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1 V I R G I N I A:
2 IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE
3 - - - - -

4 MARISSA R. SIMPSON, an infant :
who sues by her father and :
5 next friend, CHRISTOPHER L. :
SIMPSON, :
6 :
Plaintiff :
7 :
v. : CASE NO. CL03-213
8 :
DAVID ROBERTS, M.D., et al., :
9 :
Defendants :
10 :
- - - - -

MAY 17, 2012
9:00 A.M.

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12
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14 HEARD BEFORE:
15 THE HONORABLE WILLIAM D. BROADHURST
16

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18
19 CENTRAL VIRGINIA REPORTERS
P. O. BOX 12628
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* * * * *

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1 The following is an excerpt of the
2 proceedings heard on May 17th, 2012, before the
3 Honorable William D. Broadhurst, Judge of the
4 Circuit Court for the City of Roanoke, and a jury
5 of seven, sitting at Roanoke, Virginia.

6
7 (The court reporter, Shirley S.
8 Bassett, RPR, was duly sworn.)

* * * * *

10

11
12 MR. MALONE: Thank you, Your
13 Honor.

14 May it please the Court, ladies
15 and gentlemen, and Chris and Marsha and
16 the family, everyone, and defense counsel
17 and Dr. Roberts and Dr. Terry.

18 I want to start with something the
19 judge said what seems like forever ago,
20 and you might have forgotten it, but it
21 sent a little chill down my spine. When
22 you first were sworn in as jurors he
23 said, "This is the front line where
24 democracy is lived out."

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1 I like to tell people, kind of put
2 in perspective what's the role of the
3 jury in our society just a little bit,
4 because the decision you reach today
5 could be one of the most -- or tomorrow
6 or whenever, one of the most momentous
7 decisions that you will ever make.

8 There was a famous guy back in the

9 1830s who really nailed it. He was named
10 Alexis de Tocqueville and he wrote a
11 famous book called Democracy in America.

12 I'll just give you a very brief
13 quote from that book. "The institution
14 of the jury places the real direction of
15 society in the hands of the governed and
16 not in that of the government. The jury
17 system as it is understood in America
18 appears to me to be as direct and as
19 extreme a consequence of the sovereignty
20 of the people as universal suffrage.
21 They are two instruments of equal power
22 which contribute to the supremacy of the
23 majority."

24 Now, when we go into the voting

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1 booth, which is what he was talking about
2 with suffrage, you know, you just punch
3 the button and you decide.

4 This is different. You have to
5 not just decide. You have to deliberate.
6 You must talk with each other. You must
7 reason. And you must form a decision
8 that will be your joint decision.

9 You will be speaking as the
10 conscience of this community. Your
11 verdict will decide what is the proper
12 standard of care -- and I say "care" with
13 a capital C -- for delivering babies in
14 this Commonwealth.

15 One set of standards that you've
16 heard from respects the patient as an
17 adult, involves the parents in the key
18 decision making and respects the idea
19 that tiny babies should not be messed
20 with unless there's something wrong and
21 some real big reason to do so. But then,
22 if something does go wrong, you've got to
23 move quickly to rescue the baby. That's
24 one set of standards that you've heard.

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1 Or you could choose a standard
2 that says it's okay to keep patients in
3 the dark, it's okay to run unnecessary
4 risks on babies and it's okay to turn
5 your job as a doctor over to someone
6 else.

7 There is a word I want to write
8 down for you if I can find my marker --
9 there you go -- that is an important word

10 for you to consider.

11 The judge said "verdict." Those
12 of you who took Latin know that "ver"
13 means truth, "dict" means to speak. You
14 will literally be speaking the truth with
15 your verdict.

16 Now, I guess the first question in
17 everybody's mind is: Well, what happened
18 to Marissa? What happened to this baby?

19 We've heard one story that seems
20 very straight forward, another one that
21 is really convoluted and hard to follow
22 and really kind of bizarre.

23 The one story says a normal baby
24 got a test she really didn't need when

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1 she was perfectly healthy and she was
2 stuck twice with a needle and she bled
3 and she went neglected for 11 hours
4 despite numerous signs that she was in
5 trouble and she was born -- once her
6 amniotic sac, her bag of waters, was cut
7 open it was filled with blood and she had
8 swallowed a lot of blood.

9 It turned out, once they ran the
10 test, that she'd lost almost half of her
11 blood volume, and as a consequence she
12 suffered terrible damage to the two most
13 vulnerable organs in the human body, the
14 brain and the kidneys.

15 That's one very straightforward
16 account, and that's the one we heard from
17 the most important witness in the case,
18 we submit, Dr. Victoria Norwood, who has
19 kept this child alive for the last ten
20 and a half years, the lady from the
21 University of VA.

22 She spelled it all out right here.
23 She had me write down these things. But
24 she considered all the evidence and she

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1 put it all together.

2 She's not a hired-gun expert
3 witness. She's a truth teller who was
4 there to first treat her patient and then
5 just to say what medically happened.

6 Now, I want to mention just
7 briefly the defense theory that we heard
8 yesterday.

9 According to the defense theory,
10 what must have happened, conveniently

11 before the amnio ever started, was that
12 Marsha Simpson developed between her
13 placenta and her uterus a detachment and
14 that it filled with blood and that it was
15 likely her blood.

16 Somehow, then, she dropped her
17 blood pressure enough that the perfusion
18 to the baby got so low that the baby
19 suffered the brain and the kidney damage.

20 Well, I asked the doctor some
21 questions about that, you know, "How come
22 they didn't see that when we have the
23 surveillance video and we have 20
24 images" -- he didn't look at any of them,

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1 of course.

2 But we had a world-class man from
3 the University of California San
4 Francisco say there was no -- with quite
5 certainty, there was no detachment of the
6 placenta from the wall of the uterus and
7 we heard no one on that side say that
8 there was -- or say that there must have
9 been according to the ultrasound test.

