

**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 2**

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1 (Video playing), this is where we want to go.
2 The vacuum comes off, the baby's head is --
3 there, there, you can just see, he lifted part
4 of the cord right over the baby's head. The
5 reason that's significant is that -- I believe
6 that there has been testimony that this cord
7 was very tight. This cord is not very tight.
8 When you have a very tight cord, you can't
9 lift it over the head like that.

10 When it's so tight, the only way that you
11 can get that cord loosened is that you
12 literally have to clamp it in two places and
13 cut it because it's so tight that the baby is
14 being hung up by the cord, if you will.

15 This one very loosely comes up, this is
16 what you would call a loose umbilical cord.

17 Q. Thank you. How frequent or infrequent
18 are umbilical cords, of any variety?

19 A. Quite frequent, so we're talking
20 something on the order of at least one out of
21 four deliveries.

22 Q. How concerning is a cord around the neck
23 that is loose?

24 A. It's not concerning because -- it's
25 common. There are some decelerations in the

1 fetal hear that are attributable to that but
2 those are also very common and not ominous.

3 Q. How concerning is a tight cord around the
4 neck?

5 A. The tighter that it is the more
6 concerning that it is, because when it gets so
7 tight as I talked about that you literally
8 cannot reduce it, that you have to cut it,
9 then there is compromise of the blood flow
10 going through that cord. If you remember
11 yesterday, we talked about that that is the
12 oxygen passage for the baby. It has to get
13 the oxygen through the cord, coming through
14 the placenta going to the baby. If that cord
15 gets obstructed, that's dangerous.

16 Q. Do you have an opinion to a reasonable
17 degree of medical certainty whether
18 decelerations of a baby's heart rate that may
19 be associated with a loose cord around the
20 neck would be an indication, to Dr. Rhett or
21 to any obstetrician, to use vacuum extraction
22 from the mid-pelvic station under these facts
23 and circumstances?

24 A. I think that it is not an indication for
25 a mid-pelvic delivery.

1 Q. Thank you, sir. Now, I would like to
2 turn back to Dr. Rhett's deposition. We
3 stopped yesterday and I believe that the last
4 line that we played was 145, Line 4. I would
5 next ask that we play Page 35, Lines 5 through
6 20.

7 (Video playing):

8 Q. What time interval defines an
9 arrest of descent for a woman's first baby?

10 A. I don't know.

11 Q. Is it more or less than one
12 hour?

13 A. I don't know.

14 Q. Is it more or less than two
15 hours?

16 A. I don't know.

17 Q. Is it more or less than three
18 hours?

19 A. I don't know.

20 Q. Is it more or less than four
21 hours?

22 A. Same answer.

23 Q. No matter what number that I
24 would ask you, you would say ---

25 A. If I knew the answer to your

1 question, I would have answered it. I just
2 didn't understand what you were -- I don't
3 know the answer to your question, so ...

4 (Video Stopped)

5 Q. Dr. Oakes, do you have an opinion to a
6 reasonable degree of medical certainty whether
7 an obstetrician who doesn't know long how long
8 a baby has to stay at the same station for
9 there to be an arrest of the descent? Do you
10 have an opinion as to whether or not such an
11 obstetrician is capable of or has sufficient
12 knowledge to properly manage labor and
13 delivery under these circumstances?

14 A. I think that this again is bread-and-
15 butter obstetrics, basics that an obstetrician
16 should have, knowledge -- this kind of
17 knowledge in order to clinically manage
18 obstetric cases.

19 Q. Do you have an opinion as to whether a
20 baby is reasonably safe when the delivery of
21 that baby is managed by someone who lacks that
22 knowledge?

23 A. I think that I said yesterday that the
24 important thing that physicians give patients
25 is their clinical judgment and they -- that

1 clinical judgment is the application of the
2 knowledge of the situation that is being
3 handled. If you -- if you don't have basic
4 knowledge, you can't expect that you can apply
5 the appropriate care because you don't have
6 anything to base it upon.

7 Q. So my question remains, do you have an
8 opinion whether a baby being delivered by such
9 an obstetrician would be reasonably safe in
10 the hands of such an obstetrician with that
11 level or knowledge, or lack of knowledge?

12 A. I think that it is problematic and that
13 it would be difficult to be done.

14 Q. Thank you, sir. Next I would like to
15 play clip number nine, Page 60, Lines 1
16 through Line 24, (video playing):

17 Q. All right. What if there is a
18 prolonged or arrested descent at minus one or
19 a zero station? Would that be
20 contraindication to use of a vacuum?

21 A. I don't think so. I think if
22 the baby comes on past that, you know, that if
23 it is down ready to be delivered it gets
24 delivered. Some times you'll have arrest of
25 descent and then you get over the arrest of

1 *descent; change in the baby's position, change*
2 *in the way it's turned in the pelvis; better*
3 *uterine contraction; those can all overcome a*
4 *slowed descent.*

5 *(Video Stopped)*

6 Q. Dr. Oakes, do you have an opinion about
7 the level of knowledge -- whether the level of
8 knowledge that is sufficient to manage labor
9 and delivery if the obstetrician believes it's
10 appropriate to use a vacuum when a baby has
11 the descent arrested at the minus one station?

12 A. I think, as we were talking about
13 yesterday, that is really a very dangerous
14 situation because, in fact, at this point the
15 baby's head is not engaged. This large part
16 of the baby's head, the biparietal diameter,
17 has not gone through the inlet of the pelvis.
18 So, in fact, the implication with this kind of
19 situation in a long labor is that this baby's
20 head is too big for this pelvis. In fact, is
21 somebody then forces it through, which you can
22 force just about anything through if there is
23 enough force, that is a very dangerous
24 situation and ends up with lots of
25 complications and sequelae.

1 Q. Let me ask next that we play clip number
2 ten, Page 22, Lines 11 through 14, (video
3 playing):

4 Q. What is the highest you count,
5 in terms of negative numbers?

6 A. The baby is completely engaged,
7 it would be minus eight, minus seven.

8 (Video stopped)

9 Q. Dr. Oakes, what is the highest negative
10 station?

11 A. Minus five.

12 Q. Are there any previous versions of
13 numerical station categories, has there ever
14 been a negative station higher than plus five?

15 A. No.

16 Q. Next I'd like to play Page 22, Line 15,
17 through Page 23, Line 23, and Page 24, Line 13
18 through Page 25, Line 3, (video playing):

19 Q. When the baby first becomes
20 engaged, what do you consider that station?

21 A. When the crown is at zero,
22 that's probably engaged. There's some other
23 definitions that say that the bicipital part
24 has to be down further than that, but the
25 common way of doing it is when the crown is --

1 and, I'm sorry but I can't remember that right
2 now. I just haven't thought about it in a
3 while.

4 Q. You said something about the
5 bicipital?

6 A. Yes.

7 Q. What is the bicipital?

8 A. That's the difference -- that's
9 the distance between the two occiputs, the
10 frontal part of the bone -- of the brain, the
11 skull.

12 Q. Okay. What occiputs are you
13 talking about?

14 A. I don't know if I can answer
15 that question. I've got myself a little
16 confused here.

17 Q. What is an occiput?

18 A. The part of the skull.

19 Q. Which part of the skull?

20 A. The lateral part of the skull.

21 Q. Lateral meaning to the side?

22 A. I don't know. That isn't right.

23 I don't know the other answer.

24 Q. You don't know what lateral is?

25 A. I know what lateral is, I know

1 what occiput is.

2 Q. I'm confused. When you said 'I
3 don't know', what is it that you're saying
4 that you don't know?

5 A. I am having a hard time
6 remembering the parts of the head right now.

7 Q. Okay. So as you sit here today,
8 can you tell me what an occiput is?

9 A. The occiput is the -- not as I
10 sit her now. I don't think I can accurately
11 say. I can guess but I can't tell you. I
12 don't know.

13 Q. And you referred earlier to the
14 bicipital, that's when you told me that ---

15 A. I'm gotten so mixed up now that
16 I don't know what I am talking about. So I
17 can't help you at all.

18 Q. Can you spell bicipital?

19 A. No. I'm not even sure that it
20 is a word now.

21 Q. You told me that the bicipital
22 was the difference between the two occiputs.
23 Can you tell me where the two occiputs are?

24 A. I don't know that there are two
25 occiputs.

1 Q. How many are there?

2 A. I think that there's just one.

3 Q. Well, what did you mean when you
4 said that the bicipital was the difference
5 between the two occiputs?

6 A. Obviously I'm confused, Mr.
7 Graham, and I don't know what I meant.

8 (Video Stopped)

9 Q. Dr. Oakes, what is bicipital?

10 A. That's a created word.

11 Q. Who created it?

12 A. I believe Dr. Rhett did.

13 Q. Is there any word in obstetrics known as
14 bicipital?

15 A. Not that I am aware of.

16 Q. How many occiputs does a baby have and an
17 adult have?

18 A. I think, as we went through yesterday,
19 there is one occiput. That's the back portion
20 of the head. It's not lateral, it's in the
21 back, the back part of the head.

22 Q. What is the name for the bones on the
23 side of the head, the lateral part of the
24 head?

25 A. Those are the parietal bones and that's

1 what we were describing as the largest
2 diameter of the head is the distance between
3 these two parietal bones. That's the
4 biparietal, not bicipital.

5 Q. What concerns, if any, do you have about
6 the level of knowledge of an obstetrician
7 delivering babies with a vacuum at mid-pelvis
8 if he thinks that the bones at the side of the
9 baby's head are occiputs and the line between
10 them is bicipital?

11 A. I think that the -- I think that the
12 purpose of showing all this clips, and many of
13 these clips, that's why they are being shown,
14 that's -- this is what, in my opinion,
15 demonstrates a basic lack of knowledge about
16 obstetrics. When you have a basic lack of
17 knowledge, then -- as I have said several
18 times, you can't clinically apply. So when in
19 fact it is applied, it's -- it can be applied
20 dangerously so, as I believe that it was in
21 this case.

22 Q. Thank you, sir. Next I would like to
23 play clip number twelve, Page 28, Lines 13
24 through 21, (video playing):

25 Q. What significance does ischial

1 spines have in the context of the baby's
2 station?

3 A. If the -- that is the -- when
4 the baby has gotten -- now, I have to think.
5 I haven't done this in a while -- I'm probably
6 going to get this wrong. The definition is
7 that when the baby's temporal bones are the
8 ischial spine, that is considered zero station
9 and that's usually about two to three
10 centimeters from the vaginal introitus.

11 (Video Stopped)

12 Next I would like to play page 31, Lines
13 5 through Page 32, Line 1, ---

14 A. If I may comment about that.

15 Q. Please, Doctor. What significance, if
16 any, does ---

17 A. Well, we just talked about -- we just
18 talked about -- he just answered that this was
19 -- we were talking about the significance of
20 the issue of ischial spines. As we went
21 through yesterday, the level of the ischial
22 spines is the mid-pelvis. That defines the
23 zero station.

24 But it is the leading part of the skull
25 that is there. The temporal bones have

1 nothing to do with any of this. The temporal
2 bones in fact are not even considered because
3 they are in fact inside. They are not the --
4 they are further down. They are not relevant
5 to the baby's size or to its position.

6 Again, we're talking about parietal bones
7 and we're talking about a zero station that is
8 five centimeters above the introitus, not two
9 to three.

10 Q. Thank you. Next I would like to play the
11 video clip from Page 31, Lines 5 through Page
12 32, Line 1, (video playing):

13 Q. What significance, if any, does
14 the biparietal diameter have in terms of
15 determining the baby's station?

16 A. I don't know

17 Q. What significant, if any, does
18 the biparietal have in terms of determining
19 whether the baby is engaged or not?

20 A. I'm not sure that I know how to
21 answer that question.

22 Q. Does it have anything to do with
23 that?

24 A. I'm certain that it does.

25 Q. What, if anything, do the

1 *ischial spines have to do with whether or not*
2 *a baby is engaged?*

3 A. *Well, the ischial spines, until*
4 *a baby comes down, you know, to the ischial*
5 *spines the baby is not engaged.*

6 Q. *Until which part of it?*

7 A. *The crown.*

8 Q. *So the baby is engaged when the*
9 *crown is even with the ischial spines?*

10 A. *No, that's not really true.*

11 *Probably has to be centimeters past that,*
12 *further down.*

13 *(Video Stopped)*

14 Q. *Dr. Oakes, ---*

15 A. *Please let me comment. We almost got to*
16 *the right answer, if you listened right at the*
17 *top. I mean, at the very end he says -- Mr.*
18 *Graham says, 'So it is engaged when it's at*
19 *zero?' Because that's what he said. Then he*
20 *corrects it, "No, that's not true, now we're*
21 *two to three centimeters below."*

22 This whole discussion about what is
23 station, what is engagement that we're talking
24 about is as basic as there is. This is stuff
25 that we test third-year medical students on wh

1 have taken third year medical rotation. They
2 are tested on this. They have to know this
3 information. Residents, this is -- I can't
4 even imagine that a resident who didn't know
5 this basic knowledge could finish a residency
6 and be able to practice obstetrics. This is
7 way beyond what is -- this is not esoteric.
8 It's just common, run-of-the-mill, everyday
9 obstetrics.

10 Q. Let's talk about the difference between
11 third year medical students and a resident.
12 How many years are there to medical school?

13 A. Four.

14 Q. And when you talk about a third-year
15 medical student, what happens that third year?

16 A. The first two years of medical school are
17 typically the basic science, so you're just
18 doing a lot of book learning. But then you
19 start sort of the clinical years, actually
20 assessing patients, taking care of patients
21 from one service to another. So they are on a
22 medical service, on a surgical service, a
23 pediatrics service and take an obstetric and
24 gynecology rotation. So this is when they
25 have a chance to really learn about obstetrics

1 and this is the kind of thing that they learn,
2 basic obstetrics.

3 Q. Let me understand, which third-year
4 medical students do an obstetrical rotation?
5 Is that just the people who want to be
6 obstetricians?

7 A. No, that's all medical students.

8 Q. So if somebody wants to be a radiologist,
9 they still do an obstetrical rotation, have to
10 learn this?

11 A. Correct.

12 Q. If somebody want to be a pediatrician,
13 they have to learn this stuff?

14 A. Correct.

15 Q. And how does the level of knowledge
16 expressed by Dr. Rhett in this video compare
17 with the level of knowledge you would expect
18 of a prospective radiologist or a urologist
19 taking an obstetrical internship in this third
20 year of medical school?

21 A. I'm -- as we're going through all these
22 clips, I'm saying this knowledge that we're
23 showing here is not the equivalent of a third-
24 year medical student.

25 Q. You mentioned residency. What type of

1 residency are you talking about?

2 A. Obstetrics and gynecology residency.

3 Q. In the residencies that you were involved
4 with in California, what would happen if an
5 obstetrical resident exhibited the kind of
6 knowledge that Dr. Rhett is exhibiting in his
7 deposition?

8 A. Well, this would not only be in
9 California, this is Savannah, Georgia. If a
10 resident demonstrated this knowledge, they
11 would not advance. They would either be --
12 would have to repeat a year or they would have
13 to be severed from the program.

14 Q. Now, I'm confused. You told us yesterday
15 and we heard in the opening statement that Dr.
16 Rhett is Board-certified. Can you comment on
17 that apparent contradiction between him being
18 Board-certified and him exhibiting the lack of
19 knowledge you described in his deposition?

20 A. I think that is a very, very important
21 question. And I -- to be -- in order to be
22 Board-certified in obstetrics and gynecology,
23 one has to take a very extensive written test
24 and a very extensive and difficult oral
25 examination, in which somebody is being

1 quizzed just like he is being quizzed here but
2 by a number of examiners. It's usually a
3 three-on-one situation, so three people
4 examining one person, so it's a very nervous
5 kind of thing.

6 Dr. Rhett obviously passed this, so that
7 tells me that Dr. Rhett must have had this
8 knowledge at one time. Something has
9 happened. This knowledge has disappeared.

10 Now, I don't know why it's disappeared
11 and I -- I would really like to know the
12 answer. But I think that when one
13 demonstrates -- when I recognizes that they
14 don't have that knowledge, they need to cease
15 doing whatever they're doing because, in fact,
16 it is dangerous.

17 Q. Next I would like to play clip fourteen,
18 Page 52, Lines 22, through Page 53, Line 2,
19 (video playing):

20 Q. Are there any risks to the baby
21 from use of a vacuum extraction?

22 A. The baby can get a small
23 subcutaneous bruise. The baby could get an
24 intracranial bleed, but there is some question
25 as to whether that's from the cu or from the

1 vaginal delivery itself.

2 (Video Stopped)

3 Q. Dr. Oakes, what is your reaction to that
4 testimony?

5 A. I think, as we have gone through
6 yesterday, there are many other risks to the
7 vacuum. In fact, truly intracranial
8 hemorrhage/bleeding in the brain is one of
9 those factors.

10 This is something that -- again, Dr.
11 Rhett, would know about or should know about
12 because the American College of Obstetrics &
13 Gynecology, which is the group of people that
14 are certified belong to, provides periodic
15 reviews of subjects and updates them
16 periodically and that's the -- and send this
17 out to every single practicing obstetrician;
18 so that they do in fact, should learn, do know
19 what the revisions are with the current status
20 of the situation.

21 Is this -- is this the right time to
22 introduce the technical bulletin, the practice
23 bulletin?

24 Q. Well, you mentioned the FDA. Would you
25 like to address that first?

1 A. No, I really would like to go to the
2 practice bulletin.

3 Q. Very well.

4 EDWARD GRAHAM: Your Honor, this
5 document has been marked as Exhibit 31. We
6 have a blowup of that that I would like to ask
7 th witness to come down and explain.

8 THE COURT: You may.

9 EDWARD GRAHAM: Thank you, Your
10 Honor.

11 DIRECT EXAMINATION CONTINUED

12 BY EDWARD GRAHAM:

13 Q. If you would just explain what this
14 demonstrates?

15 A. I want to show -- this is the first page
16 of ths bulletin. This comes -- this is the
17 American College of Obstetrics & Gynecology.
18 So it's from the professional group for all
19 certified obstetricians. Then send out,
20 periodically, these bulletins that are reviews
21 of information.

22 This particular one, the title of this is
23 "Operative Vaginal Delivery". So it's only
24 about delivery vaginally by forceps and
25 vacuum. You can see that this was issued as

1 Number 17 in June of 2000. So two years
2 before this case takes place, and it replaces
3 one that was from 1994. The purpose of the
4 American College is to update information so
5 that people know.

6 Now, they give a background and I -- I
7 want to say that the -- do you have all the
8 pages?

9 Q. I believe so.

10 A. Oh, yeah, here we are, second page. So
11 the first page was nine ninety-eight, this is
12 nine ninety-nine, but I want you to pay
13 attention to this right here (indicating).

14 Q. Excuse me, ---

15 A. And, I read: "In 1988, ACOG redefined
16 the classification of stations and the types
17 of forceps deliveries, the revised
18 classification on the level of the leading
19 bony part of the fetal head in centimeters at
20 or below the level of the maternal ischial
21 spines to define station as zero to five
22 centimeters instead of the previously used
23 method of describing the birth canal in terms
24 of thirds, zero to three."

25 So this practice bulletin that was sent

1 out is telling us, educating a person --
2 despite the fact that they did sent it out in
3 1988, it's just reiterating in 2000 that this
4 is the way that this is defined.

5 Now, they -- as part of this bulletin,
6 they have "Potential newborn complications of
7 vacuum assisted deliveries." As one reads
8 this along, the, (reading): "...vacuum cup
9 can cause scalp lift lacerations in portions
10 that are excessive. In addition, separation
11 of the scalp from the underlying structures
12 can lead to cephalohematoma..." -- that's what
13 I told you about, the blood underneath the
14 scalp -- "...which is more common in infants
15 delivered by vacuum, fourteen to sixteen
16 percent." Fourteen to sixteen percent of
17 these babies get cephalohematoma.

18 So then, then it goes on to talk about
19 the range of other kinds of bleeding. So
20 bleeding beyond the epicranial aponeurosis.
21 This is a subgaleal bleed, so a little deeper
22 bleed, (reading): "...twenty-six to forty-five
23 per thousand vacuum deliveries. Other
24 potential neonatal complications with vacuum
25 include intracranial hemorrhage,

1 hyperbilirubin, ..."

2 -- that means too much bilirubin in the blood.

3 -- "jaundice and anorectal hemorrhage."

4 So -- skipping down to the very last
5 line, (reading): "Overall, the incidence of
6 serious complications..." -- (repeating),
7 "Overall, the incidence of serious
8 complications with vacuum extraction is
9 approximately five percent." That is one of
10 out of twenty, one out of twenty.

11 So to say that this doesn't have a risk
12 is sort of nonsense because obviously the
13 American College is saying that it does.

14 And then, this is a very important line,
15 (reading): "Given the maternal and neonatal
16 risks associated with operative vaginal
17 delivery, it is important that the patient be
18 made aware of the potential complications of
19 the proposed procedure." This is informed
20 consent. The patient needs to know what the
21 risks are.

22 Then they go on to talk about, "In 1998,
23 the FDA, U.S. Food & Drug Administration,
24 released a public health advisory to alert
25 individuals that vacuum extractors may cause

1 serious complications, including subgaleal
2 hematoma and intracranial hemorrhage."
3 They then elaborate how they had a number of
4 deaths reported to them, so they put out this
5 Warning that this is not innocuous, that there
6 is indeed a true risk of a brain bleed from
7 vacuums.

8 Last line here, (reading): "Among the FDA
9 recommendations for use of the vacuum, two are
10 particularly useful." Now, this is -- this I
11 the American College picking out from the FDA
12 what they think is important.

13 Two things, (reading): "Rocking
14 movements or torque should not be applied to
15 the device. Only steady traction in the line
16 of the birth canal should be used.

17 Second thing, (reading): "Clinicians
18 caring for the neonate should be alerted that
19 a vacuum has been used so that they can
20 adequately monitor the neonate for the signs
21 and symptoms of device-related entities."

22 So the warnings are here, given out to
23 all obstetricians. Every certified
24 obstetrician receives this and should, in
25 fact, read it and know it. This is how you -

1 - this is how you maintain basic knowledge.

2 Q. Thank you. On the last clip, Dr. Rhett
3 indicated that even though intracranial bleed
4 was a risk of vacuum it was essentially no
5 different from the risks of a vaginal
6 delivery, or words to that general effect.

7 What's your reaction to that, in light of what
8 you just explained?

9 A. I think it's clear there is an inherent
10 increased risk with vacuum.

11 A. Next I'd like to play clip number
12 fourteen, Page 52, Line 22, through Page 53,
13 Line 22.

14 JUROR: Can we take the tripod
15 away?

16 EDWARD GRAHAM: I'm sorry. Yes.
17 Thank you. My bad.

18 DIRECT EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. Okay.

21 A. Isn't the next one Page 128?

22 A. Yes. I just realized that I repeated
23 one. The next one is actually Page 128, Lines
24 17 through Page 29, Line ---

25 A. I think that's not correct. It is Page

1 128, Line 17 -- Page 128, Line 17, through
2 Page 129, Line 15.

3 Q. Okay. Hold on just a second -- Dr. Oakes
4 ---

5 EDWARD GRAHAM: Your Honor, we
6 have an issue here. There was a request that
7 we take out a part of that, where the defense
8 objected. We have inadvertently taken out the
9 question and the answer which should have been
10 in there. That's a discrepancy.

11 THE COURT: Counsel, rather than
12 delay these proceedings you'll just have to
13 skip that one and move to the next one.

14 EDWARD GRAHAM: Thank you. May we
15 read the part that was inadvertently removed?

16 THE COURT: What says the defense?

17 MOLLY CRAIG: First of all, can
18 we identify what page and line?

19 EDWARD GRAHAM: We originally
20 identified Page 128, Line 17 through Page 129,
21 Line 15. You had requested that we remove a
22 portion of that. We agreed to do that but we
23 inadvertently took out everything after Line
24 5. So we would like to read ---

25 MOLLY CRAIG: Your Honor, they

1 took out the portion they designated because
2 it wasn't in context, so we would object.

3 EDWARD GRAHAM: Well, we would
4 like to read Lines 6 through 8, which is my
5 question, delete your objection as you
6 requested, and then read the answer, Lines 10
7 through 15; which puts it back into context,
8 as we agreed.

9 THE COURT: Is there an objection?

10 MOLLY CRAIG: Your Honor, we
11 would object.

12 THE COURT: Objection sustained,
13 Counsel. Please go to your next one.

14 EDWARD GRAHAM: Well, Your Honor,
15 may we -- we can't play that at all?

16 THE COURT: Well, my comment to you
17 was that rather than delay these proceedings
18 and stop and send the jury out and resolve it,
19 skip it and we'll move to the next one. If we
20 take a break before you finish, we may revisit
21 it -- if we have an opportunity ---

22 EDWARD GRAHAM: Okay.

23 THE COURT: --- to look at it at a
24 later time.

25 EDWARD GRAHAM: Thank you, Your

1 Honor.

2 THE COURT: Please move to your
3 next one.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. Dr. Oakes, what I would like to do now,
7 if you would, is ask you to stop back down and
8 address the FDA issue that you referred to
9 before.

10 A. As I alluded to, in the practice bulletin
11 just before that, the FDA had, in 1998, that
12 bulletin came out in 2000; so, in fact,
13 they're reacting to the FDA administering
14 this bulletin or caution when using vacuum-
15 assisted delivery devices.

16 This bulletin as it goes through goes
17 through background, goes through type of
18 complications, but then talks in fact about
19 subgaleal hematomas, so this inbetween the
20 layers, not actually in the brain but between
21 the layers under the skull. But they also do
22 talk about actual bleeding inside the head and
23 in particular talking about subdural,
24 subarachnoid, intraventricular and
25 intraparenchymal. So these are different

1 types of bleeds that can relate to a vacuum.

2 But, in fact, in this case this is the type of
3 blood -- each of these types -- this baby had,
4 subsequent development.

5 They want -- their recommendations are
6 what we were sort of talking about, that
7 people be versed in how to do this. You know,
8 that it be given according to the
9 instructions, the device according to the
10 instructions that the manufactures talk about
11 and that the -- that the products are used
12 with steady traction, no rocking movements or
13 applying torque, as we were talking about
14 yesterday in the birth video.

15 They also then want -- they want to hear
16 reports, because they obviously have put
17 together a database to decide how dangerous
18 situations are. I think that is particularly
19 relevant because, to my knowledge, -- to my
20 knowledge this particular case has not been
21 reported to the FDA. I think it represents a
22 lot of situations that aren't reported to the
23 FDA because there -- they are questioning
24 whether it really is. So the FDA is only
25 really hearing about the ones that are

1 reported and that's what their data is based
2 upon. If anything, it's way under-reported.
3 That, I think, is a problem.

4 Q. Thank you. Dr. Oakes, based on your
5 review of Dr. Rhett's deposition testimony, do
6 you have an opinion whether or not Dr. Rhett
7 heeded the FDA Warning?

8 A. In Dr. Rhett's deposition, and that's the
9 part that you wanted to play, Dr. Rhett is
10 asked -- he is asked specifically 'are you
11 aware of any manufacture warnings about this
12 device', and his answer is "no." He is also
13 asked, 'are there any government warnings
14 about the risk of brain damage from vacuums'
15 and he says "no."

16 Obviously there are. Obviously he should
17 have known, because -- not just because of the
18 FDA bulletin. In fact, no everybody gets
19 those -- or, they may file them but the --
20 that's why I wanted to point out the practice
21 bulletin from the American College. That is
22 something that every certified obstetrician
23 receives and should read, because it's
24 continuing medical education. That is trying
25 to bring everybody you up to date, and they

1 ought to be reading them because that's the
2 appropriate thing to do to give the level of
3 care that is standard at that point in time.

4 Q. Thank you, Dr. Oakes. Do you have an
5 opinion to reasonable degree of medical
6 certainty as to whether an obstetrician who
7 claims to have no knowledge of the FDA
8 warnings and COG warnings about the dangers of
9 brain bleeds from vacuum use, is capable of
10 providing safe and proper management of labor
11 and delivery under the facts and circumstances
12 like those in this case?

13 A. I have an opinion.

14 Q. What is that, sir?

15 A. My opinion is -- first of all, obviously
16 he cannot given a informed consent because he
17 doesn't know what the risks are. So how can
18 he tell the patient what the risks are?

19 Then he can't do the procedure correctly
20 if he doesn't know the basic knowledge that is
21 necessary to do it.

22 Q. Thank you, sir. You talked about
23 clinical judgment in other context, but do you
24 have an opinion whether or not an obstetrician
25 is capable of exercising safe, proper clinical

1 judgment if he doesn't know about these
2 dangers and warnings?

3 A. I think that he cannot.

4 Q. Dr. Oakes, do you have the vacuum up
5 there?

6 A. Yes.

7 Q. Okay. We talked a bit about the vacuum
8 yesterday, Doctor, but how does this vacuum
9 compare with the one that you use?

10 A. I have used a number of different
11 vacuums, including this particular vacuum.
12 This vacuum is longer and has a longer bulb
13 here, so that it -- it isn't designed -- it is
14 not designed to be used for higher stations;
15 i.e., mid stations, is not designed to be
16 used.

17 What one wants to do is to get this
18 vacuum back on the back of the head, on the
19 occiput. Because of its length and its
20 relative rigidity, because it's difficult to
21 go up and put this on the back of the head.

22 There are other vacuums that are
23 mushroom-shaped, that are smaller, less deep -
24 - they would only be about this much and they
25 are a little bigger than that, which are

1 actually designed to be put in higher
2 stations. Now, we're not talking about the
3 highest station, we are again talking about
4 higher than the outlet.

5 This is made -- this is made to be placed
6 on babies' heads that are at low stations.

7 Q. What do you mean by low stations?

8 A. Well, literally not plus two but -- but
9 plus three, plus four, plus five.

10 Q. All right. That's a little confusing
11 there. If the extra long cup is not meant to
12 be used higher in the birth canal, why does it
13 look like you could reach further into the
14 birth canal?

15 A. I guess you'd have to ask the manufacture
16 why they did that. But, I mean, -- these were
17 all developed -- as I said, because of this,
18 you know, the baby's head, when it is in the
19 birth canal, uh, the birth canal is not
20 straight up and down. I mean, everybody
21 visualizes that the baby just comes straight.
22 As I sort of talked about yesterday, it
23 actually is like going down a ski slope and
24 then coming up. That's actually the curvature
25 of the birth canal, the baby's head comes down

1 that way.

2 So it is important -- to try to get this
3 device in, the length is against it. The
4 length of the cup is against it, it's not
5 designed for that.

6 Q. Let me ask you about the degree of
7 firmness or the lack of firmness in the cup
8 itself. How does the consistency or strength
9 of that material of the cup compare with
10 others?

11 A. It is -- it compares similarly to that.
12 The handle is really the -- the cup actually -
13 - as you can see, this is a Silastic device
14 and they're, they're pretty common.

15 Q. How do you know if -- given the fact that
16 that cup is longer than most, how do you know
17 that it's not supposed to be used for a mid-
18 pelvic application?

19 A. Because the manufacturer tells you so.
20 I mean, that's sort of a simple one-word
21 answer but -- but the fact is that anybody
22 that does enough of these would know just by
23 procedure that this is not well-applied in
24 that situation.

25 Q. Doctor, I'm going to ask if you would

1 step down and show the Ladies and Gentlemen
2 the manufacturer's instructions.

3 THE COURT: Counsel, you need to
4 lay a foundation for that document.

5 EDWARD GRAHAM: Yes, sir. If Your
6 Honor please, this has been marked as
7 Plaintiff's Exhibit 73, I mean as Trial
8 Exhibit 73.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. Doctor, before I ask you about these, let
12 me ask you, sir, among the materials that you
13 reviewed for preparation and formulation of
14 your opinions in this case, did you have an
15 opportunity to review certain records that
16 were produced by East Cooper Medical Center
17 where this child was born, including the
18 materials that they had on file from the
19 manufacturer?

20 A. Yes. Subsequent to my depositions.

21 Q. Let me ask you, sir, would -- well, let
22 me just ask you, would you step down, please,
23 and tell the jury what you believe is
24 important about these?

25 A. If this -- the reason -- before I show

1 it, the reason that I think this is
2 significant is because this comes from a
3 package insert.

4 All of you know when you get medications
5 and if you get devices they all have a little
6 package insert. Unfortunately not all of us
7 always read those package inserts but every
8 one of them have them, and that's in those
9 because -- always in the package inserts are
10 things about what this should, whatever it is,
11 medication or device, should be used for and
12 when it shouldn't be used and what the
13 complications are.

14 In this particular situation -- this is
15 the last page. In this particular device they
16 end up talking about what the indications are;
17 you know, gestational age greater than thirty-
18 six week, -- now, we recognize that forty
19 weeks is term. Everybody talks about nine
20 months but obstetricians talk about forty
21 weeks. So this means that you want the
22 patient to be in the last month of the
23 pregnancy if you're going to use these,
24 because a baby's head is more delicate before
25 that and these things shouldn't be used.

1 That's all devices, not just this one.

2 But there shouldn't be cephalo-pelvic
3 disproportion. That's what we've talked
4 about. The head should not be bigger than the
5 pelvis. Thereby, we need to be sure that
6 there is an engaged head, that the head has
7 already gotten into the pelvis. Full
8 dilatation in the base of the cervix, the
9 membranes or "the bag" is ruptured and that
10 the head is engaged at the outlet or a low
11 station.

12 And contraindications for use are --
13 obviously CPD, that's the cephalo-pelvic
14 disproportion. Number two is the unengaged or
15 midstation fetal head. So they don't think
16 that this device should be used at midstation.
17 And I told you why, just in practical sense,
18 why it doesn't work well for there.

19 Then it has all the other things that you
20 might expect that aren't relevant in this
21 case.

22 Q. Thank you.

23 EDWARD GRAHAM: For the record, we
24 would offer that exhibit.

25 THE COURT: All right. We had a

1 previous discussion about that matter. Over
2 the objection of defendants, the exhibit is
3 admitted into evidence.

4 (SO ADMITTED AS TRIAL EXHIBIT 73)

5 EDWARD GRAHAM: And while I'm at
6 it, Your Honor, we would also like to go ahead
7 and formally introduce the -- we'd like to
8 formally introduce Exhibit 28, which is the
9 FDA Public Health Advisory, and also the ACOG
10 Practice Bulletin Number 17 from June of 2000,
11 which is Exhibit 31.

12 THE COURT: Madame Court Reporter,
13 do you have a list of the exhibits that's in?

14 COURT REPORTER: Yes, sir, I do.

15 THE COURT: What says defendants?

16 MOLLY CRAIG: Your Honor, we
17 would renew our previous objection but also
18 note Rule 803(18), which indicates that the
19 documents can be used during the examination
20 of a witness but not admitted into evidence.

21 THE COURT: Mr. Davis?

22 JAY DAVIS: We join in the
23 objection, Your Honor.

24 THE COURT: Just a moment, please.

25 Objections are overruled and the exhibits are

1 admitted into evidence.

2 EDWARD GRAHAM: Thank you.

3 MOLLY CRAIG: Your Honor, our
4 previous objection with regards to foundation
5 and hearsay are preserved?

6 THE COURT: The foundation
7 objection was not contemporaneously raised
8 when the plaintiff questioned the doctor, the
9 witness, about the document. I find those are
10 waived.

11 ROBERT HOOD: I apologize if I
12 misunderstood your previous ruling.

13 THE COURT: Very good. Go ahead.

14 EDWARD GRAHAM: Thank you, Your
15 Honor.

16 (SO ENTERED AS EXHIBIT 28)

17 (SO ENTERED AS EXHIBIT 31)

18 DIRECT EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. We would like to play clip number
21 sixteen, Page 46, Lines 10 through 21, (video
22 playing):

23 Q. In your years of private
24 practice, approximately how many babies did
25 you deliver per year?

1 A. *Somewhere between two hundred*
2 *and two hundred and fifty.*

3 Q. *What was your C-section rate?*

4 A. *About forty percent.*

5 Q. *Of the sixty percent of vaginal*
6 *deliveries, how many of those were operative*
7 *vaginal deliveries?*

8 A. *How many of them did I use a*
9 *vacuum extractor on?*

10 Q. *(No verbal response).*

11 A. *More than half.*

12 Q. *More than half of the vaginals?*

13 A. *I think so.*

14 *(Video Stopped)*

15 Q. *Dr. Oakes, do you have an opinion how*
16 *frequently obstetricians in general, on*
17 *average, used C-section in a general OB*
18 *practice? That is, a non-high-risk practice*
19 *in 2002?*

20 A. *I do.*

21 Q. *What is that, sir?*

22 A. *The rate of cesarean delivery in 2002 was*
23 *approximately twenty-seven to twenty-eight*
24 *percent.*

25 Q. *How would you describe Dr. Rhett's forty*

1 percent rate compared to that average?

2 A. I would say that it is high. That means
3 that four out of ten deliveries are being done
4 by cesarean section. What would be general
5 practice, not a high risk situation, that --
6 it's a high number.

7 Q. Do you have an opinion as to the general
8 rate of frequency among obstetricians, or the
9 average rate among obstetricians, in 2002 for
10 the use of vacuum deliveries compared to all
11 vaginal deliveries?

12 A. A general number would be about fifteen
13 percent, fifteen percent. So, doing more than
14 half of your vaginal deliveries by vacuum is
15 exceedingly high.

16 Q. Exceedingly high?

17 A. High.

18 Q. All right. Now, he testified in that
19 video clip that he does forty percent C-
20 section and of the remainder more than half,
21 which would be over thirty percent of the
22 total, ---

23 A. Correct.

24 Q. And when you gave the fifteen percent,
25 what is that fifteen percent of?

1 A. Well, I guess it depends. When you ask
2 someone what their rate is, they can do it
3 based upon whatever their vaginal deliveries
4 are or it can be their overall delivery rate.
5 But in the ten to fifteen percent range is
6 going to be the overall delivery rate, so of
7 all deliveries.

8 Q. What I'm going to ask you, Doctor, is how
9 does an obstetrician's relative rate -- that
10 is high or low -- on one of those mode of
11 deliveries relate to whether the frequency is
12 relatively high or low on the other mode of
13 delivery? Do you follow what I'm asking?

14 A. I do. Usually if one's cesarean section
15 rate is high, their operative vaginal delivery
16 rate will be low, and vice-versa.

17 If you do more operative vaginal
18 deliveries, then you usually do less C-
19 sections.

20 It's unusual to see both of them on the
21 very high ends.

22 Q. How unusual is it to see a doctor have a
23 C-section rate of forty percent and a vacuum
24 rate over thirty percent?

25 A. Well, that's thirty percent overall. We

1 are still talking about over more than half of
2 the vaginal deliveries. That is exceedingly.
3 It is very unusual.

4 Q. What significance, if any, do you draw
5 from Dr. Rhett's being high on C-section rates
6 and exceedingly high on vacuum rates at the
7 same time?

8 A. I think that there is a -- there is a
9 push for delivery rather than waiting for a
10 spontaneous delivery.

11 Q. All right. Let me ask you, in that
12 context is an obstetrician justified to claim
13 as an indication for a vacuum delivery to
14 speed up or hasten a delivery?

15 A. It is not appropriate to make the
16 delivery faster. Now, it is appropriate in
17 certain patient groups if -- for example, if a
18 patient has a, the mother now, an underlying
19 cardiac or heart abnormality that pushing is
20 in fact going to strain her heart, then it is
21 appropriate to speed up the second stage, that
22 is make the delivery happen sooner so that she
23 doesn't have to do all this pushing, because
24 it's dangerous to her. That's not the average
25 patient and that's not applicable in this

1 case.

2 Q. Thank you. As you reviewed the video
3 deposition testimony of Dr. Rhett and also
4 observed what was in the medical records of
5 what you saw in the birth video, was there any
6 -- tell us, tell us whether there was any
7 consistency or disconnect between what you saw
8 in the birth video and what you heard in the
9 video deposition testimony.

10 A. I think that when Dr. Rhett, who had
11 viewed this birth video, he had viewed this and
12 then when he was questioned about the
13 delivery, there were a number of disconnects.
14 It's like we are not looking at the same
15 thing.

16 That is, the baby was at the outlet. You
17 could see the hair of the baby without
18 separating the sides of the vagina, the labia,
19 the vagina.

20 This was one pull.

21 The fetal scalp electrode was left on the
22 entire time.

23 All of these things were not the same
24 thing that we were seeing. It's like we
25 weren't watching the same film.

1 Q. Your Honor, I next would like to play
2 clip seventeen, Page 18, Lines 21 through Page
3 19, Line 5 and Page 123, Lines 15 through Page
4 124, Line 7:

5 A. The baby's head was crowing
6 through the introitus. It wasn't coming out.

7 Q. What do you mean by crowning
8 through the introitus but not coming out?

9 A. I mean, it was -- you could see
10 hair right there at the introitus. You could
11 see the baby start to push the labia apart but
12 the mother couldn't push any further. So it
13 was trying to crown. The head of the baby,
14 the baby's crown, which is what you were
15 talking about, is about to come out.

16 Q. Your assertion that Jayden was
17 on the perineum when you applied the vacuum is
18 based on your memory?

19 A. Yes.

20 Q. There's nothing to document that
21 in the chart. Correct?

22 A. No, I did not document that in
23 the chart.

24 Q. And we've got the video?

25 A. Got the video. The baby is

1 *sitting right there, vacuum is applied, she*
2 *pushes, I pull, the baby comes out. Very*
3 *simple, very easy, no excess pressure, no*
4 *excess pulling.*

5 *Q. And you content that the video*
6 *shows Jayden's head on the perineum at the*
7 *time that you applied the vacuum?*

8 *A. I showed the vacuum sitting*
9 *right there in my hand and it's on the*
10 *perineum. I'm pulling on the baby, and it's*
11 *coming out.*

12 *Q. When you watched the video, where was the*
13 *baby's head when the vacuum was applied?*

14 *A. Is aid that the entire upper cup of this*
15 *vacuum goes into the vagina, so it in fact*
16 *could not have been on the perineum, could not*
17 *have been on the crown.*

18 *Q. How far was it from the perineum, in*
19 *centimeters?*

20 *A. Uh, -- at least five centimeters.*

21 *Q. Next ---*

22 *A. A correction -- at least four. I've said*
23 *that it was zero or plus one, so that means it*
24 *was four or five centimeters.*

25 *Q. Let's next play Page 37, Line 21, through*

1 Page 38, Line 4, (video playing):

2 Q. Under what circumstances would
3 an inadequate pelvis be an indication for an
4 operative vaginal delivery as opposed to a C-
5 section?

6 A. If you think that there is --
7 the only time you want to do an operative
8 vaginal delivery is if you have baby that is
9 on the introitus and crowning and you have --
10 I don't know that, that you do an operative
11 vaginal delivery if you thought there was an
12 inadequate pelvis.

13 (Video Stopped)

14 Q. What significance, if any, do place on
15 that clip, Dr. Oakes?

16 A. I -- you do not do -- you do not do, not
17 that you don't think that you do not do, a
18 vacuum extraction with an inadequate pelvis.
19 That's the CPD, the cephalo-pelvic
20 disproportion part that we've been talking
21 about.

22 Q. What significance, if any, do you place
23 on his testimony that you would not do a
24 vacuum extraction unless the baby was on the
25 introitus?

1 A. Again, I think that that's the -- vacuums
2 are done at higher stations, meaning at mid or
3 low, but one has to have the appropriate
4 indication and the appropriate informed
5 consent to do that. It's not just to be
6 performed at the outlet. I mean, that's the
7 ideal situation. If one has a choice, yes,
8 that's when you would be wanting to apply a
9 vacuum but that is not always the case.

10 Q. What significance do you place on Dr.
11 Rhett's testimony that one would only want to
12 use the vacuum if the baby is at the introitus
13 and his contention that Jayden W 's
14 head was at the introitus or perineum?

15 A. I think that I've already testified that
16 it's my opinion that if this baby wasn't
17 crowning that it wasn't at the outlet, and
18 couldn't have been because of how much vacuum
19 goes in. The fact that he can insert his
20 entire fingers up to the -- all three digits,
21 uh, -- that wouldn't happen if you, if the
22 baby's head was obstructing the outlet.

23 Q. Thank you. Next, Your Honor, I would
24 like to play:

25 Page 64, Line 13, through Page 67,

1 Line 16;

2 Page 68, Lines 16 through 22;

3 Page 104, Lines 18 through 25;

4 Page 105, Lines 12 through

5 Page 106, Line 11.

6 (Video playing):

7 Q. What types of vacuum extractors
8 were available to you at East Cooper in the
9 timeframe of this delivery?

10 A. I think the brand Miele, but I
11 don't know that. I only used one kind in the
12 last thousand times, but I -- they just had it
13 in my cart and I used it, so I don't know the
14 brand.

15 Q. Do you think that it is Miele?

16 A. They make some medical
17 equipment. I might have it mixed up with some
18 other piece of equipment.

19 Q. Can you describe it, please,
20 sir?

21 A. It's a soft Silastic cup with a
22 head of about four centimeters and a cone-
23 shape that comes up, then a handle that comes
24 out of that, a tube that comes out of that
25 that leads to a vacuum pump.

1 I'm going to ask you, if you would,
2 please draw me a picture of what it looks like
3 since you're not sure of the brandname.

4 A. (Complies). I can't remember
5 exactly where the vacuum -- whether it went
6 through the handle. I think that it did. I
7 think there was a tube that came out of where
8 the handle was attached, up here. And this
9 sort of flares out here a little bit like
10 that, (sketching).

11 Q. This is what you referred to as
12 the tube?

13 A. Well, you've got to create a
14 vacuum.

15 Q. Right.

16 A. And there's a pump.

17 Q. I am just going to ask you if
18 you would label that as "tube", just so that
19 when I look at it later I will remember your
20 testimony.

21 A. (Complies).

22 Q. And if you'll label that part as
23 the -- as the handle?

24 A. (Complies), yeah, the handle.

25 Then this is the stem, if you want to call it

1 that. Then this is the Silastic, soft
2 Silastic "head". You can call it that.

3 Q. Whatever you want to call it.

4 A. Whatever you call it. And then
5 you go down to -- and it sort of comes down
6 and flares out like that just a little bit.

7 Q. Flares out at the top?

8 A. (Sketching), like that. Of
9 course it's enclosed, so it would look like
10 that. How's that?

11 Q. Like a bell-shape?

12 A. Bell shaped. That's exactly
13 what it looks like, a little teeny soft
14 Silastic bell.

15 Q. So you had the one diagram on
16 the right side of the page and then you just
17 drew a second diagram here, but what is ---

18 A. This is ---

19 Q. This is a cross section.

20 A. Cross section.

21 Q. Okay.

22 A. Then this would be the tip, this
23 is the tip here. This would be the tip, this
24 would be the bell, this would be the bell and
25 this would be the stem -- (indicating on

1 sketch).

2 Q. Thank you. Now, you put a
3 number here on the right-hand diagram. You
4 put a number. What is that?

5 A. About four centimeters, but I
6 can't remember whether it's four or six
7 centimeters. I don't remember that.

8 Q. And what dimension is that?

9 A. That dimension being from here
10 to here.

11 Q. Diameter?

12 A. Yeah, the diameter -- not the
13 circumference, that would be power squared.

14 Q. Now I'm confused. You labeled
15 it around four centimeters but you're saying
16 that it might be six centimeters?

17 A. I don't know how much it is, and
18 I'll scratch through this.

19 Q. You've scribbled through the
20 four centimeters?

21 A. Yes, sir, I did. I think that
22 will make it a lot easier.

23 Q. So as you sit here today you
24 can't tell me the size of the bell or the cup
25 that you used?

1 A. About that big (gesturing),
2 however big that is.

3 Q. Is that ---

4 A. The last time that I did that
5 was September of '05.

6 Q. Finally, if you'll date that and
7 we will mark it as an exhibit. We will mark
8 that as Plaintiff's Deposition Exhibit 2 for
9 identification.

10 Going back to Exhibit 2, which is
11 your figure of the diagram that you drew about
12 the vacuum extraction and the bell, how much
13 of that vacuum do you claim you had to put
14 inside the birth canal?

15 A. About that much (indicating).

16 Q. Okay, and could you label that?

17 A. (Complies). The baby's head is
18 sitting here. That goes right around it and
19 it comes out.

20 Q. So how much distance would you
21 say that there is of the bell inside the
22 vagina?

23 A. A centimeter.

24 Q. One centimeter?

25 A. (Moves head up and down).

1 Q. That was a "yes"?

2 A. Not really inside but -- because
3 the vagina is almost open but she just can't
4 push the baby out. The baby is sitting right
5 down there. If -- after you apply the vacuum
6 that part probably got inside a little bit,
7 just because when you apply the vacuum it goes
8 around the baby's head a little bit. Then
9 when she pushes, and I pull, the baby comes
10 out. It's that simple.

11 Q. So your testimony is that the
12 only portion of the bell portion of the vacuum
13 that would have been inside the vagina is ---

14 A. --- a centimeter, maybe two at
15 the most.

16 Q. Well, it sounds like you were
17 saying a centimeter or less.

18 A. This is not an exact science. I
19 think that baby was crowning but she couldn't
20 push it out. I put this vacuum on and applied
21 the vacuum and applied a small amount of
22 pressure while she pushed and the baby was
23 delivery. Very simple.

24 (Video Stopped)

25 EDWARD GRAHAM: Your Honor, I can

1 keep going. I know that this is ---

2 THE COURT: Well, do you have
3 questions about that clip?

4 EDWARD GRAHAM: I do, Your Honor.

5 THE COURT: Well, ask those and
6 then we will take a break at that point.

7 EDWARD GRAHAM: Thank you. Your
8 Honor, I would like to ask Mr. Oakes to step
9 down and comment about the drawing that Dr.
10 Rhett made, that was just discussed.

11 THE COURT: He may.

12 DIRECT EXAMINATION CONTINUED

13 BY EDWARD GRAHAM:

14 Q. Please step down, Dr. Oakes.

15 A. (Complies).

16 Q. Please tell us what, if anything, you
17 found significance about that part of the
18 video deposition.

19 A. Well, I think that the first thing is --
20 I'm surprised that somebody is using a piece
21 of equipment that they don't know what it is.
22 That surprises me.

23 Q. Are you familiar with a vacuum known as
24 Miele?

25 A. I'm not.

1 Q. Does one exist?

2 A. Not to my knowledge, but I'm -- I'm used
3 to people using, always using equipment that
4 they know what it is. That's surprising.

5 The other thing is that he does make a
6 drawing and I think that you can see that the
7 drawing here is fairly close except for the
8 fact except for the fact that there is no --
9 you can see that this is what he calls a bell,
10 what I call a bulb, but there is this portion
11 here that the handle cups up and which is
12 not on here.

13 This is then the, the detail of the, of
14 the, the bell, the bulb and what he shows, and
15 this is his line about how much is inside the
16 vagina when he does the delivery and all of
17 you've seen the video that that's not the
18 case. In fact the line would be here
19 (indicates.)

20 So it's what I said when we were doing
21 this before. I, I, I watched the video, you
22 watched the video, he watches the video and we
23 see different things.

24 Q. Excuse me, Dr. Oakes. Could you -- you
25 used this yesterday. I'd like you to explain

1 to the jury, show the jury how Doctor Rhett's
2 drawing of what was inside compares with the
3 still image that was retrieved from video tape
4 that you talked about yesterday.

5 A. Yes, sir. This is -- well, actually it's
6 being pulled. But this is, this is the nubbin
7 that we're talking about. That's not the --
8 that's not the bell. So the fact we're -- you
9 can see that we would have all of this if, if
10 the line that he drew here, we'd have all of
11 that sticking out, which we do not.

12 Q. And finally, sir, let me ask you to take
13 the three diagrams that we've discussed
14 yesterday. Do any of these match what Doctor
15 Rhett described in his drawing and, if so,
16 which one?

17 A. What, what he describes is this.
18 Outlet. (The witness indicates.) So that in
19 fact is the baby's head was crowning. He says
20 it got down on the perineum. You can see hair
21 without spreading the, the labia of the vagina
22 and this is what the picture would look like.
23 It literally would be and you saw from this
24 part that he drew, here, that's how much then
25 that would be sticking out.

1 But, but the reality is that that's not
2 what it is. It in fact it's this way, mid-
3 pelvic, where the baby's head is up to zero or
4 plus one, and this is how much of the vacuum
5 we have. I told you that the vacuum cup is
6 six point one centimeters. so five centimeters
7 of the cup, five centimeters of the cup are
8 bringing it down to from, from zero station
9 to, it would still have a centimeter of that
10 cup
11 sticking out.

12 Q. And when you talk about the cup being six
13 point one centimeters are you --- 12

14 A. It's here.

15 Q. So you're not counting that nub or nubbin
16 part that you referred to?

17 A. No. To this, to this break (indicating).

18 Q. Thank you, Dr. Oakes.

19 MR. GRAHAM: Your Honor, that's a
20 good stopping point.

21 THE COURT: All right, ladies and
22 gentlemen. We'll take our morning break at
23 this time. Please enjoy your break. We'll
24 give you the opportunity to go outside if
25 you wish. Let's all remain where we are while

1 questions, back and forth, it makes the motor
2 run the entire time, basically, while we're
3 doing that. All right.

4 (Projector turned on by clerk) --
5 Well, that's the fan noise that you're
6 speaking of?

7 JUROR: Yes, sir.

8 THE COURT: Okay. Are we ready?

9 EDWARD GRAHAM: Your Honor, the
10 clerk turned it off before she left and we
11 have to wait to go through the warmup process.
12 I apologize.

13 THE COURT: I understand.

14 DIRECT EXAMINATION CONTINUED

15 BY EDWARD GRAHAM:

16 Q. Next, we will play Page 98, Line 25,
17 through Page 99, Line 18, (video playing):

18 Q. Would you agree with me that you
19 did not document the station of Jayden

20 W's head as being lower than minus
21 one at any time prior to the application of
22 the vacuum?

23 A. I did not document it in this
24 chart. That's correct. But I told you that
25 the baby was on the introitus. The mother was

1 exhausted. I applied the vacuum without even
2 having to push the labia apart. In less than
3 two minutes we delivered this baby with the
4 mother pushing a little bit and my making very
5 a very gentle tug on this.

6 Q. Say that again. You said that
7 you did not have to push the labia apart?

8 A. The baby's head was pushing
9 through. She just couldn't push it out. I
10 applied the vacuum.

11 Q. How do you know that you didn't
12 open the labia?

13 A. Because the baby's head was
14 pushing through. She couldn't push it out. I
15 simply applied the vacuum.

16 (Video Stopped)

17 Q. Dr. Oakes, do you have an opinion to
18 reasonable degree of medical certainty as to
19 the significance, if any, to that testimony in
20 terms of the standard of care issues and
21 credibility issues?

22 A. I do. I think that, as we can see from
23 the video, that's not the case. I disagree
24 with that entirely.

25 Q. You're talking about the perineum?

1 A. Correct.

2 Q. All right. Let me ask you about the
3 maternal exhaustion portion of that. Do you
4 have an opinion to a reasonable degree of
5 medical certainty as to whether or not
6 Jamsetta Washington was suffering from
7 maternal exhaustion at the time the vacuum cup
8 was applied?

9 A. I saw no evidence of that. We recognize
10 that she was noted to be completely dilated.
11 That is the time at which one starts having
12 someone push. You don't start pushing before
13 one is completely dilated, and she was
14 completely dilated at 1924, 7:24. The vacuum
15 was applied at 7:35, or eleven minutes later.
16 That is a very short time of pushing. So one
17 wouldn't expect someone as, uh, -- as
18 exhausted -- I don't see evidence that's the
19 case.

20 Q. Well, what about the first stage of labor
21 that you told us about. What affect, if any,
22 does that have on the mother's level of energy
23 or tiredness?

24 A. Well, the longer that goes there is of
25 course -- of course, it's called labor. It is

1 -- it is a work, it is a tiring process. But
2 the real exhaustive part of labor usually is
3 the second stage, so when somebody is having
4 to push the baby out. That's the really
5 difficult time, which demands the mother's
6 most exertion.

7 Q. Do you have an opinion to a reasonable
8 degree of medical certainty as to how long in
9 the second stage that it takes a mother to
10 "learn" to push effectively, which muscles to
11 push and that kind of stuff?

12 A. I do. And, recognize, it is something
13 that's learned. It's something that the
14 doctors talk to patients about and that the
15 nurses talk to the patients about. It's
16 something that somebody in subsequent
17 deliveries have knowledge of.

