnecessary and inappropriate operative intervention;
- (d) choosing to make improper use of vacuum extractor;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition;
- (f) choosing to apply a vacuum extractor when Jayden's condition was reassuring, and there was no medical indication for performing an operative delivery;
- (g) choosing to use a vacuum extractor after 11-13 minutes of second stage was both unnecessary and inappropriate;
- (h) choosing to use the vacuum extractor with the infant's head at only a zero station;
- (i) choosing to use a vacuum extractor when its use was contraindicated under the circumstances of this labor and delivery; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

21. Defendant OB/GYN, P.A., its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to manage Plaintiff's labor and delivery;

- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) choosing to make improper use of vacuum extractor;
- (d) choosing to make an unnecessary and inappropriate operative intervention;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition;
- (f) in choosing not to verify Dr. Rhett's current competency in the use of a vacuum extractor;
- (g) in choosing not to train Dr. Rhett in the proper use of a vacuum extractor;
- (h) in choosing not to monitor Dr. Rhett's frequency of use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (i) in choosing not to recognize Dr. Rhett's overly frequent use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

22. The liability of Defendant OB/GYN, P.A. in this case includes but is not limited to respondeat superior liability for Dr. Rhett's wrongdoing.

23. Defendant Tenet, its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to participate in the labor and delivery of Jamsetta Washington and her son, Jayden;
- (b) in choosing not to communicate with fellow health care team workers on a timely and

accurate basis about matters of critical importance to the patients' health;

- (c) in choosing not to provide proper and timely nursing care and attention required by Jayden's condition;
- (d) in choosing not to verify Dr. Rhett's current competency in the use of a vacuum extractor;
- (e) in choosing not to train Dr. Rhett in the proper use of a vacuum extractor;
- (f) in choosing not to monitor Dr. Rhett's frequency of use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (g) in choosing not to recognize Dr. Rhett's overuse of a vacuum extractor, or if it did recognize it, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (h) in choosing not to intervene to prevent Dr. Rhett from improper use of a vacuum extractor;
- (i) failing to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

24. As a direct and proximate result of the negligence and other wrongful conduct on the part of each Defendant, which joined and concurred with the negligence and other wrongful conduct on the part of the other defendants, Jayden suffered catastrophic personal injuries, losses and damages, including but not limited to the following:

- (a) Traumatic insult to his brain and resulting brain injuries;
- (b) Physical injuries, disorders and dysfunction;
- (c) Permanent impairments and disabilities;
- (d) Medical expenses, including those to be incurred in the future;
- (e) Life care plan expenses;

- (f) Pain and suffering;
- (g) Emotional and psychological damages;
- (h) Loss of his life's work;
- (i) Loss of earning capacity; and
- (j) Loss of enjoyment of life.

WHEREFORE, Plaintiff prays for judgment against the defendants, jointly and severally, for actual and punitive damages, together with cost and such other and further relief as the Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
Attorney for Plaintiff

P.O. Box 550
Florence, SC 29503

April 12, 2007

Edward L. Graham

Sallie P. Phelan*

Brian P. Phelan*

*Licensed in S.C. and N.C.

GRAHAM PHELAN
Attorneys at Law

383 West Cheves Street (29501)

P.O. Box 550 (29503)

Florence, South Carolina

Office (843) 662-3281

Fax (843) 665-0254

egraham@grahamlawfirm.net

April 12, 2007

The Honorable Julie J. Armstrong
Clerk of Court for Charleston County
100 Broad Street
Charleston, S.c. 29401

RE: Jaymesetta Washington, as Guardian ad Litem for Jayden W. vs.
Edmund Rhett, Jr. M.D., Low Country Obstetrics & Gynecology, P.A., Tenet
South Carolina, Inc. d/b/a East Cooper Regional
C/A No.:

Dear Ms. Armstrong:

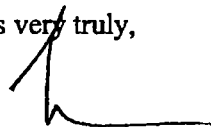
I am enclosing for filing the following documents in the above referenced action:

1. Petition for Appointment of Guardian ad Litem;
2. Proposed Order Granting Appointment of Guardian ad Litem; and
3. Summons and Complaint.

I am also enclosing my firm's check in the amount of \$175.00, the filing fee for the Summons and Complaint, and the Petition. I am also enclosing copies of the foregoing documents and a stamped, self-addressed envelope. Please return 5 certified, stamped copies of the documents after they have been filed.

Thank you for your cooperation, and with kindest personal regards, I am

Yours very truly,



Edward L. Graham

ELG/jl
Enc.

Charleston Office:
192 East Bay Street, Suite 303 • Charleston, South Carolina 29401
Telephone: (843) 722-6220 • Fax: (843) 722-6338

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Jamesetta Washington, as Guardian ad	)	C/A No. 07-CP-10-1553
Litem for Jayden W: , a minor,	)	
	)	
Plaintiff,	)	
	)	
Versus	)	ANSWER
	)	(Jury Trial Requested)
	)	
Edmund Rhett, Jr., M.D., Low Country	)	
Obstetrics & Gynecology, P.A., Tenet	)	
South Carolina, Inc., d/b/a East Cooper	)	
Regional Medical Center,	)	
	)	
Defendants.	)	

2007 MAY 16 PM 2:49
 JULIE J. ARSTRONG
 CLERK OF COURT
 BY _____
 FILED

The Defendant, Edmond Rhett, Jr., M.D., (hereinafter "this Defendant"), hereby responds to the allegations of the Plaintiff's Complaint as follows:

1. This Defendant denies each and every allegation of the Plaintiff's Complaint which is not hereinafter specifically admitted.
2. This Defendant is without sufficient knowledge and information upon which to form a belief as to the allegations contained in the Paragraph 1 of the Plaintiff's Complaint, and therefore denies the same.
3. Paragraph 2 contains conclusions of law to which no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information upon which to form a belief as the allegations contained in Paragraph 2 of the Plaintiff's Complaint and therefore denies the same..
4. This Defendant admits only so much of the allegations contained in Paragraph 3 of the Plaintiff's Complaint as allege that Defendant Rhett is a physician licensed to practice medicine within the State of South Carolina and that he is a citizen and resident of Charleston County, South Carolina. This Defendant

denies all remaining and inconsistent allegations contained in Paragraph 3 of the Plaintiffs Complaint.

5. This Defendant admits only so much of the allegations contained in Paragraph 4 of the Plaintiffs Complaint, as alleged Defendant Low Country Obstetrics and Gynecology, P.A. conducts its business in Charleston County, SC among other locations. All remaining and inconsistent allegations contained in Paragraph 4 of the Plaintiffs Complaint are denied.

6. This Defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 5 of the Plaintiffs Complaint and therefore denies the same.

7. In response to the allegations contained in Paragraphs 6 through 18 of the Plaintiffs Complaint, this Defendant craves reference to the medical records for a statement as to the facts of this case. This Defendant denies any and all allegations contained in Paragraphs 6 through 18 of the Plaintiffs Complaint that are inconsistent with the medical records in this matter.

8. This Defendant denies the allegations contained in Paragraph 19 of the Plaintiffs Complaint.

9. This Defendant denies the allegations contained in Paragraphs 20 and 21 of the Plaintiffs Complaint including all sub parts.

10. The allegations contained in Paragraph 22 state a conclusion of law to which no response is required. To the extent that a response is required, this Defendant denies the allegations contained in Paragraph 22 of the Plaintiffs Complaint.

11. This Defendant denies the allegations contained in Paragraph 23 of the Plaintiffs Complaint including all sub parts.

12. This Defendant denies the allegations contained in Paragraph 24, including subparts (a) through (j), of the Plaintiff's Complaint.

13. This Defendant denies all remaining allegations contained in the Plaintiff's Complaint including the prayer for relief.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Deviation from Standard of Care)

14. That the care and treatment administered by this Defendant conformed to and was in full compliance with the standard of care. All care and treatment administered by this Defendant was within acceptable medical standards and methods, and, at no time pertinent hereto, did this Defendant deviate from any medical standard while caring for or tending to the Plaintiff or minor child. Consequently, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

15. That even if this Defendant was negligent as alleged in Plaintiff's Complaint, this was not the direct or proximate cause of the Plaintiff's injury. Therefore, the Plaintiff is barred from recover against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Informed Consent)

16. The Plaintiff with knowledge and understanding consented to treatment and therefore her claims are barred in accordance with the principles of informed consent.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

17. That this Defendant acted reasonably and in good faith at all times material herein, based on the material facts and circumstances known by this Defendant. Accordingly, the Plaintiff is not entitled to recover any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Pre-existing Medical Condition)

18. Whatever injuries the Plaintiff and/or minor child sustained, which are specifically denied herein, were the result of pre-existing medical conditions of the Plaintiff and/or minor child, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Predisposition of Medical Condition)

19. Whatever injuries the Plaintiff and/or minor child sustained, which are specifically denied herein, were the result of the Plaintiff's and/or minor child's predisposition to medical conditions, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

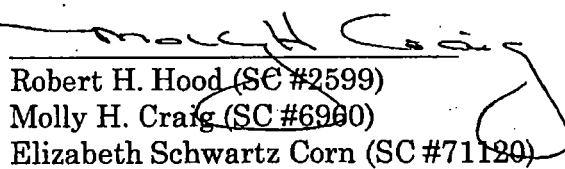
20. This Defendant would plead the requirements for an award of punitive damages as set forth by the Supreme Court of South Carolina in the case of State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003) as defenses to this claim and would specifically assert that they are entitled to summary judgment on punitive damages and if denied to a bifurcated trial.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

21. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, this Defendant, Edmund Rhett, Jr., M.D. prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com


Robert H. Hood (SC #2599)
Molly H. Craig (SC #6960)
Elizabeth Schwartz Corn (SC #71120)

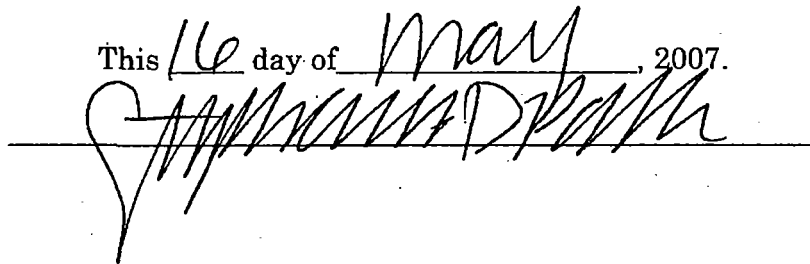
Attorneys for the Defendant
Edmund Rhett, Jr., M.D.

5/16, 2007
Charleston, South Carolina
J:\docs\2.100\Answer.doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒ 
mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure.

This 16 day of May, 2007.



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JAMESETTA WASHINGTON, AS)
GUARDIAN AD LITEM FOR)
JAYDEN WASHINGTON, A MINOR,)

PLAINTIFF,)
)
)

vs.)
)
)

EDMUND RHETT, JR., M.D.,)
LOWCOUNTRY OBSTETRICS &)
GYNECOLOGY, P.A., TENET)
SOUTH CAROLINA, INC., D/B/A)
EAST COOPER REGIONAL)
MEDICAL CENTER,)

DEFENDANTS.)
)
)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2007-CP-10-1553

**ANSWER OF LOWCOUNTRY
OBSTETRICS & GYNECOLOGY, P.A.**

CP

JULIE J. ARMSTRONG
CLERK OF COURT

2007 MAY 21 AM 9:43

FILED

TO: EDWARD L. GRAHAM, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendant, Lowcountry Obstetrics & Gynecology, P.A., answering the Complaint herein states as follows:

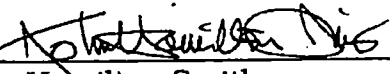
1. That it denies each and every allegation contained in the Complaint except as specifically admitted.
2. This Defendant is without sufficient knowledge or information upon which to form a belief as to the allegations contained in Paragraphs 1 and 2 of the Complaint.
3. This Defendant, in answer to Paragraph 3 of the Complaint, admits that Dr. Rhett is a licensed physician, his specialty is obstetrics and

gynecological care and that he both resides and practices medicine within Charleston County, South Carolina. This Defendant denies any other allegations contained in the said paragraph that are inconsistent with these admissions.

4. In answer to Paragraph 4 of the Complaint, this Defendant admits it holds itself out to the public as having well trained physicians and staff in order to provide high quality obstetrical and gynecological care and does conduct business in Charleston County, South Carolina. This Defendant denies that it currently is the employer of Dr. Rhett.
5. This Defendant is without sufficient information or knowledge upon which to form a belief as to the allegations contained in Paragraph 5 of the Complaint.
6. In answer to the allegations contained in Paragraphs 6 through 18 of the Complaint, this Defendant would crave reference to the medical records and would deny any allegations contained in said paragraphs inconsistent therewith.
7. This Defendant denies the allegations contained in Paragraphs 19 through 24 of the Complaint.

WHEREFORE, Defendant prays that, having fully answered the Complaint herein, that same be dismissed and that it be awarded the costs of defending this action including a reasonable attorney's fee.

YOUNG CLEMENT RIVERS, LLP

By: 

John Hamilton Smith

P.O. Box 993, Charleston, SC 29402

(843) 720-5402; jsmith@ycrlaw.com

Attorneys for the Defendant

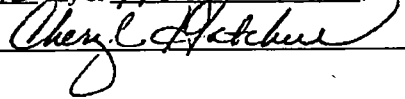
Lowcountry Obstetrics & Gynecology, P.A.

Charleston, South Carolina

Dated: May 17, 2007

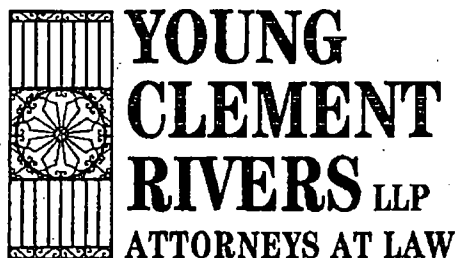
CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 17th day of May, 2007.



CHARLESTON
28 BROAD STREET
P.O. Box 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000
www.ycrlaw.com

Other Office:
Columbia, SC



John Hamilton Smith

Direct Dial: (843) 720-5402
Direct Fax: (843) 579-1309
E-mail: jsmith@ycrlaw.com

May 17, 2007

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Jamesetta Washington, as Guardian ad Litem for Jayden
W . a minor vs. Edmund Rhett, Jr., M.D, et al
Case No.: 2007-CP-10-1553
Claim No.: CB063712M
Date of Loss: 7/15/2002
YCRT File: 2466-20070630

Dear Ms. Armstrong:

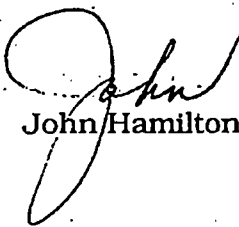
Enclosed please find the original and one (1) copy of the **Answer of Lowcountry Obstetrics & Gynecology, P.A.** in the above-referenced case. Upon filing, please return a time-stamped copy of same to me.

By copy of this letter to all counsel of record, I am herewith serving them with a copy of same.

Thank you for your assistance and cooperation in this matter, and should you have any questions or comments, please do not hesitate to contact me.

Sincerely,

YOUNG CLEMENT RIVERS, LLP


John Hamilton Smith

JHS/emh
Enclosures

cc: All Counsel of Record

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., East Cooper
Community Hospital, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO.: 07-CP-10-1553

AMENDED SUMMONS

2007 MAY 23 PM 1:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FILED

TO THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their office in Florence, S.C., within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded therein.

GRAHAM LAW FIRM, P.A.

BY:



Edward L. Graham
383 W. Cheves Street
Post Office Box 550
Florence, S.C. 29503

Attorney for Plaintiff

May 18, 2007

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., East Cooper
Community Hospital, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO.: 07-CP-10-1553

AMENDED COMPLAINT
(Jury Trial Requested)

2007 MAY 23 PM 1:10
JULIE J. ARMSTRONG
CLERK OF COURT
BJ

FILED

COMES NOW Plaintiff complaining of Defendants above named and would show unto the
Court as follows:

1. Plaintiff Jamesetta Washington (hereinafter, "Plaintiff") is a citizen and resident of Lexington County, South Carolina, and is the mother of Jayden W. _____ (hereinafter, "Jayden").
2. Plaintiff has been appointed, or is in the process of being appointed, as Guardian ad Litem for Jayden and brings this action as Guardian ad Litem for Jayden.
3. Defendant Rhett (hereinafter "Rhett") is, upon information and belief, a physician duly licensed to practice medicine within the State of South Carolina, who hold himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care, who is a citizen and resident of Charleston County, South Carolina, and who maintains an office in Charleston County, South Carolina, for the practice of obstetrics and gynecology.
4. Defendant Low Country Obstetrics & Gynecology, P.A., (hereinafter, "OB/GYN,

P.A.”) is, upon information and belief, a professional corporation or professional association which holds itself out to the public as having specially trained physicians, facilities, equipment and staff for the provision of high quality obstetrical and gynecological care, and which conducts its business in Charleston County, South Carolina. Defendant OB/GYN, P.A. is, upon information and belief, the employer of Defendant Rhett.

5. Defendant East Cooper Community Hospital , Inc.(hereinafter “East Cooper”) is, upon information and belief, a hospital corporation which owns, operates and manages a hospital in Charleston County, South Carolina, commonly known as “East Cooper Regional Medical Center”, and holds itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical care. Defendant East Cooper is named as a party to this action by virtue of the acts and/or omissions of its employees and agents, within the course and scope of that respective employment and agency.

6. In 2001, Plaintiff Jamesetta Washington became pregnant with her son, Jayden. and submitted herself to the medical care and attention of various physicians at the OB/GYN, P.A., including but not limited to Defendant Rhett.

7. On July 15, 2002, Plaintiff Jamesetta Washington was admitted to East Cooper for labor and delivery services at the direction of Defendant Rhett or one of the other employees of Defendant OB/GYN, P.A..

8. At approximately 7:46 A.M. on July 16, 2002, Plaintiff’s labor was induced by artificial rupture of her membranes and the administration of Pitocin.

9. Jayden’s station within the birth canal was noted to be 0 at approximately 6:15 P.M. that evening, and cervical dilation was noted to be complete at 7:24 P.M..

10. Defendant Dr. Rhett applied a vacuum extractor to Jayden’s head at 7:35 P.M., and

delivered Jayden by vacuum extraction at 7:37 P.M..

11. There was no recorded entry of a station lower than zero, and no documentation of the station at the time the vacuum extractor was applied.

12. Apgars were reportedly 7 at one minute, and 9 at five minutes.

13. Blood gases were reported to be 7.21.

14. The newborn records refer to a "rough" labor and delivery, and describe Jayden as being lethargic with poor muscle tone, apnea, desaturations, bradychardia, and coarse breath sounds.

15. Presumed sepsis was not substantiated by culture examination.

16. Jayden was transferred to the Medical University of South Carolina (hereinafter, "MUSC") on 7/17/02.

17. At MUSC, Dr. Jennifer Braden's Discharge Summary notes that a head CT "revealed a large posterior fossa bleed with intraventricular extension as well as a subdural hematoma." A subsequent MRI "revealed mass effect on the 3rd or 4th ventricle and brain stem as well as 2 subdural hematomas, a subgaleal hematoma, and an absence of transverse sinus."

18. Dr. Jeffrey Campbell performed neurosurgery to evacuate the posterior fossa hemorrhage.

19. Negligence and other wrongful conduct on the part of each Defendant joined and concurred with negligence and other wrongful conduct on the part of the other Defendants, to directly and proximately cause Jayden certain injuries, losses and damages.

20. Defendant Rhett was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including but not limited to, the following particulars:

(a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about

obstetrics generally, and use of a vacuum extractor in particular, before attempting to manage Plaintiff's labor and delivery;

- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) choosing to make an unnecessary and inappropriate operative intervention;
- (d) choosing to make improper use of vacuum extractor;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition;
- (f) choosing to apply a vacuum extractor when Jayden's condition was reassuring, and there was no medical indication for performing an operative delivery;
- (g) choosing to use a vacuum extractor after 11-13 minutes of second stage was both unnecessary and inappropriate;
- (h) choosing to use the vacuum extractor with the infant's head at only a zero station;
- (i) choosing to use a vacuum extractor when its use was contraindicated under the circumstances of this labor and delivery; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

21. Defendant OB/GYN, P.A., its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to manage Plaintiff's labor and delivery;

- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) choosing to make improper use of vacuum extractor;
- (d) choosing to make an unnecessary and inappropriate operative intervention;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition;
- (f) in choosing not to verify Dr. Rhett's current competency in the use of a vacuum extractor;
- (g) in choosing not to train Dr. Rhett in the proper use of a vacuum extractor;
- (h) in choosing not to monitor Dr. Rhett's frequency of use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (i) in choosing not to recognize Dr. Rhett's overly frequent use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

22. The liability of Defendant OB/GYN, P.A. in this case includes but is not limited to respondeat superior liability for Dr. Rhett's wrongdoing.

23. Defendant East Cooper, its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to participate in the labor and delivery of Jamsetta Washington and her son, Jayden;
- (b) in choosing not to communicate with fellow health care team workers on a timely and

- accurate basis about matters of critical importance to the patients' health;
- (c) in choosing not to provide proper and timely nursing care and attention required by Jayden's condition;
- (d) in choosing not to verify Dr. Rhett's current competency in the use of a vacuum extractor;
- (e) in choosing not to train Dr. Rhett in the proper use of a vacuum extractor;
- (f) in choosing not to monitor Dr. Rhett's frequency of use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (g) in choosing not to recognize Dr. Rhett's overuse of a vacuum extractor, or if it did recognize it, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (h) in choosing not to intervene to prevent Dr. Rhett from improper use of a vacuum extractor;
- (i) failing to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

24. As a direct and proximate result of the negligence and other wrongful conduct on the part of each Defendant, which joined and concurred with the negligence and other wrongful conduct on the part of the other defendants, Jayden suffered catastrophic personal injuries, losses and damages, including but not limited to the following:

- (a) Traumatic insult to his brain and resulting brain injuries;
- (b) Physical injuries, disorders and dysfunction;
- (c) Permanent impairments and disabilities;
- (d) Medical expenses, including those to be incurred in the future;
- (e) Life care plan expenses;

- (f) Pain and suffering;
- (g) Emotional and psychological damages;
- (h) Loss of his life's work;
- (I) Loss of earning capacity; and
- (j) Loss of enjoyment of life.

WHEREFORE, Plaintiff prays for judgment against the defendants, jointly and severally, for actual and punitive damages, together with cost and such other and further relief as the Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
Attorney for Plaintiff

P.O. Box 550
Florence, SC 29503

May 18, 2007

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 07-CP-10-1553

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

Plaintiff,

v.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., Tenet
South Carolina, Inc., d/b/a East Cooper
Regional Medical Center,

Defendants.

ANSWER OF DEFENDANT EAST
COOPER REGIONAL MEDICAL CENTER

2007 JUN 25 AM 9: 08
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Now comes East Cooper Regional Medical Center, incorrectly named and sued as "Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center" (hereinafter referred to as "the Defendant") by and through its undersigned attorneys, answering the Complaint of the Plaintiff herein, stating and alleging as follows:

FOR A FIRST DEFENSE

1. That each and every allegation contained in the Plaintiff's Complaint not specifically admitted hereinafter is denied and strict proof demanded thereof.

2. That the Defendant lacks sufficient information or knowledge upon which to form a belief as to the allegations contained in Paragraphs 1 and 2 of the Complaint and, therefore, denies same.

3. That the Defendant, answering Paragraph 3 of the Complaint, admits, upon information and belief, that Defendant Edmund Rhett, Jr., M.D., (hereinafter referred to as "Defendant Dr. Rhett") is a medical doctor specializing in the field of obstetrics and gynecology. The Defendant lacks sufficient information or knowledge upon which to form a belief as to the remaining allegations of Paragraph 3 and, therefore, denies same.

4. That the Defendant lacks sufficient information or knowledge upon which to form a belief as to the allegations contained in Paragraph 4 of the Complaint and, therefore, denies same.

5. That the Defendant, answering Paragraph 5 of the Complaint, admits that East Cooper Regional Medical Center is a hospital providing certain healthcare services in the County of Charleston in the State of South Carolina. The Defendant further admits that Tenet South Carolina, Inc., is a corporation organized and existing under the laws of the State of Delaware. The Defendant denies that Tenet South Carolina, Inc., was incorporated, organized or existing at the times complained of in the Plaintiff's Complaint. The Defendant further denies Tenet South Carolina, Inc., has ever owned, operated or done business as East Cooper Regional Medical Center and that any of the alleged acts and omissions complained of in the Complaint were performed by employees, servants or agents of Tenet South Carolina, Inc. All remaining allegations of Paragraph 5 of the Complaint inconsistent with the above are denied.

6. That the Defendant admits, upon information and belief, the allegations contained in Paragraph 6 of the Complaint.

7. That the Defendant, answering Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the Complaint, admits that Plaintiff Jamesetta Washington presented to East Cooper Regional Medical Center on or about July 15, 2002, for the labor and delivery of her son Jayden W . The Defendant craves reference to the records of East Cooper Regional Medical Center as to the exact date and nature of the care and treatment rendered to the Plaintiff and Jayden W , as well as their respective complaints, presentations and conditions. All allegations contained in Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the Complaint inconsistent the above are denied.

8. That the Defendant, answering Paragraphs 17 and 18 of the Complaint, admits that Jayden W was transferred from East Cooper Regional Medical Center to the Medical University of South Carolina on or about July 17, 2002. The Defendant craves

reference to the records of the Medical University of South Carolina as to the exact dates and nature of the care and treatment rendered to Jayden W while a patient there, as well as his presentation and condition. All allegations contained in Paragraphs 17 and 18 of the Complaint inconsistent the above are denied.

9. That the Defendant denies the allegations contained in Paragraphs 19, 20 and 21.

10. That Paragraph 22 of the Complaint states a legal conclusion to which the Defendant is not required to respond. All remaining allegations contained in Paragraph 22 inconsistent with the above are denied.

11. That the Defendant denies the allegations contained in Paragraphs 23 and 24 of the Complaint.

FOR A SECOND DEFENSE

12. That the Defendant reiterates all of the allegations contained in each and every foregoing Paragraph of this Answer, as fully as if repeated verbatim herein.

13. That the care and treatment administered by the agents, servants, and employees of the Defendant conformed to and was in full compliance with the standard of care. All care and treatment administered by the Defendant, through its agents, servants, and employees, was within acceptable standards and methods, and at no time pertinent hereto did this Defendant, its agents, servants, or employees, deviate from any acceptable standard while caring for or tending to Plaintiff Jamesetta Washington or Jayden W. Consequently, Plaintiff is barred from recovery against this Defendant.

FOR A THIRD DEFENSE

14. That the Defendant reiterates all of the allegations contained in each and every foregoing Paragraph of this Answer, as fully as if repeated verbatim herein.

15. That the Plaintiff has failed to allege facts sufficient to constitute a cause of action as against this Defendant.

FOR A FOURTH DEFENSE

16. That the Defendant reiterates all of the allegations contained in each and every foregoing paragraph of this Answer, as fully as if repeated verbatim herein.

17. That if the Defendant was negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, the negligence of the Defendant is not the direct or proximate cause of any injury as alleged by the Plaintiff and therefore the Defendant is not liable for injuries sustained or any damages alleged as a result thereof.

FOR A FIFTH DEFENSE

18. That the Defendant reiterates all of the allegations contained in each and every foregoing paragraph of this Answer, as fully as if repeated verbatim herein.

19. That the Defendant would allege, upon information and belief, that any injuries or damages allegedly sustained herein were due to, caused and occasioned by a natural disease process over which the Defendant had no control and, as such, the Defendant pleads such as a complete bar to this action.

FOR A SIXTH DEFENSE

20. That the Defendant reiterates all of the allegations contained in each and every foregoing paragraph of this Answer, as fully as if repeated verbatim herein.

21. That if the Defendant was negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, any alleged injuries and damages were the direct and proximate result of the intervening and superseding negligence of third parties for which the Defendant is not liable.

FOR A SEVENTH DEFENSE

22. That the Defendant reiterates all of the allegations contained in each and every foregoing paragraph of this Answer, as fully as if repeated verbatim herein.

23. That if the Defendant was negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, any injuries or damages sustained by Jayden

W as set forth in the Complaint were due to and caused in whole or in part by Plaintiff's acts of comparative negligence.

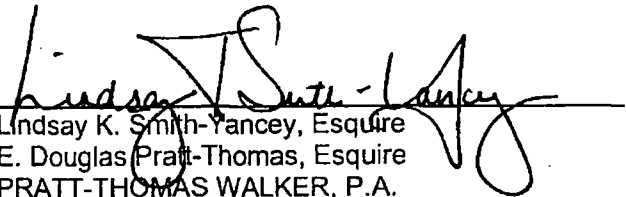
FOR AN EIGHTH DEFENSE

24. That the Defendant reiterates all of the allegations contained in each and every foregoing paragraph of this Answer, as fully as if repeated verbatim herein.

25. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

WHEREFORE, having fully answered the Complaint herein, Defendant East Cooper Regional Medical Center, incorrectly named and sued as "Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center" prays that the same be dismissed with costs.

By:



Lindsay K. Smith-Yancey, Esquire
E. Douglas Pratt-Thomas, Esquire
PRATT-THOMAS WALKER, P.A.
P.O. Drawer 22247

Charleston, S.C. 29413-2247

Tel: (843) 727-2211

Attorneys for Defendant East Cooper Regional Medical Center, incorrectly named and sued as "Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center"

Charleston, South Carolina

June 21, 2007

07-CP-10-1553

I hereby certify that I have served a true copy of the foregoing by delivering a copy to the following counsel/parties, in accord with applicable Rules of Civil Procedure, on June 21, 2007, by first class mail (postage prepaid, properly addressed):

Edward L. Graham, Esquire
Graham Phelan, Attorneys at Law
383 W. Cheves Street (29501)
P.O. Box 550
Florence, SC 29503

Robert H. Hood, Jr., Esquire
Hood Law Firm, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402

By: 

Jeff D. MacKey, Paralegal to Lindsay K. Smith-Yancey

FILED

2007 JUN 25 AM 9:48

JULIE J. ARMSTRONG
CLERK OF COURT

PRATT-THOMAS | WALKER

ATTORNEYS AT LAW

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CLAYTON B. MCCULLOUGH

LAURA JOHNSON EVANS

THOMAS H. HESSE (SC, GA)

IAN W. FREEMAN (SC, CA)

FRANCIS M. ERVIN II (SC, MA)

June 21, 2007

The Honorable Julie J. Armstrong
Clerk of Court for Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Jamesetta Washington, as Guardian ad Litem for Jayden W. a minor vs. Edmund Rhett, Jr., M.D., Low
Country Obstetrics & Gynecology, P.A., Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center
C.A. No.: 07-CP-10-1553
Matter No.: 07-31693
Our Client: Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center
D/L: ~7/16/02
Our File No.: 722.109

Dear Ms. Armstrong:

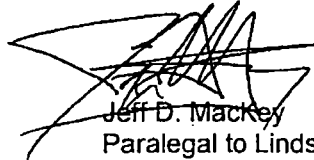
Enclosed for filing in the above-referenced case are an original and two (2) copies of the Answer of Defendant East Cooper Regional Medical Center to Plaintiff's Complaint. Please return the filed copies of the Answer to me in the self-addressed, stamped envelope enclosed herewith.

By copy of this letter to all counsel of record, I am providing a copy of the Answer.

Thank you for your attention to this matter. Should you have any questions, please feel free to contact me at your convenience.

With warmest regards, I am,

PRATT-THOMAS, EPTING & WALKER, P.A.



Jeff D. Mackey
Paralegal to Lindsay K. Smith-Yancey

jdm

Enclosures

cc: Edward T. Graham, Esquire
Robert H. Hood, Jr., Esquire
Mr. James Riley

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO.: 07-CP-10-1553

AMENDED SUMMONS

FILED
2009 NOV -4 AM 9:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
of which a copy is herewith served upon you, and to serve a copy of your answer to the said
Complaint on the subscribers at their office in Florence, South Carolina, within thirty (30) days
after the service hereof, exclusive of the day of such service; and if you fail to answer the
Complaint within the time aforesaid, judgment by default will be rendered against you for the
relief demanded therein.

GRAHAM LAW FIRM, P.A.

BY:

Edward L. Graham
Mary H. Watters
383 W. Cheves Street
Post Office Box 550
Florence, S.C. 29503
Attorneys for Plaintiff

Florence, South Carolina
October 28th, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO.: 07-CP-10-1553

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

Plaintiff,)

vs.)

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

Defendants.)

AMENDED COMPLAINT
(Jury Trial Requested)

FILED
2009 NOV -4 AM 9:23
CLERK OF COURT
J. ARISTIDE

COMES NOW Plaintiff complaining of Defendants above named and would show unto the Court as follows:

1. Plaintiff Jamesetta Washington (hereinafter, "Plaintiff") is a citizen and resident of Charleston County, South Carolina, and is the mother of Jayden W. (hereinafter, "Jayden").
2. Plaintiff has been appointed, or is in the process of being appointed, as Guardian ad Litem for Jayden and brings this action as Guardian ad Litem for Jayden.
3. Defendant Rhett (hereinafter "Rhett") is, upon information and belief, a physician duly licensed to practice medicine within the State of South Carolina, who holds himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care, who is a citizen and resident of Charleston County, South Carolina, and who maintains an office in Charleston County, South Carolina, for the practice of obstetrics and gynecology.

4. Defendant Low Country Obstetrics & Gynecology, P.A., (hereinafter, "OB/GYN, P.A.") is, upon information and belief, a professional corporation or professional association which holds itself out to the public as having specially trained physicians, facilities, equipment and staff for the provision of high quality obstetrical and gynecological care, and which conducts its business in Charleston County, South Carolina. Defendant OB/GYN, P.A. is, upon information and belief, the employer of Defendant Rhett.

5. Defendant East Cooper Community Hospital, Inc. (hereinafter "East Cooper") is, upon information and belief, a hospital corporation which owns, operates and manages a hospital in Charleston County, South Carolina, commonly known as "East Cooper Regional Medical Center", and holds itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical care. Defendant East Cooper is named as a party to this action by virtue of the acts and/or omissions of its employees and agents within the course and scope of that respective employment and agency.

6. Defendant AMN Services Inc. (hereinafter "AMN Services") is, upon information and belief, a healthcare staffing company, registered as a corporation doing business in the state of South Carolina, which contracts for and supplies temporary healthcare staffing services to South Carolina healthcare facilities, including but not limited to, East Cooper Regional Medical Center. AMN Services holds itself out to the public and to healthcare facilities as providing qualified healthcare providers having specialized education and training in the provision of healthcare services to the public. Defendant AMN Services is named as a party to this action by virtue of the acts and/or omissions of its employees and agents, specifically, Judy Mercer, R.N., within the course and scope of that respective employment and agency.

7. In 2001, Plaintiff Jamesetta Washington became pregnant with her son, Jayden, and submitted herself to the medical care and attention of various physicians at the OB/GYN, P.A., including but not limited to Defendant Rhett.

8. On July 15, 2002, Plaintiff Jamesetta Washington was admitted to East Cooper for labor and delivery services at the direction of Defendant Rhett or one of the other employees of Defendant OB/GYN, P.A..

9. At approximately 7:46 A.M. on July 16, 2002, Plaintiff's labor was induced by artificial rupture of her membranes and the administration of Pitocin.

10. Jayden's station within the birth canal was noted to be 0 at approximately 6:15 P.M. that evening, and cervical dilation was noted to be complete at 7:24 P.M..

11. Judy Mercer, RN was the labor and delivery nurse attending Jamesetta Washington on the evenings of July 15 and 16, 2002.

12. Defendant Dr. Rhett applied a vacuum extractor to Jayden's head at 7:35 P.M., and delivered Jayden by vacuum extraction at 7:37 P.M..

13. There was no recorded entry of a station lower than zero, and no documentation of the station at the time the vacuum extractor was applied.

14. Apgars were reportedly 7 at one minute, and 9 at five minutes.

15. Blood gases were reported to be 7.21.

16. The newborn records refer to a "rough" labor and delivery, and describe Jayden as being lethargic with poor muscle tone, apnea, desaturations, bradychardia, and coarse breath sounds.

17. Presumed sepsis was not substantiated by culture examination.

18. Jayden was transferred to the Medical University of South Carolina (hereinafter,

“MUSC”) on 7/17/02.

19. At MUSC, Dr. Jennifer Braden’s Discharge Summary notes that a head CT “revealed a large posterior fossa bleed with intraventricular extension as well as a subdural hematoma.” A subsequent MRI “revealed mass effect on the 3rd or 4th ventricle and brain stem as well as 2 subdural hematomas, a subgaleal hematoma, and an absence of transverse sinus.”

20. Dr. Jeffrey Campbell performed neurosurgery to evacuate the posterior fossa hemorrhage.

21. Negligence and other wrongful conduct on the part of each Defendant joined and concurred with negligence and other wrongful conduct on the part of the other Defendants, to directly and proximately cause Jayden certain injuries, losses and damages.

22. Defendant Rhett was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to manage Plaintiff’s labor and delivery;
- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients’ health;
- (c) choosing to make an unnecessary and inappropriate operative intervention;
- (d) choosing to make improper use of vacuum extractor;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients’ condition;
- (f) choosing to apply a vacuum extractor when Jayden’s condition was reassuring, and there was no medical indication for performing an operative delivery;

- (g) choosing to use a vacuum extractor after 11-13 minutes of second stage was both unnecessary and inappropriate;
- (h) choosing to use the vacuum extractor with the infant's head at only a zero station;
- (i) choosing to use a vacuum extractor when its use was contraindicated under the circumstances of this labor and delivery; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

23. Defendant OB/GYN, P.A., its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to manage Plaintiff's labor and delivery;
- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) choosing to make improper use of vacuum extractor;
- (d) choosing to make an unnecessary and inappropriate operative intervention;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition;
- (f) in choosing not to verify Dr. Rhett's current competency in the use of a vacuum extractor;
- (g) in choosing not to train Dr. Rhett in the proper use of a vacuum extractor;

- (h) in choosing not to monitor Dr. Rhett's frequency of use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (i) in choosing not to recognize Dr. Rhett's overly frequent use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

24. The liability of Defendant OB/GYN, P.A. in this case includes but is not limited to respondeat superior liability for Dr. Rhett's wrongdoing.

25. Defendant East Cooper, its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and use of a vacuum extractor in particular, before attempting to participate in the labor and delivery of Jamsetta Washington and her son, Jayden;
- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) in choosing not to provide proper and timely nursing care and attention required by Jayden's condition;
- (d) in choosing not to verify Dr. Rhett's current competency in the use of a vacuum extractor;
- (e) in choosing not to train Dr. Rhett in the proper use of a vacuum extractor;
- (f) in choosing not to monitor Dr. Rhett's frequency of use of a vacuum extractor; or if it did, in failing to stop Dr. Rhett's overuse of a vacuum extractor;

- (g) in choosing not to recognize Dr. Rhett's overuse of a vacuum extractor, or if it did recognize it, in failing to stop Dr. Rhett's overuse of a vacuum extractor;
- (h) in choosing not to intervene to prevent Dr. Rhett from improper use of a vacuum extractor;
- (i) failing to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition; and
- (j) such other failures and refusals as may be identified during discovery and the trial of this case.

26. The liability of Defendant AMN Services in this case includes but is not limited to respondeat superior liability for Judy Mercer's wrongdoing.

27. Defendant AMN Services, its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, including but not limited to, the following particulars:

- (a) in choosing not to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, before attempting to participate in the labor and delivery of Jamesetta Washington and her son, Jayden;
- (b) in choosing not to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patients' health;
- (c) in choosing not to acquire a reasonable safe level of knowledge, skill and training about proper and accurate interpretation of fetal heart monitor tracings;
- (d) choosing to call for an unnecessary and inappropriate operative intervention;
- (e) choosing not to timely and properly monitor, observe, record and/or have transcribed vital information about the patients' condition;

- (f) choosing to facilitate emergent or operative intervention when Jayden's condition was reassuring, and there was no medical indication for performing an operative delivery;
- (g) choosing to facilitate emergent or operative intervention after 11-13 minutes of second stage was both unnecessary and inappropriate; and
- (h) such other failures and refusals as may be identified during discovery and the trial of this case.

28. As to Defendant AMN Services directly, Defendant AMN Services, its employees and agents, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, including but not limited to, the following particulars:

- (a) in choosing not to verify Judy Mercer's current competency in the management of labor and delivery and proper interpretation of fetal heart monitor tracings;
- (b) in choosing not to train Judy Mercer in the proper management of labor and delivery and proper interpretation of fetal heart monitor tracings;
- (c) in choosing not to adequately monitor Judy Mercer's competencies regarding proper management of labor and delivery and proper interpretation of fetal heart monitor tracings; and
- (d) such other failures and refusals as may be identified during discovery and the trial of this case.

29. As a direct and proximate result of the negligence and other wrongful conduct on the part of each Defendant, which joined and concurred with the negligence and other wrongful conduct on the part of the other defendants, Jayden suffered catastrophic personal injuries, losses and damages, including but not limited to the following:

- (a) Traumatic insult to his brain and resulting brain injuries;
- (b) Physical injuries, disorders and dysfunction;
- (c) Permanent impairments and disabilities;
- (d) Medical expenses, including those to be incurred in the future;
- (e) Life care plan expenses;
- (f) Pain and suffering;
- (g) Emotional and psychological damages;
- (h) Loss of his life's work;
- (i) Loss of earning capacity; and
- (j) Loss of enjoyment of life.

WHEREFORE, Plaintiff prays for judgment against the defendants, jointly and severally, for actual and punitive damages, together with cost and such other and further relief as the Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
Mary H. Watters
Attorneys for Plaintiff
P.O. Box 550
Florence, SC 29503

October 28th 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Jamesetta Washington, as Guardian ad	)	C/A No. 07-CP-10-1553
Litem for Jayden W , a minor,	)	
	)	
Plaintiff,	)	
	)	
Versus	)	DEFENDANT EDMUND RHETT, JR.,
	)	M.D.'S ANSWER TO PLAINTIFF'S
Edmund Rhett, Jr., M.D., Low Country	)	AMENDED COMPLAINT
Obstetrics & Gynecology, P.A., Tenet	)	(Jury Trial Requested)
South Carolina, Inc., d/b/a East Cooper	)	
Regional Medical Center, AMN Services	)	
Inc., f/k/a Nurses RX, Inc.,	)	
	)	
Defendants.	)	

FILED
 2009 DEC -1 PM 2:59
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY

The Defendant, Edmund Rhett, Jr., M.D., (hereinafter "this Defendant"), hereby answers the Amended Complaint of the Plaintiff, subject to all applicable motions, affirmative defenses, and other pleadings, as follows:

1. This Defendant denies each and every allegation of the Plaintiff's Amended Complaint which is not hereinafter specifically admitted.
2. This Defendant is without sufficient knowledge and information upon which to form a belief as to the allegations contained in the Paragraph 1 of the Plaintiff's Amended Complaint, and therefore denies the same.
3. Paragraph 2 of the Plaintiff's Amended Complaint contains conclusions of law to which no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information upon which to form a belief as the allegations contained in Paragraph 2 of the Plaintiff's Amended Complaint and therefore denies the same.
4. This Defendant admits only so much of the allegations contained in Paragraph 3 of the Plaintiff's Amended Complaint as allege that Defendant Rhett is

a physician licensed to practice medicine within the State of South Carolina and that he is a citizen and resident of Charleston County, South Carolina. This Defendant denies all remaining and inconsistent allegations contained in Paragraph 3 of the Plaintiff's Amended Complaint.

5. The allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Amended Complaint are not directed at this Defendant and, therefore, do not require a response. Further responding, the allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Amended Complaint set forth conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Amended Complaint.

6. In response to the allegations contained in Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Plaintiff's Amended Complaint, this Defendant craves reference to the medical records of Jamesetta and Jayden Washington for a complete and accurate description of what is contained therein. All remaining and inconsistent allegations contained in Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Plaintiff's Amended Complaint are denied.

7. This Defendant denies the allegations contained in Paragraphs 21, 22, including subparts (a) through (j), 23, including subparts (a) through (j), 24, and 25, including subparts (a) through (j), of the Plaintiff's Amended Complaint.

8. The allegations contained in Paragraph 26 of the Plaintiff's Amended Complaint set forth conclusions of law to which no response is required. To the extent that a response is required, this Defendant denies the allegations contained in Paragraph 26 of the Plaintiff's Amended Complaint.

9. The allegations contained in Paragraphs 27, including subparts (a) through (h), and 28, including subparts (a) through (d), of the Plaintiff's Amended Complaint are not directed at this Defendant and, therefore, do not require a response. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 27, including subparts (a) through (h), and 28, including subparts (a) through (d), of the Plaintiff's Amended Complaint.

10. This Defendant denies the allegations contained in Paragraph 29, including subparts (a) through (j), of the Plaintiff's Amended Complaint and the Plaintiff's Prayer for Relief, such being all remaining allegations contained in the Plaintiff's Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Deviation from Standard of Care)

11. That the care and treatment administered by this Defendant conformed to and was in full compliance with the standard of care. All care and treatment administered by this Defendant was within acceptable medical standards and methods, and, at no time pertinent hereto, did this Defendant deviate from any medical standard while caring for or tending to the Plaintiff or minor child. Consequently, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

12. That, even if this Defendant was negligent, as alleged in the Plaintiff's Amended Complaint, which is specifically denied, the negligence of this Defendant is not the direct and proximate cause of any injury alleged by the Plaintiff and/or minor child and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff and/or minor child.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Informed Consent)

13. The Plaintiff with knowledge and understanding consented to treatment and therefore the Plaintiff's claims are barred in accordance with the principles of informed consent.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

14. That this Defendant acted reasonably and in good faith at all times material herein, based on the material facts and circumstances known by this Defendant. Accordingly, the Plaintiff is not entitled to recover any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Pre-existing Medical Condition)

15. Whatever injuries the Plaintiff and/or minor child sustained, which are specifically denied herein, were the result of pre-existing medical conditions of the Plaintiff and/or minor child, whether disclosed or undisclosed, and were not related to the incidents complained of in the Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Predisposition of Medical Condition)

16. Whatever injuries the Plaintiff and/or minor child sustained, which are specifically denied herein, were the result of the Plaintiff's and/or minor child's predisposition to medical conditions, whether disclosed or undisclosed, and were not related to the incidents complained of in the Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Superseding/Intervening Causes)

17. Whatever injuries and damages, if any, may have been sustained by the Plaintiff and/or minor child, were due to superseding and/or intervening causes beyond the control of this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Intervening Negligence/Negligence of Third Party)

18. That, upon information and belief, even if this Defendant is negligent in the manner described in the Amended Complaint, which is specifically denied, whatever injuries and damages, if any, which may have been sustained by the Plaintiff and/or minor child were the direct and proximate result of the intervening and superseding negligence of third parties, for whose conduct this Defendant bears no responsibility. Therefore, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Idiosyncratic Reaction)

19. That this Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff and/or minor child were due to and caused by an idiosyncratic reaction over which this Defendant had no control and as such, this Defendant pleads such an idiosyncratic reaction as a complete bar to this action.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

20. That any award or assessment of punitive damages as prayed for by the Plaintiff would violate this Defendant's constitutional rights under the Fifth,

Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

21. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, and having asserted these affirmative defenses, this Defendant, Edmund Rhett, Jr., M.D., prays that the Plaintiff's Amended Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com


Molly H. Craig (SC #6960)
Chilton Grace Simmons (SC #68279)
Elizabeth W. Ballentine (SC #74965)

Attorneys for the Defendant
Edmund Rhett, Jr., M.D.

December 1, 2009
Charleston, South Carolina
J:\docs\2.100\Answer (Amended Complaint).doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 1st day of Dec, 2009.

Christiane A. Baily

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2009 DEC -1 PM 2:59

FILED

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jamsetta Washington, as Guardian ad Litem
for Jayden W a minor,

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., East Cooper
Community Hospital, Inc., and AMN Services,
Inc., f/k/a Nurses RX, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2007-CP-10-1553

ANSWER OF DEFENDANT AMN
SERVICES, INC., F/K/A NURSES RX, INC.,
TO AMENDED COMPLAINT

(Jury Trial Demand)

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
2009 DEC -2 AM 11:15

TO: EDWARD L. GRAHAM, ESQUIRE AND MARY H. WATTERS, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFF

The Defendant, AMN Services, Inc., f/k/a Nurses RX, Inc. (hereinafter, "Defendant"), by
and through its undersigned counsel, answer Plaintiff's Amended Complaint, as follows:

FOR A FIRST DEFENSE

1. This Defendant denies each and every allegation, which is not hereinafter
specifically admitted.

2. This Defendant admits, upon information and belief, the allegation of Paragraph 1
of the Amended Complaint.

3. This Defendant does not have sufficient information or knowledge to admit or
deny the allegations of Paragraph 2 of the Amended Complaint.

4. The allegations of Paragraphs 3, 4, and 5 of the Amended Complaint do not
pertain to this Defendant and therefore, no response is required. To the extent a response is

required, this Defendant is without sufficient information to admit or deny the same and therefore, denies the allegations and demands strict proof thereof.

5. This Defendant admits so much of Paragraph 6 of the Amended Complaint as may be construed to allege that AMN Services, Inc, is a corporation doing business in South Carolina as a health care staffing provider, placed nurse Judy Mercer, R.N., at East Cooper Regional Medical Center during the time period pertinent to the allegations in the Amended Complaint. All remaining and inconsistent allegations are denied as stated.

6. This Defendant is without sufficient information or knowledge to admit or deny the allegations of Paragraph 7 of the Amended Complaint and therefore, denies the same.

7. Paragraphs 8 through 20 are alleged factual assertions based in part on the medical records of Plaintiff and the minor child. In response, this Defendant craves reference to the applicable medical records for a more complete and accurate response. This Defendant denies any additional or inconsistent allegations not contained within the medical records.

8. This Defendant denies the allegations of Paragraph 21 of the Amended Complaint.

9. The allegations of Paragraphs 22, 23, 24, and 25, including all subparts, do not pertain to this Defendant. To the extent a response is required, the allegations are denied.

10. This Defendant denies the allegations of Paragraphs 26, 27, including subparts (a) through (h), and 28, including subparts (a) through (d), of the Amended Complaint and demands strict proof thereof.

11. This Defendant is without sufficient information or knowledge to admit or deny the allegations regarding Plaintiff's alleged injuries and therefore, denies the same. This Defendant further denies that it was the proximate cause of any of the alleged damages.

FOR A SECOND DEFENSE
(Failure to State a Claim)

12. Further answering, this Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

13. Plaintiff's allegations against this Defendant should be dismissed for failure to state a claim upon which relief can be granted.

FOR A THIRD DEFENSE
(No Deviation from Standard of Care)

14. Further answering, this Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

15. That the care and treatment administered by nurse Mercer conformed to and was in full compliance with the standard of care. All care and treatment administered by nurse Mercer was within the acceptable medical standards and methods, and, at no time pertinent hereto, did nurse Mercer deviate from any medical standard while caring for or tending to the Plaintiff so as to bar the Plaintiff from recovery against nurse Mercer.

FOR A FOURTH DEFENSE
(No Proximate Cause)

16. Further answering, this Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

17. That no act or omission of this Defendant was a proximate cause of the damages alleged so as to bar the Plaintiff from recovery against this Defendant.

FOR A FIFTH DEFENSE
(Punitive Damages Unconstitutional)

18. Further answering, this Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

19. This Defendant asserts that any award of punitive damages to Plaintiff would violate the constitutional safeguards provided to this Defendant by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution, because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, sustained by or awarded to Plaintiff. In this vein, this Defendant craves the Court's reference to the U.S. Supreme Court opinions of State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408(2003), and Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

20. This Defendant strenuously asserts that it did not fail to exercise due care nor did it breach any duty owed to Plaintiff; but even if such were true, which is specifically denied, any and all acts or omissions on the part of this Defendant with respect to the facts alleged in the Complaint were wholly unintentional, and thus public policy militates against the application of punitive damages in a case such as this, where the facts do not establish or even allege that this Defendant possessed any intent to injure or deliberately pursued wrongful conduct in disregard of the rights and interests of others.

21. This Defendant strenuously asserts that it did not fail to exercise due care nor did it breach any duty owed to Plaintiff; but even if such were true, which is specifically denied, this Defendant respectfully and in good faith asserts that the better reasoned view of the law of punitive damages is that of the Supreme Court of Arizona, which has held that terms such as "gross," "reckless," and "wanton" . . . "convey little and fail to focus the jury's attention on the important question – the Defendant's motives."

FOR A SIXTH DEFENSE
(Independent Contractor)

22. Further answering, this Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

23. This Defendant alleges it was not the employer of Judy Mercer, R.N., and alleges Judy Mercer, R.N. was an independent contractor. This Defendant further alleges that Judy Mercer, R.N., was acting under the direction and control of East Cooper Regional Medical Center and supervising physicians at all times pertinent to the allegations in the Amended Complaint, so as to bar the Plaintiff from recovery against this Defendant.

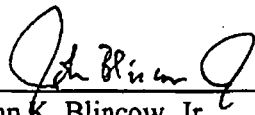
FOR A SEVENTH DEFENSE
(Reservation)

24. Further answering, this Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

25. This Defendant specifically reserves its right to raise as additional affirmative defenses, any defense raised by the co-defendants and any defense which may become available during discovery or otherwise and which may be proven at trial. This Defendant specifically reserves its right to amend this Answer as necessary and applicable.

(SIGNATURE ON FOLLOWING PAGE)

TURNER PADGET GRAHAM & LANEY P.A.

By: 
John K. Blincow, Jr.
Ashley S. Heslop
P.O. Box 22129
Charleston, South Carolina 29413
Telephone: (843) 576-2800
Facsimile: (843) 577-3369
jblincow@turnerpadget.com
aheslop@turnerpadget.com

ATTORNEYS FOR DEFENDANT
AMN SERVICES, INC., F/K/A
NURSES RX, INC.

Charleston, South Carolina
November 30, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2009, a copy of the above and foregoing ***ANSWER OF DEFENDANT AMN SERVICES, INC., F/K/A NURSES RX, INC. TO AMENDED COMPLAINT*** has been and mailed to counsel of record, postage prepaid and properly addressed as follows:

Edward L. Graham
 Mary H. Watters
Graham Law Firm, P.A.
 P. O. Box 550
 Florence, SC 29503

Chilton Simmons
Hood Law Firm, LLC
 P. O. Box 1508
 Charleston, SC 29402

Lindsay Smith-Yancey
Pratt-Thomas Walker, P.A.
 P. O. Drawer 22247
 Charleston, SC 29413

James E. Scott, IV
Young Clement Rivers, LLC
 P. O. Box 993
 Charleston, SC 29402-0993

FILED
 2009 DEC -2 AM 11:15
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

Penny S. Davis
 Penny S. Davis

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

John K. Blincow, Jr.

E-Mail: JBlincow@TurnerPadget.com

Writer's Direct Dial: (843) 576-2806

Direct Fax: (843) 577-1624

November 30, 2009

Julie J. Armstrong, Clerk
Charleston County Court of Common Pleas
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: Jamsetta Washington, as Guardian ad Litem for Jayden W . . . , a minor,
v. AMN Services, Inc., f/k/a Nurses RX, Inc., et al.
Case No.: 2007-CP-10-1553
Our File No.: 3869.111

Dear Julie:

We enclose for filing an original and one copy of the *Answer of Defendant AMN Services, Inc., f/k/a Nurses RX, Inc., to Amended Complaint*. Please return a file-stamped copy in the envelope provided. By copy of this letter to counsel of record, we are hereby serving them with our Answer.

Kind regards,

Yours truly,

TURNER, PADGET, GRAHAM & LANEY, P.A.



John K. Blincow, Jr.

JKB:psd
Enclosures

cc: Edward L. Graham/Mary H. Waters
Chilton Simmons
Lindsay Smith-Yancey
James E. Scott, IV (all w/enclosure)

TPGL 3007004v1

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Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 07-CP-10-1553

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

Plaintiff,

v.

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

Defendants.

**ANSWER AND CROSS CLAIM OF
DEFENDANT EAST COOPER REGIONAL
MEDICAL CENTER TO PLAINTIFF'S
AMENDED COMPLAINT**

FILED
2009 DEC -9 AM 11:39
JULIE J ARMSTRONG
CLERK OF COURT
BY

Now come Defendants East Cooper Regional Medical Center and Tenet South Carolina, Inc., incorrectly named and sued as "Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center" (and hereinafter referred to as "the Defendants") by and through its undersigned attorneys, answering the Amended Complaint of the Plaintiff herein, and cross claiming against co-Defendant AMN Services, Inc., stating and alleging as follows:

FOR A FIRST DEFENSE

1. That each and every allegation contained in the Plaintiff's Amended Complaint not specifically admitted hereinafter is denied and strict proof demanded thereof.
2. That the Defendants lacks sufficient information or knowledge upon which to form a belief as to the allegations contained in Paragraphs 1 and 2 of the Amended Complaint and, therefore, denies same.
3. That the Defendants, answering Paragraph 3 of the Amended Complaint, admits, upon information and belief, that Defendant Edmund Rhett, Jr., M.D., (hereinafter referred to as "Defendant Dr. Rhett") is a medical doctor specializing in the field of gynecology and formerly of obstetrics. The Defendants lack sufficient information or knowledge upon which to form a belief as to the remaining allegations of Paragraph 3 and, therefore, denies same.

4. That the Defendants lack sufficient information or knowledge upon which to form a belief as to the allegations contained in Paragraph 4 of the Amended Complaint and, therefore, denies same.

5. That the Defendants, answering Paragraph 5 of the Amended Complaint, admit that East Cooper Community Hospital, Inc., is a South Carolina corporation which owns and operates Defendant East Cooper Regional Medical Center. The Defendants further admit that Defendant East Cooper Regional Medical Center is a hospital providing certain healthcare services in the County of Charleston in the State of South Carolina. By way of further answer the Defendants would offer that Defendant Tenet South Carolina, Inc., is a corporation organized and existing under the laws of the State of Delaware; was not incorporated, organized or existing at the times complained of in the Plaintiff's Amended Complaint; never owned, operated or conducted business as East Cooper Regional Medical Center; and never employed any of the healthcare providers involved in the events alleged in the Complaint. All remaining allegations of Paragraph 5 of the Amended Complaint inconsistent with the above are denied.

6. That the Defendants, answering Paragraph 6 of the Complaint, admit that Defendant AMN Services, Inc., is a licensed temporary staffing agency in the business of providing supplemental staffing to healthcare providers. The Defendants further admit that at the times complained of in the Complaint, Defendant East Cooper Regional Medical Center contracted with Defendant AMN for supplemental nursing staff, including but not limited to Judy Mercer, R.N. All remaining allegations of Paragraph 6 of the Amended Complaint inconsistent with the above are denied.

7. That the Defendants admit, upon information and belief, the allegations contained in Paragraph 7 of the Amended Complaint.

8. That the Defendants, answering Paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Amended Complaint, admit that Plaintiff Jamesetta Washington presented to East

Cooper Regional Medical Center on or about July 15, 2002, for the labor and delivery of her son Jayden W. The Defendants craves reference to the records of East Cooper Regional Medical Center as to the dates and nature of the care and treatment rendered to the Plaintiff and Jayden W. as well as their respective complaints, presentations and conditions. All allegations contained in Paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Amended Complaint inconsistent with the above are denied.