10 The other problem is, well, if
11 this caused the bleeding and that caused
12 the damage to the baby, then how did this
13 blood outside here get into an intact bag
14 of waters and then into the baby's tummy
15 and get swallowed by the baby and then
16 how did she drain out half of her blood
17 supply if what we're talking about is the
18 mom's loss of blood.

19 If you find this confusing, I do,
20 too. But that was the story we heard
21 from that man yesterday morning.

22 And his idea was, well, what must
23 have happened is the collection of blood
24 moved through the placenta somehow and

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1 got into the amniotic sac and then --

2 Of course, the hole that it got in
3 through had to be resealed up because the
4 bag was intact by the time Dr. Terry
5 broke the membranes.

6 It sounds like magic, not
7 medicine. You know, actually, in both
8 science and real life we know that simple
9 stories are usually correct and
10 convoluted stories, usually there's
11 something wrong with them.

12 Now, speaking of magic, I wanted
13 to mention some sleight of hand that we
14 saw yesterday.

15 When we're dealing -- look, the
16 reality of expert witnesses in court is
17 some try to cut it down the middle and
18 some always play it in one direction, and
19 they're smart and sophisticated enough
20 that they can do it.

21 I try with my cross-examination --
22 and I'm no Clarence Darrow -- but I try
23 to kind of expose some of what's going
24 on.

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1 There was one thing that the
2 fellow did yesterday that I just want to
3 call to your attention because it went by
4 so quick. Let me show you what he did.

5 There was a quote that he gave --
6 whoops. That's the -- okay. "Improved
7 glycemic control and better methods of
8 antepartum fetal surveillance have
9 obviated the need for elective pre-term
10 delivery to avoid fetal death."

11 Now, the grayed-out part is what
12 I'm going to mention in a minute.

13 That's all that was shown to him
14 on the screen. And what he did was, he
15 said, "Oh, pre-term, that means 34 to 36
16 weeks and, of course, yeah, we don't
17 deliver babies anymore at 34 to 36
18 weeks."

19 But he left out the next two
20 sentences. Take a look. Here's what we
21 showed you in our case from the same
22 paragraph. There's that same first
23 sentence.

24 There's the sentence that says,

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1 "Timing of delivery should be determined
2 by a combination of maternal and fetal
3 risk factors," and we've talked about
4 those.

5 And then look at this one. "If a
6 patient has maintained excellent glycemic
7 control and all parameters of fetal
8 surveillance have remained normal, she
9 may await the spontaneous onset of
10 labor."

11 So if you read the paragraph as it
12 was obviously written, the context of the

13 paragraph, pre-term is just referring
14 down here to any baby born before
15 reaching term before mom goes into labor.

16 It's subtle, but that's the kind
17 of little stuff that goes on when you're
18 a 100 percent expert for one side or the
19 other.

20 Here's what we also showed you
21 just to show you the weight of the
22 evidence. In '94 and 2001 the College of
23 Obstetricians said, "Look, there's just
24 no evidence to deliver these babies

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1 early. You don't have to do it as long
2 as mom's control is good on her blood
3 sugar and as long as the baby is doing
4 okay." That's what the '94 thing said,
5 that's what the 2001 said.

6 And to top it all off, we showed
7 you the American Diabetes Association
8 that said essentially the same thing in
9 1998, that diabetes is not an indication
10 for delivery before 38 weeks in the
11 absence of objective evidence of fetal
12 compromise, that there's something wrong
13 with the baby. And we didn't have that
14 here, did we?

15 Now, I've got to mention one
16 little frustrating thing about our law on
17 evidence in Virginia. I would love to be
18 able to just give you these articles and
19 let you examine them and mark them up any
20 way you want but I can't. That's the way
21 our law works.

22 Each side is allowed to show
23 quotes, and you saw our quotes, you saw
24 their quotes. But under the law of

0014

1 Virginia the whole articles can't go back
2 to the jury room. It's evidence for you
3 to consider, and if anybody wants to take
4 notes on what we wrote, feel free if you
5 hadn't done it already. But we can't
6 send it back to the jury room.

7 The fair way of doing it is -- you
8 know, it's a check and balance situation.
9 If one side puts up a quote that the
10 other side thinks is out of context,
11 then, you know, you go back and forth,
12 and that's how it works.

13 But you've seen how hard it can be

14 to follow this when one side leaves out
15 the key context of a quote that makes the
16 quote make sense, and it doesn't mean
17 we're talking about, you know, 34 and 36
18 weeks.

19 Now, we heard towards the end of
20 the judge's instructions that Southwest
21 Virginia Physicians for Women is a
22 defendant here -- and really, may be the
23 main defendant here -- because they kept
24 their doctors so busy that they just

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1 didn't have time to slow down and take
2 the time to give the care that was needed
3 for this patient and her baby.

4 MR. PEAKE: Your Honor, I object
5 to that. There's no evidence to that at
6 all. I'm sorry to interrupt.

7 THE COURT: Members of the jury,
8 you'll remember the evidence and the
9 instructions.

10 MR. PEAKE: But there's --

11 THE COURT: The jury will remember
12 the evidence and the instructions.

13 MR. MALONE: Being too busy means,
14 just as a practical consequence, that
15 instead of being able to sit down with a
16 patient and go through and say, "Well,
17 here's a possible plan; here's the pros
18 and cons. Here's another possible plan;
19 here's the pros and cons," instead of
20 doing that you say, "Here's what we're
21 going to do and this is what we're going
22 to do."

23 And also being too busy means that
24 you hand off patients to other doctors

0016

1 when you need to slow down and think and
2 involve the patient and appreciate what's
3 going on. And involving the patient is
4 absolutely key.

5 I just want to -- I've only got a
6 couple more of these to show you.

7 One of our standards that we put
8 forward to you is that patients should be
9 treated like adults. This was the
10 statement that I put up in my opening
11 statement and also with Dr. Borow and
12 also the final witness yesterday, Dr. 100
13 percent, and he finally agreed to it
14 grudgingly.