18 This was -- this was this patient's first
19 delivery, so it's not something that she was
20 going to be able to do right at the outset
21 correctly. It takes some counseling. The
22 reason that it does is because one wants the
23 patient to push with the contractions.

24 There obviously is pain associated with
25 contractions and it's difficult to coordinate

1 pushing when in fact you're having pain. But
2 that's necessary in order to advance the
3 descent of the baby through.

4 Q. Do you have an opinion as to whether or
5 not eleven minutes is a sufficient time for a
6 mother, a first time mother, to adequately learn
7 how to push the baby?

8 A. I do. I think that's an inadequate time.

9 Q. Next let's play Page 109, Lines 14
10 through 18, (video playing):

11 Q. And your testimony is that the
12 fetal scalp electrodes stayed on the entire
13 time that the vacuum was applied and used?

14 A. I think so. I think that's why
15 there's -- yes, sir.

16 (Video Stopped)

17 Q. Dr. Oakes, can you tell us whether or not
18 the fetal scalp electrode in fact stayed on
19 through the vacuum extraction or was it
20 removed?

21 A. It was removed. During that video, I
22 pointed out the fact that it was removed.

23 Q. Next I'd like to play:

24 Page 50, Line 8 through Page 51,

25 Line 10

1 Page 59, Lines 6 through 10

2 Page 160, Line 13 through 14.

3 Page 163, Line 17 through

4 Page 164, Line 8

5 (Video playing):

6 Q. What is your understanding of
7 the suggestions from ACOG about when and how a
8 vacuum extraction delivery should properly be
9 performed?

10 A. I don't know what they
11 specifically have said. I know they have some
12 guidelines. I know I've read them.

13 Q. Are there any obstetrical texts
14 that you believe are generally reliable about
15 the subject of when and how to properly
16 perform a vacuum extraction?

17 A. There are plenty obstetrical
18 tests but you can't say one of them in
19 reliable.

20 Q. Do you consider any obstetrical
21 text to be reliable about the generally-
22 accepted standards of practice for
23 obstetricians in terms of when and how a
24 vacuum extraction is to be performed?

25 A. There are written things but you

1 can't call them "reliable". There's no one
2 standard, there is no one text. Obstetrics is
3 something that's practiced actively and there
4 is no one reliable text. No, sir.

5 Q. So not a single one?

6 A. There is no one text that's
7 reliable. There's suggestions, guidelines
8 that are helpful.

9 Q. Where would I go to get
10 suggestions and guidelines that are helpful
11 about that subject?

12 A. Obstetrical textbooks and
13 published things. But I'm not sure that you
14 can get reliable. "Reliable" says that 'this
15 is the right way to do it and there's no other
16 way to do it.' Reliable -- you can't find
17 that. And I believe that I did the right
18 thing in this circumstance.

19 Q. Of all the obstetrical text that
20 tell how and when vacuum extraction should be
21 done, you consider those to be unreliable.

22 MOLLY CRAIG: Your Honor, ---

23 (Video Stopped)

24 THE COURT: Cut the sound off.

25 ROBERT HOOD: This is beyond the

1 page he designated.

2 THE COURT: Counsel objects and
3 says that it is beyond what you designated.

4 MOLLY CRAIG: According to the
5 document produced, he was supposed to stop at
6 Line 10.

7 EDWARD GRAHAM: Ms. Hood, are you
8 referring to Page 51, Line 10?

9 MOLLY CRAIG: It's Page 50,
10 Lines 8 through Page 52, Line 10.

11 EDWARD GRAHAM: Is that the Line
12 10 that you are referring to?

13 MOLLY CRAIG: Yes, sir, in your
14 designations.

15 EDWARD GRAHAM: Okay, I just
16 wanted to make sure that we re on the same ---

17 THE COURT: Counsel, ---

18 MOLLY CRAIG: This is what was
19 given to us.

20 THE COURT: Counsel, rather than
21 study it further, I'm going to sustain the
22 objection. It's beyond, Counsel says, what
23 was designated. Please move to your series of
24 questions.

25 DIRECT EXAMINATION RESUMED

1 BY EDWARD GRAHAM:

2 Q. Dr. Oakes, is any -- what is the
3 importance of obstetrical literature and
4 literature from the American College of
5 Obstetricians & Gynecology in terms of proper
6 management of labor and delivery in accordance
7 with generally accepted standards?

8 A. The purpose of the literature, obstetric
9 literature -- and this published literature,
10 not talking about textbooks -- is to provide a
11 body of literature about how things are done,
12 so that based on this one can make decisions
13 on how to manage obstetric cases.

14 Now, the textbooks take this information,
15 body of literature, and they put it together
16 in an instruction way, a summary, so that this
17 can be taught. It is -- textbooks are behind
18 the times because there is a publishing gap
19 between when they come out and what in fact is
20 exactly the current state of the literature.
21 So from that standpoint, they are -- they are
22 always a little behind.

23 But when you talk about the basic fund of
24 obstetric knowledge, that's not something
25 that's changed -- ever. So when we are

1 talking about things like station and
2 presentation and those things, that hasn't
3 changed. So whatever is in these textbooks is
4 in fact reliable. It's not that everything in
5 the whole book is reliable or an authority --
6 authoritative -- just because of the time gap.
7 But to say that everything is unreliable is
8 just not true.

9 Q. Do you have an opinion -- could you help
10 us understand whether the literature -- what -
11 - do you have an opinion to a reasonable
12 degree of medical certainty as to whether or
13 not the recognized leading literature in
14 obstetric and from ACOG is of importance in
15 representing and informing what the rules of
16 the road are for obstetricians? In other
17 words, the generally accepted standard of care
18 for obstetricians in circumstances like this?

19 A. I do.

20 Q. What is your opinion?

21 A. I think that these are guidelines that
22 are setting the path that one wants to follow.
23 It doesn't set the only path that you can
24 follow but it sets a reasonable base by which
25 you can act.

1 Q. What do you consider some of the leading
2 textbooks and literature in obstetricians with
3 regard to labor, delivery and in particular
4 the use of a vacuum?

5 A. There's a large number of textbooks but
6 the -- the classic textbooks today in
7 obstetricians are what we call Williams, which
8 has gone through multiple editions. It was
9 first done by Dr. Williams long ago and now it
10 is updated about every three to five years.
11 This has been sort of a classic textbook.

12 There is another one called Gabbe,
13 G-a-b-b-e, which is of more recent vintage but
14 also is a good basic textbook for
15 obstetricians.

16 Q. Do you have an opinion to a reasonable
17 degree of medical certainty as to whether or
18 not Dr. Rhett conformed with or breached rules
19 for delivering babies with vacuum, as
20 expressed in those textbooks?

21 CHILTON SIMMONS: Objection, Your
22 Honor, as to -- there are no rules. It is the
23 standard of care. That is not a proper
24 question.

25 THE COURT: Sustained. Please

1 rephrase.

2 DIRECT EXAMINATION CONTINUED

3 BY EDWARD GRAHAM:

4 Q. Doctor, do you have an opinion to a
5 reasonable degree of medical certainty as to
6 whether or not Dr. Rhett, in his interaction
7 with Jayden W. [redacted] in this delivery,
8 conformed to, or not, the principles of proper
9 labor and delivery management and vacuum usage
10 as expressed in those textbooks?

11 A. I do. I think -- one, just talking about
12 textbooks, we're taking -- we're talking about
13 the whole body of literature. As I said, the
14 -- it is my opinion that there is not an
15 indication for this mid vacuum delivery, there
16 was no informed consent. These are basic
17 principles that should be applied. I think
18 those were violated.

19 The instrument used is not indicated in a
20 mid-pelvic delivery.

21 That's the basis of my opinion.

22 Q. Thank you. From reading Dr. Rhett
23 deposition and from view the videotape, do you
24 have an opinion as to whether or not -- or do
25 you know whether or not Dr. Rhett considers

1 any ACOG literature or obstetrical literature
2 reliable about delivering babies with a
3 vacuum?

4 CHILTON SIMMONS: Objection, Your
5 Honor. The witness does not know what Dr.
6 Rhett knows.

7 THE COURT: Sustained. Please move
8 to your next question.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. Doctor, what effect, if any, would it
12 have on an obstetrician's ability to conform
13 to the generally accepted standards of
14 practice if he considered all obstetrical
15 literature or ACOG literature on the use of a
16 vacuum properly to be unreliable?

17 CHILTON SIMMONS: Objection, Your
18 Honor. Speculative.

19 THE COURT: Overruled. You may
20 answer it.

21 THE WITNESS: I think that, you
22 know, one has to rely upon some fund of
23 knowledge in order to make this kind of
24 clinical judgment. It is the purpose of these
25 technical bulletins or textbooks to provide

1 that basic fund of knowledge that then can be
2 utilized in the management of patients.
3 Obviously there is a reliability about this
4 information. It is not necessarily the
5 absolute authority but it clearly is reliable
6 information.

7 DIRECT EXAMINATION CONTINUED

8 BY EDWARD GRAHAM:

9 Q. Let me move to another subject, Doctor.
10 What should be documented regarding the use of
11 a vacuum extraction to deliver a baby?

12 A. The importance, as we've gone through the
13 various complications that arise, the most
14 important thing is to document that a vacuum
15 was used, number one.

16 Number two then is, because of the
17 complications, uh, increase with more pulls on
18 the vacuum and more time with the vacuum being
19 applied, those information -- that information
20 ought to be documented.

21 Then similarly, one has to know what the
22 position of the baby's head and the station
23 was at the point in which the vacuum was
24 applied. Also, then, one has to document the
25 indication and one has to document the

1 consent.

2 THE COURT: Counsel, do you have
3 further video clips that you are going to use?

4 EDWARD GRAHAM: Yes, sir, one
5 more.

6 THE COURT: All right, let's go
7 ahead and complete that so that we don't have
8 to -- so that we might dispense with the
9 machine.

10 EDWARD GRAHAM: Yes, sir. Thank
11 you.

12 THE COURT: Thank you.

13 DIRECT EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. Please play the last video clip. This
16 is:

17 Page 72, Line 21 through

18 Page 73, Line 9

19 Page 75, Line 23 through

20 Page --- (video playing):

21 Q. *How should a vacuum extraction*
22 *be properly documented and charted in the*
23 *hospital records by an obstetrician?*

24 A. *I make a note that I did a*
25 *vacuum extraction, vaginal delivery.*

1 Q. Is that just your routine
2 procedure, to document a vacuum delivery?

3 A. Yes, sir.

4 Q. You don't document the station
5 at which you apply the vacuum?

6 A. No.

7 Q. You don't document the head
8 orientation?

9 A. Sometimes I will say that this
10 baby was LOA or ROA or even O, or OA.

11 Q. Did you see anything missing
12 from the mother's record that you would
13 ordinarily expect to see?

14 A. I noted that I didn't mark the
15 time of the delivery.

16 Q. Anything else?

17 A. Let me look at my notes and I'll
18 tell you. (Upon review), I didn't write the
19 time of the delivery down but I wrote down
20 what I normally write in delivery.

21 (Video Stopped)

22 DIRECT EXAMINATION CONTINUED

23 BY EDWARD GRAHAM:

24 Q. Dr. Oakes, have you reviewed the delivery
25 notes of Dr. Rhett created in this case?

1 A. I did.

2 Q. Do you have an opinion to a reasonable
3 degree of medical certainty as to whether or
4 not his delivery note conforms with or
5 breaches the generally accepted standards of
6 care for documentation of the use of a vacuum?

7 A. I do.

8 Q. What is that opinion?

9 A. I think it deviates from the standard of
10 care because in fact vacuum isn't even
11 mentioned.

12 Q. Let me direct your attention, Dr. Oakes,
13 to the delivery notes on the board. And I
14 would like ---

15 A. It's this portion right here?

16 Q. Actually the one about that.

17 EDWARD GRAHAM: If Your Honor
18 please, this is Exhibit 2024.

19 DIRECT EXAMINATION CONTINUED

20 BY EDWARD GRAHAM:

21 Q. Can you read that for us, please, sir?

22 A. I believe the time there says 2000, which
23 is 8:00 p.m., and that -- then there's a
24 blank, "overintact perineum, under CLE" --
25 which I believe is continuous lumbar epidural,

1 "seven pound, ten ounce, Male, Apgar 6/9,
2 placenta spontaneous intact, nuchal cord times
3 one, second degree laceration at introitus
4 repaired, four-0 vichal, mother and baby
5 tolerated well, ABG 7.21..." -- that's the
6 arterial blood gas, 7.21 and then I believe
7 that is Dr. Rhett's initials.

8 Q. What, if anything, is missing from this
9 note that should be there for it to comply
10 with generally accepted standards of care for
11 obstetricians under these circumstances?

12 A. Obviously the type of delivery needs to
13 be documented. That is, the use of a vacuum
14 has to be documented. This information should
15 then include what I said before, that the
16 station that is applied -- the position of the
17 head, the point where it was applied, how many
18 pulls and how long it took, uh, -- it also
19 needs, the information also needs to be
20 complete but also needs to be accurate. These
21 are not the correct Apgar scores. The correct
22 scores, as we went through yesterday, were
23 seven at one minute and nine at five minutes.
24 It wasn't six. I don't know where that comes
25 from.

1 Q. Doctor, when an obstetrician chooses to
2 use a vacuum and then chooses not to document
3 use of a vacuum in the medical records, do you
4 have an opinion whether or not that creates a
5 risk that other healthcare providers on the
6 healthcare team might not be aware that a
7 vacuum was used?

8 CHILTON SIMMONS: Objection, Your
9 Honor. Mischaracterization of the evidence,
10 and leading.

11 THE COURT: Sustained on leading,
12 Counsel. Please do not lead the witness.

13 EDWARD GRAHAM: All right.

14 DIRECT EXAMINATION CONTINUED

15 BY EDWARD GRAHAM:

16 Q. Well, Dr. Oakes, have you had the chance
17 to review the discharge summary in this case?

18 A. I have.

19 Q. Okay. Who signs the discharge summary
20 the first time or who dictated the discharge
21 summary?

22 A. A midwife, Barbara Stone, actually did
23 the discharge summary.

24 Q. Can you tell us whether that's customary
25 and usual?

1 A. I think that to use -- to use other
2 personnel to dictate discharge summaries is --
3 it may be unusual. I don't mean that's below
4 the standard of care, but the -- the important
5 thing is that the information be accurate.

6 Q. What did Barbara Stone's discharge
7 summary say about the mode of delivery?

8 A. In this situation it is dictated, and
9 this is an NSVE, which means a normal
10 spontaneous vaginal delivery. Again, there's
11 no information here about the use of a vacuum.

12 Q. Would you highlight with your (laser)
13 pointer where that NSVE is, please?

14 A. I honestly can't see it from here.

15 Q. (Indicating), NSVE.

16 A. Yeah. Now we can see -- down in the body
17 here, it says right there "NSVE, overintact
18 perineum, epidural." So that NSVE stands for
19 normal spontaneous vaginal delivery. That
20 means that it is not an operative delivery.

21 Q. Doctor, when an obstetrician allows
22 someone else to prepare his discharge summary
23 for him, what requirement if any is there for
24 him to follow up?

25 A. Well, as I said, the most important thing

1 is that -- the information can be compiled by
2 someone else but it is -- it is very important
3 that the information be accurate.

4 In this situation, as this was compiled
5 by midwife Stone -- but, Your Honor, if you
6 can go to the next page, Dr. Rhett
7 countersigns this, or at least initials it,
8 which then gives it a credibility to this note
9 and this note is inaccurate. So it shouldn't
10 have been countersigned or it should have been
11 modified and then signed. This is the second
12 page of the discharge summary and this is
13 Barbara Stone's name and ---

14 CHILTON SIMMONS: Objection.
15 Counsel is publishing the document without
16 putting it into evidence.

17 THE COURT: Counsel, ---

18 EDWARD GRAHAM: We offer -- we
19 formally introduce it at this time, Your
20 Honor. THE COURT: What is the
21 objection to it?

22 CHILTON SIMMONS: It has not been
23 formally admitted, properly authenticated. We
24 do want it in, we want the entire record in.

25 THE COURT: The objection is

1 overruled at this point. Go ahead, Counsel.

2 EDWARD GRAHAM: Thank you, Your
3 Honor.

4 THE COURT: You are in the middle
5 of an answer, if you would like to finish your
6 answer.

7 THE WITNESS: Yes. Could you
8 leave that on there? I was just saying that
9 this situation is dictated by Barbara Stone
10 and this is the time that it was dictated,
11 this is when it was transcribed. This is Dr.
12 Rhett's initials, so he is in fact, if you
13 will, authenticating it, corroborating it; in
14 fact, it is inaccurate information.

15 Q. What should an obstetrician do if
16 presented with a document to countersign that
17 contains significance inaccuracies?

18 A. Read it and make corrections.

19 Q. There's another document that I'd like to
20 call your attention to, Dr. Oakes, which is
21 the list of procedures -- a list of procedures
22 ---

23 CHILTON SIMMONS: Your Honor,
24 objection again. We just want him to put it
25 in evidence before he publishes it to the

1 jury. This is from a separate chart from the
2 hospital chart that has not been admitted.

3 THE COURT: No speaking objections,
4 Counsel. Thank you.

5 CHILTON SIMMONS: Thank you, Your
6 Honor.

7 THE COURT: What do you say, Mr.
8 Graham?

9 EDWARD GRAHAM: Your Honor, it is
10 Dr. Rhett's own writing from the hospital
11 chart.

12 THE COURT: What number is it? I
13 mean, the way you publish it, the way that you
14 put a document into evidence is you lay a
15 foundation, ask the witness if they know what
16 it is.

17 EDWARD GRAHAM: Yes, sir.

18 THE COURT: But we discussed
19 avoiding that procedure because of the delay
20 by reaching an agreement. So is this document
21 agreed to be in evidence?

22 EDWARD GRAHAM: The authenticity
23 was agreed to, Your Honor. It's my
24 understanding ---

25 THE COURT: Okay.

1 DIRECT EXAMINATION CONTINUED

2 BY EDWARD GRAHAM:

3 Q. Dr. Oakes, what is this document?

4 A. This is -- the title of this is called
5 Patient Information Face Sheet.

6 Q. Starting from the bottom, the second one
7 from the bottom, what is that and what does it
8 mean?

9 A. Well, this is the form -- this form is ---

10 CHILTON SIMMONS: Objection, Your
11 Honor, still not in evidence.

12 THE COURT: All right, I am going
13 to overrule the objection.

14 Ladies and Gentlemen, there is a
15 dispute between counsel -- it's obvious.
16 Counsel for the plaintiff seeks to put pieces
17 into the record, the defense counsel wants to
18 put the entire medical record in evidence.
19 They have not reached an agreement on that.

20 I am going to overrule your objection
21 at this point. We will resolve this issue
22 over the lunch hour. At this juncture, I will
23 allow the document to come in, in piecemeal
24 fashion, and the objection is overruled.

25 You may answer the question.

1 THE WITNESS: Thank you, Your
2 Honor. This form is a summary sheet which has
3 the principal diagnosis, then the secondary
4 diagnoses and then it has the operative and
5 nonoperative procedures.

6 And this is on the procedures and,
7 and going from the top that's EFM, which is
8 electronic fetal monitoring; Cervidil, which
9 is a medication which is used to soften and
10 ripen the cervix before induction. This is
11 basically a matter of getting her labor
12 induced.

13 "Pit" is for Pitocin, which is the
14 medication used to stimulate uterine
15 contractions and used to induce patients,
16 induce labor.

17 This is "continuous lumbar epidural",
18 so an anesthetic.

19 Artificial rupture of membranes,
20 AROM.

21 Fetal scalp electrode. That's a
22 device that monitors the baby's heart, that we
23 showed there.

24 This is vacuum extraction, vaginal
25 delivery, VE/VD.

1 The repaired second degree laceration
2 times one.

3 DIRECT EXAMINATION CONTINUED

4 BY EDWARD GRAHAM:

5 Q. Thank you. Dr. Oakes, do you recall when
6 this document was created?

7 A. The date down here is 7/19.

8 Q. And when was the baby born?

9 A. This was -- the baby was born on the 16th
10 at 7:37 p.m.

11 Q. Thank you, sir. Now, what significance,
12 if any, does that document have, listing this
13 vacuum extraction on this document, what
14 significance does that have in terms of Jayden
15 Washington's safety and well-being?

16 A. I think that if the information was to
17 impart that a vacuum extraction had been done,
18 that this wouldn't meet that need; because in
19 fact this was filled out on the following day.
20 The following day is the time, in fact, that
21 the infant was suffering the effects of the
22 brain hemorrhages and was transferred to MUSC.

23 Q. What is the purpose of this type of
24 document?

25 A. This is a summary information of the

1 things that took place, to use primarily for
2 coding -- you know, elaborating those things
3 that are done from a billing code standpoint.

4 Q. Let me turn to causation, please, sir. Do
5 you have an opinion to a reasonable degree of
6 medical certainty as to the most probable
7 cause of Jayden Washington's brain bleeds
8 diagnosed shortly after his birth?

9 A. I do.

10 CHILTON SIMMONS: Objection, Your
11 Honor, beyond his qualification. He's a
12 standard of care witness.

13 THE COURT: Counsel, what do you
14 say?

15 EDWARD GRAHAM: He is a Board-
16 certified obstetrician, Board-certified as a
17 maternal fetal specialist.

18 THE COURT: Response?

19 CHILTON SIMMONS: He was identified
20 as a standard of care witness.

21 EDWARD GRAHAM: And causation.

22 CHILTON SIMMONS: He did not treat,
23 he does not diagnose a baby's conditions after
24 birth, he's not been a practicing physician in
25 twelve years. He has never ---

1 THE COURT: Do you have a response?

2 EDWARD GRAHAM: Yes, sir. I did
3 not ask him the cause of the child's cognitive
4 difficulties or motor difficulties. I asked
5 the cause of the brain bleeds, which he is
6 perfectly qualified to ---

7 THE COURT: Objection overruled.
8 You will have cross-examination on that point.
9 The credibility and believability of it is
10 ultimately for the jury to determine. You may
11 proceed.

12 EDWARD GRAHAM: Thank you, Your
13 Honor.

14 DIRECT EXAMINATION CONTINUED

15 BY EDWARD GRAHAM:

16 Q. Dr. Oakes, do you remember the question?

17 A. I do. I have an opinion.

18 Q. What is your opinion?

19 A. It is my opinion that the bleeds in this
20 baby's head that are elaborated on the MRI
21 that was done at MUSC are consistent with
22 those types of bleeds that result from vacuum
23 extraction. That is, it's not -- as I showed
24 you on that information about the types of
25 bleeds, there is a subgaleal bleeds, there are

1 subdural bleeds, there is intracranial bleeds.

2 This baby had all three of those, as

3 elaborated on the MIR that was done on, I

4 believe on the 18th.

5 Q. Do you have an opinion ---

6 CHILTON SIMMONS: Objection, Your

7 Honor. We move to strike. Speculation.

8 THE COURT: Overruled.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. Doctor, do you have an opinion as to
12 whether Jayden Wa 's brain bleeds were
13 most probably preventable?

14 A. I do. I think had the vacuum not been
15 used there would not have been this bleeding.

16 Q. Doctor, I have asked you a number of
17 opinion questions. When you've expressed an
18 opinion during your testimony, yesterday and
19 today, have all of those opinions been
20 expressed with at least a reasonable degree of
21 medical certainty, most probably?

22 A. They have.

23 Q. Reference was made to you not practicing
24 medicine in twelve years. I know you're
25 retired. When is the last time that you

1 actually delivered a baby in a hands-on way,
2 where you were the one that actually delivered
3 the baby?

4 A. December 28th, 1998.

5 Q. Since you have not delivered a baby since
6 that date, what effect, if any, do you believe
7 that has on your ability to judge a man who
8 delivered Jayden in July 2002?

9 A. I think that's a very good question. It
10 -- it's -- sort of the purpose of staying
11 current in obstetrics is to realize how things
12 change and the -- in this situation, the facts
13 and circumstances that are relevant in this
14 case are not any different than in 1988 of
15 2002, or even 2010. It's -- the information
16 is exactly the same today as it was during
17 that. It hasn't changed. So I think that
18 there isn't any difference, that I can see.

19 EDWARD GRAHAM: Thank you, Dr.
20 Oakes, please answer any questions that
21 defense counsel may have.

22 THE COURT: Rather than go to
23 cross, let's stop at this point for lunch and
24 let you open your cross-examination after
25 lunch.

1 THE COURT: Ms. Simmons.

2 CROSS EXAMINATION

3 BY MS. SIMMONS:

4 Q. Dr. Oakes, you have not delivered a baby
5 in twelve years, isn't that true?

6 A. That's correct. Well, not quite twelve
7 years. It will be in December.

8 Q. Yes, sir. Eleven years, seven months?

9 A. Correct.

10 Q. And, Dr. Oakes, you are aware that Dr.
11 Rhett had delivered Jayden six years before he
12 was videotaped, answering all those questions
13 asked by Mr. Graham; is that correct?

14 A. His videotaped testimony was on July 21st
15 2008.

16 Q. And that was six years after the date that
17 he delivered Jayden, isn't that true?

18 A. That's correct.

19 Q. And that was three years after he stopped
20 practicing obstetrics and delivering babies,
21 isn't that true?

22 A. That's my understanding, yes.

23 Q. You have reviewed cases for plaintiff's
24 counsel, Mr. Graham, on five other occasions,
25 haven't you?

1 A. I have.

2 Q. And you are not a practicing physician any
3 more?

4 A. Correct.

5 Q. And you are paid to review records
6 produced by other doctors and to study medical
7 definitions, to give your opinion in courts
8 just like this?

9 A. No, I wouldn't agree with that. I'd have
10 to study to make definitions. The definitions
11 that we are talking about are the definitions
12 that I learned when I first did obstetrics and
13 all the time that I was doing obstetrics.

14 It's not something that I've gone back and had
15 to relearn.

16 Q. And you don't work in a hospital anymore?

17 A. I do not.

18 Q. You have not in twelve years?

19 A. Correct.

20 Q. Your profession since 2001, for which you
21 earn money, is as a legal consultant; isn't
22 that true?

23 A. That is the earned income that I have.

24 Q. And you worked out of your home instead of
25 a doctor's office or a hospital, isn't that

1 true?

2 A. That's correct.

3 Q. You do not see any patients anymore?

4 A. That's correct.

5 Q. You do not perform any procedures?

6 A. That's correct.

7 Q. You do not have any admission privileges
8 at any hospital, including in Savannah?

9 A. That's correct.

10 Q. Nor any hospital here in South Carolina?

11 A. That's correct.

12 Q. You are not authorized to admit any
13 patients in a hospital in South Carolina?

14 A. No, and I never was.

15 Q. And that has been -- you have not been
16 authorized to admit patients at any hospital
17 for over ten years? Is that true?

18 A. I don't exactly the date my privileges
19 stopped but it's approximately that, yes.

20 Q. The cases that you review in medical/legal
21 cases are mostly for a plaintiff suing
22 doctors; isn't that true?

23 A. That's the cases that I've received. It's
24 not something that I chose but -- yes.

25 Q. The answer to my question is "yes"?

1 A. Yes.

2 Q. And your role -- and you were a peri-
3 natologist, limited to treating the mother as
4 far as delivery was concerned. Isn't that
5 true?

6 A. We took care of the mother and the fetus
7 while it was still within the uterus. I did
8 not take care of babies after they were
9 delivered.

10 Q. Thank you. You are not a neurologist?

11 A. That's correct.

12 Q. You're not a pediatrician?

13 A. That's correct.

14 Q. You're not a pediatric neurologist?

15 A. That's correct.

16 Q. You are not a neonatologist?

17 A. Correct.

18 Q. But you have come to this court to give
19 opinions that the vacuum caused this baby's
20 damages?

21 A. Correct.

22 Q. You have never treated Ms. Washington?

23 A. I have not.

24 Q. You have never treated Jayden W

?

25 A. I have not.

1 Q. In fact, you had never even met Ms.
2 Washington before this trial; isn't that true?

3 A. That's correct.

4 Q. And you had never met Jayden?

5 A. Correct.

6 Q. When you reviewed Jayden's records the
7 first time around, before you gave your
8 deposition, you were not even provided all of
9 Jayden's medical records from MUSC, were you?

10 A. I would -- I did not have the -- the
11 complete record, meaning nurses notes,
12 etcetera. I still don't.

13 Q. And plaintiff's counsel didn't provide
14 those to you?

15 A. I didn't ask for them.

16 Q. But that's how you get the information, is
17 from plaintiffs' attorneys; is that true?

18 A. Yes, but they provide also what -- what I
19 ask to look at, too. So I -- from my
20 standpoint of reaching my conclusions, it
21 wasn't -- it wasn't necessary to look at the
22 nurses' notes, the respiratory therapist's
23 notes, etcetera, from MUSC, so I -- in fact, I
24 didn't look at them.

25 Q. You also didn't review the July 2005 CT

1 scan of Jayden or the MRI done around the same
2 time?

3 A. I didn't look at the actual films, I
4 looked at the reports.

5 Q. And you're not a radiologist in order to
6 review the films, are you?

7 A. That's correct.

8 Q.
9 When you gave your opinions in this case in
10 November of 2008, you had reviewed no records
11 beyond the discharge summary at MUSC; isn't
12 that true?

13 A. I reviewed the discharge summary, the
14 operating notes and the results of those
15 films.

16 Q. But you had not reviewed Jayden's records
17 at that point?

18 A. These are parts of the record. So the
19 operative notes, the operation that -- that
20 the infant had, Jayden had at MUSC, I reviewed
21 that operative note. I reviewed the discharge
22 summary and I reviewed the MRI and CT that was
23 done.

24 Q. And the fact that Ms. Washington was late
25 in obtaining prenatal care was a risk factor

1 to Jayden. Would you agree?

2 A. In general, late prenatal care can be a
3 risk factor. Yes. Now, do I think it is
4 applicable in this case, absolutely not.

5 Q. And you are not here to give any opinions
6 on which of Jayden's problems today are
7 related to his hemorrhages?

8 A. That's correct.

9 Q. Doctor, you do not have a problem with the
10 way Dr. Rhett used the vacuum, you have a
11 problem with the fact that he used it in the
12 first place; isn't that true?

13 A. No, I think that I've talked about -- that
14 I have been critical of his technique. I
15 believe that he did not pull along the axis of
16 the birth canal and that, in fact, he rocked
17 it and moved it around. So I'm critical of
18 the technique as well as the need for the
19 vacuum, which I didn't agree was needed.

20 CHILTON SIMMONS: Your Honor, may I
21 approach the witness.

22 THE COURT: Yes, sir. If I could,
23 if you could speak up a little bit at the end
24 of your sentences so that we can all hear you,
25 please.

1 THE WITNESS: Yes, sir.

2 THE COURT: Thank you.

3 CROSS EXAMINATION CONTINUED

4 BY CHILTON SIMMONS:

5 Q. Dr. Oakes, (tendering) that a copy of your
6 deposition that I took of you in 2008?

7 A. Okay.

8 Q. If you would turn to Page 15, Line 3, sir.

9 A. Okay, (complies).

10 Q. Are you there?

11 A. I'm there.

12 Q. I am going to read the question that I
13 asked at that time of you when you gave sworn
14 testimony and, if you would, you read your
15 answer, please. The question was, (reading):

16 Q. So as I understand it, you do
17 not have a problem with the way Dr. Rhett used
18 the vacuum. You do have a problem with the
19 fact that he used it at all?

20 Your answer was?

21 A. (Reading):

22 A. Yes, and I mean -- the first
23 thing is that the vacuum was an inherent
24 danger to is and the second part is that there
25 needs to be informed consent. It seems clear

1 to me that there was no consent for this and
2 the patient is unaware of any risks and to --
3 to decide to take that risk, one has to have
4 an indication. In my view there is no
5 indication at the time that it's done.

6 I would conclude that that didn't answer your
7 question.

8 Q. The first word of your answer was "yes",
9 is it not? My question was, (reading):

10 Q. So as I understand it, you do
11 not have a problem with the way Dr. Rhett used
12 the vacuum. You do have a problem with the
13 fact that he used it at all?

14 Your answer was, the first word?

15 A. I said "yes", but I wasn't addressing that
16 particular problem. I believe that somewhere
17 later in this that we talked about rocking
18 and, in fact, I indicate that I agreed that
19 that was present and that that is a deviation
20 from the normal technique for vacuum.

21 Q. So you said yes, but that wasn't in
22 response to the question that I had just asked
23 you?

24 A. No. You can hear the rest of my
25 explanation. I was not even thinking about

1 what you said, to be honest.

2 Q. You were on another subject?

3 A. Correct.

4 Q. You do not believe that Dr. Rhett's pulls
5 with the vacuum were difficult?

6 A. Say it again?

7 Q. You did not think that Dr. Rhett's pulls
8 on the vacuum were difficult, based on your
9 viewing of the video?

10 A. I would agree with that.

11 Q. Thank you. And you did not believe the
12 number of pulls done by Dr. Rhett was
13 excessive or too much?

14 A. I agree with that.

15 Q. In fact, you've had an occasion to use a
16 vacuum with around six pulls and the baby came
17 out healthy. Is that true?

18 A. Correct.

19 Q. And the timeframe that Dr. Rhett used the
20 vacuum was short enough and the baby made
21 progress, isn't that true?

22 A. I would agree with that.

23 Q. You also used the vacuum to address
24 maternal exhaustion in your own practice?

25 A. Correct, but not after eleven minutes in

1 the second stage.

2 Q. And in fact you used the vacuum numerous
3 times in assisting deliveries; isn't that
4 true?

5 A. That's true.

6 Q. In your opinion, the timeframe of Dr.
7 Rhett using the vacuum was appropriate?

8 A. I'm sorry. The timeframe?

9 Q. The three minutes and seven seconds that
10 he used the vacuum, that was an appropriate
11 time to use a vacuum?

12 A. That length of time, I think is
13 appropriate. I don't think that when it was
14 used was appropriate.

15 Q. And you agree that Ms. Washington was
16 completely dilated when the vacuum was
17 applied?

18 A. I do.

19 Q. You saw no evidence of pop-offs during
20 Jayden's delivery?

21 A. Right, that's correct.

22 Q. And is it appropriate to apply the vacuum
23 by feel, just as Dr. Rhett did?

24 A. Yes.

25 Q. Thank you, sir. Jayden's fetal heart

1 monitor strips showed that his heart rate had
2 declined into the nineties and he was have
3 decelerations, didn't it?

4 A. Yes.

5 Q. And a declining heart rate can be an
6 indication or a reason that the baby is having
7 distress?

8 A. If in fact it is sustained, yes. As we
9 have talked about in this situation, however,
10 up until approximately 7:29 there weren't any
11 decels of significance that were -- that were
12 repetitive. So this baby goes into this
13 second stage in very good condition with no
14 evidence at all that it has any compromise.
15 As I showed you on that video, when in fact
16 Dr. Rhett does an examination and that during
17 a deceleration an in fact the baby's heart
18 rate accelerates, that in fact is quite
19 reassuring.

20 Q. If the baby is having distress in utero
21 from a declining heart rate, it can mean that
22 he is not getting enough oxygen. Isn't that
23 true?

24 A. That's -- yes.

25 Q. And oxygen, a lack of oxygen can cause

1 brain damage; you agree with that?

2 A. I do.

3 Q. And you agree that concern over a fetal
4 heart monitor strip ov a fetus can be a proper
5 indication to use the vacuum?

6 A. I do.

7 Q. And you agree that maternal exhaustion or
8 poor pushing, for whatever reason, by the
9 mother, whether she is tired, whether she is
10 not strong enough, for whatever reason, that
11 is also an indication to use the vacuum?

12 A. Yes, provided that there is the timeframe
13 there and the conditions that are met, which
14 they are not in this case.

15 Q. And you used the vacuum to address
16 maternal exhaustion in your own practice?

17 A. Yes.

18 Q. You noted from the records that Jayden was
19 born with the umbilical cord around his neck?

20 A. Yes.

21 Q. And you noted that Dr. Rhett ordered some
22 labs on Jayden after he was born?

23 A. (No verbal response).

24 Q. The pH, the baby's pH?

25 A. Uh, -- yes. This is not performed -- ths

1 is taken from the umbilical cord, so it's not
2 -- so it's not really -- I mean, it's from the
3 baby but it is not something that he orders
4 somebody take from the baby. It's taken from
5 the umbilical cord at the time of delivery.

6 Q. And the pH was on the low side of normal;
7 isn't that true?

8 A. His pH was 7.21, which -- when one is
9 talking about a low pH in an infant and
10 concerned about the pH from an asphyxial
11 standpoint, the lower level or the level that
12 one is talking about is 7.0; this is 7.21, not
13 anywhere near a level of concern about
14 asphyxia.

15 Q. So you disagree that it was on the low
16 side?

17 A. I disagree that it is on the low side. In
18 fact, when we look at these features -- a pH
19 that is above 7.2 is within the normal range,
20 albeit on the low side of normal.

21 Q. If you would, turn to Page 50 of your
22 deposition, please.

23 A. (Complies).

24 Q. My question at Line 3 was, (reading)

25 Q. And do you have an explanation

1 as to why the PCO2 was slightly high?

2 Your answer was?

3 A. (Reading):

4 A. Because there's PCO retention.

5 There's also -- that's also what makes the pH

6 a little low. You know, 7.21 is not the usual

7 pH. This is on the lower side but it's not

8 alarmingly low. But the reason that it is a

9 little low is because the PCO2 is a little

10 high.

11 Q. And in your own words, ---

12 A. It's not because there is a metabolic

13 change. That's what that's saying.

14 Q. But in your own words you stated that the

15 pH of 7.21 is not the usual pH of baby, it's

16 on the lower side, did you not?

17 A. I think that's what I ended up saying just

18 a few minutes ago, too.

19 Q. Thank you. The medical team gave oxygen

20 to Jayden after he was born, didn't they?

21 A. Yes.

22 A. Dr. Rhett requested that he be given

23 oxygen?

24 A. I'm not sure. I can't, I can't

25 corroborate that. I don't know that.

1 Q. You are not aware of who ordered the
2 oxygen?

3 A. Correct.

4 Q. And the baby had decelerations on the
5 fetal heart monitor strip, the mom was having
6 trouble pushing, the baby had a low pH on
7 delivery, the umbilical cord was wrapped
8 around his neck and the baby needed oxygen
9 after birth -- five factors going on here, but
10 yet you think that there was no indication for
11 intervention by Dr. Rhett to use the vacuum?

12 A. I take it that -- you're taking those
13 completely out of context; so, yes, I don't
14 agree with that at all.

15
16 Q. You found Jayden's Apgar scores as seven
17 at one minute and nine at five minutes were
18 acceptable and normal, did you not?

19 A. I did.

20 Q. And those values were consistent with what
21 you saw on the video?

22 A. Yes.

23 Q. You have no reason to question them?

24 A. No.

25 Q. You felt that the use of Pitocin in this

1 case was appropriate?

2 A. I did.

3 Q. And if there was any cord compression with
4 this baby, it would not have been caused by
5 Dr. Rhett and would be beyond his control?

6 A. I would agree with that.

7 Q. You would agree that delivery itself, even
8 a normal delivery, is traumatic; do you agree?

9 A. It has some risk for trauma, yes.

10 Q. In other words, the baby is squeezed
11 through a tight space in the birth canal,
12 which can cause problems?

13 A. I would agree with that.

14 Q. And it causes risk to the baby and to the
15 mama, isn't that true?

16 A. Correct.

17 Q. Doctor, did you note that Jayden had
18 coloboma of the eye, which is a congenital
19 problem?

20 A. I am aware that he had a unilateral
21 coloboma, yes.

22 Q. And that's not birth-related and is not
23 caused by Dr. Rhett. True?

24 A. Correct.

25 Q. He also had a heart murmur?

1 A. I think he had a heart murmur initially
2 but that resolved spontaneously.

3 Q. You're not aware that he was just again
4 diagnosed with a heart murmur in recent times?

5 A. I am not.

6 Q. You would agree that a heart murmur is not
7 caused by a doctor or the birth process?

8 Isn't that true?

9 A. I would agree.

10 Q. And you saw that Jayden had been diagnosed
11 with hydroceles?

12 A. Yes.

13 Q. And an undescended testicle?

14 A. Yes.

15 Q. Those were not caused by Dr. Rhett or the
16 birth process.

17 A. Correct.

18 Q. And you saw that he was diagnosed with an
19 inguinal hernia?

20 A. Yes. Recognizing that the inguinal hernia
21 is associated with the undescended testes and
22 the hydrocele, they're -- it's sort of all one
23 kind of situation "package", if you will.

24 Q. And that was not caused by Dr. Rhett nor
25 was it caused by the birth process?

1 A. Correct.

2 Q. Are you aware that Jayden was diagnosed
3 with congenital clastoma, which is an ear
4 abnormality?

5 A. I am not aware of that. I couldn't find
6 that. I don't know that.

7 Q. Are you aware that he was diagnosed with
8 hyper-extensibility of the joints?

9 A. I am not aware of that either.

10 Q. Are you aware that he was diagnosed with
11 reflux and other GI issues, gastrointestinal
12 issues?

13 A. I believe I am aware of that, yes. I
14 don't know what the extent of that is however.

15 Q. Are you aware that he was diagnosed with
16 pulmonary artery branch stenosis, or a
17 narrowing of his arteries?

18 A. That was the -- that was the explanation
19 for the initial heart murmur but, as I said,
20 the heart murmur resolved spontaneously, so
21 supposedly this narrowing had abated itself.

22 Q. And all of those diagnoses are not caused
23 by Dr. Rhett or the birth process, do you
24 agree?

25 A. I do.

1 Q. And "genetic" means that the baby is born
2 with those problems, that they are not caused
3 by a person or an event?

4 A. I wouldn't say that's what "genetic"
5 means, no.

6 Q. All right. Genetic problems, genetic
7 abnormalities.

8 A. No. These are birth defects. They are
9 not necessarily genetic. Normal babies,
10 thirty-five percent of babies have some kind
11 of birth defect.

12 Q. And those birth defects are not caused by
13 Dr. Rhett and they are not caused by the birth
14 process. Would you agree?

15 A. That's correct. I agree.

16 Q. You have no opinions on whether Jayden's
17 hemorrhages caused his developmental delays or
18 other problems; isn't that true?

19 A. That's not my field of expertise and I
20 certain would defer to the individuals whose
21 expertise that it is.

22 Q. And you agree that babies can have
23 hemorrhages without ever having been born with
24 the help of a vacuum?

25 A. I do agree with that.

1 Q. And that, in fact, babies can have
2 hemorrhages that were born by C-section?

3 A. They can.

4 Q. And in fact -- in fact, that's what it
5 says right here in this practice bulletin by
6 the American College of Obstetricians &
7 Gynecology, doesn't it?

8 A. I'm sorry, what does it say? What are
9 you asking?

10 Q. It explains that babies can have
11 hemorrhages from events totally not connected
12 to a vacuum, isn't that true?

13 A. Yes.

14 Q. And, in fact on Page 420 of this document,
15 in Table 1, the number of babies that have
16 hemorrhages from a C-section is remarkably
17 similar to the number of babies that have
18 hemorrhages associated with a vacuum, is it
19 not?

20 A. I'm sorry, you'll have to show me that.
21 My copy of this has Page 1001.

22 Q. (Indicating).

23 A. Okay.

24 Q. The incidence of hemorrhage caused after a
25 C-section was one in nine hundred fifty two

1 babies; is that true?

2 A. Yes.

3 Q. And the incidence associated with vacuum
4 was one in eight hundred sixty babies?

5 A. Yes.

6 Q. Those are very similar numbers, and the
7 babies from C-sections did not have vacuum
8 usage, isn't that true?

9 A. Yes, but these had failed labors and they
10 make that point here. When you have a
11 difficult labor that you end up having a C-
12 section for, yes, that's traumatic.

13 Q. And this Table was not shown to you by
14 plaintiff's counsel yesterday or today, these
15 questions were not asked of you by plaintiff's
16 counsel, were they?

17 A. These questions were not asked but in fact
18 what I showed to the jury included this very
19 page.

20 Q. You didn't explain this table, did you?

21 A. I did not.

22 Q. Thank you, Doctor. Dr. Oakes, how do you
23 handle chelisoimmunization?

24 A. That's a very good question. Cheliso-
25 immunization is one of the minor antigens. So

1 in fact, one has to determine whether or not
2 the baby is anemic. This can be done via
3 sampling of the umbilical cord and, in fact,
4 it may need to have a transfusion if it is
5 severely anemic.

6 Q. What is amploidy screening?

7 A. I'm sorry?

8 Q. What is amploidy screening?

9 A. Can you spell the word?

10 Q. A-m-p-l-o-I-d-y.

11 A. I can't tell you.

12 Q. Thank you, Doctor. To the video, please.

13 If we could cue that up.

14 A. If -- if in fact you asking about
15 amuploidy screening, one is -- what one is
16 looking for is chromosomal abnormalities, but
17 that's amuploid. The word that you're using,
18 I'm not sure that is a word. But amuploid
19 screening is something that's routinely done
20 in prenatal care now by sampling the mother's
21 blood, measuring a number of hormonal factors
22 and also in look at the fetus to see that it
23 has certain characteristics that are
24 consistent with amuploidly. That just means
25 abnormal chromosome balance.

1 Q. And if you would watch a short portion of
2 this video, I have a few questions for you --
3 and I'll scoot out of the way, (video
4 playing):

5 Q. Tell me about your ...

6 A. Can you tell me the lines that you're
7 doing, I'd like to follow along.

8 Q. Sure. Line (sic) 41, 24.

9 A. Page?

10 Q. Page 41, Line 24 through Page 44, Line 24
11 (video playing):

12 Q. Tell me about your education
13 starting with high school.

14 A. I went to Northside High School
15 in Atlanta, which is a public school. Then I
16 went to the University of the South, which is
17 in Sewanee, Tennessee. Then I taught school
18 for a Avondale High school in Atlanta. Then I
19 went to the Medical College of Georgia in
20 Augusta. I did my residency in Jacksonville,
21 Florida, and then I came to town, came to
22 Charleston.

23 Q. Any Fellowships?

24 A. No, sir.

25 Q. Are you Board-certified?

1 A. Yes, sir.

2 Q. In what field?

3 A. Ob-Gyn.

4 Q. As of when?

5 A. 1979.

6 Q. Did you pass your boards on the
7 first time?

8 A. Yes, sir.

9 Q. Have you gotten recertified?

10 A. No, sir, I'm still certified.

11 Q. You have no special training in
12 maternal, fetal; is that correct?

13 A. No, sir.

14 Q. Since your residency, tell me
15 about your employment.

16 A. I started a solo private
17 practice in 1977 and I did that approximately
18 nine years. Then I joined with Granger
19 Osborne, O-s-b-o-r-n-e, and we formed
20 Lowcountry Ob-Gyn somewhere along in there.
21 I left them -- in February of '07, I went into
22 private/solo gyn practice. I stopped doing
23 obstetrics on September 29th, 2005. I only
24 remember the date because it's my mother's
25 birthday. Three of those patients named

1 babies after my mother, they did, called them
2 Mary.

3 MOLLY CRAIG: That's wonderful.

4 THE WITNESS: They said they
5 did anyhow. Who knows?

6 Q. Why did you stop obstetrics?

7 A. Eleven years of nights in the
8 hospital is enough. I enjoyed it. I'd done
9 my share. I'm in my late fifties and ---

10 Q. I understand. Why did you leave
11 Lowcountry?

12 A. That's a big Ob-Gyn practice.
13 It's lots of people, lots of employees and
14 that's what it takes to run an obstetrics
15 practice, where people have enough time off.
16 But it was too -- I started it, I built it
17 and, so, I just thought it was time for me to
18 do my own thing again. I started that way and
19 I thought that I'd end my practice that way.
20 Now my life is very simple. I have three
21 employees and my own hours.

22 Q. What is the name of your
23 practice now?

24 A. Edmund Rhett, Jr., M.D. PA.

25 Q. Have you ever had any

1 investigations relating to your licenses or
2 right to practice medicine or privileges or
3 anything like that?

4 A. No, sir.

5 Q. Where do you currently have
6 privileges?

7 A. I have full gyn privileges at
8 East Cooper and courtesy privileges at Roper
9 and St. Francis hospitals.

10 Q. Tell me about the process by
11 which your ob-gyn privileges no longer exist?

12 A. I wrote a letter that said that
13 I wanted to stop practicing obstetrician, I
14 wrote letters to the patients that I was
15 taking care of and told them what day that I
16 was going to stop, assigned all of my pregnant
17 patients to other patients (sic) in my
18 practice.

19 Q. So that was a completely
20 voluntary process?

21 A. Oh, yes sir.

22 Q. Where are your offices?

23 A. 725 Long Point Road, Mount
24 Pleasant, South Carolina 29464.

25 Q. What were the call arrangements

1 at Lowcountry back when Jayden was born?

2 A. Everybody was assigned a twenty-
3 four hour period of time that they were on
4 call. Doctors sometimes would come in to
5 deliver their own patients but the on-call
6 doctor was always there.

7 Q. Did you become involved in this
8 particular case because you were on call that
9 day?

10 A. Yes, sir.

11 (Video Stopped)

12 Q. Dr. Rhett was trained and qualified to
13 practice Ob, wasn't he?

14 A. Yes.

15 Q. And it's hard working staying up all night
16 delivering babies, isn't it?

17 A. It is. I would certainly agree with that.

18 Q. And when Dr. Rhett said that he or his
19 other partners were on call for twenty-four
20 hours, that meant that they could be
21 delivering babies for twenty-four hours
22 straight, did it not?

23 A. It did.

24 Q. So there was nothing wrong for Dr. Rhett
25 to make the decision not to do obstetrics

1 anymore when he turned -- when he got close to
2 sixty years old. Agreed?

3 A. I agree with that. I made the same
4 decision.

5 Q. Yes, sir, you sure did. Thank you.

6 Next clip, please, Page 124, Lines 20 through
7 Page 125, Line 13 (video playing):

8 Q. And when you measured minus one,
9 you were measuring ---

10 A. No, I was measuring where I
11 thought the baby was at minus one excluding
12 the molding. Mr. Graham, I have been doing
13 this so long, if you -- you asked me all those
14 definitions earlier today and, you know, I've
15 been -- I haven't been practicing obstetrics
16 for about three years now but I practiced
17 obstetrics from 1974 until 2005. You know,
18 I've forgotten some of those definitions.
19 Some of them, you know, they're just technical
20 terms but I'm a clinical physician and I
21 practice things that make sense. When I said
22 it was minus one, I thought the baby had moved
23 down. I didn't think that the molding was at
24 minus one, I thought that the molding was
25 beyond that. I'm talking about the vertex

1 *itself, not the -- not the little bit of edema*
2 *off of the top of the baby's head.*

3 *(Video Stopped)*

4 Q. Dr. Oakes, Dr. Rhett was in private
5 practice when he delivered Jayden, isn't that
6 true?

7 A. Yes.

8 Q. Dr. Rhett did not work at a teaching
9 hospital where he trained medical students and
10 trained residents, isn't that true?

11 A. That's true.

12 Q. And as a clinical physician who's in the
13 hospital all day or all night delivering
14 babies, it is not part of his job to be asked
15 questions on the spot about technical
16 definitions; isn't that true?

17 A. I don't think that we are talking about
18 him being asked questions when he was on call.

19 He was asked questions during his deposition.
20 This was a five-hour deposition, a hundred
21 seventy pages. You know, it goes on from 3:00
22 to 8:00 and throughout -- that's the reason
23 that I had Mr. Graham play so many of these
24 things. This is -- I made notes myself, which
25 these people reviewed. These are the notes

1 that I picked out of the deposition myself and
2 it's -- it is -- you can't just take a couple
3 of these things and then criticize him.
4 That's why -- I'm sorry that we played so many
5 but it is -- it's time after time after time
6 during these five hours of which he says that
7 he is feeling fine, that there's no reason why
8 he can't answer answers (sic), but this is
9 basic obstetrics.

10 Q. Doctor ---

11 A. It wasn't -- these questions were not
12 answered. It doesn't take something to be --
13 to be thinking about. It's not esoteric.
14 It's everyday obstetrics.

15 Q. Doctor, you said it yourself, Dr. Rhett
16 was not in the hospital when he was asked
17 those questions. He was sitting in a lawyer's
18 office, wasn't he?

19 A. He was.

20 Q. For five hours, being interrogated with
21 questions by plaintiff's counsel; isn't that
22 true?

23 A. Pretty similar to the situation that I am
24 sitting in right now.

25 Q. Yeah. You're getting paid to sit there,

1 aren't you?

2 A. I am.

3 Q. Quite handsomely, as a matter of fact?

4 A. Yes, I am.

5 Q. Thousands of dollars you're being paid to
6 sit here and answer my questions?

7 A. I am.

8 Q. Over twenty thousand dollars to be here at
9 trial, with all the work that you have put
10 into this over the last few years?

11 A. No.

12 Q. Over ten thousand dollars?

13 A. Correct.

14 Q. Easily over ten thousand dollars?

15 A. I believe so.

16 Q. That you are getting from reviewing this
17 one case?

18 A. Correct. But this is the -- this is --
19 this is the most depositions I believe that
20 I've ever looked at it a case.

21 Q. And you said yourself that it is not part
22 of Dr. Rhett's practice as a clinical
23 physician to be asked questions on the spot
24 and give definitions. Isn't that true?

25 A. I'm sorry. I guess that I disagree with

1 that. I think that that is his job, to be
2 able to respond to questions about common
3 things relative to his practice.

4 Q. Dr. Oakes, you testified earlier to
5 plaintiff's counsel that those definitions are
6 things that medical student know, did you not?

7 A. I did.

8 Q. Dr. Rhett has not been a medical student
9 in over thirty-five years, isn't that true?

10 A. Correct.

11 Q. Thank you, sir. Next clip, Page 116, Line
12 4 through Page 117, Line 3 -- (video playing):

13 Q. The other indication, you
14 asserted, for using the vacuum in this case
15 was maternal fatigue. What do you base that
16 on?

17 A. If you look at the video that
18 Jamsetta's family took, you'll see that she is
19 just worn out and she was not making a very
20 valid pushing effort because she was tired.
21 She'd been in the night before, where they had
22 done something to try and help her cervix open
23 up, and it was 7:00 o'clock at night and I
24 thought that she was worn out.

25 Q. Do you make a distinction

1 *between maternal fatigue as an indication for*
2 *vacuum and poor pushing as an indication for*
3 *vacuum?*

4 A. *I think its words to the same*
5 *effect, I think both things happened.*

6 Q. *So the ---*

7 A. *She really wasn't able to push*
8 *because she was tired. You know, all that*
9 *pushing will wear you out.*

10 Q. *Earlier I think you said that*
11 *there were three indications that you*
12 *contended existed for the use of a vacuum:*
13 *fetal distress, maternal fatigue and poor*
14 *pushing. Did I get those right?*

15 A. *Yes, sir.*

16 Q. *So the second and the third are*
17 *really this same point. Correct?*

18 A. *Well, you can push when you're*
19 *tired sometimes but she was tired -- she was*
20 *tired and didn't push well and needed some*
21 *help, and I gave her some help.*

22 Q. *Tell me the basis for your*
23 *contention that poor pushing was an indication*
24 *for vacuum.*

25 A. *Well, the baby needed to be*

1 delivered. We had delayed decelerations,
2 meaning that we may be compromising this baby.
3 So instead of wasting any more time, there's
4 the baby sitting right there -- when I pulled
5 a little bit, then she really pushed.

6 Q. Well, my question is -- I
7 understand you claim that there was fetal
8 distress that justified use of the vacuum.
9 And I understand that you claim that there was
10 maternal video as displayed on the video. But
11 what is your basis for contending that
12 Jamsetta Washington was not pushing very well?

13 A. Well, with each contraction when
14 she would push she would not move the baby
15 very much. She would make -- you can see here
16 -- this is a -- let's go back. When she had a
17 contraction at thirty-one, really, and forty
18 seconds, she made no pushing effort.

19 Q. What page are you on?

20 A. Three ten.

21 (Video Stopped)

22 Q. Dr. Oakes, you were not at Jayden's
23 delivery, were you?

24 A. I was not.

25 Q. You did not see with your eyes and feel

1 with your hands what progress Ms. Washington's
2 efforts were making in getting Jayden out, did
3 you?

4 A. I did not.

5 Q. You agree that Dr. Rhett repeatedly
6 encouraged Ms. Washington to push on that
7 video, did she (sic) not?

8 A. During the part that we have there the
9 answer is yes. There was very little
10 encouragement before the vacuum was applied,
11 though.

12 Q. And plaintiff's counsel, Mr. Graham, did
13 not show these parts of the video when he's
14 been asking you questions for the last day,
15 did he?