9. That the Defendants, answering Paragraphs 19 and 20 of the Amended Complaint, admit that Jayden W. was transferred from East Cooper Regional Medical Center to the Medical University of South Carolina on or about July 17, 2002. The Defendants craves reference to the records of the Medical University of South Carolina as to the dates and nature of the care and treatment rendered to Jayden W. while a patient there, as well as his presentation and condition. All allegations contained in Paragraphs 19 and 20 of the Amended Complaint inconsistent with the above are denied.

10. That the Defendants deny the allegations contained in Paragraphs 21, 22 and 23 of the Amended Complaint, including but not limited to the subparts.

11. That Paragraph 24 of the Amended Complaint states a legal conclusion to which the Defendants are not required to respond. To the extent a response is required, the allegations of Paragraph 24 are denied.

12. That the Defendants deny the allegations contained in Paragraph 25 of the Amended Complaint.

13. That Paragraph 26 of the Amended Complaint states a legal conclusion to which the Defendant is not required to respond. To the extent a response is required, the allegations of Paragraph 26 are denied.

14. That the Defendants deny the allegations contained in Paragraphs 27, 28 and 29 of the Amended Complaint.

FOR A SECOND DEFENSE

15. That the Defendants reiterate all of the allegations contained in each and every foregoing Paragraph of this Amended Answer, as fully as if repeated verbatim herein.

16. That the care and treatment administered by the agents, servants, and employees of Defendant East Cooper Regional Medical Center conformed to and was in full compliance with the standard of care. All care and treatment administered by the Defendant East Cooper Regional Medical Center, through its agents, servants, and employees, was within acceptable standards and methods, and at no time pertinent hereto did this Defendant, its agents, servants, or employees, deviate from any acceptable standard while caring for or tending to Plaintiff Jamesetta Washington or Jayden Washington. Consequently, Plaintiff is barred from recovery against the Defendants.

FOR A THIRD DEFENSE

17. That the Defendants reiterate all of the allegations contained in each and every foregoing Paragraph of this Amended Answer, as fully as if repeated verbatim herein.

18. That the Plaintiff has failed to allege facts sufficient to constitute a cause of action as against the Defendants.

FOR A FOURTH DEFENSE

19. That the Defendants reiterate all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

20. That if the Defendants were negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, the negligence of the Defendants is not the direct or proximate cause of any injury as alleged by the Plaintiff and therefore the Defendants are not liable for injuries sustained or any damages alleged as a result thereof.

FOR A FIFTH DEFENSE

21. That the Defendants reiterate all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

22. That the Defendants would allege, upon information and belief, that any injuries or damages allegedly sustained herein were due to, caused and occasioned by a natural disease process over which the Defendants had no control and, as such, the Defendants plead such as a complete bar to this action.

FOR A SIXTH DEFENSE

23. That the Defendants reiterate all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

24. That if the Defendants were negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, any alleged injuries and damages were the direct and proximate result of the intervening and superseding negligence of third parties for which the Defendants are not liable.

FOR A SEVENTH DEFENSE

25. That the Defendants reiterate all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

26. That if the Defendants were negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, any injuries or damages sustained by Jayden Washington as set forth in the Amended Complaint were due to and caused in whole or in part by Plaintiff's acts of comparative negligence.

FOR AN EIGHTH DEFENSE

27. That the Defendants reiterate all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

28. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate the Defendants' constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND BY WAY OF CROSS CLAIM
AGAINST CO-DEFENDANT AMN SERVICES, INC.

29. That the Defendants reiterate all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

30. At the time of the events complained of in the Amended Complaint, the Defendant East Cooper Regional Medical Center (hereinafter referred to as "Defendant Hospital") and Defendant AMN Services Inc. (hereinafter referred to as "Defendant AMN") were parties to an Agreement for Supplemental Staffing Agencies (hereinafter "the Agreement") whereby Defendant AMN was contracted to provide supplemental nursing staff at East Cooper Regional Medical Center.

31. As a result of the Agreement, a special relationship existed between Defendant Hospital and Defendant AMN.

32. According to the pertinent terms of the Agreement, Defendant AMN agreed to indemnify, defend and hold harmless Defendant Hospital from and against any and all losses, expenses, damages, liabilities, costs, attorneys fees and judgments arising out of bodily injury or any other damage caused by the negligence of Defendant AMN, its agents, independent contractors, employees and servants, in the provision of services under the Agreement.

33. In addition, the Agreement required Defendant AMN to procure and maintain at its expense general public liability insurance with Defendant Hospital named as an additional insured.

34. Pursuant to the terms of the Agreement, Defendant Hospital is entitled to a legal defense, insurance coverage, and contractual indemnity from Defendant AMN for all liability, losses, claims and costs relating to this lawsuit which arise out of the alleged acts and omissions of its agent, Judy Mercer, R.N.

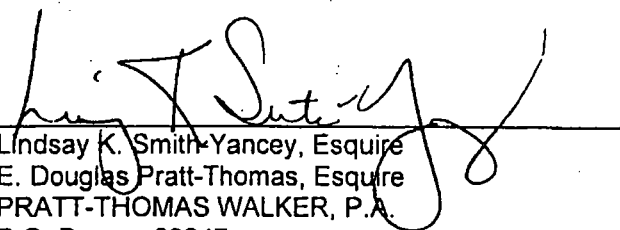
**FURTHER ANSWERING AND BY WAY OF CROSS CLAIM
AGAINST CO-DEFENDANT AMN SERVICES, INC.**

35. Defendant Hospital reiterates all of the allegations contained in each and every foregoing paragraph of this Amended Answer, as fully as if repeated verbatim herein.

36. Pursuant to the terms of the afore-mentioned Agreement and special relationship between the Defendant Hospital and Defendant AMN, Defendant Hospital is entitled to equitable indemnity from Defendant AMN for all liability, losses and costs relating to this lawsuit, which arise out of the alleged acts and omissions of its agent, Judy Mercer, R.N.

WHEREFORE, having fully answered the Amended Complaint herein, Defendant East Cooper Regional Medical Center, incorrectly named and sued as "Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center" prays that the same be dismissed with costs, and that an Order be entered requiring Defendant AMN to reimburse Defendant Hospital for all costs and fees for the defense of this matter which relate to the alleged acts and omissions of Defendant AMN's agent, Judy Mercer, R.N. In the alternative, these Defendants move for an Order requiring Defendant AMN to provide a legal defense and insurance coverage to Defendant Hospital for all liability, losses, claims and costs relating to this lawsuit which arise out of the alleged acts and omissions of its agent, Judy Mercer, R.N.

By:



Lindsay K. Smith-Yancey, Esquire
E. Douglas Pratt-Thomas, Esquire
PRATT-THOMAS WALKER, P.A.
P.O. Drawer 22247

Charleston, S.C. 29413-2247

Tel: (843) 727-2211

Attorneys for Defendant East Cooper Regional Medical
Center and Tenet South Carolina, Inc.

Charleston, South Carolina
December 8th, 2009

07-CP-10-1553

I hereby certify that I have served a true copy of the foregoing Answer and Cross Claim of Defendant East Cooper Regional Medical Center to Plaintiff's Amended Complaint by delivering a copy to the following counsel/parties, in accord with applicable Rules of Civil Procedure, on December 8th, 2009, by first class mail (postage prepaid, properly addressed):

Edward L. Graham, Esquire
Mary H. Watters, Esquire
Graham Law Firm, P.A.
383 W. Cheves Street
P.O. Box 550
Florence, SC 29503

Molly H. Craig, Esquire
Chilton Grace Simmons, Esquire
Hood Law Firm, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402

D. Jay Davis, Jr., Esquire
James E. Scott, IV, Esquire
Young Clement Rivers
28 Broad Street
P.O. Box 993
Charleston, SC 29402

John K. Blincow, Esquire
Ashley Heslop, Esquire
Turner Padgett Graham & Laney, P.A.
40 Calhoun Street, Ste. 200
P.O. Box 22129
Charleston, SC 29413

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2009 DEC -9 AM 11:39

FILED

By: _____

Alison A. B. Preacher, Paralegal to Lindsay K. Smith-Yancey

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403PO DRAWER 22247
CHARLESTON, SC 29413-2247PHONE: 843.727.2200
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(843) 727-2230 (direct dial)
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E. DOUGLAS PRATT-THOMAS

G. TRENHOLM WALKER

W. ANDREW GOWDER, JR.

JOHN L. AUSTEN

J. KEITH MCCARTY (SC, TN)

LINDSAY K. SMITH-YANCEY (SC, RI)

CLAYTON B. McCULLOUGH

THOMAS H. NESSE (SC, GA)

JAM W. FREEMAN (SC, CA)

FRANCIS M. ERVIN II (SC, MA)

DANIEL S. McQUEENEY, JR.

JAMIE A. KHAN

SARA E. DeWOLF

December 8, 2009

The Honorable Julie J. Armstrong
Clerk of Court for Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Jamesetta Washington, as Guardian ad Litem for Jayden W. , a minor vs. Edmund Rhett, Jr., M.D.,
Low Country Obstetrics & Gynecology, P.A., Tenet South Carolina, Inc., d/b/a East Cooper Regional
Medical Center, AMN Services, Inc. f/k/a Nurses RX, Inc.
C.A. No.: 07-CP-10-1553
Matter No.: 07-31693
Our Client: Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center
D/L: ~7/16/02
Our File No.: 722.109

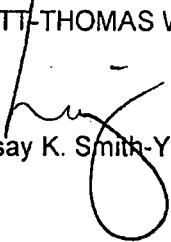
Dear Julie:

Enclosed for filing in the captioned case are an original and three (3) copies of the Answer and Cross Claim of Defendant East Cooper Regional Medical Center to Plaintiff's Amended Complaint. Please return the filed copies of the Answer to me in the self-addressed, stamped envelope enclosed herewith.

By copy of this letter, I am serving all counsel of record with the above. As always, your courtesies and assistance are greatly appreciated. Should you have any questions regarding this matter, please do not hesitate to contact me.

With warmest regards, I am,

PRATT-THOMAS WALKER, P.A.


Lindsay K. Smith-YanceyLKS-Y:aabp
Enclosurescc: Edward L. Graham, Esquire (w/encl)
Chilton Grace Simmons, Esquire (w/encl)
D. Jay Davis, Jr., Esquire (w/encl)
John K. Blincow, Esquire (w/encl)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., East Cooper
Community Hospital, Inc., and AMN Services,
Inc., f/k/a Nurses RX, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2007-CP-10-1553

ANSWER OF DEFENDANT AMN
SERVICES, INC., F/K/A NURSES RX,
INC., TO CROSS-CLAIM

(Jury Trial Demanded)

FILED
2010 JAN -5 AM 11:00
JULIE J. ARMSTRONG
CLERK OF COURT

TO: LINDSAY K. SMITH-YANCEY, ESQUIRE, ATTORNEY FOR EAST COOPER
COMMUNITY HOSPITAL, INC.

Defendant AMN Services, Inc., f/k/a Nurses RX, Inc., responds to the Cross-Claim of
Defendant East Cooper Community Hospital, Inc. and alleges as follows:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation that is not hereafter specifically admitted.
2. The Defendant craves reference to and adopts herein the responses and defenses made in its Answer to the Amended Complaint.
3. The Defendant admits the allegations of paragraph 30 of the Cross-Claim.
4. The Defendant admits so much of paragraph 31 of the Cross-Claim as may be construed to allege that the Defendant hospital and Defendant AMN Services, Inc. had a contractual relationship and that various rights and responsibilities existed by virtue of that contract.

TPGL 3045667v1

5. Defendant AMN would refer to the agreement between Defendant AMN and Defendant hospital for a more particular response regarding the terms of the agreement in response to the allegations in paragraphs 32 and 33 of the Cross-Claim. All allegations of paragraphs 32 and 33 of the Cross-Claim inconsistent with the terms of the agreement are specifically denied.

6. Defendant AMN denies the allegations of paragraph 34 of the Cross-Claim and demands strict proof thereof.

7. In response to the allegations contained in paragraph 35, Defendant AMN reiterates and realleges each of its previous responses as if set forth fully herein.

8. Defendant AMN denies the allegations of paragraph 36 of the Cross-Claim and demands strict proof thereof, being all the remaining allegations in the Cross-Claim.

FOR A SECOND DEFENSE
(Intervening Negligence)

9. The Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

10. Further answering the Cross-Claim, this Defendant alleges that any damage sustained by the Plaintiff was due to and caused by some intervening cause set in motion by some other third party over which this Defendant has no control, so as to bar the Plaintiff from recovery against this Defendant.

FOR A THIRD DEFENSE
(Equitable Estoppel)

11. The Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

12. Plaintiff's claims are barred by the doctrine of estoppel.

FOR A FOURTH DEFENSE
(No Proximate Cause)

13. The Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

14. That no act or omission of the Defendant was a proximate cause of the damages alleged in the Cross-Claim as to bar the Plaintiff from recovery against this Defendant.

FOR A FIFTH DEFENSE
(Comparative Negligence)

15. The Defendant reiterates and realleges each of its previous responses as if set forth fully herein.

16. The Defendant alleges that any injuries or damages sustained by the Plaintiff were caused by the negligence and carelessness of the Plaintiff, combining with the negligence and carelessness of the Defendants, which is denied, so as to bar or reduce the Plaintiff from recovery against this Defendant.

FOR A SIXTH DEFENSE
(Joint Tortfeasor)

17. The Defendant reiterates each of its previous responses as if set forth fully herein.

18. That the co-Defendant hospital is alleged to have its own separate fault such that the hospital is a joint tortfeasor so as to bar the hospital from recovery against this Defendant.

FOR A SEVENTH DEFENSE
(Reservation)

19. The Defendant reiterates and reallege each of its previous responses as if set forth herein.

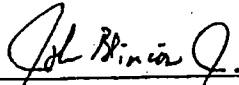
20. The Defendant specifically reserves its right to raise as additional affirmative defenses, any defense raised by the co-Defendants and any defense which may become available

during discovery or otherwise and which may be proven at trial. The Defendant specifically reserves its right to amend this Answer to Cross-Claim as necessary and applicable.

WHEREFORE, having fully answered the Cross-Claim, this Defendant prays that it be dismissed together with such further relief, as this Court deems just and equitable.

TURNER PADGET GRAHAM & LANEY P.A.

By:



John K. Blincow, Jr.

Ashley S. Heslop

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2800

Facsimile: (843) 577-3369

jblincow@turnerpadget.com

aheslop@turnerpadget.com

ATTORNEYS FOR DEFENDANT

AMN SERVICES, INC., F/K/A

NURSES RX, INC.

Charleston, South Carolina
January 4, 2010

CERTIFICATE OF SERVICE

07-CP-10-1553

I hereby certify that on this 4th day of January, 2010, a copy of the above and foregoing
ANSWER OF AMN SERVICES, INC., F/K/A NURSES RX, INC. TO CROSS-CLAIM has
been and mailed to counsel of record, postage prepaid and properly addressed as follows:

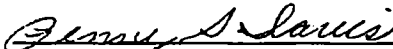
Edward L. Graham
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Charleston, SC 29413

James E. Scott, IV
Young Clement Rivers, LLC
P. O. Box 993
Charleston, SC 29402-0993

FILED
2010 JAN -5 AM 11:06
JULIE J. ARMSTRONG
CLERK OF COURT


Penny S. Davis

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

John K. Blincow, Jr.

E-Mail: JBlincow@TurnerPadget.com
Writer's Direct Dial: (843) 576-2806
Direct Fax: (843) 577-1624

January 4, 2010

Julie J. Armstrong, Clerk
Charleston County Court of Common Pleas
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: Jamsetta Washington, as Guardian ad Litem for Jayden W a minor,
v. AMN Services, Inc., f/k/a Nurses RX, Inc., et al.
Case No.: 2007-CP-10-1553
Our File No.: 3869.111

Dear Julie:

We enclose for filing an original and one copy of the *Answer of Defendant AMN Services, Inc., f/k/a Nurses RX, Inc., to Cross-Claim*. Please return a file-stamped copy in the envelope provided. By copy of this letter to counsel of record, we are hereby serving them with our Answer.

Kind regards,

Yours truly,

TURNER, PADGET, GRAHAM & LANEY, P.A.



John K. Blincow, Jr.

JKB:psd
Enclosures

cc: Edward L. Graham/Mary H. Waters
Chilton Simmons
Lindsay Smith-Yancey
James E. Scott, IV (all w/enclosure)

TPGL 3051488v1

BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413
Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Jamesetta Washington, as Guardian ad Litem)
for Jayden W: a minor,)

CASE NO.
07-CP-10-1553

☐ Plaintiff(s),)

DEFENDANT EDMUND RHETT, JR., M.D.'S
NOTICE OF MOTION AND MOTION TO
AMEND ANSWER

Versus)

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., Tenet South
Carolina, Inc., d/b/a East Cooper Regional
Medical Center, AMN Services Inc, f/k/a
Nurses RX, Inc.,)
☒ Defendant(s).)

check box above indicating submitting party

Plaintiff's attorney:

Edward L. Graham, Esquire
Graham Law Firm, P.A.
383 W. Cheves St.; P.O. Box 550
Florence, SC 29503
P: 843.662.3281; F: 843.665.0254

Defendant's attorney:

Molly H. Craig, Esquire (SC #6960)
HOOD LAW FIRM, LLC
172 Meeting Street; P.O. Box 1508
Charleston, SC 29402
P: 843-577-4435; F: 843-722-1630

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)

☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Minutes

Court Reporter Needed: YES ☐/ NO ☐

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order -

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

6/30/10
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the
attached order.

☐ Other:

JUDGE

CODE:

DATE:

CLERK'S VERIFICATION

Collected by:

(print name)

DATE FILED

☒ MOTION FEE COLLECTED: \$25

☐ CONTESTED-AMOUNT DUE:

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiff,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 07-CP-10-1553

) DEFENDANT EDMUND RHETT, JR.,
) M.D.'S NOTICE OF MOTION AND
) MOTION TO AMEND ANSWER

FILED
2010 JUL -1 AM 9:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: EDWARD L. GRAHAM AND MARY WATTERS, ATTORNEYS FOR THE
PLAINTIFF:

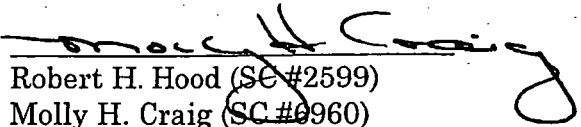
PLEASE TAKE NOTICE that pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, the Defendant, Edmund Rhett, Jr., M.D. (hereinafter "this Defendant"), by and through his undersigned counsel, will move as soon as may be heard for an Order granting leave to Amend his Answer to the Plaintiff's Amended Complaint to include the affirmative defense of comparative negligence. This Defendant makes this motion to conform their Answer to the facts developed in discovery.

Leave of Court is required to amend a pleading after thirty days has expired, and such leave is freely given when it does not prejudice another party. This Defendant reserved the right to amend their Answer to add additional affirmative defenses in Paragraph 21 of the Answer previously filed with the Court. The documents produced to date and depositions taken throughout discovery addressed issues of comparative negligence and the Plaintiff is on notice that this issue will be raised at trial.

A motion to amend is addressed to the sound discretion of the trial judge. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004). Leave to amend pleadings pursuant to Rule 15, SCRPC, shall be liberally and freely given when justice so requires and does not prejudice any other party. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997). The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993). In *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999), the court explained the prejudice envisioned by Rule 15 as a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Rule 15 strongly favors amendments and the court is encouraged to freely grant leave to amend. *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

This Motion is based in part on the discussion above, as well as the pleadings in this case, the proposed Amended Answer of Edmund Rhett, Jr., M.D. attached hereto, and may be supported by supplemental memoranda, affidavits, or other evidence prior to a hearing on this matter.

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172 Meeting Street
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Phone: (843) 577-4435
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Robert H. Hood (SC #2599)
Molly H. Craig (SC #0960)
Chilton Grace Simmons (SC #68279)

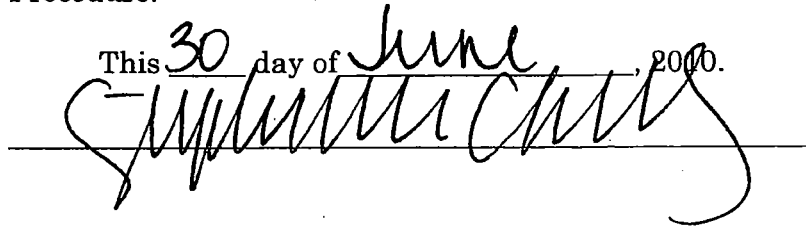
Attorneys for the Defendant
Edmund Rhett, Jr., M.D.

June 30, 2010
Charleston, South Carolina
J:\docs\2.100\MTA.doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☒ facsimile, or ☐ hand delivery, in the manner prescribed by the applicable Rule of Civil Procedure.

This 30 day of June, 2010.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Jamesetta Washington, as Guardian ad	)	C/A No. 07-CP-10-1553
Litem for Jayden W. a minor,	)	
	)	
Plaintiff,	)	DEFENDANT EDMUND RHETT, JR.,
	)	M.D.'S AMENDED ANSWER TO
Versus	)	PLAINTIFF'S AMENDED
	)	COMPLAINT
	)	(Jury Trial Requested)
Edmund Rhett, Jr., M.D., Low Country	)	
Obstetrics & Gynecology, P.A., Tenet	)	
South Carolina, Inc., d/b/a East Cooper	)	
Regional Medical Center, AMN Services	)	
Inc., f/k/a Nurses RX, Inc.,	)	
	)	
Defendants.	)	

The Defendant, Edmund Rhett, Jr., M.D., (hereinafter "this Defendant"), hereby answers the Amended Complaint of the Plaintiff, subject to all applicable motions, affirmative defenses, and other pleadings, as follows:

1. This Defendant denies each and every allegation of the Plaintiff's Amended Complaint which is not hereinafter specifically admitted.
2. This Defendant is without sufficient knowledge and information upon which to form a belief as to the allegations contained in the Paragraph 1 of the Plaintiff's Amended Complaint, and therefore denies the same.
3. Paragraph 2 of the Plaintiff's Amended Complaint contains conclusions of law to which no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information upon which to form a belief as the allegations contained in Paragraph 2 of the Plaintiff's Amended Complaint and therefore denies the same.
4. This Defendant admits only so much of the allegations contained in Paragraph 3 of the Plaintiff's Amended Complaint as allege that Defendant Rhett is

a physician licensed to practice medicine within the State of South Carolina and that he is a citizen and resident of Charleston County, South Carolina. This Defendant denies all remaining and inconsistent allegations contained in Paragraph 3 of the Plaintiff's Amended Complaint.

5. The allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Amended Complaint are not directed at this Defendant and, therefore, do not require a response. Further responding, the allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Amended Complaint set forth conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Amended Complaint.

6. In response to the allegations contained in Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Plaintiff's Amended Complaint, this Defendant craves reference to the medical records of Jamesetta and Jayden W. for a complete and accurate description of what is contained therein. All remaining and inconsistent allegations contained in Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Plaintiff's Amended Complaint are denied.

7. This Defendant denies the allegations contained in Paragraphs 21, 22, including subparts (a) through (j), 23, including subparts (a) through (j), 24, and 25, including subparts (a) through (j), of the Plaintiff's Amended Complaint.

8. The allegations contained in Paragraph 26 of the Plaintiff's Amended Complaint set forth conclusions of law to which no response is required. To the extent that a response is required, this Defendant denies the allegations contained in Paragraph 26 of the Plaintiff's Amended Complaint.

9. The allegations contained in Paragraphs 27, including subparts (a) through (h), and 28, including subparts (a) through (d), of the Plaintiff's Amended Complaint are not directed at this Defendant and, therefore, do not require a response. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 27, including subparts (a) through (h), and 28, including subparts (a) through (d), of the Plaintiff's Amended Complaint.

10. This Defendant denies the allegations contained in Paragraph 29, including subparts (a) through (j), of the Plaintiff's Amended Complaint and the Plaintiff's Prayer for Relief, such being all remaining allegations contained in the Plaintiff's Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THIS DEFENDANT ALLEGES:

(No Deviation from Standard of Care)

11. That the care and treatment administered by this Defendant conformed to and was in full compliance with the standard of care. All care and treatment administered by this Defendant was within acceptable medical standards and methods, and, at no time pertinent hereto, did this Defendant deviate from any medical standard while caring for or tending to the Plaintiff or minor child. Consequently, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THIS DEFENDANT ALLEGES:

(No Proximate Cause)

12. That, even if this Defendant was negligent, as alleged in the Plaintiff's Amended Complaint, which is specifically denied, the negligence of this Defendant is not the direct and proximate cause of any injury alleged by the Plaintiff and/or minor child and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff and/or minor child.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Informed Consent)

13. The Plaintiff with knowledge and understanding consented to treatment and therefore the Plaintiff's claims are barred in accordance with the principles of informed consent.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

14. That this Defendant acted reasonably and in good faith at all times material herein, based on the material facts and circumstances known by this Defendant. Accordingly, the Plaintiff is not entitled to recover any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Pre-existing Medical Condition)

15. Whatever injuries the Plaintiff and/or minor child sustained, which are specifically denied herein, were the result of pre-existing medical conditions of the Plaintiff and/or minor child, whether disclosed or undisclosed, and were not related to the incidents complained of in the Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Predisposition of Medical Condition)

16. Whatever injuries the Plaintiff and/or minor child sustained, which are specifically denied herein, were the result of the Plaintiff's and/or minor child's predisposition to medical conditions, whether disclosed or undisclosed, and were not related to the incidents complained of in the Amended Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Superseding/Intervening Causes)

17. Whatever injuries and damages, if any, may have been sustained by the Plaintiff and/or minor child, were due to superseding and/or intervening causes beyond the control of this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Intervening Negligence/Negligence of Third Party)

18. That, upon information and belief, even if this Defendant is negligent in the manner described in the Amended Complaint, which is specifically denied, whatever injuries and damages, if any, which may have been sustained by the Plaintiff and/or minor child were the direct and proximate result of the intervening and superseding negligence of third parties, for whose conduct this Defendant bears no responsibility. Therefore, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Idiosyncratic Reaction)

19. That this Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff and/or minor child were due to and caused by an idiosyncratic reaction over which this Defendant had no control and as such, this Defendant pleads such an idiosyncratic reaction as a complete bar to this action.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

20. That, upon information and belief, even if this Defendant was negligent as described in the Amended Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

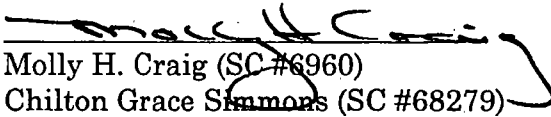
21. That any award or assessment of punitive damages as prayed for by the Plaintiff would violate this Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

22. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, and having asserted these affirmative defenses, this Defendant, Edmund Rhett, Jr., M.D., prays that the Plaintiff's Amended Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

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Molly H. Craig (SC #6960)
Chilton Grace Simmons (SC #68279)
Elizabeth W. Ballentine (SC #74965)

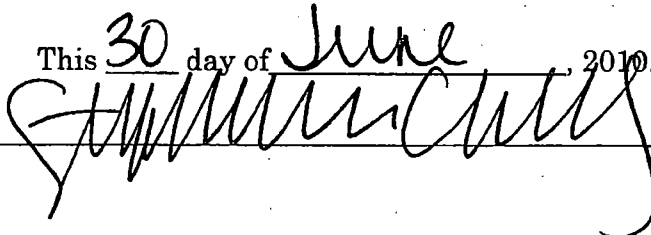
Attorneys for the Defendant
Edmund Rhett, Jr., M.D.

June 30, 2010
Charleston, South Carolina
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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☒ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 30 day of June, 2010.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NUMBER: 2007-CP-10-1553
	)	
Jamesetta Washington, as Guardian ad	)	
Litem for Jayden W , a minor,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Edmund Rhett, Jr., M.D., Low Country	)	
Obstetrics & Gynecology, P.A., Tenet	)	
South Carolina, Inc., d/b/a East Cooper	)	
Regional Medical Center,	)	
	)	
Defendants.	)	

**PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE
CERTAIN TESTIMONY AND EVIDENCE
(UPDATED FOR TRIAL JULY 28, 2010)**

Plaintiff Jamesetta Washington as Guardian ad Litem for Jayden W , a minor, by and through her undersigned legal counsel will move this Honorable Court to strike or exclude certain testimony and evidence from the trial of this case, as follows:

- a. Plaintiff has a videotape of the birth of Jayden W . Although Plaintiff has not received any indication that Defendant(s) will seek to exclude that video from evidence, and Plaintiff is unaware of any basis for such an attempt, the video contains critically important evidence which should be admitted.
- b. Defendants intend to present expert testimony regarding the opinion of Dr. Aubrey Milunsky, geneticist. Dr. Milunsky has not examined Jayden, yet claimed at deposition the ability to determine from photographs and his mother's medical records that Jayden has a connective tissue disorder that caused or contributed to his brain bleeds. Dr. Milunsky also claims Jayden W 's physical and mental deficits are a result of some yet unidentified or unnamed genetic syndrome. Dr. Milunsky's opinions are without foundation or scientific basis and are completely theoretical in nature. Plaintiff seeks to prevent Defendants from presenting Dr. Milunsky as a witness or expert and seeks to exclude any medical or other opinions relating to (i.) alleged connective tissue disorder and (ii.) theoretical genetic syndrome.

- c. Defendants will most probably seek to introduce evidence that the Plaintiff used tobacco, marijuana and/or alcohol during the first month or so of her pregnancy. Such evidence is of minimal if any relevance, and any theoretical relevance is outweighed by the prejudicial nature thereof. Plaintiff testified that she did not use any of those substances once she found out she was pregnant, at approximately a month or so of pregnancy. Defendants do not have any credible evidence that Plaintiff used any such substance after the learned of her pregnancy. Furthermore, Defendants do not have any credible evidence to suggest that Plaintiff's use of these substances early in pregnancy caused or materially contributed to Jayden W's developmental, motor or cognitive deficits.
- d. Defendants may attempt to introduce evidence relating to Plaintiff's medical diagnosis with herpes or any other sexually transmitted disease. That should be excluded because it is completely irrelevant. There has been no evidence or testimony which suggests that Jayden W's damages in any way result from this medical condition. Plaintiff contends that such evidence would be completely irrelevant and highly prejudicial.
- e. Defendants may also attempt to introduce evidence or testimony regarding the incarceration or criminal record of Christopher Geiss, Jayden W's biological father. There has been no testimony or suggestion whatsoever that his incarceration is in any way related to Jayden's injuries, nor was Mr. Geiss present at the time of Jayden's delivery. As such, this information is completely irrelevant and would be introduced solely for the purpose of inciting prejudice against the Plaintiff.
- f. Defendants will most likely attempt to introduce medical records and/or elicit testimony regarding medical treatment of Jamesetta Washington at times subsequent to the birth of Jayden W on July 16, 2002. Such records and medical treatment are irrelevant to matters relating to this case or Jayden's injuries and would be introduced only for the purpose of confusing the jury or inciting prejudice against the Plaintiff.
- g. Numerous records which have been obtained through the course of this litigation contain references to and/or correspondence from and by former defendants and counsel for defendants who have been dismissed from this matter. Such evidence or documents may confuse the jury and should be excluded on that basis.
- h. The only basis for liability of Low Country Obstetrics and Gynecology, P.A., is vicarious liability for torts of Dr. Rhett. The P.A. and Dr. Rhett have the same liability insurer, but separate representation in this case. Plaintiff asserts it would be unfair and improper to allow counsel for either to ask leading questions in cross examination of a witness called by the other.
- i. Certain records have identified two birth defects of Jayden W: a coloboma of one eye which causes no harm and requires no treatment; and a unilateral inguinal hernia, which also involves a hydrocele and intermittent undescended testis. These represent two minor birth defects, as the inguinal hernia, hydrocele and testis issues are part of one problem, the hernia, easily corrected by hernia surgery. Defendants should be precluded from addressing these birth defects as though they are four separate birth defects, as that is untrue, prejudicial and confusing.

- j. Defendants attempt to describe various other conditions of Jayden W., which were caused by traumatic brain bleeds, as additional birth defects, with no evidence they would exist but for the traumatic vacuum delivery. Such include low platelets, D.I.C. and feeding disorder, among others. Such testimony should be excluded as confusing, prejudicial, and violative of the "most probable" rule.
- k. Defendants attempt to designate parts of various differential diagnoses and potential causes, mentioned in records early after birth, as though they were actual diagnoses and actual causes; and further argue that such represent additional birth defects. Such arguments are dishonest, misleading, confusing, prejudicial and violative of the "most probable rule" and should also be precluded.
- l. Defendants also attempt to ascribe "birth defects" to many traits that represent individual variations, not birth defects, such as ear size and shape, nipple location and similar matters. Each is confusing, prejudicial, unscientific and should be precluded.
- m. Plaintiff requests preclusion of all other evidence which is irrelevant, or whose minimal relevance is outweighed by its rendering to prejudice or confuse the jury.
- n. Plaintiff seeks to preclude all evidence which fails the "most probable" test for causation evidence.
- o. Any and all testimony about the Medicaid, prior payment or Plaintiff's bills by Medicaid, or the Plaintiff's eligibility for Medicaid.
- p. Any testimony from Dr. Allen Elster as Defendants have failed to provide the Plaintiff an opportunity to depose him and the Defendants have subsequently withdrawn him as a witness.
- q. Any and all purported expert testimony which is not based on sufficiently reliable medical or scientific principles.

GRAHAM LAW FIRM, P.A.


By: Edward L. Graham
Mary H. Watters
P.O. Box 550
Florence, SC 29503
Attorneys for Plaintiff

Florence, SC
23 day of July, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NUMBER: 2007-CP-10-1553
	)	
Jamesetta Washington, as Guardian ad	)	
Litem for Jayden W. , a minor,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Edmund Rhett, Jr., M.D., Low Country	)	
Obstetrics & Gynecology, P.A., East Cooper	)	
Community Hospital, d/b/a East Cooper	)	
Regional Medical Center,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER
MOTION IN LIMINE TO STRIKE OR PRECLUDE
CERTAIN TESTIMONY AND EVIDENCE**

Plaintiff Jamesetta Washington as Guardian ad Litem for Jayden W. , a minor, by and through her undersigned legal counsel submits this memorandum in support of her Motion in Limine to strike or preclude any testimony by any of Defendants' witnesses or experts suggesting or opining that alleged ingestion or exposure to alcohol, marijuana or cigarettes is in any way related to the causation of the birth injuries, physical features or developmental delays suffered by Jayden W. . It has become evident through the course of discovery that Defendants seek to offer opinions by various witnesses that Jayden W.'s injuries and/or developmental delays were not caused by the improper utilization of a vacuum extractor to facilitate his delivery as alleged in Plaintiff's Complaint, but are the result of alleged maternal alcohol ingestion during pregnancy. These witnesses' opinions to do not reach the necessary

level of reliability or probability required of expert testimony. As such, exercising its gatekeeper function, this court should preclude any such testimony offered by any witness or based on any opinions asserting such a causal connection. Further, the court should preclude any reference to these matters by any other party or witness based upon such improper testimony.

Argument

Exercising its 'gate-keeper' function to rule on the admissibility of a theory proffered by an expert, the Court must conduct a three-part inquiry, set forth by this Court in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (S.C. 1999) (citing with approval, though not adopting, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

The Court found the current and proper analysis for determining admissibility of scientific evidence set forth under the South Carolina Rules of Evidence. "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability" (citing *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)). The *Jones* factors are as follow: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

Throughout discovery, Defendants have made reference to alleged alcohol, tobacco or marijuana ingestion by Jamesetta Washington during the first month or so of pregnancy and

suggested that such use was a causal or contributing factor to the minor, Jayden W s injuries and/or developmental delays. Defendants have not, however, produced or elicited any evidence *whatsoever* that Jamesetta Washington was exposed to sufficient quantities of such substances to the extent that they could have impacted the unborn child during her pregnancy. Each and every expert, including Defendants' experts, has been questioned as to whether or not he or she can truthfully testify to a reasonable degree of medical certainty that such substances most probably caused Jayden W s brain damage, developmental delays, cognitive or motor impairments. *No expert* has been able to truthfully state such an opinion. As such, any reference to alcohol, tobacco or marijuana is irrelevant and would be introduced for the sole purpose of prejudicing the jury against the Plaintiff.

Defendants base their allegations upon certain references in Jamesetta Washington's prenatal records. Early in her pregnancy when describing her history, Jamesetta answered honestly that she may have been exposed to alcohol, tobacco or marijuana at some point in the first month of pregnancy, prior to recognizing that she was pregnant. In her deposition, Jamesetta testified that she suspected that she might be pregnant early into the pregnancy. She further testified that after the pregnancy was confirmed, she ensured that neither she nor her unborn child were exposed to any such substance. Furthermore, she testified that any quantities of exposure prior to confirmation of the pregnancy were minimal. Specifically, she did not consume any large quantities of alcohol, tobacco or marijuana. Jamesetta Washington dep. at 30—34. There has been no evidence presented which in any way contradicts Jamesetta's testimony.

Defendants have identified numerous experts to testify in this matter. Each medical expert has been asked to state his or her opinions as to what caused Jayden W s injuries. Not even one expert has stated to a reasonable degree of medical certainty that exposure

to any of these substances most probably caused Jayden's damages such as brain bleeds, brain damage, developmental problems, cognitive or motor impairments.

The qualification of a witness as an expert and the admissibility of this testimony are matters largely within the discretion of the trial judge; however the exercise of this discretion will be reversed where an abuse of discretion has occurred. Before expert medical testimony is admissible on the question of causation between the plaintiff's injuries and the acts of the defendant, the testimony must satisfy the "most probably" rule.

Payton v. Kears 329 SC 51, 61; 495 S.E.2d 205, 211 (S.C. 1998) (citations omitted).

When asked their opinions regarding the cause of Jayden Weinstein's injuries and consequent developmental delays, each expert has either declined to offer an opinion regarding causation or has acknowledged that any opinions could not be offered to a reasonable degree of medical certainty or could not meet the "most probable" standard. Although the specific terminology, "most probably," is not required, "the question is whether the medical testimony satisfies the 'most probably' standard." *Madison v. Brantley*, 302 S.C. 282, 284; 395 S.E.2d 190, 191 (Ct. App. 1990). No defense expert opines that Jayden's brain bleeds or brain damage was most probably caused by maternal ingestion of alcohol, tobacco or marijuana. As such, testimony of each of these experts regarding alcohol, tobacco or marijuana must be excluded.

Victor Weinstein, MD

Dr. Victor Weinstein is an obstetrician identified to serve as an expert on behalf of Dr. Rhett. Dr. Weinstein was deposed on May 27, 2009. Dr. Weinstein declined to render an opinion regarding causation. Specifically, Dr. Weinstein testified as follows:

Q. Did you consider yourself qualified to render an opinion in court about the cause of the unfavorable outcome?

A. I don't think so.

Q. Let me ask you: Even though you don't think you're qualified to offer the opinion, do you have an opinion —

A. As to what caused?

Q. Yes, Sir.

A. No. I don't know what caused this baby's bleed.

Q. Earlier you said something about there's a risk of brain damage from any vaginal delivery or words to that effect.

A. Correct.

Q. Okay. What do you base that on?

A. Just outcomes. We know that even if everything goes normally, naturally and perfectly comfortably as well as that can be, that some babies have less than optimal outcomes, and frequently, we don't know the cause.

Weinstein dep., at 126:12—127:7. As such, Dr. Weinstein offers no opinion or even suggestion that alcohol, tobacco or marijuana had any impact whatsoever on Jayden Washington or otherwise had any causal effect with regard to his injuries.

Stanley Ottinger, MD

Dr. Stanley Ottinger is an obstetrician identified to serve as an expert on behalf of Dr.

Rhett. Dr. Ottinger was deposed on April 28, 2009. Dr. Ottinger did not offer any opinions that alcohol, tobacco or marijuana are causally related to Jayden W. brain injuries.

Specifically, Dr. Ottinger testified as follows:

Q: As far as you're concerned, does the use of alcohol, tobacco, or marijuana by the mother in this case, have anything to do with the outcome?

A: It could have had an out—impact on the outcome. I can't state that. I mean, I'm not, again, a neurologist or a neurosurgeon, but we—it's well known that Fetal Alcohol Syndrome can cause brain injury. Marijuana probably doesn't cause any injury, but alcohol use in pregnancy can be a risk factor for brain injury, yes. And it's well studied; Fetal Alcohol Syndrome.

Q: All right. But you don't consider yourself (sic) on that potential cause?

A: No, but, I—do think it's impor—I mean, I can — I'm an expert to tell you that use in pregnancy is not recommended and can — is — as discussed, can result in injury to an infant.

Q: Okay.

A: But, I can't state that his injury currently is any result of alcohol, no.

Q: All right. And you aren't going to testify along those lines at trial?

A: No.

Ottinger dep. Vol. II at 66—67. As such, Dr. Ottinger offers no opinion or even suggestion that alcohol, tobacco or marijuana had any impact whatsoever on Jayden W or otherwise had any causal effect with regard to his injuries.

Lynn Norton, MD

Dr. Lynn Norton was deposed beginning on May 8, 2009 and resuming and completing on May 20, 2009. In her deposition, although Dr. Norton claimed to have special expertise in the area of the effect of alcohol consumption during pregnancy (Norton dep. at 49—51), she unequivocally stated that she could not testify that alcohol most probably or even more likely than not caused Jayden W's brain damage. (Norton dep. at 63—65). With specific reference to alcohol, Dr. Norton testified as follows:

Q: Have you formed an opinion as to whether or not Jayden W suffers from or has ever suffered from Fetal Alcohol Syndrome?

A: No Sir.

Q: So I don't need to worry about you telling this jury that you believe he suffers or has suffered from that syndrome?

A: That's correct.

Norton dep. at 53.

Q: Have you formed an opinion in this case to the effect that any ingestion of alcohol by Jamesetta Washington caused any neurotoxic effect or other brain damage or other harm to Jayden?

A: I believe that it could have. I don't know for sure that it did.

Norton dep. at 54.

Q: Okay. Have you formed an opinion that alcohol consumption by Jamesetta Washington most probably caused her son to have brain damage?

A: No.

Q: Have you formed an opinion that alcohol consumption during the pregnancy by Jamesetta Washington more likely than not caused her son to have brain damage?

A: No.

Q: You have formed an opinion, as I understand it, from your prior testimony that there is some possibility that alcohol consumption by Jamesetta caused her son to have brain damage?

A: Yes.

Q: Okay. Can you be any more specific about that?

A: Can you clarify your question, please?

Q: Yes, Ma'am. I mean, to me possibility or phrases like that mean different things to different people. Can you give me a percentage equivalency of what you mean by possibility in that context?

A: No.

Q: Okay. Can you say for example that there is a ten percent chance that consumption of alcohol by Jamesetta caused her son brain damage?

A: No.

Q: Can you say that there's a one in a 1,000 possibility that consumption of alcohol by the mom caused brain damage to Jayden?

A: No.

Q: Can you say – Can you be any more specific about the possible connection that you referred to earlier?

A: I said before, we don't know a – a threshold for alcohol and what damage it might cause. One binge episode is considered to be potentially damaging to the –

Q: Okay.

A: --baby.

Q: And you don't know of any binge episode by Jamesetta during her pregnancy, do you?

A: No.

Q: If I kept asking you mathematical questions, like, can you say there's a one in a million chance that alcohol consumption by Jamesetta caused brain damage in her son, would – would the answer still be no?

A: Yes.

Norton dep. at Pt. I, 63—65.

When Dr. Norton's deposition resumed on May 20, 2009, she sought to muddy the waters of her opinions as they related to the effects of alleged maternal alcohol on Jayden. After lengthy discussion about what Dr. Norton "might say" at trial (Norton dep. at Pt. II, 88—96), ultimately she stated that she could not render an opinion to a reasonable degree of medical certainty. Specifically, she testified as follows:

Q: Well as you sit here today, do you have an opinion to a reasonable degree of medical certainty as to whether or not alcohol ingestion by Jamesetta Washington was more likely than not a cause of her son's neurodevelopmental delays –

A: I do not.

Q: -- or other damage?

A: I do not.

Norton dep. at Pt. II, 96.

With reference to any impact of tobacco use on Jayden, Dr. Norton again noted that she had no evidence and offered no opinion that cigarette smoking in any ways contributed to Jayden's damages. Norton dep. at Pt. I, 66.

As such, Dr. Norton's testimony does not satisfy the "most probably" standard; therefore, her testimony should be limited to exclude any reference to any sort of substance use as having any causal connection to Jayden's injuries or developmental delays.

Peter Van Dorsten, MD

Dr. Van Dorsten was deposed on January 11, 2010. When asked his opinion regarding the most probable cause of Jayden's brain damage, he made no reference whatsoever to any impact of maternal alcohol, tobacco or marijuana exposure upon Jayden's developmental deficits and should be precluded from testifying regarding such matters at trial. When asked his opinion regarding causation, Dr. Van Dorsten testified as follows:

Q: My question is, do you claim to have an opinion to a reasonable degree of medical certainty as to the most probable cause of Jayden Washington's brain bleeds or brain damage?

A: I do. I think it was a consequence of labor and delivery.

Van Dorsten dep. at 119. Dr. Van Dorsten did not offer any opinions regarding alcohol, tobacco or marijuana at all, much less to the necessary degree of medical certainty. It would be unduly prejudicial to Plaintiff if he were permitted to add such testimony at trial. As such, he and defense counsel should be instructed to limit his testimony to exclude such matters.

John Hobbs, MD

Similar to Dr. Van Dorsten and Dr. Weinstein, Dr. Hobbs does not render any opinions whatsoever that maternal exposure to alcohol, tobacco or marijuana is causally related to Jayden's injuries. Specifically, Dr. Hobbs testified as follows:

Q: I'm really asking – I'm trying to find out whether you consider yourself qualified to give expert opinions on the cause of this child's brain damage.

A: No.

Q: ... So you do not consider yourself qualified to testify about causation issues in this case, correct?

A: Exactly.

Q: I don't need to ask you any question along those lines because you're not going to testify about any causation matter at trial, right?

A: You don't need to ask me now, but if you ask me later, I'm stuck, I have to answer something. And as I said, I have no anticipations of doing that unless you force me to do so.

Q: Well, if I were – If the question were to come up at trial, it would involve a qualifier, such as, do you have an opinion to a reasonable degree of medical certainty, as to the most probable cause of this child's brain injury?

You can't offer any opinion to a reasonable degree of medical certainty, can you?

A: You got it.

Hobbs dep. at 79—80. As such, Dr. Hobbs admits that he is not qualified to testify as to causation. Any testimony relating to alcohol, tobacco or marijuana would be for purposes of addressing causation; therefore, Dr. Hobbs must be precluded from testifying regarding such matters.

Aubrey Milunsky, MD

When asked generally about his opinions regarding the cause of Jayden's developmental delays,

Dr. Milunsky mentioned "his mother's alcohol intake as yet another significant contributor."

Milunsky dep. at 13. However, Dr. Milunsky admitted that there is no evidence as to the amount of alcohol or marijuana allegedly consumed by Jamesetta Washington during her pregnancy.

There has been no evidence whatsoever introduced to refute her testimony that exposure to these

substances, if any at all, was minimal and only in the early weeks of her pregnancy, prior to recognition of the pregnancy. Jamesetta Washington dep. at 30—34. Furthermore, Dr. Milunsky declined to offer testimony to a reasonable degree of medical certainty, most probably, that Jayden W suffered any ill effects as a result of any alleged alcohol ingestion by his mother during pregnancy.

Dr. Milunsky testifies as follows:

Q: Okay. You would not testify in this case that the ingestion of alcohol or marijuana early in pregnancy most probably caused any birth defect in Jayden Washington, would you?

A: I wouldn't put it that way, but I would certainly be pointing to an etiological factor in this pregnancy that includes alcohol.

Q: But it would be considerably less than a 50 percent likelihood?

A: I couldn't put a percentage on that. I don't think anybody could.

Q: Right. So do I understand that you could not even say, for example, that there is at least a one-in-a-million chance that alcohol ingestion or marijuana ingestion by the mom caused the baby to have any birth defect?

A: I'm not sure where you are getting the one-in-a-million from. But the fact is that alcohol ingestion by pregnant women in the United States ranks at the most common cause of birth defects that we see; and, as a consequence, this remains a significant possibility in this case as a contributing factor, which is why I talked about that there are multiple factors that operate in the operation of Jayden's ultimate problems.

Q: Yes, sir, But please answer my question.

Can you testify to a reasonable degree of medical certainty that ingestion of alcohol or marijuana by the mom creates at least one-in-a-million chance that Jayden's — that any of Jayden's birth defects were caused by the ingestion of those substances?

A: That figure, one in a million, sounds difficult to come to. If you are making a hypothetical one in a million, I would say it's much more likely than one in a million. But nobody would be in a position to come up with a precise

number. For example, one in 100,000, one in 10,000 would be much more probable than one in a million.

Q: Would you be willing to testify at trial that there is at least -- I mean, to a reasonable degree of medical certainty, there's at least one-in-a-million chance that alcohol or marijuana ingestion by the mom caused any birth defect of Jayden Washington?

A: There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects.

Milunsky dep. at 22—24. Dr. Milunsky further testified as follows:

Q: Let's talk, if we may, about what you can and cannot testify occurred to a reasonable degree of medical certainty most probably.

You don't know the amount of the mother's alcohol ingestion?

A: Correct.

Q: You don't know the time over which she ingested it?

A: Other than early pregnancy, no.

Q: You don't have any evidence that she ever binged with alcohol during pregnancy?

A: I'm not aware of that record.

Q: And with that limited knowledge, you cannot testify that her alcohol intake was most probably causally significant in this case, can you?

A: I can't comment on her alcohol intake; the amount of her alcohol intake.

Q: Okay. And, therefore you can't comment that the amount that she ingested and at the time she ingested it played any causally significant role in the development of her son's problems, can you?

A: I can only draw attention to the features that were found that are consistent with alcohol.

Q: But you can't testify that those are more likely than not caused by alcohol correct?

A: Please ask me the question again.

Q: You can't testify that her ingestion of alcohol most probably caused Jayden any problem, can you?

A: I answered the question by saying that I don't know the amount of alcohol she took, but that the features that he shows, some of which are consistent with fetal – incomplete Fetal Alcohol Syndrome.

Q: Okay. I don't mean to beat a dead horse here. I think what you are saying is you can't testify that more likely than not ingestion of alcohol caused any problem, but you're not giving me a direct answer to that, and I want to make sure.

A: No, I cannot say that it's more probable than not.

Milunsky dep. at 76—78 (emphasis added). As such, Dr. Milunsky's testimony regarding alcohol ingestion by Jayden's mother during pregnancy should be precluded in that Dr. Milunsky clearly and unequivocally concedes that he cannot testify to a reasonable degree of medical certainty that maternal alcohol ingestion most probably caused Jayden any harm.

Timothy Livingston, MD

Although Livingston initially opines that prenatal alcohol exposure "had effects on Jayden's neurologic health . . ." (Livingston Dep. 20:9-12), he later admitted that he was not an expert in fetal alcohol syndrome. (Id., 33:4-5). He "cannot imagine [prenatal alcohol ingestion] not having influences on the birth of an unborn child (Id., 28:3-6), but acknowledges he has no evidence of the amount of alcohol ingested (Id., 27:9-10). At first he thought the record established the mother used alcohol during three months of the pregnancy (Id., 20:23- 21:1), but later acknowledged he had no evidence she had ingested alcohol after November 1, 2001, just 2 -- 3 weeks into her pregnancy (26:6-11). Eventually, the witness acknowledged the limits of science in trying to prove causal significance of alcohol ingestion by Jayden's mother (Id.,

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad
Litem for Jayden Washington, a minor,
Plaintiffs,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics & Gynecology, P.A., East Cooper
Community Hospital, d/b/a East Cooper
Regional Medical Center,
Defendants.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER
MOTION IN LIMINE TO STRIKE OR PRECLUDE
CERTAIN TESTIMONY AND EVIDENCE**

Plaintiff Jamesetta Washington as Guardian ad Litem for Jayden Washington, a minor, by and through her undersigned legal counsel submits this memorandum in support of her Motion in limine to strike or preclude any testimony by Defendant's expert Dr. Aubrey Milunsky regarding causation of the birth injuries suffered by Jayden Washington. Defendant Dr. Rhett seeks to offer opinions by Dr. Aubrey Milunsky that Jayden Washington's injuries were not caused by the improper utilization of a vacuum extractor to facilitate his delivery as alleged in Plaintiff's Complaint, but are the result of some unnamed, unidentified genetic disorder, undiagnosed connective tissue disorder or maternal alcohol ingestion during pregnancy. Dr. Milunsky's opinions to do not reach the necessary level of reliability or probability required of expert testimony. As such, exercising its gatekeeper function, this court should exclude Dr. Milunsky as an expert witness as well as any testimony offered by him or based on his opinions as stated in

his deposition taken on May 19, 2009, including any affidavits by him which may be proffered. Further, the court should preclude any reference to these matters by any other party or witness based upon the testimony of Dr. Milunsky.

Argument

Exercising its 'gate-keeper' function to rule on the admissibility of a theory proffered by an expert, the Court must conduct a three-part inquiry, set forth by this Court in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (S.C. 1999) (citing with approval, though not adopting, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). The Court found the current and proper analysis for determining admissibility of scientific evidence set forth under the South Carolina Rules of Evidence. "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability" (citing *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)). The *Jones* factors are as follow: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

Dr. Aubrey Milunsky is a physician who holds board certifications in pediatrics, internal medicine and clinical genetics. He does not purport to be an expert in obstetrics or have any expertise relating to labor and delivery; therefore, his opinions do not assert any position as to

the standard of care as it relates to this case. See Milunsky dep. at 14 and 75. All of Dr. Milunsky's opinions and testimony relate solely to causation.

The Plaintiff alleges that Dr. Edmund Rhett was negligent in his medical treatment of Jamesetta Washington at the time of her labor and delivery and the birth of her son Jayden; and that as a result of this negligence, Jayden suffered brain bleeds and brain injury which resulted in damage to the structures of his brain causing severe developmental delays, cognitive and motor impairments. Dr. Milunsky was hired by Dr. Rhett to opine that Jayden's developmental delays and impairments were of genetic origin, not resulting from the brain injury caused by the improper vacuum use. Dr. Milunsky, however, is unable to render any expert opinion regarding the cause of Jayden's injuries or developmental delays on any scientific bases whatsoever. Furthermore, Dr. Milunsky's opinions do not satisfy the "most probably" standard as required for expert testimony under South Carolina Law.

DR. MILUNSKY'S TESTIMONY DOES NOT ASSIST THE TRIER OF FACT, BUT INSTEAD IS OFFERED FOR THE SOLE PURPOSE OF CONFUSING THE JURY.

In his deposition, Dr. Milunsky testifies extensively regarding the potential for chromosomal or genetic disorder as factors causally related to Jayden Washington's birth defects, damages, and/or developmental delays. Dr. Milunsky notes that as of the date of his deposition, he is not aware of any testing for genetic disorders undergone by Jayden. He suggests that Jayden may exhibit certain traits consistent with specific identified disorders but notes that none have been ruled out by genetic testing. In his deposition, however, ultimately, Dr. Milunsky testifies that "[he] thinks it's likely that [Jayden] does not [have any chromosomal problems]" Milunsky dep. at 113. He nevertheless opines that Jayden suffers from a yet unrecognized genetic syndrome, for which no test exists. Dr. Milunsky therefore opines that he

would persist in asserting that Jayden has a not yet recognized genetic syndrome, even if all known genetics tests proved negative.

Furthermore, as follow up to Dr. Milunsky's deposition, geneticist, Dr. Barbara Burton, who not only reviewed relevant medical records, but also performed a clinical examination of Jayden, ordered the specific tests referenced by Dr. Milunsky. The tests performed include chromosome analysis, Microarray/whole genome, Charge Syndrome, Fragile X syndrome and coagulation tests. The results of each and every test indicate normal or negative results, reflecting that Jayden does not suffer from any of the known genetic disorders Dr. Milunsky mentions. Despite these results ruling out genetic disorders, Dr. Milunsky testified he would persist in his testimony regarding a not yet recognized genetic syndrome. His testimony has no basis in fact and is not supportable by any measure of scientific reliability. As such, it is not relevant, reliable or helpful to the jury; and, if admitted, its prejudicial effect outweighs any minimal probative value. *See State v Council* at 20. It is clear that Dr. Milunsky's testimony is being offered for the sole purpose of confusing the jury.

Dr. Milunsky also claims Jayden has a connective tissue disorder, based solely on diagnoses of his mother's vertebral anomalies in her spine and viewing of photographs of Jayden. He has not examined Jayden, and has no valid scientific basis for asserting that Jayden has any connective tissue disorder. Thus, any testimony along those lines should be precluded, because it is not helpful to the jury.

Dr. Milunsky also asserts that Jayden has been harmed by alcohol consumption by his mother during the first month or so of pregnancy. Yet Dr. Milunsky cannot state that such alcohol consumption most probably caused harm to Jayden. In fact, he cannot state there is even a 1 in 10,000 or a 1 in 100,000 chance that alcohol ingestion by the mother in early pregnancy

was causally significant. Testimony from Dr. Milunsky about alcohol consumption by the mother would thus be completely unhelpful to the jury.

DR. MILUNSKY IS NOT QUALIFIED TO RENDER OPINIONS REGARDING THE CAUSE OF JAYDEN W. INJURIES AND DAMAGES.

Dr. Milunsky limits his testimony to and asserts his expertise on the subject of causation only. Without making any definitive diagnoses, Dr. Milunsky's opinions suggest and imply diagnoses of various not yet recognized genetic disorders and/or a connective tissue disorder and/or harm from alcohol. Yet Dr. Milunsky is not qualified to render opinions as to any diagnosis of Jayden W. — a not contained in his medical records because he has never seen or examined the child. The possible diagnoses he suggests are not stated, suggested or implied in any of Jayden's medical records, and the sole bases for Dr. Milunsky's purported diagnoses are two photographs taken by Jayden's mother at the request of Defense counsel, vertebral anomalies of the mother, and speculation based thereon.

THERE IS NO UNDERLYING SCIENCE TO SUPPORT DR. MILUNSKY'S OPINIONS RENDERING THEM INHERENTLY UNRELIABLE.

"When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified and *the underlying science is reliable.*" *State v. Council* at 20 (emphasis added). To determine reliability and admissibility under Rule 703, SCRE, the court must consider the *Jones* factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Id.* at 19 (citations omitted).

There is no "underlying science" to support Dr. Milunsky's opinions because Dr. Milunsky never examined Jayden W: — , never ordered any diagnostic tests to determine

whether test results support his opinions, and does not base his opinions upon any documented diagnoses in Jayden's medical records. Moreover, Dr. Milunsky speculates about not yet recognized genetic syndrome for which no test or criteria exists. He infers connective tissue disorder from the mother's vertebral anomalies and the photographs of Jayden; and he presumes harm from alcohol ingestion despite acknowledging he cannot address mathematical probability of causation even in the 1 in 10,000 to 1 in 100,000 range. This dearth of medical support for Dr. Milunsky's opinions reveals the absence of reliability of his testimony which is required by South Carolina law for introduction of expert testimony. As such, the bases for Dr. Milunsky's testimony are so inadequate as to render any admissibility under the *Jones* factors hopeless.

Jayden W. has no Genetic or Chromosomal Disorders.