15 "If there are reasonable options,
16 the obstetrician must inform the patient
17 so the patient can make an intelligent
18 choice." That is just a restatement of
19 the Virginia law that the judge has
20 instructed you with. The judge
21 instructed you --

22 And I didn't put the entire
23 instruction there. I want you to, you
24 know, take your time and look at it later

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1 if you like.

2 But it says, "A doctor has a duty
3 to obtain his patient's informed consent
4 before treatment. The law requires
5 informed consent, not mere consent. That
6 means the consent of a patient after a
7 doctor has given the patient all
8 information that would be given by a
9 reasonably prudent practitioner in the
10 doctor's field of practice."

11 What happened here, however, is
12 that a plan was set in motion based on a
13 cookie-cutter approach, that all
14 insulin-taking moms go straight to amnio
15 and straight to early delivery no matter
16 what, even if in the meantime all the
17 baby's testing is absolutely normal, the
18 ultrasounds show the baby is normal size,
19 even at 32nd percentile on October 22nd;
20 nice, average-size baby. All the baby's
21 heartbeat tests are A-plus. The baby is
22 doing absolutely fine. Don't mess with
23 the baby unless you have to.

24 Even on the blood sugar, her blood

0018

1 sugar did great except for two tests
2 here, the 50 gram load and the three-hour
3 glucose tolerance test, and then she's
4 doing fine, except on her own logbook she
5 had a little high blood sugar after
6 breakfast. And so, properly, he put her
7 on a tiny bit of insulin, a small dose of
8 insulin once a day, and everything was
9 fine after that. And we had, you know,
10 one little --

11 In lawsuits you go down these
12 byroads, and sometimes they're not that
13 important.

14 But this idea of fasting
15 hyperglycemia that she had, well, that's

16 where the guy yesterday moved the goal
17 post. The definition, the correct
18 definition, American Diabetes
19 Association, was a blood sugar fasting
20 over 105. She had 101. They wanted to
21 say, "Oh, by this other definition she
22 definitely has fasting hyperglycemia."
23 Well, the point is, the woman did
24 not have out-of-control blood sugars.

0019

1 She was a responsible mom who did the
2 best she could. You even probably saw
3 the request for admissions that we had
4 asked the defense, we asked them, "Do you
5 agree that this mother did everything
6 properly and normally?" and they said,
7 "Yes, we admit that." No criticism of
8 her. And we had that hemoglobin A1c
9 which says that, on average, over the
10 past three months her sugar is fine.

11 So we're running medical stop
12 signs here, because we've set a plan in
13 motion based on what we do with all our
14 patients but not coordinated specifically
15 to this patient.

16 And then we get to November 5, the
17 morning. Then there's a blinking yellow
18 light at the intersection because the
19 doctor sees not only that the placenta's
20 on top, anterior placenta, but that he
21 needs -- and he needs to puncture it to
22 get in there, but also, that the fluid
23 pocket is very small. An unneeded,
24 aggressive test on a healthy baby.

0020

1 But the big thing is -- and even
2 on what the defense doctors are saying,
3 sure, some doctors were still doing
4 cookie cutter back then and they were
5 putting all of the moms through -- or
6 they were recommending it, anyway, to
7 their patients, diabetic patients.

8 But give the mother a discussion
9 of the pros and the cons and the
10 alternative. And the alternative here is
11 what they called watchful waiting where
12 we just keep on keeping on with what we
13 were doing before. We watch the baby
14 closely with those nonstress tests, with
15 the ultrasound, and everything would have
16 been fine.

17 Then we have this series of
18 handoffs on the morning of November 5.
19 And no one's telling mom or dad about any
20 of this. Everyone's just assuming,
21 "Well, she said, you know, weeks ago that
22 she wanted the family practice doctors
23 involved. That must mean that even when
24 we've reached this high-risk situation

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1 she probably also wants them involved."
2 And so nobody asked her. They just sent
3 in the doctor. And she trusts them.
4 That's her sin here. She trusted them.
5 We all trust our doctors. We
6 stand naked in front of these people.
7 They put their hands inside us. And
8 that's because we trust them to always do
9 the right thing for us and to treat us
10 with respect and like adults. And when
11 they don't do it it's wrong.

12 You know, nobody said, "Marsha,
13 the baby's not looking all that great.
14 We're going to have to do this
15 biophysical profile," and then after the
16 biophysical profile, "Hey, you know, she
17 didn't pass the test, although -- well,
18 the breathing's okay. But she didn't
19 pass the test. Her heart rate is
20 flattening out. The variability that she
21 had before is gone."

22 Nobody says to Marsha, "Well,
23 Mrs. Simpson, there's some choices here
24 right now. We could go straight to

0022

1 C-section if you would like. Now, there
2 are risks to C-section," et cetera,
3 et cetera. "But we can deliver your baby
4 right now if you want." And that would
5 have been a reasonable option to offer
6 her.

7 Remember how I had to struggle to
8 finally get that guy yesterday to admit
9 that yes, he'd said it in his deposition
10 and yes, it's still true, yes, C-section
11 was a reasonable option at 10:30 in the
12 morning, but nobody told Marsha because
13 they were passing the buck.

14 And is that right, for an
15 obstetrician, who's the only one who can
16 do the C-section, to pass the discussion
17 buck off to somebody who cannot do a

18 C-section? They can't give the informed
19 consent discussion because they're not
20 intimately familiar with the pros and the
21 cons.

22 In any case, have you ever heard
23 of a mother who, given the option of a
24 C-section for a baby who even might be in

0023

1 trouble, will say, "No, I don't want the
2 scar on my belly and I don't want to stay
3 in the hospital another day or two"? No.
4 That mom says, "Take me, take me straight
5 there."