16 A. I'm not sure what parts you're actually
17 talking about.

18 Q. This part of the video of Dr. Rhett's
19 five-hour deposition?

20 A. Oh, from the ---

21 Q. Thank you. The last clip, please, --
22 designation is Page 152, Line 3 through Page
23 154, Line 21, (video playing):

24 Q. Dr. Rhett, how many years have
25 you been delivering babies?

1 A. *Thirty-four.*

2 Q. *Approximately how many babies*
3 *have you delivered in your career?*

4 A. *About seven thousand.*

5 Q. *And how many of those seven*
6 *thousand deliveries were deliveries that*
7 *needed the assistance of a vacuum?*

8 A. *At least a thousand.*

9 Q. *Why did you use a vacuum for the*
10 *delivery in this case?*

11 A. *Because it was the easiest for*
12 *the mother and baby, simplest and quickest way*
13 *to get the baby out.*

14 Q. *You were asked by plaintiff's*
15 *counsel some technical definitions. You were*
16 *also asked some questions about the shape and*
17 *size, the specifics of the vacuum. Do those*
18 *definitions have anything to do with the*
19 *delivery in this case?*

20 EDWARD GRAHAM: *Object to the*
21 *form.*

22 A. *It's just the vacuum that I have*
23 *used. I have used the same vacuum for fifteen*
24 *to twenty years, I think. I know I've used it*
25 *at least a thousand times and I -- so I don't*

1 -- I just, I mean I just drew a picture of a
2 vacuum because he asked me to. I don't think
3 it has a thing to do with this delivery.

4 Q. And does the shape or the design
5 of the vacuum have anything to do with the
6 delivery?

7 EDWARD GRAHAM: Object to the
8 form.

9 A. It's the vacuum I've used for
10 literally over a thousand deliveries. I don't
11 think so.

12 Q. Did you prepare for this
13 deposition as if you were sitting for a
14 medical exam?

15 A. No.

16 Q. Speaking of medical exams, are
17 you Board-Certified?

18 A. I am.

19 Q. And you passed those Board
20 certifications on the first attempt?

21 A. I did.

22 Q. Now, in preparation for your
23 deposition today, did you review the hospital
24 medical records of Ms. Washington's delivery?

25 A. I did.

1 Q. And based upon the hospital
2 medical records and your independent
3 recollection of the delivery, did you act
4 reasonably in the care of this patient?

5 EDWARD GRAHAM: Object to the
6 form.

7 A. I thought that I acted extremely
8 reasonably in the delivery here. I thought
9 that it was one of the better deliveries that
10 I've done. I -- I actually saw a video of
11 myself and I'd never seen that. I have done
12 seven thousand or so deliveries and I've never
13 seen myself deliver a baby. Kind of
14 interesting.

15 Q. Dr. Rhett, do you have an
16 opinion as to whether or not you complied with
17 the standard of care in the delivery that's
18 at-issue in this case?

19 EDWARD GRAHAM: Object to the
20 form.

21 A. I do.

22 Q. And what is that opinion, sir?

23 A. I was following the standard of
24 care in the delivery of this baby.

25 Q. Were you negligent in the care

1 and treatment of Ms. Washington?

2 A. Not one little bit.

3 EDWARD GRAHAM: Object to the
4 form.

5 Q. Did you do anything to cause the
6 injuries to this child?

7 A. No, I did not.

8 (Video Stopped)

9 Q. Dr. Oakes, if a vacuum is used
10 appropriately, it is not a deviation of the
11 standard of care to use it for a proper
12 indication. Do you agree with that?

13 A. I do.

14 Q. And if a vacuum is used appropriately,
15 that is not needlessly harming a patient. Do
16 you agree with that?

17 A. As long as one has an indication, has
18 informed consent, no, I don't think so.

19 Q. And you have no opinions that Jayden's
20 hemorrhage caused his developmental or balance
21 problems. Is that true?

22 A. I think you already asked me that and I
23 said that that's not my field of expertise.

24 CHILTON SIMMONS: May I approach,
25 Your Honor?

1 THE COURT: You may.

2 CHILTON SIMMONS: If I could ask the
3 witness to read some of Dr. Rhett's answers
4 and then I will ask a few questions about
5 those answers. I think it will be faster and
6 easier than playing the video.

7 THE COURT: All right, you may
8 proceed.

9 CHILTON SIMMONS: Is that acceptable
10 to the Court?

11 THE COURT: It is. If there is an
12 objection from the other side, we'll resolve
13 it at that time. You may proceed.

14 CROSS EXAMINATION CONTINUED

15 BY CHILTON SIMMONS:

16 Q. I hand you, Doctor, a copy of Dr. Rhett's
17 deposition.

18 EDWARD GRAHAM: Page and line,
19 please?

20 CHILTON SIMMONS: I'll give it to
21 you, I sure will.

22 CROSS EXAMINATION CONTINUED

23 BY CHILTON SIMMONS:

24 Q. Page 57, Line 18, through Page 58, Line
25 11.

1 A. Page 57, Line?

2 Q. Page 57, Line 18. I'll walk you through
3 it, Dr. Oakes. I was just providing that to
4 plaintiff's counsel.

5 EDWARD GRAHAM: Objection.

6 CHILTON SIMMONS: This is in response
7 to plaintiff's counsel's portions of the video
8 that they played of Dr. Rhett. We're just
9 trying to put his other answers, which are
10 right around the portions that plaintiff's
11 counsel played, into context, Your Honor.

12 THE COURT: What is your objection?

13 EDWARD GRAHAM: Your Honor, we were
14 informed of certain counter-designations and
15 this was not among those.

16 CHILTON SIMMONS: These are within
17 the counter-designations and they are the
18 questions immediately preceding or following
19 the portion that was played by plaintiff's
20 counsel.

21 THE COURT: All right. I am
22 hearing a basic difference. Counsel for the
23 plaintiff tells me that this was not
24 designated or counter-designated. Now you say
25 that it was. So which is it? Did the

1 defendants give you these counter-
2 designations?

3 EDWARD GRAHAM: I don't believe so,
4 Your Honor.

5 THE COURT: Well, let's just take a
6 moment so you can tell me with certainty
7 whether they did or not.

8 EDWARD GRAHAM: If Your Honor
9 please, she gave us one type list and then she
10 followed up with this and said 'this is the
11 real list', and I know it's not the real list.

12 If Your Honor please, they -- they've
13 given us three separate counter-designations.
14 It was not on the first set. It was on the
15 supplemental set. Then they gave us the
16 "real" list and it was no longer included, so
17 we didn't take up that issue.

18 THE COURT: All right. Then look
19 through the contents and see if you find an
20 objection Let's just go to the first one.
21 How many are there?

22 CHILTON SIMMONS: There are not many,
23 Your Honor. I think five different examples.

24 THE COURT: All right. Let's just
25 give the plaintiff the page and line again.

1 EDWARD GRAHAM: Can we just have
2 the page and line again?

3 CHILTON SIMMONS: Absolutely. Sure.

4 EDWARD GRAHAM: Can you give us all
5 of the new ones?

6 CHILTON SIMMONS: Page 57, Line 18,
7 to Page 58, Page 11.

8 MR. GRAHAM: Yes.

9 MS. SIMMONS: Page 58, Line 24, to
10 Page 60, Line 4.

11 MR. GRAHAM: Your Honor, we withdraw
12 our objection. We were just concerned since
13 that was not on the real list.

14 THE COURT: All right. Okay.
15 Withdrawn and you may proceed.

16 MS. SIMMONS: With all due respect,
17 I gave them a list of the video portions that
18 I played and those were
19 the portions that I didn't play.

20 THE COURT: I'm going to declare
21 the whole thing a tempest in a teapot and --
22 please proceed.

23 MS. SIMMONS: Okay.

24 DIRECT EXAMINATION CONTINUED

25 BY MS. SIMMONS:

1 Q. Dr. Oakes, yesterday when Mr. Graham was
2 asking you questions, he asked -- he showed a
3 portion of the video of Dr. Rhett talking
4 about indications for using a vacuum and he
5 did not play this portion which I would like
6 to ask you the question and have you read it
7 into the record.

8 At Page 57, Line 18, age fifty-seven,
9 plaintiff's counsel's question to Doctor Rhett
10 was this, (reading):

11 Q. Would it be a breach of the
12 generally accepted standards of obstetrical
13 practice to apply a vacuum extractor and use
14 it to deliver a baby without there being an
15 indication for use of the vacuum?

16 And Dr. Rhett's answer was what?

17 A. (Reading):

18 A. I'm not sure I know the answer
19 to that. I know in this particular case I saw
20 an indication, which means a cause that says I
21 need to fix something and I applied the vacuum
22 to the baby and helped the mother push it out.

23 Q. And that's all my questions at that point.

24 And moving on to the next designations. Line
25 thirteen, twenty-five, three lines. I'm

1 sorry. Page 13, Line 25, ---

2 MR. GRAHAM: What -- what was that
3 again?

4 MS. SIMMONS: Page 13, Line 25.

5 MR. GRAHAM: Oh. I thought you were
6 just giving us all of them.

7 MS. SIMMONS: I have about four of
8 them.

9 MR. GRAHAM: Could we have those,
10 please, so we can see if we can withdraw all
11 the objections to these new ones?

12 MS. SIMMONS: May I proceed, your
13 Honor?

14 THE COURT: Just give counsel a
15 moment to look at The content. Is there an
16 objection to the content of the first one,
17 counsel?

18 MR. GRAHAM: Your Honor, the two that
19 she just told us about we have no objection
20 to.

21 MS. SIMMONS: Thank you.

22 CROSS EXAMINATION CONTINUED

23 BY MS. SIMMONS:

24 Q. Doctor, looking at page thirteen, the
25 question to Dr. Rhett was, (reading):

1 Q. If you were in the process of
2 delivering a baby today, how would you
3 determine whether or not the baby's head is
4 engaged?

5 And his answer was?

6 A. "By pelvic exam."

7 Q. Thank you. Moving to Page 50, Line 19.
8 If you would, please, sir, ---

9 A. I'm sorry. Say it again.

10 Q. Page 50, Line 19.

11 A. Okay.

12 Q. I'll ask you two questions that were asked
13 to Dr. Rhett at the time. The question was,
14 (reading):

15 Q. Do you consider any obstetrical
16 text to be reliable about the generally
17 accepted standards of practice for OB's in
18 terms of when and how a vacuum extraction
19 should be performed?

20 His answer was?

21 A. (Reading):

22 A. There are written things but you
23 can't call them reliable. There's no one
24 standard. There's no one text. Obstetrics is
25 something that's practiced actively and

1 *there's no one reliable text. No, sir.*

2 Can I make a comment about that?

3 Q. No, sir, I'd like to you to finish the
4 next sentence. The next question was,
5 (reading): *Not a single one?* And Dr. Rhett's
6 answer to that?

7 A. (Reading):

8 A. *There are -- there's no one text*
9 *that's reliable. There are suggestions,*
10 *guidelines that are helpful.*

11 Q. And in fact that publication by the
12 American College of Obstetricians & Gynecology
13 states that it is a guideline, does it not?

14 A. It does.

15 Q. Thank you, Doctor. That's all my
16 questions at this time.

17 THE WITNESS: Judge, if I could
18 make a comment about it?

19 THE COURT: Actually we're going to
20 go to cross-examination (sic) and if counsel
21 wishes to pick it up that would be his choice.
22 Not your counsel but plaintiff's counsel.

23 All right. Ladies and Gentlemen, the
24 way that a witness is presented, we have
25 direct examination, which has been completed;

1 then we have cross-examination; then we go
2 back to the proponent of the witness on
3 redirect so that the proponent may take up any
4 new issues which were raised during cross-
5 examination.

6 Yes, ma'am? Were you not quite
7 finished?

8 CHILTON SIMMONS: I was not quite,
9 Your Honor. Just a few more questions. I am
10 finished with the transcripts. I apologize.

11 THE COURT: That's all right. Go
12 ahead, Counsel.

13 CROSS EXAMINATION CONTINUED

14 BY MS. SIMMONS:

15 Q. Dr. Oakes, you agreed that a doctor cannot
16 prevent a birth defect?

17 A. I agree with that.

18 Q. And you agree a doctor cannot prevent a
19 genetic disorder?

20 A. I do agree with that.

21 Q. You agree that a doctor must exercise ---

22 A. Let me just ---

23 Q. --- his clinical judgment ---

24 A. Let me -- let me, let me just talk about,
25 you know, sort of the advancements. When you

1 ask a blanket question like that, can you
2 prevent a genetic problem, the answer is, in a
3 broad sense, no.

4 But what in fact is going on right now in
5 the research arena is in fact these things are
6 going to be prevented. They're now running a
7 whole bunch of tests looking at the genome and
8 knowing what the genome and abnormality is and
9 in women who are carrying some of these genes,
10 they're actually taking embryos very early and
11 they're sampling them and looking at the
12 various genomes that are there. They're
13 deleting them or they're picking out the right
14 embryos to use and not use. So the answer is
15 that, in probably out lifetime, there's going
16 to be a lot of prevention of genetic
17 abnormalities.

18 Q. So that ---

19 A. So in a broad sense it's -- the answer is
20 not quite correct.

21 Q. And that's good news.

22 A. Absolutely.

23 Q. And that's current research but that was
24 not in practice in 2002 when Jayden Washington
25 was born?

1 A. Correct.

2 Q. Thank you. You agree that a doctor must
3 exercise his clinical judgment based on the
4 circumstances?

5 A. I do. But as I stated very clearly, one
6 can't do clinical judgment if you don't have
7 the knowledge underneath it to apply it.

8 That's what clinical judgment is, is applying
9 one's basic knowledge.

10 Q. And you agree a vacuum is a generally
11 accepted device used by obstetrics to help
12 deliver babies?

13 A. I do.

14 Q. You agree there are risks caused by C-
15 sections, forceps and normal spontaneous
16 vaginal delivery?

17 A. I completely agree with that.

18 Q. And no delivery is risk free, is it,
19 Doctor?

20 A. No delivery is risk free. I agree with
21 that.

22 CHILTON SIMMONS: Those are all the
23 questions that I have at this time.

24 THE COURT: All right. Thank you.

25 Counsel -- if there were new issues brought up

1 during cross, we give the proponent of the
2 witness an opportunity in what we call
3 redirect to address those.

4 One other thing, you may have noticed
5 on cross-examination that you can ask leading
6 questions. In fact, normally that is the mode
7 of interrogation, is by leading questions --
8 on cross-examination but not on redirect.

9 We're back to the proponent of the
10 witness. Are there questions on redirect?

11 EDWARD GRAHAM: Yes, Your Honor.

12 THE COURT: All right, go ahead.

13 REDIRECT EXAMINATION

14 BY EDWARD GRAHAM:

15 Q. Dr. Oakes, let me start by asking you if
16 you would like a chance to finish the answer
17 that you were not allowed to finish earlier,
18 when you asked if you could make a comment to
19 certain of the deposition portions?

20 A. I would.

21 Q. Please do.

22 A. The question to me was about the
23 reliability of texts and Dr. Rhett's answer at
24 that time was that there aren't any reliable
25 text. Before, we've gone through all of these

1 different things about what makes reliability,
2 what doesn't make reliability but the curious
3 part that was left out by -- in the whole
4 situation here, and one of these things that I
5 had designated -- in fact that I wanted to
6 play and didn't get played here in this on
7 Page 59, Line ---

8 CHILTON SIMMONS: Objection, Your
9 Honor. This is not ---

10 THE WITNESS: This has to do with
11 the reliability of text.

12 THE COURT: Just a moment, sir.
13 What is your objection?

14 CHILTON SIMMONS: It's not responsive
15 and it's beyond the scope.

16 THE COURT: Overruled. It's in
17 response to your question, Counsel, and
18 therefore the Court will allow it. You may
19 proceed.

20 THE WITNESS: Thank you, Your
21 Honor. This is not starting at Line 16, Page
22 159. Mr. Graham's question is, (reading):

23 Q. Earlier you told me that tests
24 weren't reliable. Now I'm asking you, do you
25 consider them unreliable?

1 The answer is, (reading):

2 A. That would be turnover of the
3 way I said what I was saying. What I was
4 saying...

5 EDWARD GRAHAM: Hold it.

6 CHILTON SIMMONS: Objection, Your
7 Honor.

8 EDWARD GRAHAM: Your Honor, we are
9 getting into a matter that we had designated
10 earlier and there was an objection.

11 THE COURT: Right. I believe the
12 Court excluded it, did I not?

13 EDWARD GRAHAM: You did, but the
14 witness did not.

15 THE COURT: All right, very good.
16 Well, let's just move on with the next issue.

17 REDIRECT EXAMINATION CONTINUED

18 BY EDWARD GRAHAM:

19 Q. All right. The Judge has indicated that
20 we're not allowed to give this testimony
21 through Line 23. Was there anything else?

22 A. No, that's what in fact I was going to
23 read.

24 Q. Okay.

25 THE COURT: Mr. Graham, just hold

1 on a minute. In fact, how about handing that
2 up and letting me take a look at it because I
3 don't think it's appropriate to leave it here
4 with the jury have the impression that
5 something has been excluded that is important.

6 EDWARD GRAHAM: Yes, sir,
7 (tendering).

8 THE COURT: All right. The reason
9 that the answer that was given was excluded
10 was that the Court determined the answer given
11 by the deponent, by Dr. Rhett, had to do with
12 attorney/client privilege. The answer
13 references something that was discussed
14 between counsel and the client and one of the
15 privileges that we have in this society and in
16 this case specifically is confidentiality of
17 communications between a lawyer and client.
18 For that reason the Court excluded it.
19 Please move on to the next issue.

20 EDWARD GRAHAM: Yes, Your Honor.

21 THE COURT: An the -- actually,
22 let's -- I am going to continue on the point.
23 The reason it is excluded is this. This is
24 not the lawyer's deposition nor the testimony
25 being taken from the lawyer. It's what the

1 witness has to say and what the witness'
2 answer is.

3 So if there's been a discussion by an
4 attorney that may provide an answer to an
5 anticipated question or may bear upon an
6 answer, then the attorney/client privilege
7 issue protects that and, thus, it is excluded
8 here. In other words, it's not the lawyer's
9 answer we're looking for. It's what the
10 witness' answer would be. For that reason the
11 Court thought it not only appropriate under
12 the Rules but fair to exclude it.

13 No, go ahead if you have further
14 questions.

15 EDWARD GRAHAM: Thank you, Your
16 Honor. I do have several.

17 REDIRECT EXAMINATION CONTINUED

18 BY EDWARD GRAHAM:

19 Q. Dr. Oakes, would you please turn in your
20 deposition to Page 44.

21 A. (Complies).

22 Q. I want to direct your attention to your
23 sentence that starts on Line 7. I believe
24 earlier in Ms. Simmons' questions of you that
25 asked you a question about the technique and

1 you indicated that you thought you had
2 provided additional answers about rocking.
3 I'm going to ask you if you would like an
4 opportunity to give the rest of your answer on
5 this subject.

6 CHILTON SIMMONS: Objection, leading.

7 THE COURT: Sustained. Counsel,
8 Leading. Also improper use of a deposition.
9 You may question the witness without it --
10 well, at any point did you question the
11 witness about his deposition or were you ---

12 EDWARD GRAHAM: Yes, sir.

13 THE COURT: Were you questioning
14 him about his testimony with regard to the
15 technique? In the deposition?

16 CHILTON SIMMONS: Yes, Your Honor.

17 THE COURT: All right. Then your
18 objection as to leading is overruled. It
19 arose from a deposition and the Court will
20 permit it. You may proceed.

21 EDWARD GRAHAM: Thank you, Your
22 Honor.

23 REDIRECT EXAMINATION CONTINUED

24 BY EDWARD GRAHAM:

25 Q. Dr. Oakes, what was your testimony about

1 technique on that portion of your answer?

2 A. Page 44, the start of that paragraph says,
3 and we talking about the ACOG technical
4 bulletin, (reading):

5 The next paragraph summarizes the
6 FDA public health advisory. Then they come up
7 and say that among the FDA recommendations for
8 use of the vacuum two are particularly useful.
9 Rocking movements and torque should not be
10 applied to the device. Only steady traction
11 in the line of the birth canal. Number one.

12 Number two, Clinicians caring for the
13 neonate should be alerted that a vacuum device
14 has been used so that they can adequately
15 monitor the neonate for the signs and symptoms
16 of device-related injuries.

17 So the importance here is that one
18 has to give someone informed consent, which
19 isn't done in this case, that there is a clear
20 inherent risk to vacuum extraction and its
21 potential for serious complications.

22 Third, the nursery needs to know
23 about this and they need to be aware that
24 they're following a baby because of the vacuum
25 risk.

1 *Lastly, rocking movements should not*
2 *be applied.*

3 *To look at this video, you see Dr.*
4 *Rhett rocks the vacuum many times, up and down*
5 *and sideways.*

6 The next question, (reading):

7 Q. *So rocking movements when*
8 *applying the vacuum should not be done?*

9 A. *When applying traction to the*
10 *vacuum,..." ---*

11 CHILTON SIMMONS: Your Honor, ---

12 THE COURT: Is there an objection?

13 CHILTON SIMMONS: There was.

14 THE COURT: Overruled.

15 REDIRECT EXAMINATION CONTINUED

16 BY EDWARD GRAHAM:

17 Q. Does that complete what you wanted to call
18 attention to, Dr. Oakes?

19 A. I believe so. Yes.

20 Q. Thank you. Now there was also a question
21 about the ACOG technical bulletin and a ques-
22 tion about whether or not you had explained
23 something on a certain page.

24 I would like to ask you now, sir, would
25 you like that opportunity to explain the

1 portion of the ACOG, Number 17 that Ms.

2 Simmons called your attention to, relating to
3 the relative risk of vacuum, of, of, of brain
4 bleeds from --

5 A. Oh, the chart on it. Sure. Sure. That's
6 ---

7 Q. I have this here if you'd like to step
8 down and explain it to the jury.

9 A. Again we're -- we're talking about this
10 practice bulletin that came out in June of
11 2000. We looked at a number of those things
12 and on the one page that I did put up here,
13 you recognize that this is the FDA warning
14 that was given. This is the advice that comes
15 off of the FDA warning. But it -- because
16 they talked some of the risks but they didn't
17 get into some details about how big some of
18 these risks are.

19 As I showed you, the overall risk is
20 approximately five percent. If we just look
21 at intracranial hemorrhage, that's how they
22 end up here in this table and that's based
23 upon an article that was published in the New
24 England Journal of Medicine of a review of a
25 large number of deliveries from the state of

1 California.

2 CHILTON SIMMONS: Objection, Your
3 Honor. I asked the witness about the table,
4 a very limited question.

5 THE COURT: Very good.

6 CHILTON SIMMONS: It's beyond the
7 scope.

8 THE COURT: Nonspeaking objection.
9 It's beyond the scope, Counselor. What do you
10 say?

11 EDWARD GRAHAM: Well, if Your Honor
12 please, the table that she refers to has
13 corresponding text. To look at one -- it
14 refers you to records and others. He's
15 responding directly to what she asked about
16 it.

17 THE COURT: All right. Overruled.
18 Please note now the general mode of
19 interrogation of a witness is question and
20 answer; question and answer as opposed to
21 monologue, so be aware of that, Counsel.
22 The objection was not posed but the Court will
23 require it be by your question.

24 EDWARD GRAHAM: Starting now or
25 after this answer?

1 THE COURT: You may go ahead and
2 finish your answer because there's no
3 objection but then if one comes, be aware of
4 the proper mode of questioning a witness.

5 EDWARD GRAHAM: I anticipate one
6 coming.

7 THE COURT: As do I. Go ahead.

8 THE WITNESS: I'm sorry, Judge.
9 I couldn't give a one- -- a 'yes' or 'no'
10 answer. That's why I was trying to give a
11 context about how we got this chart in here.

12 THE COURT: Yes, sir. Go ahead.

13 REDIRECT EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. Okay.

16 A. Okay. This data is from a series out of
17 California reviewing a large number of infants
18 who'd had spontaneous deliveries, forceps
19 deliveries and long labor cesarean sections
20 and vacuum deliveries. They looked at the
21 birth certificates and looked for these kinds
22 of complications, but specifically they looked
23 at death and intracranial hemorrhage and this
24 is the number from this series, this one
25 publication, of these kinds or risks.

1 As counsel alluded to, spontaneous vaginal
2 delivery had a risk, one in nineteen hundred.
3 One baby out of nineteen hundred had an
4 intracranial hemorrhage and just had a normal
5 spontaneous vaginal delivery. So that's the
6 basis of the question. Yes, there is risk in a
7 normal delivery.

8 But when one has labor and no cesarean
9 section, it's twice that. It's down to one in
10 nine hundred so twice as frequent.

11 The same thing goes with vacuum
12 alone. It's one hundred in -- one out of one
13 hundred -- one out eight hundred sixty.

14 So it's a risk and in this series
15 it's a little more than twice as much as
16 spontaneous delivery but it still is in fact a
17 risk and that's the point.

18 Q. And, Dr. Oakes, let me ask you this, how
19 does the term and weight of Jayden W.
20 compare with the term and weight of the babies
21 in those studies and what significance, if
22 any, does that have?

23 A. Well, in this study the authors, when they
24 were choosing how many babies, what criteria
25 that they're looking for to do this analysis,

1 they chose to look at birth weight, meaning
2 that there is -- and they chose twenty-five
3 hundred grams, which is five and a half
4 pounds, up.

5 CHILTON SIMMONS: Objection, Your
6 Honor. We're back to the monologue.

7 EDWARD GRAHAM: I just asked him
8 what significance, if any, does that study
9 have ---

10 THE COURT: Overruled.

11 THE WITNESS: Sorry.

12 THE COURT: Go ahead.

13 REDIRECT EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. Please complete your answer.

16 A. Anyway, so they picked these weights.

17 The difficulty with doing this is that that
18 doesn't say anything about gestational age.

19 Remember, we talked about you use a vacuum on
20 something that's above thirty-six weeks?

21 Well, there are a number of five and a half
22 pound babies who fall into that less than
23 thirty-six weeks category.

24 So they acknowledged that they're not
25 looking at gestational age and they're not

1 looking at the clinical factors of station or
2 any of these other things. They just took
3 this large population base, so it's not
4 completely applicable in this case.

5 Q. Doctor, do you have an opinion to a
6 reasonable degree of medical certainty as
7 to how the risk of brain damage to Jayden
8 Washington from the use of the vacuum by Dr.
9 Rhett at a mid-pelvic station compares to the
10 risk of brain bleeds in the table referenced
11 by counsel?

12 A. I do.

13 Q. What is your opinion?

14 A. My opinion is, substantiated by the
15 literature, that the higher the station that
16 the delivery occurs from, the greater the
17 risks. Now, recognizing in this series they
18 don't talk about -- they don't talk about what
19 station is right but the overwhelming majority
20 of vacuum extractions are done at very low
21 stations, either at the outlet or very low;
22 so that in that, you're going to have the
23 least number of complications.

24 What one has to do is to look at
25 what in fact situation the risk of a mid-

1 forceps vacuum and that's not part of this
2 table.

3 THE COURT: Anything further,
4 Counsel?

5 EDWARD GRAHAM: Yes, sir.

6 REDIRECT EXAMINATION CONTINUED

7 BY EDWARD GRAHAM:

8 Q. Dr. Oakes, do you have an opinion to
9 reasonable degree of medical certainty as to
10 whether the risk to Jayden of a brain bleed if
11 he had been born with a normal spontaneous
12 natural delivery compares to the rate of brain
13 damage from the smaller babies on this table?

14 CHILTON SIMMONS: Objection,
15 speculation, Your Honor.

16 THE COURT: Sustained. It is
17 speculation.

18 REDIRECT EXAMINATION CONTINUED

19 BY EDWARD GRAHAM:

20 Q. Dr. Oakes, do you have an opinion as to
21 whether or not the weight of a baby influences
22 the potential risks of brain damage from a
23 normal spontaneous vaginal delivery?

24 CHILTON SIMMONS: Objection, beyond
25 the scope. I never asked anything about the

1 weight of the baby.

2 THE COURT: How is this within the
3 scope of responding to what was brought up in
4 the case?

5 EDWARD GRAHAM: The table was
6 brought up in cross and Dr. Oakes explained
7 the significance of the table, and the study
8 it is based on assumed certain weights of
9 babies. Our baby is much bigger.

10 THE COURT: Well, Counsel, we all
11 understand that -- the response. However, the
12 purpose of redirect is to answer questions
13 raised by questions posed and you've done that
14 but now you've gone beyond that. The Court is
15 going to sustain the objection. Please move
16 to your next issue, if you have other issues.

17 EDWARD GRAHAM: Thank you, Your
18 Honor.

19 REDIRECT EXAMINATION CONTINUED

20 BY EDWARD GRAHAM:

21 Q. Counsel asked you a question about this
22 not being a teaching hospital at East Cooper.
23 When you were giving the standard of care
24 opinions that earlier, were you basing those
25 on obstetrics at teaching hospitals or

1 something else; if so, what?

2 A. Absolutely not. There are not different
3 standards in community hospitals or teaching
4 hospitals. It's the same standard.

5 Q. A question was brought up about work that
6 you've done for me and my clients on some
7 other cases and questions about you
8 representing or doing work for plaintiffs'
9 attorneys. In your career, have you -- tell
10 the Ladies and Gentlemen of the jury whether
11 or not you have done work for healthcare
12 providers and their attorneys as well as for
13 injured patients and their attorneys?

14 A. I have. In particular when I lived in
15 California, before I moved to Savannah, fifty
16 percent of the cases that I was reviewing were
17 in fact on behalf of the defense. It's just
18 since I've been in Savannah that attorneys who
19 have primarily called and sent me records are
20 plaintiffs attorneys. It's not something that
21 I advertise or I request. It's all by word of
22 mouth, so that's ---

23 Q. And ---

24 A. It's not -- I don't prefer it to be that
25 way.

1 Q. And you indicated in response to a
2 question that you've agreed to support my
3 client's cases on five times. Tell the Ladies
4 and Gentlemen of the jury whether or not there
5 were other items when you've indicated that
6 you would not be able to do so.

7 Q. Absolutely. As I stated in my deposition,
8 I was asked by the defense counsel how often I
9 have negative reviews. That means that I've
10 been asked to review something and I don't
11 think that there has been a departure from the
12 standard of care, and that's about half.

13 Q. Thank you. Now, there was a question
14 about your having made ten thousand dollars or
15 so, on in a range to that effect, from your
16 work in this case. What effect, if any, does
17 the amount of money -- does the fact that
18 you're paid any amount of money have on the
19 opinions that you've expressed?

20 A. It is absolutely has no bearing
21 whatsoever. I mean, this is -- to come to
22 court and testify in a situation like this is
23 a very difficult task. I don't relish it. I
24 don't take it lightly, because it is in fact a
25 very difficult task. So it's not about the

1 money. It's about the appropriateness of
2 care.

3 Q. I had asked you questions earlier about a
4 standard of care. Ms. Simmons asked you
5 questions or played you a videotape of Dr.
6 Rhett talking about his belief that he acted
7 reasonably and was not negligent. Do you have
8 an opinion to a reasonable degree of medical
9 certainty as to whether or not Dr. Rhett acted
10 reasonably in this delivery?

11 A. I think -- it is my opinion that the
12 choice to do the delivery at the time wasn't
13 reasonable. In fact, it was potentially
14 dangerous.

15 Q. Do you have an opinion to a reasonable
16 degree of medical certainty as to whether or
17 not Dr. Rhett's actions in this case were
18 negligent?

19 A. Well, "negligent" is, I believe, a legal
20 term. I don't -- I don't deal in legal terms.
21 So if is talking about this being below the
22 standard of care, then my opinion is that it
23 is below the standard of care.

24 Q. Thank you.

25 THE COURT: Anything further?

1 EDWARD GRAHAM: Yes, sir.

2 REDIRECT EXAMINATION CONTINUED

3 BY EDWARD GRAHAM:

4 Q. There was a question about needlessly
5 harming the patient. Do you have an opinion
6 to reasonable degree of medical certainty as
7 to whether or not Dr. Rhett reasonably
8 endangered and needlessly harmed Jayden

9 Was he negligent?

10 CHILTON SIMMONS: Objection, Your
11 Honor.

12 THE COURT: Sustained. Counsel,
13 this is something you covered in direct and,
14 thus, it really is not a new issue brought up
15 on cross. Anything further?

16 REDIRECT EXAMINATION CONTINUED

17 BY EDWARD GRAHAM:

18 Q. There was a question as to whether or not
19 any delivery is risk free? Do you have an
20 opinion to a reasonable degree of medical
21 certainty as to whether or not an obstetrician
22 following the standard of care, following the
23 rules of the road, is able to minimize risks
24 to a baby?

25 A. Of course. That is, in fact, the role of

1 the obstetrician, to try to minimize the risk
2 as much as possible. It's not possible to
3 eliminate the risk but one wants to minimize
4 it.

5 Q. Do you have an opinion to a reasonable
6 degree of medical certainty as to whether or
7 not Dr. Rhett minimized the risk to Jayden
8 W.?

9 A. I do. I think that I have so testified,
10 in fact, that I do not believe so. I think
11 that it increased the risk.

12 EDWARD GRAHAM: Thank you, that's
13 all.

14 THE COURT: All right, very good.

15 CHILTON SIMMONS: Your Honor, I just
16 have one final question if you would so allow
17 me.

18 THE COURT: What is the new issue
19 brought up on redirect?

20 CHILTON SIMMONS: It is one regarding
21 a quote he just made. One question, Your
22 Honor.

23 THE COURT: On what issue, what's
24 the quote?

25 CHILTON SIMMONS: That he stated he

1 doesn't deal in legal terms.

2 THE COURT: All right, then you may
3 go ahead.

4 RECROSS EXAMINATION

5 BY MS. SIMMONS:

6 Q. Sir, you just testified that you do not
7 deal in legal terms. Yet your sole mode of
8 income is reviewing legal cases in medical
9 malpractice cases, mostly for plaintiffs, is
10 it not?

11 A. Well, that isn't -- that really isn't
12 fair. What I said was -- that is my source of
13 income but the fact is that that does not
14 support me. I have a pension and I live off
15 of Social Security and I have investment
16 returns and that is my predominant means of
17 sustaining myself, not from medical legal
18 work. What I said about not doing legal
19 terms, I don't -- I don't think in legal
20 terms. That's what I was trying to say.

21 THE COURT: All right.

22 CHILTON SIMMONS: No further
23 questions.

24 THE COURT: Thank you. This is
25 your witness. Do you want to follow up on

1 (JURY IN @ 3:22 P.M.)

2 THE COURT: Welcome back, Ladies
3 and Gentlemen. Call your next witness.

4 EDWARD GRAHAM: Thank you. At this
5 time we call Dr. Michael Katz.

6 (WITNESS TAKES STAND)

7 MICHAEL KATZ, being duly sworn to
8 tell the truth, the whole truth and nothing
9 but the truth, testified, as follows:

10 DIRECT EXAMINATION

11 BY EDWARD GRAHAM:

12 Q. Dr. Katz, tell the jury a bit about your
13 personal background, please.

14 A. Sure. I live and practice in New Jersey
15 and New York, so I have an office in the city
16 of New Jersey and New York. I have been there
17 ten or fifteen years. I practice pediatric
18 neurology.

19 Q. Do you have a family there?

20 A. Yes.

21 Q. I am going to try to be as quick as I can
22 to make this -- starting with college, tell
23 the jury about your educational background?

24 A. Sure. I went to the State University of
25 New York. I'm -- I went to St. Joseph

1 University, graduated in 1984. Then did a
2 Pediatrics residence, which is general
3 residency in general pediatrics. Then I went
4 three years in Nashville, Tennessee, where I
5 did a neurology, pediatric neurology residency
6 fellowship.

7 I then left Tennessee and I was in
8 California in private practice, worked part-
9 time at the University, Stanford, for about
10 four or five years.

11 I relocated with my family to New York and
12 worked at New York Medical College, so I was
13 employed by the medical school, saw patients
14 in private practice.

15 I then was recruited, I believe in the
16 year 2000, to be chief of the pediatric
17 neurology section, Section Chief of Neurology,
18 in Hackensack, New Jersey.

19 I left there in 2002 and have been in
20 private practice since then.

21 Q. This jury has already heard about Board-
22 certification and that process. Are you
23 Board-certified in any fields? In so, how
24 many field?

25 A. Yes, I am Board-certified in General

1 Pediatrics, Pediatric Neurology, and
2 Neurodevelopmental Disabilities.

3 Q. Have you served as a professor from time
4 to time?

5 A. Yes, I have.

6 Q. Where was that?

7 A. When I was at Stanford, I was a clinical
8 instructor -- different titles, -- so I
9 taught, met the students, pediatricians,
10 neurology residents.

11 When I was in New York Medical College I
12 was what was called an assistant professor, I
13 think that was my title, and I taught also the
14 same thing to medical students, residents,
15 fellows.

16 And since I moved to New Jersey, because
17 of politics, our hospital has switched medical
18 school affiliates, so I haven't really kept up
19 my medical school title since I relocated to
20 New Jersey.

21 Q. Thank you.

22 EDWARD GRAHAM: Your Honor, without
23 further ado, we would proffer Dr. Katz as an
24 expert in pediatric neurology and
25 neurodevelopmental disabilities.

1 THE COURT: And, Counsel for the
2 defense, are there questions in the area of
3 expertise?

4 MOLLY CRAIG: No, sir, no
5 objections.

6 JAY DAVIS: No objection, Your
7 Honor.

8 THE COURT: Are there -- there are
9 no objections nor questions?

10 JAY DAVIS: Very good. Then
11 without objection he is so admitted. You may
12 proceed.

13 EDWARD GRAHAM: Thank you, Your
14 Honor. By the way, we have agreed on Trial
15 Exhibit 49, not into evidence but just so that
16 the jury -- as a court's exhibit. It's one
17 that we agreed to when we met, forty-nine one
18 through five.

19 THE COURT: Counsel, what is the
20 document?

21 EDWARD GRAHAM: It is his CV.

22 THE COURT: All right. The
23 doctor's curriculum vitae will be a court's
24 exhibit. Is there any objection? Hearing
25 none, it ---

1 MOLLY CRAIG: Not as a court's
2 exhibit.

3 THE COURT: No objection, please
4 proceed.

5 EDWARD GRAHAM: Yes, thank you,
6 Your Honor.

7 DIRECT EXAMINATION CONTINUED

8 BY EDWARD GRAHAM:

9 Q. Dr. Katz, did there come a time when you
10 were contacted by me to see if you would be
11 available to provide us with your work, your
12 expertise and your opinions concerning certain
13 issues related to this case?

14 A. Yes.

15 Q. When you take on a job -- first of all,
16 how did you view your job description? What
17 was it that you considered yourself expected
18 to do?

19 A. Obviously, I'm a pediatric neurologist
20 and, you know,, all these case, you know,
21 there are different areas, different
22 specialities. I am a child expert, so my
23 expertise is children, number one, and
24 children specifically who have neurologic
25 problems, neurologic issues moving forward.

1 So when someone asks of me can I review a
2 case and will I give my opinion, there's a
3 couple of things. Number one, a review of the
4 medical records because obviously I can't kind
5 of take myself back to what happened, so I
6 rely greatly on the medical record. In this
7 case, that's huge boxes of medical records.

8 The second thing that I will rely on is an
9 examination of the child. For example, a mom
10 or a family member brings the child to see me.
11 I examine the child.

12 Then together, with both the medical
13 record and examination of the child, I put
14 together an opinion. That's the opinion that
15 I bring to court today.

16 Q. Did you in fact have an opportunity to
17 examine Jayden in your office?

18 A. Yes, I did.

19 Q. When was that?

20 A. Well, actually, I have my report --
21 the date is in the report. (Upon review),
22 December '08.

23 Q. Can you explain to us what you as a
24 pediatric neurologist do in the examination of
25 a patient like Jayden? What is it that you do

1 and what were the results of your examination?

2 A. When you ask my kids that, you ask them
3 the answer would be different. Essentially
4 what happens is that when you have a child
5 come to your office, any child is going to be
6 hesitant, is going to have a hard time, is not
7 going to cooperate because a lot of what we
8 do, the children have to cooperate.

9 So what we -- what we try to do is I will
10 talk to the parents and, over a period of
11 time, have the kids kind of walk off,
12 especially someone like Jayden who, you know,
13 comes from a long distance away.

14 They are a little uncomfortable, so what
15 we try to do is to create an atmosphere where
16 children are comfortable. I have some toys in
17 the office that they can play with and I talk
18 to them. With a lot of kids, it's not so much
19 what you say but the tone of your voice so you
20 just want to say stuff that is -- you know,
21 this is not going to hurt, you're not going to
22 get a shot, obviously that there's no blood
23 that is going to be taken. Then as the kids
24 warm up, you use your best judgment and you do
25 the best that you can with them.

1 Sometimes the kids aren't in a great mood.

2 Everyone knows that.

3 Sometimes the kids really have an hard
4 cooperating, doing the things that we ask of
5 them. So -- you just do the best that you
6 can, just having them -- you sit down and you
7 do things with them. Try to have an
8 interactive conversation.

9 Q. As a result of your interaction with
10 Jayden and your evaluation of him, what were
11 your findings, your significant findings on
12 examination of Jayden.

13 A. Sure. I ask if I might use my report
14 here? Is it okay to refer to my report?

15 Q. Absolutely.

16 A. Okay. So, you know, the usual pediatric
17 doctor thing, you weigh and measure patients
18 and I -- I thought that he had some core
19 weakness, on the left versus the right. I've
20 got to get my glasses -- sorry.

21 He had some decreased coordination in the
22 movement of his left upper extremity. He had
23 some weakness in the arms, as well. I use the
24 term "supination". Is it okay to demonstrate
25 that?

1 Q. Go ahead.

2 A. Sure, (standing up) -- it's one of those
3 things where a picture is worth a thousand
4 words? So what you do with a kid is obviously
5 have them move in a coordinated fashion, so
6 this (demonstrating) is what they call
7 supination. I ask the children to put their
8 hands up and he had some weakness, which is a
9 classic finding of a child who has some
10 weakness in the arm, he had some weakness
11 supinating, fully moving his hands in this
12 direction.

13 He also had at that time some decrease in
14 the sizes of his left upper extremity. So what
15 we do is we measure the arm. We measure the
16 muscle bulk. His wasn't dramatically
17 different. His was -- in the bicep, the upper
18 part of the arm, was seventeen centimeters on
19 the left and seventeen and a half centimeters
20 on the right, so it was a little bit smaller
21 on the left. His arm a little bit smaller,
22 very subtle.

23 He has a scar where he'd previously had
24 some surgeries.

25 I thought that his pupils were brisk.

1 His neck was supple.

2 Face was symmetrical.

3 He has very poor articulation, very poor,
4 difficult to understand him.

5 He had a lot of difficulty with multiple
6 step commands and hopefully we can demonstrate
7 that to you.

8 He had a lot of difficulty understanding
9 things. In other words, he -- you'd ask him
10 and he -- he is really -- you know, he would
11 really try very hard for it was just difficult
12 for him to understand what was going on. Even
13 something -- you know, even simple statements,
14 he really had a hard time.

15 Let's see (reviewing report). Even with
16 simple things like 'hop on the table' or 'hop
17 on the scale', you had to have it multiple
18 times to him.

19 Let's see (reviewing report). I think
20 that there was decrease in motor tones, some
21 stiffness on the left. Also he, in just
22 walking around, wasn't very coordinated. In
23 other words, I have a rug in my and even like
24 the simple edge of a rug he would trip over
25 and fall. You could tell that he had some

1 immobility with coordination.

2 He wasn't able to do just simple stuff
3 like -- some difficult with coordination.

4 He was able to jump up and down pretty
5 well.

6 To the best of my ability to tell, he
7 really tried pretty hard. At the time that I
8 saw him, he was only able to write his first
9 name, unable to write his last name. He was
10 able to write nine of the letter of the
11 alphabet and he was able to recall the numbers
12 one, two, three, four and nine.

13 He would say that he was tried and I
14 really had a difficult time with him when he
15 had to wait. You know, when I spoke to his
16 mom he -- he just had a hard time waiting for
17 two minutes, three minutes. Just, you know,
18 very impatient with his mom.

19 Those are the things that I saw when I saw
20 him in December of '08.

21 Q. What was your impression and findings?

22 A. My impression at that time was -- at that
23 time Jayden was in kindergarten. I believe --
24 I am not sure whether that was the first or it
25 seems like that was the second time that he

1 had been to kindergarten. He had a phenomenal
2 delay that is fairly well documented in school
3 reports.

4 I believe that it's secondary to the
5 neurologic injury, the bleeding, that he had
6 at or around the time of birth. I believe
7 that all of his developmental delays are
8 consistent with the neurologic injuries.

9 I was concerned about his school
10 performance -- and that's difficult. He was
11 -- at that time when I saw him, he's been to
12 kindergarten for the second time. That's
13 fairly concerning. At that time, and I think
14 to this day, that he receives resources that's
15 been -- (phone ringing in courtroom) -- uh,
16 and for those of you who don't know, resources
17 is where someone comes and helps with his
18 physical. So if he needs resources in
19 reading, someone sits and specifically works
20 with him on reading. If he need resources in
21 math, someone takes him away from the other
22 children and works with him on math.

23 He also had some difficulty with
24 coordination and I think that there was some
25 mention -- for example, in his individualized

1 education plan, or his IEP, about safety.
2 They were concerned because he just wouldn't
3 watch what he did. So he would walk into
4 things, he'd trip, he'd fall -- not all the
5 time, fortunately, but he just didn't have a
6 good sense of just general coordination.

7 So my opinion was -- is that -- is that
8 Jayden is going to need accommodations and
9 modifications in school. By accommodations
10 and modifications, I mean that all during the
11 school work he could be successful.

12 My other opinion was that -- that school
13 is like a twelve-story building. You know,
14 if a child has some difficulty in the first
15 several years, the years where you develop
16 your foundation, he's in a shaky building,
17 that school is going to be difficult for him,
18 that he is going to struggle.

19 I also felt that even though Jayden
20 didn't have severe problems that the
21 combination of having problems with
22 coordination and some, uh, poor physical
23 coordination as well as poor articulation,
24 speech and language problems, is really a bad
25 set of circumstances for a child to have.

1 Because physical things are difficult for him
2 and things where he had to use his voice and
3 he had to speak, where he had to interact with
4 people, was also a problem. That combination
5 creates, in a lot of children, profound
6 difficulty when they grow up despite the fact
7 that none of them were severe in and of
8 themselves.

9 Q. Well, you mentioned not severe in and of
10 themselves.

11 A. (Affirmative nod).

12 Q. On the scale of moderate, mild, severe, or
13 any other scale that you know of, can you give
14 us an idea of how you would peg Jayden?

15 A. The problem is the -- the combination is
16 what the problem is, the combination of mild
17 to moderate problems. What we are ending up
18 with is a child a profound difficulty to
19 function.

20 So the whole mild, moderate -- I don't
21 know where Mild begins or Moderate ends.
22 All I know is that it will be profoundly
23 difficult. The truth is that he -- the
24 combination of things which creates his
25 profound difficulty to be successful in his

1 working environment. For Jayden, that's going
2 to school.

3 Q. Have there been any materials that you
4 have reviewed that shed light on Jayden's
5 primary problems? If so, what is that and
6 what significance does it have?

7 A. I think the best thing for everyone to
8 looks at is what the school records show. In
9 other words, the school is -- it is fairly
10 unbiased. They have programs to deal with
11 children who have problems and I -- I had the
12 opportunity, this morning actually, to see his
13 latest individualized education plan -- we use
14 the letters IEP for that -- where they've
15 described some of the problems that he is
16 having.

17 EDWARD GRAHAM: Your Honor, at
18 this time we would offer into evidence and
19 show Exhibits 21/530, 21/552, and 21/553.

20 THE COURT: Is there an objection?

21 MOLLY CRAIG: Your Honor, we
22 have no objection to a complete set of school
23 records coming into evidence.

24 THE COURT: Very good. Noted then,
25 without objection these three pages come in.

1 EDWARD GRAHAM: Thank you, Your
2 Honor.

3 DIRECT EXAMINATION CONTINUED

4 BY EDWARD GRAHAM:

5 Q. Dr. Katz, it's kind of read but -- were
6 you able to highlight certain portions of
7 that. Is there a certain part of particular
8 significance that we need to highlight?

9 THE WITNESS: Your Honor, can I
10 get up and kind of point to things? Would
11 that be okay?

12 THE COURT: Yes, sir, you can. You
13 just need to be near a microphone so that
14 everyone can hear you. Speak loudly. There
15 should be a microphone on that podium right
16 there by the ELMO device.

17 THE WITNESS: Can everyone hear
18 me? (Affirmative response from various
19 jurors). Okay.

20 A couple of things, this is a
21 document from May 4th, 2010. This is the --
22 (pause) -- so essentially what an IEP is, all
23 the people would be here to come together and
24 they make recommendations so that we can
25 modify his school requirements. This is that

1 report. So this have been done on an approved
2 designated time.

3 Essentially the way that the document
4 it is like this, what the various strengths
5 and weaknesses are. Obviously all children
6 have areas which they -- like all of us do.

7 I think that the, uh, the -- the way
8 that this form is, they put it into four
9 separate areas: one is resources, see up
10 there resources; -- could we kind of highlight
11 that paragraph? Is that the best that we can
12 do? Okay. Well, -- (pause).

13 Some of the -- I think some of the
14 important parts is that -- it's all -- but
15 some of the things that are troubling to the
16 school are these things right here. I believe
17 that means academic progress ---

18 THE COURT: Can you hear?

19 JUROR: Can he move to a microphone?

20 THE COURT: Put that microphone
21 right beside you so that there is better
22 amplification.

23 (ADJUSTMENT OF SOUND SYSTEM)

24 THE WITNESS: So a couple of
25 things that I -- and I don't want to get into

1 it too much but, for example, like math, he's
2 in the one percentile, meaning low -- that
3 ninety-nine percent of the children are better
4 at math than he is.

5 COURT REPORTER: I'm sorry. Could
6 you keep your voice up?

7 THE COURT: You need to use the
8 microphone so that we can hear you.

9 THE WITNESS: So when we look at
10 that, we see that he is in the first
11 percentile, meaning -- that's very, very low.

12 I think that some of the troublesome
13 parts or one of the reasons that I wanted to
14 highlight it is that you see -- can you see
15 the fifty-one percentile? Can everyone see
16 where I am pointing to? Then it says that it
17 is decreased by five, but the percentile
18 didn't change. In other words, Jayden is
19 improving but the percentile doesn't change.
20 That means that the other children are
21 advancing faster. So even though he is moving
22 in the right direction the other children are
23 -- unfortunately he's not able to catch up to
24 them.

25 Same concept down here, (indicating).

1 His progress in reading only increased by one
2 point but his percentile decreased. So even
3 though he increased a level he fell behind,
4 because he wasn't increasing as fast as the
5 other children.

6 Obviously there are some strengths.
7 He has this strength here -- seventy-five
8 percentile.

9 DIRECT EXAMINATION CONTINUED

10 BY EDWARD GRAHAM:

11 Q. What is ---

12 A. It's an index of articulation. I am not a
13 speech therapist but -- (inaudible).

14 So he does have some strengths but on a
15 lot of things, unfortunately, even though
16 there is some incremental improvement he's not
17 improving as fast as the other children.

18 Uh, -- the second, uh, the second part of
19 this IEP that stands out is that there is
20 obviously some improvement, which of course we
21 like to see, and I have to tell you since the
22 last one that I saw he is still improving
23 although he really still has some difficulties
24 with coordination and things like that. In
25 school, they talk about that Jayden's balance

1 affects his safety when he plans on the
2 playground and travels around in the school
3 environment, that he occasionally falls, loses
4 his balance. So there is still some concern
5 about his being able to move in a safe way.
6 Obviously he's not in kindergarten any more
7 and there is still concerns that his
8 coordination is such that the school is
9 worried about it.

10 But, thankfully, there are some positive
11 things. Same thing here (indicating). So
12 there are a whole bunch of positive things
13 that is -- Jayden is working on some of his
14 fine motor movements and has made some
15 progress. He still has -- see, in this last
16 sentence, "Jayden does demonstrate some
17 effective movements", ---

18 COURT REPORTER: I'm sorry, what
19 kind of movement?

20 THE WITNESS: Effective
21 movements, coordination, such as picking up
22 something from a tabletop. Motor planning and
23 fine motor skills tend to be a little bit more
24 difficult. In plain English, his coordination
25 is better but it is not as good as it should

1 be and there is still some concern about it.

2 The last thing is speech, which is
3 the most notable thing with Jayden, is his
4 articulation, his ability to pronounce things.
5 He still struggles with reading, although he
6 is developing early sight recognition but he
7 struggles -- he struggles to answer certain
8 types of questions. He really does try hard
9 to please, he really does try to enunciate --
10 although, when you speak with him -- I was
11 with his grandmother and she has to say "use
12 the words, baby, use the words" because he
13 will just nod his head or shake his head
14 repetitively just because it is laborious for
15 him to produce words and use words correctly.
16 The problem is that his continued language
17 development delays may affect his ability to
18 express himself in a classroom situation, as
19 well as his ability to carry out protective
20 auditory information.

21 What you will hear is -- and one of the
22 reasons that I want to go through this, if we
23 have the opportunity to hear him speak, you
24 will see that it is very hard to hear him. I
25 feel bad for some of you because with even

1 using the microphone it's difficult to hear
2 him very well, but he really -- it's hard to
3 understand him.

4 DIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. Dr. Katz, are you prepared to bring Jayden
7 in and demonstrate some of his capabilities?

8 A. Sure. What I would like to do is -- we're
9 going to bring him in and we are going to do
10 some things relatively quickly and then I will
11 explain to you what he did -- (inaudible).

12 THE COURT: Can you hear him,
13 Madame Court Reporter?

14 COURT REPORTER: He needs to speak
15 up, keep his voice up.

16 THE COURT: Please remember that
17 these proceedings are being recorded and the
18 court reporter must be able to hear you.

19 EDWARD GRAHAM: We need to try to
20 get him as close as possible to a mic. Is it
21 possible that we could use one of these mics
22 here, closer to the jury?

23 THE WITNESS: Can we turn this
24 (projector) off?

25 THE COURT: It'll take a moment.

1 THE WITNESS: Well, we will do
2 the best that we can with that. First, I want
3 to get him comfortable, let him sit down.

4 (JAYDEN W. ENTERS COURTROOM)

5 WITNESS, DR. KATZ: Jayden, I am
6 going to ask you a couple of questions. Okay?

7 JAYDEN W.: Okay.

8 WITNESS, DR. KATZ: Could you tell
9 everyone what your name is?

10 JAYDEN W.: (Inaudible).

11 COURT REPORTER: I can't hear.

12 WITNESS, DR. KATZ: Just so
13 everyone knows. You can look at me.

14 JAYDEN W.: Jayden

15 W. 1.

16 WITNESS, DR. KATZ: How old are
17 you, Jayden?

18 JAYDEN W.: Eight.

19 WITNESS, DR. KATZ: Eight. Did
20 you just have a birthday?

21 JAYDEN W.: Yeah.

22 WITNESS, DR. KATZ: How old --
23 what did you get for a birthday present?

24 JAYDEN W.: (No verbal
25 response).

1 WITNESS, DR. KATZ: Do you get any
2 toys?

3 JAYDEN W. J: Yeah.

4 WITNESS, DR. KATZ: What kind of
5 toys did you get?

6 JAYDEN W. J: (No verbal
7 response).

8 WITNESS, DR. KATZ: What toys did
9 you get?

10 JAYDEN W. J: (No verbal
11 response).

12 WITNESS, DR. KATZ: Do you
13 remember?

14 JAYDEN W. J: (No verbal
15 response).

16 WITNESS, DR. KATZ: What is your
17 favorite sport?

18 JAYDEN W. J: (Inaudible).

19 WITNESS, DR. KATZ: Remember we
20 talked about it? What is your favorite sport?

21 JAYDEN W. J: Football.

22 WITNESS, DR. KATZ: Yeah, and
23 what's the guy who throws the football? What
24 is the name of that guy?

25 JAYDEN W. J: Quarterback.

1 WITNESS, DR. KATZ: Quarterback,
2 that's right. And who is the guy who runs
3 with the football?

4 JAYDEN W. : (No verbal
5 response).

6 WITNESS, DR. KATZ: Remember,
7 you've got to use the words. Who is the guy
8 who runs with the football?

9 JAYDEN W. : (No verbal
10 response).

11 WITNESS, DR. KATZ: And what
12 happens -- do people -- what happens when they
13 push someone in football, what do they call
14 that?