Despite Dr. Milunsky's voluminous testimony regarding possible genetic disorders and their speculative potential relationship to Jayden W. 's damages and developmental delays, even Dr. Milunsky notes that it is likely that Jayden does not have any chromosomal abnormalities. *Milunsky dep.* at 113. Specifically, with regard to each chromosomal disorder, Dr. Milunsky refers to, he testifies that normal or negative results of such tests would not surprise him in that he does not attribute Jayden's deficits to chromosomal abnormalities. When asked "Can you conceive of the possibility that Jayden may not have chromosomal problems?" Dr. Milunsky responds: "I think it's likely that he does not." *Milunsky dep.* at 113.

Dr. Milunsky further elaborates on his meaningless opinions as follows:

Q: Do you expect Jayden's high resolution chromosome test, if it were performed, to be normal?

A: I don't know the answer. It has to be done. My betting is it would be normal.

Q: What significance, if any would that have?

A: That it's normal?

Q: Yes, sir.
A: That you still haven't found the answer.
Q: Excuse me?
A: That you still have not found the answer.
Q: Can you conceive of a microarray being done for Jayden with normal results?
A: I can certainly conceive of it, but the odds are increasing at this point that one might find something.
Q: And if it resulted in normal results?
A: You still don't have the answer.
Q: And I assume you can conceive of Fragile X testing normal?
A: Yes.
Q: What significance would you attribute to that?
A: Don't have the answer.

Milunsky dep. at 116-7.

Furthermore, the genetic tests which were ordered by geneticist, Dr. Burton, subsequent to Dr. Milunsky's deposition, all returned normal or negative results. As such, the absence of evidence at the time of Dr. Milunsky's deposition has now been replaced with definitive evidence that Jayden W. does not have any genetic or chromosomal disorders which would otherwise be revealed through tests suggested by Dr. Milunsky. As such, the mention of such speculative and theoretical disorders should be inadmissible as not only irrelevant but also unequivocally disproven based on current scientific knowledge. In the absence of any underlying science or support for speculative opinions which have been plainly nullified, such testimony must be excluded for lack of reliability and no foundation or scientific basis whatsoever.

Jayden W. does not have a Connective Tissue Disorder.

Based on his review of medical records of Jamesetta and Jayden W. which records do not suggest any diagnoses of connective tissue disorder, Dr. Milunsky opines that Jayden "almost certainly inherited a connective tissue disorder from his mother for (sic) which may have added to his susceptibility from a vascular point of view and made his vascular more vulnerable to the pressure that ordinarily would be exerted by a vacuum." *Milunsky dep. at 12-*

13. Although none of the numerous physicians who have actually examined and provided medical treatment for Jayden since his birth in 2002 have suggested any connective tissue disorder, Dr. Milunsky opines that an undescended testis and inguinal hernia noted at the time of Jayden's birth suggest that he suffers from a connective tissue disorder. *Milunsky dep.* at 30-1. Dr. Milunsky provides tenuous support for this "diagnosis" by reference to two photographs provided to him at his request which show Jayden's upper body as photographed from the front and back. Based on these photographs, Dr. Milunsky, without performing an actual physical examination, "diagnoses" scoliosis and "prominent" ears which he contends support his speculation that Jayden has a "connective tissue disorder, which is associated with vascular weakness, friability." *Milunsky dep.* at 39-40, 41. Dr. Milunsky concedes that the records in existence at that time did not reflect a physical examination by a geneticist, but he indicates that such an examination, done by a qualified geneticist, would likely be a reliable indication whether or not Jayden does indeed exhibit a connective tissue disorder. *See Milunsky dep.* at 93-4.

In fact, Dr. Barbara Burton, a well qualified geneticist who has special expertise in the area of connective tissue disorders, has now performed a full and complete physical examination of Jayden Washington in late April of 2009. She specifically notes and testifies that there is "no evidence that [Jayden] has any type of connective tissue disorder." *Burton de bene esse dep.* at 40. *See also Id.* at 41—43 (noting that bone disorders noted identified in Jamesetta Washington's medical history are unrelated to any alleged connective tissue disorder.).

Certain information that was not available at the time of Dr. Milunsky's deposition render implications of genetic, chromosomal and connective tissue disorders purely speculative. All such suggestions have been unequivocally rejected by medical examination and testing which Dr. Milunsky recommended as a necessary prerequisite for purposes of evaluation and medical

diagnosis. As such, the speculative testimony set forth in his deposition and any related testimony is rendered irrelevant, immaterial and inappropriate in that its introduction would serve no purpose whatsoever other than to confuse the jury.

DR. MILUNSKY'S OPINIONS DO NOT SATISFY THE "MOST PROBABLY" STANDARD REQUIRED UNDER SOUTH CAROLINA LAW.

The qualification of a witness as an expert and the admissibility of this testimony are matters largely within the discretion of the trial judge; however the exercise of this discretion will be reversed where an abuse of discretion has occurred. Before expert medical testimony is admissible on the question of causation between the plaintiff's injuries and the acts of the defendant, the testimony must satisfy the "most probably" rule.

Payton v. Kears 329 SC 51, 61; 495 S.E.2d 205, 211 (S.C. 1998) (citations omitted).

When asked his opinions regarding the cause of Jayden Washington's injuries and consequent developmental delays, Dr. Milunsky states that "causation is probably multifactorial." Milunsky dep. at 12 and 42. This testimony does not satisfy the "most probably" standard set forth throughout South Carolina law. Although the specific terminology, "most probably," is not required, "the question is whether the medical testimony satisfies the 'most probably' standard." *Madison v. Brantley*, 302 S.C. 282, 284; 395 S.E.2d 190, 191 (Ct. App. 1990). Dr. Milunsky was asked repeatedly, with specific reference to each of his opinions whether or not each suggested disorder was "most probably" the cause of Jayden Washington's injuries. Each time he conceded that he could not testify to that degree of medical certainty.

With regard to his assertions of some unnamed, unidentified genetic or chromosomal disorder, Dr. Milunsky responds as discussed in full hereinabove, that despite voluminous references to various disorders, he does not believe that Jayden suffers from any of such

disorders. Dr. Milunsky thus concedes that he cannot satisfy the "most probably" standard regarding those theoretical and speculative diagnoses and proffered alternative causes of Jayden's brain damage. Milunsky dep. at 25-6.

With regard to his assertion that Jayden has a connective tissue disorder, Dr. Milunsky testified as follows:

Q: Have you formed an opinion that Jayden has a connective tissue disorder which more likely than not has contributed to his brain bleeds?

A: Like I said earlier, it is another factor that is in the multifactorial mix that resulted in his bleed.

Q: Yes, sir, but my question focuses on whether you can testify that that most probably is causally significant in terms of his bleeds.

A: Not by itself. There's certainly a high degree of suspicion about that.

Q: Can you give me any mathematical percentage of probability that you would be willing to assert with a reasonable degree of medical certainty as to the presumed causal relationship between connective tissue disorder and brain bleeds?

A: I would say that in his case, it is more probable than not that his connective tissue disorder was a contributing factor to his bleed faced with the exerted force from a vacuum.

Milunsky dep. at 42. As such, Dr. Milunsky declines to testify that the purported connective tissue disorder was most probably the cause of Jayden's brain bleeds. In fact, Dr. Milunsky specifically states that the bleed is associated with the force from the vacuum.

Although Dr. Milunsky's testimony pointlessly ventures into references to specific connective tissue disorders such as "Loeys Dietz Syndrome," "Ehlers-Danlos Syndrome," "Sticker Syndrome, types one, two and three," "familial aortic aneurysms," "Beals and contractual arachnodactyly," Dr. Milunsky specifically states that "[he doesn't] think [Jayden] has any of these conditions. Specifically he testifies with regard to these conditions as follows:

A: They are connective tissue disorders, all of them.

Q: Do you have an opinion to a reasonable degree of medical certainty that Jayden W does not have any of those?

A: I don't think he has any of those that I mentioned.

Milunsky dep. at 61-2. Dr Milunsky further qualifies his testimony with the suggestion that Jayden might have a "benign type of Ehlers-Danlos," but states that such a diagnosis could be confirmed or denied through clinical examination which, as noted above, was later conducted by Dr. Burton who clearly ruled out any diagnosis of Ehlers-Danlos, benign or otherwise. *See* Burton rebuttal dep. at 13 (stating that Jayden "absolutely has no form of Ehlers-Danlos Syndrome. He has no clinical findings consistent with any of the forms of Ehlers-Danlos Syndrome . . . He actually has no findings consistent with any type of connective tissue disorder.") Because Dr. Milunsky's testimony regarding a connective tissue disorder is essentially withdrawn, subsequently disproven and further fails to meet the necessary "most probably" standard, it should be excluded in full.

DR. MILUNSKY COULD NOT TESTIFY THAT MATERNAL ALCOHOL INGESTION MORE LIKELY THAN NOT CAUSED JAYDEN'S DEVELOPMENTAL DELAYS.

When asked generally about his opinions regarding the cause of Jayden's developmental delays, Dr. Milunsky mentioned "his mother's alcohol intake as yet another significant contributor to his problems." Milunsky dep. at 13. However, Dr. Milunsky admitted that there is no evidence as to the amount of alcohol or marijuana allegedly consumed by Jamesetta Washington during her pregnancy. There has been no evidence whatsoever introduced to refute her testimony that exposure to these substances, if any at all, was only in the early weeks of her pregnancy, prior to recognition of the pregnancy. Jamesetta Washington dep. at 30---34. Furthermore, Dr. Milunsky declined to offer testimony to a reasonable degree of medical certainty, most probably, that Jayden W. suffered any ill effects as a result of any alleged alcohol ingestion by his mother during pregnancy.

Dr. Milunsky testifies as follows:

Q: Okay. You would not testify in this case that the ingestion of alcohol or marijuana early in pregnancy most probably caused any birth defect in Jayden Washington, would you?

A: I wouldn't put it that way, but I would certainly be pointing to an etiological factor in this pregnancy that includes alcohol.

Q: But it would be considerably less than a 50 percent likelihood?

A: I couldn't put a percentage on that. I don't think anybody could.

Q: Right. So do I understand that you could not even say, for example, that there is at least a one-in-a-million chance that alcohol ingestion or marijuana ingestion by the mom caused the baby to have any birth defect?

A: I'm not sure where you are getting the one-in-a-million from. But the fact is that alcohol ingestion by pregnant women in the United States ranks at the most common cause of birth defects that we see; and, as a consequence, this remains a significant possibility in this case as a contributing factor, which is why I talked about that there are multiple factors that operate in the operation of Jayden's ultimate problems.

Q: Yes, sir, But please answer my question.

Can you testify to a reasonable degree of medical certainty that ingestion of alcohol or marijuana by the mom creates at least one-in-a-million chance that Jayden's -- that any of Jayden's birth defects were caused by the ingestion of those substances?

A: That figure, one in a million, sounds difficult to come to. If you are making a hypothetical one in a million, I would say it's much more likely than one in a million. But nobody would be in a position to come up with a precise number. For example, one in 100,000, one in 10,000 would be much more probable than one in a million.

Q: Would you be willing to testify at trial that there is at least -- I mean, to a reasonable degree of medical certainty, there's at least one-in-a-million chance that alcohol or marijuana ingestion by the mom caused any birth defect of Jayden Washington?

A: There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects.

Milunsky dep. at 22--24. Dr. Milunsky further testified as follows:

Q: Let's talk, if we may, about what you can and cannot testify occurred to a reasonable degree of medical certainty most probably.

You don't know the amount of the mother's alcohol ingestion?

A: Correct.

Q: You don't know the time over which she ingested it?

A: Other than early pregnancy, no.

Q: You don't have any evidence that she ever binged with alcohol during pregnancy?

A: I'm not aware of that record.

Q: And with that limited knowledge, you cannot testify that her alcohol intake was most probably causally significant in this case, can you?

A: I can't comment on her alcohol intake; the amount of her alcohol intake.

Q: Okay. And, therefore you can't comment that the amount that she ingested and at the time she ingested it played any causally significant role in the development of her son's problems, can you?

A: I can only draw attention to the features that were found that are consistent with alcohol.

Q: But you can't testify that those are more likely than not caused by alcohol ... correct?

A: Please ask me the question again.

Q: You can't testify that her ingestion of alcohol most probably caused Jayden any problem, can you?

A: I answered the question by saying that I don't know the amount of alcohol she took, but that the features that he shows, some of which are consistent with fetal -- incomplete Fetal Alcohol Syndrome.

Q: Okay. I don't mean to beat a dead horse here. I think what you are saying is you can't testify that more likely than not ingestion of alcohol caused any problem, but you're not giving me a direct answer to that, and I want to make sure.

A: No, I cannot say that it's more probable than not.

Milunsky dep. at 76—78 (emphasis added). As such, Dr. Milunsky's testimony regarding alcohol ingestion by Jayden's mother during pregnancy should be precluded in that Dr. Milunsky clearly and unequivocally concedes that he cannot render such testimony to a reasonable degree of medical certainty.

**DR. MILUNSKY'S TESTIMONY IS OFFERED ONLY FOR THE PURPOSE OF
CONFUSING THE JURY.**

The only definitive opinion Dr. Milunsky offers is his acknowledgement that Jayden suffered from hemorrhages within the brain and that these hemorrhages would most probably not have occurred if a vacuum had not been used in the delivery of Jayden. Dr. Milunsky confirmed the Plaintiff's allegations as follows:

Q: You do believe to a reasonable degree of medical certainty that but for the use of the vacuum, this child would not have had brain bleeds, correct?

A: I do believe that the vacuum was instrumental in the bleed.

Milunsky dep. at 104—105. The remaining substance of Dr. Milunsky's deposition testimony is either dismissed by the expert himself, stating that he does not believe that the conditions mentioned are the cause of Jayden's damages; or otherwise disproven by subsequent genetic testing and clinical examination and diagnosis, ruling out the suggested genetic, chromosomal and connective tissue disorders. As such, it is abundantly clear that Dr. Milunsky's "expert" testimony is being offered for the sole improper purpose of confusing the jury in contravention of the South Carolina Rules of Evidence and case law which clearly maintain:

It is not sufficient for the expert to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged.

Martisin v. Hilton Head Health System et al. 364 S.C. 430, 439; 613 S.E.2d 795, 800 (Ct. App. 2005) (holding in a medical malpractice case that survival chances of thirty percent "fall[s] well short of satisfying the 'most probably' causation standard.'") Clearly, Dr. Milunsky's testimony does not satisfy the necessary "most probably" standard, and, as such, must be excluded to avoid confusion of the jury and unfair prejudice to the Plaintiff.

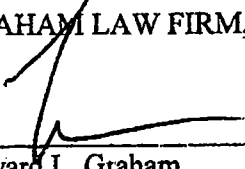
Conclusion

For the foregoing reasons, the Plaintiff respectfully requests that the Court issue an Order in Limine excluding any and all testimony which may be offered by Dr. Aubrey Milunsky regarding causation of the birth injuries suffered by Jayden W. other than by traumatic vacuum delivery; or reference to Dr. Milunsky's alternative causation opinions or testimony by other parties, witnesses or experts. Plaintiff further requests that the Court instruct counsel for the Defendants to bring to the Court's attention any intent to make reference to or ask questions of

these witnesses regarding such matters by side bar before any such evidence is introduced or such questions propounded.

Respectfully Submitted,

GRAHAM LAW FIRM, P.A.



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Mary H. Watters
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843-662-3281
Attorneys for Plaintiff

July 25, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jamesetta Washington, as GAL for Jayden

W

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., et al.

Defendant.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2007-CP-10-1553

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:

Edward L. Graham, Bar No. 2483

Address:

383 W. Cheves St., Florence, SC 29501

Phone: 843-662-3281 Fax 843-665-0254

E-mail: zglaw@aol.com Other:

Defendant's Attorney:

Molly H. Craig, Bar No. _____

Address:

P.O. Box 1508, Charleston, SC 29402

Phone: 843-577-4435 Fax 843-722-1630

E-mail: _____ Other: _____

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: New Trial Absolute

Estimated Time Needed: 45 minutes

Court Reporter Needed: ☒ YES ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff ☐ Defendant

8/23/10

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics and Gynecology, P.A.; Tenet
South Carolina, Inc. d/b/a East Cooper
Regional Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A No: 07-CP-10-1553

**MOTION FOR
NEW TRIAL ABSOLUTE**

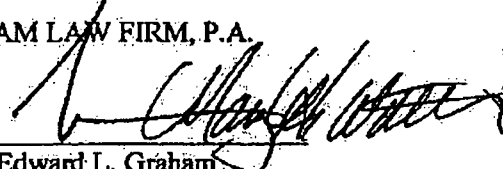
JUL 23 2010
CLERK OF COURT

2010 AUG 23 PM 5:00

Comes now Plaintiff, through counsel, and moves for a new trial absolute. This motion is brought pursuant to Rule 59, SCRCP. Grounds for this motion are set forth in the attached Memorandum of Law in Support of Plaintiff's Motion for New Trial Absolute and attached affidavit of Mary Watters.

Respectfully submitted,

GRAHAM LAW FIRM, P.A.

By: 

Edward L. Graham
Mary H. Watters
Post Office Box 550
Florence, SC 29503
843-662-3281
Attorneys for Plaintiff

August 23, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A No: 07-CP-10-1553

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

Plaintiff,

vs.

Edmund Rhett, Jr., M.D., Low Country
Obstetrics and Gynecology, P.A.; Tenet
South Carolina, Inc. d/b/a East Cooper
Regional Medical Center,

Defendants.

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S
MOTION FOR NEW TRIAL ABSOLUTE

2010 AUG 23 PM 5:00
JULIE J. ANDERSON
CLERK OF COURT

FILED

The jury in this case returned a defense verdict on Wednesday, August 11, 2010, following an Allen charge. That verdict does not render justice, as it was the product of an unfair trial. The trial was unfair for six primary reasons: (1) the Court's failure to charge the jury on Plaintiff's Request #3 and failure to charge the jury completely on Request #12 led to jury confusion and resulted in prejudice to Plaintiff; (2) certain jurors failed to answer voir dire questions truthfully; (3) the Court failed to pose certain voir dire questions requested by Plaintiff which were designed to elicit suggestion of possible bias against Plaintiff; (4) the Court's ruling on evidence allowed the jury to hear unreliable and prejudicial evidence that should have been precluded under the Court's gatekeeper role; and under the "most probable" rule; (5) the Court's rulings on evidence prevented the jury from hearing probative testimony on critically important subjects; and (6) misconduct by defense counsel prevented a fair trial.

1. The Court Failed to Charge Correct Principles of Law Fairly Raised by the Evidence.

The purpose of jury instructions is to enlighten the jury and aid it in arriving at a correct verdict. *State v. Leonard*, 292 S.C. 133, 355 S.E. 2d 270 (1987). Ordinarily, a trial court has the duty to

give a requested instruction that correctly states the law applicable to the issues and the evidence.

Singletary v. South Carolina Dept. of Educ., 316 S.C. 153, 447 S.E.2d 231, 93 Ed. Law Rep. 978

(Ct. App. 1994). See also, *State v. Cooney*, 320 S.C. 107, 463 S.E. 2D 597 (1995) (the law to be charged must be determined from the evidence presented at trial.)

A trial court is required to charge the current and correct law. *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E. 2d 675 (2006) Where a request to charge is timely made and involved a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error. *Brown v. Smalls*, 325 S.C. 547, 481 S.E. 2d 444 (1997); *Baker v. Weaver*, 279 S.C. 479, 309 S.E. 2d 770 (Ct. App. 1983) Moreover, when general instructions to the jury are insufficient to enable to jury to understand fully the law or the case and issues involved, a refusal to give a requested charge is reversible error. *Stokes, supra*.

Plaintiff's Request to Charge #3 addressed expert fees. It provides as follows:

When an expert witness is called by either a plaintiff or defendant, he expects to be paid and he should be paid. You should not take into consideration the fact that the witness is paid unless there is some evidence or circumstances appearing from the evidence which would fully and reasonably convince you that the testimony of the witness has been influenced because of the sum which he has been paid as a witness.

It is taken directly from Judge Ralph K. Anderson's book on jury instructions, and is a correct statement of South Carolina law. See *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E. 2d 104 (1943). It should have been charged because Defendants elicited testimony regarding fees from every liability expert presented by Plaintiff and also from certain damages expert(s).

Defendant repeatedly sought to prejudice the jurors against Plaintiff by persistently arguing directly and through innuendo that Plaintiff's experts were unworthy of belief because of the fact and amount of their payment for time and work as experts in the case. The failure to give the

requested charge was prejudicial to Plaintiff, as is evident from the defense verdict.

Plaintiff's Request to Charge #12 addresses the informed consent issue, a primary issue

in the case. It provides as follows:

Informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. However, a physician must respect a competent patient's refusal of treatment, even in an emergency. If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency.

Even under the emergency exception to the informed consent doctrine, a physician should seek the consent of the patient, or, if the patient is incapable of providing consent, the consent of a family member, before administering treatment. Impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception.

It too is taken directly from Judge Anderson's charge book and is a correct statement of law.

The Court chose to charge the jury on the pro-defense portions of this requested charge, but declined to charge the portion more favorable to Plaintiff, which was absolutely necessary for the charge to be a balanced and fair charge on South Carolina law. See *Harvey v. Strickland*, 61 Am. Jur. 2d "Physicians, Surgeons and other Healers" §§ 157, 167, 176 (2002).

That this erroneous charge was prejudicial to Plaintiff is clear not only from the defense verdict, but also from feedback obtained from jurors. See Affidavit of Mary Watters. The jury agreed that improper use of a vacuum by Dr. Rhett caused Jayden's brain damage, but mistakenly thought the presence of a purported emergency situation would eliminate the need for a defendant doctor to comply with any standard of care. They were obviously confused about the charge regarding standards of care and breaches thereof.

Further, the jury did not reach the issue of informed consent, for they mistakenly thought they should not address that issue if they found that there was no standard of care breach; and

they found no standard of care breach because they thought a purported emergency situation eliminated an obstetrician's obligation to comply with any standard of care. The jury did not understand that performing a vacuum extraction delivery without informed consent is negligence in and of itself. They also misunderstood the Court's ruling that the permission slip signed at the time of hospital admission was not informed consent. They thought the Court had decided the informed consent issue, so that they need not address it. Because the jury was so utterly confused about the law pertaining to these issues, its deliberations were contrary to law; and Plaintiff is entitled to and should receive a new trial.

2. Certain Jurors Did Not Answer the Court's Voir Dire Inquiries Truthfully: One juror, regularly seated on the far right of the second row, was biased in favor of the defendants from the start. That was suggested by her disparaging and dismissive looks toward Plaintiff and Plaintiff's counsel throughout trial from the very beginning through the very end; and by her friendly smiles, positive head nods and pro-defense body language/demeanor throughout trial. That suggestion of bias was confirmed by feedback from the jury. See Affidavit of Mary Watters. Although Plaintiff cannot prove the specific cause of this juror's bias against Plaintiff, the record does prove that this juror told the Court she could and would give all parties a fair and impartial trial, and she did not.

Other jurors failed to alert the Court that they had had personal hospital experiences that caused them also to be biased toward Defendants and against Plaintiffs. The biases of these jurors, and their failures to acknowledge such biases in response to questioning by the Court, precluded Plaintiff from having them stricken for cause or peremptorily, if the Court for any reason declined to strike any such juror for cause. A trial judge has a duty to assure that every juror is unbiased, fair and impartial. *State v. Gullede*, 277 S.C. 368, 287 S.E.2d 488

(1982). It is fundamental that every litigant entitled to a trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. *Haley v. Blue Ridge Transfer Co. Inc.*, 802 F2d 1531 (4th Cir. 1986) Although trial judges are accorded much discretion in matters of voir dire, that discretion is not unlimited, and it is the appellate court's function to correct an abuse of discretion or error of law. *Southern Bell Tel. & Tel. Co. v. Shepard*, 262 S.C. 217, 204 S.E.2d 11 (1974); *Wall v. Kells*, 331 S.C. 210, 501 S.E.2D 754 (Ct. App. 1998) A judge has the duty to assure that every juror is unbiased, fair and impartial. See, e.g., Rule 47(a), S.C.R.C.P.; *State v. Gullede*, *supra*. That was not done here. As a result, the Plaintiff was denied a fair trial and received a jury verdict which represents the product of bias and prejudice.

3. The Court Declined to Pose Voir Dire Requests from Plaintiff Which Would Have Likely Generated Helpful Information to Allow Plaintiff to Use Her Peremptory Strikes More Intelligently.

The Court declined to pose several voir dire requests submitted by Plaintiff, including numbers 10, 15 – 20, 23- 27. These were designed to elicit information from jurors who may have had previous experiences that would make them biased against Plaintiff, whether the prospective juror realized the bias or not. Although the trial court did ask a general question about ability to be fair and impartial, and ability to follow the law as instructed by the judge; numerous Voir Dire questions suggested by the Plaintiff were not posed. The Court refused to ask questions concerning active involvement in a political party or political cause, Even with the limited voir dire that is customary in this state, a case of this magnitude cries out for more than minimal voir dire, especially regarding attitudes toward tort reform, the medical industry, and religious and political matters, relevant religious beliefs, court system and tort reform, medical industry and

related matters. Failure to pose the voir dire requests to the venire prevented Plaintiff from obtaining a jury of twelve fair and impartial jurors; and provides further support for Plaintiff's Motion for a New Trial Absolute.

4. The Court Allowed Evidence of Theoretical Causes of Brain Damage that Lack Scientific Reliability and Failed the "Most Probable" Test.

The Court should have disallowed Dr. Milunsky to testify regarding maternal alcohol consumption as a possible cause because it is highly prejudicial, unreliable and fails the "most probable" test. Dr. Milunsky admitted no one could ascribe a mathematical percentage to the chances that alcohol was a contributing cause: not 1 in 10,000; not 1 in 1 million. He admitted that without compelling evidence regarding a large quantity of alcohol consumed at an important time, no one could ever say that it "most probably" had any adverse effect whatsoever on this pregnancy. To allow testimony of alcohol as a potential cause of a baby's brain damage under these circumstances violates Daubert and State v. Council because it is utterly reliable. Any limited relevance, if any, is greatly outweighed by its prejudicial nature. Moreover, the testimony violates *Payton v. Kears*, 329, S.C. 51, 495 S.E. 2D 205, because it obviously fails the "most probable" test. Defendants have cited no legal authority that reference to a "multifactorial" cause permits a witness to speculate about theoretical possibilities which fall well short of a "most probable" standard. Dr. Milunsky was also allowed to speculate about possible genetic causes of Jayden's brain damage despite the fact that his genetic evaluation and all genetic tests were negative and that no literature in existence had ever documented a connection between a genetic condition (other than brittle bone syndrome, which Dr. Milunsky agrees is not present here) and brain hemorrhage in a newborn baby. Dr. Milunsky was allowed

to so testify based on his speculations about future genetic knowledge that may some day be available, and future genetic tests that may some day exist. Such speculation is precisely the sort of pseudo-science or junk science that Daubert and State v. Council mandate should not get past the trial judge's gatekeeper function.

5. The Court Disallowed Probative and Material Evidence from Plaintiff on Critically Important Issues. The Court precluded Plaintiff from publishing certain portions of Dr. Yvonne Gomez Carrion's deposition testimony which could not be played by videotape for technical reasons. When that situation occurred and Defendants wanted the material published, the Court allowed Defendant counsel to read the omitted portions. However, when portions were omitted which Plaintiff wanted to publish, the Court refused to allow Plaintiff's counsel to read the omitted portions. Further, the Court disallowed Plaintiff's request to make a proffer of those critically important portions of the depositions regarding the absence of an emergency, Dr. Rhett's breaches of the applicable, standards of care, and Dr. Rhett's lack of knowledge needed to form proper clinical judgment. The Court also precluded Plaintiff from presenting much reply or rebuttal testimony. Many areas were disallowed, but of special importance to the outcome of this case were the refusals to allow explanation of the significance of (and limitations of) the New England Journal of Medicine article, absence of an emergency, fact that an emergency, when present, does not excuse the conduct of Dr. Rhett, violations of the standard of care, explanation of the Defendant's demonstrative evidence.

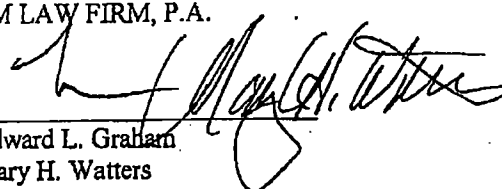
6. Pervasive and Persistent Misconduct by Defense Counsel Prevented Plaintiff from Receiving a Fair Trial. Misconduct by Defendant counsel includes blatant refusal to heed the

Court's instructions regarding no speaking objections; persistent and willful violation of the Court's rulings regarding not leading Dr. Rhett and defense witnesses; displaying un-redacted exhibits to the jury in violation of the Court's prior motion in limine rulings; use of demonstrative evidence not identified to Plaintiff and not displayed to Plaintiff (indeed, not even suggested or hinted to Plaintiff) by Defendant's counsel in violation of the Case Management Order.

7. Thirteenth Juror Doctrine. Under the thirteenth juror doctrine, a trial judge may grant a new trial if the judge believes the verdict is unsupported by the evidence. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). In ruling on a new trial motion as the thirteenth juror, the trial judge may weigh the evidence and rely on his view of the circumstances. *Fallon v. Rucks*, 217 S.C. 180, 60 S.E.2d 88 (1950). It is not necessary to justify the ruling with factual findings. *Folkens*, 300 S.C. 251, 381 S.E. 2d 265. Basically, the circumstances are as though the judge, as the thirteenth juror "hangs" the jury. A trial judge not only has the discretion but the duty to grant a new trial where the jury verdict is contrary to the fair preponderance of the evidence. *Jessup v. Hansen*, 289 S.C. 54, 344 S.E. 2d 618 (Ct. App. 1986).

For the reasons stated, Plaintiff respectfully requests a New Trial Absolute.

GRAHAM LAW FIRM, P.A.

By: 

Edward L. Graham
Mary H. Watters
Post Office Box 550
Florence, SC 29503
843-662-3281
Attorneys for Plaintiff

August 23, 2010

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Jamsetta Washington, et al	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 07-CP-10-01553
	)	
Edmund Rhett, Jr., M.D. et al	)	
	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL

The within Jury Trial was held in the above-captioned action on July 26, 2010 through August 11, 2010, before The Honorable Michael Baxley, in Courtroom 4C of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

Edward Graham, Esq.
 Mary H. Waters, Esq.
 GRAHAM LAW OFFICE
 P O Box 50
 Florence, SC 29503
 Appearing for Plaintiff

Robert H. Hood, Sr., Esq.
 Molly Craig, Esq.
 Grace Chilton Simmons, Esq.
 HOOD LAW FIRM
 P O Box 1508
 Charleston, SC 29401
 Appearing for Edmund Rhett, M.D.

Jay Davis, Esq.
 Appearing for Defendant Granger Osborne, M.D.

Transcribed from Audio Tapes of Gayle Burns, Presiding Court Reporter

DEBORAH GARRISON

Circuit Court Reporter - 9th Judicial Circuit

P O Box 901

Johns Island SC - 29457

dgarrison@sccourts.org

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NUMBER: 2007-CP-10-1553
	)	
Jamesetta Washington, as Guardian ad	)	
Litem for Jayden Washington, a minor,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Edmund Rhett, Jr., M.D., Low Country	)	
Obstetrics & Gynecology, P.A., Tenet	)	
South Carolina, Inc., d/b/a East Cooper	)	
Regional Medical Center,	)	
	)	
Defendants.	)	

PRE-MARKED TRIAL EXHIBITS
UPDATED FOR TRIAL JULY 28, 2010

- 1. Low Country Ob/GYN for Jamesetta Washington LC OB-GYN 0001—0098
- 2. ECH Jamesetta and Jayden W. ECH 0001—0322
- 3. St Francis Hospital for Jamesetta Washington St Francis 0001—0212
- 4. Palmetto Health Richland for Jamesetta Washington Palmetto Health 0001—0098
- 5. Richland County Health Department for Jamestta Washington; Richland County Health
Department 0001—0016
- 6. Planned Parenthood for Jamestta Washington; Planned Parenthood 0001—0005
- 7. Thomas J. Carzoli, MD for Jamestta Washington; Carzoli MD 0001—0005
- 8. University Specialty Clinics for Jayden W University Specialty Clinics 0001—
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- 9. James G. Glasser, MD for Jayden W ; James G. Glasser MD 0001—0020
- 10. Lenwood Smith, MD for Jayden W Lenwood Smith MD 0001—0004

Jamsetta Washington GAL v Edmund Rhett, et al
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11. University Pediatric Cardiology for Jayden W ; University Pediatric Cardiology
0001—0012

12. Rathna P. Amarnath MD for Jayden W ; Rathna Amarnath MD 0001—0038

13. Palmetto Health for Jayden W ; Palmetto Health 0001—0569

14. Charleston Pediatric Rehab for Jayden W ; Chas Ped Rehab 0001—520

15. Jennifer Amrol, MD for Jayden W Amrol 0001—0114

16. Storm Eye for Jayden W ; Storm Eye 0001—0110

17. Bright Start for Jayden W ; BrightStart 0001—0308

18. Alan Brill, MD for Jayden W ; Brill, MD 0001—0004

19. Gingerbread House Nursery & Kindergarten for Jayden W , Gingerbread 0001—
0023

* 20. George I. Pair School for Jayden W , George I. Pair School 0001—0112

* 21. Oakland Elementary School for Jayden W ; Oakland Elementary 0001—0521

22. Palmetto Health Women's Center records for Jamestta Washington; PHRWC 0001—0043

23. University of South Carolina Records for Jamestta Washington; Univ of SC 0001—0016 &
USC Academic 0001—0010

24. Allen University records of Jamestta Washington; Allen University 0001—0009

25. Trident Technical College records of Jamestta Washington; Trident Tech. College 0001—
0009

26. Franklin C. Fetter records; Franklin C. Fetter HC 0001—0008

27. MUSC for Jamestta & Jayden W MUSC 0001—1437

28. FDA Public Health Advisory dated 5-21-98 – enlargement

29. FDA Adverse Event Report for Event dated 7-6-99 – enlargement

30. FDA Patient Safety News: Show # 5, June 2002

31. ACOG Practice Bulletin Number 17, June, 2000

32. Edmund Rhett Deposition Exhibit #2 dated 7-21-08 - enlargement

33. Chromosome Analysis dated 4-22-09

34. Microarray/Whole Genome test results dated 5-29-09

35. Genetic Testing Results dated 7-20-09

36. LabCorp – Fragile X test results dated 7-30-09 & 8-5-09

37. Lab Corp – Blood test results dated 1-29-10

38. Report of Robert Voogt dated 3-12-09 (updated)

39. Report of Dr. Oliver G. Wood dated 5-27-09 (updated for trial)

40. Report of Margaret Greer- Simmons

41. CV of Dr. Oliver G. Wood

42. CV of Robert A. Zimmerman

43. CV of Gary Kent Oakes, MD

44. CV of Robert D. Voogt

45. CV of Margaret Greer- Simmons

46. CV of Yvonne Gomez-Carrion, M.D.

47. CV of Barbara K. Burton, M.D.

48. CV of Daniel Adler, M.D.

49. CV of Michael D. Katz, M.D.

50. CV of Jean R. Hutchinson

51. CV of Ann Neulicht

52. CV of Dr. Livingston

53. CV of Aubrey Milunsky MD
54. CV of Dr. Hobbs
55. CV of Dr. Peter Van Dorsten
56. CV of Dr. Norton
57. CV of Dr. Weinstein
58. CV of Dr. Ottinger
59. Itemization of medical expenses from SC Medicaid
60. 8x10 photo of Ultrasound
61. 8x10 photo of Jayden and Jamesetta
62. 8x10 photo of Jayden in hospital
63. 8x10 photo of Jayden and Jamesetta
64. 8x10 photo of Jayden in hospital (with mobile)
65. 8x10 photo of Jayden in hospital (sleeping)
66. 8x10 photo of Jayden with cousins
67. 8x10 photo of Jayden and Jamesetta (at arcade)
68. 8x10 photo of Jayden with bunny
69. 8x10 photo of the back of Jayden's head
70. 8x10 photo of Jayden shirtless with scar on stomach
71. 8x10 photo of Jayden's kindergarten class
72. Obstetrical Vacuum Delivery Kit with 60 mm Tender Touch Cup
- 1-27 (73) Instruction for Use Tender Touch revised 5-15-02 and Instruction Booklet for Vacuum Delivery Systems, published by Utah Medical Products
74. First 3 pages with Instruction booklet for Tender Touch (73)

~~75.~~ Birth Video

76. Photo from birth video showing depth of vacuum

77. Photo from birth video

78. Photo from birth video

79. Photo from birth video

80. Photo from birth video

81. Photo from birth video

82. Photo from birth video

83. Photo from birth video

84. Photo from birth video

85. Excerpts from Day in the Life Video

86. Video Deposition of Edmund Rhett, Jr., M.D.

~~87.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~88.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~89.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~90.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~91.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~92.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~93.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

~~94.~~ Radiographic films from MUSC (CT scan, MRI, etc.)

95. Still photo from birth DVD showing gauge in green zone and showing vacuum operator

96. Still photo from birth DVD showing gauge in green zone and showing vacuum operator

97. ACOG Committee Opinion #208 Sept. 1998

98. Dr Oakes diagrams A, B, C

EXHIBIT RECORD & RECEIPT FORM

CASE TITLE

JANEETTA WASHINGTON VS. EDWARD RHETT, MD

DOCKET #

07-EP-D-1552

PLAINTIFF'S EXHIBITS

DEFENDANT'S EXHIBITS

1. DR. RHETT DEPO	1. ~~_____~~
2. FILE DESIGNATIONS (RHETT)	2. ~~_____~~
3. FF " (RHETT)	3. ~~_____~~
4. PLE " (RHETT)	4. ~~_____~~
5. DR. DAKES DEPO	5. ~~_____~~
6. FILE DESIGNATIONS (GOMEZ-MARRION)	6. ~~_____~~
7. PACKET OF DOCUMENTS (CARE Management Office)	7. ~~_____~~
8. GOMEZ-MARRION DEPO DESIGNATIONS	8. ~~_____~~
9. Letter 7-1-10	9. ~~_____~~
10. RE-TRIAL EXHIBIT LIST	10. ~~_____~~
11. ANNUNCIATION, + thumb	11. ~~_____~~
12. DR. ZIMMERMAN DEPO	12. ~~_____~~
13. STIPULATION	13. ~~_____~~
14. DR. DOUTY DR. BUN patient chart	14. ~~_____~~
15. JUDGE'S NOTES	15. ~~_____~~
16. LIFE CARE PLAN (WOOD)	16. ~~_____~~
17. ADLER-SIMMONS CV	17. ~~_____~~
18. KATZ CV	18. ~~_____~~
19. ZIMMERMAN CV	19. ~~_____~~
20. DAKES CV	20. ~~_____~~
21. VOGGT CV	21. ~~_____~~
22. HITCHINSOR CV	22. ~~_____~~
23. GOMEZ-MARRION CV	23. ~~_____~~
24. BARTON CV	24. ~~_____~~
25. ADLER CV	25. ~~_____~~

CASE TITLE

LIVINGSTON V. BRET

DOCKET #

07-42-11-1553

PLAINTIFF'S EXHIBITS

26. NEDLIGHT CV
27. LIVINGSTON CV
28. MILUNSKY CV
29. HOBBS CV
30. VAN DORSTEN CV
31. NORTON CV
32. WEINSTEIN CV
33. BITTINGER CV
34. NORTON DEPO 5/8/09
35. NORTON DEPO 5/20/09
36. POMP (continued to left)
37. JAYDEN FARMER'S CARTON FRAUDS
38. DEF REQUEST TO DISMISS
39. PLF REQ TO DISMISS #1
40. PLF REQ TO DISMISS #2
41. PLF REQ TO DISMISS #3
42. BLOW-UPS (MED. RECORDS)
43. " " "
44. " " "
45. JURY NOTE
46. WEINSTEIN DEPO
47. BORTON DEPO
48. VAN DORSTEN DEPO
49. HOBBS DEPO
50. GOMEZ-CARRION DEPO
51. Jur. Note

DEFENDANT'S EXHIBITS

- 1.
- 2.
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- 22.
- 23.
- 24.
- 25.

51 Jur. Note

8-10-10

CASE TITLE

DOCKET #

PLAINTIFF'S EXHIBITS

1. Los Angeles Times
2. Los Angeles Times
3. Los Angeles Times
4. Los Angeles Times
5. Los Angeles Times
6. Los Angeles Times
7. Los Angeles Times
8. Los Angeles Times
9. Los Angeles Times
10. Los Angeles Times
11. Los Angeles Times
12. Los Angeles Times
13. Los Angeles Times
14. Los Angeles Times
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16. Los Angeles Times
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18. Los Angeles Times
19. Los Angeles Times
20. Los Angeles Times
21. Los Angeles Times
22. Los Angeles Times
23. Los Angeles Times
24. Los Angeles Times
25. Los Angeles Times

DEFENDANT'S EXHIBITS

1. Los Angeles Times
2. Los Angeles Times
3. Los Angeles Times
4. Los Angeles Times
5. Los Angeles Times
6. Los Angeles Times
7. Los Angeles Times
8. Los Angeles Times
9. Los Angeles Times
10. Los Angeles Times
11. Los Angeles Times
12. Los Angeles Times
13. Los Angeles Times
14. Los Angeles Times
15. Los Angeles Times
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17. Los Angeles Times
18. Los Angeles Times
19. Los Angeles Times
20. Los Angeles Times
21. Los Angeles Times
22. Los Angeles Times
23. Los Angeles Times
24. Los Angeles Times
25. Los Angeles Times

CASE TITLE

DOCKET #

PLAINTIFF'S EXHIBITS

1. nothing
2. nothing
3. nothing
4. nothing
5. nothing
6. nothing
7. nothing
8. nothing
9. Medical information
10. nothing
11. nothing
12. nothing
13. nothing
14. nothing
15. nothing
16. nothing
17. nothing
18. nothing
19. nothing
20. nothing
21. nothing
22. vacuum extractor
23. Tender touch instructions
24. nothing
25. birth video

DEFENDANT'S EXHIBITS

1. Blower photo delivery
2. nothing
3. nothing
4. nothing
5. nothing
6. nothing
7. nothing
8. nothing
9. nothing
10. nothing
11. nothing
12. nothing
13. nothing
14. nothing
15. nothing
16. nothing
17. nothing
18. nothing
19. nothing
20. birth photo
21. birth photo
22. birth photo
23. Dr. Baker's statement A, B, C
24. Hand's chart
25. nurse's birth bill

EXHIBIT RECORD & RECEIPT FORM

CASE TITLE

DOCKET #

PLAINTIFF'S EXHIBITS

DEFENDANT'S EXHIBITS

1. <u>Handwritten notes</u>	1. _____
2. <u>Handwritten notes</u>	2. <u>Handwritten notes</u>
3. <u>Handwritten notes</u>	3. _____
4. <u>Handwritten notes</u>	4. <u>Handwritten notes</u>
5. <u>Handwritten notes</u>	5. <u>Handwritten notes</u>
6. <u>Handwritten notes</u>	6. <u>Handwritten notes</u>
7. <u>Handwritten notes</u>	7. _____
8. <u>Handwritten notes</u>	8. _____
9. <u>Handwritten notes</u>	9. <u>Handwritten notes</u>
10. <u>Handwritten notes</u>	10. _____
11. <u>Handwritten notes</u>	11. <u>Handwritten notes</u>
12. <u>Handwritten notes</u>	12. <u>Handwritten notes</u>
13. <u>Handwritten notes</u>	13. <u>Handwritten notes</u>
14. _____	14. _____
15. _____	15. _____
16. _____	16. _____
17. _____	17. _____
18. _____	18. _____
19. _____	19. _____
20. _____	20. _____
21. _____	21. _____
22. _____	22. _____
23. _____	23. _____
24. _____	24. _____
25. _____	25. _____

1 JULY 26, 2010

9:30 A.M.

2

3

(STATUTORY JURY QUALIFICATION

4

BEFORE THE HONORABLE ROGER C. YOUNG)

5

THE COURT: Good morning, Ladies and

6

Gentlemen, please be seated. Let me first of all

7

welcome our jurors to the courtroom. As you can

8

see, we've changed judges. I understand that

9

Judge Young qualified you this morning. You may

10

have also been involved in another jury pick with

11

another judge.

12

I am Judge Baxley, from Hartsville,

13

South Carolina. It's always my privilege -- I

14

work here in Charleston a good bit and it's

15

always my pleasure to be here in your beautiful

16

county and city. I look forward to working with

17

you.

18

We are here to choose a verdict in the

19

case of Washington v. Rhett and other parties.

20

We'll talk a little bit more about the specifics

21

of the case in just a few minutes.

22

Before we do that, let me just chat

23

with you for just a moment as to what we're

24

doing here. I know that there is not anybody

25

sitting out there this morning who said to your

1 loved one sitting at home and I know you didn't
2 just say, 'I believe that I'll go down to the
3 courthouse and see what is happening there in
4 the courts this week.' I know that everybody
5 here has been subpoenaed, that you are not here
6 of your own volition.

7 I would just say this to you about jury
8 service -- when we broke away from Great
9 Brittan, we didn't just up one day and leave.
10 We had put particulars before King George about
11 things that we said that he had done that broke
12 the "rules", I guess, of civility and national
13 government. One was that he had taken away the
14 right to a trial by a jury. That's what we are
15 here for this week. So this week we will be
16 exercising the very things upon which our
17 country was founded.

18 If I came out here on a Monday at noon
19 and somehow there was nobody sitting out there
20 where you are, then the business of this court
21 would come to a stop. We could not go forward.
22 So I thank you for setting aside your busy
23 lives. I know, before you ever walked in the
24 door here, that you've got plenty to do whether
25 it's business affairs, personal affairs, family

1 issues or a mix of all those. So, I thank you
2 for setting aside your affairs. I know that I
3 speak on behalf of the lawyers also when we
4 thank you just for your presence of being here.

5 One other thing that I would say about
6 it is that while we're sitting here in the
7 peace and sanctity of this courtroom, in other
8 parts of the world -- if you think about, if
9 you pick up a newspaper, people are people and
10 people are dying for the right to have a jury
11 trial, for the right to have a judge assist
12 them who has some level of competence but for
13 the issues to be decided by the citizens as
14 opposed to being decided by some kind of
15 military dictator or some tribunal. So we have
16 many blessings to be thankful for, even though
17 you have been summoned here for jury duty.

18 Now what I would like to do is to talk
19 with you for a few minutes about questions that
20 are tailored to this specific case. Now, I
21 know -- I've served on jury duty myself in
22 Darlington County, where I live, and I know
23 what when you're sitting as a group, just like
24 you are, that you hear questions and you think,
25 'Well, that doesn't apply to me.' Or, 'I don't

1 want to answer that, I don't want to look
2 foolish.' But I'd ask you to do just the
3 opposite. If you have some belief or some
4 inkling you should respond to questions, please
5 stand up and give us the benefit of whatever
6 information that you have. There are no wrong
7 answers in jury qualification.

8 The purpose of this process is to make
9 sure that every juror chosen is -- and I am
10 going to use the word "disinterested", meaning
11 not that you don't care but meaning that you
12 don't have some connection to the case,
13 whatever it may be, that might make you an
14 inappropriate juror for this particular case.

15 One other thing that I want to ask you
16 to do is that when you stand and speak to me,
17 please kindly give me your juror number and
18 your name. We don't use a juror number to
19 demean you -- I know that everybody arrived
20 here with a name this morning and doesn't
21 really need a juror number but, remember, we're
22 making a record here. In case there is some
23 dispute about whom we're speaking, then if you
24 give us a juror number there would be no
25 question about it. Many times we have jurors

1 with the last names or similar names. On one
2 or two jury panels, I've had jurors with the
3 same name. Thank you for that courtesy.

4 We are going to start with the lawyers
5 introducing themselves to you. We are going to
6 start with the plaintiff's side. The plaintiff
7 commenced this action by filing a lawsuit, so I
8 will ask the lawyers to introduce themselves --
9 just counsel, please. Go ahead.

10 EDWARD GRAHAM: Thank you, Your
11 Honor. My name is Ed Graham. I am the
12 attorney for the plaintiff. With me is Mary
13 Waters. We work together in representing the
14 plaintiff in this case.

15 THE COURT: All right. Thank you.
16 Counselor, tell us where you practice.

17 EDWARD GRAHAM: My primary practice
18 is in Florence. I try to get down to
19 Charleston as often as I can. Mary practices
20 out in Mount Pleasant.

21 THE COURT: Now we switch to the
22 defendants. We can go in the order of the
23 pleadings or any way that you wish to,
24 counselors.

25 ROBERT HOOD: Good morning, Your

1 Honor, thank you.

2 THE COURT: Yes, sir.

3 ROBERT HOOD: Good morning,
4 Ladies and Gentlemen. I am Bobby Hood. I
5 practice three or four blocks up on Meeting
6 Street, in Charleston. We are defending Dr.
7 Edmund Rhett in this case. Dr. Rhett is
8 sitting here with me -- please stand up,
9 Doctor.

10 EDMUND RHETT: (Complies).

11 ROBERT HOOD: The attorneys in
12 my office that are with me in the preparation
13 and trial of this case is Chilton Simmons,
14 Elizabeth Ballantine, and my daughter Molly
15 Craig who is not going to be here until
16 Wednesday, she had something else to come up
17 but she'll be with us on Wednesday. Thank you.

18 JAY DAVIS: Thank you, Your Honor.
19 My name is Jay Davis. I appear on behalf of
20 Lowcountry Ob-Gyn and I practice right here in
21 Charleston.

22 THE COURT: Thank you. Ladies and
23 Gentlemen of the jury, asking about counsel
24 only, asking about the attorneys only, defense
25 or plaintiff, if you're related to any of them

1 by blood or marriage, if you have some close
2 business, professional or social connection, or
3 whether you've at any time, past or present,
4 been represented by them or any of the law
5 partner(s) that you know they may be associated
6 with -- if that applies to you, any of that,
7 please stand. We are looking for related by
8 blood or marriage to any of the lawyers or if
9 you have been previously represented by any of
10 these lawyers, personally, business,
11 professionally. If that applies to you, please
12 stand.

13 Sir, please tell me your name and jury
14 number.

15 JUROR NUMBER 14: My name is Kenneth
16 Barfield, Number 14. I don't know if it is a
17 close professional connection but I practice
18 with a local defense firm, Barnwell Whaley, and
19 obviously I am familiar with the Hood Law Firm
20 and some of the other defense attorneys in the
21 case.

22 THE COURT: All right. Mr.
23 Barfield, let me ask you, would that prevent
24 you -- number one, that you practice law, and
25 secondly that you know some of the attorneys,

1 would that somehow prevent you from being fair
2 and impartial in this case, in your opinion?

3 JUROR NUMBER 14: No, sir.

4 THE COURT: Then I find you are
5 qualified, by your response. Thank you.

6 Anyone else now who wishes to speak
7 about some connection with counsel? (No
8 response).

9 All right, let's go to the parties
10 now.

11 We talked about the attorneys. Let's
12 talk about the actual parties to the case.
13 We're going to start with plaintiff. Counsel,
14 please either introduce the plaintiff to the
15 jury or tell us a little bit about the
16 plaintiff, please.

17 EDWARD GRAHAM: Thank you, Your
18 Honor. This is my client, Jamsetta Washington.
19 She is here not for her own self but as the
20 legal representative of her son, Jayden
21 W She lives here in Charleston.
22 Her mother is also with her today, Your Honor.

23 THE COURT: All right.

24 EDWARD GRAHAM: I'd like to
25 introduce Charlene, Jamsetta's mother. She

1 will be here during the week. Jamsetta's
2 father is taking care of Jayden today. So
3 they'll be swapping off that responsibility
4 throughout the trial.

5 THE COURT: And, ma'am, please tell
6 us your last name, if you would.

7 MS. WASHINGTON: Washington.

8 THE COURT: It's Washington also.
9 Okay. Very good. Now let's switch to the
10 defendants' side of the case. Mr. Hood, if you
11 want to reintroduce Dr. Rhett, that would be
12 fine.

13 ROBERT HOOD: Thank you, Your
14 Honor. I've already introduced Dr. Edmund
15 Rhett, my client in this case. With him today
16 is his wife, Sally. Thank you very much.

17 THE COURT: Thank you. Now let's
18 move to the next defendant.

19 JAY DAVIS: Thank you, Your Honor.
20 Again, I am Jay Davis and I represent
21 Lowcountry Ob-Gyn.

22 THE COURT: Can you tell us who the
23 other physicians are in Lowcountry Ob-Gyn at
24 this time?

25 JAY DAVIS: Dr. Granger Osborne, Dr.

1 Molly Joseph, and I think the rest are on the
2 list, Your Honor. Those are the two primary
3 ones.

4 THE COURT: Very good. We will ask
5 about those then when we inquire further about
6 the witnesses.

7 Now my question for the parties is
8 this, is there any member of this jury panel
9 who knows any of these parties? Whether you
10 know them, in whatever capacity that may be:
11 professional, social, business. Or are you
12 related by blood or marriage to any of them?
13 Or do you have some business connection to
14 them, including whether you may have been a
15 patient of that physician or that practice or
16 had some other connection to that practice?
17 Or some independent business personally with
18 the defendants? If this is true, please stand.
19 (Number of members of the jury panel standing.)

20 All right, I tell you what we're going
21 to do. If anyone gets tired of standing, this
22 is only going to take a moment, be seated and
23 when we move to you as we move backwards then
24 you can stand. Let's start on the front, this
25 lady first. Ma'am, please tell me your name

1 and juror number.

2 JUROR NUMBER 258: Paula Swindle,
3 Number 258. I was a patient of Lowcountry a
4 while back, not currently.

5 THE COURT: How long ago would you
6 say that'd been?

7 JUROR NUMBER 258: Oh, fifteen
8 years.

9 THE COURT: Very good. I ask,
10 ma'am,
11 is there anything in that experience or past
12 relationship that would prevent you from being
13 fair and impartial in the trial of this case?

14 JUROR NUMBER 257: No.

15 THE COURT: Then I find that you are
16 qualified by your response. Thank you. You
17 may be seated.

18 JUROR NUMBER 342: Helen Walker,
19 Juror 42. I am a patient of Lowcountry.

20 THE COURT: You are currently a
21 patient?

22 JUROR NUMBER 342: Yes, sir.

23 THE COURT: Is that of Dr. Rhett or
24 of another physician?

25 JUROR NUMBER 342: Another

1 physician.

2 THE COURT: Then I ask you, ma'am,
3 is there anything in that experience that would
4 prevent you from being fair and impartial in
5 this case as a juror?

6 JUROR NUMBER 342: No.

7 THE COURT: Please give me your juror
8 number once again?

9 JUROR NUMBER 342: Three-four-two.

10 THE COURT: Thank you, ma'am. You
11 may be seated. I find that you are qualified
12 at this point.

13 Ma'am, on the right, please tell me
14 your name and juror number.

15 JUROR NUMBER 313: Three-thirteen,
16 Debra Erich. My husband is a physician and
17 he knows Molly Joseph, personally and
18 professionally.

19 THE COURT: And do you know Molly
20 Joseph as well?

21 JUROR NUMBER 313: Yes.

22 THE COURT: Would that prevent you
23 from being a fair and impartial juror in this
24 case, in your opinion?

25 JUROR NUMBER 313: No.

1 THE COURT: All right, then I find
2 that you are qualified by your response. Thank
3 you for responding. You may be seated.

4 Yes, ma'am?

5 JUROR NUMBER 304: My name is
6 Heather Benton, Number 304. I am a patient of
7 Lowcountry Ob-Gyn.

8 THE COURT: Is there anything in
9 that experience that would prevent you somehow
10 from being fair and impartial in this case?

11 JUROR NUMBER 304: No.

12 THE COURT: I find that you are
13 qualified. You may be seated.

14 Let's go directly to the back. Please
15 tell me your name and juror number.

16 JUROR NUMBER 232: Ralph Shuman,
17 321. I was a patient of Lowcountry.

18 THE COURT: How long ago was that?

19 JUROR NUMBER 232: Long time ago.

20 THE COURT: Is there anything in
21 that experience that would prevent you from
22 being fair and impartial in this case, in your
23 opinion?

24 JUROR NUMBER 232: No, sir.

25 THE COURT: I find that you are

1 qualified. Thank you. Coming across, ma'am,
2 please tell me your name and juror number.

3 JUROR NUMBER 263: 253, Joni

4 Thomas. I am a current patient of ---

5 THE COURT: Did you say two-sixty-
6 three?

7 JUROR NUMBER 263: Yes, sir.

8 Tell me, is there anything in that experience
9 that would prevent you from being fair and
10 impartial in this case?

11 JUROR NUMBER 263: No.

12 THE COURT: Very well then, I find
13 that you are qualified because of your
14 response. You may be seated.

15 Ma'am, tell me your name and juror
16 number.

17 JUROR NUMBER 265: I am Ann

18 Thornhill, and my number is 265. I am a
19 patient of Dr. Edmund Rhett.

20 THE COURT: Are you currently a
21 patient of his?

22 JUROR NUMBER 265: No.

23 THE COURT: All right. How long ago
24 has that been since you've been a patient of
25 Dr. Rhett's?

1 JUROR NUMBER 265: Fifteen years.

2 THE COURT: All right. Is there
3 anything in that experience that would prevent
4 you from being fair and impartial in this case,
5 in your opinion?

6 JUROR NUMBER 265: No.

7 THE COURT: Then I find that you're
8 qualified in your response. Thank you, you may
9 be seated.

10 Yes, ma'am, please tell me your name
11 and juror number?

12 JUROR NUMBER 252: Tara Spicer,
13 Number 252. Currently a patient of Dr. Wilson
14 with Lowcountry Ob-Gyn.

15 THE COURT: Very well. Is there
16 anything in that experience that would prevent
17 you from being fair and impartial, in your
18 opinion, in this case?

19 JUROR NUMBER 252: No.

20 THE COURT: Then I find that you are
21 qualified by that response.

22 Sir, please tell us your name and
23 juror number again?

24 JUROR NUMBER 14: Kenneth Barfield,
25 Number 14. My wife is presently a patient of

1 Lowcountry, Dr. Osborne delivered our second
2 child about a year ago.

3 THE COURT: And would that
4 experience somehow prevent you from being fair
5 and impartial here as a juror?

6 JUROR NUMBER 14: No, sir.

7 THE COURT: Then I find that you are
8 qualified by your response. Thank you.

9 Sir, please tell me your name and
10 juror number.

11 JUROR NUMBER 195: I am a
12 physician and a close -- I have a close
13 professional relationship with Dr. Rhett.

14 THE COURT: How many years have you
15 been working for Dr. Rhett?

16 JUROR NUMBER 195: I don't
17 actually work for him but I have hospital
18 privilege in pediatrics.

19 THE COURT: Tell me your juror
20 number, please.

21 JUROR NUMBER 195: One-nine-five.

22 THE COURT: Do you believe that your
23 close personal working relationship with Dr.
24 Rhett would prevent you from being fair and
25 impartial?

1 JUROR NUMBER 195: No, sir.

2 THE COURT: Do you think that you
3 could be fair and impartial?

4 JUROR NUMBER 195: Yes, sir.

5 THE COURT: Then based on that,
6 Doctor, I thank you for your response and I
7 find that you're qualified. You may be seated.

8 Anyone else now to respond they have a
9 connection to one of the defendants? (No
10 response).

11 Also plaintiffs are included. Is
12 there anyone in this jury panel who either
13 knows the plaintiff, knows of him or has some
14 connection to the plaintiff. If that applies
15 to you, please stand. (No response). No one
16 further has stood in response to the court's
17 question.