6 And this mom told us when she
7 testified that she was in so much pain --
8 and now we know it was from the bleeding
9 inside the amniotic sac afterwards -- she
10 was in so much pain and cramping
11 afterwards that she would have loved to
12 have had the C-section if somebody had
13 mentioned it to her. But she just
14 assumed. She trusted. And that's not
15 her fault.

16 In that jury instruction on the
17 duty of informed consent, it doesn't say
18 anything in there about a patient's duty
19 to ask the right questions or a patient's
20 duty to cross-examine their doctor. It's
21 the doctor's duty to tell the patient
22 what are the reasonable options. That's
23 why they admit she didn't do anything
24 wrong.

0024

1 Nobody talked to the
2 radiologist -- well, it depends whether
3 you believe Dr. Terry one or Dr. Terry
4 two -- or actually, it was Dr. Terry
5 three, because we had testimony from
6 Chris Simpson that he saw the radiologist
7 ask to get Terry on the phone. The nurse
8 comes back and says, "Well, we can't find
9 him."

10 Then we asked Terry in his
11 deposition, "Well, how did you get the
12 information?" He says, "Well, I got it
13 from the nurse." He comes into court and
14 says, "Oh, no. I spoke to the
15 radiologist, except the radiologist
16 didn't tell me some of this other stuff
17 down at the bottom of the report," about
18 the heartbeat maybe looking sluggish,

19 what the doctor called questionable
20 hypokinesia, a very ominous thing.

21 If you remember, Dr. Filly from
22 San Francisco said, "That is worrisome."
23 It is twice in that report. Yes, he kind
24 of fudged on it a little bit. But

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1 radiologists don't put that kind of stuff
2 in their report unless they're trying to
3 raise a red flag.

4 But, according to Dr. Terry, this
5 radiologist held this back from him for
6 some reason. And then we said, "But you
7 gave us this interrogatory answer where
8 we asked you what the radiologist told
9 you and you said you can't remember."

10 What's going on here? I mean,
11 we've got three different stories. Which
12 one do you believe? Or maybe you don't
13 believe any of them.

14 Dr. Morehouse -- and it's too bad
15 he couldn't testify in this case for his
16 own health problems -- he could have
17 conveyed that sense of urgency to
18 Dr. Terry and we wouldn't be here today.

19 And you know what, another thing
20 that we might not be here today? If it's
21 true that Dr. Roberts got that dark blood
22 that he didn't understand what it was
23 when he pulled that amnio needle out on
24 that second pass, if it's true that it

0026

1 was dark blood instead of what he wrote
2 twice on his note, bloody fluid, if it's
3 true, it would have really been helpful.
4 It would have raised some alarm bells
5 while this baby still was doing fine and
6 we could have rescued her right then and
7 there.

8 That's another thing where Dr. 100
9 percent in his deposition said, "Yeah,
10 that's true, that would be important
11 information," and then, of course, he
12 tries to, you know, back away from it
13 when he's here in court in front of you.

14 Poor Dr. Badillo, he didn't know.
15 He had never once done an induction of
16 labor on an insulin-taking mom. He told
17 us he had never once done an induction on
18 a mom after a bloody tap amniocentesis.
19 He told us he had never once done an

20 induction of labor on a mom after a
21 biophysical profile of four out of eight.
22 But the, you know, ball was handed off to
23 him by Dr. Terry, who just assumed that
24 Dr. Badillo would be able to handle all

0027

1 that and Dr. Badillo, you know...

2 While we're at the subject I want
3 to raise a question that somebody in the
4 jury room might say, not necessarily with
5 any particular person. But, you know,
6 you've heard nurses in here, other
7 doctors.

8 Somebody might say, "Well, aren't
9 there other people at fault here? How
10 come the plaintiffs -- how come they're
11 not in this case?"

12 Well, I want you to look at the
13 jury instruction. The law does not
14 require a plaintiff to sue everybody in
15 sight. The law puts no penalty on a
16 plaintiff who reaches a decision to focus
17 on who they think is mainly at fault.

18 The law says -- and it's in your
19 instructions -- "There may be more than
20 one proximate cause of an injury. The
21 plaintiff need only prove that a
22 defendant's negligence was one cause of
23 the injury, not that that negligence was
24 the sole cause."

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1 In other words, it doesn't matter
2 if other people might be at fault. If
3 you think other people might be at fault,
4 it just doesn't matter. That's for some
5 other day.

6 Now --

7 MR. PEAKE: Your Honor, object to
8 the last part and ask that that be
9 stricken. That goes beyond what we
10 discussed.

11 THE COURT: All right. Members of
12 the jury, don't worry about what day that
13 will be.

14 Go ahead.

15 MR. MALONE: That's fine with me.

16 So you have to ask yourself the
17 question: If they could defend the care
18 straight up and say this was good care,
19 why did they have to come up with this
20 bizarre causation defense and why did

21 they have to rewrite the history of the
22 case?

23 Why would Dr. Roberts need to say
24 that when he wrote "bloody fluid" twice

0029

1 it was just a mistake? Why would he not
2 write it down until he knew the baby had
3 been hurt?

4 And, you know, you've got to raise
5 the question: What was he thinking at
6 the time? Is this CYA or is he trying to
7 help the baby or the mom or not?

8 And it doesn't help him even if
9 it's true because this baby was perfectly
10 fine before that amniocentesis. They
11 have zero evidence, zero evidence --

12 Well, let's ask them if they've
13 got some evidence. I want to challenge
14 Mr. Peake, or whoever does the closing
15 statement, where is the objective
16 evidence that this baby had suffered some
17 harm before that amniocentesis?

18 Even one of their experts on the
19 video -- his name was Boehm, I believe --
20 said that the pattern we saw --

21 Jeff, where is the foldout? Oh,
22 here it is.

23 Even he said that this pattern
24 right here before the amniocentesis gave

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1 him 100 percent certainty that there had
2 been no injury before that amniocentesis.