15 JAYDEN W. : Touchdown.

16 WITNESS, DR. KATZ: No, no, that's
17 too far ahead. Jayden, I want to ask you to
18 do a couple of things, would that be okay?
19 You can just look down, that's fine. It's
20 kind of scary. Can I have you just stand up.

21 JAYDEN W. : (Complies).

22 WITNESS, DR. KATZ: Jayden, just
23 look at me. Show me your right hand.

24 JAYDEN W. : (Complies).

25 WITNESS, DR. KATZ: Okay. Can you

1 show me your left hand?

2 JAYDEN W. : (Complies).

3 WITNESS, DR. KATZ: Jayden, can I
4 ask you to do something? I want you to listen
5 real, real close. Okay? I want you to hop on
6 your right foot. Turn around. Raise your
7 left hand. Okay, what did I ask you to do?

8 JAYDEN W. : Hop on my foot
9 and, uh, ---

10 WITNESS, DR. KATZ: Listen real,
11 real close. I want you to hop on your right
12 foot, three times; turn around, and raise your
13 right hand. What did I ask you to do?

14 JAYDEN W. : Hop on my
15 right foot, turn around, raise the right hand.

16 WITNESS, DR. KATZ: Let me see you
17 do that again, okay, buddy?

18 JAYDEN W. : (Complies).

19 WITNESS, DR. KATZ: Okay,
20 excellent. I want you to walk on your heels.

21 JAYDEN W. : (Complies).

22 WITNESS, DR. KATZ: And try to
23 walk on your tippy toes.

24 JAYDEN W. : (Complies).

25 WITNESS, DR. KATZ: (Inaudible).

1 Now what I want you to do is to walk five
2 steps in that direction, putting one foot in
3 front of the other.

4 JAYDEN W: (Complies).

5 WITNESS, DR. KATZ: Okay. Jayden,
6 I want you to walk backwards five steps.
7 Okay?

8 JAYDEN W: (Complies).

9 WITNESS, DR. KATZ: Okay, just
10 watch your step. Okay?

11 JAYDEN W: (Complies).

12 WITNESS, DR. KATZ: Excellent job.
13 Excellent job. Okay, take turns and -- I want
14 you to pretend like you have two plates of ice
15 cream and you don't want to drop them because
16 they are very -- you don't want to drop it --
17 (guiding Jayden).

18 Now, close your eyes.

19 Excellent job.

20 Very good. Excellent job.

21 (JAYDEN W. EXITS COURTROOM)

22 DIRECT EXAMINATION CONTINUED

23 BY EDWARD GRAHAM:

24 Q. Dr. Katz, I know what I just saw, but why
25 don't you give me your pediatric neurology

1 version of what you just saw?

2 A. Okay. So you see Jayden is a very good
3 little boy, really very nice, very well-
4 behaved, he did the best that he could.

5 Couple things. One is his articulation.
6 It's hard -- that's as good as he is as far as
7 articulating, using words. So it's really
8 difficult, even with a microphone I know that
9 it is difficult to hear.

10 He has difficulty with multiple step
11 commands. In other words, when I gave him
12 three separate things to do, very difficult.
13 Imagine being in a school situation, being
14 asked to take out his book, turn to page
15 forty-eight, second paragraph. So what
16 happens with someone like Jayden, when he has
17 multiple step commands, either at school or at
18 home, very difficult.

19 He really has a hard time remembering.
20 Things like right, left, very difficult for
21 him to try to remember.

22 Walk five steps forward, five steps
23 backwards. That's a test for Jayden.

24 Things like memory, uh, I -- I think that
25 that's a problem although I have to tell you

1 that a lot of kids, the week after Christmas,
2 can't remember what their parents got for
3 them, so I am not really sure whether that's
4 anxiety or not although there has been some
5 description of -- you know, some difficulty
6 remembering things.

7 So I -- and, then, you know, obviously the
8 coordination, the balance. It's not
9 terrible but even walking -- walking straight
10 is difficult for him, when kids that age are
11 just usually much more coordinated.

12 Q. Thank you, sir. As a pediatric
13 neurologist with special expertise in terms of
14 neurodevelopmental disability, let me ask you,
15 sir, how do you perceive -- or do you have an
16 opinion to a reasonable degree of medical
17 certainty as to whether or not Jayden's
18 problems will affect his ability to work and
19 earn a living?

20 A. I do.

21 Q. What is your opinion?

22 A. You know, we talked about this before.
23 I think that he has various disproportionate
24 disabilities; one, with speech and language
25 being affected, difficultly with school, and

1 this kind of motor dis-coordination of his
2 motor abilities. The combination of those is
3 -- it's just very difficult for find job --
4 not impossible but very difficult to find a
5 job for someone like Jayden. He's not --
6 there is just not a lot of things that he is
7 going to be able to do.

8 Q. Will he be able to obtain a job that pays
9 him for his brain power?

10 A. I think that that would be difficult.

11 Q. Will he be able to find work that pays him
12 for his manual strength, physical work?

13 A. I think that that would be unlikely.

14 Q. Let me ask you about independent living,
15 do you have an opinion to a reasonable degree
16 of medical certainty as to whether or not
17 Jayden will be able to get along and live and
18 take care of himself independently without his
19 mom or someone else's assistance?

20 A. Right now with what I see -- obviously
21 things could change but from what I see, he
22 doesn't have the language ability to function
23 in an independent environment.

24 When I saw him, mom at that time was
25 living in a three-story walkup and he couldn't

1 walk up more than one flight of stairs. She
2 would have to carry him up the stairs every
3 day. So it would have to be an environment
4 where he could handle such things himself,
5 safely.

6 And, for example, the school. The school
7 is very concerned about his personal safety.
8 I think the issue with safety has to do with
9 language. In other words, if he is not well,
10 he has to be -- he has to understand to call
11 911, or he has to be able to go to a doctor's
12 appointment. I don't see that today. I
13 don't.

14 Q. Do you have an opinion to reasonable
15 degree of medical certainty as to the most
16 probable cause of Jayden W. 's brain
17 bleeds, brain damage and developmental
18 problems?

19 A. I do.

20 Q. What is your opinion?

21 A. Well, I believe that he suffered an intra-
22 cranial, or inside in head, bleed around the
23 time of birth. I believe that there's a
24 direct relationship between that particular
25 injury, in other words the bleeding, and the

1 person that we see here today.

2 Q. Do you have an opinion to a reasonable
3 degree of certainty as to the mode of injury
4 to those blood vessels in his brain?

5 A. I do.

6 Q. What is that?

7 A. They were torn, they were mechanically
8 torn, uh, by, uh, by the vacuum.

9 Q. What -- are there -- could you give us
10 some understanding of which blood vessels can
11 be affected by a vacuum and which ones you
12 believe were torn in this case?

13 A. Sure. What happens -- I am not going to
14 talk about the vacuum was used or how it
15 wasn't used. But in reviews of these type of
16 things, uh, the -- what was described in the
17 medical chart was that he suffered a subgaleal
18 and an intracranial bleed. A subgaleal
19 hemorrhage is a hemorrhage where there is what
20 they call subsurface veins between the scalp
21 and the sinuses or blood vessels inside the
22 brain. These veins, which are relatively low
23 flow compared to arteries, which are pumps,
24 these veins are torn. What happens in that
25 process is that blood accumulates -- usually

1 between twelve and seventy-two hours after the
2 injury -- and that blood is, obviously, very
3 irritating to the -- actually there is a
4 certain mortality to it, which is why they
5 elected to do a neurosurgical procedure,
6 because literally children could potentially
7 lose half their blood volume in that space.

8 The other thing that happens with a vacuum
9 besides that subdural damage is that literally
10 the blood vessels in the brain, with this
11 vacuum, can be torn. That can cause focal or
12 localized brain injury and trapping of the
13 blood anywhere along the surface of the brain.

14 The problem with force is that it is not
15 predicable, so even though the vacuum was
16 applied -- just for example -- on one part of
17 the brain, the injury may be in another part
18 of the brain because in half of these injuries
19 we don't know what the force was, where it was
20 applied, that type of thing.

21 Q. You mentioned medical records in your
22 examination. Have you also read some
23 depositions of other witnesses?

24 A. Sure.

25 Q. Have you given any consideration to any

1 alternative causes of Jayden's brain bleeds
2 and brain problems other than the trauma of
3 the vacuum?

4 A. Sure.

5 Q. Please tell us about that.

6 A. Well, I read the deposition of one of the
7 other pediatric neurologists. I don't ---

8 MOLLY CRAIG: Objection, Your
9 Honor. Pitting witnesses.

10 THE COURT: What do you say to
11 that?

12 EDWARD GRAHAM: So far all he's
13 said is that he read a deposition. I don't
14 think that's he's pitted at all at this point.

15 THE COURT: At this juncture,
16 overruled. You may respond.

17 THE WITNESS: And so, you know,
18 there was this sort of concern about Jayden
19 being somewhat unique, he had these unique or
20 abnormal blood vessels. And, uh, I -- I
21 thought about it but it just struck me as very
22 unusual that there was different about his
23 brain versus anyone else's brain, that he had
24 literally pediatric neurosurgeon within hours,
25 forty-eight hours, of life and he had no

1 problems whatsoever. The surgeon actually saw
2 his blood vessels, so -- who did the surgery
3 on him.

4 And, subsequently, after that he's
5 had several other surgeries. I think he had a
6 hernia repair and some other procedures. So
7 he's had these procedures done and he's never
8 had an other bleeding problems or problems
9 with any other blood vessels in his body. So
10 I just -- I just had a very hard time with the
11 concept of Jayden having a bleeding problem or
12 a blood vessel problem.

13 DIRECT EXAMINATION CONTINUED

14 BY EDWARD GRAHAM:

15 Q. If a surgeon was under the impression that
16 -- well, strike that.

17 As a pediatric neurologist, if you were
18 concerned that one of your patients had
19 abnormal blood vessels and a problem with
20 bleeding, what would be your conclusion about
21 whether or not you should allow that patient
22 of yours to be operated on by a surgeon?

23 A. It would be a problem.

24 Q. Can you explain that in more detail?

25 A. Sure. I mean, that any surgeon in those

1 circumstances would at least make a notation
2 that -- and, despite -- and sometimes we have
3 to do surgery that is lifesaving. So in those
4 circumstances people say 'we understand what
5 the risks and benefits are' and they document
6 that, you know, despite all this stuff we are
7 going to go ahead with this. I just didn't
8 see that in the medical record. More than
9 that, his healing was fine. He's had multiple
10 surgeries since then and he's just never had a
11 problem. So I -- I just would have to say
12 that I just -- I don't believe that that
13 concept holds water with Jayden.

14 Q. Let me ask you, sir, do you have an
15 opinion to a reasonable degree of medical
16 certainty as to whether or not alcohol
17 consumption by Jamsetta in the first three
18 weeks or so of pregnancy, before she found out
19 that she was pregnant, caused any harm to her
20 son such as fetal alcohol syndrome or any
21 other -- any other recognized alcohol problem
22 in newborns?

23 A. I do.

24 Q. What is your opinion?

25 A. I don't think it was related at all.

1 Q. Do you have an opinion as to whether or
2 not alcohol consumption in the first few weeks
3 before any mother finds out that she is
4 pregnant can cause brain -- blood vessels to
5 bleed or be more vulnerable to bleeding?

6 A. I do.

7 Q. What is your opinion?

8 A. I don't think that there is any
9 relationship.

10 Q. Let me ask you a couple of specific
11 causation questions. You talked about speech
12 and language problems. Do you have an opinion
13 to a reasonable degree of medical certainty as
14 to the most probable cause of those problems?

15 A. Sure. I mean, I -- I -- all of those
16 things -- speech, language and the other
17 things that you asked me about, his physical
18 weaknesses as well, they're in the brain. So
19 children who have brain injury or neurological
20 impairment have speech and language delay.

21 Q. Do you have an opinion to reasonable
22 degree of medical certainty as to the most
23 probable cause of his physical deficits, his
24 motor tone problems and his lack of proper
25 coordination?

1 A. I do.

2 Q. What is that?

3 A. Again, those things live in the brain. So
4 when a child has brain injury, neurological
5 impairment, those things come to the rise. In
6 other words, those children have difficulty
7 with coordination, uh, with both motor --
8 gross and fine coordination.

9 Q. Do you have an opinion as to the most
10 probable cause of Jayden's left arm being a
11 bit weaker and smaller than his right arm?

12 A. Sure.

13 Q. What is that?

14 A. I believe -- what happens with the
15 bleeding is that sometime more of the brain is
16 impaired or more of the brain is affected than
17 others, so I believe that speaks to the
18 hemisphere in which the bleed occurs -- in
19 other words, probably a right hemispheric
20 bleed to the right.

21 A. You mentioned surgeries. Do you have an
22 opinion as to the most probable cause for
23 Jayden's need for brain surgery to evacuate
24 those blood clots?

25 A. Sure.

1 Q. What is that?

2 A. Well, he -- the blood vessels were torn
3 and the blood was calling massive pressure,
4 pressing on this area of the brain stem that
5 they call the posterior -- on the back of your
6 head -- so much so that if the blood wasn't
7 taken out, that clot wasn't removed, it would
8 crush the area of the brain that makes us who
9 we are, that part of the brain that is
10 evolving consciousness, that part of the brain
11 that controls independent respiration. That
12 is a neurosurgical emergency and that's what
13 they did.

14 Q. What about Jayden's feeding problems, the
15 stomach surgery with the feeding tube, reflux
16 and all that. Do you have an opinion to a
17 reasonable degree of medical certainty as to
18 the most probable cause of those problems and
19 those treatments?

20 A. Yes.

21 Q. What is that?

22 A. Very commonly children who are neuro-
23 logically impaired, neurologically injured,
24 have very poor feeding. It goes with the
25 territory. Many of the children that I take

1 care of who have deficits from a neurologic
2 point of view have poor feeding and need to
3 have nutritional supplementation. That comes
4 along with the ride. I mean, it's a very
5 common problem.

6 Q. Let me ask you about a few more therapies
7 and we will be done with this line.

8 A. Okay.

9 Q. Do you have an opinion as to the most
10 probable cause for Jayden's need for braces,
11 occupational therapy, physical therapy and
12 speech therapy?

13 A. Yes.

14 Q. What is that?

15 A. Sure. The braces -- in fact, Grandma was
16 sharing with me that she still has his brace
17 from when he was a child, she still looks at
18 it. When a muscle is weak, what happens is
19 that it puts a lot of stress on the joint.
20 So, for example, if you -- people who are
21 weak, we protect the joints with a brace,
22 something to keep it solid, because kids need
23 to stand up straight, need to walk. It's a
24 very therapeutic thing.

25 In other words, for example, children who

1 are in wheelchairs are must more likely to get
2 pneumonias and respiratory infections.

3 So it is very important that they get up
4 and standing, so we use these devices in order
5 to give them a little support. Sometimes they
6 can damage their ankles, damage their knees,
7 because they use the ligaments in their knees
8 and ankles to hold up that weight.

9 The physical therapy or occupational
10 therapy are interventions that we use to make
11 kids stronger. So, you know, there are
12 different exercises. Now, you know, you and I
13 -- or maybe you -- go to the gym and exercise,
14 but kids at a certain point they have -- they
15 need to do something that is kid-friendly.
16 The physical therapists are pros. You know,
17 they have certain toys, certain interactions
18 with the children, and they can work on a
19 kid's balance and it's a safe, healthy way
20 that is kid-friendly.

21 Q. Dr. Katz, do you have an opinion to
22 reasonable degree of medical certainty as to
23 Jayden W. 's most probable life
24 expectancy?

25 A. It should be normal.

1 Q. You've expressed a number of opinions
2 today. Have all of the opinions that you've
3 expressed been opinions that you hold to at
4 least a reasonable degree of medical
5 certainty, most probably?

6 A. Yes.

7 EDWARD GRAHAM: Thank you. Please
8 answer any questions that Counsel may have.

9 THE COURT: How long do you expect
10 cross?

11 MOLLY CRAIG: Your Honor, I will
12 try to move it along.

13 THE COURT: Not to limit you but
14 just to know.

15 MOLLY CRAIG: Yes, sir.

16 THE COURT: Thirty minutes?

17 MOLLY CRAIG: I would think so.

18 THE COURT: All right, does anyone
19 need to take a break? (No verbal response).

20 All right, then you may proceed. Doctor, I
21 didn't ask you. Do you need to take a break?

22 WITNESS, DR. KATZ: No, I'm fine.

23 THE COURT: Very good.

24 CROSS EXAMINATION

25 BY MOLLY CRAIG:

1 Q. Good afternoon, Doctor. How are you
2 doing?

3 A. Good.

4 Q. Doctor, you had some positive things to
5 report. I think you said with the document
6 that plaintiff's counsel showed you, the IEP?

7 A. That's correct.

8 MOLLY CRAIG: Would you (Clerk)
9 go ahead and turn on the projector -- Your
10 Honor, if I may approach the witness, I would
11 like to show him what has been marked as
12 Exhibit 21, Pages 529 and 533 (sic) out of the
13 IEP.

14 THE COURT: You may.

15 DIRECT EXAMINATION CONTINUED

16 BY MOLLY CRAIG:

17 Q. Doctor, could you just read that high-
18 lighted section about how Jayden is doing,
19 about how his school ---

20 A. You're talking about this document?

21 Q. Yes, sir.

22 A. Well, the highlighted portion is the
23 percentage of time that the student spends
24 in the regular education environment and what
25 is checked is eight to a hundred percent.

1 Q. Eighty-five percent would be a normal --
2 I didn't hear you.

3 A. I am just reading what the document says.
4 It says, -- well, it's three sentences here:
5 it says primary developmental delay, other
6 disabling conditions and speech and language
7 impairment. Then it says the percentage of
8 time student spends in regular education
9 environment, eighty to one hundred percent.

10 Q. So eighty to a hundred percent, he would
11 be in a regular educational environment?

12 A. Yes.

13 Q. That's good news, right?

14 A. Oh, yeah, that's great news.

15 Q. Great. Let me also show you what has been
16 marked previously as Exhibit 21, Page 533, and
17 the question on this is, (reading): *Does the*
18 *student's level of performance require program*
19 *modifications in the general curriculum?* What
20 is the response?

21 A. Well, it says modifications in the general
22 curriculum. It is marked "no".

23 Q. So no modifications?

24 A. Yes, that is correct.

25 Q. That is good news?

1 A. Yes, absolutely.

2 MOLLY CRAIG: Your Honor, we
3 would move these into evidence, please.

4 THE COURT: Any objection?

5 EDWARD GRAHAM: Your Honor, we have
6 been informed of the use of those documents
7 and we have no objection. Your Honor, there
8 is highlighting and we would object to that.

9 THE COURT: All right, Counsel
10 objects to the highlights. Do you have an
11 objection other than the highlighting?

12 EDWARD GRAHAM: I am just looking
13 for the dates. Is there a date on these
14 documents?

15 MOLLY CRAIG: These are the
16 documents that you gave us. The IEP.

17 EDWARD GRAHAM: To clarify the
18 record, you served these on us this morning,
19 but we didn't serve them on you. We have no
20 objection, Your Honor, except as to the
21 highlighting.

22 THE COURT: All right, objection to
23 the highlighting.

24 MOLLY CRAIG: Yes, sir.

25 COURT REPORTER: And, again, the

1 number?

2 MOLLY CRAIG: Yes. The number is
3 Exhibit 21, Page 529 and Page 533.

4 (SO ENTERED AS EXHIBIT 21, PAGE 520)

5 (SO ENTERED AS EXHIBIT 21, PAGE 533)

6 DIRECT EXAMINATION CONTINUED

7 BY MOLLY CRAIG:

8 Q. Now looking at the documents that were
9 shown to you by plaintiff's counsel, Mr.
10 Graham, and for the records these are Pages
11 552, 553 and 530. This is a progress report,
12 is that right?

13 A. That's right.

14 Q. Okay. The date is what?

15 A. (Upon review), May the 5th, 2010.

16 Q. Let's go back this first page of this
17 progress report. It says period two nine,
18 eighteen, two thousand nine. Projected
19 completion of goal, what does that say?

20 A. Well, I think -- if you don't mind, this
21 -- this document or this progress report was
22 created while Jayden was in the first grade,
23 after spending two years in kindergarten. If
24 you read the annual goal where it says
25 "competent", while -- it says "By May 2010,

1 Jayden, when getting kindergarten level probes
2 will identify forty-two random letters of the
3 alphabet in one minute." So essentially he
4 hasn't even accomplished kindergarten level
5 work and he's finishing the first grade.

6 Q. Well, ---

7 A.. So that's -- whoa, whoa, whoa, let me
8 finish. You put it up and it says "goal by
9 the end of IEP", so this is after two years of
10 kindergarten, the end of the first grade and
11 they are still questioning him on kindergarten
12 level work. I get the fact that he may need
13 it and that would be great if it does, uh,
14 and, you know, you can go through all that.

15 It says he's meeting the goals, but those are
16 goals that he should have met three years ago.

17 Q. Let's look at this document that is the
18 document from the people who are taking care
19 of Jayden and it says that he may meet goal by
20 the end of IEP. You see that, the first one?

21 A. That's what it says.

22 Q. This is the second one, "May meet goal by
23 the end of IEP, identified thirty-two letters,
24 thirty-five letters, may meet goal by end of
25 IEP." Is that correct?

1 A. That's what it says, Counsel.

2 Q. And, again, "May meet goal by end of IEP"

3 for that period.

4 A. Yes.

5 Q. Then on 2/17/02, he met that goal with

6 fifty-six letters, right?

7 A. That's correct. Yes, I see that.

8 Q. He met the goal again, he met the goal

9 again?

10 A. Okay.

11 Q. All right. Now going to Page 553, which

12 is another document, which is the next page of

13 this progress report, again, "May meet goal by

14 the end of IEP." Right?

15 A. That's what it says.

16 Q. And it goes all the way down and the one

17 that -- after twenty-one of these, the only

18 one that he didn't meet his goal was on

19 5/4/10. Is that correct?

20 A. That's correct.

21 Q. All right. Now, on Page 530, you went

22 through a little bit of this, Mr. Graham did,

23 on your direct examination but not all of it.

24 So let's look at some of the other good things

25 that have happened. It says Physical

1 Performance, what does it say about Jayden's
2 physical performance that is highlighted right
3 there?

4 A. (Reading): *"Is able to walk, run, jump*
5 *appropriately throughout the school*
6 *environment. He enjoys all ball playing and*
7 *does well with throwing, catching and kicking*
8 *activities."*

9 Q. Enjoys ball playing?

10 A. Yes.

11 Q. Then, (reading): *"Gross motor skills are*
12 *improving as he moves throughout the school*
13 *environment but occasionally he needs verbal*
14 *cues for safety."* Right?

15 A. That's correct.

16 Q. He's an eight-year-old, right?

17 A. That's correct.

18 Q. All right. Then we go down to
19 Occupational Functioning, (reading): *"Jayden*
20 *as worked on fine motor, visual and*
21 *perceptual skills this year. He has shown*
22 *steady progress in these areas."*

23 A. Right, absolutely.

24 Q. All right, let's look at Speech, (read-
25 ing): *"Jayden continues to make steady*

1 *progress in his speech skills.*" Did I read
2 that correctly?

3 A. Perfect.

4 Q. We have agree on these things today?

5 A. Absolutely.

6 Q. You're not an Ob-Gyn, like Dr. Rhett?

7 A. That's correct.

8 Q. You're not an Ob-Gyn, is that correct?

9 A. That's right.

10 Q. You don't deliver babies for a living?

11 A. That's correct.

12 Q. And you're not here to testify as to the
13 standard of care for an obstetrician?

14 A. That's absolutely correct.

15 Q. Whether or not the vacuum was used
16 appropriately, you cannot say and you have no
17 opinion on that?

18 A. That's correct.

19 Q. And you have no opinions on whether Dr.
20 Rhett should have used the vacuum to assist
21 in the delivery of Jayden?

22 A. I don't have an opinion on that.

23 Q. And no opinions on whether the baby should
24 have been delivered with the assistance of
25 forceps versus vacuum versus a caesarean

1 section? No opinion?

2 A. No opinion.

3 Q. You do not have any obstetrical opinion as
4 to whether or not the vacuum was necessary in
5 this case?

6 A. That's correct.

7 Q. That you would agree that when a baby's
8 heart rate drops during delivery and doesn't
9 come back up that the baby needs to be
10 delivered as quickly and as safely as
11 possible.

12 EDWARD GRAHAM: Objection.

13 THE COURT: Objection sustained.

14 There was an objection from behind you, Ms.
15 Simmons (sic).

16 MOLLY CRAIG: Okay. Thank you,
17 Your Honor.

18 EDWARD GRAHAM: Your Honor, we will
19 stipulate that Dr. Katz is not an obstetrician
20 and there is no ---

21 THE COURT: We just went through
22 those questions and we just finished
23 establishing that he is not, so he's testified
24 appropriate about ---

25 MOLLY CRAIG: Yes, sir, I'll

1 rephrase the question.

2 THE COURT: All right.

3 CROSS EXAMINATION CONTINUED

4 BY MOLLY CRAIG:

5 Q. With regard to a child that has suffered
6 brain damage -- and you take care of those
7 children, is that correct?

8 A. Yes, that's correct.

9 Q. And in taking care of those children, do
10 you have an opinion of whether or not it is a
11 good or a bad thing for that child to be
12 deprived of oxygen?

13

14 (LOUD FEEDBACK FROM SOUND SYSTEM)

15 MOLLY CRAIG: I swear, I didn't
16 touch anything.

17 THE COURT: Sir (addressing juror),
18 are you all right? That might be have been
19 worse with your hearing aid?

20 JUROR: Yes, sir, I'm fine.

21 THE COURT: Is the sound system
22 off?

23 CLERK: It's not off but I've turned
24 it down as far as I can.

25 THE COURT: Please speak up so that

1 we can all hear as best we can without the
2 microphone system, temporarily. Go ahead.

3 CROSS EXAMINATION CONTINUED

4 BY MOLLY CRAIG:

5 Q. You treat children that are suffering from
6 brain damage, correct?

7 A. That's correct.

8 Q. Children that are deprived of oxygen
9 suffer brain damage?

10 A. That's right.

11 Q. That is not a good thing?

12 A. Oxygen is good, no oxygen is bad.

13 Q. Okay.

14 A. I agree.

15 Q. Now, you are here because you examined
16 Jayden W. on December the 9th, 2009;
17 is that right?

18 A. That's right.

19 Q. And Mr. Graham was the one to arrange for
20 this examination?

21 A. That's correct.

22 Q. And Mr. Graham was the one who actually
23 sent you the records to review?

24 A. That's correct.

25 Q. And that Mr. Graham was the one that paid

1 you for that examination?

2 A. That's correct.

3 Q. What was that, about \$1,400 or \$1,500?

4 A. Total, yes.

5 Q. Did you talk with any of Jayden's past or
6 current treating physicians?

7 A. No.

8 Q. All the information came from Mr. Graham?

9 A. No.

10 Q. All the information and the documents came
11 from Mr. Graham?

12 A. Yes. All the documents -- and some came
13 from actually mom and Jayden himself when they
14 came to see me.

15 Q. Okay. But none of the folks in here in
16 South Carolina that are taking care of Jayden,
17 you haven't spoken with any of his treating
18 doctors?

19 A. That's correct.

20 Q. Okay. So Jayden and his mama traveled to
21 New Jersey to see you?

22 A. That's correct.

23 Q. That's your home? I can hear the accent?

24 A. Really?

25 Q. Is that right?

1 A. That's the first that I am hearing that I
2 have an accent.

3 Q. I can hear the New Jersey accent.

4 A. Very good.

5 Q. You bounce between New Jersey and New
6 York, is that right?

7 A. That's correct.

8 Q. That's -- and did Jayden and his mom come
9 to the New York office or to your New Jersey
10 office?

11 A. My New Jersey office.

12 Q. Are there pediatric neurologists here in
13 South Carolina?

14 A. You tell me. I assume that there are.

15 Q. Do you know if there are pediatric
16 neurologists in South Carolina?

17 A. Actually a very good friend of mine is a
18 pediatric neurologist, or used to be in South
19 Carolina.

20 Q. You saw Jayden one time for, what, about
21 four hours?

22 A. Yes.

23 Q. And you did that at the request of his
24 attorney?

25 A. That's correct.

1 Q. You've been paid fifteen to twenty
2 thousand dollars to be an expert witness in
3 this case?

4 A. I am not sure what that number is, I don't
5 have the receipts with me.

6 Q. Let's see. At the time of your deposition
7 it was over eleven thousand dollars?

8 A. So I -- I have no reason to question you,
9 I just don't know the exact number.

10 Q. You charged twenty-five hundred for a
11 four-hour deposition?

12 A. That's correct.

13 Q. And you reviewed twenty to twenty-five
14 cases as an expert witness?

15 A. Over probably -- yeah, probably over five
16 or six years. That's correct.

17 Q. And only one or two of those was for a
18 defendant?

19 A. That's correct.

20 Q. You do not consider yourself a treating
21 doctor of Jayden Wa , do you?

22 A. I am not Jayden's treating doctor. That's
23 correct.

24 Q. You did not develop a treatment plan for
25 him, did you?

1 A. I did not.

2 Q. You didn't describe any medication or any
3 therapies?

4 A. That's correct.

5 Q. None of the information that you obtained
6 during your examination has been provided to
7 any of these doctors in South Carolina; is
8 that correct?

9 A. I -- not that I know of, but (pause).

10 Q. You did not review Jayden's CT or the MRI
11 or the ultrasound films in this case?

12 A. I reviewed the reports.

13 Q. But not the actual films?

14 A. That's correct.

15 Q. In this case, a lot of those reports were
16 from MUSC; is that correct?

17 A. That's correct.

18 Q. And at MUSC the ultrasound was reported as
19 normal; is that correct?

20 A. Yes.

21 Q. There was no evidence of bleeding on the
22 brain by the MUSC doctors, right?

23 A. Which ultrasound are you referring to?

24 Q. The ultrasound that was taken at MUSC
25 on ---

1 MOLLY CRAIG: Your Honor, may I
2 approach?

3 THE COURT: You may.

4 CROSS EXAMINATION CONTINUED

5 BY MOLLY CRAIG:

6 Q. I show you Exhibit 27, Page 459. This is
7 -- can you identify this document, please,
8 Doctor?

9 A. (Upon review), yes, it's normal per the
10 report.

11 Q. Let's start with the date of the ultra-
12 sound?

13 A. Sure -- (upon review), do you want me to
14 tell you the date?

15 Q. Yes, sir.

16 A. 7/17 -- right.

17 Q. And under the impression it says "Normal
18 head ultrasound", is that right?

19 A. Yes.

20 MOLLY CRAIG: Your Honor, I would
21 offer this document into evidence at this
22 time.

23 THE COURT: Is there an objection?

24 EDWARD GRAHAM: No objection, Your
25 Honor.

1 MOLLY CRAIG: Exhibit 27, 459.

2 (SO ENTERED AS EXHIBIT 27, PAGE 459).

3 CROSS EXAMINATION CONTINUED

4 BY MOLLY CRAIG:

5 Q. All right, let's take a look at your
6 report. Do you still have your report up
7 there?

8 A. I do.

9 Q. When you reviewed the records, you made
10 notes about the pertinent -- what I believe
11 that you can the positives and pertinent
12 negatives in your report, is that correct?

13 A. Yes.

14 Q. And when you wrote your report, you left
15 off some of these pertinent positives like --
16 where did you put in here that Ms. Washington
17 had late prenatal care?

18 A. I didn't put it in there.

19 Q. All right. Where in here did you put that
20 she used alcohol during her first trimester?

21 A. I didn't put it in congenitally.

22 Q. Now, you agree that after Jayden was born
23 that his Apgar scores were normal?

24 A. Absolutely.

25 Q. And if you look again at your report, you

1 also note that Jayden had terminal meconium in
2 delivery, is that correct?

3 A. That's correct.

4 Q. And this is a sign of fetal distress?

5 A. It can be.

6 Q. Okay. You did not note in that report
7 that Jayden was born with a heart murmur, did
8 you?

9 A. I did not note that.

10 Q. And you did not note that Jayden was born
11 with congenitally abnormal pulmonary artery,
12 did you?

13 A. Well, I don't think that's true.

14 Q. You disagree with the doctors at the
15 Medical University of South Carolina?

16 A. Well, I have a report, also from the
17 Medical University, where they were -- they
18 actually relooked at it and it was normal.

19 Q. Well, what I am going to ask you is, did
20 you note in your report that Jayden was born
21 with congenitally abnormal pulmonary artery.

22 Do you agree or disagree with that statement?

23 A. Well, except that the report that I have
24 from the same Medical University says that
25 this part of the evaluation is normal.

1 Q. What is the date of that report?

2 A. It's July 20th, 2006.

3 Q. 2006?

4 A. Yeah.

5 Q. Do you have the records from 2002, sir?

6 A. I, I -- I do. But if you'd like the ones
7 from 2006, you can review it.

8 Q. I see the one from 2006 but I'm talking
9 about the one right after delivery, in 2002,
10 July of 2002.

11 A. Yeah, sure. I saw a mention of the fact
12 that he had a murmur, but when I followed his
13 cardiac records and I saw that the Medical
14 University of South Carolina pediatric
15 cardiologist, who had been following him, had
16 reassessed the situation. He called it an
17 innocent heart murmur, which some children
18 get. A repeat ultrasound of the heart was
19 completely normal as of 2006, and he
20 absolutely has not, uh, been following him on
21 a routine basis.

22 Q. All right. But in your report, which is
23 dated 2008, did you mention heart murmur at
24 all?

25 A. No, I didn't mention it.

1 Q. All right. And when you examined Jayden,
2 you did not notice any unusual neck movements
3 when you examined him?

4 A. That's correct.

5 Q. And that's something that you would
6 usually see in the time period of the three to
7 four hours in which you're examining somebody?

8 A. Not always. Not always. Movement --
9 different movement disorders, different
10 coordination, sometimes you just don't see it.
11 Kids may do things one visit but not on
12 another. You're correct in saying that you
13 usually would see it, but not always.

14 Q. Did his mother report movement like that?

15 A. I don't recall. I think I would have
16 remembered that.

17 Q. How about his father, did he report a
18 movement like that?

19 A. No. I didn't -- I don't remember a report
20 of movement like that. But children -- in
21 normal children, roughly one in twenty
22 children, will have a movement -- we call them
23 "tics" and they usually last -- motor tics --
24 and they usually last less than six months. I
25 didn't see it. Even if I had -- neck rolling,

1 eye movements, different movements with
2 bodies, that can be a normal finding with
3 children Jayden's age. That would not strike
4 me as unusual.

5 Q. You said -- was Jayden's father with them?

6 A. No. If I remember correctly, it was mom
7 and Jayden.

8 Q. Have you had any conversations with Jayden
9 W's father regarding any possible
10 problems or genetic problems that he may have?

11 A. No.

12 Q. No conversations at all?

13 A. No conversations.

14 Q. Did you review his medical records to
15 determine whether or not he has any genetic
16 abnormalities in his family's lives?

17 A. No, I did not.

18 Q. In that report, you did not note that
19 Jayden was born with a congenitally smaller or
20 absent major blood vessel in his brain, which
21 is a left transverse sinus, did you?

22 A. Well, that's -- no.

23 MOLLY CRAIG: May I approach?

24 THE COURT: You may.

25 CROSS EXAMINATION CONTINUED

1 BY MOLLY CRAIG:

2 Q. (Tendering) --- Page 42, again from the
3 Medical University of South Carolina, ---

4 EDWARD GRAHAM: Just a correction,
5 Your Honor, the one that was handed to us is
6 Exhibit 27, 472.

7 MOLLY CRAIG: I must not have my
8 glasses on.

9 CROSS EXAMINATION CONTINUED

10 BY MOLLY CRAIG:

11 Q. Do you have 472 up there?

12 A. (Upon review), 472.

13 Q. Okay. I do, too. What is the date of
14 this -- well, let's identify the document.

15 This is a radiology report from the Medical
16 University, is that right?

17 A. Right.

18 Q. All right. What is the date of this
19 radiology report?

20 A. The date is 7/18 of 2002.

21 Q. Now, the Impression part of this report,
22 which is on what the radiologist bases his or
23 her findings, number three on the radiology
24 report from the Medical University of South
25 Carolina says, "Absence of flow in the left

1 transverse sinus, suggesting fibrous or
2 compression." Is that correct?

3 A. Yeah, that's number three. That's
4 correct.

5 MOLLY CRAIG: Your Honor, at this
6 time I would offer Exhibit 27, Page 472 into
7 evidence.

8 EDWARD GRAHAM: No objection.

9 THE COURT: Without objection, it
10 is admitted.

11 (SO ADMITTED AS EXHIBIT 27, PAGE 472)

12 CROSS EXAMINATION CONTINUED

13 BY MOLLY CRAIG:

14 Q. The transverse sinus of the brain, does
15 that mean that one or two of the veins that
16 drains into the jugular is narrow or is
17 completely missing?

18 A. Well, can I have that report back? If we
19 are going to talk about it, I wouldn't mind
20 taking a look at it.

21 Q. Well, that was my only question. Can you
22 answer that without the report? My question
23 was, is -- if you have a transverse sinus of
24 the brain -- why don't you tell me what the
25 definition of that is?

1 A. Well, what happens is that there's --
2 there's obviously multiple vascular systems in
3 the brain. The transverse sinus is a sinus
4 that drains the venous system, so there's
5 arterial blood going to the brain, venous,
6 where the blood is taken away from, uh, you
7 know, the -- to make it simplistic. The
8 transverse sinus is one of the sinuses in the
9 posterior or back of the brain which drains to
10 the venous structures in the neck.

11 Q. And if that vein is absent, the transverse
12 sinus of the brain, is that a defect or an
13 abnormality that a person is born with?

14 A. Well, if you -- if you look at the report,
15 it is unclear whether or not there was a
16 thrombosis there or whether the transverse
17 sinus, if it was there or not.

18 The other problem is that, because of
19 technique, there was a lot of blood and spasm
20 in that particular area. Usually doctors who
21 take a look at those studies, we -- I mean,
22 they did the best that they could and I think,
23 you know, that they did a pretty good job.
24 But what happens is that you usually repeat
25 those a little later in life because it's

1 unclear whether or not, as I said, that it was
2 a clot because of all the abnormal blood and
3 spasm in that area, whether it was foreign.

4 I think the radiologist specifically said
5 in that report that they couldn't tell whether
6 it was foreign or whether or not there was a
7 thrombose of a clot in there.

8 Q. Who is it that you think did a pretty good
9 job? Are you talking about the Medical
10 University of South Carolina?

11 A. The radiologist?

12 Q. Did a pretty good job?

13 A. They did a great job.

14 Q. I agree. I think we can agree on several
15 things. How about this, a doctor cannot
16 prevent a genetic abnormality. Do you agree
17 with that?

18 A. I think that's modern science. Yes, I
19 think that's correct.

20 Q. What is a bilateral hydrocele? Did Jayden
21 have that?

22 A. I remember reading that he had a
23 hydrocele. I don't know if he had bilateral.
24 If he had bilateral, that's fine. Could I
25 take a look? Do you have that record?

1 Q. Well, I am trying to find basically from
2 the documents that were given to you so that
3 you could do an examination of Jayden do you
4 recall whether not he had bilateral
5 hydroceles?

6 A. I remember that he had a hydrocele. I
7 don't remember specifically that he had
8 bilateral, but I remember that he had a
9 hydrocele.

10 Q. Okay, bilateral hydrocele is not something
11 that's caused by the birth process; is it?

12 A. No.

13 Q. It's a congenital problem?

14 A. That's congenital. Correct.

15 Q. All right. Undescended testes, do you
16 recall whether or not Jayden had that problem?

17 A. I think that he had undescended testes,
18 that's correct.

19 Q. That is not caused by the birth process,
20 is it?

21 A. That's correct.

22 Q. That's a congenital problem?

23 A. That's correct.

24 Q. Inguinal hernia?

25 A. Inguinal hernia.

1 Q. I am sure that I just butchered that
2 pronunciation. Sorry.

3 A. Inguinal hernia.

4 Q. Did Jayden have that?

5 A. He did.

6 Q. That is not caused by the birth process,
7 it is?

8 A. That's correct.

9 Q. It is a congenital problem?

10 A. It had been an acquired problem. It's
11 just a defect in the muscle wall, so it could
12 be an acquired problem -- especially with
13 children who have decreased muscle tone like
14 Jayden does.

15 Q. Based on your review of the records, did
16 Jayden have coloboma?

17 A. Well, that's -- (pause) -- well, some of
18 the eye records describe it, some of the other
19 eye records didn't describe it. So I -- uh, I
20 -- I would agree that it probably was there,
21 but I did read some records where they didn't
22 see it.

23 Q. Can we agreed that a coloboma is not
24 caused by the birthing process?

25 A. That's correct.

1 Q. And, again, it's also a congenital
2 abnormality?

3 A. That's correct.

4 Q. How about hyperextension of the joints?
5 Did you read in the medical records that
6 Jayden had this problem?

7 A. I read -- I read that.

8 Q. Again, this is not something caused by the
9 birthing process?

10 A. Well, the problem with the hyperextended
11 joints was a ligamentally laxity. It has to
12 do with the muscle tone and that may be
13 related to neurologic injuries. Many of the
14 kids who have decreased muscle tone and
15 weakness can have joints which are hyper-
16 extensible; which is one of the reasons that
17 they put a brace on him, because what happens
18 when the muscles are weak is that they tend to
19 expose the vulnerable joint. I think that's
20 -- that may be related.

21 Q. So hyperextensibility of the joints can
22 also be a congenital abnormality?

23 A. I can be congenital but it can be related
24 to perinatal birth injuries, as well.

25 Q. How about congenital cholesteatoma?

1 A. I don't remember seeing that in the
2 record.

3 Q. You don't recall that?

4 A. No, I don't.

5 Q. Is that a congenital abnormality?

6 A. It can be developed. I just didn't see
7 that in the records.

8 Q. How about, do you recall the record of
9 Jayden having pulmonary artery branch
10 stenosis?

11 A. Well, that's one of those things that I
12 saw with the cardiologist. I was concerned
13 about that but the cardiologist from the
14 Medical University repeated the ultrasound and
15 they didn't see it.

16 Q. Is that a congenital abnormality?

17 A. It can happen.

18 Q. Is isn't something caused by the birthing
19 process?

20 A. It is definitely not something caused by
21 the birthing process.

22 Q. And the heart murmur is not caused by the
23 birth process?

24 A. Well, I think you can have an incident
25 murmur, which is a common pediatric thing.

1 Q. But, sir, is a heart murmur caused by the
2 birthing process?

3 A. It is not.

4 Q. It is a congenital abnormality?

5 A. Uh, it -- it can be congenital, it can be
6 acquired.

7 Q. Can congenital abnormality or genetic
8 abnormality -- nobody can prevent those. You
9 would agree that's the way God makes some
10 people?

11 A. Well, God makes all of us different.

12 Q. And God can prevent a congenital
13 abnormality, can't he?

14 A. That's correct, he can.

15 Q. Now, doctor, would you agree that Jayden's
16 neurological exam would not change from one
17 day to another, within a twenty-four hour
18 period?

19 A. That's not true, Counselor.

20 Q. Of, you think it would?

21 A. I think that children especially --
22 especially in objective testing -- I mean,
23 just look at school. Kids will have good
24 days, kids will have bad days. So certain
25 abnormalities, some days you'll see. Certain

1 you don't.

2 I mean, we were just talking about rolling
3 of the neck and that's a classic one. It's a
4 movement -- it's a normal movement that
5 children have and it tends to wax and wane in
6 intensity. Some kids will come to the office
7 and they'll have movements and the parents
8 will say, 'You should have seen him last
9 night, he was moving his neck all over.'
10 Neurologic exams change. That's one of the
11 reasons why I still have a job.

12 Q. All right, let's talk about your job.
13 Your job in this case was to issue a report to
14 Mr. Graham for this case; right?

15 A. That's correct.

16 Q. And you saw Jayden on December 9th, 2008;
17 is that correct?

18 A. That's right.

19 Q. And when we took your deposition in this
20 case, you did not know that the day before
21 your examination that Mr. Graham had Jayden go
22 to another pediatric neurologist in New York,
23 on December 8th, 2008; did you?

24 A. No, I didn't.

25 Q. And, Dr. Adler is the other pediatric

1 neurologist that Jayden went to see the day
2 before your examination. Do you know Dr.
3 Adler?

4 A. I know his name. I don't think I've met
5 him.

6 Q. He is a pediatric neurologist; he does
7 exactly what you do, right?

8 A. You'd have to ask him that.

9 Q. But you haven't seen Dr. Adler's report in
10 this case, have you?

11 A. I have not.

12 Q. And the purpose of Jayden going to see Dr.
13 Adler to get an examination done on December
14 8th and then one on December 9th, by you, was
15 not for care and treatment; correct?

16 A. You'd have to ask Mr. Graham that. I have
17 no idea why he sent him to Dr. Adler, I have
18 no idea why he sent him to both. I never
19 talked with him about that.

20 Q. But Dr. Adler and you have not discussed
21 Jayden's care or his treatment, his
22 examinations?

23 A. That's correct.

24 Q. In fact, you have never received Dr.
25 Adler's report?

1 A. That's correct.

2 Q. Although Dr. Adler saw Jayden the day
3 before your examination?

4 A. Well, that's what you're telling me.
5 Not that I know of.

6 Q. Well, this is a truth-seeking process and
7 it certainly would be better to have full and
8 complete information rather than bits and
9 pieces. Would you agree, Doctor?

10 A. Okay.

11 Q. Would you agree, that this is a truth
12 seeking process? And would you agree ---

13 A. I don't have a problem with that.

14 Q. Thank you. So the real purpose that
15 Jayden was sent to both you and to Dr. Adler
16 was to see which opinion and which report
17 would help his lawsuit the best?

18 A. You'd have to ask Mr. Graham that.

19 MOLLY CRAIG: Just one moment.

20 Those are all the questions that I have.

21 Thank you very much.

22 THE WITNESS: You're welcome.

23 THE COURT: Mr. Davis?

24 JAY DAVIS: Nothing from me, Your

25 Honor.

1 THE COURT: Very good. Is there
2 redirect?

3 EDWARD GRAHAM: Yes, sir, Your
4 Honor.

5 THE COURT: Briefly.

6 EDWARD GRAHAM: Briefly, Your
7 Honor.

8 REDIRECT EXAMINATION

9 BY EDWARD GRAHAM:

10 Q. Dr. Katz, Ms. Hood asked you some
11 questions about the good news of Jayden having
12 met certain goals as established on the IEP
13 document that she put before you. Do you
14 recall that?

15 A. Yes.

16 Q. All right. Would that good news have been
17 worse news or better news if he had met the
18 goals that were age appropriate for his age
19 group?

20 A. Well, those were. You know, I showed
21 those were goals for kindergarten, that he'd
22 been to kindergarten twice and was finishing
23 first grade and I -- so, totally, he was eight
24 and we are working on goals for kindergarten.

25 Q. For a normal child the age of Jayden

1 during the past IEP period, would it be good
2 news for that aged child to attain the goals
3 that Jayden was able to attain when he
4 attained it?

5 A. It would be a problem.

6 Q. She also asked you if oxygen was good for
7 a baby. Let me ask you this, sir, when a baby
8 is sucked out by vacuum forces from the
9 mother's birth canal in a way that blood
10 vessels in that child's brain are torn and the
11 blood bleeds out into the brain, is that -- do
12 you have an opinion to a reasonable degree of
13 medical certainty ---

14 MOLLY CRAIG: Your Honor, he is
15 leading the witness.

16 THE COURT: Counsel, you didn't
17 preface it by explaining what she asked. Of
18 course, the jury would have heard that
19 question, so ---

20 EDWARD GRAHAM: All right, I will
21 rephrase it.

22 THE COURT: Just go straight to
23 your question.

24 EDWARD GRAHAM: Thank you, Your
25 Honor.

1 REDIRECT EXAMINATION CONTINUED

2 BY EDWARD GRAHAM:

3 Q. Doctor, do you have an opinion to a
4 reasonable degree of medical certainty as to
5 whether or not bleeding into a baby's, a
6 newborn baby's brain, from torn blood vessels
7 would have any effect on that child's ability
8 to have oxygen delivered to the parts of the
9 brain that need to be developed in that young
10 baby?

11 A. I do.

12 Q. What is your opinion?

13 A. Well, when you tear the blood vessels, you
14 injure the physiologic or innate ability to
15 deliver oxygen because the blood vessels bring
16 the blood to those tissues. If you tear --
17 which is one of the reasons that Apgars are
18 relatively normal. So when there is a
19 hemorrhage or a tear of the blood vessels,
20 even though the brain is relatively deficient
21 in oxygen, the rest of the body is relatively
22 okay. So this child had a focal or localized
23 injury right to the brain as opposed to the
24 rest of the body.

25 Q. Thank you. Now, there was a question

1 about paying money for your time and effort on
2 this case. What affect does billing for your
3 time and receiving money for your work have to
4 do with the opinions that you've expressed
5 here today?

6 A. Well, you know, when I come to court, you
7 know, people make you swear and you swear to
8 tell the truth. You don't swear to tell the
9 truth according to one side or the other. You
10 do the best that you can, considering the fact
11 and in coming up with a conclusion.

12 Q. Counsel asked you questions about the
13 ultrasound at MUSC and some other radiological
14 studies at MUSC. Which is more sensitive to
15 detect brain bleeds after birth: ultrasound,
16 CT or MRI?

17 A. Actually a CAT scan is properly the most
18 sensitive test to see whether or not there is
19 blood.

20 Q. How does the ultrasound rank? Or would
21 you defer to a neuroradiologist?

22 A. I would defer to a neuroradiologist,
23 although I think it's pretty widely held that
24 a CAT scan is probably the best test to look
25 for blood.

1 Q. At any rate, does the failure of the
2 ultrasound to document the presence of brain
3 bleeding -- do you have an opinion to a
4 reasonable degree of medical certainty as to
5 whether or not the absence of a positive
6 finding of brain bleeds on the ultrasound
7 proves that there was no bleeding in the brain
8 at the time of that test?

9 A. Well, we -- and -- and my answer is that
10 we talked a little about it. It takes about
11 -- when you tear the veins -- you know, this
12 is in some of the classic literature and
13 stuff. In subgaleal hemorrhages, it takes
14 about twelve to seventy-two hours after you
15 tear the vein for there to be enough blood to
16 accumulate in order to cause pressure on the
17 areas of the brain. So there is always a
18 delay in both the radiologic studies and the
19 symptoms. So none of the -- so occasionally
20 you'll have a traumatic -- for a child to have
21 trauma at birth, but many children will have
22 this kind of delayed twelve to seventy-two
23 hour period where the blood accumulates and
24 causes neurological injury and depression.

25 Q. Do you have an opinion to a reasonable

1 degree of medical certainty as to whether or
2 not good Apgars after the birth of a vacuum-
3 delivered baby demonstrate whether or not
4 there is any bleeding in the blood vessels of
5 the brain?

6 A. I do.

7 Q. What is that?

8 A. There is no relationship.

9 Q. How long does it take for tears from the
10 vacuum to the baby's blood vessels in its
11 brain to affect bodily systems in a way that
12 the nurses can pick up on it?

13 A. Well, it can occur pretty quickly. But,
14 as I said, the vast majority of the time it
15 takes hours because the blood has to
16 accumulate.

17 Q. There were questions about terminal
18 meconium. What is meconium?

19 A. Meconium is the fetus -- the fetus during
20 the delivery process passing stool and so the
21 -- so what happens is, the thinking is that if
22 there is decreased oxygenation, the sphincter
23 loses muscle tone and the baby passes meconium
24 or stool in the fluid. So the -- sometimes
25 that it can be helpful so that if there is a

1 significance enough decrease in oxygenation
2 that you see meconium. Unfortunately it's
3 sometime difficult to document. It's
4 difficult -- it's to a very specific problem.
5 Sometimes it helps you, sometimes it doesn't.

6 Q. Counsel asked you about the MRI. What
7 does the MRI -- you did review the MRI from
8 MUSC, correct?

9 A. That's correct.

10 Q. What does the MRI tell you about the
11 health of Jayden's brain at the time that it
12 was taken, a couple of days or so after he was
13 born?

14 A. Can I take a look at it?

15 Q. Sure.

16 A. He's had a couple of scans. (Upon
17 review), I -- this scan is very abnormal.

18 He has a large quantity of blood pressing
19 on the back of his brain, called a cerebellum
20 hematoma, massive. That means that it is
21 crushing/compressing the back of the brain.

22 There's bilateral areas of blood that we
23 call the subdural hematomas, which are small
24 in volume.

25 There's an absence of flow in the last

1 transverse sinus, which is what Counsel was
2 talking about, suggesting either thrombosis or
3 clotting or compression.

4 And there is two areas of subcortical
5 hyperintensive within the left occipital lobe
6 related to birth trauma, or swelling in these
7 areas.

8 And the subgaleal hematoma.

9 Pretty abnormal, pretty abnormal MRI.

10 Q. So one of those findings that Counsel
11 called your attention to says something like
12 'absent flow' in the transverse sinus, or
13 words to that general effect. Do you have an
14 opinion to a reasonable degree of medical
15 certainty as to whether or not an absent flow
16 in the transverse sinus means that the
17 transverse sinus and its veins are not there?

18 A. I do.

19 Q. What is that opinion?

20 A. It's just impossible to tell, to
21 differentiate between the two structures.

22 That's why we do repeat scans.

23 Q. When you say it is impossible to tell,
24 it's impossible to tell when and why?

25 A. Because the veins are clotted, so --

1 essentially what these tests are, when we see
2 the venous structures, is an MRI -- and MRI is
3 just a big, fancy computer. So what we do is
4 we subtract the plane and we just leave the
5 blood vessels, and there's a software
6 manipulation where we can do that. So what
7 happens is that we -- when the blood flows
8 through a structure it has a characteristic
9 signal with the MRI and that's the way that we
10 can tell. Veins have a signal, arteries have
11 a characteristic signal. Because there's no
12 flow through the veins, we can't tell whether
13 it's there or just that there is no blood flow
14 through it. That's -- you know, in a nutshell
15 that's the best way that I can explain it.

16 Q. Assume for the purpose of this question
17 that a newborn baby, delivered by vacuum
18 suction force has a normal transverse sinus.
19 Please assume further that that baby's blood
20 vessels in its brain had been ripped and torn
21 by the vacuum extraction.

22 MOLLY CRAIG: Objection, Your
23 Honor.

24 THE COURT: Sustained. Now,
25 Counsel, your final question. Go ahead and

1 ask your final question.

2 EDWARD GRAHAM: Thank you, Your
3 Honor.

4 REDIRECT EXAMINATION CONTINUED

5 BY THE COURT:

6 Q. Sir, assume that a normal transverse sinus
7 is in a baby who has had multiple bleeds in
8 his brain, uh, at or about the time of birth.
9 Assuming those facts, what would you expect an
10 MRI to show in terms of flow of the transverse
11 sinus?

12 MOLLY CRAIG: Objection, Your
13 Honor.

14 THE COURT: On what basis?

15 MOLLY CRAIG: Beyond the scope of
16 cross.

17 THE COURT: Overruled. Close
18 question, but overruled.

19 THE WITNESS: It's -- you know,
20 if -- if you have a baby with this much
21 bleeding, it's unclear what it would show
22 because there could be clotting, there could
23 be compression, there is a whole host of
24 factors. So it's unknown what it could show.
25 It could exactly show like this, where there

1 is decreased flow or -- we don't know whether
2 it is there or it is not there. So we can't
3 tell.

4 THE COURT: Anything further? One
5 last question?

6 EDWARD GRAHAM: Yes, sir.

7 THE COURT: Go ahead.

8 EDWARD GRAHAM: Thank you, Your
9 Honor.

10 REDIRECT EXAMINATION CONTINUED

11 BY EDWARD GRAHAM:

12 Q. You mentioned subsequent testing. What --
13 did you have a chance to review subsequent
14 MRIs of this child's brain?

15 A. I think, I did.

16 Q. So what does it tell you about the
17 transverse sinus?

18 A. I think subsequent findings show that it
19 is normal.

20 Q. Thank you. No further questions.

21 THE COURT: Very good. Any
22 objection to releasing the witness?

23 MOLLY CRAIG: No, sir.

24 THE COURT: Hearing none, you are
25 free to leave.

1 THE COURT: Welcome back, Ladies
2 and Gentlemen, back to the courthouse this
3 morning.

4 Let me ask, since we were last
5 together is there any member of this jury
6 panel who has had a discussion with anyone
7 concerning the facts of this case? If so,
8 please raise your hand. (No response).
9 Let the record reflect that no one raised
10 their hand.