18 Now, Ladies and Gentlemen, we are
19 going to read out a witness of potential
20 witnesses who may appear in the case. I am
21 going to tell you in advance that my question
22 about witnesses, as opposed to parties, is not
23 as close. While I asked you about parties it
24 was whether you knew them, had any connection
25 to them. When I ask you about witnesses, what

1 I am looking for is whether you have some close
2 business, professional or social relationship
3 to them or whether you may be related to them
4 by blood or marriage. Counsel, who has the
5 joint list for witnesses.

6 EDWARD GRAHAM: (Stands).

7 THE COURT: All right. Mr. Graham,
8 do you want to publish them?

9 EDWARD GRAHAM: I don't have the
10 joint list, Your Honor. I was just double-
11 checking. We have our witnesses.

12 THE COURT: I believe -- Ms.
13 Simmons, do you have the joint list?

14 GRACE CHILTON-SIMMONS: I have our
15 list, Your Honor.

16 THE COURT: Well, let's do this.
17 We are going to let the plaintiff go first,
18 call out their names. Then we will -- there
19 may be some duplicates. Then we will come to
20 the defendants. Ladies and Gentlemen, don't be
21 intimidated by the length of this list that you
22 are getting ready to hear. These are potential
23 witnesses who may appear in the trial of the
24 case. Go ahead, Mr. Graham.

25 EDWARD GRAHAM: First Jamsetta

1 Washington, whom you've already met.

2 Secondly, Charline, her mother, whom
3 you have already met.

4 Sisters: Renee Washington, Elnora
5 Washington. Those are Jamsetta's sister.

6 Jamsetta's father: James Washington.

7 Dr. Gary Folks, who is an obstetrical
8 witness from Savannah, Georgia.

9 Dr. Robert Zimmerman from
10 Philadelphia. He is a pediatric
11 neuroradiologist.

12 Dr. Robert Voight from Virginia Beach.
13 He is a life care planner for brain-damaged
14 individuals.

15 Barbara Burton, who is a physician and
16 geneticist in Chicago.

17 Jean Hutchinson, who is a vocational
18 witness from Charleston.

19 Dr. Daniel Avert, who is a pediatric
20 neurologist from New York and New Jersey.

21 Dr. Michael Katz, who is a pediatric
22 from Pakistan, New Jersey.

23 Dr. Oliver Wood, who is an economist -
24 - former economist at the University of South
25 Carolina, who still lives in Columbia.

1 Dr. Margaret Greer-Simmons, who is the
2 pediatric neuropsychologist from Mount
3 Pleasant.

4 Dr. Yvonne Gomez-Carrion, who is
5 obstetrical witness for the plaintiff. She is
6 in Boston at one of the Harvard teaching
7 hospitals.

8 Carolina Gadsden, who is a local --
9 I'm sorry. Cynthia Gadsden, who is a local
10 teacher.

11 Kristen Pirolli, who is a local
12 therapist.

13 Sara Rentz, who is a local therapist.

14 Christine Delk, who is a local
15 therapist.

16 Candice Aver, who is a local teacher.

17 Those are our witnesses.

18 THE COURT: Thank you. Now to the
19 defendants. Again, there may be some
20 duplication. Go ahead.

21 GRACE CHILTON-SIMMONS: Thank you,
22 Your Honor:

23 Edmund Rhett, Jr., M.D.,

24 Granger Osborne, M.D.

25 Victor Winestein, M.D.,

1 Lynn Norton, M.D.,

2 Ann Oxner, M.D.

3 Mary Beth Hill

4 Aubrey Milunsky, M.D.

5 Peter VanHorsten, M.D.

6 John Hobbs, M.D.

7 Ben Ulich, Ph.D.

8 Harvarsen, R.N.

9 Eileen Peters, R.N.

10 Darlene George, R.N.

11 Jane Nivens, R.N.

12 _____ Nahan, R.N.

13 Mary Beth Phillips.

14 THE COURT: Thank you, Counselor.

15 Ladies and Gentlemen, you have heard the names
16 of potential witnesses who may appear in the
17 trial of this case. Again, I am asking if
18 there is anyone who is related by blood or
19 marriage to any of these witnesses or who has
20 some close business, professional or social
21 connection.

22 In the instance of a physician
23 witness, if you are a patient or if you have
24 been a patient of that physician, then I would
25 count that as close relationship.

1 Therefore, if anyone wishes to respond
2 to the witness list, please stand.

3 Ma'am, please tell your name and juror
4 number.

5 JUROR NUMBER 164: My number is
6 264. My name is Teresa Thompson and I am a
7 patient of Dr. Osborne.

8 THE COURT: And if Dr. Osborne is in
9 fact called -- you're currently a patient?

10 JUROR NUMBER 164: Yes.

11 THE COURT: And if the doctor is
12 called a witness in the trial of the case,
13 would that somehow prevent you from being fair
14 and impartial in this case, in your opinion?

15 JUROR NUMBER 164: No, sir.

16 THE COURT: Then I find that you are
17 qualified by your response. Thank you.

18 Yes, ma'am? Please give me your name
19 and number.

20 JUROR NUMBER 31: My name is Jack
21 Bradshaw and I am a current patient of Dr.
22 Osborne.

23 THE COURT: And if that physician is
24 called during the course of the trial, would
25 that prevent you from giving a fair and

1 impartial trial in this case, in your opinion?

2 JUROR NUMBER 31: No, sir.

3 THE COURT: Then you are qualified
4 by that response. Anyone else now who would
5 respond? Yes, ma'am, please tell me your name
6 and juror number.

7 JUROR NUMBER 319: I am Kathleen
8 King, 319. Dr. Simmons was my doctor and Mary
9 Beth Hill is a coworker of mine.

10 THE COURT: Would the fact that you
11 have connections to potentially two witnesses,
12 potential witnesses, prevent you from being
13 fair and impartial in this case?

14 JUROR NUMBER 319: No, sir.

15 THE COURT: Then I find that you're
16 qualified by your response. Anyone else now
17 who would -- (No response).

18 Let me say to you that I am also aware
19 that the lunch hour is approaching. I'm not
20 going to take your lunch away from you. I'll
21 tell you what we do try to do is to go ahead
22 and qualify the jury so that we can go ahead
23 and release the rest of you for the day, try
24 not to inconvenience as many people as
25 possible. So we are -- I am not unaware that

1 the lunch hour is approaching.

2 Ladies and Gentlemen, this case
3 involves -- first I should say this, that a
4 lawsuit starts when a plaintiff files a
5 document called a Complaint against a
6 defendant. The defendant then files a
7 response, what they call an Answer. What is in
8 the Complaint is a set of allegations that are
9 set forth by the plaintiff. They are not to be
10 accepted as the truth, because ultimately what
11 the truth is in a case is ultimately determined
12 by a jury whether the plaintiff is saying it or
13 a defendant says it; not what it says on a
14 piece of paper, but because the evidence in the
15 case shows it.

16 But I will tell you that the Complaint
17 in this lawsuit alleges that on July 16th,
18 2002, the plaintiff's mother, Jamsetta
19 Washington, was admitted -- actually admitted
20 the day before, July the 15th -- to East Cooper
21 Hospital. The following day she was -- the
22 following day labor was induced, there was a
23 vacuum-assisted -- or a vacuum extractor
24 procedure that was used in the birth. The
25 plaintiffs allege that there was medical

1 negligence that occurred and as a result the
2 child was injured. Now, that is an extremely
3 scant comment about what the allegations are.
4 Please don't accept that with any degree of
5 detail. That just gives you an idea of what
6 the claim is.

7 Now, let me immediately say that the
8 plaintiffs (sic) have answered and admitted, of
9 course, that the child was born, born in the
10 hospital, but they have denied any
11 responsibility for any injuries for whatever
12 may have occurred that was an unexpected
13 result. They have denied the allegations of
14 the complaint, thus the issues have been joined
15 for trial.

16 Now, with that understanding, again
17 with the operative date being July 16th, 2002,
18 I ask you whether there is any member of this
19 jury panel who knows anything about this case,
20 the dispute, that it occurred or anything that
21 has happened in this case from whatever source
22 that may come? If that applies to you, please
23 stand. (No response).

24 If you know anything about this case,
25 please stand. (No response).

1 It looks like no one has responded to
2 the court's question.

3 All right, now I want to ask you a
4 little bit about your personal business in the
5 courts previously. I'm not going to get too
6 far into your business but I want to ask if any
7 of you have ever been a plaintiff before or
8 ever been a defendant. We are going to start
9 with plaintiff.

10 First of all, I am not talking about
11 domestic relations or Family Court. I am
12 talking about civil court, where we find
13 ourselves here today, whether it be magistrate
14 or small claims court, here in Circuit Court,
15 or in Federal Court. If you have ever had a
16 dispute with another person or an entity, some
17 company, whatever it may be, to the point that
18 you filed a lawsuit, that you've been a
19 plaintiff before, please stand.

20 We will begin with the lady on the
21 front row. Ma'am, please tell me your name and
22 juror number?

23 JUROR NUMBER 342: Donna Walker,
24 342.

25 THE COURT: Let me ask you, this

1 matter, is it over with or still pending?

2 JUROR NUMBER 342: Over with.

3 THE COURT: Was it a personal injury
4 claim where someone was hurt?

5 JUROR NUMBER 342: No.

6 THE COURT: Just in a word or two,
7 can you tell me what it was about?

8 JUROR NUMBER 342: It was real
9 estate related.

10 THE COURT: Very good. Is there
11 anything in that experience that would prevent
12 you from being fair and impartial in this case
13 somehow?

14 JUROR NUMBER 342: No.

15 THE COURT: All right, then I find
16 that you are qualified. Then -- please tell me
17 your name and juror number.

18 JUROR NUMBER 341: Pamela Vaughn,
19 341.

20 THE COURT: All right. Is this
21 matter over with or ---

22 JUROR NUMBER 341: One is over
23 with and one is pending.

24 THE COURT: Are these personal
25 injury claims where someone was hurt?

1 JUROR NUMBER 341: No.

2 THE COURT: Can you tell me in a
3 one-word, or two, description of what they
4 were?

5 JUROR NUMBER 341: Security fraud.

6 THE COURT: Is there anything in
7 that experience that would prevent you from
8 being fair and impartial in your opinion in
9 this case?

10 JUROR NUMBER 341: No.

11 THE COURT: Then I find that you're
12 qualified by your response. Sir, please tell
13 me your name and juror number.

14 JUROR NUMBER 270: My name is John
15 Tugwell and I'm 270.

16 THE COURT: Is this a matter that is
17 over with or that is pending?

18 JUROR NUMBER 270: Over with.

19 THE COURT: Is this a personal
20 injury claim?

21 JUROR NUMBER 270: No.

22 THE COURT: Can you tell me in a
23 word what it was?

24 JUROR NUMBER 270: Contract.

25 THE COURT: Is there anything in

1 that experience that would prevent you from
2 being fair and impartial here?

3 JUROR NUMBER 270: No, sir.

4 THE COURT: Then I would find that
5 you're qualified by your response. You may be
6 seated.

7 Yes, sir, please tell me your name and
8 juror number?

9 JUROR NUMBER 301: Stuart Andrew,
10 301. An injury.

11 THE COURT: Was it an automobile
12 accident?

13 JUROR NUMBER 301: No.

14 THE COURT: Is it over with?

15 JUROR NUMBER 301: Yes.

16 THE COURT: Is there anything in
17 that experience that would prevent you from
18 giving a fair and impartial trial in this case,
19 in your opinion?

20 JUROR NUMBER 301: No, sir.

21 THE COURT: Very good. Then I find
22 that you're qualified.

23 Moving to the right side of the
24 courtroom, sir, please tell me your name and
25 number.

1 JUROR NUMBER 44: Sherman Brown, 44.

2 About three yeas ago.

3 THE COURT: Is that over with now?

4 JUROR NUMBER 44: Yes.

5 THE COURT: Is there anything in
6 that experience that would prevent you from
7 being fair and impartial here?

8 JUROR NUMBER 44: No.

9 THE COURT: Then I find that you are
10 qualified. Thank you. Sir, please tell me
11 your name and juror number.

12 JUROR NUMBER 316: David Hills,
13 316.

14 THE COURT: And is this matter over
15 with or still pending?

16 JUROR NUMBER 316: The matters are
17 over with.

18 THE COURT: Were they personal
19 injury claims?

20 JUROR NUMBER 316: No.

21 THE COURT: And in a word can you
22 tell me what they were?

23 JUROR NUMBER 316: One was a
24 dispute as to where a property line was and the
25 other was a lemon case for a car.

1 THE COURT: All right. Is there
2 anything in those experiences that would
3 prevent you from being fair here in this case?

4 JUROR NUMBER 316: No.

5 THE COURT: Then find that you are
6 qualified.

7 Let's skip back to the next row. Sir,
8 tell me your juror number and name, please.

9 JUROR NUMBER 230: William Schaufler,
10 230. On a car.

11 THE COURT: It was an automobile
12 accident?

13 JUROR NUMBER 230: Yeah.

14 THE COURT: Is it over with?

15 JUROR NUMBER 230: No.

16 THE COURT: Is it still pending?

17 JUROR NUMBER 230: Yeah.

18 THE COURT: All right, sir. Is
19 there anything in that experience, that ongoing
20 experience, that would prevent you from being
21 fair and impartial here as a juror in this
22 court?

23 JUROR NUMBER 230: No.

24 THE COURT: Then find that you are
25 qualified by your response.

1 Sir, please tell us your name and
2 juror number.

3 JUROR NUMBER 9: William Anson, 9.

4 It was small claims.

5 THE COURT: Is it over with?

6 JUROR NUMBER 9: Yes.

7 THE COURT: Can you tell me what
8 that small claim was about? Was it personal
9 injury?

10 JUROR NUMBER 9: No.

11 THE COURT: Very good. In a word,
12 can you tell me what it was about?

13 JUROR NUMBER 9: Former roommate
14 owed me money and I took it small claims court.

15 THE COURT: Very good. Is there
16 anything in that experience that would prevent
17 you from being fair and impartial?

18 JUROR NUMBER 9: No.

19 THE COURT: I find that you are
20 qualified by your response. Thank you, sir.

21 Now, let's flip the question. I want
22 to now ask if you've been a defendant, that is
23 if you've been sued by someone or some entity.
24 If that applies to you, please stand.

25 We will begin with you on the front

1 row. Please tell us your name and juror
2 number.

3 JUROR NUMBER 258: Paula Swindle,
4 258.

5 THE COURT: Was this a personal
6 injury claim?

7 JUROR NUMBER 258: No.

8 THE COURT: Is it over with?

9 JUROR NUMBER 258: (Affirmative
10 nod).

11 THE COURT: And in a word, what was
12 it about?

13 JUROR NUMBER 258: My husband is a
14 veterinarian. We purchased a clinic from some
15 other vet, he died and his wife sued us because
16 she wanted it back. She didn't ---

17 THE COURT: All right, we will call
18 that a business dispute. Let me ask you,
19 ma'am, if there is anything in that dispute
20 that would prevent you from being fair and
21 impartial in this ---

22 JUROR NUMBER 258: I think so. We
23 are still very angry about the whole thing.

24 THE COURT: All right. Let's do
25 this. I am going to let you be seated. In a

1 moment I am going to come down and talk to some
2 individual jurors and we will have a chance to
3 speak with you then. You be sure to come
4 forward. All right?

5 JUROR NUMBER 258: Yes, sir.

6 THE COURT: Thank you. Thank you
7 for your candor. All right, sir, on the end,
8 please tell me your name and juror number.

9 JUROR NUMBER 121: Joe Hamm, 121.

10 THE COURT: All right. How long ago
11 was this?

12 JUROR NUMBER 121: Fifteen years.

13 THE COURT: So it is over with?

14 JUROR NUMBER 121: (Affirmative
15 nod).

16 THE COURT: Was this a personal
17 injury claim?

18 JUROR NUMBER 121: No, sir.

19 THE COURT: Is there anything in
20 that experience that would prevent you from
21 being fair and impartial?

22 JUROR NUMBER 121: No, sir.

23 THE COURT: Then I find that you are
24 qualified by your response.

25 Sir, please tell me your name and

1 juror number.

2 JUROR NUMBER 333: Jon Riordan,
3 333 I believe it is. I was sued by Beth Israel
4 Hospital over an emergency I had.

5 THE COURT: Okay. You say it is
6 over with now?

7 JUROR NUMBER 333: Yes.

8 THE COURT: Is there anything in
9 that experience that would prevent you from
10 being fair and impartial hearing this case?

11 JUROR NUMBER 333: A whole lot,
12 (affirmative nod).

13 THE COURT: Then I am going to ask
14 you to stay with me. I'm going to let you be
15 seated and I'll be back to you on that in just
16 a moment.

17 All right. Sir, please tell me your
18 name and juror number?

19 JUROR NUMBER 270: John Tugwell,
20 270. Sued for rent a few years ago.

21 THE COURT: Is there anything in
22 that experience that would somehow prevent you
23 from being fair and impartial?

24 JUROR NUMBER 270: No, sir.

25 THE COURT: Then I find that you are

1 qualified by that response.

2 Sir, please tell me your name and
3 juror number?

4 JUROR NUMBER 24: It is Mark Blake,
5 24.

6 THE COURT: And is it over with now?

7 JUROR NUMBER 24: Yeah.

8 THE COURT: Was it personal injury?

9 JUROR NUMBER 24: Business.

10 THE COURT: Business?

11 JUROR NUMBER 24: Yes, sir.

12 THE COURT: All right. Is there
13 anything in that experience that would prevent
14 you from being fair and impartial in this case?

15 JUROR NUMBER 24: I think so, yes.

16 THE COURT: All right, I tell you
17 what, I am going to come back and speak with
18 you as well rather than talk about that here in
19 open court. That means that we have three
20 jurors that I will be talking to individually.

21 The next thing that I want to ask is,
22 now moving specifically to medical negligence,
23 whether there is any juror who has ever had a
24 claim or dispute with a physician, whether it
25 was either for a medical procedure or the care

1 that you received from a physician, or a
2 hospital, or a medical care entity. If you've
3 ever had a claim -- it doesn't have to be
4 litigation. I'm going to ask you about
5 litigation in a moment. But I want to know now
6 whether you've had a dispute with a physician.
7 If that applies to you, just asking about you
8 as a juror, please stand. (No response). Let
9 the record reflect that no juror has stood.

10 JUROR NUMBER 333: Could I have a
11 clarification, could you ask the question
12 again?

13 THE COURT: I can shorten it. You
14 had a collections claim from a hospital?

15 JUROR NUMBER 333: Yes, sir.

16 THE COURT: Is there something else
17 that you are referring to?

18 JUROR NUMBER 333: No, it was a
19 dispute with a medical professional that
20 started into litigation. Was that your
21 question?

22 THE COURT: Yes, that actually is my
23 question. But because you told me that your
24 experience was not a good one, I won't need to
25 get any further information at this point.

1 Anyone else, in light of the
2 discussion which just transpired, that wishes
3 to respond? (No response).

4 Now I want to know if anyone in your
5 immediate family has an ongoing -- that is a
6 present dispute with a physician or a medical
7 provider or a medical entity. I am going to
8 define immediately family this way, just for
9 the purposes of these questions -- immediate
10 family is your spouse or your children,
11 regardless of where they may live, and anyone
12 that resides in your household with you.

13 So what I would like t know is whether
14 or not there is anybody on this jury panel who
15 has an immediate family member that is
16 presently involved in a dispute with a
17 physician or medical provider. If you do,
18 please stand.

19 All right. Ma'am, please tell me
20 your name and juror number.

21 JUROR NUMBER 3: My name is
22 Henrietta Allen. I am number three and my son
23 has brought a malpractice action.

24 THE COURT: Is that pending
25 presently?

1 JUROR NUMBER 3: Yes, it is pending.

2 THE COURT: Is your son less than
3 eighteen years of age?

4 JUROR NUMBER 3: No, sir.

5 THE COURT: Is there anything in
6 that experience that would prevent you from
7 giving a fair and impartial trial in this case,
8 in your belief?

9 JUROR NUMBER 3: No

10 THE COURT: Then I find that you are
11 qualified by your response. Thank you for your
12 response. Anyone else now who would respond to
13 the court's question? (No response).

14 All right. I want to ask now if there
15 is anyone who has ever been -- I asked earlier
16 about litigation, but just to make sure, is
17 there anyone who has ever been a party or a
18 witness in a medical negligent trial? That is,
19 a party to a claim that arose from medical
20 negligence. When I say "party", I mean that it
21 has gone all the way to litigation. Or who
22 appeared as a witness in a medical negligence
23 trial, whether you were a party or not. If
24 that applies to you, please stand. (No
25 response). Let the record reflect that no one

1 has stood.

2 Excuse me -- yes, sir. I believe that you --
3 tell us your name and juror number.

4 MALE JUROR: I appeared as an expert
5 in a dispute that involved medical negligence.

6 THE COURT: Would the fact that you
7 appeared as an expert provide you from being
8 fair and impartial in this case?

9 MALE JUROR: No.

10 THE COURT: I believe that you said
11 your profession is -- that you're a physician
12 but that you are a geneticist?

13 MALE JUROR: Yes.

14 THE COURT: Thank you for your
15 response. I find that you are qualified by
16 your response. Yes, sir, tell us your name
17 and juror number again.

18 JUROR NUMBER 14: Barfield, Number
19 14. Again, Your Honor, I am an attorney with
20 Barnwell Whaley here in town and -- this
21 probably a little broader than your question
22 but our firm has done defense in med mal cases.
23 I do not do med mal work myself but I do do
24 other types of professional negligence defense.

25 THE COURT: Do you believe that type

1 of work would prevent you from being fair and
2 impartial in this case as a juror?

3 JUROR NUMBER 14: No, sir.

4 THE COURT: Okay, let me just make
5 sure that we are on the same wavelength. Can
6 you listen to the evidence in this case and
7 make your decision based on the evidence on
8 this case that is going to come from the
9 witness stand and put out of your mind any
10 previous connections or work that you may have
11 done? Are you able to do that?

12 JUROR NUMBER 14: Absolutely.

13 THE COURT: Are you certain of that?

14 JUROR NUMBER 14: Yes, sir.

15 THE COURT: Very good. With that
16 response, I find that you are qualified. Thank
17 you, sir, for your response, Mr. Barfield.

18 I want to know now whether any member
19 of this jury panel, whether you or a member of
20 your immediate family, as I just defined, has
21 ever been employed by -- employed by/worked for
22 -- Lowcountry Obstetrics & Gynecology, P.A.
23 If that applies to you, please stand. (No
24 response). Let the record reflect that no one
25 has stood.

1 My next question is the same question
2 for East Cooper Regional Medical Center. Any
3 member of the jury panel who, either you or a
4 member of your immediate family, employed by
5 East Cooper Regional Medical Center?

6 Yes, ma'am, please tell me your name
7 and juror number?

8 JUROR NUMBER 313: Debra Erich. I
9 used to work for East Cooper and my husband was
10 employed with East Cooper.

11 THE COURT: And what did you do at
12 East Cooper?

13 JUROR NUMBER 313: I was a
14 registered nurse in the E.R. and my husband was
15 an emergency room physician.

16 THE COURT: How long ago has that
17 been for you, ma'am?

18 JUROR NUMBER 313: Five years for
19 me and about six months for my husband.

20 THE COURT: All right. Would that
21 prevent you, in your opinion, from being fair
22 and impartial in hearing this case?

23 JUROR NUMBER 313: No, it would
24 not.

25 THE COURT: Tell us your juror

1 number one more time.

2 JUROR NUMBER 313: Three-thirteen.

3 THE COURT: All right. Thank you,
4 ma'am. And I'll ask the same question --
5 anyone to respond about East Cooper? (No
6 response).

7 I now ask the same question about an
8 entity name Anm Services, formerly known as
9 Nurses RX, Inc.? If that applies to you,
10 please stand. If you or a family member every
11 worked for them? (No response). Let the
12 record reflect that no one responded.

13 Ladies and Gentlemen, I want to ask
14 you now -- and this gets, uh, -- it may be
15 personal for some of you, so I will tell you,
16 thus, at the end of my questions I am going to
17 come down and -- there are three jurors already
18 that I am going to speak with individually. If
19 you don't wish to respond to this question at
20 this time, I'll give you an opportunity to come
21 forward when I ask an open-end question, if you
22 have any response that you would like to make
23 down here at the court reporter's stand. We
24 will do that in a few minutes.

25 I want to ask now whether there is any

1 member of this jury panel, either you or a
2 member of your immediate family, as I defined
3 it earlier, who has ever had complication(s)
4 from a vacuum-assisted delivery. If you wish
5 to stand now, please stand.

6 Ma'am, is this something that you want
7 to discuss at a later time.

8 JUROR NUMBER 37: No, I can go ahead
9 and tell you.

10 THE COURT: Please tell me your name
11 and juror number.

12 JUROR NUMBER 37: My name is Melissa
13 Broughton and my juror number is 37.

14 THE COURT: Let's do this -- now
15 that you've identified yourself, I am going to
16 ask you as a courtesy to the court, not because
17 you requested it but I request it, let me talk
18 with you about this at the end.

19 JUROR NUMBER 37: Okay.

20 THE COURT: Thank you. Anyone else
21 who would respond at this time. (No response).

22

23 All right. Let me also ask whether
24 there is any member of this jury panel, whether
25 you or your immediate family, have had some

1 unexpected complications from a vaginal
2 delivery. If that applies to you and you wish
3 to stand at this time and discuss it, please
4 stand.

5 All right, is that the same incident,
6 ma'am?

7 JUROR NUMBER 37: It was just -- it
8 was an awful birth, ---

9 THE COURT: Very well, stay with us.

10 JUROR NUMBER 37: --- but he is alive
11 and well now.

12 THE COURT: Very good. We will come
13 back and I will talk to you about both of those
14 instances.

15 JUROR NUMBER 37: Okay.

16 THE COURT: Thank you for your
17 response. That is Juror Number 37, who
18 responded previously.

19 All right, let me ask now, is there
20 any member of this jury panel who has ever been
21 -- or your immediate family, who has ever been
22 a member of the Greater Saint Luke AME Church?
23 If that applies to you, has been a member of
24 the Greater Saint Luke AME, please stand. (No
25 response).

1 All right, I believe that's here in
2 Charleston County -- the Greater Saint Luke AME
3 Church.

4 Also, the Triangle Church. I want to
5 ask the same question about the Triangle
6 Church. If you've been a member of the
7 Triangle Church, please stand. (No response).

8 Let me ask of the plaintiffs -- then I
9 will come down and talk with the jurors. But
10 are there anything -- any further issues that
11 the plaintiff wishes for me to take up at this
12 time, on jury qualification?

13 EDWARD GRAHAM: Your Honor, may we
14 approach?

15 THE COURT: You may.

16 (BENCH CONFERENCE)

17 THE COURT: All right, Ladies and
18 Gentlemen, thank you for your patience while we
19 discussed matters.

20 I do have some questions that I want
21 to ask for you. I asked you earlier about
22 anyone who had ever been involved in a dispute
23 with a medical provider. That is, a claim or
24 litigation. I want to know whether there is
25 any member of this jury panel who has ever had

1 what I would call an unsatisfactory experience
2 with medical personnel that you felt was a
3 fault of the medical personnel in caring for
4 you? In other words, if you've had some
5 complaint about unsatisfactory service or
6 experience from medical personnel. If that
7 applies to you, please stand. This is in the
8 past -- actually what I am going to do is I am
9 going to limit it to the past ten years. If
10 that applies to you, please stand.

11 Ma'am, give us your name and jury
12 number.

13 JUROR NUMBER 347: Bethany
14 Matthews, Juror Number 347.

15 THE COURT: Ms. Matthews, let's do
16 this, I am going to let you come up and talk to
17 me at the end, if you don't mind, rather than
18 going into the details here. Thank you for
19 your courtesy in doing that. All right?

20 JUROR NUMBER 347: Yes, sir.

21 THE COURT: Anyone else? (No
22 response).

23 I asked you earlier if anyone had had
24 a problem with a vacuum delivery. I want to
25 ask you now if anyone has had a child by vacuum

1 delivery. If that applies to anyone, or anyone
2 in your immediate family, that has had a child
3 with a vacuum-assisted delivery, please stand.
4 I know that we have one, Juror Number 37, and
5 it is not necessary for you to stand. I'll
6 talk to you in a moment. If there are others
7 who have had, please stand. (No response).

8 Yes, ma'am, let me get your name and
9 juror number.

10 JUROR: (Inaudible)

11 THE COURT: All right. How long ago
12 was this?

13 JUROR: (Inaudible)

14 THE COURT: And is there anything in
15 those experiences that would prevent you from
16 being fair and impartial in this trial?

17 JUROR: No, sir.

18 THE COURT: I find that you are
19 qualified by your response.

20 All right, what I am going to do is --
21 and, again, the best way, I think, is to ask
22 you remain with us and hopefully you won't miss
23 too many of your workshops. I certainly don't
24 think we will be running longer than this week.
25 Okay. Thank you for coming forth.

1 to draw and now there you sit.

2 Let me ask you this question, how many
3 of you have served before on a jury, whether it
4 be criminal or civil? If you have, raise your
5 hand, please.

6 JUROR: The question again?

7 THE COURT: If you've served before
8 on a jury, civil or criminal? (Several jurors
9 raise their hands). Very good. So we've got
10 some people with some experience.

11 Let me say this to you, if you find
12 yourself sitting there for the first time,
13 don't be uncomfortable about where you find
14 yourself. It takes two tools to serve and
15 serve well as a juror and you've got them both.
16 First is your collective -- well, the first is
17 your ability to listen. The second is your
18 collective common sense. Armed with those two
19 things, you are going to find yourself in good
20 stead.

21 To the Plaintiff, is there any
22 objection to the jury draw procedure that the
23 court employed or the strikes imposed by the
24 other side?

25 EDWARD GRAHAM: No, Your Honor.

1 THE COURT: Now from the defense?

2 ROBERT HOOD: No. No, sir.

3 THE COURT: All right, then that
4 means you'll be our jury, Ladies and Gentlemen.
5 I'll be right back to you in just a moment.

6 The remaining panel, I know that
7 you're disappointed that you were not chosen
8 (laughter from jury pool). What I am going to
9 do is I am going to release you for the day. I
10 ask that after 6:00 o'clock tonight you call
11 the jury number for further instructions to the
12 entire panel. Just one moment before you
13 leave? Do you need to take care of something
14 before the jury leaves?

15 ROBERT HOOD: Yes, please.

16 THE COURT: What might that be?

17 ROBERT HOOD: We have a *Batson*
18 Motion.

19 THE COURT: All right. Counsel, let
20 me get you to come up and speak to me here at
21 the bench.

22 BENCH CONFERENCE:

23 THE COURT: All right, just
24 step back from the microphone and we'll deal
25 with it.

1 (BENCH CONFERENCE CONCLUDED)

2 THE COURT: Ladies and Gentlemen,
3 there is a matter that the attorneys wish to
4 take up, so we're just going to be at-ease here
5 for a moment while that is done. Then we will
6 have further instructions for you. Thank you
7 for your patience. I note that we would not
8 bring them back this afternoon -- I note that
9 for both sides, that's for both the jury chosen
10 and for the jury panel. Unfortunately the
11 timing just did not work out for us, so thank
12 you for giving your afternoon to come back so
13 that we could pick our jury.

14 I will tell you, for those of you that
15 are going to be on the jury panel, that we are
16 not going to begin the trial this afternoon. I
17 will have further instructions for you on that
18 whenever we -- when the lawyers complete their
19 discussion with me and we dismiss the remainder
20 of the panel. We'll be with you shortly.

21 THE COURT: All right, on the
22 record, let me ask again, is there any
23 objection to the jury draw procedure from the
24 Plaintiff?

25 EDWARD GRAHAM: No, Your Honor.

1 critically important piece of evidence that
2 even though no objection has yet been made to
3 it, I just wanted to call it to Your Honor's
4 attention that we believe that is a critically
5 important piece of evidence.

6 I don't know what any legitimate basis
7 would be for objecting to it but I wanted to
8 call it to Your Honor's attention.

9 We can have -- we have the sister
10 available to testify about the circumstances,
11 the authenticity if it should be a problem. I
12 don't know if they are even going to raise
13 that, but ---

14 THE COURT: Have you not discussed
15 that with counsel, as required by Rule 11?

16 EDWARD GRAHAM: We have had
17 multiple discussions, Your Honor.

18 THE COURT: Let me ask then, will
19 there be an objection to the video?

20 ROBERT HOOD: No, Your Honor.

21 THE COURT: Then it is a moot issue.

22 ROBERT HOOD: Thank you, Your
23 Honor.

24 THE COURT: It will not be an issue.

25 EDWARD GRAHAM: The second one,

1 Your Honor, relates to the purported expert
2 testimony of the defense expert, Aubrey
3 Milunsky. Dr. Milunsky is a geneticist at
4 Boston University. He has not examined Jaylan.
5 At the time that he formed his opinions in the
6 case, he had no access to any genetic test
7 results. Nevertheless, he had seen the medical
8 records of Jaylan and his mom and he had seen
9 two photographs of the child, with his shirt
10 off, front and the back, and he claims that he
11 is able to determine from the photographs and
12 from review of the medical records that Jaylan
13 W has a connective tissue disorder.

14 We hired a geneticist from Chicago who
15 has examined the child and who has obtained
16 genetic test results and she says that he has
17 no connective disorder. We don't think that
18 Dr. Milunsky's diagnosis of connective tissue
19 disorder based on two photographs and a review
20 of medical records that don't contain a
21 diagnosis of connective tissue disorder, would
22 be sufficient helpful and reliable to the
23 jurors in deciding the facts.

24 It is not even relevant, Your Honor.
25 He tries to concoct the theory that because the

1 child's back looks crooked in a photograph that
2 he could diagnose scoliosis, that he inherited
3 his mother's vertebral anomalies and that means
4 that he's got connective tissue disorder and
5 that means -- some of the connective tissue
6 disorders involve weak blood vessels and that
7 means that this child probably has weak blood
8 vessels in his brain and he probably had brain
9 bleeds because of all of that.

10 He goes on to say that this child does
11 not have, in his opinion, the type of
12 connective tissue disorder that involves the
13 conditions associated with weak blood vessels
14 but that even if he did, those -- it is
15 undocumented that those bizarre/unusual
16 conditions have ever resulted in a brain
17 hemorrhage occurring.

18 Maybe over time there's some kind of
19 aneurysm after decades of life where blood
20 vessels weaken a little more readily than
21 normal people's would, but it's just -- it's
22 far out there. It's without scientific basis
23 and we don't think that it is appropriate.

24 THE COURT: Wouldn't the photograph,
25 medical records, be something that would be

1 reasonably relied upon by an expert in that
2 particular field to form an opinion?

3 I mean, you say that it is not known
4 but isn't that sufficient -- isn't that part of
5 a sufficient basis for an expert's opinion?

6 I mean, isn't -- are arguing really
7 about credibility and believability as opposed
8 to admissibility?

9 EDWARD GRAHAM: Well, certainly
10 photographs in medical records can be relied
11 upon but we submit in Your Honor's gatekeeper
12 role that it has to meet certain tests for
13 reliability and that to diagnose a connective
14 tissue disorder based on a perception of large
15 ears and a photograph of a back taken at an
16 angle -- he hasn't been seen the back straight
17 on. The only provider who has examined the
18 scoliosis says that he doesn't have scoliosis.

19 THE COURT: Which defendant has
20 offered this expert? Which defendant is
21 offering the expert?

22 EDWARD GRAHAM: We both.

23 JAY DAVIS: It's Dr. Rhett.

24 THE COURT: What say you to this,
25 Ms. Simmons?

1 CHILTON SIMMONS: Thank you, Your
2 Honor, may it please the court. Dr. Milunsky
3 is our board-certified genetics expert. He has
4 reviewed the multiple medical records of Jayden
5 W. as well as the photographs. His
6 opinions are based on his medical degree, to a
7 reasonable medical certainty most probably,
8 with regard to the cause of this child's
9 problems. We would just ask Your Honor that if
10 you have any hesitation that you would allow a
11 *voir dire* of his expert at the appropriate
12 time. At this stage it certainly is not
13 appropriate.

14 THE COURT: All right. I will deny,
15 Mr. Graham. I don't think that there is any
16 need to go further with it. Clearly if there
17 is a defense of a genetic condition and this
18 gentleman is a geneticist, you can attack him
19 all day long on credibility but I don't think
20 it's appropriate at this stage.

21 EDWARD GRAHAM: Your Honor, I
22 realize that we neglected to enter a memorandum
23 that we prepared. May I do that?

24 THE COURT: Yes, sir.

25 EDWARD GRAHAM: (Tenders). It also
26 addresses the next two issues. There are two

1 other Motions related to Dr. Milunsky, if Your
2 Honor please.

3 He testifies that -- he testifies that
4 at the point of his opinion formulation certain
5 genetic tests had not been done, nobody had
6 done the genetic examination. That has now
7 been done by Dr. Burton in Chicago, a
8 geneticist from Northwestern.

9 But he claimed after going through a
10 long explanation of the tests that he thought
11 should be done to rule out certain genetic
12 causes, he testified that even if all those
13 test results came back negative that it
14 wouldn't change his opinion.

15 He went on to say that he expected the
16 tests results to be negative and that he did
17 not believe that this child had any genetic
18 condition or syndrome that had ever been
19 previously recognized.

20 He testified that in his opinion that
21 this child, all of them, virtually everybody,
22 has genetic features that have not yet been
23 recognized and cannot yet be tested for because
24 the level of genetic science has not reached
25 that point. We don't know as much now, in
26 other words, as he speculates that we will be

1 in the future. That may well be true but for
2 him to say 'I can offer an opinion to a
3 reasonable degree of medical certainty that
4 this child has a genetic syndrome that has not
5 yet been recognized and cannot yet be tested
6 for' has to fail the reliability standard.

7 Under *Daulbert* and *State v. Council*,
8 we -- that is just so far out there to say 'I
9 believe it even though all the test are
10 negative, but there may be a test in the future
11 that I think he is going to fail.' There may
12 be knowledge in the future that would explain
13 that he has a genetic syndrome. That's just
14 not good enough to be helpful to the ladies and
15 gentlemen of the jury.

16 THE COURT: All right. Let me hear
17 from Ms. Simmons on that?

18 MS. SIMMONS: Your Honor, again,
19 this expert is a board-certified geneticist and
20 the fact he -- his point is that multiple
21 causes can cause a hemorrhage. Just because
22 they used a vacuum tube doesn't mean that the
23 vacuum caused the hemorrhage.

24 This child has an array of other
25 genetic problems and his opinion goes to what
26 the most possible causes of his hemorrhages

1 were apart from the vacuum. So it is not
2 speculative at all. In fact, the plaintiff's
3 case is speculative to say that just because a
4 vacuum tube was used means that the vacuum
5 caused all his problems, all this child's
6 damages.

7 The expert testified within the
8 standard required by the court to a reasonable
9 degree of medical certainty, most probably, as
10 to what caused the damages to this child.

11 Certainly at this juncture it is
12 premature when the witness has not even been
13 *voir dired* by counsel.

14 THE COURT: All right.

15 EDWARD GRAHAM: May I be heard?

16 THE COURT: Yes, sir.

17 EDWARD GRAHAM: Dr. Milunsky's
18 testimony fails the most probable test. The
19 only -- the only evidence or the only opinion
20 that he offers that comes close to meeting the
21 most probable test is his opinion is that most
22 probably there are multiple causes of this
23 child's brain damage and brain bleeds. But
24 among those -- and we haven't talked about
25 alcohol yet, but he says that he can't even say
26 that there is a one in a million chance that

1 alcohol was causally significant but he
2 believes that most probably it's part of the
3 cause; alcohol ingestion by the mom in the
4 first few weeks of pregnancy, before she found
5 out that she was pregnant. It's that kind of
6 stuff, he cherry picks little things that fail
7 the most probable test and then he says 'in my
8 opinion, most probably all of those in the
9 aggregate are the most probable cause.' It's
10 just -- if it fails the most probable test, its
11 speculation. It builds speculation upon
12 speculation upon speculation and it is not
13 helpful to the jury.

14 Thank you.

15 THE COURT: Just a moment.

16 ROBERT HOOD: Your Honor, while
17 you are thinking, can I add a few medical
18 things?

19 THE COURT: Go ahead.

20 ROBERT HOOD: Most genetic
21 syndromes cannot be tested for. Most syndromes
22 are identified by examination, not genetic
23 testing. This man is qualified.

24 I think to rule at this juncture would
25 be totally inappropriate. If he wants to

1 contest the witness' qualifications, fine. Or
2 his opinions, fine. That's why we have cross-
3 examination, that's why we have *voir dire*.

4 But the testing that he is talking
5 about is done based on the doctor's training,
6 board certifications and opinions. That's what
7 he's given in this case. To rule in a vacuum
8 is to ---

9 THE COURT: Thank you. Just a
10 moment.

11 ROBERT HOOD: Thank you, Your
12 Honor.

13 THE COURT: Mr. Graham, I am
14 prepared to rule. This is a little bit of
15 background -- and please don't believe that I
16 consider myself to be an expert. I do not. I
17 had a brother that passed away earlier this
18 year who had a genetic neurodegenerative
19 disease. And I just came, two weeks ago, from
20 a conference on genetics with regard to his
21 particular disease. I can tell you that one
22 thing that geneticists are saying is that the
23 state of the science at this time, because we
24 have just -- humans have just been able to
25 match the geno and the -- from that just the --

1 it's opened an entire array of genetic
2 possibilities of things that we don't yet
3 understand, that we know are out there. So I
4 cannot tell you that this is hocus-pocus that
5 you're claiming that the defendants are putting
6 up. I've got to further listen to the basis of
7 what the geneticists say and make a
8 determination of whether or not there is a
9 reliable basis for it.

10 I can tell you that from what I am
11 hearing, not only does it not defy
12 believability but to me it's what my
13 understanding of the state of the science is.

14 At this point, I deny your Motion.

15 EDWARD GRAHAM: But we can revisit
16 that ---

17 THE COURT: Well, we can but I also
18 would decline to delay the proceeding by taking
19 some kind of proffer, unless in the preamble to
20 the doctor's testimony there is something very
21 obviously erroneous. At this juncture, I don't
22 see any -- we will revisit it, it's all Motions
23 *in limine* and, thus, there is nothing final at
24 this state.

25 EDWARD GRAHAM: Yes, sir.

1 THE COURT: We will revisit it at
2 the appropriate time but, again, I believe that
3 this is just the state of science. This is
4 apparently going to be the battleground, or one
5 of the battlegrounds, of this case.

6 Good luck in explaining genetics, to
7 both sides, to the jury -- not that they can't
8 understand it, but it is a very complex
9 subject.

10 EDWARD GRAHAM: Judge, there is one
11 final point about Dr. Milunsky, and that
12 relates to alcohol ingestion. I just
13 referenced it every so slightly in talking
14 about multiple causes. I didn't really focus
15 on it in my remarks. I don't think you've
16 ruled on that yet.

17 THE COURT: Does he ---

18 EDWARD GRAHAM: Thank you, Your
19 Honor.

20 THE COURT: --- say that the child
21 has fetal alcohol syndrome?

22 EDWARD GRAHAM: No. He says that
23 he does not. But what he says is that -- this
24 is addressed on page four of our memorandum, in
25 the last paragraph. (Reading): *Mr. Milunsky*

1 *asserts that Jay has been harmed by alcohol*
2 *consumption by his mother during the first*
3 *month or so of pregnancy, yet he cannot state*
4 *that such alcohol consumption most probably*
5 *caused harm to Jay.*

6 I asked him if he could say that there
7 was even a one in a million chance that alcohol
8 had caused Jaylan's damage. He said, "I don't
9 know where you get one in a million but there's
10 -- there's no basis for one in a million. It's
11 probably like one in ten thousand or one in a
12 hundred thousand or something on that order of
13 magnitude. But nobody can express the
14 mathematical odds. It may be more than one in
15 a million, but I can't even say that to a
16 reasonable degree of medical certainty, that
17 alcohol ingestion by the mother in early
18 pregnancy was causally significant."

19 The testimony shows that when she
20 first went to the OB that she gave a history of
21 alcohol, tobacco and marijuana until she
22 suspected that she was pregnant and got the
23 test suggesting pregnancy. That was just
24 weeks, less than a month, the evidence shows,
25 that there was the potential of alcohol

1 ingestion. There was no suggestion there was
2 consumption to excess or bingeing or anything
3 like that. Later on ---

4 THE COURT: All right, let's just
5 back up to the basic point. Do you have some
6 way of excluding that evidence from coming in?
7 That that's what the medical records show when
8 she first reported to the OB, that she had
9 consumed alcohol and marijuana?

10 EDWARD GRAHAM: Our contention,
11 Your Honor, is that that is completely
12 irrelevant, confusing and prejudicial. It has
13 no scientific, it has no causal significance of
14 any scientific basis whatsoever.

15 THE COURT: Well, there are -- first
16 of all, what evidence do you have that it takes
17 binge drinking or excess use of drugs or
18 alcohol to cause some type of result to the
19 fetus?

20 EDWARD GRAHAM: Excessive drinking
21 can cause fetal alcohol syndrome. No expert
22 contends that this child has fetal alcohol
23 syndrome. No expert contends that this child
24 has the types of signs and symptoms that are
25 suggestive of maybe an incomplete fetal alcohol

1 syndrome. There is nothing consistent with
2 fetal alcohol syndrome at all. What they are
3 saying is that she had some alcohol during the
4 early pregnancy, that the child has brain
5 bleeds from the traumatic vacuum and 'we want
6 the jury to believe that somehow the alcohol is
7 connected with the brain bleeds even though our
8 experts can't even say that there is a one in a
9 million chance that's true.'

10 THE COURT: All right. So you are
11 going to couple this with the Motion to exclude
12 those medical records?

13 EDWARD GRAHAM: Yes, sir.

14 THE COURT: All right, let's go to
15 the defendants and hear what they have to say.

16 CHILTON SIMMONS: Thank you, Your
17 Honor. First of all, Dr. Milunsky, our expert,
18 testified that more likely than not the
19 prenatal (sic) alcohol contributed to Jay's
20 condition.

21 As Your Honor stated, the field of
22 genetics is complicated. So he was being
23 honest insofar as not being able to say to a
24 reasonable degree of medical certainty, most
25 probably, the alcohol caused all of the child's

1 problems. Nobody can say that. Obviously
2 there is no way to do a study on fetuses to see
3 how the alcohol affects them.

4 He did say that the medical research
5 is far enough along to know what effects
6 alcohol can cause on a fetus in utero. This
7 child has multiple delays, some of which could
8 be caused by a hemorrhage, others which are
9 more likely caused by teratogens or alcohol,
10 alcohol or drugs, during a pregnancy.

11 She did admit to the use marijuana and
12 to drink. The alcohol most likely contributed
13 to the this child's damages.

14 It's overbroad and not accurate for
15 the plaintiff to say that a vacuum was used,
16 that it caused the hemorrhages and these
17 hemorrhages caused all this child's delays.

18 THE COURT: Thank you.

19 CHILTON SIMMONS: And, Your Honor,
20 secondly, uh, from a credibility standpoint the
21 medical records of the plaintiff Mrs.
22 Washington casts doubts on her story that she
23 stopped drinking and using marijuana as soon as
24 she became pregnant. There are also questions
25 as to when she knew that she was pregnant.

1 The scientific literature is concrete
2 in that alcohol is most significant in terms of
3 what damages is caused to a fetus in the first
4 trimester of pregnancy.

5 This also goes to the credibility of
6 the witness as far as what she testified in her
7 deposition, as far as what the medical records
8 show.

9 And, lastly, Your Honor, just because
10 the child doesn't have fetal alcohol syndrome
11 does not mean that the child was not negatively
12 impacted by the alcohol. Drinking of alcohol
13 in the first trimester is known to cause
14 general development delays. That is what this
15 child has.

16 We've had two experts talk about this,
17 Dr. Milunskey and our OB experts, uh, -- so I
18 believe that it does meet the standard to be
19 admissible to be weighed by the jury.

20 THE COURT: Mr. Davis?

21 JAY DAVIS: I have nothing to add on
22 the subject of alcohol, drugs and tobacco.

23 EDWARD GRAHAM: Before we get to
24 that, if Your Honor please, if you look at the
25 memo that I handed up originally that focuses

1 only on Dr. Milunsky, the third page from the
2 back, and I apologize for these pages not being
3 numbered, but the third page from the back and
4 the two pages before that contain extensive
5 deposition testimony of Dr. Milunsky -- for
6 days. Page before that, I should say.

7 I don't want to belabor the court's
8 time, but let me just focus on the last
9 question and answer in that series. After some
10 somewhat evasive answers, I finally said,
11 (reading):

12 *Q. I don't mean to beat a dead*
13 *horse here. I think what you are saying is*
14 *that you can't testify that more likely than*
15 *not ingestion of alcohol caused any problem,*
16 *but you're not giving me a direct answer to*
17 *that and I want to make sure.*

18 *A. No. I cannot say that it is*
19 *more probable than not.*

20 That is their star witness on being
21 causally significant. Just part of his
22 testimony. The rest of it goes into that 'I
23 can't say one in a million.'

24 Then in terms of the other memo that I
25 just handed up, we go through the testimony of

1 each defense expert that addresses this subject
2 at all. Some will admit that either they have
3 no expertise or that they can't express an
4 opinion that it had any significance, they
5 don't believe that it had any significant.
6 They start off asserting that it has
7 significance but then by the time we work
8 through their rationale, they finally conceded
9 that it really didn't or they don't have a
10 basis to testify.

11 So I am not sure -- first -- if the
12 defense would be able to identify which one
13 that she is talking about, we would be able to
14 address the specifics of that.

15 CHILTON SIMMONS: Dr. Norton.

16 EDWARD GRAHAM: Okay, Dr. Norton is
17 specifically addressed in here. She -- early
18 on she claimed to have special expertise in the
19 subject of the effect of alcohol consumption
20 during the pregnancy but later on she
21 unequivocally stated that she could not testify
22 that alcohol most probably, or even more likely
23 than not, caused Jayden's brain damage. That
24 is in her deposition, Pages 63 to 65.

25 Then we -- we cite in here, verbatim,

1 her testimony on Pages 63 to 65.

2 She doesn't -- she hasn't formed an
3 opinion about fetal alcohol. I say, (reading):

4 Q. I don't need to worry about
5 you telling this jury that he suffers from that
6 syndrome or ever has?

7 A. That's correct.

8 Q. Have you formed an opinion
9 that ingesting caused any neurotoxic effect or
10 other brain damage or other part?

11 A. I believe that it could
12 have. I don't know for sure that it did.

13 Q. Is it your opinion that
14 alcohol consumption most probably caused brain
15 damage?

16 A. No.

17 Q. Consumption of alcohol most
18 likely did not cause brain damage?

19 A. No.

20 Q. Have you formed an opinion
21 that there is some possibility that alcohol
22 consumption caused brain damage?

23 A. Yes.

24 Then I asked her if she could be more
25 specific and, (reading):

1 Q. "...give me a percentage
2 equivalency of what you means by "possibility"?

3 A. No.

4 Q. Can you say, for example,
5 that there is a ten percent chance that alcohol
6 caused brain damage?

7 A. No.

8 Q. Can you say that there is a
9 one in a thousand possibility that alcohol
10 caused brain damage?

11 A. No.

12 Q. Can you be more specific
13 about the possible connection?

14 A. As I said before, we don't
15 know what the threshold of her alcohol was or
16 what damage it might cause. What we can say is
17 that one binge episode of alcohol ingestion is
18 considered to be potentially damaging.

19 Q. And you don't know of any
20 binge episode by Jamsetta; do you?

21 A. No.

22 Q. If I asked medical questions
23 like can you say that there is a one in a
24 million chances that alcohol consumption causes
25 brain damage, would the answer still be no?

1 A. Yes.

2 So they are just pulling out tiny,
3 tiny, theoretical mathematical possibilities
4 that fail the most probable test. They don't
5 come close to most probable.

6 THE COURT: All right, let me hear
7 from them on most probable. He just quoted one
8 of your experts in his argument, that they
9 cannot testify most probably. What do you say
10 to that?

11 CHILTON SIMMONS: Your Honor, our
12 expert Dr. Malinsky has repeatedly said that it
13 most probably contributed to this child's
14 delays. Dr. Malinsky was being honest in
15 saying that nobody on earth can say to a
16 reasonable degree of medical certainty most
17 probably that alcohol caused all of this
18 child's problems.

19 Because the child has so many genetic
20 problems as well as the issue of the mother
21 admitting to drinking alcohol and smoking
22 marijuana during the first trimester, it is
23 certainly a causal factor in some of his
24 delays. Dr. Milunksy said that the jury is
25 entitled to weight that alcohol as a

1 contributing factor to at least some of the
2 child's damages.

3 In other words, it's not fair to just
4 say that the hemorrhages caused everything and
5 exclude a major causal factor of at least of
6 this child's problems.

7 In Dr. Milunsky's deposition, the
8 question by plaintiff's counsel was, (reading):

9 Q. Do I understand that you
10 cannot even say, for example, that there is at
11 least a one in a million chance that alcohol
12 ingestion or marijuana ingestion by the mom
13 caused the baby to have a defect?

14 A. I am not sure where you are
15 getting the one in a million from. It is a
16 fact that alcohol ingestion by pregnant women
17 in the U.S. ranks as the most common cause of
18 birth defects that we see; and, as a
19 consequence, this remains a significant
20 possibility in this as a contributing factor to
21 this case, which is why I talked about that
22 there are multiple factors that operate in the
23 operation of Jayden's ultimate problems.

24 And he says, (reading):

25 A. To a reasonable degree of

1 *medical certainty, most probably, I believe*
2 *that alcohol to be a contributing factor to*
3 *this child's delays.*

4 End quote. He does not say it is the
5 only cause. He says that it is a contributing
6 cause in the myriad of this child's problems.

7 THE COURT: What about Dr. Norton?

8 CHILTON SIMMONS: Dr. Norton's
9 discussion went on for over an hour, between
10 plaintiff's counsel and Dr. Norton. Dr.
11 Norton's testimony is very similar to Dr.
12 Milunsky's in that, you know, -- from a moral
13 standpoint, you don't have fetuses -- but she
14 said that based on all the findings, research
15 and literature that alcohol ingestion in the
16 first trimester causes general delays, some of
17 which are the exact ones which Jayden has.

18 So she could not say to a reasonable
19 degree of medical certainty, most probably,
20 that the alcohol caused all of them but she
21 said that it certainly is a distinct
22 possibility based on current medicine in
23 America. She is not a geneticist, so it's out
24 of her expertise to talk about genetics but as
25 far as her position as an obstetrician, and in

1 counseling patients on not drinking during
2 pregnancy, on what effects it can cause, that
3 was opinion. The discussion went on for an
4 hour. I will be happy to provide the court
5 with quotations from her deposition that are on
6 point.

7 Certainly I think Dr. Milunsky's
8 position is sufficient ---

9 THE COURT: Very good.

10 CHILTON SIMMONS: And, also, Your
11 Honor, as the last word, we agree not to
12 mention in the opening statement anything about
13 the drinking.

14 THE COURT: All right. Just
15 briefly, Mr. Graham?

16 EDWARD GRAHAM: I can hand up the
17 original transcripts of both of those witnesses
18 -- we have those with us today -- if Your Honor
19 please.

20 I would like to quote briefly from the
21 case of *Payton v. Kearse*. I am sure Your Honor
22 is familiar with it. "Before expert medical
23 testimony is admissible on causation of the
24 plaintiff's injury, the testimony must satisfy
25 the most probably rule." Now, that's in the

1 context of the defense testimony coming in
2 trying to prove all kinds of alternative causes
3 and the issue on appeal was, was it proper or
4 improper to stop and conclude alternative
5 causes that could not meet the most probable
6 test. The court ruled that that should not
7 have come in from the defense expert if it
8 didn't meet the most probable test.

9 THE COURT: Very good. What I would
10 like to ask you to do -- I am going to withhold
11 a decision because I'd like to see the
12 supporting evidence that you have in the
13 deposition. Other than just handing it up, if
14 you would just highlight those portions that
15 you would like for me to consider.

16 I will tell you that Dr. Milunsky's
17 testimony that you just quoted, Ms. Simmons, as
18 to most probably -- this is how I see it, Mr.
19 Graham, I spent many years practicing law
20 sitting over there at the table where you are
21 sitting. And -- lawyers, you know, in a
22 particular case want me to exclude this or to
23 exclude that but my experience has been, first
24 of all, that juries are capable of
25 understanding the nuances and impact, and the

1 degree of impact, that testimony may have, very
2 accurately. Quite often when things come in
3 that you don't want to come in, they have an
4 effect that may be -- that maybe you didn't
5 think was going to come in. That's just been
6 my experience in looking back over some years
7 of doing this.

8 We don't make the facts. You know,
9 when a lawyer comes in, when a case comes into
10 your office there is a certain factual scenario
11 that is already established. You can't change
12 it, can't hide it, really can't amplify it. As
13 people say, it is what it is.

14 I will tell you now that the court
15 will not exclude the record about the alcohol
16 abuse as a major component of the defense's
17 case. It's known science and even among lay
18 people it's known that you don't ingest alcohol
19 when you may be pregnant. The court will not
20 exclude that testimony.

21 EDWARD GRAHAM: As it extends to
22 tobacco and/or marijuana, I don't believe that
23 there is any showing from any expert witness
24 that those have any causal significance.

25 THE COURT: We will talk about

1 marijuana or tobacco when we get to that point.
2 Of course, marijuana is a crime, a criminal
3 activity, so we would take a look at that.

4 What's your next one?

5 EDWARD GRAHAM: Thank you, Your
6 Honor. Well, actually that one -- that one,
7 "C" on our list does address tobacco, marijuana
8 and alcohol. We got to that through Milunksy,
9 but we address it directly in "C".

10 THE COURT: Let me just stop you
11 there. I understand your position. Let me
12 hear from the defendants as to why tobacco or
13 marijuana use would be appropriate.

14 ROBERT HOOD: Your Honor, like
15 you say, possession or use would be the
16 commission of a crime. As far as the start of
17 the case goes, we will not mention marijuana or
18 smoking. But I think as the case develops that
19 -- I would like to talk to these experts, who I
20 have not talked to myself, and just lay it out
21 to say -- I handled a case for MUSC that went
22 all the way to the United States Supreme Court
23 on crack babies. I am sure you've read about
24 it.

25 THE COURT: I have.

1 ROBERT HOOD: So I know a lot
2 about what cocaine does to the brain of a baby,
3 just as a layman. It's horrifying. It's
4 awful. It -- they are born premature, four
5 pounds, and they are ruined for life. Society
6 pays for them.

7 I don't know if that is true about
8 smoking marijuana, but I know that there is
9 nothing good about it.

10 I would just like to have an
11 opportunity before you rule, one way or the
12 other, on those two subjects to personally talk
13 to these two doctors that are qualified.
14 Frankly, they may say that it is not admissible
15 and we won't go there. But if they say that
16 there is a basis for it, then I would like to
17 come up and tell you what we've got, why we
18 would like to ask about it. If you rule with
19 us, you do. If you don't, you don't.