3 Now, let me just mention another
4 little evidentiary frustration. I can't
5 send this back to the jury room. You're
6 just going to get the raw fetal heart
7 rate tracings. So if you want to look at
8 them, you've got to write down 120 low
9 normal, 160 is the upper limit of normal.
10 That's our blue range here. And you
11 remember the defense expert used it, too,
12 without any, you know, fuss about it.
13 You're going to have to look real fine up
14 here to see these times that we put, you
15 know, bigger down here.

16 You don't have to be an expert to
17 read this fetal monitor strip. Good
18 strip before, odd looking after, a tiny
19 bit of recovery when Dr. Roberts leaves
20 and then more abnormalities, more
21 abnormalities, sinusoidal type of

22 pattern, goes to BPP, doesn't do well on
23 the BPP, still not good afterwards. This
24 is the time to save the baby.

0031

1 As I said, the key witness was
2 Dr. Norwood. She put the whole case
3 together for us.

4 And by the way, you'll see in the
5 evidence her discharge summary, which
6 talks about amniocentesis and no other
7 cause. Nobody's thinking some kind of
8 placental abruption that somehow tunneled
9 its way into the amniotic cavity and all
10 this kind of stuff. Everybody -- as
11 Dr. Norwood concluded, this was the amnio
12 and that's it.

13 The bottom line is that a caring
14 doctor who is not too busy makes sure to
15 do the following things: First, preserve
16 important evidence. Don't throw away the
17 blood that looks so weird if you can save
18 it and send it to a lab nearby and they
19 might be able to tell you if it's mom's
20 blood or baby's blood and that might give
21 you another clue.

22 A caring doctor also tells other
23 providers what they need to know. If you
24 think you've got something weird, tell

0032

1 the people, tell your people. Let them
2 know.

3 And counsel your patient. If you
4 think there's something wrong here that
5 happened -- if they think it's Marsha's
6 uterus that is the fault, tell her so
7 she'll know in the future because it's a
8 risk. And a caring doctor asks the
9 patient what she wants. That's the way
10 it should work.

11 Now, I want to just turn to the
12 important stuff about the injuries but
13 just want to make sure you understand the
14 other key thing here, which is there
15 are -- you have two separate pathways to
16 a just verdict for the plaintiff in this
17 case.

18 You have the pathway of the
19 medical care not being appropriate,
20 breaking the very simple rules that we
21 pointed out to you, the rule about leave
22 the baby alone if there's no good

23 reason -- let's see. Where did I write
24 this down? Yeah.

0033

1 And if the obstetrician injures
2 the baby or the cord or the placenta by
3 an invasive test, it's the OB's job to
4 make sure the baby remains okay with
5 further monitoring. And if the OB can't
6 make sure the baby remains okay after
7 causing an injury, the OB needs to rescue
8 the baby promptly.

9 We put these up. We discussed
10 these with Dr. Borow. They never really
11 challenged them. Those are the standards
12 that are the simple core standards that
13 should govern your discussion in this
14 case. So that's one pathway.

15 And then the other pathway is the
16 informed consent, give the mom the
17 options so she can decide. And we know
18 there were two critical points here where
19 if Dr. --

20 Well, let's show you a little clip
21 here on treating patients like adults.
22 (From video deposition of Dr. Roberts)
23 Answer, "'-- or to do nonstress testing
24 to monitor the baby's health as best we

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1 can. And when you get to 37 and 38
2 weeks, if the baby's lungs are mature,
3 we're going to try to get you delivered
4 by doing an induction.

5 "'Now, the way we can figure out
6 if the baby's lungs are mature is by
7 taking a sample of fluid from around the
8 baby and looking for certain chemicals in
9 the fluid that will tell us the baby can
10 breathe outside of you. And if we find
11 those kind of chemicals in the amniotic
12 fluid, then we'll induce you."

13 Question, "To the best you can
14 recall, that's what you would have said
15 to her."

16 Answer, "Yes."

17 So that was the fair question and
18 the fair answer at the deposition. At
19 trial he said, "Oh, no. I would have
20 said a whole lot more," but that's
21 what -- you know, you can rely on that.

22 And is that the way you present
23 options to a patient or is that the way

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you just decide, "We're going to drive

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the car down this path"? So it's up to
you to decide that. So two separate
pathways.

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We have one critical moment here.
We have the other critical moment at
10:30 in the morning where we absolutely
know there was no discussion of the
C-section, which even the defense experts
reluctantly admit was a reasonable option
at that time.

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If it wasn't discussed and you
decide that Marsha would have taken the
C-section at 10:30, this case is over.
We win. It's that simple. But we also
win on the medicine, too. So I just want
to be clear that we have those two
pathways.

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Now, let's talk about the hard
stuff. I think that's -- and it's not
what I think. But the first part of what
I'm talking about, are they at fault, do
they need to be held accountable here by
you, that's really not that hard. It's
pretty straight forward. What's harder

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is figuring out what the damages are.

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Now, this is civilization at work.
You know, if we were over in Afghanistan
or, you know, someplace like that and
there was some dispute between two
parties, you know how they'd resolve it.
It wouldn't be in a court of law. It
would be somewhere else.

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We do things the civilized way.
And the way we do it is with money. As
inadequate as money is, it is the only
thing we have because we cannot turn back
the clock, we cannot restore this little
girl's brain. And so that's what we have
to live with.

23
24

And the way our system works is --
it's almost like -- you can think of it
as the grim reaper coming in the night
before, November 4th, and telling Marsha
Simpson at that point, "Something
terrible is going to happen tomorrow. We
can't stop it. And it's going to affect
you for the rest of your life and it's
going to affect your baby for the rest of

0037

1 her life. The wheel has been set in
2 motion. It cannot be stopped now.
3 "But I can tell you one thing: We
4 have a system for bringing justice to the
5 situation. In our country for the last
6 200 years we have a system where everyone
7 is equal in court. Professionals are
8 equal to high school graduates. And we
9 don't just use professional decision
10 makers. We bring in a cross section of
11 the community. We're going to pick
12 people at random, Marsha, and they will
13 decide what is fair." It's an awful
14 responsibility but it's one you have to
15 live with.