11 You will recall that we were in the
12 plaintiff's case at the end of the day
13 yesterday and we remain there. Please call
14 your next witness.

15 MARY WATERS: Thank you, Your
16 Honor. The plaintiff calls Christine Delk.

17 (WITNESS TAKES STAND)

18 CHRISTINE DELK, being duly sworn to
19 tell the truth, the whole truth and nothing
20 but the truth, testified, as follows:

21 DIRECT EXAMINATION

22 BY MARY WATERS:

23 Q. Good morning, Ms. Delk. Can you tell the
24 jurors where you live?

25 A. I live in Charleston, South Carolina.

1 Q. How long have you lived in Charleston?

2 A. I moved here back in 2006, so four years.

3 Q. Tell us a little bit about your
4 educational background.

5 A. I grew up here -- I'm sorry. I grew up
6 in Goose Creek, South Carolina. I went away
7 to college, went to Columbia College. I got
8 my undergraduate degree in Speech Language
9 Pathology and then I got -- I graduated from
10 there in 2000. I began working in 2001 in
11 Union County schools.

12 COURT REPORTER: I'm sorry, Union
13 High School?

14 THE WITNESS: No, Union County
15 Schools. Sorry. Let me start over. I went
16 to Stratford High School in Goose Creek. I
17 went to Columbia College, then I went to the
18 University of South Carolina for a business
19 degree after my masters degree.

20 DIRECT EXAMINATION CONTINUED

21 BY MARY WATERS:

22 Q. Do you have a master's degree?

23 A. Yes.

24 Q. What is the subject matter of your
25 master's degree?

1 A. It is a master's in Communication
2 Disorders.

3 Q. Do you have any certifications or
4 licenses?

5 A. I am licensed in South Carolina and I
6 have the American PGM Association -- it's a
7 national speech and hearing. I have a
8 certificate in clinical competence. So I am
9 nationally certified also.

10 Q. Certified in what?

11 A. As a speech pathologist.

12 Q. Would it be reasonable to call you a
13 speech therapist?

14 A. Yes. That's correct.

15 Q. You are currently employed?

16 A. Yes.

17 Q. Where do you work?

18 A. I work at Charleston Pediatric Rehabili-
19 tation.

20 Q. How long have you been with Charleston
21 Pediatric Rehabilitation?

22 A. I began working there part-time in
23 September of 2007 and I began working full-
24 time in June of 2008.

25 Q. Do you have any children?

1 A. I do. I have one little girl, she is
2 two.

3 Q. So you work full-time as a speech
4 therapist?

5 A. Yes.

6 Q. Tell us, what does a speech therapist do
7 on a day-to-day basis?

8 A. Uh, we work on a lot of different
9 things. I work on perspective language,
10 understanding language. I work on the use of
11 words, we work on articulation, so certain
12 sounds -- if they have difficulty with
13 certain sounds, we work on those.

14 I have one child that I work with on
15 with stuttering.

16 I work with children that have cerebral
17 palsy.

18 I have some children that have Down
19 Syndrome.

20 I've got children with autism that I
21 work with.

22 So we work on just getting them more
23 functional with their communication skills.

24 Q. Do you also work with children who have
25 sustained brain injury?

1 A. Yes.

2 Q. Do you currently provide therapy to

3 Jayden W. ?

4 A. I do.

5 Q. How long have you treated Jayden?

6 A. I began working with Jayden in October

7 of 2007.

8 Q. So almost three years?

9 A. Almost three years.

10 Q. How often do you see Jayden?

11 A. At this point I see him once a week for

12 sixty minutes and every other week I see him

13 for thirty minutes. So one week he will get

14 an hour in therapy and the following week he

15 will get an hour and a half of therapy.

16 Q. So who ordered Jayden to seek therapy?

17 A. Mom requested that we add an extra

18 speech session to work on his articulation,

19 his intelligibility and his, uh, his phonic

20 awareness in his reading.

21 Q. And what are some of the things that you

22 work on specifically with Jayden W. ?

23 A. We work on language skills covering wh-

24 questions, vocabularies, sequencing, we work

25 on word finding, we work on, uh, articula-

1 tion, we work on motor strengths, the
2 receptive perspective language articulation.

3 COURT REPORTER: Please speak more
4 distinctly. I'm having trouble understanding
5 you.

6 DIRECT EXAMINATION CONTINUED

7 BY MS. WATERS:

8 Q. What is some of the exercises that you
9 do with Jayden W. to work on those
10 categories?

11 A. I -- I used a lot of literacy in my
12 therapies, so we generally begin our sessions
13 by reading a book. I have Jayden to do that
14 to help work on his reading fluency and his
15 reading comprehension. We will go through
16 the book and we will address questions, we
17 will address categories, sequencing, uh, and
18 then while he is reading we address the
19 articulation and if he has any problems with
20 words, then we practice those words.

21 Q. What are some of the exercises that you
22 use to address articulation?

23 A. Well, we work some overall to increase
24 the strength and coordination and range of
25 motion for his cheeks, his tongue, his lips.

1 So then, uh, for articulation we either have
2 picture words or a word lists or an image
3 that he imitates for me and we work on a
4 specific sound during session.

5 Q. Can you give us some examples of the
6 types of ---

7 A. Sure. One of Jayden's sound deficits is
8 the "R", which is very difficult to address.
9 If you have -- if you think about the many
10 different ways that we use "R", for us it is
11 second nature. We say "rah", but if you say
12 "water" then that's an "er" sound. If we say
13 "car", that's "R". In each one of those, to
14 produce that sound we have to use our tongue
15 and our lips in a different way to produce
16 that sound. So that's the way that it works
17 and so what we will do is -- is -- like right
18 now we are working on the "er" and --
19 sometimes Jayden gets it, so we will put an
20 "R" at the beginning of some words also. So
21 he might have to imitate just a certain word
22 and then we will work up to phrases and then
23 we will work up to sentences. Eventually, we
24 have a little conversation.

25 Q. You said earlier that you that you work

1 with books, is that with Jayden reading the
2 book?

3 A. Um-humm.

4 Q. Tell us some of the types of books that
5 you have to read?

6 A. I use early, first grade level books
7 with Jayden. He struggles with his reading.
8 He doesn't feel very confident in it, so I
9 use easier level books to boost his
10 confidence and his fluency.

11 Uh, and -- he used to -- to -- he used
12 to just not want to read and if he saw a
13 letter he would just guess a word that
14 started with that letter. Now, he will --
15 when we are reading our book, he actually
16 will try to sound out the words, but it is
17 difficult for him.

18 Uh, we -- we use it -- uh, we will just
19 -- he will take his time now. He's starting
20 to read the books for me but he still has
21 difficulty comprehending what he is reading
22 if he is reading it to himself. So if he
23 reads a sentence, he can't go back and tell
24 me what he just read because he is so focused
25 on the words. So then I will reread it again

1 and then he has to tell me about it, to work
2 on the comprehension part also.

3 Q. Is that the part where you were talking
4 about the wh-questions?

5 A. Yes. We start wh-questions very easily.

6 What -- he might look at a picture and,
7 'what is the boy holding?' It's very
8 concrete, he can see what the boy is holding.

9 Then we move to a little more abstract
10 and we do a wh-, 'what does a dog like to
11 chew, what could be his name', those kinds of
12 things.

13 And what we are working on now is,
14 Jayden, is wh-factors after a story -- which
15 in fact takes a lot of perceptive language
16 work for him. He has to think about what he
17 is hearing, remember what he has heard and
18 bring it back to me. So right now we are
19 working on very short paragraphs, like two
20 to three, maybe four-word paragraphs (sic)
21 and working on the wh-questions with those.

22 Q. How does he do with the wh-questions
23 with that?

24 A. He still struggles. He cannot bring it
25 back to me, so typically I have to repeat it

1 to him and break it down sentence by sentence
2 in order for him to answer questions.

3 Q. Can you tell us what are some of
4 Jayden's strengths and ---

5 A. Sure. Jayden has, uh, he is motivated,
6 he tries real hard. He -- and he -- he
7 doesn't give up when things get too hard. We
8 went through a little bit of a struggle at
9 one point this summer where he didn't really
10 like -- he really didn't feel like coming to
11 therapy, and we think that he had some other
12 issues going on with school, but, as for
13 strengths he is motivated, he tries. He
14 doesn't get too hard -- I can easily bring
15 him back and get him to work with me and, uh,
16 he -- he really is -- he is just a fun -- you
17 know, he plays and he likes to have fun.
18 He's got a great sense of humor. Uh,
19 (pause).

20 Q. Can you identify some of Jayden's
21 weaknesses?

22 A. Yes. Jayden -- (emotional).

23 Q. Take your time.

24 A. Jayden is difficult to understand -- I'm
25 sorry, (emotional).

1 Q. Take your time.

2 A. He, uh, -- he has difficulty when he
3 doesn't have any visual cue. Uh, -- he, uh,
4 trying to piece together information is very
5 difficult for Jayden. Trying to look at the
6 whole picture is very hard for Jayden. He
7 likes -- he needs smaller pieces. And, uh,
8 he, uh, -- I think that some of his
9 struggles, now that he realizes that he is
10 below his peers ---

11 COURT REPORTER: I'm sorry?

12 THE WITNESS: I am so sorry,
13 (emotional).

14 DIRECT EXAMINATION CONTINUED

15 BY MARY WATERS:

16 Q. Take your time.

17 A. But I think that Jayden is now starting
18 to realize that he can't do what other kids
19 in his class can do and I think that it is
20 starting to hurt his feelings a little bit.

21 Q. How does Jayden compare to other
22 children today?

23 A. He's definitely delayed to other
24 children his age, uh, -- are able to listen
25 to a story, retell a story, they are able to

1 answer questions about the stories, they are
2 able to do, uh, sequencing steps, uh, even,
3 uh, simple, uh, like things any eight-year-
4 old child would know how to do.

5 Like when getting ready for school in
6 the morning, Jayden has a very difficult time
7 telling us the steps of how he gets ready for
8 school in the morning.

9 Making peanut butter and jelly sandwich,
10 he goes from getting out the peanut butter to
11 eating it. He leaves out all of those little
12 steps that are involved. That's why I say
13 that he has difficulty seeing everything. He
14 needs it really, really broken down. We have
15 to go step-by-step for him to understand.

16 Uh, -- typically developing eight-year-
17 olds would be able to tell you step by step
18 what they do to be able to get ready every
19 morning to go to school.

20 Jayden has a lot of word finding
21 difficulty answering questions, so when he is
22 answering a question he may not be able to
23 think of a word.

24 Uh, typically in healthy eight-year-old
25 children you can understand everything that

1 they say. Typically, by age four you should
2 be able to understand everything that your
3 child says. Jayden, right now he's -- he
4 is about eighty to eighty-five percent
5 intelligible so we can understand, out of
6 context, eighty percent of what he is telling
7 us. But he still has difficulty with certain
8 words and that -- that can affect his playing
9 skills with his peers, if his peers don't
10 understand him. It can affect his
11 employability (sic) with his mom if his mom
12 doesn't understand what he means. So
13 typically eight-year-old children don't have
14 this kind of difficulty.

15 Q. In your job as a speech therapist, is it
16 part of your role to evaluate a child to
17 determine whether or not there is any unusual
18 anatomy that impacts that child's ability to
19 comply with their goals.

20 A. Yes. What -- whenever we have a child
21 that has articulation difficulties, we always
22 do an overall assessment. We look at how
23 well they can move the different muscles, how
24 well they can coordinate muscle movement and
25 if any structures are off -- if he has

1 enlarged tonsils or if there -- if there's a
2 problem, then they are referred to an ear,
3 nose and throat doctor for that. We do an
4 initial assessment, kind of a screening. So
5 then we refer on if we need, if we think that
6 there is something physical interfering with
7 his speech.

8 Q. Are there -- in your experience, are
9 there certain anatomical unusual features
10 that would relate to genetic disorders of
11 children that you encounter?

12 A. Some children, uh, -- well, because if a
13 child has a cleft palate that's a physical,
14 uh, -- if we work that child, that obviously
15 that is going to affect. Then there are
16 some, uh, uh, some -- some disability, some
17 diagnoses -- they had a raised palate, but
18 Jayden doesn't -- Jayden's structure are
19 typically -- I'm sorry -- are they aren't
20 interfering with his speech.

21 Q. Can you explain to us where Jayden
22 stands with regards to his comprehension and
23 understanding?

24 A. He, uh, on the last assessment given, he
25 did have a age-appropriate accepted language

1 score but he -- the age fluency, which is --
2 he's a year behind his chronologic age. Uh,
3 so, again, he is perceptive but he's a year
4 behind where he should be. That's where like
5 the wh-questions and the retelling, uh, he
6 has to understand all of that to perform it.

7 So if I gave him a two-step direction,
8 if I told him to go pick a game from the
9 shelf and come sit back down, he might get
10 stuck on picking the game and never come sit
11 back down.

12 And he -- so Jayden has difficulty just
13 keeping all this kind of information and
14 doing it, performing it.

15 Q. Ms. Delk, you brought with you today
16 your file on Jayden, your chart on Jayden?

17 A. I did.

18 Q. Would you show that to the -- as part of
19 your role as a speech therapist, do you keep
20 notes and records?

21 A. I do. We do. After every session, we
22 write what we worked on, his performance
23 level and then we give a little statement at
24 the end just going over how his -- his
25 attitude during the therapy session, as well

1 as the patient level and then, uh, uh, how he
2 acted as he did.

3 Q. I would like to refer to your attention
4 to what has been previously marked as Exhibit
5 14-501, entitled "Speech Therapy Notes", and
6 I believe the date reflected as -- do you
7 have that document in front of you?

8 A. I do.

9 Q. Let's start with the one that refers to
10 June 1, the first page, is this the type of
11 document that you create during the course of
12 your speech therapy with Jayden?

13 A. It is.

14 Q. And did you create this document?

15 A. Yes.

16 Q. Where you recorded your observations of
17 Jayden?

18 A. Right.

19 Q. And your goals for Jayden?

20 A. (No verbal response).

21 MARY WATERS: Your Honor, we
22 would like to offer this as exhibit in
23 evidence at this time and publish it to the
24 jury.

25 THE COURT: Yes. Is there any

1 objection?

2 CHILTON SIMMONS: No, sir.

3 THE COURT: Hearing none, you
4 may.

5 DIRECT EXAMINATION CONTINUED

6 BY MARY WATERS:

7 Q. Ms. Delk, because of the magnification
8 on the visual aid, we are going to start with
9 the first document -- the first page.

10 A. Okay.

11 Q. If you could just go through and -- tell
12 us what this document says about Jayden.

13 A. This on the far left is the objectives.
14 That's what we work on in all of our therapy
15 sessions. Then the baseline data is given
16 like when we started that objective.

17 So where you see June 1st, those are the
18 things that we worked on in that session and
19 Jayden's progress at that time. So we -- we
20 didn't do oral mode therapy that day. We
21 worked on the "er" sound in isolation and
22 then we worked on the "r" in opposition to
23 words. So at the beginning of our word, run;
24 at the middle of our word, carry; and at the
25 end of our word, water.

1 We had to work on L1 -- (phonetic).

2 COURT REPORTER: I'm sorry?

3 THE WITNESS: El-one. That
4 would be the "L" as in P-L and then one,
5 (phonetic), and then the wh-questions after
6 short stories.

7 DIRECT EXAMINATION CONTINUED

8 BY MARY WATERS:

9 Q. So these are things that you have been
10 working on with Jayden as recently as June of
11 this year?

12 A. Yes.

13 Q. What were your observations?

14 A. He -- he was in a good mood and he
15 participated well, both with the books that
16 we read and -- uh, he -- and we used that for
17 the reading and articulation, as I was saying
18 before (phonetic), uh, uh, and then we worked
19 on the wh-questions about the story and the
20 category.

21 He sees his physical therapist at the
22 same time as the treatment session, so
23 inbetween his physical therapy he obviously
24 can't -- he obviously can't speak to me when
25 he is doing his jumping jacks. So after he

1 failed with his jumping jacks, while he was
2 resting we worked on categories or we worked
3 on answering questions about the book, which
4 is difficult for Jayden because it had been a
5 lot -- because we hadn't just read the book,
6 so we had to go back through it and read it.

7 Q. And I think you have here notes of his
8 sessions from June 1st through June 15th.

9 A. Yes.

10 Q. And how did Jayden do?

11 A. He is progressing. It's slow progress
12 but he is showing progress. He -- it looks
13 like he is working at about seventy-five
14 percent of his goal. Our goal is that we --
15 we would love to be a hundred percent but
16 it's reasonable to look for eighty percent.

17 Q. In the third box down it says that it's
18 hard for Jayden to pronounce words in
19 isolation.

20 A. Uh-huh.

21 Q. You have noted there that he mastered
22 some portions of that.

23 A. Yes, Jayden had many problem areas when
24 we first started working. So instead of
25 listing them all, we just -- whatever we

1 were working on that day, that's what is in
2 the notes. He had mastered the phonics, he
3 had ---

4 Q. I'm sorry, can you explain what you mean
5 by phonics?

6 A. Yes, that's the sounds. So he, uh, --
7 Jayden used to, instead of saying "sorry", he
8 would say "tar-ree". So where ever there was
9 an "s" he would put in the "t" sound. He has
10 since corrected that, so he has mastered the
11 "s" sound, he is able to pronounce it and he
12 consistently produces it.

13 Q. Are there other goals or -- goals that
14 Jayden has mastered?

15 A. There are. And -- when we also look at
16 when there is a "t", it -- whenever he first
17 started working, it was just "wh", -- so he
18 achieved the simple answering of wh-
19 questions. So then we graded the goals.
20 We're still working on wh-questions but we
21 upgraded it to be working, after a story or
22 after a paragraph, uh, so -- so he has
23 mastered some goals and then we build on
24 those to make it a little bit harder as she
25 see the progress.

1 Q. So when he masters a goal, do you leave
2 that behind and move on to something else?

3 A. No. No.

4 Q. Why not?

5 A. We -- Jayden -- if the goal isn't
6 revisited sporadically, uh, when I first
7 started working with Jayden, we were working
8 on -- I guess, colors. I started working
9 with Jayden when he was five years old, again
10 specifically with colors. Jayden was
11 struggling with that. He mastered that goal
12 but he still has green and blue confusion.
13 So we still go back to our colors. Typically
14 twice a month we will go back and -- if we're
15 doing -- I always throw in the blue and green
16 just to make sure that we're still working on
17 it and targeting it.

18 Q. I would like for you to turn to page two
19 of this progress note previously marked
20 Exhibit 14-502.

21 A. (Complies).

22 Q. Are this progress notes that coincide
23 with what we show on the previous page, in
24 the columns there?

25 A. Yes.

1 Q. And this is where you note the progress
2 for the day.

3 A. Um-humm. The little statement at the
4 top is from the second session I saw him in
5 June and it's dated June 8th. So, again, it
6 just tells about how his -- how his
7 participation was, how his mood was, and it
8 tells us what we did and how he performed in
9 it.

10 MARY WATERS: Your Honor, we
11 would like to offer this in evidence, page
12 two of the previously offered document.

13 CHILTON SIMMONS: No objection.

14 THE COURT: Without objection, it
15 is in evidence.

16 (SO ENTERED AS EXHIBIT 14, PAGE 502)

17 DIRECT EXAMINATION CONTINUED

18 BY MARY WATERS:

19 Q. Looking at your treatment notes or your
20 progress notes for June 23rd through the
21 29th, do you have that document in front of
22 you?

23 A. I do.

24 Q. Can you tell us what you were working on
25 during that time period?

1 A. It was a continuation of what we were
2 working on at the beginning of June, in that
3 first progress note. So we -- it -- the same
4 kind of activity, the same kind of structure
5 because Jayden really struggles with
6 structure. So he comes in, we read a book
7 and then we do our therapy. Again, Jayden --
8 Jayden is able to produce the "er" with
9 eighty percent accuracy in isolation. And,
10 so, we would consider his "er" mastered. But
11 that's in isolation and now we have to start
12 putting it into syllables and words so he can
13 master those.

14 Q. How do his goals compare with goals that
15 you set for typical children Jayden's age?

16 A. That is kind of hard to say because a
17 child Jayden's age should be able to produce
18 all of these sounds. So we wouldn't be
19 seeing them in therapy.

20 As part of isolation goes, children --
21 we do see age-appropriate or typically
22 developed children for articulation therapy.
23 Their goals would be about the same. We
24 might not need to work on the goal motor to
25 work on the strength and increase

1 coordination of the lips, cheeks and tongue.

2 Q. The two pages of this progress note
3 previously marked as -- (inaudible) -- those
4 are progress notes that you created?

5 A. Yes.

6 COURT REPORTER: I'm sorry. I am
7 having difficulty hearing you.

8 DIRECT EXAMINATION CONTINUED

9 BY MARY WATERS:

10 Q. Were those created in the course of your
11 treatment of Jayden?

12 A. Yes.

13 MARY WATERS: Your Honor, we
14 would offer these in evidence.

15 THE COURT: Is there an
16 objection?

17 CHILTON SIMMONS: No, Your Honor.

18 THE COURT: Without objection
19 they are so admitted.

20 (SO ENTERED AS EXHIBIT)

21 DIRECT EXAMINATION CONTINUED

22 BY MARY WATERS:

23 Q. Ms. Delk, has Jayden improved since he's
24 been in speech therapy?

25 A. He has. As I said, I've been seeing him

1 for three years and he's definitely improved
2 in his intelligibility to where you can
3 understand him, and he has shown an
4 improvement in his language skills but he is
5 still delayed with his language skills and
6 English.

7 Q. It is good news that he has improved,
8 right?

9 A. It's great news.

10 Q. Is there any bad news?

11 A. Jayden has a long way to go. He -- you
12 know, he can't be understood by everyone
13 around him. He -- and that creates a problem
14 in the classroom, because if the teachers
15 can't understand him or the other children
16 can't understand him he might start to feel
17 isolated. His language skills are still at
18 least a year below his biological age; which,
19 again, as those are delayed (phonetic), those
20 are skills that we all -- we don't think
21 about that on a day to day basis but
22 difficult with a language skill, that's a big
23 part of our lives.

24 Q. What about Jayden's cognitive skills?

25 A. Jayden has -- well he has trouble with

1 the understanding of language, the use of
2 language, those are all part of your
3 cognitive ability and Jayden's delayed.

4 Q. How would you describe Jayden's
5 progress?

6 A. Slow but steady. We've had some times
7 when he has shown great improvement and then
8 we kind of taper off for a while, and then he
9 starts improving again. He has shown
10 progress but it is slow going.

11 Q. Does Jayden try?

12 A. He does. He does, he tries hard.

13 Q. Have you, in your role as his speech
14 therapist have you noted any social problems
15 that Jayden has because of his speech?

16 A. Yes, actually -- he went through a stage
17 where he did not want therapy, he wanted --
18 mom would carry him in and make him come to
19 therapy. She would come back with us into
20 therapy, to try to get him be calm and relax
21 and participate. And, so, at that time we
22 had a talk with mom. He was having
23 difficulty in school because the other kids
24 were picking on him. Uh, and it -- you know,
25 it's hard for Jayden because he knows that he

1 is different from the other children and he
2 tries extra hard to be just like them and it
3 was causing trouble in the classroom, as well
4 as in therapy -- he didn't want to. The
5 other children he went to school went, they
6 didn't have to do therapy.

7 Q. You referred to Jayden's mom. Jamsetta,
8 right?

9 A. (No verbal response).

10 Q. Do you know Jayden's mother?

11 A. Yes.

12 Q. Have you communicated with Jayden's
13 mother in your role as his speech therapist?

14 A. Yes. After each session, we walk Jayden
15 out and we tell mom what we worked on that
16 day, what they can do at home. We often
17 discuss about if she is seeing the thing that
18 we are seeing, at home, at school, and
19 discuss every setting that Jayden goes to:
20 school, home, the playground, anywhere. So
21 we speak on a weekly basis.

22 Q. Are you under the impression that mom
23 works with Jayden on the things that you give
24 him to practice home at home?

25 A. It appears so. Even though -- even

1 though progress has been happening slowly, we
2 wouldn't have seen this much progress if he
3 wasn't getting support other than during our
4 therapy sessions.

5 Q. Is she generally cooperative with you?

6 A. Yes.

7 Q. And does she seem genuinely interested
8 in Jayden's life?

9 A. Yes.

10 Q. Do you think you'll reach a point where
11 Jayden will no longer need speech therapy?

12 A. I think Jayden will always needs some
13 therapy, especially as the workload gets
14 harder. It'll get harder for him to keep up
15 and to understand things that are being
16 taught to him. So I do think that he will
17 need support and -- (inaudible).

18 Q. And what would you -- what would you
19 expect to happen if Jayden's therapy stopped?

20 A. I would expect that he would crash and
21 would lose the skills that he has fought so
22 hard to learn.

23 MARY WATERS: Thank you, Ms.

24 Delk. Please answer any questions that
25 counsel may have.

1 THE COURT: Cross-examination?

2 CHILTON SIMMONS: Yes, sir, just a
3 few minutes, Your Honor.

4 CROSS EXAMINATION

5 BY CHILTON SIMMONS:

6 Q. Good morning.

7 A. Good morning.

8 Q. Thank you for coming today. I have just
9 a few questions for you, Ms. Delk.

10 A. Sure.

11 Q. You did not diagnose Jayden's cause of
12 his brain bleed; is that true?

13 A. No, I did not.

14 Q. That is not your job as a speech
15 therapist?

16 A. It is not. No.

17 CHILTON SIMMONS: And if I could
18 approach, Your Honor, just to show the
19 witness a document to refresh her memory.

20 THE COURT: You may.

21 CHILTON SIMMONS: This has already
22 been marked as evidence.

23 CROSS EXAMINATION CONTINUED

24 BY CHILTON SIMMONS:

25 Q. I think you've seen that document,

1 (tendering). What is that -- what is
2 document, what is that dated?

3 A. This is dated June 2010, so it is June
4 22nd through June 29th.

5 Q. And under this Objective information ---

6 A. Um-humm.

7 Q. --- how many appointments were canceled
8 without notice?

9 A. In June there was just one.

10 Q. Is that a zero after that?

11 A. That's my initials, "CD". We have to
12 initial.

13 Q. Great. Thank you.

14 A. Um-humm.

15 Q. And in the February of 2009 evaluation
16 that you did, ---

17 A. Um-humm.

18 Q. --- in the final recommendation, did you
19 state that he had excellent progress?

20 A. Yes.

21 Q. And that's good news, obviously?

22 A. It is.

23 Q. And Jayden is continuing to improve his
24 skills?

25 A. Yes.

1 Q. And you hope to continue to help him?

2 A. I do.

3 Q. Do you hope to continue to help him so
4 that he can be gainfully employed one day?

5 A. Yes. But it -- it's -- it'll be hard if
6 he can't follow directions or if he can't do
7 sequencing. He's -- he'll be very limited in
8 his career.

9 CHILTON SIMMONS: Thank you so
10 much. No further questions.

11 THE COURT: Is there redirect?

12 MARY WATERS: No, Your Honor.

13 THE COURT: You may step down and
14 you're free to leave, if you wish.

15 (WITNESS STEPS DOWN)

16 THE COURT: Please call your next
17 witness.

18 MARY WATERS: Your Honor, the
19 plaintiff calls Renee Washington.

20 (WITNESS TAKES STAND)

21 RENEE WASHINGTON, being duly sworn
22 to tell the truth, the whole truth and
23 nothing but the truth, testified, as follows:

24

25 DIRECT EXAMINATION

1 BY MARY WATERS:

2 Q. Ms. Washington, please speak up so that
3 we will be able to hear you. If you don't
4 hear me, let me know. Can you tell us where
5 we live?

6 A. I live at 775 Cartwright Drive
7 (phonetic), in Charleston.

8 Q. I understand that you are soft spoken.
9 Tell us who you live there with?

10 A. My two children, my family.

11 Q. How old are you?

12 A. I am thirty.

13 Q. How old are your children?

14 A. I have two boys. They are twelve and
15 ten.

16 Q. How long have you lived at 775 Kirkland
17 Drive?

18 A. For about two years.

19 Q. Where did you live before that?

20 A. In Ladson.

21 Q. Tell us about your education, did you
22 graduate from high school?

23 A. I graduated from high school and I am
24 currently attending Trident Technical
25 College.

1 Q. How did you do in high school?

2 A. I had all A's.

3 Q. Now, you said that you have two
4 children, are they boys or girls?

5 A. Two boys.

6 Q. And what are their ages?

7 A. Twelve and ten.

8 Q. How are you related to Jamsetta and
9 Jayden W ?

10 A. Jamsetta is my sister and Jayden is my
11 nephew.

12 Q. How often do you see Jamsetta and
13 Jayden?

14 A. About every day.

15 Q. Earlier in this case we had the
16 opportunity to witness the birth of Jayden.
17 Were you there for the birth?

18 A. I was, I recorded the birth.

19 Q. So you were operating the video camera?

20 A. Yes.

21 Q. Do you have any professional training in
22 operating a video camera?

23 A. I've recorded home videos.

24 Q. Have you -- tell me, why -- why did you
25 record this video?

1 A. I went birth twice myself and I wanted
2 Jamsetta to see how she was acting in her
3 labor.

4 Q. Was your family excited about the birth
5 of Jayden?

6 A. We were.

7 Q. Who was there for the birth, do you
8 remember?

9 A. My mother, two of my sisters and two
10 friends.

11 Q. Tell me about your family, how many
12 sisters and brothers do you have?

13 A. I have four sisters.

14 Q. And how many nieces and nephews?

15 A. I have three nieces and two nephews --
16 sorry, I have four nieces and two nephews.

17 Q. Do you know their oldest?

18 A. My oldest niece is fourteen, my oldest
19 nephew is twelve, my two nieces -- two of my
20 nieces are eight and the youngest niece is
21 four months. Jayden is eight.

22 Q. Does your family spend a lot of time
23 together?

24 A. We do.

25 Q. What are some of the things that you do

1 together as a family?

2 A. We go to the beach, we go to the park,
3 we go to the water park with the children,
4 take them to the pool.

5 Q. Do the children spend a lot of time
6 swimming?

7 A. Yes.

8 Q. They play together?

9 A. They do.

10 Q. What kind of things do the children like
11 to do?

12 A. They like to play on the back porch,
13 they like to play video games, they like the
14 jump castle.

15 Q. And you said that you see Jayden every
16 day?

17 A. Almost every day.

18 Q. Does he play with the other children?

19 A. Yes.

20 Q. And what kind of things have you seen
21 Jayden play with the other children?

22 A. He tries to play basketball. He really
23 can't play football but he tries. He really
24 can't keep up with them.

25 Q. Does he try playing?

1 A. He does.

2 Q. Does he try to keep up with them?

3 A. He tries.

4 Q. Are there any challenges that you know
5 of that Jayden has in playing with your
6 children?

7 A. Well, my boys are older, so they are
8 faster and they really can't play with Jayden
9 how they want to play. Like football, he
10 can't tackle them. In basketball, he can't
11 really keep up. They play tee-ball
12 sometimes.

13 Q. Is Jayden able to do the things that
14 your boys could do when they were eight years
15 old?

16 A. Not that I remember.

17 Q. How are you boys doing?

18 A. They're happy.

19 Q. Are they in any sort of special
20 education classes?

21 MOLLY CRAIG: Objection,
22 relevance.

23 THE COURT: The question was
24 about 'your children'?

25 MARY WATERS: Her children.

1 THE COURT: Sustained. Go ahead
2 with your next question, please.

3 DIRECT EXAMINATION CONTINUED

4 BY MARY WATERS:

5 Q. Have any of your children been diagnosed
6 with any congenital problems?

7 A. No.

8 Q. (Pause).

9 THE COURT: Go ahead. Do you
10 have further questions?

11 MARY WATERS: Yes, sir.

12 THE COURT: Please go ahead.

13 DIRECT EXAMINATION CONTINUED

14 BY MARY WATERS:

15 Q. In raising two boys, have you had an
16 opportunity to observe when they've achieved
17 certain developmental milestones?

18 MOLLY CRAIG: Please note my
19 objection.

20 THE COURT: Overruled. You may
21 go ahead and pursue that line.

22 THE WITNESS: My oldest son
23 started to walk when he was about ten months
24 and my youngest son started to walk when he
25 was eleven months, but with Jayden he started

1 to walk when he was about two and a half.

2 When they started reading, they was about

3 four.

4 DIRECT EXAMINATION CONTINUED

5 BY MARY WATERS:

6 Q. When did Jayden start reading?

7 A. He was six, about seven.

8 Q. You said that Jayden plays with your
9 children?

10 A. Yes.

11 Q. Does your family encourage Jayden to do
12 the things that ---

13 MOLLY CRAIG: Leading.

14 DIRECT EXAMINATION CONTINUED

15 BY MARY WATERS:

16 Q. Does our family encourage all your
17 children to do their best?

18 A. Yes.

19 MARY WATERS: Those are all the
20 questions that I have. Please answer any
21 questions by counsel.

22 THE COURT: Cross-examination.

23 MOLLY CRAIG: Briefly, Your
24 Honor.

25 CROSS EXAMINATION

1 BY MOLLY CRAIG:

2 Q. Good morning, Ms. Washington. You would
3 agree that Jayden has made progress, would
4 you not?

5 A. Yes.

6 Q. The father of your children and the
7 father of Jayden are different, are they not?

8 A. That's right.

9 MOLLY CRAIG: Thank you.

10 THE COURT: Redirect?

11 MARY WATERS: Just briefly.

12 REDIRECT EXAMINATION

13 BY MARY WATERS:

14 Q. Ms. Washington, you have met Jayden's
15 father, haven't you?

16 A. Once or twice.

17 Q. In your observations, does his father
18 have any differences than the average adult?

19 A. No.

20 MARY WATERS: Nothing further.

21 THE COURT: Do you wish to follow
22 on that issue?

23 RECROSS EXAMINATION

24 BY MOLLY CRAIG:

25 Q. When did see Jayden's father?

1 A. Before Jayden was born.

2 Q. When was the last time that you've seen
3 him?

4 A. I've seen him recently, about a couple
5 of months -- about six months ago.

6 Q. So you've seen one or two times, is that
7 correct?

8 A. Yes.

9 THE COURT: Do you wish to follow
10 up, this is your witness, on that same issue?

11 MARY WATERS: No, Your Honor.

12 THE COURT: Ma'am, you are free
13 to step down.

14 (WITNESS STEPS DOWN)

15 THE COURT: Counsel, are you
16 ready to proceed with your next witness?

17 EDWARD GRAHAM: Our next witness,
18 Your Honor is the video deposition of Dr.
19 Gomez-Carrion. We can start with that and
20 address other matters during lunch.

21 THE COURT: Do you wish to
22 address those issues before you begin?

23 EDWARD GRAHAM: At Your Honor's
24 discretion.

25 THE COURT: Let's take a brief

1 break, Ladies and Gentlemen. We have some
2 issues apparently with the next -- you said
3 it's a video presentation?

4 EDWARD GRAHAM: Yes, sir.

5 THE COURT: We will do that, let
6 you take a break while we do that. Please
7 enjoy your break and we'll be with you
8 shortly. If you wish to go outside, we will
9 give you that opportunity. All others remain
10 seated while the jury departs.

11 (JURY OUT @ 10:15 A.M.)

12 THE COURT: You have the video?

13 EDWARD GRAHAM: Yes, sir, and we
14 have the original transcript. They did not
15 seal it, they expedited it because we just
16 took it last week.

17 THE COURT: All right. Before we
18 go into this, let me address one issue with
19 counsel -- Court come to order! Order!
20 Thank you.

21 Let me address one issue with
22 counsel. When you come in Monday morning,
23 what we may do depending on where we are at
24 the end of the day, is have the jury come in
25 a little later than we start so that we can

1 resolve issues of evidence. We bring the
2 charges in -- you've got charges, you've
3 given me some charges but please bring your
4 final charges in Monday morning so that we
5 can at least start the process of having the
6 charges.

7 Now, anything with regard to the
8 next witness, Counsel, I will be glad to take
9 it up at this time.

10 EDWARD GRAHAM: Thank you, Your
11 Honor. There was an objection from the
12 defense to our designation of Page 87, Line
13 22 through 89, Line 8.

14 THE COURT: Counsel, let me ask
15 you -- I know that this witness is a
16 physician. What is she?

17 EDWARD GRAHAM: Obstetrician.

18 THE COURT: And she is called for
19 what purpose?

20 EDWARD GRAHAM: Standard of care
21 -- (phone ringing in courtroom). Standard of
22 care and general causation in terms of
23 causation of the brain bleeds.

24 THE COURT: And what is the
25 objection to the designation?

1 CHILTON SIMMONS: Your Honor, I
2 believe that it comes close, if it doesn't
3 already violate, your ruling with regard to
4 Dr. Rhett's knowledge. I think that there
5 was an inappropriate question in the
6 deposition. That was, asking another witness
7 to assess Dr. Rhett's knowledge as compared
8 to other physicians. I think that it is
9 speculative to know what other physicians
10 know about FDA warnings, et cetera.

11 THE COURT: All right. I
12 overrule your objection. The question really
13 is should a physician know these things. I
14 find that's an appropriate question. What I
15 had excluded earlier was Dr. Rhett's response
16 'my lawyer told me that there was no reliable
17 text.' That had to do with attorney-client
18 privilege. I don't find that to be really
19 connected to this issue. So that objection
20 is overruled.

21 JAY DAVIS: Just for the record,
22 I join in the objection.

23 THE COURT: Mr. Davis joins in
24 and it is overruled as well.

25 EDWARD GRAHAM: The other one,

1 Your Honor, in Page 181, Line 17 through Page
2 182, Line 7. We designated it, they object.

3 THE COURT: 181/17 through --
4 what?

5 EDWARD GRAHAM: Page 182, Line 7.

6 THE COURT: Thank you,
7 (reviewing). What is your objection,
8 Counsel?

9 CHILTON SIMMONS: Your Honor,
10 defense counsel is asking the doctor about
11 what a caring physician, that a caring
12 physician follows the rules. First of all,
13 it should be following the standard of care,
14 not the rules. The standard is not -- a
15 doctor doesn't have to be caring by law. I
16 think that it is a misleading question, I
17 think it is inappropriate. Really the
18 question doesn't even make sense.

19 THE COURT: I am going to sustain
20 that objection because of the use of the word
21 "caring". I don't find that to be an
22 appropriate standard in this case. It
23 certainly is not with regard to medical
24 negligence. For that reason, the Court
25 grants or sustains the objection. Are there

1 further issues?

2 EDWARD GRAHAM: No, Your Honor.

3 THE COURT: All right. We will
4 stand down ourselves for about ten minutes.

5 (BRIEF RECESS 10:18 - 10:24 A.M.)

6 THE COURT: Please be seated. We
7 are all here. Please bring in the jury.

8 (JURY IN @ 10:27 A.M.)

9 THE COURT: Welcome back, Ladies
10 and Gentlemen. Please call your next
11 witness.

12 EDWARD GRAHAM: Your Honor, at
13 this time we would like to play the video-
14 taped deposition of Dr. Yvonne Gomez-Carrion.

15 THE COURT: Is there any
16 objection?

17 CHILTON SIMMONS: No, Your Honor.

18 JAY DAVIS: No, Your Honor.

19 THE COURT: Hearing none, you may
20 proceed. Ladies and Gentlemen, rather than
21 call the witness live, the plaintiff intends
22 to call the witness through a video
23 deposition. Go ahead.

24 EDWARD GRAHAM: Your Honor, could
25 you explain to the jury that we have edited

1 it so that there may be some gaps? How that
2 is done?

3 THE COURT: All right. Quite
4 often in a deposition there would be
5 preliminary information, there would be
6 sometimes rambling questions or responses
7 that are not pertinent to the issues
8 developed at trial. So the attorneys have
9 gone through the deposition and have omitted
10 superfluous information. You may see what
11 may be a jump in the testimony. It's not
12 that they are trying to hide something you,
13 it's simply speeding up the process and
14 eliminating unnecessary testimony. Please
15 give us the date and time -- it may be on the
16 recording, but for our record, please tell
17 us.

18 EDWARD GRAHAM: It's the
19 deposition of Dr. Gomez-Carrion. If Your
20 Honor please, this deposition was taken last
21 Thursday, July 22nd, 2010, commencing at
22 11:23 a.m. in Boston, Massachusetts.

23 (SO ENTERED AS COURT'S EXHIBIT 4 -
24 VIDEO DEPOSITION OF YVONNE GOMEZ-CARRION)
25 (VIDEO DEPOSITION PUBLISHED)

1 THE COURT: Let's stop right
2 there (Page 103, ...people in the
3 nursery...").
4 We will take our lunch recess at this time,
5 Ladies and Gentlemen. Your lunch is supposed
6 to arrive at 12:30. We'll check on that and
7 advise you about that momentarily. Let's all
8 remain where we are while the jury returns to
9 the jury room.

10 (JURY OUT @ 12:20 P.M.)

11 THE COURT: How much longer is
12 your direct?

13 EDWARD GRAHAM: Thirty pages in
14 the transcript and some of that has come out,
15 so I am not sure where we are.

16 THE COURT: What is the
17 approximately length of cross.

18 CHILTON SIMMONS: Less than an
19 hour.

20 THE COURT: You are going to cut
21 this off after direct and go to your live
22 witness?

23 EDWARD GRAHAM: I would like to,
24 Your Honor. We adjusted it to try to
25 accommodate counsel on the witness that they

1 had to bring in today. Last night they said
2 that they weren't going to bring them, so we
3 got a guy from New York, and he should be
4 here now, but I haven't been able to verify
5 that there. We need to get him up as soon as
6 we can, right after the lunch break.

7 THE COURT: Do you have a
8 position on that?

9 CHILTON SIMMONS: We would like to
10 have the cross after that so as to keep it in
11 context, Your Honor.

12 THE COURT: I understand, but
13 counsel tells me that he was surprised by
14 what might have been -- a last minute
15 decision to accommodate, since you didn't
16 need to be accommodated on Friday, so -- if
17 he wants to proceed with the live witness, I
18 am going to allow him to do that. Let's
19 stand down, take a little break and see where
20 we are. We will be back in approximately
21 ten minutes and have further instructions for
22 everyone.

23 (BRIEF RECESS)

24 THE COURT: Let's bring in the
25 jury at this time.

1 EDWARD GRAHAM: Your Honor, may
2 we back up the video to the last word?

3 THE COURT: What is the last
4 word?

5 EDWARD GRAHAM: I mean, I just
6 didn't want to stop in midsentence.

7 THE COURT: At least the jury
8 will know that we tried, we can just pick it
9 up where it is.

10 EDWARD GRAHAM: Okay.

11 CHILTON SIMMONS: Your Honor, we
12 have a scheduling issue if we could talk
13 about that.

14 THE COURT: Let's talk about that
15 at the lunch break. We are about fifteen
16 minutes away.

17 (JURY IN @ 12:25 P.M.)

18 THE COURT: Ladies and Gentlemen,
19 we have about fifteen minutes before your
20 lunch arrives, so we thought we'd try to
21 finish the direct examination of Dr. Gomez-
22 Carrion. We will stop when your lunch
23 arrives.

24 BAILIFF: Lunch is here.

25 THE COURT: Well, that was a

1 little quicker timing that we expected. I
2 tell you what, let's do this, Ladies and
3 Gentlemen. Rather than you worrying about
4 your lunch be here, let's turn to lunch and
5 enjoy your lunch. There is no need to wait
6 here while they -- so we will stop now.
7 Enjoy your lunch, let us know when you're
8 ready to resume.

9 (JURY OUT @ 12:26 P.M.)

10 THE COURT: We will be in recess
11 now subject to the call of the jury, which I
12 expect will be about thirty minutes. Do you
13 want to take up your scheduling issue?

14 MOLLY CRAIG: Yes, sir, if you
15 don't mind. First of all, with regard to
16 next week, we are trying to get our experts
17 lined up and I know that Your Honor said that
18 we are going to go Monday, Tuesday, Wednesday
19 -- is that correct, of next week?

20 THE COURT: I have sort of
21 reconsidered that and we probably ought to
22 discuss it among ourselves. Thursday and
23 Friday, while an enjoyable event and one
24 which any lawyers will be attending, I don't
25 mind waiving, giving that up and trying to

1 remain here if you think we can finish this
2 case.

3 I've got -- I've already canceled a nonjury
4 term in Darlington for next week but the
5 following week I have a rather substantial
6 General Sessions scheduled in Darlington, a
7 jury trial. I don't want to go into a third
8 week. Thus, my preference would be to stay
9 here Thursday and Friday and finish this case
10 if we're able to do that. Do you believe
11 that you can do that, Mr. Craig?

12 MOLLY CRAIG: Well, it all
13 depends on when the plaintiff finishes. All
14 we need to know is to know so we can work the
15 schedule of our experts around the court's
16 schedule and the plaintiff lawyer's schedule.

17 Also, Your Honor, there are several
18 additional witnesses that we would -- that we
19 re going to offer in light of the past three
20 days. This case is not about this delivery,
21 in our opinion. This case is about Dr.
22 Rhett's five-hour deposition. It's a
23 character assassination on Dr. Rhett. To
24 counter that, the only way that we can do is
25 to bring people in this community who have

1 worked hand-in-hand with Dr. Rhett over the
2 past thirty-plus years to testify about his
3 knowledge over thirty-plus years.

4 THE COURT: Counsel, how can you
5 be surprised by what's in his deposition?
6 You've known this a long time, this is
7 standard operating procedure -- deposition of
8 a party. It's a good deposition, good for
9 you. If it is not, then -- well, this is not
10 -- this is not something that is a character
11 assassination, it's just simply the way the
12 deposition was taken and given.

13 MOLLY CRAIG: With all due
14 respect, we did not think that it was going
15 to be three days talking about Dr. Rhett's
16 five-hour deposition. We thought we were
17 coming in here to defend Dr. Rhett in a
18 malpractice case, the delivery at-issue in
19 this case.

20 For that reason, the only way that we can
21 counter the five-hour deposition is to bring
22 people in the community, healthcare
23 professionals who have worked hand-in-hand
24 with Dr. Rhett, observed him and know his
25 knowledge in delivering babies.

1 JAY DAVIS: I would join in that,
2 Your Honor. This expert has just testified,
3 just moments ago, that he lacked the
4 knowledge and skills to handle this
5 procedure. I think he's entitled to respond
6 to witnesses, to respond to her assessment
7 that he lacks knowledge. It is not
8 character. It's the fact that they take the
9 position that he doesn't have the skill and
10 knowledge when he has ---

11 THE COURT: Well, what I am
12 surprised -- what surprises me is, how were
13 you surprised by that? That issue is all
14 over this case and had to be all over the
15 depositions. Although I have not read them
16 word for word, but from the experts that we
17 have already heard, it's no surprise -- at
18 least at this juncture, for the court. How
19 can you be surprised?

20 MOLLY CRAIG: Yes, sir, I will
21 be happy to respond. This issue came up in a
22 hearing that Chilton attended with Judge
23 Dennis where Mr. Graham was asking questions
24 of our expert witnesses, "Do you know any
25 doctors stupider than Dr. Rhett?"

1 THE COURT: Well, we ---

2 MOLLY CRAIG: We didn't think
3 that he was going to pursue that -- he's not
4 saying "stupider" now but he's implying it.
5 We didn't think that we were coming in here
6 for three hours, three days, dealing with
7 that issue. This deposition was taken de
8 bene esse last week when she made these
9 comments, so it's not like we've really been
10 expecting this was going to be the central
11 theme and focus of this case.

12 THE COURT: Well, how about Dr.
13 Oakes? Surely you deposed him and surely he
14 said that the doctor didn't show -- in his
15 opinion -- evidence of lack of knowledge.

16 MOLLY CRAIG: He did in his
17 deposition, but a -- a lack of knowledge --
18 there's been three days of "lack of
19 knowledge", 'he doesn't know this, he doesn't
20 know that', we've had three days of it and
21 that's not what we expected and we are
22 surprised by it.

23 JAY DAVIS: Dr. Oakes certainly
24 never went through specific portions of the
25 video deposition. We didn't see that, that

1 wasn't in his deposition. No one said 'here
2 it is.' We didn't know that the demeanor of
3 the witness was going to be used in the
4 expert's testimony, which it was. The
5 demeanor is relevant when he testifies, but
6 when the expert brought his demeanor in on
7 the video that's totally new to us. That
8 wasn't done in the deposition.

9 THE COURT: Well, we will
10 consider this -- rather than ruling on it at
11 this time, we will consider it. First of
12 all, whether or not it would be appropriate
13 to add witnesses at this time, and what the
14 plaintiff's position is. Secondly, what the
15 timing of this event, how that triggers our
16 schedules.

17 I was just talking about the court's plans
18 for next week. I am sure that we all have
19 plans to attend a judicial conference. Thus,
20 remain here, knowing that we have to turn
21 right around -- we have an opportunity to
22 explore that on the record, but at this time
23 we stand adjourned for approximately thirty
24 minutes to accommodate the jury.

25 MOLLY CRAIG: Thank you.

1 (LUNCH RECESS 12:30 - 1:08 P.M.)

2 THE COURT: All right, is our
3 jury ready?

4 BAILIFF: Yes, sir.

5 THE COURT: Let's talk a little
6 bit about scheduling. Do you want to switch
7 now to take up your expert?

8 EDWARD GRAHAM: Please, Your
9 Honor.

10 THE COURT: Then cut that
11 (projector) off. Are you going to use that
12 in the expert?

13 EDWARD GRAHAM: We are not.

14 THE COURT: Cut that off so the
15 jurors will not be disturbed by the fan.
16 Counsel, I will let you put a more full
17 objection on the record if you wish, about
18 stopping to take up this witness, not getting
19 your cross on the deposition until Monday or
20 whenever you wish to put it up. Do you have
21 something that you wish to add further so
22 that the record is protected?

23 MOLLY CRAIG: So, it's the
24 court's understanding that our cross is not
25 going to be played today?

1 THE COURT: I don't believe that
2 we are going to finish the direct on that
3 today nor your cross today. The reason for
4 that is that I'd told this jury that we would
5 stop at 3:00 o'clock today.

6 MOLLY CRAIG: Right.

7 THE COURT: Anytime that I got
8 for a week, I give the jury usually all of
9 Friday afternoon to get whatever business
10 done that they have to do in preparation for
11 being present next week as well. For that
12 reason, we will stop at 3:00 o'clock. The
13 plaintiff has called this expert from out of
14 state ---

15 EDWARD GRAHAM: Yes, sir.

16 THE COURT: That's why I am doing
17 this. Very good. Please bring in the jury.
18 I will explain that to the jury, that your
19 cross will be fully played at a later time.

20 (JURY IN @ 1:08 P.M.)

21 THE COURT: Welcome back, Ladies
22 and Gentlemen. I trust that you had a good
23 lunch. If you see our Clerk of Court, Julia
24 Armstrong, be sure to tell her that you
25 enjoyed your lunch today. That was courtesy

1 or her and Tara's efforts.

2 What we are going to do now is --
3 as you will recall, I had mentioned that we
4 would stop early on Friday. I always do that
5 when I go for a week and we're going into
6 next week, to give you time to do whatever
7 business is necessary on Friday afternoon
8 before the close of business hours. So we
9 are going to stop around 3:00 today here.

10 In order to meet that schedule, the
11 plaintiff has requested to stop the video.
12 We will pick it up next week and finish it.
13 To call a live witness at this time who has
14 come from out of state and is not otherwise
15 available. So we will do that.

16 We are now ready to continue. You
17 may call your next witness.

18 EDWARD GRAHAM: The plaintiff
19 would call Dr. Daniel Adler.

20 (WITNESS TAKES STAND)

21 DANIEL ADLER, being duly sworn to
22 tell the truth, the whole truth and nothing
23 but the truth, testified, as follows:

24 DIRECT EXAMINATION

25 BY EDWARD GRAHAM:

1 Q. Dr. Adler, good afternoon.

2 A. Good afternoon.

3 Q. Please tell us a little bit about your
4 personal background. Who is Dr. Daniel
5 Adler? Tell us about your family and where
6 you live at?

7 A. I am from New York City. I have a
8 medical practice in Pediatric Neurology in
9 New York City and in the state of New Jersey.
10 I am a medical doctor.

11 I attended Albert Einstein College,
12 which is in the city of New York; graduated
13 in 1975.

14 After, I trained as a pediatrician at a
15 hospital that is now known as the Children's
16 Hospital of New York. From there I trained
17 as an pediatric neurologist.

18 Pediatric neurologists are doctors that
19 provide neurological care to children.

20 Neurological care means attending to problems
21 of the nervous system that children may have,
22 problems with the brain, spinal cord, muscles
23 and nerves.

24 We train first as pediatricians, so we
25 learn how to take care of children and then

1 we learn all about the nervous system. So we
2 take care of children who have those types of
3 problems.

4 I spent a year getting additional
5 training in the treatment of diseases of
6 muscle and nerves. Neurologist take care of
7 those types of problems.

8 I was on the faculty at Albert Einstein
9 for one year as a full-time employee, two
10 years as a voluntary employee and during that
11 time I started my private practice and I've
12 been in private practice of pediatric
13 neurology in the New York City metropolitan
14 area on a full-time basis since 1983.

15 Q. You mentioned some work as a professor
16 at Albert Einstein. What was your status
17 there?

18 A. I was an assistant professor, full-time
19 for one year and part-time, voluntary, for
20 two years. I attended the pediatric
21 neurology clinic. I supervised medical
22 students, doctors in training, and saw
23 children in various clinics.

24 Q. Have you had any experience assisting
25 pharmaceutical companies with research; if

1 so, tell us briefly about that.

2 A. I had pharmaceutical companies or medial
3 device companies that utilized doctors and
4 hospitals to help test either their
5 medication(s) or the devices that they were
6 manufacturing to see whether they might be
7 useful in treatment of certain diseases, so
8 that they could supply information to the
9 Food & Drug Administration, so that those
10 medications and/or devices could be approved
11 and sold in this country. For about a ten-
12 year period, I was engaged in that type of
13 research.

14 Q. In which states are you licensed to
15 practice medicine?

16 A. New York and New Jersey.

17 Q. Are you Board certified? If so, in
18 which areas?

19 A. I am board-certified in Pediatrics, I'm
20 board-certified in Pediatric Neurology and
21 I'm board-certified in Electric Diagnostic
22 Medicine, which is a certification to do
23 certain special tests on people who have
24 diseases of muscles and nerves.

25 Q. Have you written articles in various

1. publications that have been published in the
2. medical literature?

3. A. I've written one article.

4. Q. And have you had some other
5. publications?

6. A. Yes, I've had letters to the editor
7. published.

8. Q. Thank you. Are you knowledgeable about
9. the signs and symptoms of brain damage in
10. young children?

11. A. Yes, I am.

12. Q. Have you had clinical experience in
13. dealing with such children; if so, please
14. describe that?

15. A. Both brain problems and brain injuries
16. are things that in any child are things that
17. concern a pediatric neurologist, because
18. pediatric neurologists take care of children
19. like that. They order diagnostic tests, they
20. employ various therapies. If they prescribe
21. medications, they refer those patients and
22. supervise therapies that are provided by
23. other health professionals like physical
24. therapist, occupational therapists.

25. EDWARD GRAHAM: Your Honor, at

1 this time we would tender Dr. Adler as being
2 qualified to testify on expert subjects
3 related to pediatric neurology.

4 THE COURT: Very good. Are there
5 questions from counsel?

6 MOLLY CRAIG: No, sir.

7 JAY DAVIS: No, sir.

8 THE COURT: Any objection?

9 MOLLY CRAIG: No, sir.

10 THE COURT: Hearing none, the
11 witness is so qualified. You may proceed.

12 EDWARD GRAHAM: Thank you, Your
13 Honor.

14 DIRECT EXAMINATION CONTINUED

15 BY EDWARD GRAHAM:

16 Q. Dr. Adler, at my request, did you agree
17 to review certain materials and take certain
18 actions with a view toward furnishing
19 opinions related to the situation of Jayden
20 Washington?