20 THE COURT: All right. My
21 inclination is that type of evidence would not
22 come in because it would be more probative
23 -- but if you can show me -- we can revisit it
24 if you can show me from your expert's testimony
25 that it is probative and that it outweighs the

1 prejudicial impact. That would be another
2 consideration if -- once it's determined that
3 it is probative. Until that time, I'd direct
4 that you not mention it in openings or to make
5 references to the fact that there are medical
6 records that tobacco use or -- as well as
7 marijuana use.

8 Let me ask just as a point of personal
9 injury, does Ms. Washington still use tobacco?

10 EDWARD GRAHAM: No, she does not.
11 She stopped either as soon as she found out
12 that she was pregnant or suspected that she may
13 be pregnant.

14 THE COURT: Thank you.

15 EDWARD GRAHAM: The next one, Your
16 Honor, has to do with sexual number and a
17 number of sexually-transmitted diseases, issues
18 along those lines; in terms of number of fours,
19 it appears from the records that it is a
20 relatively high number. It certainly -- it's
21 not probative of anything and it is
22 prejudicial, so we would ask that the history
23 of herpes and a history of other sexually-
24 transmitted disease, which appears periodically
25 throughout the records, -- but every expert,

1 including every defense expert, has said those
2 have no causal significant. They were treated,
3 they were not active at the time of delivery.
4 That is the child had been adversely affected
5 by it that he would have had signs or symptoms
6 of those type infections and diseases, which he
7 does not have. And that those types of
8 problems do not cause the types of problems
9 that he does have. So we believe that would be
10 highly improper and prejudicial.

11 ROBERT HOOD: That's probably
12 similar to the marijuana. We're not going to
13 go there unless we have an expert that
14 substantiates relevance to this case.

15 THE COURT: Very good, then my
16 ruling would be the same regarding number of
17 sexual partners as well as any previously
18 sexually-transmitted diseases.

19 EDWARD GRAHAM: Thank you, Your
20 Honor. Next, the biological father of Jay
21 W. Christopher Geise, who throughout
22 the litigation has been incarcerated. We don't
23 believe that that would be probative of
24 anything and is highly prejudicial.

25 I just found out this morning that he

1 is no longer incarcerated but -- at any rate,
2 we don't believe that would be proper to bring
3 that out. It would just be brought up to
4 prejudice the plaintiff. And he was not
5 present for the delivery, so he wouldn't be a
6 fact witness.

7 THE COURT: Has he asserted a claim
8 against the damages, has he claimed?

9 EDWARD GRAHAM: He has not, Your
10 Honor. I mean, our claim is asserted solely on
11 behalf of the child.

12 THE COURT: Okay. What say you to
13 that, Ms. Simmons?

14 CHILTON SIMMONS: Your Honor, three
15 important points on the separation. Number one
16 is that plaintiff's own vocational and
17 rehabilitation expert based her report on the
18 education and employment and outcome of the
19 parents. It is certainly relevant that the
20 child's father has spent the last seven years
21 incarcerated for armed robbery. So they have
22 made it an issue with their own expert's
23 report. Their expert testified -- I'm sorry.

24 In the expert's report, she states,
25 (reading): "*Jay's father, Christopher Geise,*

1 *is currently incarcerated. He served in the*
2 *United States Army for two years and attended*
3 *Allen University for two years."* End quote.

4 So their own expert is relying on that
5 information and now they want to keep that
6 information out. They say now that Jay
7 W. cannot be fully employed for the
8 rest of his life. He has the damage caused by
9 the vacuum, when in fact they are conceding
10 that they're taking in the parents' education
11 and employment. It is certainly relevant that
12 the father has been in jail for the first seven
13 years of Jayden's life.

14 THE COURT: What relevance is there
15 that it is armed robbery for which he's
16 incarcerated? If any?

17 CHILTON SIMMONS: Well, we would
18 admit -- we would concede to leave that out as
19 long as it would come in that he has been in
20 jail. Certainly everybody knows that two
21 parents raising a child is different from one
22 parent raising a child.

23 THE COURT: Very good. Now, back to
24 the plaintiff. Ms. Simmons says that you
25 opened the door, that your vocational expert

1 opened the door.

2 EDWARD GRAHAM: Well, it's true
3 that Jean Hutchinson's report recites certain
4 family facts but that's a far cry from saying
5 that she relied on the fact that this man has
6 been incarcerated in terms of reaching her
7 vocational assessment/opinion.

8 She looks at -- for that to be
9 relevant, one would have to assume that -- and
10 I'm not sure where that logical trend takes you
11 to. There is an increased chance that this
12 child would be frustrated and not every work?
13 I mean, what's relevant is what's the parents'
14 level of education, what is the parents' type
15 of employment capacity and is this child with
16 this brain damage able to deal with that type
17 of earning capacity. In fact, he can only ---

18 THE COURT: Counsel, don't you think
19 that the jury is going to wonder as Ms.
20 Washington testifies about the difficulties of
21 caring for her child where is the father? I
22 mean, don't you think what you're asking the
23 court to do leaves a gaping hole in the global
24 situation with this situation?

25 EDWARD GRAHAM: Sadly, it's a

1 single parent environment that many children
2 grow up in these days. But whether he's just
3 deserted the family or is incarcerated or is
4 just not providing them support, it is not
5 probative of any issue in this case. Certainly
6 not in terms of this child's vocational
7 capacity.

8 THE COURT: Counselor, I disagree.
9 We make choices in life that impact ourselves,
10 our children and your vocational expert's
11 testimony about the vocational viability of a
12 child is based on role models and parental
13 experience. The court is going to allow the
14 testimony -- not for what he is incarcerated
15 for but the fact that he is incarcerated, or
16 that he has been. If you have recent testimony
17 that he is out now, is participating or
18 whatever, that would be different. The court
19 is not going to strip the defense of that
20 defense, which relates to now only -- well, it
21 relates to damages, and I bel that it is -- I
22 find that it is more probative than it is
23 prejudicial.

24 EDWARD GRAHAM: Thank you, Your
25 Honor. The next one, under "F", as we have had

1 our exhibit conferences, the defense has listed
2 as exhibits all kinds of medical records of
3 Jamsetta Washington after Jayden's birth. We
4 don't believe that any of her medical records
5 after his birth have any probative value. Some
6 of them are highly prejudicial.

7 She had an abortion of a subsequent
8 pregnancy and we think that would be highly
9 prejudicial and inflammatory and we don't
10 believe that should come in. It has absolutely
11 no probative value and is highly prejudicial to
12 the case.

13 THE COURT: Defense?

14 CHILTON SIMMONS: Your Honor, we
15 would concede that the subsequent abortion
16 isn't relevant. We're not bringing that up.

17 We're not bringing up records of Ms.
18 Washington to pick on her in any way, not to
19 say anything bad about her. Rather, they are
20 separations about potential health issues that
21 she has that Dr. Milunsky, an geneticist
22 expert, feels relevant as predisposing Jayden
23 to certain problems.

24 THE COURT: What, as an example?

25 CHILTON SIMMONS: I believe that it

1 was actually from her previous record, before
2 she had Jayden, that she had an extra rib and,
3 uh, something else -- some muscluoskeletal
4 genetic issue in her medical record that made
5 it more likely that Jayden had that as well,
6 which is a part of a general bleeding disorder
7 which Jayden has, which is certainly relative
8 to a hemorrhage at birth.

9 THE COURT: But what I'm hearing
10 then is an agreement on the subsequent medical
11 records, with regard to the subsequent medical
12 issues. I believe that still allows you to put
13 in ---

14 CHILTON SIMMONS: Yes, sir.

15 EDWARD GRAHAM: Thank you, Your
16 Honor. What about them wanting to rely on
17 information as to the treatment of a traumatic
18 injury to his leg when Jamsetta was thirteen.
19 That was long before ---

20 THE COURT: You ---

21 CHILTON SIMMONS: For clarification,
22 the abortion is included but prior medical
23 records are not?

24 THE COURT: That's right.

25 CHILTON SIMMONS: Thank you, Your

1 Honor.

2 THE COURT: Is there something in
3 the
4 primary ---

5 EDWARD GRAHAM: Well, it says -- I
6 think some of the other rulings that you've
7 made will impact it such that we can agree on
8 the others without going in the minutiae of ---

9 THE COURT: Very good.

10 EDWARD GRAHAM: And I assume, Your
11 Honor, that we will just get together with the
12 other side and redact those document in such a
13 way -- we have no problem with approaching it
14 that way.

15 THE COURT: That's fine.

16 EDWARD GRAHAM: Next, if Your Honor
17 please, we've got "G". A lot of the records in
18 this case -- I notice that defense counsel in
19 this case has made composite exhibits, which
20 often include correspondence from an attorney
21 or references to an attorney that requested
22 records and -- such as, 'I am Lindsey Smith
23 Yancey. I represent East Cooper, which has
24 been sued in this case.'

25 We believe that all records as to

1 former parties and former counsel should be
2 removed from any exhibits because it just
3 causes undue confusion and has no probative
4 value.

5 THE COURT: Well, first of all, have
6 you settled with all the other defendants in
7 this case?

8 EDWARD GRAHAM: There were two
9 other defendants that we -- the nurse agency,
10 we settled with and Your Honor approved it.
11 As far as the Hospital is concerned, we settled
12 with them a few days for \$395,000; it is
13 subject to Your Honor's approval. We have
14 submitted some proposed documents to Lindsey in
15 recent days. She's got the check, she's got
16 the -- she is working on the release. We were
17 hoping that we might be able to get that
18 approved -- hopefully before the trial started,
19 so that if there was any question about whether
20 or not that was approved.

21 THE COURT: Your settlement against
22 the nursing agency, was it -- what was the
23 figure on that?

24 EDWARD GRAHAM: It was \$80,000.

25 THE COURT: Do you agree that those

1 on, Mr. Graham?

2 EDWARD GRAHAM: Basic fairness. If
3 Your Honor please, I don't have the Rule to
4 cite and can't recite it from memory. If I
5 might have a few minutes, during lunch I might
6 be able to provide the court with something
7 specific.

8 THE COURT: All right. We will
9 withhold judgment on that particular issue
10 until we have had a chance to review the Rules.

11 EDWARD GRAHAM: Thank you, Your
12 Honor.

13 THE COURT: Let's move on to our
14 next one, Counselor, which I believe is "I".

15 EDWARD GRAHAM: It is, Your Honor.
16 One of the issues in this case is, it's well
17 known anytime we've got a group of lawyers and
18 a group of jurors in a case that we've got a
19 host of individual variations biologically.
20 One of the issues in this case has to do with
21 where individual variations stop and where
22 birth defects begin.

23 Our geneticist concedes that this
24 child has two birth defects.

25 One is a condition coloboma in one of

1 his eyes. A coloboma can be genetic. Usually
2 if it is genetic it's both eyes, He only has it
3 in one eye. It can be developmental. It's
4 really just a failure to completely close off a
5 space -- it's like a tiny little blind spot in
6 the eye, as I understand it. Anyway, a
7 coloboma is there, it's a birth defect.

8 He also had a inguinal hernia on one
9 side. An inguinal hernia is considered by
10 geneticists to be a birth defect, even though
11 it's very common defect. Our geneticist has a
12 son who had bilateral inguinal hernias and he's
13 perfectly fine.

14 The defense keeps trying to make it
15 sounds like this child has dozens of birth
16 defects. When they take one single birth
17 defect of an inguinal hernia -- an inguinal
18 hernia involves a situation where the --
19 there's the opening in the lining of the body
20 that separates, you know, different cavities.
21 And the testes on that side can descend and
22 slide back up, so they are saying -- in some of
23 the records early on it said that he had two
24 descended testes. Later records said one of
25 the testes -- that the testes on the hernia

1 side was not fully descended. So they are
2 trying to claim that the undescended testes is
3 an additional birth defect and that something
4 called a hydrocele is an additional birth
5 defect.

6 If you have an inguinal hernia, you
7 can have the other two. They've taken three
8 different conditions, three different aspects
9 of one birth defect, trying to make it sound
10 like all of these are birth defects. That's
11 one concern.

12 But then they are going beyond that.
13 They are saying that, 'oh, he's got big ears,
14 he's got' -- and his ears were smaller than
15 every other person in the room. But, you know,
16 they say that he's got big ears.

17 They say that he's got -- that he had
18 a murmur at birth that was a very benign murmur
19 that lots of children have and they said that
20 it could be an aortic stenosis. It didn't
21 require treatment, it went away on its own.
22 They are latching onto that as another birth
23 defect.

24 They take dozens of individual
25 variations and try to call them birth defects,

1 to try to confuse and prejudice the jury. We
2 don't think that's proper.

3 THE COURT: Ms. Simmons?

4 CHILTON SIMMONS: Yes, Your Honor.
5 First of all, all of the terms that we use in
6 the depositions regarding the hydrocele, et
7 cetera, are all separate diagnoses in the
8 multiple medical records of Jayden W.
9 We were simply asking if this child had these
10 conditions were they genetic or birth defects.
11 Every single expert in the case conceded that
12 they were genetic or that if they were a birth
13 defect and that they were not caused by Dr.
14 Rhett and/or the labor/delivery process.

15 So we're not playing a game here.
16 We're just dealing directly with the child's
17 medical records by his treating physicians.

18 Secondly, with respect to the big
19 ears, it's an observation made by our genetics
20 expert that he found relevant to an overall
21 genetic condition, big ears is a genetic
22 syndrome. So we were not making fun of the
23 child that the ears were out of proportion.
24 Rather, it was an observation of the child's
25 ear that geneticists do as part of their job,

1 to take into consider whether or not a child
2 has a genetic syndrome. Even Dr. Milunsky and
3 even the plaintiff's expert conceded that there
4 are hundreds or thousands genetic syndromes
5 that have not been identified.

6 As you stated, Your Honor, yourself
7 it's the state of medical knowledge and what we
8 are finding out, things that we are dealing
9 with now. So we are not taking it out of
10 proportion and plaintiff's own expert admitted
11 that these were genetic conditions or birth
12 defects, the terms were not interchangeable,
13 but that either way that they were not caused
14 by Dr. Rhett or the birth.

15 THE COURT: Do you want to respond
16 to that, Mr. Graham?

17 EDWARD GRAHAM: We don't like the
18 words "birth defects". If there is something
19 in the records that says that this child has a
20 hydrocele, I don't mind them bringing up that
21 he has a hydrocele but to call it an individual
22 birth defect when it's part of inguinal hernia
23 just gives a false impression to the jury.

24 There are a number of other things and
25 -- to call it "conditions" is one thing, to

1 call it "birth defects" is just -- I mean, we
2 are going to be here far longer than we need to
3 to try this case if we are going to get into
4 all of these individual characteristics.

5 I mean, not that -- Dr. Milunsky,
6 during a break, told me about all my birth
7 defects: my nose is too big, my forehead is too
8 big. You know, maybe I have autism because of
9 my forehead. My ears are even bigger than
10 Jayden's.

11 If we start getting into individual
12 variations as "birth defects", it's just --
13 it'll be a circus.

14 THE COURT: All right. Counsel, let
15 me respond. First of all, I decline to somehow
16 limit the terminology that is used by the
17 experts in these fields. That would totally
18 inappropriate for me, as a layperson, to
19 circumscribe the way that the doctors describe
20 conditions and the terminology that they use.
21 I also don't think it's fair to us to --
22 because, based on what you're saying, we need
23 to take it down because the words "birth
24 defect" may be inflammatory with the jury.
25 Again, I think you give the jury too little

1 credit. If it's an insignificant condition, I
2 think the jury will identify it as an
3 insignificant condition.

4 At this juncture, I am going to deny
5 your Motion. You'll have to object
6 contemporaneously if you believe the cumulative
7 effect is too much, goes too far. Again, the
8 words that you suggest goes too far for the
9 court to come down to some ruling -- so for
10 those reasons I am going to deny your Motion at
11 this juncture.

12 EDWARD GRAHAM: Next, Your Honor,
13 is ---

14 THE COURT: One other point, it is
15 well-known in science, just as you said
16 geneticists described to you, that certain
17 conditions may be a genetic marker or a trait
18 that may be relevant to the damages hearing.
19 Thus, I think it would be unfair to prevent the
20 defense from exploring what I perceive to be a
21 fairly well-accepted, scientific belief.

22 EDWARD GRAHAM: Okay. Thank you,
23 Your Honor. The next is "J". This child had
24 massive bleeding in his brain diagnosed roughly
25 twenty-four hours after his birth and was

1 helicoptered over to MUSC, where they did brain
2 surgery to remove a clot from the cerebellum.
3 He had massive bleeding in various parts of his
4 brain.

5 When that happens, platelets in the
6 blood go down because a tremendous percent of
7 the child's blood circulating in this body is
8 now bleeding into his brain. He developed
9 something called "DIC", which is a condition
10 related to massive bleeding.

11 Now, the defense is trying to flip
12 that around and say that low platelets and BIC
13 prove that this child has a bleeding disorder.
14 There is just no reliable science to suggest
15 that most probably that is true. They have all
16 acknowledged that if the brain bleed precedes
17 the reduction of platelets and so forth that,
18 uh, -- that it's perfectly logical for those
19 conditions to exist after the brain bled out.
20 But they are trying to flip it around to
21 confuse the jury, to make it sound like those
22 conditions are birth defects.

23 THE COURT: All right.

24 EDWARD GRAHAM: So it is just a
25 special aspects of what we talked about

1 earlier.

2 CHILTON SIMMONS: Your Honor, at the
3 time we took the deposition of Mr. Graham's own
4 expert, I asked her what certain condition --
5 were they genetic conditions and she said no,
6 that they are not genetic, they are birth
7 defects. I did not raise that term of art
8 until the expert did, so -- you know, I -- I
9 don't recall anybody ever saying that Jayden --
10 but I can't limit a genetic experts to limit
11 his examination of a child.

12 THE COURT: All right. Mr. Graham,
13 for the same reasons that I just denied your
14 previous Motion, I am going to deny this Motion
15 as well. Again, it is not something that the
16 court can impose -- you say that it is
17 violative of the most probable rule, but,
18 again, I find that based upon the testimony and
19 the understanding that that is not the case,
20 that it does meet the most probable rule that
21 it may have some impact on the condition; thus,
22 the court denies this Motion.

23 EDWARD GRAHAM: "K", if Your Honor
24 please, defendants had taken certain parts of
25 the early medical records of MUSC where there

1 is a differential diagnosis or comment, such as
2 'we need to figure out' -- or 'On the MRI we
3 can't see the transverse sinus. We need to
4 figure out whether the transverse sinus is
5 missing or if we can't see it because it is
6 filled with blood.' They later figured out
7 that it was filled with blood, but the defense
8 is trying to score points and confuse the jury
9 by saying to these various experts, 'Did you
10 see where there was the diagnose of a missing
11 transverse sinus?' 'Did you see where there
12 was a diagnosis of a compression?'

13 What they said was that this could be
14 traumatic, it could be compression, 'we need to
15 know more about the history.' They're trying
16 to cherry pick things and twist them around as
17 though that's a diagnosis and it's confusing
18 and prejudicial to the jury.

19 THE COURT: All right. Again, I am
20 going to deny that even before I hear argument
21 from the side, because of the way that you've
22 described it. I believe that it is incorrect
23 to do that and I don't believe that the defense
24 would do it. If they did it at their own risk,
25 you would certainly have a response that I

1 believe that the jury would appreciate. So --
2 thus demeaning the believability and
3 credibility of their overall defense. So I am
4 going to leave that where it is. It is denied
5 specifically at this point.

6 EDWARD GRAHAM: And, if Your Honor
7 please, the next one is "L" but we don't need
8 to discuss it; from your earlier rulings, I
9 know that you are going to deny that, so I
10 accept that ruling.

11 THE COURT: (Affirmative nod), very
12 good.

13 EDWARD GRAHAM: The next one, "M",
14 this was just a general category to exclude all
15 evidence which is irrelevant or that has
16 minimal evidence outweighed by prejudicial or
17 confusion.

18 THE COURT: Right.

19 EDWARD GRAHAM: One thing in
20 particular that we would like to bring out is
21 that one of their witnesses, one or more of
22 their witnesses, had speculated that Jamsetta's
23 internal anatomy might be abnormal. There is
24 no evidence that it is abnormal. None of their
25 witnesses have examined her to see if it is

1 normal or abnormal.

2 Basically, if Your Honor please, one
3 of the big issues in this case has to do with
4 what the staging of the baby was in the birth
5 canal when the vacuum was applied. Just
6 assuming that this is the opening of the birth
7 canal and this is the vacuum cup, Dr. Rhett has
8 testified that this was an outlet vacuuming
9 with the head crowning and that the cup just
10 went right here. Well, we've got a birth
11 videotape. There you can measure -- the cuff
12 used a five-centimeter basis. When the head's
13 engaged, that is zero station. They measure
14 plus five in the downward direction, minus five
15 in the upward direction, to determine whether
16 the baby is ready to birth or not. Different
17 rules apply for vacuum usage depending on where
18 the baby's head is. We can prove that this was
19 a delivery by the birth video and the
20 mathematical calculation.

21 They are trying to undermine those
22 numbers by saying that 'well, if the
23 obstetrician used a plus five centimeter to
24 determine from the zero station to the outlet
25 of the birth canal but Jamsetta might have an

1 extra big birth canal.' There is absolutely no
2 evidence that she does. It will be just
3 completely speculative, completely speculative,
4 no scientific basis for asserting that. Again,
5 it would tend to confuse and prejudice the
6 jury.

7 THE COURT: All right. You want to
8 respond to that?

9 CHILTON SIMMONS: I don't know what
10 Mr. Graham is talking about. We've never
11 contended that Jansetta Washington had an extra
12 big birth canal.

13 THE COURT: Well, it appears to me
14 that it is not going to be an issue, Mr.
15 Graham. If it does become an issue, please
16 object contemporaneously.

17 EDWARD GRAHAM: Thank you, Your
18 Honor.

19 THE COURT: Thank you.

20 EDWARD GRAHAM: We have a general
21 request for all evidence which fails the most
22 probable rule. We have dealt with that before.
23 There are certain specific context, and I feel
24 that they may come up from time to time during
25 the trial.

1 We can deal with it with each witness as we get
2 to it if the Court would ---

3 THE COURT: Well, in order to, as
4 best we can, use our time efficiently, if there
5 are some issues that we can resolve in advance
6 while the jury is not here today, let's do what
7 we can -- let's take up the -- are you prepared
8 to argue the Motion to amend the pleadings.

9 ROBERT HOOD: I would rather that
10 Chilton do it because she was -- she will be
11 right back.

12 THE COURT: Okay. We will be at-
13 ease for a few minutes until she come back.

14 ROBERT HOOD: Thank you.

15 THE COURT: We will just sit right
16 here for a moment. What I would like to do
17 also, after we finish these, is retire to the
18 back and revisit again the potential for
19 resolving this case, if there is any potential,
20 based on any change or rulings made here.

21 ROBERT HOOD: Yes, sir.

22 THE COURT: Ms. Simmons, welcome
23 back. I understand that you are going to argue
24 the Motion ---

25 CHILTON SIMMONS: Yes, sir.

1 THE COURT: Okay.

2 CHILTON SIMMONS: We would like to
3 first argue the Motion to -- I'm sorry. The
4 first Motion is regarding Dr. Rhett's
5 testimony, Your Honor. Two issues on this,
6 Judge.

7 First of all, in discovery Plaintiff's
8 counsel repeatedly asked various expert
9 witnesses, including Dr. Ottinger or Dr.
10 Norton, could they identified doctors who they
11 believed were "doctors stupider than Dr.
12 Rhett", and that's a direct quote. We did file
13 our Motion for a protective order regarding
14 that and Judge Dennis ruled that they would be
15 prohibited from using that term further in
16 discovery. We would like to extend that ruling
17 to also include this trial. We have it highly
18 prejudicial and not in keeping with the rule of
19 civility.

20 EDWARD GRAHAM: Judge, I have
21 absolutely no intention of doing anything of
22 the kind, but I also would say that we don't
23 have a copy of any Motion *in limine* along those
24 lines. So if there are Motions *in limine*, we
25 would like to be served with that.

1 THE COURT: I have a coversheet

2 dated 2/18/10 and filed, this Motion, on

3 February the 18th at 3:09 p.m. -- you don't

4 have a copy of it, Counselor?

5 EDWARD GRAHAM: We have some -- we

6 have some Motions *in limine* but nothing that

7 addresses that comment, that I ---

8 CHILTON SIMMONS: It was provided on

9 the due date. I don't have an extra copy in my

10 hand. But it's the Motion to limit testimony

11 about Dr. Rhett.

12 EDWARD GRAHAM: Could you show it

13 to me?

14 CHILTON SIMMONS: Sure, (tendering).

15 JAY DAVIS: Your Honor, I have a

16 copy of it.

17 THE COURT: All right. Mr. Davis

18 has a copy for you, Counselor.

19 JAY DAVIS: (Tenders to Mr. Graham).

20 CHILTON SIMMONS: Also, Your Honor,

21 with regard to ---

22 THE COURT: Well, let's -- with

23 regard to that unfortunate characterization,

24 I'll agree with you that would not be

25 appropriate at trial and counsel would not use

1 it at trial. The court expects that it would
2 not be used at trial, or anything similar. Go
3 ahead.

4 CHILTON SIMMONS: Also with regard to
5 that Motion, plaintiff's counsel asked
6 witnesses to judge Dr. Rhett's level of
7 knowledge based on his deposition testimony,
8 specifically with regard to how he was able to
9 answer definitions of specific medical terms
10 during his deposition. We find that is not
11 appropriate and is prejudicial to the jury.
12 Dr. Rhett is in private practice, he's not in a
13 teaching hospital where he was used to giving
14 deposition. It's inappropriate that an expert
15 would be asked to judge his competency as to
16 how he answered question about medical terms in
17 a deposition as opposed to what his records
18 reflect and what the video shows as to how he
19 delivered this baby.

20 THE COURT: All right. Do you want
21 to respond to that?

22 EDWARD GRAHAM: Yes, Your Honor.
23 We would ask that Your Honor charge the jury
24 that a physician, to meet the standard of care,
25 must have sufficient knowledge of the medical

1 issues and must act upon that knowledge in an
2 appropriate manner consistent with the standard
3 of care. We think that it is entirely proper
4 for our experts to rely on the sworn testimony
5 of Dr. Rhett. I mean, his -- his knowledge,
6 according to one defense expert, is clearly not
7 in the top fifty percentile. It's somewhere in
8 the bottom half, but probably not the bottom
9 ten percent. We've got all kinds of statements
10 that the doctor made that he defined terms
11 completely inappropriately that relate to
12 specifics in this case about the difference
13 between how to determine the baby's station, so
14 that you know if you can properly apply a
15 vacuum.

16 I asked him, 'how do you know' a
17 certain question about the station and he
18 answered by making reference to a bicipital
19 (phonetic), which he later admitted was a word
20 that he just made up. He testified that the
21 bicipital was the imaginary line between the
22 two occipates. There is only one occipate, he
23 thought that there were two occipates.

24 There's just, we think, a lack of
25 knowledge of anatomy and a lack of knowledge of

1 obstetrics and a lack of knowledge of the
2 dangers of the vacuum used which are critically
3 important issues.

4 THE COURT: All right. Do you want
5 to reply?

6 CHILTON SIMMONS: Yes, sir, very
7 briefly. Again, to ask an expert what kind of
8 physician Dr. Rhett is based on answering
9 definitions in a deposition is confusing
10 because that doesn't mean that he doesn't know
11 how to deliver a baby. What that means is that
12 he doesn't know how to answer what that
13 definition is on the spot in a deposition.

14 We just think that is confusing to
15 have these multiple questions of these experts
16 talking about, 'well, how did Dr. Rhett's
17 knowledge of obstetrics compare to other
18 obstetricians that you know?' It takes it out
19 of context, talking about how he answered
20 questions in a deposition versus how he
21 practices medicine.

22 THE COURT: Mr. Hood?

23 ROBERT HOOD: If I may, Your
24 Honor, just on this one Motion.

25 THE COURT: Yes, sir.

1 ROBERT HOOD: Dr. Rhett and I are
2 lifelong friends. He's delivered thousands of
3 babies. He is Board-certified. The reason
4 that I am here is because he was examined at
5 length in a deposition that was cruel and
6 unusual punishment and we want this jury to
7 hear him testify and rectify that problem in
8 his lifetime. For him to stand up and call him
9 stupid -- (pause) -- is inexcusable.

10 THE COURT: Okay.

11 EDWARD GRAHAM: If Your Honor
12 please, if I may, I would like to apologize to
13 Dr. Rhett for losing my cool and using that
14 phrase. I was frustrated because I didn't
15 believe that the witness was being forthright
16 and direct in answering some questions. I lost
17 my cool. I don't intend to do anything along
18 those lines during this trial.

19 THE COURT: Thank you. Just a
20 moment, please, (sidebar with law clerk).

21 Just thinking out loud, my inclination
22 is to grant the Motion. First of all, it's a
23 jury determination for credibility and believ-
24 ability. It is almost pitting a witness when
25 you ask one witness 'is this other witness

1 capable and competent' based on a limited
2 analysis of something said in a deposition.

3 It would seem to me that the best
4 evidence of whether Dr. Rhett is capable and
5 competent, generally and specifically, with
6 regard to this verdict would be from a general
7 analysis of the evidence in this case and
8 testimony about what happened and not about
9 what some defense -- I mean, that some expert
10 would say about a witness.

11 To me that invades the province of the
12 jury. Mr. Graham, why would that not be
13 invading and usurping the jury's role?

14 EDWARD GRAHAM: Well, let me make
15 sure that I understand what we are talking
16 about. If we are talking about me asking a
17 defense witness how Dr. Rhett ranks, of their
18 own knowledge, that's one thing. I thought
19 they were talking about admissibility of his
20 lack of knowledge as expressed in his
21 deposition testimony.

22 THE COURT: Well, let me stop you
23 right there. I don't think that there is
24 anything wrong with you asking a witness,
25 'Well, didn't you testify in your

1 deposition...' -- I mean, he's a party. You
2 can use his deposition for any purpose
3 including quoting from him -- whatever the word
4 is.

5 But to say that Witness X says that he
6 falls within the tenth percentile of knowledge,
7 which is grossly speculative, is not
8 appropriate.

9 EDWARD GRAHAM: But, Your Honor,
10 it's is critically important to the plaintiff's
11 case that we allowed through our own experts,
12 who are entitled to reasonably rely on Dr.
13 Rhett's sworn testimony about his lack of
14 knowledge of anatomy and of obstetrics. It
15 goes directly to the use of the vacuum in this
16 case without knowing the station, without
17 knowing the dangers and a child is brain-
18 damaged as a result.

19 THE COURT: I hear what you are
20 saying but, again, going back to the threshold
21 consideration, for some witness to assign a
22 percentage and say that this is inappropriate
23 and he falls in a certain percentile would not
24 be permitted.

25 Now, to go further and say that 'the

1 witness (sic) in a deposition didn't know this
2 term and, thus, I am concerned about his
3 ability to use the vacuum-assisted delivery
4 under this sets of circumstances', that may be
5 appropriate.

6 Let me hear from the defense as to
7 whether you believe that's an appropriate use
8 of an expert's testimony. Or, a better way to
9 say it is if you believe it to be
10 inappropriate, please give me a rule or a
11 precedent to support your position.

12 CHILTON SIMMONS: We have no problem
13 with that testimony, Your Honor.

14 THE COURT: I don't think that I
15 have -- I think what I am hearing is that a
16 consensus is developing as to what is an
17 appropriate use. You know, just -- again, if
18 it is relevant to the testimony of the expert
19 about Dr. Rhett's -- because you are
20 testifying about what Dr. Rhett did, -- that
21 something in the deposition might cast light
22 upon him, making a fact more probable than not,
23 then it comes into evidence. That's the best
24 ruling that I can give you at this point.

25 EDWARD GRAHAM: Thank you.

1 THE COURT: Except to say that
2 contemporaneously, again you must object if you
3 believe it is has violated -- has gone beyond
4 what the rules say.

5 EDWARD GRAHAM: So when you rule in
6 favor of that Motion, it's a very limited
7 ruling? Just that I can't ask questions about
8 percentile rank of knowledge and that sort of
9 thing.

10 THE COURT: Well, I don't think that
11 it is appropriate for you that you think Dr.
12 Rhett is a poor doctor.

13 EDWARD GRAHAM: I understand.

14 THE COURT: Based on the fact that
15 'he didn't know this in his deposition, this
16 term in his deposition.'

17 EDWARD GRAHAM: I understand.

18 THE COURT: Again, the reason that I
19 say that is because that is a very limited few
20 minutes in a physician's life who has had a
21 lifetime of serving the public.

22 A better way for the jury to determine
23 exactly what happened here, who is capable, who
24 is competent and who is not, is not from what a
25 witness says based on something that might have

1 occurred in a deposition but based on the facts
2 of the case.

3 That's the best that I can tell you at
4 this time. I don't think that a defense
5 witness or a plaintiff's witness should say,
6 'based on the fact that he didn't know this in
7 his deposition, he falls below the standard of
8 care.'

9 EDWARD GRAHAM: All right. But we
10 would be able to address gaps in knowledge
11 which would have an effect on his ability to
12 manage this labor and delivery appropriately?

13 THE COURT: Exactly.

14 EDWARD GRAHAM: Thank you.

15 THE COURT: That's an appropriate
16 line of questioning.

17 EDWARD GRAHAM: Thank you.

18 THE COURT: And if the defendants
19 believe that you are going beyond what is
20 appropriate, then again a contemporaneous
21 objection can be made to bring it to the
22 court's attention and a ruling would issue.

23 All right, let's move to the next
24 point.

25 CHILTON SIMMONS: Thank you, Your

1 Honor. The next Motion that we would like to
2 address is the Motion *in limine* regarding
3 statements made by Plaintiff. Your Honor, we
4 have assembled here for today's Motion but we
5 would just ask that you would inform the
6 plaintiff before she takes the stand, just so
7 that she does understand that as far as the
8 hearsay rule that she would not be able to
9 testify that several doctors, or a doctor, told
10 her that the vacuum caused Jayden's injuries.
11 When we brought this up in her deposition, she
12 said that several doctors told her that the
13 vacuum caused the injury but she was not able
14 to provide the name of a specific doctor or the
15 name of the medical entity where it occurred.
16 We would just ask that you -- wanted to give
17 you a heads up on that.

18 THE COURT: Mr. Graham, is there a
19 dispute about that?

20 EDWARD GRAHAM: We don't intend to
21 ask that question. I mean, if they open the
22 door through cross-examination of her, then
23 something like that might come out but we
24 certainly don't intend to ask her.

25 THE COURT: It would be difficult to

1 open the door with such a nonspecific reference
2 but -- I hear what you're saying, but -- your
3 Motion is appropriate. Ms. Washington, I would
4 just say to you, and your lawyer will explain
5 this to you better than the court can, I'm
6 certain, but it is inappropriate under most
7 circumstances to say what someone else told you
8 in court. The best evidence of that is to
9 bring that person in who apparently said
10 something and have them say what they said, to
11 avoid any confusion or misunderstanding. I
12 will let your lawyer explain that to your
13 further. I will grant that Motion.

14 EDWARD GRAHAM: Your Honor, may I
15 speak to a tiny aspect of that Motion?

16 THE COURT: Go ahead, (affirmative
17 nod).

18 EDWARD GRAHAM: Ordinarily hearsay
19 assumes what somebody says, but not always. If
20 they were to ask, for example, why did you file
21 this lawsuit and the answer is 'because I kept
22 hearing from doctors that Dr. Rhett had caused
23 my child brain damage by the improper use of
24 the vacuum.' That's because of notice, not
25 hearsay and we believe that it would be

1 appropriate. That's why I said what I said
2 about cross-examination.

3 THE COURT: I understand that. If
4 the explanation -- I didn't go into it as far
5 as Rule 803, but -- we could spend the rest of
6 the day, even lawyers talking among lawyers,
7 about exceptions to the hearsay Rule. We will
8 just -- I cannot in advance the circumstances
9 in which that would arise. We will just have
10 to rule contemporaneously, but I'd say that if
11 the defense asked a question like 'why did you
12 file the lawsuit', we might as well give the
13 witness a bat to hit them over the head before
14 they get the answer. All right. Next Motion?

15 CHILTON SIMMONS: Yes, sir, Your
16 Honor, our third and last Motion to address is
17 the Motion to amend the Answer to add
18 comparative negligence. We would just ask Your
19 Honor to conform the evidence that has come out
20 in discovery into the pleadings, specifically
21 as related to the alcohol, marijuana and
22 tobacco and also about the STD issues. I know
23 some of your rulings, about the alcohol, have
24 come in.

25 THE COURT: You say that would lead

1 to a defense of comparative negligence?

2 CHILTON SIMMONS: (Affirmative nod).

3 THE COURT: Please tell me how.

4 CHILTON SIMMONS: Your Honor, just in
5 that if the jury found that the alcohol did
6 cause Jayden's problems that that would
7 certainly lend credibility to the comparative
8 negligence theory, that she did have some
9 portion in causing the injury. Importantly,
10 the plaintiff has been trying to put all the
11 blame for Jayden's problems on the vacuum and
12 some of Jayden's problem(s) might be caused by
13 something other than the vacuum; or, they might
14 not be caused by the vacuum at all.

15 THE COURT: Isn't that really a
16 damages issues as opposed to causation, if
17 there was negligence in applying the -- using
18 the vacuum-assisted delivery? I am not certain
19 that something that would impact damages would
20 be a, quote, comparative negligence.

21 Do you have a -- we had this issue in
22 the last case that we tried together, that a
23 damages issue was raised as to comparative
24 negligence. Tell me what case that you rely
25 upon or what precedent that you rely upon to

1 assert that that is comparative negligence as
2 opposed to a mitigation or damages argument?

3 CHILTON SIMMONS: I do not have a
4 case offhand but I would ask Your Honor to
5 allow us the afternoon to find one and get back
6 to you on that.

7 THE COURT: All right, let me just
8 hear generally from the Plaintiff on that.

9 EDWARD GRAHAM: Well, on the point
10 that you raise, Your Honor, we agree. It's --
11 but it also comes off the -- we've taken
12 thousands and thousands of dollars worth of
13 deposition, all around the country. We haven't
14 focused on any alleged comparative negligence.
15 Plus, as a matter of law, I am not sure that
16 comparative negligence on a representative
17 party could be held against a minor claimant.
18 So it seems to me that the Motion is flawed for
19 several reasons.

20 We've anticipated that they would have
21 these defenses that say 'We didn't cause your
22 brain damage or other problems with traumatic
23 vacuum.' That alcohol caused it or some damage
24 associated with alcohol rather than traumatic
25 vacuum. As a damages argument, I understand

1 that -- but I -- I don't think that it's a
2 comparative negligence defense.

3 THE COURT: Very good. At this
4 point I am going to deny your Motion. Of
5 course, we will hear the evidence and then can
6 decide at a later time whether or not this
7 rises to the level of comparative negligence.
8 At this point the Court declines to allow you
9 to amend the pleadings.

10 CHILTON SIMMONS: Thank you, Your
11 Honor. We will reserve that.

12 THE COURT: Very good. Anything
13 further now from Defendant Lowcountry
14 Obstetrics?

15 JAY DAVIS: No, sir, Your Honor.

16 THE COURT: All right, let's talk a
17 little bit before we break about the trial and
18 how we want to run the court since we may be
19 together for about two weeks, so that we have
20 an understanding before we begin.

21 Madame Court Reporter, do you have an
22 exhibit list?

23 COURT REPORTER: Not yet, sir.

24 THE COURT: Is there a joint exhibit
25 list or have the exhibits been reviewed by

1 counsel? Is that process complete, Mr. Graham?

2 EDWARD GRAHAM: It is not complete.

3 We've spent hours and hours working on that but

4 we agreed that we couldn't finalize it until

5 after Your Honor ruled on what needed to be

6 redacted. So that's the part that is missing.

7 We have got some demonstrative issues that we

8 need to go over. We went over all the other

9 exhibits. It seems like there was some

10 potential demonstrative evidence that the

11 defense didn't have. Do you'all have that now?

12 CHILTON SIMMONS: We marked all the

13 records and we want all of them to come in. We

14 agreed to get together on the demonstrative

15 exhibits.

16 EDWARD GRAHAM: That's not true,

17 Your Honor. We did not agree on the exhibits

18 coming in. We agreed that that there would be

19 certain exhibits that those were the exhibits,

20 but we have different versions of the exhibits.

21 We agreed on what the versions were. We have

22 not addressed objections.

23 THE COURT: All right, this is what

24 I -- I understand. Let me say this, I don't

25 want to put our trial -- a trial is stressful

1 to begin with. I don't want to get here in the
2 morning and have a bunch of work dumped on our
3 court reporter when she doesn't time to do it
4 before the trial starts. So I'm going to leave
5 you this afternoon to finalize your exhibits
6 and have an exhibit list -- to premark your
7 exhibits and give that list to our court
8 reporter first thing in the morning, without
9 further dispute or argument because we're not
10 going to have time to take these matters up in
11 the morning.

12 My personal philosophy is that if you
13 have documents that you know are going to be an
14 exhibit and there's an agreement on them and
15 you want to use them in your openings, you may
16 do so. But of course opening statement is not
17 some big persuasive event, it's simply an
18 opportunity to tell what you believe that the
19 facts will or will not show. The court will
20 allow you some limited use of documents that
21 are agreed upon by all the parties that will be
22 in evidence.

23 Now, if you cannot do that, if you
24 cannot agree on the evidence, I'll be here by
25 9:00 in the morning -- but just remember that

1 we won't have time in the morning, because
2 we're to start at 9:30, I told the jury that,
3 to talk about that in the morning. We won't
4 have a lot of time to do a lot of tampering or
5 dickering with the evidence in the morning
6 before trial. We'd have to wait until some
7 later point in the day. Please be aware of
8 that.

9 Let's just talk a little bit generally
10 about how we are going to operate in the trial
11 -- go ahead, I'll let you'all finish your
12 conversation.

13 CHILTON SIMMONS: Your Honor, I was
14 just concerned about one thing. We did agree t
15 the authenticity of the medical records. We
16 did not agree to the admissibility.

17 THE COURT: Okay.

18 JAY DAVIS: I didn't want to cause a
19 problem in the morning with regard to time, if
20 we could just go ahead and address those ---

21 THE COURT: That's why I am here
22 today. If there is something that I need to
23 take up today, I should do it today. Again,
24 there's no reason to put Gayle (court reporter)
25 in a crisis in the morning, as well as getting

1 us started off in a difficult position with the
2 jury sitting there waiting, wondering what we
3 are doing. Is there some evidentiary issue or
4 are they not yet to the point where the court
5 can rule?

6 CHILTON SIMMONS: I think where we
7 are is that defense wants all of the medical
8 records of the mom and the child to come in.
9 Plaintiff's counsel does not agree to that. We
10 have agreed on the actual copies that will come
11 in if you so rule that they are admissible.
12 The bottom line is that we have agreed on all
13 the actual copies as the authentic records and
14 we have those marked. We will now be able to
15 redact them accordingly to take off certain
16 information, but we -- we wanted to wait on
17 your ruling so far as alcohol use was
18 concerned.

19 THE COURT: And I ruled.

20 CHILTON SIMMONS: So possibly we
21 could leave that in.

22 ROBERT HOOD: All we want to do
23 is to make sure that the records that he wants
24 to put in evidence are the complete medical
25 records.

1 THE COURT: Right.

2 ROBERT HOOD: We do not object to
3 the authenticity. Admissibility -- if there is
4 some hearsay in the record, then we would want
5 to reserve the right to talk about that at the
6 time. We don't know of anything, to be honest
7 with you.

8 THE COURT: Well, all right. Here
9 is my response, we've all been doing this a
10 long time, you'all have a pretty good general
11 feel for what would come in and what would not.
12 I will let you review the records outside of my
13 presence. If there are some that you cannot
14 resolve, then we will just mark those as
15 "unresolved" and we will take that up tomorrow,
16 on some break or at some point, outside the
17 jury, maybe at lunch time work it all out. You
18 just can't go into it at the openings, and
19 that's way we won't be driving a train wreck
20 tomorrow morning. Is that satisfactory?

21 CHILTON SIMMONS: Yes, sir.

22 THE COURT: Okay. Again, I will be
23 here by 9:00 and I'm certain that Gayle will be
24 here by 9:00, if not before.

25 COURT REPORTER: Yes, sir.

1 THE COURT: Give her the evidence
2 that you have, be sure that we've got it
3 marked. What agreed upon, we'll know. What is
4 not, we'll know. Then we can resolve the case.

5

6 Now let's talk a little bit about how
7 we are going to proceed in trial. Mr. Graham?

8 EDWARD GRAHAM: Your Honor, may I
9 say one thing? I would like to enter the
10 designations of some -- (tendering).

11 THE COURT: Thank you.

12 EDWARD GRAHAM: Thank you, Your
13 Honor.

14 THE COURT: All right. Just a few
15 points that I would raise. First, let's go
16 back to the civility issue. I realize that
17 tempers flare in depositions. Trial is, of
18 course, extremely stressful. I do want to
19 remind everyone that throughout the proceeding
20 that we have got a jury in here, that they
21 gauge us for our competence and our
22 capabilities as lawyers and also how we act as
23 humans. I would just again reiterate to
24 you'all that we are going to be civil, get
25 along. Of course, we will treat all of our

1 witnesses with respect no matter what their
2 stations are, no matter how much we may
3 disagree with what they may say.

4 Secondly, let's talk about timing.

5 One of the things that I've always tried to do
6 with a jury is to be punctual. If I tell them
7 that we are going to start at 9:30, then I
8 intend to start at 9:30. I don't intend to
9 come out here at 9:30 and then learn that I
10 have several matters that need to be resolved,
11 then at 10:15 go back there to bring the jury
12 out. We are going to give them more respect
13 than that.

14 So if there is an issue that I need to
15 take up, I would ask you to tell me in the
16 afternoon before I tell the jury what time to
17 come back in the morning; so that we can take
18 it up before, and I don't have them coming in
19 and sitting, waiting.

20 If I tell them that we are going to
21 take a fifteen-minute break, we generally take a
22 fifteen-minute break and then start back.

23 While that sounds like a very simple
24 concept, when we're in trial, as you know, there
25 are a lot of things that get in the way of that

1 but be aware that I am going to try to be
2 timely with the jury at all times and
3 respectful of their schedule.

4 Microphones. You have a microphone on
5 your desk, obviously. Please remember that a
6 whisper, whether it be a soft whisper or a
7 quiet whisper, can very easily be picked up on
8 these microphones and broadcast to the court.
9 Secondly, when you are speaking and wish to be
10 on a mic -- like today, your mics are pointed
11 up, that makes it much easier on our court
12 reporter if you'll stay near a microphone or if
13 you will pull the microphone to you; which is a
14 very simple act, just remember to do that. As
15 you know, if the jury wants something played
16 back, we can play it back from the sound
17 system, from the amplification system by which
18 we are recording. I don't want something to be
19 off mic and something be missed that we cannot
20 fix.

21 Also, if you bring a witness down from
22 the stand to the jury trial, please remember,
23 first of all, to position that position on the
24 far side of you so that the witness is looking
25 back at the court reporter and can thus be

1 observed by the court reporter.

2 Secondly, please remember to speak up
3 so that everyone can hear you. Remember,
4 you've got to back to me and although I am not
5 the one that has to hear everything as the fact
6 finder, it is best that the court be able to
7 hear. Remember that, counsel your witnesses
8 about that in advance.

9 If you have an objection, and I expect
10 that we may have objections during the course
11 of the trial, -- as you know, this is not my
12 first trial nor is it yours. So if you have an
13 objection, please just stand up and say
14 "Objection" and give me a one word of what it
15 is: leading, hearsay, irrelevant, whatever it
16 may be. I will just tell you now, please do
17 not make a speech for which there will a jury -
18 - if that happens, one of two things is doing
19 to happen. Either I will have to embarrass you
20 by saying 'we don't make speeches to the jury
21 in our cases' or give the other side an
22 opportunity to stand up and make a counter
23 speech about the objection. If I need
24 additional information about the objection, I
25 will ask you for it. Generally, if I have to

1 do that, I have given the other side an
2 opportunity to weigh in, because the jury is
3 sitting there listening, I generally give the
4 other side an opportunity a chance to respond.
5 First of all, for my own edification, I try to
6 be fair and have this case, the defense of the
7 case, presented.

8 Then, again, I will encourage the
9 defendants, for reasons of efficiency, to -- in
10 your joint defense not to belabor the points or
11 to -- I say in tandem to cover the same
12 territory. I will leave that to your
13 professional capabilities to reduce that.

14 Mr. Graham, the plaintiff's case,
15 since you are going to start this off, I would
16 just say to you that speed and efficiency are
17 important to the jury, as well, so be cognizant
18 of that. A lot of delays, a lot of what
19 appears to be unnecessary testimony or
20 repetition in a lengthy trial, like this, I
21 think can be damaging -- to either side's case.
22 Certainly it is damaging to the speed and
23 efficiency of the proceedings.

24 How long does the plaintiff that the
25 plaintiff will take in opening?

1 EDWARD GRAHAM: Perhaps, estimated,
2 an hour.

3 THE COURT: And let's -- for
4 economy, for the defendants, how much time do
5 you believe, Mr. Hood, that your side will
6 need?

7 ROBERT HOOD: We won't take any
8 longer than the plaintiff. If he takes an
9 hour, we won't take any more than an hour.
10 Honestly, I think maybe a half hour.

11 THE COURT: Very good. Mr. Davis?

12 JAY DAVIS: No more than five or ten
13 minutes, max, Your Honor. Could I just address
14 one thing further?

15 THE COURT: Yes, sir.

16 JAY DAVIS: Do you require me to
17 object simultaneous with Mr. Hood or would it
18 be sufficient that we can agree that if there
19 is a vicarious situation, a liability
20 situation, that we could have joint objections
21 or do you require me to stand up and object?

22 THE COURT: I understand. Let me
23 hear from the other side. Does he plaintiff
24 have a position on that?

25 EDWARD GRAHAM: I don't want to

1 belabor anything to the court or for Mr. Davis,
2 however Mr. Davis said earlier that he was
3 planing to cross examine other defense
4 witnesses. It seems to me that, in fairness,
5 if he would be willing to concede that, I would
6 absolutely concede joint objections.

7 THE COURT: Thank you, that's what I
8 needed to know. I am going to ask you to
9 object contemporaneously. A lot of what we are
10 really covering here is not something that will
11 be before me. Ultimately it may be a clouded
12 issue. Thus, to somehow do something down here
13 by giving you license that is then fatal at the
14 appellate court level is probably not a good
15 idea.

16 JAY DAVIS: I certainly understand
17 the court's position.

18 THE COURT: There may also may do
19 thins, depending on how the testimony breaks,
20 that you may not post an objection to. I'd
21 just ask that you object contemporaneously.

22 JAY DAVIS: Thank you, Your Honor.

23 THE COURT: Very good. Counsel, I
24 am not going to limit you in your openings. I
25 would just simply say to you -- well understand

1 the attention span of the jury is important in
2 opening and closing statement; thus, I will
3 leave that to your professionalism. But if you
4 -- I will stop you in an hour because time is
5 getting close for the jury at that point, but
6 also because that's a lengthy opening
7 statement.

8 EDWARD GRAHAM: Yes, sir, and I
9 will try to beat that significantly but I hate
10 to -- I hate to straightjacket myself.

11 THE COURT: I understand. Well,
12 here is what I will do. I will warn you at
13 fifty minutes, if we ever get to that point,
14 that you have ten minutes remaining. Fair
15 enough?

16 EDWARD GRAHAM: Thank you, Your
17 Honor.

18 THE COURT: Same for both sides. We
19 will proceed in that fashion. Okay.

20 Now, I've talked a little bit about
21 some things and now I'll listen to comments by
22 counsel so that we have an understanding here.
23 I'll go first to the plaintiff, about the
24 procedures you are going to use in trial.

25 EDWARD GRAHAM: Judge, only on

1 objections. You want us to give you a one word
2 objection, without talking?

3 THE COURT: Right: "Objection,
4 hearsay." Please do.

5 EDWARD GRAHAM: Thank you.

6 THE COURT: Anything further from
7 the defendant?

8 ROBERT HOOD: Your Honor, he has
9 given us the designations of Dr. Rhett's
10 deposition that he intends to read, which I
11 assume is the first thing that he is going to
12 introduce. We will now make counter-
13 designations.

14 THE COURT: All right.

15 ROBERT HOOD: Which we will try
16 to do as quickly as possible, though it will be
17 tomorrow morning.

18 THE COURT: That's fine. I will
19 leave you to discuss those things among
20 yourself. Usually a deposition can be used for
21 any purpose by either party.

22 ROBERT HOOD: But the Rule also
23 requires to give us two days and this is one
24 day. All I am saying is that I don't know that
25 we will have them for your this afternoon but

1 we will bring them in the morning.

2 THE COURT: That's fine.

3 ROBERT HOOD: I would like to
4 know his lineup and we will tell him our lineup
5 each day before, uh, the next day so that we
6 can have the appropriate folders and files and
7 allocate who is doing what, on our side.

8 THE COURT: I think that's fair for
9 you to let him know your witnesses in advance?

10 EDWARD GRAHAM: I'm sorry. I was
11 stumbling over that two-day reply. I thought
12 that the Rule said one day after we distributed
13 copies of the designations.

14 ROBERT HOOD: Well, ---

15 THE COURT: Rather than getting hung
16 up on that, Mr. Hood is telling me that they
17 are going to bring their designations back to
18 what you designated; then, that's appropriate.

19 EDWARD GRAHAM: Yes, sir. May I
20 could use talk about the use of -- and it is a
21 one-day rule, Rule 32(a)(5).

22 Ordinarily if we were using Dr.
23 Rhett's deposition designations on their own,
24 in lieu of calling him as a live witness, then
25 the counter-designations we would have to play

1 at the same time that we played ours. That's
2 not what we are intending to do.

3 As the designation indicates, we
4 intend to play these during the deposition of
5 Dr. Oakes. Frankly, it will be -- and I will
6 ask him the question, 'What is the basis for
7 that?' Then he will refer to portions of the
8 video deposition of Dr. Rhett.

9 My point is, I think that they are
10 still entitled to counter-designations but I
11 think that they should properly be done during
12 their cross-examination of Dr. Oaks because it
13 just wouldn't make sense, if he is relying on
14 certain parts of the deposition in this direct
15 testimony, to make him play a bunch of other
16 things that they want him to play. It would
17 just throw off his testimony.

18 THE COURT: Mr. Hood, do you want to
19 be heard on that?

20 ROBERT HOOD: Yes, sir. I think
21 he calls Dr. Oaks and asks him his questions
22 and then we cross examine him.

23 If he is going to read extensively
24 from the testimony of Dr. Rhett or show a
25 video, we certainly have a right to do counter-

1 designations. To do it like he is talking
2 about is totally jumbling it up and it would be
3 very confusing to everyone, including the
4 witness.

5 THE COURT: So do I hear an
6 agreement then that what will happen is that
7 you will publish what you wish and on cross Mr.
8 Hood will publish what he wishes.

9 EDWARD GRAHAM: Yes, sir.

10 THE COURT: Very good. Anything
11 further?

12 EDWARD GRAHAM: And we will have
13 our tech guy here, as soon as we get -- work
14 out the calendars, we'll have our tech guy to
15 play that, just as an accommodation to Mr.
16 Hood.

17 ROBERT HOOD: Actually, having
18 not read what he has done -- if he's got a
19 witness on the stand and he says, 'Now what do
20 you think of this? Then he plays Dr. Rhett,
21 ten pages. If that is not complete, then at
22 that point I want to make sure that it is
23 complete. I don't want that to go through
24 direct and then I have to do cross, in other
25 words all jumbled up.

1 THE COURT: This is a little bit --
2 sort of amorphous to, uh, without the specifics
3 of what we are talking, so you make your
4 designations, you make your response and then
5 we will take a look and see whether or not you
6 should be -- based on how confusing it may be,
7 whether you should be allowed to, quote,
8 "interrupt" the flow of the plaintiff's
9 questions.

10 My initial impression would be that
11 the better way to do is to tell the jury in
12 advance that you dispute the -- you take the
13 position that some of the deposition excerpts
14 were taken out of context and rather than
15 allowing you to play them at the same time
16 you'd be able to play them at a later time
17 during your cross-examination. In other words,
18 sort of warming the jury as opposed to breaking
19 in constantly to give your take on it. We can
20 take a look at it and see what is fair.

21 All right, we had moved on to
22 something else, I believe, also, Mr. Graham --
23 and I don't recollect what it was now. Is
24 there anything else that you wish to bring up?

25 EDWARD GRAHAM: I don't recall

1 right now Your Honor what it was.

2 THE COURT: Very good.

3 EDWARD GRAHAM: That's all that is
4 pressing right now.

5 THE COURT: All right. Mr. Hood had
6 said that he would like to have your witnesses
7 in advance so that he can be prepared for them,
8 the day before. So what I'd ask you to do is
9 to -- and you can do this outside of my
10 presence -- tell him who you intend to call
11 tomorrow. I think that's only fair to give him
12 an opportunity to ---

13 EDWARD GRAHAM: As long as there is
14 reciprocity.

15 THE COURT: I am sure there will be.
16 Fair enough?

17 ROBERT HOOD: Yes, sir. I've
18 already told him that.

19 THE COURT: All right, then. If
20 there is nothing further, then we are going to
21 stand down. Well, let me -- I am going to ask
22 counsel to come back in the back and talk with
23 me for a moment or two. Anything further for
24 our record before we close the record.

25 EDWARD GRAHAM: Nothing for the

1 plaintiff.

2 ROBERT HOOD: No, sir.

3 THE COURT: Anything from our clerk
4 that we need to know about?

5 CLERK: No, sir.

6 THE COURT: All right -- Madame
7 Court Reporter, anything that you need to say
8 while we are all together, before the jury
9 comes in?

10 COURT REPORTER: No, sir. Thank
11 you.

12 THE COURT: All right, then we are
13 adjourned until 9:30 tomorrow morning.

14 (COURT IN RECESS)

15 (TRANSCRIPT CONTINUED NEXT PAGE)

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1 JULY 28, 2010

9:30 A.M.

2

3 THE COURT: Good morning, please be
4 seated. I am advised that our jury has just
5 arrived. Is there anything that we need to
6 place on the record before we bring in the jury
7 and begin the trial? We'll start with the
8 plaintiff.

9 EDWARD GRAHAM: Yes, sir, Your
10 Honor. Chilton Simmons just told me that they
11 were going to object to our use of the informed
12 decision issue in both of these, on the theory
13 that we have not pled -- that in our pleadings
14 we did not use the phrase "informed consent".
15 But we talked about improper use of the vacuum,
16 we talked about such other failures as are
17 identified in the discovery. With every single
18 obstetrical expert, both for the plaintiff and
19 the defense that's been a central issue. If we
20 are not allowed to touch on it in opening, we
21 are afraid that we would not be allowed to do
22 it later. So we would like to do that.

23 THE COURT: Ms. Simmons, does the
24 other side wish to be heard on that?

25 CHILTON SIMMONS: Thank you, Your

1 Honor. We do object to Mr. Graham arguing
2 anything with regard to lack of informed
3 consent. I have a copy of his Amended Summons
4 and Complaint, if Your Honor please, in which
5 it was not pled.

6 Specifically under paragraph twenty-
7 two, there's specific subsections and
8 everything that he says, quote, that he
9 believes supports this case of action: medical
10 negligence, etc. Lack of informed consent is
11 not there and we would object to any arguments
12 that he proposes to make, which I anticipate is
13 what he wants to do in his opening statement.