16 Let's talk about what some of the
17 elements are, a little bit on Marissa.
18 She is a miracle child. And the love of
19 this family has taken this little girl a
20 long way.

21 But you saw the video and you saw
22 Dr. Glass. Yeah, we had to pay a fair
23 amount of money to bring him in. I'm not
24 ashamed of it. I wanted to bring in a

0038

1 top guy who really knew what he was
2 talking about.

3 He showed us everything, and it
4 just is so profound, the communication,
5 both expressive and incoming
6 communication, the CP, the, you know,
7 difficulty walking, the motor planning,
8 the ability to plan how you walk, the
9 right-sided weakness, the inability to
10 really understand people, and that makes
11 her so vulnerable for the future, her
12 impulsivity, her executive function, her
13 cognitive. She's down at the first
14 percentile. And it didn't have to
15 happen. Her sister, right here in court,
16 could have been just like her sister.

17 But now she needs help. There's
18 just no question about that. And we
19 did -- we tried to do the most
20 responsible thing we could.

21 This is Exhibit 6. It's the care
22 plan put together by Ms. Overbey. It got
23 the seal of approval from both
24 Dr. Norwood and Dr. Glass. They went

0039

1 through all the elements.

2 I frankly didn't want to -- you
3 know, I could have spent hours on this
4 stuff, but we hit the important stuff.

5 The great thing is that if you
6 guys decide to give her the care she
7 needs, she will get a little bit better,
8 and you can help her that way. And you
9 can protect her for the rest of her life,
10 which she definitely needs. You can see
11 that.

12 We tried to be really
13 conservative. We only took it out 40
14 years. She's got a lot of kidney
15 problems. You know, who knows. I mean,
16 who's got a crystal ball on how long this
17 girl's going to live.

18 But you remember what Marsha said.
19 Her prayer is, "Lord, take me first."
20 That is her burden, because she couldn't
21 take it. Parents aren't supposed to bury
22 their children. And if Marissa does go
23 first, do you think Marsha will be much
24 longer after that? That's, you know,

0040

1 hard to know.

2 I don't want you to think that --
3 because it bothers me -- that I'm asking
4 for sympathy. I am not. We want
5 justice. The judge told you, and I want
6 you to follow this --

7 And that's one of the reasons why
8 the Simpsons have not been here, because
9 they don't want to cry in front of you.
10 They don't want your sympathy. They just
11 want whatever is fair.

12 One of the hardest things for a
13 mom and a dad is when a child who is
14 severely disabled gets to be grown up
15 and, both for her own good and their own
16 good, needs to leave the family home.

17 We put that in that care plan, for
18 the group home. It's actually a lot
19 cheaper than the option of having
20 somebody in their home to help her.

21 But it will be good for her to
22 have some independent life with kids
23 similarly situated to her. She can have
24 some measure of independence.

0041

1 So it's a big number, at least six

2 million. That's what it takes when a
3 brain gets unnecessarily and terribly
4 damaged.

5 Marsha's case, this thing here is
6 the exhibit of -- it's Exhibit 3, the
7 medical bills. Each one of these bills
8 is dripping with sorrow and heartache,
9 and I do not exaggerate, because you
10 heard the testimony.

11 Every single time they take that
12 girl for any kind of test at the
13 hospital, any kind of procedure -- and
14 there's been tons of them. This is \$1.7
15 million or something like that -- tons of
16 them, every time it hurts Marsha so bad
17 and she wants to say, "Take me. Don't
18 take my baby. Take me."

19 And you heard how really hard it
20 is for her when she has to inflict pain
21 on her own daughter to treat her.
22 "Mommy, you're hurting me." That is
23 hard.

24 The two worst things that can

0042

1 happen to any parent are seeing your own
2 child die and seeing your child not be
3 able to live a normal, independent life,
4 and we know at least one of those is
5 going to happen -- has already happened
6 to this mother and hopefully not both.

7 But these bills, would they be --
8 I just ask you the question, would they
9 be a reasonable proxy for the amount of
10 damages that would be fair to pay Marsha
11 on her separate claim?

12 The bills are part of baby's claim
13 per se. I'm saying: Are they a marker
14 that would make it fair for mom's claim?
15 And actually, they might be on the low
16 side because think of all the future
17 stuff that is going to happen.

18 And another thing to think about
19 that's hard to think about -- excuse me.

20 Marsha, I'm sorry I have to
21 mention this, but I think it's important.

22 Savannah will graduate from high
23 school, college probably, maybe even
24 become a doctor like she wants to to help

0043

1 people like her sister and she will
2 hopefully get married and have

3 grandchildren.
4 On each and every one of those
5 milestones there will be a marker of
6 sorrow, a marker of if only, if only the
7 doctors had slowed down and been a little
8 more careful and thoughtful and paid
9 attention and showed respect to an adult.
10 So it's your choice, ladies and
11 gentlemen. If you feel you need to, you
12 should return a verdict for the
13 defendants.

14 By doing that, you will approve a
15 certain standard of care, a certain
16 system of baby delivery practices that
17 allows patients to be handed off and
18 handed off and handed off and that allows
19 parents to be kept in the dark.

20 If you feel you have to do that,
21 then that's what you have to do. But if
22 you think that's wrong --

23 MR. PEAKE: Your Honor, I object.
24 We've dealt with this pretrial. This is

0044
1 about this case. This is not about a
2 system. This is about a standard of care
3 that exists for these doctors in this
4 case.

5 THE COURT: I think that's
6 correct.

7 Go ahead. You can finish up,
8 Mr. Malone.

9 MR. PEAKE: Well, I hope not in
10 that direction, Your Honor.

11 THE COURT: I sustain your
12 objection, Mr. Peake.

13 MR. MALONE: The option for you is
14 to approve a standard of care applicable
15 to this case that shows respect for
16 parents and that shows safety for babies.