21 A. Yes, I did.

22 Q. Did you have an opportunity to do a
23 physical examination of Jayden Washington;
24 and, if so, when?

25 A. I saw him on December 8th, 2008.

1 Q. Did you have an opportunity to review
2 medical records related to his birth? If so,
3 what did you review?

4 A. I had some medical records. I saw the
5 prenatal records of Ms. Washington, her labor
6 and delivery records from East Cooper
7 Regional Medical Center, the records that
8 relate to Jayden Washington after his birth,
9 I saw the records from MUSC when he was
10 transferred there immediately after his birth
11 -- which included all the surgery and all of
12 the treatment records and imaging studies
13 that were done at that time.

14 I've seen the records of all of the care
15 that Jayden received at MUSC in terms of
16 rehabilitation, other specialists that --
17 Jayden had swallowing problems and he had an
18 additional operation to place a feeding tube
19 and an operation on his stomach so that he
20 wouldn't reflux or regurgitate food out of
21 the stomach back into his mouth.

22 I've seen school records going back many
23 years that relate to not only speech therapy
24 but occupational and physical therapy.

25 Jayden had a heart murmur after his

1 birth and I've seen the records of the
2 cardiologist that provided Jayden with care,
3 pediatric care.

4 Q. Thank you. Tell the Ladies and
5 Gentlemen what it is that you did during your
6 physical examination and what were you
7 findings.

8 A. Pediatric neurologists do a full
9 neurological examination and a general
10 examination. There are parts of the general
11 examination that sometimes are of interest to
12 the pediatric neurologist. The size of the
13 head is important to the pediatric
14 neurologist because it is a direct, uh,
15 statement about whether the brain is growing
16 properly or not.

17 So I did a general physical examination
18 for Jayden. That was normal, his head size;
19 normal heart, lungs, -- there was records of
20 a murmur, which I didn't hear but certainly
21 others have heard.

22 I did a neurological examination.
23 Neurological examinations are -- to turn back
24 to all of our childhoods, for example, you
25 can -- you cannot do a complicated

1 examination of how well a child walks if he
2 is only eight months old, for example. But
3 you're interested in the child's behavior,
4 the quality of their speech and language.
5 You know, we do these things in a general
6 screening way. We look at a child's
7 coordination; what is their muscle tone, do
8 their muscles stretch, or they stiff or
9 loose? How well do they walk? How well
10 their reflexes are. All things that are
11 designed to tell us if the nervous system is
12 functioning normally and, if it is not, what
13 part of the nervous system may be injured.

14 Q. Were any parts of Jayden Washington
15 nervous system not working properly; if so,
16 what were those?

17 A. At the time of my examination, I noticed
18 that Jayden had abnormal behavior. He was
19 very hyperactive, not -- and that he was
20 distractable. He had low muscle tone -- and
21 while he had normal strength he had poor
22 coordination. Fine finger movements were
23 abnormal. He also had difficulties with
24 walking. He appeared somewhat clumsy,
25 although his general gait was normal and his

1 reflexes were normal.

2 I thought -- at least to me, he spoke
3 relatively well. He could construct a
4 sentence for me and made it sound reasonably
5 normal.

6 Q. What was your clinical impression?

7 A. At the time that I saw him?

8 Q. Yes, sir.

9 A. Well, my clinical impression, at least
10 in terms of examination, was that he had low
11 tone and incoordination. But part of the
12 clinical impression that I wrote was affected
13 by the medical records that I reviewed, so --
14 it was part of my clinical impression that he
15 had delays in his motor development, meaning
16 that he walked late; he had delay in his
17 language development, I made note of that;
18 and I noted in the medical records that he
19 had a difficult birth and that there was
20 evidence of injury to the brain, so I made
21 comments about that as part of my medical
22 impression.

23 Q. Thank you. Let me ask you, sir, how
24 would you describe the severity of those
25 problems that you just referred to?

1 A. Problems that I saw in the records and
2 the problems that I saw on my examination are
3 quite significance. There have been delays
4 really from the very beginning. I don't
5 think that there is a single note in any
6 medical record that suggests that Jayden
7 functions at an age-appropriate level.

8 He makes progress. The records say that
9 he walked late, but he was obviously walking
10 on his own. So he is a boy with delayed age-
11 appropriate development on a persistent and
12 continuing basis.

13 Q. Do you use the scale of mild, moderate
14 and severe when evaluating neurological
15 problems? If so, how would you characterize
16 Jayden's problems?

17 A. I would say, at least in terms of what
18 you can say, that he stands -- obviously he
19 is not severely impaired. But I think that
20 when you ask him to do more complex things,
21 uh, -- ask him to do more than just walk or
22 ask him to speak more than just a simple
23 sentence, I think that you realize that on
24 the surface he has a substantial neurological
25 disability, which I would characterize as at

1 least moderate.

2 Q. Do you have an opinion to a reasonable
3 degree of medical certainty as to whether or
4 not these problems are permanent?

5 A. Yes, I do.

6 Q. What is your opinion?

7 A. It is my opinion that these problems are
8 permanent. I think they've been present from
9 the beginning and they continue -- again,
10 despite improvements he continues to have
11 gaps between what he is doing as now an
12 almost eight-year-old and what normal eight
13 year olds do.

14 Q. You mentioned that he has shown some
15 improvement. Have you reviewed any materials
16 that shed light on his improvement; if so,
17 would you please explain that?

18 A. I've seen records of physical and
19 occupational therapy that has been provided -
20 - I believe at MUSC, as well as school
21 records. They all show that he makes
22 progress, that he attends his therapy
23 sessions diligently, uh, and he has
24 individualized education plans that set goals
25 for his achievement and he makes progress.

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He is still way behind in terms of his level of achievement. He repeated kindergarten. I think that the records clearly show substantial problems.

Q. Do you have an opinion to a reasonable degree of medical certainty as to whether or not Jayden's level of improvement is equal to, less than or more than his age peers?

A. Oh, he is definitely behind his peers.

One would see in the future, in a child like Jayden that has had such a significant brain injury, is that as he moves forward and his level of development is supposed to accelerate that he will become even more deficient, because there are parts of the brain in this young child that don't work yet. By that, I mean that they are not supposed to work. They are not developmentally ready to begin showing their effects: higher level thinking, the ability to plan and organize, the ability to read long sections of books. Those are all things that young children -- young primary grade children don't do. But as you move

1 forward and you become ten, twelve and
2 fifteen, those are all things that you would
3 expect. Considering the level of brain
4 injury, those are things that either are not
5 going to appear or are going to appear very
6 late.

7 Q. Do you have an opinion as to his
8 prognosis?

9 A. Yes.

10 Q. What is that?

11 A. Continued improvement but marked
12 neurological disabilities in terms of ongoing
13 and permanent problems with coordination, in-
14 coordination; ongoing and permanent problems
15 with language function, what we would call
16 higher-level thinking, cognition; all are
17 going to be impaired in some fashion.

18 Q. Do you have an opinion as to the
19 prognosis with respect to his physical
20 capabilities, motor skills and speech and
21 learning, that sort of thing?

22 A. Again -- I would expect improvement but,
23 again, marked deficiencies of what we would
24 consider age-appropriate.

25 I am sure that in a year that Jayden

1 W. will be more coordinated than he
2 is today but he won't be as coordinated as
3 children his age.

4 As he ages and you would expect more and
5 more from him, he is not going to be able to
6 keep up because he is too brain damaged.

7 Q. Do you have an opinion to a reasonable
8 degree of medical certainty as to whether
9 that gap between Jayden's capacities and his
10 age peers' capacities will stay the same,
11 grow larger or smaller?

12 A. The gap will grow wider, if you will,
13 because what we expect children to do as they
14 age increases over time. They develop a
15 level of coordination and -- and thinking
16 ability that permits them to do even more
17 things. It's an incremental and exponential
18 increase in abilities that you expect over
19 time.

20 Q. Do you have an opinion to a reasonable
21 degree of medical certainty as to whether or
22 not these neurological problems will have an
23 impact on his vocational capacities; if so,
24 please explain that.

25 A. His motor abilities and his level or

1 thinking is going to have an impact on jobs
2 that he can compete for. I think he's not
3 going to be educated sufficiently to compete
4 for many jobs. I would believe, more likely
5 than not, that his level of coordination is
6 going to be an impediment to certain kinds of
7 jobs. I can't list those jobs because I am
8 not a vocational expert but I would certainly
9 say that jobs that require fine bimanual
10 skills -- keyboarding, being an electrician,
11 which requires some coordinated moves of both
12 hands, I think that those are going to be
13 difficult jobs for Jayden to compete with.

14 Q. Do you have an opinion to reasonable
15 degree of medical certainty as to whether or
16 not Jayden will be able to compete
17 effectively for a job that requires
18 brainpower?

19 A. I didn't understand the last word, sir.

20 Q. Brainpower.

21 A. I think that he has a cognitive problem.
22 I think he's just beginning to read and I --
23 I think that -- word retrieval, language
24 functioning, coordination are all things that
25 are impaired and that as he moved forward are

1 going to limit him substantially.

2 Q. Do you have an opinion to a reasonable
3 degree of medical certainty as to whether or
4 not Jayden will be able to live independently
5 without his mom's help?

6 A. I would say that he will not. I think
7 that his cognitive ability difficulties,
8 combined with motor problems, are going to
9 make it difficult for him to function
10 independent in all ways without the
11 supervision of an adult.

12 Q. Dr. Adler, let me ask you, sir, do you
13 have an opinion to a reasonable degree of
14 medical certainty as to the most probable
15 cause of Jayden W 's neurological
16 problems and impairments?

17 A. Yes, I do.

18 Q. What is that, sir?

19 A. It is my opinion that Jayden
20 W 's brain injury during the process
21 of delivery and at his birth had blood
22 really, uh, everywhere throughout his brain -
23 - he had blood in his brain, he had blood
24 inbetween the skull and the brain, things
25 that doctors call subdural hematomas.

1 He had blood within his spinal fluid.

2 The brain is surrounded by a "water", I
3 guess, a watery product which we call spinal
4 fluid. He had blood within his spinal fluid.

5 The brain has fluid-filled cells called
6 ventricles, he had blood there.

7 He had a substantial amount of blood
8 between his scalp and his skull itself.

9 So he had blood on top of the skull, he
10 had blood below the skull, he had blood in
11 the fluid that surrounds the brain, he had
12 blood within his brain and he had blood
13 within the fluid-filled chambers of the brain
14 called the ventricles. All -- to see that
15 much blood through the blood can only be
16 caused by a traumatic injury, which occurs as
17 a result of events that occurred during
18 events that occurred during labor and
19 delivery.

20 Q. Sir, I realize that you're not an
21 obstetrician, but do you have an opinion to
22 reasonable degree of medical certainty as a
23 pediatric neurologist as to whether there is
24 a relationship between a vacuum extractor in
25 this case to effectuate delivery and the

1 bleeding in and about the brain that you have
2 just referred to? If so, please describe
3 that relationship?

4 A. Certainly, I have an opinion about that.
5 That amount of blood just cannot occur, will
6 not occur and never occurs as a result of the
7 typical forces of labor, where the uterus
8 contracts and the mother pushes trying to
9 deliver the baby. It can only occur as the
10 result of the use of an appliance such as a
11 vacuum extractor or forceps. It requires an
12 external force to produce that amount of
13 bleeding.

14 Q. Let me ask you some followup questions
15 about the cause. Have you read certain
16 depositions of defense witnesses, as well as
17 plaintiff's witnesses?

18 A. I have.

19 Q. Have you given consideration to any
20 alternative causes of brain bleeds and
21 neurological impairment of Jayden other than
22 traumatic vacuum extraction?

23 A. I have. I think reviewing records and
24 examining children yourself is no different
25 than taking a history in your office from a

1 patient, the family, examining when you're
2 seeing a patient. In those situations,
3 you're required to consider all possibilities
4 before you zeroed in on the cause.

5 I think the medical records of Jayden
6 Washington are very clear in the sense that
7 all other reasonable possibilities are
8 excluded, in terms of potential injury to
9 Jayden W. There are clear signs
10 that the baby suffered lack of oxygen during
11 the delivery, clear signs in the medical
12 records that point to that.

13 Babies receive a score at birth called
14 an
15 Apgar score. It's a measure of a baby's
16 general health at delivery. It's often a
17 sign of whether they have been deprived of
18 oxygen at birth. Jayden W.'s Apgar
19 scores were normal.

20 Babies who are deprived of oxygen
21 through delivery have too much acid in their
22 blood. Jayden has an acid base -- we call it
23 an acid base determination after birth -- and
24 it was relatively normal, minimally abnormal.

25 Jayden looked healthy after birth before

1 he started to become sick from the blood that
2 he had in his brain.

3 There were very sophisticated imaging
4 studies of the brain that was performed in
5 looking at all the blood that Jayden had,
6 using a magnet. That can give signs -- or
7 show signs, I should say -- of injury to the
8 brain from a lack of oxygen. That's
9 excluded. That sort of test which is
10 abnormal in every baby was in this baby
11 normal, it showed that there was no signs of
12 injury to the brain from lack of oxygen.
13 That would be the only other "reasonable",
14 quote, consideration.

15 On top of all the blood, all the other
16 images that were done on Jayden, uh, are to
17 the structure of the brain showed that it was
18 completely normal. So the brain was normal
19 until it was injured. Then when the blood
20 disappeared the neurological surgeon removed
21 the bloodclot that gave Jayden so much
22 trouble after birth, the brain returned to
23 normal. Indeed, all of the imaging studies
24 that were done later in Jayden's life are
25 normal. So his brain is normal except that

1 he suffered a traumatic injury to his brain.

2 Q. Were you aware that Jamsetta told her
3 prenatal care doctors that she had had some
4 alcohol intake, some adult beverages if you
5 will, during the three weeks before she found
6 out that she was pregnant?

7 A. I am aware that there is a history of
8 alcohol usage.

9 Q. Do you have an opinion to reasonable
10 degree of medical certainty as to whether or
11 not that alcohol consumption in the first few
12 weeks or so, the first three weeks, before
13 she found out that she was pregnant had any
14 effect on the bleeding in the brain?

15 A. Absolutely not. It would be completely
16 impossible.

17 Q. Do you have an opinion as to whether
18 Jayden suffers from fetal alcohol syndrome?

19 A. He does not. To produce fetal alcohol
20 syndrome, the mother needs to drink
21 throughout the pregnancy. The babies look
22 funny, they are small, they don't have
23 bleeding problems. That is not diagnosed by
24 any of the doctors in the medical records
25 anywhere, meaning at East Cooper, at MUSC, no

1 doctor at any time has ever offered that
2 diagnosis in the medical records about the
3 treatment.

4 Q. Do you have an opinion to a reasonable
5 degree of medical certainty as to whether or
6 not Jayden W. suffers from any signs
7 or symptoms that relate to alcohol
8 consumption by his mom during the first three
9 weeks of pregnancy?

10 A. I can -- not related to any alcohol
11 consumption.

12 Q. All right. Let me turn to another
13 subject that we heard about yesterday. Have
14 you read the MRI, the first MRI from MUSC?

15 A. I've seen the MRIs, (affirmative nod),
16 I've read them.

17 Q. One of the references there talks about
18 the transverse sinus. We heard some
19 discussion about that yesterday. What you
20 please address -- or, let me ask you: Do you
21 have an opinion to reasonable degree of
22 medical certainty as to what the MRI's
23 comments about transverse sinuses meant in
24 terms of Jayden's status at the time of that
25 test?

1 A. I have an opinion.

2 Q. What is that?

3 A. The sinuses are just -- I mean, arteries
4 carry blood into the brain. Sinuses carry
5 blood out of the brain. The imaging studies
6 that I have seen and the reports that discuss
7 it say that the sinus isn't well seen because
8 there was really so much blood, that it was
9 impossible to evaluate that area of the
10 brain. At least in the early studies,
11 either just the sheer amount of blood and the
12 compression by the blood -- the brain that
13 was being compressed by the big blood clot in
14 the cerebellum, basically it obliterated that
15 sinus so that we couldn't see it.

16 Later it seemed to be present and I'd
17 say that any abnormalities of that sinus
18 related to the traumatic injury to the skull
19 and were not related to any other problems
20 that Jayden had and, in my opinion, is
21 completely irrelevant.

22 Q. Let me ask you some specific causation
23 questions. Do you have an opinion, sir, as
24 to the most probable cause of Jayden's
25 thinking of cognitive impairments?

1 A. Yes, I do.

2 Q. What is that?

3 A. The tremendous bleeding that Jayden had
4 in his brain, in all the areas of his brain
5 that we have discussed.

6 Q. Do you have an opinion to reasonable
7 degree of medical certainty as to the most
8 probable cause of his speech and language
9 problems?

10 A. Yes, I do.

11 Q. What is that?

12 A. Again, the traumatic brain injury, the
13 blood within his brain.

14 Q. Do you have an opinion to a reasonable
15 degree of medical certainty as to the most
16 probable cause of his swallowing problems,
17 his feeding problems, and his reflux?

18 A. Yes, I do.

19 Q. What is that?

20 A. Again, the traumatic brain injury and
21 the blood within his brain.

22 Q. Do you have an opinion to a reasonable
23 degree of medical certainty as to his
24 physical difficulties, motor impairments?

25 A. Yes, I do.

1 Q. What is that, sir?

2 A. Again, the bleeding within his brain and
3 around his brain. The cerebellum is the part
4 of the brain that controls coordination.
5 When you damage it, when you put a big clot
6 in it and then you operate on the cerebellum
7 and the additional injury then that leads to
8 long-standing and permanent coordination
9 problems.

10 Q. One final question, Dr. Adler. Do you
11 have an opinion to a reasonable degree of
12 medical certainty as to what Jayden's life
13 expectancy will be?

14 A. Yes, I have an opinion.

15 Q. What is that?

16 A. Well, certainly from a neurological
17 point of view, he has nothing wrong with him
18 that would shorten his life. While he may
19 have motor problem, coordination problems and
20 thinking problems, none of those would have
21 an impact on his life expectancy; meaning how
22 long he may live.

23 Q. You have addressed a number of opinions
24 today. Have all of the opinions that you
25 have expressed been opinions that you hold to

1 at least a reasonable degree of medical
2 certainty most probably?

3 A. All of my opinions are within a
4 reasonable degree of medical certainty.

5 EDWARD GRAHAM: Thank you, sir.
6 Please answer any questions that counsel may
7 have.

8 THE COURT: You may begin your
9 cross examination.

10 MOLLY CRAIG: Yes, sir, may it
11 please the court.

12 CROSS EXAMINATION

13 BY MOLLY CRAIG:

14 Q. Good afternoon.

15 A. Good afternoon.

16 Q. It is a good afternoon, it's a Friday
17 afternoon.

18 A. It is, (affirmative nod).

19 Q. Dr. Adler, you have no criticisms of Dr.
20 Rhett, in his use of the vacuum or how he
21 used the vacuum, do you?

22 A. I am not an obstetrician. It would not
23 be proper for me to criticize the use of the
24 vacuum. I am only indicating -- if I refer
25 to the vacuum, it is only as the instrument

1 that resulted in the injury to the brain of
2 Jayden W

3 Q. So you are not going to give any
4 criticisms today about Dr. Rhett's use of the
5 vacuum, is that correct?

6 A. Correct. I am not criticizing my
7 physician in my testimony.

8 Q. So you have no criticisms about how Dr.
9 Rhett conducted himself during this delivery?

10 EDWARD GRAHAM: Objection, Your
11 Honor. We stipulate that he is not an
12 obstetrician.

13 THE COURT: Well, objection
14 overruled. The jury, of course, has heard
15 this.

16 CROSS EXAMINATION CONTINUED

17 BY MOLLY CRAIG:

18 Q. You have no criticism of Dr. Rhett about
19 how Dr. Rhett conducted himself during the
20 delivery, do you, sir?

21 A. No.

22 Q. You agree that a doctor cannot prevent a
23 genetic disorder?

24 A. Cannot prevent -- I'd say, generally,
25 yes, that a doctor cannot prevent a genetic

1 disorder.

2 Q. Thank you. And you agree that a doctor
3 should exercise his clinical based on the
4 circumstances?

5 A. As a general statement, that's true.

6 Q. You are charging \$500 an hour for your
7 opinions in this case; is that right?

8 A. For my testimony, yes.

9 Q. You're here today and you're being paid
10 \$5,000 for your testimony today?

11 A. Yes, my office is closed today and that
12 sum is to replace the potential income for
13 today.

14 Q. So it's \$5,000 for today?

15 A. (Affirmative nod).

16 Q. Forty percent of your salary comes from
17 being an expert witness in medical
18 malpractice cases?

19 A. That's true.

20 Q. And out of this work that you do for
21 expert legal work in medical malpractice
22 cases, ninety-five percent of those cases are
23 on behalf of the plaintiff; is that right?

24 A. On behalf of children bringing lawsuit.

25 Q. Like Mr. Graham?

1 A. (Affirmative nod), like Mr. Graham.

2 Q. In fact, you testify for him frequently?

3 A. Yes, I believe that I've reviewed at

4 least four cases for Mr. Graham; total,

5 including the case of Jayden W

6 Q. You have given over three hundred

7 depositions?

8 A. Over my career since 1992, yes.

9 Q. And testified at trial over a hundred

10 times?

11 A. That's true.

12 Q. In fact, it is unusual for you to turn

13 down a case?

14 A. The answer is, uh, yes. I turn down

15 very few cases. Considering the selection

16 process that lawyers go through first, I do

17 turn down very few cases.

18 Q. So once you get a case, it is almost

19 always something that you can support and you

20 will give a causation opinion on?

21 A. I think that is generally true.

22 Q. In your practice as a pediatric

23 neurologist, you take care of patients who

24 have been deprive of oxygen during labor.

25 A. I see such children.

1 Q. And a baby who has been deprived of
2 oxygen can have catastrophic consequences,
3 would you agree with that?

4 A. I would.

5 Q. A baby can be deprived of oxygen when
6 the umbilical cord is wrapped around the
7 baby's neck?

8 A. That's a potential cause of lack of
9 oxygen to the brain of a newborn.

10 Q. And you have taken care of those babies?

11 A. I have.

12 Q. And it's sad, isn't it?

13 A. It can be.

14 Q. Doctor, you're not an obstetrician?

15 A. Correct. I am not.

16 Q. You were trained in pediatric?

17 A. Yes.

18 Q. But you did not get a Fellow -- you do
19 not have a fellowship, did not do a
20 fellowship in pediatric neurology; is that
21 correct?

22 A. No, I did. That was my training at
23 Einstein.

24 Q. And you are not board-certified as an
25 ob-gyn?

1 A. Correct, I am not certified in Ob-Gyn.

2 Q. You saw Jayden, I believe you said, on
3 December 8th, 2008; is that correct?

4 A. That's true.

5 Q. And you saw him at the request of Mr.
6 Graham?

7 A. Yes.

8 Q. And it was Mr. Graham and his office
9 that sent you the medical records in this
10 case?

11 A. True.

12 Q. You did not consult with any of Jayden's
13 treating physicians prior to your examination
14 of Jayden; is that fair?

15 A. That's right. I am not his treating
16 doctor, so I wouldn't be able to consult with
17 the ---

18 Q. You are not his treating doctor?

19 A. Correct, I don't follow Jayden.

20 Q. You didn't provide him with any
21 medicine, did you?

22 A. I did not.

23 Q. No therapy?

24 A. No.

25 Q. No treatment plan?

1 A. No.

2 Q. You didn't discuss anything that you'd
3 obtained in your examination of Jayden with
4 any of his treating doctors?

5 A. That's true.

6 Q. The sole purpose of the examination was
7 for you to give information to Mr. Graham for
8 use in this lawsuit?

9 A. Correct.

10 Q. So Jayden came to see you in -- did you
11 say that you are from New York or New Jersey?

12 A. Both. I saw him in New York.

13 Q. You have offices both in New York and in
14 New Jersey?

15 A. Correct.

16 Q. All right. So you saw him in New York?

17 A. I did.

18 Q. Are there South Carolina physicians here
19 with the same qualifications in pediatric
20 neurology as you?

21 A. If by that you mean if there are board-
22 certified pediatric neurologists in South
23 Carolina, I'm sure there are.

24 Q. You don't know any of them?

25 A. Not personally.

1 Q. So this examination that you did and the
2 information that resulted from that
3 examination, that you gave to Mr. Graham for
4 this lawsuit, the total time of that
5 examination was forty minutes. Right?

6 A. Correct.

7 Q. And Mr. Graham paid you for that visit?

8 A. He did.

9 Q. And during that examination you did not
10 do any specific cognitive testing on Jayden?

11 A. Correct. Pediatric neurologists don't
12 do the kind of cognitive testing that -- you
13 know, we are not trained to do it and you
14 need to be licensed to do it.

15 Q. So no cognitive testing and there were
16 no objective tests performed on Jayden?

17 A. Correct.

18 Q. You did not review Jayden's CT's of MRI
19 films or ultrasounds in this case?

20 A. Not at that time. I've seen them
21 subsequently but I didn't see them at the
22 beginning. That's true.

23 Q. When you issued your report to Mr.
24 Graham in this lawsuit, you had not reviewed
25 the films of the CT, the MRI(s) or the

1 ultrasounds? Is that true?

2 A. Correct, I was relying on the medical
3 records.

4 Q. Your opinions in this case are based
5 solely on your examination of Jayden and the
6 medical records that were sent to you by Mr.
7 Graham?

8 A. That's correct.

9 Q. You agree that labor alone can cause a
10 brain hemorrhage?

11 A. It can.

12 Q. And all newborns have cranial
13 compression during labor?

14 A. They do.

15 Q. Compression of the skull can cause a
16 hemorrhage?

17 A. It can.

18 Q. And there are other causes of
19 intracranial hemorrhage in a newborn,
20 including bleeding disorders, problems with
21 platelets, mal-formation of blood vessels
22 within the brain. Do you agree with that?

23 A. I do.

24 Q. Now, during labor the head molds; do you
25 agree with that?

1 A. I do.

2 Q. And as the baby comes down the birth
3 canal, the head molds and the bloods vessels
4 get stretched?

5 A. Yes.

6 Q. And that stretching can cause a brain
7 hemorrhage?

8 A. It -- it -- I don't know that it can
9 cause a brain hemorrhage. It can causing
10 bleeding under the skull.

11 Q. Okay, let's use bleeding under the
12 skull. As a baby is coming down the birth
13 canal, those blood vessels can cause bleeding
14 under the skull?

15 A. Yes.

16 Q. Even when a vacuum is not used during
17 delivery?

18 A. Correct, even in a normal delivery.

19 Q. Now, you talked about some of the
20 conditions that Jayden has based on your
21 review and your examination of him. I would
22 like to talk about a few others.

23 Based on your review of his medical
24 records, were you aware that he has a
25 coloboma?

1 A. Correct, he has some problems with the
2 back of his eye.

3 Q. And this is a congenital abnormality; is
4 that correct?

5 A. It is.

6 Q. And it is not caused by the birthing
7 process?

8 A. Correct, it is not.

9 Q. And it is not caused by anything that
10 Dr. Rhett did?

11 A. Correct.

12 Q. Another congenital abnormality would be
13 an inguinal hernia, did you see that in the
14 medical records?

15 A. Correct. Jayden had an inguinal hernia.

16 Q. Again that is not caused by the birthing
17 process?

18 A. It is not.

19 Q. And it was not caused by Dr. Rhett?

20 A. It is not.

21 Q. Doctor, you -- continuing on with the
22 congenital abnormalities. The next one, in
23 the medical records did you see undescended
24 testes?

25 A. Correct.

1 Q. That is a congenital abnormality?

2 A. I don't know that I'd call it a
3 congenital abnormality. It's a condition
4 that he was born with.

5 Q. It's a condition that he was born with?

6 A. (Affirmative nod).

7 Q. It's a condition that was not caused by
8 the birthing process?

9 A. Correct, it was not.

10 Q. And was not caused by Dr. Rhett?

11 A. Correct.

12 Q. Hydrocele, did you see that Jayden was
13 diagnosed as having a hydrocele, in the
14 medical records?

15 A. I did.

16 Q. Again, that is a congenital problem and
17 not caused by the birthing process?

18 A. I don't think it is nec--, -- that I
19 would call it congenital. He was born with
20 it and in that sense it was present at birth
21 but it's a common neurological condition that
22 babies have. So -- (pause).

23 Q. But he was born with it, correct?

24 A. (Affirmative nod), he was.

25 Q. It is not something that Dr. Rhett

1 caused?

2 A. That's right.

3 Q. And it was not caused by the birthing
4 process?

5 A. Correct, it was not.

6 Q. You mentioned a heart murmur earlier in
7 your ---

8 A. Yes.

9 Q. --- direct testimony. Clearly that is
10 not caused by the birthing process either, is
11 it?

12 A. Correct.

13 Q. Colosteoma, an ear abnormality, did you
14 look in the medical records and see that
15 Jayden had been diagnosed with that ear
16 abnormality?

17 A. Correct, he had a colosteoma. Correct.

18 Q. And that is not caused by the birthing
19 process?

20 A. Correct. It is not.

21 Q. And it was not caused by Dr. Rhett?

22 A. Correct. It was not.

23 Q. Hyperextensibility. Did you see that
24 Jayden was diagnosed with hyperextensibility?

25 A. Yes.

1 Q. Is that caused by the birthing process?

2 A. Yes, it's a manifestation of low muscle
3 tone.

4 Q. The hyperextensibility, when did you see
5 that that was diagnosed?

6 A. I don't recall the exact time but that's
7 an issue that -- not necessarily in those
8 exact words, but low muscle tone, extension,
9 flexibility, those are all referred to in the
10 medical records, by therapists and medical
11 doctors, really from the beginning.

12 Q. Do you know which medical records that
13 you saw?

14 A. I couldn't point to them without going
15 through all the pages but low muscle tone was
16 clearly a diagnosis, and I would think hyper-
17 flexibility is equivocal to the words low
18 muscle tone.

19 Q. You equate the two?

20 A. Yes. Hypertonia, hyperflexibility,
21 those are all the same.

22 Q. I just want to be sure that you equate
23 the two words, hyperextensibility and low
24 muscle tone?

25 A. If you have low muscle tone, you develop

1 hyperextensibility.

2 Q. They are different things, though,
3 aren't they?

4 A. The words are different but they're a
5 manifestation of the same thing.

6 Q. Absent of flow in the left transverse
7 sinus. Would you agree that that is abnormal
8 blood vessels?

9 A. If you have no flow in the left sinus,
10 that's abnormal. That's correct.

11 Q. And based on the MRI that was taken the
12 morning of July 18th, 2002, it was the
13 impression of the radiologist at MUSC that
14 Jayden had a narrow or absent transverse
15 sinus in his brain?

16 A. Well, the answer -- he did say that but
17 he said a little more than that, but he
18 definitely said that. He makes that
19 statement among many statements that he makes
20 about the MRI.

21 Q. And that transverse sinus is one of the
22 major veins to the brain; is that right?

23 A. It is one of the major venous structures
24 taking blood out of the brain, among others.

25 Q. It is number three in the impression of

1 the MRI that was read by the doctor at MUSC
2 where it says that the absence of flow in the
3 left transverse sinus means that that vein is
4 not open. Is that correct?

5 A. Correct. That's what it is.

6 Q. It was narrow or absent, based on the
7 MRI; is that right?

8 A. That was the consideration (sic) given
9 by the radiologist.

10 Q. Now, it the purpose of that transverse
11 -- I think you said that it takes the blood
12 away from the brain. Can I expand on that?

13 A. (Affirmative nod).

14 Q. Is the purpose of the transverse sinus
15 to carry used blood or toxic products away
16 from the cerebellum?

17 A. I believe that the word "toxic" --
18 arteries bring blood into the brain and the
19 sinuses carry the blood out.

20 Q. Okay, that's it? The sinuses bring it
21 out?

22 A. (Affirmative nod).

23 Q. You don't have to agree to "toxic" but
24 the sinus vein brings it out. Can we agree
25 on that?

1 A. Sure. We definitely do.

2 Q. Okay. Do you know Dr. Katz, who is also
3 a pediatric neurologist with offices in New
4 York and New Jersey?

5 A. Dr. Michael Katz. I know who he is.

6 Q. But you weren't aware that Dr. Katz saw
7 Jayden the day after your examination, are
8 you?

9 A. Correct. I was not aware of that.

10 Q. And you didn't send your report to Dr.
11 Katz?

12 A. Absolutely not. I did not.

13 Q. Okay, and Dr. Katz did not send his
14 report to you?

15 A. Correct. I am not aware of any of Dr.
16 Katz's opinions.

17 Q. Because you'all didn't share any
18 information?

19 A. Correct, we did not.

20 Q. So the report that you did after your
21 forty-minute examination didn't go to Dr.
22 Katz, who did an examination the day after,
23 or any of the doctors who are taking care of
24 or have taken care of Jayden in South
25 Carolina? Your report went to Mr. Graham?

1 A. Correct. I wrote my report and I sent
2 it to Mr. Graham.

3 MOLLY CRAIG: That's all that I
4 have. Thank you very much.

5 THE COURT: Is there redirect?

6 EDWARD GRAHAM: Yes, Your Honor.

7 REDIRECT EXAMINATION

8 BY EDWARD GRAHAM:

9 Q. Doctor, are you a geneticist?

10 A. I am not.

11 Q. Did you see any reference in any medical
12 records from a treating doctor to suggest any
13 genetic abnormality of this child or any
14 genetic syndrome?

15 A. Not whatsoever.

16 Q. Now, the question was put to you about
17 the importance of clinical judgment. Do you
18 have an opinion to a reasonable degree of
19 medical certainty as to whether a physician
20 who lacks ordinary knowledge in his field is
21 capable of exercising clinical ---

22 MOLLY CRAIG: Objection,
23 leading.

24 THE COURT: Overruled.

25 REDIRECT EXAMINATION CONTINUED

1 BY EDWARD GRAHAM:

2 Q. --- judgment?

3 A. Good clinical judgment -- to practice
4 good clinical judgment is a complete, uh, set
5 of knowledge about the area in which you're
6 about to perform work in.

7 Q. Now, you testified that you -- that you
8 get paid for your services and that you get
9 paid well for your time and your work. Sir,
10 what effect, if any, does that have on the
11 opinions that you expressed here today?

12 A. None whatsoever. I've come to South
13 Carolina to tell the truth and what I think
14 the medical records say. My opinion is based
15 on the medical records, my examination of
16 Jayden W. and I am paid for my time
17 to express that opinion.

18 Q. Reference was made to a cord around the
19 neck, a nuchal cord. In your review of the
20 medical records, did you see any reference
21 from any treating doctor to suggest that the
22 nuchal cord, the cord around Jayden's neck at
23 birth, had any adverse effect on him?

24 A. No, that's not a diagnosis in the
25 medical records. As I said earlier, if the

1 cord around the baby's neck were to lead to a
2 deprivation of oxygen to the baby, the
3 condition of Jayden W. 's date of
4 birth would have completely different. He
5 would had have low Apgar scores, his scores
6 are normal. He would have had significance
7 acidosis, meaning too much acid in this
8 blood. He didn't that. And he would have
9 been, for lack of a better term, unconscious
10 after birth -- which he wasn't. He became
11 sick afterwards as a result of the bleeding
12 that was ongoing and continuing until care
13 was initiated at MUSC.

14 Q. Let me ask you about those Apgars. If a
15 baby has the vacuum applied to his head while
16 he is still in the birth canal and if the
17 vacuum is what caused the brain bleeds and if
18 the Apgars are scored after the baby comes
19 out, can you explain how he can have brain
20 bleeding and good Apgars at the same time?
21 If so, please explain that.

22 MOLLY CRAIG: Objection.

23 THE COURT: What is your
24 objection?

25 MOLLY CRAIG: Beyond the scope,

1 I didn't ask about Apgars.

2 THE COURT: How is that
3 responsive to what was asked in cross,
4 Counselor?

5 EDWARD GRAHAM: She asked about
6 oxygen deprivation. This goes to the oxygen
7 deprivation that she ---

8 THE COURT: I will give you
9 latitude to follow up. You may answer, sir.
10 Do you need the question repeated?

11 THE WITNESS: I do not.

12 THE COURT: Please answer.

13 THE WITNESS: The Apgars are
14 mainly a measure of the baby's ability to
15 breathe and his heart beat and to some extent
16 the amount of acid that's in the baby's
17 blood. All of that is affected by the lack
18 of oxygen. Bleeding is something that I've
19 indicted, and will say again, is a
20 progressive injury. The baby was reasonably
21 healthy in, say, the first hour and then as
22 the blood began to accumulate, the baby got
23 sicker and sicker..

24 REDIRECT EXAMINATION CONTINUED

25 BY EDWARD GRAHAM:

1 Q. On an order of magnitude, do you have an
2 opinion to a reasonable degree of medical
3 certainty as to how long it takes for
4 bleeding in the brain to start to show up in
5 bodily functions of a baby?

6 A. It depends on how extensive that it is
7 but generally within hours.

8 Q. And do you have an opinion as to whether
9 the bleeding is faster or slower if the
10 bleeding is from a vein as opposed to an
11 artery?

12 A. It's much slower in terms of
13 accumulation when it is a vein, because the
14 artery delivers blood under pressure.

15 Q. A question was put to you about whether
16 labor alone can cause brain damage. Sir, my
17 question is, do you have an opinion to a
18 reasonable degree of medical certainty as to
19 whether labor alone can cause the type of
20 brain bleeds and brain damage that Jayden
21 W. sustained?

22 A. The answer is that labor cannot. It is
23 true that when the uterus contracts that the
24 skull is compressed, the skull molds. The
25 baby has to -- the baby's head shape has to

1 change so that the baby can exit and be
2 delivered. They sometimes get small amounts
3 of blood, inconsequential amounts of blood,
4 that we never -- we, meaning doctors -- do
5 anything about. But labor never produces,
6 uh, blood in the brain, in the fluid-filled
7 spaces of the brain, under the skull, on top
8 of the skull and never produces bloodclots in
9 the cerebellum that require surgical
10 intervention. Labor doesn't do that. It's
11 instruments that do that, meaning vacuum or
12 forceps; though they weren't used in this
13 case, forceps can do it as well.

14 Q. The question was put to you about mal-
15 formation of blood vessels. Do you have an
16 opinion to a reasonable degree of medical
17 certainty as to whether or Jayden W.
18 had any malformed blood vessels in his brain
19 before the vacuum was applied to his head?

20 A. Jayden W. did not have malformed
21 blood vessels. Malformed blood vessels put
22 blood into one of the brain -- this had blood
23 everywhere. The surgeon who operated on the
24 brain, he had a chance to see the brain under
25 the microscope and he doesn't describe any

1 abnormal blood vessels in the surgical
2 report. Then after all the surgery and all
3 the blood had gone away, the brain became
4 completely normal and there are no malformed
5 blood vessels at all. So that possibility is
6 completed excluded.

7 Q. In answering a question from defense
8 counsel, you indicated that labor can cause
9 bleeding under the skull. When you used that
10 phrase, under the skull, were you attempting
11 to rule out other types of bleeding being
12 caused by labor. If so, please clarify that.

13 MOLLY CRAIG: Objection.

14 Leading.

15 THE WITNESS: Well, ---

16 THE COURT: Sustained. That was
17 leading, Counsel. Please restate or move to
18 another issue.

19 EDWARD GRAHAM: Thank you, Your
20 Honor. I will restate it.

21 REDIRECT EXAMINATION CONTINUED

22 BY EDWARD GRAHAM:

23 Q. Doctor, in response to a question about
24 whether labor can cause brain bleeds or brain
25 damage, you indicated that labor can cause

1 bleeding under the skull. What did you mean
2 by that?

3 A. There's a space between the skull and
4 the brain underneath. It has a name, is
5 called the subdural space. You can see small
6 amounts of subdural bleeding, that's under
7 the skull but on top of the brain, as a
8 result of normal labor and delivery in babies
9 who are born and are normal. But it -- but
10 labor and delivery doesn't put blood in the
11 brain, in the spinal fluid, in the fluid-
12 filled chambers of the brain to the need that
13 you need surgical intervention. Labor
14 doesn't do that. Something else is required
15 to do that.

16 Q. You were asked a number of questions
17 about various conditions of Jayden. The
18 first one was called coloboma. What effect,
19 if any, does a coloboma have in terms of
20 Jayden's functioning?

21 A. It's a common problem seen in the eye,
22 something that babies are born with. It's
23 completely irrelevant in terms of Jayden's
24 current issue.

25 Q. You were -- you were asked questions

1 about an inguinal hernia.

2 A. (Affirmative nod).

3 Q. Undescended testes, and hydrocele. Are
4 those three separate issues or is there a
5 relationship. If there is a relationship,
6 please describe that.

7 A. Well, there is a relationship because
8 hydroceles, undescended testicles, inguinal
9 hernias all come together, they are common
10 neurological problems seen in newborns --
11 inguinal hernias are very common in babies,
12 unrelated to any of the issues that surround
13 the brain problems of Jayden W

14 Q. You were also asked about a heart
15 murmur, did you see anything in the medical
16 records about the heart murmur being a
17 serious problem or a problem that even needed
18 treatment?

19 MOLLY CRAIG: Objection,
20 leading.

21 THE COURT: Sustained.

22 EDWARD GRAHAM: I will rephrase.

23 REDIRECT EXAMINATION CONTINUED

24 BY EDWARD GRAHAM:

25 Q. Reference was made to a heart murmur.

1 Could you tell the Ladies and Gentlemen of
2 the jury how serious you considered that
3 heart murmur to be and what treatment, if
4 any, is required?

5 A. Jayden received care from a pediatric
6 cardiologist in South Carolina. He's never
7 been on any medication to treat that heart
8 murmur. I think the later records indicate
9 that the heart murmur has disappeared. I
10 think it's a nonevent, not relevant.

11 Q. Reference was made to a colosteoma.
12 What is that, sir?

13 A. A growth in the middle ear. There is an
14 outer ear and an inner ear, middle ear, and
15 it's a growth in the middle ear. It's a
16 common problem in children. It is not
17 relevant in any way.

18 Q. What functional problems, if any, does
19 that cause?

20 A. None.

21 Q. You mentioned muscle tone and hyper-
22 extensibility. Do you have an opinion to a
23 reasonable degree of medical certainty as to
24 the cause of Jayden W 's muscle tone
25 issues and hyperextensibility?

1 A. Yes. He's brain damaged as a result of
2 the brain hemorrhaging.

3 Q. There were questions also about absent
4 flow and -- does that represent abnormal
5 conditions? My question, sir, is do you have
6 an opinion to a reasonable degree of medical
7 certainty as to whether or not absent flow in
8 the transverse sinus means that there is any
9 problem with the formation of the sinus?

10 A. No. I think the absent flow in the
11 sinus was related to all those bleedings that
12 occurred rather than the opposite; meaning
13 that the flow of sinus caused the bleeding.
14 The bleeding was caused by injury, not by any
15 problems -- alleged problems in the sinuses.

16 Q. Thank you. Now, reference was made to
17 Dr. Katz, that you and Dr. Katz saw this
18 child on consecutive days or words to that
19 effect. Did I share with you any of the
20 records and materials regarding Dr. Katz's
21 evaluation of Jayden?

22 A. No, not all.

23 Q. Did I ask you to compare notes with Dr.
24 Katz and try to get your story straight?

25 MOLLY CRAIG: Objection,

1 leading.

2 THE COURT: Sustained.

3 REDIRECT EXAMINATION CONTINUED

4 BY EDWARD GRAHAM:

5 Q. Yesterday we heard that -- during Dr.

6 Katz, we heard that I had sent you ---

7 MOLLY CRAIG: Objection.

8 THE COURT: Sustained. That is

9 leading still, Counsel. Just ask the

10 question. The jury is aware of what they

11 heard yesterday. Just ask a question, if you

12 have one.

13 EDWARD GRAHAM: I have no further

14 questions, Your Honor. I will just leave it

15 at that.

16 THE COURT: All right. Counsel,

17 what new issue was brought up on redirect?

18 MOLLY CRAIG: The new issue was

19 whether or not the umbilical cord wrapped

20 around the baby's neck was documented in the

21 medical records.

22 THE COURT: All right, I will let

23 you follow up on that, on that sole issue.

24 MOLLY CRAIG: Thank you.

25 RECROSS EXAMINATION

1 BY MOLLY CRAIG:

2 Q. Doctor, did you review the birth video
3 that showed where Dr. Rhett actually removed
4 the umbilical cord around the baby's neck
5 when the baby was delivered?

6 A. I've seen that video.

7 Q. You saw that birth video?

8 A. I did.

9 Q. And you saw him remove the umbilical
10 cord from around the neck?

11 A. Correct, it wasn't -- the nuchal cord.

12 Q. The umbilical cord or the nuchal cord?

13 A. Sorry, that's doctor lingo. The
14 umbilical cord that was wrapped around the
15 baby's neck, that's called the nuchal cord.

16 Q. Thank you. Dr. Rhett removed it, didn't
17 he?

18 A. He did.

19 MOLLY CRAIG: Thank you.

20 THE COURT: Followup?

21 EDWARD GRAHAM: Just very
22 briefly.

23 REDIRECT RESUMED

24 BY EDWARD GRAHAM:

25 Q. Dr. Adler, did you see anything in the

1 records of treatment doctors suggesting that
2 the cord around Jayden's neck had caused him
3 any problems whatsoever?

4 A. I did not.

5 EDWARD GRAHAM: Thank you.

6 THE COURT: Any objection to
7 releasing the witness?

8 EDWARD GRAHAM: None, Your Honor.

9 MOLLY CRAIG: No, Your Honor.

10 THE COURT: Hearing none, you are
11 free to leave, sir.

12 (WITNESS STEPS DOWN)

13 THE COURT: Counsel, let's step
14 up and talk about scheduling for a moment
15 before we go any further in the proceedings.

16 (OFF RECORD BENCH CONFERENCE RE SCHEDULE)

17 THE COURT: Thank you, Ladies and
18 Gentlemen. Let's talk a little bit about two
19 or three things that I want to discuss with
20 you.

21 Number one, when we come back on
22 Monday morning -- we will be here a little
23 earlier with the attorneys to work out some
24 issues in the evidence. You've heard some
25 discussion about some exhibit numbers. It

1 THE COURT: Please be seated,
2 Ladies and Gentlemen. Welcome back.
3 I hope that you had a good weekend.

4 Let me ask, since we were last
5 together is there any member of this jury
6 panel who has had a discussion with anyone
7 concerning the facts of this case? If so,
8 please raise your hand. (No response).
9 Let the record reflect that no one raised
10 their hand.

11 We are now ready to resume the
12 plaintiff's case. Mr. Graham, you may call
13 your next witness.

14 EDWARD GRAHAM: Thank you, Your
15 Honor. The plaintiff calls Dr. Robert
16 Zimmerman.

17 (WITNESS TAKES STAND)

18 ROBERT ZIMMERMAN, being duly sworn
19 to tell the truth, the whole truth and
20 nothing but the truth, testified, as follows:

21

22 Q. Good morning, Dr. Zimmerman.

23 A. Good morning.

24 Q. Please tell us something about who you
25 are, your personal background and that sort

1 of stuff.

2 A. I come from Philadelphia, Pennsylvania.

3 I work in the Children's Hospital in
4 Philadelphia and I practice pediatric
5 neuroradiology.

6 I was born in Philadelphia and I'm still
7 there. I've lived in other parts of the
8 world, through the U.S. armed forces.

9 I am currently a professor of Radiology
10 at the School of Medicine at the University
11 of Pennsylvania.

12 Q. Thank you. Let me ask you, sir, what is
13 radiology?

14 A. Anything that deals with imaging of
15 structures. It could be x-ray, it could be
16 magnetic resonance, it could be ultrasound,
17 it could be plain x-rays. Something
18 anatomic.

19 Q. What is neuroradiology?

20 A. It's the same thing except we're doing a
21 part of the brain, the head and the neck and
22 eyes, ears and spine.

23 Q. What is pediatric neurology?

24 A. Well, it starts with fetuses in utero
25 and it ends with the children hopefully

1 growing up to be adults.

2 Q. Thank you. Let me ask you, in terms of
3 your professional background, just tell the
4 Ladies and Gentlemen about your education,
5 starting with college.

6 A. Went to Temple University in
7 Philadelphia, Pennsylvania. Graduated with a
8 bachelors degree. That was 1960.

9 1960 to 194, I went to the medical
10 school at the Georgetown University School of
11 Medicine. I did an internship there the next
12 year in Internal Medicine.

13 Following that, I did a Radiology
14 residency and a Fellowship in what was called
15 Special Procedures at that time, at the
16 hospital at the University of Pennsylvania,
17 which was basically neuroradiology.

18 Q. When you finished medical school, where
19 were you in terms of academic performance?
20 Did you get any sort of special recognition?

21 A. I graduated summa cum laude, which meant
22 that I did well.

23 Q. You mentioned military service. Tell us
24 about that, please, sir.

25 A. I was stationed overseas in the U.S.

1 armed forces, in Europe for three years.

2 Q. Let me ask you about teaching
3 activities, where have you been a professor?

4 A. Well, mainly at the University of
5 Pennsylvania School of Medicine. I hold a
6 professorship in Radiology and I hold a
7 secondary employment in Neurosurgery, as a
8 radiologist for research purposes.

9 I had the opportunity, though, to be a
10 visiting professor in places such as
11 Australia, Italy, England, Israel, Taiwan,
12 Japan and a variety of other places. South
13 Africa.

14 Q. Thank you. Have you received grants
15 from any organizations to assist in your
16 research in publication of matters relevant
17 to your field and, if so, who are of the
18 organizations who have provided financial
19 assistance?

20 A. The main organization is the National
21 Association of Disability. They have given
22 assistance to study head trauma. We had the
23 traditional study on computer tomography,
24 head injuries in both adults and children.

25 They funded research in brain tumors and

1 stroke. Hypoxic ischemic brain injury in
2 neonates at the neonate seizure center. The
3 developmental disabilities in the mental
4 retardation center of the Children's Hospital
5 also.

6 Q. Sir, do you have any clinical work or is
7 it all teaching?

8 A. It's mostly clinical. About ninety
9 percent sitting in a reading room and
10 interpreting studies as they come through.

11 Q. In that regard what does a pediatric
12 neuroradiologist do on a typical day?

13 A. Come in around seven thirty in the
14 morning. Read the cases from the previous
15 night that have accumulated, emergency Cts
16 and MRIs. Interpret anything that comes
17 along.

18 Actually monitor the studies as they're being
19 done to look for anything that's usual or
20 that

21 needs additional work that hasn't been
22 ordered. See that the studies are reported.
23 See if there was any unusual findings or
24 emergency findings that the referring
25 clinician had and see what needs to be done.

1 So that's basically it. We operate
2 clinically from seven thirty in the morning
3 till midnight. There's a day shift and a
4 night shift. That we now, starting in
5 August, have a shift that actually goes
6 twenty-four hours
7 a day so that we're there staffing it twenty-
8 four hours, seven days a week.

9 Q. How many pediatric neuroradiologists
10 work under you in your group?

11 A. I'm one of eight.

12 Q. We've heard already some testimony about
13 bleeding in Jayden W- 's

14 brain. What special knowledge,
15 skill, training, and experience, if any, do
16 you have with regard to bleeding in the
17 brains of newborn babies?

18 A. I've been looking at that since 1974
19 when we had the forty-third CT scanner in the
20 world. That was the beginning of CT
21 scanning, in 1974.

22 And then 1976, when we got funded by the
23 National Institutes of Health to look at
24 trauma to the brain. So I've been doing it
25 for a long time.

1 We had one of the first MRI scanners in
2 the world in 1982. So we've been doing that
3 for quite a long time.

4 Q. We've heard already in this trial about
5 board certification. Do you have board
6 certifications and, if so, in what areas?

7 A. I do. In general diagnostic radiology
8 since 1970 and I have it in neuroradiology
9 since 1995, with recertifications in 2009 and
10 recertified again in 2015.

11 Q. In which states are you licensed to
12 practice medicine?

13 A. Pennsylvania and New Jersey.

14 Q. Do you serve on the editorial board of
15 any peer review medical journals and, if so,
16 which
17 ones?

18 A. Well, until a couple of years ago I was
19 the editor in chief of Neuroradiology, which
20 is the official journal of the European and
21 Japanese scientists. I'm currently still on
22 the editorial board but I'm no longer the
23 chief.

24 I review articles for the American
25 Journal of Neuroradiology and a variety of

1 other journals from around the world.

2 Q. Have you been a visiting professor and a
3 lecturer at any foreign locations and, if so,
4 just tell us about a few of those.

5 A. Well, coming up is Brazil in November.

6 I'll be a visiting professor in Brazil. And
7 in October I will be lecturing as a guest,
8 invited to lecture at the Symposium

9 Neuroradiologica in Bologna, Italy. This
10 past March I was invited to speak in Taiwan
11 at the Child Neuroradiology Association to
12 talk about

13 neurometabolic diseases. Usually invited to
14 someplace overseas about three or four times
15 a year on the average.

16 Q. Have you been published in peer review
17 journals and, if so, approximately how many
18 times?

19 A. Approximately four hundred and twenty
20 peer review manuscripts over the course of my
21 career. About a hundred chapters in text-
22 books, and two textbooks.

23 Q. Have you taught review courses and
24 refresher courses for other physicians about
25 the issues in your specialty and, if so,

1 approximately how many times?

2 A. Well, I haven't kept count. Any number
3 of times.

4 MR. GRAHAM: Your Honor, at this
5 point we would offer Doctor Zimmerman as an
6 expert witness qualified to matters with
7 regard to pediatric neuroradiology.

8 THE COURT: All right. Are there
9 any questions from the defense?

10 MS. CRAIG: No, sir.

11 MR. DAVIS: No, sir, Your Honor.

12 THE COURT: Is there any
13 objection?

14 MS. CRAIG: Not as to causation.
15 No, sir.

16 THE COURT: Ms. Craig, you said
17 not as to?

18 MS. CRAIG: I believe he
19 qualified him on causation opinions based on
20 his
21 qualifications.

22 THE COURT: Very good.

23 MS. CRAIG: Thank you.

24 THE COURT: And you may proceed,
25 counsel.

1 MR. GRAHAM: If Your Honor please,
2 I proffered him on all issues related to
3 pediatric neuroradiology, not limited to
4 causation.

5 THE COURT: All right. Then there
6 may be damages as well. Any questions you
7 have for the witness?

8 MS. CRAIG: No, sir, as long as a
9 proper foundation is laid.

10 THE COURT: All right. If
11 there's an objection please make it
12 contemporaneously.

13 And you may proceed, Mr. Graham.

14 MR. GRAHAM: Thank you, Your Honor.

15 DIRECT EXAMINATION CONTINUED

16 BY EDWARD GRAHAM:

17 Q. Dr. Zimmerman, have you at my request
18 agreed to perform certain work on this case
19 with a view toward expressing opinions about
20 pediatric neuroradiology and Jayden

21 W- ?

22 A. I have.

23 Q. All right. Tell us how that works.
24 When you agree to get involved in a case what
25 is it you want to see and what do you do?

1 A. Well, what I want to see are the images.
2 I'm a neuroradiologist so basically you'll
3 send me a CD or films. I'll put the up on a
4 view box or on a computer and I'll make my
5 analysis as to what they show and what they
6 don't show. And after I've done that at some
7 point in time talk to you and tell you what I
8 think. I don't want to initially be told why
9 you're sending me the stuff except that it's
10 sent.

11 Q. And you do that just for lawyers like me
12 that represent injured children or do you
13 work for healthcare providers, as well, and
14 their lawyers?

15 A. I did for both sides. The same work.

16 Q. Approximately how does that break down?

17 A. It's about fifty/fifty.

18 Q. What did you review in this case?

19 A. I reviewed the neuro imaging studies
20 performed on Jayden W from the day
21 after birth through to 2006.

22 Q. Sir, I'm going to ask you if you had
23 made arrangements to present to the jury what
24 you reviewed and, and so that you can explain
25 what it means to you; if so, I'll ask our

1 technical assistant to move forward with
2 that.

3 A. That will be fine. I have a
4 presentation of the basically a PowerPoint
5 presentation showing you images from Jayden
6 W.

7 Q. Thank you. Please feel free to direct
8 the technician and to through the various
9 images how ever you think it would be best to
10 present this information to the jury.

11 MOLLY CRAIG: Your Honor, for
12 the record, just note our previous objection.
13 Objection to the pictures.

14 THE COURT: Objection noted.
15 Overruled.

16 JAY DAVIS: Same objection.

17 THE COURT: Overruled, as well.

18 MOLLY CRAIG: Your Honor, we
19 asked for a curative instruction.

20 THE COURT: Yes. Ladies and
21 Gentlemen of the jury, while this is being
22 brought up the Court had an opportunity to
23 look at one of the -- some of the scans that
24 are going to be shown and they depict a brain
25 and the brain. To help orient it, it has a

1 face on it. A baby's face. This is not the
2 face of Jayden W- . It's purely given
3 for purposes of orienting the photograph. I
4 do want to say to you that it is not Jayden's
5 picture and is not intended to appear to look
6 like him.