14 THE COURT: Then, Counsel, I am
15 going to exclude that in the opening. If it is
16 not pled and is not before the court at this
17 time, it -- if the testimony will permit an
18 amendment of the pleadings, I will take up the
19 appropriate Motion. It may be that could be
20 done when you attempt to put it into evidence
21 but it certainly would not be appropriate for
22 openings because it is not properly before the
23 Court. I will sustain or grant the Motion that
24 the defense makes to exclude that from the
25 opening.

1 Are there any other issues with
2 regards to plaintiff's opening that we need to
3 heat at this time?

4 CHILTON SIMMONS: (No verbal
5 response).

6 THE COURT: Hearing none, what about
7 the defendant's openings? Have we resolved the
8 issues that we talked about back in the back.

9 CHILTON SIMMONS: (Nonverbal
10 response).

11 THE COURT: Thank you. I suspect
12 what is going to happen here is that I will
13 bring in the jury. I'll give them the few
14 opening comments that I make and then by the
15 time we have the plaintiff's opening, if it
16 take about the hour that was predicted
17 yesterday, then that will be a good time for a
18 break. We may be able to break before we to
19 the defendants. We'll just see when that
20 happens and how it proceeds.

21 Are there pads and pens in the jury
22 seats? Let's go ahead and put them in the
23 juror's seats so that we don't have to stop and
24 hand them out after they come in.

25 CHILTON SIMMONS: Your Honor, if we

1 could just have a short two-minute break
2 inbetween so that I an set up ---

3 THE COURT: We will do that. We may
4 take a more extended break depending on the
5 length of Mr. Graham's opening. Is there
6 anything else before we bring in the jury?
7 From the plaintiffs?

8 EDWARD GRAHAM: No, Your Honor.

9 THE COURT: From the defendants?

10 CHILTON SIMMONS: Your Honor, out of
11 an abundance of caution, I understand that
12 anything that we have agreed to that is
13 admissible may be used in opening. The only
14 other thing that I was going to use was the
15 birth video, which there is no objection to by
16 the plaintiff's counsel.

17 THE COURT: Then -- let's do one
18 thing while we are here right now. Pull your
19 microphone to you and pull yours to you, Mr.
20 Graham, so that our court reporter can pick up
21 and so that the recorder will pick you up.

22 Is there any problem with the use of
23 the video, Mr. Graham?

24 EDWARD GRAHAM: Your Honor, our
25 only concern is picking and choosing portions

1 of that. It may be argumentative.

2 THE COURT: Is it all coming into
3 evidence eventually. Is it going to be used
4 eventually?

5 EDWARD GRAHAM: Portions of the --
6 Dr. Oaks relies on portions of it for -- to
7 support his opinions.

8 THE COURT: All right.

9 EDWARD GRAHAM: The whole thing is
10 hours long and he is only going to play like
11 maybe like fifteen minutes or so.

12 THE COURT: Then the court's ruling,
13 if pieces of it are coming in, then I will
14 allow the defendant to use pieces. I don't
15 find it to be argumentative simply to choose a
16 section rather than playing the entire hour-
17 plus video during an opening statement.

18 EDWARD GRAHAM: Okay, we were just
19 concerned about getting any words that might --
20 oh, Your Honor, my co-counsel just reminded me
21 that this is a very graphic birth video.
22 Before we were going to play it, we were going
23 to ask Your Honor if you would warn the jurors
24 that they are about to see something very
25 graphic. And also, out of respect for Jamsetta

1 and her family, to allow them to be excused
2 while it is being played. Perhaps -- I am not
3 sure who'all else is in the audience but it's -
4 - it is the birth of the child and -- (pause).

5 THE COURT: All right. Ms. Craig,
6 do you want to be heard about that?

7 MOLLY CRAIG: Yes, sir, I will
8 certainly explain the video and sensitive
9 nature of the video.

10 THE COURT: Okay then. Mr. Graham,
11 if your client wishes to leave, she is welcome
12 to do so but I don't intend to stop the
13 proceedings to allow her to do that. If she
14 wants to just get up and walk out, that's her
15 prerogative to do so. The court certainly
16 doesn't require that she leave. I would ask,
17 rather than the court weigh-in to discuss --
18 obviously not if Ms. Craig appropriately
19 comments to the jury, what she feels is
20 appropriate and necessary.

21 EDWARD GRAHAM: Thank you, Your
22 Honor.

23 THE COURT: Very good. Let's bring
24 in the jury, please.

25 (JURY IN @ 9:50 A.M.)

1 THE COURT: Good morning, Ladies and
2 Gentlemen. Please take your seats. Good
3 morning. Welcome back to the courthouse.
4 I know that some of you have already had a
5 frustrating morning in traffic, attempting to
6 get here. We welcome you back.

7 We are going to begin this trial with
8 you accepting the oath as jurors in this
9 specific case.

10 (WHEREUPON JURY SWORN)

11 THE COURT: Let me ask, Ladies and
12 Gentlemen, is there any juror that did not take
13 the oath just administered? If, for any
14 reason, you did not take it, please your hand.
15 (No response). Let the record reflect that no
16 one raised their hand and then everyone, thus,
17 is appropriately sworn.

18 Since we were last together, let me
19 ask you, is there any member of the jury panel
20 who has had a discussion about the facts of
21 this case with any third party or had any
22 contact with anyone about this case. If that
23 has happened to you, please raise your hand.
24 (No response). Again, let the record reflect
25 that no one has raised their hand, Madame Court

1 Reporter.

2 Thank you for complying with the
3 court's instructions. Of course, I didn't
4 think that anyone would be contacting you but
5 if they did I would certainly want to know
6 about that.

7 Now, let's just take a moment before
8 we get started, because I know you're not where
9 you would normally be on a Wednesday morning.
10 Let's talk a little bit about these
11 proceedings. Let me start with some
12 introductions. What I am going to do now is I
13 am going to introduce to you the court staff
14 that is working here, will be working around
15 you during the course of this trial. Not for
16 you to remember everyone's name but I thought
17 it might be of interest to you to know who is
18 who and what they do in the courtroom. I am
19 going to let the lawyers, if they wish, in
20 their opening statements in a few minutes
21 introduce themselves and their parties. I will
22 not do that. This is simply court personnel:

23 Again, I am Judge Baxley and I'll be
24 your presiding officer here during the course
25 of the trial. I look forward to working with

1 you.

2 Not in the courtroom now but you will
3 see a young lady who works with me. Her name
4 is Carly Wilcox. She is from Charleston. She
5 is an attorney and she is my law clerk and
6 assists with research, administration and other
7 things that are required during the process of
8 a trial.

9 Our clerk here is a deputy clerk for
10 civil court. She works for Julia Armstrong.
11 Our clerk is Tara Conyers.

12 Our court reporter is Gayle Burns.
13 This is a court of record and she will be,
14 throughout this trial, taking down what is said
15 in here and taking down the proceedings.

16 Our bailiffs who have been working
17 with you, I want to say to you again that the
18 bailiffs are here for your assistance. They
19 are in the courthouse every day. We know that
20 you are not. So if you get lost, which is
21 possible, or if you can't determine where the
22 restrooms are, how to get in, how to get out,
23 where to park, then please ask one of them.
24 I'll get them to raise their hands, we have:
25 Jean Agnostino seated there closest to you; Ms.

1 Madelaine Parker, along seated on the end; we
2 also have Faith Deaconson and Sadie Brown and
3 Pat Erhlansen who is the back. Also Mr.
4 Rivers, also seated in the back of the room.

5 Then our security officer is Officer
6 Smitty York.

7 These are the court personnel who will
8 be working with you throughout the trial of
9 this case. Again, not for you to remember
10 everyone's name but just to know what the roles
11 are of those that are around you.

12 Now, I asked the clerk to put in your
13 chair a pad and pen. You are not required to
14 take notes but we give you this opportunity if
15 you want to. My suggestion to you is that if
16 you want to take notes, just on the first page
17 of your notebook -- just -- the only thing that
18 you should write is your name in large letters.
19 The reason for that is that we will take them
20 up at the end of the day and then give them
21 back to you the next morning.

22 Let me tell you a little bit about
23 that. That means that if anyone's eyes should
24 fall upon your book -- the open book, the only
25 thing that they see if just the first page that

1 has your name on it.

2 We'll treat your notes with extreme
3 confidence. We do not review your notes. We
4 don't take them up to look at them at the end
5 of the day. No one will be looking at your
6 notes. We keep them here for security reasons.
7 At the end of the trial we will destroy your
8 notes without looking at them. The reason that
9 we do that is that the proceedings and
10 deliberations of the jury are confidential. We
11 don't allow any violation of the
12 confidentiality requirement, thus we will
13 destroy them when the trial is complete.

14 Some people may not wish to take
15 notes. That's fine, you don't have to. But
16 given the potential length of the trial and,
17 thus, the amount of evidence we give you that
18 opportunity if you wish to.

19 The final thing that I want to say
20 about your notes is there -- the proper use of
21 your notes would be to refresh your own
22 recollection during deliberations, as opposed
23 to having something recorded. You know, you
24 say 'well, it must be true because it's here in
25 my notes.' My suggestion again is that it is

1 proper for you to refresh your own recollection
2 during deliberations.

3 Now let's talk a little bit about this
4 trial itself. This is a civil case. The first
5 thing that I want to make sure that we all
6 understand is that nobody goes to jail as a
7 result of what happens in this court. This is
8 where parties have disputes and disagreements
9 among themselves that they cannot resolve;
10 thus, a jury is assembled to resolve the issue.
11 This is not a criminal case, no criminal
12 charges arise out of these trials.

13 Please understand that the complaints,
14 that the allegations or complaints made by the
15 plaintiff are not to be accepted as the truth.
16 They are the plaintiff's allegations, at this
17 point answered by the defendant's responses,
18 which we call an Answer.

19 I will tell you that the plaintiff is
20 seated at the table closest to you. If you
21 look out in the courtroom the plaintiff is at
22 the table closest to you. Our tradition in our
23 courtrooms is that the party with the burden of
24 proof sits closest to the jury. What that
25 really means is that in order to recover, if

1 they are entitled to recover, the plaintiff
2 must meet the burden of proof and has the
3 burden of proof here in the courtroom.

4 So the purpose of this trial really is
5 to determine whether or not the plaintiff is
6 able to be entitled to the relief that they
7 claim. In other words, can they meet the
8 appropriate proof.

9 Now let's talk a little bit about your
10 role in the court and my role. I am the judge
11 of the law, which means that if there are
12 disputes about the law that I will make the
13 decisions over objections during the court of
14 the trial and that at the end of the trial I
15 will give you the charge on the law.

16 But you have what I believe to be the
17 more important role, which is that you are the
18 judge of the facts. What that really means is
19 that you listen to the testimony, this is why
20 you sit where you do and the witnesses come sit
21 where they will, close to you so that you can
22 observe them closely. You determine what the
23 facts are. You apply it to the law that I give
24 you. That is how we work together. In a
25 nutshell, that's how we are going to go forward

1 in this case.

2 Now, let me tell you in advance --
3 and, just like you, I've not heard the evidence
4 in this case. So we bring fresh minds to the
5 bar of justice today.

6 But in any case, we would have
7 witnesses that come in on different sides of
8 the case who may say things that sometimes seem
9 inconsistent, sometimes actually mutually
10 exclusive that cannot be reconciled. I am not
11 here to tell you that someone is going to be
12 dishonest with you. I think we all know from
13 human experience that an event will occur and
14 you may hear descriptions of that event that
15 are so varied that you wonder if it is the same
16 event that everyone is talking about, because
17 people's perceptions are different. Someone
18 may be dishonest with you. That's for you to
19 determine.

20 I tell you in advance that you must
21 gauge credibility and believability of the
22 witnesses who come before you. That's why I am
23 telling you in advance, so that you can do this
24 when we call the first witness.

25 Now, if you think about it, this is

1 something that we do constantly every day,
2 whether we are talking about -- talking with an
3 adult or with a child, we gauge them for
4 credibility and believability using factors that
5 you use every day of your life, and you should
6 use those factors here in the courtroom.

7 Some other things that you may want to
8 look to here in the courtroom to gauge
9 credibility and believability are:

10 What is the demeanor of the
11 witness when they testify? Are they hesitant
12 or straightforward?

13 How did that witness come to know
14 what it is that they are talking about?

15 And is the witness consistent,
16 even with himself?

17 Is it weakened or is strengthened
18 by other evidence in the case. In light of the
19 global evidence in the case, whatever you find
20 that global evidence to be, how reasonable is
21 what that witness is saying?

22 Further, with regard to an expert
23 witness -- an expert witness is someone who may
24 come in and give an opinion on certain issues
25 in the case. What is the basis for that

1 opinion and how did they come to know what it
2 is that they are talking about? So you should
3 gauge an expert's testimony, credibility and
4 believability such as you would a lay witness.

5 Then, finally, why might there be a
6 reason as to why he or her, one side or another
7 in the case, might have a witness who has a
8 bias or a prejudice?

9 These are just some things that you
10 should consider as you listen to the witnesses
11 testimony.

12 Let's talk a little bit about the
13 proceeding. In just a moment when I conclude
14 these comments, both sides will -- all sides --
15 there are two sides, plaintiff and defendant,
16 but there are two defendant, so all parties.
17 Each party will come before you in an opening
18 statement. The opening statement is an
19 opportunity for the attorneys to tell what they
20 believe the evidence will or will not show
21 during the course of the trial.

22 After all parties have opening
23 statement with you, then we will begin the
24 evidence.

25 The plaintiff has the burden of proof.

1 The plaintiff goes first.

2 Every time that the plaintiff calls a
3 witness, that witness is subject to direct
4 examination by plaintiff's counsel and then
5 cross examination by each -- by lawyers for
6 each of the other two parties, the defendants.

7 After the plaintiff has called all
8 their witnesses, the plaintiff rests their case
9 and then we move to the defendant to put up
10 their cases. They will call witnesses and they
11 will be subject to cross examination by
12 plaintiff's counsel and cross examination by
13 the codefendant. When when each defendant
14 finishes all the witnesses then the testimony
15 is closed, the lawyers will come before you in
16 closing argument, I give you the charge on the
17 law and you return to deliberate.

18 That's just a brief description of how
19 we are going to go. It won't go, obviously, as
20 quickly as I just described it. Obviously it
21 is going to take a little bit of time based on
22 the number of witnesses, as you heard during
23 jury qualifications, that may be called during
24 the trial.

25 I will tell you that during the course

1 of the trial, I usually go about an hour and a
2 half or so before I take a break. Now, I don't
3 want you to be watching the clock or to worry
4 about that to the minute, because we could
5 never stop on the minute. It just depends on
6 where we are in the testimony. Generally after
7 an hour and a half we will take a break.

8 But I want you to know this, if you
9 need to take a break before reaching an hour
10 and a half, please raise your hand. I
11 understand what that means and we'll stop
12 immediately and take a break, no matter where
13 we are, what we are doing or how long it has
14 been since the last break. I do that for two
15 reasons -- number one, you are performing an
16 extremely important and high civic duty and I
17 want you to be comfortable about what you are
18 doing. Number two, I don't want you worrying
19 about something else, I want you to be able to
20 listen to the testimony and the evidence in the
21 case and render a verdict which is just and
22 true. So if you need a break, don't hesitate
23 to stop us.

24 Now, when you do take a break, please
25 don't go back to the jury room and discuss this

1 case until the end of the case when it is given
2 to you for deliberation. The reason for that
3 is this: the plaintiff goes first and it would
4 be unfair if the plaintiff called a witness, we
5 took a break, the jury went back and made some
6 preliminary decision that drove the rest of the
7 case without hearing from any other witnesses,
8 for plaintiff and the defendants. Thus, it
9 would be unfair. So please don't discuss the
10 case among yourselves, any aspect, until it is
11 given to you for deliberation at the end of the
12 case. Then and only then is it appropriate to
13 discuss the case.

14 Now, we operate this courtroom on a
15 system of rules that we call the Rules of Civil
16 Procedure, as well as the Rules of Evidence.
17 If one side or the other believes that the
18 other is either breaking those rules, or about
19 to bring them, they'll call that to my
20 attention by objections. Just like you're
21 sitting where you are and I am sitting here
22 where I am, I don't know what the objections
23 are before they come or when they are coming.
24 But when they do come, I rule on them right
25 here in the courtroom, in your presence, based

1 on my training as a judge, my understanding of
2 the law and training in the law, my experiences
3 in the courtroom for many years before becoming
4 a judge.

5 But never do I rule on an objection so
6 that I send you a message about how I feel
7 about the facts. I want to tell you right now
8 that I don't have a position on the facts. If
9 I did, I would be invading your privacy.
10 You're the judges of the facts, not me. So
11 please take no inference from any rulings that
12 you may hear me make during the course of the
13 trial.

14 Then, finally, I want to say to you
15 that the lawyers are advocates. The lawyers
16 are going to come before you in openings, in
17 just a moment, and then in closings at the end
18 of the trial. At that time, the lawyers have
19 an opportunity to speak to you directly without
20 going through or questioning a witness. Please
21 understand that what the lawyers tell you in
22 openings and in closings is not evidence. It's
23 their argument, it's their position of what
24 they believe the facts will show, in opening,
25 or have shown, in closing.

1 The evidence in the case is what the
2 witnesses say, the ones that are under oath, on
3 direct and cross examination and what the
4 exhibits put into the record during the course
5 the trial showed in your estimation. That's
6 what the evidence is. So please remember that
7 distinction between a lawyer's argument and
8 evidence in the case.

9 Then the last time that I will say to
10 you is that we are going to get a lot of paper
11 flowing here in this courtroom, eventually,
12 because there are going to be a lot of
13 exhibits. Just be patient with us because we
14 are very cautious about the exhibits, what is
15 in evidence and what is not, because at the end
16 of this trial when you retire to deliberate
17 what is in evidence will go back with you to
18 the jury room and everything that is not in
19 evidence does not go back with you in the jury
20 room.

21 I tell you that for two reasons. One
22 it seems like we're being awfully painstaking
23 and we're just making sure, because there may
24 be hundreds or thousands of pieces of paper
25 floating around here before we get finished.

1 Secondly, if you can't see an exhibit while it
2 is being discussed, then please understand that
3 at some point you will be able to see it and
4 hold it because it will be in the jury room
5 with you when you return.

6 With that, Ladies and Gentlemen, I say
7 again to you, thank you for your service. I
8 look forward to working with you during the
9 course of the trial.

10 At this point, I recognize plaintiff's
11 counsel for opening statement.

12 EDWARD GRAHAM: Thank you, Your
13 Honor, may it please the Court, Counsel.

14 Ladies and Gentlemen, good morning.

15 When the doctor who delivers babies
16 takes on the responsibility for ---

17 COURT REPORTER: I'm sorry, Mr.
18 Graham, could you talk a little louder.

19 EDWARD GRAHAM: I'm sorry. When
20 the doctor who delivers babies accepts
21 responsi-bility for that duty, he must avoid
22 needlessly endangering the baby.

23 If he needlessly endangers the baby,
24 if the baby is harmed as a result, he is
25 responsible for the harm.

1 A physician who chooses to use a
2 vacuum to assist in the delivery of a baby -- a
3 vacuum device such as this (displaying), to
4 apply suction, suction force to pull the baby
5 out, when the doctor does that, he must have a
6 good reason for using the vacuum. If he uses
7 the vacuum without good reason and the baby is
8 harmed as a result, then he is responsible for
9 the harm.

10 If a doctor uses a vacuum, he must use
11 a vacuum that is designed for the station of
12 the baby in the birth canal. If the baby is
13 too high in the birth canal for the vacuum that
14 he chooses to use and the baby is harmed as a
15 result, then the doctor is responsible for the
16 harm.

17 If he used a vacuum, he must use the
18 proper technique. He must pull in a smooth way
19 along the axis of the birth canal to pull the
20 baby out smoothly, avoiding sideways motions off
21 the axis or extreme upward pulls which are
22 against the principles that obstetricians are
23 taught. If he uses the wrong technique and
24 that wrong technique harms the baby, he is
25 responsible for that harm.

1 Finally, if a doctor who delivers
2 babies choose to use a vacuum must have
3 sufficient knowledge about the anatomy of the
4 birth canal and where the baby is within the
5 birth canal and must have sufficient knowledge
6 about the dangers of this device. If he lacks
7 proper knowledge about the anatomy of the
8 mother's pelvis and about the dangers of this
9 device, if the baby is harmed as a result of
10 his lack of knowledge, then that doctor is
11 responsible for the harm.

12 Let me tell you a story about what
13 happened in this case. Dr. Rhett, who sits at
14 the table over there, yellow tie, blue shirt,
15 is a handsome man, he is a charming man, he's
16 got a pleasant bedside manner.

17 Several decades ago, he goes to
18 medical school, he chooses obstetrics as his
19 specialty area. He watches his professors, he
20 learns how to deliver a baby the natural way --
21 Mother Nature taking her course. He also
22 learns how to use forceps, kind of like
23 "tongs", if you will, a metal device to reach
24 in the birth canal, wrap around the baby's head
25 and pull the baby out.

1 He learns how to do a C-section, an operation
2 to cut through the abdomen and the uterus, to
3 pull the baby out without it going through the
4 birth canal. He learns those three ways to
5 deliver babies.

6 He finishes school, he moves to
7 Charleston, he sets up his private practice and
8 starts delivering babies. One day he learns a
9 new way to deliver babies, he learns about the
10 vacuum extraction. He likes the new way. He
11 starts using the vacuum extraction almost as
12 frequently as he uses the C-section.

13 Now let me turn your attention to July
14 17th, 2002. On that day a mother is in the
15 hospital, she has come into East Cooper the day
16 before. She's been induced -- that term, given
17 some drugs to help her baby, help the forces of
18 labor to help get her baby out. As she has
19 been in there for hours, Dr. Rhett comes in, he
20 examines her, he checks out her birth canal, he
21 reaches his hand in her to check on where the
22 baby is and what is going on. People in the
23 room hear the monitors making sounds that
24 indicate what is going on.

25 The time comes when the mother's

1 cervix, the opening of the uterus, is
2 completely dilated, ten centimeters. It was
3 big enough for her baby to come out. When the
4 mom gets to ten centimeters, he tells her that
5 it is okay to start trying to push.

6 Eleven minutes later, Dr. Rhett takes
7 a vacuum -- the nurse hands him the vacuum. He
8 takes the vacuum, puts it inside the mother's
9 vagina, attaches the cup to the baby's head and
10 he starts to pull. The mother screams. He
11 pulls more, the mother screams more. He pulls
12 and eventually the baby's head comes out. He
13 removes the cup from the baby's head, from the
14 baby's swollen head and the baby's head is
15 swollen on top and is swollen in back. You
16 could feel the fear in that room, you could
17 feel the hair on your arms stand on end;
18 waiting, watching. Finally the baby cries and
19 relief replaced the fear. The baby cried.

20 The relief did not last long. Over
21 the next day the baby had problems breathing,
22 the baby had problems with muscle tone, the
23 baby did not "look right". The nurses and
24 doctors at East Cooper taking care of the baby
25 made arrangements for that baby to be

1 transferred emergently to MUSC.

2 An ultrasound was done of that baby's
3 brain. The doctors then ordered a CAT scan, a
4 CT scan of that baby's brain that showed a
5 bleed in the baby's brain. The doctors then
6 ordered an MRI, the gold standard, which showed
7 more bleeding in more places in the baby's
8 brain.

9 The next day the neurosurgeon that
10 does surgery on baby's brains cut through the
11 back of the baby's brain, went through the
12 different levels, the scalp and bone, to get to
13 the areas where the blood was clotting and
14 blood from the baby's body was pouring into the
15 brain instead of circulating. It wasn't
16 circulating, so it was developing blood tissues
17 in the brain just pooling up and the doctors
18 had to cut that out.

19 This baby walks, but not like a normal
20 child. This baby talks, but not like a normal
21 child. This baby goes to school but not like a
22 normal child. This baby is Jayden W
23 the first child/son of Jamsetta, who sits with
24 us here today.

25 Jayden will never live a normal life

1 like other children.

2 Who are we suing and why?

3 We are suing Dr. Rhett for several
4 reasons, we are suing the company that was his
5 employer back in July of 2002, Lowcountry
6 Obstetrics, for two reasons. We are suing Dr.
7 Rhett because he needlessly endangered Jayden
8 W

9 You will hear from Dr. Gary Oakes, an
10 internal fetal specialist, an obstetrician that
11 focuses on high risk deliveries. He did his
12 teaching and his career at the medical school
13 in Los Angeles, UCLA. He is now retired in
14 Savannah.

15 You will also hear from Dr. Yvonne
16 Gomez-Carrion. She can't come to the trial, so
17 we will watch her on videotape. She is a
18 professor that teaches residents in medical
19 school at Harvard in Boston how to safely
20 deliver babies.

21 Dr. Oakes and Dr. Gomez-Carrion will
22 explain to you how Dr. Rhett needlessly
23 endangered this baby. They will explain that
24 while there are multiple ways to deliver a baby
25 that a doctor must choose the safe alternative.

1 If he chooses a riskier alternative and the
2 baby is harmed, then preventable harm has
3 occurred for which the doctor is responsible.

4 The second reason that we have filed
5 suit against Dr. Rhett is because he lacks the
6 knowledge, he lacked the knowledge in July 2002
7 than an obstetrician should have about female
8 anatomy of the birth canal, to figure out where
9 the baby is within the birth canal. He also
10 lacked knowledge about the dangers of using
11 this device. You will hear from Dr. Oakes and
12 from Dr. Gomez-Carrion about the knowledge
13 that's expected of a Board-certified
14 obstetrician like Dr. Rhett. You will hear
15 from Dr. Rhett's own testimony when I took his
16 video deposition, you will hear from Dr. Rhett
17 what he claims to know and not know about
18 anatomy and about dangers.

19 Because his lack of knowledge created
20 a dangerous situation, caused brain bleeding
21 and brain damage to Jayden we've sued him.

22 Another reason that we have sued is
23 because there was no good reason to use the
24 vacuum in this case. This child was just
25 eleven minutes into the pushing stage for a

1 first-time mom. You will hear from Dr. Gomez-
2 Carrion and others that it usually takes a good
3 hour or two or longer for a first-time mom to
4 push a baby out. In eleven minutes she hadn't
5 figured out what muscles she was supposed to be
6 pushing with. In eleven minutes, with the baby
7 just fine before the vacuum was applied -- the
8 baby was fine, but Dr. Rhett jumped in at
9 eleven minutes to suck that baby out with
10 vacuum force without a good reason. Had he not
11 done so, this baby would have been fine.

12 The fourth reason that we have filed
13 suit against Dr. Rhett is because of the vacuum
14 device that he chose to use. Not too many
15 doctors use this particular device. You'll
16 see, you'll see testimony from Dr. Gomez-
17 Carrion. She and others will tell you that
18 this is not designed to deliver a baby via
19 vacuum that was as far up in the birth canal as
20 Jayden W. was.

21 You don't have just those
22 obstetricians to hear from but you'll see the
23 manufacturer's instructions for use of this
24 vacuum cup. The manufacturer of this device
25 described this product as different from

1 others. They tell you, 'don't use this when
2 the baby is mid pelvis.' This device is
3 contraindicated if the baby is not that far.
4 So if there was a need to use the vacuum, which
5 there wasn't, but if there was, if there had an
6 emergency, which there was not, but if there
7 was, if the doctor decided that he had to get
8 that baby out fast when it was mid pelvis,
9 choose a vacuum that was designed for that
10 purpose, not one where the manufacturer says
11 don't use it for that purpose.

12 One more reason that we are suing Dr.
13 Rhett is because he has used improper
14 techniques with this birth, as video taped by
15 Jamsetta's sister during the birth. You will
16 see that instead of a smooth pull that he
17 pushes the vacuum to the side, he pushes it up
18 high and -- that's one of the dangers that are
19 warned about and he didn't pay attention to the
20 dangers.

21 The final reason that we are suing Dr.
22 Rhett is because he has not stepped up to the
23 plate to take responsibility for the harm that
24 he caused Jayden W

25 Like you, we've got other things that

1 we would rather be doing the next couple of
2 days but this is the most important thing going
3 on in my client's life, her son's life, my
4 life, because Dr. Rhett refused to accept
5 responsi-bility. That's why we had to come to
6 trial.

7 We sued the corporation for two
8 reasons. They were Dr. Rhett's employer.
9 Anytime that an employee on the job commits a
10 wrong that causes harm, the employer is also
11 responsible along with the employee. That's
12 why we sued them. They also have to take
13 responsibility, so we had to bring them to
14 trial as well.

15 But before we came to trial we had to
16 figure out, are we right? Are we right about
17 this case? We know that Dr. Rhett has
18 extremely bright and competent lawyers working
19 on his team. We know that they are going to
20 leave no stone unturned looking for some
21 explanation other than that the doctor was
22 wrong, he broke the rules and he caused the
23 brain bleeds. So we had to figure out, was
24 there a good reason for him to use the vacuum.

25 We investigated. We talked to Dr.

1 Oakes, we talked to Dr. Gomez-Carrison, we
2 studied the literature. What Dr. Oakes and
3 what Dr. Gomez-Carrion told us, that's what the
4 literature told us. There are very limited
5 circumstances when you should use a vacuum when
6 a baby is this high up. When a baby is doing
7 as well as this baby was doing, there are safer
8 things to do. All you've got to do, if you're
9 worried about the baby, is to change the
10 mother's position, support her with fluids,
11 support her with oxygen.

12 If you really are convinced that there
13 is an emergency and the baby is that high up,
14 do a C-section.

15 But if you insist on doing a vacuum,
16 use a vacuum that is designed for a baby at
17 that high station, that relatively high station
18 in a woman's pelvis.

19 So we realize that there was no good
20 reason to use a vacuum, especially of this
21 type.

22 Another thing that we had to figure
23 out is what would Dr. Rhett's team say when the
24 found out that Jamsetta had enjoyed some adult
25 beverages before she missed her period and

1 suspected that she might be pregnant? Could
2 consumption of alcohol is the first few weeks
3 cause these kinds of problems?

4 If a mother damages her baby by
5 drinking heavy enough during the pregnancy and
6 the baby is born with fetal alcohol syndrome,
7 then we can't take that case to trial. So we
8 investigated. We asked the experts that know
9 about fetal alcohol syndrome, could consumption
10 of drinks in the first few weeks explain brain
11 bleeds and brain damage? The experts said no.
12 This child doesn't have fetal alcohol syndrome.
13 This child doesn't have anything remotely like
14 fetal alcohol syndrome.

15 If alcohol affects the baby, you get a
16 small baby that is malnourished and
17 underdeveloped. That's not what we've got
18 here. This is traumatic brain bleed. You'll
19 hear that from various doctors. There will be
20 a geneticist from Chicago, Dr. Burton, who has
21 addressed that issue. We have Dr. Robert
22 Zimmerman, who is one of the world's leading
23 pediatric neuroradiologists. It's hard for me
24 to say word, but what that means is that he is
25 one of the top guys in the country for looking

1 at babies' MRI's and trying to figure out what
2 caused this kind of a problem with the baby's
3 brain. Is it infection? Is it alcohol? Is it
4 trauma? It is not enough oxygen? He's the top
5 guy. He'll be here. He will explain to you
6 that this is not a close question, this is not
7 a gray area, this is trauma -- trauma from the
8 vacuum that caused this baby's brain to bleed,
9 that caused the other things.

10 We know that drinking before you find
11 out that you're pregnant of any relevance here.
12 Even the defense's experts, who are going to
13 come in and try to convince you that alcohol
14 somehow was a problem, let's see if they can
15 even say that there was a one in a million
16 chance that alcohol caused harm to this child,
17 caused any brain damage to this child.

18 You will hear all kinds of things from
19 those opinions but listen, apply your life
20 experience, your good sense and the knowledge
21 that you bring to this case. Many times
22 someone may choose to have an alcoholic
23 beverage at any time before they find out that
24 they are pregnant. She stopped when she
25 suspected that she was pregnant.

1 The other thing that we had to figure
2 out was might genetics have played any kind of
3 role here. Now, I am not expert on genetics
4 but I know that some babies just have gene
5 problems. Some people have chromosome
6 problems, a plethora of things like various and
7 different, uh, congenital malformations where
8 you see odd looking physical features where the
9 genes have just mutated, or maybe the parents
10 had a bad condition that they passed on. So I
11 had to investigation was there anything in the
12 family tree that might play a role here.

13 So we talked to the geneticist, one of
14 the top geneticist in the country, Barbara
15 Burton. She heads up the Children's Memorial
16 Hospital Genetic Center there in Chicago. She
17 is a professor at Northwestern. She authors
18 extensive publications. She has written a
19 textbook on this subject. We asked her. She
20 did an examination and was convinced that there
21 was nothing wrong with this child genetically.
22 But she knew -- she's been in court cases
23 before with brain-damaged children, on the
24 plaintiff's side, the child's side and the
25 doctor's side and she knows how aggressive

1 defendants can be, so she ordered every test
2 that she could think of that the other side
3 might reasonably try to use to blame this
4 child's brain damage on. Results: negative.
5 Every one, negative.

6 This child has a couple of oddities,
7 like we all do; you know, some are a little
8 more unusual than others. Just like I have a
9 big nose, other people have individual
10 variations. That's part of the beauty of being
11 human.

12 We were concerned enough to check into
13 the genetics for a couple of reasons. Jamsetta
14 has some problems in her back. She has some
15 vertebra that are fused together and she has a
16 couple of other odd things in her back that
17 were diagnosed when she was thirteen years old
18 and in an automobile wreck. She wasn't -- she
19 didn't know that she had problems with her back
20 but they showed up on a routine x-ray after an
21 automobile accident. So we had to determine if
22 that somehow in some way could be relevant in
23 this case. Dr. Burton said that it was not.

24 We had a question about the biological
25 father. He's adopted, so we don't really know

1 anything about his family tree. So we couldn't
2 bring in his parents to see if they were normal
3 and healthy. We had no knowledge of who his
4 biological parents were. Plus -- plus you
5 will hear that he's spent some time behind
6 bars, so
7 -- (pause).

8 So we wanted to address might there be
9 some type of gene issue here. If there is, we
10 don't want to bring it up to the court. But
11 Dr. Burton helped us determine that there is no
12 gene problem here. Every known genetic test,
13 she brings all of her knowledge and says that
14 there is no genetic problem here, that this is
15 traumatic damage to the brain from shearing the
16 blood vessels in the brain.

17 Having done our work on those, we were
18 able to determine that we could bring this case
19 to trial.

20 Now, one of the big issues that the
21 Judge is going to ask you about at the end of
22 the case is, what are the harms and losses that
23 Jayden W has suffered and what is the
24 right amount of money to match those harms and
25 losses. So a good bit of the case will involve

1 us talking to you about the harms and losses
2 that this child has suffered.

3 There's been lots of medical
4 treatment, the bills to date are right high.
5 We hired a life care planner from Virginia
6 Beach who specializes in planning future care
7 needs of brain-damaged individuals, Dr. Voight.
8 He will be here, you will hear from Dr. Voight.
9 He will explain to you what this child's
10 problems will require in terms of future
11 treatment.

12 You will hear from a vocational
13 expert, Jean Hutchinson, about this child never
14 working a normal job. He may be able to get
15 some satisfaction of working sheltered
16 employment, getting nominal pay that might make
17 him feel like he is a contributing member of
18 society but he will never be like normal
19 Americans earning a paycheck every Friday.

20 So we've got medical expenses out of
21 pocket, future medical expenses, life care,
22 support needs out of pocket, we've got loss of
23 earnings out of pocket. All of the future ones
24 will be reduced to present value and you'll
25 hear from Dr. Oliver Wood, a Ph.D. Economist

1 from Columbia who will project out those future
2 needs and then reduce them to present value
3 because, you know, a dollar today is only worth
4 a little bit more in a year. So aren't we
5 entitled to future expenses without reducing
6 those to today's value. We will show you how
7 that is done.

8 Now, most of those are out-of-pocket
9 expenses but what this case is really about is
10 that Jayden W will never enjoy his
11 life, he will never take pride in his work or
12 joy in his play the way that the rest of us are
13 able to do. He will never live a normal life.
14 Those human losses, the awareness that he is
15 different, those human losses is what this case
16 is about.

17 Jayden, when you see him, is not going
18 to look as brain damaged as you might have in
19 your brain that a brain-damaged person is to
20 look like. I have and clients before that are
21 more severe, more profoundly brain damaged,
22 such that they can't even sit up, they can't
23 hold their head up, they are more or less in a
24 vegetative state. Not to be disrespectful but
25 you think of them kind of just sitting off in a

1 corner, waiting to be tube fed. Jayden has
2 attention. You will hear from therapists that
3 work with him on a regular weekly basis about
4 how he is taking two steps forward and one step
5 back. He works so hard, and Mom helps him to
6 do everything that he can do to try to maximize
7 this child's potential. The potential is
8 there, you will hear about that.

9 After you've heard all the evidence,
10 you're going to realize why I have to come
11 before you at the end of this trial and ask for
12 a very large verdict. You will understand why
13 I have to ask you for a verdict that is
14 significantly higher than the out-of-pocket
15 medical costs, because that doesn't take care
16 of the human needs, the human suffering, the
17 human part. When it comes to deciding the
18 amount of money that it takes to balance the
19 scales with the amount of harm that Dr. Rhett
20 caused, the only thing that you can think about
21 is what does it take to fix what can be fixed?
22 What does it take to help what can be helped?
23 What does it take make up for the things that
24 can't be fixed, that can't be helped. No other
25 reasons, no outside reasons. Your job is, what

1 are the harms?

2 Like a real estate appraisal, what is
3 this house worth -- not what it ought to sell
4 for but what it is worth. If you're appraising
5 the harms and the losses, you're appraising
6 what it takes to fix, help and make up for.
7 That's your job. That's your big duty, the one
8 that you took an oath to follow. At the end of
9 the case we'll be asking for that verdict,
10 because the verdict -- I'm here not just for
11 Jayden but because when we hold medical
12 wrongdoers accountable, it helps to keep the
13 community safe. Below standard medical care in
14 any context is dangerous for patients. You
15 speak at the end of the case for everyone.
16 Thank you.

17 THE COURT: Let's take a break. Do
18 you need to set up equipment, Counselor?

19 MOLLY CRAIG: Yes, sir, it will
20 just take a couple of minutes.

21 THE COURT: Let's do this, Ladies
22 and Gentlemen, let's take a few minutes break
23 at this time before we move into the next
24 argument. You may leave your notes where they
25 are and we will all remain where we are while

1 you return to the jury room. Enjoy yourselves.

2 We will be in recess for probably ten minutes.

3 (JURY OUT @ 10:50 A.M.)

4 THE COURT: The court will be in
5 recess now for about ten minutes.

6 (BRIEF RECESS)

7 THE COURT: Anything before we bring
8 the jury back in? Are you ready?

9 MOLLY CRAIG: Yes, sir.

10 THE COURT: I understand that you
11 have worked it out with the clerk that you are
12 going to signal her about a minute before you
13 need the projector so that she can turn it on?

14 MOLLY CRAIG: Yes, sir.

15 THE COURT: Because as you know, the
16 fan is rather loud. It's not on now, but it
17 makes it much easier on our court reporter and
18 our recording system not to have the constant
19 noise.

20 MOLLY CRAIG: Yes, sir.

21 THE COURT: Very good. Please bring
22 in the jury.

23 (JURY IN @ 11:00 A.M.)

24 THE COURT: Thank you, Ladies and
25 Gentlemen. Please be seated as you wish, you

1 do not have to remain standing.

2 Welcome back, Ladies and Gentlemen.

3 Let me say to you that we have three alternate
4 jurors and I would ask that you remain on the
5 back row, although you can move around on the
6 back row if you wish. For the rest of you,
7 it's not quiet like church where you have to
8 sit in the same seat every Sunday. If you want
9 to move around so that you have a better view
10 or if you feel like you're more comfortable
11 with another seat, please feel free to move
12 around among yourself. At some point we will
13 appoint a foreperson that will sit in a
14 particular chair but for the time being feel
15 free to move around to different chairs.

16 We now move to the Defendant Dr. Rhett
17 and, Counsel, I recognize you for opening
18 statement.

19 MOLLY CRAIG: May it please the
20 Court?

21 THE COURT: Ms. Craig.

22 MOLLY CRAIG: When a doctor
23 delivers a baby, the entire focus is on the
24 health of the baby. You do not, and a doctor
25 does not, want to take a chance on the health

1 and welfare of the baby.

2 That's why when Jayden W 's
3 heart rate dropped on July 16th, at 7:00
4 o'clock, p.m., as evidenced on the fetal heart
5 monitor and Mrs. Washington had been in labor
6 for twenty-four and was too tired to push that
7 Dr. Rhett wasn't going to take a chance.

8 Dr. Rhett, based on his clinical
9 judgment and his professional judgment knew
10 that it was time to get the baby out. That is
11 exactly what he did. He did not take a chance.

12

13 Thank goodness he didn't. Because
14 when Dr. Rhett delivered that baby, the
15 umbilical cord was wrapped around the baby's
16 neck.

17 The umbilical cord can wrap around the baby's
18 neck and what happens is that it prevents the
19 baby breathing. It can strangle a baby, it can
20 prevent the baby from getting oxygen.

21 This can happen when the baby is in
22 the mother's stomach, when the baby is in
23 utero. It can happen when the baby is
24 delivered by Caesarean section. It can happen
25 when a baby is delivered vaginally. It can

1 happen and it's nobody's fault, it can't be
2 predicted and it can't be prevented despite all
3 of the modern technology -- except when the
4 baby is being delivered in a hospital setting.
5 When the baby is delivered in a hospital
6 setting, the mother is attached to what is
7 called a fetal heart monitor and the fetal
8 heart monitor tracks the mother's contractions
9 and the fetal heart tone. It tells the doctors
10 and the nurses if there is a problem. It's a
11 picture that tells the doctors and the nurses
12 if the baby is in trouble.

13 Now, we will show you the fetal
14 monitor strip -- (displaying), there it is.
15 This will be a part of the record, we will put
16 the whole medical record into evidence so that
17 you will have all of the documents available to
18 you when you make a decision in this case.

19 This is a fetal monitor strip. It
20 tells a picture, it draws a picture of what the
21 baby is doing. Our experts are going to
22 explain to you how this is a picture of how the
23 baby is tolerating labor. It is a picture of
24 whether or not there is a problem during the
25 labor process. Now, Ms. Washington was

1 in labor for almost eighteen hours before Dr.
2 Rhett was on call. We will go into the details
3 of her labor and delivery. Actually Ms.
4 Washington went into the hospital on July the
5 15th but she didn't deliver until July 16th.
6 When Dr. Rhett was on call, he took over at
7 noon on July 16th. When he took over, she had
8 already been in labor for eighteen hours.

9 During the time that Dr. Rhett was
10 taking care of Ms. Washington, during those
11 seven hours, he was monitoring Ms. Washington,
12 he was watching and listening to the fetal
13 heart monitor and the fetal heart monitor's
14 strip, which in a hospital setting is on a
15 computer at the nurses' station and at the
16 bedside. There is a computer, there's a
17 printout and it tells exactly what is going on
18 with the baby; just like an echocardiogram
19 tells a picture of your heart, it tells you a
20 picture of what is going on with the baby.
21 What you see here is what is actually printed
22 out and put into the medical chart. That is
23 what Dr. Rhett and the nurses were watching,
24 they were watching and listening to the fetal
25 heart monitor.

1 They were watching and listening as
2 the baby's heart rate dropped at approximately
3 7:00 o'clock, p.m., on July the 16th.

4 So Dr. Rhett examined Ms. Washington.
5 He did a sterile vaginal exam and when he did
6 that he found out and determined that she was
7 fully dilated. She was almost at ten
8 centimeters and it was time to deliver the
9 baby. He observed Ms. Washington's
10 exhaustion. She had been in labor for twenty-
11 four hours, she was completely exhausted. She
12 could not push the baby out.

13 Dr. Rhett could see the baby's head.
14 He knew exactly what he needed to do. He had
15 all of the information available to him. He
16 monitored, he examined, he observed, he
17 watched, he listened, he felt. It was time to
18 deliver the baby and not take a chance.

19 I would like to introduce you to our
20 client, Dr. Edmund Rhett, seated at the counsel
21 table next to my father. He is here with his
22 wife, Sally Rhett, who is in the front row.

23 I am Molly Craig and I, along with my
24 father Bobby Hood, Chilton Simmons and
25 Elizabeth Bowden, have the honor and privilege

1 of representing Dr. Rhett in this case.

2 Dr. Rhett was born and raised in
3 Atlanta, Georgia. He went to public schools
4 and high school in Atlanta and then he went to
5 an outstanding liberal arts school in Sewanee,
6 Tennessee for college. After he graduated from
7 college, he taught high school students for a
8 year before he went to the Medical College of
9 Georgia in Augusta for medical school. He then
10 did his residency in Jacksonville, Florida, in
11 Ob-Gyn and then moved to Charleston to open a
12 practice. He became Board-certified in 1979.

13 Now, board certifications are big
14 deals for doctors. You cannot sit for these
15 boards until you have been practicing for a
16 certain period of time. A doctor takes the
17 Board exams in whatever his or her specialty
18 field is. For Dr. Rhett, of course that was in
19 obstetrics and gynecology. These board exams
20 take place over a series of days. You have to
21 take oral and written boards. Like I said,
22 it's a big deal. Dr. Rhett passed these boards
23 on his first attempt in 1979 and he has held
24 his board certification every since, without
25 question and without ever being challenged.

1 Now, during this same timeframe, Dr.
2 Rhett and Dr. Granger Osborne, who is also
3 seated at the table next to his attorney, they
4 became partners and they established Lowcountry
5 Ob-Gyn. Both Dr. Rhett and Dr. Osborne built
6 this practice over thirty years.

7 Dr. Rhett has hospital privileges at
8 East Cooper, St. Francis Hospital and Roper
9 Hospital.

10 In 2004, Dr. Rhett received a Nursing
11 Advocate award for outstanding support of
12 nursing from the MUSC College of Nursing.

13 In 2005, Dr. Rhett decided to focus on
14 gynecology only because after thirty years of
15 taking calls on the weekends, at night, on
16 holidays, he was ready to spend more time with
17 his wife, his three children and his
18 grandmother; a very typical course for any
19 obstetrician.

20 So in February of 2007, Dr. Rhett
21 decided to simplify his practice and he went
22 back to practicing as a sole practitioner. He
23 is doing so in gynecology, taking care of many
24 of the same patients that he's taken care of
25 for years and years.

1 Before I get into the facts of this
2 case, I would like to say thank you to all of
3 you for being here. I know that jury service
4 is not -- that all of you have work and family
5 obligations, but we appreciate you being here.
6 Without you, we would not be able to resolve
7 this lawsuit.

8 For a minute, I would like to discuss
9 something. Every person in this courtroom is
10 sympathetic towards Ms. Washington and her son.
11 That is because we are all human. But Judge
12 Baxley will tell you that sympathy cannot come
13 into this courtroom. We have to rely on you to
14 be fair and impartial and that's is what we are
15 going to ask of you, that you listen to the
16 evidence that is presented in this case and
17 that you be fair and impartial and not let
18 sympathy come into this courtroom.

19 The lawyers get to speak directly to
20 you on two occasions, right now during opening
21 statement and then at the very end of the case
22 in closing arguments. In between opening
23 statements and closing arguments, both sides
24 will present to you the evidence, the evidence
25 so that you can make the determination of

1 whether Dr. Rhett was reasonable, whether or
2 not Dr. Rhett was reasonable to deliver Jayden
3 Washington as quickly and as safely as possible
4 when his heart rate dropped and didn't come
5 back up, as evidenced on the fetal monitoring
6 strips, and Ms. Washington was so exhausted
7 that she couldn't push the baby out. It was
8 time to get the baby out. You will make that
9 determination based on the evidence presented
10 to you during this trial.

11 This is a medical malpractice case.
12 Just because the plaintiff has filed a medical
13 malpractice does not mean that there was
14 medical malpractice. The plaintiff has to
15 prove her case, the plaintiff has the burden of
16 proof and it is a heavy burden.

17 The plaintiff has to prove four things
18 in a medical malpractice case:

19 The first one is the standard of
20 care. What is the standard of care is what a
21 reasonable physician would do under the same or
22 similar circumstances.

23 The next thing that the plaintiff
24 must prove is that there was a deviation from
25 the standard of care. This means that the

1 plaintiff must prove by the preponderance of
2 the evidence, the greater weight of the
3 evidence, that Dr. Rhett was not reasonable and
4 did not act as other obstetricians would have
5 done under the same or similar circumstances.

6 The third thing that the
7 plaintiff must prove is proximate cause. In
8 other words, the plaintiff must prove that the
9 defendants, and not something else, caused
10 Jayden W [REDACTED]'s injuries.

11 The fourth thing that the
12 plaintiff must prove are damages.

13 The plaintiff must prove all four of
14 these things, not one or the other. The
15 plaintiff must prove that there was a deviation
16 from the standard of care. If something,
17 something else caused Jayden W [REDACTED]'s
18 injuries then the plaintiff cannot meet her
19 burden of proof.

20 So what is the standard of care that
21 applies to obstetricians delivering a baby? As
22 I said, the law says that it is what a
23 reasonable obstetrician would have done under
24 the same or similar circumstances. We will
25 bring physicians who deliver babies for a

1 living, experts in their field, to tell you
2 what they saw, what they reviewed and that they
3 would have done exactly what Dr. Rhett did in
4 this situation to deliver the baby as quickly
5 and as safely as possible. Those doctors would
6 not have taken the chance.

7 Not only do we have obstetricians who
8 will testify as experts in this case but we
9 have an internal fetal medical specialist.
10 That's a doctor did additional medical
11 training. That doctor is Dr. Peter Vandorsen
12 with the Medical University of South Carolina,
13 who will also testify that he would have done
14 exactly what Dr. Rhett did if he was delivering
15 Ms. Washington.

16 Through the testimony of these expert
17 witnesses, you will understand that Dr. Rhett
18 acted appropriately and did not cause Jayden
19 W. 's injuries.

20 Number two, deviation from the
21 standard of care. What evidence will we
22 present to prove that Dr. Rhett acted
23 reasonably? The independent evidence is the
24 fetal heart monitor strips, which each of these
25 experts will walk through and show you when

1 Jayden W. got into trouble, when his
2 heart rate dropped and why Jayden W.
3 needed to be delivered immediately.

4 The other independent evidence, the
5 video of the birth, shows Dr. Rhett take that
6 umbilical cord and unraveled it from the baby's
7 neck -- we will see the video in about two
8 minutes, the system has to heat up for the
9 video to show. We'll show the video, portions
10 of the video of Ms. Washington's birth in just
11 a minute. Thank goodness we have that video to
12 offer into evidence in this case. It is
13 another piece of independent evidence that
14 shows that Dr. Rhett acts reasonably and shows
15 the actual birth of Jayden W.

16 Now it's time to tell you the whole
17 story of Ms. Washington's prenatal care and her
18 delivery. It was in 2001 that Ms. Washington
19 lived in Columbia and she became pregnant.

20 She went to the Richland County Health
21 Department on November 7th, 2001, to confirm
22 that she was pregnant. But she did not go for
23 prenatal care or until she was sixteen weeks,
24 or four months, pregnant. So that first
25 prenatal visit was in February of 2002, and

1 that was at Palmetto Health in Columbia.

2 In May of 2002, Ms. Washington was
3 seven months pregnant and that's when she
4 started seeing Dr. Osborne at Lowcountry Ob-
5 Gyn. She continued to see Dr. Osborne until
6 she was admitted for induction of labor at East
7 Cooper Hospital on July the 15th, 2001.

8 Now, the reason why she was admitted
9 for induction of labor was because she was over
10 forty weeks pregnant. She was over her
11 delivery date. It was time for the baby to be
12 birthed.

13 So on July 15th, 2002, Ms. Washington
14 goes to East Cooper Hospital and Dr. Molly
15 Joseph is on call for the practice at that
16 time. She was partners with Dr. Rhett and Dr.
17 Osborne at Lowcountry Ob-Gyn.

18 Dr. Joseph examined Ms. Washington and
19 gave her something called Cervidil, an agent
20 used to jump start the labor process. Ms.
21 Washington was also attached to the fetal heart
22 monitor so that the nurses and doctors could
23 monitor the baby's heart rate through the
24 labor. Ms. Washington start to have
25 contractions but her labor was very slow.

1 She is still in labor on July 16th,
2 2002, when Dr. Osborne is now on call for the
3 practice. Dr. Joseph goes off call and Dr.
4 Osborne assume calls for the practice.

5 Dr. Osborne examined Ms. Washington
6 and then he ruptured her membranes, he "broke
7 her water" so that they could get the labor
8 moving here. He broke her water, he gave her
9 Pitocin, a common drug to help start the
10 contractions. So she is now moving along, we
11 are still very slow but we are moving along in
12 the labor process. Also Dr. Osborne called in
13 an anesthesiologist so that Ms. Washington
14 could have an epidural and be more comfortable.
15 The contraction were starting to get painful.

16 Moving on now to noon on July 16th,
17 2002. Dr. Rhett is on call for the practice
18 now. Ms. Washington has been in labor for
19 approximately eighteen hours.

20 Now, about a quarter of 1:00 there is
21 a dip in the heart rate on the fetal monitoring
22 strip. Dr. Rhett goes in, he examines Ms.
23 Washington. They stop the Pitocin, they give
24 her oxygen, they reposition her. She is only
25 five centimeters dilated. She is not ready to

1 push, you can't push until you are fully
2 dilated, ten centimeters. So it's not time yet
3 but we are getting there, and we're watching
4 the fetal heart monitor strip and the baby's
5 heart rate comes back up. It's reassuring.
6 Everything is going as planned.

7 Then approximately 7:00 o'clock, p.m.,
8 that night, the heart rate goes down. The
9 nurse alerts Dr. Rhett, he sees it on the
10 strip. He goes in and he checks Ms.
11 Washington. She is now fully dilated, she is
12 ready to have this baby, it's time to push.

13 The heart rate is not coming up, Dr.
14 Rhett see this on the fetal heart monitor
15 strip, he is watching it. It's time to deliver
16 the baby.

17 What you will see on the video is that
18 Ms. Washington can't push the baby out. She's
19 now been in labor twenty-four hours and she is
20 exhausted, maternal exhaustion has set in and
21 she can't push the baby out. When this
22 happens, the doctor has to deliver the baby.
23 If mama can't push the baby out, you have
24 several options that all obstetricians use, day
25 in and day out. Those options are a C-section,

1 using forceps or using the vacuum to effect
2 delivery. If she can't push it out, you've got
3 to get that baby out as quickly and as safely
4 as possible.

5 Now, a C-section, that takes twenty to
6 thirty minutes to prep the operating room and
7 get Ms. Washington ready for surgery. They
8 didn't have twenty to thirty minutes. Dr.
9 Rhett kept his eye on that monitoring strip. He
10 seems that heart rate is down and it's not
11 coming back up. A C-section was not the best
12 option.

13 Forceps. We will bring forceps in
14 during the course of this trial so that you can
15 see them, but they look very much, you know,
16 like kitchen tongs. They are metal. You
17 insert the forceps into the mother's vagina,
18 the blades go on either side of the baby's
19 side, and the doctor gently pulls the baby out
20 with the use of the forceps. Very common,
21 within the standard of care. Many, many
22 obstetricians use forceps.

23 Another is a vacuum. Let me tell you
24 about the vacuum. The vacuum is a small cuff,
25 like u-shaped, that goes on the baby's head, is

1 attached to the baby's head and when the mama
2 pushes, tries to push, the doctor uses the
3 vacuum -- the nurse has the pump, she adds
4 pressure to the pump and the doctor slides the
5 baby out to delivery. There will be no
6 testimony that using the vacuum or forceps for
7 delivering a baby vaginally is the wrong thing
8 to do. They are perfectly acceptable. All
9 doctors use all these methods to get a baby
10 delivered as safely as possible.

11 Now, as I said, we are fortunate to
12 have a video of this birth to show you. You
13 can see Dr. Rhett's demeanor. You can see the
14 problems that Ms. Washington was having pushing
15 because she was exhausted; by the way, through
16 no fault of her own, no one is blaming Ms.
17 Washington because she couldn't push. Lots of
18 us have been in labor, lots of people know how
19 hard it is after a long time of being in labor
20 to push. Nobody is blaming her, she was
21 completely exhausted. That's why we have
22 forceps, that's why we have a vacuum device
23 when those things happen to get the baby out.

24 Before I show this video, the video is
25 graphic. It is evidence in this case. We are

1 very fortunate to have this video. A lot of us
2 have had babies, a lot of us have been at the
3 bedside with their spouse or their significant
4 other when they've had babies, a lot of people
5 have seen videos of babies being born.

6 So, it's graphic. It's a miracle that
7 we have, it's a miracle that God gave us. But
8 it's painful, it hurts, there is going to be
9 screaming and it is uncomfortable. But this is
10 evidence in this case and it shows you exactly
11 what Dr. Rhett did, why it was reasonable, and
12 how he got that baby out safely even though
13 that baby's umbilical cord was wrapped around
14 his neck.

15 All right, let's play -- these clips
16 are going to be short, I am not playing the
17 whole thing. These are short clips. The first
18 one is just about a minute or so long. It just
19 shows you Dr. Rhett's demeanor, it shows you
20 his compassion, it shows him treating Ms.
21 Washington with dignity and respect. It's just
22 a short one-minute video -- (video playing with
23 sound).

24 This is earlier on, this was before
25 7:00 o'clock, p.m., you can see that Dr. Rhett

1 is there, that he is attending, that he is
2 monitoring her progress. He mentioned a C-
3 section because the labor has been going on for
4 a long time and he's thinking about a C-
5 section, she's think she might have to have
6 some help. When it got to 7:00 o'clock and
7 that baby was all the way there and ready to
8 come out and she couldn't push that baby out, a
9 C-section was not the safest way to keep the
10 baby out. Twenty or thirty minutes was not in
11 the baby's best interest.

12 The next clip is short, less than a
13 minute, but it shows the next phase. We're
14 getting closer, (video playing with sound).

15 So we are trying to get the baby out.
16 The next short clip is Dr. Rhett, when he
17 checks to see where the baby is, you can see
18 that the baby is right down in the birth canal;
19 you can tell by where his fingers are in her
20 vagina, the baby is right there. It's a short
21 clip and it shows that pushing is not working
22 and Ms. Washington cannot help, (video playing
23 with sound). He's telling her that she needs
24 to push, 'you need to pop that baby out, you
25 need to push.' You can see that Dr. Rhett's

1 fingers, when he went to check on the baby's
2 head that the baby's head was right there. But
3 he doesn't use the vacuum yet. They're trying
4 to get it out by her pushing that baby out.

5 The next clip is the end, it's the
6 final delivery part and it shows Dr. Rhett
7 effectively, safely puts the vacuum on and
8 talked Ms. Washington through the delivery of
9 this baby. This is longer, it's about six
10 minutes long. This is the delivery of Jayden
11 W n where Dr. Rhett was able to get
12 Jayden out safely and quickly by using the help
13 of the vacuum device, (video playing with
14 sound).