17 Thank you very much.

18 * * * * *

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21 MR. MALONE: Thank you.

22 Wow. I don't know about you but
23 I'm exhausted. But I've got to say --
24 and I have nothing personal against

0045
1 Mr. Batten.

2 But is what we just watched a fair
3 review of the evidence or were we again

4 cherry picking like the experts did and
5 leaving out all the stuff that's
6 inconvenient for their case?

7 On their experts, just to give you
8 a couple of examples, how come we never
9 heard anything -- we kept hearing about
10 all of these qualifications and whatnot
11 and they've got maternal-fetal medicine
12 and whatnot.

13 Well, obviously, we wanted to have
14 doctors with the same kind of training as
15 the defendant doctors because that's
16 fair, not having somebody who's superior.

17 Well, they say, "Well, we're going
18 superior because they know so much more."
19 Well, but how come they never answered
20 this question: Of all these
21 maternal-fetal medicine guys in the
22 country, why did they have to go with one
23 who said he's 90 percent defense oriented
24 and who said -- this is this Boehm

0046

1 fellow -- and who said in his deposition,
2 "I always try to cut the break for the
3 doctor." The other guy said, "No; I'm a
4 hundred percent defense. The plaintiffs'
5 lawyers never call me." Well, there's
6 reason for that, folks. There's bias.
7 So how come we never heard anything about
8 that?

9 Then he actually says that this
10 man Karotkin, who was on this witness
11 stand yesterday morning, was quoting
12 science to you when --

13 And I'm not bragging. But I
14 crushed the guy on a whole bunch of
15 stuff, including the fact that one of the
16 very first things, he said he -- "I rely
17 on this MRI report" -- I don't know if
18 you remember this -- "I rely on this MRI
19 report that is consistent with bleeding
20 having occurred before the
21 amniocentesis."

22 Well, I finally got him to admit
23 that, first off, he had completely
24 changed his reading on the thing. He'd

0047

1 never actually seen the MRI studies.

2 He thought there was some little
3 focal injury that wasn't consistent with
4 the drop in the baby's blood volume. And

5 then he says, "But it supports the timing
6 of the injury."

7 Well, finally he says, "Oh, well,
8 the timing could have been on November
9 5th, but it also could have been on
10 November 4th or November 3rd, and
11 therefore it supports it." I mean,
12 there's just -- it just wasn't there.

13 And this is the same guy who
14 couldn't explain basic anatomy, that they
15 still can't explain, which is: How in
16 the world do you do the magic trick of
17 having bleeding outside the lady's -- a
18 separation between the placental wall and
19 the uterus?

20 Dr. Roberts missed it on his
21 ultrasound. The radiologist completely
22 misses it on his ultrasound and they --
23 you heard the testimony. They take
24 hundreds of images. We've preserved 20

0048

1 of the images. It ain't there, folks.

2 And if it was there, how come they
3 can't show how it got into the baby's
4 stomach and how it got into an intact
5 amniotic sac? I told you before, that's
6 not science, that's magic.

7 Now, a couple other things he left
8 out. And there's so -- because I'm just
9 leaving stuff out, red herrings and blah,
10 blah, blah.

11 But why do we fool with the
12 medical literature? You know, one guy
13 says one thing, one guy says the other
14 thing.

15 Well, I showed you the actual
16 quotes of what the medical literature
17 said. And I'm going to just -- bear with
18 me. I'm going to show you one more time.
19 I want to make two points with it.

20 They had some quotes that said,
21 "These women who are on insulin during
22 the pregnancy, they need to be treated
23 just like they're pregestational
24 diabetics."

0049

1 Okay. Well, where was the
2 follow-up quote that said, "Oh,
3 pregestational diabetics, we always put
4 them into early delivery with amnio."
5 That quote didn't appear anywhere.

6 Here's what you did see, though,
7 if my machine would be working but, of
8 course, it's turned itself off. I'll get
9 that going in a second.

10 And another -- oh, let's go ahead.
11 Good.

12 This is Page 2 of the 2001
13 bulletin. I've showed you this before.
14 This blows this whole thing about insulin
15 being different totally out of the water,
16 because what does the quote say? "Older,
17 admittedly flawed, studies suggest an
18 increase in this rate. More recent
19 studies that did not indicate an increase
20 in the stillbirth rate all included
21 interventions of diet or insulin."

22 There is no greater risk on
23 insulin. We showed you the quotes, they
24 didn't.

0050

1 Here's another curious thing that
2 I'd never heard the defense discuss on
3 this blizzard of stuff that just came
4 down the pike.

5 How come not just both parents
6 thought -- and you heard them testify.
7 "We thought we were supposed to do the
8 amnio for early delivery because of a big
9 baby." They said that.

10 Dr. Badillo in his testimony on
11 the witness stand the other day -- and
12 this was a little confusing because we
13 had to remind him what he had said
14 before.

15 First he said, "Well, I thought it
16 was that -- the reason to do the amnio
17 and the early delivery was big baby plus
18 death risk."

19 But we reminded him what he said
20 in his deposition and he corrected
21 himself and said, "Oh, the only thing
22 that I had discussed with Dr. Roberts was
23 risk of big baby."

24 So Dr. Roberts sets this plan in

0051

1 motion on October the 8th, 2001. That's
2 two weeks before that ultrasound I showed
3 you, if I can find it real quick, with
4 the --

5 Here we go. October 22nd the
6 baby's in the 32nd percentile of weight.

7 They all had to admit that blows out of
8 the water the whole idea of doing the
9 early delivery and the amnio because of a
10 risk of a big baby.

11 So all that's left is this alleged
12 risk of death. But how come Dr. Roberts
13 was the only one who knew about it? How
14 come Dr. Badillo didn't know about it?
15 How come the parents didn't know about
16 it? Or is this something he had to come
17 up with after the fact to justify the
18 cookie-cutter plan that he set in motion
19 and paid no attention to what happened in
20 the interim?