7 EDWARD GRAHAM: I apologize, Your
8 Honor. We had a problem with the green
9 screen this morning. We're trying to sort is
10 out.

11 THE COURT: Please proceed.

12 THE WITNESS: This is Jayden's
13 brain and this is the CT scan from the day
14 after birth at 11:02 p.m. That's the 17th.
15 Basically this is the brain, the right side.

16 THE COURT: Sir, if you can be
17 seated so that you can be heard by
18 microphone. It's difficult for our jurors to
19 hear.

20 THE WITNESS: I'll do the best
21 I can. This is the right side of the brain,
22 left side of the brain.

23 We're up in the cerebral hemisphere
24 which is above the ears and we're looking at
25 a little bit of blood on the outside. And

1 we're looking at some blood here on the
2 outside.

3 We're looking at blood in the
4 ventricle over here.

5 We're looking at blood along the
6 structured wall of the falx cerebellum.

7 So -- we will be working our way
8 from above, downward as we go from the brain
9 above the tentorium to the brain below the
10 tentorium.

11 DIRECT EXAMINATION CONTINUED

12 BY EDWARD GRAHAM:

13 Q. Excuse me. Dr. Zimmerman, may I ask
14 just a couple of questions? Did you see this
15 is -- what type of study did you say this is?

16 A. A computer tomographic examination, a CT
17 scan.

18 Q. A CT scan. Could you go back to the ---

19 A. Okay, this is ---

20 Q. Well, what is the -- whatever that is.

21 A. It means blood in the scalp.

22 Q. Thank you. You mentioned blood in the
23 falx, what is the falx?

24 A. The falx is a neural structure that
25 divides the two hemispheres apart and toward

1 the back of the head there's more of this
2 neural structure here. It's bleeding along
3 that, basically the subdural space. That
4 would be traumatic etiology for the blood.

5 Q. Thank you. Please continue.

6 A. We can go now to the next. We've come
7 down a little bit here (indicating). Now
8 we're at the level of lateral chondragles,
9 which everybody has.

10 One on the right side.

11 One on the left side.

12 There's blood in and around the
13 ventricles. There's blood back here along
14 the course of the falx.

15 There's blood along the outside of the
16 skull.

17 There's some subarachnoid hemorrhage
18 that's against the inner part of the skull.

19 You can come down (on video) now.

20 Now we're at the level of the tentorial
21 incisura, which is where you start to run
22 into the posterior fossa structures below the
23 tentorium.

24 Q. Where do you mean? You're down to what
25 level?

1 A. Your head is divided into a top part and
2 a bottom part. It's called the tentorium.
3 And it's a neural reflection that has your
4 cerebral hemispheres right on top and below
5 it you have the brain stem and the cerebellum
6 -- we're right, -- going right through that
7 notch between the two structures.

8 Q. Thank you.

9 A. If you go back one -- come down -- next
10 one. This is the blood that is in that
11 tentorial notch.

12 What you see there's a great deal of
13 bleeding at that site.

14 When he gets it in 3-D -- here is Jayden
15 and we can see that over here is the blood
16 that's starting to be glaring here between
17 the upper portion of the brain and the lower
18 portion that you're going to be seeing in
19 just a moment.

20 So we have blood on the outside of the
21 scape here.

22 We have some subarachnoid hemorrhage.

23 We have this extensive amount of
24 bleeding here, which is really into the
25 structures of the brain at that particular

1 site.

2 So what we have is brain tissue being
3 destroyed by the blood within the brain
4 tissue itself.

5 You can come down to the next slice,
6 then go up to the axial image. Here we are a
7 little bit lower in the brain. We have lots
8 of blood which is involving the region that
9 is the junction of the cerebellar
10 hemispheres.

11 The posterior fossa.

12 Then we go to the 3-D.

13 Q. Doctor, let me hold you right there for
14 a second.

15 A. Sure.

16 Q. As we're looking at this image, can you
17 orient us to where the baby's face is and
18 where the back of the head is?

19 A. If we come down just a little bit lower
20 we're going to see the eye on the right, the
21 eye on the left.

22 We're just above it here.

23 Here we're staring to pick up a little
24 bit of the top of the ear on the right.

25 A little bit lower we'll be picking up

1 both ears.

2 Q. All right. Let me make sure I
3 understand what you're saying about the left
4 and the right. As I look at this image it
5 looks to me like that's the left toward the
6 back of this.

7 What did you say about this?

8 A. This the right side. That's by
9 convention. And this is the left side.
10 That's how it's made, coming from top to
11 bottom.

12 Q. Please continue.

13 A. (Video playing) -- now we've turned the
14 brain around so that we have right and left -
15 - this will now be the right, this is the
16 left.

17 We reversed it, fitting it into his
18 skull here.

19 The face, you can see -- see what we're
20 talking about. This is just above the eyes,
21 this is just above the ears and here is the
22 blood back there (indicating).

23 Next, we're right smack in the middle of
24 what we call the posterior fossa when you go
25 below the tentorium, below the right and left

1 cerebral hemispheres.

2 Here is a structure that contains the
3 brain stem and two cerebellar hemispheres.
4 What the brain stem does is it takes all the
5 information that your brain up here, right
6 and left hemispheres, generates and transmits
7 them to your arms, to your legs, your chest,
8 your heart and to help coordinate. What it
9 translates is that you have structures on
10 either side of the brain stem called
11 cerebellar hemispheres, which integrate that
12 information in a fashion so that everything
13 is smooth going.

14 What we're looking at over is that
15 there's extensive bleeding into that midline
16 structure that connects the two cerebral
17 hemispheres. So we have a very large
18 posterior fossa hematoma with a lot of blood.

19 Q. All right. I understand about the
20 cerebellar but what is the posterior fossa?

21 A. The posterior fossa is a structure that
22 these are contained within. You have the
23 brain stem and the cerebellum. Around them
24 you have bone and you have soft tissues of
25 the scalp and they contain the posterior

1 fossa.

2 Q. Is the posterior -- please tell us
3 whether or not the posterior fossa is part of
4 the brain tissue itself.

5 A. No, it is not. It is a structure that's
6 like a bowl. It contains the brain tissue.
7 Inside of the posterior fossa you have
8 various pieces of brain tissue.

9 Q. When you talk about bleeding in the
10 posterior fossa, are you talking about
11 bleeding in the bowl or bleeding in the brain
12 or both?

13 A. Both. You have bleeding in the brain
14 tissue and have also bleeding around the
15 brain tissue.

16 Q. Thank you, sir. Please continue.

17 A. (Video playing) -- now we're even a
18 little bit lower. You can see blood along
19 the tentorial edges here.

20 Next, this shows that in cross-section.

21 This, again, would be the left and that
22 would be the right.

23 This is the back of the head.

24 This is the posterior fossa over here.

25 This is the portion of the super

1 tentorial brain.

2 That's blood outlining this area.

3 Q. Dr. Zimmerman, I believe that may be the
4 last cut of that series. Which series would
5 you like to go to next?

6 A. Well, I think what we want to look at
7 next is the MRI.

8 Q. Let's proceed, please, to the MRI.

9 A. The MRI was done the next day. (Video
10 playing), basically this is starting again.

11 Here's the right hemisphere.

12 Here's the left hemisphere.

13 There's blood out here in the scalp.

14 As we see, there's blood over here
15 around this opening that going to go down into
16 the posterior fossa.

17 There's hemorrhage you can see coming
18 back along the falx.

19 Q. Let's me stop you, Doctor. Since we
20 moved from the CT to the MRI, would you
21 please explain the basic technological
22 difference between the types of studies that
23 you've had a chance to review?

24 A. Well, you have an ultrasound. An
25 ultrasound, they use an acoustic wave through

1 the anterior fossa, which is the soft spot on
2 the baby's skull, and you generate an
3 acoustic wave that comes down and is
4 reflected back in the probe and recorded on a
5 computer. You're able to look where the
6 fluid in the ventricles are, where the
7 substance of the brain is and you're able to
8 look for blood products.

9 Q. Could you put "acoustic wave" in
10 layman's language, please, sir?

11 A. You know, I'm talking about producing an
12 acoustic wave with your hearing. Basically
13 it's a probe from an ultrasound machine that
14 does that, produces an inaudible acoustic
15 wave that's reflected -- like my voice is
16 being reflected right now off of the wall of
17 this courtroom. In essence, in the
18 ultrasound machine the acoustic wave
19 generated by the probe is being reflected off
20 of brain tissue, but it's not being heard as
21 sound because it's inaudible.

22 Q. So we're talking about a sound wave?

23 A. Yeah.

24 Q. Thank you. You mentioned ultrasound.

25 What about the other two?

1 A. CT or computer tomograph, which we just
2 looked at, you have an x-ray tube on one side
3 of the head, you have a detector on the other
4 side, and tiny pinpoint, much thinner than
5 this laser, goes through the brain. It comes
6 out the other side of the head. You measure
7 how much has been absorbed by the brain
8 tissue in that passage straight through by
9 going around, three hundred sixty degrees,
10 and making maybe a million measurements.

11 You can then plot out the densities of the
12 brain tissue that the x-ray beam was passed
13 through from the images. You're able to tell
14 blood from brain tissue by its density.

15 Q. What's the basic technology behind MRI?

16 A. An MRI -- what you're looking at is
17 water. Our structure of the body is made up
18 of predominately water bound to other
19 substances: carbon, calcium a variety of
20 other things.

21 Water is H₂O, two hydrogens and one oxygen.

22 At any given moment in time, your body is one
23 out of a million of those hydrogens are free.

24 What you do with an MRI scanner -- which is a
25 big magnet is that you tune the water in the

1 body to the frequency of hydrogen and you can
2 generate, by raising the hydrogen that's
3 free, to a new energy level with a radio
4 frequency pulse, put a little bit of energy
5 in over a thousandth of a second. You wait a
6 moment after you turn off the radio frequency
7 and let that decline, then you see that the
8 energy is coming back to a normal level from
9 that.

10 By using an antenna that finds that
11 activity, the loss of energy in that
12 hydrogen, you can reconstruct an image of the
13 brain tissue. You can do it in a plane, you
14 can do it with various sensitivities that
15 bring out water or blood or a variety of
16 other things.

17 Q. Of those three tests -- ultrasound, CT
18 and MRI, -- which is best for determining
19 whether or not there's blood in the brain of
20 a baby?

21 A. Well, we use ultrasound for looking for
22 blood that's usually above the tentorium; in
23 the cerebral hemispheres, right and left.

24 Most of the blood that we're dealing
25 with here, for Jayden, is posterior fossa or

1 below the tentorium. For that, the CT is
2 better and the MRI is better.

3 They are both very good, so I would say
4 that they are relatively equal.

5 Q. Thank you. Please continue.

6 A. (Video playing) -- now we are going down
7 to the next, lower section here. We see that
8 there's a massive amount of blood here that's
9 at that tentorial level going into the
10 posterior fossa.

11 Next, it shows it in the axial plane.
12 It's basically analogous to what we just saw
13 in the CT scan. On the CT scan, we saw blood
14 at the same localized area.

15 This is the frontal lobe.

16 Here's your eyes.

17 The ears are over here.

18 There's blood down in the scalp. The
19 main accumulation of blood, though, here is
20 right down into the posterior fossa, into the
21 cerebellum.

22 Next, we're at the substance of the
23 cerebellar hemispheres and the vermis and we
24 have a great big clot here, which you can see
25 in red, and it's compressing the stem, coming

1 up against it. That is the structure that
2 controls your breathing, your heart rate, a
3 lot of your functions of your arms and legs:
4 integration of information.

5 Q. You mentioned a word there, vermis?

6 A. Vermis, (affirmative nod). What you
7 have -- all the anatomy here is wiped out.
8 The normal anatomy is gone because of the
9 blood.

10 But if you look at the structures
11 without the hemorrhage, what you have is the
12 posterior fossa behind the brain stems. You
13 have a right and left cerebellar hemisphere
14 and they are connected in the midline with a
15 structure called the vermis, which is the
16 connection between the two so that
17 information can go from one side to the other
18 side.

19 This bleed, edema, is primarily centered
20 in the vermis that goes out into the brain
21 here, right and left cerebellar hemispheres.

22 Q. Now let's talk about what some of these
23 words mean. You've talked already about the
24 falx. But edema means what?

25 A. Edema is the generation of increased

1 fluid and tissue, more water than there
2 should be. You do that by compressing
3 structures around the hematoma.

4 Q. And hematoma means what?

5 A. Hematoma is blood flow.

6 Q. You mentioned ventricles earlier. Could
7 you explain what ventricles are exactly and
8 especially the significance of the compressed
9 fourth ventricle?

10 A. Okay. Let me start with above the
11 tentorium. You have a right and a left
12 cerebral hemisphere. Inside each -- each
13 hemisphere has a ventricle.

14 What happens in the ventricle is that's
15 where the fluid called the cerebral spinal
16 fluid is made. It basically looks like
17 water. It is water. It comes out of your
18 blood as a serum filtered from the blood
19 tissue.

20 The water inside your brain is used to
21 carry away waste products, meaning you're
22 basically thinking, you're exercising, you're
23 doing all sorts of things -- which means that
24 you're eating up various metabolites: oxygen,
25 glucose.

1 The waste products from your brain have
2 to be gotten rid of somehow. One of the ways
3 of getting rid of them is by making fluid
4 that's stored in the brain, over the brain,
5 through the brain, down over the surface of
6 the brain, getting ride of the waste
7 products.

8 It's also there for some buttressing so
9 that if you get a blow to the head it absorbs
10 some of the impact. Also the fluid generated
11 in the brain carries some of the hormones
12 that your brain generates from one area to
13 another, so that you as you go through things
14 like puberty your skin changes pigmentation,
15 and a variety of other things happen.

16 Q. Where is the fourth ventricle?

17 A. Well, the fourth ventricle is in the
18 posterior fossa. It lies behind the brain
19 stem, which is over here, and then what lies
20 behind the fourth ventricle are the vermis
21 and the two cerebellar hemispheres. What we
22 have going along here, because of the
23 bleeding, this compression of the fourth
24 ventricle, it's being displaced forward up
25 against the brain stem.

1 Q. What is the significance of compression
2 of the ventricle?

3 A. It shows there's mass affect. That mass
4 affect produces damage to tissue.

5 We're not so much worried about the
6 compression of the fourth as we are
7 compression of the cerebellar structures that
8 are not involved with the hemorrhage and the
9 compression of the brain stem that lie in the
10 hemorrhage.

11 Q. Can you tell us whether or not we have
12 that more troubling type of compression here?

13 A. We have that type of compression here.

14 Q. Thank you. Please continue.

15 A. (Video playing), this is the axial
16 appearance of that clot.

17 Here's the eye on the left -- excuse me,
18 on the right and the left.

19 Q. So when you say the right and left in
20 this image, you're talking about from the
21 baby's view as opposed to the viewer.

22 Correct?

23 A. That's correct.

24 Q. Let me ask you, Doctor, I see over on
25 the left-hand side -- well, actually on both

1 sides of the brain, I see what looks like a
2 ridge or a stream of red-colored materials.

3 A. You mean over here (indicating)?

4 Q. Yes, sir. That is that?

5 A. That's the extra axial clot that's
6 outside the brain. But, again, the bleeding
7 is more extensive than just the posterior
8 fossa.

9 Q. And what is the red on the right from
10 our point of view as we look at it, left from
11 the baby's point of view?

12 A. This is blood over here along the falx.
13 There's blood in the clot that's going into
14 the posterior fossa, there's blood in the
15 scalp. That's about it.

16 Q. All right. When there's blood in the
17 brain, what determines where the blood goes?

18 A. Well, blood in the brain is going to be
19 there because it is actually destroying brain
20 tissue. The thing that you do with that is
21 you surgically evacuate it; which is what
22 they did in Jayden, they took out the clot so
23 as to prevent any more damage than was
24 already done. The blood that's around
25 the brain, unless it's very large, then you

1 need to leave it alone.

2 Q. Please continue.

3 A. (Video playing), here we are at the sort
4 of bottom portion of the posterior fossa,
5 looking at a very large clot. There's a
6 little bit of cerebellum left on the right
7 and a little bit left on the left over here
8 (indicating).

9 Q. Shall we continue?

10 A. Yes, we should continue -- (video
11 playing). Again, this is showing a
12 reconstructed image.

13 Next -- all right, this is a good
14 opportunity to explain the difference between
15 the supratentorium in the brain and the
16 intra-tentorium in the brain.

17 Here's where the eye would be, just a
18 little bit off the midline.

19 There's a portion of the nose.

20 That's the top of the head, the front,
21 the back.

22 The tentorium is right about over here.

23 This is a rigid structure that divides
24 the supratentorial brain, with is two
25 cerebral hemispheres, from the cerebella,

1 which is down here, from the brain stem which
2 is more medial than we are.

3 There's a slice.

4 This is showing a clot at that level of
5 the cerebellum.

6 Next, this shows an image, three
7 dimensionalized, that's showing where the
8 nose and eyes are.

9 This is where that clot is, over here --
10 the posterior fossa.

11 Next, we're in the midline and this is
12 the nose.

13 You can see how the clot is extended up
14 here along the posterior fossa, beneath the
15 tentorium. It's compressing the brain stem
16 here.

17 There's blood up here in the extra-axial
18 space outside the brain, beneath the stem.

19 Next is the same thing.

20 I think this is the stage of the game
21 that we may want to go on to the
22 postoperative followup MRI.

23 Q. Okay.

24 A. This is the followup study in '04, June
25 the 25th as I remember it. Basically it's an

1 MRI scan and this is the supratentorial brain
2 we're looking at. As we get to the area --
3 (video playing) -- we're starting to enter
4 the posterior fossa right here. That's where
5 that clot was taken out from. There is
6 damage brain, called encephalomalacia --
7 which is basically dead brain.

8 Q. What does the blue color represent?

9 A. The dead brain tissue.

10 Next, this show it in the cross-section
11 here, basically right over here where the
12 clot was.

13 Next, working out way down, you can see
14 here that there is a lot of lost tissue in
15 the middle of the posterior fossa.

16 These are cerebellar hemispheres to
17 either side, and they have loss of tissue
18 along the medial aspect.

19 Q. Okay. Does the blue mean the same thing
20 as before?

21 A. It does. It means that there's loss of
22 tissue.

23 Next, (video playing): Again, here's the
24 brain stem.

25 This is the right cerebellum.

1 This is the left cerebellum.

2 That's the area where there is the
3 damage between the two hemispheres.

4 I think that's basically it with the
5 images.

6 Q. Thank you, sir. Why don't we go ahead
7 and shut that (projector) off, or do you need
8 to use this to illustrate any more opinions?

9 A. I don't think so.

10 Q. Okay, let's go ahead and shut it off.
11 Thank you. Dr. Zimmerman, what ability, if
12 any, does a pediatric neuroradiologist like
13 yourself have to determine the timing and
14 causation of brain damage from studying films
15 like these?

16 A. Well, we have a lot of experience
17 because basically we're used to dealing with
18 acute emergencies from an accidental trauma
19 that is child abuse, from automobile
20 accidents, from falls, kids presenting to the
21 hospital.

22 We get images, CT and MRI, acutely, so
23 we're very good at recognizing acute blood
24 products within the brain tissue or within
25 the surrounding tissues. With the MR scan,

1 by the signal intensities you can time things
2 pretty well within a matter of a day or two.

3 Q. Sir, do you have an opinion to a
4 reasonable degree of medical certainty as to
5 the most probable cause and timing of Jayden
6 Washington's brain bleeds and brain damage?

7 A. Yes, I do.

8 Q. What is that, please, sir?

9 A. That he, at the time of delivery, had a
10 vacuum pull on the brain which led to
11 bleeding into the brain tissue.

12 Q. Are you an obstetrician?

13 A. I am not.

14 Q. Okay. Do you -- are you here today to
15 voice any opinions about whether or not Dr.
16 Rhett acted appropriately as an obstetrician?

17 A. I am not.

18 Q. Have you given consideration to any
19 alternative causes of Jayden's brain bleeds
20 and brain damage other than traumatic vacuum
21 delivery by Dr. Rhett?

22 A. I have.

23 Q. Such as what, sir?

24 A. I looked for an arterial venous
25 malformation. None was relevant.

1 MOLLY CRAIG: Your Honor,
2 objection. This is beyond the opinions
3 elicited at his deposition.

4 JAY DAVIS: I join in that
5 objection, Your Honor.

6 THE COURT: All right, just a
7 moment. Counsel, is this a new issue?

8 EDWARD GRAHAM: I don't believe
9 it is, Your Honor. I mean, he talked about
10 the rationale for his opinion as to causation
11 and I believe there were questions about
12 alternative causes.

13 THE COURT: All right. Very
14 good. Overruled. You'll have cross-
15 examination on this point.

16 MOLLY CRAIG: I have his
17 deposition.

18 THE COURT: We'll let you mark it
19 for the record and the objection is noted but
20 overruled, for both.

21 JAY DAVIS: Thank you, Your
22 Honor.

23 THE COURT: All right, you may
24 proceed.

25 EDWARD GRAHAM: Thank you, Your

1 Honor.

2 THE COURT: Let's hear that term
3 one more time. You actually turned away from
4 the court reporter. Just tell the jury what
5 the term was.

6 THE WITNESS: Arterial venous
7 malformation mean an abnormal communication
8 between arteries and veins in the brain and
9 can lead to bleeding, so it is one of the
10 things that you'd look for on an MRI scan so
11 as to rule out as a cause of the bleed around
12 it. There was no evidence of that.

13 I also looked to the question of
14 whether there was a sinus thrombosis. You
15 don't see that left transverse sinus very
16 well, but it's been compressed by a clot in
17 the subdural space.

18 MOLLY CRAIG: Objection, Your
19 Honor. This is another new opinion that was
20 not given during his discovery deposition.

21 THE COURT: Overruled.

22 JAY DAVIS: Same objection.

23 THE COURT: Overruled, same
24 reasons.

25 EDWARD GRAHAM: Thank you, Your

1 Honor.

2 DIRECT EXAMINATION CONTINUED

3 BY EDWARD GRAHAM:

4 Q. Please continue.

5 A. Basically there's no evidence of a sinus
6 thrombosis that is visible on the MR scan. I
7 did not see anything that suggested a brain
8 tumor that would have bled and caused the
9 hemorrhage. So those are the main things
10 that I ruled out.

11 Q. In opening statement we heard about the
12 cord around the baby's neck. Can you look at
13 the films and determine whether or not the
14 baby suffered from oxygen deprivation,
15 strangled by the cord?

16 A. There is no evidence of hypoxic ischemic
17 brain injury to the supratentorial brain,
18 which is what you would get from the nuchal
19 cord. They ruled it out very effectively.

20 Q. Do you have an opinion to a reasonable
21 degree of medical certainty as to whether or
22 not alcohol consumption by the mother for
23 three weeks or so before she found out that
24 she was pregnant can cause this condition?

25 MOLLY CRAIG: Objection, Your

1 Honor. This is another ob that wasn't
2 discussed prior to today.

3 JAY DAVIS: Same objection.

4 THE COURT: For the same reasons
5 previously ruled on, I am going to overrule
6 your objections. You may take this up on
7 cross-examination if you wish to ask him
8 about it.

9 EDWARD GRAHAM: Thank you, Your
10 Honor.

11 DIRECT EXAMINATION CONTINUED

12 BY EDWARD GRAHAM:

13 Q. Please continue.

14 A. There's no evidence of fetal alcohol
15 syndrome by imaging.

16 Q. Did you consider whether or not this
17 child was born with -- well, strike that.

18 Do you have an opinion to a reasonable
19 degree of medical certainty as to whether or
20 not this child was just born with bad blood
21 vessels, or weak blood vessels, or malformed
22 blood vessels that made them more vulnerable
23 to trauma from the vacuum?

24 MOLLY CRAIG: Objection,
25 another new opinion.

1 JAY DAVIS: Same objection.

2 THE COURT: Overruled.

3 EDWARD GRAHAM: Thank you, Your
4 Honor.

5 DIRECT EXAMINATION CONTINUED.

6 BY EDWARD GRAHAM:

7 Q. Please continue.

8 A. There's no evidence of that.

9 Q. Sir, let me just take you back to the
10 preparation of the images that you showed us
11 earlier. What role, if any, did you play in
12 that process of creating that?

13 A. I basically indicated what images were
14 useful. I went over the reconstructions to
15 make sure that they were accurate. I took
16 out inaccuracies that I found on the initial
17 go-round, and verified what we were looking
18 at, where the blood was, in reality where it
19 is in the image.

20 Q. Sir, can you explain to the jury how it
21 is that brain bleeds, such as depicted in
22 this case, cause damage that can permanently
23 affect a young child?

24 A. You know, basically when you pull on the
25 scalp you elongate or you create a pull on

1 the skull. You're pulling the veins that are
2 connected to the venous sinuses inside the
3 skull off the surface of the brain tissue.

4 If you pull a vein that drains the blood
5 out of the brain and disrupt it, you're going
6 to end up with bleeding. That bleeding can
7 be both subdural, subarachnoid and within the
8 substance of the brain tissue itself.

9 In this case, the cerebellum.

10 So, in essence, you're basically pulling
11 the brain off the substance of the
12 cerebellum, leading to bleeding.

13 Q. What types of bleeding did this child
14 have?

15 A. He had both subdural, subarachnoidly and
16 intracerebral cerebellar bleeding and he also
17 had scalp bleeding.

18 Q. I remember reading somewhere about the
19 word "subgaleal".

20 A. Yeah.

21 A. Can you tell whether or not he had that
22 type of bleeding?

23 A. (Affirmative nod), he did.

24 Q. Sir, do you have an opinion to a
25 reasonable degree of medical certainty as to

1 the most probable cause of all of those brain
2 bleeds?

3 A. Yes. The vacuum extraction.

4 Q. Have you answered all of my questions --
5 when you've expressed an opinion, have you
6 expressed those answer with at a reasonable
7 degree of medical certainty, most probably?

8 A. I have.

9 EDWARD GRAHAM: Please answer any
10 questions that counsel may have.

11 THE COURT: Cross-examination,
12 Ms. Craig?

13 MOLLY CRAIG: Yes, Your Honor.

14 CROSS EXAMINATION

15 BY MOLLY CRAIG:

16 Q. Good morning, sir.

17 A. Good morning.

18 Q. I think it's -- yeah, it's still
19 morning.

20 Doctor, you agree that a vacuum can cause a
21 hemorrhage and it doesn't always mean that
22 the doctor who delivered the baby was
23 negligent?

24 A. I do.

25 Q. And one of the known and accepted risks

1 of using a vacuum is hemorrhage?

2 A. It is, (affirmative nod).

3 Q. You agree that a doctor should exercise
4 his clinical judgment based upon the
5 circumstances?

6 A. I do.

7 Q. And a patient can have a bad outcome or
8 a negative result but that does not mean that
9 the doctor was negligent; does it?

10 A. I would leave that up to people who are
11 obstetrics, obstetricians, to make that
12 decision.

13 Q. Well, just in general, Doctor, would you
14 agree that a patient, in general, could have
15 a bad outcome or a negative result and it
16 doesn't always mean that there's someone to
17 blame?

18 A. Yeah, in general.

19 Q. Thank you. Now, you've been reviewing
20 cases for attorneys since 1983?

21 A. That's correct.

22 Q. And as of 2006, you'd reviewed more than
23 five hundred cases for lawyers?

24 A. That's correct.

25 Q. And in your experience as an expert

1 witness, you are aware that if a plaintiff
2 cannot prove there was a deviation from the
3 standard of care then the jury does not even
4 consider your opinions in this case?

5 A. I'm aware that that is something that is
6 an obstetrical issue in this case and not a
7 radiographic issue. I'm not an expert in the
8 standard of care in obstetrics.

9 Q. Yes, sir, but you're an expert in
10 testifying in medical-legal cases. You've
11 done it over five hundred times. Is that
12 right?

13 A. Yes.

14 Q. Okay. And you know that the plaintiff
15 must first prove that there was a deviation
16 from the standard of care before we even
17 consider the opinions on causation, you are
18 aware of that?

19 A. I'm aware.

20 Q. And you are aware that it is an issue in
21 this case about whether or not there was an
22 indication to use the vacuum.

23 A. I'm not an expert on whether it was
24 appropriate to use it or not appropriate to
25 use it. I'll leave it up to the

1 obstetrician.

2 Q. You have no opinions on whether or not
3 it was appropriate to use the vacuum in light
4 of fetal distress and the heart rate going
5 down and not coming back up?

6 A. Not -- not being an obstetrician, not
7 using vacuums, I would not have an opinion.

8 Q. Okay. So you have no opinions on
9 whether there was a deviation from the
10 standard of care, the very first thing that
11 the jury must consider in this case?

12 A. Okay, I would leave it to obstetrical
13 experts to make that decision based on the
14 situation that was occurring at that time.

15 Q. And in fact you have no criticisms of
16 Dr. Rhett in the use of vacuum when
17 confronted with fetal distress?

18 A. Again, I'm not an obstetrician and so I
19 would have no opinion on that.

20 Q. All right. Let's go back to your
21 experience as an expert witness. You charge
22 six hundred dollars to review a case?

23 A. Yes, sir.

24 Q. And you are charging seven thousand
25 dollars a day for your trial testimony?

1 A. That's correct.

2 Q. Now, the only thing that you do is
3 interpret a radiological study as accurately
4 as you can, that's your only purpose?

5 A. That's correct.

6 Q. And a child can have genetic defects
7 even if there's no radiographic evidence on
8 the film, correct?

9 A. That's true.

10 Q. And just because there's no radiograph
11 evidence does not mean that there is no
12 genetic defect?

13 A. That is true.

14 Q. A doctor cannot prevent a genetic
15 disorder. Is that correct?

16 A. That's true.

17 Q. Now, in your own practice you like to
18 have clinical information before rendering a
19 diagnosis?

20 A. I always look at the images without a
21 clinical diagnosis to make all the
22 observations that are important.

23 Q. Do you like to have clinical information
24 in your own practice, sir?

25 A. Ma'am, I always go over the clinical

1 information after I've made my diagnosis
2 without the clinical information.

3 Q. Thank you. Now, Doctor, Mr. Graham has
4 not given you the medical records or the
5 depositions to review in this case?

6 A. He gave me the discharge summary for
7 Jayden and he gave me the reports, but that
8 was after my deposition.

9 Q. After your deposition?

10 A. Yes.

11 Q. So you saw the discharge summary of
12 Jayden?

13 A. Not the discharge. The reports, I saw
14 just recently. I can't tell you precisely
15 when I saw the discharge summary but I did
16 see the discharge summary.

17 Q. Okay. Let's talk about recently. When
18 did you send that PowerPoint that went up on
19 the screen? When did you send that to Mr.
20 Graham?

21 A. It was sent to me and I went over it,
22 this is over the last month or two.

23 Q. Okay. When was it sent to you, sir/

24 A. I don't remember the date.

25 Q. It was over a month ago?

1 A. It was over the last month or two.

2 Q. And you and Mr. Graham have been
3 discussing it over the past month or so?

4 A. Yes.

5 MOLLY CRAIG: At this time,
6 Your Honor, I would move to strike any
7 testimony with regard to the PowerPoint
8 presentation since it was produced and
9 available over a month again and ---

10 THE WITNESS: It wasn't final.

11 MOLLY CRAIG: --- we didn't see it
12 until Friday, very briefly and then when it
13 was e-mailed to me on Sunday, yesterday.

14 THE WITNESS: Well, it wasn't
15 finalized a month ago.

16 THE COURT: All right. Do you
17 have -- do you join in that, Mr. Davis?

18 JAY DAVIS: I do, Your Honor.

19 THE COURT: Do you have a
20 response, Counselor?

21 EDWARD GRAHAM: Yes, sir. If
22 Your Honor please, we've shown this to her at
23 various times. I can get into the specifics
24 if Your Honor wishes. But, uh, in accordance
25 with the instructions to get together with

1 counsel about witnesses, we offered to show
2 it to her and at her request we sent her hard
3 copies of the scan.

4 THE COURT: Do you want to reply?

5 MOLLY CRAIG: I'd be delighted
6 to. We saw it for the first time Friday
7 afternoon, after court, on a laptop at
8 counsel's table. I told them that this was
9 too much medical information for me just to
10 review quickly and asked them to please e-
11 mail it to our office. I received it by e-
12 mail on Sunday, yesterday, and that's when I
13 had full opportunity to review it. That's
14 why we're asking, why we move to strike the
15 testimony.

16 ROBERT HOOD: I'd like to add
17 to what Ms. Craig has said.

18 THE COURT: Yes, sir?

19 ROBERT HOOD: one of the ---

20 THE COURT: Just a moment,
21 Counsel. I know we've been talking over you.
22 We'll be right back to you in just a moment.

23 ROBERT HOOD: Yes, sir.

24 THE COURT: Mr. Graham?

25 EDWARD GRAHAM: Thank you, Your

1 Honor. If Your Honor please, Ms. Craig was
2 not at the document conference. She sent Ms.
3 Simmons and a paralegal. We sat down with
4 them, we went over everything. In terms of
5 exhibits to go to the jury, we talked about
6 demonstrative evidence. We had it there for
7 her to review had she chosen to do it.

8 THE COURT: All right.

9 EDWARD GRAHAM: She wanted to
10 wait until later.

11 THE COURT: Very good.

12 MOLLY CRAIG: My father just
13 said that he wrote a letter to Mr. Graham
14 approximately two weeks ago asking to see all
15 animations or demonstrative evidence and he
16 did not respond to that letter.

17 THE COURT: All right. Anything
18 further then, from either side? I'm going to
19 overrule the objection, Counsel. You may
20 proceed. The Court declines -- actually the
21 Court declines to strike the evidence, which
22 is what your request was. Please proceed.

23 MOLLY CRAIG: Yes, sir.

24 CROSS EXAMINATION CONTINUED

25 BY MOLLY CRAIG:

1 Q. All right. Back to what records you had
2 available to you to render your opinions in
3 this case, you have not reviewed the reports
4 of the treating physicians at MUSC who
5 interpreted the imaging studies?

6 A. I did last night.

7 Q. Oh, you did last night?

8 A. (Affirmative nod).

9 Q. How about before your deposition when we
10 had an opportunity to ---

11 A. Not before my deposition. I always
12 prefer to do my interpretation uninfluenced
13 by anybody's, other's, readings. I mean, I'm
14 not interested in what they've said. I'm
15 interested in what I find on the films.

16 Q. All right. Sir, when we took your
17 deposition on November 7th, 2008, and the
18 question was asked of you:

19 Q. Please give us all of your
20 opinions you are prepared to offer in this
21 case.

22 At that time, had you had the chance to
23 review the reports from the doctors at the
24 Medical University?

25 A. No, I did not.

1 Q. Prior to giving those opinions?

2 A. I did not.

3 Q. All right. So you saw them last night
4 for the first time?

5 A. That's correct.

6 Q. All right. And you didn't speak with
7 any of the treating physicians about their
8 diagnoses or their treatment of this child?

9 A. I did not.

10 Q. The only information that you had was
11 the information that Mr. Graham chose to
12 share with you?

13 A. He chose to share the films, which are
14 what I do. I interpret the films.

15 Q. Films only?

16 A. Yes.

17 Q. I do believe one deposition was sent to
18 you is the deposition of Nurse Judy Mercer;
19 is that correct?

20 A. That's correct.

21 Q. But you didn't read that?

22 A. I did not.

23 Q. But Mr. Graham did send you a letter
24 about his thoughts on the case. Do you
25 remember receiving that?

1 A. I remember a mention of it in my
2 deposition that said a few things -- and I
3 read it to you in the deposition.

4 Q. Mr. Graham did not tell you there were
5 problems with the baby's heart rate during
6 the delivery?

7 A. No, he did not. I did not consider
8 that. There is no hypoxic ischemic brain
9 injury?

10 Q. He did not tell you that the vacuum was
11 used for only three minutes and seven seconds
12 during delivery?

13 A. No, he did not.

14 Q. He did not tell you that there were no
15 pop-off's during the delivery?

16 A. No, he did not.

17 Q. And he did not tell you that the vacuum
18 was in the safe zone for suction the whole
19 time that it was being used?

20 A. He did not tell me that, nor would I be
21 an expert on that from an obstetrical
22 standpoint. I wouldn't know what the safe
23 zone is.

24 Q. Mr. Graham did not tell you that the
25 Apgar scores, once the baby was delivered,

1 were good because the umbilical cord had been
2 unwrapped from the baby's neck and the baby
3 was given oxygen?

4 A. Again, he did not tell me that. But I
5 would leave that to an obstetrician to make a
6 comment on.

7 Q. You agree that it's important for a
8 radiologist to have clinical coordination of
9 your findings?

10 A. I agree that I should do my job and
11 interpret the images accurately, then talk
12 with the clinicians to make sure they
13 understand what I have found or not found,
14 and they may have their clinical input.

15 Q. But you didn't talk to any of the
16 clinicians in this case?

17 A. No, this is all after the fact.

18 Q. Okay. The only clinical information
19 that you had is the information that was
20 given to you by Mr. Graham?

21 A. That's correct.

22 Q. And you never spoke with any of the
23 radiologists for the Medical University of
24 South Carolina who interpreted these studies?

25 A. I did not.

1 Q. You would agree that you can see brain
2 hemorrhages in children after birth where no
3 vacuum was used in delivery?

4 A. Sure.

5 Q. You agree with that, sir?

6 A. I do.

7 Q. Is that your opinion in this case?

8 A. This would not be a very typical
9 opinion, typical example of a brain
10 hemorrhage without the use of a vacuum, or
11 forceps, or without a difficult delivery with
12 cephalo-pelvic disproportion. You don't get
13 this in a normal vaginal delivery.

14 Q. Yes, sir. Let me read it again and
15 let's see if you can answer this question:
16 You agree that you can see brain hemorrhages
17 in children after birth when no vacuum is
18 used in the delivery?

19 A. Sure.

20 Q. Do you agree or disagree?

21 A. I do.

22 Q. Thank you. I believe that you testified
23 that you've seen quite a few imaging studies
24 of children with cerebral hemorrhages. Is
25 that correct?

1 A. I have seen many, yes.

2 Q. But all those cases were not involving
3 medical malpractice?

4 A. Some of them involved medical
5 malpractice. Many of them occurred in the
6 hospital where I work as patients being
7 transferred in from various obstetrical
8 services.

9 Q. And some of those cases did not involve
10 medical malpractice; is that correct?

11 A. Some of them did not.

12 Q. Hemorrhage can also result from trauma
13 during the birthing process, when the baby is
14 coming down the birth canal. Is that true?

15 A. That's true.

16 Q. Now, you testified about -- this is on
17 this PowerPoint that you had about a month
18 ago, you testified about cuts were made.

19 You're talking about cuts. I believe that
20 you were talking about cuts on the images.

21 A. The images, (affirmative nod). What you
22 do is you select a slice, what people call a
23 cut, and then ---

24 Q. But you don't ---

25 A. You are talking about an image number.

1 Q. Thank you. You don't -- so you are
2 talking about the cuts or slices with regard
3 to images. You know that in this case when
4 Jayden as born that there were no cuts on his
5 head?

6 A. I understand that. I never said that
7 there was.

8 Q. But just so that we're talking about the
9 same thing, you're just talking about cuts
10 that were made on the PowerPoint
11 presentation?

12 A. The slices that were made at different
13 levels of the brain.

14 Q. You have no understanding of where Dr.
15 Rhett placed the vacuum, do you?

16 A. I do not personally.

17 Q. Children have plasticity of the brain,
18 and forgive my simplistic definition of
19 plasticity of the brain, but it means that
20 the brain rewires itself. Is that a fair
21 statements?

22 A. Well, there's two ways plasticity s
23 used. One is that the brain of an infant
24 is more malleable or compressible because it
25 is not myleonated and, therefore, it deforms.

1 more easily than an adult brain when it's
2 compressed.

3 Plasticity is also used to describe the
4 fact that the neural network is not
5 necessarily well-established at the time of
6 birth, so that if an injury occurs there is
7 some ability of the brain to rewire itself at
8 that point in time.

9 Those would be the two definitions.

10 Q. Okay. So "rewiring itself" is an
11 acceptable definition of the plasticity of
12 the brain ---

13 A. It's one of them.

14 Q. Okay, thank you. You'd agree that
15 fortunately babies' brains are uniquely able
16 to rewire themselves after injury and they
17 call that plasticity of the brain, that that
18 is one of the definitions?

19 A. That's correct.

20 Q. And, Doctor, you agree that none of the
21 opinions that you have given today, none of
22 those are considered -- and if the jury finds
23 that Dr. Rhett was reasonable in using the
24 vacuum to delivery Ms. Washington's baby as
25 soon as he could, based on the circumstances

1 that presented, you'd agree with that; don't
2 you?

3 A. I am not an obstetrician, so I am going
4 to leave that to the obstetrician experts to
5 make that decision.

6 Q. But you've testified in quite a few
7 trials, right?

8 A.. Yeah, but I never testify on the
9 standard of care for an obstetrician. That
10 is outside my area of expertise.

11 Q. Yes, sir. I'm really not asking you
12 questions on the standard of care. I'm
13 asking based upon you being involved in five
14 hundred and something cases since 1993, that
15 you understand as a medical-legal expert that
16 the jury does not consider causation in this
17 case unless -- at all if they find that Dr.
18 Rhett acted reasonably by applying the vacuum
19 to help Ms. Washington delivery her baby in
20 the face of fetal distress?

21 A. Well, you understand more about medical-
22 legal matters than I understand. I would
23 leave that to an obstetrical expert to make
24 that decision.

25 Q. Yes, sir.

1 A. I mean, I'm not a lawyer.

2 Q. Let me see if I can rephrase this so
3 that you can understand it. Do you agree or
4 disagree that the jury does not consider any
5 of the your causation opinions if they find
6 that Dr. Rhett was reasonable to use the
7 vacuum to help Ms. Washington to delivery her
8 baby?

9 I'm not asking you for a standard of
10 care opinion. I'm asking you, based upon
11 your understanding and your involvement in
12 five hundred something cases.

13 The jury doesn't get to your opinions at
14 all if they find that Dr. Rhett acted
15 reasonably. Do you agree with that, sir?

16 A. Again I would say I'm not a lawyer, I
17 don't know that I can -- I'm talking about
18 neuroradiological in five hundred cases, at
19 lease from interpreting films and not at
20 trial or in a deposition. I am not an expert
21 on the legal chain of information.

22 Q. Yes, sir. Can you answer my question or
23 not?

24 A. I don't think I can answer it.

25 Q. You can't give me, based on five hundred

1 and -- hold on, in 2006 you'd reviewed more
2 than five hundred cases for attorneys; is
3 that right?

4 A. Yeah, from a neuro-imaging standpoint,
5 for from the question of the chain of 'if you
6 do this', then is acceptable or not
7 acceptable.

8 Q. You understand what deviation from the
9 standard of care is?

10 A. I understand it for a radiologist. I
11 will leave it up to somebody else for an
12 obstetrician.

13 Q. Yes, sir.

14 A. You asked me about a radiologist, that's
15 a different question.

16 Q. And the radiology opinion, which is a
17 causation opinion, that you've given in this
18 case, the jury doesn't get to it if they find
19 that Dr. Rhett acted reasonably; is that a
20 fair statement?

21 EDWARD GRAHAM: Objection, Your
22 Honor. It's redundant and it's badgering.

23 THE COURT: It's been asked and
24 answered in his own, Counsel. Please move to
25 your next question.

1 MOLLY CRAIG: Yes, sir, -- just
2 one minute.

3 CROSS EXAMINATION CONTINUED

4 BY MOLLY CRAIG:

5 Q. There were images of the actual vacuum
6 on your PowerPoint presentation?

7 A. Yeah, I did not put them there.

8 Q. Who put those there?

9 A. Whoever made the PowerPoint presenta-
10 tion. It was not me.

11 MOLLY CRAIG: Thank you very
12 much. Those are all the questions that I
13 have.

14 THE WITNESS: You're welcome.

15 THE COURT: Mr. Davis?

16 JAY DAVIS: No questions, Your
17 Honor.

18 THE COURT: Is there redirect?

19 EDWARD GRAHAM: Yes, Your Honor.

20 REDIRECT EXAMINATION

21 BY EDWARD GRAHAM:

22 Q. Dr. Zimmerman, I realize you're not an
23 obstetrician but did you take an obstetrician
24 internship in medical school?

25 A. I did a month of obstetrics at D.C.

1 General Hospital. I delivered approximately
2 a hundred and ten infants in that month.

3 Q. One of the early questions that Ms.
4 Craig ask you was whether there was a risk of
5 hemorrhage from a vacuum. My question, sir,
6 as a pediatric neuroradiologist, would you
7 expect a Board-certified obstetrician to know
8 that there's a risk of brain bleeds from a
9 vacuum?

10 A. Sure.

11 Q. Before being exposed to the level of
12 knowledge or lack thereof of Dr. Rhett, have
13 you ever been aware of an obstetrician who
14 did not know that?

15 A. No, I have not.

16 MOLLY CRAIG: Objection, Your
17 Honor, beyond ---

18 JAY DAVIS: Objection.

19 MOLLY CRAIG: --- the scope.

20 THE COURT: Sustained, Counsel.

21 That was -- that is beyond the scope.

22 MOLLY CRAIG: Move to strike
23 his response.

24 THE COURT: I'm going to strike
25 that. Just move to your next area, please.

1 EDWARD GRAHAM: All right.

2 REDIRECT EXAMINATION CONTINUED

3 BY EDWARD GRAHAM:

4 Q. There was a question about money. Does
5 the fact that you get paid for your work as
6 an expert witness or the amount of money that
7 you get paid have an impact on your opinions.
8 If so, what is that?

9 A. There is no impact. My opinion is based
10 on what the films show and it doesn't matter
11 who it is for, whether it's for the defense
12 or for the plaintiff, it's the same.

13 Q. Ms. Craig used the phraseology that you
14 were only allowed to see the materials that I
15 chose to send you. Sir, did you get to
16 review what I chose to send you or what you
17 asked for?

18 A. What I asked for.

19 Q. You were asked a question about whether
20 or not you have ever encountered a brain
21 bleed that did not involve the use of a
22 traumatic vacuum and you indicated you had.
23 My question is, when you see that does it
24 look like the images in this case?

25 A. It does not.

1 MOLLY CRAIG: Objection,
2 leading.

3 REDIRECT EXAMINATION CONTINUED

4 BY EDWARD GRAHAM:

5 Q. Do you have an opinion to reasonable
6 degree of medical certainty as to whether or
7 not it looks like the images in this case?

8 A. It does not look like that.

9 THE COURT: Counsel, that
10 happened so quickly but let's let the record
11 reflect that I sustained the objection and
12 the question was rephrased.

13 EDWARD GRAHAM: Thank you.

14 THE COURT: Please move forward.

15 REDIRECT EXAMINATION CONTINUED

16 BY EDWARD GRAHAM:

17 Q. And there were questions about bleeds to
18 a baby's brain from a vaginal delivery in and
19 of itself, without the use of an instrument.

20 Sir, do you have an opinion to a reasonable
21 degree of medical certainty as to whether or
22 not when that happens it is usually smaller,
23 younger babies?

24 JAY DAVIS: Objection.

25 MOLLY CRAIG: Leading.

1 JAY DAVIS: Leading, Your Honor.

2 THE COURT: Sustained. That is
3 leading, Counselor.

4 REDIRECT EXAMINATION CONTINUED

5 BY EDWARD GRAHAM:

6 Q. Doctor, when bleeds do -- do you have an
7 opinion to a reasonable degree of medical
8 certainty as to whether the age and size of a
9 baby at the time of delivery has an impact on
10 the likelihood of brain bleeds from a vaginal
11 delivery without the use of an instrument?

12 A. Basically bleeds that see in normal
13 vaginal deliveries are quite small. They're
14 subdural, they're in the posterior fossa,
15 they don't have cerebellar hemorrhages, they
16 don't have mass effect. You see those in
17 term infants in about somewhere between
18 twenty-six to fifty-two percent, but they're
19 tiny.

20 So we're not even remotely near that in
21 this case. This is what you get in trauma,
22 what we see in Jayden.

23 Q. Do you have an opinion to reasonable
24 degree of medical certainty as to whether or
25 not the bleeds that you saw on the images in

1 Jayden Washington's case can be cased by
2 vaginal delivery in and of itself?

3 A. They cannot.

4 Q. There was a question about rewiring of
5 the brain. Do you have an opinion to a
6 reasonable degree of medical certainty as to
7 whether or not the severity of brain damage
8 has any impact on the ability of a baby's
9 brain to rewire? If so, what is that
10 opinion?

11 A. There more severe the damage the less
12 like rewiring is to occur.

13 The rewiring that we know about is in
14 the supratentorial brain, the right and left
15 cerebral hemispheres.

16 There really is no information about
17 cerebellar rewiring. That's a fairly rare
18 injury.

19 Q. There was a question about whether you
20 asked for certain portions of the exhibit to
21 be put on there or whether it came to you in
22 that fashion. Sir, let me ask you this, when
23 -- what role, if any, did you play in
24 modifying the exhibit that was initially
25 presented to you for your review?

1 A. I made sure that it was correct.

2 EDWARD GRAHAM: Thank you, no
3 further questions.

4 THE WITNESS: You're welcome.

5 THE COURT: Any new issues?

6 MOLLY CRAIG: Yes, sir.

7 THE COURT: What is the new issue
8 brought up in redirect?

9 MOLLY CRAIG: The issue is the
10 documents he reviewed to give his os in this
11 case. They're not consistent with what he
12 testified at his deposition.

13 EDWARD GRAHAM: That is not new.

14 THE COURT: Okay. How is that
15 covered in redirect?

16 MOLLY CRAIG: He asked about
17 certain documents that he had reviewed, for
18 his office to review in this case. I'd like
19 to ---

20 EDWARD GRAHAM: Your Honor, all
21 I ---

22 MOLLY CRAIG: He requested
23 certain documents and I would like to ask him
24 the question about what he reviewed to give
25 his opinions in this case and what he

1 testified to in his deposition back in 2008.

2 EDWARD GRAHAM: May I be heard,
3 Your Honor?

4 THE COURT: Go ahead.

5 EDWARD GRAHAM: Counsel attacked
6 me for sending him what I chose to send him.
7 All I asked him was if I sent him what I
8 chose or what he asked me for.

9 THE COURT: I'll give you some
10 leeway. You may ask him. This is the
11 plaintiff's witness, so the plaintiff will be
12 able to follow -- but only on that one issue
13 about the deposition. All right, you may
14 proceed.

15 RECROSS EXAMINATION

16 BY MOLLY CRAIG:

17 Q. Doctor, when your deposition was taken
18 on November 7, 2008, you brought everything
19 to that deposition that you had received to
20 give your opinions in this case; is that
21 right?

22 A. That's correct.

23 Q. Which was a letter from Mr. Graham's
24 office, dated April 26th, 2005; another
25 letter dated August 25, 2005; a \$2,000

1 retainer on January 20th, 2006. You
2 submitted an affidavit and you brought that
3 to your deposition. Then you brought you
4 notice of deposition that we'd sent for your
5 deposition, which was dated October 23, 2008,
6 and a deposition of Nurse Judy Mercer. Those
7 are the documents that you reviewed in order
8 to render your opinions in this case?

9 A. Mainly I reviewed the neuro-imaging
10 studies to give you my opinion in the case.

11 Q. Are the document, other than those, than
12 the images and the documents I just read off
13 to you, are those the sum total of the
14 documents you reviewed to give your opinions
15 in this case prior to your deposition in
16 November of 2008?

17 A. That's correct. I had not reviewed the
18 Mercer deposition, though. I had it but I
19 didn't review it.

20 MOLLY CRAIG: Those are all the
21 questions that I have. Thank you.

22 THE COURT: Do you wish to follow
23 up on that, Counsel?

24 EDWARD GRAHAM: Yes, Your Honor.

25 REDIRECT EXAMINATION RESUMED

1 BY EDWARD GRAHAM:

2 Q. Dr. Zimmerman, what effect, if any, did
3 the Mercer deposition have on your opinions?

4 A. No effect.

5 Q. Did you even read it?

6 A. I did not read it.

7 Q. Was there anything in any letter from my
8 office that had an effect on your opinions?

9 If so, what was that?

10 A. There was not.

11 EDWARD GRAHAM: Thank you.

12 THE COURT: All right. You may
13 step down, sir.

14 (WITNESS STEPS DOWN)

15 THE COURT: You are free to
16 leave, if you wish.

17 MOLLY CRAIG: Your Honor, we
18 would ask that the witness not be released
19 yet. We have a matter of law for the Court.

20 THE COURT: Tell me that one more
21 time.

22 MOLLY CRAIG: We have a matter
23 of law for the Court that we'd like to bring
24 up with this witness. We can do it outside
25 the presence of the jury. We would ask that

1 the video, so that I can tell the jury?

2 EDWARD GRAHAM: Best I can tell,
3 thirty minutes to an hour.

4 THE COURT: All right. Bring in
5 the jury.

6 (JURY IN @ 2:16 P.M.)

7 THE COURT: Thank you, Ladies and
8 Gentlemen, welcome back. I trust that you
9 had a nice lunch.

10 Mr. Graham, please call your next
11 witness.

12 EDWARD GRAHAM: Yes, sir, Your
13 Honor. We would like to publish a
14 stipulation into evidence at this time.

15 THE COURT: Ladies and Gentlemen,
16 -- this has been agreed to by all parties, is
17 that correct?

18 EDWARD GRAHAM: Yes, sir.

19 THE COURT: Very well, you may
20 proceed. A stipulation is an agreement by
21 all the parties as to a fact.

22 EDWARD GRAHAM: Thank you, Your
23 Honor. If Your Honor please, it is entitled
24 Stipulation, dated July 15, 2010, (reading):

25 *This is a medical negligence action.*

1 in which the plaintiff asserts that certain
2 acts and omissions of negligence arising out
3 of the birth of her son, Jayden W.,
4 Dr. Edmund Rhett delivered Jayden W.
5 on July 16th, 2002, at East Cooper Regional
6 Medical Center with the assistance of a
7 vacuum extraction system. During the course
8 of the discovery process, the parties to this
9 matter have confirmed that the vacuum
10 extraction system used in Jayden W.'s
11 delivery was manufactured by and comprised of
12 the following components:

13 Utah Medical Products, Inc.'s
14 vacuum pump number 101-A and Utah Medical
15 Products, Inc.'s TenderTouch silicone bell-
16 shaped vacuum cup, number 404TT.

17 It is further agreed that the
18 above-reference vacuum extraction system was
19 the vacuum extraction system used in the
20 delivery of Jayden W. and that the
21 video of the delivery may come into evidence.
22 In doing so, each party agrees, affirms and
23 consents that the above-referenced vacuum
24 system, which was the system used in the
25 delivery of Jayden W. and that there

1 *were no other component of manufacturers or*
2 *systems were used in the delivery of Jayden*
3 *Washington will be made at the trial of this*
4 *matter.*

5 Then it says that we consent and
6 signatures of all the parties involved in the
7 case are affixed.

8 THE COURT: Thank you. You may
9 call your next witness.

10 EDWARD GRAHAM: Your Honor, at
11 this time we would like to finish the video
12 deposition of Dr. Yvonne Gomez-Carrion, which
13 we started on Friday.

14 THE COURT: All right.

15 (RESUMED PLAYING VIDEO OF GOMEZ-CARRION
16 FROM PAGE 103 TO PAGE 134)

17 CHILTON SIMMONS: (Page 134, Line
18 5) -- Your Honor, we have an ---

19 THE COURT: All right. Counsel,
20 do you want to take it up now or do you want
21 to take it up at the end.

22 CHILTON SIMMONS: Your Honor, I
23 would like to publish it now.

24 THE COURT: Please tell us the
25 page and line that you're reading.

1 CHILTON SIMMONS: Yes, sir. Your
2 Honor, it looks like from Page 131, Line 3,
3 all the way through Page 132, Line 11.

4 THE COURT: Okay. Do you want to
5 publish that?

6 CHILTON SIMMONS: Yes, sir.

7 THE COURT: Mr. Graham, do you
8 agree that it's supposed to be in there?

9 EDWARD GRAHAM: I do. May I
10 weigh in on this discussion?

11 THE COURT: You may. Is there any
12 objection to what Ms. Simmons wants to
13 publish?

14 EDWARD GRAHAM: (No verbal
15 response).

16 THE COURT: Just go ahead and
17 publish it. If there is an objection, we
18 might discuss it further a break.

19 CHILTON SIMMONS: (Sidebar with
20 Mr. Graham).

21 EDWARD GRAHAM: Your Honor, as
22 best I can tell, the -- this sentence should
23 have been included. Our technical assistance
24 erroneously interpreted some of the marginal
25 notes. So, we apologize and I'll be happy to

1 either try to play the video or just read it
2 in.