15 You saw Dr. Rhett take the umbilical
16 cord and remove it from the baby's neck. You
17 saw him attach the vacuum, no problem. There
18 weren't any pop-off's, the vacuum attached. I
19 know that it seems longer than it was because
20 it's uncomfortable to watch a video birth, but
21 from the time that he attached the vacuum to
22 the time that the baby was delivered was three
23 minutes seven seconds. He got that baby
24 quickly and safely, as you can witness on the
25 video; which is the evidence we will present

1 our case, so that you can make the
2 determination of whether Dr. Rhett was
3 reasonable and that Dr. Rhett did not deviate
4 from the standard of care.

5 All right. We are now to the third
6 thing, which is proximate cause. What is the
7 cause of Jayden W 's cause. Jayden had
8 congenital abnormalities, this is undisputed in
9 this case. He was born with multiple
10 congenital abnormalities or anomalies that no
11 one could have ever predicted or prevented.
12 It's simply the way that God made him.

13 Our experts include a geneticist and
14 pediatric neurologists who will explain in
15 detail these congenital abnormalities which
16 cause or contributed to Jayden's bleed, that no
17 one can be blamed for Jayden's congenital
18 problems or the congenital propensity that he
19 has for bleeding. That's just the way that he
20 was born.

21 Now, looking at the evidence that we
22 will present during the defendant's case at
23 trial, as I told you, you will see the video --
24 of course, as you have already seen Dr. Rhett
25 untangle the umbilical cord and we will show

1 that again during our case. Then the baby was
2 fine.

3 The medical records that his Apgar
4 scores, the Apgar scores are the numbers that
5 known professionals give to the baby to tell
6 how the baby is doing. They give a number
7 saying how the baby is doing after birth, and
8 those were normal. The ultrasound that was
9 taken at the Medical University of South
10 Carolina was reported to be normal by the MUSC
11 professor who was taking care of Jayden at the
12 time. In other words, there was no hemorrhage,
13 there was no bleed. If there had a problem
14 relating to the use of the vacuum they way that
15 the plaintiff would have you to bleed, it would
16 have evident and it would have been evident
17 shortly after the delivery.

18 Later, the day after the delivery an
19 MRI was ordered and it clearly shows Jayden's
20 abnormal blood vessels. Now, according to the
21 doctors at MUSC who were taking care of Jayden,
22 he had congenitally small or absent blood
23 vessels. We will put those documents, those
24 medical records into evidence; produced for
25 you, so that you can determine what the cause

1 of Jayden's problems are.

2 Jayden's blood vessels were malformed
3 and they were weak when he was born, so even if
4 the vacuum had never been used he was
5 predisposed to bleeding in his brain. The
6 bleeding in one area of the brain the day after
7 the birth could not possibly have caused his
8 current problems. We have the imaging studies
9 and the medical records from Medical University
10 of South Carolina to prove it.

11 This case is all about reasonableness.
12 Was it reasonable for Dr. Rhett to use the
13 vacuum to delivery Jayden Washington when his
14 heart rate dropped as evidenced on the fetal
15 monitoring strip. Ms. Washington suffered from
16 maternal exhaustion and was unable to push the
17 baby out and she was ten centimeters dilated
18 and that baby was ready to be delivered. You
19 will answer that question when you go back to
20 the jury room and deliberate. If you find that
21 Dr. Rhett was reasonable, I submit to you that
22 he did not deviate from the standard of care,
23 then your deliberations are over.

24 We are honored to represent Dr. Rhett
25 in this case. He is in this courtroom for one

1 reason and one reason only, he's here to stand
2 tall and tell you the truth, why he was
3 reasonable, why he did what he did, why it was
4 necessary to deliver Jayden W. . He has
5 waited over three years to be in this courtroom
6 to tell you folks exactly what happened and to
7 tell you the truth. By the end of this case
8 the truth will be obvious.

9 Now, when you go back to the jury room
10 and deliberate, we are going to ask that you
11 return a verdict that speaks the truth. The
12 word "verdict" comes from the Latin phrase
13 *veridicto*, which means "to speak the truth".

14 We are going to ask that you use your
15 good judgment and commonsense. I submit to you
16 that based upon the testimony that will come
17 from the witness stand and the documents that
18 we put into evidence, you will come to the
19 conclusion that there is only one conclusion in
20 this case, that Dr. Rhett acted reasonably.

21 Therefore, we are going to ask that you return
22 a verdict for the defendants, that Dr. Rhett
23 and his practice wins because they were not
24 negligent. That's what we are going to ask at
25 the end of this case, that you return a verdict

1 for the defendants.

2 Again, thank you for being here.

3 Thank you for your time, thank you for your
4 patience in helping us resolve this case.

5 THE COURT: Now for the Defendant
6 Lowcountry Obstetrics & Gynecology.

7 JAY DAVIS: May it please the Court?

8 THE COURT: Yes, sir.

9 JAY DAVIS: Good morning, Ladies and
10 Gentlemen of the jury. I have a little bit of
11 good news for you. I will be the shortest
12 lawyer that you heard from, both in height and
13 length. Ladies and Gentlemen, I met you during
14 jury selection. My name is Jay Davis. I
15 represent Dr. Osborne, seated over here. He is
16 one of the doctors at Lowcountry.

17 You have heard but very briefly I want
18 to echo what Ms. Craig said to you, what the
19 judge said to you and that's two words: Thank
20 you. I know that you don't want to be here, I
21 know that you have a lot outside to do and that
22 it is not a pleasure to be stuck here. Your
23 service is very, very important and I want to
24 thank you for your time and attention. Thank
25 you.

1 Ladies and Gentlemen, I represent
2 Lowcountry Ob-Gyn. For those of you who don't
3 know, Lowcountry Ob-Gyn is something that's
4 called a professional association. You've
5 heard the word "corporation" mentioned by Mr.
6 Graham, but really it's just a group of doctors
7 who practice together, deliver babies.
8 Lowcountry is not just doctors but Lowcountry
9 is nurses, midwives, office folks and they've
10 been around for twenty-five years delivering
11 babies in this community. That's what they do,
12 and they do it with the help of these fine
13 physicians.

14 Now, Dr. Osborne is here. He's been
15 in this community for over twenty-five years,
16 he's been practicing for thirty-three years.
17 He practices at the Medical University, as
18 well. He's here today and he'll be here with
19 us -- I don't know that he will be here every
20 day this week because he has to tend to
21 patients, but he's here today as a
22 representative of Lowcountry.

23 Now, Ladies and Gentlemen, I want to
24 talk to you very, very briefly about
25 malpractice. It's been covered a little bit

1 but I want to talk to you just briefly about
2 what medical malpractice is not. Medical
3 malpractice is not simply a bad outcome. Okay?
4 That happens. It is unfortunate when it
5 happens but it happens despite the best of
6 care. Secondly, the standard of care is not
7 about perfection. It is exactly what Ms. Craig
8 said, is it reasonable. Was Dr. Rhett
9 reasonable in his decision that day?

10 I mention malpractice to you really
11 because I have to tell one very, very important
12 factor about Lowcountry. No one, not the
13 plaintiff, not Mr. Graham, no one has alleged
14 Lowcountry did anything wrong independent of
15 the action of Dr. Rhett. No expert is going to
16 walk in here and take this stand and say that
17 Dr. Osborne did anything wrong, that any of the
18 nurses who work at that facility did anything
19 wrong. There will be no testimony about that.

20 That's good news for two reasons. One
21 is that it limits the number of questions that
22 I am going to be asking and, two, you don't
23 have to take a long time in reaching a decision
24 that Lowcountry Ob-Gyn did anything wrong.
25 They did not and we would ask that you find a

1 verdict for the defendants.

2 Thank you very much.

3 THE COURT: Ladies and Gentlemen,
4 we will take our break for lunch now and let
5 you go to lunch. I'd ask that you be back in
6 your jury room at 1:45. Please do not discuss
7 the case, do not allow anyone to discuss the
8 case with you. You may leave your notebooks in
9 your seats and we'll see you at 1:30. Thank
10 you.

11 (JURY OUT @ 12:00 P.M.)

12 (LUNCH RECESS)

13 THE COURT: Counsel, we left at the
14 end of the morning hour with you'all to discuss
15 the presentation and use of deposition in the
16 first witness. Are there any other issues that
17 the court needs to resolve?

18 MS. WATERS: There is one issue that
19 we could address right now. The first issue is
20 that we exchanged designations for the use of -
21 --

22 THE COURT: Please pull your
23 microphone forward.

24 MS. WATERS: Sorry, Your Honor. We
25 exchanged designations for the use of the

1 deposition ---

2 THE COURT: Pull your microphone
3 down to you a little bit.

4 MS. WATERS: Sorry. --- of Dr.
5 Rhett's video deposition testimony, those
6 designations that Dr. Oakes relied upon in
7 forming his opinions in this case as to
8 Jayden's care and causation, as well as other
9 matters. We exchanged our designations and
10 received counter-designations at the beginning
11 of the lunch break and made every effort to go
12 through those. Chilton and I have sat and
13 reviewed those. There is one objection that
14 they have raised with regard to matters of
15 informed consent. Dr. Rhett was asked
16 questions regarding informed consent and, as
17 was raised with you earlier, although informed
18 consent has not been specifically pled in the
19 Complaint it is an issue that has covered from
20 the beginning of this case. Each and every
21 witness has been asked questions about the
22 issue and we would like to be able to include
23 that portion of the deposition testimony
24 because it is a very important part of what Dr.
25 Oakes relies on with regard to the standard of

1 care.

2 THE COURT: Very good. Ms. Chilton,
3 there is some feedback on the microphone system
4 and it's a little hard to understand but go
5 ahead.

6 CHILTON SIMMONS: Thank you, Your
7 Honor. We would object to anything coming in.
8 Your Honor, if it was so important they should
9 have moved to amend their pleadings. We have
10 all been held to the deadline in this case,
11 Your Honor, expired months ago. They neglected
12 to amend their pleadings. We have not been
13 able to amend our pleadings to add negligence,
14 we were not able to find a Motion to exclude
15 Dr. Oakes. Because of things that were done
16 beyond the scheduling order, we would also ask
17 that the plaintiff be held to the same
18 standard. We've had three years of discovery
19 in the case and the time has expired for them
20 to amend their pleadings to make that a
21 relevant portion of their case.

22 THE COURT: All right. Well, the
23 way that the court sees that is whether there
24 is notice of the issue. As I understand it,
25 this informed consent issue has been a theme

1 within the plaintiff's depositions as well as -
2 - within discovery, although it may not have
3 been appropriately pled. Thus, the court is
4 not going to prohibit the plaintiff from asking
5 questions which may involve conformed consent
6 even though the position of the defendant is
7 that it was not pled. I don't find that there
8 is any surprise, don't find that there was a
9 lack of notice.

10 Now, to contrast that with decisions
11 that I made about some of the defendant's
12 issues, so that the record will be clear that
13 I am attempting to be fair, the first issue
14 excluding Dr. Oakes was raised yesterday
15 afternoon about 6:00, well maybe about 3:00 but
16 after the court had adjourned for the day. I
17 had set aside yesterday to take up those issues
18 and it just simply came too late.

19 The issue of comparative negligence,
20 this court doesn't believe that there is -- at
21 least at this juncture it would not allow that
22 simply because I do not believe what really may
23 be a proximate causation issue is actually a
24 comparative negligence on the main claim of
25 liability. I am still thinking that at this

1 point and that's the reason that my rulings
2 have been as they have been thus far.

3 ROBERT HOOD: You asked for some
4 authority and ---

5 THE COURT: Yes, that's where I left
6 it yesterday and I would like to have it. That
7 decision remains under consideration. Thank
8 you.

9 All right, is there anything else ---

10 EDWARD GRAHAM: Can we have a copy
11 of the ---

12 ROBERT HOOD: We will have to get
13 it copied, I don't have a copy either but we
14 will ---

15 THE COURT: Is this something that
16 you want on the record or off?

17 ROBERT HOOD: No, it's just --
18 off the record.

19 (OFF RECORD BENCH CONFERENCE)

20 THE COURT: I don't believe that we
21 have all of our jurors yet, so we have a
22 moment. Is there an issue about presentation
23 and use of depositions?

24 MOLLY CRAIG: Yes, sir.

25 THE COURT: All right.

1 MOLLY CRAIG: Your Honor, over
2 the lunch break, I had the opportunity to go
3 through and look at their plaintiff's
4 deposition designations and we mentioned our
5 counter-designations, we have provided them a
6 copy, we just finished those. The problem is
7 what they want to do is to take excerpts from
8 Dr. Rhett's deposition testimony and then have
9 their expert comment on it. Those experts were
10 taken -- those excerpts are taken out of
11 context. That's why we have done counter
12 designations just to their designations, to put
13 it back in context and we have several
14 objections.

15 There are improper questions about
16 learned treatises where Dr. Rhett does not
17 concede that something is authoritative or
18 reliable. There are improper questions about
19 that. So we set forth the objections.

20 Our problem with the actual
21 designations is that it is virtually impossible,
22 unless they do a big time edit of the
23 videotape, to include our portions or counter-
24 designations to make sure that it is not
25 misleading and confusing to the jury. I think

1 the only way to do this is to read the
2 deposition and not play the video, because we
3 can control it with the witness (sic).

4 THE COURT: All right. Briefly, do
5 you want to respond to that, Ms. Waters or Mr.
6 Graham?

7 EDWARD GRAHAM: Yes, Your Honor.
8 Briefly, if we were putting a doctor up as a
9 witness through his deposition, I think Molly
10 would be right that we would have to play their
11 counter-designations along with ours. What we
12 are doing instead is allowing Dr. Oakes an
13 opportunity a chance to testify as to what he
14 relied on in reaching his opinions. To do
15 that, it would be unduly cumbersome to force
16 him to show what he relies on in a lot of other
17 things. We found two points -- we
18 found two points, if Your Honor please, where
19 we thought an argument might fairly be made
20 that we had only designated part of Dr. Rhett's
21 answer to a question. We did that in the
22 belief that there were two totally different
23 subjects and really we only needed part of it.
24 We're happy to play his full answer on those
25 two. And I believe that we have that evidence

1 in the works.

2 But the other stuff, a lot of the
3 other stuff violates your rulings on Motions in
4 *limine* and all kinds of things.

5 THE COURT: All right. Here comes
6 the court's ruling, and it is just in an effort
7 to be fair, I am ruling that the plaintiff may
8 put up the witness and play the excerpts. The
9 very first one that you believe there is
10 something that is -- that is out of context or
11 inappropriate, I am going to ask you to object
12 on that.

13 I am going to give a cautionary
14 instruction to the jury. I am going to
15 overrule your objection with a cautionary
16 instruction to the jury that the defendants
17 take the position that it is out of context and
18 in their cross-examination may publish portions
19 of the deposition that they believe is contrary
20 to what the plaintiff is publishing.

21 The jury, they are adults, they are
22 sophisticated and they can follow whether or
23 not plaintiff is overreaching or the defense
24 side is as the trier of the facts.

25 To do otherwise would be to stop in

1 the middle of a question, publish either by
2 reading or video another portion of the
3 deposition; argue over what is responsive and
4 what is not. It would just be impossible and
5 we would never get it done. To try to do it in
6 front of bringing this jury out would take at
7 least an hour, I'm certain, and rather than do
8 that the court rules the way that it has. So
9 please note your objection the first very time
10 that that happens and the court will explain it
11 to them.

12 Anything further now before we bring
13 in the jury?

14 EDWARD GRAHAM: No, Your Honor.

15 THE COURT: From the defendants?

16 CHILTON SIMMONS: One quick
17 matter, Your Honor, the -- the nursing agency
18 that was a former defendant, their attorney is
19 here, Ashley Eplett (phonetic) from Turner
20 Padget. We have talked with her about bringing
21 one of her nurses to the trial. We just found
22 out that the nurse had vacation planned for
23 next week and she has requested that -- she
24 lives in Tennessee, she has to fly here for her
25 testimony. She is requesting to be called out

1 of turn on Friday of this week. We have
2 discussed that with plaintiff's counsel and
3 they are not willing to
4 call her out of turn due to their schedule. We
5 are requesting the court grant us this request.

6 THE COURT: Counsel, I will most
7 likely grant the request because it's a common
8 occurrence in cases that take more than a week
9 to try that expert witnesses, or sometimes lay
10 witnesses have other plans and commitments,
11 coming from out of state and in some case even
12 out of the country. The court will allow the
13 witness to be taken out of turn so as to
14 minimize the damage to the flow of the
15 plaintiff's case. All right.

16 I would ask you to attempt, now, with
17 that ruling to work with counsel to set a time
18 during the day that would be less than -- that
19 would minimize the damage. I don't know that
20 we will be here for the full day Friday.
21 Normally when we are going to run over, I knock
22 off early on Friday.

23 It is now 2:00 o'clock, so we need to
24 stop and bring in the jury. Please bring us
25 the jury.

1 MOLLY CRAIG: Your Honor, may I
2 handle the objections to the deposition,
3 because I am the one that handled that, not
4 Chilton.

5 THE COURT: That's fine. Mr.
6 Graham, is the plaintiff ready?

7 EDWARD GRAHAM: Yes, sir. Your
8 Honor, may we take down the board?

9 THE COURT: Please bring in the
10 jury. Counsel, at your request we are going to
11 turn the projector on. That means that the fan
12 is on, so speak up so that our court reporter
13 can hear you.

14 EDWARD GRAHAM: Yes, sir.

15 THE COURT: Remember, if we have to
16 play back testimony, it comes from our rolling
17 tape. Make sure that we all can hear you.

18 (JURY IN @ 1:54 P.M.)

19 THE COURT: Welcome back, Ladies and
20 Gentlemen. I trust that you had a nice lunch.
21 We are now ready to proceed with the trial of
22 this case. Mr. Graham, you may call your first
23 witness.

24 EDWARD GRAHAM: Thank you, Your
25 Honor. We call Dr. Gary Oakes.

1 (WITNESS TAKES STAND)

2 GARY K. OAKES, M.D., having been
3 called as a witness, is duly sworn and
4 testifies as follows:

5 DIRECT EXAMINATION

6 BY MR. GRAHAM:

7 Q. Good afternoon, Dr. Oakes. Let me ask
8 you, please, first of all just some personal
9 questions so the jury will have some
10 understanding of who you are and how you got
11 here today. Where do you live currently?

12 A. Savannah, Georgia.

13 Q. Okay. And who do you reside with?

14 A. My wife.

15 Q. Where did you do -- why don't you just
16 tell the ladies and gentlemen something about
17 your professional background, starting with
18 college.

19 A. Okay. I think -- let me just start with
20 graduating from high school in Memphis,
21 Tennessee.

22 Q. There you go.

23 A. And then I went to Columbia University in
24 New York City to college.

25 Then went out to the west coast to UCLA

1 Medical School, where I graduated in 1968.

2 Then I did an internship at Orange County
3 Medical Center which is in Orange, California.

4 I went back to UCLA to do a residency in
5 obstetrics and gynecology which I finished in
6 1973.

7 I then went to the National Institutes of
8 Health in Bethesda, Maryland where I did a
9 fellowship in perinatal physiology. I was
10 there for three years and then I went back to
11 California in 1976 to begin work.

12 Q. And where did you begin work?

13 A. At the L. A. County U.S.C. Medical Center
14 in Los Angeles where I was on a fulltime
15 faculty there teaching residents to do
16 obstetrics
17 and gynecology.

18 I was there for two years and then
19 transferred to another Los Angeles County
20 facility called Harvard U.C.L.A. Medical Center
21 in Florence, California where I was three years
22 doing the same thing, working for the county of
23 Los Angeles, teaching residents in obstetrics
24 and gynecology.

25 I then transferred to Cedars-Sinai Medical

1 Center in Los Angeles, a large private
2 hospital, also working fulltime teaching
3 residents and medical students in obstetrics
4 and gynecology; but also there supervising
5 fellows in maternal fetal medicines as well as
6 doing some private practice. I was there for
7 five years, ending in 1988.

8 I got recruited to Savannah, Georgia to
9 head the perinatal medicine program at Memorial
10 Medical Center in Savannah and I practiced
11 there for ten years.

12 Stopped doing my hospital practice in the
13 end of 1998. Worked then in an outpatient
14 annex counseling firm until February of 2000
15 and then have only done volunteer practice
16 since that time.

17 Q. When you were working in Savannah who, who
18 was the head of the obstetrics department at
19 the hospital there in Savannah?

20 A. The last four years that I practiced I was
21 the chairman of the Department of Obstetrics
22 and Gynecology, so I was in charge of the
23 department.

24 Q. Did you have any other physicians there?

25 A. I was the head of perinatal medicine, too,

1 perinatal college so that's the, the practice
2 of high risk obstetrics but I also was the --
3 Memorial was one of the State-designated
4 regional centers for perinatal care and as part
5 of that we had a responsibility for looking
6 after eighteen hospitals doing obstetrics
7 practice in southeast Georgia. It was my
8 responsibility as the head of the program to
9 look at these eighteen hospitals which we did
10 on

11 a, on a, actually twice a year basis to, of
12 going out, reviewing medical care, giving
13 continuing education, looking at charts,
14 up-dating current policy. So this was
15 everything from facilities to practice to
16 nursing care in obstetrics and gynecology.

17 Q. We heard a lot this morning about board
18 certification in Obstetrics. Are you board
19 certified?

20 A. I am.

21 Q. All right. And in what field or
22 subspecialty fields are you board certified?

23 A. I'm certified in general obstetrics and
24 gynecology and also in maternal fetal medicine.
25 which is a sub-specialty board of, of

1 obstetrics and gynecology.

2 Q. Now, can you explain to the ladies and
3 gentlemen just briefly what the options for
4 subspecialization are for obstetricians and
5 gynecologists?

6 A. Well, there is, there, there's three major
7 subspecialties. It's oncology, so there's the
8 study of cancer and this would now been
9 gynecological oncology, so that kind of cancer
10 relating to the, to the female reproduction
11 tract; excluding breast for, for reasons that
12 are difficult to explain.

13 But also there's a sub-specialty board in
14 reproductive medicine. So reproductive
15 endocrinology and fertility.

16 There's also a subspecialty board in
17 maternal fetal medicine, so this is in high
18 risk obstetrics.

19 Q. You mentioned work at various teaching
20 hospitals. What role, if any, did you have
21 for teaching residents who wanted to grow up
22 to be obstetricians?

23 A. I spent my entire professional career
24 teaching residents and medical students.
25 Medical students just in obstetrics and

1 gynecology and residents just in obstetrics

2 and gynecology. Primarily in obstetrics.

3 Q. In addition to your teaching activities,

4 did you also have clinical responsibilities?

5 Did you actually deliver babies yourself?

6 A. I did. I, as I said, when I started at

7 Cedars-Sinai Medical Center in Los Angeles, I

8 had private patients so these were patients

9 that I personally took care of or my group

10 took care of.

11 Also at Memorial we, I had two partners

12 and we ran a practice of high risk patients.

13 These would be patients who have been referred

14 to us because they had some kind of problem

15 that needed subspecialist care.

16 But also I supervised residents in

17 general obstetrics of doing just normal

18 deliveries day in and day out.

19 Q. Approximately how many babies have you

20 delivered in your career?

21 A. I honestly have no idea. I was, I was

22 doing between twenty-five and fifty deliveries

23 a month all the time I was in Savannah but I

24 never really kept track of numbers so I can't

25 really -- it would be just a pure guess.

1 Q. Thank you. When you were in California
2 was your rate of deliveries comparable to
3 that? More or less?

4 A. When I was at L. A. County U.S.C. Medical
5 Center, this is at the height of their
6 deliveries they actually were doing about
7 eighteen thousand deliveries a year. I
8 obviously didn't supervise those but when one
9 was on call, which we would be on call about
10 once a week, we would be supervising all those
11 deliveries. So, you know, you end up that --
12 that's a, that's a hundred and fifty
13 deliveries a day. So it was a very busy
14 practice.

15 Now Los Angeles County U.S.C. Medical
16 Center only does about four thousand
17 deliveries because they, the system has
18 changed and patients went out into community
19 hospitals but back when I was there that
20 wasn't the case.

21 Q. Are you licensed to practice medicine in
22 any states and, if so, which states?

23 A. I am. I'm licensed in Georgia and
24 California.

25 Q. In the past have you been licensed in any

1 other states and, if so, which?

2 A. When I was in the National Institutes of
3 Health I had licensure in Washington, D. C.
4 and in Maryland, but when I went back to
5 California I didn't maintain those licenses.

6 Q. Now earlier today I told the ladies and
7 gentlemen that you were currently retired.
8 When did you retire?

9 A. I stopped, I stopped hospital practice at
10 the end of 1998 but I continued this
11 outpatient genetics counseling practice until
12 February of 2000. Then I did volunteer work
13 just doing, supervising -- not supervising.
14 Providing care in a free clinic in Savannah,
15 which I ceased doing about three years ago.

16 Q. Thank you. Since you retired from, from
17 regular active medical practice what efforts,
18 if any, have you made to keep up with the
19 state of the medicine in your field?

20 A. Well, I continually -- I maintain the
21 receipt of a number of journals, which I read
22 so this is a -- in obstetrics and gynecology
23 which is the, the Journal of the American
24 College of Obstetrics & Gynecology. Also look
25 at the American Journal of Obstetrics &

1 Gynecology. This is different. Those are the
2 two major peer review journals for, for
3 obstetrics and gynecology. I look at those
4 but I also do continuing education as I have
5 to do to, to maintain my license. So that I'm
6 -- I spend a lot of time reading, so at least
7 ten to fifteen hours a week just, just
8 maintaining my currency in obstetrics.

9 Q. Have you authored or -- strike that.
10 Have you been a member of various societies
11 and are you still a member of various
12 societies?

13 A. I am.

14 Q. Have you authored any publications in
15 peer review journals related to your field of
16 interest?

17 A. I have.

18 Q. Are you familiar with the generally
19 accepted standards of obstetrical care back
20 in July of 2002 under facts and circumstances
21 similar to those involved in the delivery of
22 Jayden W ?

23 A. I am.

24 Q. Are you familiar with the rules of the
25 road or the generally accepted standards of

1 practice for use of a vacuum extractor in July
2 of 2002?

3 A. I am.

4 Q. Are you familiar with the risks and
5 alternatives to the use of a vacuum extractor
6 during that same time period?

7 A. I am.

8 Q. Are you familiar with the anatomy and
9 obstetrical principles that go into the safe
10 use of vacuums?

11 A. I am.

12 Q. Are you familiar with adverse outcomes
13 that can be caused by use of a vacuum that
14 doesn't conform to the rules?

15 A. I am.

16 MR. GRAHAM: If Your Honor please,
17 at this time we would proffer Dr. Oakes as an
18 expert witness qualified to address standard
19 of care issues, breaches of standards, and
20 causation of brain bleeds.

21 THE COURT: Counsel, you're offering
22 the witness as an expert in the area of
23 obstetrics and gynecology?

24 MR. GRAHAM: Yes, sir.

25 THE COURT: All right. Very good.

1 Ladies and gentlemen, as I mentioned to you
2 earlier, that in this case we may have both
3 lay and expert witnesses. In fact many
4 professional negligence allegation cases
5 involve expert witnesses.

6 Most witnesses in cases are lay
7 witnesses who come in and testify about what
8 they saw or heard or did.

9 An expert witness on the other hand,
10 by reason of their background, their
11 education, their training, their skill,
12 experience, or knowledge in a particular area
13 may come in and testify about what they saw or
14 heard or did but may go further than that and
15 testify about what opinion they derived from
16 what they saw or heard or did.

17 Now when an expert is offered we
18 stop right there and go to the other side and
19 allow them to ask questions, if they wish,
20 solely on the issue of expertise. Not to the
21 merits of the testimony but just on the
22 expertise of the
23 witness.

24 Counsel, are there questions from
25 either of defendants concerning the witness's

1 expertise?

2 CHILTON SIMMONS: No, Your Honor.

3 THE COURT: All right.

4 MR. DAVIS: No, sir, Your Honor.

5 THE COURT: Is there an objection
6 to the qualifications of the witness as expert
7 in the area of obstetrics and gynecology?

8 CHILTON SIMMONS: No, sir. Not
9 as it relates to the standard of care.

10 MR. DAVIS: No, sir.

11 THE COURT: Very good. Then the
12 witness is so admitted.

13 Now let's talk about what the effect
14 of that is. Expert testimony will be
15 presented by both sides or really by all
16 parties in this case. It's never given for
17 the opinion of controlling your judgment but
18 for assisting you in finding matters of fact
19 that are before you that are within the
20 purview of the expert. You should weigh it
21 for credibility and believ-ability and give it
22 what weight you deem it to be entitled to.
23 With with that understanding we'll proceed,
24 Counsel.

25 You -- counsel, you may continue

1 then.

2 MR. GRAHAM: Yes. Thank you, Your
3 Honor.

4 THE COURT: Go ahead.

5 MR. GRAHAM: Your Honor, would you
6 indulge me just a moment?

7 THE COURT: Go ahead.

8 MR. GRAHAM: If Your Honor please, I
9 would just note for the record that Exhibit 43
10 is a true and correct copy of the CV,
11 curriculum vitae, of this witness. However
12 counsel have agreed that we will mark these as
13 Court exhibits but not actually put them into
14 evidence.

15 THE COURT: Very good.

16 MR. GRAHAM: Thank you.

17 DIRECT EXAMINATION CONTINUED

18 BY EDWARD GRAHAM:

19 Q. Dr. Oakes, let's turn to this case. Did
20 you at my request agree to review certain
21 materials, medical records, watch video tapes,
22 read depositions and so forth to see if you
23 could form relevant opinions to help the jury
24 do their job?

25 A. I did.

1 Q. Before we get into that, tell me please,
2 sir, how does an ethical expert go about
3 accepting the responsibility of that type of
4 job?

5 A. I think that's a very good question. I
6 think that one has to or what I, what I try to
7 do is I do not come into a review with a
8 preconceived notion about what the situation
9 is. I, in fact, try to go through the case
10 from the beginning, looking at the prenatal
11 care, the hospital care, and the neonatal care
12 to see in fact that the care has been, in my
13 view, appropriate to the standard of care for
14 that time period under which this is taking
15 place and then come up with a conclusion
16 whether it, the care was appropriate or not.

17

18 Then of course one looks and sees what,
19 what the end result is and one has to then
20 come to a conclusion is the, is the, whatever
21 care that was provided, is that responsible
22 for the resultant outcome.

23 So that's looking at the respective
24 causation, so -- excuse me. I guess -- sorry.

25 So what, what I, what I look at is the

1 appropriateness and I do the -- solely look at
2 obstetric care because that's where my field
3 of expertise is. So I look at the level of
4 obstetric care and look at whether it's a, if
5 it is appropriate for the standard of care and
6 look at the outcome. Then I make a
7 conclusion, was the care or lack of care or
8 substandard care responsible for the outcome.
9 And that's how I come up with a conclusion.

10 Q. With regard to your work on this case
11 what materials have you reviewed?

12 A. I have reviewed the prenatal records, the
13 maternal hospital records from the delivery,
14 the neonatal records from the delivery in the
15 hospital.

16 Q. Excuse me. Let me interrupt you right
17 there. What does neonatal mean?

18 A. Neonatal means the newborn records.

19 Q. Thank you. Please continue.

20 A. And then I looked at the birth video. I
21 reviewed the electronic fetal monitor strips.
22 These are the heart rate strips that go along
23 looking at the, what the contraction pattern
24 and the heart rate of the baby is during
25 labor, right up to delivery. And then I

1 reviewed a number of depositions, I think
2 about twenty depositions. You want me to list
3 those?

4 Q. I won't ask you to take the time to do
5 that, Doctor. Did they include, to the best of
6 your knowledge, another plaintiff's
7 obstetrical expert witness and five defense
8 witnesses in the field of obstetrics?

9 A. Yes.

10 Q. Among others?

11 A. Yes. There's, there are, there are five
12 defense obstetricians; two of which have two
13 volumes.

14 Q. Did you also review the deposition of the
15 defendant, Dr. Rhett?

16 A. I did.

17 Q. Thank you. Let me ask you, sir, before
18 we get to your opinions, let me just ask you
19 to educate us about some of the basic
20 obstetrical principles and definitions.

21 First of all I'm going to, I'm going to
22 start from the beginning. What is obstetrics
23 exactly?

24 A. Obstetrics is the, it is the practice of,
25 of prenatal care and birth. It does not --

1 obstetricians do not take care -- they take
2 care of the mother and fetus but obstetricians
3 do not take care of the baby once it's
4 born.

5 Q. Thank you. What are the general ways to
6 deliver a baby?

7 A. We really have -- there's sort of three
8 major areas:

9 That is to have a normal spontaneous
10 vaginal delivery. So this is one in which
11 there's no intervention.

12 Then there is cesarean section so the
13 baby is born from, from the abdomen as opposed
14 to the vagina.

15 And then there is operative vaginal
16 delivery. That is that some apparatus is used
17 to assist them in the delivery of a vaginal
18 birth. And those are generally broken down
19 into forceps and vacuum extraction, which in
20 this case there is a vacuum extraction.

21 Q. Can you explain to us how a vacuum
22 extraction works?

23 A. A vacuum extractor is a device that goes
24 on the scalp of the baby and there is a
25 negative pressure from a vacuum applied with

1 this cup that's on the scalp such that one can
2 then exert a pulling force against the baby's
3 scalp to assist it in descent and delivery.

4 Q. When I hear the word "vacuum", my first
5 thought is of a vacuum cleaner like in my home
6 and office. Is that a -- does that have any
7 connection with what we're talking about when
8 you use a vacuum to deliver a baby; and, if
9 so, please explain how that is.

10 A. Well, if you ever had -- if you ever had
11 the vacuum, you know, taken off, if you've
12 taken the brush off of it so you just have the
13 tube and you put it on your hand, you get a
14 suction such that you could actually, you
15 could pull your hand along. And that's, this,
16 this is the same thing that's happening here.

17 There is a negative pressure that's
18 applied and that pressure is maintained. If
19 you pull too hard just like you would with
20 the, your home vacuum pulling off your hand,
21 if you pull too hard it will, it will pop off.
22 And that's the same exact thing that happens
23 with the vacuum extractor during delivery.

24 Q. Do obstetricians break down labor and
25 delivery into stages and, if so, please

1 explain that to us.

2 A. We do. We really have three major
3 stages. The first stage is the stage from the
4 onset of labor until delivery. I'm sorry.
5 The onset of labor until complete dilatation.
6 So this means that the -- one is that the
7 patient is in labor. The cervix, which is the
8 outlet to the uterus is opening and allowing
9 the baby to be delivered, and when that cervix
10 is completely dilated -- and we use the
11 number, it's ten centimeters to do that. When
12 that is -- happens that's the end of the first
13 stage of labor.

14 The second stage of labor is from that
15 point, complete dilatation of the cervix,
16 until the delivery of the entire baby. Not
17 just part of it but the entire baby.

18 And the third stage is from the delivery
19 of the baby to the delivery of the placenta.
20 So the afterbirth.

21 Three stages.

22 Q. Thank you. You mentioned the first stage
23 ends when the cervix, the opening to the
24 uterus is completely dilated?

25 A. (Affirmative nod).

1 Q. That was how many centimeters?

2 A. Ten centimeters.

3 Q. Could you show us what that looks like.

4 A. Roughly if one, if one does that, this is
5 as wide as my fingers can go. So this part is
6 here (indicating). Ten centimeters is about
7 four inches.

8 Q. Thank you. Let me ask you about the
9 birth canal. Can you tell us from an
10 obstetricians's point of view what the parts
11 of the birth canal are and what their
12 importance is?

13 A. I think as everybody recognizes, there is
14 the, the pelvis is a bony encasement around
15 the birth canal. So it's not one solid bone.
16 It's a, it's a group of bones that form the
17 birth canal. And the, and the top of the
18 birth canal would be the top of the pelvis.
19 The bottom of the birth canal would be what we
20 call the outlet. So the top is what we call
21 the inlet. The bottom is what we call the
22 outlet and that's, would be where, where your,
23 if you, the bones you actually sit on, the
24 ischial tuberosities. That's the line between
25 that and the pubic synthesis so this, this

1 bone that you can push in front is, defines
2 the outlet.

3 Then we have a mid-pelvis plane, so
4 between those two, between the inlet and the
5 outlet, called the mid-plane which is at the
6 level of the ischial spines. These are
7 protuberances from the ischial bones that mark
8 the mid-pelvis.

9 Q. Thank you, sir. I know some of the words
10 we're going to hear later on and I'd like to
11 run through and have you explain those. Is
12 one perineum. What is that?

13 A. The perineum is your bottom between, uh,
14 really between the vaginal opening and the
15 rectal opening.

16 Q. And the introitus. What is that?

17 A. That is the vaginal opening.

18 Q. Just the same thing as the vaginal
19 opening?

20 A. Yes.

21 Q. The introitus is the same idea as the
22 opening of the vagina?

23 A. Yes.

24 Q. Thank you. What does biparietal diameter
25 do?

1 A. Biparietal diameter means that that's the
2 diameter between the two parietal bones.

3 This is in a, in a baby that this is relevant.

4 The parietal bones are these bones right here.

5 Its relevance is that this, this diameter in a
6 baby is usually the widest part of -- that you
7 can go laterally in a normal baby.

8 Q. Thank you. You mentioned this, you
9 mentioned the ischial spines. But what -- let
10 me make sure we understand what ischial spines
11 are and what their significance is for where
12 the baby is in the birth canal.

13 A. Well, the real relevance, the real
14 relevance of the ischial spines is the fact
15 that this, this marks the mid-pelvis. But
16 when, when a baby descending through the birth
17 canal, it comes head-first usually with the,
18 the back of the head coming as the leading
19 part. When that part reaches the mid-plane of
20 the pelvis it, it means that in a normal baby
21 that the biparietal diameter, which is the
22 biggest diameter that we're talking about, has
23 entered the pelvis. So it's at the inlet. So
24 if a baby can descend to the mid-plane of the
25 pelvis, it means that it's going to be able to

1 come through the birth canal.

2 Q. Is there a word for that when the, when
3 the top part of the baby's head reaches the
4 ischial spine level?

5 A. The word that we use is engagement. Yes.
6 But what engagement really -- we measure
7 engagement by where the presenting part is in
8 relationship to the ischial spines. But its
9 relevance is whether or not the biparietal
10 diameter has entered the inlet and that's the
11 only way we can tell. You can't actually do
12 any kind of real measurement to know whether
13 the biparietal diameter is in the inlet except
14 by, by feeling vaginally and telling where the
15 presenting part is in relation to these
16 planes.

17 Q. What is the biggest part of a baby?

18 A. I'm sorry?

19 Q. What is the biggest part of the baby
20 going through the birth canal?

21 A. In general it's the head ---

22 Q. Okay.

23 A. --- in an average baby. But, but again
24 it
25 is the largest diameter. If a baby has the

1 normal attitude then the largest diameter
2 going through is this biparietal diameter.

3 Now if there are abnormal presentations
4 then you can change it and get even bigger
5 diameters then. So, for example, if a baby
6 doesn't -- a normal baby has its chin on its
7 chest when it's being delivered. So it's,
8 it's flexed and that's why this becomes the
9 biggest diameter. In an abnormal situation,
10 if the baby was back like this, extended, now
11 the biggest diameter is actually here
12 (indicating). Right? This is what we would
13 call the brow and that's such a big diameter
14 that -- in fact that will not, under normal
15 circumstances, that will not deliver
16 vaginally.

17 Q. You used a word. I want to stop you and
18 ask you to explain. You said attitude and
19 I've got a feeling that obstetricians might
20 mean something different about attitude than I
21 understand and ordinarily do. What is the
22 attitude?

23 A. Well, it's what I'm just saying. In the
24 normal presentation of a baby it's normal
25 attitude has a flexed head in a straight-

1 forward plane; so not cocked to the side but
2 straight, looking forward.

3 Q. And what is the significance of a baby
4 with a normal attitude, chin down, having the
5 biparietal diameter enter the pelvis?

6 A. That signifies that it is engaged and in
7 fact in the, in the normal situation, in the
8 normal situation if a baby can descend through
9 the inlet it will be able to descend through
10 the entire pelvis.

11 Q. Thank you, sir. Now, is there a system
12 doctors use to express where the baby is in
13 the birth canal besides just talking about
14 engagement? Is there another way, a numerical
15 way to talk about that?

16 A. There is. This is what we call station
17 and we're measuring where the baby is in
18 relation-ship to this mid-plane so, so this is
19 the plane that runs from the pubic symphysis
20 to the, to the line between the ischial
21 spines. That's the mid-part of the pelvis and
22 in that, that we call the baby's presenting
23 part, the, the, of the skull has reached that
24 plane it is a zero station. And then for each
25 centimeter that's below that is plus one, plus

1 two, plus three, plus four, and plus five
2 means that the baby's head -- at plus five the
3 baby's head is right on the introitus. In
4 fact it's at the vaginal opening. And in fact
5 at, at plus five you can see the head without
6 opening the introitus at all.

7 Q. So the greater the positive number the
8 farther the baby has gone through the birth
9 canal?

10 A. Correct.

11 Q. All right. In addition to positive
12 numbers, are there any other numbers; and,
13 if so, what are those significance?

14 A. There's some negative numbers, too,
15 meaning that the baby's head is above the
16 mid-plane so this would be unengaged, meaning
17 that it hasn't, the biparietal diameter has
18 not entered the inlet and that the leading
19 part of the baby has not come to the zero
20 station. It's not come to the mid-plane.

21 Q. What is the highest negative number?

22 A. The highest that's used is a, you know,
23 is a minus five, but many people only use
24 minus numbers one, two, three and then go to
25 floating meaning it's, the, or dipping meaning

1 the head is just dipping into the pelvis so
2 it's not, it's not even in the pelvis.

3 Q. I grew up using inches. Can you show me
4 with your fingers what a centimeter looks
5 like?

6 A. Well, if you -- a centimeter is about
7 this (indicating). But if you, if you just
8 use inches it's two and a half inches -- I
9 mean two and a half centimeters is an inch.
10 So four inches is ten centimeters. So if we
11 talk about that which is an inch it's about
12 two and a half centimeters.

13 Q. So can you show us how far we're talking
14 from a zero station to a plus five station?

15 A. Then we would be talking about two
16 inches. So two, two and a half centimeters to
17 the inch. This is five centimeters or two
18 inches (indicating).

19 And the reason that that's broken down
20 that way, the reason it's broken into that
21 kind of system is because in the average baby,
22 in the average baby the, the distance from the
23 biparietal diameter to the occiput is two
24 inches.

25 So it is, it is, that's what it takes to

1 have this relationship that we're talking
2 about both from the delivery standpoint and
3 the introitus, but also in the engagement
4 standpoint.

5 Q. You just used another word I want you to
6 define. What is occiput?

7 A. Occiput, occiput is the back of the head.
8 This is, this is the occiput of your head.
9 This (indicating), the prominence in the back
10 is the occiput.

11 Q. How many occiputs does an adult person
12 have?

13 A. One.

14 Q. How many occiputs does a baby have?

15 A. One. And it's just, you know, is, the
16 reason it's one is because it's like talking
17 about the front and back. You kind of have
18 one front and you have one back.

19 Q. Thank you. What does the word
20 "indication" mean to an obstetrician?

21 A. Well, it can mean a lot of things but in
22 the context of an operation, an indication
23 means the reason that one is doing it. So if
24 you're doing any kind of procedure, operation,
25 treatment, you have an indication. That's

1 just the reason for doing it.

2 Q. Is it appropriate to do a medical
3 procedure without there being an indication or
4 good reason?

5 A. No.

6 Q. What is a contraindication?

7 A. That means that there is a reason
8 not to do it, why you don't do something; or
9 you, you wouldn't under certain circumstances,
10 if they met these contraindications, you
11 wouldn't do procedure.

12 Q. What does the phrase "informed consent"
13 mean?

14 A. "Informed consent" is the process of
15 providing the risks of whatever is going to be
16 done, the benefits of what, why are we doing
17 this and what are the alternatives to what's
18 being proposed. So that a patient knows the
19 positives, the negatives, and what the
20 alternatives are if you don't do whatever
21 we're talking about doing.

22 Q. With regard to that subject, what are the
23 risks to a baby of a vacuum extraction?

24 A. There are several risks. The major risk
25 is getting some kind of scalp edema and/or

1 blood accumulation where this vacuum suction
2 is applied. We call that a cephalohematoma.

3 But you can end up getting other kinds of
4 bleeding abnormalities, as well as
5 lacerations. There actually can end up being
6 cuts that are, that result in the scalp
7 because of the pull away of the scalp tissue.

8 Also there can be bleeds in the retina so
9 they're in the, in the back of the eye, and
10 various bleeds within the skull itself. So
11 either adjacent to the area where this vacuum
12 was applied or even further in.

13 So underneath the bone, underneath the
14 lining of the brain or actually into the brain
15 itself.

16 Q. Which is a bigger concern to
17 obstetricians, cuts or brain bleeds?

18 A. Obviously brain bleeds would be the
19 biggest
20 consideration.

21 Q. And when we're talking about bleeds,
22 which is of more concern, brain bleeds, bleeds
23 that are on the outside of the skull or a
24 bleeds that are inside the skull or inside the
25 brain?

1 A. Obviously any bleed within the brain,
2 inside the brain is a bigger concern than any
3 outside.

4 Q. You mentioned the operative vaginal
5 delivery can involve forceps or vacuum. When
6 you're talking about whether or not it's
7 appropriate to use vacuum or a forceps, do
8 obstetricians use phrases to describe where
9 the baby is in the birth canal other than
10 "station", other than a numerical station?

11 A. Well, we, we group these stations into
12 some terminology.

13 Q. Please explain what those are.

14 A. So if, if we talk about a high station,
15 it
16 means that the baby is not engaged. It means
17 it is above zero station. So one of these
18 negative numbers.

19 If it's at a mid-station it is zero or
20 plus one.

21 Low would be plus two, plus three, plus
22 four.

23 And outlet, plus five.

24 Q. Thank you. Does, do the rules about
25 whether it's appropriate to use a vacuum vary

1 depending on where the baby is in the birth
2 canal; if so, please explain that.

3 A. The rules, the rules vary. I mean it is,
4 it is possible to do a vacuum extraction at
5 any of these levels. But it is, it's below
6 the standard of care to do a vacuum at any
7 time at a minus station. So when we're
8 talking about a high station. So any of these
9 minus numbers, that's below the standard of
10 care.

11 There are some advocates that say that
12 mid-vacuum is below the standard of care and
13 in the, in the general situation it's my
14 opinion that that's, that that's not, that's
15 not an absolute deviation from the standard of
16 care to do a mid-vacuum.

17 So this is a plus zero or the plus one.

18 But at the -- if one is going to do that,
19 there's going to be different risks and
20 greater risks. The higher one does this, the,
21 the greater the chance there's going to be
22 some, some abnormality that results from doing
23 it.

24 The easiest and less risky is to do an
25 outlet. So we're talking about now a plus

1 five where the baby's head, you can literally
2 see the baby's head and easily deliver it.
3 That has the least risk.

4 Q. Is it always appropriate for an
5 obstetrician to use a vacuum; and if not
6 always, when is it appropriate?

7 A. I think we just said it's not, it's never
8 appropriate to do this at a minus station and
9 it's not appropriate to do this if there are
10 some contraindications.

11 So some of the contraindications would be
12 that one doesn't do this in a baby whose
13 gestational age is thirty-four weeks or less.
14 And the reason one doesn't do that is because
15 these babies's brains are more fragile and so
16 this, this risk of having a bleed within the
17 brain is increased.

18 If the baby has a bleeding disorder or
19 something like that, one wouldn't do this.

20 If you have an abnormal presentation, one
21 wouldn't do this.

22 So I mean I'm talking about we want the
23 baby to be in the the normal attitude we're
24 talking, about not one of these. If the
25 baby's head is extended back like I'm just

1 doing (the witness indicates), if you put a
2 vacuum on it's going to be, that's surely
3 going to be a catastrophe.

4 Similarly, one doesn't want to -- one
5 wants to be sure that the baby's size is
6 compatible with the maternal pelvis. You
7 can't, you can't pull the baby through too
8 large a pelvis -- I mean too large a baby
9 through a smaller pelvis without there being
10 some kind of damage.

11 Q. You indicated that some obstetricians
12 think that mid-pelvic vacuum extractions are
13 always a violation of the rules and, and you
14 said you don't agree with that.

15 A. (Affirmative nod).

16 Q. When do you believe a mid-pelvic applica-
17 tion is appropriate?

18 A. I think that it's a very good question.
19 It is -- and the reason it's a good question
20 is because you end up having to decide when,
21 when in fact is one going to resort to doing
22 this sort of thing. Personally, I think that
23 the decision almost always from a risk/benefit
24 is not to do the vacuum. That's my own
25 opinion. That's, that's in fact the way I

1 would counsel a patient.

2 But if somebody decides to do that, in my
3 view that's still one of the acceptable things
4 to do but then one has to have a very good
5 indication for doing it and you need to know
6 that there is an increase in risk associated
7 with it and the patient has to know that
8 there's an increased risk associated with it
9 and accepts that risk instead of doing --
10 because the alternative is a cesarean section.
11 Under certain circumstances people, people
12 will say they don't want to have a cesarean
13 section, they want to have a vaginal delivery.

14 Q. Thank you for that general background
15 about Obstetrics 101, Doctor.

16 Let me now turn to your opinions in this
17 case. Have you formed an opinion as to
18 whether or not Dr. Rhett had an indication to
19 use the vacuum in the delivery of Jayden
20 W. ?

21 A. I have.

22 Q. What is your opinion, sir?

23 A. My opinion is that there was not an
24 indication for the vacuum in this situation
25 at this time that it was done and under the

1 circumstances that it was done.

2 Q. Do you have an opinion as to whether Dr.
3 Rhett's use of the vacuum without an
4 indication conforms to or represents a breach
5 of the generally-accepted standards of care
6 for obstetricians under these circumstances?

7 A. I do.

8 Q. What is your opinion?

9 A. It is my opinion that it's a deviation
10 from the standard of care.

11 Q. What is the basis for your opinion that
12 there was no indication and that that breaks
13 the rules?

14 A. Because it's my opinion that this vacuum
15 delivery occurred from a mid-station, so
16 either zero or plus one. I believe there was
17 no informed consent given. And I don't think
18 there is an indication for delivery at a
19 mid-station at the time that it was done.

20 Q. Thank you. You mentioned informed
21 consent. What should an obstetrician do to
22 get a patient's informed consent prior to
23 using a vacuum to suction the baby out?

24 A. I think we've already gone through what
25 informed consent means. You know, it means

1 explaining what the procedure is, what the
2 risks are, what the benefits are and what the
3 alternatives for doing this are.

4 Q. What -- let me ask -- I'm sorry. Go
5 ahead.

6 A. And that's something that can be in, you
7 know, in very long detail or in fact it can be
8 more briefly done depending upon the urgency
9 of doing something. But it is something that
10 has to be, it has to be done and in, in the
11 ideal circumstances this is done in writing.
12 Not, not verbal. It can be done verbally when
13 there is, when the timeframe that demands but
14 in general it should be done in writing.

15 Q. What risks should an obstetrician warn
16 about in order to get informed consent for a
17 vacuum at a mid-station?

18 A. I think that one has to talk about the
19 risks of some adverse menial outcome and, in
20 particular, we're talking about these kinds of
21 bleeding episodes -- with the most frequent
22 being cephalohematomas, so this a, just
23 an accumulation of blood under the skin, but
24 that in itself can be a problem because it can
25 lead to jaundice and some other bleeding

1 abnormalities.

2 But there's also then this, the idea of
3 retinal bleeds and bleeds inside the head.

4 They are -- there is, there is a risk in
5 them and as I said, the higher the station
6 that this is done at, the greater the risk.

7 Q. If the baby is at a mid-pelvic station
8 should the obstetrician warn the patient that
9 station makes the risk of brain bleeds even
10 greater?

11 A. I think that it's something that one has
12 to say, that the risk of adverse outcome is
13 greater. So -- it's this wide variety of
14 abnormalities. The risk is greater. Yes.

15 Q. You mentioned that a part of informed
16 consent is explaining alternatives. What
17 alternatives would there be to use of a vacuum
18 by a reasonable obstetrician based on the
19 circumstances that Dr. Rhett was faced with in
20 this case?

21 A. Well, my personal opinion in this
22 situation is that doing nothing, doing nothing
23 but waiting, having the patient change
24 positions and administer oxygen, stopping the
25 Pitocin -- which is the drug being given to

1 stimulate the
2 labor -- giving this baby a chance to
3 resuscitate itself without the stresses of
4 labor and pushing was the thing to do.

5 If, if in fact, if in fact delivery is
6 necessitated, I think that delivery should
7 have been done by, by cesarean section as
8 the alternative or -- or by this, an operative
9 procedure such as vacuum or forceps. I think
10 one has to present the options that are, all
11 those options that are available.

12 Q. But if one presents the option of a
13 vaginal, an operative vaginal delivery of
14 vacuum or forceps with the baby at the
15 mid-pelvic station, would the doctor need to
16 explain about those greater risks of brain
17 bleed?

18 A. Of course. Yes.

19 Q. Do you have an opinion as to whether or
20 not Dr. Rhett obtained Jamesetta's informed
21 consent to the use of a vacuum to deliver
22 Jayden at the time that he applied the vacuum
23 for that purpose?

24 A. I think it's very clear both from the
25 birth video and from Dr. Rhett's own testimony

1 that he did not give get an informed consent.
2 He in fact says that the blanket consent, the
3 blanket consent that the patient signs on the
4 admission to the hospital for obstetric care,
5 covers that. That, in my opinion, is totally
6 inaccurate. That, that the doesn't cover
7 operative procedures. It covers normal
8 obstetric procedures, of which this is not one
9 of them.

10 Q. Dr. Oakes, you mentioned a, a blanket
11 consent form. Is that what you're talking
12 about on the board here?

13 A. I am.

14 MR. GRAHAM: And if -- Your Honor,
15 for the record that is a part of ---

16 MS. SIMMONS: Your Honor, objection
17 to him showing that to the jury. The
18 documents are not in evidence yet.

19 THE COURT: Counsel, let's take that
20 down from the stand until we talk about it for
21 a moment. You intend to offer that in
22 evidence?

23 MR. GRAHAM: We do, Your Honor.

24 THE COURT: All right. And are
25 your exhibits marked in advance as requested

1 by the Court?

2 MR. GRAHAM: Your Honor, we have, we
3 have them marked. We have not agreed on
4 specific portions but we did agree this
5 morning, as Your Honor will recall, that we
6 could use that in opening and ultimately we
7 agreed not to. But there was a specific
8 agreement for that one.

9 THE COURT: All right. What is
10 your objection to that document?

11 MS. SIMMONS: Your Honor, we do
12 not object to the entire medical chart being
13 admitted. We have a problem with records
14 being just cherry picked out, so if counsel
15 would move to admit the entire record we would
16 have no objection.

17 THE COURT: All right. The Court
18 will not require that of counsel at this time.
19 I am going to overrule your objection.
20 What is the number on that document, counsel?

21 MR. GRAHAM: Excuse me, Your Honor.
22 Just one moment.

23 THE COURT: Now, remember and our
24 records should reflect that we have to
25 coordinate this with the court reporter and it

1 should be done in advance. We'll have to do
2 this evening before the jury returns tomorrow
3 to make sure there's not some confusion about
4 what documents are marked what number.

5 MR. GRAHAM: Yes, sir.

6 THE COURT: What number do you have
7 this marked at this time?

8 MR. GRAHAM: Bear with me just a
9 moment, Your Honor.

10 THE COURT: Very good.

11 MR. GRAHAM: I apologize, Your
12 Honor. We -- our paralegal stepped out to do
13 something else and she is the quarterback.

14 THE COURT: Well, in her absence
15 we'll make it plaintiff's number one. That
16 may throw everything else off but rather than
17 delay these proceedings we'll make it
18 Plaintiff's Exhibit 1.

19 (SO ENTERED AS PLAINTIFF'S EXHIBIT 1:

20 General Consent Form)

21 MR. GRAHAM: All right. Thank you,
22 Your Honor.

23 THE COURT: Very good. Plaintiff's
24 Exhibit 1 should be marked. It's in evidence
25 over the objection of both defendants.

1 MR. DAVIS: No objection.

2 THE COURT: All right. Then over
3 the objection of Defendant Rhett. You may
4 proceed. Plaintiff's one in evidence.

5 MR. GRAHAM: Thank you, Your Honor.
6 Your Honor, may I publish it?

7 THE COURT: Very good. You may
8 turn the screen on and publish it now if you
9 wish.

10 DIRECT EXAMINATION CONTINUED

11 BY EDWARD GRAHAM:

12 Q. Dr. Oakes, is this the blanket consent
13 form you're referring to?

14 A. (Upon review), it is.

15 Q. Thank you. Thank you, Dr. Oakes. Why is
16 this not informed consent?

17 A. I think that it does not talk about the
18 procedure that is to be done. It doesn't talk
19 about risks. It doesn't talk about benefits
20 and it doesn't talk about alternatives.

21 Q. Thank you. I would -- thank you, Dr.
22 Oakes. Does it even mention vacuum?

23 A. It does not.

24 Q. Is -- you may have touched on this, but
25 let me ask you, sir, if a particular doctor

1 believes that there's an emergency situation,
2 what effect would, what impact, if any, would
3 that have on the obstetrician's duty to obtain
4 informed consent before using a vacuum?

5 A. I think that one still gets an informed
6 consent, albeit abbreviated. So all of this
7 has to be focused down. You still end up --
8 you still end up talking to the patient about
9 what's going to be done, why we're doing this,
10 and what the alternatives are. But, again,
11 it's abbreviated; the more emergent the
12 situation, obviously the more abbreviated it
13 becomes.

14 I -- it is my, it's my opinion that there
15 is no emergency in this situation that demands
16 that kind of action. And literally when we're
17 talking about something emergent here, we're
18 really talking about the situation where if
19 one doesn't do something in a matter of
20 minutes in
21 obstetrics, that the baby is going to die.
22 There is, and there is no indication that
23 that's the situation here.
24 Q. What was the health or health condition
25 of Jayden at the time the vacuum was applied?

1 A. The baby had begun having some
2 decelerations of its heart rate approximately
3 five minutes before that, but up until that
4 time its condition was as reassuring as it
5 could be. In fact, even during this time the,
6 -- the factors are present that are, that make
7 one believe that the baby's status was in fact
8 not in jeopardy.

9 Q. Could you give examples?

10 A. The baby is responding to stimulation, as
11 we'll see later. It -- there is normal
12 variability of the heart rate, and this
13 something that is very reassuring. It had
14 responded to resuscitative measures earlier
15 in the day, doing the same thing, and there's
16 no reason to think in fact it wasn't going to
17 respond if, if, if one did those things again.

18 Recognizing that, in general, babies are
19 not particularly happy when mothers are laying
20 flat on their back -- and the reason for that
21 is because the whole weight of the uterus, the
22 whole weight of the uterus is pressing on her
23 abdominal vasculature and that is compressing
24 the flow into the uterine artery. So, in
25 fact, the placental profusion, that which is

1 oxygenating the baby is not at its best.

2 So what one wants to do is, if the baby
3 is
4 showing some signs of stress, that first thing
5 is to get the mother off their back. So put
6 her over on her side because optimizes
7 placental flow.

8 Q. You used a phrase and I want to make sure
9 we all understand. You talked about placental
10 profusion. In layman's terms, what is that?