21 It's not fun for me to have to
22 point out these truths. They seem like
23 nice guys. And certainly Mr. Batten was
24 careful to bring out all that kind of

0052

1 stuff.

2 But he did say one thing that we
3 both agree with: No sympathy for either
4 side. That means no sympathy for them
5 either. Your job is to cut it right down
6 the middle.

7 What else did he leave out? Well,
8 let me mention a red herring that kept
9 coming up: "How were these doctors
10 supposed to know of the risk of kidney
11 damage?" He said that -- must have said
12 that about five times.

13 We never said they were supposed
14 to know of a risk of kidney damage from
15 when this kind of thing happens. All we
16 said was, "What you're supposed to
17 foresee is, when you stick a needle
18 through the placenta and you know you've
19 caused bleeding, you've got to make sure
20 the baby's okay. And if you can't make
21 sure the baby's okay, you've got to get
22 the baby out of there."

23 Nobody said anybody had to have a
24 crystal ball that said, "Oh, you've got

0053

1 to know -- it's not fair that they should
2 have had to know that kidney transplant
3 was going to come up." Nobody ever said
4 that.

5 And he tries to disparage the most
6 objective witness in the case,
7 Dr. Norwood. But there's the lady who

8 went through all the evidence of
9 summarizing exactly what had happened.
10 It was this other fellow over here who
11 kept changing up.

12 Another ridiculous thing that
13 Mr. Batten left out of -- I thought he
14 said he was giving you all the evidence,
15 and he certainly had enough PowerPoint
16 slides to get this in if he wanted to.

17 His man says, "Well, this was from
18 mom bleeding because we know that when
19 the placenta separates from the wall of
20 the uterus, that's on the mom's side, so
21 that's maternal bleeding." He said most
22 likely. So that's mom's blood there
23 supposedly if this invisible thing had
24 occurred.

0054

1 Well, how come the first time they
2 tested the mother's blood on the day of
3 the amnio at 11:00 in the morning she had
4 a perfectly normal blood count, perfectly
5 normal hemoglobin and hematocrit? And he
6 tells me, "Well, it could have been lower
7 earlier." You know, how do you deal with
8 that kind of speculation?

9 Remember when the judge -- or all
10 the witnesses were asked, "You've got to
11 say reasonable degree of certainty,
12 reasonable degree of probability." This
13 guy just kept saying, "Well, this is
14 possible, that's possible."

15 It's possible -- it ain't even
16 possible. But we're talking science.
17 We're talking something obviously
18 happened.

19 And they didn't need a crystal
20 ball for kidney. All they needed was to
21 focus on their jobs and not do these
22 handoffs where the amount of information
23 kept deteriorating with each handoff
24 because that's what happens.

0055

1 If you were to say four sentences,
2 whisper to this juror and then whisper to
3 this juror and then to this and then to
4 this and then to this, the old telephone
5 game, at the end of the line it's going
6 to be totally different because that's
7 human nature.

8 But doctors know that's human

9 nature and they're supposed to know that
10 you don't keep doing handoffs on a
11 critical case in a limited period of
12 time.

13 Another thing they left out of
14 this supposedly comprehensive discussion
15 of the evidence, I guess I call it
16 Dr. Terry's curious lack of curiosity.

17 We saw a pattern here where -- if
18 you believe what Dr. Terry first told us,
19 he didn't care to talk to the radiologist
20 about what went on on that biophysical
21 profile. Now he changed that all up.

22 But you're entitled to believe his
23 original testimony because we put it in
24 in our case and it is evidence.

0056

1 He did not seek the full details
2 of the report. He admitted as much. Why
3 was he so uncurious as to not want to
4 examine the patient?

5 Why was he so uncurious as to not
6 even want to talk to this patient after
7 doing this critical test.

8 Why was he so uncurious as to not
9 inquire with Dr. Badillo, "Dr. Badillo,
10 do you have -- I know you like to
11 deliver. But maybe we should talk it
12 over with the mom first. And do you
13 really have experience in this kind of
14 high-risk situation when we've got the
15 low score and all this?" And Badillo we
16 know would have told him, "Well, no, I
17 really don't."

18 Then Terry, being the responsible
19 guy with superior knowledge, would say,
20 "Well, maybe I should take the job."
21 That's what he should have done.

22 And why was he so uncurious as to
23 not look at the placenta at the end of
24 the case if he thought there was

0057

1 something wrong with it?

2 And when he found out the placenta
3 had been lost, why was he so uncurious as
4 to not even find out who lost it and why
5 such a bizarre event would occur? You
6 talk about things not adding up here.

7 We've got the science on our side.
8 We've got a bunch of conflicting stories
9 where doctors keep changing what they're

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saying. They keep trying to rewrite records, rewrite history, rewrite their depositions. They have no scientific explanation of what happened.
This evidence is overwhelming, ladies and gentlemen. We deserve your verdict.

* * * * *

1 C E R T I F I C A T E
2 COMMONWEALTH OF VIRGINIA
3 COUNTY OF ROANOKE
4 I, Shirley S. Bassett, RPR, Notary Public
5 in and for the Commonwealth of Virginia, at Large,
6 do hereby certify that the proceedings were by me
7 reduced to machine shorthand, afterwards
8 transcribed by me by means of computer, and that
9 to the best of my ability the foregoing is a true
10 and correct transcript of the proceedings as
11 aforesaid.
12 I further certify that these proceedings
13 were taken at the time and place specified in the
14 foregoing caption.
15 I further certify that I am not a
16 relative, counsel or attorney for either party, or
17 otherwise interested in the outcome of this
18 action.
19 IN WITNESS WHEREOF, I have hereunto set
20 my hand at Vinton, Virginia, on June 20th, 2012.
21
22 _____
23 SHIRLEY S. BASSETT, RPR
24 NOTARY PUBLIC
My Commission expires April 30, 2016.
Notary Registration Number 227362.