3 THE COURT: Sure. Ms. Simmons,
4 what is your preference? We will go with
5 your preference?

6 CHILTON SIMMONS: I would prefer
7 the video, Your Honor, to just show it in
8 sequence in that line of questioning.

9 THE COURT: Very good. See if you
10 can back it up and play that, please, Mr.
11 Graham.

12 EDWARD GRAHAM: We will have to
13 have a break for him (technician) to do that.
14 He doesn't have it right here, it's been
15 edited out.

16 THE COURT: Let's just publish it
17 then, Ms. Simmons. Rather than take a break,
18 let's just do that. Go ahead, you may
19 publish the question and the answer.

20 CHILTON SIMMONS: Okay, the
21 question was, (reading):

22 Q. Doctor, I understand that you
23 did not think that there was an ominous
24 pattern on the fetal heart rate?

25 A. Correct.

1 Q. But you understand from Dr.
2 Rhett's testimony and Nurse Judy Mercer's
3 testimony that they both did at that time
4 think that there was an ominous pattern? Do
5 you agree with that, that they had a
6 different opinion than you do?

7 A. They had a different opinion,
8 but ominous means you think the baby is going
9 to die.

10 Q. Okay. And therefore you would
11 agree that Nurse Mercer and Dr. Rhett felt
12 that there was an ominous pattern, though I
13 understand that you disagree?

14 A. Correct.

15 Q. And it is your opinion that the
16 fetal head was above the plus-two station.

17 A. Based on the documentation that
18 I was provided, correct.

19 Q. And this mother had never had a
20 baby?

21 A. As stated in the record,
22 correct.

23 Q. And those are your criteria, in
24 your own quote on Page 27, that states that
25 that is a reason for the physician to make

1 the judgment as to whether to use the vacuum
2 or not. Would you agree?

3 A. That is correct.

4 Q. Okay. Thank you. It's your
5 opinion that first-time mothers in labor and
6 delivery don't push very well, is that right?

7 A. For the most part. It's a
8 learning process, yes.

9 Q. And the mother getting tired
10 and not pushing well is an indication or a
11 reason to use the vacuum, is that true?

12 A. Typically after a mother has
13 been pushing for an hour, two hours, three
14 hours even, that is work and those women do
15 get tired. If you feel that the baby will
16 fit and it would be safe to help mom deliver
17 this baby vaginally, then that is certainly
18 an indication to place the vacuum or forceps.

19 Q. And you did not get the sense
20 from the video that Ms. Washington really
21 reached down and gave pushing her all, did
22 you?

23 A. Well, she didn't really get a
24 chance to push. She became fully and eleven
25 minutes later a vacuum was placed on her

1 *baby's head. You know, ten minutes is not*
2 *enough time for a first-time mom to get*
3 *instruction and then have some trial pushing*
4 *to see if she is going to be a good pusher or*
5 *not, or if the baby is going to descend in a*
6 *quick fashion or not.*

7 *Q. And the vacuum was placed on*
8 *the baby's head after his fetal heart tones*
9 *have moved from the one twenty to the one*
10 *fifty range and then down to the nineties*
11 *range; is that true?*

12 *A. And that's typically seen when*
13 *mom is pushing; yes, true.*

14 *Q. But is that true?*

15 *A. Absolutely.*

16 *Q. And you felt that she really*
17 *wasn't pushing very well or very hard because*
18 *she could easily breathe during her*
19 *contractions, which reinforced the fact that*
20 *she wasn't having great effort or urge to*
21 *push. Would you agree with that?*

22 *A. It's hard to answer that*
23 *question because I don't know what her urge*
24 *to push was. Again, I didn't have a lot to*
25 *look at in terms of the pushing effort, but I*

1 *would say that she was pretty typical of*
2 *someone who is initially instructed to push.*
3 *The first instinct is 'this hurts' and you'll*
4 *hear yelling and see fidgeting, because it's*
5 *a new experience and it's painful -- even*
6 *when woman have epidurals.*

7 CHILTON SIMMONS: Then, Your Honor,
8 I think it started it started at Page 133,
9 Line 12. I am not entirely sure because I
10 was trying to figure out where to start and
11 stop.

12 THE COURT: Then may we resume?

13 CHILTON SIMMONS: Yes, sir.

14 THE COURT: Go ahead.

15 (VIDEO OF DR. YVONNE GOMEZ-CARRION
16 RESUMED @ PAGE 134, LINE 17 TO PAGE 153)

17 CHILTON SIMMONS: We have a little
18 problem, Your Honor. I don't know how much
19 was skipped -- (video playing) -- okay, I
20 think that it just skipped one line and I can
21 read that out.

22 THE COURT: Go ahead.

23 CHILTON SIMMONS: The question was,
24 (reading):

25 Q. *There is no way to know that*

1 *had Ms. Washington pushed longer, that she*
2 *would have delivered Jayden successfully*
3 *without the help of the vacuum, is there?*

4 A. *We will never know that.*
5 *Sorry.*

6 Q. *There is no way to know had Ms.*
7 *Washington pushed longer that she would have*
8 *delivered Jayden successfully without the*
9 *help of the vacuum?*

10 CHILTON SIMMONS: *I think it picks*
11 *up right there.*

12 EDWARD GRAHAM: *You didn't give*
13 *her answer. The answer was, (reading):*

14 A. *That's true for any vacuum*
15 *delivery. You never know if it's going to be*
16 *a successful vaginal delivery until the baby*
17 *is out.*

18 THE COURT: *Are we ready to resume*
19 *the video?*

20 (VIDEO RESUMED)

21 PAGE 154, LINE 24 TO PAGE 156)

22 CHILTON SIMMONS: *Your Honor, I'm*
23 *sorry. There is more. I'm sorry, I know*
24 *that this is frustrating but we didn't have*
25 *the video, Your Honor.*

1 THE COURT: Go ahead.

2 CHILTON SIMMONS: If I could read,

3 ---

4 THE COURT: Go ahead.

5 CHILTON SIMMONS: Page 154, Line 11

6 (reading):

7 Q. Doctors don't have a crystal
8 ball to see inside into the future to guide
9 them in the present, do they?

10 A. No, but that would make life a
11 lot easier.

12 Q. That would be nice.

13 A. Yes, it would.

14 Q. Do you agree it was not a
15 breach of the standard of care for Dr. Rhett
16 not to have let Ms. Washington push longer?

17 A. Repeat that question.

18 Q. Do you believe that it was a
19 breach of the standard of care for Dr. Rhett
20 not to have let Ms. Washington push longer?

21 A. I think it was a breach of the
22 standard of care to move to the vacuum
23 delivery at that time. Again, and I keep
24 repeating myself, I believe based on the
25 baby, the tracing, with the standard

1 *customary decelerations that occur when a mom*
2 *starts pushing, you need to allow her body to*
3 *adjust to the new stress and do all those*
4 *things I've said before.*

5 CHILTON SIMMONS: Then that's where
6 the video picked up.

7 (VIDEO RESUMED AT PAGE 155, LINE 8)

8 THE COURT: Can you stop it there
9 a moment, (PAGE 177, LINE 3). How much
10 longer do you believe the deposition is?

11 EDWARD GRAHAM: Sixteen
12 deposition pages, some of which may have been
13 redacted.

14 THE COURT: Let's stop where we
15 are and take our break and then we will come
16 back and finish this afterwards. If you wish
17 to go outside, we will make that opportunity
18 available to you. Let's all remain where we
19 are while our jury returns to the jury room.

20 (JURY OUT @ 3:47 P.M.)

21 THE COURT: All right, we will be
22 in recess approximately fifteen minutes.

23 (BRIEF RECESS 3:48 - 4:00 P.M.)

24 COURT REPORTER: At this time I
25 marked in the stipulation as Court's Exhibit

1 PAGE 117, LINE 190, LINE 9)

2 EDWARD GRAHAM: Thank you.

3 CHILTON SIMMONS: Your Honor,

4 I ---

5 THE COURT: Is there an objection?

6 CHILTON SIMMONS: Your Honor, I

7 did just have one final question.

8 THE COURT: You may publish it.

9 CHILTON SIMMONS: My last question

10 was, Page 190, Line 23 (reading):

11 Q. Doctor, my question is, Dr.

12 Rhett's reason for intervention with the

13 vacuum was Jayden's declining fetal heart

14 strips; is that correct?

15 A. That's what the doctor stated.

16 EDWARD GRAHAM: Your Honor, also,

17 some of my designation was left off. Could I

18 publish that, please?

19 THE COURT: Have you reviewed it

20 with her?

21 EDWARD GRAHAM: (Sidebar with Ms.

22 Simmons) ---

23 THE COURT: Is there any

24 objection?

25 CHILTON SIMMONS: Your Honor,

1 there's five pages.

2 THE COURT: Well, is there -- is
3 there an objection?

4 CHILTON SIMMONS: It is cumulative,
5 Your Honor. We would object to ---

6 THE COURT: Sustained. Counsel,
7 I decline your request to publish. It was
8 your technical team that put together the
9 video. If it was left off, that would be
10 through your error. I deny your request to
11 publish further.

12 EDWARD GRAHAM: I understand.

13 THE COURT: Anything further now
14 with regard to the video? (No response).
15 Hearing nothing, please call your next
16 witness.

17 MARY WATERS: Your Honor, at
18 this time the plaintiff calls Sarah Rentz.

19 (WITNESS TAKES STAND)

20 MARIE RENTZ, being duly sworn to
21 tell the truth, the whole truth and nothing
22 but the truth, testified, as follows:

23 DIRECT EXAMINATION

24 BY MARY WATERS:

25 Q. Good afternoon, Ms. Rentz. Thank you

1 for being here today. Could you please tell
2 us where you live?

3 A. I live in West Ashley.

4 Q. West Ashley?

5 A. Yeah.

6 Q. You're going to have to speak up --
7 (inaudible), and I'll try to do the best.

8 A. Okay.

9 Q. Tell us a little bit about your
10 background, your education.

11 A. I went to the College of Charleston, got
12 a bachelors in Psychology; then I went to
13 MUSC and got a masters; and ---

14 COURT REPORTER: I'm sorry. Could
15 you speak a little slower and louder.

16 THE WITNESS: Yes, ma'am.

17 DIRECT EXAMINATION CONTINUED

18 BY MARY WATERS:

19 Q. (Inaudible).

20 A. Okay. I have a masters in Occupational
21 Therapy, from MUSC.

22 Q. What is your occupation?

23 A. I am an occupational therapist.

24 Q. Where are you employed?

25 A. Charleston Pediatric Rehabilitation.

1 Q. How long have you been there?

2 A. Since February of 2007.

3 Q. How long have you been an occupational
4 therapist?

5 A. Since January of 2007.

6 Q. Can you explain to the Ladies and
7 Gentlemen of the jury exactly what is an
8 occupational therapist?

9 A. An occupational therapist, as far as
10 pediatrics is concerned, we work on the
11 body's motor skills, so anything to do with
12 the hands, handwriting, things like that
13 nature. We also do any other activities,
14 anything that you would do in your daily life
15 -- not only in childhood. So we work on
16 daily living skills as far as dressing,
17 bathing, eating, feeding, uh, hygiene,
18 grooming, things of that nature. We also do
19 some sensory skills, which would be for
20 children who cannot regulate their own
21 bodies.

22 Q. Can you define that for me, please?

23 A. Yes. An example would be -- the best
24 one would be like if you were sitting on a
25 couch and even though you are not cold, you

1 will put a blanket on yourself. That's very
2 common. These children's bodies do not have
3 that and we -- so it is a way of teaching
4 them -- (indecipherable).

5 Q. What are some of the tools that you use
6 for working on pediatric occupational therapy
7 matters?

8 A. We use the same equipment but we also
9 have swings and things where they can extend
10 or they can go straight ---

11 Q. I'm sorry, could you slow down?

12 A. Sorry. We also, uh, within my room we
13 cook meals, everything that has to do with a
14 meal, with a microwave, we do not have a
15 stove but we do sequencing like making
16 sandwiches or making something like pudding.
17 We also do handwriting where we use pencils.
18 We do lots of things like crafts. We do
19 thing like wardrobing (phonetic), things of
20 that nature to work to, uh, work on visual
21 perception. We also use different things --
22 balls, things like that.

23 Q. What skills would you be trying to
24 develop, say, by using something like balls?

25 A. Using balls, we work on strengthening

1 using the balls, work on core strength, --
2 well, everything -- muscles.

3 Q. Can you explain to us what you mean by
4 core strength?

5 A. Core strength would be your abdominal
6 muscles, your trunk.

7 Q. What impact does weakness of core
8 strength have?

9 A. It would affect balance, it would affect
10 you as far as your strength within your
11 shoulders, it would affect your posture, uh,
12 (pause).

13 Q. Do you -- as you provide occupational
14 therapy to children in pediatric occupational
15 therapy, what are some of the reasons that
16 children are given occupational therapy?

17 A. Developmental delays for many types of
18 reasons, whether they are delayed in school
19 or whatever. If it is a matter of core
20 strengthening, we might start with weight
21 bearing and then we go on to skills such as
22 writing, dressing, tying shoes, buttons,
23 putting on shirts, taking off pants. Things
24 of that nature.

25 Q. You said that you work with children.

1 with developmental delays. Are there varying
2 diagnoses that lead to the developmental
3 delays in children that you work with?

4 A. Yes. I've had autism, had brain
5 injuries, we've had strokes from birth, we've
6 had, uh, different types of malformations of
7 the brain.

8 Q. If there are genetic disorders that you
9 work with, with children?

10 A. There are.

11 Q. Do you know Jayden W. ?

12 A. Yes, I do.

13 Q. How long have you known Jayden?

14 A. Since October of 2007.

15 Q. Have you been providing occupational
16 therapy services to Jayden since that time?

17 A. Yes, ma'am.

18 Q. Tell us about the things that you work
19 on with Jayden.

20 A. As of now or ---

21 Q. Let's start from the beginning. You
22 don't have to tell us everything but what are
23 some of the things that you've worked with
24 Jayden on in your role as an occupational
25 therapist.

1 A. Well, we had to work on buttoning, he
2 had to learn to put on shirts. We've done
3 shoe tying. We have worked on making small
4 simple meals, sequencing on how to put them
5 together safely. We work on strengthening as
6 far as walking, his arm strength and his core
7 muscle strength that we were talking about
8 earlier. We are focusing right now on his
9 visual perception to improve his reading
10 skills, to be able to function and, uh, also
11 working on -- sorry -- learning skills.

12 Q. How old was Jayden when you started
13 working with him?

14 A. He would have been five.

15 Q. Was he able to perform at the level of,
16 in your experience, a typical five-year-old?

17 A. No.

18 Q. Skills that they would have?

19 A. No.

20 Q. What were some of the weaknesses that
21 you saw in Jayden's performance, if any?

22 A. In Jayden's performance. Just the self-
23 help things like being able to get dressed on
24 his own. He was not able to identify colors,
25 he had difficulty with his handwriting,

1 holding things correctly. He had an
2 inability to move things from this fingers to
3 his palms, things like that.

4 Q. Are those things that you would expect a
5 typical five-year-old to be able to do?

6 A. Yes..

7 Q. And since working with Jayden, have you
8 had an opportunity to note progress?

9 A. Yes, we have. His progress has been
10 slow but -- he's made progress but he does
11 not -- he's not a typical eight-year-old.

12 Q. Why don't we take a look at your most
13 recent occupational progress notes for
14 Jayden.

15 MARY WATERS: Your Honor, we
16 would move to enter Exhibit 14-514, 516, 517,
17 5198, 519.

18 THE COURT: Is there any
19 objection?

20 CHILTON SIMMONS: No, sir, Your
21 Honor.

22 THE COURT: Without objection,
23 it's in evidence and you may publish it.

24 DIRECT EXAMINATION CONTINUED

25 BY MARY WATERS:

1 Q. Ms. Rentz, the projector is very loud,
2 please make sure that you keep your voice
3 elevated.

4 A. Okay.

5 Q. The first progress note that I would ask
6 you to look at is dated June 2, (inaudible).

7 A. Okay.

8 Q. Do you have that progress note in front
9 of you?

10 A. Yes.

11 Q. Does your file show that -- (inaudible).

12 A. At the top is just demographic
13 information and we have his occupational
14 therapy notes along the side.

15 Q. As you have sessions with Jayden, do you
16 make notes of his occupational therapy and
17 his progress?

18 A. Yes. I know that there are some notes
19 where I have the student also write things
20 down, which are then cosigned by me.

21 Q. When you cosign a note, do you
22 personally review the entire time to
23 determine whether it is accurate or not?

24 A. Yes.

25 Q. Recognizing the difficulty of trying to

1 read some of this (displaying by projector),
2 can you describe for us -- just describe for
3 us what those records tell us or tell you as
4 an occupational therapist?

5 A. This side of the note will tell us his
6 demographic information.

7 Then we have listed all the goals that
8 we are working on, on the left-side, so that
9 column is the baseline where the goal started
10 from. Sometimes they will be upgraded
11 throughout treatment, so it is really the
12 first time that we have addressed the issue.

13 Then in the middle is the date that he
14 was seen and what we saw as to each of those
15 goals.

16 Then at the end of the month we do a
17 note where we say whether the goal was
18 achieved or not, what level it is.

19 Q. Let's look at the goals. Can you tell
20 us what the goal was and whether or not
21 Jayden had achieved the goal by June -- by
22 the end of this period shown on the progress
23 note.

24 A. Our first goal, Jayden will complete two
25 moderately difficult pattern but no more --

1 it's a visual perceptual goal. Then the
2 second is his reading.

3 Q. Can you tell us specifically what you
4 did ---

5 A. What these are is a book that -- one
6 thing that we do, there is a book that has
7 different activities in it and what they are
8 is that on the top there is a picture and on
9 the bottom there will be half a picture and
10 then dots on the other side. What they do
11 is, he has to complete the picture to look
12 like the top picture.

13 Q. Did Jayden progress with that goal?

14 A. He did progress with that goal and he
15 did achieve that goal by the end of the
16 month. Then we upgraded the goal so that he
17 would be able to complete it with no more
18 than two mistakes, at first it was four
19 mistakes.

20 Q. That's what you do when you achieve a
21 goal, you upgrade or abandon the goal?

22 A. No, you continue working on it once it
23 is upgraded.

24 Q. What happens if you abandon a task or a
25 goal?

1 A. You'd write "discharged goal". You
2 typically don't want to abandon a goal.

3 Q. Why not?

4 A. Because there will be regression.

5 Q. Can you explain to us what you mean by
6 regression?

7 A. Skills will be lost over time if they
8 are not practiced daily. Like many things
9 that you do in your daily life, if you don't
10 do them every day that become harder for you.

11 Q. And have you -- does Jayden exhibit
12 regression in certain goals that he's
13 achieved?

14 A. There have been some things, such as
15 buttoning, but we work on it for a very long
16 time until we finally master it. Then moving
17 on to other goals with dressing, he has
18 progressed. It is very difficult for him, he
19 can button but it takes him increased time
20 for him to button a shirt.

21 Q. Would you expect that in a typical
22 eight-year-old?

23 A. Yeah (sic).

24 Q. You would expect him not to be able to
25 button his shirt?

1 A. He should be able to button his shirt.

2 Q. So Jayden has -- in your observation and
3 in your experience, Jayden is -- is he or is
4 he not buttoning at a level of a typical
5 eight-year-old?

6 A. He is delayed in buttoning at this time.

7 Q. What is next goal?

8 A. The second goal is that Jayden will
9 write two sentences on one-inch line paper
10 with good formation, spacing and sizing.
11 That's a typical handwriting goal, to be able
12 to write and not only make his letters
13 correctly with good form but to space them.
14 Jayden has a tendency to write his words
15 together without spacing between them, so
16 they are very difficult to read. Sizing is
17 either writing them too big or too small
18 within the lines.

19 Q. Did Jayden meet this goal that day?

20 A. He did not. He's very inconsistent, his
21 handwriting.

22 Q. What is the next one?

23 A. Jayden will demonstrate increased
24 strength and bilateral coordination by crab-
25 walking -- that is you're walking on your

1 hands and feet, your hands are behind you --
2 it's very hard. That's to work on his arm
3 strength, core strength. Jayden achieved
4 that goal by the end of the month.

5 Q. At what age would you expect a typically
6 developed child to be able to perform the
7 crab walking?

8 A. Typically I've had it done by four and
9 five-year-olds.

10 Q. And this was done this year, with Jayden
11 as an almost eight-year-old?

12 A. Yes.

13 Q. What do you have next?

14 A. The next goal is that Jayden will
15 complete a three-step task with no more than
16 one verbal cue. We work on this goal by
17 making lunches. We also made pudding, mini
18 pizzas. He had the directions written out and
19 he had to sequence the activity, then go in
20 the kitchen and actually perform the
21 activity.

22 Q. Tell us specifically what you mean by
23 "sequencing".

24 A. Well, what we do is that we would write
25 out the different steps. For example, making

1 a sandwich: going to the cupboard, getting
2 the bread, opening the bread, placing the
3 bread on a plate, then using whatever we make
4 it. We have him read the directions, put the
5 directions in order as to what he would do
6 first to what he would do last. Then we
7 would have him actually go into the kitchen
8 and follow the directions to complete the
9 task.

10 Q. How was Jayden's performance on the
11 sequencing tasks?

12 A. He typically needs cues between steps
13 even with them written down for him. We
14 simply have to verbally cue him, tell him
15 what to do next and even start showing him
16 the directions.

17 Q. Is this sequencing for tasks that you
18 would expect typical eight-year-olds to be
19 able to do?

20 A. Yes.

21 Q. Moving on to the next one?

22 A. Jayden will complete a ten by ten word
23 search, demonstrating visual scanning with no
24 verbal or manual cues. This is a goal, again
25 it is a mental perceptual goal really working

1 on being able to scan letters from left to
2 right as you would do with reading. When we
3 first started this goal, Jayden was unable to
4 find words. We started the goal actually
5 with just reading the lines of letters. He
6 would skip certain letters or he would skip
7 down certain lines, so we really had to block
8 things out. It's still very difficult for
9 him to do that, word search.

10 Q. Why is being able to do a word search an
11 important goal?

12 A. Well, it is actually not the word search
13 itself but it is important -- visual scanning
14 is important because if you don't -- if you
15 can't visually scan, you know, you can't
16 read. To really learn that step by step,
17 that's that process. To be able to visually
18 process it in your head, develop those brain
19 skills and -- visual scanning skills to be
20 able to organize what is going on in your
21 head.

22 Q. How did Jayden do with this goal?

23 A. He was able to complete a ten by ten
24 word search with moderate assistance. So
25 -- about fifty percent assistance to attain

1 the goal.

2 Q. So you're saying that goal was achieved
3 or was not achieved by the end of the period?

4 A. It was not achieved.

5 Q. Would you say that Jayden has made
6 improvement with his therapy?

7 A. Yes, he has made improvements.

8 Q. In your opinion as an occupational
9 therapist, do you believe that Jayden should
10 achieve a point where he can stop
11 occupational therapy?

12 A. I think he will always have to have some
13 sort of maintenance, some forms of reminders,
14 just because that's -- I feel like the gap is
15 actually going to grow as he gets older and
16 the skills needed become harder and harder
17 for him to accomplish.

18 Q. You said the "gap"?

19 A. Meaning the gap between -- like right
20 now, he could be -- even though he is eight,
21 he's a couple of years behind. The older
22 that he gets and the more detailed things are
23 for him, the more difficult things are for
24 him, he will become further and further
25 behind.

1 Q. Now, I would like for you to turn your
2 attention to the evaluation that --
3 (inaudible). Can you describe for us -- what
4 is this document?

5 A. This document is an evaluation form that
6 we use. Once a year we will update our
7 evaluation and perform new testing to see
8 what level of functioning that they would be
9 within that year, to see progression or
10 regressions or to set new goals.

11 Q. What date is this evaluation?

12 A. This was performed on June 9th, 2010.

13 Q. Can you -- describe for us the treatment
14 plan, his weaknesses and his strengths, as
15 recorded as his treatment.

16 A. The treatment plan, uh, the first thing
17 is ADR training, which would be your daily
18 activities such as dressing, freeing,
19 hygiene, grooming-type skills.

20 The second thing that it lists is
21 therapeutic motor activities which would be
22 any type of handwriting, anything to do with
23 actual grasping different object.

24 The third is therapeutic visual motor
25 activities, which would be perception and

1 being able to perform an activity using his
2 hands and his eyes, so hand-eye coordination
3 type activities.

4 As far as his weaknesses, what we have
5 listed is decreased bimotor skills, decreased
6 visual motor skills, decreased visual
7 perceptual skills, decreased independence
8 with activities of daily living, uh, poor
9 trunk muscles and also we have poor balance
10 with reaction.

11 Q. Tell us about his strengths.

12 A. Strengths that we have listed as strong
13 family support, awareness of his environment,
14 pleasant and friendly nature, and motivation
15 to conform.

16 Q. Is it fair to say that Jayden tries?

17 A. Yes, he does try.

18 Q. And he has strong family support?

19 A. Yes.

20 Q. Do you know Jamsetta Washington?

21 A. Yes, I do.

22 Q. Do you have communication with Jamsetta
23 in the course of providing occupational
24 therapy services to Jayden?

25 A. Yes, she brings him to therapy most of

1 the time. So when she's there we do discuss
2 the activities of the day and how he
3 performed. If she has any questions or
4 concerns at the end of the treatment, we
5 discuss that.

6 Q. Are there times when somebody else might
7 bring Jayden to therapy?

8 A. His grandmother brings him sometimes
9 also.

10 Q. And does the family communicate with you
11 about the goals and the skills that you are
12 working on?

13 A. Yes, we do discuss them.

14 Q. And does Jayden continue to work on
15 those things when he's not in therapy
16 session?

17 A. I believe that he does work on the
18 skills. If he did not, he would not make the
19 same progress that you'd see that he does.

20 Q. And are they consistent with bring him
21 to his therapy sessions?

22 A. Yes. If they are not there, they call
23 to let us know and try to reschedule.

24 Q. You told us about Jayden's strength. As
25 an occupational therapist, are there any

1 things that Jayden does not that give you
2 concern about his ability to ---

3 A. I do feel that his sequencing skills and
4 perceptual skills, I find those to be very
5 concerning. To be able to learn and to be
6 able to function in today's society, you have
7 to be able to read and be able to sequence an
8 activity like bathing yourself, making a meal
9 for yourself.

10 Q. Are these things that Jayden has
11 difficulty doing?

12 A. Yes, they are.

13 Q. I think you said earlier that -- what
14 are you working on?

15 A. We are working on identifying the
16 different coins -- Jayden is able to -- we
17 really started practicing it in the month of
18 July, so it's not -- I mean -- but he is able
19 to identify pennies but he is not able to
20 identify what is a dime or a quarter. He
21 knows the names of them but if I showed him
22 the forms he cannot tell me which is which or
23 what they are worth.

24 Q. Why does that cause you concern? Do you
25 expect a typical eight-year-old to be able to

1 identify money?

2 A. Yes, definitely. They should be able to
3 identify coins and be able to count money.

4 Q. Do you feel that Jayden will have --
5 (inaudible).

6 A. I am not sure.

7 Q. If Jayden were handed a handful of
8 change to go purchase something from the
9 store, is it your opinion and your
10 observation that he would be able to count
11 out the money for purchasing an item?

12 A. No. He cannot imagine how coins work at
13 this time, so he would not be able to count
14 to be able to purchase an item.

15 Q. How about working with a calendar?

16 A. We have only done a calender for a month
17 but we've been living with it for the last
18 couple of months, I'd say since about April
19 we've been talking about it.

20 Q. As a specific goal?

21 A. Yes.

22 Q. How often do you see Jayden?

23 A. I see him for once a week for sixty
24 minutes a session.

25 Q. Do you know whether or not he is seeing

1 any other therapists currently?

2 A. He does. He receives speech and p.t.,
3 also within our clinic, and I believe that he
4 receives therapy within the school system
5 too: occupational therapy, physical therapy
6 and speech.

7 Q. Based on your experience, are you able
8 to evaluate what age range skills that Jayden
9 has achieved thus far?

10 A. Within reason, yes. We don't actually
11 like to look at the ages, but as far as
12 percentage of children his age where he
13 performs.

14 In his last evaluation, the one that is
15 up there, we did two different types of
16 testing on him. One was a wide-range
17 assessment of visual, motor testing his
18 motor, bimotor, his visual motor and his
19 visual spatial processing.

20 As far as his visual motor skills he was
21 in the ninth percentile, meaning that ninety-
22 one children in this age range scored higher
23 on the exam than he did.

24 As far as vision spatial, he was in the
25 second percentile. That's matching pictures,

1 touch and match. It gets very detailed,
2 showing puzzle pieces and such.

3 The last part was the coordination,
4 moving the right hand and the left hand
5 separately, and he was in the first
6 percentile for that, meaning that ninety-nine
7 out of a hundred children would have scored
8 higher on that.

9 The second test, which breaks down
10 visual spatial skills, which shows exactly
11 where the deficits are, overall on that test
12 he scored below the first percentile; meaning

13 that ninety nine out of a hundred children
14 would score higher than he did.

15 Q. Ms. Rentz, what is your -- I understand
16 you have short-term goals for specific
17 skills. What is your long-term goals for
18 Jayden?

19 A. The biggest goal, especially as far as
20 occupational therapy is concerned, is making
21 him as independent as he can possibly be.

22 Q. Does he have the independence that you
23 typically see in an eight-year-old?

24 A. No.

25 MARY WATERS: Ms. Rentz, those

1 are the all the questions I have. Please
2 answer any questions that defense counsel may
3 have.

4 THE COURT: Cross-examination of
5 this witness.

6 CROSS EXAMINATION

7 BY CHILTON SIMMONS:

8 Q. Good afternoon, Mr. Rentz.

9 A. Good afternoon.

10 Q. You would agree that Jayden's progress
11 has been steady and improving?

12 A. I would agree, yes.

13 Q. And that's good news?

14 A. It is good news, but he is still delayed
15 as far as his skills.

16 Q. He can read?

17 A. He can read, he has difficulty reading.

18 Q. And he's moving up to second grade on
19 time?

20 A. Yes.

21 Q. And he's spends most of his day in a
22 regular classroom as opposed to special ed?

23 A. I am not aware of what he spends his
24 classroom -- I know that he receives other
25 therapies, but I am not sure of how much he

1 receives.

2 Q. It is not part of your job to monitor
3 his school work?

4 A. I do not monitor him out of therapy, no.

5 Q. Are you aware that Jayden is able to
6 play sports like basketball?

7 A. Yes, he does.

8 Q. And you are not qualified to say what
9 Jayden will be doing or will be capable of
10 doing in the future such as in adulthood?

11 A. No, I am not.

12 Q. And you don't have an opinion at this
13 point of how long you will need to work with
14 him, is that true?

15 A. I do believe that I will need to work
16 with him until eighteen years old. I do not
17 know -- I don't have a time cap.

18 Q. And you are not giving a medical opinion
19 on the cause of his delays?

20 A. No, I am not.

21 CHILTON SIMMONS: Just one moment.

22 Those are all my questions. Thank you.

23 THE COURT: Is there redirect?

24 MARY WATERS: No, sir.

25 THE COURT: You are free to leave.

1 further questions.

2 THE COURT: Thank you. You may
3 step down.

4 (WITNESS STEPS DOWN)

5 THE COURT: Please call your next
6 witness, Counsel.

7 MARY WATERS: We call at this
8 time Jamsetta Washington.

9 (WITNESS TAKES STAND)

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

13 DIRECT EXAMINATION

14 BY MARY WATERS:

15 Q. Good morning, Ms. Washington.

16 A. Good morning.

17 Q. We've heard a lot of testimony in the
18 last week and a half. Thank you for being
19 here through it all. Can you tell the Ladies
20 and Gentlemen of the jury where you live?

21 A. I live in North Charleston, South
22 Carolina.

23 Q. Who lives with you?

24 A. Jayden W---, my son.

25 Q. And, uh, tell us a little bit about your

1 childhood, growing up.

2 A. I grew up in West Ashley, I attended St.
3 Andrews High School.

4 Q. Did you graduate from high school?

5 A. Yes.

6 Q. And what did you do after high school?

7 A. After high school, I went to Allen
8 University in Columbia. I attended there
9 for, I think, a year and a half.

10 Then I transferred to the University of
11 South Carolina.

12 Then I went -- I didn't finish at USC.

13 I had some difficulties there academically.

14 So, uh, then I went to Trident Technical
15 College, and I didn't finish there.

16 I just grad--, -- I just finished
17 college in May, as a medical assistant, and I
18 got certified last month.

19 Q. Did you have to take an exam or a
20 certification test?

21 A. Yes, last month.

22 Q. How did you do?

23 A. I passed it.

24 Q. Congratulations. And you said that you
25 had some difficulty at USC. When did you

1 transfer to USC?

2 A. I think that it was August 2001.

3 Q. What happened during that Fall 2001?

4 A. I got pregnant that semester.

5 Q. Did that have any impact on your focus
6 on your studies?

7 A. It did.

8 Q. Did you continue at USC the next
9 semester?

10 A. Yes, I did.

11 Q. How did you do that semester?

12 A. I didn't do so well. I was just focused
13 on my pregnancy and -- (pause).

14 Q. Ms. Washington, when did you find out
15 that you were pregnant?

16 A. The end of October my cycle was late, so
17 I figured that I was pregnant. Then in
18 November, like the first week of November, I
19 went to the Health Department, got a
20 pregnancy test and found out that I was
21 pregnant.

22 Q. So your pregnancy was confirmed in
23 November?

24 A. Yes.

25 Q. What did you do when you realized that

1 you were late on your period?

2 A. When I realized that I was late on my
3 period, I stopped, uh, going out and using
4 alcohol at the time.

5 Q. You were a college student at the time?

6 A. Yes.

7 Q. At that time you were -- what were some
8 of your social activities?

9 A. I would go out with some of my friends,
10 we'd just go out and have some drinks.

11 Q. Did you continue to have any drinks
12 whatsoever after period was late?

13 A. No.

14 Q. Do you know your exact date of
15 conception?

16 A. Not the exact date.

17 Q. Do you remember when you realized that
18 your period was late?

19 A. It was the end of October.

20 Q. And at that point you said that you went
21 to the Health Department?

22 A. Yes.

23 Q. And when you went to the Health
24 Department, did you talk with anyone there?

25 A. After I had a positive pregnancy test, I

1 talked to -- I think it was a counselor. And
2 she told me, counseled me on the risks of
3 pregnancy and she counseled me on, uh, all
4 the negative impact of anything that was
5 happening. So, (pause).

6 Q. By negative impact, you mean -- things
7 that were happening when?

8 A. Negative impact -- because I told her
9 that I was a social drinker and she said, you
10 know, I told her that I'd stopped when I
11 thought that I was pregnant. And she told me
12 about the negative impact if I continued to
13 use alcohol, so she counseled me on that.
14 And she counseled me on just how pregnancy
15 works and things are done.

16 Q. At some point, did you start taking
17 vitamins?

18 A. Yes, I did.

19 Q. When did you do that?

20 A. When I got a positive pregnancy test, I
21 spoke with my sisters who had already went
22 through a pregnancy and they told me to get
23 some Flintstone vitamins, and I started
24 taking them.

25 Q. Did you get chewable or swallow?

1 A. Chewable.

2 Q. Why Flintstone vitamins?

3 A. Uh, she just -- one of my sisters told
4 me that throughout her pregnancy that she
5 couldn't tell the little pills, so her doctor
6 told her that Flintstone vitamins were just
7 as well, just as good as the other ones; so
8 that's why she took those.

9 Q. And at some point did you go back to the
10 Health Department?

11 A. Yes, I went back at the end of November.

12 Q. Okay. Why did you go back at the end of
13 November?

14 A. She told me that I needed another
15 pregnancy test, so I went back in at the end
16 of November; and -- it was still positive and
17 they gave me prenatal pills.

18 Q. At any time between early November at
19 the Health Department and the late November
20 visit, did you consume any alcohol at all?

21 A. No, I did not.

22 Q. Following that late November visit, what
23 did you do to care for yourself and to
24 prepare for the birth of the child?

25 A. I started eating better, taking my

1 vitamins, -- (pause).

2 Q. And did you seek prenatal care from an
3 obstetrician at some point?

4 A. Yes, I went back to the Health
5 Department and they helped me, uh, find an
6 Ob-Gyn.

7 Q. What Ob-Gyn did you go to see?

8 A. Uh, it was an OB clinic in Columbia,
9 South Carolina.

10 Q. Jamsetta, at any point after you found
11 out that you were pregnant, did you consider
12 terminating your pregnancy?

13 A. No.

14 Q. Were you in any way encouraged to
15 terminate the pregnancy?

16 A. Uh, -- yes, I was encouraged.

17 Q. Who suggested that you terminate the
18 pregnancy, if anyone?

19 A. Jayden's father.

20 Q. Tell us a little bit about Jayden's
21 father. How long had you known him before
22 you became pregnant?

23 A. I'd known him for a couple of months.
24 He was going to Allen University when I met
25 him. And -- what else do you want to know.

1 about him?

2 Q. Tell us a little bit about his back-
3 ground.

4 A. He was adopted by his aunt, and his
5 father lived in Germany, and most of the
6 family was in Columbia.

7 Q. So when you say that he was adopted, I
8 think the perception is that generally people
9 who are strangers to the family adopt a
10 child. Was he indeed adopted within his own
11 family?

12 A. Yes, he was.

13 Q. So the aunt that adopted him, what was
14 the blood relation of that aunt to him?

15 A. It was his mother's aunt.

16 Q. What was his name? Jayden's father?

17 A. Christopher Geise.

18 Q. Now, did Christopher want you to go
19 forward and have the baby?

20 A. No, he wanted me to have an abortion.

21 Q. Did you at any time consider terminating
22 this pregnancy?

23 A. No.

24 Q. At some point did you talk with
25 Christopher about whether or not his family

1 had any history of genetic disorders or
2 physical problems?

3 A. Yes. When I found out that I was
4 pregnant, I just asked him about family
5 history and he said that there was no
6 problems with his family.

7 Q. Tell us about your prenatal care after
8 our first visit with Palmetto Health.

9 A. I went to Palmetto Health until I came
10 back home to Charleston and then advised me
11 -- I went to Lowcountry Ob-Gyn.

12 Q. When you were still in Columbia, how
13 often did you go to Palmetto Health for
14 prenatal care?

15 A. Whenever I had an appointment I went.

16 Q. Do you recall when your first
17 appointment was?

18 A. It was in January of 2002.

19 Q. At that point how far along in your
20 pregnancy were you?

21 A. I was -- I was still in the first
22 trimester.

23 Q. And you followed the schedule for
24 obstetrical appointments that was recommended
25 by Palmetto Health while you were in

1 Columbia?

2 A. Yes, I did.

3 Q. At some point did you have an ultrasound
4 done?

5 A. Yes.

6 Q. Do you remember when that was?

7 A. I am not sure. It was February -- it
8 was before I left Columbia. February, March
9 or April 2002.

10 Q. What kind of information did you find
11 out about at that point?

12 A. I found that it was a boy; I found out
13 that he was healthy, as far as she could tell
14 at the time; and -- that's it.

15 Q. At some point did you discuss your
16 pregnancy with your family?

17 A. Yes.

18 Q. What did you tell your family?

19 A. Well, I told my sisters as soon as I
20 found out. Then I told my mother.

21 Q. Do you remember how you came to tell
22 your mother about your pregnancy?

23 A. Well, she just noticed that I was
24 getting better and she asked me if I was
25 pregnant and I said yes.

1 Q. How did your family respond to your
2 pregnancy?

3 A. Everyone was excited.

4 Q. Did your sisters give you lots of
5 advice?

6 A. They did.

7 Q. How many children were there in your
8 family at the time, before Jayden was born?

9 A. I think there were six of them.

10 Q. We heard from Elnora earlier that she
11 has an eight-year-old daughter. Was that
12 daughter born before or after Jayden?

13 A. Before.

14 Q. How long before?

15 A. Her daughter was born in December 2001.

16 Q. So she had just been through it?

17 A. Yes. Then my other niece that is eight
18 years old, she was born in January 2002.

19 Q. Three children within an eight-month
20 period?

21 A. Yeah.

22 Q. So that's been good?

23 A. It is.

24 Q. Do they see each other very often?

25 A. Yeah.

1 Q. You said that you eventually decided to
2 move back to Charleston?

3 A. Yes.

4 Q. When was that?

5 A. It was May 2002.

6 Q. Why did you decide to move back to
7 Charleston?

8 A. I just didn't want to go through the
9 pregnancy by myself. I needed my family.
10 I wanted to move home.

11 Q. Did you move home to live with your
12 parents?

13 A. Yes.

14 Q. Who else was living there at the time?

15 A. My parents and my sister, her two
16 children.

17 Q. And at that point you sought prenatal
18 care, as well?

19 A. Yes.

20 Q. Where did you go for prenatal care?

21 A. It was Lowcountry Ob-Gyn. I think
22 that's the name of it.

23 Q. What doctors did you see when you went
24 to see Lowcountry Ob-Gyn?

25 A. I went to see Dr. Osborne.

1 Q. Now, when you started prenatal care at
2 Lowcountry Ob-Gyn, do you remember filling
3 out any forms?

4 A. Yeah.

5 Q. In those forms, do you recall that you
6 were asked -- do you recall what kind of
7 information that you were asked to provide?

8 A. It was just information about -- I think
9 that it was about my prenatal care and
10 doctors that I seen, things like that.

11 Q. Did you at all time indicate that you'd
12 consumed alcohol after finding out that you
13 were pregnant?

14 A. No. I did tell them that I used
15 alcohol. The question was alcohol and I told
16 them that I used alcohol but I didn't clarify
17 that I wasn't using at the time. But when I
18 saw alcohol, I just put how much I used to
19 use.

20 Q. How much that you used to use?

21 A. Yes, before I got pregnant. Yes, the
22 question was alcohol and I thought -- I told
23 them that I used alcohol, but I didn't -- I
24 didn't clarify that I wasn't using at the
25 time. I put how much I used to use before I

1 found out that I was pregnant, thought that I
2 was pregnant.

3 Q. Do you recall what your estimated due
4 date was?

5 A. It was -- I think it was July 8th.

6 Q. What date was Jayden born?

7 A. July 16th.

8 Q. You went beyond that due date?

9 A. Yeah.

10 Q. As you approached your due date, did you
11 continue to follow with prenatal care?

12 A. Yeah.

13 Q. And as your due date came and went, did
14 you see the doctors at Lowcountry Ob-Gyn?

15 A. I did. I saw Dr. Osborne.

16 Q. And when you saw Dr. Osborne, did you
17 have any discussions with him?

18 A. He told me that he was going to have to
19 induce my labor because I was already a week
20 overdue.

21 Q. So was the induction scheduled?

22 A. Yes.

23 Q. What was your understanding of what
24 induction of labor meant?

25 A. He basically told me that I would be

1 admitted to the hospital and he would come
2 there to give me some kind of medicine to
3 make the labor start up.

4 Q. Did that happen?

5 A. It did.

6 Q. When did you got to the hospital?

7 A. July 15th.

8 Q. And what do you remember about arriving
9 at the hospital?

10 A. I arrived at the hospital. I was a
11 little scared and nervous. Uh, -- got an IV
12 and labor progressed.

13 Q. Who was there with you when you went to
14 the hospital on July 15th?

15 A. My mother.

16 Q. Was your mother helpful to you?

17 A. She was.

18 Q. Did she try to keep you calm?

19 A. Yes.

20 Q. This was your first baby?

21 A. Yeah.

22 Q. This was your first pregnancy?

23 A. Yeah.

24 Q. How did it go on July the 15th.

25 A. How did it go?

1 Q. Yeah.

2 A. Like I said, I was nervous and scared, I
3 didn't know what to expect.

4 Q. Did you have Jayden on July the 15th?

5 A. No, I had him on July 16th.

6 Q. Was labor hard on July 15th?

7 A. No. I contracted -- it wasn't as bad as
8 it was on the 16th.

9 Q. Did you get any rest?

10 A. Yeah.

11 Q. And on the 16th, what do you remember
12 about July the 16th?

13 A. Dr. Osborne came in the morning of the
14 16th to give me an epidural and to break my
15 water, whatever. Then later on that evening,
16 that's when I felt the need to push.

17 Q. You said that Dr. Osborne -- you said
18 that you got an epidural?

19 A. Yeah.

20 Q. Did they help with the labor pains?

21 A. No.

22 Q. So -- were you feeling contractions?

23 A. Yeah.

24 Q. How did you feel about that?

25 A. Uh, I was in pain.

1 Q. Did you do some yelling?

2 A. Yeah.

3 Q. Did the contractions get stronger as
4 they progressed?

5 A. They did, later in the evening.

6 Q. And at some point did Dr. Rhett come in
7 to provide obstetrical care to you?

8 A. Yes, he did.

9 Q. What do you remember about Dr. Rhett?

10 A. Uh, -- he came in and checked me as
11 labor progressed.

12 Q. How you met him before that day?

13 A. No, I had never seen him.

14 Q. Did you recall the nurses or Dr. Rhett
15 telling you to push.

16 A. Yes. I was -- I don't know the exact
17 time but it was later that evening before I
18 got the urge to push.

19 Q. Tell us about that pushing?

20 A. Uh, it was hard. I mean, I didn't know
21 how to push and I was in a lot of pain and
22 just scared.

23 Q. Did you push for very long?

24 A. No, not that long.

25 Q. At that point did you feel exhausted?

1 A. No. But I did want a C-section because
2 I -- everyone told me that the pain was
3 different from a C-section, so I did ask for
4 a C-section.

5 Q. Do you know if there was any reason for
6 a C-section at that time?

7 A. No, I didn't know if there was a reason,
8 I just -- (pause).

9 Q. Were you scared?

10 A. I was very scared.

11 Q. So once you started pushing, tell us
12 what you remember, if anything, from that
13 period of time on until Jayden was born?

14 A. I started pushing and I just remember
15 the pain. Eventually Jayden come out and,
16 uh, then they took him to the nursery after I
17 had him. My sisters were going back and
18 forth to the nursery -- because usually when
19 I was in their labor, present for their
20 labor, you'd have the baby, they'd clean the
21 baby up, give them shots or whatever, and
22 bring the baby back. But they never brought
23 Jayden back.

24 I called the nurses station and asked if
25 they could bring him, and -- I had him about

1 7:00 or 7:30 p.m., and they didn't bring him
2 to me until about 2:00 a.m. When they
3 finally brought him to me, I had him for a
4 couple of minutes and they took him right
5 back.

6 Q. Let's back up a minute to when Jayden
7 was delivered. You said that -- you said
8 that you'd never seen Dr. Rhett before, did I
9 understand you?

10 A. That's correct.

11 Q. Once Jayden was born, did you know
12 whether or not the vacuum had been used in
13 his delivery?

14 A. No, I didn't know.

15 Q. When did you find out that a vacuum had
16 been used in his delivery?

17 A. I found out later that night -- or it
18 was the next morning.

19 Q. During that time, during labor when you
20 were pushing, did anyone tell you that it was
21 an emergency, that the baby needed to be
22 born?

23 A. No.

24 Q. Did anyone talk with you about the
25 possibility ---

1 JAY DAVIS: Objection to leading.

2 THE COURT: I sustain. Counsel,
3 your answer was contained within the
4 question.

5 DIRECT EXAMINATION CONTINUED

6 BY MARY WATERS:

7 Q. Did Dr. Rhett talk to you about the
8 procedure that he used to delivery Jayden?

9 A. No, he did not.

10 Q. Did he ask your permission to use a
11 vacuum?

12 A. No.

13 Q. Did he discuss the warnings associated
14 with using a vacuum?

15 CHILTON SIMMONS: Objection, Your
16 Honor. Leading.

17 THE COURT: It is attempting to
18 lead, Counsel. The appropriate question
19 would be ---

20 MARY WATERS: I'll rephrase.

21 DIRECT EXAMINATION CONTINUED

22 BY MARY WATERS:

23 Q. Were you aware of any risks associated
24 with a vacuum delivery?

25 A. No, I was not.

1 Q. Before that date, had you ever had any
2 awareness of a vacuum delivery?

3 A. No.

4 Q. So during your obstetrical care at
5 Lowcountry Ob-Gyn, was there ever any
6 discussion of the possibility of a vacuum
7 delivery?

8 CHILTON SIMMONS: Objection.
9 Leading.

10 THE COURT: I didn't hear the
11 question. There's feedback on the
12 — microphone. Please restate it for me,
13 please.

14 MARY WATERS: I asked her if
15 during her obstetrical care there was ever
16 any discussion about the possibility of
17 vacuum delivery, used in the delivery.

18 THE COURT: Overruled as to that
19 question. You may answer that, ma'am.

20 PLAINTIFF: No, there was not.

21 DIRECT EXAMINATION CONTINUED

22 BY MARY WATERS:

23 Q. When you were about to deliver Jayden,
24 did you hear Dr. Rhett request the vacuum?

25 A. No.

1 Q. If Dr. Rhett asked you whether or not
2 you would consent to using a vacuum, what
3 would your answer have been?

4 A. No, I would not.

5 Q. If Dr. Rhett had told you of the
6 increased risk of brain bleed associated with
7 delivering a baby at a mid pelvic station,

8 ---

9 JAY DAVIS: Objection. Leading,
10 compound.

11 CHILTON SIMMONS: Objection.

12 DIRECT EXAMINATION CONTINUED

13 BY MARY WATERS:

14 Q. --- what would your answer have been?

15 THE COURT: Just a moment. Your
16 objection is that, one, it is a compound
17 question. And, leading. I will overrule it
18 as to that. You will have cross-examination.

19 Any other objections? (No response).

20 Hearing none, go ahead. Please restate the
21 question.

22 DIRECT EXAMINATION CONTINUED

23 BY MARY WATERS:

24 Q. If Dr. Rhett had told you that there was
25 an increased risk of brain bleeding in using

1 a vacuum to deliver a baby at a mid-pelvic
2 station, would you have consented to the use
3 of a vacuum in the delivery of Jayden?

4 A. No, I would not.

5 Q. Earlier you were telling us about the
6 first time that you saw Jayden. What do you
7 remember about seeing Jayden for the first
8 time?

9 A. Uh, -- (pause) -- you talking about when
10 I had him or when I got him in the morning.

11 Q. You tell us what you remember.

12 A. After I had him, I just remember him --
13 looking at him inside the little bassinet
14 thing. He was just so cute. That's the
15 first thing I thought.

16 Q. When is the next time that you saw him?

17 A. At 2:00 a.m. in the morning.

18 Q. How as he doing at that point?

19 A. Well, to nurses brought him in and they
20 gave him to me. When I remember -- as soon
21 as I got comfortable with him, like a couple
22 of minutes, they took him away.

23 Q. Do you know why they took him away?

24 A. No.

25 Q. When did you see Jayden again?

1 A. I saw him again on the 17th, early in
2 the morning.

3 Q. Where did you see him?

4 A. In the nursery.

5 Q. How was he doing?

6 A. He was doing well. They told me to rush
7 to the nursery and that they were going to
8 him to MUSC and I just asked what was wrong
9 with him, and they didn't really answer any
10 questions. They say 'he not doing well, we
11 have to get him to MUSC as soon as possible.'

12 Q. Did anyone tell you why he was going to
13 MUSC?

14 A. They just kept saying that he wasn't
15 doing well, 'we have to get him to MUSC.'

16 Q. At some point did you find out why he
17 was transferred to MUSC?

18 A. Yeah.

19 Q. What was your understanding?

20 A. It was -- it was on the 17th of July.

21 Later on that night, maybe 9:00 or 10:00
22 o'clock, I am not sure of the exact time, but
23 IC called and they said that he had bleeding
24 on his brain.

25 I asked them what happened, how did he

1 get blood on his brain and they said ---

2 JAY DAVIS: Objection.

3 CHILTON SIMMONS: Objection, Your
4 Honor. Hearsay.

5 THE COURT: Sustained.

6 MARY WATERS: And I'm trying to
7 stop her from ---

8 DIRECT EXAMINATION CONTINUED

9 BY MARY WATERS:

10 Q. You can't tell us what anyone told you.

11 A. Okay.

12 THE COURT: We've haven't talked
13 about hearsay, Ladies and Gentlemen of the
14 jury. Let's talk about that for a moment.
15 It hasn't come up yet but it's a fairly
16 common objection.

17 You've probably all, as children,
18 played the game where you sit in a circle and
19 you whisper something and then it comes back
20 around and it'll be totally different by the
21 time it got around.

22 The hearsay rule basically prevents
23 someone from coming into court and saying
24 what a third person has said. The best
25 evidence of that is to bring that third

1 person in to say what they said, to prevent
2 confusion or unreliability.

3 Now, there are exceptions. There
4 are multiple exceptions to the hearsay rule.
5 You may hear us discuss some of these during
6 the course of the trial.

7 As to that question and answer, I am
8 going to sustain the objection. Please go to
9 your next question.

10 MARY WATERS: Yes, sir.

11 DIRECT EXAMINATION CONTINUED

12 BY MARY WATERS:

13 Q. So, Ms. Washington, when did you next
14 see Jayden?

15 A. I saw him in ICU on the 17th of July,
16 they let me see him for a few minutes.

17 Q. Was that at MUSC?

18 A. Yes, it was.

19 Q. And how was he doing at that time?

20 A. He had a lot of tubes running around his
21 body and they -- they said that I couldn't
22 stay, that I had to leave.

23 Q. Did you get to hold him?

24 A. No.

25 Q. What do you remember next?

1 A. The following morning, on the 18th, when
2 I went to see him they told me that he had to
3 have some kind of brain surgery because of
4 the bleed on his brain. I saw him before
5 they took him back.

6 Q. Did they discuss with you any risks of
7 the surgery?

8 A. Yes, they did. They informed me that I
9 would have to sign consent because he could
10 die during the procedure.

11 Q. How did he do in the procedure?

12 A. He did well.

13 Q. Do you know what that procedure was?

14 A. They just told me that they would have
15 to take some blood off his brain.

16 Q. Did you eventually get to bring Jayden
17 home?

18 A. I took him home a couple of weeks later.

19 Q. And how did he do once he was home?

20 A. Well, when we was at home he was very
21 sick, he had a lot of doctors appointments.

22 Q. What kind of doctors appointments?

23 A. He had to see lots of different
24 specialists. He had a lot of problems.

25 Q. Did Jayden (inaudible).

1 A. Yes.

2 Q. Did he have any other procedures?

3 A. Yes, he had a G-tube button and he had a
4 missing bone (phonetic).

5 Q. Can you tell us what that is?

6 A. It's when they place like a feeding tube
7 in their stomach because he had problems with
8 acid reflux, so he was not gaining weight.
9 He had a G-tube button for, I think it was a
10 year.

11 Then he had a missing bone -- it's where
12 they take like from your esophagus and wrap
13 it around so that you can throwing up so
14 much.

15 He also had -- he saw the neurologists.
16 He had lots of CAT scans.

17 He had hernia surgery.

18 That was about it.

19 He just went to a lot of different
20 specialists, started different therapy.

21 Q. How did he come to start therapy?

22 A. Well, after he left ICU the doctors and
23 nurses gave me a lot of information. They
24 told me that someone from BabyNet would be
25 contacting me since he had so much

1 disabilities, developmental disabilities that
2 he would need to start getting different
3 therapies.

4 Q. What do you know about BabyNet?

5 A. BabyNet is just -- they come to your
6 home and help your child with developmental
7 disabilities, to try to progress the child.
8 They come to the home and help with therapies
9 and they refer you to different private
10 therapy.

11 Q. How did Jayden do?

12 A. He did fine.

13 Q. Do you remember when Jayden crawled?

14 A. I know that he was over a year old when
15 he started crawling.

16 Q. Do you remember how old he was when he
17 walked?

18 A. I think he was -- he was almost two and
19 a half when he started walking, two and a
20 half or a little past that.

21 Q. Did he continue to receive therapy?

22 A. He did. Once he finally did start
23 walking, they gave him braces on his legs and
24 he had a walker for a while.

25 Q. How did he like having braces on his