11 A. Well, everybody has to understand
12 that,
13 you know, that a baby is not breathing while
14 it's inside the uterus. It is being breathed
15 for, if you will, by the placenta, by the
16 afterbirth. It is taking, this afterbirth is
17 taking oxygen out of the mother's blood,
18 transferring it across into the blood of the
19 baby, and that's what's doing the oxygenation.
20 It in fact is not, it's not, it's not
21 breathing oxygen through its lungs. It's,
22 it's getting the oxygen from its umbilical
23 cord.

24 And so then that says if the mother --
25 it's the mother's oxygenation and profusion

1 that has to be at its best in order to have
2 the baby be profuse. So the mother in this
3 kind of situation, if one is trying to get a
4 baby
5 inside the uterus resuscitated, one gives the
6 mother oxygen to increase her oxygen level.

7 One changes the position so that the
8 blood flow to the placenta is increased, and
9 one stops the stimulations of
10 contractions/labor. So when she is receiving
11 a medication -- which in this situation was
12 called Pitocin, it a artificial hormone that
13 is put in intravenously to actually cause the
14 uterus to contract. That needs to be stopped
15 so that the baby -- the blood flow can be
16 increased because there are no contractions,
17 which decreases blood flow.

18 Q. Let me stop you there. Before we leave
19 the subject of informed consent, I want to get
20 one question out. That is, if Dr. Rhett has
21 done proper counseling and discussion with
22 Jamsetta about the various risks ---

23 CHILTON SIMMONS: Objection, Your
24 Honor. Leading.

25 THE COURT: Sustained. Actually,

1 let me hear the question, Counselor. Before
2 you answer, Doctor, let me just hear the
3 question.

4 THE WITNESS: Yes, sir.

5 EDWARD GRAHAM: Thank you.

6 DIRECT EXAMINATION CONTINUED

7 BY EDWARD GRAHAM:

8 Q. Doctor, just assuming for the purpose of
9 this question that Dr. Rhett had done the
10 proper discussion and counseling with
11 Jamsetta, in which he expressed the risks of
12 vacuum extraction from the station where her
13 baby was and gave her the alternatives to use
14 the vacuum, assuming further that Jamsetta had
15 turned down that option of a vacuum and opted
16 for an alternative, then based on those
17 assumptions do you have an opinion as to
18 whether or not it would be reasonable for a
19 patient in Jamsetta's circumstances to decline
20 vacuum extraction of her baby?

21 THE COURT: Before you answer, I am
22 going to overrule the objection.

23 But let me first explain to the
24 jury. When you have a witness up on the
25 stand, you cannot "lead" your own witness. A

1 leading question is a question that contains
2 the answers.

3 In simple form, if this was a car
4 wreck case, which is it is not, when you ask
5 'Was the car blue?', and you have your own
6 witness on the stand, that's leading because
7 inside that question was the answer. The
8 appropriate question would be, 'What was the
9 color of the car?'

10 That's what the objection was. But
11 the question was actually a hypothetical, so
12 the Court overrules the objection and you may
13 answer, Doctor. If you need it repeated
14 because I broke in, then we will get counsel
15 to repeat it. If you're prepared to answer,
16 go ahead.

17 THE WITNESS: I am, Your Honor.

18 I think that when one, that when a patient
19 receives informed consent that there isn't a
20 right or wrong answer. One can in fact
21 decline the procedure that is being -- the one
22 that is being talked about, and that's an
23 appropriate thing to do.

24 DIRECT EXAMINATION CONTINUED

25 BY EDWARD GRAHAM:

1 Q. Under those circumstances, would it be
2 reasonable for Jamsetta to decline the vacuum?

3 A. Yes.

4 Q. Thank you. Dr. Oakes, while my good --
5 our technology assistant is helping pull a
6 certain document, let me just tell you this is
7 from the labor progress chart, Bates-stamped
8 Exhibit 2014. Let me ask you, sir, what is
9 this document?

10 A. This is a document that is designed to
11 follow the progress of the labor.

12 At the top up there -- it's very hard for
13 anybody to see that, however, but what one is
14 plotting -- what one is plotting by the lines
15 at the very top of that graphic form is the
16 dilatation of the cervix, so the opening of
17 the cervix as it goes from closed to
18 completely dilated, that's the ten
19 centimeters, and one is also plotting the
20 station of the baby's head.

21 So, again, the level -- the level of the
22 bony part of the head that is presenting is
23 related to the level of the ischial spines.
24 That's the zero station.

25 On this particular thing, the X's

1 that you can there are plotting the station
2 and the dots with the line connected to them
3 is the dilatation of the cervix. You can see
4 that the one that starts there on the left,
5 that the first dot is at two centimeters.
6 We've now talking the opening of the cervix
7 and it -- you see what I am pointing to here?
8 This is about two centimeters (indicating). I
9 am just kind of showing you what it would be
10 as opposed to when it's wide open, talking ten
11 centimeters -- like yeah, (indicating).

12 And we go up there -- then across
13 the top if the hours, the time. So that says
14 7:00, 8:00, 9:00. That's in the morning:
15 7:00, 8:00, 9:00, 10:00, 11:00, 12:00. Then,
16 they're doing this military time, 1300, 1400,
17 1500. You know, that's 1:00, 2:00, 3:00, 4:00
18 in the afternoon. This chart ends at 1700,
19 5:00 p.m.

20 EDWARD GRAHAM: Your Honor, may I
21 approach the witness and provide him with a
22 laser pointer?

23 THE COURT: You may.

24 EDWARD GRAHAM: (Tenders laser
25 pointer to witness).

1 DIRECT EXAMINATION CONTINUED

2 BY EDWARD GRAHAM:

3 Q. Dr. Oakes, could you please show us on
4 this graph the lines that designate the
5 station of the baby?

6 A. As I said, those are the X's.

7 (Indicating), this is the first X and we can
8 see that the first time that it is documented
9 and measured -- and we have over here the
10 station, this is zero, minus one, and you can
11 see that the first time that it's examined, it
12 looks like that it's just under minus one.

13 Then somebody comes along and thinks that
14 it is minus two (indicating).

15 Back to minus one.

16 Minus two.

17 Minus one.

18 Minus one.

19 Minus one.

20 So as of 5:00 p.m., the patient is seven
21 centimeters dilated, that's this dot (indicat-
22 ing), but still the station is a minus one.

23 Q. Thank you, sir. Now, does this
24 particular graph go on past that time?

25 A. It does not.

1 Q. Thank you. Is there another part of the
2 labor progress chart where there are
3 additional measurements of the baby's station?

4 A. There are.

5 Q. I know have on the board what has been
6 marked as Exhibit 2016. Can you -- I'm going
7 to ask our assistant to ---

8 A. First just load this up so that we can
9 see the time. See, this starts at 1700 --
10 1700, 1800, 1900. Yeah. So we left off that
11 other one at 1700, or 5:00 p.m., and this is
12 now 1700, 1800, 1900 and 2000.

13 Now if you highlight down near the bottom
14 -- now because we have this at 1900, we have
15 these two entries. These are two entries of
16 cervical dilatation that are further along
17 than the ones that we showed you before.

18 This one at 1800, it says here that this
19 is -- and this copy doesn't show it, my copy
20 really makes it as being nine centimeters
21 dilated.

22 Ninety, which is basically an effacement
23 meaning how thin the cervix is, not only does
24 the cervix open up but it thins down. It
25 starts out about yeah long and by the time

1 that it is all dilated it is almost paper
2 thin. So one hundred percent is as thin as it
3 is going to get. This says that it is ninety
4 percent.

5 But also then we have a station here and
6 that says that it is a zero. That is the last
7 time that station is recorded in this chart,
8 that's at 6:00 p.m., at a zero station. This
9 is per Dr. Rhett.

10 At 7:24 she is said to be completely
11 dilated but they give no station there.

12 Q. Thank you, sir.

13 THE COURT: Counsel, when you reach
14 an appropriate time to take a break, we will
15 do so.

16 EDWARD GRAHAM: This is fine.

17 THE COURT: Let's do that. Ladies
18 and Gentlemen, we will take a break at this
19 time.

20 Sir, I am going to ask you (witness)
21 not to speak to lawyers on either side of the
22 case, although you're welcome to stand and
23 take a break. Since you are a witness under
24 testimony, please do not talk to the attorneys
25 during the break.

1 If there are those who wish to go
2 outside to take an outside break, we will make
3 that opportunity available to you, as well.

4 Let's all just remain where we are
5 while the jury returns to the jury room.

6 Enjoy your break, Ladies and
7 Gentlemen.

8 (JURY OUT @ 3:22 P.M.)

9 THE COURT: All right, we will be
10 in recess now. We'll take about fifteen to
11 twenty minutes, subject to the return of the
12 jury to the jury room. Court's in recess.

13 THE WITNESS: Sir, can I go out
14 to the restroom?

15 THE COURT: Certainly you can. You
16 can go out, go wherever you want. Thank you.

17 (BRIEF RECESS 3:22 - 3:23 P.M.)

18 THE COURT: Please be seated,
19 Ladies and Gentlemen. Are you ready for the
20 jury, Mr. Graham?

21 EDWARD GRAHAM: Yes, Your Honor.

22 THE COURT: Bring in the jury.

23 (JURY IN @ 3:39 P.M.)

24 THE COURT: All right. Welcome
25 back, Ladies and Gentlemen. You will recall

1 we were in direct examination of the witness
2 and we remain there. Mr. Graham, you may
3 proceed.

4 DIRECT EXAMINATION RESUMED

5 BY EDWARD GRAHAM:

6 Q. Dr. Oakes, one of the topics that we
7 addressed before the break had to do with the
8 health of the baby. This morning we heard
9 something by Apgar. Could you please explain
10 what Apgars are and how they relate to the
11 health of a baby?

12 A. Apgar scores were named after an
13 anesthesiologist, Virginia Apgar, who
14 described these so that there would be some
15 kind of standard for the need for
16 resuscitation of a baby. So she defined five
17 parameters, five things that one looks at in a
18 baby, and you can get a score of zero if it's
19 absence, two if it's present, and a one if it
20 is sort of in between.

21 The five things that are looked are
22 color, the color of the blue as to whether it
23 is pink or kind of blue as the opposite;
24 respiration, whether it is breathing; whether
25 it has tone, normal muscle tone; whether --

1 what this heart rate is, if it is over a
2 hundred it is two and then it steps down below
3 that. Of course, a zero means that a person
4 doesn't have any heart rate. Then reflex
5 irritability, which means how it is
6 responding, what kind of grimace it has,
7 whether it has normal reflexes to
8 irritability.

9 So two/ten is the maximum score,
10 zero is the least score. Obviously if a baby
11 has an Apgar os zero it is effectively not
12 alive at that point. But these things are
13 taken at various intervals after birth and the
14 standard intervals that these are done are at
15 one minute, five minutes and then usually at
16 five minutes after that if in fact it is not
17 in the normal range, which is nine, nine or
18 ten. Those are the normal ranges. So you run
19 these things out at five-minute intervals
20 until you get up to there.

21 Q. Do you recall what the Apgar scores were
22 for Jayden after his birth?

23 A. I do.

24 Q. What were those?

25 A. It was a seven at one minute and then

1 nine at five minutes.

2 Q. What does that tell you about the health
3 of Jayden at the time the vacuum was applied
4 to his head?

5 A. Well, again, what these Apgars are
6 telling you is what the status of the baby is
7 at that point. But if -- it has some
8 relationship to what a baby is like before
9 that, too. Obviously if a baby is severely
10 depressed before birth, the likelihood is that
11 it is going to be severely depressed shortly
12 after birth until in fact it is resuscitated.
13 So usually if a baby has very good Apgar
14 scores it hasn't been substantially
15 compromised before that. It's obvious that
16 this baby required minimal resuscitation.

17 Q. What do Apgars of seven and nine tell us
18 about whether the baby's brain was bleeding at
19 the time the Apgar scores were done?

20 A. I think that it tells us that there could
21 not have been a significant bleed at that
22 point or there couldn't be these kinds of
23 values. The reason for that is that when one
24 has bleeding in the brain, this affects these
25 various faculties that we're measuring. For

1 example, a baby is not going to have breaths.
2 It is not going to respire normally, therefore
3 its color is not going to be appropriate.
4 It's muscle tone can be decreased, meaning
5 that it is very flaccid, it is just floppy.
6 It's reflex irritability will not be normal.
7 So, in fact, these are -- these reflect that
8 there hasn't been a significant injury that is
9 going on at that point.

10 Q. Well, let me make sure that I understand
11 you. When you say no significant injury going
12 on at that point, are you addressing whether
13 or not the blood vessels are intact in
14 Jayden's brain?

15 A. No, we are talking about that there is
16 not a significant bleed at that point. That's
17 kind of what one expects in a bleed that's
18 caused by a vacuum extraction. It doesn't
19 cause this immediate effect, because what in
20 fact is broken are veins and these are not
21 under high pressure; they are under low
22 pressure, so they continue to leak under low
23 pressure and it has to accumulate over time
24 until there in fact is a significant blood
25 loss and accumulation of blood to cause

1 symptoms.

2 Q. Thank you, sir. Now, let me move on to
3 the subject of station. You touched on this a
4 little bit about referring to the screen with
5 some of the medical records with the graph
6 showing the station and the note about a zero
7 station per Dr. Rhett.

8 Let me ask you, sir, in your review of
9 the medical records, did you ever see any
10 doctor or any nurse ever document in the
11 records that this baby was at a positive
12 station? That is, something above zero -- or
13 closer to the bottom of the birth canal than
14 zero?

15 CHILTON SIMMONS: Objection, Your
16 Honor, leading.

17 THE COURT: Sustained as to the end
18 of the question. Counsel, please don't lead
19 your witness. You may answer, sir.

20 EDWARD GRAHAM: Thank you.

21 THE WITNESS: I think that we
22 showed on the last sheet and that is in fact
23 the last entry of any station, anywhere in the
24 medical records. So the answer is no, there
25 is not any entry. In fact, it's my opinion

1 that that entry of zero, or plus one, is in
2 fact what the station was at the time that the
3 vacuum was applied.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. So you have an opinion to a reasonable
7 degree of medical certainty as to the station
8 of Jayden W. at the time that this
9 vacuum was applied?

10 A. I do.

11 Q. What is that?

12 A. It is my opinion that it was applied at a
13 zero to a plus-one station.

14 Q. What is the basis or that opinion?

15 A. Primary the -- there are two bases. The
16 first is that when one looks at the vacuum
17 that was used and the birth video of when the
18 vacuum was applied, one can see that literally
19 the entire upper part of the vacuum is within
20 the vagina. This vacuum that as used is
21 called a Tender Touch Vacuum.

22 EDWARD GRAHAM: Your Honor, may I
23 approach?

24 THE COURT: You may.

25 DIRECT EXAMINATION CONTINUED

1 BY EDWARD GRAHAM:

2 Q. This is trial Exhibit 72.

3 A. This is the vacuum that was used in this
4 situation. This measurement that I am showing
5 right here, from the very top of the vacuum to
6 the bend here on this vacuum measures six
7 point one centimeters, six point one
8 centimeters. If you remember, we talked about
9 the stations being centimeters up from the
10 introitus:

11 Five centimeters at the introitus,
12 Zero station is at five centimeters
13 above that.

14 I think as one can see from this birth
15 video, this entire upper bulb, when it is on
16 the head and Dr. Rhett is starting to pull,
17 the entire bulb is within the vagina.
18 Therefore, the baby's head had to be at least
19 that far up from the introitus.

20 The second part is that when Dr. Rhett
21 does his examination just before he puts on
22 this vacuum, he -- as one can see when we look
23 at this video, he is examining the patient
24 vaginally and his hand, his entire fingers are
25 going all the way in. If the baby's head was

1 there, as he states that it was, that it was
2 literally right at the introitus and we put
3 this on, his fingers would run into the head
4 and he couldn't have put his entire hand up
5 into the vagina and he could not have put this
6 entire bulb within the vagina, because the
7 baby's head would be occupying the entire
8 vagina.

9 Q. Dr. Oakes, did you at my request work
10 with a medical artist to have a diagram
11 prepared that would help express your opinions
12 about the station?

13 A. I did.

14 Q. Would you kindly step down, with His
15 Honor's permission, and explain those to the
16 jury?

17 THE COURT: Well, -- Counsel, first
18 of all, is there an objection? Are they
19 offered as exhibits or what, what's the
20 position?

21 EDWARD GRAHAM: They are offered
22 as demonstrative exhibits this time, without
23 objection.

24 CHILTON SIMMONS: We have no
25 objection to them as demonstrative exhibits,

1 Your Honor.

2 THE COURT: Very well.

3 EDWARD GRAHAM: Thank you.

4 THE COURT: You may step down, sir.

5 EDWARD GRAHAM: Doctor, let me ask
6 you, please, to stand on this side so that you
7 will be facing the court reporter.

8 DIRECT EXAMINATION CONTINUED

9 BY EDWARD GRAHAM:

10 Q. Which would you like to start with?

11 A. By don't we start with the outlet?

12 Q. Okay.

13 A. As we talked about, we have three sort of
14 descriptions that are used throughout this
15 case for vacuum extraction, and that is:
16 outlet, low and mid. Outlet, low and mid.

17 Outlet means that the baby literally
18 -- by definition, the baby literally is at the
19 vaginal introitus, that you can see hair
20 without separating any part of the vagina.

21 The baby's head is sitting right at the
22 outlet.

23 That's plus five.

24 You can see that if -- and, again, what
25 we start to reference is that at the zero

1 station this are the ischial spines. These
2 are the little points that come out from the
3 pelvic bone that you can readily feel if
4 somebody is doing an examination of the
5 vagina. You can feel these because they are
6 sharp.

7 So this -- the line that runs between
8 those is the zero station.

9 When it's plus five, if the baby is right
10 down even with the outlet, the ischial
11 tuberosities, this is -- the vacuum is put on,
12 it's literally put on right at the outlet. You
13 can't put any more of it in because the baby's
14 head is completely occupying the birth canal
15 and it looks like this.

16 You see, again when I showed you the
17 vacuum, the thing that's important to see on
18 this vacuum is that there is this bell here
19 and then is just this nubbin here. So if this
20 was sitting here, we would see this nubbin out
21 here but we would see all of the bell because
22 the baby's head is right at the outlet. Now,
23 if we take and look at what -- now this is
24 plus five.

25 If we go to low, low means plus two,

1 plus three, plus four -- it could be any of
2 those. Again, what is demonstrated here is
3 that the baby's head, this is the baby's head
4 coming right here, is at two to three. One
5 would see that part of the vacuum, about half
6 of it, is -- again, I would say that this is
7 six centimeters, this part right here, so
8 about half of that would be inside the vagina
9 if it was at two-and-a-half, which is what
10 this is. We'd be looking like this
11 (demonstrating). So half of the big bell, all
12 of the nubbin.

13 If we now go up to a mid, that means that
14 it is zero or plus one, zero or plus one, that
15 means that the baby's head is right here at
16 zero to plus one. We would have virtually all
17 of the bell in. If it was -- if it was at
18 zero, and this is at six centimeters, we would
19 have one centimeter or this part outside of
20 the introitus. It would look like this,
21 almost the whole bell in.

22 What I demonstrate to you, this is a
23 picture taken from the video and we're going
24 to show -- I think that we are going to show
25 the video. This is just -- this is just when

1 Dr. Rhett has put the vacuum on and he is just
2 starting to pull on this. You can see -- I'm
3 sorry, this is embarrassing, but this is --
4 this is the vaginal area, this is the
5 introitus, this is the vacuum and you can see
6 that we're seeing that the nubbin here is just
7 -- almost all of the vacuum is inside the
8 vagina. That's why I said that it can't be,
9 if in fact the by is down at the introitus, as
10 Dr. Rhett says it was.

11 Q. Thank you. Doctor, as I was watching
12 you, I couldn't help but think that it looked
13 like some part of that bell and the cuff was
14 interacting with the baby's head in such a way
15 that part of that cuff was overlapping the
16 head. Can you tell us whether or not you took
17 that into account in directing the creation of
18 that diagram. If so, please explain.

19 A. I did. In fact, as this vacuum comes in
20 the sphere of the head does go down. It goes
21 down about a centimeter in this. So, yes,
22 when we're talking about this being six
23 centimeters, I am actually counting, my view,
24 that there are five centimeters from the head
25 and that's where I get that we're at -- in

1 fact, if it went down two centimeters, then we
2 would have four centimeters left and we could
3 be at plus one. That's why I said in my view
4 it's at zero or plus one, depending upon what
5 the depth of the head is and it's not going to
6 be more than two centimeters down into this
7 cup.

8 . Q. Do you have an opinion to a reasonable
9 degree of medical certainty as to whether or
10 not it would be in compliance with generally
11 accepted standard of obstetrical practice or
12 in breach of those standards for Dr. Rhett to
13 apply a vacuum to Jayden W. with his
14 head in the midpelvis, at zero to plus one?

15 A. I think that we already went through
16 this. It is -- because of the increased risk,
17 this demands that there be a strong indication
18 an that there be informed consent. I think
19 that there has not been an indication and that
20 there was not consent; so, therefore, yes, I
21 think it's a deviation from the standard of
22 care.

23 Q. Let's turn to how one properly uses a
24 vacuum extractor. Please explain to us
25 whether there is a proper way to do it and

1 commonly, uh, improper ways of doing it.

2 A. Okay. Because this is a suction cup, it
3 is very important that this suction cup be
4 pulled straight -- straight, not to the side,
5 not rocked back and forth, because in fact
6 that can cause damage or you can break the
7 seal.

8 Same as we were talking about the vacuum
9 hose that you would put on your hand. You
10 know, if you pull straight you can actually
11 pull your hand along, but if you pull it
12 sideways you're going to break the suction.

13 In the situation of a baby, if you're
14 pulling sideway, what we call "rocking", that
15 is in fact dangerous because it causes these
16 kinds of abnormalities that we are talking
17 about.

18 The normal way to pull on this is
19 straight out in the axis of the birth canal.
20 The axis of the birth canal actually comes
21 down and goes up. When you look at a pelvis,
22 it's kind of like the slide that the skiers go
23 down and then come up. It's the same with the
24 birth canal. So one has to pull the baby down
25 literally about at a forty-five degree angle,

1 straight out, and then as the baby's occiput
2 comes below the pubic synthesis, below the
3 pubic bone here in the front, now it comes up.
4 It's all in the axis of the birth canal. Not
5 to the side, not pulling to the side; not up
6 and down, wiggling around. It literally is --
7 one is pulling and you're normally pulling the
8 cup to see the descent as you come down and
9 then one goes (witness gesturing).

10 Q. Do you have an opinion as to whether or
11 not Dr. Rhett complied with the generally
12 accepted standard of the practice for
13 obstetricians in terms of how he used the
14 vacuum extraction technique on Jayden
15 Washington?

16 A. I do.

17 Q. What is your opinion?

18 A. I think that in this delivery that Dr.
19 Rhett did not just pull in the axis of the
20 birth canal. In fact, he moved the vacuum
21 around quite a bit, as we will see on the
22 birth video.

23 Q. You've mentioned that birth video several
24 times. May I suggest that we go ahead and
25 play that birth video now? And, Dr. Oakes, I

1 am going to ask you to please direct Mike
2 Hood, our tech guy, to pause or go back if you
3 need to explain what is being shown on the
4 video --

5 (video playing with sound).

6 A. We jumped there. Could we start at
7 thirty-one?

8 Q. (Video playing) ---

9 A. Stop just a minute. I want you to
10 listen. In the background, you can listen to
11 the baby's heart, that beep, beep, beep, beep.
12 That's the baby's heart that is being
13 registered from a scalp electrode, an
14 electrode that is actually put onto the baby's
15 scalp. That is recording the baby's heart
16 rate. It is that -- it that beep, as you get
17 that rhythm, that becomes a concern to Dr.
18 Rhett, because it -- it gets down to ninety to
19 a hundred but then it speeds up. In
20 particular, when Dr. Rhett does an
21 examination, it speeds up.

22 That actually is -- in taking of babies,
23 if you stimulate a baby's scalp and its heart
24 rate speeds up, that is one of the most
25 reassuring signs that there is about the

1 baby's condition. It's reacting to its
2 environment and it's reacting in a very
3 positive way. There has never been a report
4 of a baby who is acidotic if it has an
5 acceleration with scalp stimulation. That
6 says that the baby's pH, the baby's pH is
7 above seven point two at that point, which
8 means that it is not -- that is not
9 asphyxiated.

10 Q. Okay. Before we go on, let's define two
11 phrases. What is "asphyxiated"?

12 A. Asphyxiated is a description of lack of
13 oxygen and an accumulation of acid. So that's
14 -- that's a risk that one gets to when you
15 don't have enough oxygen.

16 Q. You mentioned pH, what does a pH test
17 measure?

18 A. That measures the amount of acidity or
19 alkalinity, in this case. A normal pH -- in
20 humans, the normal pH is right around seven
21 point four. But in babies -- for babies to
22 have difficulty, it has to be below seven
23 point two, below seven point two.

24 Q. What is the ---

25 A. I'm sorry. It has to be below seven point

1 zero -- not two, but below seven point zero.

2 So, like I said, when a baby responds to scalp
3 stimulation, it has a pH of at least seven
4 point two or higher.

5 Q. What does that tell us, seven point two
6 or higher?

7 A. That it is not asphyxiated. It's not
8 having any problem because of the lack of
9 oxygen and acid buildup.

10 Q. Thank you. Please continue -- (video
11 playing with sound).

12 A. Now, see if you can keep that rate --
13 beep, beep, beep, -- no, no, keep playing --
14 (video playing).

15 Okay, now do you hear it speeding up?
16 It's faster than it was.

17 Now we can't hear it because they're
18 talking.

19 Now, there (video paused). Dr. Rhett is
20 examining her and you can see, literally, his
21 entire fingers are way up to here inside the
22 vagina. That means that the head cannot be --
23 cannot be down there. There's not room for
24 the fingers to go all the way in.

25 (Video playing), listen to the heart

1 beat.

2 Hear how fast it is: bing, bing, bing, bing,
3 bing, bing, bing, bing, bing. It has speeded
4 up because he is stimulating the baby's head.
5 That's what I told you was reassuring. Before
6 he did that, it was going ninety to a hundred.

7 (Video playing), now when she pushes
8 you'll see -- you'll hear the heart rate is
9 back and you'll hear the heart rate goes down.
10 That's a very common thing. We call that the
11 second stage of labor. So this is the part
12 that's after the complete dilation to have,
13 with a push, the heart rate go down.

14 (Video playing), see how his hand is allt
15 he way up in the vagina right here? His
16 fingers are all the way up to the entire
17 pelvis, all digits. You can't do that if the
18 baby's head is obstructing the area.

19 (Video playing), now you can just barely
20 hear the heart rate in the background. All
21 during the time that they're talking you can't
22 hear it because they're covering it up, but
23 it's about a hundred.

24 (Video playing), stop. Stop now. You
25 hear that, he said "we need to get the baby

1 out." The family thinks that that means that
2 there needs to be a C-section. Then whoever
3 is in the foreground says, "Oh, no, no, no.
4 It's not going to be a C-section." But they
5 don't say what it is because, in fact, nobody
6 has said anything about what we're going to do
7 or not do except "we need to get the baby
8 out."

9 That's not informed consent. That
10 doesn't say what in fact you're doing and you
11 can see that nobody there understands what in
12 fact is going to be done.

13 Go ahead, (video playing). Now he has
14 dislodged the connection from the, the scalp
15 electrodes and he's re-, he's reattaching,
16 putting it in. It goes on a plat on her leg.
17 He hasn't pulled the electrode, that's still
18 in.

19 (Video playing), now see where the entire
20 hand, right there the entire hand is inside
21 the vagina again. The fingers are all the way
22 up to his digits, his two digits.

23 (Video playing), now he's taking the
24 electrode off. He's undoing the wires. He's
25 not doing that by taking it out from inside.

1 All you do is separate the wires. It
2 unscrews, this is the little screw that goes
3 onto the baby's scalp. He undoes that. See
4 how close his fingers are to the baby's head?
5 Not even inside the vagina.

6 (Video playing), stop right there --
7 stop. This is where I'm talking about right
8 now. You can see that the entire bell right
9 there that we're talking about, the entire
10 bell, all we see is a little bit of the nubbin
11 is coming out of the vagina. The entire bell
12 is inside the vagina. If the baby's head was
13 sitting right at the outlet, it couldn't go
14 inside. There'd be no room.

15 (Video playing), this is where he starts
16 to pull. Now see how he's moving that to the
17 side? All you're supposed to do is to be
18 pulling down, not moving it to the side. Now
19 you can see the nubbin, the end nubbin that I
20 showed you. This part right here is what we
21 can see and we are just starting to see, we're
22 just starting to see the bell right there, the
23 upper part of this. We are -- we can see the
24 nubbin but, like I said, again this is six
25 centimeters from that, the break right there,

1 and we're just starting to see that now. It's
2 descended enough. At this point it's about a
3 three-plus station. Go ahead.

4 (Video playing), now see how he moves it
5 to the right side. Instead of holding it on
6 the axis he moves it to the right.

7 (Video playing), and now to the left.

8 (Video playing), and now there isn't a
9 constant pressure in the way the axis is being
10 moved around.

11 (Video playing), now he is pulling to the
12 left inside of down.

13 (Video playing), he pulled left.

14 (Video playing), we are pulling it right.

15 (Video playing), we pulled left.

16 (Video playing), we pull down -- freeze
17 it there. What I want you to see up there,
18 see this little nubbin, and you're going to
19 see when that when it comes out.

20 (Video playing), this is the part of the
21 scalp that goes up into the vacuum. And we're
22 -- when we're talking about station, it is not
23 where the scalp is. It's where the bony
24 contours of the hear are.

25 (Video playing), now bringing it out. So

1 every time that there's a vacuum you develop
2 this nubbin on the head. We call it a
3 chignon. When it comes out, I'll freeze it
4 again.

5 (Video playing), you can see that at this
6 time on this that the baby is out. It's not
7 crying yet but as soon as he stimulates it, it
8 starts crying. If it had a brain bleed that's
9 already compressed, it wouldn't cry.

10 (Video playing), I want to freeze it --
11 there. It's so quikc. It --the baby had this
12 little "nubbin" on his head, on the occiput
13 right back here where the vacuum was. That's
14 a normal part of the vacuum, it causes a bump
15 on the day that takes a few days to resolve.
16 That's a normal accompaniment. Go ahead.

17 (Video playing), I think that's -- go
18 ahead.

19 (Video playing), it's only when he raises
20 it up there that you can see -- he hasn't
21 raised it up yet. We're only seeing -- now
22 watch this part as he turns around. Go ahead
23 -advance it slow, slowly advance it.

24 (Video playing), right here. It's hard
25 to see but -- okay. Now the baby is crying,

1 very lustily crying. That's -- at that point
2 that's a normal baby, normal response. It
3 takes that kind of delay before it cries.

4 Butt he problem develops that this baby
5 has bleeding going on inside, underneath that
6 vacuum, ---

7 CHILTON SIMMONS: Objection, Your
8 Honor.

9 THE COURT: Just a moment. What is
10 your objection?

11 CHILTON SIMMONS: He is an expert
12 witness and he is testifying about causation.

13 THE COURT: Do you want to respond
14 to that, Counselor?

15 EDWARD GRAHAM: Yes, sir. He's
16 been qualified as an obstetrician and it
17 relates to what he does.

18 THE COURT: Overruled. We'll give
19 you cross-examination on that point.

20 CHILTON SIMMONS: Thank you, Your
21 Honor.

22 DIRECT EXAMINATION CONTINUED

23 BY EDWARD GRAHAM:

24 Q. Please continue, Doctor.

25 A. So the baby is very active, very active,

1 normal, normal response but in fact has
2 bleeding going on inside its head in several
3 different places and that accumulates and ends
4 up having this deterioration; such that this
5 baby has to get transferred to MUSC, where in
6 fact they diagnose that he has a brain bleed
7 which has to be operated on and drained. It's
8 deterioration is such that if they didn't do
9 that, this baby was going to die. But also
10 because of that, it ends up having some
11 neurological sequella that results because of
12 the bleeds that were there during the time
13 that the bleedings happened and you can't --
14 you can't make that go away.

15 Q. Thank you. All right. Doctor, let me
16 turn to the subject of knowledge of anatomy
17 and vacuum risks and obstetrical principles
18 about how to properly use a vacuum.

19 What role does knowledge of those
20 categories play in terms of proper management
21 of labor and delivery?

22 A. I think that the fundamentals of any
23 practice is one has to have the knowledge of
24 the subject in order to, in order to practice
25 it both effectively and to keep patients
26 informed about what in fact is going on and

1 what the risks are.

2 If one doesn't know the basic knowledge,
3 you can't inform about a patient about what
4 the risks and the alternatives are.

5 This is -- this is the area that we talk
6 about as clinical judgment. You take
7 knowledge, basic knowledge and you apply this
8 basic knowledge. But you can't apply it if
9 you don't it. When you don't know it, you
10 should be applying it because in fact it's
11 going to be applied inaccurately.

12 Q. Do you have an opinion to a reasonable
13 degree of medical certainty as to whether or
14 not Dr. Rhett had sufficient knowledge of
15 anatomy, vacuum risks and vacuum usage to
16 properly manage this labor and delivery with a
17 vacuum.

18 A. I do.

19 Q. What is your opinion?

20 A. I think that Dr. Rhett demonstrates in
21 his deposition that he lacks very fundamental
22 basic obstetric knowledge.

23 Q. Thank you.

24 EDWARD GRAHAM: If Your Honor
25 pleases, may we approach? We've work through
26 some issues but there's one that we need your

1 help on.

2 THE COURT: All right, you may
3 approach.

4 (OFF RECORD BENCH CONFERENCE)

5 THE COURT: All right. Thank you
6 for your patience, Ladies and Gentlemen of the
7 jury while we resolved an issue. You're ready
8 to proceed, Mr. Graham?

9 EDWARD GRAHAM: Yes, Your Honor.

10 THE COURT: Please do.

11 DIRECT EXAMINATION CONTINUED

12 BY EDWARD GRAHAM:

13 Q. Dr. Oakes, you made reference to some
14 portions of Dr. Rhett's deposition, I believe.

15 A. Yes.

16 Q. All right. Have you made arrangements
17 with Mr. (Mike) Hood to have him play those
18 for the jury? If so, please go ahead.

19 A. Your Honor, if I could -- I have thirty-
20 six of these, are we playing all thirty-six
21 right now?

22 Q. No, no. Right now we're playing one
23 through four.

24 A. Okay. One through four deal with the ---

25 MOLLY CRAIG: Your Honor, for
26 the record, we would object based on our

1 previous discussion.

2 THE COURT: Let's cut it off. All
3 right. Now let me talk to our court reporter.
4 Madame Court Reporter, in order for the record
5 to correctly reflect what we are doing, you're
6 taking down what the lawyers and the witness
7 are saying but I'll need for you to detail
8 page and line numbers so that anyone reviewing
9 these proceedings will know what we're showing
10 on the screen at this time. All right.
11 That's point number one.

12 Second point was -- just a moment,
13 Counsel. Please listen.

14 There's an objection from the
15 defense. What is your objection?

16 MOLLY CRAIG: Your Honor, our
17 objection is that the page and line
18 designations that plaintiff would like to show
19 the jury are out of context and we would like
20 to add additional pages and lines to be played
21 from Dr. Rhett's deposition to put it in
22 context.

23 THE COURT: All right. Ladies and
24 Gentlemen, ---

25 JAY DAVIS: Your Honor, I join in
26 that objection. Sorry to interrupt.

1 THE COURT: Very good. From both
2 defendants, (affirmative nod). Ladies and
3 Gentlemen, one reason we took a little bit of
4 extra time at lunch today was to discuss this
5 issue. The Court rules permit a party, the
6 plaintiff in this instance, to use another
7 party's deposition for any purpose. He may
8 just take it up, publish it. It's not a
9 witness, this is the deposition of a party.

10 The Rules also allow that the party whose
11 deposition is being published may publish
12 additional parts of that deposition if they
13 believe it completes the thought that's being
14 made, or whatever the discussion is about.

15 Now what the plaintiff proposes to do
16 here is to play a piece of the deposition and
17 have the witness respond to it. The defendant
18 says, as you heard the objection, that's not
19 fair, that it takes it out of context.

20 Well, in order to -- we could never
21 really present it if we played a piece and
22 then stopped, played another piece and then
23 had the witness -- it just would be very
24 confusing.

25 So what we're going to do is allow the
26 plaintiff to play the portions that they

1 believe are appropriate and then n cross we're
2 going to allow the defendants to play what
3 they believe is a more full explanation of the
4 portion that the plaintiff wishes to play. So
5 please reserve your judgment until such tme as
6 you've seen the entire portions as to what
7 weight or value you may give this part of the
8 testimony.

9 Now, with that understanding, the
10 objections are overruled with the cautionary
11 instruction, and you may go forward.

12 Please tell us what are the page and
13 lines that you first intend to publish in this
14 first group.

15 EDWARD GRAHAM: Thank you, Your
16 Honor:

17 Page 58, Lines 1 through 8

18 Page 61, Lines 7 through 12

19 Page 62, Lines 4 through

20 Page 63, Line 1.

21 THE COURT: All right. Now, before
22 we do this again, the further explanation is,
23 unlike you may see on television where the
24 parties come in and they testify and everyone
25 hears something for the first time in the
26 courtroom, that's not really the way that it

1 works in civil litigation. The parties are
2 often deposed, meaning that they sit down in
3 front of a court reporter under oath and both
4 sides are able to question them. The
5 testimony is preserved and it then may be
6 later used in trial. So for our jury's
7 edification, what is the date and time of the
8 deposition from which you are publishing?

9 EDWARD GRAHAM: July 21, 2008,
10 starting at 3:10 p.m.

11 THE COURT: All right.

12 EDWARD GRAHAM: At the Hood Law
13 Firm.

14 THE COURT: All right. Very good,
15 you may go ahead and play the first portion.

16 MOLLY CRAIG: Your Honor, he
17 hasn't asked the question yet, but just for
18 clarification, for the record would you like
19 for us to identify the page and line
20 designations that we would like to include, to
21 keep it complete?

22 THE COURT: Well, ----

23 MOLLY CRAIG: Would that be
24 helpful for the record?

25 THE COURT: Well, not at this

1 juncture. We'll let you do that at a later
2 time, so as to not break the flow of what the
3 plaintiff attempts to do.

4 MOLLY CRAIG: Yes, sir, I
5 understand. Thank you.

6 THE COURT: Very good.

7 EDWARD GRAHAM: Thank you, Your
8 Honor.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. (Video playing) ---

12 (JURORS INDICATE VIDEOTAPE SOUND TOO LOW)

13 DIRECT EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. (Video playing):

16 Q. *My question is not tied to this*
17 *case. Just in general, what are the benefits*
18 *of vy extraction?*

19 A. *To assist in a vaginal delivery, it*
20 *makes it easier for the mother and the baby.*
21 *Decreases the timeline between -- it makes the*
22 *delivery faster. "Faster" may not be the*
23 *right term. Maybe hastens the delivery is a*
24 *better way to say that.*

25 (Video Stopped)

1 MOLLY CRAIG: Your Honor, that's
2 not a correct portion of this deposition that
3 was just palyed to the jury.

4 THE COURT: Counsel, that's ---

5 EDWARD GRAHAM: I believe it is,
6 Your Honor.

7 THE WITNESS: No.

8 MOLLY CRAIG: Your Honor, it's
9 not.

10 THE WITNESS: I agree. This is
11 Page 56, the second one. That wasn't the
12 first one.

13 MOLLY CRAIG: I believe that he
14 identified Page 58, Line 12. This was ---

15 THE WITNESS: This wasn't. This
16 was Page 56, Line 1. It's the second
17 designation.

18 EDWARD GRAHAM: There were two
19 clips that we described, Your Honor. We -- I
20 told you about four clips. This might not be
21 in the same order that counsel is looking at
22 them but those four clips are all part of this
23 section.

24 THE COURT: Well, to avoid this in
25 the future, why are they not in order?

1 EDWARD GRAHAM: I thought they
2 were, Your Honor.

3 THE COURT: All right. Again,
4 we'll give you latitude. We'll give you -- if
5 you believe you need to designate additional
6 portions; and most likely this will occur
7 tomorrow, so you'll have time over the evenign
8 hour to look at it. The objection is noted
9 for the record but at this juncture I'm going
10 to continue to overrule it.

11 MOLLY CRAIG: Yes, sir, Your
12 Honor.

13 THE COURT: Thank you. Go ahead.

14 EDWARD GRAHAM: Your Honor, there
15 was a problem with some of the jurors hearing
16 it at the beginning. May we start over?

17 THE COURT: There was. Yes, you
18 may.

19 EDWARD GRAHAM: Thank you.

20 DIRECT EXAMINATION CONTINUED

21 BY EDWARD GRAHAM:

22 Q. (Video playing):

23 Q. My question is not tied to this
24 case. Just in general, what are the benefits
25 of vy extraction?

1 A. To assist in a vaginal delivery,
2 it makes it easier for the mother and the
3 baby. Decreases the timeline between -- it
4 makes the delivery faster. "Faster" may not
5 be the right term. Maybe hastens the delivery
6 is a better way to say that.

7 Q. That's all that I am asking.
8 Would it, would it be improper to use a vacuum
9 to -- to use a vacuum if there was not an
10 indication to use a vacuum?

11 A. It's always been -- I've never
12 seen anybody put a vacuum on. I've done over
13 a thousand vacuums with, you know, an
14 indication. An indication might be fatigue or
15 distress or
16 -- I don't know that I've ever seen anybody do
17 what you're talking about. Do a vacuum
18 extraction without some indication to put it
19 on.

20 Q. Would it be wrong to do that?

21 A. Might be.

22 (Video stopped)

23 Q. Let me stop you right there, Dr. Oakes.
24 Is speeding up the delivery to make it faster
25 or hasten the deliver an appropriate

1 indication?

2 A. That is not an indication.

3 Q. (Video playing):

4 Q. Is the mother's consent required
5 before an obstetrician may properly use a
6 vacuum?

7 A. I've never gotten a mother's
8 consent in over a thousand of those that I've
9 done. She consented to obstetrical care. I
10 assumed she trusted me to do the best I knew
11 how to do.

12 Q. My question was, what warnings,
13 if any, do you believe an obstetrician should
14 give the mother prior to using a vacuum
15 extraction? Your answer didn't specifically
16 say anything about warnings. Are you telling
17 me that no warnings are needed?

18 A. I've never given a warning to a
19 mother whose baby I was delivering before. I
20 wouldn't think so.

21 Q. All right. And you did not give
22 Jamsetta Washington any warning about the
23 risks of vacuum extraction?

24 A. No, I did not.

25 Q. And you did not obtain her

1 informed consent to the use of a vacuum?

2 BY MS. CRAIG: Objection.

3 THE WITNESS: We got consent to
4 do obstetrical care, that's part of the
5 obstetrical care.

6 EXAMINATION CONTINUED

7 BY EDWARD GRAHAM:

8 Q. Apart from that general consent,
9 you never obtained specific consent to use of
10 a vacuum, did you?

11 BY MS. CRAIG: Same objection.

12 THE WITNESS: No, sir.

13 (Video Stopped)

14 MOLLY CRAIG: Your Honor, that's
15 not a correct portion. Your Honor, could we
16 approach briefly?

17 THE COURT: You may.

18 (OFF RECORD BENCH CONFERENCE)

19 THE COURT: Ladies and Gentlemen,
20 again thank you for your patience. You may
21 proceed to the next area.

22 EDWARD GRAHAM: Thank you Your
23 Honor.

24 DIRECT EXAMINATION CONTINUED

25 BY EDWARD GRAHAM:

1 Q. Before we play the next clip, Doctor, how
2 would you describe Dr. Rhett's refusal to give
3 the patient warnings and alternatives,
4 warnings about and alternatives to the use of
5 a vacuum at this type of station?

6 A. I think that it -- it goes back to just
7 what that clip says, there is no informed
8 consent in this case. Dr. Rhett doesn't think
9 it's necessary to give informed consent,
10 doesn't give an informed consent, but in fact
11 every operative delivery requires an informed
12 consent.

13 CHILTON SIMMONS: Objection, Your
14 Honor.

15 THE COURT: On what basis?

16 CHILTON SIMMONS: This doctor is not
17 licensed in South Carolina and is not
18 qualified to say that.

19 THE COURT: What response do you
20 have to that?

21 EDWARD GRAHAM: He's qualified as
22 an obstetrician. There's no indication --
23 well, I can ask him foundation questions about
24 knowledge that ---

25 THE COURT: Please do.

1 EDWARD GRAHAM: In different
2 states.

3 THE COURT: Please do.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. Dr. Oakes, you mentioned that were a
7 Board-certified obstetrician with a board
8 specialty certification in maternal/fetal
9 medicine?

10 A. Yes.

11 Q. Are you a member of ACOG?

12 A. I am.

13 Q. Do you know whether or not Dr. Rhett is a
14 Board-certified obstetrician?

15 A. He is.

16 Q. Do you know whether he's a member of
17 ACOG?

18 A. I believe he is.

19 Q. Do you know whether ACOG and the
20 certification group have local regional
21 standards that vary from place to place or do
22 they have national rules about how to safely
23 use a vacuum?

24 A. In fact, the guidelines that are
25 promulgated by the American College of

1 Obstetrics & Gynecology are nationwide
2 guidelines. They are not regional-only, they
3 are not statewide.

4 THE COURT: All right. That's
5 sufficient, Counsel. I am going to overrule
6 your objection and give you cross examination
7 on that point when you cross-examine.

8 You may proceed.

9 EDWARD GRAHAM: Thank you, Your
10 Honor.

11 DIRECT EXAMINATION CONTINUED

12
13 BY EDWARD GRAHAM:

14 Q. How would you describe Dr. Rhett's
15 refusal to give the patient informed consent
16 in terms of whether it appears to be
17 accidental or on purpose?

18 A. I think it's very clear from the response
19 to the question that it's not, it's not
20 accidental. He believes that the general
21 consent authorizes all parts of obstetric
22 care, but that just is not the case.

23 Q. Thank you.

24 EDWARD GRAHAM: Your Honor, we
25 would next like to play the video clips from

1 Dr. Rhett's deposition:

2 Page 12, Lines 13 through 17

3 Page 33, Lines 21 through 23

4 Page 142, Lines 15 through

5 Page 143, Line 12.

6 DIRECT EXAMINATION CONTINUED

7 BY EDWARD GRAHAM:

8 Q. (Video playing):

9 Q. What is engagement?

10 A. Engagement means the baby's head has
11 moved down into the pelvis.

12 Q. Can you be more specific?

13 A. No.

14 Q. Can you clarify for me, please, sir,
15 exactly what is engagement?

16 A. No.

17 Q. So as you sit here today, can you
18 tell me with confidence what engagement is?

19 A. Engagement is, no. I can't do that.
20 It's a clinical thing. I could tell you if I
21 went and examined somebody today what it was,
22 but I couldn't write out a definition. So,
23 no, sir, I could not tell you.

24 Q. If a baby has just become engaged in
25 the birth canal, what is his or her station?

1 A. Minus two.

2 Q. And how do you determine that?

3 A. By vaginal exam.

4 Q. But explain to me where the minus
5 two comes from, minus two above what?

6 A. Well, it's supposed to be some part
7 of the hear above the ischial tuberosities,
8 but I can't remember that answer now. That's
9 what I've already explained to you.

10 Q. But ---

11 A. But clinically, having done this for
12 literally thousands of deliveries, I know
13 exactly what I mean by that and, you know,
14 it's just a clinical use. It's not a
15 definition that I could write down.
16 Obviously, I can't even state it here.

17 (Video Stopped)

18 Q. Dr. Oakes, is it true that when the
19 baby's head has just become engaged that the
20 baby is at a minus two?

21 A. Now. I think when we went through our
22 basic definitions that it means that it
23 situation is at zero, not at a minus station.

24 Q. Do you have an opinion to a reasonable
25 degree of medical certainty as to whether to

1 not it conforms to or breaches the generally
2 accepted standards of obstetrical care in
3 terms of not knowing whether engagement is
4 zero station or minus two?

5 A. I think that this is -- this is basic
6 obstetric knowledge. This is what -- this is
7 not what -- obstetricians learn this, but
8 medical students learn this also. This is
9 basic obstetrics.

10 That's kind of the reason why we're
11 playing these clips, because there's a whole
12 bunch of these that Dr. Rhett demonstrates
13 that he does not have the basic knowledge of
14 obstetrics in. When you don't have that, in
15 my opinion you cannot practice clinical
16 judgment because you don't have the basis, the
17 facts, the knowledge to base it upon.

18 EDWARD GRAHAM: Your Honor, the
19 next clips that we would like to play are:

20 Page 13, Lines 15 through 23

21 Page 14, Lines 9 through

22 Page 15, Line 17

23 Excuse me, it's just the first one
24 that I mentioned, Page 13, Lines 15 through
25 23.

1 DIRECT EXAMINATION CONTINUED

2 BY EDWARD GRAHAM:

3 Q. (Video playing):

4 Q. What does zero station mean?

5 A. Zero means the baby is well
6 engaged in the pelvis and about to come out.

7 Q. Can you be more specific about
8 "well engaged in the pelvis"?

9 A. Well, when you do a pelvic exam,
10 you can feel the baby's head. The baby has
11 come past -- I can't remember the name of the
12 little bony notches right now. Sorry.

13 (Video Stopped)

14 Q. Dr. Oakes, do you have an opinion to
15 reasonable degree of medical certainty as to
16 whether it conforms to or breaches the
17 generally accepted standards of obstetrical
18 practice for an obstetrician to think that
19 zero station means that the head is about to
20 come out?

21 A. I think, as we talked about, that it is
22 in fact just -- the biparietal diameter is
23 just entering the pelvis, so this is -- this
24 is the widest part of the head is just
25 starting down the birth canal.

1 EDWARD GRAHAM: Your Honor, our
2 next clip is Page 14, Lines 9 through Page 15,
3 Line 17.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. (Video playing):

7 Q. How would you determine the
8 station of the baby within the birth canal?

9 A. By pelvic exam.

10 Q. What about the pelvic exam would
11 tell you the baby's station?

12 A. How far down in the pelvis it is
13 and how far away from the introitus it is.

14 Q. Okay. Can you be more specific?

15 A. Well, when the baby is at the
16 introitus, everybody consider that at least
17 plus two. It's all done in centimeters. So
18 if you go backwards two centimeters from
19 there, that would be the zero station. If you
20 go above that, you would be at a minus
21 station.

22 Q. All right. The introitus is a
23 plus two station?

24 A. Yes, at least.

25 Q. Well, it is a -- what is the

1 *introitus in terms of a station? If it is at*
2 *least plus two, ---*

3 A. *Yes, sir.*

4 Q. *I mean, is it plus two, plus,*
5 *three, plus four, plus five, plus ten? Could*
6 *you just give me a description, an overall*
7 *description of what the station numbering*
8 *system is all about?*

9 A. *Well, the numbering system is*
10 *about measuring the progress of the baby*
11 *through the pelvis. I'm sorry that I can't*
12 *define what zero station. I know that as the*
13 *baby gets closer and closer to delivery that*
14 *the baby is at plus two station or so and, you*
15 *know, it's just a matter of a few pushes and*
16 *the baby will usually be delivered.*

17 Q. *All right.*

18 A. *The baby is sitting at the*
19 *introitus plus two; generally the top of the*
20 *baby's crown.*

21 Q. *At plus two the baby has*
22 *crowned, is that what you said?*

23 A. *Is crowning.*

24 *(Video stopped)*

25 Q. *Dr. Oakes, at plus two where is the*

1 baby's head?

2 A. It is three centimeters above the
3 introitus. So, in fact we are just the
4 beginning of the low station.

5 It's not crowning, as we talk about that
6 being plus five. And that's kind of
7 difficulty of deciding, you know, if you're
8 putting the vacuum -- you're putting the
9 vacuum on at a certain station but, in fact,
10 under the stations as described here, if one
11 says 'I put it on at plus two, as Dr. Rhett
12 said at the introitus, it clearly it not.

13 Q. Dr. Oakes, have there ever been -- you
14 mentioned a plus five on the bottom at the
15 crowning to a minus five above the engagement,
16 unengaged. Has there ever been a different
17 system that any obstetricians have used for
18 talking about a station in numerical terms?

19 A. There has, but the -- there were a number
20 of different classification but, in fact, in
21 1988 the American College of Obstetrics &
22 Gynecology unified the definitions on the plus
23 five rule, on the centimeter standard that
24 we're talking about here -- in 1988, and it
25 hasn't deviated since that time.

1 Q. So it's been plus five and minus five
2 since 1988?

3 A. Correct.

4 Q. According to ACOG?

5 A. Correct.

6 Q. Well, even if someone were still using
7 the plus-three system, would plus two be
8 crowning?

9 A. No. Even under that system zero or
10 engagement was still at zero. It wasn't at a
11 minus station. So it had to do with being
12 talked about in thirds, and that made it
13 difficult for anybody to translate because it
14 wasn't -- it was somewhat subjective, or more
15 subjective, than the centimeter situation is
16 now. That's why it was revised, to make it
17 more objective.

18 EDWARD GRAHAM: Your Honor, the
19 net clip that we would like to play is Page
20 21, Line 25 through Page 22, Line 4.

21 DIRECT EXAMINATION CONTINUED

22 BY EDWARD GRAHAM:

23 Q. (Video playing):

24 Q. So in your numbering system,
25 plus two is at the introitus?

1 A. Yes, sir.

2 Q. What part of the baby was at the
3 introitus?

4 A. Crown.

5 (Video Stopped)

6 EDWARD GRAHAM: Next, Your Honor,
7 is Page 143, Line 19 through Page 145, Line 4.

8 DIRECT EXAMINATION CONTINUED

9 BY EDWARD GRAHAM:

10 Q. (Video playing):

11 Q. Give me your definition of an
12 outlet vacuum extraction.

13 A. Plus two station or better, by
14 whatever I meant by that.

15 Q. And how do you determine the
16 plus two station?

17 A. By vaginal exam, by clinical
18 experience and vaginal exam.

19 Q. You can't give ---

20 A. I can't give you a definition of
21 that.

22 Q. So as you sit here today, you
23 can't give me a definition of what plus two
24 means?

25 A. No.

1 Q. What is your -- how many times
2 do you content you have done a low vacuum
3 extraction?

4 A. I don't know. Maybe a hundred.

5 Q. What is your definition of a low
6 vacuum extraction?

7 A. Just above minus two.

8 Q. How much above minus two?

9 A. Not more than a centimeter -- or
10 two.

11 Q. So, ---

12 A. If somebody has the ability to
13 push a baby out and they've brought the baby
14 down so that it is low in the pelvis, plus
15 two, plus one, then applying the vacuum and
16 giving it an attempt to delivery is very
17 appropriate and -- I would think that I
18 attempted some that never made it, where the
19 baby wouldn't come out and we ended up doing a
20 C-section.

21 Q. I want to make sure. When you
22 were talking about a low vacuum extraction,
23 did you say minus two or plus two?

24 A. Oh, I might have said minus two
25 but I meant to say plus two. I'm so sorry.

1 Q. All right.

2 A. I am not going to reach up to
3 somebody's liver to get their baby out.

4 Q. So you meant plus two or
5 slightly higher?

6 A. Or slightly higher.

7 Q. So plus one to plus two?

8 A. Yes, sir.

9 (Video Stopped)

10 Q. Dr. Oakes, what level of the pelvis is
11 the baby's head at if it is truly at plus one
12 or plus two?

13 A. Plus one, this is at the midpelvis. It
14 would be a midpelvis delivery.

15 Plus two would be low, at the beginning
16 of low.

17 Q. If it is above plus two in the birth
18 canal, what is it?

19 A. Well, it's -- it depends on what it is,
20 but if it is above plus two it can't be lower
21 outlet. It is either mid or it's high,
22 anything above that.

23 Q. By the way, when you use the word "high",
24 I know that you have defined high as
25 unengaged, but does high ever mean anything

1 other than that when you're talking about
2 station?

3 A. Well, if you really say what is a high
4 station, then that's the only answer that
5 there is, that is anything above zero. But,
6 in fact, as people are talking in conversation
7 they can talk about delivery at a higher
8 station than crowning, for example, and that
9 doesn't mean that it's a high station, it just
10 means higher up than crowning.

11 THE COURT: Counsel, if that
12 concludes your question on that last clip,
13 then we will end for the day.

14 EDWARD GRAHAM: Thank you, Your
15 Honor.

16 THE COURT: All right, Ladies and
17 Gentlemen. We are going to end our
18 proceedings for the day.

19 Again let me say to our witness,
20 over the evening break you should not talk to
21 lawyers on either side of the case because you
22 are a witness under testimony (sic). We will
23 resume your testimony tomorrow morning at
24 9:30. Ladies and Gentlemen, please be
25 in the jury room tomorrow morning by 9:30. We

1 will begin at that time. When you go home
2 tonight, your loved ones are going to say,
3 'What is the case about?' Just as I discussed
4 with you the other day, please don't discuss
5 the facts of the case with your loved ones. I
6 will ask you about that in the morning. Any
7 questions now about scheduling? I will see
8 tomorrow morning at 9:30.

9 Let's all remain where we are out of
10 respect for the jury as they leave the
11 courtroom for the day.

12 Have a nice evening, Ladies and
13 Gentlemen.

14 (JURY OUT @ 4:57 P.M.)

15 THE COURT: Dr. Oakes, you may
16 step down while we go through a few more
17 discussions.

18 THE WITNESS: Judge, can I ask a
19 quick question? Can I leave my stuff here or
20 shall I take it with me?

21 THE COURT: The courtroom will be
22 secured, you may leave your things here.

23 We had a sidebar, I meant -- let me
24 just state so that our record will be clear
25 that I have asked counsel not to ask for a

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9:30 A.M.

2

3 THE COURT: All right. Counsel, I
4 am told that there are some evidentiary issues
5 that we want to discuss and I will be glad to
6 take them up. I welcome everyone back to the
7 courtroom.

8 EDWARD GRAHAM: Thank you, Your
9 Honor. First of all, a week or so before
10 trial we did meet with Chilton Simmons and a
11 court reporter, downtown, and we agreed on
12 marking certain exhibits. However, we stopped
13 just short of having all the objections worked
14 out.

15 We have handed the court reporter a
16 list of those exhibits as we numbered them on
17 that occasion. We've had to make one change
18 because Your Honor marked one of those
19 Plaintiff's Exhibit 1 yesterday, so we will
20 make that correction. Otherwise, we want Your
21 Honor to know that the court reporter has that
22 list that we have been working off of.

23 Now, one of the main -- well, Mary
24 is prepared to handle those objections, so I
25 will just turn it over to her.

1 MOLLY CRAIG: Your Honor, if we
2 could ask what page designation he is
3 referring to?

4 EDWARD GRAHAM: This is not the
5 video of the deposition, this is part of the
6 birth video.

7 THE COURT: You may proceed.

8 EDWARD GRAHAM: Thank you, Your
9 Honor.

10 DIRECT EXAMINATION CONTINUED

11 BY EDWARD GRAHAM:

12 Q. Go ahead, (video playing) ---

13 A. Right there. Start again, go slowly.

14 Q. (Video playing) ---

15 A. The baby's head is just delivered, this
16 is the baby's head is out and the vacuum is
17 still on the baby's head -- just coming out
18 right there is the face.

19 Now, there is a loop of the baby's
20 umbilical cord around the neck -- there, he
21 just took it off. If you could -- (video
22 replayed), now, look at his left hand --
23 sorry, are you going back? (Video replayed),
24 now, okay -- yes -- you've gone too far, I
25 think.